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Terms of Reference

REVIEW OF THE JUDICIARY ACT 1903

I, DARYL WILLIAMS, Attorney-General of Australia, HAVING REGARD TO:

- the need for clear and comprehensive legislative provisions for the exercise and distribution of the judicial power of the Commonwealth; and

- various judicial decisions, including the recent decisions in *Commonwealth v. Mewett* and *Re The Residential Tenancies Tribunal of New South Wales and Henderson; ex parte Defence Housing Authority* which have raised issues in relation to claims brought in federal jurisdiction, including claims against the Commonwealth;

REFER to the Australian Law Reform Commission for inquiry and report under the *Australian Law Reform Commission Act 1996* the following matters:

(a) whether the provisions relating to and governing the exercise of the judicial power of the Commonwealth in civil matters, contained in the *Judiciary Act 1903* and related Acts, establish and apply the most appropriate arrangements for the efficient administration of law and justice in the exercise of federal jurisdiction;

(b) whether any changes are desirable, include the appropriate legislative means of giving effect to any desirable changes, having regard to any constitutional limitations on the exercise of the judicial power of the Commonwealth; and

(c) any related matter.

The Commission shall consider:

- the source, scope and exercise of the judicial power of the Commonwealth in civil matters;

- the conferral of federal jurisdiction on federal and State courts;

- the conferral of jurisdiction on Territory courts under Commonwealth laws;

- the impact of self-government on the exercise of jurisdiction in Territory Courts under Commonwealth laws;

- whether it is appropriate or necessary for provisions of Part IXA of the Judiciary Act relating to the Northern Territory to be replicated for the Australian Capital Territory;

- whether the procedural provisions dealing with the High Court included in the Judiciary Act would be better placed in another Act;

- the operation of Part VII of the Judiciary Act and particularly the workings of s.44 dealing with the remittal of matters by the High Court to other courts;

- whether the provisions of Part IX and Part XI Division 2 of the Judiciary Act relating to or affecting proceedings involving the exercise of federal jurisdiction, including claims against the Commonwealth, continue to be appropriate, and in particular,

    (a) whether Commonwealth legislation should deal in greater detail or differently with the law that is to apply in proceedings involving the exercise of federal jurisdiction, including matters relating to or affecting claims against the Commonwealth, instead of placing continued reliance on the various State/Territory laws. In this connection, particular consideration should be given to whether provision should be made in relation to

        (i) limitation periods applicable to actions against the Commonwealth; and

        (ii) the basis on which interest is awarded in relation to judgments against the Commonwealth.

    (b) whether, and if so the extent to which, there is a need for general legislative provision, such as s.64 of the Judiciary Act, in relation to the rights of a party created by or under a statute to which the Commonwealth is not otherwise subject.

In light of the current consideration being given to options to deal with the consequences of the decision of the High Court in the *Wakim* case, including a possible constitutional amendment, the Commission is not to examine this issue as part of this Reference.

IN PERFORMING its functions in relation to this Reference the Commission shall

(i) consult with relevant bodies, and particularly with

— the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and other State and Territory courts exercising federal jurisdiction or jurisdiction under Commonwealth laws

— relevant federal departments and agencies,

— the Law Council of Australia, law societies, bar associations, legal aid commissions, community legal centres and national groups representing business and consumers; and

(ii) in recognition of work already undertaken, have regard to relevant reports, and any steps taken by governments and courts to implement their recommendations.

IN MAKING ITS REPORT the Commission will also have regard to its function in accordance with section 21(1)(b) of the *Australian Law Reform Commission Act 1996* to consider proposals for making or consolidating Commonwealth laws in relation to matters referred to it.

THE COMMISSION IS REQUIRED to make a final report not later than 28 February 2001.*

Dated 21 January 2000

[signed]

Daryl Williams

Attorney-General

NOTE

* In a letter dated 9 August 2000, the Attorney-General extended the deadline for reporting to 30 June 2001.

Participants

The Commission

The Division of the Commission constituted under the *Australian Law Reform Commission Act 1996* (Cth) for the purposes of this reference comprises the following:

President
Professor David Weisbrot

Deputy President
Dr Kathryn Cronin (until June 2001)

Members
Brian Opeskin (full-time Commissioner from July 2000)
Ian Davis (full-time Commissioner from June 2000)
Justice Ian Coleman (part-time Commissioner)
Justice Mark Weinberg (part-time Commissioner)

Advisory Committee

The Hon Justice Bryan Beaumont, Federal Court of Australia
The Hon Justice Catherine Branson, Federal Court of Australia
Henry Burmester QC, Chief-General Counsel, Australian Government Solicitor
The Hon Justice Richard Chisholm, Family Court of Australia
The Hon Justice Paul Finn, Federal Court of Australia
Stephen Gageler SC, Barrister
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The Hon Justice Leslie Katz, Federal Court of Australia
The Hon Justice Susan Kenny, Federal Court of Australia
Stephen Lloyd, Barrister
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The Hon Dr Peter Nygh
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Alan Robertson SC, Barrister
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Bret Walker SC, Barrister
Dr Fiona Wheeler, Australian National University

The Hon Justice Christine Wheeler, Supreme Court of Western Australia
The Hon Justice Margaret White, Supreme Court of Queensland
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Abbreviations

AEC	Australian Electoral Commission
AFP	Australian Federal Police
AGS	Australian Government Solicitor
AIJA	Australian Institute of Judicial Administration
ASIC	Australian Securities and Investments Commission
ASIS	Australian Secret Intelligence Service
ATO	Australian Taxation Office
CCJ	Council of Chief Justices
CSO	Community Service Obligation
DHA	Defence Housing Authority
DoFA	Department of Finance and Administration
FCAA	*Federal Court of Australia Act 1976* (Cth)
FCR	Federal Court Rules
FLA	*Family Law Act 1975* (Cth)
FLR	Family Law Rules
FMA	*Federal Magistrates Act 1999* (Cth)
GBE	Government Business Enterprise
GOC	Government Owned Corporation
HCAA	*High Court of Australia Act 1979* (Cth)
HCR	High Court Rules
ICCPR	International Covenant on Civil and Political Rights 1996
JA	*Judiciary Act 1903* (Cth)
JCCVA	*Jurisdiction of Courts (Cross vesting) Act 1987* (Cth)
LRCWA	Law Reform Commission of Western Australia
NNTT	National Native Title Tribunal
SCAG	Standing Committee of Attorneys-General
SEPA	*Service and Execution of Process Act 1992* (Cth)
TPA	*Trade Practices Act 1974* (Cth)

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Executive Summary

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Introduction

In January 2000 the Attorney-General of Australia, the Hon Daryl Williams AM QC MP, asked the Commission to review the *Judiciary Act 1903* (Cth) and related legislation.

The terms of reference required the Commission to inquire into and report on whether the provisions governing the exercise of the judicial power of the Commonwealth in civil matters, which are contained in the *Judiciary Act* and related Acts, establish and apply the most appropriate arrangements for the efficient administration of law and justice in the exercise of federal jurisdiction. The Commission also was charged with the task of reporting on whether any changes to the law are desirable having regard to constitutional limitations on the exercise of the judicial power of the Commonwealth.

In undertaking this task the Commission specifically was asked to consider:

- the source, scope and exercise of the judicial power of the Commonwealth in civil matters;
- the conferral of federal jurisdiction on federal and state courts;
- the conferral of jurisdiction on territory courts under Commonwealth laws;
- the impact of self-government on the exercise of jurisdiction in territory courts under Commonwealth laws;

- whether it is appropriate or necessary for the provisions of Part IXA of the *Judiciary Act* relating to the Northern Territory to be replicated for the Australian Capital Territory (ACT);

- whether the procedural provisions dealing with the High Court included in the *Judiciary Act* would be better placed in another Act;

- the operation of Part VII of the *Judiciary Act* and particularly the workings of s 44 dealing with the remittal of matters by the High Court to other courts; and

- whether the provisions of Part IX and Part XI Division 2 of the *Judiciary Act* relating to or affecting proceedings involving the exercise of federal jurisdiction, including claims against the Commonwealth, continue to be appropriate.

The scope of the Commission's inquiry was thus very broad, particularly because the jurisdictional issues raised by the inquiry were not quarantined in the *Judiciary Act*. It was necessary, as the terms of reference recognised, for the Commission to consider a range of related legislation. The principal additional legislation considered in this Report includes the *Family Law Act 1975* (Cth), the *Federal Court of Australia Act 1976* (Cth), the *High Court of Australia Act 1979* (Cth), and the *Federal Magistrates Act 1999* (Cth).

Matters excluded from the reference

The terms of reference expressly limited the extent of the inquiry in three important respects. First, the inquiry was confined to federal civil jurisdiction, which precluded consideration of those provisions of the *Judiciary Act* dealing with federal jurisdiction in criminal matters. Second, the inquiry excluded the arrangements for cross-vesting jurisdiction between Australian courts in the light of the High Court's decision in *Re Wakim; Ex parte McNally.*[1] During the course of the reference this issue was under review by the Australian Attorneys-General, and the fruits of that review can now be seen in the *Corporations Act 2001* (Cth). Third, during the course of the inquiry the Attorney-General clarified that the inquiry was not intended to cover litigation brought under the judicial review scheme in the *Migration Act 1958* (Cth) or under the new scheme proposed in the Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth).

The reform process

Early in the course of the reference, the Commission formed an Advisory Committee of experts to assist it in defining the scope of the inquiry and to provide

1 (1999) 198 CLR 511.

advice over the course of the reference. The members of the Committee included past and present members of the judiciary (including a former Chief Justice of the High Court), legal practitioners, government lawyers and academics. The full list of Advisory Committee members is reproduced in this Report. Members of the Advisory Committee were asked to read and comment on draft chapters of the Discussion Paper and the Report, and also commented on draft recommendations.

In December 2000 the Commission published a substantial Discussion Paper entitled *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (DP 64). The Discussion Paper was distributed widely to judges, court officers, government lawyers, Attorneys-General, Solicitors-General, law societies, bar associations, legal practitioners, legal academics and others who had expressed an interest in the inquiry.

In February and March 2001, the Commission undertook extensive consultations in every capital city in Australia except Hobart, where there was insufficient response. Those meetings were extremely beneficial in providing practical information and informed opinion from individuals who had wide experience in the operation of the *Judiciary Act* and the federal judicial system.

The Commission received 41 written submissions in response to DP 64 and the consultations. A list of submissions is set out in an Appendix to this Report. Although some important institutional submissions were not received until a substantial time after the deadline for submissions had passed, the Commission endeavoured to consider all views that were put to it, within the limits imposed by the reporting date. The Commission also received a large amount of correspondence in response to draft recommendations, which were circulated on a strictly confidential basis to interested persons in April and May 2001. Both the formal submissions and the advice correspondence are cited extensively throughout this Report.

The sections below describe the thrust of the reforms recommended in each Part of the Report. A complete list of the 125 Recommendations contained in this Report is provided in the following Chapter.

Part B: Original Jurisdiction

Part B considers the allocation of original federal jurisdiction within the Australian judicial system. Federal jurisdiction refers to the authority of a court to adjudicate matters under Chapter III of the Constitution, and in particular the matters enumerated in the nine paragraphs of ss 75 and 76. It is a central feature of the Australian judicial system that the Commonwealth Parliament may confer this jurisdiction on federal, state or territory courts, and may make that jurisdiction either exclusive or concurrent.

Original jurisdiction of the High Court

Alone among the federal courts, the High Court's original jurisdiction is defined expressly by the Constitution and by federal legislation. The Constitution confers original jurisdiction on the High Court in five enumerated matters (s 75) and allows Parliament to confer additional federal jurisdiction on the Court in four others (s 76). In Chapter 3 the Commission considers the allocation of original jurisdiction to the High Court and focuses on the additional jurisdiction conferred on it in matters 'arising under any law made by the Parliament' pursuant to s 76.

In DP 64, the Commission identified only one area in which there appeared to be controversy regarding the conferral of additional federal jurisdiction on the High Court. Under the *Commonwealth Electoral Act 1918* (Cth), the High Court, sitting as the 'Court of Disputed Returns', has jurisdiction in respect of disputed electoral returns and the qualification of members of Parliament. The Commission notes that there is no necessity for Australia's highest court to have original jurisdiction in federal electoral matters, and that this jurisdiction might satisfactorily be conferred on the Federal Court. However, on balance the Commission considers it appropriate for the High Court to determine matters pertaining to voting for and composition of the Australian Parliament. A decision of the High Court brings finality, the jurisdiction is not onerous in practical terms, and the ability to remit fact-finding to other courts avoids inappropriate use of the High Court's scarce judicial resources.

In the Report, the Commission notes the confusion that has arisen from time to time from the conferral of electoral jurisdiction on the Court of Disputed Returns. The Commission recommends that jurisdiction under the *Commonwealth Electoral Act* be conferred on the High Court directly and that the *Judiciary Act* be amended to ensure that appeals from a single justice exercising that jurisdiction can be brought only by special leave.

Original jurisdiction of the Federal Court

Chapter 4 analyses the original jurisdiction of the Federal Court of Australia. The Federal Court was established in 1976 and was initially conferred with jurisdiction in only a few areas of federal law, albeit highly significant areas. Today, jurisdiction is conferred on the Court by approximately 150 Acts of Parliament, principally in the areas of trade practices, federal administrative law, bankruptcy, admiralty, intellectual property, industrial law, native title, human rights, and (from July 2001) corporations law. In 1997, the *Judiciary Act* was amended to confer on the Court jurisdiction in all matters 'arising under any law made by the Parliament' (s 39B(1A)(c)).

In consultations and submissions, the Commission heard that the conferral of original jurisdiction on the Federal Court from overlapping sources — one general, the others specific — has created uncertainty for litigants and the Court. The

Commission recommends that the Attorney-General order a review of the relationship between s 39B(1A)(c) and the specific Acts that confer jurisdiction on the Court. Pending that review, the Commission recommends that s 39B(1A)(c) be amended to clarify that the jurisdiction conferred by that paragraph is subject to specific limitations or prohibitions on jurisdiction identified in other Acts.

Original jurisdiction of the Family Court

Chapter 5 addresses aspects of the original jurisdiction of the Family Court of Australia. The Family Court was established in 1975 and exercises jurisdiction in family law matters, including divorce, property settlements, child residence and contact, and support orders. The Court operates in all States and Territories except Western Australia, where a state court performs equivalent functions.

The original jurisdiction of the Family Court was not central to the Commission's inquiries in this reference. One issue raised in DP 64 was whether the Court might be better placed to do complete justice between the parties if its jurisdiction extended to other federal matters that sometimes arise in the course of family law proceedings, such as bankruptcy. The Commission considers that this proposal has merit and recommends that the Attorney-General order a review of this question.

Original federal jurisdiction of state courts

The Australian Constitution permits state courts to be conscripted to exercise the judicial power of the Commonwealth. Since 1903 the Commonwealth has relied heavily on state courts to exercise federal jurisdiction, and continues to do so in both civil and criminal matters. As discussed in Chapter 6, s 39 of the *Judiciary Act* achieves this in a general fashion by conferring federal jurisdiction on 'the several Courts of the States', 'within the limits of their several jurisdictions'. In the Commission's view, the mechanism by which this is done is needlessly complicated and the Commission recommends that the section be recast in more simple terms.

In addition to the federal jurisdiction invested in state courts by s 39, many federal Acts confer jurisdiction on state courts in specific terms. As with the situation of the Federal Court described above, the relationship between overlapping sources of jurisdiction — one general, the others specific — can lead to uncertainty. The Commission recommends that the Attorney-General order a review of the relationship between ss 39 and 39A of the *Judiciary Act* and the specific Acts that invest state courts with federal jurisdiction.

Section 39 attaches three conditions to the exercise of federal jurisdiction by state courts. In DP 64 the Commission invited comment on whether any of these conditions remain justifiable. The first condition prevents an appeal being taken to

the Privy Council from a decision of a state court exercising federal jurisdiction. In view of the abolition of appeals to the Privy Council in 1986, the Commission recommends that this condition be repealed as obsolete. The second condition seeks to allow the High Court to grant special leave to appeal from a decision of a state court notwithstanding that a state law may prohibit such an appeal. The Commission recognises the importance of avoiding state interference with the appellate functions of the High Court, but believes that this result can be achieved more transparently. The Commission recommends that this condition be repealed and that the *Judiciary Act* be amended to provide expressly that any state law that purports to limit an appeal to the High Court shall not apply.

The third condition in s 39 states that when federal jurisdiction is exercised by a state court of summary jurisdiction, it must be exercised by a particular kind of magistrate, such as a Stipendiary, Police or Special magistrate. The apparent purpose of the condition was to ensure that federal jurisdiction was not exercised by lay magistrates, who were prevalent when the provision was enacted in 1903 but are far less common today. The views obtained by the Commission in consultations and submissions revealed a tension between two competing principles. On the one hand, there is the constitutional principle that, if state courts are invested with federal jurisdiction, the Commonwealth Parliament must take those courts as it finds them. On the other hand, there is a concern that individuals who lack appropriate legal qualifications and training should not exercise the judicial power of the Commonwealth.

The Commission does not consider that state magistrates should be required to have the qualifications necessary for appointment as federal magistrates if they are to exercise federal jurisdiction. However, the Commission affirms that the concern underpinning the original condition is a legitimate one, even though the language of the section is now outdated. The Commission therefore recommends that the condition be amended to provide that federal jurisdiction may be exercised by a state magistrate only if the magistrate is qualified for admission as a legal practitioner in the Supreme Court of that State.

Exclusive or concurrent jurisdiction?

The Constitution authorises Parliament to define the extent to which the jurisdiction of any federal court is exclusive of the jurisdiction of the courts of the States. Pursuant to this power, s 38 of the *Judiciary Act* identifies a number of circumstances in which federal jurisdiction is excluded from state courts. These include matters arising directly under any treaty, suits between States, and suits between the Commonwealth and a State. The Commission recommends that these provisions be repealed, with the consequence that jurisdiction in these matters may be exercised by state courts. The Commission also recommends that the Federal Court be expressly conferred with jurisdiction in these matters, to the extent that the

Judiciary Act does not already do so. In the Commission's view, there are adequate mechanisms for ensuring that matters falling within these classes are heard in the most appropriate forum, including removal to the High Court. Moreover, the apprehension that motivated the enactment of the exclusive jurisdiction provisions in the first place, namely, the potential bias of state courts, is misplaced today, even if it was a valid concern at federation.

One class of federal matters that merits separate consideration is that in which writs of mandamus or prohibition are sought against an officer of the Commonwealth. Presently, s 38(e) of the *Judiciary Act* excludes state courts from issuing these constitutional writs. For reasons of principle and pragmatism, the Commission considers it entirely appropriate that excesses of power by the officers of one polity be restrained solely by the courts of that polity. The Commission recommends that this policy be reflected more fully by amending s 38(e) to cover other public law remedies that have a similar purpose. Accordingly, state courts invested with federal jurisdiction should be excluded from issuing any order for ensuring that the powers or duties of an officer of the Commonwealth be exercised or performed according to law. By parity of reasoning, the Commission recommends that federal courts (other than the High Court) be excluded from issuing such orders against an officer of a State. In Chapter 37 equivalent recommendations are made in relation to the Territories. The Commission recommends an exception to these principles where an officer may exercise both state and federal functions pursuant to an intergovernmental arrangement. Where these functions are intermingled, an order may be sought in either a state or federal court.

Part C: Transfer of Proceedings

Part C considers the transfer of proceedings within and between courts exercising federal jurisdiction. Mechanisms for transferring proceedings are an integral part of an effective and efficient legal system. They ensure that proceedings are heard as soon as practicable in the most appropriate forum, having regard to the interests of the parties and the ends of justice. Such mechanisms also avoid unnecessary costs and delays, for the parties and the courts, associated with the conduct of proceedings in inappropriate courts or locations.

Mechanisms for transfer

Part C discusses three transfer procedures available to federal courts. Change of venue provisions (Chapter 9) enable a matter to be transferred from one location to another within a single court with national operation. Case stated provisions (Chapter 10) allow a single justice to state a case for determination by a Full Court for the purpose of achieving a timely and authoritative resolution of a question of law. Remittal provisions (Chapter 11) enable the High Court to transfer a matter that is pending in that Court to another court for determination. They ensure that

the High Court is able to discharge its core functions without being overburdened by cases that are commenced in the High Court (as the Constitution permits) but are nevertheless inappropriate for initial determination by Australia's highest court.

These mechanisms are not the only means by which proceedings may be transferred within the federal judicial system. Two others, namely, removal of cases into the High Court and review of decisions by higher courts through the appellate process, are dealt with in Parts D and E respectively.

Central issues

The Commission found a high degree of satisfaction with the *existence* of procedures for changing venue, stating cases and remitting cases. The procedures generally were considered to be necessary for the efficient administration of justice in the exercise of federal jurisdiction and appropriate to that task.

However, several commentators remarked on inconsistencies between provisions, which could not readily be explained by the differing contexts in which the mechanisms were invoked. These inconsistencies related both to the way in which a particular mechanism operated in different courts as well as to the way in which different mechanisms operated in the same court. These differences crystallised around five core issues, namely:

- who should be able to initiate a transfer;
- which courts should be able to make a transfer;
- which courts should be able to receive a transfer;
- according to what criteria should be a transfer be made; and
- should the transferring court have power to attach conditions to a transfer.

Harmonising transfer provisions

The Commission believes that there are benefits to be derived from greater consistency in the transfer provisions of federal courts, so long as appropriate account is taken of differences between courts and between the functions of different mechanisms. To this end, the Commission recommends that the Attorney-General order a review of the provisions relating to change of venue and cases stated with a view to achieving greater harmonisation.

Initiating transfer

The Commission also recommends that the law be clarified to ensure that each transfer mechanism considered in Part C is capable of being invoked by the court of its own motion, as well as by the parties to the proceedings. The existence of an own-motion power is essential if judges are to ensure that court proceedings meet the ends of justice and not merely serve the interests of litigants. This approach is consistent with the move toward greater case management of federal civil proceedings, supported by the Commission is its report *Managing Justice: A Review of the Federal Civil Justice System* (ALRC 89, 2000).

Imposing conditions on transfer

For similar reasons, the Commission recommends that the power of a court to impose conditions on the parties when exercising its powers to change venue, state a case, or remit, should be confined to matters of practice and procedure. Any court receiving a transferred proceeding should have a significant degree of freedom to manage the litigation as it thinks best, and the transferring court ought therefore to be limited in its capacity to regulate the conduct of proceedings after transfer.

Criteria for transfer

In relation to the criteria for transfer, the Commission heard disparate views on the desirability of structuring the courts' discretions through the use of statutory criteria. Some people expressed the view that the courts should be trusted to discharge their duties judicially and that they should not be unduly constrained in doing so. Others took the view that a list of factors may be useful to litigants, some of whom may be unrepresented, and to judges.

The Commission acknowledges that universal answers cannot be given to the question whether a court's discretion to transfer should be structured by legislation. However, the Commission favours the approach of specifying criteria to guide the exercise of a discretion where this is likely to assist the court or the parties to the litigation. The Commission accordingly recommends the adoption of statutory criteria in relation to change of venue provisions and in relation to identifying the receiving courts under the remitter provisions. In other transfer contexts the variety and uniqueness of relevant factors or the inability of parties to access information relevant to the exercise of the discretion (such as court workload statistics) make it undesirable to fashion statutory criteria to guide the exercise of the discretion to transfer.

Part D: Constitutional Litigation

Part D considers litigation in matters arising under the Constitution or involving its interpretation, which is a specific head of federal jurisdiction under s 76(i) of the Constitution. This topic overlaps with other Parts of this Report because constitutional matters may arise in either original or appellate proceedings. Nevertheless, the subject matter is sufficiently distinct to warrant separate treatment.

Allocating jurisdiction in constitutional matters

The ability of the judiciary to review the constitutional validity of the actions of the executive and legislative branches of government is fundamental to the Australian system of government. In Chapter 12, the Commission endorses the policy underlying the current allocation of jurisdiction in constitutional matters, by which jurisdiction is dispersed widely throughout the judicial system. The Commission recommends that this goal can be enhanced by expressly conferring jurisdiction on the Family Court and the Federal Magistrates Service in constitutional matters that arise in the course of proceedings otherwise within their jurisdiction. This amendment would clarify a jurisdiction that these courts currently possess only by implication.

The Commission believes that the courts of the Northern Territory and the ACT should have the same jurisdiction in respect of constitutional matters as is possessed by the courts of the States. In Part H the Commission recommends that federal jurisdiction be conferred on territory courts in a way that would ensure that those courts are expressly invested with jurisdiction under s 76(i) of the Constitution in the same manner as state courts.

Mechanisms for privileging constitutional litigation

The *Judiciary Act* currently provides three mechanisms by which constitutional litigation is privileged over other classes of federal litigation. These mechanisms comprise the mandatory notice to be given to each Attorney-General of a constitutional 'cause' pending in any Australian court (s 78B); the right of an Attorney-General, so notified, to intervene in any such proceeding (s 78A); and the right of an Attorney-General to seek the removal of a constitutional cause to the High Court (s 40). In combination, these mechanisms are designed to ensure that important constitutional questions do not languish in lower courts, but can be brought expeditiously to the High Court as the keystone of the federal arch.

Notice to Attorneys-General

In relation to notification (Chapter 13), it was universally agreed in consultations and submissions that some mandatory system of notifying the Attorneys-General of pending constitutional causes should be preserved. However, there was

substantial discontent with the current operation of s 78B. The section was thought to produce unnecessary delays in so far as it requires a court to halt proceedings while notices are issued to the Attorneys-General and a 'reasonable time' is allowed to elapse. The Commission recommends that the s 78B procedure be retained but refined in a number of respects. These refinements include clearer specification of the person on whom the obligation to issue notices rests, what the notice should contain, and how they are to be served. The Commission also recommends that courts be given greater powers to strike out summarily a constitutional pleading that is manifestly groundless or lacks any realistic prospect of success. In addition, courts should be given a discretion to continue hearing a matter up to but not including final judgment, pending the Attorneys-General being notified and given a reasonable opportunity to make a submission to the court.

Intervention by Attorneys-General

Chapter 14 considers the right of an Attorney-General to intervene in proceedings in constitutional matters and whether that right should be extended to non-constitutional matters. The Commission has twice considered the legislative basis for intervention by Attorneys-General in the context of broader inquiries into the law relating to standing to sue (ALRC 27, 1985; ALRC 78, 1996). The Commission affirms the approach taken in its earlier reports of liberalising the circumstances in which an Attorney-General may intervene by right. In particular, the Commission recommends that the right of an Attorney-General to intervene be extended beyond constitutional matters to non-constitutional matters that raise an important question affecting the public interest in the jurisdiction represented by that Attorney-General. To ensure that this right is not exercised in a manner that is inimical to the efficient administration of justice, the Commission recommends that courts be given the power to direct whether the intervention shall be exercised by the presentation of written submissions or oral argument. The Commission further recommends that the power of a court to make orders as to costs arising from an intervention be exercised by reference to statutory criteria.

Removal of causes

Chapter 15 discusses the removal of causes into the High Court. The Commission received no comments raising any substantial concern about the current operation of s 40 of the *Judiciary Act*. The Commission notes that there are some minor anomalies in the wording of the test used to order removal of a constitutional cause at the instance of a party to the proceedings when compared with removal of a non-constitutional cause at the instance of a party. However, the Commission does not believe that a change to the section is warranted.

Part E: Appellate Jurisdiction of Federal Courts

Part E deals with the appellate jurisdiction of federal courts. The availability of an appeal from one court to another is a fundamental aspect of any mature legal system. Appeals allow justice to be done in individual cases by correcting factual and legal errors, and they enable the law to be developed through the time-honoured method of the common law. However, appeals do not achieve these goals without cost — they defer the finality of proceedings and impose significant expense on the parties to the action and the court system as a whole.

In this Part, the Commission focuses on the role of the Federal Court and the Family Court as intermediate courts of appeal in federal matters, and on the role of the High Court as Australia's final court of appeal in all matters of state and federal jurisdiction.

Nature of federal appeals

Several High Court decisions handed down during the course of this inquiry provoked comments in consultations about the nature of federal appeals — that is, about what type of review federal courts perform when they hear appeals. Particular concern was expressed about whether federal appeals were, or should be, strict appeals or appeals by way of rehearing. The central differences between these options relate to the capacity of an appellate court to admit new evidence, draw inferences from the facts found at trial, or take account of changes in the law since the date of the decision appealed from.

Federal legislation currently identifies the powers of the Federal Court and the Family Court in hearing appeals, but the Commission received numerous comments from judges regarding the uncertainty and deficiencies of the present law. It was widely accepted in consultations that federal legislation should stipulate more completely the nature of appeals in federal courts, although special constitutional considerations were said to apply to the High Court.

In Chapter 17 the Commission recommends that, subject to constitutional constraints, legislation conferring appellate jurisdiction on each federal court be amended to specify the nature of the appeal undertaken by the court, and in particular to indicate that the appellate court has a discretion to admit further evidence, draw inferences from the evidence at trial and review findings of credibility of witnesses.

Appellate jurisdiction of the High Court

Chapter 19 considers the appellate jurisdiction of the High Court of Australia. In DP 64, the Commission raised a number of issues concerning the Court's appellate functions. Some of these related to anomalies in the Court's jurisdiction, others to the most appropriate means of managing its growing workload.

The High Court presently has jurisdiction to hear appeals from the Supreme Court of Nauru in civil and criminal cases, pursuant to a treaty concluded between Australia and Nauru in 1976. This channel of appeal has seldom been invoked. In consultations and submissions some people remarked that this jurisdiction, though anomalous, was harmless and should be left undisturbed. Others informed the Commission that the legislation might now be considered unconstitutional. The Commission does not wish to pre-empt a High Court ruling on this question, but considers that there are other reasons for seeking to remove this jurisdiction. The Commission believes that the participation of Australian judges in the local judicial institutions of Nauru is a more appropriate means of assisting Pacific neighbours than conscripting Australian institutions to perform that task. For this reason the Commission recommends that the Attorney-General consult with the Minister for Foreign Affairs and Trade about the feasibility of terminating Australia's treaty with Nauru and further recommends that these Ministers consult with their counterparts in Nauru about other avenues of assistance.

Another anomaly in the High Court's appellate jurisdiction concerns appeals from the Family Court. The usual channel of appeal to the High Court from a decision of a Full Court of the Family Court is by the grant of special leave to appeal. However, since its inception, the Family Court has had the power to bypass the special leave requirement by granting a certificate stating that an important question of law or public interest is involved. The Family Court traditionally has exercised this power with circumspection and few certificates have been issued. However, the Court recently has signalled that it may adopt a more liberal approach to granting certificates in the future.

Submissions and consultations on this issue acknowledged the potential benefits of a facility by which an intermediate appellate court may identify a question of law for consideration by the highest court. Notwithstanding these benefits, the overwhelming response was that certification was an anomalous procedure and should be repealed. Commentators noted that it denied the High Court the ability to control its appellate workload and that the provision had no counterpart in other courts. It was also remarked that the Family Court has ample opportunity in the course of writing its judgments to indicate that a matter is one in which the opinion of the High Court would be desirable. The Commission agrees with these views and recommends that the relevant provision be repealed. It is noteworthy that the Family Court's submission also acknowledged the force of these arguments and identified a 'near-unanimous view' within the Court that the provision be repealed.

The Commission also considered the jurisdiction of a Full Court of the High Court to hear appeals from a decision of one or more justices of the Court exercising original jurisdiction. Presently such appeals lie as of right except from interlocutory judgments, which require the Court's leave. During consultations, individuals voiced dissatisfaction with the uncertain scope of the term 'interlocutory judgment'

and commented on the desirability of extending the leave requirement to other specified types of procedural appeal. The Commission agrees with that view and recommends accordingly.

One issue that attracted widespread comment in relation to High Court appeals was the Court's burgeoning workload and how best to manage it. Since 1984, all appeals to the High Court have required special leave to appeal, except in the anomalous circumstances discussed above. This process has enabled the Court to screen both the content and volume of full appeals coming before it, in accordance with criteria set out in the *Judiciary Act*. The effect of screening is that the number of full appeals requiring determination by the High Court has remained fairly stable over time. However, considerable workload pressure is now being exerted on the Court by the volume of special leave applications themselves. The High Court made no formal submission to the Commission in relation to this issue but, as this Report shows, the statistical and other information received in the course of the inquiry demonstrates a compelling need for reform. In 1983–84 only 50 applications were filed for special leave in civil cases; in 1999–2000 there were 394 applications, involving a 60% increase over the last two years alone.

Submissions and consultations pointed very strongly to the view that the present system for determining special leave applications was not sustainable in the longer term. There was substantial concern, which the Commission shares, that the amount of judicial time taken in screening appeals might in due course detract from the Court's capacity to perform its core functions of determining major constitutional cases and important questions of general law. However, beyond agreement on the nature of the problem and the need for reform, there was little consensus on the appropriate direction of change.

The Commission considered a broad range of reform options. These included increasing court filing fees, introducing eligibility criteria (such as a minimum monetary sum), altering the criteria for granting special leave, permitting screening to be undertaken by intermediate appellate courts, reducing the number of judges assessing each application, and increasing the total number of High Court justices. Each option received a measure of support in some quarters and strong opposition in others.

For reasons canvassed in the Report, the Commission does not favour any of these options. Rather, it recommends that the procedures for determining special leave applications be reformed to enable the High Court to determine applications solely on the basis of written submissions from the parties, but with a discretion to list an application for oral hearing in appropriate cases. Such a procedure would not remove the possibility of oral argument, but would confine it to those cases in which the Court was of the opinion that oral argument would assist the Court in determining the merits of the application for special leave. This approach is similar

to that adopted in the Supreme Court of Canada but is more accommodating of the oral legal tradition than the procedures utilised in the United States Supreme Court.

Appellate jurisdiction of the Federal Court

Chapter 20 discusses appeals to the Federal Court of Australia and focuses on three broad issues — aspects of the Court's appellate jurisdiction, methods for ameliorating its workload pressures, and features of the Court's appellate structure.

The Federal Court currently has jurisdiction to hear appeals from state courts in certain areas of federal law. The Commission found that these cross-jurisdictional appeals represent a very small proportion of the Court's total appellate caseload (1% in 1999–2000), and mainly occur in discrete areas such as intellectual property, extradition and workplace relations. In DP 64 the Commission queried the suitability of the present jurisdictional arrangements. The reason for the Commission's concern was that in these areas state courts are invested with original federal jurisdiction but cannot hear appeals from these decisions because these must go to the Federal Court. The object of these arrangements is to facilitate uniformity in the interpretation of federal law, but the impression created is that, while state courts are suitable vehicles for primary fact-finding, the development of binding legal principles in these specialised areas should be entrusted to federal judges alone. In DP 64 the Commission identified two alternatives to the present system — (a) conferring federal appellate jurisdiction on state courts and requiring parties to stay within the court system in which proceedings were initially commenced, and (b) conferring exclusive jurisdiction, both original and appellate, on federal courts in these matters.

The Commission is of the view that in choosing an appropriate model regard must be had to the subject matter in question. In relation to intellectual property and extradition, the Commission recommends that original federal jurisdiction be removed from state and territory courts and conferred on federal courts exclusively. In so doing, use should be made of the Federal Magistrates Service in less complex cases, while first appeals should continue to go to the Federal Court alone. A fundamental consideration in relation to intellectual property matters is the importance of developing a uniform body of federal law in this specialised area in order to promote Australia's participation in the global information and technology sectors. In relation to workplace relations, the Commission recommends that there be no change to the present appellate arrangements. In relation to remaining areas of federal law subject to cross-jurisdictional appeals, the Commission recommends that appellate jurisdiction be conferred on state courts and that parties be required to stay within the state or federal court system in which proceedings were initially commenced.

Chapter 20 also examines two matters that relate to the capacity of the Federal Court to manage effectively its growing appellate caseload, namely, whether appeals to the Federal Court should continue to lie as of right and whether a Full Court should be constituted by two rather than three judges in some circumstances. These issues were raised in DP 64 as potential reforms that might enhance the capacity of the Federal Court to perform its appellate work.

In DP 64, the Commission raised for discussion the question whether a leave to appeal procedure should be introduced in the Federal Court as a means of screening access to the Full Court. A similar system has recently been introduced in the English Court of Appeal, with apparent success. The Commission's inquiries revealed a great deal of resistance within the Australian legal community to the idea of removing the right to a first appeal. The Commission supports this approach at the present time but acknowledges that the matter may need to be revisited in the future. However, the Commission recommends that the category of cases in which leave to appeal is currently required, namely, interlocutory appeals, be expanded to include other specified categories of procedural appeals.

In relation to two-judge courts of appeal, the Commission recommends that legislation be amended to permit interlocutory and procedural appeals to be determined by a Full Court of the Federal Court comprised of two or more judges. Where a Full Court is constituted by two judges and there is a difference of opinion as to the outcome of the appeal, the appeal should be redetermined before a bench comprising three or more judges, who may include the judges who heard the original appeal. The Commission further recommends that the Federal Court adopt internal procedures to identify the likelihood of disagreement at an early stage of the appellate proceedings.

A further issue identified in the Report relates to the appellate structure of the Federal Court. The issue came to the attention of the Commission because of concerns expressed during the course of the inquiry about inconsistency between decisions of panels of the Full Court constituted by different judges. The Commission notes that problems of inconsistency are not unique to the Federal Court — they occur in any large and busy court, and even in some small ones. In DP 64 the Commission asked whether the appellate structure of the Federal Court might exacerbate these problems. At present, the Chief Justice of the Federal Court constitutes a Full Court by drawing the required number of judges for each panel from the entire pool of Federal Court judges, though the selection is not a random one. This arrangement differs from two other Australian models — a Court of Appeal model, in which a small number of Justices of Appeal do all the court's appellate work; and a hybrid model, in which Justices of Appeal are combined with trial judges in forming an appellate bench.

The Commission heard widely divergent views on the extent of the problem of inconsistency in the Federal Court and the choice of an appropriate remedy, if one were needed. The Commission agrees with the views expressed to it regarding the importance of 'decisional harmony' in a federal court with national operation. Inconsistent decisions may lead to injustice because individuals in like situations are not treated alike; they may make it difficult for legal advisers to provide reliable advice to clients; and they may in time erode public confidence in the judiciary.

Notwithstanding these concerns, the Commission does not believe, on the information presently available to it, that the problems of inconsistent decisions in the Federal Court are of sufficient magnitude to warrant an alteration to the Court's own preferred appellate structure. The Commission recommends that the Attorney-General keep under review the impact on the Federal Court of changes to its size and jurisdiction. In the interim, the Commission recommends a number of reforms suitable for administrative implementation within the Federal Court. Among these, the Commission recommends that the Court review its internal procedures for allocating judges to appellate benches with a view to further enhancing its current practice of using similarly constituted panels to hear similar kinds of appeals.

Appellate jurisdiction of the Family Court

The appellate jurisdiction of the Family Court of Australia did not form a major part of the Commission's inquiry in this reference. Chapter 21 discusses two aspects of appeals to the Family Court, namely, the circumstances in which an appeal to the Family Court requires leave, and the circumstances in which a Full Court may be constituted by only two judges. The Commission's recommendations on these questions are the same as those described above in relation to the Federal Court.

Part F: Claims Against the Commonwealth, States and Territories

Part F makes recommendations with respect to claims against the Commonwealth. It also deals with claims against the States and Territories in so far as the Constitution permits. These issues were at the forefront of matters identified in the Commission's terms of reference, which specifically required the Commission to report on the appropriateness of Part IX of the *Judiciary Act* (ss 56–67).

This aspect of the reference raises important questions of policy regarding the immunities that the executive branch of government enjoys from the operation of the law of the land, whether common law or statutory. These immunities are often called 'Crown immunities' but this Report avoids that term wherever possible because of the uncertainties inherent in identifying the nature of 'the Crown'.

It was widely acknowledged in consultations and submissions that governmental immunity is a difficult and complex area of the law. The immunities recognised by the common law are of uncertain scope and continue to evolve through judicial decision. These are overlaid with statutory principles at a federal, state and territory level. These statutes generally seek to remove certain immunities, but do so in terms that continue to give rise to disputation and uncertainty. The statutory principles are further overlaid with constitutional principles — themselves in the process of judicial development — which affect not only the ambit of Commonwealth immunities but also the power of the Commonwealth to legislate with respect to the immunities enjoyed by the States and Territories.

Core immunities under review

In Part F, the Commission examines four core areas of immunity. The first relates to procedural immunities enjoyed by the Commonwealth, including immunity from being sued, immunity from procedural orders made in the course of litigation, and immunity from coercive civil remedies (Chapter 23). A further category of procedural immunity is the immunity from execution of judgments, which is considered in Chapter 24.

The second area relates to the immunity of the Commonwealth from the substantive common law, and most especially from liability in tort (Chapter 25).

The third area relates to the traditional presumption that executive government is immune from the operation of statutes. In a federation, this immunity arises in a number of situations, such as the application of Commonwealth statutes to the Commonwealth executive (Chapter 26); the application of Commonwealth statutes to the executives of the States and Territories (Chapter 27); and the application of state and territory statutes to the Commonwealth executive (Chapter 28). Each situation requires separate consideration because of the asymmetrical nature of the federal compact.

The fourth area of inquiry is the extent to which the immunities described above apply to a variety of persons or entities, ranging from those at the core of executive government to those at the periphery (Chapter 29). The principal question here is not the content of the immunities but how widely they apply. In this Chapter the Report focuses on the immunities of bodies that are established by federal law.

Immunity from execution

The views expressed in consultations and submissions revealed a reasonable degree of satisfaction with the existing law regarding the Commonwealth's immunity from execution of judgments. Most observers took the view that the existing immunity from execution, coupled with a statutory obligation to satisfy the

judgment debt, provided an appropriate balance between avoiding potential disruption to government functions that might result if execution could be levied against government assets, on the one hand, and ensuring that governments complied with court orders, on the other. The Commission agrees with these views but considers that the effectiveness of the current provisions could be enhanced in several respects.

The Commission recommends that the *Judiciary Act* be amended to provide that, where a judgment is given against the Commonwealth, the judgment must be satisfied within a reasonable time and a judgment creditor may enforce that obligation by seeking a writ of mandamus, or an equivalent order, to compel performance of that duty. The Commission further recommends that, where a judgment is given against a body that has separate legal personality but is regarded as the Commonwealth for the purpose of the Constitution, the Minister for Finance or the Treasurer may direct that body to satisfy the judgment debt within a reasonable time.

The relevant provisions of the *Judiciary Act* presently apply to execution against the Commonwealth and to execution against a State. The Commission recommends that the application of these provisions to the States be clarified by indicating that they apply only in matters of federal jurisdiction. The Commission also recommends that the same principles be applied to the Northern Territory and the ACT in lieu of the current divergent treatment of those Territories.

Other procedural immunities

In some areas of procedural immunity, the Commission heard consistent reports that the law operates well in practice but that the legal foundation of the Commonwealth's immunity, or lack of immunity, was unclear. For some observers, this situation necessitated no legislative intervention. For the majority, however, legislative amendment was thought desirable to clarify the law and avoid wasteful legal argument. The Commission agrees with the latter view and recommends changes that seek to clarify the law while leaving its essential content intact.

One such area relates to procedural immunities enjoyed by the executive government at common law. Historically, the Crown was immune from being sued and, if sued (for example, where immunity was waived), it was immune both from procedural orders in the course of litigation and from coercive civil remedies. These immunities have been effectively abolished in relation to the Commonwealth but the source of that change is variously said to arise from an implication in s 75(iii) of the Constitution, or from s 56 or s 64 of the *Judiciary Act*.

In order to provide greater certainty in the law, the Commission recommends that the Commonwealth's immunity from being sued, its immunity from procedural court orders and its immunity from coercive remedies be expressly abolished. The

procedural rights of persons in legal proceedings against the Commonwealth should accordingly be expressed to be the same as those in a claim between persons of full age and capacity, unless a Commonwealth Act otherwise provides. The Commission recommends that the same principles be applied to the States and the Territories in matters of federal jurisdiction.

Immunity from liability at common law or in equity

Another area in which the Commission considers greater clarity to be desirable is the substantive liability of the Commonwealth at common law and in equity. Historically, the executive government was considered immune from liability in tort because of the maxim that 'the King can do no wrong'. With one important exception, this immunity has now been abrogated, although there is some uncertainty as to whether this is achieved by the common law or by provisions of the *Judiciary Act*. The Commission recommends that the existing law be clarified by stipulating that the Commonwealth is subject to the same substantive obligations at common law and in equity as apply to persons of full age and capacity, unless a Commonwealth Act otherwise provides. The Commission also recommends that the Attorney-General order a review of the circumstances in which a statutory exception should be made for the purpose of preserving any residual common law immunities that are considered desirable.

The exception to the Commonwealth's liability in tort, referred to above, relates to the so-called *Enever* principle.[2] This principle holds that the Commonwealth will not be vicariously liable for the wrongful conduct of an officer who exercises an independent discretion pursuant to statute. In such a case the plaintiff's remedy in tort generally lies against the officer alone, unless the Commonwealth is held directly liable for a breach of a duty of care owed by it. In submissions and consultations, the *Enever* principle was roundly criticised as outdated, anomalous and inappropriate. It was noted that most Australian jurisdictions have expressly abrogated the rule in relation to police officers and that New South Wales has done so in respect of all 'persons in the service of the Crown', in each case without ill-effects. The Commission agrees with the substance of these criticisms and recommends that the *Enever* principle be expressly abolished.

Immunity from statute

The immunity of the executive government from the operation of statute was frequently described in consultations as the most unsatisfactory area of the law of immunity. The Commission heard repeatedly of the resources that were wasted by governments and other entities in seeking advice about the application of Commonwealth, state and territory laws to them. Many with whom the Commission

2 *Enever v The King* (1906) 3 CLR 969.

consulted were less concerned about the content of the immunity rule than with the need for a clear statement of what the rule is, so that affairs could be organised within a known legal environment. The Commission shares these concerns and notes that the area is fortunately one in which it is relatively simple to achieve certainty through a clear expression of legislative intention.

The Commission's recommendations in relation to immunity from statute have been informed by a number of considerations.

- First, the Commission considers it desirable to avoid, wherever possible, a case-by-case determination of an entity's immunity by reference to highly fact-sensitive tests. Such tests are apt to lead to an environment of legal uncertainty and to wasteful litigation.

- Second, the Commission considers it axiomatic that the executive branch of government should not be beyond the law but should generally be subject to the same law of the land as applies to citizens.

- Third, the Commission recognises that governments perform functions that have no counterpart among citizens and that it is not possible to subject governments to the same laws as citizens in every case. However, in such circumstances, the Commission believes that any immunity from the operation of the general law ought to be justified through open and accountable democratic processes, as reflected in laws enacted or authorised by Parliament.

- Fourth, the Commission is of the view that due regard must be had to the fact that Australia is a federation. Different constitutional and prudential considerations apply in assessing the immunity that the executive government of one polity enjoys from the laws of another polity than in assessing immunity within a polity.

- Finally, the Commission considers that the reform of immunities applicable to new statutes and existing statutes merits different approaches. New principles of immunity may be readily applied to new Acts. A more cautious approach is warranted for existing statutes, which may have been drafted on the basis of the presumption of immunity from statute as it existed at the time of enactment. For this reason the Commission recommends a program of review of existing legislation, with a sunset clause to ensure that this legislation is brought into line with the new principles in an agreed time frame.

With these principles in mind, in Chapter 26 the Commission considers the application of Commonwealth Acts to the Commonwealth executive. The Commission recommends that every new Commonwealth Act should bind the Commonwealth unless the Act states expressly that the Commonwealth is not so

bound. Existing Commonwealth Acts should be reviewed and amended if necessary within five years, after which the new rule of immunity should apply.

In Chapter 27 the Commission considers the application of Commonwealth Acts to the executives of the States and Territories. In this context the Commission believes that regard should be had to the nature of Australia's federal compact. The application of a Commonwealth statute to other polities within the federation may have quite different consequences to its application to citizens. Although it may be appropriate, and indeed desirable, for Commonwealth statutes to be applied to the States and Territories as a matter of policy, the Commission believes that a commitment to federal values requires that the Commonwealth Parliament consider that issue expressly and reflect its conclusion in legislation. For this reason, the Commission recommends that every new Commonwealth Act should not bind the States or Territories unless the Act states expressly that the States or Territories are so bound. Existing Commonwealth Acts should be reviewed and amended if necessary within five years, after which the new rule of immunity should apply.

In Chapter 28 the Commission considers the application of state and territory Acts to the Commonwealth executive. This question has given rise to considerable uncertainty under s 64 of the *Judiciary Act*, which the Commission believes should be repealed. The Commission recommends that the Commonwealth adopt a rule by which every new state or territory Act binds the Commonwealth, subject to three qualifications. These are that the Commonwealth should be able to exempt itself by regulation from the application of a state or territory Act; the Commonwealth should not be bound by a state or territory Act that does not bind the executive of that State or Territory; and the Commonwealth should not be bound by a state or territory Act that is expressed not to bind the Commonwealth. Existing state and territory Acts should be reviewed and any necessary exemptions should be made by regulation within five years, after which the new rule of immunity should apply.

Immunity of Commonwealth bodies

Underlying the consideration of all immunities are important changes to the way in which governments perform their functions and deliver services to citizens. The corporatisation, privatisation and contracting out of governmental functions have exerted considerable pressure on the traditional doctrines of immunity. This has occurred as entities lying progressively further from the core of executive government have sought the advantages of procedural and substantive immunities, which historically attached to the monarch alone. These immunities may not be as easy to justify for diverse entities through which governments operate in contemporary society.

In Chapter 29 the Commission makes recommendations in respect of bodies that are established by a Commonwealth Act and owe their existence, powers and

functions to that Act. The Commission recommends that new bodies established by a Commonwealth Act should not enjoy the privileges and immunities of the Commonwealth unless that Act states expressly that they are entitled to do so. Additionally, all Acts that establish existing Commonwealth bodies should be reviewed and amended if necessary within five years, after which the new rule of immunity should apply.

These recommendations go a substantial way towards identifying those entities that are entitled to claim the privileges and immunities of the Commonwealth. The Commission acknowledges that they do not cover the full range of complex immunity issues arising from the corporatisation, privatisation and contracting out of governmental functions. However, on this topic the Commission did not have the benefit of sufficiently broad consultations or submissions to justify the making of more extensive recommendations.

Part G: The Law Applicable in Federal Jurisdiction

Part G addresses an issue that has generated conceptual and practical difficulties since the *Judiciary Act* was enacted in 1903, that is, ascertaining the law to be applied by courts exercising federal jurisdiction. The principal difficulty is that the Commonwealth Parliament does not possess power to make laws governing every substantive issue that might arise in matters of federal jurisdiction. Even where Parliament has the necessary legislative power, it may not have exercised it. For example, if a matter falls within federal jurisdiction because a contractual dispute arises between residents of different states, this alone does not empower Parliament to make comprehensive laws regulating contracts, such as would be necessary for the resolution of the dispute on the merits.

In DP 64 the Commission identified a number of ways in which this gap in federal law might be filled. The possibilities discussed below are not mutually exclusive but can be used cumulatively to supply a body of law to be applied by courts exercising federal jurisdiction. Parliament has already used each method to some extent.

A federal limitation statute

The first option considered by the Commission was whether the range of substantive matters that are subject to federal law should be extended. One issue that was regularly brought to the attention of the Commission as meriting a greater role for federal law was the limitation of actions (Chapter 31). At present, Commonwealth legislation contains a few ad hoc limitation provisions, but there is no general statute that provides the full machinery for regulating the limitation of actions in federal jurisdiction. That gap is currently filled by state and territory laws, which impose different time bars and machinery provisions. The Commission's view is

that there is considerable merit in enacting a federal limitation statute, and it accordingly recommends that the Attorney-General order a full review of this question. While the ambit of such a statute merits separate investigation, the Commission's preliminary view is that a federal limitation statute should not apply across the whole field of federal jurisdiction but should be confined to regulating causes of action created by Commonwealth law.

Federal laws of procedure

The second option considered by the Commission was whether the range of procedural matters that are subject to federal law should be extended by regulating procedure in federal courts or in all courts exercising federal jurisdiction (Chapter 32). Presently, most matters of practice and procedure are regulated by Rules of Court made pursuant to delegated legislative power, although some matters are regulated by statute directly. The Commission notes the current work of the Committee on the Harmonisation of Rules of Court, chaired by Justice Kevin Lindgren of the Federal Court, which is established under the auspices of the Council of Chief Justices (CCJ). That Committee has not sought to harmonise Rules of Court across all areas of practice and procedure but has adopted a selective approach of considering areas thought most in need of, and most amenable to, harmonisation.

The Commission's consultation process did not reveal any deep concern regarding laws of procedure in federal jurisdiction. In these circumstances, the Commission believes that voluntary harmonisation through the CCJ's Harmonisation Committee is a sensible way to proceed. The Commission recommends that the Attorney-General monitor the progress of this Committee with a view to referring the harmonisation of procedural law to the Standing Committee of Attorneys-General at a later point, if circumstances require.

Federal choice of law rules

The third option considered by the Commission was whether Parliament should enact federal choice of law rules, which indicate directly the legal rule to be applied in matters that have connections with more than one State or Territory (Chapter 33). In 1992, the Commission published a Report, *Choice of Law* (ALRC 58), in which it recommended the enactment of a choice of law statute. The statute did not seek to codify all common law rules on choice of law but rather sought to make provision in specific areas in which the common law was unclear or unsatisfactory. The Commission's intention was that the choice of law statute be adopted across Australia as part of a national legislative scheme. The federal component of that scheme was to be the enactment of a new Part in the *Judiciary Act*, establishing choice of law rules for all courts exercising federal jurisdiction.

The States and Territories were to complement the federal legislation by enacting identical choice of law rules for all courts exercising state or territory jurisdiction.

The Commission's Report on *Choice of Law* has not yet been implemented (apart from a few recommendations that are not presently material). The Commission believes that the Attorney-General should now consider implementing that Report and recommends accordingly. However, the Commission considers that there are two matters in respect of which the 1992 Report calls for qualification.

First, in view of the difficulties experienced in achieving a uniform national solution through cooperative legislation, the Commonwealth Parliament should now proceed with its own choice of law statute, irrespective of legislative action taken by the States or Territories. The Commission recommends that the operation of that statute be confined to matters arising in federal courts rather than extending to all courts exercising federal jurisdiction. This avoids the situation of state and territory courts having to apply different choice of law rules according to whether they are exercising state or territory jurisdiction on the one hand, or federal jurisdiction on the other, in any particular case.

The second qualification relates to the 'flexible exception' to the choice of law rule in torts, which the Commission had recommended in the 1992 Report. This exception would have permitted a court to depart from the usual rule of applying the law of the place where the tort was committed if a matter was more closely connected with another place. In consultations, a number of Solicitors-General raised strong objections to the proposed exception. Since the Commission reported in 1992, the High Court has rejected the idea of a flexible exception for intra-Australian torts. The High Court has also suggested that this new choice of law rule has 'constitutional underpinnings', which may invalidate any legislative attempt to impose a flexible exception. For this reason, and for the sake of certainty in determining the law applicable to intra-Australian torts, the Commission recommends that there be no flexible exception in such cases.

Surrogate federal law

The most common method for filling the gap in federal law in matters of federal jurisdiction has been by recourse to ss 79 and 80 of the *Judiciary Act*. These sections pick up and apply the laws of the State or Territory in which the court exercises federal jurisdiction. In consultations and submissions, the view was strongly pressed that ss 79 and 80 are confusing and lead to considerable uncertainty. These problems arise from the unsettled relationship between the sections as well as from interpretational difficulties within each section. A persistent problem is the extent to which state or territory laws are picked up with their meaning unchanged when applied in federal jurisdiction as 'surrogate federal law'.

In Chapter 34, the Commission recommends that ss 79 and 80 be repealed and replaced by a single provision. The function of that section, like that of the existing provisions, should be to identify the circumstances in which gaps in federal law are to be filled by state or territory law when a court exercises federal jurisdiction. The Commission recommends that the section clearly identify the sources of law to be applied by a court exercising federal jurisdiction, and the order in which those sources are to be applied. The Commission further recommends that the section define the circumstances in which certain state or territory laws are to be included or excluded from application as surrogate federal law, with a view to removing the difficulties that have arisen under the current law.

Part H: Judicial Power in the Territories

The Commission's terms of reference asked it to inquire into and report on the exercise of judicial power in territory courts. In particular, the Commission was asked to comment on whether Part IXA of the *Judiciary Act* (ss 67A–67F), which relates to the jurisdiction of the Supreme Court of the Northern Territory, ought to be replicated for the ACT.

The Commission's recommendations in Part H must be understood in the context of two considerations. The first is the uncertainty created by the High Court's changing understanding of the nature of judicial power in the Territories. The traditional view has been that judicial power in the Territories is founded on s 122 of the Constitution and is largely unaffected by Chapter III of the Constitution (ss 71–80). However, recent High Court decisions increasingly have sought to bring the Territories within the scope of Chapter III, at least in some respects. The uncertainty resulting from this shifting paradigm has informed the Commission's approach of recommending only those reforms that rest on sure constitutional foundations.

The second consideration is the extent to which the Northern Territory and the ACT ought to be treated similarly to States — and to each other — in the arrangements made for the exercise of federal judicial power. The Commission sought no comment and expresses no view on the wider but overlapping question of whether these Territories can or ought to be granted statehood. Nonetheless, the Commission's consultations and submissions revealed near-unanimous opinion that the exercise of federal judicial power in the Northern Territory and the ACT ought to be put on the same footing as the States, in so far as it was constitutionally possible to do so. The Commission agrees with this approach and has reflected this in its recommendations.

The Commission's principal recommendations in relation to the exercise of the judicial power in the Northern Territory and the ACT are as follows.

- Federal jurisdiction should be conferred on territory courts in the same manner and subject to the same conditions as federal jurisdiction is invested in state courts.

- The Federal Court and the Supreme Courts of the Northern Territory and the ACT should be granted concurrent jurisdiction to hear and determine suits between the Commonwealth and a Territory.

- Territory courts should be precluded from granting public law remedies against an officer of the Commonwealth, and federal courts (other than the High Court) should be precluded from granting them against an officer of a Territory. However, more liberal jurisdictional provisions should apply where an officer may exercise territory and Commonwealth functions pursuant to an intergovernmental arrangement.

- The jurisdiction of the Federal Court should exclude common law claims arising in a Territory as well as statutory claims arising under a law made by a territory legislature, except to the extent that they form part of the Federal Court's accrued jurisdiction.

- An intermediate appellate court should be established for the ACT to hear those appeals from a single judge of the ACT Supreme Court that currently go to the Federal Court.

- The use of the terms 'Territory' and 'State' should be reviewed to clarify the application of the *Judiciary Act* with respect to internal and external territories.

To the extent that the Constitution permits, these reforms aim to achieve parity of treatment between the Northern Territory and the ACT, and between the Territories and the States, in respect of the exercise of federal judicial power. The effect of these reforms is to expand the jurisdiction of territory courts in some instances and to contract it in others, while in others the reforms leave the jurisdiction of territory courts unchanged but clarify the legal basis on which it is exercised.

Part I: Location, Consolidation and Simplification

Over the course of its near 100 year history, the *Judiciary Act* has been amended by approximately 70 separate pieces of legislation, implementing hundreds of changes to the Act. The *Judiciary Act* is described in its long title as 'an Act to make provision for the exercise of the judicial power of the Commonwealth'. However, that unifying theme has been eroded over the years by amendments that have little or nothing to do with that subject matter.

Under s 21 of the *Australian Law Reform Commission Act 1996* (Cth), the Commission is obliged to consider proposals for simplifying the law, consolidating Commonwealth laws, and repealing obsolete or unnecessary laws in relation to matters referred to it by the Attorney-General. In addition, the Commission's terms of reference ask it to consider:

- the need for clear and comprehensive legislative provisions for the exercise and distribution of the judicial power of the Commonwealth; and

- whether the procedural provisions dealing with the High Court included in the *Judiciary Act* would be better placed in another Act.

The Commission received only a limited number of submissions in relation to these issues. One reason for this was that this aspect of the reference was seen to be more concerned with form than substance. Yet, among those who commented, there was very strong support for reviewing the provisions of the *Judiciary Act* in accordance with the Commission's statutory mandate.

The Commission holds the view that this part of the reference raises issues that are central to the rule of law, including issues of accessibility, intelligibility and clarity of the law. These might be regarded as matters of form but they have important implications for the ability of the federal judicial system to deliver just and effective outcomes for litigants and the public as a whole. The Commission's recommendations in Chapter 41 are divided into four groups, as follows.

Renaming and cross-referencing

The Commission recommends that the *Judiciary Act* be renamed to reflect more accurately its content as an Act relating to the allocation and exercise of the judicial power of the Commonwealth. In addition, the Commission believes that clarity and accessibility would be promoted by renumbering the sections of the Act and including notes and cross-references to relevant provisions of the Constitution and other federal legislation.

Obsolete provisions

The Commission recommends the repeal of a range of obsolete provisions. Sections 82–85 of the *Judiciary Act* provide for venue in suits for pecuniary penalties, taxes and forfeiture. These sections were closely modelled on provisions of United States law and were adopted for Australia by the principal drafters of the Act. The Commission notes that one government department favoured retention of these provisions but the Commission believes that the sections no longer serve a useful function. The Commission recommends that venue in suits of the kind described should be determined in accordance with general principles of law.

These principles do not privilege particular venues for particular kinds of suit but determine the most appropriate forum in a particular case taking into account the interests of all the parties and the ends of justice.

A further segment of the *Judiciary Act* that may warrant repeal is Part VIII. This Part relates to suppression orders made in connection with criminal proceedings arising out of a raid by the Australian Secret Intelligence Service (ASIS) on a hotel in Melbourne in 1983. Part VIII was designed to protect Australia's national and international security interests, but its value may have been spent by the passage of nearly 20 years since its enactment. The Commission recommends that the Attorney-General inquire of the Minister responsible for ASIS whether any security interest continues to be served by Part VIII. If not, the Commission recommends that Part VIII be repealed.

Relocating provisions to existing legislation

A third group of recommendations is intended to simplify the law by ensuring that certain provisions of the *Judiciary Act* are relocated to other Acts, having regard to their subject matter. Piecemeal amendments to the *Judiciary Act* over many years have resulted in many anomalies. For example, the *Judiciary Act* contains provisions defining the jurisdiction of the Federal Court despite the fact that the Court's jurisdiction is otherwise conferred on it by the *Federal Court of Australia Act 1976* (Cth) and other subject-specific legislation.

There was widespread agreement in consultations and submissions that the current location of jurisdictional provisions was confusing and made the law difficult to access, even for experienced legal practitioners. The Commission acknowledges that greater coherence may be achieved in different ways but it prefers an approach that ensures that each federal court is constituted by a dedicated Act of Parliament. Such an Act would establish the court, define its original and appellate jurisdiction, grant powers appropriate for the administration of justice, provide for the court's practice and procedure, and set up the framework for its finance and management.

In accordance with this view, the Commission recommends that provisions of the *Judiciary Act* relating to the jurisdiction and powers of the High Court be relocated to the *High Court of Australia Act 1979* and that provisions relating to the jurisdiction and powers of the Federal Court be relocated to the *Federal Court of Australia Act 1976.* The Commission further recommends that notes and cross-references be included to lend additional assistance to users of the federal civil justice system.

Relocating provisions to new legislation

The Commission recommends that certain sections of the *Judiciary Act* be relocated to new Commonwealth Acts. Specifically, the Commission recommends the enactment of a new Act dealing with the provision of legal services by and to the Commonwealth. This Act would accommodate certain parts of the *Judiciary Act* that do not specifically relate to the exercise of the judicial power of the Commonwealth, namely, those dealing with the Australian Government Solicitor (Part VIIIB), the Attorney-General's Legal Services Directions (Part VIIIC), and Attorney-General's lawyers (ss 55E–G).

The Commission also recommends that federal legislation make a clearer distinction between the Family Court of Australia and the substantive law that the Court administers. This could be achieved by enacting a new Act — the *Family Court of Australia Act* — to accommodate relevant parts of the *Family Law Act 1975*. There was support for this recommendation, including from the Family Court. It was generally agreed that the nexus between the substance of family law and the court administering that law has been substantially weakened over the intervening 25 years. Not only is jurisdiction in family law matters now conferred on other courts (for example, state magistrates' courts and the Federal Magistrates Service), but the jurisdiction of the Family Court also extends beyond family law matters and may in time broaden further. In these circumstances, the Commission recommends that the Family Court be established under a separate Act in a similar fashion to other federal courts.

List of Recommendations

The number of each Recommendation reflects the Chapter number in which the Recommendation is made.

Part B: Original Jurisdiction

Original jurisdiction of the High Court

3–1 The *Judiciary Act* should be amended to provide that, in addition to the jurisdiction conferred on the High Court by s 75 of the Constitution, the Court has such additional original jurisdiction as is conferred on it by the *Judiciary Act* or other Acts of Parliament. The provision should be cross-referenced to the legislation that confers such additional original jurisdiction.

3–2 The *Commonwealth Electoral Act 1918* should be amended to abolish the title 'Court of Disputed Returns' and to confer the relevant jurisdiction on the High Court directly. Section 34 of the *Judiciary Act* should be amended accordingly to provide that an appeal from a single justice of the High Court exercising original jurisdiction conferred by the *Commonwealth Electoral Act* shall not be brought to a Full Court without special leave.

Original jurisdiction of the Federal Court

4–1 All statutory provisions that confer jurisdiction on the Federal Court in general terms (such as s 39B of the *Judiciary Act*) should be relocated to the *Federal Court of Australia Act 1976*. [See Recommendation 41–6.]

4–2 Section 39B(1A)(c) of the *Judiciary Act* should be amended to provide that the jurisdiction conferred on the Federal Court by that paragraph is subject to specific limitations or prohibitions on the Court's jurisdiction as stipulated in other Acts of Parliament. Section 39B(1A)(c) should also be amended to state that it shall not provide a basis for granting a remedy that is excluded, expressly or by necessary implication, by the legislative regime established by other Acts of Parliament.

4–3 The Attorney-General should order a review of the relationship between s 39B(1A)(c) of the *Judiciary Act* and the specific federal Acts that confer jurisdiction on the Federal Court. The review should consider the extent to which the provisions of each specific Act remain necessary or desirable and whether the relationship between the provisions might be harmonised by greater use of cross-referencing.

Original jurisdiction of the Family Court

5–1 The Attorney-General should order a review of the question whether the original jurisdiction of the Family Court should be expanded to include additional matters arising under laws made by Parliament, such as bankruptcy matters that arise in the course of family law proceedings.

Investing state courts with federal jurisdiction — general

6–1 Section 39 of the *Judiciary Act*, which invests state courts with federal jurisdiction, should be redrafted in simple language that invests federal jurisdiction in state courts within the limits of their respective jurisdictions. The provision should:

(a) extend to all matters of original federal jurisdiction within the meaning of ss 75 and 76 of the Constitution;

(b) extend to all matters of appellate federal jurisdiction within the meaning of ss 75 and 76 of the Constitution; and

(c) be subject to the *Judiciary Act* and to any other Act of Parliament that expressly limits or prohibits the exercise of federal jurisdiction (whether original or appellate) by state courts.

6–2 The Attorney-General should order a review of the relationship between ss 39 and 39A of the *Judiciary Act* and the specific federal Acts that confer federal jurisdiction on state courts or impose conditions on its exercise. The review should consider the extent to which provisions of each specific Act remain necessary or desirable and whether the relationship between the provisions might be harmonised by greater use of cross-referencing.

6–3 Section 39A of the *Judiciary Act* should be amended to provide that the federal jurisdiction invested in state courts pursuant to s 39 is subject to the conditions or restrictions stipulated in any other Act of Parliament.

Investing state courts with federal jurisdiction—attaching conditions

6–4 In view of the abolition of all appeals from Australian courts to the Privy Council by the *Australia Act 1986* (Cth) and the *Australia Act 1986* (Imp), s 39(2)(a) of the *Judiciary Act* is obsolete and should be repealed.

6–5 Section 39(2)(c) of the *Judiciary Act*, which provides that the High Court may grant special leave to appeal from a state court notwithstanding anything to the contrary in a state law, should be repealed. Section 35 of the *Judiciary Act*, which deals generally with appeals to the High Court, should be amended to provide that any state law that purports to restrict or limit an appeal from a state court to the High Court shall not apply.

6–6 Section 39(2)(d) of the *Judiciary Act* should be amended to provide that federal jurisdiction may be exercised by a state magistrate only if the magistrate is qualified for admission as a legal practitioner in the Supreme Court of that State. [See Recommendation 36–2 in relation to the Territories.]

Exclusive or concurrent jurisdiction — general

7–1 Section 38 of the *Judiciary Act*, and the heading to that section, should be amended to clarify that the matters specified in the section are exclusive of the federal jurisdiction exercised by state courts rather than exclusive to the jurisdiction of the High Court.

7–2 Section 38(a) of the *Judiciary Act*, which concerns matters arising directly under any treaty, should be repealed, thereby enabling such matters to be commenced in state courts.

7–3 Section 38(b) of the *Judiciary Act*, which concerns suits between States, should be repealed, thereby enabling such matters to be commenced in state courts. Any stay or transfer of such a proceeding should be determined in accordance with established principles.

7–4 Section 38(c) and (d) of the *Judiciary Act*, which concern suits by the Commonwealth against a State and suits by a State against the Commonwealth, should be repealed, thereby enabling such matters to be commenced in state courts. Any stay or transfer of such a proceeding should be determined in accordance with established principles. [See Recommendation 37–1 in relation to the Territories].

7–5 As a corollary of Recommendations 7–2 to 7–4, s 39B of the *Judiciary Act* should be amended to confer additional federal jurisdiction on the Federal Court in relation to all matters (a) arising under any treaty, (b) between States, and (c) between a State and the Commonwealth. Any stay or transfer of such a proceeding should be determined in accordance with established principles. [See Recommendation 37–1 in relation to the Territories].

Exclusive or concurrent jurisdiction—public law remedies

7–6 Subject to Recommendation 7–8, s 38(e) of the *Judiciary Act* should be amended to exclude from the federal jurisdiction invested in state courts any matter in which an order is sought to ensure that the powers or duties of an officer of the Commonwealth (as that term is understood in s 75(v) of the Constitution) are exercised or performed according to law. [See Recommendations 37–2 and 37–3 in relation to the Territories.]

7–7 Subject to Recommendation 7–8, the *Judiciary Act* should be amended to provide that federal courts (other than the High Court) do not have jurisdiction to grant an order to ensure that the powers or duties of an officer of a State are exercised or performed according to law. [See Recommendation 37–4 in relation to the Territories.]

7–8 The *Judiciary Act* should be amended to provide that, where an officer of a State or an officer of the Commonwealth may exercise both state and federal functions pursuant to an intergovernmental arrangement, an order to ensure that the powers or duties of that officer are exercised or performed according to law may be sought in the following courts:

(a) where the order is sought in respect of state functions alone — in a state court;

(b) where the order is sought in respect of federal functions alone — in a federal court;

(c) where the order is sought in respect of intermingled state and federal functions— in either a state court or a federal court, to the extent that the Constitution permits.

[See Recommendation 37–5 in relation to the Territories.]

Part C: Transfer of Proceedings

Change of venue in federal courts

9.1 The Attorney-General should order a review of federal laws providing for change of venue within federal courts, with a view to achieving greater harmonisation. State and territory courts exercising federal jurisdiction should continue to order a change of venue in accordance with state and territory laws on that subject.

9.2 The *Family Law Act 1975* should be amended to confer expressly on the Family Court the power to:

(a) change the venue of a proceeding or part of a proceeding; and

(b) make relevant Rules of Court.

9.3 Federal legislation should be amended to clarify that the power to change the venue of a proceeding or part of a proceeding in a federal court may be exercised on the application of a party or by the court of its own motion.

9.4 The discretion of a federal court to change the venue of a proceeding or part of a proceeding should be structured by including in legislation a list of factors that the court must consider when exercising the discretion. These factors should include:

- the residence or place of business of the parties and the residence of the witnesses likely to be called in the proceeding;
- the convenience of the parties and of the witnesses;
- the place where the cause of action arose;
- the place where the events that gave rise to the plaintiff's claim occurred;
- the place where the subject matter of the proceeding is situated;
- the financial circumstances of the parties, including the availability of legal aid;
- any contractual agreement between the parties regarding the court or place in which the proceeding should be instituted;
- the law to be applied in the proceeding;
- whether a related proceeding has been commenced by or against a party to the proceeding;
- the interests of the efficient administration of justice; and

- any other factor that the court considers relevant in the circumstances of the case.

9.5 Federal legislation should be amended to ensure that federal courts ordering a change of venue have power to impose conditions on the transfer, provided the conditions are limited to matters of practice and procedure.

The case stated procedure

10–1 Federal legislation should continue to provide a mechanism by which a matter arising in a federal court, or a question arising in such a matter, can be transferred before final determination from a single judge to a Full Court.

10–2 The Attorney-General should order a review of federal laws providing for a case to be stated or a question reserved for a Full Court of a federal court, with a view to achieving greater harmonisation. State and territory courts exercising federal jurisdiction should continue to state a case or reserve a question in accordance with state and territory laws on that subject.

10–3 Section 18 of the *Judiciary Act* and Order 35 of the *High Court Rules* should be amalgamated into a single provision located in the *High Court of Australia Act 1979*, by which a single justice of the High Court may state a case or reserve a question for a Full Court.

10–4 Federal laws that provide for a case to be stated or a question reserved for a Full Court of a federal court should be amended to incorporate the following elements.

(a) A single judge should be able to state a case or refer a question to a Full Court on the application of a party or on the judge's own motion.

(b) A single judge should have a statutory discretion to refuse to state a case or refer a question, notwithstanding that the parties favour such a course.

(c) The case stated or question reserved should be expressly limited to questions of law or mixed questions of law and fact.

(d) The matter, or question arising in a matter, should be one in respect of which an appeal would lie to a Full Court from a judgment of a single judge.

(e) A Full Court should have an express discretion to decline to answer a case stated or question reserved where the Full Court considers it inappropriate to answer the case stated or question reserved.

(f) A Full Court should be able to remit a case stated or question reserved to a single judge and should also be able to remit to a single judge any question of fact that arises out of a case stated or question reserved.

(g) A Full Court should be authorised to draw from the facts and documents such implications and inferences as could have been drawn by a single judge.

Cases stated and questions reserved: transfers between courts

10–5 Section 26 of the *Federal Court of Australia Act 1976* should continue to provide a procedure whereby a case may be stated or a question reserved by a single judge of one court for a Full Court of the Federal Court before final determination, provided that the matter is one in respect of which an appeal lies from a judgment of a single judge to the Federal Court. Section 26 should be amended to incorporate the elements identified in Recommendation 10–4.

10–6 Section 94A of the *Family Law Act 1975* should continue to provide a procedure whereby a case may be stated or a question reservedby a single judge of one court for a Full Court of the Family Court before final determination, provided that the matter is one in respect of which an appeal lies from a judgment of a single judge to the Family Court. Section 94A should be amended to incorporate the elements identified in Recommendation 10–4.

Remittal of matters by the High Court

11–1 Section 44 of the *Judiciary Act* should be amended to enable the High Court to remit to another court any matter falling within the judicial power of the Commonwealth, which is at any time pending in the High Court, subject to the following exceptions.

(a) Subject to Recommendations 7–8 and 37–5, the High Court should not be able to remit a matter in which an order is sought to ensure that the powers or duties of an officer of the Commonwealth (as that term is understood in s 75(v) of the Constitution) are exercised or performed according to law to a court other than a federal court. [See Recommendations 7–6, 37–2 and 37–3].

(b) Subject to Recommendations 7–8 and 37–5, the High Court should not be able to remit a matter in which an order is sought to ensure that the powers or duties of an officer of a State or Territory are exercised or performed according to law to a court other than a court of the relevant State or Territory. [See Recommendations 7–7 and 37–4].

(c) The High Court should not be able to remit to any other court a matter in which an order is sought to ensure that the powers or duties of a judge or officer of the Federal Court or the Family Court are exercised or performed according to law.

(d) The High Court should not be able to remit to any other court a matter falling within the High Court's appellate jurisdiction.

11–2 Subject to Recommendation 11–1, s 44 of the *Judiciary Act* should be amended to provide that the High Court may remit a matter that is at any time pending in the High Court to any other court in Australia. The section should also provide that if the receiving court does not otherwise possess federal jurisdiction with respect to the matter being remitted, the receiving court is thereby invested with federal jurisdiction or has federal jurisdiction conferred on it in that matter by virtue of the remittal.

11–3 Section 44 of the *Judiciary Act* should be amended to clarify that the High Court's discretion to remit a matter or retain it should be unfettered. However, where the High Court decides to remit a matter to another court, the Court's choice of receiving court should be exercised by reference to statutory criteria. In particular, the Court should be required to take into account the following factors:

- whether the receiving court would have had jurisdiction with respect to the subject matter and the parties had the proceeding been commenced in that court;
- the residence or place of business of the parties and the residence of the witnesses likely to be called in the proceeding;
- the convenience of the parties and of the witnesses;
- the place where the cause of action arose;

- the place where the events that gave rise to the plaintiff's claim occurred;
- the place where the subject matter of the proceeding is situated;
- the financial circumstances of the parties, including the availability of legal aid;
- any contractual agreement between the parties regarding the court or place in which the proceeding should be instituted;
- the law to be applied in the proceeding;
- whether a related proceeding has been commenced by or against a party to the proceeding;
- the interests of the efficient administration of justice; and
- any other factor that the Court considers relevant in the circumstances of the case.

11–4 Section 44 of the *Judiciary Act* should be amended to clarify that the High Court's power to give directions in relation to a remittal is limited to matters of practice and procedure and does not extend to the substantive law to be applied in the receiving court.

Part D: Constitutional Litigation

Jurisdiction in constitutional matters

12–1 The *Family Law Act 1975* should be amended to clarify that the Family Court has jurisdiction to hear and determine a matter arising under the Constitution or involving its interpretation where it arises in the course of adjudicating a matter that is otherwise within the Family Court's statutory jurisdiction. The *Federal Magistrates Act 1999* should be amended to clarify the jurisdiction of the Federal Magistrates Service in a like manner.

Notice to Attorneys-General — section 78B

13–1 The *Judiciary Act* should continue to make provision for the mandatory issuing of notices to the Attorney-General of the Commonwealth and the Attorney-General of each State and Territory of any pending cause that involves a matter arising under the Constitution or involving its interpretation. However, s 78B of the *Judiciary Act* should be amended as follows:

(a) The section should indicate that the obligation to issue the notice rests on the party who first expressly raises a matter arising under the Constitution or involving its interpretation, unless the court directs that the notice be given by another party.

(b) The section should clarify that the obligation to issue notices arises at each stage of the litigation, whether at first instance or on appeal.

(c) The section should specify the content of the notice but should provide that failure to comply with any statutory requirement as to content does not invalidate the notice. The court should have a discretion to order that a notice be reissued for the purpose of rectifying any non-compliance with the statutory requirements.

(d) The section should facilitate the issuing of notices to the Attorneys-General by authorising the making of regulations specifying an address for service of the notice on each Attorney-General. The Standing Committee of Attorneys-General should also consider ways in which information technology may be used to facilitate the issuing of notices in an efficient and cost-effective manner.

(e) The section should authorise the making of regulations requiring the parties to certify that they have considered the necessity of issuing s 78B notices. The requirement of certification should apply to such courts and in such circumstances as are prescribed by regulation.

(f) The section should authorise the court to make such orders as to costs as it thinks fit where a party has failed to take reasonable steps to notify the Attorneys-General in accordance with this section.

(g) The section should clearly state that the court in which the cause is pending has a duty to consider of its own motion whether s 78B notices are required in a particular case.

(h) The section should provide that a court has power to strike out summarily a pleading that purports to raise a constitutional question where that question is manifestly groundless or lacks any realistic prospect of success. Where such a pleading has been struck out, the parties should have no obligation to issue s 78B notices. A similar provision should be made where a constitutional question that is manifestly groundless or lacks any realistic prospect of success is raised otherwise than in a pleading (for example in the course of oral argument during an appeal).

(i) The section should confer on the court in which the cause is pending a discretion to continue to hear and determine the cause,

whether in relation to constitutional or non–constitutional questions. However, the court should not be able to give judgment in relation to a matter arising under the Constitution or involving its interpretation unless the Attorneys-General have been given a reasonable opportunity to make a submission to the court on that matter.

(j) The section should require each Attorney-General to indicate within 14 days of receiving the notice whether he or she intends to make an oral submission, a written submission, both oral and written submissions, or no submission to the court in relation to the matter. Where an Attorney-General does not indicate an intention within 14 days, the Attorney-General should be deemed to have been given a reasonable opportunity to make a submission to the court, unless the court otherwise extends the time. Where an Attorney-General does indicate within 14 days (or such longer period as the court allows) an intention to make a submission, the court should be empowered to fix a reasonable time within which that submission must be made, whether orally or in writing.

Intervention by Attorneys-General — section 78A

14–1 The Commission affirms its recommendations with respect to intervention by Attorneys-General, identified in its 1985 Report, *Standing in Public Interest Litigation* (ALRC 27), and its 1996 Report, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (ALRC 78). The Commission further recommends that s 78A of the *Judiciary Act* be amended to provide for intervention by the Attorney-General of the Commonwealth and the Attorney-General of each State and Territory as follows.

(a) The section should be amended to confer on each Attorney-General a right to intervene in non-constitutional matters that raise an important question affecting the public interest in the jurisdiction represented by that Attorney-General. The court should be given a power to direct whether the right of intervention shall be exercised by the presentation of written submissions, oral argument, or both.

(b) The section should be amended to provide that each Attorney-General's right to intervene in proceedings in a matter arising under the Constitution or involving its interpretation extends to non-constitutional issues arising in those proceedings in so far as the non-constitutional issues raise an important question affecting the

public interest in the jurisdiction represented by that Attorney-General.

(c) The section should be amended to authorise a court to make orders as to costs arising from an intervention of the kind described in paragraphs (a) and (b). In exercising its discretion to award costs, the court should be required to have regard to the following factors:

(i) the extent to which an Attorney-General's intervention has assisted the court in resolving the questions arising in the matter before it;

(ii) the extent to which an Attorney-General's intervention has presented the court with arguments that would not otherwise have been raised in the proceedings;

(iii) any cost or delay to other parties or to the court arising from the intervention; and

(iv) any other circumstance that the court considers relevant.

(d) The section should authorise the making of Rules of Court to regulate the practice and procedure of intervention by the Attorneys-General.

Part E: Appellate Jurisdiction of Federal Courts

Nature of federal appeals

17–1 Legislation conferring appellate jurisdiction on each federal court should be amended to specify clearly the nature of the appeal undertaken by the court. To the extent that the Constitution permits, legislation should indicate that the appellate court has a discretion, which it may exercise in appropriate cases, to:

- draw inferences from the evidence given at trial;
- review findings of credibility of witnesses;
- admit further evidence; and
- consider changes in the law up to the date at which it gives judgment, subject to relevant transitional legislation.

Appeals to the High Court from Nauru

19–1 The Attorney-General should consult with the Minister for Foreign Affairs and Trade regarding the feasibility of terminating the treaty between Australia and Nauru, which provides for certain appeals to be brought to the High Court from the Supreme Court of Nauru. If termination is considered feasible, the *Nauru (High Court Appeals) Act 1976* should be repealed.

19–2 The Attorney-General and Minister for Foreign Affairs and Trade should inquire of their counterparts in Nauru whether there are other ways in which Australian judicial officers might be used to mutual advantage to enhance the local legal institutions of Nauru.

Appeals to the High Court from the Family Court

19–3 Section 95(b) of the *Family Law Act*, which empowers a Full Court of the Family Court to grant a certificate allowing an appeal to be taken to the High Court without special leave, should be repealed.

Appeals from justices of the High Court exercising original jurisdiction

19–4 An appeal to the High Court from a judgment of one or more justices exercising original jurisdiction should generally lie as of right and not by leave of the Court, at least in present circumstances. However, s 34 of the *Judiciary Act* should be amended to expand the categories of cases in which such an appeal requires the leave of the Court to include, in addition to appeals from an interlocutory judgment, other specified categories of procedural appeals.

19–5 In those cases in which leave is required to bring an appeal to the High Court from a judgment of a justice or justices of that Court exercising original jurisdiction, an order granting or refusing leave to appeal should itself be immune from appeal, to the extent that the Constitution permits.

Special leave to appeal to the High Court

19–6 The *Judiciary Act* should be amended to confer on the High Court an express power to determine applications for special leave to appeal on the basis of written papers without oral argument, irrespective of the parties' consent. However, the Court should be given a discretion to list an application for oral hearing in such circumstances as the Court thinks fit.

19–7 The High Court should review its Rules of Court for the purpose of determining whether they are appropriate for the special leave procedure proposed in Recommendation 19–6. In particular, the Court should re-

view the procedures relating to the length and timing of written submissions and the length of oral argument.

19–8 Section 21 of the *Judiciary Act* should be amended to provide that an application for special leave to appeal must be determined by a Full Court comprising two or more justices, whether that determination is made on the basis of written papers alone or after oral argument.

Cross-jurisdictional appeals to the Federal Court

20–1 Federal legislation should be amended to provide that original and appellate jurisdiction in matters arising under federal intellectual property laws be conferred exclusively on federal courts. The original jurisdiction presently exercised by state and territory courts in these matters should be abolished.

20–2 Federal legislation should be amended to provide that original and appellate jurisdiction in matters arising under the *Extradition Act 1988* be conferred exclusively on federal courts. In particular, jurisdiction to make orders determining a person's eligibility for surrender should be conferred on the Federal Magistrates Service. Jurisdiction to review such an order should be conferred on the Federal Court, and jurisdiction to hear an appeal from such a review should be conferred on the Full Court of the Federal Court.

20–3 There should be no change to the present arrangements for determining appeals in federal industrial matters. Subject to this qualification and to Recommendations 20–1 and 20–2, federal legislation should be amended to abolish the jurisdiction of the Federal Court to hear appeals from state courts exercising original federal jurisdiction. Accordingly:

(a) Where civil proceedings have been commenced in a state court exercising original federal jurisdiction, the parties should be required to pursue any appeal within the state court system. To that end, the Supreme Court of each State should be invested with appellate federal jurisdiction in those matters.

(b) Where civil proceedings have been commenced in a federal court exercising original jurisdiction, the parties should be required to pursue any appeal within the federal court system. To that end, the Federal Court should be invested with appellate jurisdiction in those matters.

(c) The same jurisdictional principles should be applied to the Northern Territory as are applied to the States.

(d) Until such time as the ACT establishes its own intermediate appellate court (see Recommendation 39–1), the Federal Court should continue to act as an intermediate appellate court in matters originally commenced in the Supreme Court of the ACT. Thereafter, the same jurisdictional principles should be applied to the ACT as are applied to the States.

Access to a first appeal to the Federal Court

20–4 An appeal to a Full Court of the Federal Court from a judge exercising original federal jurisdiction should continue to lie as of right and not by leave of the Court. However, the Attorney-General should order a review of this issue within five years of the publication of this Report. In the interim, the *Federal Court of Australia Act 1976* should be amended to expand the categories of cases in which a first appeal requires the leave of the Court to include, in addition to interlocutory appeals, other specified categories of procedural appeals.

20–5 In those cases in which a first appeal can be taken from a trial judge to a Full Court of the Federal Court only by leave of the Court, the *Federal Court of Australia Act 1976* should be amended to:

(a) set out non-exhaustive criteria by which the discretion to grant or refuse leave is exercised;

(b) provide that an application for leave to appeal shall be determined by a Court that does not include the judge whose decision is subject to the application for leave to appeal; and

(c) provide that an order granting or refusing leave to appeal should itself be immune from appeal.

Two-judge courts of appeal in the Federal Court

20–6 The *Federal Court of Australia Act 1976* should be amended to permit certain classes of appeals (namely, certain interlocutory and procedural appeals) to be determined by a Full Court comprised of two or more judges. Within those classes, the Chief Justice should be granted a discretion to constitute a Full Court with such number of judges (being no less than two) as he or she thinks fit.

20–7 Where a Full Court of the Federal Court is constituted by two judges, the Court should adopt internal procedures to identify the likelihood of disagreement at an early stage of the appellate proceedings in order to facilitate the inclusion of one of more additional judges in the panel.

20–8 Where a Full Court of the Federal Court is constituted by two judges and there is a difference of opinion as to the outcome of the appeal, the *Federal Court of Australia Act 1976* should provide for the appeal to be redetermined before a bench comprising three or more judges, who may include the judges who heard the original appeal.

Decisional harmony and the appellate structure of the Federal Court

20–9 The Commission does not consider that there is presently sufficient reason to alter the appellate structure of the Federal Court. However, the Attorney-General should keep under review the impact on the Federal Court of changes to its size and jurisdiction. In the event that there is a significant increase in the number of judges appointed to the Court or in the fundamental nature of the Court's workload, the Attorney-General should consider ordering a review of the most appropriate structure by which its appellate functions can be discharged.

20–10 The Federal Court should continue to enhance its current efforts to disseminate information within the Court about appeals that are listed for hearing, reserved, or recently decided, in order to minimise the risk of differently constituted panels of the Full Court giving judgment in ignorance of the decisions of each other.

20–11 The Federal Court should review its internal procedures for allocating judges to appellate benches with a view to enhancing its current practice of using similarly constituted panels to hear similar kinds of appeals.

20–12 The Federal Court should consider additional ways in which it might address inconsistency between benches of the Full Court, including differences of approach between judges of the Court to the question whether an earlier decision of a Full Court should be departed from because it is 'clearly wrong'.

Appellate jurisdiction of the Family Court

21–1 Recommendations 20–4 and 20–5, which relate to the circumstances in which leave to appeal is required in the Federal Court, should be similarly applied to the Family Court by amending the *Family Law Act 1975* accordingly.

21–2 Recommendations 20–6 to 20–8, which relate to the circumstances in which a Full Court of the Federal Court may be constituted by two judges, should be similarly applied to the Family Court by amending the *Family Law Act 1975* accordingly.

Part F: Claims Against the Commonwealth, States and Territories

General

22–1 Part IX of the *Judiciary Act* should be repealed and a new Part inserted dealing with claims against the Commonwealth and claims against the States and Territories in federal jurisdiction in accordance with the recommendations set out in Part F. Sections 61–63 of the Act should be re-enacted in any new Part.

22–2 The *Acts Interpretation Act 1901* should be amended to include cross-references to the relevant provisions of the *Judiciary Act,* where appropriate.

Procedural immunities of the Commonwealth

23–1 The Commonwealth's procedural immunity from being sued should be expressly abolished by legislation. The *Judiciary Act* should be amended to provide that proceedings may be commenced against the Commonwealth in any Australian court that has jurisdiction with respect to that matter in the same manner as proceedings may be commenced against a person of full age and capacity, except as specifically provided by a Commonwealth Act.

23–2 The procedural immunities enjoyed by the Commonwealth at common law in the course of civil litigation (such as those relating to discovery, interrogatories, interim orders and costs) should be expressly abolished by legislation. The *Judiciary Act* should be amended to provide that the procedural rights of persons in legal proceedings in which the Commonwealth is a party should be the same as those in a claim between persons of full age and capacity, except as specifically provided by a Commonwealth Act. However, nothing in this recommendation is intended to affect the laws of evidence relating to public interest immunity.

23–3 The procedural immunities enjoyed by the Commonwealth at common law with respect to coercive remedial orders (such as those relating to injunctions and specific performance) should be expressly abolished by legislation. The *Judiciary Act* should be amended to provide that the remedies that may be awarded in legal proceedings against the Commonwealth should be the same as those in a claim between persons of full age and capacity, except as specifically provided by a Commonwealth Act.

Procedural immunities of the States and Territories

23–4 The procedural immunities enjoyed by the States and Territories at common law in relation to being sued, procedural orders made in the course of litigation, and coercive remedies should be expressly abolished by legislation in matters of federal jurisdiction.

23–5 The *Judiciary Act* should be amended to provide that, in matters of federal jurisdiction:

(a) proceedings may be commenced against a State or Territory in any Australian court that has jurisdiction with respect to that matter in the same manner as proceedings may be commenced against a person of full age and capacity, except as specifically provided by a Commonwealth Act;

(b) the procedural rights of persons in legal proceedings against a State or Territory should be the same as those in a claim between persons of full age and capacity, except as specifically provided by a Commonwealth Act; and

(c) the remedies that may be awarded in legal proceedings against a State or Territory should be the same as those in a claim between persons of full age and capacity, except as specifically provided by a Commonwealth Act.

However, nothing in this recommendation is intended to affect the laws of evidence relating to public interest immunity.

Executing judgments against the Commonwealth or a State

24–1 Section 66 of the *Judiciary Act* should be amended to provide that the obligation of the Minister for Finance or the Treasurer to satisfy a judgment given against the Commonwealth or a State must be discharged within a reasonable time.

24–2 Section 66 of the *Judiciary Act* should be amended to provide that a judgment given against the Commonwealth or a State shall be satisfied out of moneys that have been lawfully appropriated by the relevant Parliament or are otherwise legally available, in accordance with the Australian Constitution and federal law, or the State's Constitution and state law, as the case may be.

24–3 Section 66 of the *Judiciary Act* should be amended to provide that, where a judgment is given against a body that has separate legal personality but is entitled to the privileges and immunities of the Commonwealth or a State, the Minister for Finance or the Treasurer may give directions to that body to satisfy the judgment debt within a reasonable time. Section 66 should further provide that the body is authorised and required to carry out any such direction.

24–4 Section 66 of the *Judiciary Act* should be amended to provide that, if a judgment against the Commonwealth or a State is not satisfied within a reasonable time, a judgment creditor may seek a writ of mandamus or an equivalent order:

(a) against the Minister for Finance or Treasurer of the Commonwealth or a State; or

(b) where the Minister for Finance or Treasurer gives a direction to a body pursuant to Recommendation 24–3, against that body or a relevant officer of that body.

Such a writ or order may be sought in any Australian court that has jurisdiction with respect to that matter. However, the section should provide that no writ of mandamus, or an equivalent order, shall issue to compel a person or body to satisfy a judgment debt from moneys that have not been lawfully appropriated or are not otherwise legally available in accordance with Recommendation 24–1.

24–5 Sections 65, 66 and 67 of the *Judiciary Act* should be amended to clarify that, in so far as the sections apply to judgments given against a State or to judgments given in favour of a State, the provisions extend only to judgments relating to matters of federal jurisdiction.

Execution of judgments against a Territory

24–6 Sections 65, 66 and 67 of the *Judiciary Act* should be amended to extend those provisions to the Northern Territory and the ACT, and s 67E should consequently be repealed. [See Recommendations 24–1 to 24–5 in relation to execution of judgments against the Commonwealth or a State.]

Liability of the Commonwealth at common law and in equity

25–1 The principle in *Enever v The King* (1906) 3 CLR 969, namely, that the Commonwealth is not vicariously liable for the tortious conduct of Commonwealth officers who act with independent discretion pursuant to statute, should be expressly abolished in relation to the Commonwealth.

25–2 The Attorney-General should order a review of the law relating to claims for compensation for loss arising from wrongful federal administrative action.

25–3 The *Judiciary Act* should be amended to state expressly that the Commonwealth is subject to the same substantive obligations at common law and in equity as apply to persons of full age and capacity, except as specifically provided by a Commonwealth Act. The Attorney-General should order a review of the circumstances in which a statutory exception is considered necessary or desirable.

Application of Commonwealth statutes to the Commonwealth

New Commonwealth legislation

26–1 The rule of statutory construction that the Commonwealth is presumed to be immune from the operation of Commonwealth legislation should be abolished. The *Judiciary Act* should be amended to provide that the Commonwealth is bound by every Commonwealth Act that is enacted after the date on which this amendment comes into force unless that Act states expressly that the Commonwealth is not bound by the Act in whole or part.

Existing Commonwealth legislation

26–2 The *Judiciary Act* should be amended to provide that, upon the expiration of a period of five years, every Commonwealth Act existing at the date on which these amendments come into force shall bind the Commonwealth unless the Act states expressly that the Commonwealth is not bound by the Act in whole or part.

26–3 The Attorney-General should order a review of all existing Commonwealth legislation for the purpose of determining whether, and to what extent, each Act should bind the Commonwealth. Following such a review, each Act should be amended, as necessary, to state expressly whether it does not bind the Commonwealth in whole or part. The review should be completed and any amendments to legislation enacted within five years.

Application of Commonwealth statutes to the States and Territories

New Commonwealth legislation

27–1 The rule of statutory construction that the States and Territories are presumed to be immune from the operation of Commonwealth legislation should be given legislative effect. The *Judiciary Act* should be amended to provide that the States and Territories are not bound by any Commonwealth Act that is enacted after the date on which this amendment comes into force unless that Act states expressly that the States and Territories are bound in whole or part.

Existing Commonwealth legislation

27–2 The *Judiciary Act* should be amended to provide that, upon the expiration of a period of five years, no Commonwealth Act existing at the date on which these amendments come into force shall bind the States and Territories unless the Act states expressly that the States and Territories are bound in whole or part.

27–3 The Attorney-General should order a review of all existing Commonwealth legislation for the purpose of determining whether, and to what extent, each Act should bind the States and Territories. In conducting the review, the States and Territories should be consulted, so far as practicable. Following such a review, each Act should be amended, as necessary, to state expressly whether it binds the States and Territories in whole or part. The review should be completed and any amendments to legislation enacted within five years.

Application of state and territory statutes to the Commonwealth

New state and territory legislation

28–1 The rule of statutory construction that the Commonwealth is presumed to be immune from the operation of state and territory statutes should be abolished. The *Judiciary Act* should be amended to provide that the Commonwealth is bound by every state and territory Act that is enacted after the date on which this amendment comes into force, subject to the exceptions identified in Recommendations 28–2 to 28–4.

28–2 The *Judiciary Act* should be amended to provide that the Commonwealth shall not be bound by any state or territory Act that has been prescribed by Commonwealth regulation not to bind the Commonwealth. The regulation-making power should provide as follows.

(a) Regulations may identify state or territory Acts either specifically by name or generally by subject matter.

(b) Regulations may exclude the application of state or territory Acts to the Commonwealth either wholly or in part.

(c) Regulations may be made either before or after the relevant state or territory Act has come into force.

(d) Where the state or territory Act has come into force, the regulations may, if so expressed, have retrospective effect and apply from the date on which the state or territory Act came into force. In order to make any such retrospective regulation effective, the primary provision by which the Commonwealth accepts the application of state and territory Acts to the Commonwealth should be made conditional on there being no subsequent regulation excepting the relevant state or territory law. [See Recommendation 28–1].

(e) Regulations are subject to ordinary procedures for disallowance.

28–3 The *Judiciary Act* should be amended to provide that the Commonwealth shall not be bound by any state or territory Act that does not bind that State or Territory, unless that Act is prescribed by Commonwealth regulation as an Act by which the Commonwealth shall be bound in whole or part.

28–4 The *Judiciary Act* should be amended to provide that the Commonwealth shall not be bound by any state or territory Act that expressly states that it does not bind the Commonwealth, unless that Act is prescribed by Commonwealth regulation as an Act by which the Commonwealth shall be bound in whole or part.

28–5 The Attorney-General should refer to the Standing Committee of Attorneys-General the following issues for the purpose of ensuring that the Commonwealth is informed of pending state or territory legislation at a sufficiently early stage to enable a timely determination to be made of the desirability of exempting the state or territory legislation by regulation in accordance with Recommendation 28–2.

(a) Whether an intergovernmental protocol might be established by which the Commonwealth is informed of Bills pending in either House of a state parliament or a territory legislature; and

(b) The use of information technology to facilitate access to Bills pending in either House of a state parliament or a territory legislature at the time of, or as soon as practicable after, their introduction to the House.

Existing state and territory legislation

28–6 The *Judiciary Act* should be amended to provide that, upon the expiration of a period of five years, the Commonwealth is bound by all state and territory Acts existing at the date on which these amendments come into force, subject to the exceptions identified in Recommendations 28–2 to 28–4 in respect of new state and territory legislation.

28–7 The Attorney-General should order a review of existing state and territory legislation for the purpose of determining whether particular Acts or particular subject areas should be excepted by regulation from binding the Commonwealth in accordance with Recommendation 28–6. In conducting the review, the States and Territories should be consulted, so far as practicable. The review should be completed and any necessary regulations promulgated within five years.

Immunities of Commonwealth bodies

New Commonwealth bodies

29–1 The *Judiciary Act* should be amended to provide that no body that is established by Commonwealth legislation after the date on which this amendment comes into force shall enjoy the privileges and immunities of the Commonwealth unless the legislation states expressly that the body is entitled to enjoy the privileges and immunities of the Commonwealth and to what extent.

29–2 The Commonwealth should adopt a policy, applicable to all its Departments, to ensure that every Act that establishes a new Commonwealth body states expressly whether the body is entitled to enjoy the privileges and immunities of the Commonwealth and, if so, to what extent. The Office of Parliamentary Counsel should review its legislative drafting practice to ensure compliance with this policy.

Existing Commonwealth bodies

29–3 The *Judiciary Act* should be amended to provide that, upon the expiration of a period of five years, no body that is established by Commonwealth legislation shall enjoy the privileges and immunities of the Common-

wealth unless the legislation states expressly that the body is entitled to enjoy the privileges and immunities of the Commonwealth and to what extent.

29–4 The Attorney-General should order a review of all existing Acts that establish a Commonwealth body for the purpose of determining whether each body should be entitled to enjoy some or all of the privileges and immunities of the Commonwealth. Following such a review, each relevant Act should be amended, as necessary, to state expressly whether the body is entitled to enjoy the privileges and immunities of the Commonwealth and to what extent. The review should be completed and any amendments to legislation enacted within five years.

Part G: The Law Applicable in Federal Jurisdiction

A federal limitation statute

31–1 The Commonwealth Parliament should enact a general limitation statute with respect to causes of action created by Commonwealth law. The Attorney-General should order a review to consider:

- the desirability of harmonising existing federal provisions with respect to limitation of actions;
- the enactment of general legislative provisions for determining, among other things, when a limitation period begins to run and the circumstances in which it may be postponed, suspended or extended; and
- whether a federal limitation statute should be enacted for proceedings in federal courts or, more broadly, for all courts exercising federal jurisdiction.

Federal laws of procedure

32–1 The Attorney-General should monitor the progress of the Council of Chief Justices' Committee on the Harmonisation of Rules of Court. In the light of that Committee's progress, the Attorney-General should consider the appropriateness of referring to the Standing Committee of Attorneys-General the following issues:

(a) extending the process of harmonisation of Rules of Court beyond the topics selected by the Council of Chief Justices; and

(b) extending the process of harmonisation to Acts and regulations that relate to matters of practice and procedure.

Federal choice of law rules

33–1 The Attorney-General should consider implementing the Commission's recommendations in its 1992 Report on *Choice of Law* (ALRC 58) by enacting a federal choice of law statute, subject to the following qualifications.

(a) In view of the difficulties experienced in achieving a uniform national solution through cooperative legislation, the federal choice of law statute should be confined in its operation to matters arising in federal courts.

(b) There should be no 'flexible exception' to the choice of law rule applicable to tort-like claims and motor vehicle accident claims, as identified by the Commission in clauses 81D(8) and 81E(2) of its 1992 draft amendments to the *Judiciary Act*.

Application of laws in matters of federal jurisdiction

34–1 Sections 79 and 80 of the *Judiciary Act* should be repealed and replaced by a single section that specifies the law to be applied by federal courts and by state and territory courts exercising federal jurisdiction. The new section should indicate the sources of law to which any court exercising federal jurisdiction should have regard and the order in which they should be applied. The sources should include:

(a) the Australian Constitution;

(b) relevant Commonwealth Acts and regulations;

(c) relevant state and territory Acts and regulations; and

(d) the common law of Australia.

34–2 In so far as a court exercising federal jurisdiction is required to apply state or territory laws as surrogate federal law pursuant to Recommendation 34–1:

(a) The state or territory laws to be applied should expressly include procedural and substantive laws, and statutory choice of law rules. They should also include state and territory laws notwithstanding that they may be expressed to apply only to courts of that State or Territory or to a particular court of that State or Territory.

(b) The state or territory laws to be applied should expressly exclude those that do not form part of the adjudicative process by which the state or territory court resolves the federal matter before it.

34–3 The *Judiciary Act* should be amended to provide that when a court exercises federal jurisdiction, a state or territory law will not be applied as surrogate federal law pursuant to Recommendation 34–1 if:

(a) it is directly inconsistent with a Commonwealth law; or

(b) a Commonwealth law evinces an intention to cover the relevant field exclusively.

34–4 The Attorney-General should order a review of s 68 of the *Judiciary Act* with a view to making the application of state and territory law in federal criminal matters compatible with the approach in Recommendation 34–1.

Part H: Judicial Power in the Territories

Conferring federal jurisdiction on territory courts

36–1 Section 39 of the *Judiciary Act* should be amended to invest federal jurisdiction in the courts of the ACT and the Northern Territory in the same manner and to the same extent as federal jurisdiction is invested in the courts of the States.

36–2 Section 39(2)(d) of the *Judiciary Act* should be amended to provide that federal jurisdiction may be exercised by a territory magistrate only if the magistrate is eligible for admission as a legal practitioner in the Supreme Court of that Territory. [See Recommendation 6–6 in relation to the States.]

36–3 Section 67C(c) of the *Judiciary Act*, which confers jurisdiction on the Supreme Court of the Northern Territory in matters that were part of the Supreme Court's jurisdiction under s 15(2) of the *Northern Territory Supreme Court Act 1961*, should be repealed.

Suits between the Commonwealth and a Territory

37–1 The *Judiciary Act* should be amended to confer on each of the Supreme Court of the Northern Territory and the Supreme Court of the ACT jurisdiction to hear and determine suits between the Commonwealth and the Northern Territory and suits between the Commonwealth and the ACT. The *Federal Court of Australia Act 1976* should also be amended to con-

fer on the Federal Court the same jurisdiction. The stay or transfer of such a proceeding should be determined in accordance with established principles. [See Recommendations 7–4 and 7–5 in relation to the States].

Public law remedies against Commonwealth officers

37–2 Section 67C(b) of the *Judiciary Act* should be repealed. Subject to Recommendation 37–5, the Act should be amended to preclude the Supreme Court of the Northern Territory from granting an order against an officer of the Commonwealth for the purpose of ensuring that the officer's powers or duties are exercised or performed according to law, in the same manner as that jurisdiction is excluded from the States. [See Recommendation 7–6 in relation to the States.]

37–3 Subject to Recommendation 37–5, the *Judiciary Act* should be amended to preclude the Supreme Court of the ACT from granting an order against an officer of the Commonwealth for the purpose of ensuring that the officer's powers or duties are exercised or performed according to law, in the same manner as that jurisdiction is excluded from the States. This amendment should take effect notwithstanding anything in s 48A of the *Australian Capital Territory (Self-Government) Act 1988*. [See Recommendation 7–6 in relation to the States.]

Public law remedies against territory officers

37–4 Subject to Recommendation 37–5, the *Judiciary Act* should be amended to provide that federal courts (other than the High Court) do not have jurisdiction to grant an order to ensure that the powers or duties of an officer of a Territory are exercised or performed according to law. [See Recommendation 7–7 in relation to the States.]

Public law remedies where officers exercise dual functions

37–5 The *Judiciary Act* should be amended to provide that, where an officer of a Territory or an officer of the Commonwealth may exercise both territory and Commonwealth functions pursuant to an intergovernmental arrangement, an order to ensure that the powers or duties of that officer are exercised or performed according to law may be sought in the following courts:

(a) where the order is sought in respect of territory functions alone — in a territory court;

(b) where the order is sought in respect of Commonwealth functions alone — in a federal court;

(c) where the order is sought in respect of intermingled territory and Commonwealth functions— in either a territory court or a federal court.

[See Recommendation 7–8 in relation to the States.]

Common law and statutory claims arising in the Territories

38–1 Section 39B(1A)(c) of the *Judiciary Act* should be amended to exclude from the jurisdiction of the Federal Court:

(a) common law claims arising in the ACT or the Northern Territory; and

(b) statutory claims arising under a law made by the legislature of the ACT or the Northern Territory;

where those claims are not attached to a federal claim otherwise within the jurisdiction of the Federal Court.

Appeals from territory Supreme Courts

39–1 The ACT legislature should consider establishing an intermediate appellate court for the ACT with jurisdiction to hear appeals from a single judge of the Supreme Court of the ACT. Once established, s 24 of the *Federal Court of Australia Act* should be amended to preclude appeals being taken to the Federal Court from the Supreme Court of the ACT, in like manner to the exclusion of appeals to the Federal Court from the Supreme Court of the Northern Territory.

39–2 Section 35AA of the *Judiciary Act* should be amended to provide that appeals from a decision of a single judge of the Supreme Court of the Northern Territory may be made only to the Northern Territory Court of Appeal, and then by special leave to the High Court. Similar provision should be made in relation to the ACT once an intermediate appellate court has been established for the ACT.

Drafting

40–1 The Attorney-General should order a review of the use of the terms 'Territory' and 'State' in the *Judiciary Act* with a view to clarifying the application of the Act to the internal and external Territories. The review should consider the relationship between these terms, as used in the *Judiciary Act*, and the definitions used in the *Acts Interpretation Act 1901*.

Part I: Location, Consolidation and Simplification

General

41–1 The *Judiciary Act* should be amended to reflect the Act's underlying theme, namely, the allocation and exercise of the judicial power of the Commonwealth. Existing provisions that do not comport with this theme or are obsolete should be relocated or repealed, as recommended below. In order to describe its content more accurately, the *Judiciary Act* should be renamed.

41–2 The sections of the *Judiciary Act* should be renumbered in light of the extensive amendments recommended in this Report.

41–3 Legislation that relates to the allocation or exercise of the judicial power of the Commonwealth should include notes and cross-references to relevant provisions of the Constitution and other Acts of Parliament to promote the clarity and accessibility of the law.

Obsolete provisions

41–4 The Attorney-General should inquire of the Minister for Foreign Affairs and Trade, as the Minister responsible for the Australian Secret Intelligence Service (ASIS), whether any national or international security interest continues to be served by Part VIII (ss 46–51) of the *Judiciary Act*. If not, Part VIII of the Act, which relates to certain orders made in connection with an ASIS raid in Melbourne in 1983, should be repealed.

41–5 Sections 82–85 of the *Judiciary Act*, which provide for venue in suits for pecuniary penalties, taxes and forfeiture, are unnecessary and should be repealed.

Relocated provisions

41–6 Provisions of the *Judiciary Act* that relate to the jurisdiction and powers of specific federal courts should be relocated to the Act constituting the relevant court. In particular:

(a) Part III of the *Judiciary Act* (Jurisdiction and powers of the High Court generally) should be relocated to the *High Court of Australia Act 1979*;

(b) Part IV of the *Judiciary Act* (Original jurisdiction of the High Court) should be relocated to the *High Court of Australia Act 1979*; and

(c) Section 39B of the *Judiciary Act* (Original jurisdiction of the Federal Court of Australia) should be relocated to the *Federal Court of Australia Act 1976*. [See Recommendation 4–1.]

41–7 Provisions relating to appeals from one court to another should be relocated to the Act establishing the Court to which the appeal is made. To promote the clarity and accessibility of the law, notes or cross-references identifying the available channels of appeal should be inserted in the Act establishing the court from which an appeal may be brought. In particular:

(a) Part V of the *Judiciary Act* (Appellate jurisdiction of the High Court) should be relocated to the *High Court of Australia Act 1979*;

(b) Sections 33 and 33ZD of the *Federal Court of Australia Act 1976* (appeals to the High Court from the Federal Court) should be relocated to the *High Court of Australia Act 1979*; and

(c) Section 20 of the *Federal Magistrates Act 1999* (appeals to the High Court from the Federal Magistrates Service) should be relocated to the *High Court of Australia Act 1979*.

41–8 Part XA and Part XB of the *Judiciary Act*, and any other provision relating to the High Court's practice and procedure, should be relocated to the *High Court of Australia Act 1979*. Prior to relocation, the Attorney-General should order a review of these provisions to determine whether they are necessary or desirable.

41–9 The delegation of legislative power to the High Court to make Rules of Court should be effected by a single provision located in the *High Court of Australia Act 1979*. The provision should be cast sufficiently broadly to enable the Court to make rules necessary or convenient for carrying that Act into effect. The present duplication between s 86 of the *Judiciary Act* and s 48 of the *High Court of Australia Act 1979* should be removed by appropriate legislative amendment.

New Acts

41–10 Federal legislation should draw a clearer division between the Family Court of Australia and the substantive law that the Court administers. Accordingly, the *Family Law Act 1975* should be amended to transfer Parts IV and IVA from that Act to a new Act entitled the *Family Court of Australia Act*. The new Act should specify the Family Court's constitution, jurisdiction, management and procedure.

41–11 The provisions of the *Judiciary Act* relating to the Australian Government Solicitor, Attorney-General's Legal Services Directions, and Attorney-General's lawyers (Part VIIIB, Part VIIIC and ss 55E–G respectively) should be relocated to a new Act dealing with the provision of legal services by and to the Commonwealth.

41–12 The provisions of Part VIIIA of the *Judiciary Act*, relating to the rights of practice of solicitors and barristers, should be retained in that Act because of their relevance to the effective exercise of the judicial power of the Commonwealth. However, the Attorney-General should order a review of the effectiveness of these provisions in regulating legal practitioners in matters of federal jurisdiction.

Part A
Introduction

1. The Commission's Review

Contents

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Why Review the *Judiciary Act*?

1.1 The *Judiciary Act 1903* (Cth) is one of the oldest pieces of Commonwealth legislation. It is also the most significant Act regulating the structure of the Australian judicial system and the jurisdiction of the courts that comprise it. As originally enacted, the Act established the High Court, defined its jurisdiction within the limits set by Chapter III of the Constitution, and established the basic jurisdictional relationships between federal and state courts.

1.2 Over the course of nearly a century, the Act has been amended by approximately 70 pieces of legislation, implementing hundreds of individual changes, but the Act has never been subject to systematic review. The Commission's report provides a unique opportunity to review jurisdictional relationships within the Australian judicial system from the perspective of underlying principle and practical operation.

1.3 The need for a comprehensive review of the *Judiciary Act* is underpinned by the fact that there have been significant changes to the structure and operation of the federal judicial system since 1903. New federal courts have been created with substantial jurisdiction in civil matters; the internal territories have been granted self-government and now exercise considerable autonomy over their judicial affairs; the increasing volume of civil litigation has heightened concerns about the efficiency of the judicial system; and the High Court has developed new understandings of Chapter III of the Constitution and its impact on federal, state and territory courts.

Content of the Review

1.4 The terms of reference raised a large number of issues. Some were highly specific; others invited the broadest inquiry into whether the current jurisdictional arrangements best served the interests of 'efficient administration of law and

justice in the exercise of federal jurisdiction'. In undertaking this task the Commission was specifically asked to consider:

- the source, scope and exercise of the judicial power of the Commonwealth in civil matters;
- the conferral of federal jurisdiction on federal and state courts;
- the conferral of jurisdiction on territory courts under Commonwealth laws;
- the impact of self-government on the exercise of jurisdiction in territory courts under Commonwealth laws;
- whether it is appropriate or necessary for the provisions of Part IXA of the Judiciary Act relating to the Northern Territory to be replicated for the Australian Capital Territory (ACT);
- whether the procedural provisions dealing with the High Court included in the Judiciary Act would be better placed in another Act;
- the operation of Part VII of the Judiciary Act and particularly the workings of s 44 dealing with the remittal of matters by the High Court to other courts; and
- whether the provisions of Part IX and Part XI Division 2 of the Judiciary Act relating to or affecting proceedings involving the exercise of federal jurisdiction, including claims against the Commonwealth, continue to be appropriate.

1.5 As well as defining the scope of the Commission's inquiry into the *Judiciary Act*, the terms of reference also contemplated that the inquiry would reach beyond the confines of that Act. The terms of reference directed the inquiry to review 'related Acts', such as those that may be affected by or have an impact on the objectives of the inquiry. Related Acts that are central to the exercise of federal jurisdiction include the *Family Law Act 1975* (Cth), the *Federal Court of Australia Act 1976* (Cth), the *High Court of Australia Act 1979* (Cth), and the *Federal Magistrates Act 1999* (Cth). Each of these Acts is abbreviated, where appropriate, in accordance with the list on page 11.

1.6 In addition to these Acts, all federal Acts that confer jurisdiction on federal, state or territory courts were also potentially within the scope of the inquiry. For example, jurisdiction is conferred on the Federal Court by approximately 150 federal Acts, while many others confer federal jurisdiction on state and territory courts, as discussed in Chapters 4 and 6 respectively. The Commission has considered the operation of these Acts, where relevant.

Matters Excluded from the Review

1.7 The terms of reference placed important limits on the scope of the inquiry. First, the inquiry was confined to federal civil jurisdiction, which precluded consideration of those provisions of the *Judiciary Act*, such as Part X, that deal with federal jurisdiction in criminal matters. During the course of the review, the Commission received a number of comments about provisions of the *Judiciary Act* relating to criminal jurisdiction. For example, concerns were expressed about s 68 JA, which provides for the application of certain state and territory laws in state and territory courts exercising federal criminal jurisdiction. In view of the terms of reference, the Commission makes no recommendation about the substantive law in this area, but does recommend that the matter be investigated further (see Chapter 34).

1.8 A second limitation on the scope of the inquiry was the express exclusion of the arrangements for cross-vesting jurisdiction between Australian courts. In *Re Wakim; Ex parte McNally,*[3] the High Court invalidated that part of the cross-vesting scheme that purported to invest federal courts with state jurisdiction. During the course of this reference the Attorneys-General considered the consequences of this decision for the adjudication of matters arising under the *Corporations Law*. That issue has now been resolved by the agreement between the States to refer the matter of the *Corporations Law* to the Commonwealth pursuant to s 51(xxxvii) of the Constitution, and by the subsequent passage of the *Corporations Act 2001* (Cth). However, notwithstanding this exclusion, the cross-vesting arrangements are referred to in this Report from time to time for the purpose of explaining the legal environment in which the federal judicial system operates.

1.9 A third limitation on the scope of the inquiry related to jurisdiction in migration matters. There has been much discussion recently of the restrictions imposed by amendments to the *Migration Act 1958* (Cth) on the jurisdiction of the Federal Court to review migration matters. In a recent High Court decision, McHugh J commented that the amendments to that Act have caused the High Court to be unduly burdened by trial matters. His Honour remarked that

> The reforms brought about by the [*Migration Act*] amendments are plainly in need of reform themselves if this court is to have adequate time for the research and reflection necessary to fulfil its role as 'the keystone of the federal arch' and the ultimate appellate court of the nation. I hope that in the near future the parliament will reconsider the jurisdictional issues involved.[4]

3 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

4 *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407, 411. See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 176 ALR 219, 256 (Kirby J).

1.10 In the course of the Commission's consultations, jurisdiction in migration cases and the Federal Court's limited scope for review gave rise to considerable adverse comment and dissatisfaction. A principal concern was the effect of this limitation on the workload of Australia's highest court, whose jurisdiction to review federal administrative action is entrenched in the Constitution.

1.11 In August 2000, the Attorney-General informed the Commission that the review of the *Judiciary Act* was not intended to cover litigation brought under the judicial review scheme in the *Migration Act* or under the proposed scheme in the Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth).[5] As a result, the Commission has made no recommendations on these issues. However, because of the importance of these issues to the efficient operation of the federal judicial system, the Commission has noted the views put to it in the course of the inquiry. It has also flagged, where appropriate, the need for further examination of these issues by the Attorney-General. In this regard, the Commission notes that the matter is currently under joint consideration by the Attorney-General's Department and the Department of Immigration and Multicultural Affairs.

1.12 Finally, the Commission has not addressed the issue of constitutional reform. The possibility of amendments to Chapter III of the Constitution was considered in 1988 by the Constitutional Commission.[6] Amendments to Chapter III could solve some of the difficulties arising from the operation of the federal judicial system. However, the Commission's terms of reference do not ask it to consider constitutional change; rather they require the Commission to take into account existing constitutional limitations on the exercise of judicial power of the Commonwealth in considering proposals for legislative change.

Conduct of the Review

Time frame

1.13 The Commission received the reference in relation to the *Judiciary Act* from the Attorney-General, the Hon Daryl Williams AM QC MP, on 21 January 2000.[7] The Commission was initially asked to report by 28 February 2001 but the Attorney-General later extended this deadline to 30 June 2001 to accommodate a delay in appointing new members to the Commission.

1.14 During this time, the Commission established an Advisory Committee of experts, published a substantial Discussion Paper, conducted Australia-wide consultations with a broad range of interested parties, and received submissions and advice correspondence from a large number of individuals and institutions. The details of this review process are described more fully below.

5 The Hon D Williams AM QC MP, *Correspondence*, 28 August 2000.
6 Constitutional Commission (1988).
7 The terms of reference are reproduced at the front of this Report.

1.15 The Commission's Report deals with a broad range of complex and technical legal issues, which span the breadth of federal civil jurisdiction. A number of those consulted in the course of the reference commented on the scale and complexity of the subject matter and the demanding time frame of the review. Indeed, it was frequently remarked that distinct parts of the review, such as claims against the Commonwealth, choice of law in federal jurisdiction, and the exercise of judicial power in the Territories, were akin to separate reviews in themselves.

Advisory Committee

1.16 Early in the course of the reference the Commission formed an Advisory Committee of experts to assist it in defining the scope of the inquiry and to provide advice over the course of the reference. The members of the Committee included past and present members of the judiciary, legal practitioners, government lawyers and academics. A list of the members of the Committee is found at pages 9–10 of this report. The first meeting of the Advisory Committee was held on 21 March 2000 to discuss the direction of research for the review. A second meeting on 30 March 2001 discussed the consultations conducted by the Commission, submissions made up to that time, and preliminary draft recommendations.

1.17 Members of the Advisory Committee were also forwarded draft chapters of the Discussion Paper and this Report for comment. The Commission derived great assistance from the comments of the Advisory Committee and extends its gratitude to members of the Committee for their generosity with their time and the benefit of their expertise.

Discussion Paper

1.18 In December 2000, the Commission released a Discussion Paper, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* (DP 64). The Discussion Paper invited comment on 265 questions, which covered the spectrum of issues raised by the inquiry. The Commission distributed over 700 printed copies of DP 64 to a range of interested individuals and organisations, and published the Paper on the Commission's web site. Responses to the Discussion Paper assisted the Commission in preparing draft recommendations.

Consultations

1.19 From the beginning of the review, the Commission embarked on an open process of consultation. In March 2000 the Commission wrote to a wide range of individuals and institutions, advising them of the nature of the inquiry and inviting preliminary comments on the direction of the inquiry. Those contacted included federal, state and territory courts, legal practitioners, professional legal associations, federal departments and agencies, Attorneys-General and Solicitors-General.

1.20 Following the release of DP 64, the Commission consulted extensively across Australia, particularly during February, March and April 2001. The consultations included meetings with current and former Chief Justices of the High Court, Federal Court judges, Family Court judges, the Federal Magistrates Service, legal practitioners, professional legal associations, government lawyers, Solicitors-General, Chief Justices of several state and territory Supreme Courts, Attorneys-General's Departments, other law reform agencies and legal academics. In the course of the review, the Commission conducted approximately 75 consultations involving over 150 individuals.

1.21 The consultation program included meetings in Sydney, Melbourne, Brisbane, Perth, Adelaide, Canberra and Darwin. The Commission contacted relevant individuals and organisations in Tasmania and set aside time and resources to attend consultations in Hobart. Unfortunately there was insufficient interest shown in Tasmania to justify the Commission travelling to Hobart for the purpose of consultations. The Commission notes, however, that it received comments on draft recommendations from the Solicitor-General for Tasmania during the inquiry.[8]

Submissions and advice correspondence

1.22 The Commission received 41 submissions from a variety of sources including the Federal Court, the Family Court, the Federal Magistrates Service, the Law Council of Australia, a number of federal court judges, several state and territory court judges, several Solicitors-General, some state Supreme courts, several state Attorneys-General Departments and the Family Law Council. Several key submissions were received after the closing date but were nevertheless fully considered in the Commission's deliberations. A complete list of submissions is contained in Appendix A.

1.23 The Commission also received nearly 100 items of advice correspondence, which provided comment on draft recommendations and on draft chapters of both the Discussion Paper and the Report. This correspondence also supplied information and data about the operation of the federal civil justice system.

1.24 The Commission requested specific data from the AGS and from each of the federal courts. The AGS provided information about the number and subject matter of notices given to the Commonwealth Attorney-General in constitutional matters pursuant to s 78B JA, as well as the number of interventions flowing from those notices. The Commission sought statistics and information from the High Court, the Family Court and the Federal Court in relation to each of the major topics covered in the review. Much of the data that was requested concerned the

8 W Bale QC, *Correspondence*, 23 April 2001.

practical use of various provisions of the *Judiciary Act* or related legislation. The Federal Magistrates Service also provided information about its jurisdiction, particularly in relation to appeals to the Federal Court and the Family Court.

1.25 Each federal court willingly provided as much assistance as it could in the short time available to it. The courts encountered some practical difficulties in providing all the information sought. This was because some types of data had never been recorded or were too difficult to retrieve from court databases. These difficulties reinforce the comments made by the Commission in its Report, *Managing Justice*, namely, that federal courts are not yet able to provide data on all matters that would allow a satisfactory assessment and comparison of their activities and performance.[9] The Commission has set out the data received from the courts where relevant to this Report and has noted where it would have been useful to have additional information that could not be provided.

1.26 The Commission wishes to record its appreciation for the assistance of those who were consulted and those who provided submissions, advice and information during the inquiry.

Related Studies

1.27 In recognition of work already undertaken, the Commission's terms of reference required it to have regard to relevant reports and any steps taken by governments or courts to implement their recommendations. Although the *Judiciary Act* has not previously been subject to systematic review, the Commission has considered a range of work previously undertaken in relation to the subject matter of the Act. The principal reports are described briefly below; a fuller description may be found in DP 64.[10]

- **Judiciary Act Review Committee.** This Committee was established in 1968 and operated for two years under the chairmanship of the Commonwealth Solicitor-General, Mr R J Ellicott QC. The Committee had two terms of reference—to review the *Judiciary Act* generally and to consider a proposed Bill to establish a national appellate court. During the course of the Committee's inquiry, the Government decided not to proceed with the proposed Bill,[11] and the Committee never formally reported.

- **Constitutional Commission.** In 1988 the Constitutional Commission reported on proposed amendments to the Constitution, including provisions relating to the exercise of judicial power.[12] The Commission's report was

9 Australian Law Reform Commission, Report No 89 (2000) para 1.36-1.46.
10 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 1.14–1.33.
11 Judiciary Act Review Committee (1972), para 1.
12 Constitutional Commission (1988), 16–17.

informed by a 1987 report of the Advisory Committee on the Australian Judicial System, whose broad objective was 'to identify the appropriate constitutional framework for the Australian judicature'.13 The Commission's recommendations were confined to possible constitutional reforms but in a number of places it considered matters relevant to the Judiciary Act.

- Senate Standing Committee on Legal and Constitutional Affairs. In 1992 the Senate Standing Committee on Legal and Constitutional Affairs produced a report entitled The Doctrine of the Shield of the Crown.14 The report focused on the immunities of governments when engaged in corporate or commercial activities in competition with private enterprises in the marketplace. The report discussed a number of issues relevant to the present inquiry and is considered in Chapter 29.

- ALRC reports. The present inquiry addresses several matters that have been the subject of previous reports by the Commission. Chapter 14 addresses the issue of intervention by Attorneys-General, which was considered in the Commission's reports on standing to sue (ALRC 27, 1986 and ALRC 78, 1996). Chapter 33 considers choice of law in federal jurisdiction, which was considered in the Commission's report on choice of law (ALRC 58, 1992). In addition, this inquiry overlapped with some issues addressed by the Commission in *Managing Justice* (ALRC 89, 2000). That report examined the institutions and procedures through which the judicial power of the Commonwealth is exercised in Australia. It was predominantly concerned with case management, dispute resolution and evidentiary procedures for the purpose of reducing delay and cost of the federal civil justice system. The present inquiry is directed more to jurisdictional issues arising in the exercise of the judicial power of the Commonwealth, principally as regulated by the *Judiciary Act*.[15]

13 Advisory Committee to the Constitutional Commission (1987), xi.

14 Senate Standing Committee on Legal and Constitutional Affairs (1992).

15 Australian Law Reform Commission, Report No 89 (2000) referred to the *Judiciary Act* by way of background but did not recommend amendments to that Act. See para 2.8 (distribution of federal jurisdiction); para 3.49, 5.16 (practice rules in federal jurisdiction); paras 3.130, 3.148, 8.49 and 8.55 (legal services directions and model litigant rules); and para 10.3 (remittal from the High Court of judicial review cases).

References

Advisory Committee to the Constitutional Commission, *Australian Judicial System* (1987), AGPS, Canberra.

Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000), ALRC, Sydney.

Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 (Cth) and Related Legislation*, Discussion Paper No 64 (2000), ALRC, Sydney.

Constitutional Commission, *Final Report* (1988), AGPS, Canberra.

Judiciary Act Review Committee, *Report of the Judiciary Act Review: First Draft* (1972), Canberra.

Senate Standing Committee on Legal and Constitutional Affairs, *The Doctrine of the Shield of the Crown* (1992), Commonwealth of Australia, Canberra.

2. The Australian Federal Judicial System

Contents

2.1 This Chapter provides an overview of the Australian federal judicial system. The Chapter discusses the nature of federal jurisdiction, the courts that exercise it, and the means by which federal, state and territory elements are integrated.

Federal Jurisdiction

Federal and state jurisdiction

2.2 The concepts of federal jurisdiction and state jurisdiction are fundamental to the operation of the Australian judicial system. In *Baxter v Commissioners of Taxation (NSW)*, Isaac J explained the fundamental distinction between these concepts as follows:

> 'Jurisdiction' is a generic term and signifies in this connection authority to adjudicate. State jurisdiction is the authority which State Courts possess to adjudicate under the State Constitution and laws; federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws.[16]

2.3 The authority of a court to adjudicate matters of federal jurisdiction arises principally from Chapter III of the Constitution. In practice, this generally means the matters listed in the nine paragraphs of ss 75 and 76 of the Constitution, together with any claims that are inseparably linked with these matters.[17]

2.4 Section 75 of the Constitution states that the High Court has original jurisdiction in all matters:

(i) arising under any treaty;

16 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142.

17 These additional claims comprise a federal court's accrued or associated jurisdiction.

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

2.5 Section 76 of the Constitution provides that the Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of Admiralty and maritime jurisdiction;

(iv) relating to the same subject-matter claimed under the laws of different States.

2.6 The paragraphs of ss 75 and 76 specify an odd assortment of federal matters. Some matters focus on the subject matter of an action, some on the identity of a party, and others on the remedy sought in relation to a particular party. Where a matter is federal because of the identity or residence of a party, it is clear that the jurisdiction is federal whatever the subject matter of the proceedings.[18]

2.7 Of the nine paragraphs, there are four that are central to the operation of the federal judicial system and in which the Commonwealth, as a polity, has an undoubted interest. Matters in which the Commonwealth is a party (s 75(iii)) and matters in which a constitutional writ is sought against a Commonwealth officer (s 75(v)) ensure that 'there is an entrenched jurisdiction in which the Commonwealth and its officers can be made accountable for the observance of the law'.[19] Section 76(i) provides the foundation for federal judicial review of the constitutionality of the conduct of the executive and legislative branches of government. Section 76(ii), in combination with other provisions, also enables Parliament to confer federal jurisdiction on courts in respect of matters arising under laws made by the Parliament.

18 Advisory Committee to the Constitutional Commission (1987), para 3.17–3.18.
19 L Zines (2000), 268.

2.8 Apart from the matters identified in paragraph 2.7, most other heads of jurisdiction in ss 75 and 76 have been regarded as 'useless, meaningless or inappropriate'.[20] For example, jurisdiction based on diversity of residence of the parties (s 75(iv)) has often been regarded as inappropriate in Australian circumstances. The paragraph was the result of unthinking copying from Article III of the United States Constitution, which itself reflected a concern that state courts might be biased against residents of other states. That concern was never justified in Australia at the time of federation.[21]

2.9 For different reasons, which have been canvassed elsewhere, ss 75(i), 75(ii), 76(iii) and 76(iv) are also inappropriate or little utilised as heads of federal jurisdiction.[22]

2.10 The failure of ss 75 and 76 to correspond with a modern conception of what is appropriate for federal jurisdiction has led to calls for constitutional change.[23] For example, in 1988 the Constitutional Commission recommended amendments to the jurisdiction of the High Court.[24] However, as explained in Chapter 1, the Commission has not made recommendations that would necessitate constitutional change.

Original and appellate jurisdiction

2.11 Original jurisdiction refers to the power of a court to adjudicate a matter at first instance, including the right to inquire into and grant relief in respect of any part of the matter.[25]

2.12 The original jurisdiction of all federal courts is defined in part by the Constitution and in part by federal legislation. In the case of the High Court, some of its original jurisdiction is entrenched in s 75 of the Constitution, and some is conferred on it by federal legislation pursuant to s 76.

2.13 In the case of other federal courts, original jurisdiction is largely defined by federal legislation enacted pursuant to s 76(ii). However, the Constitution continues to set the boundaries of original federal jurisdiction. For example, original jurisdiction is confined to the heads of jurisdiction enumerated in ss 75 and 76 of the Constitution,[26] and can only be conferred on federal courts in relation to 'matters'.

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20 Ibid, 284.
21 Ibid, 284.
22 Ibid, 286–290.
23 See Z Cowen and L Zines (1978), 4; Advisory Committee to the Constitutional Commission (1987), para 4.1–4.19.
24 Constitutional Commission (1988), 376–377, 379–382.
25 R Lumb and G Moens (1995), para 580.
26 An attempt to confer state jurisdiction on federal courts was held invalid in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

2.14 Appellate jurisdiction refers to the power of a court to review, by way of appeal, a judgment given in the exercise of original jurisdiction.

2.15 Appellate jurisdiction must also be exercised within the framework of Chapter III of the Constitution. Under s 73, the High Court may exercise appellate jurisdiction in both state and federal matters. This places the High Court in a unique position among federal courts in being able to determine binding principles in all matters of Australian law, whether state or federal in origin. By implication from Chapter III, other federal courts may exercise appellate jurisdiction in federal matters alone.[27]

2.16 The Constitution makes no mention of the appellate jurisdiction of other courts. However, from the earliest years of federation, the High Court has regarded it as axiomatic that Parliament has power to confer appellate jurisdiction.[28] As a result, Parliament may confer appellate federal jurisdiction on federal courts (pursuant to s 77(i)) and on state courts (pursuant to s 77(iii)).[29] Moreover, pursuant to s 77(ii), Parliament may define the extent to which the appellate jurisdiction of a federal court is exclusive of that invested in a State. These arrangements provide considerable legislative choice in providing channels of appeal in federal matters.

Associated and accrued jurisdiction

2.17 The concepts of associated jurisdiction and accrued jurisdiction have been developed to avoid multiplicity of proceedings and split jurisdictional problems. Associated jurisdiction is a statutory doctrine that enables a federal court to exercise jurisdiction in relation to federal claims that are not otherwise within its jurisdiction, where the claim is associated with another federal claim over which the court does have jurisdiction. Accrued jurisdiction is a judicial doctrine that enables a federal court to adjudicate a claim that would otherwise be non-federal, where that claim is attached to and not severable from a federal claim within the court's jurisdiction.

2.18 In relation to associated jurisdiction, s 32(1) FCAA provides that:

> To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked.

27 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529.
28 *Ah Yick v Lehmert* (1905) 2 CLR 593, 603–4 (Griffith CJ).
29 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 559-560 (Taylor J); *Cockle v Isaksen* (1957) 99 CLR 155; *New South Wales v Commonwealth* (1915) 20 CLR 54 ('*Wheat Case*'), 90 (Isaacs J); *Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69, 114 (Starke J); *R v Spicer; Ex parte Truth and Sportsman Ltd* (1957) 98 CLR 48; Z Cowen and L Zines (1978), 130–132.

2.19 The Family Court and the Federal Magistrates Service each has an equivalent provision.[30]

2.20 Historically, the purpose of associated jurisdiction was to cure gaps in the Federal Court's jurisdiction, which arose from the fact that the Court was conferred with jurisdiction under piecemeal federal legislation.

2.21 Since 1997 the Federal Court has had jurisdiction in any matter 'arising under any laws made by the Parliament,' other than criminal matters.[31] This has reduced the need to rely on associated jurisdiction. However, s 32 FCAA may still capture some cases that are not covered by the Federal Court's extended statutory jurisdiction. This is because the additional jurisdiction conferred in 1997 by s 39B(1A)(c) JA falls wholly within s 76(ii) of the Constitution whereas the associated jurisdiction conferred by s 32 FCAA applies not only to s 76(ii) matters but also to matters falling within other paragraphs of ss 75 or 76 of the Constitution.

2.22 An example of the nature and impact of associated jurisdiction is provided by *Allied Mills Industries Pty Ltd v Trade Practices Commission*.[32] In that case the question arose as to whether the Federal Court had jurisdiction over a cross-claim brought by Allied Mills against the Trade Practices Commission. The cross-claim was founded on common law and equitable causes of action, and was not otherwise within the Federal Court's jurisdiction (including its accrued jurisdiction). The Federal Court held that it had jurisdiction over the cross-claim by reason of s 32. The Trade Practices Commission was an emanation of the Commonwealth and the cross-claim was therefore a matter in which the Commonwealth was a party within the meaning of s 75(iii) of the Constitution. Such a claim was clearly a federal claim, even though the Federal Court would not otherwise have had jurisdiction in the matter because there has been no general conferral of jurisdiction on the Federal Court in matters in which the Commonwealth is a party. Moreover, the requirement of 'association' was satisfied because the cross-claim was said to be associated with the principal claim by the Trade Practices Commission in respect of a breach of s 45 of the *Trade Practices Act 1974*.

2.23 The doctrine of accrued jurisdiction had its origins in the High Court's approach to its own jurisdiction in the 1940s and 1950s.[33] However, it was not until the question arose in relation to the Federal Court in the 1980s that the doctrine

30 s 33 FLA ; s 18 FMA.
31 s 39B(1A)(c) JA.
32 *Allied Mills Industries Pty Ltd v Trade Practices Commission (No 1)* (1981) 34 ALR 105. See B Opeskin (1995), 802.
33 *Carter v Egg & Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557; *R v Bevan* (1942) 66 CLR 452.

was amplified, largely through the vehicle of the constitutional notion of a 'matter'.[34]

2.24 According to the case law, the doctrine of accrued jurisdiction has the following elements.

- It applies where a non-federal claim is attached to and not severable from a federal claim, such as where the claims arise out of common transactions and facts. Whether a non-federal claim is severable is a matter of practical judgment.35

- The federal claim must not be merely colourable, trivial, insubstantial or unarguable but must be one of substance.36

- Jurisdiction over a non-federal claim is not extinguished merely because the federal claim is dismissed on its merits.37

- The doctrine may apply not only to claims made between plaintiff and defendant, but to claims against third parties.[38]

2.25 Historically, Australian courts have treated accrued jurisdiction as a discretionary jurisdiction, which need not be exercised in all cases. More recently, the High Court has suggested that accrued jurisdiction is not discretionary. Gleeson CJ, Gaudron and Gummow JJ remarked that a court either has jurisdiction in the constitutional sense or it does not, and that ordinarily jurisdiction conferred upon a court must be exercised.[39]

2.26 The accrued jurisdiction of the Federal Court has been cast broadly. This has avoided multiplicity of proceedings by enabling the Court to do complete justice between the parties without regard to sterile jurisdictional disputes. It has been especially useful in cases where a common law claim is pleaded along with a claim arising from a federal statute, since the Federal Court does not have common law jurisdiction. The High Court has accepted that the Family Court may also

34 L Aitken (1988).
35 *Fencott v Muller* (1983) 152 CLR 570, 610.
36 *Post Office Agents Association Ltd v Australian Postal Commission* (1988) 84 ALR 563, 564–5; *New South Wales Aboriginal Land Council v Aboriginal and Torres Strait Islander Commission* (1995) 131 ALR 559, 572–573; *Buck v Comcare* (1996) 137 ALR 335, 345.
37 *Burgundy Royale Investments Pty Ltd v Westpac Banking Corp* (1987) 76 ALR 173, 181; *Klewer v Dutch* (2000) 99 FCR 217, 230. See G Griffith and G Kennett (2000).
38 *Stohl Aviation v Electrum Finance Pty Ltd* (1984) 56 ALR 716, 720-722; *Obacelo Pty Ltd v Taveraft Pty Ltd* (1985) 5 FCR 210, 215-217.
39 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 177 ALR 329, 344.

exercise accrued jurisdiction, but it appears to have taken a more restrictive view of the ambit of the accrued jurisdiction of the Family Court.[40]

Australian Courts

Federal courts

2.27 Section 71 of the Constitution contemplates the creation of 'a Federal Supreme Court', to be called the High Court of Australia, and envisages that Parliament may create other federal courts as circumstances require. In 1903 the *Judiciary Act* perfected the constitutional obligation by establishing the High Court. Other federal courts were subsequently created in the specialised areas of bankruptcy and industrial relations.[41] However, Parliament generally used its power to create additional federal courts sparingly when compared with the practice in the United States.

2.28 This remained the situation in Australia until the 1970s, when significant institutional reforms were made to the federal civil justice system. In 1975 the Family Court of Australia was established with jurisdiction in family law matters. In 1976 the Federal Court of Australia was established with a broader, but still specialised, jurisdiction in civil matters. In addition to acquiring the jurisdiction of the Federal Court of Bankruptcy and the Australian Industrial Court (as it was then known),[42] the Federal Court was given trade practices and the review of federal administrative action as its principal areas of jurisdiction. Despite the Court's narrow jurisdictional base at its inception, the Federal Court is now emerging as a court of broad federal jurisdiction, as discussed further in Chapter 4.

2.29 The federal court system currently comprises the High Court (1903), the Family Court (1975), the Federal Court (1976) and the Federal Magistrates Court (1999), which is also known as the Federal Magistrates Service.[43] The Industrial Relations Court of Australia was established in 1994 and continues to exist in a formal sense, but its jurisdiction was effectively transferred to the Federal Court in 1996. These federal courts are national courts and have an Australia-wide operation, although the Family Court does not sit in Western Australia to hear cases at first instance.[44]

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40 *In the Marriage of Smith (No 3)* (1986) 161 CLR 217, 251–252.

41 These were the Federal Court of Bankruptcy (established in 1930) and the Commonwealth Court of Conciliation and Arbitration (established in 1904 and subsequently reformed and renamed).

42 *Federal Court of Australia (Consequential Provisions) Act 1976* (Cth), s 4.

43 s 8 FMA.

44 Western Australia has established its own court in respect of family law matters, namely, the Family Court of Western Australia.

2.30 The comparative size of the federal courts is shown in Figure 2–1, which plots the annual budget appropriation for each federal court for the period 1995-96 to 2001–02. The Family Court has by far the largest budget, with an annual appropriation of more than $100 million over that period. The Federal Court's budget over the period has ranged from nearly $40 million in 1995–96 to nearly $65 million for 2001–02, reflecting the steady growth in the Court's jurisdiction, including its native title work. The Federal Magistrates Service, which completed its first year of operation on 3 July 2001, has the smallest budget allocation of approximately $12 million annually.

High Court of Australia

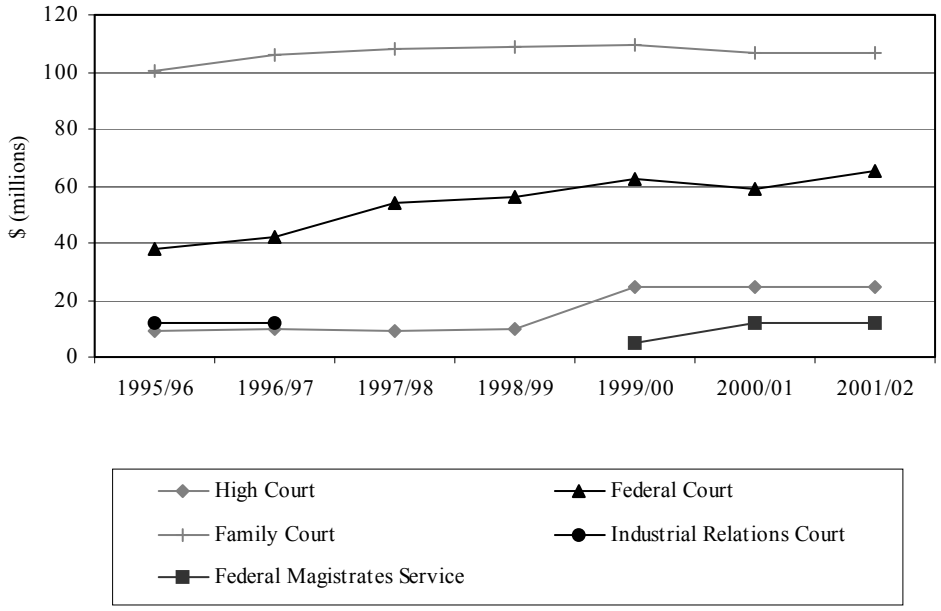
2.31 The High Court lies at the apex of the Australian judicial system. The Court was formally established by the *Judiciary Act* and originally consisted of a Chief Justice and two Justices. The Court was increased to five members in 1907 and to seven members (its current number) in 1912.

2.32 The Constitution confers both original and appellate jurisdiction on the High Court. The Constitution entrenches the original jurisdiction of the Court in respect of the matters enumerated in s 75. In respect of matters enumerated in s 76, the Constitution concedes to the Parliament the power to confer additional federal jurisdiction on the Court.

2.33 The appellate jurisdiction of the High Court is set out in s 73 of the Constitution. Section 73 contemplates that appeals may be brought to the High Court from decisions of a single justice of that Court, from other federal courts, from State Supreme Courts, and from any other court exercising federal jurisdiction. The section accordingly establishes the High Court as the final court of appeal in all matters of law, whether in state or federal jurisdiction.

2.34 The right of appeal conferred by s 73 of the Constitution is qualified by the capacity of Parliament to prescribe exceptions and regulations. The most significant of these is the prerequisite that in almost all cases an appeal can be brought to the High Court only with the special leave of the Court. As described in Chapters 18 and 19, that requirement allows the Court to screen both the number and subject matter of appeals before it.

Figure 2–1 Annual Budget Appropriations for Federal Courts



Source: Data supplied by the Attorney-General's Department from the Attorney-General's Portfolio Budget Statements 1995–96 to 2001–02.

Notes:
1 Information relates to the beginning-of-year Budget appropriation and does not take account of Additional Estimates adjustments.
2 For the Federal Magistrates Service, 1999–2000 funding was appropriated to the Attorney-General's Department pending passage of legislation establishing the court.
3 The rise in the High Court's funding from 1998–99 to 1999–2000 reflects the introduction of the Capital User Charge, which is calculated at about 12% of an agency's equity. The High Court's equity includes over $120 million for the land and buildings of the Court.

2.35 The total appropriation for the High Court in the 2001–02 Budget was $24.277 million. This figure excludes judicial salaries and allowances, which are separately administered by the Attorney-General's Department and totalled $1.887 million for 2001–02.[45]

Federal Court of Australia

2.36 The Federal Court of Australia was established by the *Federal Court of Australia Act 1976* and began operating in February 1977 with a Chief Justice and 19 other judges. The Court assumed the work of the Australian Industrial Court and the Federal Court of Bankruptcy.

45 <http://law.gov.au/publications/budget/htm> (11 July 2001).

2.37 The Federal Court's jurisdiction is derived from a variety of federal statutes. The Court's jurisdiction has continued to expand since its inception and is now conferred by approximately 150 federal statutes. Its principal areas of jurisdiction include bankruptcy, trade practices, federal administrative law, industrial law, intellectual property, taxation, admiralty, native title, human rights, and (from July 2001) corporations law.[46]

2.38 In addition to the specific subject areas listed above, the Federal Court also has jurisdiction conferred on it by various provisions of the *Judiciary Act*. The most significant of these is its jurisdiction in any matter arising under a law made by the Parliament. The Court also has jurisdiction in any matter in which the Commonwealth is seeking an injunction or declaration, and in any matter arising under the Constitution or involving its interpretation.[47]

2.39 The Federal Court has jurisdiction to hear appeals from decisions of single judges of the Court, decisions of the Supreme Courts of the Australian Capital Territory and Norfolk Island, certain decisions of State Supreme Courts exercising federal jurisdiction (for example, in intellectual property matters) and certain decisions of the Federal Magistrates Service. The Chief Justice, in consultation with other judges, determines the composition of appellate benches from the pool of Federal Court judges. Despite its substantial size, the Court has no permanent judges of appeal.

2.40 The Federal Court currently consists of a Chief Justice and 49 judges.[48] The total appropriation for the Federal Court in the 2001–02 Budget was $64.93 million.

Family Court of Australia

2.41 Prior to 1975, family law was administered in state courts under the *Matrimonial Causes Act 1959* (Cth). The *Family Law Act 1975* established two fundamental changes to family law in Australia — it removed fault-based divorce and it established the Family Court to exercise jurisdiction under the new Act. The Court commenced operation in 1976.

2.42 The original jurisdiction of the Family Court and of other courts exercising jurisdiction in relation to family law is primarily set down in the *Family Law Act 1975*. The Court also has jurisdiction under the *Child Support (Registration and Collection) Act 1988* (Cth), the *Child Support (Assessment) Act 1989* (Cth), and the *Marriage Act 1961* (Cth). The Court has jurisdiction over matters concerning the care of children, spousal and child support, and property of parties.

46 M Crock and R McCallum (1995), 199.
47 s 39B(1A) JA.
48 Federal Court of Australia (2000), 3.

2.43 The Full Court of the Family Court hears appeals from a single judge of the Family Court, from the Family Court of Western Australia, and from state and territory Supreme Courts exercising jurisdiction under the *Family Law Act*. The Family Court also hears appeals concerning family law from the Federal Magistrates Service.

2.44 The Court currently consists of the Chief Justice and 47 judges.[49] The Court maintains registries in all capital cities and other major towns, except in Western Australia, which has a state family court. The Family Court of Australia regards its primary goal as resolving or determining family disputes.[50] To achieve that goal the Court provides a range of services that encompasses information about family law, dispute resolution services such as mediation, and judicial determination of litigated matters.

2.45 The total appropriation for the Family Court of Australia in the 2001–02 Budget was $106.499 million.

Federal Magistrates Service

2.46 The Federal Magistrates Service, established by the *Federal Magistrates Act 1999*, is the first lower tier federal court in Australian history. The court began hearing cases on 3 July 2000. Its main purpose is to provide a cheaper, simpler and faster method of dealing with less complex matters, which would otherwise be determined by the Family Court or the Federal Court. Sixteen federal magistrates have been appointed to date, and additional appointments are planned for the near future.[51]

2.47 The Federal Magistrates Service encourages people to resolve disputes through primary dispute resolution. The use of conciliation counselling and mediation is strongly encouraged in appropriate cases. The court uses community based counselling and mediation services as well as the existing counselling and mediation services of the Family Court and the Federal Court, providing as wide a choice as possible for clients of the service.

2.48 The jurisdiction of the Federal Magistrates Service currently includes family law and child support, administrative law, bankruptcy, discrimination, consumer protection and privacy.[52] The court shares jurisdiction in these areas with the Family Court, the Federal Court and some state courts.

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49 <www.familycourt.gov.au/court/html/list.html> (31 July 2001).
50 Family Court of Australia (2000), 14.
51 <http://www.fms.gov.au/html/mrfirst.html> (29 June 2001).
52 *Federal Magistrates Act 1999* (Cth); *Federal Magistrates (Consequential Amendments) Act 1999* (Cth); and *Jurisdiction of Courts (Miscellaneous Amendments) Act 2000* (Cth).

2.49 Family law and bankruptcy have been the court's principal areas of work. During its first 12 months, almost 28 000 family law actions were commenced in the Federal Magistrates Service, including 23 500 divorces, which constitutes the vast majority of divorce applications. In addition to divorce applications, the court receives about 23% of other filings in family law matters and it is expected that this proportion will continue to increase.[53] In relation to the non-family law jurisdiction of the court, over 2000 general federal law matters were filed in the first year, with bankruptcy matters comprising almost 90% of those filings.[54]

2.50 The total appropriation for the Federal Magistrates Service in the 2001–02 Budget was $11.938 million. The court is clearly in its early stages, but the Chief Justice of Australia has predicted that the court will become one of the largest in Australia in the next twenty years.[55]

State courts

2.51 State courts have existed since colonial times and thus pre-dated the establishment of a federal judicial system. Before federation, each Australian colony had a Supreme Court from which an appeal could be taken to the Privy Council. Some members of the High Court have suggested that the continued existence of state supreme courts is required by the Constitution.[56] State courts are generally organised into three tiers — Supreme Courts, District or County Courts, and Local or Magistrates Courts. In Tasmania there are only two levels of courts.

2.52 All States have a Supreme Court, which is a superior court of record. Supreme Courts generally have jurisdiction over all matters of state legislation and jurisdiction at common law and in equity. However, legislation can exclude or limit the court's jurisdiction, for example, by setting financial limits to the exercise of jurisdiction. Supreme Courts may be organised into divisions for administrative convenience, such as common law, equity, administrative, or commercial divisions.

2.53 All States apart from Tasmania also have a middle tier trial court. In New South Wales, Queensland, South Australia and Western Australia they are called District Courts, in Victoria it is called the County Court. These courts deal with criminal and civil matters within specified jurisdictional and monetary limits.

2.54 The States also have courts that exercise summary jurisdiction in civil and criminal matters, which are called Magistrates Courts or Local Courts. These courts are generally presided over by stipendiary magistrates, who are full time

53 D Williams, Attorney-General *News Release* 1010, 3 July 2001.
54 <http://www.fms.gov.au/html/mrfirst.html> (29 June 2001).
55 A Gleeson (2001), <http://www.hcourt.gov.au/speeches/cj/cj_changeju.htm> (7 July 2001).
56 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103 (Gaudron J), 110 (McHugh J).

paid appointees with appropriate legal qualifications. Unlike England, very few justices of the peace in Australia exercise jurisdiction, although their continuing judicial role in some States has given rise to difficulties, which are addressed in Chapter 6.[57]

2.55 All States have an appellate court, which hears appeals from the Supreme Court and from the District or County Court in those jurisdictions with an intermediate trial court. New South Wales, Queensland and Victoria have Courts of Appeal with specially appointed judges of appeal. In other States, appeals go to a Full Court, usually comprising three judges.

Territory courts

2.56 Part H of this Report deals with the exercise of judicial power in the Territories and in particular examines the role of the ACT and Northern Territory Supreme Courts. These courts are briefly described below.

Supreme Court of the ACT

2.57 The Supreme Court of the ACT was created in 1933. Until 1992 the Court was established and empowered by a Commonwealth statute — the *Australian Capital Territory Supreme Court Act 1933* (Cth).[58] Responsibility for the Court was transferred to the ACT in 1992 when that Act, renamed the *Supreme Court Act 1933* (ACT), was converted into a territory enactment and hence subject to repeal or amendment by the territory legislature.[59] At the same time, the jurisdiction of the Supreme Court of the ACT was protected by the inclusion of provisions in the *Australian Capital Territory (Self-Government) Act 1988* (Cth) relating to the jurisdiction of the Supreme Court and the removal of judicial officers. In particular, s 48A was inserted. That section provides:

> 48A(1) The Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory.

2.58 Because this provision is located in a Commonwealth Act, the ACT Legislative Assembly cannot amend it. This has the effect that the jurisdiction of the ACT Supreme Court is entrenched so far as the ACT Legislative Assembly is concerned.[60]

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57 In most States, justice of the peace also exercise non-judicial functions, such as witnessing documents.

58 The history of judicial power in the ACT is described in J Miles (1992); D Mossop (1999).

59 *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 34; *ACT Supreme Court (Transfer) Act 1992* (Cth), s 13.

60 See *R v Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 334-335; contrast J Miles (1992), 564.

2.59 The ACT Supreme Court presently comprises a Chief Justice, three resident judges, a master and nine additional judges who are judges of the Federal Court.[61] The additional judges sit only when the workload of the ACT Supreme Court requires it and in practice they spend most of their time as Federal Court judges. There is also power to appoint acting judges and since 1993 a number of acting judges have been appointed.

2.60 The ACT Supreme Court also has jurisdiction in relation to the Jervis Bay Territory, the Australian Antarctic Territory and the Territory of Heard and McDonald Islands, being three other Territories in which ACT law is applied.[62]

Supreme Court of the Northern Territory

2.61 The Supreme Court of the Northern Territory was established under the Northern Territory *Supreme Court Ordinance 1911*, which was in due course replaced by the *Northern Territory Supreme Court Act 1961* (Cth).

2.62 When the Northern Territory was granted self-government in 1978, responsibility for the Northern Territory Supreme Court was passed from the Commonwealth to the Territory. This involved the repeal of the *Northern Territory Supreme Court Act 1961* and the enactment by the territory legislature of the *Supreme Court Act 1979* (NT). Under the latter Act, the Northern Territory Supreme Court presently comprises seven judges, two additional judges and a master. There is also power to appoint acting judges.

2.63 Until 1986, appeals from the Northern Territory Supreme Court went to the Federal Court and from there to the High Court. Since then, appeals from a single judge of the Supreme Court have been to the Court of Appeal of the Northern Territory and then, with special leave, to the High Court.

2.64 The courts of the Northern Territory also exercise jurisdiction in relation to the Territory of Ashmore and Cartier Islands.[63]

Integration of the Court System

2.65 There has always been a significant degree of integration between state and federal courts and between state and federal jurisdiction in Australia. The nature of the integration and the mechanisms used to achieve it have varied over the course of federation. Integration is necessary to provide a unified system of Australian law and to ensure consistency across the nation in legal process and

61 <http://www.supremecourt.act.gov.au> (12 July 2001)

62 A fourth, the Coral Sea Islands Territory, is governed by ACT law but jurisdiction is conferred on the courts of Norfolk Island. See *Coral Sea Islands Act 1969* (Cth), s 8.

63 *Ashmore and Cartier Islands Acceptance Act 1933* (Cth), s 12.

outcomes. In a federal system, integration also reduces problems such as multiplicity of proceedings, excessive forum shopping, jurisdictional gaps and inappropriate choice of forum. The major components of this integration are discussed below.

2.66 The existence and nature of the integration of the judicial system has emerged as a major theme in recent High Court jurisprudence. In *Commonwealth v Mewett*, Gaudron J observed that the fact that the Commonwealth was a single nation and had an integrated legal system meant that the jurisdiction of the High Court and the Federal Court was exercised throughout Australia and not in a particular State or Territory.[64] Moreover, she remarked that when state courts exercise federal jurisdiction they do so throughout Australia and not merely in the States.[65] It was thus not strictly accurate to speak of a court exercising federal jurisdiction in a State or Territory. Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ accepted this view in *John Pfeiffer Pty Ltd v Rogerson*.[66]

Appellate role of the High Court

2.67 The High Court provides significant integration in the Australian judicial system. Under s 73 of the Constitution, the High Court may exercise appellate jurisdiction in state and federal matters. Under s 122 it may do likewise in territory matters. The general appellate jurisdiction of the High Court has enabled the Court to supervise 'the integrated appellate structure of the Australian court system',[67] playing a crucial role in developing a single common law for Australia, as well as determining other legal and constitutional questions of public importance.

Investing state courts with federal jurisdiction

2.68 Section 77(iii) of the Constitution confers power on the Parliament to make laws 'investing any court of a State with federal jurisdiction' with respect to any of the matters mentioned in ss 75 and 76. This power has been used to conscript state courts in the exercise of the judicial power of the Commonwealth.

2.69 In practice, the federal judicial system has always relied heavily on the state court systems to exercise federal jurisdiction. The exercise of federal criminal jurisdiction is still overwhelmingly the province of state courts. In relation to civil matters, since the 1970s federal courts have begun to exercise jurisdiction in a broader range of federal matters. There is currently a lack of data about the extent to which state courts exercise federal jurisdiction, yet it is clear that state courts continue to play a significant role in federal civil matters.

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64 *Commonwealth v Mewett* (1997) 191 CLR 471, 524.
65 Ibid, 525.
66 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, 640.
67 *Gould v Brown* (1998) 193 CLR 346, 479 (Kirby J).

2.70 The High Court once described the facility of conferring federal jurisdiction on state courts as an 'autochthonous expedient',[68] that is, an expedient that is indigenous or home grown. As a result, the Australian judicial system has always been more highly integrated than the United States system on which it was modelled.

The cross-vesting scheme

2.71 Another element of integration is the national scheme for cross-vesting jurisdiction between Australian superior courts, which commenced operation on 1 July 1988.[69] The scheme has been one of the most adventurous experiments in sharing jurisdiction between courts within the Australian judicial system.[70] As originally enacted, it purported to allow federal courts to exercise state jurisdiction, state courts to exercise federal jurisdiction, and state courts to exercise each others' state jurisdiction. In *Re Wakim; Ex parte McNally,*[71] the High Court ruled that the Constitution does not permit federal courts to be invested with state jurisdiction. However, other parts of the scheme continue to operate.

2.72 The scheme has two main features, which operate independently but are related. The first part of the scheme is structural and cross-vests the subject matter jurisdiction of participating courts in other participating courts. The second part of the scheme is operational and provides for the transfer of proceedings between those courts. The courts participating in the scheme are the Federal Court and the Family Court, the Supreme Courts of the six States, the Supreme Courts of the two internal Territories (the Northern Territory and the ACT) and the Family Court of Western Australia. The scheme excludes from its ambit the High Court, criminal proceedings[72] and four federal Acts.[73] It also excludes the lower state courts from the structural provisions that relate to cross-vested jurisdiction although it does encompass these courts in the transfer provisions.

2.73 So far as the structural aspect of the scheme is concerned, the pivotal provisions are those vesting the subject matter jurisdiction of participating courts in other participating courts, subject to certain exceptions. For example, s 4 JCCVA vests the jurisdiction of the Federal Court and the Family Court in each of the state Supreme Courts and, reciprocally, s 4 of the corresponding state Acts confers jurisdiction in 'state matters' on the Federal Court and the Family Court. Likewise, the jurisdiction of each state and territory Supreme Court is cross-vested in all the other state and territory Supreme Courts.

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68 *R v Kirby; Ex parte the Boilermakers' Society of Australia* (1956) 94 CLR 254, 268.
69 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and cognate state and territory legislation.
70 See B Opeskin (2000), 299.
71 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
72 s 3(1) JCCVA.
73 *Conciliation and Arbitration Act 1904* (Cth); *Workplace Relations Act 1996* (Cth); *Native Title Act 1993* (Cth); and certain provisions of the *Trade Practices Act 1974* (Cth).

2.74 The second central feature of the cross-vesting scheme relates to the transfer of proceedings between participating courts. As a result of the cross-vesting of jurisdiction, it is possible for a litigant to commence most proceedings in any of the participating courts without regard to the subject matter of the action. However, it was always intended that federal and state courts keep within their traditional jurisdictional fields. To this end, the legislation provides for the transfer of proceedings between participating courts at the initiative of a party to the proceeding, an Attorney-General, or the court of its own motion (see s 5 JCCVA).

2.75 The transfer provisions are fundamental to the cross-vesting scheme. Unless proceedings are transferred in such a way that each participating court keeps within its 'proper' jurisdictional fields, there is the potential for a dramatic redistribution of jurisdiction between state and federal courts in Australia.[74]

The influence of the Constitution on state courts

2.76 A further source of integration is the emerging view of the role of Chapter III of the Constitution in regulating state courts, as developed by the High Court in its decision in *Kable v Director of Public Prosecutions (NSW)*.[75]

2.77 *Kable* concerned the constitutional validity of the *Community Protection Act 1994* (NSW). The Act empowered the Supreme Court of New South Wales to make an order to detain a convicted criminal, Kable, in custody after the expiration of his sentence. The Act had been passed by the New South Wales Parliament in response to the threat that Kable allegedly posed to the New South Wales community.

2.78 Gaudron, McHugh and Gummow JJ, who formed the majority with Toohey J, spoke of state courts as being significant components of an integrated Australian judicial system.[76] The majority held that the jurisdiction conferred on the Supreme Court by the New South Wales Act was non-judicial and incompatible with the Supreme Court's position as a recipient of federal judicial power in an integrated system.

2.79 As Kirby J described it in a later case, this integrated system is derived in part from the autochthonous expedient, and in part also as an implication of Chapter III of the Constitution, 'with its express recognition of the Supreme Courts and of the other courts of the States, as potential recipients of federal jurisdiction and as participants in the integrated appellate structure of the

74 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1986, 2556 (Bowen).
75 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
76 Ibid, 102–103 (Gaudron J), 112–114 (McHugh J), 137–139 (Gummow J). Also see P Johnston and R Hardcastle (1998), 219.

Australian court system'.[77] Affirming the unity of the federal judicial system, whereby the States must maintain a system of courts available for the vesting of federal jurisdiction, the majority in *Kable* held that a weak form of the separation of powers doctrine existed at the state level, by implication from Chapter III of the Constitution.[78]

2.80 This integrated federal judicial system results in limitations being placed upon state legislative power. A state law that grants to a state court any functions that are incompatible with the exercise of the judicial power of the Commonwealth is invalid.[79] What makes *Kable* even more striking is that, with the exception of Toohey J, the reasoning of the majority did not rely on the Court exercising federal jurisdiction in the case at hand.

Allocating Federal Jurisdiction

2.81 The Constitution gives Parliament considerable flexibility in allocating federal jurisdiction within the Australian judicial system. Federal jurisdiction may be invested in federal, state or territory courts. It may be granted exclusively or concurrently. It may be invested as original or appellate jurisdiction. The preceding factors may also be mixed together in various combinations. For example, it is possible to invest original federal jurisdiction exclusively in state courts but confer appellate federal jurisdiction in the same matters exclusively in federal courts. Cross-jurisdictional appeals are discussed further in Chapter 20.

2.82 The contours of the federal judicial system have changed substantially since federation in 1901. In civil matters, the reliance that was initially placed on state courts exercising federal jurisdiction has changed as new federal courts have been created and as their jurisdiction has expanded. These changes have been incremental but they suggest a changing view of the policies underlying the allocation of federal jurisdiction between state and federal courts. The maturation of the federal judicial system over the past 25 years has not taken place without debate regarding the allocation of jurisdiction among its component courts. At times, certain federal matters have been vested exclusively in federal courts, while others have been vested exclusively in state courts. But for the most part the allocation of federal jurisdiction between state and federal courts has been shared.

Underlying policies

2.83 It has been said that until the 1970s Parliament did not proceed on any set principles in allocating federal jurisdiction and that legislation apportioning federal jurisdiction reflected ad hoc decisions made without any real thought being given

77 *Gould v Brown* (1998) 193 CLR 346, 479.

78 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 92-94 (Toohey J), 103 (Gaudron J), 110 (McHugh J), 142-143 (Gummow J).

79 Ibid, 104 (Gaudron J).

to the problem.[80] However, the establishment of two new federal courts in the 1970s brought a new focus to the policies underlying the jurisdictional relationship between state and federal courts.

2.84 The factors taken into account in allocating federal jurisdiction include the following. A fuller account may be found in DP 64.[81]

- **Special role of the High Court.** One relevant factor is the need to limit the conferral of additional original jurisdiction on the High Court pursuant to s 76 of the Constitution so that the Court may focus on deciding the most important cases, whether they be matters of general law or constitutional law.

- **Uniform interpretation of federal law.** The uniform interpretation of federal law is an important goal of any federal judicial system because it helps maintain the rule of law. How this goal is best achieved is less certain. Conferring jurisdiction on a federal court with national operation might achieve greater uniformity than conferring the same jurisdiction on a state court. This is because there may be greater comity between judges within a single federal court than between judges exercising federal jurisdiction in several state courts.[82] On the other hand, it has been said that state courts interpreting federal law are required to apply the same principles of comity,[83] and that the general appellate jurisdiction of the High Court ensures reasonable uniformity of judge-made law in Australia, irrespective of how original jurisdiction is allocated between state and federal courts.

- **Specialisation.** Conferring federal jurisdiction on federal courts may enable specialist expertise to be developed in particular subject areas. However, specialisation has shortcomings. It may fail to give judges sufficient variety of work to provide intellectual stimulation and maintain their long term interest in judicial office.

- **Federalism**. E G Whitlam once expressed the view that judges who are called on to interpret and apply statutes should be appointed by governments who are responsible to the Parliaments that passed those statutes.[84] Applying this principle of accountability in a federal system suggests that federal judges should interpret federal law. An opposing view is that courts are in-

80 M Byers and P Toose (1963), 309.

81 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 2.5–2.33. See also B Opeskin (1995).

82 This was the view of the founders of the United States Constitution. See A Hamilton (1788).

83 *R v Abbrederis* [1981] 1 NSWLR 530, 542. See also *R v Parsons* [1983] 2 VR 499, 506; *R v Yates* (1991) 102 ALR 673, 679–680; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.

84 E Whitlam (1963).

dependent organs, which should administer the entire body of law irrespective of its state or federal source.[85]

- **Efficacy of court processes and orders.** Legislation establishing federal courts makes provision for nationwide jurisdiction over defendants and ready enforcement of judgments throughout Australia.[86] For some time this was a significant advantage in conferring federal jurisdiction on federal courts rather than state courts. However, the passage of the *Service and Execution of Process Act 1992* (Cth) has largely removed the comparative advantage enjoyed by federal courts. The Act establishes a nationwide scheme for the service of process and execution of judgments of state courts and goes a long way towards converting Australia into a single jurisdiction in respect of the efficacy of court processes and orders.[87]

- **Historical considerations.** For historical reasons, jurisdiction in industrial law[88] and bankruptcy[89] has been conferred on federal courts from an early stage. That factor alone would appear to make it more likely that jurisdiction in these fields will remain predominantly with federal courts.[90] Today, only the Federal Court and the Federal Magistrates Service exercise jurisdiction in bankruptcy, and industrial law is largely though not exclusively the province of the Federal Court.

Ascertaining when federal jurisdiction is exercised

2.85 The final section of this Chapter considers some practical difficulties associated with the allocation of federal jurisdiction within the Australian judicial system. As previously discussed, the original and appellate jurisdiction of federal courts (other than the High Court) is necessarily federal. However, state courts may exercise both state and federal jurisdiction. The former jurisdiction belongs to the state courts by virtue of state law; the latter may be invested in state courts by federal law.

2.86 Since federal law may attach consequences to the exercise of federal jurisdiction by state courts, it may be necessary to identify the type of jurisdiction being exercised in a particular case. Any difficulty in identifying the source of a state court's jurisdiction may, conversely, inform the decision about whether it is desirable to attach a particular consequence to the exercise of federal jurisdiction.

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85 O Dixon (1935), 606.
86 For example, s 18 FCAA.
87 *Service and Execution of Process Act 1992* (Cth), s 15 (service of process), s 105 (enforcement of judgments).
88 *Conciliation and Arbitration Act 1904* (Cth). See R McCallum and M Crock (1995), 736–737.
89 *Bankruptcy Act 1966* (Cth), s 27, as amended by the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth), sch 7.
90 *Bankruptcy (Amendment) Act 1976* (Cth), s 8.

2.87 In DP 64, the Commission asked how deeply federal law should penetrate the judicial systems of the States and Territories.[91] The issue arises because reforms might be applied either to all courts exercising federal jurisdiction (whether federal or state) or, more narrowly, to all federal courts. The views received during the course of the inquiry strongly opposed the idea that there should be a general policy of extending federal regulation to state courts exercising federal jurisdiction.

2.88 Submissions and consultations identified many practical difficulties that would arise if state courts were required to switch between state and federal procedures according to the nature of the jurisdiction they exercised. These include the following.

- Many disputes raise a combination of state and federal issues, the relative importance of which may change significantly during the course of litigation, as evidence is heard and facts are found. A typical example is a claim in contract, tort or equity, which contains an alternative claim for relief in relation to misleading and deceptive conduct pursuant to s 52 of the *Trade Practices Act 1974* (Cth).

- Categories of jurisdiction create procedural hurdles that are distant from the substantive merits of a case. Emphasising the nature of the jurisdiction exercised by a court may lend disproportionate weight to the procedural aspects of a case.

- The determination of whether a matter lies within state or federal jurisdiction may be highly technical. There appears to be a lack of detailed knowledge in the legal profession about the finer points of the distinction.[92] Consequently, cases may founder in the superior courts due to jurisdictional problems before the substantive issues can be aired.

- There is a degree of unpredictability as to when a matter becomes federal in character. A matter that begins in state jurisdiction may be unexpectedly transformed into federal jurisdiction during the course of the hearing, for example, if a constitutional defence is raised in argument.[93]

- There may be legal difficulties in determining the scope of federal jurisdiction where, for example, a federal claim is allied to a common law claim and the accrued jurisdiction of a federal court is consequently invoked. In such cases, the federal law may or may not be a colourable attempt to bring the case within the jurisdiction of a federal court.

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91 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 1.55–1.63.
92 W Gummow (2000), vi.
93 See, for example, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

2.89 These difficulties are a major factor in the Commission's view that there should be no *general* policy of extending federal law, including matters of practice and procedure, to all courts exercising federal jurisdiction. The penetration of federal legislation into the heartland of the state court systems would make the question whether a state court was exercising state or federal jurisdiction in a particular case of pre-eminent importance. This would compound what Cowen and Zines have described as the 'absurdity in a notion of separate channels of state and federal jurisdiction within the same single court system'.[94] This would be the antithesis of the approach of the cross-vesting legislation, which sought to bring about a situation in which no court would have to determine whether it was exercising federal, state or territory jurisdiction.[95] Although this goal was never wholly achieved, it is an understandable response to the difficulty of determining when federal jurisdiction is being exercised.

2.90 The Commission also notes that there are constitutional limitations on the competence of Parliament to regulate how state courts exercise federal jurisdiction, which are discussed further in Chapter 6. While the procedure of state courts may be regulated when exercising federal jurisdiction, the structure and organisation of state courts may not be altered by federal laws.

2.91 In the absence of a general policy favouring greater federal regulation of state courts exercising federal jurisdiction, the issue is considered in subsequent chapters in the particular context in which the question arises.

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94 Z Cowen and L Zines (1978), 138.

95 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1986, 2556 (Bowen).

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Part B

Original Jurisdiction

3. Original Jurisdiction of the High Court

Contents

Introduction

3.1 The High Court has a substantial original jurisdiction that derives from ss 75 and 76 of the Constitution. Cases heard in that capacity account for a significant proportion of the High Court's workload. Figure 3–1 shows that the number of matters filed in the Court's original jurisdiction has increased substantially over the last five years, most of which is accounted for by the rise in migration matters. In 1999–2000, 137 matters were filed in the High Court's original jurisdiction, including 65 (47%) in migration matters.

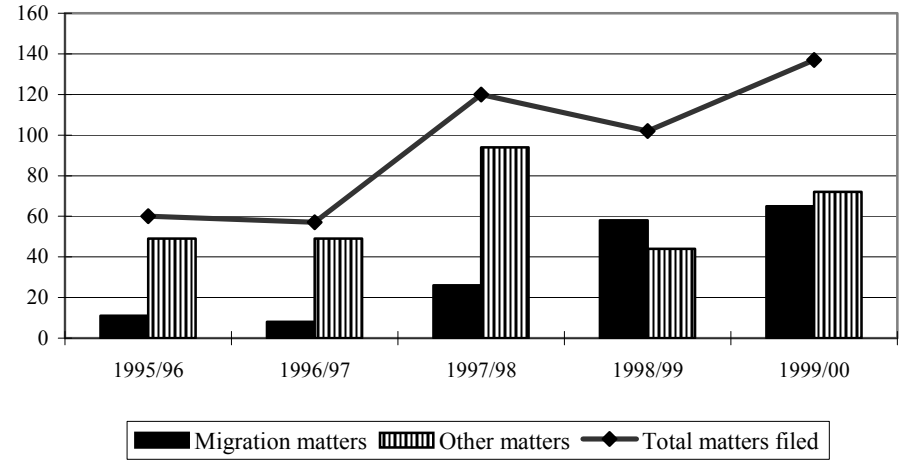
3.2 Both ss 75 and 76 of the Constitution confer jurisdiction on the High Court in respect of 'matters' but there are significant differences between the sections. The High Court's jurisdiction under s 75 is conferred directly by the Constitution and cannot be withdrawn other than by constitutional amendment. By contrast, s 76 merely empowers Parliament to confer jurisdiction upon the High Court. The High Court does not have the jurisdiction until it is conferred by Parliament, and such jurisdiction can later be repealed.

3.3 Some issues arising from the High Court's entrenched jurisdiction in s 75 of the Constitution are considered elsewhere in this report. For example, the power to remit matters under s 44 JA has enabled the Court to remove from its workload at least some matters that are unsuitable for adjudication by Australia's highest court (see Chapter 11). Other issues are considered in this chapter.

3.4 This chapter addresses those aspects of the High Court's original jurisdiction that are amenable to legislative reform, namely, those that arise from s 76 of the Constitution. There are two relevant categories of jurisdiction. Section 76(i) relates to matters 'arising under this Constitution, or involving its interpretation'. Since the High Court's establishment in 1903, s 30(a) JA has conferred jurisdiction on the High Court with respect to such matters. This jurisdiction is discussed in detail in Chapter 12.

3.5 The second category of jurisdiction relates to matters 'arising under any laws made by the Parliament' pursuant to s 76(ii). During the High Court's first 75 years, this power was used to confer considerable jurisdiction on the Court under a miscellany of Acts. When the Federal Court was established in 1976, a substantial part of the High Court's original jurisdiction under federal statutes was transferred to that Court. Today, the principal example of the use of s 76(ii) is the jurisdiction conferred on the High Court, sitting as the Court of Disputed Returns, in respect of federal electoral matters.[96]

Figure 3–1 Matters Filed in the High Court's Original Jurisdiction



Source: Data provided by the Registry of the High Court of Australia.
Note: In 1996–97, 665 related writs of summons issued from the Darwin office of the Registry. They are treated as a single matter in Figure 3–1.

Jurisdiction Conferred by the Constitution

Section 75(i)–(iv)

3.6 The High Court's original jurisdiction in matters arising under s 75(i) and s 75(ii) of the Constitution (relating to treaties and consuls, respectively) has caused few practical problems for the Court. As discussed in Chapter 2, the reasons for including these heads of federal jurisdiction in s 75 are somewhat obscure but few cases, if any, have arisen under them.

3.7 The Court's 'diversity jurisdiction' under s 75(iv) has been more widely utilised by litigants.[97] Here, potential workload difficulties have been avoided both

96 *Commonwealth Electoral Act 1918* (Cth).
97 Jurisdiction under s 75(iv), which is based on the diversity of residence of the parties, is described in Chapter 2.

by the High Court's restrictive interpretation of the provision and by its generous use of the remittal power (see Chapter 11). Matters in which the Commonwealth is a party, under s 75(iii), have been a more significant head of jurisdiction for the Court. Some of these matters represent significant cases that are appropriate for the High Court's determination; others have been remitted to lower courts pursuant to s 44 JA.

Section 75(v) and judicial review in migration matters

3.8 The most significant recent development in the High Court's s 75 jurisdiction relates to matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, as identified in s 75(v). Many matters in which this head of jurisdiction is invoked relate to the review of migration and refugee decisions.

3.9 In Chapter 1 it was noted that the Attorney-General informed the Commission during the course of the inquiry that the review of the *Judiciary Act* was not intended to cover litigation brought under the judicial review scheme in the *Migration Act 1958* (Cth) or under the proposed scheme in the *Migration Legislation Amendment (Judicial Review) Bill 1998* (Cth).[98] Accordingly, the Commission makes no recommendation in respect of this area of the High Court's jurisdiction.

3.10 However, in consultations and submissions the Commission was repeatedly advised that the restricted grounds on which the Federal Court may exercise judicial review in migration matters has created a pressing problem for the function and workload of the High Court. Indeed, in comparison with the effect of migration cases, some of the jurisdictional issues addressed in this inquiry were said to be insignificant. The Commission considers it appropriate therefore to report the views expressed to it on this topic. The Commission notes that in April 1999 the Senate Legal and Constitutional Legislation Committee reported on proposed legislative amendments affecting judicial review in migration matters, and in June 2000 the Senate Legal and Constitutional References Committee reported on Australia's refugee determination process and related issues.[99] The issue is also under consideration within the Attorney-General's Department and the Department of Immigration and Multicultural Affairs.

3.11 The difficulties in respect of migration matters arise in the following way. The *Migration Act 1958* provides in ss 474–475 for judicial review by the Federal Court of decisions made by the Migration Review Tribunal and the Refugee Review Tribunal, as well as certain other decisions made under the Act or regulations. These provisions exclude certain grounds of judicial review, including

98 The Hon D Williams AM QC MP, *Correspondence*, 28 August 2000.

99 Senate Legal and Constitutional Legislation Committee (1999); Senate Legal and Constitutional References Committee (2000).

the commonly argued ground of breach of the rules of natural justice.[100] The Federal Court's jurisdiction to review tribunal decisions in migration and refugee matters is accordingly restricted. Applicants who wish to argue the restricted grounds must apply for judicial review to the High Court, whose jurisdiction is guaranteed by s 75(v) of the Constitution.[101]

3.12 The High Court may remit a migration matter to the Federal Court pursuant to s 44 JA. However, s 485 of the *Migration Act 1958* provides that in such a case the Federal Court has only those powers it would have had if an application had been made under Part 8 of the *Migration Act 1958*. The High Court does in practice remit those parts of migration matters that can be dealt with in the Federal Court. However, it is unlikely that the High Court would remit a whole matter to the Federal Court in the knowledge that that Court cannot consider all grounds of review raised by the applicant. The remittal of matters in which a constitutional writ is sought against a Commonwealth officer is considered further in Chapter 11.

3.13 Figure 3–1 shows the impact of migration and refugee review applications on the workload of the High Court. In 1995–96, migration matters constituted only 18% of new matters filed in the High Court's original jurisdiction. By 1999–2000 they constituted 47% of new matters — an increase of 161% in five years.

3.14 The High Court has expressed concern at this situation. In *Abebe v Commonwealth*, Gleeson CJ and McHugh J stated as follows:

> In the present case, the Parliament has chosen to restrict severely the jurisdiction of the Federal Court to review the legality of decisions of the Refugee Review Tribunal. That restriction may have significant consequences for this Court because it must inevitably force or at all events invite applicants for refugee status to invoke the constitutionally entrenched s 75(v) jurisdiction of this Court. The effect on the business of this Court is certain to be serious.[102]

3.15 Many with whom the Commission consulted stressed the need for Parliament to reconsider the present judicial review regime in respect of migration and refugee matters.[103] The Commission was advised that restrictions on the scope of judicial review by the Federal Court have dramatically increased the volume of

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100 *Migration Act 1958* (Cth), s 476(2). See *Abebe v Commonwealth* (1999) 197 CLR 510.

101 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 176 ALR 219.

102 *Abebe v Commonwealth* (1999) 197 CLR 510, 534. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407, 409–411 (McHugh J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 176 ALR 219, 256 (Kirby J).

103 The Hon Justice R Nicholson, *Consultation*, Perth, 23 March 2001; C Doogan, *Consultation*, Canberra, 28 March 2001; Law Society of Western Australia, *Consultation*, Perth, 23 March 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001; B Walker SC, *Consultation*, Sydney, 5 March 2001; Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001; D O'Brien, *Consultation*, Canberra, 22 February 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001.

migration and refugee matters before the High Court. This increase was regarded as consuming excessive judicial resources and placing a great burden on the Court. The necessity of making certain types of judicial review application to the High Court was also seen as unfair to applicants, who faced increased costs and delays as a result. It was also seen as having a deleterious effect on other litigants whose access to the Court was potentially affected by the Court's consideration of migration matters.

3.16 The most comprehensive view put to the Commission was that of the Law Council of Australia.[104] It stated that 'the volume of migration judicial review matters threatens to significantly deflect the High Court from dealing with important constitutional cases and significant appeals in other areas of law'. The Law Council cited its submission to the Senate Legal and Constitutional Legislation Committee in its review of the *Migration Legislation Amendment (Judicial Review) Bill 1998*:

> As the highest judicial body in Australia, the High Court is responsible for determining the most contentious and significant legal issues in Australia. At present, the court finalises less than 100 cases each year and applicants are subjected to lengthy delays. The number of migration applications before the High Court is already at a record level. If only a small proportion of litigants before the Federal Court decided to try their hand in the High Court, the impact on the productivity of the High Court could be catastrophic.[105]

3.17 The Law Council recommended reinstating a regime for judicial review of migration decisions under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The Law Council further recommended introducing measures to address baseless applications, including empirical research into applications for judicial review; a requirement that applicants demonstrate a *prima facie* case or obtain leave from the court; improving the quality of decision making in the migration tribunals; and restoring legal aid funding for eligible applicants in migration cases. In conclusion, the Law Council stated:

> Simply put, judicial review applications in migration matters constitute the single biggest cuckoo in the nest of the High Court's jurisdiction. Decisions on migration matters have serious consequences for individuals; such decisions definitely deserve careful consideration by a court. However, as High Court judges have warned, the High Court is not the appropriate court for this role. The Law Council recommends that the federal government should urgently reconsider the jurisdiction of the Federal Court in migration matters.[106]

104 Law Council of Australia, *Submission J037*, 6 April 2001.
105 Law Council of Australia (1999), 9.
106 Law Council of Australia, *Submission J037*, 6 April 2001.

3.18 In May 2001, the media reported that the federal government is considering conferring jurisdiction on the Federal Magistrates Service to hear migration and refugee review cases.[107] The Law Council supported this option in their submission to the Commission.[108]

Jurisdiction Conferred by Parliament

Section 76(i)

3.19 As mentioned above, Parliament has long conferred jurisdiction on the High Court in matters 'arising under the Constitution, or involving its interpretation' pursuant to its power in s 76(i) of the Constitution.[109] By contrast, there is no general law conferring original jurisdiction on the High Court in any matter 'arising under any laws made by the Parliament' pursuant to s 76(ii).[110]

Section 76(ii)

3.20 It is widely accepted that the High Court's principal functions are as a final court of appeal in matters of general law and as the final arbiter of the meaning of the Constitution. If the Court's original jurisdiction under s 76(ii) were widened, its capacity to perform these functions effectively might be compromised. The Court might then be burdened with matters that are not of sufficient legal significance to command the attention of Australia's highest court.

3.21 For these reasons, few Commonwealth Acts confer original jurisdiction on the High Court under s 76(ii). There are, however, two notable examples of this jurisdiction. First, s 30(b) JA confers original jurisdiction on the High Court 'in trials of indictable offences against the laws of the Commonwealth'. Criminal matters are outside the Commission's terms of reference and the Commission makes no further comment on this provision. Second, original jurisdiction is conferred on the Court in respect of federal electoral matters.

3.22 The potential for jurisdiction to be conferred on the High Court by miscellaneous federal Acts raises questions about the ease with which the High Court's jurisdiction may be understood by those who use the legislation. The Commission considers it desirable to amend the *Judiciary Act* to provide that, in addition to the jurisdiction conferred on the High Court by s 75 of the Constitution, the Court has such additional original jurisdiction as is vested in it by laws made by

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107 'Help for the High Court', *The Weekend Australian* 26-27 May 2001, 98; 'Backing for Plan to let Magistrates ease High Court Workload', *The Australian* 29 May 2001, 93; B Haslem, 'Little Appeal in Justice Strained by Heavy Migrant Load', *The Australian* 28 May 2001, 9.

108 Law Council of Australia, *Submission J037*, 6 April 2001.

109 s 30(a) JA.

110 Compare s 39B(1A)(c) JA in relation to the Federal Court, as discussed in Chapter 4.

the Parliament. Similar provision is currently made in respect of the Federal Court.[111] Such a provision should be cross-referenced to the legislation that confers additional original jurisdiction. The Commission considers that this change would clarify the operation of s 76 by alerting users of the legislation to other sources of the Court's original jurisdiction. The Commission notes that in accordance with the recommendations in Chapter 41, the preferred location for such a provision is ultimately the *High Court of Australia Act 1979*.

Recommendation 3–1. The *Judiciary Act* should be amended to provide that, in addition to the jurisdiction conferred on the High Court by s 75 of the Constitution, the Court has such additional original jurisdiction as is conferred on it by the *Judiciary Act* or other Acts of Parliament. The provision should be cross-referenced to the legislation that confers such additional original jurisdiction.

Federal Electoral Matters

Current law and practice

3.23 The High Court exercises original jurisdiction under the *Commonwealth Electoral Act 1918* (Cth) ('*Electoral Act*'), sitting as the Court of Disputed Returns, in respect of disputed federal electoral returns and the qualifications of members of Parliament. In exercising this jurisdiction, the High Court has made a number of important decisions on the meaning of various provisions of the Constitution.[112]

Origins of the jurisdiction

3.24 The High Court's jurisdiction over disputed electoral returns can be traced to the practices of the United Kingdom Parliament in the 19th century. In the United Kingdom, the power to resolve disputed elections originally reposed in the House to which the election pertained. This situation prevailed until 1868, when legislation was passed conferring jurisdiction on two judges of the Queen's Bench.[113] The transfer of jurisdiction from Parliament to the courts was hastened by a concern with the partisanship of Parliament in ruling on electoral disputes.[114]

111 s 19 FCAA.

112 *Re Wood* (1988) 167 CLR 145; *Sykes v Cleary (No 2)* (1992) 176 CLR 77; *Sue v Hill* (1999) 199 CLR 462. See also P Schoff (1997); J Shaw (2000); G Carney (2000).

113 *Parliamentary Elections Act 1868* (UK).

114 P Schoff (1997), 324.

3.25 The Australian experience was similar.[115] In accordance with s 47 of the Constitution, the power to determine disputed elections was originally exercised by the relevant House and not by the courts. Jurisdiction over disputed elections and returns was conferred on the High Court, sitting as the Court of Disputed Returns, by Part XVI of the *Commonwealth Electoral Act 1902* (Cth). Jurisdiction to hear disputes as to qualifications of members of Parliament was conferred by s 2 of the *Disputed Elections and Qualifications Act 1907* (Cth). These statutes were combined into a single Act in 1918, namely, the *Commonwealth Electoral Act 1918* (Cth). The States have enacted legislation that gives similar powers to state Supreme Courts in respect of state elections.[116]

Two types of jurisdiction

3.26 A variety of disputes may arise in the context of a federal election. These include matters relating to electoral boundaries, electoral rolls, qualifications and disqualifications of voters, registration of parties, electoral writs, the location and regulation of polling places and polling procedures, scrutiny of votes, electoral funding and disclosure, electoral offences such as bribery and undue influence, and permissible advertising.

3.27 The *Electoral Act* confers jurisdiction on the High Court, sitting as the Court of Disputed Returns, in two types of case. The first concerns the determination of petitions disputing elections for the Commonwealth Parliament (Part XXII, Div 1). That jurisdiction is concerned with post-election issues such as disputes about results and the election of particular persons. The second type of jurisdiction enables the Court to determine any question referred to it by Parliament concerning the qualifications of a Senator or a Member of the House of Representatives, or respecting a vacancy in either House of Parliament (Part XXII, Div 2). These issues may occur at any time and need not be related to an election.

Disputed Elections and Returns — Pt XXII, Div 1

3.28 Section 353 of the *Electoral Act* allows the validity of any election or return to be disputed by a petition addressed to the Court. Section 354(1) establishes the High Court as the Court of Disputed Returns and provides for the Court to hear the petition or refer it to the Federal Court for trial. Additionally, under s 354(3) the High Court may refer part of a petition to the Federal Court, being a part that involves a question or questions of fact. This is akin to the High Court's power of remittal in s 44 JA (see Chapter 11). Where a referral has been made

115 K Walker (1997), 263.

116 *Parliamentary Electorates and Elections Act 1912* (NSW), Pt 6; *Electoral Act 1992* (Qld), Pt 8; *Constitution Act Amendment Act 1958* (Vic), Div 22; *Electoral Act 1907* (WA), Pt V; *Electoral Act 1985* (Tas), Pt VIII.

under s 354, the Federal Court has jurisdiction to try the petition and has the powers and functions of the Court of Disputed Returns in relation to the petition.[117]

3.29 The powers of referral and part referral have undergone significant changes in recent years. Prior to 1998, the High Court could refer a matter or part of a matter only to the Supreme Court of the State or Territory in which the election was held or the return was made. The *Electoral and Referendum Act 1998* (Cth) added the Federal Court as a potential recipient.

3.30 In June 2000, the Joint Standing Committee on Electoral Matters recommended that the High Court be able to refer a matter or part of a matter to the Federal Court alone and not to the Supreme Court of a State or Territory.[118] The Committee said that it was more appropriate for matters relating to federal elections to be heard by a federal court and that such a change might result in greater consistency in decisions. It was also noted that the *Electoral Act* was enacted before the establishment of the Federal Court, with the obvious consequence that the original Act could not take into account the availability of the Federal Court as a potential recipient of a referral from the Court of Disputed Returns.

3.31 In consequence of these recommendations, the *Electoral and Referendum Act (No 1) 2001* (Cth) was enacted. The effect of the Act, which was proclaimed to commence on 16 July 2001, is to make the Federal Court the only court to which the High Court can refer a matter or part of a matter under s 354.

3.32 Figure 3–2 shows the High Court's statistics in relation to matters under Part XXII Div 1 of the *Electoral Act* for the period 1995–96 to 1999–2000. The statistics reveal that the High Court does not hear many election petitions. There is clearly a cyclical nature to the jurisdiction, which reflects the cycle of federal elections.[119] However, when such matters are brought to the Court, they are by their nature urgent and must be given high priority.

117 The powers of the Federal Court in relation to a part referral are more limited: see s 360 (1)(v), (vi), (vii), (viii) and s 379 of the *Electoral Act*.

118 Joint Standing Committee on Electoral Matters (2000), Rec 56, para 5.112–5.113.

119 The last three federal elections were held on 13 March 1993, 2 March 1996 and 3 October 1998.

Figure 3–2 Election Petitions in the Court of Disputed Returns

Category of petition	1995–96 *	1996–97	1997–98	1998–99 *	1999–00
Election petitions filed (Full Court)	4	0	0	10	0
Election petitions heard (Full Court)	0	2	0	2	1
Election petitions heard (single justice)	n.a.	2	0	10	10

Source: High Court of Australia, *Annual Report*, Tables 2, 8, 30 (various years).
Notes: n.a.= not available.
* = year in which a federal election was held.

Qualifications and vacancies — Pt XXII Div 2

3.33 Section 376 of the *Electoral Act* allows the Parliament to refer to the Court of Disputed Returns any question relating to the qualifications of a Senator or a Member of the House of Representatives, or relating to a vacancy in the Senate or the House. Section 379 provides for additional powers of the Court in relation to qualifications or vacancies, including the power to declare any person as not qualified to be a Senator or Member and to declare that there is a vacancy in the Senate or the House. The Court of Disputed Returns has determined relatively few cases under Pt XXII Div 2, but those that have arisen have been high profile and the subject of considerable public interest.[120]

Issues and problems

Constitutional validity

3.34 One issue raised in the course of the inquiry was whether the jurisdiction conferred by the *Electoral Act* on the High Court, sitting as the Court of Disputed Returns, was consistent with the separation of powers mandated by Chapter III of the Constitution. Commentators have expressed different views on this question, particularly in regard to Pt XXII Div 2 of the Act.[121] The issue is whether the determination of a question under Pt XXII Div 2 involves giving an advisory opinion contrary to the principle in *Re Judiciary and Navigation Acts*.[122]

120 See, for example, *Re Webster* (1975) 132 CLR 270; *Sue v Hill* (1999) 199 CLR 462.
121 K Walker (1997); P Schoff (1997).
122 The jurisdiction of the High Court to give advisory opinions was inserted into the *Judiciary Act* in 1910. Following the decision of the High Court in *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, the provisions were repealed. The High Court held that Chapter III of the Constitution confers jurisdiction on the Court in respect of 'matters', and this precludes consideration of abstract questions of law.

3.35 The constitutional issue was addressed in part by the High Court in *Sue v Hill,*[123] where a majority of the Court upheld the validity of the *Electoral Act* in so far as it authorised the Court to determine a petition under s 354. The majority determined that the jurisdiction under Part XXII Div 1, relating to disputed elections and returns, could be conferred on a federal court or a court exercising federal jurisdiction, consistently with Chapter III of the Constitution.[124]

3.36 *Sue v Hill* did not consider the validity of Part XXII Div 2. Prior to that case, there appear to have been only two cases in which the Court of Disputed Returns has decided a question under Div 2,[125] neither of which considered the constitutional validity of the power.

Should the High Court exercise original jurisdiction?

3.37 Another issue raised in DP 64 was whether the High Court or another federal court (such as the Federal Court) should exercise jurisdiction in relation to electoral matters, in so far as they involve the exercise of judicial power. One view is that the High Court should not exercise this original jurisdiction because these matters do not necessarily raise issues of legal importance and, where they do, they can be removed into the High Court pursuant to s 40 JA (see Chapter 15). An alternative view is that the history of the jurisdiction demonstrates that cases heard by the Court of Disputed Returns are of significant public interest because they relate to the election of federal parliamentarians.

Referral powers

3.38 As noted above, recent legislation has removed state and territory Supreme Courts as potential recipients of a reference from the High Court under s 354 of the *Electoral Act*. Prior to the introduction of this legislation, the Commission had received comments about whether state and territory courts should continue to play a role in federal electoral matters. The issue is addressed later in this chapter.

Nomenclature

3.39 A further issue is whether the High Court should be referred to as the Court of Disputed Returns when exercising jurisdiction under the *Electoral Act* or whether that title should be abolished and the relevant jurisdiction conferred directly on the High Court.

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123 *Sue v Hill* (1999) 199 CLR 462.
124 Ibid, 484, 518.
125 *Re Webster* (1975) 132 CLR 270; *Re Wood* (1988) 167 CLR 145. See P Schoff (1997), 344.

3.40 In *Sue v Hill*, Gaudron J considered the argument that s 354(1) of the Act did not confer jurisdiction on the High Court as such, but that the Court was instead conscripted to act as a special electoral tribunal. Her Honour noted that s 354(1) could have been better expressed. However, she expressed the view that the wording in s 354(1) could be explained by reference to the fact that Parliament believed it was conferring a special jurisdiction on the High Court and for the exercise of that jurisdiction the Court was to be granted special status as the Court of Disputed Returns. Her Honour remarked:

> Moreover it is apparent from the terms of s 360(1) [powers of the Court] that the jurisdiction was not intended to be reposed in a special tribunal whose functions the High Court was conscripted to perform but, instead, was conferred on the Court as an additional special jurisdiction with powers considered appropriate to its exercise.[126]

3.41 The nomenclature assumes importance for a number of reasons. In the transcript of proceedings in *Sue v Hill*, Kirby J raised the question of how an Act of Parliament, namely the *Electoral Act,* could expel the jurisdiction of the High Court that is conferred by s 75(v) of the Constitution, and instead confer it on the Court of Disputed Returns.[127] The sources suggested for this conferral were s 47 and s 51(xxxvi) of the Constitution, the latter providing that Parliament has power to make laws with respect to 'matters in respect of which the Constitution makes provision until the Parliament otherwise provides', s 47 being such a matter.

Consultations and submissions

3.42 In relation to constitutionality, the general view expressed in consultations and submissions was that the jurisdiction of the Court of Disputed Returns, including that under Pt XXII Div 2, was valid provided that it related to an actual dispute between parties and not merely an abstract question of law.[128] Professor Lindell commented that a review of the case law confirmed that the determination of electoral disputes has traditionally been regarded as a judicial function when performed by a court of law. As a result, the exercise of that jurisdiction by a federal court was unlikely to contravene the separation of powers doctrine upheld in the *Boilermakers Case*.[129] One reform raised in consultations was the possibility of amending Pt XXII Div 2 to make it clear that the power to determine a question concerning the qualifications of a Senator or a Member of a House of Representatives was limited to 'matters'. A contrary view was that s 47 of the Constitution may provide an alternative source of jurisdiction, which is outside Chapter III and

126 *Sue v Hill* (1999) 199 CLR 462, 519.

127 High Court of Australia Transcripts S179/1998 (11 May 1999).

128 Faculty of Law University of Adelaide, *Consultation*, Adelaide, 16 March 2001; Victorian Bar Association, *Consultation*, Melbourne, 6 March 2001.

129 *R v Kirby; Ex parte the Boilermakers' Society of Australia* (1956) 94 CLR 254; G Lindell, *Submission J012*, 5 March 2001. See *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 178–179 (Isaacs J); *R v Quinn; Ex parte Consolidated Food Corp* (1977) 138 CLR 1.

therefore not limited by the constitutional meaning of 'matter'. On this view, the High Court should be left to determine any outstanding issues of constitutional validity on a case by case basis.

3.43 There was a difference of opinion as to whether the jurisdiction of the Court of Disputed Returns should be exercised by the High Court or by the Federal Court. A clear majority of those consulted were of the view that the significance of the membership of the Commonwealth Parliament, and the need for expedition, certainty and finality warranted the High Court maintaining the jurisdiction.[130] Analogies were drawn with the controversy in which the United States Supreme Court was embroiled in *Bush v Gore*.[131] That case concerned a disputed result in the election of the United States President in 2000. The limited role of the United States Supreme Court in reviewing the electoral decisions of the Supreme Court of Florida was said to demonstrate the value of having electoral matters determined quickly and conclusively by the highest court.[132] Some observers also remarked that, given the subject matter of the dispute, many matters would be appealed to the High Court even if another court were chosen as the court of first instance.[133] Moreover, as the jurisdiction generated few cases in practice, it did not impose a significant burden on the High Court.

3.44 The alternative view focused on the capacity of the Federal Court to adjudicate these claims. Many matters arising from the jurisdiction might not be of great legal significance and there was accordingly no need for them to be determined by the High Court.[134] The High Court has a heavy workload in its original and appellate jurisdiction and should not be required to exercise original jurisdiction in electoral matters unless there is a demonstrated need for it to do so. Although this jurisdiction does not appear to have generated a large number of cases, it was said that the burden on the Court had been significant in some years. Every case requires the expenditure of judicial resources, particularly if there are factual and legal complexities. Finally, it was remarked that the urgency of these matters had the potential to disrupt the Court's orderly disposition of its regular judicial business. If electoral disputes were heard in the Federal Court, there were mechanisms to ensure that appropriate cases were removed into the High Court.

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130 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; G Griffith QC, *Consultation*, Melbourne, 16 February 2001; Faculty of Law University of Adelaide, *Consultation*, Adelaide, 16 March 2001; B Dunphy, *Consultation*, Brisbane, 8 March 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001; Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001.

131 *Bush v Gore* 531 US 1 (2000).

132 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; G Griffith QC, *Consultation*, Melbourne, 16 February 2001.

133 Faculty of Law University of Adelaide, *Consultation*, Adelaide, 16 March 2001.

134 P Brazil and K Boreham, *Consultation*, Canberra, 22 February 2001; G Lindell, *Submission J012*, 5 March 2001; W Harris, *Submission J015*, 6 March 2001.

3.45 Different views were expressed on the question of the power of the Court of Disputed Returns to refer a matter or part of a matter to another court. One view was that state and territory Supreme Courts should have jurisdiction to hear referred or part referred matters because federal electoral boundaries are state-based and state courts offer greater accessibility in regional areas, particularly in urgent interlocutory matters.[135] However, a more widely held view was that, as a matter of principle, disputes concerning membership of the federal Parliament should be determined by a federal court.[136] It also was suggested that allowing state Supreme Courts to hear referred matters might lead to inconsistent judgments.[137] As noted above, the Joint Standing Committee on Electoral Matters took this view in its report on the 1998 federal election, as did the Australian Electoral Commission in its submission to that inquiry.[138]

3.46 Different opinions were also expressed as to what name a court should be given when exercising jurisdiction under the *Electoral Act*. One view was that the title of 'Court of Disputed Returns' has historical significance and does no harm.[139] The alternative view was that the current title was unnecessary and could lead to confusion among users and the public.[140]

Commission's Views

3.47 The Commission considers that the High Court should continue to exercise original jurisdiction under the *Electoral Act*. The political nature of electoral disputes and the likelihood of them attracting significant public interest or controversy make it appropriate for the jurisdiction to be exercised by the High Court. The authority of the High Court stamps a degree of finality on contentious proceedings in a way that may not be possible if the matter were entrusted to another court, such as the Federal Court. Moreover, in the Commission's view, the political importance of these cases makes it likely that many electoral disputes would be appealed to the High Court if another court were chosen as the court of first instance.

3.48 The Commission heard no evidence to suggest that the High Court is not able to deal with the limited, cyclical workload created by its electoral jurisdiction. As Figure 3–2 shows, the Full Court heard two matters arising from the March 1996 federal election and three matters arising from the October 1998 election. This is a modest imposition on the Court given the nature of the issues at stake. The Commission notes that the High Court has power to refer matters or part

135 Supreme Court of Queensland, *Consultation*, Brisbane, 8 March 2001.
136 P Brazil and K Boreham, *Consultation*, Canberra, 22 February 2001; S Eggins, *Submission J032*, 30 March 2001.
137 S Eggins, *Submission J032*, 30 March 2001.
138 Joint Standing Committee on Electoral Matters (2000), Rec 56, para 5.112–5.113.
139 G Griffith QC, *Consultation*, Melbourne, 16 February 2001.
140 P Brazil, *Submission J010*, 22 February 2001.

matters to the Federal Court in appropriate cases, although the High Court Registry advised the Commission that it was not aware of any cases in the last five years in which this had been done.[141] This power gives the High Court the necessary flexibility to divest itself of fact finding or other issues that are not suitable for its determination.

3.49 In relation to the question of constitutional validity, the Commission considers that any outstanding issues arising from the High Court's jurisdiction under the *Electoral Act* should be left for the High Court to resolve when appropriate. It would be difficult for the legislature to anticipate the Court's approach. Moreover, it is arguable that s 47 of the Constitution would support a law conferring electoral jurisdiction on the High Court, unconstrained by the requirements of Chapter III of the Constitution.

3.50 In relation to the referral of electoral matters from the High Court to other courts, the Commission notes with approval the changes recently introduced by the *Electoral and Referendum Act (No 1) 2001* (Cth), described earlier in this Chapter. These changes have pre-empted the Commission's recommendations on this topic. The Commission accordingly records its agreement with the reasons put forward for that change and adds the following observations.

3.51 The Commission considers that significant legal issues concerning the composition of federal Parliament should be adjudicated by courts that form part of the federal polity. This reinforces political accountability and avoids the potential for unnecessary frictions between federal, state and territory elements in the federation in respect of issues that lie at the very core of politics. The Federal Court is a national court with ample capacity to deal quickly and effectively with electoral issues that are referred to it by the High Court. The Court has registries in every State and Territory except Tasmania and the Northern Territory, and the latter two jurisdictions are nevertheless well serviced by visiting judges and video conferences in urgent matters.

3.52 The Commission has already noted the divergent views expressed on the question of the most appropriate title for the High Court when exercising jurisdiction in electoral matters. The Commission acknowledges the long tradition of the Court of Disputed Returns. However, even the High Court has expressed uncertainty on occasion as to the capacity in which it has been asked to adjudicate electoral controversies. The Commission supports the view that the current title is unnecessary and may confuse litigants and legal representatives. The current title also raises uncertainty about the applicability of provisions of the *Judiciary Act* and other legislation to the High Court when sitting in its capacity as the Court of Disputed Returns. For these reasons, in Recommendation 3–2 the Commission

141 High Court of Australia, *Correspondence*, 1 May 2001.

recommends that jurisdiction in federal electoral matters be conferred directly on the High Court pursuant to the *Electoral Act*.

3.53 This recommendation may require consequential changes in relation to appeals. The jurisdiction of the Court of Disputed Returns may be exercised by a single judge pursuant to s 354(6) of the *Electoral Act*. Arguably, there is no appeal from the decision of a single justice exercising such jurisdiction. This is because the *Electoral Act* does not provide for an appeal, and because s 34 JA refers to a right of appeal from a single justice of the High Court to a Full Court but makes no reference to the High Court sitting as the Court of Disputed Returns.

3.54 If electoral jurisdiction were conferred on the High Court directly, s 34 JA would confer an automatic right of appeal to a Full Court from a judgment of a single justice. The Commission considers that there should be no automatic right of appeal in relation to federal electoral matters because of the premium placed on achieving an expeditious and conclusive determination. Section 363A of the *Electoral Act* recognises this in providing that the Court of Disputed Returns shall make its decision on a petition as quickly as is reasonable in the circumstances. A requirement of special leave to appeal would allow the High Court to consider quickly whether an appeal had merit. Accordingly, the Commission recommends that s 34 JA be amended to provide that an appeal from a single justice of the High Court exercising original jurisdiction conferred by the *Electoral Act* shall not be brought to a Full Court without special leave.

Recommendation 3–2. The *Commonwealth Electoral Act 1918* should be amended to abolish the title 'Court of Disputed Returns' and to confer the relevant jurisdiction on the High Court directly. Section 34 of the *Judiciary Act* should be amended accordingly to provide that an appeal from a single justice of the High Court exercising original jurisdiction conferred by the *Commonwealth Electoral Act* shall not be brought to a Full Court without special leave.

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4. Original Jurisdiction of the Federal Court

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An Evolving Jurisdiction

4.1 Section 77(i) of the Constitution empowers the Parliament to make laws 'defining the jurisdiction of any federal court other than the High Court' in respect of the matters described in ss 75 and 76. Unlike state Supreme Courts, which are courts of general jurisdiction, federal courts may only be conferred with jurisdiction to decide cases that fall into the categories described in ss 75 and 76, and which satisfy the constitutional description of 'matter'.[142]

4.2 Prior to the establishment of the Federal Court in 1976, most matters that arose under federal laws, within the meaning of s 76(ii) of the Constitution, were dealt with routinely in the state courts pursuant to s 39 JA.[143] The principal exceptions were bankruptcy and industrial relations matters, for which specialised federal courts had already been established,[144] and the miscellany of federal statutes that had conferred original jurisdiction on the High Court.

4.3 The *Federal Court of Australia Act 1976* does not completely define the jurisdiction of the Federal Court.[145] Section 19(1) FCAA provides that '[t]he Court has such original jurisdiction as is vested in it by laws made by the Parliament, being jurisdiction in respect of matters arising under laws made by the Parliament'.

142 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257; *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22, 37; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

143 G Griffith and G Kennett (2000), 44.

144 The Federal Court of Bankruptcy was established in 1930 and its jurisdiction transferred to the Federal Court of Australia in 1976. The Commonwealth Court of Conciliation and Arbitration was established in 1904. It was later reformed as the Commonwealth Industrial Court and its jurisdiction transferred to the Federal Court in 1976.

145 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 488.

4.4 Accordingly, it is necessary to look to other provisions in federal legislation to find the ambit of the Federal Court's original jurisdiction. Those provisions may currently be found in the *Judiciary Act* (especially s 39B), the *Federal Court of Australia Act 1976* (especially ss 19 and 32) and miscellaneous federal statutes under which jurisdiction is conferred on the Court.

4.5 When legislation to establish the Federal Court was introduced into Parliament in 1976, the Attorney-General, Robert Ellicott, described the court as a 'small court' with limited jurisdiction conferred by Parliament from time to time. [146] In addition to industrial law and bankruptcy, its principal areas of jurisdiction were initially trade practices law and review of federal administrative action. Over time that jurisdiction has significantly expanded. This can be seen in the increasing number and diversity of federal statutes that now confer jurisdiction on the Court. Its expanded role is also evident in the broad categories of federal jurisdiction that have been conferred on the Court progressively since its inception.

4.6 In its submission to the Commission, the Federal Court remarked that it was doubtful whether the change in character of the Federal Court is nearly as great as has sometimes been supposed.

> Although it has been common to refer to the limited nature of the jurisdiction of the Federal Court of Australia when it was established in 1976, to speak of that jurisdiction as 'limited' does not really say very much, indeed it begs the question. From the outset, the original jurisdiction of the Federal Court encompassed many of the most important areas of federal civil jurisdiction that then existed. … The perception that in 1976 the Federal Court was a 'small' court must therefore be qualified by reference to the breadth and importance of the small number of enactments by which jurisdiction was originally conferred upon it. … It may be doubted, therefore, whether the change in character of the Federal Court is nearly as great as has sometimes been supposed. In any event that change occurred through the will of the Parliament … [147]

4.7 The principal developments in the Federal Court's jurisdiction are outlined below.

Jurisdiction under specific federal statutes

4.8 The Federal Court's jurisdiction in matters arising under laws made by Parliament is the most significant aspect of the Court's jurisdiction. This jurisdiction can be seen as having two components: the conferral of jurisdiction under specific federal statutes since 1976 and the conferral of an extremely broad jurisdiction in matters arising under laws made by Parliament pursuant to s 39B(1A)(c) JA since 1997. The co-existence of two sources of jurisdiction has generated difficulties, which are considered further below.

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146 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1976, 2111.
147 Federal Court of Australia, *Submission J039*, 20 April 2001.

4.9 Throughout the 1980s and 1990s there was a dramatic rise in the number and variety of specific federal statutes that conferred jurisdiction on the Federal Court. On its creation in 1976, the Federal Court was invested with original jurisdiction in approximately 13 federal statutes, which had previously been administered by other federal courts.[148] By June 1992 there were approximately 100 such Acts and by June 2000 nearly 150 Acts were listed in the Federal Court's Annual Report.[149]

4.10 Amongst this miscellany, the principal areas of original jurisdiction are trade practices, review of federal administrative action, admiralty, bankruptcy, industrial law, intellectual property, taxation, native title, human rights, and (from July 2001) corporations law. The conferral of jurisdiction under numerous additional Acts since 1977 has largely been in new areas of Commonwealth legislative activity. Currently, judicial review of migration and refugee determinations accounts for a very substantial proportion of the Court's workload, both in its original and appellate jurisdiction.

4.11 Examples of new areas of jurisdiction of the Federal Court include native title and human rights. The following provides some indication of recent trends.

- Since 30 September 1998, new applications for native title determinations must be filed in the Federal Court and not the National Native Title Tribunal (NNTT). In 1995–96, 12 such matters were filed in the Court, whereas 99 were filed during 1999–2000. As at 30 June 2000, 779 native title matters, including those transferred from the NNTT, remained current.[150]

- Since 13 April 2000, the Federal Court has had jurisdiction under the *Human Rights and Equal Opportunity Act 1986* (Cth) to hear and determine complaints under federal anti-discrimination laws. The Human Rights and Equal Opportunity Commission previously determined such complaints. As at 30 June 2000, 103 applications had been made to the Court under that Act.[151]

Associated jurisdiction

4.12 Section 32 FCAA confers jurisdiction on the Federal Court in 'associated' matters. The section takes as its basis the fact that the Federal Court is not given jurisdiction to the full extent possible under ss 75 and 76 of the Constitution.

148 See *Federal Court of Australia (Consequential Provisions) Act 1976* (Cth) and *Conciliation and Arbitration Amendment Act (No 3) 1976* (Cth), transferring jurisdiction from the Australian Industrial Court; and *Bankruptcy (Amendment) Act 1976* (Cth), transferring jurisdiction from the Federal Court of Bankruptcy.

149 Federal Court of Australia (2000), Appendix 4, 122–125.

150 Ibid , Table 6.1, 129.

151 Ibid , 44.

The purpose of the provision is to ensure that when the Court adjudicates a matter, it may also deal with any associated federal matters in respect of which jurisdiction has not otherwise been conferred on the Court, but which nevertheless fall within ss 75 and 76, and so could be conferred on the Court pursuant to s 77(i) of the Constitution. Associated jurisdiction is of less significance since the enactment of s 39B(1A)(c) JA, discussed further below, which confers jurisdiction on the Court in matters 'arising under any laws made by the Parliament'. Associated jurisdiction is further discussed in Chapter 2.

Accrued jurisdiction

4.13 In the early 1980s, the High Court refined the judicial doctrine of accrued jurisdiction, which it had first developed in relation to its own jurisdiction in the 1940s.[152] Accrued jurisdiction expands the range of matters that can be adjudicated in the Federal Court. It allows the Court to adjudicate claims that would be non-federal, and therefore outside the Court's jurisdiction, but for the fact that they are attached to and not severable from federal claims that do fall within the Court's statutory jurisdiction. A common example is the linking of a common law action of passing off with a claim under s 52 of the *Trade Practices Act 1974* (Cth) (see Chapter 2).

Jurisdiction to grant constitutional writs

4.14 In 1983, jurisdiction was conferred on the Federal Court in matters in which certain constitutional writs are sought against Commonwealth officers (s 39B(1) JA).[153] This jurisdiction derives from s 75(v) of the Constitution but does not fully implement that paragraph — certain Commonwealth officers are excluded from the jurisdiction conferred by s 39B(1) and jurisdiction to grant public law remedies is excluded in relation to certain criminal matters.[154] Public law remedies are further discussed in Chapters 7 and 37.

Cross-vested jurisdiction

4.15 In 1987 the Federal Court was invested with jurisdiction in state matters under the general cross-vesting scheme and under parallel schemes applicable to particular fields.[155] One significant area in which the Federal Court exercised state jurisdiction arose under each State's *Corporations Law*. In 1999 the High Court invalidated those parts of the co-operative legislative scheme that purported to

152 *Carter v Egg & Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557.
153 *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth).
154 s 39B(2), s 39B(1B), (1C) JA.
155 See, for example, *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW) and cognate state and territory legislation.

invest state jurisdiction in federal courts.[156] For the eleven years that it operated, the legislation effected a significant expansion in the jurisdiction of the Federal Court. The Federal Court's corporations jurisdiction has since been restored by the commencement of the *Corporations Act 2001* (Cth) on 15 July 2001. The cross-vesting scheme is further discussed in Chapters 2 and 8.

Section 39B(1A) JA

4.16 In 1997, the enactment of s 39B(1A) conferred jurisdiction on the Federal Court in a range of new areas to ensure 'that the Court is able to deal with all matters that are essentially federal in nature'.[157] While this new jurisdiction covers only a subset of the matters enumerated in ss 75 and 76 of the Constitution, it has significant potential to expand the role of the Federal Court in exercising federal jurisdiction.

Injunctions sought by the Commonwealth

4.17 Section 39B(1A)(a) confers jurisdiction on the Federal Court in matters in which the Commonwealth is seeking an injunction or a declaration. This jurisdiction derives from s 75(iii) of the Constitution but does not fully implement that paragraph — it refers only to suits in which the Commonwealth is a plaintiff, and even then it is limited to claims for certain kinds of relief.

Constitutional jurisdiction

4.18 Section 39B(1A)(b) confers jurisdiction on the Federal Court in matters 'arising under the Constitution, or involving its interpretation'. This jurisdiction derives from s 76(i) of the Constitution and the new provision fully implemented that paragraph. However, the Court was already accustomed to determining constitutional issues that arose in the course of adjudicating matters within its jurisdiction. The basis of the Court's constitutional jurisdiction prior to 1997 is discussed in Chapter 12.

Jurisdiction under any laws made by Parliament

4.19 Section 39B(1A)(c) confers jurisdiction on the Federal Court in matters 'arising under any laws made by the Parliament'.[158] This provision is perhaps one of the most remarkable, and yet unremarked, features of the expansion of the Federal Court's jurisdiction in recent times. It fully implements s 76(ii) of the Constitution by investing the Court with jurisdiction under the entire corpus of

156 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
157 *Law and Justice Legislation Amendment Act 1997* (Cth), Explanatory Memorandum, para 118.
158 In 1999 this grant was qualified by the exclusion of criminal matters: *Law and Justice Legislation Amendment Act 1999* (Cth).

federal law. The enactment of the provisions has significantly altered the manner in which jurisdiction is conferred on the Federal Court and raises questions regarding the relationship between this provision and the specific federal Acts that confer jurisdiction on the Court. Section 39B(1A)(c) does, however, contain some inherent limitations — the jurisdiction is invoked 'if the right or duty in the matter owes its existence to Federal law or depends on Federal law for its enforcement', but 'does not extend to matters involving the interpretation of such statutes if they do not arise thereunder'.[159]

Common law claims in the Territories

4.20 A recent decision of the Federal Court suggests that the Court may have a more extensive jurisdiction over common law claims arising in the Territories than is possible through the doctrine of accrued jurisdiction. In *O'Neill v Mann*[160] Finn J held that an action for defamation arising under the common law in force in the ACT was a matter arising under a law made by Parliament, and therefore within the jurisdiction of the Federal Court by reason of s 39B(1A)(c) JA. This was said to be the case because of the manner in which Commonwealth law erected the legal system for the ACT at the date of its establishment.[161] This issue is considered in greater detail in Chapter 38. The reasoning in the case appears equally applicable to the Northern Territory. If the decision is correct, it has the potential (as yet unrealised) to expand significantly the Federal Court's jurisdiction in the ACT and the Northern Territory.

Relationship between General and Specific Conferral of Jurisdiction

Problems with the current law and practice

4.21 The disparate location of provisions defining the jurisdiction of the Federal Court — in the *Judiciary Act*, in the *Federal Court of Australia Act 1976* and in specific federal statutes — creates potential uncertainty in the application of the legislation. The principal difficulty is the impact of s 39B(1A)(c) JA on the interpretation of other Acts that confer jurisdiction on the Federal Court. In particular, the question arises as to whether s 39B(1A)(c) should be construed as modifying or expanding jurisdiction that is conferred by other legislation in more limited terms.

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159 *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 151, 154 (Latham J). See E Campbell (1998), 139.

160 *O'Neill v Mann* (2000) 101 FCR 160.

161 *Seat of Government Acceptance Act 1909* (Cth), s 6(1); *Seat of Government (Administration) Act 1910* (Cth), s 4.

4.22 In *Transport Workers Union v Lee,*[162] a Full Federal Court accepted the view that s 39B(1A)(c) may confer jurisdiction on the Federal Court notwithstanding a jurisdictional impediment arising under another federal statute. It was argued that s 412 of the *Workplace Relations Act 1996* (Cth), by conferring jurisdiction on the Federal Court with respect to only some of the provisions of the Act, prohibited the Court from exercising jurisdiction with respect to any other provisions. However, Black CJ, Ryan and Goldberg JJ held that s 39B(1A)(c) operates 'as a general conferral of jurisdiction' so as to avoid certain consequences of the prior system of limited Act-by-Act conferral of jurisdiction on the Federal Court — such as where there are unintended jurisdictional differences between federal and state courts.[163]

4.23 Similarly, in *Hooper v Kirella Pty Ltd,*[164] a Full Federal Court considered the relationship between s 39B(1A)(c) and s 86 of the *Trade Practices Act 1974* (Cth), which vests jurisdiction in the Federal Court in matters 'in respect of which a civil proceeding has been instituted under Part VI'. The Court held that s 39B(1A)(c) does not confer on the Federal Court jurisdiction that has been 'expressly proscribed' by another Act.[165] However, Wilcox, Sackville and Katz JJ held that s 86 of the *Trade Practices Act 1974* was a 'positive conferral' rather than a proscription. Section 39B(1A)(c) could thus extend s 86 to preliminary matters that did not arise under Part VI of the Act. The Court stated that s 39B(1A)(c) was 'plainly intended to confer a broad supplementary jurisdiction on the Court in matters arising under laws made by the Parliament'.[166]

4.24 However, in some cases, s 39B(1A)(c) has been held to confer jurisdiction on the Federal Court notwithstanding an express prohibition in a specific statute. In *Rohner v Scanlan*,[167] Drummond J held that the Federal Court had jurisdiction to review a tribunal decision under the *Migration Act 1958* (Cth) despite an express prohibition on jurisdiction in s 485(1) of that Act, which was to prevail 'in spite of any other law, including section 39B of the *Judiciary Act 1903*'. The claim, regarding the migration of de facto spouses, was that the *Sex Discrimination Act 1984* (Cth), together with the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), operated to invalidate the relevant Migration Regulation. His Honour held that, while the Court did not have jurisdiction regarding the *Migration Act,* the wording of s 485(1) was not apt to deprive the Court of the jurisdiction it has under s 39B(1A)(c) to make declarations as to the operation of the other federal Acts.

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162 *Transport Workers Union v Lee* (1998) 84 FCR 60.
163 Ibid, 67. See also *Kodak (Aust) Pty Ltd v Commonwealth* (1988) 22 FCR 197.
164 *Hooper v Kirella Pty Ltd* (1999) 167 ALR 358.
165 For example, *Migration Act 1958* (Cth), s 485. See E Campbell (1998), 139.
166 *Hooper v Kirella Pty Ltd* (1999) 167 ALR 358, 374.
167 *Rohner v Scanlan* (1997) 77 FCR 433.

4.25 These decisions may have wide-ranging consequences. If s 39B(1A)(c) is given an ambulatory operation by the courts, it may override those provisions of federal law that set out the Federal Court's jurisdiction in more limited terms.

4.26 Currently, the Court determines the relationship between s 39B(1A)(c) and other Acts on a case-by-case basis. This is advantageous in so far as it allows the Court's jurisdiction to be determined by reference to the particular circumstances of the case. However, the question remains as to whether Parliament intended the later general provision in s 39B(1A)(c) to impliedly repeal the earlier specific provision. This creates a clash of principles of statutory interpretation because, although a later Act is regarded as impliedly repealing an earlier inconsistent Act, general legislative provisions are generally treated as giving way to specific provisions.

Consultations and submissions

4.27 In consultations and submissions the view was expressed that the relationship between s 39B(1A)(c) and specific statutes that confer jurisdiction on the Federal Court was confusing and that legislative amendment was needed.[168] It was said that it was 'desirable to streamline these sections or make them conform to such an extent that there is no potential for exploitation of any ambiguities created by the various provisions'.[169]

4.28 It was also generally agreed that s 39B should be relocated to the *Federal Court of Australia Act 1976* so that all general jurisdictional provisions relating to the Federal Court would be located in the most appropriate Act (see Chapter 41).[170]

4.29 The Commission was told that ideally all provisions conferring original jurisdiction on the Federal Court should be located in one Act. However, relocating the jurisdictional provisions currently located in 150 specific Acts to the *Federal Court of Australia Act 1976* was seen as impractical.[171] On the other hand, some people remarked that a feasible alternative was to include in the *Federal Court of Australia Act 1976* a schedule listing all other Acts that conferred jurisdiction on the Court. The Law Council of Australia stated that this 'would be a useful aid to legal practitioners, the courts, policy makers and the public'.[172] The Office of

168 P Brazil, *Submission J010*, 22 February 2001; P Brazil and K Boreham, *Consultation*, Canberra, 22 February 2001.

169 W Harris, *Submission J015*, 6 March 2001.

170 D Jackson QC, *Consultation*, Sydney, 19 March 2001; Federal Court of Australia, *Consultation*, Sydney, 21 February 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 15 August 2000; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001.

171 Law Council of Australia, *Submission J037*, 6 April 2001; D Jackson QC, *Consultation*, Sydney, 19 March 2001; Federal Court of Australia, *Consultation*, Sydney, 21 February 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 15 August 2000; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001.

172 Law Council of Australia, *Submission J037*, 6 April 2001.

Parliamentary Counsel cautioned of the danger of incongruity developing between the Acts through legislative inadvertence.[173]

4.30 It was commonly suggested that if a review of the relationship between s 39B(1A)(c) and the specific statutes were conducted, many of the latter would likely be considered unnecessary.[174] In that circumstance, it was considered that the specific provisions ought to be repealed.[175] The Law Council of Australia took a different view and submitted that it:

> continues to support the conferral of jurisdiction on the Federal Court by specific provision in addition to section 39B(1A)(c) of the *Judiciary Act*. Specific and general conferral should reinforce each other for the sake of certainty.[176]

4.31 The Chief General Counsel for the Australian Government Solicitor, Henry Burmester QC, suggested that a solution to these difficulties might be found in complementary reforms that provided both a lasting solution and an interim measure to clarify the law.[177] The lasting solution was for all federal Acts conferring jurisdiction on the Federal Court to be reviewed for their continuing relevance and appropriateness. In the interim, s 39B(1A)(c) might be amended to clarify that its operation is subject to any limitation or prohibition on jurisdiction contained in other legislation.

4.32 The Law Council opposed such amendments to s 39B(1A)(c), stating that they were 'overly technical' solutions and that 'the universal approach of s 39B(1A)(c) of the *Judiciary Act* is sufficiently clear'.[178]

Commission's views

4.33 The Commission considers that the *Federal Court of Australia Act 1976* is the most appropriate location for provisions that confer jurisdiction on the Federal Court. The Commission accordingly recommends that s 39B JA be relocated to that Act. Other aspects of the relocation and consolidation of jurisdictional provisions are discussed in Chapter 41.

4.34 The Commission strongly supports the suggestion that a review be undertaken of all provisions in federal Acts that confer jurisdiction on the Federal Court. The review should consider whether the provisions are necessary and, if so, what limitations or prohibitions on the Federal Court's jurisdiction continue to be appropriate in the light of s 39B(1A)(c).

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173 Office of the Parliamentary Counsel, *Consultation*, Canberra, 28 March 2001.
174 D Jackson QC, *Consultation*, Sydney, 19 March 2001; W Harris, *Submission J015*, 6 March 2001; Law Council of Australia, *Submission J037*, 6 April 2001.
175 D Jackson QC, *Consultation*, Sydney, 19 March 2001.
176 Law Council of Australia, *Submission J037*, 6 April 2001.
177 Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001.
178 Law Council of Australia, *Submission J037*, 6 April 2001.

4.35 In view of the number of Acts that confer jurisdiction on the Federal Court (approximately 150) and the diversity of their subject matter, the Commission considers that this assessment must be made on a case-by-case basis in light of the policies relevant to the particular legislation in question. Following the review, specific provisions that are found to be unnecessary should be repealed. Those that remain should be cross-referenced to s 39B, or to whatever provision assumes its place.

4.36 Pending the completion of the legislative review outlined above, the Commission recommends that s 39B(1A)(c) be amended to clarify its relationship with other Acts that confer jurisdiction on the Federal Court. The Commission notes that this provision fulfils an important function in conferring broad jurisdiction on the Court in matters arising under s 76(ii) of the Constitution. Yet, it is unlikely that Parliament would have intended the specific limitations or prohibitions on jurisdiction contained in earlier Acts to be overridden by the later general conferral of jurisdiction in s 39B(1A)(c), particularly in the absence of any parliamentary debate on that question.

4.37 Ultimately it is for Parliament to state in each case what that relationship should be, bearing in mind the purpose of enacting s 39B(1A)(c). In the interim, the Commission recommends that s 39B(1A)(c) be amended to expressly state that it is subject to any limitations or prohibitions contained in other Acts. For similar reasons, s 39B(1A)(c) should also be amended to state that it shall not provide a basis for granting a remedy that is excluded, expressly or by necessary implication, by the legislative regime established by other Acts of Parliament.

Recommendation 4–1. All statutory provisions that confer jurisdiction on the Federal Court in general terms (such as s 39B of the *Judiciary Act*) should be relocated to the *Federal Court of Australia Act 1976*. [See Recommendation 41–6.]

Recommendation 4–2. Section 39B(1A)(c) of the *Judiciary Act* should be amended to provide that the jurisdiction conferred on the Federal Court by that paragraph is subject to specific limitations or prohibitions on the Court's jurisdiction as stipulated in other Acts of Parliament. Section 39B(1A)(c) should also be amended to state that it shall not provide a basis for granting a remedy that is excluded, expressly or by necessary implication, by the legislative regime established by other Acts of Parliament.

Recommendation 4–3. The Attorney-General should order a review of the relationship between s 39B(1A)(c) of the *Judiciary Act* and the specific

federal Acts that confer jurisdiction on the Federal Court. The review should consider the extent to which the provisions of each specific Act remain necessary or desirable and whether the relationship between the provisions might be harmonised by greater use of cross-referencing.

Future Role of the Federal Court

4.38 In DP 64, the Commission documented the evolution of the Federal Court's jurisdiction and noted that:

> The expanding jurisdiction of the Federal Court invites re-examination of the policies behind its original conception as a 'small court', and whether they have been displaced by policies that view the Federal Court differently — as a 'big' court with general jurisdiction in federal matters.[179]

4.39 The Commission also noted that, although the Federal Court's original jurisdiction has become increasingly diverse since its establishment, it still does not cover all matters of federal jurisdiction listed in ss 75 and 76 of the Constitution. The Commission asked whether the Federal Court should be given general federal jurisdiction, including those additional matters falling within ss 75 and 76 that might appropriately be dealt with by the Federal Court.[180]

4.40 This aspect of the Commission's inquiry attracted surprisingly little comment in consultations and submissions. During consultations, some Federal Court judges stated that it was not desirable that the Federal Court be given jurisdiction in respect of all heads of jurisdiction in ss 75 and 76 of the Constitution.[181] For example, the diversity jurisdiction under s 75(iv) (matters between residents of different States) had no distinctly federal element to attract the jurisdiction of the Court. Similarly, jurisdiction under s 75(iii) (matters in which the Commonwealth is a party) was not necessarily federal in character given its inclusion of common law claims against the Commonwealth for damages for personal injury.

4.41 Nor was it thought necessary for the Federal Court to be conferred with jurisdiction in these matters to alleviate the burden on the High Court arising from its entrenched jurisdiction under s 75 of the Constitution.[182] The High Court had a broad discretion to remit to other courts, including the Federal Court, and there was no evidence that this aspect of the High Court's original jurisdiction presented difficulties for that Court (see Chapter 3).

4.42 In its submission to the Commission, the Federal Court observed:

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179 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 2.127.
180 Ibid , para 2.168, Questions 2.25–2.26.
181 Federal Court of Australia, *Consultation*, Sydney, 31 January 2001.
182 Ibid.

> In these circumstances, the broad question raised by Chapter 2 of the discussion paper about the allocation of original federal jurisdiction between federal and state courts should be approached on the footing that civil matters arising under federal law should be allocated to federal courts (the Federal Court of Australia, the Family Court of Australia in its specialised area, and the Federal Magistrates Court) and state matters should be allocated to state courts. It may be (although the contrary argument might be thought to be persuasive) that the general approach could give way in areas where trial jurisdiction in federal matters has long been shared between the Federal Court and the state Supreme Courts. However, the High Court has viewed the Federal Court to be, effectively, a court of final appeal (except in extraordinary circumstances) with respect to the specialised areas of taxation and intellectual property. … In areas that can be described as 'general' and which no longer have any distinctive federal element, such as cases arising under s 52 of the *Trade Practices Act* and its equivalents in the States and Territories, jurisdiction should continue to be concurrent.[183]

4.43 By contrast, the Supreme Court of Queensland commented that it was important to maintain, or even to expand, the exercise of federal jurisdiction by state courts and to limit, if not eliminate, those areas where the Federal Court exercises exclusive jurisdiction. The Court cited a number of reasons for this, including the unifying effect of the High Court and Chapter III of the Constitution; the role of judicial comity in achieving uniformity across jurisdictions; the practical disadvantages of split jurisdiction; the accessibility of state courts in terms of cost and geographic location; and the potential dangers of excessive specialisation. The Court concluded:

> All of these factors would tend to suggest that any movement to allocate original federal jurisdiction any further away from the state courts into the federal courts creates a risk of fragmenting rather than unifying the court system of Australia and creating further constitutional and practical difficulties for the parties who wish to litigate in the courts.[184]

4.44 The Law Council of Australia did not comment in general terms on the balance to be struck in the allocation of federal jurisdiction between federal and state courts. It did observe, however, that it was not desirable to extend the Federal Court's jurisdiction to certain types of federal jurisdiction. In relation to jurisdiction under s 75(iii) of the Constitution, the Law Council remarked:

> If the suggestion were adopted, parties would be able to take ordinary tort and contract claims, for example, to the Federal Court, merely because the other party happened to be the Commonwealth. This would be an invitation to plaintiffs/applicants to make a tactical choice regarding the forum in which to commence proceedings, and thus could be expected to generate additional procedural argument from defendants/respondents. Such a proposal could also be expected to disrupt the workload arrangements for both the Federal Court and state courts.[185]

183 Federal Court of Australia, *Submission J039*, 20 April 2001.
184 Supreme Court of Queensland, *Submission J021*, 13 March 2001.
185 Law Council of Australia, *Submission J037*, 6 April 2001.

4.45 More generally, the Law Council stated that it opposed the Federal Court exercising 'general federal jurisdiction' in the sense of all federal jurisdiction other than that which is exclusive to the High Court. The Law Council recommended that the Federal Court remain 'essentially one of limited specialist jurisdiction' so that the work of other federal courts was not subsumed by the Federal Court.

4.46 In the Commission's view, it is not desirable to advocate an *a priori* view of the optimal 'size' of the Federal Court in comparison with state and territory courts, divorced from the practical contexts in which the question arises.

4.47 When the Federal Court was established in 1976, it was described as a 'small court' with limited jurisdiction. That description was undoubtedly informed by the necessity of securing acceptance of a new federal institution in the face of opposition from some state court judges.[186] It may also have reflected the fact that the scope and depth of federal regulation of private and commercial life was not nearly as great as it is today, 25 years later.

4.48 The expansion of the Federal Court's jurisdiction has been an evolutionary one. New fields of federal regulation have often been accompanied by the conferral of correlative jurisdiction on the Federal Court, though not universally so. In that respect, Campbell J's prophecy in 1979 that '[t]he more that federal jurisdiction is conferred on federal courts, the more it is likely to seem appropriate to confer further federal jurisdiction on these courts' has been fulfilled.[187]

4.49 The development of the Federal Court's jurisdiction has also been enhanced by the Court's performance. It has often been observed that the status of a court does not depend upon the exclusivity of jurisdiction, but rather upon the excellence of the work of the court and aspects of its administration. In its report on the federal civil justice system, *Managing Justice*, the Commission described the Federal Court as a 'world class civil court' and found a high level of satisfaction with the operation of the Court among its users.[188] That finding was confirmed in consultations during the present inquiry, although minor problems were identified in some areas.[189]

4.50 The Constitution grants flexible powers to the Commonwealth Parliament to establish and maintain a federal judicial system. At one end of the spectrum the powers can accommodate a system in which there are no federal courts (other than the High Court) and all federal judicial power is exercised by state courts. Such a system was contemplated in 1901 as sufficient for the

186 H Gibbs (1981); W Campbell (1979).
187 W Campbell (1979), 4–5.
188 Australian Law Reform Commission, Report No 89 (2000), paras 1.107, 4.23, 6.25, 7.6, 7.167.
189 For example, the Northern Territory Bar expressed a strong desire to have a resident Federal Court judge in Darwin: Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001.

foreseeable future.[190] At the other end, the powers can accommodate a system in which federal courts exercise exclusive jurisdiction in all matters of federal jurisdiction. The current system lies between these extremes and any movement along the spectrum in either direction is ultimately a matter for the Commonwealth Parliament.

4.51 The federal judicial system is a dynamic system, which has evolved over the course of a century. In the Commission's view, it would be unwise to attempt to impose unnecessary rigidity in the system, based upon an abstract conception of the appropriate relationship between the federal, state and territory courts that comprise it. Rather, decisions about the allocation of jurisdiction should be made in the specific context in which the questions arise.

4.52 An example of the potential development of the system is the establishment of the Federal Magistrates Service in 1999 to deal with less complex federal civil matters (see Chapter 2). The Commission has noted elsewhere that discussions are on foot regarding the possible expansion of its jurisdiction to include judicial review of migration and refugee determinations (see Chapter 3). As with the Federal Court, the better the Service discharges its judicial functions, the more likely it is to be granted federal jurisdiction in less complex civil matters. In this regard it is noteworthy that the Chief Justice of Australia, the Hon AM Gleeson AC, recently remarked that he expects the Federal Magistrates Service to become one of the largest courts in Australia in the next twenty years.[191]

4.53 For the foregoing reasons, the Commission does not make general recommendations about the jurisdictional relationship between the Federal Court and other courts. Other chapters of this report consider specific issues regarding the original jurisdiction of the Federal Court, and these are summarised below for convenience. The Commission recommends that the original jurisdiction of the Federal Court be amended as follows:

- Jurisdiction should be conferred on the Federal Court to hear and determine all matters (a) arising under any treaty, (b) between States, and (c) between a State and the Commonwealth. These matters are currently within the High Court's exclusive jurisdiction under s 38 JA. See Chapter 7.

- Jurisdiction should be conferred on the Federal Court to hear and determine suits between the Commonwealth and the Northern Territory, and between the Commonwealth and the ACT. See Chapter 37.

190 J Quick and R Garran (1901), 726.
191 A Gleeson (2001) <http://www.hcourt.gov.au/speeches/cj/cj_changeju.htm> (7 August 2001).

- Federal legislation should provide that the Federal Court does not have jurisdiction to grant an order to ensure that the powers or duties of an officer of a State or Territory are exercised or performed according to law. An exception is recommended in relation to state or territory officers who perform dual functions for the Commonwealth pursuant to an intergovernmental arrangement. See Chapters 7 and 37.

- The *Judiciary Act* should be amended to exclude from the jurisdiction of the Federal Court (a) common law claims arising in the ACT or the Northern Territory, and (b) statutory claims arising under a law made by the legislature of the ACT or the Northern Territory, where those claims are not attached to a federal claim otherwise within the jurisdiction of the Federal Court. See Chapter 38.

- Federal legislation should be amended to provide that original (and appellate) jurisdiction in matters arising under federal intellectual property laws be conferred exclusively on federal courts. The original jurisdiction presently exercised by state and territory courts in these matters should be abolished. See Chapter 20.

- Federal legislation should be amended to provide that original (and appellate) jurisdiction in matters arising under the *Extradition Act 1988* (Cth) be conferred exclusively on federal courts. In particular, jurisdiction to make orders determining a person's eligibility for surrender should be conferred on the Federal Magistrates Service and jurisdiction to review such an order should be conferred on the Federal Court. See Chapter 20.

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5. Original Jurisdiction of the Family Court

Contents

Original Jurisdiction of the Family Court

Family law proceedings and related matters

5.1 The Family Court of Australia was established by the *Family Law Act 1975* (Cth) and commenced operation in 1976. Its role and jurisdiction are discussed in Chapter 2. The original jurisdiction of the Family Court is primarily set down in the *Family Law Act 1975.* The Court also has jurisdiction under the *Marriage Act 1961* (Cth) and under federal legislation relating to child support.[192] Unlike the Federal Court, the Family Court's original jurisdiction is not dealt with in the *Judiciary Act*.

5.2 While most matters arising in the Family Court relate to divorce, property settlement, spousal and child support, and children's residence and contact arrangements, other issues may arise in the course of family law proceedings. These may include matters of bankruptcy, corporations law or immigration.

5.3 Issues of bankruptcy law may arise where one party is bankrupt or is in the process of becoming bankrupt. This may affect the distribution of property between the parties to a marriage, or the priority of the bankrupt's creditors. Corporations law issues may arise where one or more parties seek to insulate themselves from the powers of the Family Court, for example, through their use of trust structures. Immigration issues may arise in relation to international child abduction,[193] or the immigration status of parties or children who are the subject of family law proceedings.

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192 *Child Support (Registration and Collection) Act 1988* (Cth); *Child Support (Assessment) Act 1989* (Cth).

193 *Family Law (Child Abduction Convention) Regulations 1986* (Cth) give effect to the Convention on the Civil Aspects of International Child Abduction, opened for signature 25 October 1980, ATS 1987 No 2 (entered into force for Australia 1 January 1987).

5.4 In cases such as these, issues arise as to the extent to which the Family Court can or should deal with the substance of these affiliated questions and whether related proceedings in other courts should be transferred, consolidated or stayed.

Accrued and associated jurisdiction

5.5 Through the doctrine of accrued jurisdiction, the Family Court can hear common law claims that are attached to and not severable from a family law claim. For example, in one case Lindenmayer J held that the Family Court had accrued jurisdiction to determine a claim for a declaration that a person who was not a party to the family law proceedings was the sole owner of the goodwill, assets and other property of a business whose ownership was at issue in the proceedings.[194] However, the High Court has taken a rather more restrictive view of the ambit of the accrued jurisdiction of the Family Court than of the accrued jurisdiction of the Federal Court (see Chapter 2).[195]

5.6 In addition, the statutory doctrine of associated jurisdiction enables the Family Court to hear and determine federal claims that are associated with a family law claim but are not otherwise within the Court's jurisdiction. The Family Court's associated jurisdiction, which is conferred by s 33 FLA, is discussed further in Chapter 2.

5.7 The doctrines of accrued and associated jurisdiction expand the jurisdiction of the Family Court but they do not fully address concerns about the capacity of the Family Court to deal with all matters that arise in the course of a family law proceeding. The requirement that the additional matters be 'associated' or 'attached and non-severable' still leaves situations in which the Family Court cannot do complete justice between the parties.

5.8 In DP 64 the Commission asked whether these problems justified an extension of the Family Court's original jurisdiction to include other matters that arise in the course of family law proceedings. One area of long term concern is the interaction between family law and bankruptcy, which is considered further below.

Jurisdiction in Bankruptcy

5.9 Section 51(xvii) of the Constitution gives the Commonwealth Parliament power to make laws with respect to 'bankruptcy and insolvency'. In the exercise of that power, the *Bankruptcy Act 1966* (Cth) was enacted to provide for the law of bankruptcy in Australia. Section 27 of that Act states that the Federal Court and the

194 *In the Marriage of SE and MB Ireland; Collier (Third Party)* (1987) 11 Fam LR 104.
195 *In the Marriage of Smith (No 3)* (1986) 161 CLR 217.

Federal Magistrates Service have concurrent original jurisdiction in bankruptcy, which is exclusive of the jurisdiction of all courts other than the jurisdiction of the High Court under s 75 of the Constitution.

5.10 Family law and bankruptcy law can interact in a number of ways. One concern is the potential for a spouse's property claim to be defeated by the manipulation of bankruptcy proceedings, for example, by the presentation and acceptance of a debtor's petition and subsequent sequestration; by the presentation of a creditor's petition and subsequent sequestration; or by entry into a deed of arrangement.[196]

5.11 Another concern is that a debtor may make a settlement upon his or her spouse through orders made under the *Family Law Act 1975*, and this may deprive the debtor of assets that would otherwise be available to creditors. The *Bankruptcy Act 1966* exempts such settlements from its operation, provided they are not fraudulent, and creditors may be left without recourse to the assets of the non–bankrupt spouse.[197]

5.12 The Family Court and the Federal Court have generally been reluctant to interfere with orders made by the other, according to the so-called 'Baxter principle'. In *Re Baxter*,[198] Northrop J held that the Federal Court had no jurisdiction to set aside a Family Court order as to the ownership of the equity in a family law property settlement. This conclusion was based on the view that a court's orders should only be varied by the court that made them, or by a higher court on appeal.[199] Moreover, the possibility of inconsistent orders of the Family Court and the Federal Court would place the parties in an impossible position of continuing uncertainty.[200]

5.13 One continuing problem is the extent to which remedies contained in the *Bankruptcy Act 1966* can be granted by the Family Court and, conversely, the extent to which remedies contained in the *Family Law Act 1975* can be granted by the Federal Court. Currently, there is limited scope for this because there is no cross-vesting of the subject matter jurisdiction of the two courts as between each other. There is, however, a power to transfer proceedings from one court to another in accordance with the criteria specified in the cross-vesting legislation.[201] This mechanism makes it easier to transfer proceedings from one court to another but it does not necessarily give either court jurisdiction to deal with the entire dispute between the parties (see Chapters 2 and 8). There is also a provision in the *Bankruptcy Act 1966* (Cth) (s 35A) that permits the Federal Court to transfer

196 Family Law Council (1992), para 3.11.
197 Ibid , para 3.13.
198 *Re Baxter; Ex parte The Official Trustee in Bankruptcy* (1986) 10 FCR 398, 401.
199 Public law remedies may also be available under s 75(v) of the Constitution. See Chapter 7.
200 *Re Baxter; Ex parte The Official Trustee in Bankruptcy* (1986) 10 FCR 398, 402.
201 s 5 JCCVA.

bankruptcy proceedings to the Family Court on the application of a party or of the court's own motion.[202] This provision was inserted in 1988 to give Family Court judges a greater variety of work but the Commission understands that the transfer power is not widely used today.

5.14 Specific issues have arisen in relation to the intersection of family law and bankruptcy law. They include whether the Federal Court or the Family Court was the more appropriate court to hear a claim that there was an abuse of process in the Family Court;[203] avoiding the perception of conflict between the two courts, particularly where all orders might be made by one court;[204] and whether there would be any practical advantage in transferring a matter from one court to another.[205]

5.15 In 1992 the Family Law Council published a report on the interaction of bankruptcy and family law.[206] The paper considered jurisdictional problems that arise when there is overlap between the bankruptcy and family law jurisdictions. It also considered competing claims under family law and bankruptcy legislation. The report noted that there was a lack of harmony between the *Bankruptcy Act 1966* and the *Family Law Act 1975* and that this was reflected in the interplay between the Family Court and the Federal Court.[207]

5.16 The report recommended that where there are competing claims between bankruptcy law and family law, only one court should determine those claims. In the opinion of the Family Law Council, the most appropriate court was the Family Court.[208] The recommendations of the Family Law Council have yet to be implemented. The Commission notes that the report did not consider the issue of expanding the original jurisdiction of the Family Court to deal with bankruptcy matters. However, it might be argued that such an expansion would be necessary if the Family Court were to have jurisdiction to determine competing claims.

5.17 In a speech in July 2001 to mark the 25th anniversary of the Family Court, the Commonwealth Attorney-General, the Hon Daryl Williams AM QC MP remarked on these difficulties.

> There needs to be a legislative solution to remove the uncertainty that exists in the interaction between family law and bankruptcy. Currently when a separated party becomes bankrupt prior to questions of property ownership being resolved in final orders under the *Family Law Act*, there is uncertainty for both trustees and creditors as well as for the non-bankrupt spouse. The current situation is first come, first served.

202 The Federal Magistrates Service also has a power to transfer: *Bankruptcy Act 1966* (Cth), s 35A(2A).
203 *Donovan v Official Trustee in Bankruptcy* (1991) 15 Fam LR 235.
204 *Re Sabri; Ex parte Brien* (1995) 60 FCR 131.
205 *Re Sellen; Ex parte Shirlaw* (1989) 13 Fam LR 324; *Prince and Prince* (1984) 69 FLR 150.
206 Family Law Council (1992).
207 Ibid , para 4.03.
208 Ibid , Rec 1, para 4.13.

> A legislative solution that will strike a balance between the rights of third parties, particularly creditors, and non-bankrupt spouses is needed. The Attorney-General's Department is currently working on draft legislation to achieve this balance.[209]

Consultations and Submissions

5.18 In consultations and submissions, the Family Court supported an extension of its original jurisdiction to matters such as bankruptcy, corporations law and migration when such issues arose in the course of family law proceedings.[210] The Family Court submitted that it should have jurisdiction to finalise family law proceedings in the one court, notwithstanding that other issues affecting a family arise under federal legislation other than the *Family Law Act 1975*. The Court emphasised that it did not seek jurisdiction over non-family matters unless they arose in the course of family law proceedings.

5.19 The Law Council of Australia identified an important tension in this area. On the one hand, there is a desire to allow litigants to use the Family Court as 'a one stop shop' for the resolution of family disputes. On the other hand, there is a legitimate concern that the Family Court may be asked to deal with complex matters that would not usually be dealt with by that Court, and that strangers to the family dispute may be drawn into the Family Court proceedings.[211]

5.20 The Law Council of Australia stated that it would support consideration being given to extending the original jurisdiction of the Family Court so as to allow the Court to deal with matters that arise within family law proceedings. However, that consideration should take into account the specialisation of different courts and the interests of persons who are strangers to a family dispute.

5.21 The Family Law Council recognised the advantages that arise when related matters can be dealt with in one court at the same time.[212] The Family Law Council generally favoured an expansion of the Family Court's jurisdiction to enable it to deal with other matters that arise in the course of family law proceedings, such as bankruptcy. The Family Law Council noted that any such expansion would need to conform with a central tenet of the *Family Law Act 1975*, namely, that the Family Court is a court of specialised jurisdiction and only deals with ancillary matters to the extent necessary to settle family disputes. An expansion of jurisdiction could only be justified where personal and commercial lives have become so entangled that the only way to settle matters sensibly is to deal with them together in the Family Court. In its view, any reform would need to avoid

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209 D Williams (2001), para 86–87, <http://law.gov.au/ministers/attorney-general/articles/family.html> (2 August 2001).

210 Family Court of Australia, *Submission J041*, 1 May 2001; Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.

211 Law Council of Australia, *Submission J037*, 6 April 2001.

212 Family Law Council, *Submission J040*, 23 April 2001.

opening a 'back door' to the Family Court, which permitted an inappropriate use of the Court's expanded jurisdiction.

Commission's Views

5.22 The Commission considers that expanding the jurisdiction of the Family Court to determine claims arising under other areas of federal law raises complex issues of law and policy. These include the impact on litigants of the current split jurisdiction, the effect of any expanded jurisdiction on the relationship between the Family Court and other federal courts, and the possibility of strangers to a family dispute becoming involved in Family Court proceedings.

5.23 The Commission is of the view that these questions merit a more detailed consideration than the Commission has been able to pursue in the context of this inquiry. The Commission accordingly recommends that the Attorney-General order a review of the question whether the original jurisdiction of the Family Court should be expanded to include additional matters arising under laws made by Parliament. These matters should include issues of bankruptcy in so far as they arise in the course of family law proceedings. The Commission notes its support for the current consideration of these issues within the Attorney-General's Department.

Recommendation 5–1. The Attorney-General should order a review of the question whether the original jurisdiction of the Family Court should be expanded to include additional matters arising under laws made by Parliament, such as bankruptcy matters that arise in the course of family law proceedings.

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6. Original Federal Jurisdiction of State Courts

Contents

Introduction

The Commonwealth's reliance on state courts

6.1 Under s 77(iii) of the Constitution, the Commonwealth Parliament may invest any court of a State with federal jurisdiction with respect to any of the matters mentioned in ss 75 and 76. Since 1903, great reliance has been placed on state courts exercising federal jurisdiction and they continue to play a significant role in federal civil matters (see Chapter 2).

6.2 Although Chapter III of the Australian Constitution was closely modelled on Article III of the United States Constitution, the express constitutional authority to invest state courts with federal judicial power, which is found in s 77(iii), has no direct counterpart in the United States.[213] In the United States, state courts were seen as lacking the independence required 'for an inflexible execution of the national laws'.[214]

6.3 In Australia, the use of state courts was perceived to be central to the exercise of federal jurisdiction from the time of federation. This has been attributed both to the small size and dispersion of the Australian population and to a greater willingness to accept a more unified judicial system.[215] In *Re Wakim, Ex parte McNally*, Kirby J described the power compulsorily to invest the established state courts with federal jurisdiction as:

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213 The United States Supreme Court has held, however, that the Supremacy Clause in Art VI, cl 2 of the United States Constitution requires state courts to exercise federal jurisdiction in certain circumstances. See *Testa v Katt* 330 US 386 (1947); *Printz v United States* 521 US 98 (1997).

214 A Hamilton (1788).

215 Z Cowen and L Zines (1978), 175.

> an urgent necessity … if the new Commonwealth, with its limited resources, were to avoid the burdensome obligation of creating immediately a parallel federal judiciary such as had been established in the United States of America.[216]

6.4 Writing shortly before the birth of the Commonwealth in 1901, two noted commentators on the Constitution, John Quick and Robert Garran, predicted that:

> it is probable that for some time there will be no necessity for the creation of any inferior federal courts, but that all the cases in which the original jurisdiction of the Commonwealth is invoked can be dealt with either by the High Court itself or by Courts of the States.[217]

6.5 Over the course of the last century, the Commonwealth has become less reliant on state courts exercising the judicial power of the Commonwealth as a substantial federal civil justice system has been developed below the High Court. However, the importance of state courts in the federal judicial system is nonetheless substantial.

The ambit of federal power

6.6 The ability of the Commonwealth Parliament to regulate the exercise of federal jurisdiction by state courts is dependent on the scope of the power granted by s 77(iii) of the Constitution and the impact of any constitutional limitations on that power.[218]

6.7 Section 77(iii) has been described as the 'sole source of power to confer Federal jurisdiction on state courts',[219] and it covers both original and appellate jurisdiction.[220] Consistently with general principles of constitutional interpretation, the power is broadly construed. It is also supplemented by whatever is necessary to make that power effective (the 'implied incidental power') and by the express power in s 51(xxxix) of the Constitution to make laws with respect to matters incidental to the execution of powers vested in the Parliament under Chapter III.

6.8 Specifically, it has been held that the power in s 77(iii) to confer federal jurisdiction on a state court carries with it the power to 'regulate the procedure and control the method and extent of relief'.[221] When the Commonwealth Parliament invests federal jurisdiction in a state court, it can thus impose limitations and

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216 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 605.
217 J Quick and R Garran (1901), 726.
218 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 540 (Gleeson CJ).
219 *Russell v Russell* (1976) 134 CLR 495, 516; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 556 citing *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 586.
220 *Ah Yick v Lehmert* (1905) 2 CLR 593.
221 *Lorenzo v Carey* (1921) 29 CLR 243, 252–253, citing *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1145 (Isaacs J).

restrictions upon this jurisdiction.[222] However, Parliament 'may go no further than is necessary for that purpose; it may not legislate with respect to the court itself'.[223]

Constitutional Constraints

6.9 Although the power to confer federal jurisdiction on state courts is broadly construed, it is nonetheless subject to important constraints that have been implied from the nature and structure of Chapter III of the Constitution. These constraints are discussed below.

Preserving the structure and organisation of state courts

6.10 When the Commonwealth invests state courts with federal jurisdiction it must generally accept those courts in the form in which the States have created them. There are two exceptions to this principle. The first is where such regulation is incidental to the grant of power to confer federal jurisdiction. The second is Parliament's express power under s 79 of the Constitution to prescribe the number of judges who are to exercise federal jurisdiction in any court.

6.11 In *Le Mesurier v Connor* the High Court held that, as state courts are wholly creatures of state law, such law 'determines the constitution of the court itself and the organisation through which its powers and jurisdictions are exercised'.[224] Section 77(iii) thus allows the Commonwealth Parliament to 'confer additional judicial authority' on a state court[225] but not to 'affect or alter the constitution of the Court itself or ... the organization through which its jurisdiction and powers are exercised'.[226] If the Commonwealth requires such a degree of control, it is free to invest federal jurisdiction in federal courts established under Commonwealth law.[227]

6.12 The cases reveal several examples of the limits of the Commonwealth's regulation of state courts exercising federal jurisdiction. The Commonwealth can not prescribe a mode of trial that does not exist under the relevant state law,[228] dictate that proceedings be held in a closed court,[229] nor make Commonwealth registrars part of the organisation of a state court.[230] On the other hand, Common-

222 *Re Yates; Ex parte Walsh and Johnson* (1925) 37 CLR 36, 125 (Higgins J).
223 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 82 (Dawson J).
224 *Le Mesurier v Connor* (1929) 42 CLR 481, 495–496.
225 Ibid, 496.
226 Ibid, 496.
227 Ibid, 496. See also *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 61 (Mason J).
228 *Brown v The Queen* (1986) 160 CLR 171, 199–200 (Brennan J).
229 *Russell v Russell* (1976) 134 CLR 495, 506 (Barwick CJ).
230 *Le Mesurier v Connor* (1929) 42 CLR 481; *Peacock v Newtown Marrickville & General Co-Operative Building Society (No 4) Ltd* (1943) 67 CLR 25, 37 (Latham CJ).

wealth legislation can provide that a judge hearing a federal matter in a state court shall not robe.[231]

6.13 The limits on Parliament's power to regulate state courts exercising federal jurisdiction are not yet completely defined. Judicial decisions have generally confined themselves to the circumstances of the case without developing general criteria for determining the degree of permissible interference with state courts.[232]

Only judicial power may be invested

6.14 A second constitutional limitation is that the Commonwealth Parliament cannot confer non-judicial functions on state courts despite the fact that States do not have a strict separation of powers.

6.15 In *Queen Victoria Memorial Hospital v Thornton*,[233] the High Court held that a state court may not carry out an administrative function under a federal Act as 'there is no provision in the Constitution which enables the Commonwealth Parliament to require State courts to exercise any form of non–judicial power'.[234] This principle has been affirmed in subsequent cases.[235]

Federal jurisdiction must be invested in a 'court'

6.16 Section 77(iii) of the Constitution requires such federal jurisdiction as is invested in state institutions to be invested in 'any court of a State' — Parliament can not invest federal jurisdiction in bodies that do not satisfy that constitutional description.

6.17 The High Court's interpretation of this term has undergone considerable change. Initially it was held that neither a Registrar[236] nor a Master[237] of a Supreme Court could make orders pursuant to federal Acts because they are not members of 'the Court', according to the traditional distinction between judges and other officers forming part of the court organisation.[238]

231 *Russell v Russell* (1976) 134 CLR 495, 531 (Stephen J).
232 Ibid, 519 (Gibbs J).
233 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144.
234 Ibid, 151–152, citing *British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201, 236 (Latham CJ).
235 *R v Davison* (1954) 90 CLR 353, 367–368 (Dixon CJ and McTiernan J); *Gould v Brown* (1998) 193 CLR 346, 388 (Brennan CJ and Toohey J).
236 *Kotsis v Kotsis* (1970) 122 CLR 69.
237 *Knight v Knight* (1971) 122 CLR 114.
238 *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 61 (Mason J).

6.18 In *Commonwealth v Hospital Contribution Fund* (‘*HCF Case*’),[239] the High Court overruled the earlier decisions on the basis that they were contrary to the principles espoused in *Le Mesurier v Connor*,[240] discussed above. The High Court held that, for the purposes of s 77(iii), a ‘court’ is an organisation ‘consisting of judges and with ministerial officers having specified functions’.[241] Federal jurisdiction is thus ‘conferred on the court regarded as an entity, rather than on the individual persons who compose its membership’.[242] Accordingly, a Master of the Supreme Court of New South Wales was able to exercise the Court’s federal jurisdiction.

6.19 The principle in the *HCF Case* is more tolerant of the diversity of state court structures but it still imposes limits on the type of state institutions that may be invested with federal jurisdiction. In *Newman v A,* the Supreme Court of Western Australia found that a ‘children’s panel’ established pursuant to the *Child Welfare Act 1947* (WA) could not exercise federal jurisdiction. In the Court’s view, the jurisdiction had been ‘effectively transferred away from a body, which may properly be described as a court, into some other hands’.[243]

The impact of *Kable*

6.20 In *Kable v Director of Public Prosecutions (NSW)*,[244] the High Court took a significantly different approach from the conventional understanding of the position of the state courts in the federal judicial system (see Chapter 2). A majority of the Court held that the powers conferred on the New South Wales Supreme Court under the *Community Protection Act 1994* (NSW) to make an order to detain a convicted criminal in custody after the expiration of his sentence were non-judicial. The making of such an order was incompatible with the Supreme Court’s functions as a court invested with federal judicial power. This reasoning imposes a constitutional limitation on the powers of state parliaments to invest their own courts with jurisdiction that is incompatible with the courts’ role under Chapter III of the Constitution.[245]

6.21 The majority in *Kable* indicated that state courts were significant components of an ‘integrated’ Australian judicial system in which the States must maintain a system of courts available for the vesting of federal jurisdiction.[246] A

239 Ibid.
240 *Le Mesurier v Connor* (1929) 42 CLR 481.
241 *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 58 (Gibbs CJ), citing *Kotsis v Kotsis* (1970) 122 CLR 69, 91 (Windeyer J).
242 *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 58 (Gibbs CJ).
243 *Newman v A (a child)* (1992) 16 Fam LR 209, 211 (Murray J).
244 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
245 Ibid, 102 (Gaudron J). Toohey J, though in the majority, disagreed on this particular issue, stating at 94 that the Constitution may impose the requirements of Ch III on state courts only when exercising federal jurisdiction.
246 Ibid, 102–103 (Gaudron J), 112–114 (McHugh J), 137–139 (Gummow J). See also *Gould v Brown* (1998) 193 CLR 346, 479 (Kirby J); P Johnston and R Hardcastle (1998), 219.

weak separation of powers doctrine thus exists at the state level, by implication from Chapter III. Any state law that grants a state court functions that are incompatible with the exercise of the judicial power of the Commonwealth is invalid.[247]

Investing State Courts with Federal Jurisdiction

Current law and practice

6.22 The Commonwealth Parliament has invested state courts with federal jurisdiction in two ways. Federal jurisdiction is conferred on state courts in general terms by s 39 JA. Additionally, a number of federal statutes confer federal jurisdiction on state courts with respect to specific subject matter.

6.23 Section 39 JA provides as follows:

> (1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.
>
> (2) The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38, and subject to the following conditions and restrictions …

6.24 Section 39 operates through a two-step process, which is discussed more fully in DP 64.[248] First, s 39(1) deprives the state courts of jurisdiction that they would otherwise have had in all matters listed in s 75 of the Constitution. Second, s 39(2) vests state courts with jurisdiction over the full range of matters enumerated in ss 75 and 76, except those made exclusive to the High Court by s 38. By this means, a portion of the state jurisdiction of state courts was transformed into federal jurisdiction, and thus made subject to conditions listed in s 39(2).[249] These conditions are discussed in detail below.

6.25 Section 39(2) is said to be 'ambulatory' or to remain 'in force from day to day as a law presently speaking'.[250] When state legislation increases the jurisdictional monetary limit for a particular state court, that new amount applies when that

247 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 104 (Gaudron J).
248 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 2.212–2.218.
249 *Minister of State for the Army v Parbury Henty and Co Pty Ltd* (1945) 70 CLR 459, 505.
250 *Commonwealth v District Court of the Metropolitan District Holden at Sydney* (1954) 90 CLR 13, 20–22. See also *Le Mesurier v Connor* (1929) 42 CLR 481, 503.

court exercises federal jurisdiction by virtue of s 39(2)[251] and if a new state court is created it is automatically invested with federal jurisdiction.[252]

6.26 In addition to this general provision, there are many examples of Commonwealth statutes that confer federal jurisdiction on state courts in particular terms. To the Commission's knowledge, there is no compendious list of Acts that confer federal jurisdiction on state courts, nor has the Commission sought to compile one. However, some indication of the extent of this conferral was given to the Commission during consultations in Darwin. The Chief Magistrate of the Northern Territory, Mr Hugh Bradley, provided the Commission with a list of federal legislation that confers jurisdiction on local courts or courts of summary jurisdiction. The list comprises nearly 100 Acts, ranging from the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) to the *Workplace Relations Act 1996* (Cth).

6.27 For present purposes, this list is over-inclusive in some respects and under-inclusive in others. Many of the Acts confer criminal jurisdiction on state and territory courts of summary jurisdiction, whereas this inquiry is confined to civil matters (see Chapter 1). On the other hand, the list relates only to courts of summary jurisdiction and does not include the vesting of federal jurisdiction in superior courts. Taking these variations into account, the number of Commonwealth Acts conferring civil jurisdiction on state courts is still likely to be substantial.

6.28 The co-existence of the general jurisdictional provision in s 39 JA and the specific provisions in miscellaneous federal statutes has created problems in practice. The principal difficulty is that the general provision (enacted in 1903) invests state courts with federal jurisdiction subject to conditions whereas the specific provisions (enacted later) generally make no mention of conditions.[253] The Commission has previously considered a similar problem in relation to the jurisdiction of the Federal Court. In Chapter 4 the Commission discussed the difficulties faced by the courts when confronted by a provision conferring jurisdiction on the Federal Court in general terms (s 39B(1A)(c) JA) and earlier statutes that limit the Federal Court's jurisdiction in specific contexts. In Chapter 4 the Commission recommended that the Attorney-General address these difficulties by ordering a review of the relationship between these provisions.

6.29 In relation to the federal jurisdiction exercised by state courts, the extent to which s 39 is excluded by subsequent enactments has been difficult to discern. The High Court has held that a later provision must disclose 'an intention at

251 *Commonwealth v District Court of the Metropolitan District Holden at Sydney* (1954) 90 CLR 13, 20.
252 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 536.
253 H Renfree (1984), 572–575.

variance with the full operation of s 39',[254] such that 'it might be deduced that the Parliament was displacing *pro tanto* the grant of jurisdiction contained in s 39'.[255] Many of the earlier cases held that the conditions in s 39(2) applied to the federal jurisdiction conferred by later Acts.[256]

6.30 In 1968 an attempt was made to solve this problem by legislative means through the enactment of s 39A JA.[257] That section provides as follows:

> (1) The federal jurisdiction with which a Court of a State is invested by or under any Act, whether the investing occurred or occurs before or after the commencement of this section, including federal jurisdiction invested by a provision of this Act other than the last preceding section:
>
> (a) shall be taken to be invested subject to the provisions of paragraph (a) of subsection (2) of the last preceding section; and
>
> (b) shall be taken to be invested subject to the provisions of paragraphs (c) and (d) of that subsection (whether or not it is expressed to be invested subject to both or either of those provisions), so far as they are capable of application and are not inconsistent with a provision made by or under the Act by or under which the jurisdiction is invested;
>
> in addition to any other conditions or restrictions subject to which the jurisdiction is expressed to be invested.

6.31 The effect of this provision is that the condition in s 39(2)(a) is intended to apply in all cases, while the conditions in s 39(2)(c) and (d) are generally applicable but will give way to contrary provisions in later federal legislation.

Problems with the current law and practice

Operation of s 39

6.32 The effect of s 39 in apparently depriving the States of jurisdiction in s 75 matters and then investing them with federal jurisdiction in ss 75 and 76 matters, created much confusion in the law for many years. State courts arguably possessed two separate sources of s 76 jurisdiction — federal jurisdiction, which was subject to the conditions listed in s 39(2), and state jurisdiction, which belonged to them as courts of general jurisdiction and was not subject to conditions.[258]

254 *Adams v Cleeve* (1935) 53 CLR 185, 190–191 (Rich, Dixon and Evatt JJ).
255 *R v Ward* (1978) 140 CLR 584, 589.
256 *Goward v Commonwealth* (1957) 97 CLR 355. See also *Seaegg v The King* (1932) 48 CLR 251; *Ffrost v Stevenson* (1937) 58 CLR 528, 570–571 (Dixon J).
257 *Judiciary Act 1968* (Cth).
258 The jurisprudential history of s 39 is described in Z Cowen and L Zines (1978), 200–214.

6.33 The High Court put an end to these difficulties in 1971 in *Felton v Mulligan*.[259] That case held that federal jurisdiction excluded the operation of concurrent state jurisdiction due to s 109 of the Constitution, which renders a state law invalid to the extent that it is inconsistent with a Commonwealth law. As Barwick CJ observed, 'there is no State jurisdiction capable of concurrent exercise with the federal jurisdiction invested in the State court'.[260]

6.34 The Commission notes that the two-step procedure in s 39 was adopted solely for the purpose of attaching conditions to the exercise of federal jurisdiction in state courts. In DP 64 the Commission asked whether this approach was necessary to the extent that these conditions were no longer thought to be appropriate. The Commission also asked whether the conferral of federal jurisdiction on state courts might in any case be achieved more transparently.

Section 39A

6.35 Section 39A is problematic in several respects. First, s 39A(1)(a) is problematic in so far as it purports to limit the capacity of the Commonwealth Parliament to alter the conditions set out in s 39(2)(a) by later legislation. In accordance with fundamental principles of statutory interpretation, the limitation in s 39A(1)(a) may be departed from by clear and unequivocal language, notwithstanding the attempt to ensure compliance with it.[261]

6.36 Second, the conditions on which state courts exercise federal jurisdiction may vary from one subject area to another. This possibility arises because s 39A(1)(b) purports to make the conditions in s 39(2)(c) and (d) apply only so far as they are capable of application and not inconsistent with the Act conferring jurisdiction. Over time this may undermine the goals of s 39 in attaching general conditions to the exercise of federal jurisdiction.

6.37 Moreover, the language of s 39A(1)(b) arguably does little more than reiterate two accepted canons of statutory interpretation — a later Act impliedly repeals an earlier Act with which it is inconsistent, and a general Act usually gives way to a special Act with which it is inconsistent.[262]

Consultations and submissions

6.38 The view generally expressed to the Commission in consultations and submissions was that s 39 was complex and had a problematic relationship with

259 *Felton v Mulligan* (1971) 124 CLR 367, overturning *Lorenzo v Carey* (1921) 29 CLR 243.

260 *Felton v Mulligan* (1971) 124 CLR 367, 373 (Barwick CJ). See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 561 (McHugh J).

261 *Goodwin v Phillips* (1908) 7 CLR 1, 7 (Griffith CJ). See generally, D Pearce and R Geddes (1996), 198–205.

262 *Goodwin v Phillips* (1908) 7 CLR 1, 14 (O'Connor J).

s 39A.[263] It was said that a simple and straightforward procedure was needed to invest federal jurisdiction in state courts.[264] Wendy Harris of the Victorian Bar submitted that s 39 should be clarified in so far as it removes and then confers federal jurisdiction on state courts. The provision should extend to all matters of federal jurisdiction under ss 75 and 76 of the Constitution.[265] She also expressed the view that s 39 was 'very hard to fathom' and could create complexities and ambiguities in determining the extent to which state legislatures can legislate in respect of the conditions attached to the exercise of federal jurisdiction by state courts.[266]

Commission's view

6.39 The Commission considers s 39 JA to be in need of reform. The section is unnecessarily complex in achieving its goal of investing federal jurisdiction in state courts. This is evidenced by the complex wording of the section and the uncertainty that existed until 1971 as to the effect of that wording.[267] The Commission recommends that s 39 be redrafted in simple language that invests federal jurisdiction in state courts within the limits of their respective jurisdictions.

6.40 The legislation should make clear that the conferral of federal jurisdiction on state courts extends to all matters enumerated in ss 75 and 76 of the Constitution; applies to matters of original and appellate jurisdiction; and is subject to any legislative provision to the contrary.

6.41 The Commission is also of the view that the relationship between the *Judiciary Act* and the specific Acts that confer federal jurisdiction on state courts should be clarified. The Commission considers that amendment to the general jurisdictional provisions in ss 39 or 39A is unlikely to achieve this goal because of the diverse circumstances in which federal legislation invests jurisdiction in state courts, both in terms of the type of court and the range of subject matter.

6.42 The Commission recommends that the Attorney-General order a review of all Acts that invest federal jurisdiction in state courts. The review should examine the relationship between those Acts and the relevant provisions of the *Judiciary Act* for the purpose of determining whether the specific Acts remain necessary or desirable. To the extent that specific Acts should be preserved, the relationship between those Acts and ss 39 and 39A JA should be clarified through the use of cross-references. Such a review would enhance the clarity, accessibility

263 W Harris, *Submission J015*, 6 March 2001; P Brazil and K Boreham, *Consultation*, Canberra, 22 February 2001; D O'Brien, *Consultation*, Canberra, 22 February 2001; The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001.
264 Supreme Court of South Australia, *Consultation*, Adelaide, 15 March 2001.
265 W Harris, *Submission J015*, 6 March 2001.
266 Ibid.
267 *Felton v Mulligan* (1971) 124 CLR 367.

and consistency of these various jurisdictional provisions without imposing rigid uniformity.

6.43 Finally, the Commission notes that s 39A purports to identify the manner in which conditions attach to the exercise of federal jurisdiction, where that jurisdiction is invested in state courts by subsequent legislation. The Commission considers that the section should be amended to provide that the federal jurisdiction invested in state courts pursuant to s 39 is subject to the conditions or restrictions stipulated in any other Act of Parliament. This change would clarify the operation of s 39 in relation to subsequent legislation and eliminate the ambiguities in the current section.

Recommendation 6–1. Section 39 of the *Judiciary Act*, which invests state courts with federal jurisdiction, should be redrafted in simple language that invests federal jurisdiction in state courts within the limits of their respective jurisdictions. The provision should:

(a) extend to all matters of original federal jurisdiction within the meaning of ss 75 and 76 of the Constitution;

(b) extend to all matters of appellate federal jurisdiction within the meaning of ss 75 and 76 of the Constitution; and

(c) be subject to the *Judiciary Act* and to any other Act of Parliament that expressly limits or prohibits the exercise of federal jurisdiction (whether original or appellate) by state courts.

Recommendation 6–2. The Attorney-General should order a review of the relationship between ss 39 and 39A of the *Judiciary Act* and the specific federal Acts that confer federal jurisdiction on state courts or impose conditions on its exercise. The review should consider the extent to which provisions of each specific Act remain necessary or desirable and whether the relationship between the provisions might be harmonised by greater use of cross-referencing.

Recommendation 6–3. Section 39A of the *Judiciary Act* should be amended to provide that the federal jurisdiction invested in state courts pursuant to s 39 is subject to the conditions or restrictions stipulated in any other Act of Parliament.

Attaching Conditions to the Exercise of Federal Jurisdiction

6.44 Section 39(2) JA imposes three conditions or restrictions on the exercise of federal jurisdiction by state courts. Until 1976 there was a fourth condition relating to appeals to the High Court from state courts below the level of the Supreme Court.[268] The current conditions are as follows:

> (a) A decision of a Court of a State, whether in original or in appellate jurisdiction, shall not be subject to appeal to Her Majesty in Council, whether by special leave or otherwise.
>
> (c) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.
>
> (d) The federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction, or an arbitrator on whom the jurisdiction, or part of the jurisdiction, of that Court is conferred by a prescribed law of the State, within the limits of the jurisdiction so conferred.

6.45 This provision raises a fundamental policy question of whether or to what extent the Commonwealth should attempt to prescribe the manner in which state courts exercise federal jurisdiction. There is little doubt that the regulation of state courts in exercising federal jurisdiction can raise political sensitivities between the Commonwealth and the States, and between their respective court systems.

6.46 One view is that the Commonwealth should accept state courts as it finds them. This derives from the idea that state courts provide a service to the federal government when they exercise federal jurisdiction, albeit one that has an express constitutional foundation. This service relieves the federal government of the financial and administrative burden of establishing and maintaining a panoply of federal courts to adjudicate all matters of federal jurisdiction. According to this view, the Constitution 'while enabling the Commonwealth Parliament to utilise the judicial services of state courts, recognises in the most pronounced and unequivocal way that they remain "state courts"'.[269]

6.47 An alternative view is that it is legitimate and desirable for the Commonwealth to seek to ensure that federal jurisdiction is applied uniformly in all Australian courts, whether they be federal or state.

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268 Section 39(2)(b) was repealed by *Judiciary Amendment Act 1976* (Cth), s 8.

269 *R v Murray; Ex parte Commonwealth* (1916) 22 CLR 437, 452 (Isaacs J).

Privy Council appeals — section 39(2)(a)

6.48 The first condition specified by s 39(2) prevents appeals being taken from a state court to the Privy Council when exercising federal jurisdiction. This condition was based on the policy that constitutional cases in particular should find their ultimate solution in the High Court of Australia.[270] The condition may be seen as one of a range of measures designed to restrict, and eventually eliminate, appeals from all Australian courts to the Privy Council.[271]

6.49 After federation, there was an evolutionary process by which appeals to the Privy Council were gradually reduced. The details of those developments are canvassed in DP 64 and need not be repeated here.[272] It is sufficient for present purposes to note that this objective was achieved by the passage of the *Australia Act 1986* (Cth) and the *Australia Act 1986* (Imp). These Acts abolished the remaining channel of appeal to the Privy Council from state Supreme Courts in matters of state law, and indeed any matter in any jurisdiction in any Australian court. Section 11(1) of the *Australia Act 1986* (Cth) provides:

> Subject to subsection (4) below,[273] no appeal to Her Majesty in Council lies or shall be brought, whether by leave or special leave of any court or of Her Majesty in Council or otherwise, and whether by virtue of any Act of the Parliament of the United Kingdom, the Royal Prerogative or otherwise, from or in respect of any decision of an Australian court.

6.50 In view of this provision, in DP 64 the Commission asked whether s 39(2)(a) had any continuing relevance.

State limitations on High Court appeals — section 39(2)(c)

6.51 The purpose of the condition imposed by s 39(2)(c) is to nullify the effect of state laws that seek to limit the right of appeal to the High Court from the courts of that State. The provision reinforces the High Court's role as the final arbiter of Australian law by recognising the right of the High Court to grant leave to appeal notwithstanding any state law prohibiting an appeal.

6.52 In DP 64, the Commission asked whether s 39(2)(c) might be unnecessary in the light of the High Court's appellate jurisdiction conferred by s 73 of the Constitution and s 35 JA. Section 73 of the Constitution implicitly guarantees certain channels of appeal from state courts to the High Court (subject to legislative exceptions and regulations) and would thus invalidate any inconsistent state prohibition on appeals. Section 35 JA, which deals generally with appeals to the

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270 H Renfree (1984), 541. See also *Felton v Mulligan* (1971) 124 CLR 367, 395 (Windeyer J).
271 A Mason (2000), 95, 100–102; J Bennett (1980), 95.
272 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 2.222–2.229.
273 s 11(4) of the *Australia Act 1986* (Cth) relates to transitional appeals.

High Court from judgments of the Supreme Court of a State, whether or not in the exercise of federal jurisdiction, may override any inconsistent state laws pursuant to s 109 of the Constitution.

Qualifications of state magistrates — section 39(2)(d)

6.53 Section 39(2)(d) states that when a state court exercises federal jurisdiction summarily, the jurisdiction must be exercised by a person falling within one of three classes. These are (i) a stipendiary, police or special magistrate; (ii) a state magistrate specially authorised by the Governor-General to exercise such jurisdiction; or (iii) an arbitrator on whom jurisdiction is conferred by state law.

6.54 Courts of summary jurisdiction refer to courts that are generally presided over by magistrates, being courts of the lowest tier in the court hierarchy, exercising limited criminal and civil jurisdiction. Until the establishment of the Federal Magistrates Service in 1999, only the States and Territories had courts of summary jurisdiction.[274]

6.55 The purpose of the condition probably relates to a federal concern with the qualifications or quality of persons exercising the judicial power of the Commonwealth. Traditionally, stipendiary magistrates were legally qualified, full-time adjudicators while lay magistrates were not, yet both exercised summary jurisdiction in state courts. There was an apparent concern that some lay magistrates might not be suitable to exercise federal jurisdiction by reason of their lack of formal legal qualifications, experience or expertise.

6.56 One concern that has been raised in relation to s 39(2)(d) is whether it infringes an implied constitutional limitation on the investiture of state courts with federal jurisdiction. It was earlier mentioned that the Commonwealth Parliament can not interfere with the structure or organisation of state courts when investing them with federal jurisdiction. It might be thought that s 39(2)(d) breaches this rule by defining the personnel who may exercise federal jurisdiction. In *Troy v Wrigglesworth*,[275] s 39(2)(d) was held to be valid in so far as it prevented a lay magistrate from exercising federal jurisdiction. The provision was upheld again by the High Court in *Queen Victoria Memorial Hospital v Thornton*[276] and by Brennan J in *Brown v The Queen*.[277]

274 However, note that s 26 of the *Acts Interpretation Act 1901* (Cth) excludes the Federal Magistrates Service from the definition of 'court of summary jurisdiction', and s 16C excludes a Federal Magistrate from the definition of a 'Magistrate'.

275 *Troy v Wrigglesworth* (1919) 26 CLR 305.

276 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144.

277 *Brown v The Queen* (1986) 160 CLR 171, 200.

6.57 In DP 64 the Commission asked whether the categories of persons identified in the paragraph (for example 'stipendiary, police or special magistrate') are relevant to current law and practice in Australia. It also asked whether the section, as currently framed, achieves its presumed goal of ensuring that federal jurisdiction is exercised only by suitably qualified persons.

6.58 The evolution of the role of magistrates — from their beginnings as honorary justices of the peace carrying out administrative, law enforcement and judicial functions in the colonies, to their modern judicial function — was not complete at the time the *Judiciary Act* was enacted. Consequently, many of the distinctions drawn in s 39(2)(d), though relevant in 1903, are arguably no longer meaningful.

6.59 At the time of federation, the magistracy was generally part of the public service and suffered the consequential detriments associated with lateral appointment and 'insider preference'. Today, however, state magistrates are no longer part of the public service, are structurally independent, are under the administration of a Chief Magistrate who reports directly to Cabinet, and are appointed by the Executive.[278]

6.60 Over time, the role of magistrates also became more judicial than administrative; police magistrates became stipendiary magistrates; lay magistrates were prohibited from sitting in certain courts of summary jurisdiction; honorary appointment became correspondingly rare; and the magistracy acquired a degree of judicial independence.[279]

6.61 State statutes now require magistrates to be legally qualified and to be admitted to practice as a barrister or solicitor in the Supreme Court of the relevant State, in most cases with at least five years experience.[280] These provisions may have eliminated the concerns once addressed by 39(2)(d) that a magistrate might be inadequately qualified or experienced for the summary exercise of federal jurisdiction.

6.62 An exception is Western Australia, where s 8 of the *Local Courts Act 1904* (WA) provides that the Governor may appoint magistrates of Local Courts and may assign to a magistrate such courts as he or she thinks fit. However, as discussed below, the Commission was advised that Western Australia in practice appoints legally qualified persons as magistrates.

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278 J Lowndes (2000), 518.

279 Ibid, 514–515.

280 Ibid, 525–527. See *Local Courts Act 1982* (NSW), s 12; *Stipendiary Magistrates Act 1991* (Qld), s 4; *Magistrates Act 1983* (SA), s 5; *Magistrates Court Act 1987* (Tas), s 8; *Magistrates Court Act 1989* (Vic), s 7; *Magistrates Court Act 1930* (ACT), s 8; *Magistrates Act 1991* (NT), s 5.

6.63 The Commission also notes that the term 'stipendiary' has been dropped in many States[281] because nearly all magistrates are now salaried and appointed pursuant to statute. The use of the term 'special magistrate' also appears outdated. This was the generic name used for both paid and unpaid magistrates in the Northern Territory when that area was under the control of South Australia (1863–1911),[282] but the term is no longer in use. In New South Wales, the 'very anachronistic designation of "police magistrate"' [283] was abolished by the *Justices Amendment Act 1947* (NSW).

6.64 Determining the suitability of magistrates to exercise federal jurisdiction by reference to their formal title may be an inappropriate safeguard of quality. In an earlier report, the Commission canvassed concerns about generalist magistrates adjudicating family law matters and recommended that specialist magistracies be developed to exercise federal family law jurisdiction.[284]

6.65 One response to concerns about the quality of magistrates might be for federal legislation to prescribe standards for appointment as a state magistrate exercising federal jurisdiction. These standards might be prescribed by legislation or they might have less formal status, such as guidelines. Subject to constitutional constraints imposed by the need to respect the structure and constitution of state courts, these standards might extend to matters such as legal qualifications, terms of appointment, experience and training.

6.66 An indication of some of the factors that might be considered in formulating these standards can be derived from the recently established Federal Magistrates Service. The *Federal Magistrates Act 1999* (Cth) contains a schedule concerning personnel provisions relating to federal magistrates. It provides, for example, that a person must not be appointed as a federal magistrate unless he or she has been enrolled as a legal practitioner of the High Court or a Supreme Court of a State or Territory for at least five years. Importantly, in terms of establishing specialisation, under s 12(3) of the Act, the Chief Federal Magistrate may, subject to consultation, make arrangements as to which federal magistrate is to constitute the Federal Magistrates Service in particular matters or classes of matters.

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281 Queensland, Western Australia and Northern Territory still use the term 'stipendiary magistrate' in their legislation: *Stipendiary Magistrates Act 1991* (Qld); *Stipendiary Magistrates Act 1957* (WA); *Stipendiary Magistrates Act 1991* (NT).

282 *Local Courts Ordinance 1850* (SA).

283 J Lowndes (2000), 517.

284 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report No 84 (1997), para 15.61–15.74, rec 130. The establishment of the Federal Magistrates Service will have an impact on the extent to which state and territory magistrates exercise family law jurisdiction.

Consultations and submissions

6.67 In consultations and submissions the view was strongly expressed that the passage of the *Australia Act 1986* (Cth) had made s 39(2)(a) obsolete and that the provision should be repealed.[285]

6.68 It was also generally agreed that s 39(2)(c) should be clarified, perhaps by amendment to s 35.[286] The Law Council of Australia considered that there was 'no harm in a statute making explicit what is implicit in the Constitution'.[287]

6.69 There were mixed views about the condition in s 39(2)(d). The Commission received information confirming that there are now very few lay magistrates in Australia.[288] Those who remained tended to be the most experienced magistrates, because the requirement of legal qualifications was introduced some time ago in most States and Territories. In some jurisdictions Justices of the Peace exercised summary jurisdiction, although rarely in federal civil matters, and their activity was mainly reserved for remote rural areas in which no magistrate was available. Western Australian and Norfolk Island still used lay magistrates in certain matters, but this was exceptional.[289]

6.70 As to the effectiveness and relevance of s 39(2)(d), some who commented to the Commission contended that the condition achieves its purpose. The language may be outdated, but its meaning is generally understood and observed. According to this view, the provision should be retained unaltered and should not be expanded to impose additional requirements on the qualifications of state magistrates.[290]

6.71 Several of those consulted considered that if the Commonwealth was unhappy with the quality of justice dispensed by state magistrates exercising federal jurisdiction, then Parliament should confer jurisdiction on its own courts,

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285 W Harris, *Submission J015*, 6 March 2001; Law Council of Australia, *Submission J037*, 6 April 2001; Court of Appeal (NSW), *Consultation*, Sydney, 19 March 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001.

286 W Harris, *Submission J015*, 6 March 2001.

287 Law Council of Australia, *Submission J037*, 6 April 2001.

288 A Moss, *Consultation*, Adelaide, 15 March 2001; Court of Appeal (NSW), *Consultation*, Sydney, 19 March 2001; Law Institute of Victoria, *Consultation*, Melbourne, 15 February 2001; Supreme Court of Victoria, *Consultation*, Melbourne, 16 February 2001; Department of Justice (Vic), *Consultation*, Melbourne, 15 February 2001; Magistrates Court of Queensland, *Consultation*, Brisbane, 8 March 2001; H Bradley, *Consultation*, Darwin, 2 March 2001.

289 Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001; R Cahill, *Consultation*, Canberra, 22 February 2001.

290 Law Council of Australia, *Submission J037*, 6 April 2001; M Sexton SC, *Consultation*, Sydney, 19 February 2001.

for example, the Federal Magistrates Service.[291] The Solicitor-General for New South Wales, Michael Sexton SC, summarised these concerns as follows:

> In my view, these conditions should be retained. Almost all Magistrates in Australia today are stipendiary Magistrates. The addition of further qualifications is likely to lead to uncertainty and confusion. Furthermore, it may arguably be unconstitutional to require State Magistrates to possess qualifications not required under State law, on the basis that this amounts to changing the "constitution of the court". … In any event, the fact that stipendiary Magistrates have been determined by the State to have sufficient qualifications to justify their employment should be an adequate indication of their ability to exercise federal jurisdiction. …
>
> [T]he overriding principle is still, it is submitted, that the Commonwealth Parliament must take State courts as it finds them. This is because, as the High Court pointed out in *Le Mesurier*, the Parliament has the power to create federal courts if the State courts are not suitable for the task envisaged.[292]

6.72 An alternative view was that the purpose of s 39(2)(d) would be better achieved by a minimum qualification requirement.[293] One comment was that the period of enrolment as a legal practitioner is not the only relevant issue in determining whether a state or territory magistrate should exercise federal jurisdiction.[294]

6.73 Finally it was said that s 39(2)(d) may be constitutionally invalid in so far as it allows federal jurisdiction to be exercised by an arbitrator. High Court jurisprudence has held that federal jurisdiction must be exercised by Chapter III Courts, which may not include arbitrators.[295] Professor Geoffrey Lindell stated:

> The provisions in s 39(2)(d) of the *Judiciary Act* which envisage the exercise of federal jurisdiction by an *arbitrator* may require attention in the light of the *Wakim* case and, generally, the modern High Court's concerns about Ch III of the Constitution. An arbitrator is unlikely to be a "court" for the purposes of s 77(iii) of the Constitution. This is so even if the arbitrator is appointed by the courts designated under condition (d), despite the more liberal approach taken in modern times to the delegation of jurisdiction to officers of a court.[296]

Commission's view

6.74 The Commission is of the view that the function of s 39(2)(a) has been superseded by the wide-ranging changes to the law relating to Privy Council

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291 Court of Appeal (NSW), *Consultation*, Sydney, 19 March 2001; Attorney-General's Department (NSW), *Submission J002*, 28 June 2000; M Sexton SC, *Submission J009*, 23 February 2001.

292 M Sexton SC, *Submission J009*, 23 February 2001.

293 W Harris, *Submission J015*, 6 March 2001.

294 B Campbell, *Correspondence*, 20 April 2001.

295 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Northern Territory v GPAO* (1999) 196 CLR 553; *Spinks v Prentice* (1999) 198 CLR 511; *Eastman v The Queen* (2000) 172 ALR 39.

296 G Lindell, *Submission J012*, 5 March 2001. Contrast s 33A JA, the validity of which was upheld in *Minister for Home Territories v Smith* (1924) 35 CLR 120.

appeals, and in particular by the enactment of the *Australia Act 1986* (Cth). The Commission considers that s 39(2)(a) no longer serves a useful purpose and should be repealed.

6.75 The Commission also considers that s 39(2)(c) is unnecessary and should be repealed. Section 39(2)(c) seeks to achieve the valuable objective of ensuring that state law does not interfere with a right of appeal from a state court to the High Court. That objective may be achieved by the operation of s 73 of the Constitution, or alternatively by the paramount effect of federal laws relating to appeals to the High Court. The Commission considers that the objective of s 39(2)(c) could be achieved more transparently than is presently the case. Section 35 provides for appeals from state courts to the High Court. The Commission recommends that this section should be amended to provide that any state law that purports to restrict or limit an appeal from a state court to the High Court shall not apply.

6.76 In relation to s 39(2)(d), the Commission is of the view that the essential purpose of the condition is to ensure that state magistrates who exercise federal jurisdiction have appropriate legal qualifications and experience. The Commission considers that this objective is met by requiring state magistrates exercising federal jurisdiction to be eligible for admission as a legal practitioner in the Supreme Court of that State. In Chapter 36, equivalent recommendations are made in relation to the Territories. The Commission notes that the effect of the mutual recognition legislation is to ensure that a person is eligible for admission as a legal practitioner in one State if he or she is eligible for admission in another State or Territory.[297]

6.77 In the Commission's view, it is important that federal jurisdiction be exercised by persons having appropriate legal qualifications. However, the Commission does not support the application to state magistrates of a separate federal standard, such as that set out in the *Federal Magistrates Act 1999*. There may be constitutional difficulties in imposing federal standards because of the requirement that Parliament must take state courts as it finds them when investing them with federal jurisdiction. In practice, magistrates with appropriate federal qualifications may not be readily available across the state to hear federal matters, particularly in remote communities. This could cause delays and additional costs for the parties. Moreover, in those States (such as Western Australia) in which lay magistrates still exercise civil jurisdiction, magistrates who lacked legal qualifications would in every case have to identify the state or federal basis of their jurisdiction if they were to continue adjudicating at all.

6.78 In this respect the Commission agrees with the views expressed by the Solicitor-General for New South Wales, namely, that the fact that magistrates have been determined by a State to have sufficient qualifications to justify their

297 *Mutual Recognition Act 1992* (Cth), Pt 3.

employment should be an adequate indication of their ability to exercise federal jurisdiction. However, the Commission would add the important qualification that the magistrate must have the legal qualifications necessary for admission as a legal practitioner of that State.

6.79 The Commission adds that the categories of magistrate identified in s 39(2)(d) are anachronistic. The term 'stipendiary' has been abandoned in many States and the terms 'special magistrate' and 'police magistrate' are outdated. Any amendment to s 39(2)(d) should reflect these changes in usage.

Recommendation 6–4. In view of the abolition of all appeals from Australian courts to the Privy Council by the *Australia Act 1986* (Cth) and the *Australia Act 1986* (Imp), s 39(2)(a) of the *Judiciary Act* is obsolete and should be repealed.

Recommendation 6–5. Section 39(2)(c) of the *Judiciary Act*, which provides that the High Court may grant special leave to appeal from a state court notwithstanding anything to the contrary in a state law, should be repealed. Section 35 of the *Judiciary Act*, which deals generally with appeals to the High Court, should be amended to provide that any state law that purports to restrict or limit an appeal from a state court to the High Court shall not apply.

Recommendation 6–6. Section 39(2)(d) of the *Judiciary Act* should be amended to provide that federal jurisdiction may be exercised by a state magistrate only if the magistrate is qualified for admission as a legal practitioner in the Supreme Court of that State. [See Recommendation 36–2 in relation to the Territories.]

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7. Exclusive or Concurrent Jurisdiction?

Contents

7.1 Section 77(ii) of the Constitution empowers Parliament to define the extent to which the jurisdiction of any federal court shall be exclusive of that of state courts in respect of the matters listed in ss 75 and 76 of the Constitution. Section 38 JA exercises that power by making the jurisdiction of the High Court in certain matters exclusive of the jurisdiction of state courts. Section 38 has changed very little since it was first enacted in 1903 and currently lists five categories of exclusive original jurisdiction. The section provides as follows:

> Subject to sections 39B and 44, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:
>
> (a) matters arising directly under any treaty;
>
> (b) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;
>
> (c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;
>
> (d) suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth;
>
> (e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.

The Form of Section 38

7.2 Section 38 is presently couched in language that appears to suggest that the listed matters are *exclusive to* the High Court. The heading of the section is given as 'Matters in which jurisdiction of High Court exclusive'. Yet, consistently with the terms of s 77(ii) of the Constitution, s 38 states only that the listed matters are *exclusive of* the jurisdiction of the States.

7.3 By way of example, a matter in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court falls within s 38(e) and thus cannot currently be determined by a state court. However, this does not prevent jurisdiction in that class of matter being conferred on another federal court, and in fact s 39B(1) does so in respect of the Federal Court. As a result, the exclusivity of the High Court's original jurisdiction depends not only on the terms of s 38, which excludes such jurisdiction from state courts, but on whether that jurisdiction has been conferred on other federal or territory courts by another statutory provision.

7.4 In DP 64, the Commission asked whether the *Judiciary Act* should be amended to clarify the nature of the exclusivity of s 38. In submissions and consultations the Commission was informed that the section needed amendment in this respect.[298] The Law Council of Australia remarked:

> Not all of these matters are, or should be, exclusive to the High Court. Consequently section 38 of the *Judiciary Act* should be amended to make it clearer that the listed matters are not necessarily exclusive to the High Court.[299]

7.5 The Commission agrees with these views and recommends that s 38 and the heading to that section be amended to clarify that the matters specified in the section are exclusive of the federal jurisdiction exercised by state courts rather than exclusive to the jurisdiction of the High Court.

Recommendation 7–1. Section 38 of the *Judiciary Act*, and the heading to that section, should be amended to clarify that the matters specified in the section are exclusive of the federal jurisdiction exercised by state courts rather than exclusive to the jurisdiction of the High Court.

General Considerations

7.6 The matters of exclusive jurisdiction listed in s 38 reflect an historical concern that state courts may not be suitable to adjudicate certain classes of federal dispute. For example, it has been said that:

- matters arising directly under a treaty (s 38(a)) involve significant issues of national interest and should be determined by the nation's highest court;
- suits between States (s 38(b)) are not suitable for determination in a state court because of perceptions of local bias;

298 M Sexton SC, *Submission J009*, 23 February 2001; P Brazil, *Submission J010*, 22 February 2001; Law Council of Australia, *Submission J037*, 6 April 2001.

299 Law Council of Australia, *Submission J037*, 6 April 2001.

- suits between the Commonwealth and a State (s 38(c) and (d)) should be adjudicated in the High Court because, as the highest court in the land, it is seen as a neutral adjudicator of disputes between polities; and

- state courts should not have the power to grant public law remedies against Commonwealth officers (s 38(e)) because state courts are not part of the federal polity and should not exercise a supervisory jurisdiction in respect of matters concerning the activities of the federal government.

7.7 In DP 64 the Commission asked whether these justifications remained a valid basis for exclusive jurisdiction under s 38. During consultations several issues were raised, which questioned the desirability of excluding state courts from adjudicating some of the matters listed in s 38.

7.8 First, it is not necessarily correct to assume that all s 38 matters involve significant constitutional issues or questions of national importance such as would justify exclusive consideration by the High Court. For example, in *State Bank of New South Wales v Commonwealth Savings Bank of Australia*[300] an ordinary contractual dispute between banks fell within the High Court's exclusive jurisdiction because the matter was one between the Commonwealth and a State. The matter was accordingly commenced in the High Court but ultimately remitted to the Federal Court for determination.

7.9 Second, it was noted that s 38 was enacted before the creation of federal courts below the level of the High Court. The establishment of new federal courts with substantial civil jurisdiction, particularly the Federal Court, arguably reduces the need to have certain s 38 matters determined exclusively by the High Court.

7.10 Third, it was noted that courts other than the High Court do adjudicate matters falling within the subject matter of s 38 where those matters are remitted to them by the High Court. As discussed in Chapter 11, the remittal power was amended in 1984 to enable the High Court to remit any pending matter under s 38(a), (b), (c) or (d) to the Federal Court or any state or territory court.[301] It could not be said that state courts are inherently unsuitable for determining these federal matters.

7.11 Finally, it was remarked that if state courts were granted jurisdiction in relation to some or all of the matters in s 38, the power under s 40 to remove a matter into the High Court could be used to ensure that the Court determined any case of sufficient importance (see Chapter 15).

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300 *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1984) 154 CLR 579.

301 *Judiciary Amendment Act (No 2) 1984* (Cth). See also Law Council of Australia, *Submission J037*, 6 April 2001; *Bowtell v Commonwealth* (1989) 86 ALR 31; *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1984) 154 CLR 579, 582–584 (Gibbs CJ).

7.12 In the following sections of this chapter, the Commission considers each field of jurisdiction under s 38 to determine whether it is desirable for state courts to be excluded from exercising federal jurisdiction. In addition, although the jurisdiction of the Federal Court is not excluded by s 38, the Commission considers whether the Federal Court should be conferred with such jurisdiction to the extent that is does not already possess it.

Treaties Jurisdiction — Section 38(a)

Current law and practice

7.13 Section 75(i) of the Constitution identifies the first head of federal jurisdiction as matters 'arising under any treaty'. By force of that section the High Court has an entrenched original jurisdiction in those matters. State courts are also invested with jurisdiction in s 75(i) matters pursuant to the general conferral of federal jurisdiction on state courts by s 39 (see Chapter 6). However, that conferral is expressed to be subject to s 38(a), which provides that the jurisdiction of state courts is excluded in respect of matters arising 'directly' under any treaty. It would appear therefore that matters arising 'directly' under a treaty are excluded from state courts, although matters arising 'indirectly' under a treaty may be determined by state courts. The Federal Court has no explicit grant of jurisdiction pursuant to s 75(i).

Problems and options

7.14 A threshold issue is whether s 38(a) serves any practical purpose. To answer that question it is necessary to consider the purpose of s 75(i) and the difference in language between the provisions. According to the rule in *Walker v Baird*,[302] ratification of a treaty does not create direct rights or obligations for citizens. In order to have that effect, a treaty must be implemented by statute, and it is the statute not the treaty that has legal effect in domestic law. In Australia, the High Court has adopted a similar principle.[303]

7.15 Section 75(i) of the Australian Constitution was modelled closely on Article III, Section 2 of the United States Constitution. Under United States law, once a treaty is ratified by the Senate, it generally takes direct effect as the supreme law of the land without the need for legislative implementation. Professor Leslie Zines has suggested that s 38(a) was the result of unreflective copying from the United States Constitution, as was s 75(i).[304] Mark Leeming, on the other hand, suggests that the term 'directly' in s 38(a) was deliberately employed to ensure that state courts could continue dealing with matters arising indirectly under a treaty,

302 *Walker v Baird* [1892] AC 491.
303 *Chow Hung Ching v The King* (1948) 77 CLR 449; *Simsek v Macphee* (1982) 148 CLR 636, 641–642.
304 L Zines (2000), 286.

while matters of national importance that arise *directly* would be within the exclusive province of the High Court.[305] Leeming argues that a matter will arise directly under a treaty 'when some justiciable right, obligation or immunity is conferred, imposed or effected by the treaty itself, without intervention by domestic statute'.[306] This might occur where consequences flow from a change of status that is conferred by Australia's entry into a treaty — for example, changes to property rights, immunity from suit, the status of persons who were formerly aliens, and the precise location of international boundaries.[307]

7.16 In 1987 the Constitutional Commission's Advisory Committee on the Australian Judicial System concluded that s 75(i) could acquire practical meaning because of the broad interpretation given to the analogous phrase 'arising under' in cases concerning s 76(ii). The Committee contended that these cases could 'support the conclusion that a matter may arise under a treaty even though the treaty itself was not self-executing as a matter of Australian law'.[308]

7.17 In *Re East; Ex parte Nguyen*[309] the High Court commented that in order to attract the jurisdiction of the High Court under s 75(i) of the Constitution there had to be a 'matter' — that is, a justiciable controversy arising under a treaty. This was not established and, accordingly, the majority held that it was 'unnecessary and therefore inappropriate' to determine the precise scope of s 75(i).[310] Only Kirby J addressed the issue, adopting the broad view that:

> a matter arises under a treaty if, directly or indirectly, the right claimed or the duty asserted owes its existence to the treaty, depends upon the treaty for its enforcement or directly or indirectly draws upon the treaty as the source of the right or duty in controversy.[311]

7.18 The doubts that have been raised about the practical worth of s 75(i) also throw into question the usefulness of the subject matter in s 38(a). Additionally, there is an issue of resolving the differences implied by the use of the expressions 'arising directly' and 'arising indirectly' under treaties. In either case, matters arising under a treaty do not necessarily involve significant legal issues that warrant the attention of the High Court.

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305 M Leeming (1999), 176.
306 Ibid, 177.
307 Ibid, 175.
308 Advisory Committee to the Constitutional Commission (1987), 59.
309 *Re East; Ex parte Nguyen* (1998) 196 CLR 354. See also *R v Donyadideh* (1993) 115 ACTR 1.
310 *Re East; Ex parte Nguyen* (1998) 196 CLR 354, 362.
311 Ibid, 385. See also *Bluett v Fadden* (1956) 56 SR (NSW) 254, 261, where McLelland J stated that s 75(i) must refer to cases where the decision in a matter depends upon the interpretation of the treaty.

Consultations and submissions

7.19 It was generally agreed that the relationship between s 75(i) of the Constitution and ss 39 and 38(a) JA was confusing and unclear.[312] Similarly, the difference between a matter arising directly under a treaty and one arising indirectly was said to be difficult to discern.[313] The Law Council of Australia submitted that:

> The questions of when a matter arises under a treaty, and then — if it does — whether it arises directly or indirectly, are obscure legal questions. The questions have not been definitively resolved by the High Court. The questions arise infrequently in practice.[314]

7.20 The general view was that state supreme courts should be conferred with jurisdiction in matters arising under treaties, directly or otherwise, and that the *Judiciary Act* should be amended accordingly.[315] It was said that there was nothing intrinsic in treaty jurisdiction that required determination by a federal court. State courts had the expertise to deal with such matters and there was said to be merit in giving parties a choice of courts in which to litigate.

7.21 By contrast, the Law Council submitted that treaty matters are inherently federal and that the jurisdiction under s 38 should therefore continue to be exclusive of the States.[316] The Law Council considered that the Federal Court was an appropriate venue for the matters enumerated in s 38. It also suggested that the possibility of removing a proceeding into the High Court did not reduce the need for the High Court to have original jurisdiction that was exclusive of the States in the matters listed in s 38.[317]

Commission's views

7.22 The Commission recommends that s 38(a) be repealed. This would allow state courts to determine matters arising directly or indirectly under a treaty by force of the general investiture of federal jurisdiction in state courts under s 39.

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312 D Bennett QC, *Consultation*, Sydney, 20 February 2001; Law Council of Australia, *Submission J037*, 6 April 2001; P Brazil, *Submission J010*, 22 February 2001.

313 D Bennett QC, *Consultation*, Sydney, 20 February 2001.

314 Law Council of Australia, *Submission J037*, 6 April 2001.

315 Department of Justice (Vic), *Consultation*, Melbourne, 15 February 2001; D Bennett QC, *Consultation*, Sydney, 20 February 2001; P Brazil and K Boreham, *Consultation*, Canberra, 22 February 2001; The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001; Supreme Court of Western Australia, *Consultation*, Perth, 22 March 2001; M Sexton SC, *Consultation*, Sydney, 19 February 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001; Supreme Court of South Australia, *Consultation*, Adelaide, 15 March 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; W Harris, *Submission J015*, 6 March 2001; Law Council of Australia, *Correspondence*, 20 April 2001.

316 Law Council of Australia, *Submission J037*, 6 April 2001.

317 Ibid.

7.23 The Commission notes that the current understanding of the relationship between international law and domestic law in Australia is probably hostile to the view that s 75(i) of the Constitution or s 38(a) JA have substantive content. Nevertheless, eminent scholars have regarded the jurisdiction as worthy of preservation because of its potential for future development.[318] It is on this basis that the Commission recommends amendments to the section, which take into account developments in Australia's international engagement since 1903.

7.24 When s 38(a) was drafted, international law was in its infancy. The establishment of the League of Nations after the First World War and the United Nations after the Second World War brought with it enormous growth in the number, breadth and complexity of treaties to which Australia is a party. The subject matter of these treaties is no longer confined to international topics such as diplomatic representation, the laws of war and the laws of peace. Rather, their subject matter reaches into the heartland of human rights, industrial relations, environmental regulation, family life, commercial dealings and many other fields.

7.25 As a result of these developments, the range of disputes that may involve a 'matter arising under any treaty' is potentially substantial, depending on the interpretation given to the qualifying words 'arising under'. In the Commission's view, this diversity demonstrates the need to ensure that state courts are not excluded from adjudicating treaty claims. There may be cases in which a state court is the most appropriate court to adjudicate a matter, notwithstanding its connection to a treaty.[319]

7.26 The Commission notes that the High Court is always able to hear appeals in relation to matters arising under a treaty, subject to the grant of special leave to appeal, even if a state court exercises original jurisdiction. Moreover, matters can be removed from any court into the High Court pursuant to s 40 if their constitutional or public importance warrants it. For these reasons, the Commission recommends that jurisdiction in matters arising under a treaty, whether directly or indirectly, should not be excluded from state courts.

Recommendation 7–2. Section 38(a) of the *Judiciary Act*, which concerns matters arising directly under a treaty, should be repealed, thereby enabling such matters to be commenced in state courts.

318 Advisory Committee to the Constitutional Commission (1987).
319 Examples are cited by M Leeming (1999), 174.

Suits between Polities in the Federation — Section 38(b), (c) and (d)

Current law and practice

7.27 Section 38(b) provides that the jurisdiction of the High Court shall be exclusive of that of state courts in suits between States, between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State. Section 38(b) is related to s 75(iv) of the Constitution, which provides that the High Court has original jurisdiction in matters between States. Section 75(iv) also provides that the High Court shall have original jurisdiction in matters between residents of different States — the so called 'diversity jurisdiction' — but this aspect of s 75(iv) does not find expression in s 38(b).

7.28 Sections 38(c) and (d) grant the High Court exclusive jurisdiction in suits by the Commonwealth or its representatives against a State or its representatives and vice versa. These provisions relate to s 75(iii) of the Constitution, which confers original jurisdiction on the High Court in matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.

7.29 A number of commentators have questioned the appropriateness of the High Court having original jurisdiction based solely on the diversity of residence of the parties.[320] However, the grant of original jurisdiction to the High Court in relation to suits between the States themselves has been considered by some to be appropriate because justiciable disputes between polities within a federation should be tried in a national court of undoubted impartiality.[321] To have disputes between States adjudicated in the courts of one of them might give rise to a perception of bias in some circumstances.

7.30 The clause in the United States Constitution on which s 75(iv) of the Australian Constitution was modelled was similarly premised on the notion that a court 'having no local attachments, will be likely to be impartial between the different States and their citizens [and] will never be likely to feel any bias inauspicious to the principles on which it is founded'.[322] However, this reasoning was diminished by the passage of the Eleventh Amendment to the United States Constitution in 1798, which withdrew from the federal judicial power suits commenced against one State by a citizen of another State. The Supreme Court's jurisprudence on this Amendment has promoted the view that federal courts are not

320 Z Cowen and L Zines (1978), 34; See also L Zines (2000), 284–285; M Pryles (1984); C Howard (1972); M Pryles and P Hanks (1974), 134–141; C Cook (1987).
321 Z Cowen and L Zines (1978), 34.
322 A Hamilton (1788).

necessarily to be regarded as ideal forums for the resolution of suits against States.[323]

Problems with current law and practice

7.31 As noted above, concerns about state court bias underpinned the provision in the United States Constitution by which suits between States were initially treated as part of the federal judicial power. However, in Australia the potential bias of state courts in dealing with disputes between States has not been considered a significant issue. Indeed, there was arguably no evidence of bias at the time the *Judiciary Act* was enacted, a view reflected in Professor Howard's statement that 'our state judiciary is and always has been above all suspicion of bias in favour of local residents or in any other matter'.[324]

7.32 Several questions also arise as to the interpretation of certain terms used in s 38(b), (c) and (d) and the relationship of those terms to similar expressions in s 75 of the Constitution. In addition to its reference to suits between 'States', s 38(b) makes exclusive to the High Court suits 'between persons suing or being sued on behalf of different States', as well as suits between a State, on the one hand, and a 'person suing or being sued on behalf of another State'. Similar expressions are used in s 38(c) and (d). Section 75(iv) speaks more narrowly of matters 'between States'. It is only in relation to the Commonwealth that the Constitution explicitly broadens the description of the party to include 'a person suing or being sued on behalf of the Commonwealth' (s 75(iii)). The operation of s 38 regarding suits in which a State is a party may thus be broader than that permitted by the Constitution, although the term 'State' and 'Commonwealth' are given such wide import that it is unlikely that the different nomenclature would make any difference in particular cases.

7.33 Section 38(c) also raises a practical problem that is explained by the following example. Suppose an action was brought against a Commonwealth instrumentality in a state court and that the instrumentality wished to cross-claim against the State itself. Under s 38(c), the instrumentality would be precluded from bringing the cross-claim because the claim would be a suit by the Commonwealth against a State. The practical effect is that the instrumentality would be required to bring separate proceedings with the attendant costs, delays and inconvenience. Exclusive jurisdiction may therefore make it difficult for a state court to do complete justice between the parties in suits involving two or more polities.

7.34 In DP 64 the Commission raised a number of options regarding s 38(b), (c) and (d). These included retaining the provisions or repealing them. In the latter case, a further option was to allow the parties to commence proceedings in a state

323 J Gibbons (1983), 1891–1892. See *Alden v Maine* (1999) 119 S Ct 2240.
324 C Howard (1972), 196.

court with the proviso that, if one or both parties seek it, the matter may be transferred to the Federal Court or the High Court. Alternatively, the position could be reversed so that such a matter normally begins in the Federal Court or the High Court but, if one or both parties seek it, the matter may be transferred to an appropriate state court.

Consultations and submissions

7.35 An overwhelming majority of comments received by the Commission in consultations and submissions asserted that the notion of bias in state courts is outdated.[325] There was no reason why state courts should not have the jurisdiction under s 38(b)–(d) as this would reduce the chance of arid jurisdictional disputes and allow the courts to determine the most appropriate forum.[326] Accordingly, it was said that state Supreme Courts should be given jurisdiction to determine the matters presently excluded by ss 38(b), (c) and (d).[327]

7.36 Only the Law Council of Australia considered that concerns about state court bias was a relevant issue when determining claims between polities. Although the Law Council did not regard federal courts as biased in matters involving the Commonwealth, it stated that:

> As a matter of principle, a dispute between states or between the Commonwealth and a state is a dispute that goes beyond the interests of any one state. Notwithstanding the general professionalism and impartiality of the state judiciaries, there is always the potential for an apprehension of bias if the judiciary of one state has to resolve a matter involving another state or the Commonwealth. The Law Council opposes amending section 38 of the *Judiciary Act* so as to permit suits between states or between the Commonwealth and a state to be commenced in a state court.[328]

7.37 There was general opposition to the option raised in DP 64 and described above, namely, that either party have the right to have the matter transferred to a federal forum if it so wished. It was considered that special rights of transfer were not required in suits between States or in suits between the Commonwealth and a State. The general view was that any application for proceedings to be transferred

325 The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001; Supreme Court of South Australia, *Consultation*, Adelaide, 15 March 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001.

326 Supreme Court of Western Australia, *Consultation*, Perth, 22 March 2001.

327 Department of Justice (Vic), *Consultation*, Melbourne, 15 February 2001; D Bennett QC, *Consultation*, Sydney, 20 February 2001; The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001; Supreme Court of Western Australia, *Consultation*, Perth, 22 March 2001; M Sexton SC, *Consultation*, Sydney, 19 February 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001; Supreme Court of South Australia, *Consultation*, Adelaide, 15 March 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001.

328 Law Council of Australia, *Submission J037*, 6 April 2001.

should be governed by the existing principles, such as those in the cross-vesting legislation (see Chapter 8).[329]

7.38 The Solicitor-General for New South Wales, Michael Sexton SC, suggested a variation on these alternatives to the effect that 's 38 should be amended to permit suits between States or between the Commonwealth and a State to commence in a state court, provided that both parties consent to such a course'.[330] However, he qualified this view by stating that 'objection to the proceedings being heard in the State court must be filed prior to the filing of any documents in answer to the claim or petition', so as to avoid waste of resources.[331]

7.39 There was very little concern expressed about the language of the provisions. The Law Council remarked:

> Does a person who is suing or being sued on behalf of a State for the purposes of section 38(b), (c) or (d) fall outside the constitutional meaning of 'State' in section 75(iv) of the Constitution? The Law Council submits that the correct answer to this question is clearly 'No'. … The Law Council recommends that no amendment be made to the phrases in section 38(b), (c) and (d) of the *Judiciary Act* relating to a 'person suing or being sued on behalf of a State'.[332]

7.40 In contrast, Solicitor-General for New South Wales said:

> Such an amendment would eliminate any uncertainty or litigation that may arise as a result of any disparity between the terms used in the Constitution and in the legislation.[333]

Commission's views

7.41 The Commission is of the view that any matter between States or between a State and the Commonwealth should be capable of being determined in a state court. The Commission agrees with the opinions expressed in a majority of consultations and submissions that perceptions of bias no longer provide an adequate foundation for the special treatment of the federal matters identified in s 38(b)–(d), if ever they did so. If there is a genuine concern about bias in a particular case, it can be dealt with by transfer of the matter to a different court or through the appellate process.

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329 M Sexton SC, *Consultation*, Sydney, 19 February 2001; Department of Justice (Vic), *Consultation*, Melbourne, 15 February 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001.

330 M Sexton SC, *Submission J009*, 23 February 2001.

331 Ibid.

332 Law Council of Australia, *Submission J037*, 6 April 2001.

333 M Sexton SC, *Submission J009*, 23 February 2001.

7.42 Nor does the Commission consider that such matters are inherently federal in nature. Suits between States may arise in relation to common law claims, including claims for damages in contract or tort. Such cases do not raise political sensitivities of such a nature as to warrant exclusive High Court jurisdiction. Similar principles apply to suits between the Commonwealth and a State.

7.43 Permitting state courts to exercise jurisdiction in those matters enumerated in s 38(b)–(d) will enhance access to justice by giving the parties a wider choice of forum. It will also avoid duplication of proceedings, such as those described above in relation to cross-claims. Expanding the jurisdiction of state courts therefore has the potential to reduce jurisdictional disputes between courts.

7.44 Accordingly, the Commission recommends that ss 38(b), (c) and (d) be repealed, thereby enabling state courts to determine matters between States, or between the Commonwealth and a State. The repeal of these provisions will simultaneously remove any problem caused by the inconsistency of language between s 38 and s 75 of the Constitution.

7.45 The Commission further concludes that there is no need for special provisions by which a party may transfer a matter to a federal court as of right. Any stay or transfer of a proceeding should be determined in accordance with established principles. These principles, which are discussed in detail in Part C, give a court flexibility to ensure that the proceedings accommodate the interests of the parties and the ends of justice.

Recommendation 7–3. Section 38(b) of the *Judiciary Act*, which concerns suits between States, should be repealed, thereby enabling such matters to be commenced in state courts. Any stay or transfer of such a proceeding should be determined in accordance with established principles.

Recommendation 7–4. Section 38(c) and (d) of the *Judiciary Act*, which concern suits by the Commonwealth against a State and suits by a State against the Commonwealth, should be repealed, thereby enabling such matters to be commenced in state courts. Any stay or transfer of such a proceeding should be determined in accordance with established principles. [See Recommendation 37–1 in relation to the Territories].

Jurisdiction of the Federal Court under s 38(a)–(d)

Current law

7.46 In DP 64 the Commission asked whether the Federal Court ought to be conferred with jurisdiction in some or all of the matters listed in s 38(a)–(d). Presently, the Federal Court does not have express jurisdiction under these heads. The Court may exercise jurisdiction in relation to the matters identified in s 38(a)–(d) in so far as the matter also arises under another head of jurisdiction within its competence. For example, a claim in which the Commonwealth sought a declaration against a State could be brought in the Federal Court, pursuant to s 39B(1A)(a) JA. However, the availability of other heads of jurisdiction lead to a partial coverage of the matters in s 38(a)–(d).

Consultations and submissions

7.47 The general view was that the Federal Court ought to be conferred with jurisdiction in relation to matters arising directly under any treaty.[334]

7.48 A clear majority of consultations and submissions also stated that the Federal Court should be conferred with jurisdiction to determine the matters described in ss 38(b), (c) and (d).[335] The Law Council of Australia stated that, as a general proposition, all the matters listed in section 38 should be dealt with by federal courts.[336] Wendy Harris of the Victorian Bar submitted that:

> it might be desirable to exclude some of these matters from section 38 altogether and confer correlative jurisdiction on the Federal Court under section 39B (eg with respect to treaty matters, suits between the Commonwealth and a state).[337]

7.49 Sir Anthony Mason commented that the Federal Court should have jurisdiction in relation to s 38 matters because it has developed significant experience in matters of federal law and is the most natural court to exercise such jurisdiction, although there was no reason to exclude state courts.[338]

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334 The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; W Harris, *Submission J015*, 6 March 2001; Law Council of Australia, *Submission J037*, 6 April 2001.

335 Department of Justice (Vic), *Consultation*, Melbourne, 15 February 2001; D Bennett QC, *Consultation*, Sydney, 20 February 2001; D Jackson QC, *Consultation*, Sydney, 19 March 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001.

336 Law Council of Australia, *Submission J037*, 6 April 2001.

337 W Harris, *Submission J015*, 6 March 2001.

338 The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001.

Commission's views

7.50 The Commission considers that the *Judiciary Act* should be amended to confer jurisdiction on the Federal Court in matters falling within s 38(a)–(d). The implementation of Recommendations 7–2 to 7–4 would have the effect of allowing state courts to adjudicate these particular categories of federal jurisdiction. In the Commission's view it would be incongruous to deny the Federal Court the equivalent jurisdiction. The Federal Court is a national court with a broad federal civil jurisdiction. It has experience in dealing with a range of complex issues, and would be well-suited to the task of adjudicating claims under s 38. Indeed, as noted above, it already does so when such a matter is remitted to it by the High Court.

7.51 There are compelling reasons for conferring jurisdiction on the Federal Court in matters arising under a treaty. This is so notwithstanding the uncertainty surrounding the limitation in s 75(i) of the Constitution that the matter must 'arise under' a treaty. The Federal Court has significant expertise in matters involving international law. This is evident in the Court's extensive work in intellectual property, extradition, and refugee law (see Chapters 4 and 20). As noted above in relation to state courts, the increasing significance of treaties in domestic law strongly suggests that there should be broad concurrent jurisdiction in matters arising under treaties.

7.52 In relation to jurisdiction under s 38(b), the Commission notes the historical argument that suits between States should be adjudicated by a neutral federal forum. As noted above, the Commission considers the notion of local bias in adjudication between polities to lack foundation in contemporary Australian circumstances. However, to the extent that the States may have an apprehension of bias, their concerns should be allayed by adjudication in the Federal Court which, like the High Court, is a national court owing no allegiance to either party.

7.53 In relation to the jurisdiction under s 38(c)–(d), the Commission considers that there are no compelling arguments to justify every dispute between the Commonwealth and a State being determined by the High Court. Such disputes may not involve significant legal questions and the Federal Court may be a more appropriate forum than the High Court in many circumstances.

Recommendation 7–5. As a corollary of Recommendations 7–2 to 7–4, s 39B of the *Judiciary Act* should be amended to confer additional federal jurisdiction on the Federal Court in relation to all matters (a) arising under any treaty, (b) between States, and (c) between a State and the Commonwealth. Any stay or transfer of such a proceeding should be determined in accordance with established principles. [See Recommendation 37–1 in relation to the Territories].

Public Law Remedies — Section 38(e)

Current law and issues

7.54 Section 38(e) provides that the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several courts of the States in 'matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court'. Section 38(e) is related to s 75(v) of the Constitution, which provides that the High Court has original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against 'an officer of the Commonwealth'. It should also be noted that the exclusivity of s 38(e) does not extend to the Federal Court, which is expressly conferred with such jurisdiction by s 39B(1) (see Chapter 4).

7.55 Section 38(e) raises an important policy issue that is not raised by the other provisions of s 38. That issue is whether the courts of one polity should be able to review the lawfulness of the conduct of officers of another polity in the federation, and to issue public law remedies to prohibit or compel performance of their duties.

7.56 In favour of retaining s 38(e) is the principle that the courts of one polity should not be able to sit in judgment on the lawfulness of officers of another polity in the exercise of their governmental functions. The direct restraint or compulsion by a court of an officer of the Commonwealth is a significant interference with the functions of the Commonwealth. It is arguable that only a federal court should have jurisdiction in such cases. To involve state courts in such disputes may raise political sensitivities about the responsibilities of federal and state courts in passing judgment on the lawfulness of conduct of governmental and judicial officers.

7.57 This appears to be the policy behind the current exclusion of state courts from issuing constitutional writs against Commonwealth officers under s 38(e). It would also appear to inform the conferral of that jurisdiction on the Federal Court under s 39B(1). The same policy is again evidenced in s 9 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), which provides that state courts do not have jurisdiction under the Act to review administrative decisions of an officer of the Commonwealth.

7.58 The opposing argument is that the importance of maintaining the rule of law and of restraining excesses of power support state courts having supervisory jurisdiction over governmental officers from any polity within the federation. On this view, giving the state courts jurisdiction to grant public law remedies against Commonwealth officers provides the broadest access to courts throughout Australia. State courts generally have more registries than federal courts, particularly in regional and rural areas. However, the accessibility of the Federal Court,

including by video link, might be seen to reduce the need for state and territory courts to be invested with jurisdiction to grant constitutional writs against Commonwealth officers by reason of the argument for access to justice.

7.59 A further issue is the relationship between s 38(e) and s 75(v) of the Constitution. Section 75(v) states that the High Court has original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against 'an officer of the Commonwealth'. However, s 38(e) extends to 'an officer of the Commonwealth or a federal court', but does not include relief by way of injunction.

7.60 The term 'officer of the Commonwealth' clearly refers to Commonwealth ministers[339] but it has also been held to encompass judges of the Family Court and the Federal Court.[340] The term is generally regarded as having a wide meaning, such as 'a person who is appointed by the Commonwealth to carry out a Commonwealth function or purpose'.[341] The inclusion of 'an officer of … a federal court' in s 38(e) therefore seems superfluous.

Consultations and submissions

7.61 The majority of those who made comments on this issue were opposed to the courts of one polity in the federation having jurisdiction to grant public law remedies in relation to the officers of another polity.[342] It was thought that to give state courts jurisdiction in s 38(e) matters could cause concern at a political and administrative level. However, it was also said that there should be parity in these jurisdictional arrangements: if state courts are not able to grant public law remedies against Commonwealth officers, federal courts (other than the High Court) should not be able to grant public law remedies against state officers.[343]

339 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd (No 1)* (1914) 18 CLR 54.

340 *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd (No 1)* (1914) 18 CLR 54.

341 P Lane (1997), 585. See also M Aronson and B Dyer (1996), 36–37.

342 Supreme Court of the ACT, *Submission J018*, 7 March 2001; W Harris, *Submission J014*, 26 February 2001; Law Council of Australia, *Submission J037*, 6 April 2001; Australian Government Solicitor, *Consultation*, Canberra, 5 June 2000; D Mossop, *Submission J025*, 15 March 2001; W Harris, *Submission J014*, 26 February 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; Federal Court of Australia, *Consultation*, Melbourne, 6 March 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001.

343 The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; Federal Court of Australia, *Consultation*, Melbourne, 6 March 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001; H Burmester, *Correspondence*, 22 April 2001.

7.62 Patrick Brazil expressed a strong view that s 38(e) should be retained.

> Section 38(e) of the *Judiciary Act 1903* should be maintained because of the political sensitivities which would arise from State courts having the power to grant prerogative relief against officers of the Commonwealth. The potential controversy which would arise if a State Minister sought such relief against a Commonwealth Minister in a Court of the Minister's own State should be avoided. Such a power should definitely not extend to prerogative relief directed to Federal judges.[344]

7.63 Similarly, the Law Council of Australia submitted that:

> it is not appropriate for Commonwealth officers to be subject to judicial review in state courts, as there does not exist the same relationship between the federal executive and legislature on the one hand and the state judiciary on the other such as exists between the different branches of government of the same polity (eg of the same state).[345]

7.64 The Commission was also advised, however, that exclusive channels of jurisdiction might create difficulties where an officer carries on both state and federal functions pursuant to an intergovernmental arrangement. For example, a state officer may be conferred with Commonwealth functions in certain circumstances, such as where criminals convicted of federal crimes are incarcerated in state prisons.[346]

Commission's views

7.65 The Commission considers that jurisdiction to grant public law remedies against Commonwealth officers should remain exclusive of state courts.

7.66 The Commission strongly supports the policy, discussed above, that the courts of one polity in a federation should not have jurisdiction to review the lawfulness of the conduct of officers of another polity in the federation. The courts are an integral part of the system of checks and balances within each polity. A system that allows the courts of another polity to exercise that supervisory jurisdiction may raise political sensitivities, and these in turn may adversely affect cooperation between governments and their administrations.

7.67 In addition, the Commission considers that state courts are unlikely to have the same level of experience as federal courts in applying principles of federal administrative law. As noted above, state courts have no jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977*, although such experience may be useful in matters falling within s 75(v) of the Constitution.

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344 P Brazil, *Submission J010*, 22 February 2001.
345 Law Council of Australia, *Submission J037*, 6 April 2001.
346 Federal Court of Australia, *Consultation*, Melbourne, 6 March 2001.

7.68 The Commission also concludes that as a matter of parity, and for similar reasons, federal courts (other than the High Court) should not have jurisdiction to grant public law remedies against state officers. Chapter 37 makes parallel recommendations in relation to supervisory jurisdiction over territory officers. The High Court is in a special position, however, by virtue of its role at the apex of the Australian judicial system, exercising appellate jurisdiction in state and federal matters.

7.69 The Commission recognises the need to address circumstances in which an officer of a State or an officer of the Commonwealth may exercise both state and federal functions pursuant to an intergovernmental arrangement. Such arrangements are becoming increasingly common. Sometimes state officers perform functions on behalf of the Commonwealth, as where state officers enforce federal quarantine laws on behalf of the Commonwealth.[347] Sometimes Commonwealth officers perform functions on behalf of a State or Territory, as where the Australian Federal Police undertake community policing in the ACT on behalf of the ACT government (see Chapter 37).

7.70 The Commission recommends a special regime to accommodate the exercise of dual functions under this type of intergovernmental arrangement. In particular, where an officer may exercise both state and federal functions, public law remedies may be sought in the following courts:

- where the order is in relation to state functions alone — in a state court;
- where the order is in relation to federal functions alone — in a federal court;
- where the order is in relation to intermingled state and federal functions — in either a state court or a federal court, to the extent that the Constitution permits.

7.71 This recommendation is consistent with the principle of restricting supervisory review to courts of the relevant polity, in so far as the functions in question can be clearly identified as state or federal in character. In cases where federal and state functions are intermingled, the recommendation permits federal or state courts to grant the relevant remedies, subject to any constitutional constraint on the power of a federal court to grant public law remedies against a state officer.

7.72 Finally, the Commission notes that the *Judiciary Act* could be amended to remove the anomalies between the language used in s 38(e) JA and its empowering provision, s 75(v) of the Constitution. The Commission was not made aware of any practical difficulties that have arisen from these distinctions. In these circumstances the Commission does not consider the issue to be of sufficient significance to warrant a recommendation.

347 *Quarantine Act 1908* (Cth), ss 9A, 11.

Recommendation 7–6. Subject to Recommendation 7–8, s 38(e) of the *Judiciary Act* should be amended to exclude from the federal jurisdiction invested in state courts any matter in which an order is sought to ensure that the powers or duties of an officer of the Commonwealth (as that term is understood in s 75(v) of the Constitution) are exercised or performed according to law. [See Recommendations 37–2 and 37–3 in relation to the Territories.]

Recommendation 7–7. Subject to Recommendation 7–8, the *Judiciary Act* should be amended to provide that federal courts (other than the High Court) do not have jurisdiction to grant an order to ensure that the powers or duties of an officer of a State are exercised or performed according to law. [See Recommendation 37–4 in relation to the Territories.]

Recommendation 7–8. The *Judiciary Act* should be amended to provide that, where an officer of a State or an officer of the Commonwealth may exercise both state and federal functions pursuant to an intergovernmental arrangement, an order to ensure that the powers or duties of that officer are exercised or performed according to law may be sought in the following courts:

(a) where the order is sought in respect of state functions alone — in a state court;

(b) where the order is sought in respect of federal functions alone — in a federal court;

(c) where the order is sought in respect of intermingled state and federal functions — in either a state court or a federal court, to the extent that the Constitution permits.

[See Recommendation 37–5 in relation to the Territories.]

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Part C

Transfer of Proceedings

8. Introduction to Transfer of Proceedings

Contents

Importance of Transfer Procedures

8.1 Part C of this report considers the transfer of proceedings between and within courts exercising federal jurisdiction and jurisdiction under Commonwealth laws.[348] The *Judiciary Act* plays a central role in these transfers, together with certain provisions of the *High Court of Australia Act 1979*, the *Federal Court of Australia Act 1976,* the *Family Law Act 1975,* and the *Federal Magistrates Act 1999*.

8.2 Transfer is an integral part of an effective and efficient legal system. This is particularly so in a federal judicial system such as Australia's, which is comprised of federal, state and territory components, and where the exercise of federal jurisdiction across all components is an integrating feature of the system (see Chapter 2).

8.3 Transfer is a key mechanism for ensuring that proceedings are heard as soon as possible in the most appropriate forum and venue, having regard to the interests of the parties and the ends of justice.

8.4 Inadequate transfer procedures may result in delays and increased costs both to parties and the administration of justice through aborted or multiple proceedings and increased travel costs for parties, witnesses and legal representatives. Transfer procedures that are overly complex or structurally deficient may also increase the amount of litigation about the venue for litigation. The Commission notes that the cross-vesting scheme, which is discussed in this Chapter and in

348 The expression 'jurisdiction under Commonwealth laws' includes matters arising in the Territories that may not be within federal jurisdiction. See Chapter 35.

Chapter 2, specifically excludes appeals from a decision to transfer a proceeding from one court to another, thereby reducing litigation about where to litigate.

Contents of Part C

8.5 This Part discusses three of the main transfer procedures available to federal courts: change of venue, case stated procedures, and remittal by the High Court. Chapter 9 deals with change of venue provisions, which enable matters to be transferred from one registry to another registry within a federal court with national operation.

8.6 Chapter 10 discusses case stated procedures, which involve the transfer of complex legal questions from a single judge to a Full Court within the one court. More rarely, a case stated may involve the transfer of a case from a lower court to a higher court. The case stated procedure by-passes the usual appellate process by which decisions of one court are reviewed by a higher court in the judicial hierarchy.

8.7 Chapter 11 is concerned with the process by which the High Court can remit to courts lower in the judicial hierarchy cases that have been commenced in the High Court's original jurisdiction. Remittal is a unique process that enables Australia's highest court to shed itself of cases that are not of sufficient legal significance to warrant the High Court's attention, at least at first instance. Remittal is usually used to facilitate fact-finding by a lower court in circumstances in which it would be inappropriate for the High Court to expend its judicial resources in complex or detailed fact-finding.

8.8 Another important mechanism for transfer — the removal of constitutional causes from lower courts to the High Court — is dealt with in Chapter 15 in the context of constitutional litigation. Removal is a 'lower level to top level' mechanism whereby significant constitutional cases may be removed into the High Court at the motion of a party on showing 'sufficient cause', or by an Attorney-General as of right. Removal avoids the delay and expense of requiring a case to proceed to judgment and then through the appellate process. Removal may also be used in non-constitutional cases, although this is rarely done.

8.9 The appellate process, which is one of the most significant mechanisms for transferring proceedings between or within courts, is dealt with separately in Part E of this report. Appeals differ from other forms of transfer discussed in Part C as they constitute a review of a decision once made, rather than a change of adjudicator or venue prior to a decision being made.

Commission's Approach

8.10 In its report, *Managing Justice,* the Commission identified the primary focus of the federal civil justice system as ensuring that the system delivers fair, quality outcomes which are efficient and cost-effective.[349] Particular goals relevant to transfer procedures include:

- emphasising the strategic importance of good case management in the courts;
- refining procedures to reduce case events to those necessary to drive the matter towards resolution; and
- ensuring time-effective and cost-effective hearings.

8.11 In *Managing Justice*, the Commission also considered that the civil justice system should have the key characteristics of accessibility, efficiency, effectiveness, timeliness and just procedures.[350] Transfer procedures should meet these criteria. Effective transfer procedures can reduce costs, delays, inefficiencies and inconsistencies by ensuring that the most appropriate court deals with a particular matter. This is especially important in complex litigation, where inefficiencies may increase costs and delays for many parties.

8.12 As subsequent Chapters demonstrate, in this inquiry the Commission found that no major changes are necessary to existing procedures for transferring matters within the federal judicial system. They generally work well and there was no evidence of significant problems such as high levels of delay, excessive costs, or inconsistency in treatment. The Commission found a high degree of satisfaction with the existence of procedures for changing venue, stating cases and remitting cases. The procedures generally were considered to be necessary for the efficient administration of justice in the exercise of federal jurisdiction and appropriate to that task.

8.13 However, several commentators remarked on inconsistencies between provisions, which could not readily be explained by the differing contexts in which the mechanisms were invoked. These inconsistencies related both to the way in which a particular mechanism operated in different courts as well as to the way in which different mechanisms operated in the same court.

8.14 The Commission believes that there are benefits to be derived from greater consistency in the transfer provisions of federal courts, so long as appropri-

349 Australian Law Reform Commission, Report No 89 (2000), para 1.154.
350 Ibid , para 1.69.

ate account is taken of differences between courts and between the functions of different mechanisms. Harmonisation would improve the integration and accessibility of these provisions and assist in developing common precedents. As Robert Leflar has commented in relation to United States courts:

> It is important that the interrelationships between the intermediate court and the top court be intelligently planned and not allowed to develop haphazardly. The two courts should constitute a unified appellate system in which all the units work together to achieve the goals of individual justice and good law with maximum efficiency, with minimum delay, and at reasonable cost.[351]

8.15 To these ends, the Commission recommends that the Attorney-General order a review of the provisions relating to change of venue and cases stated with a view to achieving greater harmonisation.

Five Issues for Transfer Mechanisms

8.16 During the course of the Commission's consultations, it became apparent that the major differences between transfer mechanisms crystallised around five core issues, namely:

- who should be able to initiate a transfer;
- which courts should be able to make a transfer;
- which courts should be able to receive a transfer;
- according to what criteria should be a transfer be made; and
- should the transferring court have power to attach conditions to a transfer.

8.17 The Commission's recommendations in relation to each of these issues are summarised below.

Initiating the transfer procedure

8.18 The Commission recommends that the law be clarified to ensure that each transfer mechanism considered in Part C is capable of being invoked by the court of its own motion as well as by the parties to the proceedings. The existence of an own-motion power is essential if judges are to ensure that court proceedings meet the ends of justice and not merely serve the interests of litigants. This approach is consistent with the move toward greater case management of federal civil proceedings, supported by the Commission in its report, *Managing Justice*.

351 R Leflar (1976), 78.

Identifying the transferor court

8.19 The Commission considers that single judges of the High Court, Federal Court and Family Court should be able to state a case or reserve a question for their respective Full Courts. A power to state a case or reserve a question to the Federal Court should also exist in relation to courts from which appeals lie to the Federal Court, as currently provided under s 26 FCAA.

8.20 The Commission is also of the view that each federal court, as a court with national operation, should have a power to change venue. The content of these provisions should be standardised across federal courts.

8.21 During the inquiry the Commission asked which courts should have the power to remit matters to a lower court. On the information received, the Commission considers that the power of remittal should be limited to the High Court in order to accommodate the difficulties occasioned by the fact that it is the highest court, albeit with an entrenched constitutional jurisdiction. The Commission notes that it might be useful for other federal courts to have powers of remittal, for example, from the Federal Court or Family Court to the Federal Magistrates Service. However, the Commission received no information on this issue and makes no recommendation in relation to it.

Identifying the transferee court

8.22 Some transfer procedures raise no significant question about the identity of the receiving court. In the case of removal under the *Judiciary Act*, the receiving court is necessarily the High Court (see Chapter 15).[352] In the case stated procedure, it is necessarily the court to which an appeal could be taken if the matter in the lower court proceeded to final judgment.

8.23 In relation to change of venue, transfer is a horizontal movement within the one court, although the question does arise as to the most appropriate venue within that court for the trial of the action. In relation to remittal by the High Court, questions arise both as to the most appropriate receiving court and, if it is a federal court, as to the most appropriate venue within that court. For both mechanisms, the Commission considers that the legislative provisions should be framed so as to give the transferring court a wide field of options.

Criteria for transfer

8.24 In relation to the criteria for transfer, the Commission heard disparate views on the desirability of structuring the courts' discretions through the use of

352 Federal legislation also provides for discretionary or mandatory transfer from the Federal Magistrates Service to the Federal Court or the Family Court. See ss 39 and 41 FMA.

statutory criteria. Some people expressed the view that the courts should be trusted to discharge their duties judicially and that they should not be unduly constrained in doing so. Others took the view that a list of factors may be useful to litigants, some of whom may be unrepresented, and to judges.

8.25 The Commission acknowledges that universal answers cannot be given to the question whether a court's discretion to transfer should be structured by legislation. However, the Commission favours the approach of specifying criteria to guide the exercise of a discretion where this is likely to assist the court or the parties to the litigation. The Commission accordingly recommends the adoption of statutory criteria in relation to change of venue provisions and in relation to identifying the receiving courts under the remitter provisions. In other transfer contexts the variety and uniqueness of relevant factors or the inability of parties to access information relevant to the exercise of the discretion (such as court workload statistics) make it undesirable to fashion statutory criteria to guide the exercise of the discretion to transfer.

Imposing conditions on transfer

8.26 For similar reasons, the Commission recommends that the power of a court to impose conditions on the parties when exercising its powers to change venue, state a case, or remit should be confined to matters of practice and procedure. Any court receiving a transferred proceeding should have a significant degree of freedom to manage the litigation as it thinks best, and the transferring court ought therefore to be limited in its capacity to regulate the conduct of proceedings after transfer.

Related Transfer Mechanisms

8.27 The transfer mechanisms considered in Part C bear a significant relationship to several mechanisms by which a matter may be brought to trial in the most appropriate forum. These include:

- the common law doctrine of *forum non conveniens* (the inappropriate forum doctrine);
- a stay of proceeding under s 20 of the *Service and Execution of Process Act 1992* (Cth) ('SEPA'); and
- a transfer of a proceeding under s 5 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and related legislation.

8.28 The Commission's terms of reference expressly exclude the making of recommendations in relation to the cross-vesting scheme. Moreover, the law relating to service and execution of process was the subject of a report by the

Commission in 1987.[353] Nevertheless, it is necessary to discuss these methods in the present context for the purpose of explaining the broader framework within which transfers may be made between and within courts exercising federal jurisdiction.

8.29 These three related mechanisms provide a particularly useful basis of comparison when considering whether the transfer mechanisms discussed in Chapters 9, 10 and 11 should include statutory criteria to guide the exercise of the court's discretion, and if so, what types of factors should be included. Both SEPA and the cross-vesting legislation include statutory criteria to assist in determining stay or transfer issues. The courts have also identified factors to be take into account in applying the doctrine of *forum non conveniens*.

The inappropriate forum doctrine

8.30 The inappropriate forum doctrine is a common law doctrine of private international law by which a court may, in its discretion, decline to exercise jurisdiction that it is technically entitled to exercise when the interests of the parties and the administration of justice would be better served by resolving the dispute in another forum. Factors taken into account by a court when exercising its discretion include the ease of access to relevant sources of evidence; the location and availability of witnesses; the residence of the parties; the subject matter of the action; the place where the relevant events occurred; and the substantive law applicable to the action.

8.31 The leading authority on the applicability of the doctrine in Australia is the High Court's decision in *Voth v Manildra Flour Mills Pty Ltd*.[354] The majority held that where a defendant seeks a stay of proceedings the stay will be granted if it can be shown that the local court is a 'clearly inappropriate forum' for the determination of the dispute.

8.32 Common law principles such as the inappropriate forum doctrine are relevant to this inquiry for several reasons.

- The common law applies in areas not covered by federal law. For example, under s 80 JA, the inappropriate forum doctrine is applicable to the exercise of federal jurisdiction as part of the common law in Australia, in so far as it is not inconsistent with the Constitution or statutory law.

- The common law has been used as a guide in interpreting the meaning of existing legislative provisions. For example, in Western Australia the inap-

353 Australian Law Reform Commission, Report No 40 (1987), substantially adopted in the *Service and Execution of Process Act 1992* (Cth).

354 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

propriate forum doctrine has been held to be relevant to interpreting the transfer provisions under the cross-vesting legislation.[355]

- When developing proposals for law reform, the common law provides useful analogies, for example in relation to the criteria that should be considered when formulating structured statutory discretions.

Service and Execution of Process Act 1992 (Cth)

8.33 In its 1987 report, *Service and Execution of Process*, the Commission recommended the removal of technicalities that had arisen under the original *Service and Execution of Process Act 1901* (Cth).[356] The Commission's report formed the basis of the *Service and Execution of Process Act 1992* (Cth).

8.34 Section 20 SEPA enables certain courts to stay a proceeding on the application of a person who has been served with originating process under the Act. The court may order that a proceeding be stayed if it is satisfied that a court of another State that has jurisdiction to determine the matter is the appropriate court to determine the matter. It has been suggested that SEPA confers a more liberal test for staying a proceeding than the common law principles applied through the inappropriate forum doctrine.[357] Under s 20, matters to be taken into account by the court in exercising this discretion include:

- the places of residence of the parties and of witnesses likely to be called in the proceeding;
- the place where the subject matter of the proceeding is situated;
- the financial circumstances of the parties;
- any agreement between the parties about the court or place in which the proceeding should be instituted;
- the law that would be the most appropriate to apply in the proceeding; and
- whether a related or similar proceeding has been commenced against the person served or another person.

8.35 The fact that the proceeding was commenced in a particular place is not to be taken into account in deciding whether to stay a proceeding (s 20(4)). The court's order may be made subject to such conditions as the court considers just

355 *Mullins Investments Pty Ltd v Elliott Exploration Co Pty Ltd* (1990) 1 WAR 531.
356 Australian Law Reform Commission, Report No 40 (1987).
357 LBC Information Services , 5.11 *Private International Law*, para 28.

and appropriate in order to facilitate determination of the matter in issue without delay or undue expense (s 20(5)). The power provided by s 20 does not apply where a Supreme Court is the court of issue (s 20(1)) because Supreme Courts are covered by the cross-vesting legislation considered below. Section 20 is not intended to affect the operation of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) ('JCCVA') or a corresponding law of a State (s 20(10)).

8.36 Stays granted under s 20 are unilateral in that they halt proceedings that have been commenced inappropriately, but leave it to the plaintiff to determine whether or not fresh proceedings will be commenced in an appropriate forum. This makes it a less sophisticated tool than the transfer provisions of the cross-vesting legislation.

Transfers under the cross-vesting scheme

8.37 The scheme established by the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and related legislation is discussed generally in Chapter 2. This section focuses on the provisions permitting transfer between participating courts. These provisions continue to be of significance notwithstanding the invalidation of part of the cross-vesting scheme by the High Court in 1999.[358]

8.38 As noted in Chapter 2, one result of the cross-vesting of subject matter jurisdiction is that it is possible for a litigant to commence most proceedings in any of the participating courts without regard to the subject matter of the action. However, it was always intended that federal and state courts keep within their traditional jurisdictional fields. To this end, the legislation provides for the transfer of proceedings between participating courts at the initiative of a party to the proceeding, an Attorney-General, or the court of its own motion (s 5 JCCVA).

8.39 The successful operation of the cross-vesting scheme relies on the effective use of the transfer provisions. Unless proceedings are transferred in such a way that each participating court keeps within its 'proper' jurisdictional fields, there is the potential for a dramatic redistribution of jurisdiction between state and federal courts in Australia.[359]

8.40 Section 5 JCCVA and corresponding state provisions identify criteria for transfer and place an obligation on a court to transfer a pending matter to another participating court where it would be more appropriate for the other court to hear the matter. The factors relevant to the exercise of the discretion include:

- the existence of related proceedings in another court;

358 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. See Chapter 2.
359 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1986, 2557 (Bowen).

- whether the chosen forum would have had jurisdiction in the absence of the cross-vesting scheme;

- whether the interpretation of a Commonwealth law or a law of another jurisdiction is in issue; and

- the interests of justice.

8.41 Where a 'special federal matter' is pending in a state Supreme Court, that court must transfer the matter to the Federal Court (or other specified court) unless the Supreme Court makes an order to retain the matter.[360] In making a retention order, the Supreme Court must be satisfied that there are special reasons for doing so, unrelated to the convenience of the parties.

8.42 Two issues that have led to some uncertainty in the application of the transfer provisions are the breadth of the discretion and the inability to appeal a transfer decision. Australian courts have applied two different approaches to the issue of a transfer of proceedings under s 5.[361]

8.43 The New South Wales Court of Appeal articulated the most widely accepted approach in *Bankinvest AG v Seabrook*.[362] This case treats a transfer decision as a matter of judicial management, which should be undertaken without excessive legalism. Under this approach, the interests of justice are paramount and the inappropriate forum doctrine has no role to play in the resolution of applications made under the legislation.[363] There is no presumption that a court ought to exercise jurisdiction that has been regularly invoked by the plaintiff, nor that a defendant should bear an onus of proving that the criteria for transfer have been satisfied.[364]

8.44 The other approach, which is adopted by courts in Western Australia, is to exercise the discretion to transfer in the light of common law principles of private international law.[365] Under these principles, a plaintiff's initial choice of forum has significant bearing on the disposition of a defendant's transfer application because of the presumption that a court ought to exercise jurisdiction that has been regularly invoked by the plaintiff. As a corollary, if a defendant seeks to have

360 Special federal matters are defined in s 3(1) JCCVA to include certain matters arising under Part IV of the *Trade Practices Act 1974* (Cth), under the Competition Code, or from judicial review of federal administrative action.

361 See generally G Moloney and S McMaster (1992), 81–103; B Opeskin (2000), 324–325.

362 *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711.

363 Ibid, 726–727 (Rogers AJA).

364 In *James Hardie & Co Pty Ltd v Barry* [2000] NSWCA 353 (Unreported, NSW Court of Appeal, Spigelman CJ, Mason P and Priestley JA, 4 December 2000) the view was taken that in a contested application for change of venue the applicant carries a persuasive onus of proof.

365 *Waterhouse v Australia Broadcasting Corp* (1989) 86 ACTR 1; *Mullins Investments Pty Ltd v Elliott Exploration Co Pty Ltd* (1990) 1 WAR 531.

the proceedings transferred to another court, he or she bears the onus of proving that the grounds for a transfer are satisfied.

8.45 For a national scheme that is intended to operate with significant uniformity, the development of a 'wilderness of conflicting and unappellable decisions' under s 5 JCCVA is a source of concern.[366] To this end, a 1992 report on the scheme recommended that the major interpretational questions be referred to the Standing Committee of Attorneys-General with a view to resolving them by legislative means.[367] No changes have yet been made.

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366 *Re Chapman and Jansen* (1990) 13 Fam LR 853, 869 (Fogarty J).

367 G Moloney and S McMaster (1992), 103.

9. Change of Venue in Federal Courts

Contents

Introduction

9.1 Federal courts conduct their judicial business through registries or offices located in capital cities, and sometimes other major centres, throughout Australia. The extent of this presence varies. As Figure 9–1 shows, the High Court and the Federal Court each have eight registries in capital cities and none in regional centres. The Federal Magistrates Service has eight registries in capital cities and four in regional centres. The Family Court has the most extensive network of registries in Australia, with registries in seven capital cities (the Court does not operate in Western Australia) and fourteen in regional centres. This reflects the widespread use of its jurisdiction.

Figure 9–1 Location of Registries of Federal Courts

Court	Registries in capital cities	Registries in regional centres
High Court	8	0
Federal Court	8	0
Family Court	7	14
Federal Magistrates Service	8	4

Source: Websites for each federal court: <www.highcourt.gov.au>; <www.fedcourt.gov.au>; <www.familycourt.gov.au>; <www.fms.gov.au> (27 July 2001).

Notes: (1) The Family Court of Australia has no registry in Western Australia due to the operation of the Family Court of Western Australia.
(2) Not all registries of the Federal Magistrates Service deal with all matters within the court's jurisdiction.

9.2 The normal course is that a matter proceeds to hearing in the place where the initiating process is filed. However, legislation confers on each of these courts the power to move proceedings commenced in one of its registries or offices to another of its registries or offices.

9.3 In this Chapter, the transfer of a matter from one registry or office to another is referred to as a change of venue. An important feature of this mechanism is that it involves the transfer of a matter within a single court rather than between different courts. In this connection it is useful to distinguish between the concept of 'venue' and the concept of 'forum'.[368] The former is taken here to mean the particular location at which a given court exercises its jurisdiction—for example, a Sydney or Melbourne sitting of the Federal Court. The latter identifies the law district whose courts are able to exercise jurisdiction in a particular matter—for example, New South Wales or Victoria, irrespective of which particular court hears the matter.

9.4 Under current legislation, the power to change venue is conferred in broad terms and the courts themselves have developed criteria by which the discretion is exercised. The Full Court of the Federal Court, for example, has stated that as there is no statutory basis for confining its discretion to change venue, the Court is involved in 'the exercise of a wide and unfettered discretion'.[369] Only the power conferred on the Family Court provides criteria for the exercise of the discretion.

9.5 There is much more case law on change of venue in relation to the Federal Court than in relation to other federal courts. This may reflect the fact that the Federal Court has a wide commercial jurisdiction involving large corporate and government parties. Such litigants may have multiple offices across the country and conduct their activities on a national or sometimes international scale. The Family Court determines a large number of applications to change venue each year, but this does not appear to have been matched by a significant case law in relation to its change of venue provisions.

Current Law and Practice

High Court of Australia

9.6 Section 31 HCAA provides that, subject to s 80 of the Constitution, the High Court may at any stage of a proceeding direct that the proceeding or a part of the proceeding be held or continued at a place specified in the order, subject to

368 C Wright (1994), 256–257.

369 *Andrew and Frewin Pty Ltd v Arrow Ltd* (Unreported, Federal Court of Australia, Sweeney, Davies and von Doussa JJ, 6 June 1990), para 18.

such conditions as the Court imposes. Section 80 of the Constitution states that the trial on indictment of any Commonwealth offence shall be by jury and every such trial shall be held in the State where the offence was committed.

9.7 The High Court advised the Commission that it had no data on how often an application had been made to change venue under s 31, but suggested that it was unlikely that such an application has ever been made.[370] In this context it is worth noting that since 1980 the High Court has been based permanently in Canberra, but hears matters in Brisbane, Adelaide, Perth and Hobart once a year if there is sufficient business to warrant a sitting. The Court also has regular motion days in Sydney and Melbourne at which it hears applications for special leave to appeal.

Family Court of Australia

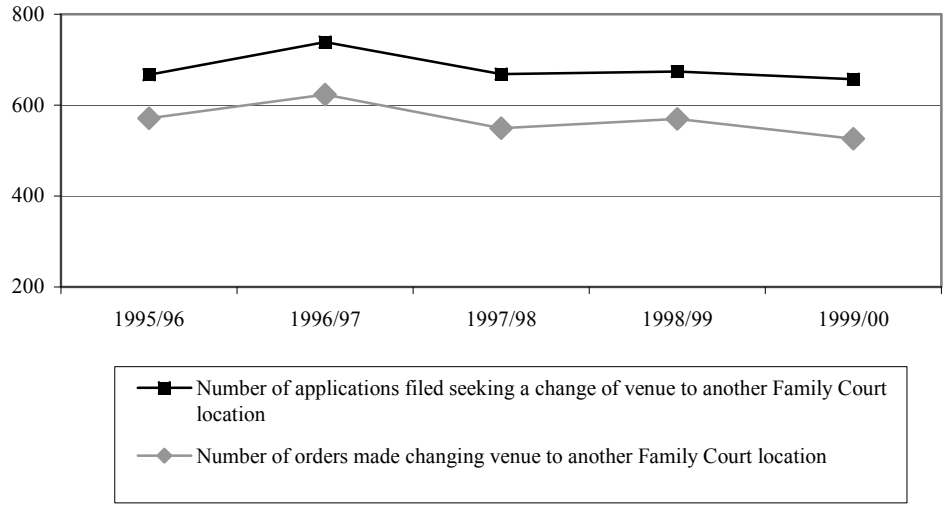
9.8 There is no primary power in the *Family Law Act 1975* to change the venue of a proceeding commenced in the Family Court. Instead, O 27 r 1 of the *Family Law Rules* provides that a party who has filed a pleading or affidavit in proceedings in a court exercising jurisdiction under the Act may, by application filed in the filing registry, apply to have the proceedings heard in another registry of that court. 'Filing registry' is defined in O 1 r 1 to mean 'the registry of that court in which the proceedings were instituted or, if the proceedings have been transferred to another registry of another court, then that registry'.

9.9 In considering an application to change venue, the court is required under O 27 r 3 to have regard to the availability of a court to hear the proceedings, the convenience of the parties, the limiting of expense and the costs of the proceedings, and any other relevant matter. The case law identifies other factors as being relevant to the exercise of this discretion.[371]

9.10 The Family Court provided the Commission with data showing the large number of applications to change venue each year.[372] Over the five year period for which data were provided (1995–96 to 1999–2000), an average of 681 applications were filed each year, and an average of 568 orders were granted each year. These figures relate only to transfers to another Family Court location and do not include transfers to other courts. As Figure 9–2 shows, the number of applications filed and granted was fairly stable over that period.

370 High Court of Australia, *Correspondence*, 1 May 2001.
371 CCH Australia Ltd , vol 2, para 52-685.
372 Family Court of Australia, *Correspondence*, 11 April 2001.

Figure 9–2 Applications to Change Venue in the Family Court



Source: Data provided by the Registry of the Family Court of Australia.

Federal Magistrates Service

9.11 Section 52 FMA authorises the Federal Magistrates Service to change the venue of a proceeding in terms similar to that of the High Court. Section 52(1) states that the court may sit at any place in Australia. Section 52(2) provides that the court or a magistrate may, at any stage of a proceeding, order that the proceeding or a part of the proceeding be conducted or continued at a place specified in the order, subject to such conditions as the court or federal magistrate imposes.

Federal Court of Australia

9.12 The Federal Court's power to change venue is similar to the High Court's power, although it is not subject to the limitation arising from s 80 of the Constitution. Section 48 FCAA allows the Federal Court or a judge at any stage of a proceeding to direct that the proceeding or part of the proceeding be conducted or continued at a place specified in the order, subject to such conditions as the Court or judge imposes. Under the *Federal Court Rules*, O 10 r 1(2)(f) allows the Court to direct that a proceeding be transferred from one registry to another, and O 36 r 6 gives the Court power to direct at what particular place the trial of a proceeding is to take place. The Federal Court uses these powers to enable it to sit where it is most convenient for the parties and the Court. For example, the Court may hear part of a case in one place and the rest of it in another place, as frequently occurs in native title matters. The Court has interpreted s 48 to allow it to order a change of venue of its own motion. Although this appears to be a reasonable implication from

the language of the section, there is no explicit power to do so. In practice, an application to change venue is usually initiated by one or more parties to the proceeding.

9.13 The Commission sought information from the Federal Court regarding the extent to which s 48 has been used by the Court to facilitate the efficient discharge of its judicial business. However, the Court advised the Commission that it was unable to provide information regarding such interlocutory applications.[373]

9.14 The major authority on change of venue in the Federal Court is *National Mutual Holdings Pty Ltd v Sentry Corporation.*[374] In that case, the Full Court of the Federal Court held that numerous factors might be taken into account in determining applications to change the venue of a proceeding. These factors include the residence of parties and witnesses, expense to the parties, the place where the cause of action arose, and the convenience of the court itself. The Full Court held that 'the balance of convenience will generally be a relevant consideration, but not necessarily determinative of each case'.[375] The Court concluded that ultimately the test is: where can the case be conducted or continued most suitably, bearing in mind the interests of all the parties, the ends of justice in the determination of the issues between them, and the most efficient administration of the court.

9.15 In cases after *Sentry,* the Federal Court has considered a wide range of factors in determining venue, giving them different weight depending upon the circumstances.[376] These include non-litigious costs,[377] the availability of modern communications, the case management system of the Federal Court,[378] and jurisdiction clauses.

9.16 Jurisdiction clauses are contractual clauses that specify the jurisdiction in which legal proceedings are to be brought in the event of a dispute. In *KC Park Safe (SA) Pty Ltd v Adelaide Terrace Investments Pty Ltd,*[379] Finkelstein J said that when parties have reached an agreement that a particular court, or a court that sits at a particular place, is to have exclusive jurisdiction to resolve their disputes, that agreement should be given effect unless there is some good reason why the parties should not be kept to their bargain. Other decisions of the Federal Court do not

373 Federal Court of Australia, *Correspondence*, 24 April 2001.
374 *National Mutual Holdings Pty Ltd v Sentry Corporation* (1988) 19 FCR 155.
375 Ibid, 162.
376 See *Thai Silk Co Ltd v Aser Nominees Pty Ltd* [1999] ATPR 41-146; *Australian Securities Commission v Lord* (1991) 6 ACSR 171; *Re Claremont Petroleum NL* (1991) 6 ACSR 205.
377 *SP Investments Pty Ltd v Federal Commissioner of Taxation* (1989) 89 ATC 4693.
378 *Barde AS v Oceanfast Ferries Pty Ltd* [1997] FCA 315 (Unreported, Federal Court of Australia, Tamberlin J, 2 May 1997), 5.
379 *KC Park Safe (SA) Pty Ltd v Adelaide Terrace Investments Pty Ltd* [1998] FCA 601 (Unreported, Federal Court of Australia, Finkelstein J, 15 May 1998).

appear to have given jurisdiction clauses as much weight when determining applications for change of venue pursuant to s 48 FCAA.[380]

Issues and Problems

Diversity of the provisions

9.17 There is considerable diversity among federal courts in the provisions for changing venue. One issue that arises from this is whether the diversity is desirable, given that the courts face similar issues and use the provisions for similar purposes. Harmonisation of the provisions might assist in developing greater cross-fertilisation of the case law, including the establishment of common precedents.

An own motion power for the courts

9.18 In DP 64 the Commission asked whether legislation should state expressly that a court may order a change of venue of its own motion. The change of venue powers of the High Court, the Federal Court and the Federal Magistrates Service appear to allow that option. They are phrased in terms of allowing a court to make an order, and they make no reference to an application by a party. On the other hand, in respect of the Family Court, O 27 r 1 FLR makes provision for a party to apply to change venue, with no reference to the Court making an order of its own motion. It is unlikely that the Family Court could order a change of venue of its own motion under O 27. The presence of an own motion power would enable a court to initiate a change of venue in the interests of the efficient administration of justice.

Location of the Family Court's power

9.19 The Family Court's power to change venue is located in the *Family Law Rules*. In DP 64 the Commission asked whether this power should be relocated to primary legislation, as one of the significant procedural powers of the Family Court. Such a change would provide a clear legislative basis for the transfer, which may be important given the number of applications that are made each year to change venue (see Figure 9–2 above). The Family Court expressed concern that the current rules on change of venue may not be supported by the rule-making power (s 123 FLA), or at least that it is not clear that it is so supported.[381]

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380 *Motor Traders Warranty Investments Pty Ltd v Fortron Automotive Treatments Pty Ltd* [1997] FCA 1496 (Unreported, Federal Court of Australia, Beaumont J, 19 November 1997); *Australian Co-operative Foods Ltd v National Foods Milk Ltd* [1998] FCA 376 (Unreported, Federal Court of Australia, Lindgren J, 2 April 1998), 8.

381 Family Court of Australia, *Consultation*, Melbourne, 14 March 2001; Family Court of Australia, *Submission J041*, 1 May 2001.

Structuring the discretion

9.20 The discretion to change venue in federal courts is largely unstructured, except in the case of the Family Court. The *Family Law Rules* list four factors to be taken into account: availability of a court to hear the proceedings, the convenience of the parties, the limiting of expense and the costs of the proceedings, and any other relevant matter.[382] It would be possible to list additional criteria in an exhaustive or non-exhaustive list. In DP 64 the Commission asked whether this course was desirable for other federal courts.

Imposing conditions on a change of venue

9.21 The change of venue powers for the High Court, the Federal Court and the Federal Magistrates Service make explicit reference to the discretion of the court to impose conditions when granting the order. The case law gives little guidance as to the manner in which this discretion is exercised. For example, it is not clear whether the discretion can extend to directions as to the procedural or substantive law to be applied, or the future conduct of the matter. It might be argued that the power to impose conditions is unnecessary because a transferred matter is still heard within the same court. On the other hand, the capacity to impose conditions might be useful in those cases in which the court decides that a change of venue is warranted in contingent circumstances. Examples of conditions might include undertakings as to costs, or the return of the proceeding to the original venue upon the occurrence of certain events.

Submissions and Consultations

9.22 There was broad support for the proposal that legislation should grant federal courts the power to order a change of venue of their own motion. The Federal Magistrates Service, the Family Law Council, and the Law Council of Australia were of the view that this would assist in the administration of justice.[383]

9.23 During consultations, the Family Court stated that its power to change venue should be relocated to primary legislation.[384] The Court said that the mobility of parties in family law matters made it important for the Court to have an unequivocal power to change venue, and that it was preferable to locate this power in the *Family Law Act 1975* rather than in the *Family Law Rules*.

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382 O 27, r 3 FLR.

383 Family Law Council, *Submission J040*, 23 April 2001; Federal Magistrates Service, *Submission J011*, 7 March 2001; Law Council of Australia, *Submission J037*, 6 April 2001.

384 Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.

9.24 There was a mixed response to the question whether legislation should list criteria to guide the exercise of the discretion. The Supreme Court of Western Australia stated that it was a good idea to have common criteria for change of venue.[385] The Federal Magistrates Service submitted that it was not necessary to stipulate criteria in legislation because individual courts could make Rules of Court to provide guidance about the exercise of discretion.[386] The Law Council of Australia was opposed to structuring the discretions in the legislation for fear of restricting judicial flexibility in the exercise of the discretion. However, it did indicate that change of venue provisions should state that contractual jurisdiction clauses should be given a high priority.[387]

9.25 In relation to the imposition of conditions on a change of venue, the Law Council of Australia supported the power of the court ordering a change of venue to attach conditions to the parties where this was warranted by particular circumstances.[388] For example, the Law Council considered that it might be appropriate to impose conditions relating to undertakings as to costs, or the return of a proceeding to the original venue upon the occurrence of certain events. However, the Law Council recommended, somewhat opaquely, that a transferring court should have no power to attach conditions to the transferee court 'in respect of the transferor'.

9.26 The Federal Court was opposed to allowing the court ordering a change of venue to attach conditions that would bind the court as constituted in the new venue.[389] The Federal Court submitted that a Federal Court judge ordering a change in 'the proper place' of a proceeding would not presume to make an order purporting to bind another Federal Court judge in another registry. The Court's submission emphasised the importance of the docket judge having a broad discretion to hear a matter or the evidence of witnesses at whatever place the judge considered appropriate in the circumstances. The Court added that this discretion was fundamental to the way in which a national court manages its business and that it should not be circumscribed.

Commission's Views

Harmonisation

9.27 The Commission considers that there is merit in greater harmonisation of the law with respect to change of venue. Currently, there is considerable diversity in change of venue provisions in federal courts, although the provisions are used for the same purpose of identifying the most appropriate venue within Australia,

385 Supreme Court of Western Australia, *Consultation*, Perth, 22 March 2001.
386 Federal Magistrates Service, *Submission J011*, 7 March 2001.
387 Law Council of Australia, *Submission J037*, 6 April 2001.
388 Ibid.
389 Federal Court of Australia, *Submission J039*, 20 April 2001.

and they do so by reference to similar factors. Harmonisation can take into account any necessary differences between courts because it does not necessarily entail uniformity. The Commission was not made aware of situations in which differences between federal courts were so significant as to make harmonisation impractical.

9.28 The Commission considers that state and territory courts should continue to determine applications to change venue in accordance with their own statutory provisions, regardless of whether they are exercising state, territory or federal jurisdiction. This is consistent with the Commission's general approach of not seeking to impose uniformity between federal courts and state or territory courts exercising federal jurisdiction in matters of practice and procedure. Any requirement that state courts apply one set of change of venue principles when exercising federal jurisdiction and another when exercising state jurisdiction would lead to practical difficulties, which are canvassed further in Part G of this report.

Family Court's power to change venue

9.29 The Commission considers that the *Family Law Act 1975* should be amended to confer expressly on the Family Court the power to change the venue of a proceeding or part of a proceeding, and to make relevant Rules of Court.

9.30 The power to change venue is an integral part of the Family Court's control over its proceedings and should be located with other important powers in primary legislation. As Figure 9–2 shows, applications to change venue are very common in family law matters. The Commission considers that the mobility of litigants in family law proceedings highlights the importance of placing the Family Court's power to change venue on a firm legislative footing.

An own motion power

9.31 The Commission recommends that legislation be amended to clarify that the power of a federal court to change the venue of a proceeding or part of a proceeding may be exercised on the application of a party or by the court of its own motion.

9.32 The conferral on federal courts of a power to initiate change of venue was widely supported during the course of the inquiry. The Commission considers that such a power is highly desirable if courts are to ensure that litigation accommodates the interests of justice in addition to the private interests of litigants.

Structuring the discretion

9.33 The Commission favours the inclusion of statutory criteria to which a court must have regard, in so far as they are relevant to the circumstances of the case, when exercising a discretion to change the venue of a proceeding. Existing case law provides guidance as to the factors that ought to be taken into account, as does s 20(4) of the *Service and Execution of Process Act 1992* (Cth). These include:

- the residence or place of business of the parties and the residence of the witnesses likely to be called in the proceeding;
- the convenience of the parties and of the witnesses;
- the place where the cause of action arose;
- the place where the events that gave rise to the plaintiff's claim occurred;
- the place where the subject matter of the proceeding is situated;
- the financial circumstances of the parties, including the availability of legal aid;
- any contractual agreement between the parties regarding the court or place in which the proceeding should be instituted;
- the law to be applied in the proceeding;
- whether a related proceeding has been commenced against a party to the proceeding;
- the interests of the efficient administration of justice; and
- any other factor that the Court considers relevant in the circumstances of the case.

9.34 The Commission considers that statutory criteria would provide greater guidance to all users of the legislation and would benefit judges, legal advisers and parties. Many unrepresented litigants are not in a position to access or digest criteria that are scattered in the case law. The enumeration of statutory criteria is likely to enhance the transparency of change of venue provisions, and to direct attention during argument to the relevant considerations.

9.35 The Commission does not believe that statutory criteria, if appropriately drafted, would unduly fetter judges in exercising their discretion to order a change of venue. The Commission acknowledges the importance of giving judges flexibility when making procedural decisions about the conduct of litigation. That flexibility could be achieved by authorising the court to consider, in addition to the specific factors enumerated in the section, 'any other factor that the Court considers relevant in the circumstances of the case'.

Power to impose conditions

9.36 Where an order has been made to change the venue of a proceeding, the court as constituted in the new location should not be shackled by conditions or restrictions imposed by the court ordering the change of venue. Any court receiving a transferred proceeding should have a significant degree of freedom to manage the litigation as it thinks best, and the transferring court should be limited in its capacity to make orders that regulate the conduct of proceedings after transfer.

9.37 The Commission accordingly recommends that the power of a court to impose conditions on the parties when ordering a change of venue should be confined to matters of practice and procedure. There may be circumstances in which the imposition of conditions may facilitate the course of litigation in the new venue, such as adherence to timetables. The legislation should be sufficiently flexible to accommodate these situations, while recognising the importance of the first judge exercising caution in imposing conditions that may unduly constrain the actions of the second judge in managing the transferred proceedings.

Recommendation 9–1. The Attorney-General should order a review of federal laws providing for change of venue within federal courts, with a view to achieving greater harmonisation. State and territory courts exercising federal jurisdiction should continue to order a change of venue in accordance with state and territory laws on that subject.

Recommendation 9–2. The *Family Law Act 1975* should be amended to confer expressly on the Family Court the power to:

(a) change the venue of a proceeding or part of a proceeding; and

(b) make relevant Rules of Court.

Recommendation 9–3. Federal legislation should be amended to clarify that the power to change the venue of a proceeding or part of a proceeding in a federal court may be exercised on the application of a party or by the court of its own motion.

Recommendation 9–4. The discretion of a federal court to change the venue of a proceeding or part of a proceeding should be structured by including in legislation a list of factors that the court must consider when exercising the discretion. These factors should include:

- the residence or place of business of the parties and the residence of the witnesses likely to be called in the proceeding;
- the convenience of the parties and of the witnesses;
- the place where the cause of action arose;
- the place where the events that gave rise to the plaintiff's claim occurred;
- the place where the subject matter of the proceeding is situated;
- the financial circumstances of the parties, including the availability of legal aid;
- any contractual agreement between the parties regarding the court or place in which the proceeding should be instituted;
- the law to be applied in the proceeding;
- whether a related proceeding has been commenced by or against a party to the proceeding;
- the interests of the efficient administration of justice; and
- any other factor that the court considers relevant in the circumstances of the case.

Recommendation 9–5. Federal legislation should be amended to ensure that federal courts ordering a change of venue have power to impose conditions on the transfer, provided the conditions are limited to matters of practice and procedure.

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10. The Case Stated Procedure

Contents

10.1 The High Court, the Federal Court and the Family Court each have a power to enable a single judge to state a case for the consideration of a Full Court before final judgment. Some statutory provisions refer to 'questions of law', while others simply refer to 'questions'. In either case, the case stated procedure is intended to allow a trial judge to seek a timely and authoritative determination of a contentious legal question from a multi-member panel. However, because the procedure bypasses the usual process by which an appeal is brought from a trial judge to a Full Court, courts have often urged caution in its use.

10.2 There is a significant divergence in the nature and form of the case stated procedure among federal courts. There are differences as to who may initiate the process and the circumstances in which a case may be stated. The following section discusses the current provisions for stating a case in federal courts.

Case Stated Procedures in Federal Courts

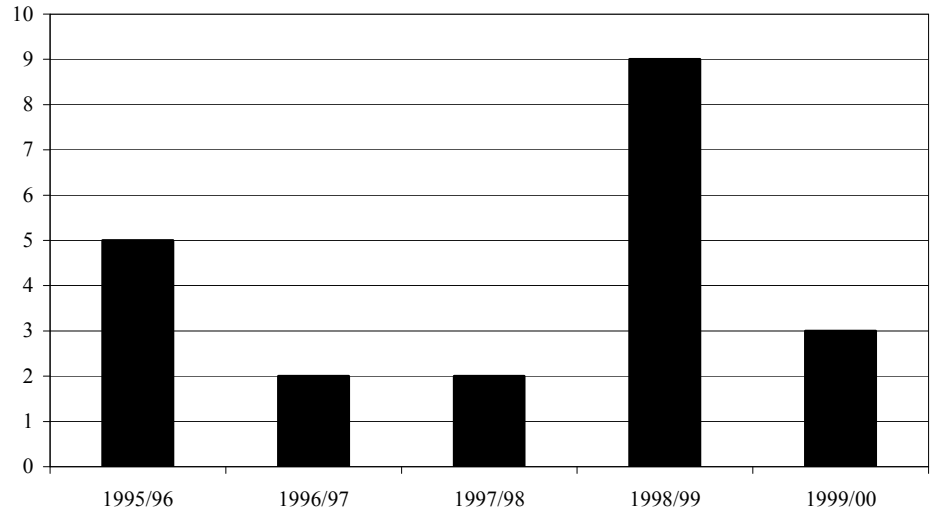
High Court of Australia

10.3 There are two procedures for stating a case for a Full Court of the High Court — one arising from the *Judiciary Act*, the other from the *High Court Rules*. Under the *Judiciary Act* procedure, s 18 identifies three particular mechanisms, namely a case stated, a question reserved, and a direction that any case or question be argued before a Full Court. The case law on the meaning of s 18 is limited and there is little guidance as to what distinguishes one mechanism from another.

10.4 Under the procedure in the *High Court Rules*, O 35 r 1 allows the parties by agreement to state a 'special case' for the opinion of a Full Court, and O 35 r 2 enables the Court or a justice to direct a question of law to be raised for the opinion of a Full Court.

10.5 The High Court provided the Commission with data indicating the extent to which these procedures have been used over the five year period from 1995–96 to 1999–2000. Figure 10–1 shows that the number of cases stated or questions reserved for a Full Court has fluctuated, but has averaged approximately four per year over that period. This is a relatively modest number, and must be measured against the Full Court's output of full written judgments each year. These numbered 72 for 1999–2000, and 78 for 2000–01 (see further Chapters 3, 18 and 19).[390] The information supplied by the High Court does not distinguish between the procedure under s 18 JA and that under O 35 r 1 HCR.

Figure 10–1 Cases Stated and Questions Reserved in the High Court



Source: Data provided by the Registry of the High Court of Australia.

Section 18 JA—cases stated and questions reserved

10.6 When a case is stated pursuant to s 18 JA, it will typically include the facts found by the justice of the High Court, or agreed between the parties, and will set out the legal questions to be answered by a Full Court. The stated case must particularise the issues in question so that a Full Court has before it all the information and evidence needed to make its determination.[391] In answering those questions, the Full Court is not presently entitled to draw inferences of fact from what is stated in the case, although it may make implications.[392]

390 High Court of Australia (2000), Table 14, 69; High Court Registry, *Correspondence*, 30 July 2001.

391 *A v Hayden (No 2)* (1984) 156 CLR 532, 551 (Mason J).

392 *Merchant Service Guild of Australasia v Newcastle & Hunter River Steamship Co Ltd* (1913) 16 CLR 591, 624 (Isaacs J); *R v Rigby* (1956) 100 CLR 146, 150–151; *Brisbane City Council v Valuer-General (Qld)* (1978) 140 CLR 41, 58–59 (Gibbs J); *Caltex Ltd v Federal Commissioner of Taxation* (1960) 106 CLR 205, 221 (Dixon J).

10.7 A question may be reserved for a Full Court if requested by a party and if the justice considers that the case merits the consideration of a Full Court.[393] A question reserved will often be used in preference to a case stated where it is unnecessary to include a formal statement of facts for a Full Court. This may occur where the facts are not at issue,[394] a lower court has made a finding of fact, or the parties have agreed on a statement of facts and wish to have certain questions arising from them answered by the High Court.[395] Questions reserved are thus likely to concern pure questions of law.

Order 35 HCR—special cases

10.8 Order 35 r 2 allows the High Court or a justice of the High Court to direct that a question of law be raised for the opinion of the Court or a Full Court where it would appear convenient to have a question of law decided before any evidence is given or any issue of fact is determined. This can be effected either by a special case or in such other manner as the Court or justice deems expedient.[396] If a Full Court determines that the facts are not sufficiently found and their determination is required, it may remit the matter for the finding of those facts.[397]

10.9 A special case under O 35 is similar in purpose to a case stated under s 18, although there are two significant differences. First, the process is effected by the agreement of the parties under O 35, whereas it requires an order of a justice under s 18. Second, O 35, unlike s 18, expressly provides that the Court may draw such inferences of fact and law from the facts and documents stated in the special case as might have been drawn from them if proved at trial.[398]

Family Court of Australia

10.10 Section 94A FLA provides that if, in specified proceedings, a question of law arises which the judge and at least one of the parties wish to have determined by a Full Court of the Family Court before the proceedings are further dealt with, the judge shall state the facts and question in the form of a special case for the opinion of a Full Court. A Full Court then hears and determines the question.

393 *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353, 371–372.
394 *New South Wales v Commonwealth* (1990) 169 CLR 482 ('*Incorporation Case*').
395 *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182.
396 *Kruger v Commonwealth* (1995) 69 ALJR 885, 889 (Brennan CJ).
397 Ibid, 889.
398 O 35 r 1(4) HCR.

10.11 Section 94A(2) provides that the Full Court may draw from the facts and the documents any inference, whether of fact or of law, which could have been drawn from them by the judge.[399]

10.12 It has been said that s 94A should be used only in exceptional circumstances, such as where it is important to get an authoritative opinion on a point of law before embarking on lengthy proceedings to determine complex facts.[400] The procedure may be justified where there is a genuine preliminary point of law, the resolution of which may save time and expense and will materially affect the course of proceedings.[401]

10.13 The Family Court advised the Commission that there were six cases stated for the consideration of a Full Court between 1996 and 2000.[402] This indicates that the procedure is used sparingly.

Federal Court of Australia

10.14 Section 25(6) FCAA provides that a single judge of the Federal Court may state a case or reserve any question for the consideration of a Full Court. The principal qualification to this power is that the case stated or question reserved must concern a matter in respect of which an appeal would lie from a judgment of the judge to a Full Court.[403]

10.15 A single judge may reserve any question of law pursuant to s 25(6) at any stage of the proceedings.[404] The power is to be exercised where the matter is likely to involve questions appropriate for determination by a Full Court and where it is reasonable to exercise the power.[405] The considerations relevant to a judge's decision to state a case or reserve a question include:

- whether or not previous authority on the issue is clear;
- the likelihood of delay, and the needs of the parties and the public to have the matter determined as soon as practicable;[406]
- whether the questions raised are preliminary and whether there are clear advantages in a court dealing with them prior to trial; and

399 *In the Marriage of Smith and Saywell* (1980) 6 Fam LR 245; *In the Marriage of CE Daff (deceased) and GEMM Daff* (1983) 9 Fam LR 546.
400 *In the Marriage of CE Daff (deceased) and GEMM Daff* (1983) 9 Fam LR 546, 548 (Evatt CJ).
401 *In the Marriage of Mullane* (1980) 5 Fam LR 801.
402 Family Court of Australia, *Correspondence*, 11 April 2001.
403 *Henderson v Pioneer Homes Pty Ltd* (1979) 142 CLR 294, 298 (Stephen, Mason and Wilson JJ).
404 *O'Toole v Charles David Pty Ltd* (1990) 96 ALR 1, 14 (Brennan J).
405 *Henderson v Pioneer Homes Pty Ltd* (1979) 142 CLR 294.
406 *Re Adamson (No 2)* (1984) 57 ALR 280, 294 (Gray J).

- whether the importance of the questions makes it appropriate that they be referred to a Full Court.

10.16 Order 50 r 1 FCR provides that a case to be stated or a question to be reserved for the consideration of the Court must be in the form of a special case. Order 50 r 1(2) provides that the special case is to state the facts concisely and annex all documents necessary to enable the Court to decide the questions raised by the special case. Pursuant to O 50 r 1(3), the Court may draw from the facts stated and the documents annexed in the special case any inference, whether of fact or law, which might have been drawn from them if proved at trial. It has been said that such a power should be 'construed narrowly as allowing a court to draw inferences only where those inferences necessarily flow from the facts stated or documents annexed'.[407]

10.17 The Commission sought data from the Federal Court regarding the number of times a judge has invoked the case stated procedure in each of the last five years. The Federal Court Registry replied that it was unable to supply data on interlocutory procedures. Accordingly, the Commission has no information on how frequently the procedure is utilised in practice, although the experience of other federal courts suggests that its use is likely to be modest.

Issues and Problems

Premature use of the procedures

10.18 In DP 64 the Commission asked whether federal courts have used their case stated procedures appropriately. If the procedure is misused it can unnecessarily burden a Full Court's case load, bypass the usual process of appeals, deprive a Full Court of the benefit of the trial judge's opinion, determine a matter prematurely before relevant facts have been found, or interrupt the orderly disposition of cases at trial.

10.19 In a number of matters in which the case stated procedure has not been used properly, judges have commented on the need for circumspection in invoking the procedure.[408] In particular, problems may occur if it is difficult to establish 'a sufficient foundation in fact for the determination of the question or questions of law reserved'.[409] That situation may arise because the facts are complex or are in

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407 *Re Alcoota Land Claim No 146* (1998) 82 FCR 391, 395, citing *Fowles v Eastern & Australian Steamship Co Ltd* (1913) 17 CLR 149, 196 and *Universal Cargo Carriers Corp v Citati (No 2)* [1958] 2 QB 254, 264–265.

408 *Brisbane City Council v Valuer-General (Qld)* (1978) 140 CLR 41, 61 (Murphy J); *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375, 396 (Lord Evershed MR).

409 *Re Alcoota Land Claim No 146* (1998) 82 FCR 391, 394–395.

dispute, the dispute is essentially hypothetical, the preliminary question is one of fact and law, or the case stated is imprecisely formulated.[410]

Duplication of High Court procedures

10.20 A particular issue raised in relation to the High Court's procedures was whether s 18 JA and O 35 HCR should be retained as separate procedures or amalgamated. The argument for amalgamation is that the differences between the two powers create confusion about their respective meaning and roles. There is a further question of whether it is appropriate for the power to be located in delegated legislation rather than in a principal Act.

Relationship to appellate process

10.21 One issue raised for consideration in DP 64 was the relationship between the case stated procedure and the power of a Full Court to hear a similar matter on appeal. The Federal Court procedure is the only one that is expressly linked to the appellate process. Section 25(6) FCAA provides that a case can only be stated or a question reserved if the matter is one in respect of which an appeal would lie from a judgment of the judge to a Full Court. An argument for restricting transfer to appellable matters is that it preserves existing jurisdictional relationships by ensuring that a Full Court adjudicates only those matters that might, in principle, have come to it on appeal. On the other hand, a case stated procedure that is not restricted to appellable matters might assist a court in resolving matters of law that would not otherwise have the benefit of appellate consideration.

Role of the Chief Justice

10.22 The case stated procedure has the potential to disrupt a court's appellate work, the orderly discharge of which is the principal responsibility of the Chief Justice. For this reason, the Commission asked in DP 64 whether legislation should require a single judge to consult with the Chief Justice before stating a case for a Full Court. On one view, this might assist the judge in weighing the desirability of stating a case against the consequences for the court's appellate workload. An opposing view is that including a requirement to consult is unnecessary because the Chief Justice is usually consulted in practice, and it is ineffective because it would not prevent a judge from stating a case against the advice of the Chief Justice.

Diversity of procedures

10.23 There is currently significant divergence in the form and content of case stated procedures in federal courts. The *Judiciary Act* allows a single justice of the High Court to state a case for a Full Court with no preconditions as to the nature or

410 Ibid, 394–395; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 358–359.

significance of the matter, and the *High Court Rules* permit the parties to state a case to the Full Court by agreement. A Federal Court judge is also able to state a case for a Full Court but the case must be one in which an appeal would lie from a judgment of the judge to a Full Court. The Family Court's provision requires a 'question of law' that the judge and at least one of the parties wish to have determined by a Full Court. The issue arises as to whether these provisions should be harmonised.

Submissions and Consultations

10.24 In submissions and consultations the view was frequently expressed that the power to state a case or reserve a question for a Full Court was a very valuable procedure, if used in appropriate circumstances.[411] This was particularly so in the High Court, where it provided a means for the timely resolution of important questions of law.[412]

10.25 No-one suggested that any significant problems existed with the use of the procedure, although it was acknowledged that difficulties sometimes arise in intermediate courts because a case stated is imprecisely drafted.[413] It was generally agreed that there is a need for caution in utilising the procedure, but this should not obscure its potential value.

10.26 The Law Council submitted that it was unnecessary to require a single judge to consult with the Chief Justice before stating a case or reserving a question for a Full Court.[414]

10.27 There was clear support for the consolidation of the High Court's procedures under s 18 JA and O 35 HCR because the current provisions were thought to create uncertainty and ambiguity.[415]

10.28 The Family Law Council expressed the view that a court constituted by a single judge should have the power to state a case or refer a question to a Full Court on the application of a party or of its own motion.[416] The Council also stated that the power should be exercised only after consultation with the Chief Justice, and that it should be limited to questions of law or mixed questions of law and fact.

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411 The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; D Graham QC, *Consultation*, Melbourne, 15 February 2001; Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.

412 The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; D Graham QC, *Consultation*, Melbourne, 15 February 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001.

413 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001.

414 Law Council of Australia, *Correspondence*, 20 April 2001.

415 The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001.

416 Family Law Council, *Submission J040*, 23 April 2001.

10.29 The Family Law Council supported the proposal that a Full Court have an express discretion to decline to answer a case stated or question reserved where it considers it inappropriate to do so,[417] while the Law Council of Australia regarded this as unnecessary.[418]

10.30 The Law Council of Australia was opposed to the view that the discretion should be structured by statute, stating that the discretion should be left at large so as to allow maximum flexibility in the handling of matters.[419] One view was that statutory criteria would not be helpful to counsel or the court and might be so broad as to be of little use.[420]

10.31 The Law Council of Australia supported a review of federal laws that establish case stated procedures with a view to their harmonisation.[421] No consultation or submission suggested that the current diversity of case stated procedures in federal courts was inherently desirable as a matter of practice or principle.

Commission's Views

10.32 The Commission considers that the case stated procedure is a useful tool in the management of federal civil litigation and should clearly be retained. If used appropriately, the procedure allows for the early and authoritative resolution of difficult legal questions, thereby avoiding the costly time-consuming determination of complex issues at trial. However, the Commission is of the view that the procedure merits fine-tuning in several respects, as discussed below.

Harmonising federal court case stated procedures

10.33 The Commission considers that the case stated procedures of federal courts should be reviewed with a view to their harmonisation. The Commission recognises that different federal courts may require slightly different procedures because of the particular requirements of their jurisdiction. However, harmonisation is likely to aid in the development of common precedents and provide greater clarity.

10.34 The Commission does not believe that federal legislation should attempt to regulate the case stated procedures of state courts exercising federal jurisdiction. Such an approach would result in state courts having two sets of case stated procedures, depending on whether they were exercising state or federal jurisdiction in a particular case. For reasons outlined in Chapter 9 and Part G, the Commission considers this to be undesirable.

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417 Ibid.
418 Law Council of Australia, *Submission J037*, 6 April 2001.
419 Ibid. See also B Walker SC, *Consultation*, Sydney, 5 March 2001.
420 B Walker SC, *Consultation*, Sydney, 5 March 2001.
421 Law Council of Australia, *Correspondence*, 20 April 2001.

Consolidating High Court provisions

10.35 The Commission recommends that s 18 JA and O 35 HCR be amalgamated into a single provision located in the *High Court of Australia Act 1979* (Cth). The overlap and inconsistencies between the existing provisions may lead to confusion and needless debate about their purpose and scope. There appears to be no justification in law or policy for the current distinctions. The Commission is also of the view that the power of a justice of the High Court to state a case should be defined in primary legislation rather than in Rules of Court.

Own motion power and power to refuse to state a case

10.36 The Commission's view is that a court constituted by a single judge should have the power to state a case or reserve a question for a Full Court on the application of a party or of its own motion. There may be situations in which the parties are reluctant to invoke the case stated procedure even though there is a strong argument for doing so. A trial judge should have sufficient powers to manage the pending litigation by stating a case for a Full Court if he or she considers it appropriate to do so. This would necessitate amendment to s 94A FLA and O 35 HCR, each of which requires the consent of one or more litigants.

10.37 It follows that a single judge should also have an explicit power to refuse to state a case, notwithstanding the parties' request to do so. There may be circumstances where the court considers that use of the procedure is unwarranted or premature, in spite of the parties' preferences. A judge should be free to consider not only the interests of the parties but the ends of justice.

Role of the Chief Justice

10.38 Chief Justices play a critical role in managing the workload of their courts. This role includes the management of the judicial work of multi-member panels exercising original jurisdiction. The Commission's consultations suggested that it is common practice for judges to consult with the Chief Justice about whether to state a case for a Full Court, and in what form. The Commission considers this to be a desirable practice, which should be encouraged. However, the Commission does not recommend that consultation be a legislative requirement. The Commission agrees with the views expressed by the Solicitor-General for Tasmania, W Bale QC:

> The *ability* to consult does not need legislative provision, and [such] a *requirement* … would not prevent referral, whatever the views of the Chief Justice. I would have thought that a Court constituted by a single judge could be relied upon only to state a case where it was persuaded that that was appropriate to do so, and that where the Full

> Court considered a referral to have been inappropriate its power to decline to answer the case is an adequate safeguard against abuse of the power to state.[422]

Limitation to issues of law or mixed issues of law and fact

10.39 The Commission considers that the case stated procedure should only be used to determine questions of law, or mixed questions of law and fact. A Full Court is not in an effective position to determine facts, and the principal benefits of the case stated procedure are likely to be lost if it is required to do so.

10.40 Case law demonstrates that problems with the case stated procedure sometimes arise from the failure of a trial judge to determine all the facts necessary for a Full Court to decide the legal issues. The trial judge should normally ensure that a case is not stated for the consideration of a Full Court unless factual issues that are necessary for the resolution of the legal questions have been determined. This may often be done by agreement between the parties. As discussed below, where the facts have not been adequately determined, it should be open to a Full Court to remit any factual inquiry to the single judge for determination.

Relationship to the appellate process

10.41 The Commission recommends that federal legislation be amended to provide that a judge may state a case or reserve a question for a Full Court only if an appeal would lie to a Full Court from a judgment of that judge. This is already stipulated in relation to the Federal Court. As explained in DP 64, the existing channels of appeal from a single justice of the High Court to a Full Court, and from a single judge of the Family Court to a Full Court, lead to the same practical result in those courts.

10.42 The Commission is of the view that restricting the case stated procedure to appellable matters preserves existing jurisdictional relationships by ensuring that a Full Court adjudicates only those matters that might, in principle, have come to it on appeal. In this way the requirement prevents litigants from using the procedure to bypass any limitations or restrictions on the availability of appeals.

Statutory criteria

10.43 One option discussed in DP 64 was whether legislation should specify the factors to be taken into account by a judge in deciding whether or not to state a case for a Full Court. Submissions and consultations generally opposed this proposal and the Commission agrees with that view. There is no evidence that the

422 W Bale QC, *Correspondence*, 23 April 2001.

absence of criteria from existing legislation has led to problems in the application of the provisions. This was clearly said to be the case in the High Court.[423]

10.44 In relation to change of venue (Chapter 9) and remittal (Chapter 11), the Commission has recommended that statutory criteria be introduced to guide the exercise of various judicial discretions. The Commission does not consider that the discretion to state a case should be similarly structured. The reason for the difference in approach is that the circumstances that may be relevant to the exercise of a discretion to state a case are too diverse to define adequately. In contrast to change of venue and remittal, the case law provides little guidance as to the factors to be taken into account in deciding whether or not to state a case. Moreover, some possible criteria merely restate the problem. For example, to require a judge to consider 'whether there are obvious advantages in the court dealing with [the questions] prior to trial' is to restate the rationale for the existence of the case stated procedure.[424]

Full Court's power to decline to answer

10.45 The Commission recommends that legislation confer on a Full Court of the High Court, the Federal Court and the Family Court an express power to decline to answer a case stated or question reserved, where the Full Court considers it inappropriate to do so. If the case stated procedure is used inappropriately, a Full Court should be able to decline to answer the case stated without expending any greater resources than is necessary to make that assessment. The Law Council of Australia submitted that there was no need to make this power explicit.[425] However, the Commission considers that doing so will clarify the law and maximise a Full Court's ability to manage the litigation before it.

Power to remit

10.46 The Commission also recommends that a Full Court be able to remit to a single judge a question that arises out of a case stated or question reserved. There may be circumstances in which a Full Court requires a finding of fact on a particular issue before it can determine the relevant legal questions. This facility would ensure that there is optimal use of judicial resources within a court, whether they be those of a single judge or a Full Court.

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423 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; D Graham QC, *Consultation*, Melbourne, 15 February 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001.

424 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 3.83.

425 Law Council of Australia, *Submission J037*, 6 April 2001.

Power to draw inferences

10.47 As outlined above, the present law is inconsistent in the provision it makes for a Full Court to draw inferences and make implications from the facts and documents before it. The case law with respect to s 18 JA allows a Full Court of the High Court to make implications but not to draw inferences, whereas under O 35 HCR, s 94A FLA and O 50 FCR, a Full Court is expressly authorised to draw inferences in a case stated.

10.48 The Commission considers that a Full Court should be authorised to draw such inferences from the facts and documents as could have been drawn by the court constituted by a single judge. Legislation should make this power clear where it does not already do so.

Recommendation 10–1. Federal legislation should continue to provide a mechanism by which a matter arising in a federal court, or a question arising in such a matter, can be transferred before final determination from a single judge to a Full Court.

Recommendation 10–2. The Attorney-General should order a review of federal laws providing for a case to be stated or a question reserved for a Full Court of a federal court, with a view to achieving greater harmonisation. State and territory courts exercising federal jurisdiction should continue to state a case or reserve a question in accordance with state and territory laws on that subject.

Recommendation 10–3. Section 18 of the *Judiciary Act* and Order 35 of the *High Court Rules* should be amalgamated into a single provision located in the *High Court of Australia Act 1979*, by which a single justice of the High Court may state a case or reserve a question for a Full Court.

Recommendation 10–4. Federal laws that provide for a case to be stated or a question reserved for a Full Court of a federal court should be amended to incorporate the following elements.

(a) A single judge should be able to state a case or refer a question to a Full Court on the application of a party or on the judge's own motion.

(b) A single judge should have a statutory discretion to refuse to state a case or refer a question, notwithstanding that the parties favour such a course.

Recommendation 10–4 cont'd

(c) The case stated or question reserved should be expressly limited to questions of law or mixed questions of law and fact.

(d) The matter, or question arising in a matter, should be one in respect of which an appeal would lie to a Full Court from a judgment of a single judge.

(e) A Full Court should have an express discretion to decline to answer a case stated or question reserved where the Full Court considers it inappropriate to answer the case stated or question reserved.

(f) A Full Court should be able to remit a case stated or question reserved to a single judge and should also be able to remit to a single judge any question of fact that arises out of a case stated or question reserved.

(g) A Full Court should be authorised to draw from the facts and documents such implications and inferences as could have been drawn by a single judge.

Use of the Case Stated Procedure between Courts

10.49 The provisions discussed above enable a single judge of a federal court to state a case or reserve a question for a Full Court of the *same* court. Legislation also enables a judge of one court to state a case or reserve a question for the consideration of a single judge or a Full Court of *another* court in some situations.

10.50 Section 26 FCAA enables a court from which an appeal lies to the Federal Court to state a case or reserve a question for the Federal Court. If the referring court is a court of summary jurisdiction, the power to hear a stated case or determine a question may be exercised by a single judge of the Federal Court or by a Full Court. If the referring court is not a court of summary jurisdiction, the power must be exercised by a Full Court.

10.51 The appellate jurisdiction of the Federal Court is considered in Chapter 20. As indicated in that Chapter, under s 24 FCAA, appeals lie to the Federal Court from other courts in three circumstances:

- from a judgment of the Federal Magistrates Service;
- from a judgment of the Supreme Court of a Territory, other than the Northern Territory; and

- from a judgment of a state court exercising federal jurisdiction, as provided for under particular federal Acts.

10.52 Section 26 recognises that an appeal lies to the Federal Court from certain decisions of other courts, and it permits the regular appellate process to be shortcut by the case stated procedure in appropriate cases. The law relating to cases stated and questions reserved by a single judge of the Federal Court for a Full Court of that Court is discussed above. Similar principles are likely to apply under s 26.

10.53 The *Family Law Act 1975* makes analogous provision. Appeals lie from the Federal Magistrates Service and the Family Court of Western Australia to the Family Court of Australia (see Chapter 21). Section 94A FLA allows judges of these courts to state a case or reserve a question for a Full Court of the Family Court.

10.54 The use of the case stated procedure between courts did not attract much comment in consultations or submissions. However, the Law Council of Australia expressed the view that s 26 FCAA should be repealed.

> The Law Council is also concerned that section 26 of the *Federal Court Act* has the potential to undermine the Federal Court's ability to control its own workload, because it gives the court from which an appeal would lie the ability to transfer matters into the Federal Court by way of the case stated or question reserved procedures. The issues dealt with by section 26 of the *Federal Court Act* would be better dealt with by the standard appeal process.[426]

Commission's view

10.55 The Commission acknowledges that use of the case stated procedure between courts may give rise to heightened concerns about the impact of stating a case on the workload of the receiving court. This is because the judge stating the case may have no experience of, or administrative connection with, the court whose judicial resources will be expended by answering the case stated or question reserved.

10.56 Nevertheless, the Commission recommends that federal provisions such as s 26 FCAA be retained. The Commission has not been able to obtain data from the Federal Court about the use of s 26, but there is no evidence that the section has been misused or that it has caused difficulties for the workload of the Federal Court.

426 Ibid.

10.57 In Recommendation 10–4 (d), the Commission indicated that the procedures for stating cases *within* federal courts should expressly require the matter to be one in respect of which an appeal would lie to a Full Court from a judgment of a single judge. The case stated procedure was said to complement the appellate process. It enables a multi-member bench to consider a question of law before the trial judge proceeds to judgment. Moreover, it does this where there is a need for an expeditious and authoritative determination in circumstances where an appeal might have been brought to a Full Court in any event.

10.58 A logical corollary is that, in those circumstances in which a Full Court of a federal court has jurisdiction to hear an appeal, it should also be able to receive a case stated or a question reserved. In the Commission's view, it is no objection that the appeal lies to a Full Court from another court, be it a federal, state or territory court. The function of a Full Court in answering a stated case or a reserved question complements its role as an appellate court and provides similar benefits for the litigants and the judge below.

10.59 The Commission accordingly recommends that s 26 be retained, but amended to incorporate the same elements as are recommended above in relation to procedures *within* federal courts. The inclusion of these elements would minimise the risk of misuse of the power by giving it greater structure. Such a change would harmonise case stated procedures and assist in developing common precedents. The Commission considers that this type of inter-court transfer may need to be monitored by the courts involved to ensure the process is used appropriately. If it were found necessary, the courts could consider developing a protocol to assist judges of the referring courts in determining when the case stated procedure should be used.

Recommendation 10–5. Section 26 of the *Federal Court of Australia Act 1976* should continue to provide a procedure whereby a case may be stated or a question reserved by a single judge of one court for a Full Court of the Federal Court before final determination, provided that the matter is one in respect of which an appeal lies from a judgment of a single judge to the Federal Court. Section 26 should be amended to incorporate the elements identified in Recommendation 10–4.

Recommendation 10–6. Section 94A of the *Family Law Act 1975* should continue to provide a procedure whereby a case may be stated or a question reserved by a single judge of one court for a Full Court of the Family Court before final determination, provided that the matter is one in respect of which an appeal lies from a judgment of a single judge to the Family Court. Section 94A should be amended to incorporate the elements identified in Recommendation 10–4.

References

Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 (Cth) and Related Legislation*, Discussion Paper No 64 (2000), ALRC, Sydney.

High Court of Australia, *Annual Report 1999-2000* (2000), Commonwealth of Australia, Canberra.

11. Remittal by the High Court

Contents

Current Law

11.1 The High Court has original federal jurisdiction conferred upon it by s 75 of the Constitution. This jurisdiction is entrenched and cannot be removed except by constitutional amendment (see Chapter 3). Today, the role of the High Court as the final court of appeal in matters of general law as well as the final arbiter of the Constitution make it inappropriate for some of this original jurisdiction to be exercised by the High Court itself. The High Court's power under s 44 JA to remit a matter to another court for adjudication provides a means by which the High Court may divest itself of matters that are inappropriate for its determination.

11.2 Section 44 allows the High Court to remit, on the application of a party or of its own motion, matters commenced in the High Court to another court, subject to any directions that the High Court may make. The power is not in its terms restricted to matters commenced in the Court's original jurisdiction. The section speaks of 'any matter … that is at any time pending in the High Court', and might in principle apply to the Court's appellate jurisdiction. However, the High Court's close scrutiny of its appellate workload through the requirement of special leave makes it unlikely that the Court would be burdened with inappropriate appellate matters (see Chapter 19). The power of remittal is thus principally used by the High Court to free itself of cases within its original jurisdiction.

11.3 Before 1976, the remittal power was conferred by s 45 in the same terms in which it had been originally enacted in 1903. That section permitted the High Court, on the application of a party, to remit a matter for trial to any state court that had federal jurisdiction with regard to the subject matter and the parties. The power has been broadened by a number of subsequent amendments.

11.4 In 1976 additional powers of remittal were conferred in a new provision in s 44.[427] The amendment allowed the High Court to remit of its own motion, and to remit to a broader range of courts, namely, any federal, state or territory court that has jurisdiction with respect to the subject matter and the parties.[428] Remittal was also made 'subject to any directions of the High Court'.

11.5 In 1983 the power was again extended to permit the remittal of parts of matters.[429] Amendments made in 1984 authorised remittal in relation to matters referred to in s 38(a), (b), (c) and (d) JA[430] and inserted s 44(2A) to make it clear that the High Court could remit matters in which the Commonwealth is a party to the Federal Court.[431]

11.6 Section 44 currently allows remittal in three circumstances.

- Section 44(1) is a general provision that, subject to s 44(2), allows the High Court to remit a matter to any federal, state or territory court that has jurisdiction with respect to the subject matter and the parties.
- Section 44(2) permits remittal to the Federal Court or any state or territory court of matters referred to in s 38(a), (b), (c) or (d) JA. These are matters in which state courts would otherwise have no jurisdiction, such as matters arising directly under treaty, suits between States, and suits between the Commonwealth and a State (see Chapter 7).
- Section 44(2A) permits remittal to the Federal Court of matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party.

11.7 Section 42 permits remittal of a matter after it has been removed into the High Court from another court pursuant to s 40. Removal is discussed in Chapter 15. Under s 42(2), where it appears to the High Court that it does not have original jurisdiction in relation to a removed cause, the Court is required to remit the cause to the court from which it was removed.[432]

When is a matter suitable for remittal?

11.8 The High Court has a discretion as to whether it will remit a matter to another court. If a matter is to be remitted, the Court will also usually have a discretion in choosing the court to which the matter is to be remitted. In relation to the first of these discretions, the High Court has taken a broad and pragmatic approach to determining which cases are suitable for remittal.

427 *Judiciary Amendment Act 1976* (Cth).
428 M Pryles (1984), 356.
429 *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth), s 3 and Schedule 1.
430 *Judiciary Amendment Act (No 2) 1984* (Cth), s 6.
431 *Statute Law (Miscellaneous Provisions) Act (No 1) 1984* (Cth), s 3 and Schedule.
432 *Attorney-General (NSW) v Commonwealth Savings Bank of Australia* (1986) 160 CLR 315.

11.9 The High Court has tended to remit matters commenced in its entrenched jurisdiction under s 75 of the Constitution unless they arise under the Constitution or involve its interpretation. In this case they are generally retained.[433] Remitted matters have mainly concerned the exercise of diversity jurisdiction under s 75(iv) of the Constitution or actions in which the Commonwealth is a party under s 75(iii).[434] Most diversity cases have involved negligence actions, often arising out of motor vehicle accidents.[435]

11.10 There have been few reported cases concerning remittal of diversity suits since the cross-vesting legislation commenced operation in 1988.[436] Since the advent of cross-vesting, plaintiffs no longer have to commence proceedings in the High Court's original jurisdiction and then seek to have the matter remitted to a court of their choice in order to secure a favourable forum for the trial of the action. As discussed in Chapters 2 and 8, the cross-vesting scheme provides for the transfer of proceedings between participating courts without resort to the High Court.[437]

Which courts can receive the remitter?

11.11 Under s 44(1), the High Court can only remit a matter to any federal, state or territory court that has 'jurisdiction with respect to the subject matter and the parties'. In *Johnstone v Commonwealth*,[438] the majority of the High Court defined this phrase broadly and held that the provision enabled the Court to remit an action against the Commonwealth in tort to the Supreme Court of any State, not merely to the State in which the cause of action arose. This interpretation went beyond the literal meaning of the section, which would have limited remittal to courts that already had jurisdiction in the matter. Gibbs J remarked:

> There is no reason to give s 44 a narrow, restrictive construction. If the Parliament had intended that remitter should be made only to a court already invested with jurisdiction it would have been very easy to say so. Strong reasons of convenience may in a particular case demand that a matter pending in this Court should be remitted to a Supreme Court other than that in which the cause of action arose. … It would not serve any useful purpose to confine the words of s 44 in the manner suggested and to fetter a power of remitter, which was obviously intended to be large and general.[439]

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433 *Re Boulton; Ex parte Construction, Forestry, Mining & Engineering Union* (1999) 73 ALJR 129, 133 (Kirby J); D Jackson (1994), 203.

434 Examples of cases in each category are given in Australian Law Reform Commission, Discussion Paper No 64 (2000), para 3.125.

435 C Cook (1987), 202.

436 See, for example, *Gardner v Wallace* (1995) 184 CLR 95; *Crouch v Commissioner for Railways (Qld)* (1989) 85 ALR 347.

437 s 5 JCCVA. A further reason for the reduction in diversity suits may have been the passage of the *Choice of Law (Limitations Periods) Act 1993* (NSW) and cognate legislation of other States and Territories.

438 *Johnstone v Commonwealth* (1978) 143 CLR 398.

439 Ibid, 402. See also 407 (Murphy J), 408 (Aickin J).

11.12 In *Broken Hill Proprietary Co Ltd v National Companies and Securities Commission (No 6),* Dawson J stated that 'it is not jurisdiction in the particular case that matters for the purposes of s 44 [but] jurisdiction to entertain an action of the kind in question that is important'.[440] Observations such as these indicate the Court's preparedness to avoid limitations on its discretion to remit to the most appropriate court in the circumstances of the case.

Choosing the appropriate receiving court

11.13 In many instances, s 44 offers the High Court a range of courts to which a matter might potentially be remitted. In choosing between these alternatives, the High Court has distinguished cases in which the laws applicable in the competing jurisdictions are materially the same from those in which the applicable laws are materially different.

11.14 In *Weber v Aidone*,[441] the High Court held that, where there is no material difference in the laws of the States, the balance of convenience is of central importance in choosing the receiving court. Relevant factors in determining the balance of convenience include: where the cause of action arose; the residence of the parties; the location, age and health of witnesses; the speed with which a matter can be heard in the alternative locations; travelling expenses and witness fees; the availability of legal aid; the capacity of the parties to meet litigation expenses; and any injustice to the parties if compelled to litigate in a particular State. In applying the balance of convenience test, the place where the cause of action arose is also of some significance[442] but the test is flexible and 'cannot be allowed to lead to injustice'.[443]

11.15 In *Pozniak v Smith*, the High Court held that, where the law applicable in the competing jurisdictions is materially different, the 'only safe course' is to remit to the State whose law has given rise to the cause of action.[444]

11.16 Although this test remains valid, the circumstances in which it is likely to apply have been significantly narrowed as a result of the High Court's decision in *John Pfeiffer Pty Ltd v Rogerson*.[445] As discussed in Part G of this report, that decision has reduced many of the material differences in the law applicable in different States and Territories in tort cases that have connections with more than one Australian jurisdiction. This is because (a) fewer laws are now classified as

440 *Broken Hill Proprietary Co Ltd v National Companies and Securities Commission (No 6)* (1986) 67 ALR 545, 548–549.

441 *Weber v Aidone* (1981) 36 ALR 345. See also *Crouch v Commissioner for Railways (Qld)* (1989) 85 ALR 347, 349.

442 *Crouch v Commissioner for Railways (Qld)* (1989) 85 ALR 347, 350.

443 *Pozniak v Smith* (1982) 151 CLR 38, 47 (Gibbs CJ, Wilson and Brennan JJ).

444 Ibid. The decision in *Pozniak* has been applied by the High Court in *Fielding v Doran* (1984) 60 ALR 342 and *McCauley v Hamilton Island Enterprises Pty Ltd* (1986) 69 ALR 271.

445 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.

'procedural laws' for the purpose of the conflict of laws, and hence fewer laws are governed by the law of the forum; and (b) the choice of law rule for intra-Australian torts no longer refers to law of the forum. As a result, the particular court to which a matter is remitted is less likely to affect the applicable law.

Issues and Problems

Range of receiving courts

11.17 In DP 64 the Commission asked whether the remittal power is sufficiently broad to enable the High Court to remit a matter to the most appropriate Australian court. Currently, under s 44(1), remittal is limited to a court that has jurisdiction with respect to the subject matter and the parties, as that phrase is understood in the light of *Johnstone v Commonwealth*.[446] One possible change would be to remove that restriction from the legislation and allow the High Court to remit to any court in Australia. Giving the High Court greater flexibility in selecting the receiving court might promote the efficient disposition of federal civil litigation. However, this objective has to be balanced against the desirability of respecting existing jurisdictional boundaries of Australian courts. The suggested change would mean that the act of remittal would confer federal jurisdiction on a receiving court in circumstances in which that court would not otherwise have had jurisdiction.

Remittal and public law remedies

11.18 Another area of difficulty is the extent to which the High Court can remit a matter in which public law remedies are sought against a Commonwealth officer. As mentioned above, the 1984 amendments to s 44(2) gave the High Court power to remit to the Federal Court or to any state or territory court matters that would otherwise have been within the High Court's exclusive jurisdiction under s 38. However, one notable omission from the new powers in s 44(2) was a reference to s 38(e). Section 38(e) concerns matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court. Gibbs CJ has commented that the matters in s 38(e) were 'obviously excluded' from the power of remitter 'as a matter of policy'.[447] However, the policy reasons for the exclusion were not made explicit in the parliamentary debates relating to the legislative amendments.[448]

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446 *Johnstone v Commonwealth* (1978) 143 CLR 398.

447 *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1984) 154 CLR 579, 583.

448 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 1984, 1284–1286, 1477–1485, 1490–1496; Commonwealth, *Parliamentary Debates*, Senate, 8 March 1984, 584–586, 852–865, 934–940, 1062–1064.

11.19 It is not clear to what extent matters falling under s 38(e) are capable of being remitted under the subsections of s 44 other than s 44(2). As noted above, s 44(1) requires the receiving court to possess jurisdiction to entertain an action of the kind in question. State courts generally have no jurisdiction to grant public law remedies against Commonwealth officers (see Chapter 7). Moreover, while s 39B(1) grants the Federal Court original jurisdiction in relation to matters 'in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth', s 39B(2) explicitly excludes some categories of Commonwealth officer.[449] Such matters would seem to be excluded from the operation of s 44(1) for the purpose of remittal to the Federal Court. One suggestion is that remittal to the Federal Court might still be possible under s 44(2A) on the basis that an application for prerogative relief against a Commonwealth officer is a matter in respect of which the Commonwealth is a party.[450]

11.20 In DP 64 the Commission asked whether s 44 should permit remittal of matters falling within s 38(e). If so, it may be necessary to distinguish matters in which public law remedies are sought against a judge of a federal court from those in which such remedies are sought against other Commonwealth officers. It may be inappropriate for judges of one federal court to grant public law remedies against those of another, and it is not possible to do so in respect of other judges of the same court.[451]

Remittal of appellate matters

11.21 A further issue is whether the High Court should be able to use its remittal powers when exercising appellate jurisdiction. Currently, s 44 appears to permit this. Section 44(1), (2) and (3) each refer to 'a matter' or 'any matter' 'that is at any time pending in the High Court'. This presumably includes matters pending in the Court's appellate jurisdiction.

11.22 The possibility of remittal of appellate matters raises a number of difficulties. At a policy level, it is arguable that the High Court should determine all appeals that are properly brought before it as the final court of appeal. On this view, it would be an abdication of responsibility to remit the determination of an appellate matter to a lower court.

11.23 There may also be constitutional obstacles to this course. Section 73 of the Constitution guarantees certain channels of appeal to the High Court, subject to 'exceptions' or 'regulations' made by Parliament. A question might arise as to whether remittal of an appellate matter was a permissible exception or regulation.

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449 The exclusions relate to a person holding office under the *Workplace Relations Act 1996* (Cth) or the *Coal Industry Act 1946* (Cth), or a judge of the Family Court of Australia.

450 LBC Information Services 19.7 *Practice and Procedure*, para 40.

451 *Re Jarman; Ex parte Cook (No 1)* (1997) 188 CLR 595, 603–604 (Brennan CJ).

Moreover, constitutional difficulties might be encountered in particular types of remittal. For example, the Federal Court could not validly adjudicate an appellate matter that had come to the High Court on appeal from a state court exercising state jurisdiction. The constitutional limitations on the appellate jurisdiction of federal courts other than the High Court are discussed in Chapters 2 and 16.

Structuring the discretion

11.24 Section 44 provides no guidance as to the manner in which the discretion to remit is to be exercised. In DP 64 the Commission asked whether the Court's discretion should be structured by including a list of factors to which the Court must have regard in making its determination. The factors might include those that have been considered in the cases as relevant to the exercise of the discretion.

Power to issue directions

11.25 Section 44(3) provides that further proceedings in a remitted matter shall be as directed by the receiving court, but 'subject to any directions of the High Court'. In *Pozniak v Smith,* the High Court held that the Court's power to give directions to the court receiving the remitter is limited to matters of procedure and does not extend to substantive law.[452] The issue that arises is whether there is a need to clarify the ambit of the High Court's power to give directions.

Submissions and Consultations

11.26 Submissions and consultations clearly demonstrated that remittal is a useful mechanism for managing the High Court's workload and for ensuring that the judicial resources of the highest court are used only for the most important cases. It was also generally agreed that the remittal power should be broad. The Law Reform Commission of Western Australia commented that the High Court should be in a position to send a matter to the most appropriate court in the country.[453] However, there was some opposition to the High Court having the power to remit a matter to any Australian court.[454]

11.27 On the issue of prerogative relief, one view was that s 44 should exclude the remittal of matters in which prerogative relief is sought against officers of a federal court.[455] The Law Council of Australia stated that, although authority is lacking on the point, the preferable view is that the High Court currently has the

452 *Pozniak v Smith* (1982) 151 CLR 38, 44. See also *Bowtell v Commonwealth* (1989) 86 ALR 31; *Mabo v Queensland* (1986) 64 ALR 1; *Dinnison v Commonwealth* (1997) 74 FCR 184.

453 Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001.

454 Law Council of Australia, *Submission J037*, 6 April 2001; M Sexton SC, *Submission J009*, 23 February 2001.

455 M Sexton SC, *Submission J009*, 23 February 2001.

power to remit such matters to the Federal Court under s 44(2A).[456] This is presumably because a matter in which a constitutional writ is sought against an officer of the Commonwealth is a matter over which the Federal Court has jurisdiction by virtue of s 38B(1).

11.28 The Law Council of Australia supported the High Court retaining its powers to remit to the Federal Court any matter in which public law remedies are sought against an officer of the Commonwealth.[457] However, where the Commonwealth officer is an officer of a federal court, the Law Council stated that the High Court should only be able to remit the matter to the Federal Court if that Court has original jurisdiction in the matter. In response to other questions raised in DP 64, the Law Council recommended that the Federal Court be given original jurisdiction in matters falling within s 38(e), subject to three qualifications. These were that the Federal Court should not have jurisdiction to grant public law remedies against:

- an officer of the Federal Court;
- a person holding office under the *Workplace Relations Act 1996* (Cth) or the *Coal Industry Act 1946* (Cth), or a judge of the Family Court; or
- an officer of the Federal Magistrates Service in relation to family law matters.

11.29 There was strong opposition to allowing remittal in appellate matters. The Law Council of Australia said in its submission that remittal of a matter falling within the High Court's appellate jurisdiction would effectively be an abdication of its responsibility as the ultimate appeal court for the nation.[458]

11.30 There was some opposition to stipulating factors that the High Court must consider when exercising its discretion to remit. One view was that such a change is unnecessary because the Court and senior legal practitioners are familiar with the relevant factors, and legislative specification might generate the need to reinterpret settled views. It was also said that a broad and largely unfettered discretion was desirable.[459] An alternative view was that the legislative provisions are confusing and need to be clarified, even though the Court might be able to achieve its objectives using the current power.[460]

456 Law Council of Australia, *Submission J037*, 6 April 2001.
457 Ibid.
458 Ibid.
459 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; P Brazil, *Submission J010*, 22 February 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001; Law Council of Australia, *Submission J037*, 6 April 2001.
460 R Meadows QC, *Consultation*, Perth, 22 March 2001.

11.31 In relation to the High Court's powers to issue directions, the Law Council of Australia submitted that there is no need to clarify the High Court's power to give directions in relation to remittal. As is currently the case, the power should be limited to procedural matters, although the directions need not relate to the actual process of remission.[461] The Attorney-General of New South Wales also submitted that the power to give directions should be limited to procedural issues.[462]

Commission's Views

11.32 The Commission is of the view that the High Court's power to remit matters to other courts for resolution is an essential mechanism for enabling the Court to regulate its workload properly. The power provides an antidote for the overly broad conferral of original jurisdiction on the High Court under s 75 of the Constitution. The importance of ensuring that the High Court determines only the most significant legal questions, whether they be questions of constitutional law or general law, strongly suggests that the remittal power should be broad and flexible. However, that does not mean that it should be unconstrained.

Choice of receiving court

11.33 The Commission considers that s 44 should be amended to provide that the High Court may remit a matter that is at any time pending in the High Court to any other court in Australia, subject to the recommendations below in relation to public law remedies. The section should also provide that if the receiving court does not otherwise possess federal jurisdiction with respect to the matter being remitted, the receiving court is thereby invested with federal jurisdiction or has federal jurisdiction conferred on it in that matter, by virtue of the remittal. This amendment would ensure that the court receiving the remittal has the federal jurisdiction necessary to determine the matter. A model for this approach can be found in the provisions relating to removal of causes into the High Court (see Chapter 15). Section 40(3) JA provides that jurisdiction to hear and determine a cause removed into the High Court by an order under s 40(2) is conferred on the High Court by this section, to the extent that that jurisdiction is not otherwise conferred on the Court.

11.34 The Commission considers that there is no need to stipulate that the receiving court have jurisdiction with respect to the subject matter and the parties, as s 44(1) currently provides. The course of litigation is most likely to be facilitated if the High Court is permitted to remit to the most appropriate court in all the circumstances of the case. However, the Commission recommends that any lack of

461 Law Council of Australia, *Submission J037*, 6 April 2001.
462 Attorney-General (NSW), *Submission J019*, 14 March 2001.

jurisdiction on the part of a receiving court should be taken into account by the High Court in exercising its discretion to remit. A model for this approach can be found in the cross-vesting legislation. Section 5 JCCVA requires a court, when considering whether to transfer a proceeding to another participating court, to have regard to whether the proceedings would have been capable of being instituted in the other court.

Criteria to be applied

11.35 The Commission considers that s 44 should be amended to clarify that the High Court's discretion to remit a matter or retain it should be unfettered. However, where the High Court decides to remit a matter to another court, the Court's choice of receiving court should be exercised by reference to statutory criteria. The Commission supports the inclusion in legislation of a list of factors that the Court must consider when exercising its discretion, in so far as they are relevant to the circumstances of the case. Existing case law provides guidance as to the factors that ought to be taken into account, as does s 20(4) of the *Service and Execution of Process Act 1992* (Cth). The factors should include:

- whether the receiving court would have had jurisdiction with respect to the subject matter and the parties had the proceeding been commenced in that court;
- the residence or place of business of the parties and the residence of the witnesses likely to be called in the proceeding;
- the convenience of the parties and of the witnesses;
- the place where the cause of action arose;
- the place where the events that gave rise to the plaintiff's claim occurred;
- the place where the subject matter of the proceeding is situated;
- the financial circumstances of the parties, including the availability of legal aid;
- any contractual agreement between the parties regarding the court or place in which the proceeding should be instituted;
- the law to be applied in the proceeding;
- whether a related proceeding has been commenced by or against a party to the proceeding;
- the interests of the efficient administration of justice; and

- any other factor that the Court considers relevant in the circumstances of the case.

11.36 This list includes factors that have been identified in judicial decisions as relevant to the exercise of the discretion. The inclusion of the last point, namely, 'any other factor the Court considers relevant in the circumstances of the case' gives the Court flexibility to do justice having regard to the particular circumstances of the case. The Commission considers that the inclusion of statutory criteria would give better guidance to legal practitioners and litigants (including litigants in person), while maintaining the flexibility necessary for the remittal power mechanism to serve its function.

Public law remedies

11.37 In Chapter 7, the Commission stated its view that, for reasons of principle and pragmatism, it is appropriate that excesses of power by the officers of one polity be restrained solely by the courts of that polity. The Commission recommended that state courts invested with federal jurisdiction be excluded from issuing any order for ensuring that the powers or duties of an officer of the Commonwealth be exercised or performed according to law. By parity of reasoning, the Commission also recommended that federal courts (other than the High Court) be excluded from issuing such orders against an officer of a State. Chapter 37 makes equivalent recommendations in relation to the Territories.

11.38 These principles have the potential to be undermined by a liberal regime of remittal. For this reason, the Commission recommends that the power of remittal be qualified in three respects.

- First, the High Court should not be able to remit a matter in which an order is sought to ensure that the powers or duties of an officer of the Commonwealth are exercised or performed according to law to a court other than a federal court.

- Second, the High Court should not be able to remit a matter in which an order is sought to ensure that the powers or duties of an officer of a State or Territory are exercised or performed according to law to a court other than a court of the relevant State or Territory.

- Third, the High Court should not be able to remit to any other court a matter in which an order is sought to ensure that the powers or duties of a judge or officer of the Federal Court or the Family Court are exercised or performed according to law. The supervisory jurisdiction of the High Court in respect

of superior federal courts mandates that this jurisdiction be exercised by the High Court alone.[463]

11.39 These recommendations must be read in the light of the Commission's proposal that special provision be made for cases in which Commonwealth and state officers, or Commonwealth and territory officers, exercise dual functions pursuant to an intergovernmental arrangement. In Chapters 7 and 37 the Commission recommends that where public law remedies are sought in respect of intermingled functions, both federal and state courts (in the first case) and federal and territory courts (in the second case) should have jurisdiction to grant the appropriate relief. In these circumstances there should be no objection to the High Court remitting such a matter to a particular court, even though that court would not have jurisdiction to grant public law remedies in accordance with the principles enunciated in the previous paragraph.

No remittal of appellate matters

11.40 Currently, there is uncertainty about whether remittal is possible in relation to appellate matters. The Commission recommends that the *Judiciary Act* be amended to provide that the High Court cannot remit a matter that falls within its appellate jurisdiction. The Commission notes that there may be constitutional difficulties with extending remittal to appellate matters and the use of such a power has the potential to undermine the Court's role as the final appellate court for Australia.

11.41 As discussed in Chapters 18 and 19, the High Court presently uses the special leave process to filter the quantity and content of its appellate workload. The Commission considers that no useful purpose would be served by maintaining an additional mechanism in the form of a power to remit.

High Court's power to give directions

11.42 Finally, the Commission recommends that the High Court's power to give directions when remitting a matter should be clarified. Section 44 should be amended to state that directions imposed by the High Court on the conduct of a remitted matter may relate only to matters of practice and procedure.

Recommendation 11–1. Section 44 of the *Judiciary Act* should be amended to enable the High Court to remit to another court any matter falling within the judicial power of the Commonwealth, which is at any time pending in the High Court, subject to the following exceptions.

463 See *Re Jarman; Ex parte Cook (No 1)* (1997) 188 CLR 595.

Recommendation 11–1 cont'd

(a) Subject to Recommendations 7–8 and 37–5, the High Court should not be able to remit a matter in which an order is sought to ensure that the powers or duties of an officer of the Commonwealth (as that term is understood in s 75(v) of the Constitution) are exercised or performed according to law to a court other than a federal court. [See Recommendations 7–6, 37–2 and 37–3].

(b) Subject to Recommendations 7–8 and 37–5, the High Court should not be able to remit a matter in which an order is sought to ensure that the powers or duties of an officer of a State or Territory are exercised or performed according to law to a court other than a court of the relevant State or Territory. [See Recommendations 7–7 and 37–4].

(c) The High Court should not be able to remit to any other court a matter in which an order is sought to ensure that the powers or duties of a judge or officer of the Federal Court or the Family Court are exercised or performed according to law.

(d) The High Court should not be able to remit to any other court a matter falling within the High Court's appellate jurisdiction.

Recommendation 11–2. Subject to Recommendation 11–1, s 44 of the *Judiciary Act* should be amended to provide that the High Court may remit a matter that is at any time pending in the High Court to any other court in Australia. The section should also provide that if the receiving court does not otherwise possess federal jurisdiction with respect to the matter being remitted, the receiving court is thereby invested with federal jurisdiction or has federal jurisdiction conferred on it in that matter by virtue of the remittal.

Recommendation 11–3. Section 44 of the *Judiciary Act* should be amended to clarify that the High Court's discretion to remit a matter or retain it should be unfettered. However, where the High Court decides to remit a matter to another court, the Court's choice of receiving court should be exercised by reference to statutory criteria. In particular, the Court should be required to take into account the following factors:

- whether the receiving court would have had jurisdiction with respect to the subject matter and the parties had the proceeding been commenced in that court;

Recommendation 11–3 cont'd

- the residence or place of business of the parties and the residence of the witnesses likely to be called in the proceeding;
- the convenience of the parties and of the witnesses;
- the place where the cause of action arose;
- the place where the events that gave rise to the plaintiff's claim occurred;
- the place where the subject matter of the proceeding is situated;
- the financial circumstances of the parties, including the availability of legal aid;
- any contractual agreement between the parties regarding the court or place in which the proceeding should be instituted;
- the law to be applied in the proceeding;
- whether a related proceeding has been commenced by or against a party to the proceeding;
- the interests of the efficient administration of justice; and
- any other factor that the Court considers relevant in the circumstances of the case.

Recommendation 11–4. Section 44 of the *Judiciary Act* should be amended to clarify that the High Court's power to give directions in relation to a remittal is limited to matters of practice and procedure and does not extend to the substantive law to be applied in the receiving court.

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Part D

Constitutional Litigation

12. Jurisdiction in Constitutional Matters

Contents

Introduction

12.1 The capacity of courts to review the constitutionality of actions of the executive and legislative branches of government is fundamental to the healthy functioning of Australia's system of government.

12.2 The principle of judicial review derives from the United States Supreme Court decision in *Marbury v Madison*,[464] which held that the United States federal judiciary has the power to declare void any act of the legislature or executive in contravention of the Constitution.[465] Australia's Constitution makes no direct reference to judicial review of the actions of the legislature or the executive.[466] However, the founders of the Constitution were aware of the significance of *Marbury v Madison* and plainly intended that the High Court should exercise judicial review.[467]

12.3 The Australian Constitution recognises the importance of judicial review by identifying it as a head of federal jurisdiction. Section 76(i) provides that 'the Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under this Constitution, or involving its interpretation'. In addition, under Chapter III and related provisions, jurisdiction in constitutional matters may be conferred on other federal courts (s 77(i)), state courts (s 77(iii)) and territory courts (s 122).

464 *Marbury v Madison* 1 Cranch 137 (1803).
465 For a comparative review of the development of judicial review in Australia and the United States see S Gageler (1987).
466 D Williams (1996), 204.
467 A Mason (1986), 6.

12.4 In view of the broad powers of Parliament in this field, this Chapter examines the extent to which jurisdiction in constitutional matters should be centralised or decentralised. It also examines the extent to which such jurisdiction has been and should be conferred on each of the above courts.

12.5 The Commission notes that s 76(i) has been given an expansive interpretation by the courts, which underpins the importance of the judicial review function. In particular, the phrases 'arising under' and 'involving the interpretation of' have been given an independent operation.[468] For example, disputes involving an alleged inconsistency between state and federal law under s 109 of the Constitution are regarded as involving the interpretation of the Constitution notwithstanding that they usually revolve around issues of statutory interpretation.[469]

Centralised or Decentralised Adjudication?

12.6 Constitutional adjudication in Australia is decentralised. Generally speaking, any Australian court may determine the constitutional validity of federal legislation when the issue arises in the course of litigation. The decentralised model is found in many of the United Kingdom's former colonies, including the United States, Canada and India.[470] By contrast, in many European countries the task of constitutional adjudication is centralised in a constitutional court. Examples of centralised models include Germany, Italy, Spain and Austria.[471]

12.7 In DP 64 the Commission asked whether there should be a move towards a more centralised model of adjudication or whether, as a limiting case, jurisdiction in constitutional matters should be made exclusive to the High Court. The Commission noted that the capacity of Parliament to establish such a system derives from its power in s 77(ii) of the Constitution to define the extent to which the jurisdiction of any federal court shall be exclusive of the jurisdiction of state courts.

12.8 The rationale of a decentralised system is that any judge may be faced with the question whether ordinary legislative norms conflict with the Constitution. On the other hand, a centralised system of constitutional adjudication has been said to reflect the legal traditions of civil law countries. These traditions are characterised by a more rigid adherence to the doctrine of the separation of powers, the supremacy of statutory law, the absence of the principle of *stare decisis*, the unsuitability of civil law courts for judicial review, and a greater concern about the role of a powerful, non-democratic judiciary.[472]

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468 *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154 (Latham CJ).

469 P Lane (1997), 599; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 531, 536, 537–538; *Hume v Palmer* (1926) 38 CLR 441, 445–446, 451, 452–453, 461.

470 M Cappelletti (1989), 133.

471 Ibid, 133–137.

472 Ibid, 147.

12.9 In DP 64 the Commission expressed its preliminary view that the High Court should not be given exclusive jurisdiction in matters falling within s 76(i) of the Constitution. The Commission sought comments on the current system of constitutional adjudication and its effectiveness.

12.10 There was almost unanimous support for the current arrangements in consultation and submissions.[473] It was thought that any change would overburden the High Court with minor constitutional issues,[474] jeopardise its general appellate jurisdiction,[475] and create the need for a new court of final appeal for non-constitutional matters.[476] It was suggested the proposed change might be perceived as raising doubts about the capacity of other courts to determine constitutional issues, and that it would be disruptive to proceedings in those courts because of the increased need to remove cases to the High Court for adjudication.[477] One view was that concern about potential bias of state courts was an outdated concept and that the ready availability of state judges to determine constitutional matters made judicial review more accessible.[478] It was also noted that constitutional cases may presently be removed into the High Court if necessary (see Chapter 15).

12.11 The Commission confirms its preliminary view that jurisdiction in constitutional matters should continue to be decentralised. There was no evidence that the current system is ineffective or should be changed. Rather, the submissions and consultations strongly vindicated the current system for reasons of principle and practice.

12.12 As a matter of principle, such a change would mean that the High Court's constitutional role would overshadow its role as the final appellate court for important questions of general law. This might generate a need for a larger court or for separate courts, with all the additional associated costs. A move to a centralised model might also be construed as a rejection of other courts' competency to deal with constitutional issues, which runs counter to the long tradition of decentralised constitutional adjudication in Australia. Indeed, in the brief interval between federation in 1901 and the establishment of the High Court in 1903, state courts were the only Australian courts capable of applying and interpreting the Constitu-

473 Attorney-General's Department (Cth), *Consultation*, Canberra, 28 March 2001; Supreme Court of Western Australia, *Consultation*, Perth, 22 March 2001; compare A Asche, *Consultation*, Darwin, 1 March 2001.
474 Victorian Bar Association, *Consultation*, Melbourne, 6 March 2001.
475 P Brazil and K Boreham, *Consultation*, Canberra, 22 February 2001.
476 The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001.
477 P Brazil and K Boreham, *Consultation*, Canberra, 22 February 2001.
478 Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001.

tion.[479] To this day, state courts continue to perform the function of constitutional adjudication in significant cases.[480]

12.13 The practical difficulties of such a change would also be immense. The High Court, which already faces a demanding workload (see Chapters 18 and 19), could receive a large number of constitutional cases of no great significance, without the filtering effect of the lower courts. One measure of this potential is that less than 8% of the constitutional matters that are notified to the Commonwealth Attorney-General each year under s 78B JA are considered sufficiently important to warrant the Attorney-General's intervention (see Chapter 14). This concern is exacerbated by the increase in the number of constitutional issues being raised in the courts, partly in response to developments regarding implied constitutional rights.

12.14 Such a change would also disrupt the case management and workload of other courts. Parties would be inconvenienced while proceedings are adjourned pending the determination of constitutional issues in another forum. This could also affect litigation costs for parties.

12.15 In the Commission's view, there are already effective mechanisms for ensuring that constitutional issues deserving of the High Court's attention are identified and transferred to it efficiently. Section 78B JA enables the Attorneys-General to receive notices about matters pending in a federal, state or territory court involving a constitutional matter (see Chapter 13). Section 78A enables Attorneys-General to intervene in relation to constitutional issues once they have been identified by the notice requirement (see Chapter 14). Section 40 provides for removal into the High Court of constitutional cases pending in other courts (see Chapter 15).

Settled Areas of Constitutional Jurisdiction

Jurisdiction of the High Court

12.16 Most observers of the judicial system would regard constitutional adjudication as one of the most important tasks of the High Court. It is an odd fact of history that a jurisdiction now regarded as essential to the role and function of the High Court should not be listed in the Court's entrenched jurisdiction under s 75 of the Constitution. Rather, conferral of that jurisdiction on the High Court is at the discretion of Parliament under s 76(i).

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479 L Zines (2000), 266.

480 Three recent cases in which a state court has considered a constitutional issue that has been appealed to the High Court are *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61; *Austral Pacific Group Ltd (in Liq) v Airservices Australia* (2000) 173 ALR 619; and *Smith v Australian National Line Ltd* (2000) 176 ALR 449.

12.17 Since 1903, s 30 JA has conferred original jurisdiction on the High Court in s 76(i) matters, namely, those 'arising under this Constitution, or involving its interpretation'. As Lane has commented, s 30(a) fully implements s 76(i) of the Constitution because the phrase in s 30(a) simply repeats the words of s 76(i).[481] It is clear that Parliament cannot give any greater constitutional jurisdiction to the High Court although, for reasons rejected above, such jurisdiction might potentially be made exclusive to the High Court.

12.18 If there is any concern about the High Court's jurisdiction in constitutional matters it is in the opposite direction, namely, that Parliament has the capacity to take it away. In recognition of the fundamental nature of judicial review in Australia, in 1988 the Constitutional Commission recommended that the Constitution be amended to give the High Court entrenched original jurisdiction in all matters arising under or involving the interpretation of the Constitution.[482] While this proposal appears to be desirable, the Commission regards the likelihood of legislative limitation of the High Court's constitutional jurisdiction as very low.

Jurisdiction of the Federal Court

12.19 Until 1997 the Federal Court had no express power to adjudicate constitutional questions. In that year, s 39B(1A)(b) was inserted into the *Judiciary Act*, conferring on the Court jurisdiction in any matter 'arising under the Constitution, or involving its interpretation'.[483] Paragraph (b) fully implements the power in s 77(i) of the Constitution to define the jurisdiction of the Federal Court with respect to matters falling within s 76(i) of the Constitution. The 1997 amendment put the Federal Court's constitutional jurisdiction beyond doubt. However, as discussed in the following section, even prior to 1997 the Federal Court proceeded on the basis that it had jurisdiction to determine the constitutional validity of Acts under which it exercised its statutory jurisdiction.

12.20 The Federal Court handles many cases involving constitutional issues. The Court advised the Commission that a search of its database of judgments delivered between 1 January 1997 and 5 April 2001 indicated that constitutional issues arose in 109 cases.[484] Moreover, the Court decides some very significant constitutional cases. In its submission to this inquiry, the Court cited the recent decision of *McBain v Victoria*[485] in which Sundberg J held that a Victorian law requiring less favourable treatment for single women seeking in-vitro fertilisation was inconsistent with the *Sex Discrimination Act 1984* (Cth).

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481 P Lane (1997), 597.
482 Constitutional Commission (1988), vol 1, para 6.53.
483 *Law and Justice Legislation Amendment Act 1997* (Cth).
484 Federal Court of Australia, *Correspondence*, 24 April 2001.
485 *McBain v Victoria* (2000) 99 FCR 116.

Jurisdiction of state and territory courts

12.21 A further area of settled constitutional jurisdiction arises in relation to state and territory courts. As discussed in Chapter 6, s 39 JA invests state courts with federal jurisdiction in all matters listed in ss 75 and 76 of the Constitution, including constitutional matters under s 76(i). Accordingly, state courts have jurisdiction to determine constitutional questions at all levels from the Local Court or Magistrates Court to the Supreme Court.

12.22 The role of state courts in constitutional adjudication is consistent with the changes brought about in 1976 to the power to remove matters into the High Court (see Chapter 15). Those changes were designed to give state courts a greater role in determining constitutional issues by preventing the automatic removal into the High Court of *inter se* questions.

12.23 The courts of the ACT and the Northern Territory also have jurisdiction in constitutional matters. However, in the case of the Territories, the legal mechanism by which federal jurisdiction is conferred on their courts is somewhat obscure (see Chapter 36).

12.24 In relation to the Northern Territory, jurisdiction is conferred on the Supreme Court of the Northern Territory by s 67C(c) JA, which confers jurisdiction in matters formally within s 15(2) of the *Northern Territory Supreme Court Act 1961* (Cth). The latter section encompassed the federal jurisdiction formerly invested in the Supreme Court of South Australia, and hence includes constitutional matters under s 76(i) of the Constitution.

12.25 By a different path the same result would appear to obtain in the ACT. Section 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides that the Supreme Court of the ACT 'is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory'. This phrase may be broad enough to include the determination of constitutional matters.

12.26 As discussed in Chapter 36, the Commission recommends that the Territories be conferred with federal jurisdiction in the same manner as the States, in lieu of the current opaque provisions. It follows from this recommendation that territory courts would continue to have jurisdiction to determine matters arising under the Constitution or involving its interpretation, but that this would be achieved more transparently than at present.

Constitutional Jurisdiction of the Family Court and Federal Magistrates Service

Current law and practice

12.27 While the jurisdiction of the Federal Court to adjudicate constitutional questions has been clarified by an express statutory grant, the Family Court and the Federal Magistrates Service are now in the same position as the Federal Court was prior to 1997, when s 39B(1A)(b) JA was enacted. As constitutional issues may be raised in proceedings before any court, in DP 64 the Commission asked whether the Family Court and the Federal Magistrates Service should also be given express constitutional jurisdiction in some form. Currently, these courts rely on implied powers in dealing with constitutional issues, by analogy with the Federal Court's position before the 1997 amendments.

12.28 Prior to 1997, judicial decisions had affirmed the Federal Court's jurisdiction over constitutional questions despite the absence of an express statutory grant of jurisdiction.[486] The Federal Court's constitutional jurisdiction might be said to arise in one of three ways.

- When the Federal Court is invested with jurisdiction in any matter arising under an Act, determination of the constitutional validity is part of the same matter. The constitutional validity of a provision is inherent in its operation since 'if it is invalid it can have no operation or effect'.[487]

- The Federal Court's associated jurisdiction, conferred by s 32 FCAA, provides another basis of jurisdiction (see Chapter 2). In *Re Tooth & Co Ltd (No 2)*,[488] Franki and Brennan JJ adopted this as an alternative basis of the Federal Court's constitutional jurisdiction.

- A third possibility, not fully explored in the cases, is that the power to determine constitutional questions is inherent in all courts because of the overriding effect of covering cl 5 of the Constitution. This clause provides that the Constitution shall be binding on the courts, judges, and people of every state and of every part of the Commonwealth.[489]

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486 However, the High Court has doubted whether the Federal Court's jurisdiction in constitutional matters can be made exclusive of the High Court. See *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190, 200–201 (Barwick CJ).

487 See *Re Tooth & Co Ltd (No 2)* (1978) 34 FLR 112, 130 (Franki J), 120 (Bowen CJ), 140 (Brennan J). See also *Grace Bros Pty Ltd v Magistrates, Local Courts (NSW)* (1988) 84 ALR 492, 496 (Gummow J).

488 *Re Tooth & Co Ltd (No 2)* (1978) 34 FLR 112, 131 (Franki J), 139–141 (Brennan J).

489 *Commonwealth of Australia Constitution Act 1900* (Imp), s 5.

12.29 The first and second explanations have intrinsic limitations, which were overcome by the enactment of s 39B(1A)(b). Associated jurisdiction requires some degree of 'association' between the constitutional matter and the matter in respect of which jurisdiction has already been conferred on the Court. Similarly, the explanation based on the constitutional conception of a 'matter' only enables the Federal Court to adjudicate claims that would otherwise be outside its jurisdiction if they are attached to and not severable from the claim within its jurisdiction (see Chapter 2). By contrast, the grant of jurisdiction under s 39B(1A)(b) is independent of any association or relationship to any other matters within the Court's jurisdiction. This provision enables the Federal Court to do what the High Court and state courts have been able to do since 1903, namely to hear and determine constitutional matters unconnected with any matter arising under federal law.

12.30 As mentioned above, neither the Family Court nor the Federal Magistrates Service has an express grant of jurisdiction in respect of constitutional questions. However, both courts have associated jurisdiction akin to the Federal Court (see Chapter 2) and both adjudicate 'matters' as that term in understood in the context of Chapter III of the Constitution. It is probable that these courts have jurisdiction in constitutional matters, as did the Federal Court before 1997, though the issue is not free from doubt.

Submissions and consultations

12.31 The general view expressed in consultations and submissions was that the Family Court should have an explicit power of constitutional adjudication.[490] In particular, it was thought that an express power would assist the Court in dealing with constitutional issues, which were frequently raised by litigants in person. The Court could then refer the parties to a clear and unequivocal grant of such jurisdiction. The Law Council submitted that the Family Court should not be placed in the anomalous position of not having a power that was given to the Federal Court.[491]

12.32 There was a mixed response to this issue in relation to the Federal Magistrates Service. The court submitted that it should have an express jurisdiction.[492] It stated that it probably had implicit authority to determine constitutional questions but that the issue should be put beyond doubt by legislation. The court also commented that the presence of express jurisdiction in the Federal Court might be seen to place doubt on the position of the Federal Magistrates Service. Furthermore, litigants in person often raised issues about the constitutional power of the Federal Magistrates Service and such arguments were more easily answered if the court could refer to a clear legislative statement.

490 Family Court of Australia, *Consultation*, Melbourne, 14 March 2001; Family Law Council, *Submission J040*, 23 April 2001; Law Council of Australia, *Submission J037*, 6 April 2001.
491 Law Council of Australia, *Submission J037*, 6 April 2001.
492 Federal Magistrates Service, *Submission J011*, 7 March 2001.

12.33 An alternative view was that, although the Federal Magistrates Service is a court of record,[493] it does not possess broad jurisdiction like the Federal Court.[494] Moreover, some magistrates might lack the expertise to determine constitutional issues, although it was conceded that federal magistrates may be in a better position than some state magistrates in this respect.[495]

Commission's views

12.34 The Commission considers that the Family Court should have express jurisdiction to adjudicate constitutional questions that arise in the course of determining matters that are otherwise within its jurisdiction. This proposal is by no means radical since the Court currently appears to have this jurisdiction by implication. However, it would remove the current anomaly with the Federal Court and assist the Family Court in dealing effectively with constitutional issues raised in the course of family law proceedings.

12.35 In relation to the constitutional jurisdiction of the Federal Magistrates Service, the Commission acknowledges the variety of views expressed on the subject. In reaching its conclusion, the Commission has had regard to the fact that state magistrates have exercised this jurisdiction since 1903.[496] In that context, concerns about the capacity of the Federal Magistrates Service to adjudicate constitutional matters appear to be unfounded. The court is playing an increasingly important role in exercising federal jurisdiction in less complex civil matters. The court itself would like an explicit recognition of its jurisdiction because it would direct the parties to the court's authority to determine constitutional issues. In the Commission's view, there is no reason to suppose that federal magistrates lack the expertise to determine constitutional issues that arise within their existing fields of jurisdiction. Moreover, the ordinary appellate process is available for correcting errors made at trial through the right to appeal to the Federal Court or the Family Court. The Commission believes that the policy of decentralising constitutional adjudication is a sound one and that the amendment suggested below serves to regularise the court's existing jurisdiction.

493 s 8(3) FMA.
494 P Brazil, *Submission J010*, 22 February 2001; W Harris, *Submission J015*, 6 March 2001.
495 A Moss, *Consultation*, Adelaide, 15 March 2001.
496 s 39 JA.

Recommendation 12–1. The *Family Law Act 1975* should be amended to clarify that the Family Court has jurisdiction to hear and determine a matter arising under the Constitution or involving its interpretation where it arises in the course of adjudicating a matter that is otherwise within the Family Court's statutory jurisdiction. The *Federal Magistrates Act 1999* should be amended to clarify the jurisdiction of the Federal Magistrates Service in a like manner.

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13. Notice to Attorneys-General

Contents

Current Law and Practice

13.1 Section 78B JA imposes a duty on every court, including the High Court, not to proceed in a cause involving a matter arising under the Constitution or involving its interpretation unless and until the court is satisfied that notice of the cause has been given to each of the Attorneys-General and a reasonable time has elapsed since such notice.

13.2 Prior to the introduction of s 78B in 1976,[497] there was no formal system of notice about constitutional issues in Australian courts. Attorneys-General operated an informal system of advising each other of constitutional issues by letter.

13.3 Section 78B itself does no more than ensure that notice is given about constitutional issues pending in Australian courts. However, in so doing it provides the informational basis for intervention by an Attorney-General (see Chapter 14) or removal of a cause into the High Court by an Attorney-General (see Chapter 15). Section 78B thus enables an Attorney-General to identify and protect Commonwealth, state or territory interests, as appropriate.

13.4 A court has no general discretion to continue hearing a proceeding once a constitutional issue is raised. However, s 78B(2)(c) enables a court to continue to hear evidence and argument concerning matters that are severable from any matter arising under the Constitution or involving its interpretation. In addition, s 78B(5) provides that a court may proceed without delay to hear and determine proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where the court thinks it necessary to do so in the interests of justice.

497 *Judiciary Amendment Act 1976* (Cth), s 17.

13.5 Under s 78B(4) the Commonwealth Attorney-General may authorise the Commonwealth to pay an amount in respect of costs arising out of the adjournment of a cause by reason of a s 78B notice.

13.6 The obligation to issue notices applies in every court in Australia, from the High Court to each local or magistrates court. Some courts have introduced Rules of Court to regulate procedural issues arising from the giving of s 78B notices.[498] In the High Court, for example, O 73 HCR provides that the party whose case raises a matter arising under the Constitution or involving its interpretation shall file a notice of a constitutional matter in the registry at Canberra. The notice must state specifically the nature of the matter and the facts showing that the matter is one to which s 78B applies. The party must serve a copy of the notice on every other party and on the Attorneys-General of the Commonwealth, the States, the Northern Territory and the ACT.

13.7 The High Court's Practice Direction No 1 of 2000 supplements the Rules of Court. It provides that the written submissions of the appellant shall certify that the appellant has considered whether any notice, or any further notice, should be given to Attorneys-General in compliance with s 78B. The Practice Direction also requires the respondent to make the same certification in his or her written submissions. The purpose of the Practice Direction is to ensure that the parties consider whether a s 78B notice is necessary so that delays and costs will be minimised if such a notice is required. It is also designed to notify the Attorneys-General of a pending constitutional matter as soon as practicable, so that they have sufficient time to consider whether intervention or removal is warranted.

13.8 The Australian Government Solicitor (AGS) provided the Commission with data about the number of s 78B notices issued to the Commonwealth Attorney-General for the calendar years 1996–2000, and the resulting number of interventions. The data is presented in Figure 13–1. The Figure shows that the number of s 78B notices received by the Attorney-General increased steadily over the sample period. In 2000, 343 notices were received, up 76% from 1996. In addition, s 78B notices resulted in intervention by the Attorney-General pursuant to s 78A in an average of only 7.9% of cases from 1996–2000.[499]

13.9 The AGS also provided data on the composition of the s 78B notices for 2000, which is also revealing.[500] In that year, 65 notices related to proceedings in an inferior court, 23 raised a question of inconsistency under s 109 of the Constitution, and 43 raised arguments as to sovereignty or related matters.[501]

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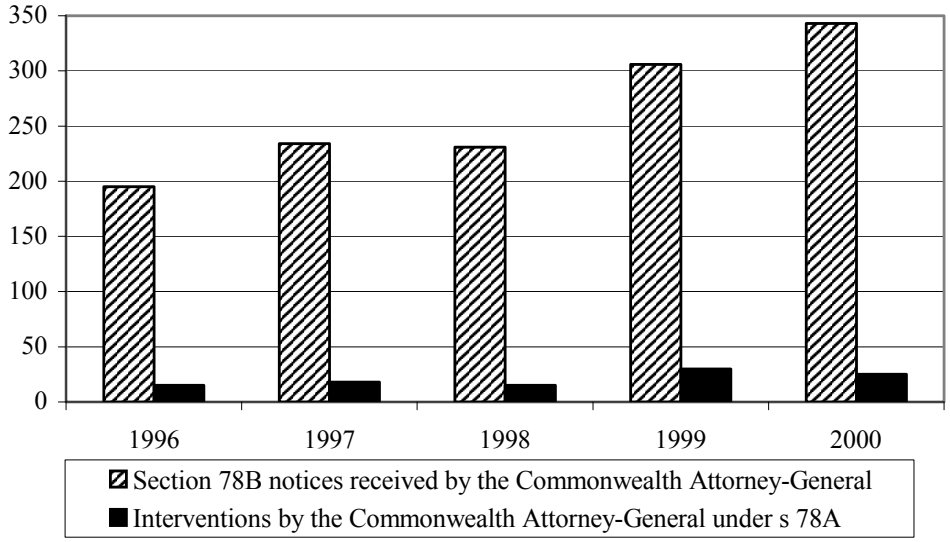
498 For example, for the Federal Court see O 51, r 1 FCR; for the Northern Territory Supreme Court see O 19.02 SCR.

499 Attorney-General's Department (Cth), *Consultation*, Canberra, 28 March 2001.

500 D Bennett, *Correspondence*, 23 February 2001.

501 H Burmester, *Correspondence*, 26 July 2000. Also see *Joosse v Australian Securities and Investments Commission* (1998) 73 ALJR 232; *Deputy Commissioner of Taxation v Levick* (1999) 168 ALR 383; and

Figure 13–1 Notice and Intervention in Constitutional Cases



Source: Data provided by the Australian Government Solicitor, Canberra.
Note: The data was provided on the basis that it is approximate only and is intended to provide a general guide as to the use of the provision.

Deficiencies in Operation

13.10 The following concerns were expressed in consultations and submissions about the current operation of s 78B.

- Some s 78B notices are vexatious or frivolous and are designed merely to delay matters for tactical purposes. Litigants in person sometimes issue notices without merit, either as a tactic of delay or out of ignorance.[502] It was said that delays could be significant because of the mandatory nature of the adjournment under s 78B.[503] While courts can award costs in relation to the issuing of notices they seldom make such awards.[504]

McKewins Hairdressing and Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation (2000) 171 ALR 335.

502 Attorney-General's Department (Qld), *Consultation*, Brisbane, 9 March 2001; M Leeming, *Submission J038*, 12 April 2001; Court of Appeal (NSW), *Consultation*, Sydney, 19 March 2001; The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001.

503 D Bennett QC, *Consultation*, Sydney, 20 February 2001.

504 Attorney-General's Department (Cth), *Consultation*, Canberra, 28 March 2001.

- Delays can occur where new counsel is engaged and identifies a constitutional point only shortly before the hearing. As a result, Attorneys-General and their advisers are often given a very short period in which to decide whether to intervene — sometimes only one or two days.[505]

- Many constitutional issues are not significant. In some cases there is no real constitutional point at all or a s 78B notice is issued out of abundant caution.[506] An example of an area in which constitutional issues may not be significant is inconsistency under s 109 of the Constitution. These cases often turn on statutory interpretation and require little more than the application of settled constitutional principles to new circumstances.

- Some parties, particularly litigants in person, experience difficulty in identifying the address for service of notices on the nine Attorneys-General because there is no central information base.

- Many s 78B notices are issued in cases where the constitutional argument is hopeless or already covered by clear and binding authority. Moreover, many cases in which notices are issued are resolved without consideration of the constitutional issues.

- The delay caused by issuing s 78B notices can be exacerbated by generous interpretation given to the phrase 'reasonable time'. Courts have tended to err on the side of caution before proceeding with a matter involving a constitutional question.[507]

- A further problem is the false but apparently common perception that s 78B notices must be responded to by each Attorney-General before the matter can proceed. This can result in unnecessary delay, especially where cases lack merit in constitutional terms.

- Section 78B does not identify who bears the onus of issuing the notice. In practice, it is the party raising the constitutional argument who should give the notice, but not all litigants are aware of this.[508]

- Section 78B does not specify whether the obligation to issue a notice arises separately on appeal, nor does it specify the content of the notice.[509]

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505 Australian Government Solicitor, *Consultation*, Canberra, 5 June 2000; M Sexton SC, *Consultation*, Sydney, 19 February 2001; D Bennett QC, *Consultation*, Sydney, 20 February 2001; Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001.

506 D Graham QC, *Consultation*, Melbourne, 15 February 2001.

507 M Sexton SC, *Submission J009*, 23 February 2001.

508 Attorney-General's Department (Qld), *Consultation*, Brisbane, 9 March 2001.

509 Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001.

13.11 Each of these concerns may have an adverse impact on the convenience and costs of the parties and may also increase costs for the courts in administering justice. These concerns are heightened by the fact that a significant number of s 78B cases originate in local or magistrates courts. According to the data provided by the AGS, 27% of notices in 1999 and 19% of notices in 2000 fell into this category. A view commonly expressed in consultations was that many of these cases were not significant and could be dealt with adequately by the appellate process.

13.12 Judges have expressed similar concerns about the operation of s 78B and the need for reform of the provision. For example, in 1983 Fitzgerald J remarked:

> It creates an impediment to the orderly disposition of the business of the Courts that is disproportionate to any benefits which it provides … Often such matters are raised, but, if the litigation could be concluded, would not have to be decided. Further, often such matters are raised which are patently without substance. Many jurisdictional questions afford good examples. Even if the High Court has recently decided the precise point in indistinguishable circumstances, a party can raise it again and halt proceedings. It is impractical to require that proceedings always be stopped whenever such a matter is raised to enable the Attorneys-General to consider whether they wish to become involved or to have the proceedings removed to the High Court, which is already over-burdened. When an action has to be stopped it causes great inconvenience to the court, the parties, their witnesses and indeed other litigants whose cases could have been set down for hearing during the days wasted because allotted to the matter which cannot go forward. Further, the already burdensome cost of litigation is increased, and judicial resources are used inefficiently, at a considerable cost to the public purse. It would not require an excess of confidence in the judges of the superior courts to permit them a discretion as to when notice should be given to the Attorneys-General.[510]

Possible Reforms

13.13 In DP 64, the Commission sought comment on a number of possible reforms to the operation of the notice procedure in s 78B, including the following:

- excluding notices in relation to certain classes of constitutional matters, such as s 109 of the Constitution;
- excluding notices in local courts and magistrates courts;
- conferring a discretion on courts to determine whether notices should be issued in a particular case;

510 *Capelvenere v Omega Developments Corporation Pty Ltd* (1983) 77 FLR 385, 396. See also *Green v Jones* (1979) 2 NSWLR 812, 818 (Hunt J); *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292, 300-301 (French J).

- conferring a discretion on courts to continue hearing a case while notices are issued to the Attorneys-General; and

- replacing the current stipulation of a 'reasonable time' with a specified period.

Submissions and Consultations

13.14 The Commission found very broad agreement that the s 78B notice system fulfils a valuable role in providing information about pending constitutional issues and protecting the interests of the Commonwealth, States and Territories.[511] There was also general agreement that the issuing of notices should be mandatory and that courts should not be given a discretion to determine when notices should be issued.[512] It was said that it was not for the judiciary to make an assessment of when the executive's interests may be affected by a decision, which could include an assessment of political, social and economic factors.

13.15 There was strong support for the view that there should be no blanket exemption for particular courts, such as local or magistrates courts.[513] This was because important constitutional issues could arise in these courts,[514] and constitutional issues might concern individual human rights and not merely the validity of laws.[515] While many constitutional issues raised in lower courts came to nothing, it could not be assumed this will always be the case. For example, the most significant modern case on s 92 of the Constitution, *Cole v Whitfield*, began humbly in the Court of Petty Sessions in Hobart.[516] One suggestion made in consultations was that the *Judiciary Act* should provide that no notices be issued from magistrates courts unless the magistrate is considering declaring a law invalid.[517]

13.16 Consultations and submissions also generally indicated that there should be no exemptions for particular types of constitutional issues such as s 109,[518]

511 D Graham QC, *Consultation*, Melbourne, 15 February 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001; Supreme Court of Western Australia, *Consultation*, Perth, 22 March 2001; Supreme Court of Victoria, *Consultation*, Melbourne, 16 February 2001; Law Society of Western Australia, *Consultation*, Perth, 23 March 2001.

512 Attorney-General (NSW), *Submission J019*, 14 March 2001.

513 There were some contrary views: Supreme Court of the Northern Territory, *Consultation*, Darwin, 1 March 2001; Law Council of Australia, *Submission J037*, 6 April 2001.

514 M Sexton SC, *Submission J009*, 23 February 2001; Attorney-General's Department (NSW), *Submission J002*, 28 June 2000; Attorney-General (Qld), *Submission J031*, 26 March 2001; Attorney-General's Department (Cth), *Consultation*, Canberra, 28 March 2001.

515 Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001.

516 *Cole v Whitfield* (1988) 165 CLR 360.

517 Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001.

518 M Sexton SC, *Submission J009*, 23 February 2001; Attorney-General's Department (NSW), *Submission J002*, 28 June 2000; Attorney-General (Qld), *Submission J031*, 26 March 2001.

although there were some contrary views.[519] One reason given was that while many s 109 arguments would have only a marginal effect on the Commonwealth, state interests could be significantly affected because what is at issue in such cases is the potential invalidity of state laws.[520]

13.17 One view was that the stipulation of 'reasonable notice' should be amended to specify a fixed period in order to give greater certainty and expedition to the process. The Law Council suggested a period of seven days; the AGS suggested that 14 days would be a suitable interval.[521] Others were of the view that 14 days would be too tight a timeframe in which to enable an Attorney-General to present argument to the court and that 14 days should instead be the period within which an Attorney-General must notify the court of an intention to intervene.[522]

13.18 There was broad agreement that courts should have a discretion to continue hearing a case once a notice had been issued. This would reduce the level of disruption to the parties and the courts.[523] In this respect, the discretion granted by s 78B(5) to grant urgent relief of an interlocutory nature was thought to be both insufficiently known and too narrow.

13.19 It was also thought that the notice system could benefit from the use of information technology such as the Internet, to make the dissemination of information easier and more convenient. This extended to identifying the place for service of a notice on an Attorney-General.[524]

13.20 The Law Council submitted that the *Judiciary Act* be amended to require that s 78B notices include an outline of the points to be argued and reference to the relevant constitutional provisions, statutes and case law.[525] The Law Council stated that failure to comply with a statutory requirement as to content should not invalidate a notice and that the court should have a discretion to order that a notice be reissued in order to rectify any non-compliance.[526]

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519 Law Council of Australia, *Submission J037*, 6 April 2001; B Selway QC, *Consultation*, Adelaide, 16 March 2001.

520 M Sexton SC, *Submission J009*, 23 February 2001; Attorney-General's Department (NSW), *Submission J002*, 28 June 2000; Attorney-General (Qld), *Submission J031*, 26 March 2001.

521 Law Council of Australia, *Submission J037*, 6 April 2001; Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001.

522 W Bale QC, *Correspondence*, 23 April 2001; H Burmester, *Correspondence*, 22 April 2001.

523 D Graham QC, *Consultation*, Melbourne, 15 February 2001; Attorney-General's Department (Qld), *Consultation*, Brisbane, 9 March 2001; Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001; R Cahill, *Consultation*, Canberra, 22 February 2001; Court of Appeal (NSW), *Consultation*, Sydney, 19 March 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001; F Wheeler, *Consultation*, 7 September 2000; South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001; Law Society of Western Australia, *Consultation*, Perth, 23 March 2001.

524 South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001; The Hon Justice R Nicholson, *Consultation*, Perth, 23 March 2001; M Leeming, *Submission J038*, 12 April 2001.

525 Law Council of Australia, *Submission J037*, 6 April 2001.

526 Law Council of Australia, *Correspondence*, 20 April 2001.

Commission's Views

13.21 The Commission agrees with the views expressed above, namely, that courts should have no discretion as to whether s 78B notices are issued. Attorneys-General are in a unique position to make an assessment of whether a pending case might affect the government's interests in their jurisdiction in a manner that warrants intervention. The issues to be considered in making that assessment are diverse and extend beyond legal considerations. Judges can never be in an adequate position to assess the full range of interests that an Attorney-General may wish to protect. Nor would it be appropriate, in the Commission's opinion, for the judiciary to attempt to make such an assessment in light of the desirability of separating the functions of the executive and judicial branches of government.

13.22 The Commission also agrees with submissions and consultations that legislation should not exempt particular courts from the notice requirement. An essential element of an effective notice system is that it should be comprehensive and provide accurate information on pending constitutional matters throughout Australia. As discussed in Chapter 12, all Australian courts have jurisdiction to determine constitutional questions that arise in proceedings before them. It would be undesirable to exclude particular courts from the notice system because significant constitutional issues can arise in any court. While it is true that less than 8% of all notices issued in the period 1996–2000 resulted in intervention, and that intervention in lower courts is even less frequent, there is no harm in Attorneys-General being informed of constitutional matters that are pending in lower courts.

13.23 The Commission considers that there are a number of difficulties with the proposal that no notices be issued in a magistrates court unless the magistrate is contemplating declaring a law invalid. A magistrate might not be able to make that assessment until giving final judgment, having heard all evidence and argument. The proposal might also cause difficulties by encouraging magistrates to make that assessment prematurely. There might also be cases in which a magistrate upholds the constitutional validity of a law in circumstances in which the submissions of an Attorney-General on that issue would have been beneficial.

13.24 Nor, for similar reasons, should particular types of constitutional issues be exempt from the notification procedure. In consultations and submissions, s 109 cases were suggested as the prime candidate for such treatment among the small number that favoured this approach. Under s 109, any state law that is inconsistent with a law of the Commonwealth is invalid to the extent of the inconsistency. While the Commonwealth's interests may not be severely prejudiced by a judicial decision one way or another, a finding against a State is highly significant because it results in invalidity of the state law. In these circumstances the Commission considers it desirable that state Attorneys-General (or, at the least, the relevant state Attorney-General) be notified so that a decision can be made about whether to intervene in the case.

13.25 The Commission also considers that s 78B should indicate that the obligation to issue notices lies on the party who first expressly raises a matter arising under the Constitution or involving its interpretation, unless the court directs that the notice be given by another party. This would be especially beneficial to litigants in person, who may be unaware of the statutory obligation unless it is made explicit.

13.26 There is also a need for s 78B to clarify that the obligation to issue notices arises at each stage of the proceedings, whether at first instance or on appeal. This would ensure that information provided by s 78B notices is up to date and comprehensive. Although it was suggested in consultations that the Attorneys-General might track the progress of each case for themselves and intervene as appropriate, the Commission considers that this suggestion is unduly onerous. As indicated above, 343 notices were issued to the Commonwealth Attorney-General in 2000. The possibility of every Attorney-General tracking every case, and all subsequent ones, over many years would present an unwelcome and unnecessary administrative burden on the relevant Departments. Moreover, the significance of constitutional issues may change as a matter progresses through the judicial system. In the Commission's opinion it is more efficient for fresh notices to be issued at each stage of the proceedings.

13.27 The Commission considers that s 78B should specify the content of the notice but should provide that failure to comply with any statutory requirement as to content does not invalidate the notice. The court should have a discretion to order that a notice be reissued for the purpose of rectifying any non-compliance with the statutory requirements. This change would enable the Attorneys-General to identify the constitutional issue more accurately and efficiently, thus enabling them to determine the most appropriate response.

13.28 The provision should facilitate the issuing of notices to the Attorneys-General by authorising the making of regulations specifying an address for service of the notice on each Attorney-General. The Standing Committee of Attorneys-General should also consider ways in which information technology might be used to facilitate the issuing of notices in an efficient and cost-effective manner. This amendment would assist in dealing with the concerns expressed to the Commission that some parties find it difficult to ascertain the correct address for service on each Attorney-General.

13.29 The Commission also considers it desirable to amend the legislation to authorise the making of regulations requiring the parties to certify that they have considered the necessity of issuing s 78B notices. Such a change would assist in bringing to the notice of each party the need to consider whether a s 78B notice was necessary in the circumstances. It would also encourage the parties to give early consideration to these matters. Order 73 HCR could serve as an appropriate

model (see paragraph 13.6). It may not be necessary for equivalent Rules of Court to be made in every Australian court. The regulations could specify the courts and circumstances in which certification is necessary.

13.30 Section 78B should also authorise the court to make such orders as to costs as it thinks fit where a party has failed to take reasonable steps to notify the Attorneys-General of a matter arising under the Constitution or involving its interpretation in accordance with the section. This provision would supplement s 78B(4), which empowers the Commonwealth to make a payment to a party in respect of costs arising out of an adjournment. The proposed amendment would give the court explicit power to consider the conduct of the parties in causing delays or additional costs through non-compliance with the section.

13.31 The Commission considers that the section should also include a specific duty on courts to consider of their own motion whether s 78B notices are required in a particular case. Section 78B presently states that 'it is the duty of the court not to proceed' unless and until the court is satisfied that notices have been given as required. This implies that a court should consider the issue independently of the parties' wishes. The suggested amendment would make this explicit.

13.32 The *Judiciary Act* should also be amended to confer on courts a power to strike out summarily any pleadings that purport to raise a constitutional issue that is manifestly groundless or lacks any realistic prospect of success.[527] At present, some courts possess such a power, while others do not. This power would enable the courts to dispose of groundless or untenable applications quickly and efficiently, thus saving the time and resources of parties, government and courts.

13.33 The Commission considers that s 78B(2)(c), which allows a court to continue to hear evidence and argument concerning matters that are 'severable' from any matter arising under the Constitution, is too restrictive.[528] Instead, the section should seek to give courts a wide discretion to determine the circumstances in which continuation of the proceedings is desirable. To this end, the legislation should confer a discretion on courts to continue to hear and determine proceedings, both in respect of constitutional and non-constitutional issues arising in the case. However, courts should not be able to give judgment in relation to a matter arising under the Constitution or involving its interpretation unless the court is satisfied that the Attorneys-General have been given a reasonable opportunity to make a submission on that matter. This amendment would avoid the significant problem of proceedings being halted to issue notices. However, it would still provide the Attorneys-General with an opportunity to present their views on any constitutional matter prior to the delivery of final judgment.

527 This view was endorsed by The Hon Justice Heydon, *Correspondence*, 27 April 2001.
528 Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001.

13.34 The Commission is of the view that the requirement to give reasonable notice to the Attorneys-General should be amended to require each Attorney-General to indicate within 14 days of receiving the notice whether he or she intends to make a submission or not in relation to the matter. Where an Attorney-General does not indicate an intention within 14 days, the Attorney-General should be deemed to have been given a reasonable opportunity to make a submission to the court, unless the court otherwise extends the time. Where an Attorney-General does indicate within 14 days (or such longer period as the court allows) an intention to make a submission, the court should be empowered to fix a reasonable time within which that submission must be made, whether orally or in writing.

13.35 The fixed period of 14 days for notifying the court whether the Attorney-General will make a submission would reduce the potential for delays. However, in the Commission's view, it would still give an Attorney-General sufficient time to consult with his or her Department, and with other Departments if necessary, to identify whether intervention is warranted. The court should have power to extend the time available to an Attorney-General in exceptional circumstances.

13.36 The Commission considers that s 78B(5) should be retained. It allows a court to proceed without delay to hear and determine proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where the court thinks it necessary in the interests of justice to do so. This provision gives the court the capacity to provide urgent interlocutory relief, where such relief could be delayed by the issuing of a notice, to the great detriment of a party.

Recommendation 13–1. The *Judiciary Act* should continue to make provision for the mandatory issuing of notices to the Attorney-General of the Commonwealth and the Attorney-General of each State and Territory of any pending cause that involves a matter arising under the Constitution or involving its interpretation. However, s 78B of the *Judiciary Act* should be amended as follows:

(a) The section should indicate that the obligation to issue the notice rests on the party who first expressly raises a matter arising under the Constitution or involving its interpretation, unless the court directs that the notice be given by another party.

(b) The section should clarify that the obligation to issue notices arises at each stage of the litigation, whether at first instance or on appeal.

Recommendation 13–1 cont'd

(c) The section should specify the content of the notice but should provide that failure to comply with any statutory requirement as to content does not invalidate the notice. The court should have a discretion to order that a notice be reissued for the purpose of rectifying any non-compliance with the statutory requirements.

(d) The section should facilitate the issuing of notices to the Attorneys-General by authorising the making of regulations specifying an address for service of the notice on each Attorney-General. The Standing Committee of Attorneys-General should also consider ways in which information technology may be used to facilitate the issuing of notices in an efficient and cost-effective manner.

(e) The section should authorise the making of regulations requiring the parties to certify that they have considered the necessity of issuing s 78B notices. The requirement of certification should apply to such courts and in such circumstances as are prescribed by regulation.

(f) The section should authorise the court to make such orders as to costs as it thinks fit where a party has failed to take reasonable steps to notify the Attorneys-General in accordance with this section.

(g) The section should clearly state that the court in which the cause is pending has a duty to consider of its own motion whether s 78B notices are required in a particular case.

(h) The section should provide that a court has power to strike out summarily a pleading that purports to raise a constitutional question where that question is manifestly groundless or lacks any realistic prospect of success. Where such a pleading has been struck out, the parties should have no obligation to issue s 78B notices. A similar provision should be made where a constitutional question that is manifestly groundless or lacks any realistic prospect of success is raised otherwise than in a pleading (for example in the course of oral argument during an appeal).

Recommendation 13–1 cont'd

(i) The section should confer on the court in which the cause is pending a discretion to continue to hear and determine the cause, whether in relation to constitutional or non–constitutional questions. However, the court should not be able to give judgment in relation to a matter arising under the Constitution or involving its interpretation unless the Attorneys-General have been given a reasonable opportunity to make a submission to the court on that matter.

(j) The section should require each Attorney-General to indicate within 14 days of receiving the notice whether he or she intends to make an oral submission, a written submission, both oral and written submissions, or no submission to the court in relation to the matter. Where an Attorney-General does not indicate an intention within 14 days, the Attorney-General should be deemed to have been given a reasonable opportunity to make a submission to the court, unless the court otherwise extends the time. Where an Attorney-General does indicate within 14 days (or such longer period as the court allows) an intention to make a submission, the court should be empowered to fix a reasonable time within which that submission must be made, whether orally or in writing.

14. Intervention by Attorneys-General

Contents

Intervention Generally

13.1 While litigation generally involves the resolution of a dispute between one or more plaintiffs and one or more defendants, the interests of other persons — third parties — may also be affected. There are two existing procedures by which third parties may participate in proceedings to protect their interests: by intervention and as *amicus curiae* ('friend of the court'). Intervention is generally regarded as the more expansive of the two procedures because a person accepted as an intervener becomes a party to the proceedings, with all the rights and obligations of a party in relation to appeals, evidence and costs.

13.2 This chapter considers intervention by Attorneys-General, principally in relation to constitutional litigation. Intervention by other persons and the role of *amici curiae* are dealt with in past Commission reports and in the literature.[529]

13.3 The ability of an Attorney-General to intervene in proceedings is regulated both by common law and statute. At common law, an Attorney-General is considered to have a right to intervene in any civil litigation that may affect the prerogatives of the Crown.[530] In other cases, at common law an Attorney-General is able to intervene only with the leave of the court. Historically, the courts approached the grant of leave with caution because of the potential for intervention to disrupt the normal course of litigation between private parties. Attorneys-General have often been refused leave to intervene in matters that might be seen to

529 Australian Law Reform Commission, Report No 27 (1986); Australian Law Reform Commission, Report No 78 (1996); E Campbell (1998); S Kenny (1998); G Williams (2000).

530 *Adams v Adams* [1971] P 188.

raise important questions of public policy, although participation has occasionally been allowed through the lesser role of *amicus curiae*.[531]

13.4 Against this background, legislation has conferred important rights on Attorneys-General to intervene in particular types of proceeding. For example, the Commonwealth Attorney-General has a statutory right to intervene in a proceeding before the Federal Court or the Federal Magistrates Service in certain applications for judicial review.[532] Similarly, the Commonwealth Attorney-General has a right to intervene in family law proceedings in a variety of circumstances, including where the Family Court requests intervention or where a matter arises that affects the public interest.[533] Attorneys-General also have a statutory right to intervene in constitutional litigation, as discussed below.

Intervention under Section 78A

Existing legislative framework

13.5 Prior to 1976, an Attorney-General could intervene in a proceeding that raised a constitutional question only by leave of the court.

13.6 In 1976, s 78A was inserted into the *Judiciary Act*.[534] Section 78A(1) gives the Attorney-General of the Commonwealth or a 'State' the right to intervene in proceedings before the High Court, any other federal court, or any court of a State or Territory, when those proceedings relate to a matter arising under the Constitution or involving its interpretation. The term 'State' is defined to include the ACT and the Northern Territory.[535] The right of intervention conferred by the section places the Attorneys-General in a privileged position compared with others, who can intervene only by leave of the court.

13.7 Section 78A(2) enables a court to make such order as to costs as it sees fit against the Attorney-General of the Commonwealth or a State in such proceedings. The aim of this provision is to protect litigants from having to pay increased costs caused by an Attorney-General's intervention.[536]

13.8 In 1988, s 78A was expanded to include s 78A(3) and (4).[537] Section 78A(3) provides that where the Attorney-General of the Commonwealth or of a State intervenes in proceedings, he or she shall be taken to be a party to the

531 *McLennan v Brisbane Sawmills Pty Ltd* [1947] QSR 38 (Philp J); *Amid Pty Ltd v Beck & Jonas Pty Ltd* (1974) 11 SASR 16, 27–28; *Amid Pty Ltd v Beck & Jonas Pty Ltd* (1974) 11 SASR 16.
532 *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 18.
533 *Family Law Act 1975* (Cth), s 91.
534 *Judiciary Amendment Act 1976* (Cth).
535 s 78AA JA.
536 Commonwealth, *Parliamentary Debates*, Senate, 16 November 1976, 1958.
537 *Statute Law (Miscellaneous Provisions) Act 1988* (Cth), Sch 1.

proceedings.[538] Section 78A(4) allows a costs order to be made against the Attorney-General in any appeal instituted by the Attorney-General from a judgment given in proceedings in which he or she intervened.

13.9 The 1988 changes followed the Commission's report on *Standing in Public Interest Litigation*.[539] As discussed below, that report recommended broadening the laws on standing in public interest litigation. In particular it recommended that a person intervening in a proceeding become a party to the proceedings.[540]

13.10 Some courts have elaborated the law and practice regarding intervention through the promulgation of Rules of Court or Practice Directions. For example, the High Court's Practice Direction No 1 of 2000 imposes procedural requirements on 'interveners', who are defined as 'any person intervening or seeking leave to intervene or to be heard as *amicus curiae* before the Full Court'. Under the Practice Direction, not less than 15 days before the hearing the intervener is required to give written notice to the Court and to the parties of the person's intention to intervene, the asserted basis of intervention, and the party or parties in support of whom the intervention is to be made. Interveners must then file their written submissions at least five days before the hearing. The appellant and the respondent have the right to file submissions in reply to the intervener two days before the hearing.

Use of the provision

13.11 Figure 13–1 in Chapter 13 provides data on the number of interventions by the Commonwealth Attorney-General under s 78A for the calendar years 1996–2000. As discussed in that Chapter, the Attorney-General intervened, on average, in only 7.8% of constitutional matters of which he was notified. The right of intervention is thus used sparingly, particularly in lower courts.[541] The data shows a small upward trend in the absolute number of interventions, but there is no discernible trend in interventions as a proportion of matters notified under s 78B. It should be noted that the Commonwealth has no need to intervene in a matter in which it is already a party because its interests are already represented.

13.12 Intervention in constitutional matters in the High Court has been a particular matter of interest. The data discussed above relate to intervention by the Commonwealth Attorney-General alone, albeit in any Australian court. However, the right of intervention conferred on each state and territory Attorney-General by s 78A creates a complex picture. In an academic survey of the 33 constitutional cases that came before the High Court in the four year period from 1994–1997, at

538 See *Cheesman v Walters* (1997) 148 ALR 21.
539 Australian Law Reform Commission, Report No 27 (1986).
540 Ibid, cl 9(7) of model Bill, 218.
541 Attorney-General's Department (Cth), *Consultation*, Canberra, 22 February 2001.

least one Attorney-General took advantage of the right to intervene in 29 cases (ie in 88% of the sample).[542] In the four remaining cases in which there was no intervention by an Attorney-General, the Commonwealth or a party sued on behalf of the Commonwealth was a party to the proceedings in any event. Moreover, in the 33 cases sampled, there were 95 interventions by Attorneys-General — an average of nearly three per case.

13.13 There are no published statements by Attorneys-General about the policies that guide their decisions whether to exercise their right of intervention in constitutional cases. Professor Campbell has suggested that the factors that may influence the decision are likely to include legal and community interests, party political considerations, costs of intervention, and assessments of whether the parties or other interveners can adequately represent the interests of the particular government.[543]

13.14 It was generally agreed in consultations that Attorneys-General have used the right of intervention selectively and responsibly.[544] For example, Solicitors-General have often co-operated to avoid repetition and duplication by adopting each other's arguments or the parties' arguments and, where appropriate, presenting joint written submissions. On occasions, a Solicitor-General may appear for more than one State.[545]

13.15 The High Court has rarely issued costs orders against Attorneys-General as interveners but there are recent examples of this approach. In *Yanner v Eaton*, the High Court made an order for costs against each intervening Attorney-General under s 78A(2).[546] The Court ordered that they pay the additional costs of the appellant resulting from the intervention on the basis that the alleged constitutional ground for intervention ultimately turned on the interpretation of a Queensland statute. The Commission has no information on the use of s 78A(2) in other courts.

Commission's Previous Reports

13.16 The Commission first considered the issue of intervention by Attorneys-General in its 1985 report, *Standing in Public Interest Litigation* (ALRC 27).[547] The report considered a wide range of issues relating to the law of standing in public interest litigation, including the role of Attorneys-General, intervention by

542 G Williams (2000).
543 E Campbell (1998), 256–257.
544 D Graham QC, *Consultation*, Melbourne, 15 February 2001.
545 *Durham Holdings Pty Ltd v New South Wales* (1999) 166 ALR 500.
546 *Yanner v Eaton* (1999) 201 CLR 351. See also *Levy v Victoria* (1997) 189 CLR 579; *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.
547 Australian Law Reform Commission, Report No 27 (1986), para 300.

private interests and *amici curiae*.[548] The Commission was of the view that the existing law of standing presented unreasonable obstacles to public spirited citizens who wished to prevent illegality by government or its agencies.[549] The report concluded that the test for standing should be broadened and the capacity for participation of individuals as *amici curiae* should be enhanced.

13.17 In relation to interventions by Attorneys-General, the report recommended that the Commonwealth Attorney-General should have a right to intervene in public interest litigation in order to protect Crown prerogatives or to argue general issues of public policy. This was said to retain the traditional role of the Attorney-General as *parens patriae* ('parent of the country') and to give the court the benefit of the Executive's views on important matters affecting the public interest.[550]

13.18 In 1994, ALRC 27 was considered by an ad hoc committee established by the Commonwealth Attorney-General and the Minister for Justice to consider ways in which the legal system could be reformed in order to enhance access to justice and make it fairer, more efficient and more effective.[551] The Access to Justice Advisory Committee recommended that the Commonwealth consider implementing the reforms to the rules of standing set out in ALRC 27. The Committee regarded the recommendations in ALRC 27 as a sensible balance between protecting the courts from wasting time with baseless actions while allowing individuals with a real interest in a matter to be heard by the courts.

13.19 In 1995, the Commission was asked to examine whether the recommendations and draft legislation contained in ALRC 27 required alteration in the light of subsequent developments in the law and proposed reforms to court and tribunal procedures. In its 1996 report, *Beyond the Doorkeeper: Standing to Sue for Public Remedies* (ALRC 78),[552] the Commission confirmed the basic thrust of ALRC 27. In particular, the Commission recommended a statutory framework for intervention to replace the current categories of intervenor and *amici curiae*.[553]

13.20 In relation to interventions by Attorneys-General, ALRC 78 confirmed that legislation should confer on the Attorneys-General an unfettered right to intervene in public law proceedings in order to protect Crown prerogatives or to argue issues of public importance as a party to the proceedings.[554]

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548 The law of standing is the set of rules that determines whether a person has a sufficient legal interest to commence a legal proceeding.
549 Australian Law Reform Commission, Report No 27 (1986), Summary, para 1.
550 Ibid, para 300.
551 Access to Justice Advisory Committee (1994).
552 Australian Law Reform Commission, Report No 78 (1996).
553 Ibid, para 1.15.
554 Ibid, para 6.43, rec 10.

13.21 Neither ALRC 27 nor ALRC 78 has been generally implemented although, as mentioned above, some minor changes to s 78A were introduced in 1988 in response to ALRC 27. These amendments provided that an Attorney-General shall be taken to be a party to the proceedings in which he or she has intervened for the purpose of instituting an appeal (s 78A(3)), and that costs may be awarded against an Attorney-General in any such appeal (s 78A(4)).

Problems and Issues

13.22 In the course of consultations, a number of issues were raised about the current state of the law regarding intervention by Attorneys-General.

13.23 First, it was asked whether the privileged position of Attorneys-General under s 78A could be justified when other potential interveners may have an interest in the litigation that is greater than that of an Attorney-General. It has been argued, for example, that it is inappropriate for an Attorney-General to be privileged in this fashion because in a pluralist society there is no one ascertainable public interest and, in any event, Attorneys-General have an overriding political nature to their office.[555]

13.24 Second, it was said that there are unresolved questions about the constitutionality of s 78A arising from the separation of powers doctrine. Specifically, it was argued that Parliament cannot compel a court to accept the submissions of an Attorney-General because this might infringe a court's inherent right to determine core aspects of curial process.[556] This argument was raised in the High Court in *DJL v Central Authority*.[557] However, the issue was not decided because the Commonwealth Attorney-General sought and obtained the Court's leave to intervene, and the Attorneys-General of the States and Territories present did not press their claim to be heard.[558]

13.25 A third issue, raised in DP 64, was whether there should be provision for non-constitutional argument by Attorneys-General in constitutional cases. At present, where an Attorney-General seeks to present argument to the court on a non-constitutional issue that arises in the context of a constitutional matter, it is unclear whether he or she can do so by right or requires the leave of the court. In *Yanner v Eaton*, Gummow J remarked that interventions were said by some to be as of right under s 78A(1) JA and by others to require leave.[559]

555 G Williams (2000), 396–398.
556 Ibid, 396.
557 *DJL v Central Authority* (2000) 201 CLR 226.
558 Ibid, 253 (Kirby J).
559 *Yanner v Eaton* (1999) 201 CLR 351, 400.

13.26 On occasions, interveners have made written submissions that extend beyond constitutional issues.[560] In the past, the Commonwealth Attorney-General's position has been that intervention relates to the whole proceeding and may therefore go beyond the constitutional issue.[561] By contrast, the High Court has generally adopted the practice of requiring leave to allow intervention in relation to non-constitutional issues.[562]

13.27 A final issue was whether s 78A should be amended to allow Attorneys-General to intervene by right in matters that do not raise a constitutional issue but which may be seen as affecting the public interest. Although Attorneys-General have traditionally been regarded as representing the public interest, under existing law they cannot intervene by right in ordinary non-constitutional litigation on a matter of public policy.[563] In DP 64 the Commission asked whether this aspect of s 78A required reform.

Submissions and Consultations

13.28 There were significant differences of opinion in submissions and consultations as to whether more use should be made of interventions under s 78A. One commonly held view was that the right of intervention had been used responsibly and that no change was required because the system worked reasonably well in practice.[564] It was said that Attorneys-General are in a different position to other interested persons because of their role as protector of the public interest.[565]

13.29 An alternative view was that the power could be used more often and should be extended to non-constitutional cases as of right.[566] For example, there might be complex areas of law of public importance, such as native title, where intervention should be given a statutory mandate.[567] It was noted that a submission from a Solicitor-General on behalf of an Attorney-General can sometimes be very helpful to the parties and the court.[568]

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560 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001.
561 Australian Government Solicitor, *Consultation*, Canberra, 5 June 2000.
562 D Graham QC, *Consultation*, Melbourne, 15 February 2001; The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001; D Bennett QC, *Consultation*, Sydney, 20 February 2001.
563 S Kenny (1998), 160.
564 D Graham QC, *Consultation*, Melbourne, 15 February 2001; The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001.
565 Attorney-General's Department (Qld), *Consultation*, Brisbane, 9 March 2001.
566 Victorian Bar Association, *Consultation*, Melbourne, 6 March 2001.
567 Ibid.
568 Court of Appeal (NSW), *Consultation*, Sydney, 19 March 2001; A Tokley, *Submission J023*, 16 March 2001.

13.30 In relation to intervention in non-constitutional issues arising in constitutional cases, there was some support for retaining the current position whereby intervention was a matter for the court's discretion.[569] Change to the provision was said to be unnecessary because Attorneys-General may have no more than a general interest in the administration of particular laws and intervention by leave of the court was currently available.[570] It was noted that courts grant leave readily and that allowing intervention by right might raise questions about the constitutionality of s 78A, which has so far gone unremarked.[571]

13.31 In relation to intervention in non-constitutional matters, one view was that intervention should be confined to constitutional issues[572] and should extend beyond this only by leave.[573]

13.32 It was also noted that intervention can impose significant burdens on the court and the parties.[574] It was agreed in consultations that the provision for awarding costs under s 78A(2) was necessary and that courts should continue to have the discretion to make costs orders against Attorney-General in appropriate cases.[575] Such a power was said to ensure that Attorneys-General gave due regard to whether intervention was appropriate in the particular case.

Commission's Views

13.33 The Commission affirms its recommendations in ALRC 27 and ALRC 78 with respect to intervention by Attorneys-General. It has traditionally been the duty of Attorneys-General to 'protect public rights and to complain of excesses of a power bestowed by law'.[576] The Commission's previous recommendations, as amplified in this report, ensure that Attorneys-General can make submissions to the court for the purpose of protecting the public interest through litigation.

13.34 In consultations and submissions, the question arose as to whether the privileged position of Attorneys-General under s 78A was justifiable. The Commission considers that the public has a fundamental interest in ensuring that government decision-makers are accountable and that their decisions are made

569 J Basten QC, *Correspondence*, 14 May 2001; W Harris, *Correspondence*, 19 April 2001; Law Council of Australia, *Correspondence*, 20 April 2001.
570 J Basten QC, *Correspondence*, 14 May 2001.
571 D Graham QC, *Correspondence*, 26 April 2001; G Griffith QC, *Correspondence*, 18 April 2001; Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001.
572 Law Council of Australia, *Correspondence*, 20 April 2001.
573 D Graham QC, *Correspondence*, 26 April 2001.
574 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001.
575 Attorney-General's Department (Qld), *Consultation*, Brisbane, 9 March 2001; G Griffith QC, *Consultation*, Melbourne, 16 February 2001.
576 *Attorney-General (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237 ('*Pharmaceutical Benefits Case*'), 272 (Dixon J).

according to law. The public also has an interest in ensuring compliance with legislation affecting the public. Attorneys-General are in a position to protect and promote the public interest effectively through their role in litigation. While the Commission acknowledges that Attorneys-General have political functions and there may be competing views as to what constitutes the public interest in a particular case, the Commission considers that Attorneys-General can play a valuable role that may otherwise go unfulfilled. As first law officers of their respective jurisdictions, Attorneys-General have the resources and experience of government at their disposal. They are also obliged to take a broad view of the public interest, which may contrast with a narrow or self-interested view of private litigants and individual interveners.

13.35 Moreover, the courts may not be in an effective position to assess the public interest because their role is limited to determining justiciable issues as brought forward by parties. Allowing intervention by leave may put courts in a difficult and potentially damaging position by creating the public perception that courts determine the most appropriate way of protecting the public interest through a selective choice of interveners.

13.36 The Commission recognises that, by increasing the circumstances in which Attorneys-General may intervene by right, differences in the treatment of Attorneys-General and other interveners will be exacerbated. In ALRC 27 and ALRC 78 the Commission recommended the liberalisation of intervention by private persons. The Commission notes that if those recommendations were implemented, differences in treatment would narrow substantially.

13.37 Questions were also raised in consultations and submissions about the constitutional validity of s 78A. The Commission considers that it is premature to base its recommendations in relation to s 78A on the alleged invalidity of the section. For 25 years courts have proceeded on the basis that s 78A is a valid exercise of federal legislative power, although the matter does not appear to have been specifically decided. It is ultimately for the courts to determine whether a different view should be taken of the section, if and when the issue becomes necessary for determination.

13.38 In the Commission's view, Attorneys-General should continue to have a right to intervene in matters arising under the Constitution or involving its interpretation because these matters directly affect the legal framework within which every polity operates. However, consistently with their traditional role as *parens patriae*, Attorneys-General should also have the right to intervene in non-constitutional issues, provided they raise an important question affecting the public interest in the relevant jurisdiction. This right should exist both where the non-constitutional question arises in connection with a constitutional question and where it arises independently of a constitutional question. This recommendation

comports with the general direction of the High Court's practice regarding intervention. While the High Court is still cautious in comparison with the top courts in other jurisdictions, including Canada, the United States and South Africa,[577] there are signs of a gradual liberalisation of the court's practice with respect to intervention by private persons.[578]

13.39 Conferring a statutory right of intervention in public interest litigation does not mean that Attorneys-General will necessarily intervene as a matter of course. As discussed above, the current experience with s 78A in relation to constitutional questions shows a substantial degree of self-restraint by Attorneys-General. The Commission considers that this self-restraint is appropriate in view of the potential impact of intervention on the conduct of private litigation.

13.40 The Commission considers that self-restraint may be encouraged by use of costs sanctions, which are a powerful deterrent against inappropriate intervention. Costs have already been awarded against Attorneys-General in particular cases, and the Commission's consultations indicate that it is an effective tool in focussing the minds of Attorneys-General and their advisers on the need to intervene only when there is a compelling need to protect the public interest. To ensure that the sanction of an adverse award of costs is explicit, the Commission recommends that s 78A be amended to empower a court to award costs against an Attorney-General in respect of intervention having regard to the following factors:

- the extent to which the intervention has assisted the court in the resolution of the proceedings before it;
- the extent to which the intervention has presented the court with arguments that would not have otherwise been raised in the proceedings;
- any costs and delays to other parties or to the court arising from the intervention; and
- any other factor the court considers relevant.

13.41 In addition, the Commission considers that courts should be given specific power to direct whether intervention by an Attorney-General in a particular case shall be exercised by the presentation of written submissions or oral argument or both. Section 78A should also be amended to authorise the making of Rules of Court to regulate practice and procedure with respect to intervention by an Attorney-General. These measures would assist the court in retaining control of proceedings so that that any intervention does not waste the time and resources of either the court or the parties.

577 G Williams (2000), 365.
578 *Levy v Victoria* (1997) 189 CLR 579, 601–603 (Brennan CJ), 651–652 (Kirby J).

Recommendation 14–1. The Commission affirms its recommendations with respect to intervention by Attorneys-General, identified in its 1985 Report, *Standing in Public Interest Litigation* (ALRC 27), and its 1996 Report, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (ALRC 78). The Commission further recommends that s 78A of the *Judiciary Act* be amended to provide for intervention by the Attorney-General of the Commonwealth and the Attorney-General of each State and Territory as follows.

(a) The section should be amended to confer on each Attorney-General a right to intervene in non-constitutional matters that raise an important question affecting the public interest in the jurisdiction represented by that Attorney-General. The court should be given a power to direct whether the right of intervention shall be exercised by the presentation of written submissions, oral argument, or both.

(b) The section should be amended to provide that each Attorney-General's right to intervene in proceedings in a matter arising under the Constitution or involving its interpretation extends to non-constitutional issues arising in those proceedings in so far as the non-constitutional issues raise an important question affecting the public interest in the jurisdiction represented by that Attorney-General.

(c) The section should be amended to authorise a court to make orders as to costs arising from an intervention of the kind described in paragraphs (a) and (b). In exercising its discretion to award costs, the court should be required to have regard to the following factors:

(i) the extent to which an Attorney-General's intervention has assisted the court in resolving the questions arising in the matter before it;

(ii) the extent to which an Attorney-General's intervention has presented the court with arguments that would not otherwise have been raised in the proceedings;

(iii) any cost or delay to other parties or to the court arising from the intervention; and

(iv) any other circumstance that the court considers relevant.

(d) The section should authorise the making of Rules of Court to regulate the practice and procedure of intervention by the Attorneys-General.

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15. Removal of Causes into the High Court

Contents

Introduction

15.1 The *Judiciary Act* contains an important mechanism by which certain kinds of 'cause' may be removed from a lower court into the High Court for determination.[579] Section 40 JA provides for removal of two types of cause — those that involve constitutional issues and those that do not. The removal of constitutional and non-constitutional causes share common elements but also have important differences, which are addressed in successive sections of this chapter. Both quantitatively and qualitatively, constitutional cases are the most significant category of removed cause, and are accordingly dealt with in Part D concerning constitutional litigation.

15.2 Since 1903, s 40 has authorised the High Court to make an order removing into the High Court any cause 'arising under the Constitution or involving its interpretation' which is pending in another court. This permits removal of the class of matters specified in s 76(i) of the Constitution, reinforcing the role of the High Court as the final arbiter of the meaning of the Constitution.

15.3 In 1976 a second ground for removal was added for non-constitutional cases. This allowed the High Court to remove any cause pending in a federal court or to remove any cause pending in a state court involving the exercise of federal jurisdiction.[580]

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579 Chapter 8 notes that legislation provides for the transfer of matters from the Federal Magistrates Service to the Federal Court or the Family Court in certain cases (ss 39 and 41 FMA). These powers are akin to removal in some respects.

580 *Judiciary Amendment Act 1976* (Cth), s 9.

15.4 The removal procedure is designed to allow the High Court to resolve constitutional issues and other questions of public importance without the delays and expense of cases proceeding to final judgment, and then through the usual appellate process.[581]

15.5 The High Court provided the Commission with data about the use of the removal power in constitutional and non-constitutional cases over the four year period spanning 1997–98 to 2000–01.[582] In that period, only eight causes were removed into the High Court; all but one of these were constitutional matters removed pursuant to s 40(1).[583]

15.6 In consultations, Sir Anthony Mason remarked that while the number of cases removed is small (an average of two per year over the sample period), this must be viewed in the context of the relatively small number of constitutional cases heard by the High Court each year.[584] Moreover, in Sir Anthony's view, the cases removed were often very significant in terms of legal principle.

Removal of Constitutional Causes

15.7 Removal was initially restricted to causes involving constitutional issues arising in 'any Court of a State'. In 1907, s 40A was added.[585] This section provided that it was the duty of a court to proceed no further, and to order the removal of a cause to the High Court, where the cause gave rise to any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States. The object of the provision was to preclude appeals in respect of *inter se* matters from being taken to the Privy Council from state Supreme Courts.[586] Section 40A operated to deprive state Supreme Courts of all jurisdiction immediately the *inter se* question arose and to ensure that the High Court alone dealt with such matters. Under s 74 of the Constitution, no appeal is allowed to the Privy Council from the High Court on an *inter se* question. Section 40A was repealed in 1976,[587] with the practical consequence of enabling more constitutional matters to be adjudicated in state courts.

15.8 The removal power has been broadened to permit removal of causes from federal, state or territory courts.[588] In 1983, the Attorney-General of the Northern

581 *O'Toole v Charles David Pty Ltd* (1990) 96 ALR 1, 7.
582 Data for 2000–01 was provided up to 30 April 2001.
583 The non-constitutional matter was *Fejo v Northern Territory* (1998) 195 CLR 96.
584 The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001.
585 *Judiciary Act 1903* (Cth).
586 W Wynes (1976), 498–499.
587 *Judiciary Amendment Act 1976* (Cth), s 9.
588 Ibid, s 9.

Territory was added as a potential applicant for removal,[589] as was the ACT Attorney-General in 1992.[590]

15.9 The order for removal may be made upon the application of a party where 'sufficient cause' is shown. However, an order is made 'as of course' where the Commonwealth Attorney-General or a state or territory Attorney-General makes an application. This provision, in combination with others in the *Judiciary Act*, has the effect of privileging constitutional litigation to a substantial degree. As discussed in Chapters 13 and 14, Attorneys-General must be given notice of constitutional matters pending in any Australian court (s 78B), and they have a right to intervene in such cases (s 78A). The combined effect of this suite of powers is that any constitutional matter pending in any Australian court may be brought to the High Court for determination on the motion of an Attorney-General.

Removal of Non-Constitutional Causes

15.10 Section 40(2) allows the removal of non-constitutional causes pending in a federal court (other than the High Court), a territory court, or a state court exercising federal jurisdiction. Section 40(4) provides that the High Court shall not make an order under s 40(2) unless all parties consent to the making of the order or the Court 'is satisfied that it is appropriate to make the order having regard to all the circumstances, including the interests of the parties and the public interest'.

Current Law and Practice

What is a 'cause'?

15.11 The power in relation to both constitutional and non-constitutional cases refers to the removal of a cause or part of a cause. 'Cause' is defined in s 3 JA to include 'any suit, and also includes criminal proceedings'. In *Re An Application by Public Service Association of NSW,* Williams J adopted the view that 'cause' should be given a wide, non-technical meaning and includes 'any proceedings competently brought before and litigated in a court'.[591]

When is a cause pending?

15.12 In relation to both constitutional and non-constitutional causes, removal is only permitted where a cause is pending. Pending proceedings include pending appeals.[592] However, where final orders have been made, a cause cannot be

589 *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth), Sch 1.
590 *Law and Justice Legislation Amendment Act (No 3) 1992* (Cth), Sch.
591 *Re Application by Public Service Association of NSW* (1947) 75 CLR 430, 433–434.
592 *Registrar, Accident Compensation Tribunal (Vic) v Federal Commissioner of Taxation* (1993) 178 CLR 145.

removed and the case must progress through the usual appellate channels until it can be removed from an intermediate appellate court. It is possible to remove a cause where minutes of orders have been published by the lower court but not yet entered.[593] The High Court's usual practice is that it will not order removal of a constitutional question until any antecedent non-constitutional questions are determined by the lower court.[594] However, if a constitutional issue is raised and an Attorney-General seeks removal, the High Court must order removal.

Who may seek removal of a cause?

15.13 An application for removal of a constitutional cause may be made by a party or an Attorney-General at any stage of the proceedings before final judgment. For an application by a party to succeed, the party must show 'sufficient cause'. The High Court has not identified any systematic criteria for establishing sufficient cause and much will turn on the particular circumstances of the case, including the significance and strength of the constitutional issue.[595] As previously mentioned, the High Court must remove a cause 'as of course' on the application of an Attorney-General.

15.14 An application for removal of a non-constitutional cause may be made by a party or by the Commonwealth Attorney-General at any stage of the proceedings before final judgment. In contrast to constitutional causes, state and territory Attorneys-General have no special privilege in this type of removal. Moreover, unlike constitutional causes, an order for removal of a non-constitutional cause under s 40(2) is not made 'as of course' on the application of the Commonwealth Attorney-General.

Grounds for removal of non-constitutional cases

15.15 The High Court cannot make an order for removal of non-constitutional causes unless all the parties consent or the Court is satisfied that it is appropriate to make the order having regard to all the circumstances, including the interests of the parties and the 'public interest' (s 40(4)).

15.16 The term 'public interest' is not defined in the *Judiciary Act*. However, in deciding whether the preconditions for removal are met, the High Court would undoubtedly be able to consider a broad range of factors, including the nature and importance of the issue, whether removal is premature, and the possible disadvantages of removal. These might include the High Court being denied the benefit of the lower court's judgment and the difficulty of deciding a matter if the lower court has not found the relevant facts.

593 *O'Toole v Charles David Pty Ltd* (1990) 96 ALR 1.
594 *Richmond v Edelsten* (1986) 67 ALR 484.
595 *Re Robertson* (1988) 79 ALR 577.

15.17 Subject to the Constitution, s 40(3) confers jurisdiction on the High Court to hear and determine such causes or parts of causes, to the extent that the requisite jurisdiction is not otherwise conferred on the Court. This section identifies an important limitation on the High Court's ability to remove non-constitutional cases, namely, that being an exercise of original jurisdiction, the subject matter of the cause must fall within one of the heads of jurisdiction enumerated in ss 75 or 76 of the Constitution. Section 40(3) seeks to confer on the High Court for the purpose of removal such jurisdiction in s 76 matters as the High Court does not already possess.

Powers of the High Court after removal

15.18 Under s 40, the High Court may order removal on such terms as the Court thinks fit, and once removed the Court exercises control over the conduct of the proceedings. Section 41 provides that, when a cause or part of a cause is removed into the High Court under s 40, further proceedings in that cause or part of a cause shall be as directed by the High Court.[596]

15.19 The High Court is not bound by the decisions, reasoning or proceedings of the lower courts from which a matter is removed. In *O'Toole v Charles David Pty Ltd*,[597] the High Court held that in removing an entire proceeding from the Federal Court, the High Court was not bound by the answers given by the Full Court of the Federal Court in response to a case stated by a single Federal Court judge. The basis of the High Court's reasoning was that the High Court could not 'be bound by a decision of a lower court in the hierarchy'.[598] Mason CJ said:

> Indeed, it verges on the ludicrous to suggest that the very purpose of removal may be frustrated simply because the cause removed has proceeded to the point at which an unappealable order has been made. It is no answer to this argument to say that an appeal will lie when the court below makes a determination resolving the rights in suit. That may take a long time and involve great expense. The object of s 40 was to secure early resolution of constitutional questions and other issues of public importance.[599]

15.20 Under s 45, when a cause or part of a cause is removed into the High Court, the defendant may use any defence that might have been used if the cause had been commenced in the High Court. That is so notwithstanding that the court from which the cause was removed did not have jurisdiction to entertain the defence or could not entertain it in the same cause.

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596 A previous version of s 41 is discussed in Australian Law Reform Commission, Discussion Paper No 64 (2000), para 3.185.

597 *O'Toole v Charles David Pty Ltd* (1990) 96 ALR 1.

598 Ibid, 7. See also *Fisher v Fisher* (1986) 161 CLR 438.

599 *O'Toole v Charles David Pty Ltd* (1990) 96 ALR 1, 7.

15.21 The only exception to the High Court's control over proceedings removed into it is provided by s 43.[600] Section 43 concerns the continuance of certain orders and proceedings extant in the lower court in matters removed into the High Court. The section provides that where a cause or part of a cause is removed, the following remain in force: orders relating to the custody or preservation of property that is the subject matter of the cause; any attachment and sequestration of goods or estate; all undertakings or security given; and all injunctions, orders and proceedings granted, made or taken. Section 40(5) allows for the transmission of records and documents between the High Court and the court from which the cause has been removed.

Issues

15.22 In DP 64 the Commission raised a number of issues regarding the power to remove a matter pending in a lower court. These included the following.

- Which courts should have the power to remove a cause from a court lower in the judicial hierarchy? Should it only be the High Court or should the power be extended to other courts?

- Should the High Court have the power to remove a matter of its own motion or should it be left to the parties or to the Attorneys-General to make application?

- Should the privileged position of the Attorneys-General in obtaining removal of constitutional causes be retained, or should removal be discretionary in all cases?

- Should the High Court's discretion to order removal be structured by specifying statutory criteria to guide the exercise of the discretion?

Submissions and Consultations

15.23 The very widely held view was that the current system of removal works well, is valuable and needs no amendment.[601] There was limited support for extending the power of removal to other courts, such as intermediate appellate courts. One view was that if a federal court hears appeals from the Federal Magistrates Service or from state courts exercising federal jurisdiction then it should have a power to remove constitutional causes or other significant causes

600 *Judiciary Amendment Act 1976* (Cth), s 9.

601 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; M Sexton SC, *Submission J009*, 23 February 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; A Tokley, *Submission J023*, 16 March 2001.

from those courts.[602] An alternative view was that the current system of removal, together with case stated procedures and the appellate system, ensured that matters could be determined quickly if that were necessary.[603] One danger of over-liberalising the removal power was said to be that parties might seek removal from lower courts before the facts had been sufficiently established, with the result that higher courts might be compromised in their determination of the case or might be forced to remit the case to a lower court for fact finding.

15.24 There was no support for removing the right of Attorneys-General to seek removal of constitutional causes. The general view was that Attorneys-General had used this power responsibly and that there was no evidence of abuse.[604]

15.25 It was also generally agreed that there was no need to structure the High Court's discretion by including criteria to assist in the interpretation of terms such as 'sufficient cause', 'the interests of the parties' and 'the public interest'.[605] It was thought that the Court and the legal profession were aware of the relevant principles, and that the present system worked effectively. Including further criteria would not assist in the exercise of the discretion, given the breadth of factors that might be relevant to the exercise of the discretion. Additional criteria might increase the complexity of the provision, thereby adding to costs and delays.

Commission's Views

15.26 The Commission agrees with the views expressed in the consultations and submissions that there is no need for reform to the existing removal provision.

15.27 In the Commission's view, an extension of the removal power to courts other than the High Court is not warranted. There are ample mechanisms for moving cases through the judicial hierarchy, including the case stated procedure (Chapter 10) and the regular appellate system (Chapters 16–21). In addition, there are specific statutory mechanisms for upward transfer, such as those permitting transfer between the Federal Magistrates Service, on the one hand, and the Federal Court and the Family Court, on the other. There would appear to be no need for specific powers of removal between these courts.[606] In the Commission's opinion, the power of removal is an exceptional power, which allows a higher court to intervene in a lower court's workload. This power is best left to the High Court as the final arbiter of constitutional questions and the appellate court of last resort.

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602 D Jackson QC, *Consultation*, Sydney, 5 March 2001.

603 Supreme Court of South Australia, *Consultation*, Adelaide, 15 March 2001.

604 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001, D Jackson QC, *Consultation*, Sydney, 5 March 2001.

605 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001; M Sexton SC, *Submission J009*, 23 February 2001; Law Council of Australia, *Submission J037*, 6 April 2001.

606 Federal Magistrates Service, *Consultation*, Melbourne, 16 February 2001.

15.28 The Commission also considers that no convincing reason has been advanced for giving the High Court the power to order removal on its own motion. Consultations revealed that the Attorneys-General have used the power selectively and responsibly. Giving the High Court power to arrogate cases that, in its opinion, merited the Court's immediate consideration would undermine the traditional roles played by the parties in litigation.[607] It might also create the perception of an overly activist Court picking and choosing its caseload according to unknown criteria.

15.29 The Commission is of the view that the privileged position of the Attorneys-General in seeking removal of causes should not be altered. As noted above, the widely held view is that Attorneys-General have sought removal in appropriate circumstances. As first law officers for their respective jurisdictions, Attorneys-General are in a very good position to assess whether a constitutional issue is of sufficient importance to the community they serve to justify seeking removal of the matter into the High Court.

15.30 In relation to structuring the discretion, the Commission considers that amplification of the existing criteria for removal, for example by adding a list of non-exhaustive factors, is likely to increase the complexity of the process without providing much additional guidance to the court, the legal profession or the parties. Moreover, the variety of circumstances that may be relevant to the exercise of the discretion are so diffuse as to make it difficult to provide any great assistance in individual cases.

15.31 Finally, the Commission considers that it would be desirable to have greater consistency between the criteria for ordering removal in constitutional causes (s 40(1)) and non-constitutional causes (s 40(4)) upon the application of a party. This might be done by amplifying the meaning of 'sufficient cause' in the former subsection by reference to the criteria identified in the latter, namely, the interests of the parties and the public interest. However, the Commission refrains from making a specific recommendation in this respect because the change is unlikely to affect the way in which the section operates in practice.

607 Australian Law Reform Commission, Report No 89 (2000), para 1.117.

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Part E

Appellate Jurisdiction of Federal Courts

16. The Federal Appellate System: An Overview

Contents

16.1 The terms of reference require the Commission to report on whether any changes to the exercise of federal jurisdiction in civil matters are desirable, having regard to any constitutional limitations on the exercise of the judicial power of the Commonwealth. One key aspect of the allocation and exercise of federal civil jurisdiction is appellate jurisdiction. Part E (Chapters 16–21) of this report considers reforms to the federal appellate system to achieve its objectives more effectively and efficiently.

16.2 This chapter sets out the basic framework of the federal appellate system and provides background information on the following matters:

- the function of appeals;
- the constitutional framework of appeals;
- the channels of appeal within the federal judicial system;
- the internal organisation of federal appellate courts; and
- proposals for a national appellate court.

16.3 Subsequent chapters in Part E build on this overview. Chapter 17 addresses the nature of federal appeals and the role of statute in determining what an appellate court does when performing its review function. Chapter 18 considers the challenges of increasing workloads facing federal appellate courts. Chapter 19 examines the appellate jurisdiction of the High Court and, in particular, options for addressing the increasing number of applications for special leave to appeal. Chapter 20 concerns the appellate jurisdiction of the Federal Court, with particular reference to whether access to a first appeal should be by right or by leave, the

option of two judge appellate benches, decisional harmony within the Full Court, the Court's appellate structure, and cross-jurisdictional appeals. Finally, Chapter 21 considers the appellate jurisdiction of the Family Court and examines access to appeals and the size of appellate benches in the Family Court.

Function of Appeals

16.4 The principal functions of an appellate court are:

- to correct errors in the decisions of trial courts or in the reasoning used by them in reaching those decisions; and
- to develop the body of law through judicial exposition.[608]

16.5 Traditionally it is said that the function of error correction predominates in intermediate appellate courts while the legal development function predominates in a final appellate court. However, neither the High Court nor intermediate appellate courts perform one function to the exclusion of the other — they merely balance them in different ways. For example, practical limits on the number of appeals that the High Court can determine has meant that intermediate appellate courts are increasingly expected to fulfil the role of a final court of appeal, and they have accordingly assumed a greater law-making function.[609] The High Court has acknowledged this in the course of determining applications for special leave to appeal. In the specialised areas of taxation and intellectual property the Federal Court is now regarded as the court of final appeal and special leave to appeal to the High Court will generally be refused except in extraordinary circumstances.[610]

16.6 One method of assessing the effectiveness of appellate courts in performing these functions is to consider the rate at which cases are upheld on appeal. In relation to error correction, a successful appeal might suggest error in the court below. A high rate of success might be viewed positively as vindicating the role of the appellate court in correcting errors, or negatively as indicating frequent errors at trial. In relation to law making, a successful appeal might indicate, perhaps less accurately, that new legal principles are being developed, changing the direction of established law.[611]

16.7 There is little published data on the success rate of appeals. Available data for the High Court demonstrate a consistently high rate of success in civil appeals. From 1996–97 to 1998–99, between 60% and 71% of civil appeals were

608 D Ipp (1995), 811.
609 M McHugh (1987), 188; M Kirby (1988), 57–58.
610 *Interlego AG & Lego Australia Pty Ltd v Croner Trading Pty Ltd* (1994) 68 ALJR 123; *Deputy Commissioner of Taxation v NSW Insurance Ministerial Corporation* (1994) 68 ALJR 616.
611 B Opeskin (2001), 17.

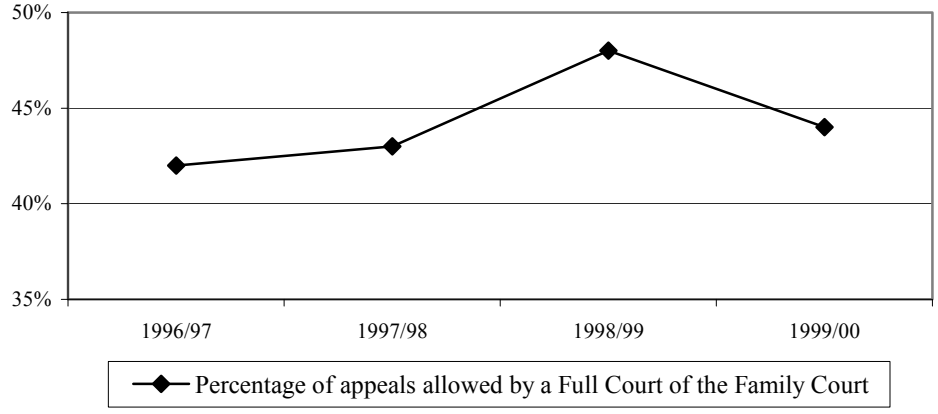
allowed by the Court, while only 47% to 64% of criminal appeals were allowed.[612] In interpreting these figures it should be recalled that the High Court filters out many appeals that have little prospect of success, through the special leave process.

16.8 By contrast, the vast majority of appeals in intermediate appellate courts may be brought as of right, suggesting that they are likely to have a significantly lower rate of success. This is borne out by the data provided to the Commission from the Federal Court and the Family Court.

16.9 The Federal Court provided data on the success rate in 445 appeals in the six appellate sittings that were held in the 15 month period from August 1999 to November 2000. In five of those sittings, the success rate ranged between 25% and 30%; for the last sitting the success rate was slightly over 20%. The Commission has no information as to whether the data for this short period are representative of longer term trends.

16.10 The success rate of appeals to the Full Court of the Family Court is shown in Figure 16–1. Over the four year period from 1996–97 to 1999–2000, the success rate ranged between 42% and 48%. These figures are considerably higher than those for the Federal Court. No explanation for this difference was given to the Commission during consultations or submissions. One possible explanation lies in the highly discretionary nature of the Family Court's jurisdiction when compared with that of the Federal Court.

Figure 16–1 Success Rate of Appeals in the Family Court



Source: Data provided by the Registry of the Family Court of Australia.
Note: A substantial number of appeals filed with the Family Court are abandoned or withdrawn before decision. In Figure 16–1, the success rate is calculated as a percentage of appeals decided rather than appeals filed.

612 High Court of Australia, *Annual Report*, various years.

16.11 The function of appeals is crucial to assessing the nature of the federal appellate system and appropriate options for reform. As discussed in detail in Chapters 19 and 20, the need to ensure an appropriate balance between the corrective and developmental functions of appellate courts requires particular consideration of the structure and operation of the Federal Court and the special leave process of the High Court. Reforms must balance the competing demands of individualised justice and efficiency in the appellate processes.

Constitutional Framework

16.12 Chapter III of the Constitution underpins the basic structure of the Australian federal judicial system, including the appellate jurisdiction of the High Court and other federal courts. Section 73 confers appellate jurisdiction on the High Court to hear and determine appeals from any other federal court or court exercising federal jurisdiction, and from the Supreme Court of any State.[613] Appellate jurisdiction is conferred on other federal courts by legislation, principally the *Judiciary Act 1903*, the *Federal Court of Australia Act 1976*, and the *Family Law Act 1975*.

16.13 As discussed in Chapter 2, under s 73 of the Constitution the High Court may exercise appellate jurisdiction in both state and federal matters. In this respect, the High Court operates as a national institution rather than as a federal institution. This role distinguishes it from the United States Supreme Court under Article III of the United States Constitution, which was otherwise an influential model in the development of the Australian system.

16.14 Section 73 guarantees the existence of rights of appeal to the High Court in stated circumstances, but these rights are subject to such exceptions and regulations as the Parliament prescribes. This gives significant latitude to the legislature in shaping the High Court's appellate jurisdiction. It has been the basis, for example, of the High Court's power to screen its appellate workload through the special leave process, described in Chapters 18 and 19.

16.15 The Constitution makes no mention of the appellate jurisdiction of federal courts other than the High Court, but Parliament's power to confer appellate jurisdiction on these courts has been held to arise under s 77(i) of the Constitution. Similarly, s 77(iii) has been held to authorise the investiture of appellate federal jurisdiction in state courts.[614] Parliament therefore has consider-

613 See Chapters 2 and 19. See also Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.27–4.32.

614 *Ah Yick v Lehmert* (1905) 2 CLR 593, 603–604 (Griffith CJ); *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 559 (Taylor J); *Cockle v Isaksen* (1957) 99 CLR 155; *New South Wales v Commonwealth* (1915) 20 CLR 54 ('*Wheat Case*'), 90 (Isaacs J); *Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69, 114 (Starke J); *R v Spicer; Ex parte Truth and Sportsman Ltd* (1957) 98 CLR 48; Z Cowen and L Zines (1978), 131–132.

able flexibility in providing for channels of appeal within or between state and federal courts, and may exclude certain appeals from the state system pursuant to s 77(ii).

16.16 As in the case of original jurisdiction, the appellate jurisdiction of federal courts (other than the High Court) must be confined to the categories of federal jurisdiction enumerated in ss 75 and 76 of the Constitution.[615] The exercise of state appellate jurisdiction by federal courts other than the High Court has been described as interfering with state judicial functions and with the judicial structure created by the Constitution.[616] Only the High Court stands in a different position, and s 73 of the Constitution is regarded as 'an exhaustive statement of the appellate jurisdiction of federal courts in respect of state jurisdiction'.[617]

16.17 The Commission's recommendations for reform of the federal appellate system take into account the limitations imposed by Chapter III of the Constitution. They also identify, where relevant, the circumstances in which Parliament has freedom of legislative action.

Channels of Appeal

16.18 This section surveys the existing channels of appeal to each federal court. A more detailed analysis is provided in succeeding chapters. The interaction of the components of the appellate system demonstrate that alteration to one part of the system may impact on other components. For example, changing cross-jurisdictional appeals from state courts to the Federal Court may have consequences for the original and appellate jurisdiction of both state and federal courts (see Chapter 20).

16.19 The High Court lies at the apex of the federal and state judicial systems. Its appellate role is defined partly by s 73 of the Constitution and partly by federal legislation, particularly the *Judiciary Act*.

16.20 The High Court may hear appeals from a single judge of the High Court exercising original jurisdiction; from state courts, whether in the exercise of federal jurisdiction or otherwise; from the Supreme Court of the Northern Territory; from the Federal Court; from the Family Court; from the Federal Magistrates Court in very limited circumstances; and from the Supreme Court of Nauru. In 1999–2000, 48% of the High Court's appellate workload came from state Supreme Courts and

615 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 539; Z Cowen and L Zines (1978), 133.

616 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 563. Issues of federalism and the integrity of state judicial systems are also discussed in Chapter 2 in respect of the powers of the Commonwealth Parliament over state courts exercising federal jurisdiction.

617 *Gould v Brown* (1998) 193 CLR 346.

46% came from the Federal Court.[618] Other courts accounted for a very small proportion of High Court appeals.

16.21 The Federal Court acts as an intermediate court of appeal when constituted as a Full Court. The Federal Court has jurisdiction under s 24 FCAA to hear appeals from a single judge of the Federal Court; from judgments of the Supreme Courts of the ACT and Norfolk Island (but not the Northern Territory); from a judgment of a state court exercising federal jurisdiction where specified by a federal Act ('cross-jurisdictional appeals'); and from judgments of the Federal Magistrates Service, other than in family and child support matters. In DP 64, the Commission noted that between 1995–96 and 1997–98, 83–87% of appeals to the Federal Court came from a single judge of that Court, while 11–13% came from state and territory Supreme Courts.[619]

16.22 The Family Court also acts as an intermediate court of appeal when constituted as a Full Court. Section 94 FLA provides that an appeal lies to a Full Court of the Family Court from a Family Court decision in original or appellate jurisdiction; from the Family Court of Western Australia; from a decision of a single judge of a state or territory Supreme Court exercising original or appellate jurisdiction under the *Family Law Act 1975*; and from the Federal Magistrates Service in family and child support matters.

16.23 The Federal Magistrates Service is the lowest court in the federal system and does not exercise appellate jurisdiction of its own. It does have the power to review certain decisions of administrative tribunals[620] but this is an exercise of original, not appellate, judicial power. As mentioned above, appeals from federal magistrates go either to the Federal Court or the Family Court, depending on the nature of the jurisdiction exercised. The Chief Justices of the Federal Court and the Family Court have a discretion to allow such appeals to be heard by a single judge exercising the appellate jurisdiction.

Internal Organisation of Appellate Courts

16.24 The internal structure of appellate courts may impact upon their exercise of appellate jurisdiction and the effective management of their appellate caseload. Chapters 20 and 21 consider the internal organisation of the Federal Court and the Family Court in the light of changes to the federal civil justice system.

16.25 Appellate courts may be structured as permanent courts, which are separate from trial courts and are comprised of judges who hear only appeals. Alternatively, appellate courts may be constituted by trial judges who form an appellate bench to hear particular appeals by rotation. Between these models lie a

618 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.44 and Figure 2, 209.
619 Ibid, para 4.47.
620 The Court has jurisdiction to hear 'appeals' from the Administrative Appeals Tribunal transferred to it by the Federal Court under s 44A of the *Administrative Appeals Tribunal Act 1975* (Cth).

variety of hybrid arrangements, which combine elements of these two models in different ways.[621]

16.26 The Federal Court is organised according to the rotation model whereby the Chief Justice allocates judges of the Court to hear appeals during designated appellate sittings. The New South Wales Court of Appeal and the Victorian Court of Appeal employ the permanent court model, with each court being comprised of permanent judges of appeal. The Family Court uses a hybrid model whereby appellate benches are comprised of permanent judges of appeal and trial judges. A similar model is used by the New South Wales Court of Criminal Appeal and the Queensland Court of Appeal.

16.27 Although the 'permanent court model', the 'rotation model' and the 'hybrid model' provide convenient descriptions of different approaches to the question of internal court organisation, in practice all appellate courts in Australia are an amalgam. For example, most permanent state appellate courts can appoint trial judges as acting judges of appeal, and the Federal Court lists judges with particular expertise to form appellate benches in particular areas, such as admiralty, intellectual property and taxation.

16.28 Each model has distinct advantages and disadvantages. The permanent court model recognises the particular skills required to perform appellate work; the advantages of appellate courts functioning independently from trial courts; and the benefits of cohesion and consistency of decision making among a smaller group of judges.

16.29 The rotating court model recognises the benefits of appellate judges having on-going experience of the trial processes which they review; of trial judges gaining appellate experience; of greater collegiality; and of the intellectual stimulation for judges in participating in the court's appellate work. The hybrid model may offer many of the advantages of each model without their perceived disadvantages, as discussed in subsequent chapters.

Proposals for a National Appellate Court

16.30 In DP 64 the Commission discussed various proposals for establishing a national court of appeal.[622] These proposals are part of an agenda of broad structural reform of the Australian judicial system. At various times there has been considerable support for the creation of a national appellate court with its perceived advantages of promoting greater uniformity in the law and reducing the appellate

621 B Opeskin (2001), 11–15.

622 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.281–4.307.

burden of the High Court. The details of the various proposals are outlined in DP 64.

16.31 In 1987, the majority of the Advisory Committee on the Australian Judicial System concluded that there should be no structural change in the Australian court system and that separate federal and state courts should be retained.[623] In the following year the Constitutional Commission also concluded that there were insufficient reasons to amend the Constitution to establish a new national court of appeal between the present intermediate appellate courts and the High Court.[624]

16.32 As indicated in Chapter 1, in this report the Commission does not address the issue of constitutional reform, which would appear to be a prerequisite for virtually all proposals for a national court of appeal.[625] However, the issue attracted significant comment in consultations and submissions. The Commission accordingly records the views that were expressed on this subject in the expectation that the issue may be raised for future consideration.

16.33 One view expressed in consultations and submissions was that it would be undesirable and ultimately unproductive for the Commission to try to settle this long and controversial debate within the context of this reference.[626] However, there was some support for the idea of a national appellate court even though it was generally recognised that implementing such a scheme would be difficult. It was said that a national appellate court could remove current jurisdictional difficulties.[627] Another view was that a national appellate court would reduce the access to justice problems created by the High Court's special leave procedure, provided that the new court was established between the Full Courts of the state Supreme Courts and the High Court.[628]

16.34 Many observers acknowledged the seemingly insurmountable constitutional and political obstacles to change.[629] The Solicitor-General for New South Wales, Mr Michael Sexton SC, submitted that the need for a national appellate court has not been demonstrated. He submitted that a new appellate level would actually add to litigation costs and restrict the High Court's role in hearing important non-constitutional matters.[630] He also stated that 'it is unlikely that the Commonwealth, either acting alone or in conjunction with the States would have

623 Advisory Committee to the Constitutional Commission (1987), 40.
624 Ibid, 35–37; Constitutional Commission (1988), 371.
625 Compare K Santow and M Leeming (1995).
626 Department of Justice (Vic), *Consultation*, Melbourne, 15 February 2001.
627 D O'Brien, *Consultation*, Canberra, 22 February 2001.
628 South Australian Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001.
629 D O'Brien, *Consultation*, Canberra, 22 February 2001; South Australian Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001; M Moshinsky, *Submission J013*, 5 March 2001; Attorney-General (NSW), *Submission J019*, 14 March 2001.
630 M Sexton SC, *Submission J009*, 23 February 2001.

the constitutional power to legislate for such a court'.[631] The creation of such a court would require constitutional change and therefore a referendum.

16.35 The Supreme Court of Western Australia suggested that a national appellate court could be a new federal court with the power to hear appeals from federal, state and territory courts in federal, state and territory jurisdiction.[632] The Supreme Court's submission identified two reasons to support the establishment of such a court — to increase the level of uniformity of Australian law and to reduce the appellate burden on the High Court. However, the submission acknowledged the significant constitutional obstacles to establishing such a court and noted the arguments against such a court. These arguments were similar to those expressed by the Solicitor-General for New South Wales, namely, that the costs of litigation might increase, and the importance of the High Court would be reduced if it were limited to hearing only constitutional or public law cases.

16.36 Other arguments in favour of a national court of appeal are that it would be compatible with the objective of a national legal profession and a national legal services market,[633] and it would enhance Australia's provision of legal and dispute resolution services in an increasingly global market.[634]

16.37 The principal argument identified in submissions and consultations against establishing a national appellate court was the need to amend the Constitution through referendum. There would also be formidable political obstacles to be overcome. The successful introduction of a national court of appeal would require the Commonwealth, States and Territories to reach agreement on who should be responsible for appointing, funding and removing the judges of the court.

16.38 The Commission makes no recommendation in relation to the various proposals for a national court of appeal. Nevertheless, the Commission considers it important that this reform option be kept under review over time as part of a continuing effort to ensure that the Australian appellate system functions effectively and efficiently.

16.39 The issue should be a consideration in any program of significant structural reform to the Australian court system. Any formal consideration of the issue should not be limited to the exercise of federal jurisdiction but should consider the channels of appeal in matters of federal, state and territory jurisdiction. The Standing Committee of Attorneys-General, or a sub-committee formed

631 Ibid.
632 Supreme Court of Western Australia, *Submission J036*, 5 April 2001.
633 Independent Committee of Inquiry (1993) (Hilmer Report); Trade Practices Commission, Final report (1994).
634 P Short (1997).

under its aegis, might be a suitable vehicle for considering issues that span the jurisdictional boundaries of Australian courts.

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17. The Nature of Appeals

Contents

17.1 This chapter examines the function performed by an appellate court when it undertakes its review of a lower court decision by way of appeal. In DP 64 the Commission asked whether federal legislation should specify the precise nature of appeals undertaken by federal courts.[635] This question became particularly significant during consultations, where it was apparent that there was substantial discontent about the state of the law, especially in light of the High Court's decision in *Allesch v Maunz*.[636] This response has prompted the Commission to undertake a broader analysis of the law and its alleged deficiencies.

17.2 There is no right of appeal at common law. Appeals are predominantly creatures of statute although, in the case of the High Court, s 73 of the Constitution makes express provision for the Court's appellate jurisdiction. Generally the nature of an appeal undertaken by a court depends on the terms of the statute that establishes the right of appeal.[637]

17.3 The term 'appeal' is an imprecise one and is used to refer to many types of review or rehearing.[638] For example, the use of the term 'appeal' in legislation may not correspond with its use in the sense mandated by Chapter III of the Constitution. An example of this can be seen in s 19(2) FCAA, which provides in relation to the Federal Court that:

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635 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.7–4.9.

636 *Allesch v Maunz* (2000) 173 ALR 648.

637 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585, 590 (Gleeson CJ, Gaudron and Hayne JJ); *Re Coldham; Ex parte Brideson (No 2)* (1990) 170 CLR 267, 273–274 (Deane, Gaudron and McHugh JJ).

638 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585, 590 (Gleeson CJ, Gaudron and Hayne JJ).

> The *original jurisdiction* of the Court includes any jurisdiction vested in it to hear and determine *appeals* from decisions of persons, authorities or tribunals other than courts.[639]

Types of Appeals

17.4 The High Court has noted that there are many types of appeal.

> In a variety of legal contexts, courts still recognise that 'appeal' has at least four different meanings. It may mean an appeal in the true sense, an appeal by rehearing on the evidence before the trial court, an appeal by way of rehearing on the evidence before the trial court and such further evidence as the appellate court admits pursuant to a statutory power to do so, and an appeal by way of a hearing de novo. Which of these meanings the term 'appeal' has depends on the context of the term, the history of the legislation, the surrounding circumstances, and sometimes an express direction as to what the nature of the appeal is to be.[640]

17.5 In an appeal in the strict sense the appellate court determines whether the decision under appeal was correct on the evidence and the law as it stood at the time the original decision was given.[641] The appellate court cannot consider changes in the law or receive further evidence.[642] It can only give the decision that should have been given at first instance.

17.6 In an appeal by way of rehearing, an appellate court may receive further evidence and substitute its own decision based on the facts and the law as they stand at the date of the rehearing.[643] However, these powers are exercisable only where the appellant can demonstrate that, having regard to all the evidence before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error.[644]

17.7 In a hearing de novo, the appellate court hears the matter afresh — not as a true appeal or review of an earlier decision, but as the exercise of original jurisdiction for the second time.[645] The parties present their cases anew and the decision of the second court is made on the basis of evidence given before it. The court is free to exercise any discretion as it sees fit[646] and it applies the law prevailing at the date of the rehearing. This type of proceeding can be undertaken regardless of whether there was any error on the part of the original court.

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639 Emphasis added.
640 *Eastman v The Queen* (2000) 172 ALR 39, 65 (McHugh J).
641 *Quilter v Mapleson* (1882) 9 QBD 672; *Logan v Woongarra Shire Council* [1883] 2 Qd R 689.
642 *Bradshaw v Medical Board (WA)* (1990) 3 WAR 322.
643 *Allesch v Maunz* (2000) 173 ALR 648, 654; *Edwards v Noble* (1971) 125 CLR 296; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.
644 *Allesch v Maunz* (2000) 173 ALR 648, 659 (Kirby J).
645 *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6.
646 *Kraemers v Attorney-General (Tas)* [1966] Tas SR 113.

Nature of Appeals in Federal Courts — Overview

17.8 Federal legislation does not address all aspects of the nature of federal appeals. There is accordingly a need to look to the common law to fill the gaps. Under the common law, judges have a discretion to determine certain aspects of the nature of an appeal, such as whether further evidence may be adduced or how an appellate court should deal with evidence based on the credibility of witnesses.

17.9 Federal courts have common elements in their powers with respect to appeals. The High Court, the Federal Court and the Family Court each have the power to review findings of primary facts and inferences drawn from primary facts.[647] The general rule is that appellate courts do not need to be especially reluctant to disturb inferences drawn from primary facts.[648] An appellate court should give due weight to the conclusions of the trial judge but it may draw its own conclusions.[649]

17.10 In the case of evidence based on the credibility of witnesses, the general rule is that appellate courts should be reluctant to disturb such findings because the trial judge is in a better position to assess credibility, having seen and heard the witnesses.[650] However, such findings can be disturbed or set aside if the appellate court considers that the trial judge has failed to use, or has palpably misused, his or her advantage.[651] The same is also true if the trial judge has acted on evidence that is glaringly improbable or is inconsistent with facts incontrovertibly established by the evidence.[652] Moreover, logical inconsistency of the evidence is a valuable guide to credibility and an appellate court is in a position in such cases to assess matters of credibility.[653]

17.11 There are also significant differences between the nature of appeals in federal courts. The High Court hears strict appeals, the Family Court hears appeals by way of rehearing, and the position of the Federal Court is uncertain. A further difference is that the High Court has no power to receive further evidence[654] while the Federal Court and the Family Court have a statutory power to do so, albeit one

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647 s 27 FCAA (Federal Court); s 93A(2) FLA (Family Court). In relation to the High Court see *Warren v Coombes* (1979) 142 CLR 531, 551 (Gibbs ACJ, Jacobs and Murphy JJ).

648 *DMK Real Estate Pty Ltd v Lilliebridge* (1992) 108 FLR 64.

649 *Warren v Coombes* (1979) 142 CLR 531, 551 (Gibbs ACJ, Jacobs and Murphy JJ).

650 Ibid, 537–538. See also B Cairns (1996), 667–668.

651 *The Hontestroom v The Sagaporack* [1927] AC 37, 47 (Lord Sumner).

652 *Devries v Australian National Railways Commission* (1993) 177 CLR 472, 479 (Brennan, Gaudron, and McHugh JJ); *Daniels v Burfield* (1994) 68 ALJR 894; *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842, 844.

653 See also B Cairns (1996), 667–668.

654 *Mickelberg v The Queen* (1989) 167 CLR 259; *Crouch v Hudson* (1970) 44 ALJR 312; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; *New Lambton Land & Coal Co Ltd v London Bank of Australia Ltd* (1904) 1 CLR 524.

that is exercised cautiously in recognition of the public interest in bringing litigation to an end.[655]

17.12 In the Federal Court and the Family Court a distinction is also drawn between evidence as to issues that occurred before the trial and those that occurred subsequently. Evidence received after trial is accepted more readily than that received or available before trial. The reason for this is the expectation that earlier evidence should have been adduced at the trial and not left to an appeal.[656]

Appeals to the High Court

17.13 The appellate jurisdiction of the High Court is regulated both by the Constitution (s 73) and the *Judiciary Act*, but neither provides for the nature of appeals to the High Court. The case law has generally accepted that appeals to the High Court are appeals in the strict sense.[657] In consequence, the High Court cannot admit further evidence[658] and cannot consider changes in the law since trial.[659] Its power of appellate review is limited to determining whether the judgment of the court appealed from was correct upon the materials before that court.[660] This view has been followed in a long line of authorities and was restated authoritatively by the High Court in *Mickelberg v The Queen*[661] and *Eastman v The Queen*.[662]

17.14 This understanding of the High Court's appellate function is based largely on the distinction between the Court's original and appellate jurisdiction under Chapter III of the Constitution. The restriction on the ability of the High Court to hear new evidence when it determines an appeal in state jurisdiction is that it does not have original jurisdiction in state matters. Gaudron J explained the distinction as follows:

> When an appellate court reaches a decision by reference to evidence called for the first time in that court, it is exercising original jurisdiction notwithstanding that the proceeding is called an appeal. Because ss 75 and 76 constitute a complete and exhaustive statement of this court's original jurisdiction, s 73 does not authorise the receipt of evidence on appeal from a State court exercising non-federal jurisdiction. And because s 73 does not relevantly distinguish between appeals from State courts

655 *Mulholland v Mitchell* [1971] AC 666; *Warr v Santos* [1973] 1 NSWLR 432.
656 *Council of the City of Greater Wollongong v Cowan* (1955) 93 CLR 435. See also B Cairns (1996), 665.
657 *Eastman v The Queen* (2000) 172 ALR 39; *Mickelberg v The Queen* (1989) 167 CLR 259; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.
658 *Mickelberg v The Queen* (1989) 167 CLR 259; *Crouch v Hudson* (1970) 44 ALJR 312; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73; *New Lambton Land & Coal Co Ltd v London Bank of Australia Ltd* (1904) 1 CLR 524; *Ronald v Harper* (1910) 11 CLR 63; *Grosglik v Grant (No 2)* (1947) 74 CLR 355, 357.
659 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.
660 *Davies v The King* (1937) 57 CLR 170, 172 (Latham CJ).
661 *Mickelberg v The Queen* (1989) 167 CLR 259.
662 *Eastman v The Queen* (2000) 172 ALR 39.

> exercising non-federal jurisdiction and appeals from courts exercising federal jurisdiction, that provision must be construed as not authorising the receipt of further evidence no matter the court from which the appeal is brought.[663]

17.15 A related issue arose in *Crampton v The Queen.*[664] The Court affirmed that appeals to the High Court are appeals in the strict sense but nevertheless held that this did not preclude the determination of an appeal on a ground raised for the first time in the High Court. In considering a question of law for the first time the Court was not required to rehear the proceedings. The Court thus exercised only appellate, not original, jurisdiction.

17.16 There is some doubt as to whether Parliament may legislate for the nature of appeals in the High Court, including the power to hear new evidence. In *Eastman*, Gleeson CJ appeared to suggest that Parliament could legislate in some circumstances.

> There is no statute which confers such power upon this court, or which regulates the circumstances in which further evidence might be received. The authorities referred to above do not deny the capacity of parliament to enact such legislation, at least in relation to appeals from courts exercising federal jurisdiction, but it has never done so.[665]

17.17 Gaudron and McHugh JJ also suggested that Parliament could probably legislate in relation to the nature of appeals in federal matters, but that this would have to be done in conjunction with conferring original jurisdiction under ss 75 and 76.[666] Gummow J doubted the Parliament's power to regulate the nature of appeals in the High Court in federal jurisdiction on the basis that such a result would give s 73 a differential operation that was not justified by a textual analysis.[667] Kirby J said that an interpretation of the Constitution in its contemporary setting permitted the Court to receive new evidence.[668] Hayne J did not consider the issue. Callinan J said the Court could receive fresh evidence and thus appeared to accept that Parliament could legislate.

Appeals to the Federal Court

17.18 Section 24 FCAA provides for the Federal Court's appellate jurisdiction (see Chapter 20). Section 27 makes provision for certain functions of the Court in conducting an appeal. The section provides:

663 Ibid, 52 (Gaudron J).
664 *Crampton v The Queen* (2000) 176 ALR 369.
665 *Eastman v The Queen* (2000) 172 ALR 39, 42.
666 Ibid, 53 (Gaudron J), 76 (McHugh J).
667 Ibid, 84–85.
668 Ibid, 97–99.

> In an appeal, the Court shall have regard to the evidence given in the proceedings out of which the appeal arose, and has power to draw inferences of fact and, in its discretion, to receive further evidence, which evidence may be taken:
>
> (a) on affidavit; or
>
> (b) by video link, telephone or other appropriate means in accordance with another provision of this Act or another law of the Commonwealth; or
>
> (c) by oral examination before the Court or a Judge; or
>
> (d) otherwise in accordance with section 46.

17.19 This section states some attributes of Federal Court appeals but it gives no clear indication of the nature of the appeal (strict, rehearing, or de novo), nor does it indicate the major consequences that flow from such a classification. Section 27 is supplemented by s 28(1), which empowers the Court in the exercise of its appellate jurisdiction to affirm, reverse, vary or set aside a judgment, remit to the trial court or grant a new trial. Ambiguity in the legislation has given rise to considerable litigation about the nature of appeals in the Federal Court.

17.20 In *Duralla Pty Ltd v Plant*[669] the Federal Court held that an appeal to the Full Court of the Federal Court is an appeal in the strict sense and not an appeal by way of rehearing, notwithstanding that the Court's powers are extended by statute under ss 27 and 28 FCAA. The Court based its decision on two factors. First, the appellate jurisdiction conferred by s 24(1) FCAA is subject to that section and any other Act, and is therefore independent of ss 27 and 28. Second, if the Court were to be able to hear appeals by way of rehearing, it would be exercising original, not appellate, jurisdiction. Smithers J, with whom Northrop and Beaumont JJ agreed, remarked that in appeals to the Federal Court from state or territory courts 'the exercise of original jurisdiction would not be appropriate'.[670] The dichotomy between original and appellate jurisdiction under Pt III FCAA was said to be precise.

17.21 Subsequent cases have affirmed this classification.[671] However, in a recent case, *Stirling Harbour Services Pty Limited v Bunbury Port Authority*,[672] Burchett and Hely JJ said that it was inevitable that the reasoning in *Duralla* would have to be reconsidered in light of the High Court decisions in *Re Coldham; Ex*

669 *Duralla Pty Ltd v Plant* (1984) 2 FCR 342. See also *Petreski v Cargill* (1987) 18 FCR 68.

670 *Duralla Pty Ltd v Plant* (1984) 2 FCR 342, 352 (Smithers J). See also *Shire Council Werribee v Kerr* (1928) 42 CLR 1, 20 (Isaacs J); *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 110.

671 *Petreski v Cargill* (1987) 18 FCR 68; *Yarmirr v Northern Territory* [2000] FCA 48 (Unreported, Federal Court of Australia, Beaumont, von Doussa and Merkel JJ, 3 February 2000).

672 *Stirling Harbour Services Pty Limited v Bunbury Port Authority* [2000] FCA 1381 (Unreported, Federal Court of Australia, Burchett, Carr and Hely JJ, 29 September 2000).

parte Brideson (No 2)[673]and *CDJ v VAJ (No 1)*.[674] Their Honours stated that these High Court decisions suggested that language comparable to that found in ss 27 and 28 FCAA strongly indicated that the appeal was by way of rehearing.[675] In *CDJ v VAJ* the High Court considered s 93A(2) FLA. In holding that an appeal to the Full Court of the Family Court was an appeal by way of rehearing, McHugh, Gummow and Callinan JJ noted the similarity between the language of s 93A(2) FLA and ss 27 and 28 FCAA.[676]

17.22 The Federal Court's statutory powers give it a discretion to act beyond the constraints normally imposed by a strict appeal.[677] As mentioned above, ss 27 and 28 give the Federal Court power in an appeal to draw inferences of fact, receive further evidence, set aside a jury verdict, order a new trial, and give such judgment as in all the circumstances the Court sees fit. The Federal Court has suggested that the *Federal Court of Australia Act 1976* confers on the Court a 'wide discretion to ensure that justice is done' in civil appeals.[678] However, the discretion to set aside a verdict will only be exercised in special circumstances.[679] A more flexible approach to receiving evidence may be necessary where the interests of persons other than the parties, or the public interest, may be affected by the determination of the appeal.[680]

Appeals to the Family Court

17.23 There are two types of appeal under the *Family Law Act 1975*. One type comprises appeals from courts of summary jurisdiction, which are heard by way of a hearing de novo.[681] The other type comprises appeals to a Full Court of the Family Court from a single judge of the Court, from the Family Court of Western Australia, from the Supreme Court of the Northern Territory, and from the Federal

673 *Re Coldham; Ex parte Brideson (No 2)* (1990) 170 CLR 267.
674 *CDJ v VAJ (No 1)* (1998) 197 CLR 172.
675 *Stirling Harbour Services Pty Limited v Bunbury Port Authority* [2000] FCA 1381 (Unreported, Federal Court of Australia, Burchett, Carr and Hely JJ, 29 September 2000), para 76–79.
676 *CDJ v VAJ (No 1)* (1998) 197 CLR 172, 199.
677 *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 526 (Gibbs CJ and Mason J); *Duralla Pty Ltd v Plant* (1984) 2 FCR 342, 353 (Smithers J), 364 (Northrop J); *Magarditch v Australia & New Zealand Banking Group Ltd* [1999] FCA 806 (Unreported, Federal Court of Australia, Spender, French and Kenny JJ, 16 June 1999), para 104.
678 *Magarditch v Australia & New Zealand Banking Group Ltd* [1999] FCA 806 (Unreported, Federal Court of Australia, Spender, French and Kenny JJ, 16 June 1999), para 104. As to criminal appeals see *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 529 (Gibbs CJ and Mason J).
679 *CDJ v VAJ (No 1)* (1998) 197 CLR 172, 234 (Kirby J); *Lynch v Howard* (1980) 44 FLR 71, 78; *Government Insurance Office (NSW) v Maher* (1981) 55 FLR 187, 191–192; *Federal Commissioner of Taxation v Walker* (1984) 2 FCR 283, 296; *Minister for Immigration, Local Government and Ethnic Affairs v Hamsher* (1992) 35 FCR 359.
680 *CDJ v VAJ (No 1)* (1998) 197 CLR 172, 234 (Kirby J); *Makhoul v Barnes* (1995) 60 FCR 572, 576–577.
681 s 96(1) and (4) FLA.

Magistrates Service.[682] These appeals have been held to be by way of rehearing. Only the second type of appeal is considered further in this chapter.

17.24 The appellate jurisdiction of the Family Court is regulated by Part X FLA. Section 93A(2), which lies within Part X, provides:

> Subject to section 96, in an appeal the Family Court shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence upon questions of fact, which evidence may be given by affidavit, by oral examination before the Family Court or a Judge or in such other manner as the Family Court may direct.

17.25 Under s 94(2), the Family Court also has the power to 'affirm, reverse, or vary the decree or decision the subject of the appeal' and to 'make such decree or decision as, in the opinion of the court, ought to have been made in the first instance'. The Court may also 'order a re-hearing, on such terms and conditions, if any, as it considers appropriate'.

17.26 In light of the powers of the Family Court to receive further evidence, draw inferences of fact, and make any finding it thinks fit, it has been held that appeals to the Court are by way of rehearing.[683] This does not involve a reconsideration of the facts of the case de novo. Error must be shown.[684] Ordinarily, the Court will make whatever finding it considers appropriate having regard to the evidence given in the proceedings out of which the appeal arose, although it has the discretion to go beyond this.

17.27 In *CDJ v VAJ* the High Court discussed the power of the Full Court of the Family Court to receive further evidence and noted the following points.[685]

- The purpose of the power to admit further evidence is to ensure that the proceedings do not miscarry.[686]
- The relevant factors to be taken into account in deciding whether to admit new evidence are the impact the evidence would have had on the trial; whether the evidence was available or could reasonably have been obtained at the time of the trial; and finality.[687]
- Further evidence cannot be admitted merely because it is useful.[688]

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682 s 94(1) FLA.
683 *CDJ v VAJ (No 1)* (1998) 197 CLR 172; *Allesch v Maunz* (2000) 173 ALR 648; *DJL v Central Authority* (2000) 201 CLR 226, 246 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
684 *Allesch v Maunz* (2000) 173 ALR 648, 659 (Kirby J).
685 *CDJ v VAJ (No 1)* (1998) 197 CLR 172.
686 Ibid, 200 (McHugh, Gummow and Callinan JJ).
687 Ibid, 200 (McHugh, Gummow and Callinan JJ), 186 (Gaudron J).
688 Ibid, 203 (McHugh, Gummow, and Callinan JJ).

- Where there has been some irregularity in the trial proceedings such that a party was unable to put his or her case effectively, or was unable to answer effectively the case made by the other side, s 93A(2) enables a Full Court of the Family Court to receive further evidence even though the evidence was available at the time of the trial.[689]

17.28 The High Court also stated that a Full Court of the Family Court must decide the rights of the parties upon the facts and in accordance with the law as it exists at the time of hearing the appeal. The appeal is a 'trial over again, on the evidence used in the Court below, but there is a special power to receive further evidence'.[690]

17.29 The High Court recently affirmed that appeals to a Full Court of the Family Court are by way of rehearing. In *Allesch v Maunz*[691] a Full Court of the Family Court found that the trial judge had erred, and chose to exercise afresh the discretion to reconsider the disputed property settlement. In doing so, the Family Court took into consideration matters that had emerged after the trial judge's original orders had been made. On appeal to the High Court it was held that the Full Court had erred in the manner in which it exercised its discretion. According to the High Court, if an appellate court exercises a discretion in a rehearing by reference to circumstances as they exist at the time of the appeal, it is necessary for the parties to be given an opportunity to adduce evidence as to those circumstances.[692]

Issues and Problems

17.30 The major issue arising from the foregoing discussion is whether legislation should specify more clearly the nature of the appeal undertaken by federal courts. There is a concern that existing principles lack clarity and certainty. Substantial reliance is placed on case law to establish the nature of federal appeals even though courts regularly remark that appeals are creatures of statute and that their legal attributes are primarily determined by legislation.

17.31 The case law is itself uncertain. There is continuing judicial debate about whether appeals to the Federal Court are strict or in the nature of a rehearing. A further concern arises from the High Court's decision in *Allesch v Maunz* in relation to the Family Court's obligation to give parties an opportunity to present fresh evidence in an appeal. These issues are made more complex because of the strong textual similarity between the relevant provisions of the *Federal Court of Australia Act 1976* and the *Family Law Act 1975*. Yet, despite the similarities, the

689 Ibid, 186–8 (Gaudron J)
690 Ibid, 202 (McHugh, Gummow and Callinan JJ) quoting *Re Chennell* (1878) 8 Ch D 492, 505.
691 *Allesch v Maunz* (2000) 173 ALR 648.
692 Ibid, 656 (Gaudron, McHugh, Gummow and Hayne JJ).

nature of appeals have been held to be quite different — appeals to the Family Court are by way of rehearing whereas appeals to the Federal Court are probably strict.

Consultations and Submissions

17.32 The general view expressed in submissions and consultations was that legislation should be introduced to provide greater clarity as to the nature of appeals in federal courts. However, it was also argued that there was a need to ensure that legislation is not overly prescriptive, particularly in relation to the admission of further evidence.

17.33 The Law Council of Australia submitted that the clarity of the law would be increased by specifying the precise nature of appeals.[693] It considered that a power to allow further evidence to be received in an appeal should be available to an appellate court, but only in rare situations. The Law Council stated that Parliament has power to legislate so as to allow the reception of further evidence in an appeal heard by a federal court from a federal or territory court, but it was arguable whether power exists in relation to appeals from state Supreme Courts. Notwithstanding these uncertainties, the Law Council supported the passage of legislation allowing reception of further evidence in appeals heard by federal courts in all cases.

17.34 The Family Court supported the proposal for legislation to prescribe the nature of federal appeals.[694] The Family Court considered that the obligation imposed on the Court by *Allesch v Maunz*, namely, to invite the parties to give fresh evidence before re-exercising the discretion of the trial judge, was unwieldy and should be removed. The rule caused difficulty in children's cases because circumstances relating to the care of children often changed. Litigants in person, in particular, often wished to lead new evidence in an appeal. However, the Family Court observed that appellate courts are not well placed to hear evidence and determine primary facts. Among other reasons, the size of an appellate bench made it difficult and time consuming for the court to establish and agree on facts. In some cases the appellate court had no choice but to remit the matter to a trial judge for rehearing, with attendant cost and delay.[695] The Family Court stated that generally it should be able to restrict fresh evidence to situations in which the Court is satisfied that it is necessary to consider additional evidence to avoid substantial injustice.

17.35 The Family Court stated that it should have a discretion to consider changes in the law since the date of the judgment under appeal. Some members of

693 Law Council of Australia, *Submission J037*, 6 April 2001.
694 Family Court of Australia, *Submission J041*, 1 May 2001; Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.
695 Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.

the Court considered that the law to be applied in determining whether or not to allow the appeal should be that which was in force at the time of the first hearing.[696]

17.36 In relation to the High Court's appellate jurisdiction, one view was that there were good policy reasons for allowing the Court in exceptional cases to hear new evidence, as was demonstrated in the dissenting judgments of Kirby and Callinan JJ in *Eastman v The Queen.*[697] To the extent that it is possible to do so by legislation that power should be conferred on the High Court.[698]

17.37 The Family Law Council expressed reservations about legislative clarification of the nature of federal appeals.[699] In its view, further consideration of the issue was necessary. The Council stated that the impact of any change might be problematic in areas of family law such as superannuation and international child abduction. Of particular concern was a power 'to consider changes in the law since the date of the judgment under appeal.'

Commission's Views

17.38 The Commission considers that the current reliance on the common law to provide guidance as to the nature of appeals in the Federal Court and the Family Court has created unnecessary complexity and uncertainty. This may in turn lead to avoidable litigation, and increase costs and delays in determining appellate proceedings. These concerns are exemplified in the continuing debate about the authority of *Duralla Pty Ltd v Plant* for the Federal Court and the implications of *Allesch v Maunz* for the Family Court.

17.39 The Commission considers that legislation relating to the Federal Court and the Family Court should be amended to state the type of appeal undertaken in each case. Legislation should also identify the functions and powers of a court in determining an appeal, including the power to draw inferences from the evidence at trial, review evidence as to credibility of witnesses, admit new evidence, and consider changes in the law since the date of judgment at first instance.

17.40 The precise content of new statutory provisions would require careful review. The Federal Court and the Family Court may have different requirements, reflecting differences in the nature and subject matter of their jurisdictions. However, the Commission considers that it is desirable to harmonise the legislative provisions wherever possible in order to develop common precedents and enhance the accessibility of the law.

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696 Family Court of Australia, *Submission J041*, 1 May 2001.
697 *Eastman v The Queen* (2000) 172 ALR 39; M Moshinsky, *Submission J013*, 5 March 2001.
698 M Moshinsky, *Submission J013*, 5 March 2001.
699 Family Law Council, *Submission J040*, 23 April 2001.

17.41 In the Commission's view, the limited scope of consultations and submissions on this issue make it inadvisable to propose detailed recommendations on the content of new provisions. However, it may be desirable for legislation to structure an appellate court's discretion by listing criteria that the court may take into account in exercising it. For example, in the case of fresh evidence, relevant factors might include the following:

- whether the evidence was available at trial or could have been obtained at trial with the use of reasonable diligence;
- whether the evidence would have had an important though not necessarily decisive influence on the outcome at trial;
- whether the fresh evidence is credible;
- whether the circumstances are so exceptional as to outweigh the normal presumption that the trial court is the arbiter of evidence; and
- whether the admission of fresh evidence is necessary to avoid substantial injustice.

17.42 A consideration of the nature of appeals in the High Court raises constitutional issues that are largely absent in the case of the Federal Court and Family Court. These constitutional considerations impose important constraints on the nature of legislative reform in this area. Additionally, even if legislation could validly regulate the nature of appeals in the High Court, there are policy issues that must be addressed as to whether a court at the apex of the judicial hierarchy should have a discretion to allow fresh evidence in exceptional circumstances.

17.43 The Commission notes that some High Court justices have argued strongly that the Court should have a residual discretion to admit fresh evidence. Deane J, dissenting in *Mickelberg*, and Kirby and Callinan JJ, dissenting in *Eastman*, argued that there were significant legal and policy reasons for allowing courts such a discretion. In *Mickelberg* Deane J referred to cases in which it would be an affront to justice or common sense for the Court to decline to receive fresh evidence.[700] In *Eastman* Kirby J noted that, with the exception of the Supreme Court of the United States, the final appellate courts of all common law jurisdictions allow the admission of fresh evidence in exceptional circumstances for the purpose of enabling the courts to do justice in the particular case and to remove any 'lurking doubt'.[701]

700 *Mickelberg v The Queen* (1989) 167 CLR 259, 280–282 (Deane J).
701 *Eastman v The Queen* (2000) 172 ALR 39, 102–104 (Kirby J).

17.44 The Commission recognises the constitutional constraints on legislative action arising from the inability of the High Court to exercise original jurisdiction in state matters. This might be problematic if the Court were authorised to exercise, and did in fact exercise, a discretion to admit fresh evidence in an appeal in a state matter. Subject to this constraint, the Commission considers it desirable that legislation clarify the nature of the task undertaken by the High Court in determining appeals. The recent cases in which the High Court has had to consider the nature of its appellate function illustrate that resources of litigants, legal representatives and judges are expended in determining questions that might be clarified by legislation, within the limits imposed by Chapter III of the Constitution.

Recommendation 17–1. Legislation conferring appellate jurisdiction on each federal court should be amended to specify clearly the nature of the appeal undertaken by the court. To the extent that the Constitution permits, legislation should indicate that the appellate court has a discretion, which it may exercise in appropriate cases, to:

- draw inferences from the evidence given at trial;
- review findings of credibility of witnesses;
- admit further evidence; and
- consider changes in the law up to the date at which it gives judgment, subject to relevant transitional legislation.

References

Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 (Cth) and Related Legislation*, Discussion Paper No 64 (2000), ALRC, Sydney.

B Cairns, *Australian Civil Procedure* 4th ed (1996) LBC Information Services, North Ryde.

18. Challenges of Appellate Workload

Contents

Introduction

18.1 There is a widely held concern about the capacity of the federal appellate system to meet its objectives of high quality, timely and cost-effective appellate determinations in the face of increasing appellate workload. This increased workload also affects a court's ability to meet caseload targets in first instance work because court resources and judicial time are often strained to meet the demands of both original and appellate jurisdiction.

18.2 All the federal courts have reported increases in the number of appeals filed in recent years. The High Court has reported an increase in the number of civil appeals and civil special leave applications filed.[702] The Federal Court's *Annual Report* for 1999–2000 comments that over the period from 1998 to 2000 there has been an increase 'of almost 150 percent in the Court's appellate caseload since 1995–96'.[703]

18.3 The Family Court has also commented that the increase in the number of appeals filed has made it more difficult for the Court to adhere to its six month standard for disposal of appeals from filing of notice of appeal to hearing.[704] In the reporting year 1999–2000, the Family Court recorded its third highest annual total of appeals filed since the Court commenced operations in 1976.[705]

18.4 One area of potential increase in the appellate workload of the Federal Court and the Family Court is appeals from the Federal Magistrates Service. During the Service's first year of operation a small number of appeals have been brought to the Federal Court and the Family Court, most of which have been heard

702 High Court of Australia (2000), 7, 62, 66.
703 Federal Court of Australia (2000), 13.
704 Family Court of Australia (1999), 43.
705 Family Court of Australia (2000), 27.

by single judges of those courts.[706] If the Federal Court and Family Court maintained their practices of listing most appeals from the Federal Magistrates Service for hearing before a single judge, the resulting pressure on their appellate workloads may be contained. However, it is premature to predict that this practice will continue across all classes of case.

18.5 Although there is undoubtedly growing pressure on appellate workloads, there is no evidence of a crisis in the system. In its report on the operation of the federal civil justice system, *Managing Justice*, the Commission found no evidence of crisis — there was a rise in case loads in some areas of federal jurisdiction but no litigation explosion, and there was no systemic problem of intractable delays.[707]

18.6 In the face of the challenges posed by increasing appellate workloads, the courts are actively engaged in considering reform to their appellate practice and procedures. The Judges' Sub-Committee on the Harmonisation of Appellate Practice and Procedure, under the auspices of the Council of Chief Justices, produced a paper in 1999 identifying many issues concerning the effective case management of appeals.[708] The Australian Institute of Judicial Administration has also recently published a report on appellate courts and the management of appeals in Australia.[709]

18.7 Individual courts also have established committees to improve their management of appeals, such as the Federal Court's Management of Appeals Committee and the Family Court's Future Directions Committee, which is yet to report on this topic. Some of the solutions proposed by the courts are set out below.

18.8 In this report the Commission makes a number of recommendations to ameliorate the pressure on the courts from increases in their appellate workloads. These proposals are discussed in Chapters 19, 20 and 21, which consider the appellate work of the High Court, the Federal Court and the Family Court respectively.

706 In consultations, the Chief Federal Magistrate indicated that there had been 8–10 appeals to the Family Court, which had all been dealt with by single judges, and two appeals to the Federal Court: Federal Magistrates Service, *Consultation*, Melbourne, 16 February 2001.

707 Australian Law Reform Commission, Report No 89 (2000), para 1.48.

708 Council of Chief Justices (Judges' Sub-Committee) (1999), 1–24.

709 B Opeskin (2001).

Sources of Increase

General trends

18.9 One general source of increase in appellate workload, and indeed in the workload of courts generally over time, is population increase. The Australian Bureau of Statistics has reported that in 1999 Australia's population was 19 million — an increase of 1.3% over the previous year and about two million more than in 1989.[710] An increasing population is likely to result in an increase in the number of disputes, with a consequent increase in the level of litigation and the number of appeals.

18.10 In *Managing Justice*, the Commission noted that there has also been an increase in the quantity, breadth and complexity of federal law, as evidenced by the rapid growth in legislation and regulations.[711] Justice McHugh, noting the steady increase in the number and complexity of Acts, has suggested that there is a direct correlation between the quantity and scope of legislation and a growth in litigation.[712]

18.11 Many other factors are likely to impact on the level and complexity of federal civil litigation. These include the growing awareness by groups and individuals of their legal rights; the increased use of class actions and representative actions; the capacity of organisations and individuals to make strategic use of litigation; the increased access to information that parties can retrieve, manipulate and deploy in litigation; and the globalisation of legal practice with the consequent ability of litigants to pursue their legal claims almost anywhere in the world.[713]

18.12 Federal courts have also identified an increase in the number of unrepresented parties in appeals. These parties frequently take more time to present their appeals than parties who are represented, with the consequence that more judicial time and court resources are consumed by such cases.[714]

18.13 Increases in population, legislation and trial litigation contribute in a general way to increases in the workload of courts and eventually to the volume of appeals. Other sources of increase, which are particular to each federal court, are considered below.

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710 Australian Bureau of Statistics, *Australia Now* (Population): <http://www.abs.gov.au/ausstats/abs@.nsf/w2.6.1 OpenView> (13 August 2001).

711 Australian Law Reform Commission, Report No 89 (2000), para 1.62.

712 M McHugh (1995).

713 Australian Law Reform Commission, Report No 89 (2000), para 1.153.

714 High Court of Australia (2000), 7; Federal Court of Australia (2000), 13; Family Court of Australia (2000), 7, 27.

High Court of Australia

18.14 The High Court's original jurisdiction and appellate jurisdiction operate side by side. In some respects the two types of jurisdiction are similar because many matters within the High Court's original jurisdiction are heard by a Full Court, as are all appellate matters.[715] The Court's original jurisdiction is discussed in greater detail in Chapter 3.

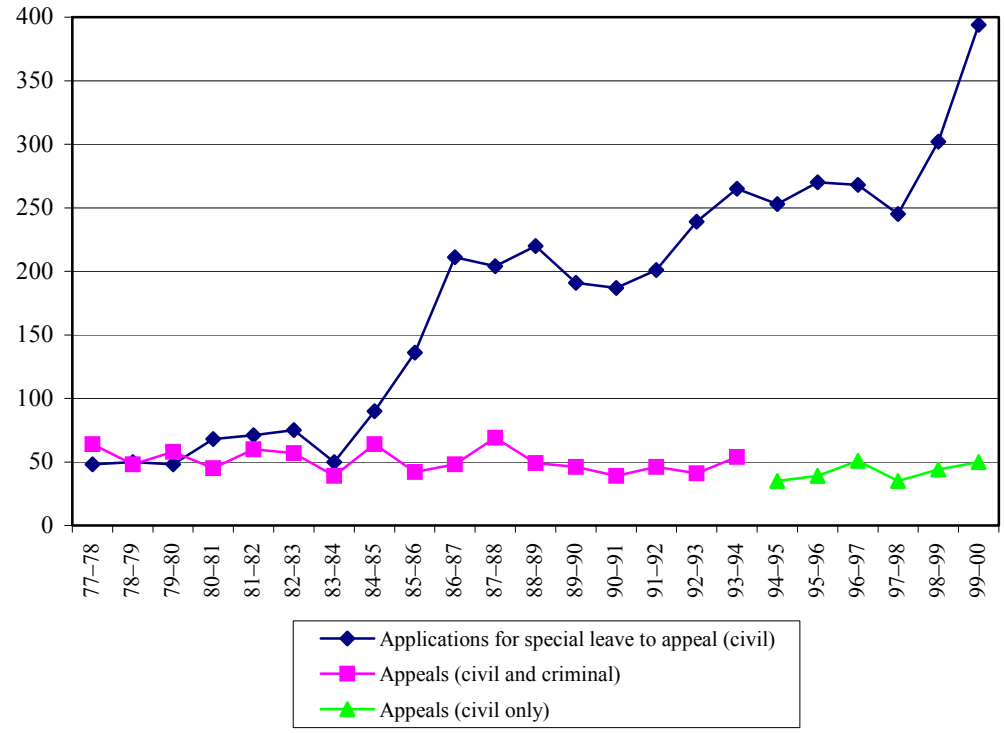
18.15 The High Court's appellate jurisdiction comprises a major part of its total workload. With some minor exceptions, which are discussed in Chapter 19, litigants can only appeal to the High Court after the Court has granted special leave to appeal. A special leave mechanism has existed in some form since 1903, but amendments in 1984 largely eliminated appeals by right and made special leave the only means of access to the High Court for all practical purposes. When the Court determines an application for special leave it exercises its original jurisdiction. However, special leave applications constitute such an integral part of the High Court's appellate function that they are included in this Part of the report on appellate jurisdiction.

18.16 Special leave applications act as a filtering mechanism to ensure that the High Court expends its limited judicial resources determining only the most significant legal questions. In attempting to achieve this objective the Court recognises that its bench of seven justices has a finite capacity to provide full reasons in complex legal cases. One effect of this filtering process has been that the number of full appeals determined by the Court has remained fairly stable over many years. The High Court has explicitly recognised the role of special leave as a filtering mechanism. In *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth*, the Court described special leave as 'a long-established procedure which enables an appellate court to control in some measure or filter the volume of work requiring its attention'.[716]

18.17 Figure 18–1 indicates the number of special leave applications and appeals filed in the High Court in civil matters over a 23-year period. As can be seen from the graph, there has been a relatively steady volume of civil appeals over the period — around 40 to 50 per year. However, there has been a very dramatic rise in the number of applications filed for special leave to appeal in civil cases, from 50 in 1983–84 to 394 in 1999–2000. This is an increase of 788% in 17 years.

715 A Full Court is comprised of any two or more justices sitting together: s 19 JA.
716 *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194, 218.

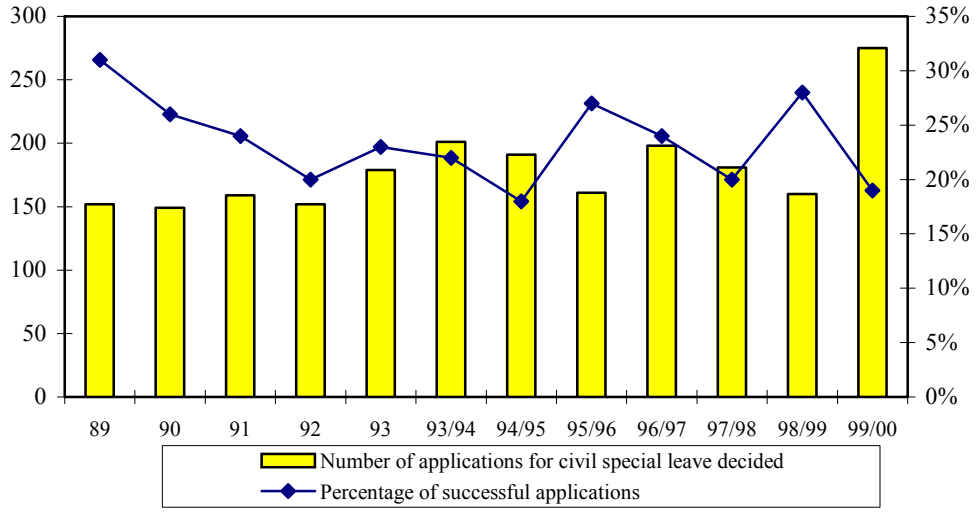
Figure 18–1 Special Leave Applications and Appeals Filed in the High Court in Civil Matters



Source: High Court of Australia *Annual Report*, various years.
Note: For the years 1977–78 to 1993–94 separate figures are not available for civil and criminal appeals.

18.18 The usefulness of special leave as a means of regulating the volume of appeals to the High Court can be seen from Figure 18–2, which shows that in recent years the special leave procedure has allowed the High Court to screen out between 69% and 82% of potential civil appeals — since 1989 the success rate of civil applications for special leave has fluctuated between 31% and 18%.

Figure 18–2 Success Rate of Applications for Special Leave in Civil Matters



Source: High Court of Australia *Annual Report*, various years.

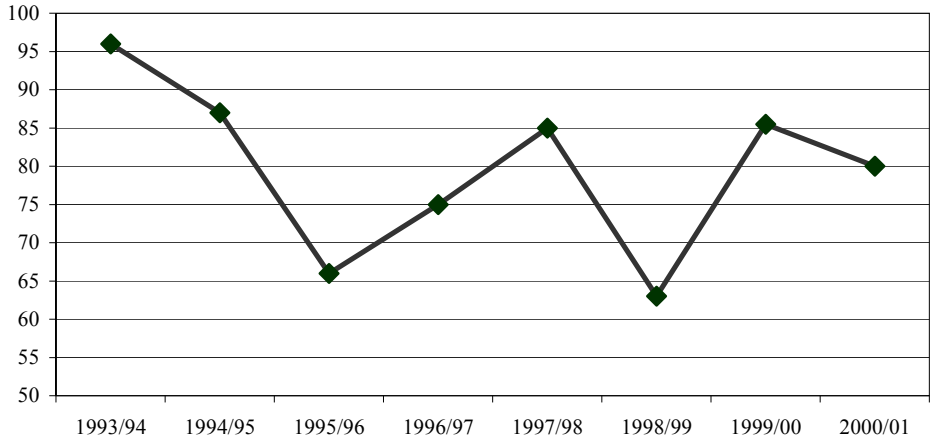
18.19 Despite the introduction in 1993 of limitations on the length of written and oral argument in special leave applications (see Chapter 19), the growth in the number of civil special leave applications has imposed a mounting burden on the High Court. This is apparent from Figure 18–1 above.

18.20 The Commission also sought data from the High Court to test whether the increasing number of special leave applications filed was being reflected in the amount of time justices of the Court spend determining applications. Figure 18–3 shows the total number of judge-days spent hearing special leave applications over eight years from 1993–94 to 2000–01. Over this period, the total number of judge-days fluctuated significantly. It should be noted that these figures take no account of the amount of judicial time required to prepare for the hearing of special leave applications.

18.21 Many factors might explain the erratic data. According to the High Court, the dip in the figure for 1998–99 corresponds with the reduction from three to two in the number of justices who usually determine applications for special leave to appeal.[717] It is significant that within a year of the new practice being introduced, the number of judge-days has returned to previous levels. In addition, the number of judge-days spent hearing special leave applications are likely to be sensitive to periods of judicial leave or retirement, given the small number of judges comprising the Court.

717 High Court Registry, *Correspondence*, 1 May 2001. This new practice was introduced in January 1998 and is further explained in Chapter 19.

Figure 18–3 Number of Judge-Days Spent Hearing Special Leave Applications in the High Court



Source: Data provided by the Registry of the High Court of Australia.
Notes: In January 1998 the High Court changed its practice of determining special leave applications by reducing the number of justices who usually hear the applications from three to two.

18.22 The High Court Registry also indicated to the Commission that a better understanding of the effect of the growing number of special leave applications could be obtained by examining data about the time for disposition of these matters.[718] For example, the number of special leave applications heard in 1994–95 was 83% of the total number filed in that year. However, data for 2000–01 for the 10 months to 30 April revealed a corresponding figure of only 55%, suggesting that the backlog of unheard special leave applications was growing.

18.23 Similarly, the Registry indicted that in 1994–95, 56% of special leave applications were finalised within six months and 84% within nine months. By contrast, in 1999–2000 only 20% were finalised within six months and 52% within nine months.

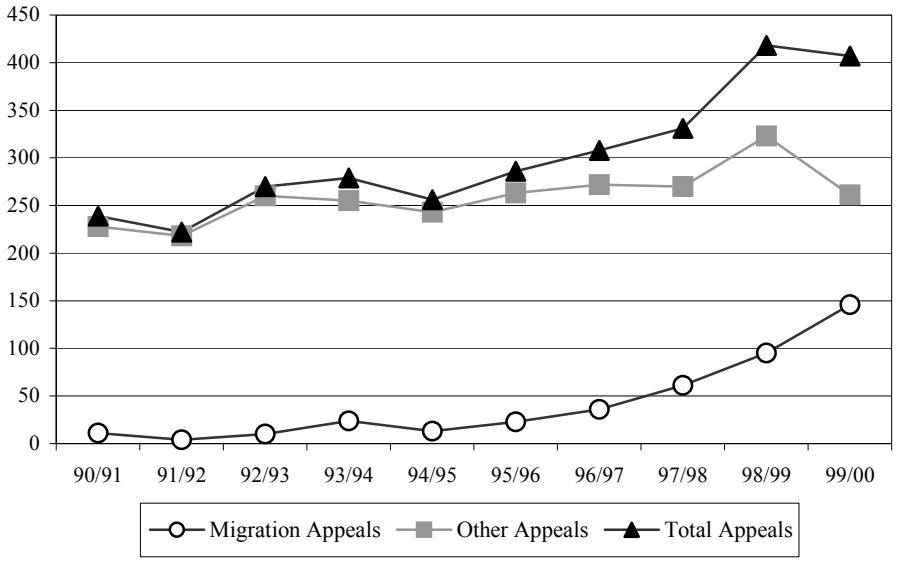
Federal Court of Australia

18.24 The Federal Court has a diverse appellate jurisdiction, which is described more fully in Chapters 16 and 20. Figure 18–4 shows the number of appeals filed in the Federal Court for the period 1990–91 to 1999–2000. The data indicates there has been a steady increase in the total number of appeals filed from 239 to 407 — an increase of approximately 70% over 10 years.

718 Ibid, 10 May 2001.

18.25 Figure 18–4 also shows that a very large proportion of the total increase in the number of appeals filed is accounted for by the rise in migration appeals. The Federal Court has noted that in addition to an increase in the number of migration matters at first instance (see Chapter 4), many migration cases proceed to appeal. In 1999–2000, these appeals made up 36% of the Court's appellate workload compared with only 8% in 1995–96.[719]

Figure 18–4 Appeals Filed in the Federal Court



Source: Data provided by the Registry of the Federal Court of Australia.

18.26 The Federal Court also noted in its last *Annual Report* that its appellate workload has increased due to the number and complexity of native title matters on appeal to a Full Court. The complexity of native title matters requires a long hearing at first instance, and on appeal such matters 'take up an extraordinary amount of the Court's judicial time'.[720]

18.27 Another source of pressure on the Federal Court's appellate caseload has been the increasing number of people appearing before a Full Court without legal representation. This often adds to the time taken to hear an appeal because unrepresented parties generally require more time and assistance during the hearing to present their case.[721]

719 Federal Court of Australia (2000), 13.
720 Ibid, 13.
721 Ibid, 13.

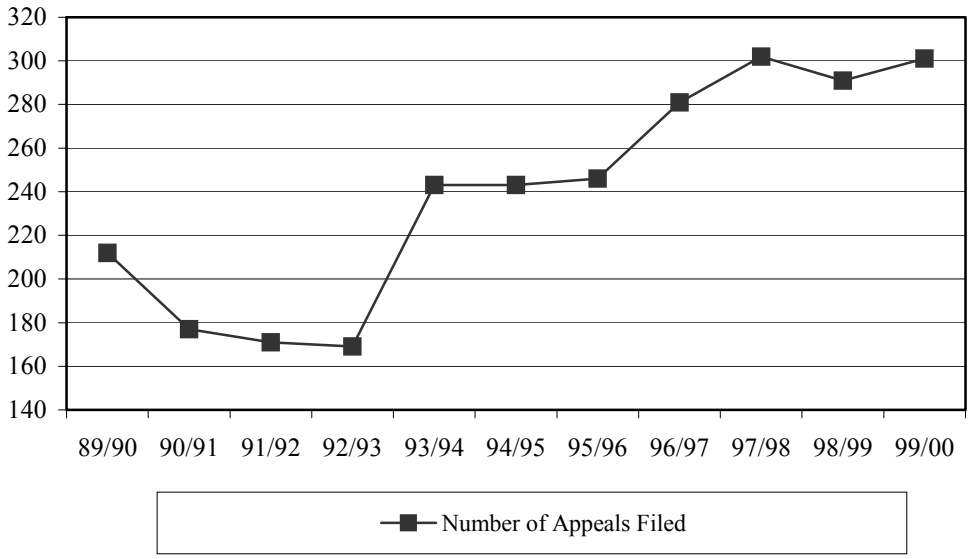
Family Court of Australia

18.28 The various channels of appeal to a Full Court of the Family Court are outlined in Chapters 16 and 21. Figure 18–5 shows the number of appeals filed in a Full Court of the Family Court from a decision of a single judge of that Court. The figures show a steady rise in the number of appeals since 1992–93.

18.29 The total number of appeals filed in the Family Court in 1999–2000 was 301, which was said to be the third highest annual total since the Court commenced operations in 1976.[722] In the eight years from 1992–93 to 1999–2000, the number of new appeals filed rose 78%.

18.30 The Family Court has also identified an increase in the number of appellants appearing in person. This has added pressure to the Court's ability to meet its goals for disposing of appeals because unrepresented parties require more time and judicial resources to present their appeals. In the reporting year 1999–2000, the proportion of unrepresented appellants in relation to the total number of appellants was 37%.[723]

Figure 18–5 Appeals to a Full Court of the Family Court from a Single Judge of the Court



Source: Data provided by the Registry of the Family Court of Australia.

722 Family Court of Australia (2000), 27. Data supplied to the Commission by the Registry of the Family Court suggested that the 1999–2000 figure was the second highest number of appeals filed. See Family Court of Australia, *Correspondence*, 11 April 2001.

723 Family Court of Australia (2000), 27.

Overview of Potential Solutions

18.31 Federal courts have recognised the impact of increasing appellate workloads on their ability to meet case processing times and on their resources generally. Each court has taken steps to alleviate these pressures, which are outlined below and considered in further detail in Chapters 19, 20 and 21.

High Court of Australia

18.32 The pressure for change in relation to the High Court's workload has come not from full appeals but from special leave applications. To manage the large increase in special leave applications, the Court has introduced a number of changes, including the following.

- The High Court has arranged for additional sittings days to be made available to hear special leave applications.[724] This involves the hearing of applications in the lay weeks between Canberra sittings. These are not formally part of the special leave days set down in the Court's annual calendar. This practice consists of a half day every fortnight, or up to 10 extra special leave days per year.

- The Court has introduced Rules of Court that impose time standards for the filing of applications for special leave to appeal and appeals (O 69A and O 70 HCR). These Orders give the Court greater control over case flow management by setting timeframes by which the various aspects of special leave applications and appeals must be prepared and filed.[725]

- In 1993, time limits on oral argument were introduced for applications for special leave to appeal.[726] The applicant and respondent are allowed 20 minutes each, and the applicant is given a further five minute right of reply.

- In 1993, limits were imposed on the length of certain documents filed with the Court in relation to special leave applications. The applicant's and respondent's summary of argument must not exceed 10 pages in length and replies must not exceed five pages.[727]

- In 1998, the High Court changed its practice of constituting a Full Court to hear special leave applications. Previously, applications were regularly heard by three justices. From January 1998 it has been usual for applications to be

724 High Court of Australia (2000), 7.
725 Ibid, 19.
726 O 69A r 11, substituted by SR No 324 of 1993, cl 2.
727 O 69A r 8, r 9(2).

heard by only two justices (which is all that is required to constitute a Full Court), unless there is disagreement as to the outcome of the application, in which case a third justice will sit.

18.33 During the course of this inquiry the Commission received many comments to the effect that the special leave process was a growing burden on the High Court and that reform was necessary to enable the Court to manage its caseload more effectively. There was, however, a wide difference of views as to what those changes should be.

18.34 In Chapter 19 the Commission identifies a number of reform options. These include introducing higher filing fees or fewer fee waivers to discourage special leave applications; introducing eligibility criteria such as a monetary amount or restricting the scope of discretionary criteria for granting special leave applications; allowing the court below to filter applications; increasing the number of High Court justices; reducing the number of High Court justices who hear each special leave application; and streamlining the process of deciding special leave applications by restricting the length of oral argument or allowing decisions on the papers.

18.35 In Chapter 19 the Commission assesses each option and recommends that the High Court be given an express power to determine special leave applications on the papers but with a discretion to list a matter for oral hearing in such circumstances as the Court thinks fit.

Federal Court of Australia

18.36 In its 1999–2000 *Annual Report*, the Federal Court noted that:

> The Court will continue to monitor the effects on its workload of an increase in the number of appeals and, as necessary or relevant, introduce changes to appellate practice and procedure to ameliorate or limit these effects, so that the Court continues to deal with its appellate and first instance work in an efficient, effective and timely manner.[728]

18.37 The Court's Management of Appeals Committee has implemented changes to practice and procedure in its appellate jurisdiction.[729] In February 2001 a new Practice Note was issued in relation to appeals to a Full Court, which applies to both represented and unrepresented parties. The Practice Note sets out the procedures to be followed in respect of Full Court appeals, including details about appeal books, notice to the Court of points of appeal abandoned, matters to be advised to the Court at call-over, and the obligation on each party to prepare an outline of its submissions, which fulfils certain requirements.

728 Federal Court of Australia (2000), 45–46.
729 <http://www.fedcourt.gov.au/pracproc/practice_notes02.html> (13 August 2001).

18.38 The Management of Appeals Committee has also proposed amendments to the *Federal Court of Australia Act 1976* to allow appellate benches of two judges to hear certain classes of appeals instead of the usual number of three judges.[730] The proposal is currently being considered by the Attorney-General's Department.

18.39 The Federal Court has advised the Commission in correspondence that the Management of Appeals Committee is also considering a number of other appellate issues.[731] These include developing a model set of statistics and other information regarding Full Court matters; reducing the size of appeal books; introducing short form appellate reasons; implementing electronic appeals; developing strategies to identify and ensure early management of complex appeals; managing migration appeals, including the possibility of transferring original jurisdiction in migration matters to the Federal Magistrates Service; revising time limits for appeals; and developing a strategy for identifying and avoiding inconsistent Full Court decisions (see Chapter 20).

18.40 In Chapter 20 the Commission considers a number of issues relating to the Court's capacity to manage its appellate workload, including the number of judges needed to determine certain classes of appeal and measures to improve decisional harmony within the Court's appellate jurisdiction.

Family Court of Australia

18.41 In DP 64, the Commission noted that the Family Court was considering reforms to its appellate procedures. The Family Court reported to the Commission that the Court's Future Directions Committee had commenced a review of the procedures and services related to the management of appeals.[732] That review is to address issues such as the provision of information to parties and practitioners; forms; interlocutory procedures; case management; listing arrangements; assistance to litigants in person; preparing and delivering judgments; and the appeal calendar.[733] A report on this work was expected by December 2000.

18.42 In April 2001 the Family Court advised the Commission that Justice Ellis had undertaken a study tour of the United Kingdom and the United States in order to investigate appellate procedures in those jurisdictions.[734] A paper dealing with the role and functions of the Full Court was being prepared. In June 2001 the Commission was advised that the Future Directions Committee had not reported yet on the subject of appeals.[735]

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730 See Chapter 20.
731 Federal Court of Australia, *Correspondence*, 24 April 2001.
732 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.17.
733 Family Court of Australia (2000), 47.
734 Family Court of Australia, *Correspondence*, 11 April 2001.
735 Family Court of Australia, *Consultation*, 26 June 2001.

18.43 The Family Court has established an ongoing self-represented litigants project to review the Court's practices and procedures to ensure that they meet the needs of those who are unrepresented.[736] One objective of that project is to ensure that appeals involving unrepresented parties are dealt with in a timely and effective manner in order that the Court can manage its appellate workload more efficiently.

18.44 In Chapter 21 the Commission considers whether certain appeals to the Family Court should be determined by a Full Court comprising two judges instead of three, and whether appeals to the Full Court should be by right or by leave.

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M McHugh, 'The Growth of Legislation and Litigation' (1995) 69 *Australian Law Journal* 37.

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736 Family Court of Australia *Self Represented Litigants Project* <http://www.familycourt.gov.au/litigants/> (12 July 2001).

19. Appellate Jurisdiction of the High Court

Contents

Channels of Appeal to the High Court

19.1 The High Court's appellate jurisdiction is derived from diverse sources, which are outlined in the following paragraphs. The Court's appellate jurisdiction must be exercised by a Full Court, which is constituted by any two or more justices of the Court sitting together (ss 19 and 20 JA).

19.2 First, the High Court has jurisdiction to hear and determine appeals from all judgments of any justice or justices exercising the original jurisdiction of the High Court, whether in court or chambers (s 34 JA). Appeals from a single justice to a Full Court are generally by right, although leave is required for an appeal from an interlocutory judgment.

19.3 Second, the High Court may hear and determine appeals from judgments of the Supreme Court of a State, whether in the exercise of federal jurisdiction or otherwise, subject to special leave being granted (s 35 JA). Section 35 also provides that the High Court may hear and determine appeals from judgments of any other state court in the exercise of federal jurisdiction, but subject to special leave.

19.4 Third, the High Court has appellate jurisdiction in relation to judgments of the Supreme Court of the Northern Territory, subject to the grant of special leave (s 35AA JA). There is no equivalent provision in relation to the Supreme Court of the ACT.

19.5 Fourth, the High Court has jurisdiction to determine appeals from the Federal Court (s 33 FCAA). Generally, appeals may only be brought to the High Court from a Full Court of the Federal Court, and such appeals are subject to the grant of special leave.

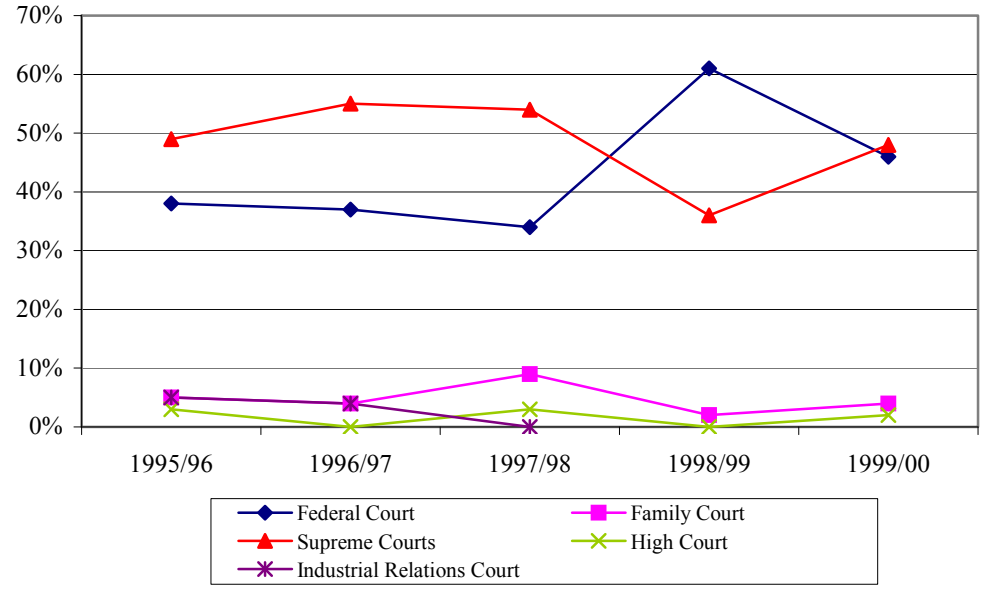
19.6 Fifth, an appeal may be brought from the Family Court to the High Court through either of two avenues — by way of a grant of special leave to appeal (s 95(a) FLA), or upon the issuing of a certificate by the Full Court of the Family Court stating 'that an important question of law or of public interest is involved' (s 95(b) FLA). The granting of a certificate appears to confer a right of appeal, which is not subject to the special leave requirements.

19.7 Sixth, the *Nauru (High Court) Appeals Act 1976* (Cth) provides for appeals from the Supreme Court of Nauru to the High Court pursuant to a treaty concluded between Australia and the Republic of Nauru on 6 September 1976.

19.8 Lastly, an appeal may arguably be brought to the High Court from the Federal Magistrates Court in very limited circumstances. Section 20(1) FMA provides that an appeal may *not* be brought directly to the High Court from a judgment of the Federal Magistrates Court. However, if this provision is inconsistent with s 73 of the Constitution then any such appeal may only be made by special leave of the High Court. The provision was thought necessary because of a concern that prohibiting an appeal directly from the Federal Magistrates Court to the High Court may not be an 'exception' or 'regulation' of the right granted by s 73 of the Constitution to bring an appeal to the High Court from 'any other federal court'. Any avenue of appeal would only operate following a judicial determination that s 20(1) was inconsistent with s 73 of the Constitution.

19.9 Figure 19–1 provides data on the sources of civil appeals filed in the High Court in the period 1995–96 to 1999–2000. Notwithstanding the range of sources of appeals, the two major components of the High Court's appellate jurisdiction are appeals from state Supreme Courts and appeals from the Federal Court. In 1999–2000, these two sources accounted for 94% of the High Court's appellate work. Historically, appeals from state Supreme Courts have been the more numerous of the two. However, in 1998–99 appeals from the Federal Court outstripped those from state Supreme Courts by 61% to 36%. It is possible that the continuing expansion of the Federal Court's original jurisdiction, as discussed in Chapter 4, will result in the Federal Court becoming the major source of High Court appellate work in the future.

Figure 19–1 Sources of Civil Appeals Filed in the High Court



Source: High Court of Australia *Annual Report*, various years.
Note: Figures for the Supreme Courts include the Supreme Court of the Northern Territory.

Appeals from the Supreme Court of Nauru to the High Court

Current law and practice

19.10 The Republic of Nauru was formerly a United Nations trust territory under the joint administration of Australia, New Zealand and the United Kingdom, until it achieved independence in 1968. In 1976 a treaty was concluded between Australia and Nauru to provide channels of appeal to the High Court of Australia in certain circumstances. As is apparent from the recitals to the treaty, the agreement sought to continue arrangements that had been in place prior to Nauru's independence. The *Nauru (High Court Appeals) Act 1976* (Cth) ('*Nauru Act*') gives effect to the treaty, which is appended in a Schedule to the Act. Section 5 of the *Nauru Act* provides that 'Appeals lie to the High Court of Australia from the Supreme Court of Nauru in cases where the Agreement provides that such appeals are to lie'.

19.11 Article 1 of the treaty provides as follows.

> Subject to Article 2 of this Agreement, appeals are to lie to the High Court of Australia from the Supreme Court of Nauru in the following cases:

A. In respect of the exercise by the Supreme Court of Nauru of its original jurisdiction —
In criminal cases — as of right, by a convicted person, against conviction or sentence.
In civil cases — as of right, against any final judgment, decree or order; and with the leave of the trial judge or the High Court of Australia, against any other judgment, decree or order.

B. In respect of the exercise by the Supreme Court of Nauru of its appellate jurisdiction —
In both criminal and civil cases, with the leave of the Court.

19.12 Article 2 provides that an appeal does not lie to the High Court from the Supreme Court of Nauru in stated circumstances, including the interpretation of the Constitution of Nauru and the qualification of members of the Parliament of Nauru. In civil cases, the treaty permits a first appeal to the High Court as of right from the Supreme Court of Nauru exercising original jurisdiction. It also permits a second appeal by leave of the High Court from the Supreme Court of Nauru exercising appellate jurisdiction.

19.13 There have been only two reported cases arising out of the jurisdiction conferred by the *Nauru Act*, both of which concerned criminal matters.[737] The High Court advised the Commission that three other criminal appeals were lodged in 1998 but were later discontinued.[738]

Issues and problems

19.14 The very small number of cases that have come to the High Court from Nauru demonstrate that this jurisdiction has had very little impact on the workload of the High Court. This itself raises a question about the utility of the jurisdiction. There are also several legal issues raised by the existence and terms of the treaty.

19.15 The terms of the treaty raise issues of interpretation and policy. Article 1B refers to obtaining the 'leave' of the High Court and not 'special leave', thus raising the question whether the criteria for special leave under s 35 JA would apply to appeals from Nauru. Another issue is why it is possible under Article 1A to appeal to the High Court as of right from the exercise of original jurisdiction by the Supreme Court of Nauru when the latter Court may itself have appellate jurisdiction. Further, it is open to the trial judge to grant leave to appeal to the High Court in relation to interlocutory civil judgments in the original jurisdiction of the Supreme Court of Nauru. This gives a trial judge powers that have no counterpart in domestic appeals.

737 *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627; *Amoe v Director of Public Prosecutions (Nauru)* (1991) 103 ALR 595.
738 High Court of Australia, *Correspondence*, 1 May 2001.

19.16 A further issue is whether the legislation may be unconstitutional on the ground that the High Court's appellate jurisdiction is derived exclusively from s 73 of the Constitution, perhaps in combination with s 122 (the territories power).

19.17 At the time of the passage of the Nauru (High Court Appeals) Bill, the Attorney-General advised the House in his second reading speech that the external affairs power (s 51(xxix)) was a sufficient source of constitutional power for the Bill. He also referred to the power of the Parliament to make laws with respect to the relationship between Australia and the islands of the Pacific (s 51(xxx)).[739]

19.18 The High Court has not directly considered the issue of the validity of the *Nauru Act*. In the two appeals arising under the legislation, the High Court did not refer to the issue of validity and thus might be said to have implicitly accepted the basis of the Court's jurisdiction.[740] There is also some express judicial authority for the Act's validity. In *Gould v Brown,*[741] Kirby J rejected the argument that a federal court may exercise only the jurisdiction set out in Chapter III of the Constitution. His Honour cited the *Nauru Act* as an example of additional jurisdiction being conferred on the High Court and exercised by it. Similarly, in his dissenting judgment in *Re Wakim; Ex parte McNally,*[742] Kirby J argued that the practice of the Parliament (for example in passing the *Nauru Act*) and the conduct of the High Court (for example in accepting jurisdiction under s 30B JA as a trial court for the ACT[743]):

> contradict any rigid view about the conferral upon federal courts (indeed upon this Court) of jurisdiction and functions standing outside those expressly stated within Ch III of the Constitution.[744]

19.19 However, observations of Brennan CJ, McHugh J and Toohey J in *Gould v Brown* cast doubts on the Act's validity. McHugh J did not refer specifically to the validity of the *Nauru Act* but nevertheless remarked that:

> Just as ss 75 and 76 were intended to be a complete statement of the heads of original jurisdiction, s 73 was intended to be an exhaustive statement of the appellate jurisdiction of the High Court. In the first case reported in the Commonwealth Law Reports, this Court said that the Parliament of the Commonwealth cannot create appellate jurisdiction for the High Court in addition to that provided by s 73 itself. Section 73 was also intended as an exhaustive statement of the appellate jurisdiction of federal courts in respect of State jurisdiction ... these limitations upon the Parliament of the Commonwealth to grant original and appellate jurisdiction to the High Court and the other

739 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 October 1976, 1647 (Mr Ellicott).
740 *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627; *Amoe v Director of Public Prosecutions (Nauru)* (1991) 103 ALR 595.
741 *Gould v Brown* (1998) 193 CLR 346, 493.
742 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
743 Inserted by the *Judiciary Act 1927* (Cth), s 4. See *R v Porter* (1933) 55 CLR 182.
744 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 608. See also *West Australian Psychiatric Nurses' Association (Union of Workers) v Australian Nursing Federation* (1991) 30 FCR 120, 131 (Lee J).

> federal courts powerfully support the negative implication that no other legislature in the federation, with or without the consent of the Parliament of the Commonwealth, can invest the High Court or the other federal courts with jurisdiction.[745]

19.20 In *Gould v Brown*, Brennan CJ and Toohey J also remarked that the High Court's appellate jurisdiction under s 73 could not be extended by Parliament except under the territories power.[746] These comments raise doubts about the constitutionality of the *Nauru Act*.

Submissions and consultations

19.21 There was no suggestion in submissions or consultations that appeals to the High Court from Nauru posed any practical difficulties for the Court. The comments that were received related to three issues: that the jurisdiction is inconsequential; that it poses a diplomatic rather than a legal problem; and that the legislation is potentially unconstitutional.

19.22 The Solicitor-General for Victoria, Douglas Graham QC, commented that the rarity of cases under the *Nauru Act* showed that the jurisdiction was inconsequential and that the treaty should therefore be terminated and the legislation repealed.[747] If it were thought necessary to provide an external channel of appeal for Nauru, arrangements could be made for appeals to go to the Privy Council because Nauru is a member of the Commonwealth of Nations.[748]

19.23 The Commonwealth Solicitor-General, David Bennett QC, considered that the potential repeal of the *Nauru Act* posed diplomatic issues rather than legal ones.[749] There was little comment on the constitutionality of the *Nauru Act*. In one consultation the Commission was told that the jurisdiction would now probably be considered unconstitutional by the High Court. However, the view taken was that the existence of the legislation was not of concern because the jurisdiction was not widely utilised.[750]

Commission's views

19.24 The Commission acknowledges that the *Nauru Act* has had a negligible impact on the appellate workload of the High Court. Nevertheless, the Commission considers that there are sufficient reasons to consider terminating the channel of appeal from the Supreme Court of Nauru to the High Court.

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745 *Gould v Brown* (1998) 193 CLR 346, 422–423 (McHugh J) citing *Hannah v Dalgarno* (1903) 1 CLR 1, 10; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529.
746 *Gould v Brown* (1998) 193 CLR 346, 380, 384.
747 D Graham QC, *Consultation*, Melbourne, 15 February 2001.
748 D Graham QC, *Correspondence*, 26 April 2001.
749 D Bennett QC, *Consultation*, Sydney, 20 February 2001.
750 G Griffith QC, *Consultation*, Melbourne, 16 February 2001.

19.25 First, the *Nauru Act* would appear to have no obvious utility. Although the treaty between Australia and Nauru was intended to continue a relationship that existed before Nauru attained independence, jurisdiction under the Act has been exercised only twice in the 25 years since the legislation was enacted.

19.26 Second, the Commission recognises the importance of Australia maintaining friendly relations with its Pacific neighbours, including Nauru. However, the Commission considers that there are more beneficial ways in which Australia might assist Nauru through the development of international legal relations. Under the present treaty, an Australian institution provides a supervisory role in respect of Nauru's domestic legal system. A more effective model would be to establish a facility by which Australian judges provide the benefit of their expertise and experience by sitting as additional judges of an appellate court of Nauru. Similar arrangements already exist in a number of other Pacific Islands, such as Tonga, Vanuatu and the Solomon Islands.[751] These arrangements avoid a situation in which the courts of one nation exercise powers of review over the decisions of the courts of another sovereign nation.

19.27 Third, the Commission is of the view that the High Court's decisions in *Gould v Brown*[752] and *Re Wakim; Ex parte McNally*[753] cast significant doubt on the constitutionality of the legislation. Although there has been no explicit consideration of the issue by the High Court, there are strong indications from some members of the Court that the *Nauru Act* impermissibly attempts to confer jurisdiction on the High Court outside Chapter III.

19.28 Given that this issue raises matters of foreign affairs and diplomatic relations, the Commission recommends that the Attorney-General consult with the Minister for Foreign Affairs and Trade about the feasibility of terminating the treaty between Australia and Nauru. Under Article 6 of the treaty, Australia can terminate the treaty on 90 days written notice. If termination is considered feasible, the *Nauru Act* should be repealed.

19.29 The Commission further recommends that the Attorney-General and the Minister for Foreign Affairs and Trade inquire of their counterparts in Nauru whether there are other ways in which Australian judicial officers might be used to mutual advantage to enhance the local legal institutions of Nauru. Other options for legal engagement with Nauru include the appointment of Australian judges as additional judges of the Supreme Court of Nauru.

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751 The former Chief Justice of Australia, Sir Anthony Mason, had judicial appointments in the Solomon Islands and Fiji. Two sitting Federal Court judges have judicial appointments in Pacific Islands — Beaumont J in Vanuatu and Tonga, and von Doussa J in Vanuatu.

752 *Gould v Brown* (1998) 193 CLR 346.

753 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

Recommendation 19–1. The Attorney-General should consult with the Minister for Foreign Affairs and Trade regarding the feasibility of terminating the treaty between Australia and Nauru, which provides for certain appeals to be brought to the High Court from the Supreme Court of Nauru. If termination is considered feasible, the *Nauru (High Court Appeals) Act 1976* should be repealed.

Recommendation 19–2. The Attorney-General and Minister for Foreign Affairs and Trade should inquire of their counterparts in Nauru whether there are other ways in which Australian judicial officers might be used to mutual advantage to enhance the local legal institutions of Nauru.

Appeals to the High Court by Family Court Certificate

Current law and practice

19.30 The Commission has previously noted that there is a near-universal requirement that appeals can be brought to the High Court only with the special leave of the Court. There is, however, an important exception to this requirement in relation to family law matters. Section 95 FLA provides as follows:

> Notwithstanding anything contained in any other Act, an appeal does not lie to the High Court from a decree of a court exercising jurisdiction under this Act, whether original or appellate, except:
>
> (a) by special leave of the High Court; or
>
> (b) upon a certificate of a Full Court of the Family Court that an important question of law or of public interest is involved.

19.31 Section 95(b) enables the usual special leave requirements of the High Court to be bypassed.[754] As such it constitutes 'a unique power so far as intermediate appellate courts are concerned in this country'.[755]

19.32 There is no clear explanation for the inclusion of s 95(b) in the *Family Law Act 1975* from the inception of that Act. Nicholson CJ has speculated that:

> it must be that because of the specialist nature of this court and the limited number of family law cases that were likely to come before the High Court, the legislature considered that the Full Court of this Court would in some circumstances, have a high

754 The current section is identical to its form as originally enacted, save for a minor amendment by the *Family Law Amendment Act 1976* (Cth), s 32.

755 *Laing v Director General, Department of Community Services (NSW)* (1999) 24 Fam LR 623, 627 (Nicholson CJ).

> degree of awareness of what were important questions of law or public interest in the family law area.[756]

19.33 When the *Family Law Act 1975* was originally enacted it contained many significant, and in some cases controversial, changes to family law (see Chapter 2). Section 95 provided a convenient mechanism for the Full Court to refer on appeal significant issues of law that arose in the context of a substantially new system of family law in which there was no established jurisprudence. Indeed, the Full Court of the Family Court has identified the lack of a clear majority view to guide 'profound' questions of family law as a significant factor in determining whether a certificate should be granted.[757]

19.34 The certification procedure in s 95(b) has been used parsimoniously, both by litigants and by the Family Court. Figure 19–2 shows the number of applications that have been made for certificates in comparison with the number of applications that have been made to the High Court for special leave to appeal from a decision of the Family Court. Figure 19–2 shows that over the nine-year sample period, only nine applications have been made to the Family Court for a certificate. Only one of these was successful. In the 25 years that the Family Court has been in operation, only four certificates have been granted under s 95(b).

19.35 These figures contrast markedly with the use made of the alternative channel of appeal to the High Court. Over the same nine-year period, 136 applications were made to the High Court for special leave to appeal from a decision of the Family Court, outnumbering applications for certificates by a ratio of 15:1. The success rate of special leave applications was also low, reflecting the accepted principles applicable to reviewing the exercise of a discretion.[758] The High Court's annual reports do not consistently report statistics showing the outcome of special leave applications according to the court appealed from. However, for the four years of the sample period for which published data are available, only four out of 47 special leave applications (8.5%) were successful.[759]

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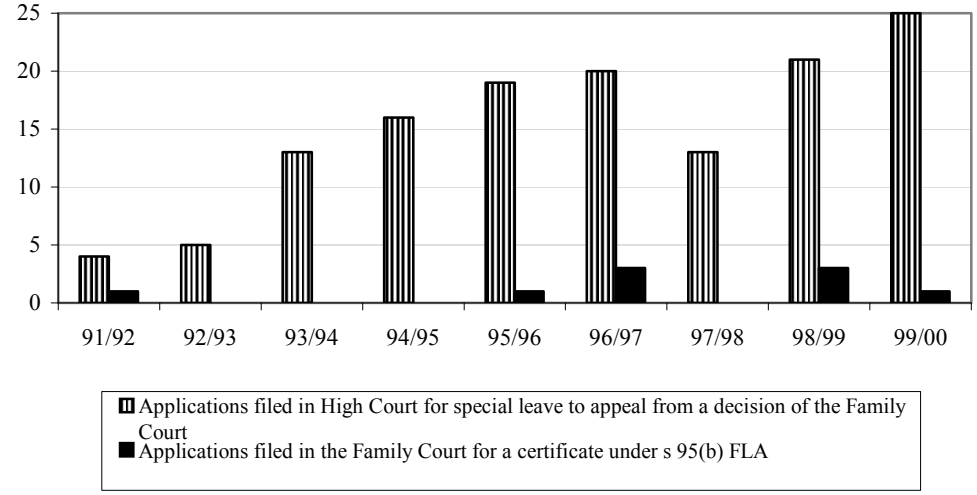
756 Ibid.
757 Ibid, 626 (Nicholson CJ).
758 *House v The King* (1936) 55 CLR 499, 504–505 (Dixon, Evatt and McTiernan JJ).
759 The High Court's annual reports do not publish the relevant data from 1994–95 to 1998–99.

Figure 19–2 Paths of Appeal to the High Court from the Family Court: Special Leave and s 95(b) Certificates



Source: High Court of Australia, *Annual Report*, various years.

19.36 Before 1999, the Family Court took a conservative approach to granting certificates under s 95(b). For example, in *Re Z (No 2)* the majority of the Full Court refused an application to grant a certificate under s 95(b) on the basis that:

> to grant a certificate is a serious step, which effectively usurps the High Court's discretion and detracts from its capacity to determine for itself, the matters which it considers significant for the function and development of the law as seen from the position of the highest court in the land.[760]

19.37 In 1999, the Full Court of the Family Court took a more expansive view of s 95(b). In *Laing v Director General, Department of Community Services (NSW)* ('*Laing*') Nicholson CJ (Moore and May JJ concurring) said that the approach in *Re Z (No 2)* was 'too restrictive'.[761] Section 95(b) 'must be given its ordinary meaning', so that the question to be determined in an application under s 95(b) is simply 'whether the outcome of the case leaves to be determined any important questions of law or public interest'.[762] Kay J also expressed approval of a more liberal interpretation, although he determined that the instant case did not raise an important question of law or public interest to warrant the grant of a certificate.[763]

760 *Re Z (No 2)* (1996) 20 Fam LR 743, 748 (Nicholson CJ and Frederico J). Fogarty J in dissent argued (at 750) that such a conservative focus on the existence of special leave and the seriousness of pre-empting the High Court left little purpose in the continued existence of s 95(b). See also *Re Evelyn (No 3)* (1998) 23 Fam LR 667.

761 *Laing v Director General, Department of Community Services (NSW)* (1999) 24 Fam LR 623, 627.

762 Ibid, 628 (Nicholson CJ).

763 Ibid, 633.

Finn J dissented and did not draw a firm conclusion as to whether s 95(b) had been too narrowly construed in the past.[764] An unusual feature of *Laing* was that the High Court had previously considered and refused an application for special leave to appeal.

Issues and problems

19.38 In DP 64 the Commission asked whether s 95(b) should be repealed. This issue requires a balance to be found between the desirability of the High Court determining its appellate caseload and the value of an intermediate appellate court being able to seek the High Court's expeditious ruling on a key legal question.

19.39 The main arguments in favour of retaining s 95(b) are as follows.

- The mechanism grants the Full Court of the Family Court a discretion that, when properly exercised, enables the High Court to make timely, authoritative decisions on significant questions of family law.[765]

- The mechanism has been used sparingly and does not impinge unduly on the High Court's management of its appellate caseload.[766]

- The mechanism enables the High Court to consider important family law issues that it might not otherwise consider because special leave is granted only infrequently in family law matters. However, this argument perhaps assumes that the High Court is otherwise unable to identify those cases that would be appropriate for its consideration.

19.40 In DP 64 the Commission expressed its preliminary view that s 95(b) was unnecessary and should be repealed. The principal reasons for this were as follows.

- The mechanism is inconsistent with the principle that the High Court, as Australia's court of last resort, should have substantial control over its appellate workload.

- The infrequency with which the mechanism has been invoked by litigants and the even lower frequency with which it has been invoked successfully, suggests that the mechanism is largely unnecessary.

- The High Court's special leave process provides an effective mechanism for reviewing Family Court decisions. In determining special leave applications the High Court considers similar issues to those considered by the Full Court of the Family Court under s 95(b), such as the public importance of the case.

764 Ibid, 630.
765 *Re Z (No 2)* (1996) 20 Fam LR 743, 750 (Fogarty J).
766 *DJL v Central Authority* (2000) 201 CLR 226, 261 (Kirby J).

- The disparity between the powers of the Family Court, which has a certification procedure, and other federal courts, which do not, cannot readily be justified.

- There are doubts about the constitutionality of the provision, which have not yet been resolved. In *DJL v Central Authority,*[767] the High Court considered the appeal in respect of which the Full Court of the Family Court had granted a certificate in *Laing*. A majority of the High Court observed that the Family Court's decision to grant a certificate was implemented by a formal order of the Family Court, which itself attracted the operation of s 73 of the Constitution. This raised the question whether the requirement of a certificate under s 95(b) was a permissible 'regulation' of the right of appeal protected by s 73.[768] That question was not decided in that case and remains open for the future.

19.41 Another problem that has arisen is the lack of legislative guidance about the form and content of a certificate. In *DJL v Central Authority,* Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ said that it was unsatisfactory in the case before them for the certificate to do no more than repeat the statutory criteria, namely 'an important question of law or of public interest'.[769] They indicated that the certificate should specify the terms of the important question and state whether that question is one of law or of public interest or both.

Submissions and consultations

19.42 There was strong support in consultations and submissions for the repeal of s 95(b).[770] The most common reasons given for this view were that the provision is anomalous and that the High Court should be allowed to control its own workload.

19.43 During consultations the Family Court expressed the view that s 95(b) should be repealed, although it was felt that the section provided some assistance to the Court. The Family Court recognised that the High Court should be able to organise its own appellate workload, but that if the section were retained it should provide more guidance as to what information the certificate should contain.[771]

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767 Ibid.
768 Ibid, 238. Compare 257–259 (Kirby J), 283 (Callinan J).
769 Ibid, 246–247.
770 Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001; Attorney-General's Department (Cth), *Consultation*, Canberra, 22 February 2001.
771 Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.

19.44 In its submission to the Commission, the Family Court remarked that 'there was a near unanimous view that s 95(b) of the *Family Law Act* should be repealed'.[772] The case for repeal was explained by one Family Court judge in the following terms:

> It seems anomalous to me that the Family Court of Australia should be the only court to have the power to determine in part the High Court's caseload. There is ample scope in my view for the Court in the course of writing a judgment to indicate that the issue which the Court is grappling with might well be something that the Court could benefit having the matter determined by the High Court. And doubtless the High Court could take the matter into consideration in the course of determining whether or not special leave should be granted. I do not see any need for a particular exception to remain in respect of the Family Court, and indeed the history of the number of successful certificates granted in the past 25 years would indicate that the section serves little utilitarian purpose.[773]

19.45 Acknowledging the difference of opinion within the Court on this issue, the Family Court also commented that 'there was some support for the view that both federal appellate courts [ie the Family Court and the Federal Court] be given the power to issue some form of certificate that the appeal involved an important point of law or public interest'.[774]

19.46 The view that s 95(b) should be repealed was shared by judges of other courts and by several government lawyers. In consultations, the Chief Justice of Australia commented that s 95(b) should be repealed, as did the Supreme Court of Western Australia.[775] The Solicitors-General for Victoria and Western Australia thought the provision was anomalous and should be repealed.[776]

19.47 Dr Peter Nygh submitted that s 95(b) should be abolished because 'it is for the High Court to determine whether a matter is of sufficient public importance to grant leave to appeal'.[777] Similarly, Andrew Tokley of the South Australian Bar stated that the section should be repealed because judges of the High Court 'are in the best position to know whether the matter involves an important question of law or public interest'.[778]

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772 Family Court of Australia, *Submission J041*, 1 May 2001.
773 Ibid.
774 Ibid.
775 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; Supreme Court of Western Australia, *Consultation*, Perth, 22 March 2001.
776 D Graham QC, *Consultation*, Melbourne, 15 February 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001.
777 P Nygh, *Consultation*, Sydney, 12 February 2001.
778 A Tokley, *Submission J023*, 16 March 2001.

19.48 A similar comment was made by the Family Law Council in its submission to the inquiry. The Family Law Council was of the view that the provision is anomalous and cannot be justified on the ground of public interest. The Council went on to state that:

> there is nothing distinctive today about family law that justifies this unique approach. In family law as in other areas, submissions can be made at the special leave application about the public importance of the issues. An intermediate court should not be able to control what cases the High Court takes.[779]

Commission's views

19.49 The Commission considers that there are compelling reasons for repealing s 95(b). These reasons relate both to matters of principle and practice.

19.50 The Commission considers it of paramount importance that the High Court be able to regulate its own workload and priorities. As the Family Court has recognised in judicial decisions, s 95(b) 'effectively usurps the High Court's discretion and detracts from its capacity to determine for itself the matters which it considers significant for the function and development of the law'.[780] The High Court stands at the apex of the Australian judicial system and has a vital supervisory role over the entire corpus of Australian law. The High Court alone is able to assess its workload and priorities for the purpose of ensuring that its limited resources are directed to determining the most important legal questions.

19.51 Moreover, the Commission considers that the High Court's special leave procedure provides an effective mechanism for reviewing appellate decisions of the Family Court. This assessment appears to mirror that of litigants themselves. The figures quoted above demonstrate that over the past nine years 15 applicants have chosen the special leave procedure for every one that has chosen the certificate procedure.

19.52 The Commission also notes that the factors to which the High Court must have regard in determining special leave applications pursuant to s 35A JA are similar to those to which a Full Court of the Family Court must have regard under s 95(b). These include the public importance of the case. Cases such as *Laing* demonstrate that different courts may come to different views as to the merits of allowing an appeal to be brought to the High Court. However, the Commission does not believe that there are sound reasons for preferring the assessment of the Family Court to that of the High Court.

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779 Family Law Council, *Submission J040*, 23 April 2001.
780 *Re Z (No 2)* (1996) 20 Fam LR 743, 748.

19.53 Nor does the Commission regard the disparity between the powers of the Family Court and the Federal Court to be justifiable. Section 95(b) may have been based on sound policy when enacted in 1975. It enabled a new federal court to identify important questions of law for the High Court's consideration in the new field of family law. After 25 years of operation, family law jurisdiction is no longer so distinctive as to justify the unique power of certification. For these reasons, the Commission considers that the disparity between the Family Court and the Federal Court should be removed by repealing the certification power of the Family Court, rather than conferring such a power on the Federal Court.

19.54 Finally, the Commission notes that the repeal of s 95(b) was almost universally supported in submissions and consultations, including by the two courts most closely affected, namely, the High Court and the Family Court.

Recommendation 19–3. Section 95(b) of the *Family Law Act*, which empowers a Full Court of the Family Court to grant a certificate allowing an appeal to be taken to the High Court without special leave, should be repealed.

Appeals From a Single Justice to a Full Court of the High Court

19.55 Leaving aside appeals on interlocutory matters, Australian law generally permits one appeal as of right and one further appeal by leave of the court. In the Federal Court and the Family Court the usual process is that an appeal from a judgment of a single judge is first taken to a Full Court comprising three judges. A second appeal may then be taken from a decision of a Full Court, if special leave is granted, to the High Court comprised of five or seven justices. In special circumstances the appellate chain may be either shorter or longer than this customary three-step process.

19.56 The position of the High Court is unique because of its role as the final court of appeal for Australia. The High Court's appellate jurisdiction may be invoked in two ways. The most common situation is one in which the High Court provides a second appeal from a decision of an intermediate appellate court. In such a case an appeal can only be brought with special leave of the High Court, subject to the exception discussed above relating to Family Court certificates.

19.57 Less common is the situation in which the High Court provides the first and only appeal from a decision of a single judge. This may arise where an appeal is taken from a decision of a single judge of the High Court exercising original jurisdiction. As indicated in Figure 19–1, such appeals are extremely uncommon,

accounting for between 0–3% of the High Court's appellate workload in civil matters from 1995–96 to 1999–2000.

19.58 Appeals from a single justice of the High Court to a Full Court of the High Court are regulated by s 73(i) of the Constitution and s 34 JA. The constitutional provision guarantees that the High Court has jurisdiction to hear and determine appeals from all judgments 'of any Justice or Justices exercising the original jurisdiction of the High Court', subject to exceptions or regulations prescribed by Parliament. The terms of s 73(i) are replicated in s 34(1).

19.59 Section 34(2) sets out an exception to the constitutional right of appeal. It provides that an appeal shall not be brought without the leave of the High Court from an interlocutory judgment of a justice or justices exercising the original jurisdiction of the Court whether in court or in chambers. Most matters that currently come before a single justice of the High Court are interlocutory matters, such as an order nisi for a prerogative writ. Appeals in these matters can be taken to a Full Court only with the leave of the Court.

19.60 The result of these provisions is that the appellate arrangements within the High Court are similar to those within the Federal Court and the Family Court. The first appeal is available as of right, except for interlocutory matters, which require leave. In the case of the High Court, however, the first appeal is the only available appeal because of the Court's position at the apex of the judicial system.

19.61 In DP 64 the Commission asked whether s 34 remained appropriate or whether reform of the section was desirable. The principal issue is whether appeals from decisions of a single justice of the High Court exercising original jurisdiction to the Full Court should continue to lie as of right. If leave to appeal is required in particular types of appeals, such as interlocutory or procedural matters, then additional issues might arise. These issues include whether legislation should identify criteria for granting leave; whether a decision to grant or refuse leave should be immune from appeal and so on. Many of these issues are discussed in relation to the Federal Court and the Family Court in Chapters 20 and 21, respectively.

Consultations and submissions

19.62 No submission or consultation suggested that the right of appeal from single justices of the High Court should be amended to require the leave of the Court in all cases. The general view was that access to a first appeal should generally be by right, save in defined classes of appeal, such as those relating to matters of procedure.

19.63 Concern was expressed about the lack of clarity as to what constituted an interlocutory matter for the purposes of s 34(2), and about the scope of leave to appeal in relation to procedural matters. The Commission was informed that several unrepresented litigants were bringing actions under s 34, alleging incorrectly that they had a right of appeal from what were, in law, interlocutory decisions of a single justice.[781] The Commission was told that it would be beneficial if the legislation identified with greater particularity the types of procedural appeal for which the Court's leave was required.

Commission's views

19.64 The Commission recommends that there continue to be a right of appeal from single justices of the High Court to a Full Court under s 34 JA in most cases. The Commission acknowledges the broad support for a policy of access to a first appeal by right, including appeals from decisions of single justices of the High Court (see Chapter 20). This view appears to accord with community perceptions about the need for access to justice.

19.65 No concern was expressed in submissions or consultations that appeals from single justices of the High Court were a significant factor in the Court's appellate workload. As shown in Figure 19–1, the number of such appeals is insignificant.

19.66 However, the Commission considers that there should be clearer delineation of which procedural decisions require leave to appeal. Currently, there is considerable argument about which decisions are interlocutory for the purpose of s 34(2). The Commission considers that these disputes could be avoided by appropriate amendment to the legislation. The Commission endorses the approach of specifying the procedural matters that should be subject to leave. The Federal Court has made such a proposal in relation to its own jurisdiction (see Chapter 20). A similar approach could be adopted in relation to the High Court.

19.67 In Chapters 20 and 21 the Commission considers a range of issues in relation to leave to appeal in the Federal Court and the Family Court. These issues include identifying criteria for exercising the discretion; to whom an application for leave should be made; whether leave determinations should be immune from appeal; and whether there should be a power to rescind leave after it has been granted.

19.68 These issues do not assume the same importance in the High Court as in other federal courts. The High Court has a more restricted original jurisdiction, the volume of procedural appeals is likely to be small, the Court comprises a small

781 C Doogan, *Consultation*, Canberra, 28 March 2001.

cohort of seven members exercising original and appellate jurisdiction in closely related circumstances, and its judges are appointed to the highest judicial office in the land. The Commission accordingly makes no recommendation in relation to many of the issues identified in the preceding paragraph.

19.69 However, the Commission considers that the *Judiciary Act* should provide that an order granting or refusing leave to appeal should itself be immune from appeal, to the extent that it is constitutionally permissible to do so. The Commission recognises that a decision of the High Court to grant or refuse leave to appeal may itself be regarded as a judgment 'of any Justice or Justices exercising the original jurisdiction of the High Court'. An appeal to a Full Court from such a decision may thus be protected by s 73 of the Constitution. The ability of Parliament to prohibit an appeal from a leave determination is thus a constitutional question that hinges on Parliament's power to prescribe exceptions and regulations under s 73. The Commission considers that a law prohibiting further appeals is likely to satisfy the constitutional requirement. In the Commission's view the reform is desirable as a matter of policy in order to bring finality to legal proceedings, particularly in the highest court.

Recommendation 19–4. An appeal to the High Court from a judgment of one or more justices exercising original jurisdiction should generally lie as of right and not by leave of the Court, at least in present circumstances. However, s 34 of the *Judiciary Act* should be amended to expand the categories of cases in which such an appeal requires the leave of the Court to include, in addition to appeals from an interlocutory judgment, other specified categories of procedural appeals.

Recommendation 19–5. In those cases in which leave is required to bring an appeal to the High Court from a judgment of a justice or justices of that Court exercising original jurisdiction, an order granting or refusing leave to appeal should itself be immune from appeal, to the extent that the Constitution permits.

Managing the High Court's Appellate Workload

19.70 In Chapter 18 the Commission presented a brief statistical overview of the appellate workload of the High Court. As that overview indicated, there are two principal elements to managing the High Court's appellate workload. The first is managing the special leave process; the second is managing the hearing and determination of full appeals. These two aspects are closely interrelated because special leave acts as the filter for the Court's appellate work. If the special leave process is well-managed, the management of full appeals will be made substantially easier.

19.71 The special leave process filters the High Court's full appeals in two ways. It filters for quality by ensuring that the Court determines only the most significant legal questions on appeal, in accordance with the statutory criteria in s 35A JA. It also filters for quantity by ensuring that the number of full appeals that require the Court's determination are manageable in the light of the Court's scarce judicial resources and the demands placed on the Court's time by its original jurisdiction (see Chapter 3). Filtering for quality and quantity are also interrelated: the greater the reduction required in the number of potential appeals, the greater the care that must be taken in selecting the most appropriate cases for hearing and determination.

19.72 The data presented in Chapter 18 demonstrate that the special leave procedure appears to be filtering the quantity of appeals quite successfully. The number of full civil appeals heard and determined by the High Court has remained at a stable level of about 40–50 each year for over two decades. Moreover, few concerns have been voiced about the effectiveness of the qualitative aspects of screening through the special leave process. As the discussion later in this Chapter shows, most observers believe that the criteria for granting special leave are well-adapted to the ends it is intended to serve.

19.73 However, the number of special leave applications filed in the High Court has increased dramatically since 1984. In Chapter 18 the Commission observed that the rising number of special leave applications presents problems for both the High Court and litigants. For the Court, determining special leave applications takes up a growing proportion of the justices' time. For litigants, there are growing delays in having a special leave application listed for hearing.

19.74 Against this background, the consultations conducted and the submissions received by the Commission demonstrated a near unanimous concern with the burden imposed by the High Court's workload. There was widespread acceptance of the need for timely reform for the purpose of ensuring that the High Court is able to function effectively in fulfilling its constitutional purpose as the 'keystone of the federal arch'.[782] However, the commonality of views regarding the need for reform was matched by wide divergence of opinion as to what those reforms should be.

19.75 During the course of the inquiry, the Commission identified a range of options for reforming the appellate process and in particular the process for determining applications for special leave to appeal to the High Court. The following options are considered in subsequent sections of this chapter:

782 Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10967 (Alfred Deakin).

- discouraging special leave applications by higher filing fees or fewer fee exemptions;
- introducing conditions of eligibility for appeals to the Court, such as monetary amounts;
- permitting High Court appeals to be filtered by the court below;
- increasing the number of justices on the High Court;
- restricting the statutory criteria for granting special leave to appeal;
- streamlining the special leave process by reducing or eliminating oral argument; and
- reducing the number of justices who hear each special leave application.

19.76 The difficulties faced by the High Court in screening potential appeals are not unique to Australia. The highest court faces similar problems in most developed countries. For example, the approach of the High Court in culling around 400 civil special leave applications to around 40 appeals each year may be compared with the approach of the United States Supreme Court in culling around 7 000 certiorari petitions (which are functionally equivalent to the High Court's special leave procedure) to about 100 each year.[783] In DP 64 the Commission considered the practices of other comparable courts, such the United States Supreme Court, the Canadian Supreme Court and the British House of Lords.[784] That discussion is not repeated in this report but provides background material that informs the present discussion.

Filing Fees and Fee Exemptions

19.77 During the inquiry the Commission considered whether frivolous, vexatious or other unmeritorious applications for special leave might be deterred by increasing the cost of accessing the highest court. This might be done by increasing the filing fees for certain categories of applicants or reducing the availability of fee exemptions for those categories of person who are currently entitled to them.

783 W Rehnquist (2001), 224.
784 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.125–4.126, 4.182–4.192; 4.204–4.205.

19.78 The filing fee for individuals in relation to civil special leave applications is currently $1 052.[785] Corporations pay double that fee.[786] However, there are a number of exemptions from payment, such as for individuals receiving legal aid or holding specified cards issued by the Department of Social Security or the Department of Veterans' Affairs.[787] The Registrar also has a discretion, having regard to the financial circumstances of a person, to waive a fee if, in his or her opinion, it would cause financial hardship to the person.[788]

19.79 One view expressed to the Commission was that higher fees or fewer fee exemptions might be introduced on the basis that users of the Court should be required to make a greater contribution to the real cost of an appeal than is now the case. However, it was recognised that such a change was likely to be politically unpopular.[789] Litigants in the High Court were said to be consuming scarce judicial resources.[790] It was pointed out that parties who pursue an appeal to the High Court have usually had their dispute determined by a judge at first instance and have had at least one appeal by right. Some people thus thought it appropriate that access to the highest court be carefully controlled, including through the use of filing fees. This was thought to be especially important when one considers that frivolous or vexatious applications result in other parties incurring significant cost and inconvenience.

19.80 An opposing view was that any increase in fees or reduction of exemptions would further impair access to the court of final resort by those who may already be disadvantaged. Such a change would be detrimental to the parties' perception that they had been treated fairly and may also detract from the public perception of the fairness of the judicial system. It could be argued that the availability of costs orders gives the Court sufficient powers to deter applications that lack merit.

19.81 On the basis of the information available to it, the Commission does not presently support reforms that would increase the level of filing fees or reduce the availability of fee exemptions for special leave applications. Such changes would detrimentally affect litigants' access to the High Court, particularly for those who are economically disadvantaged. The Commission considers that increasing filing fees is an indiscriminate mechanism for regulating the number of unmeritorious applications for special leave. There is no reason to suppose that the financial

785 *High Court of Australia (Fees) Regulations 1991* (Cth), Sch 1, Reg 5A and 5B. This amount will operate until 30 June 2002, when there will be a biennial increase that takes into account any movement in the Consumer Price Index (CPI).
786 Ibid, Reg 4(1A).
787 Ibid, Reg 4(4).
788 Ibid, Reg 4(4)(c).
789 C Doogan, *Consultation*, Canberra, 28 March 2001; Federal Court of Australia, *Consultation*, Sydney, 31 January 2001; W Soden, *Consultation*, Sydney, 13 March 2001.
790 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001.

capacity of applicants or potential applicants correlates with the merits of the application or the importance of the legal question at issue. The Commission found little support for such measures in submissions and consultations and considers that public support for such a change is also likely to be lacking.

Introducing Conditions of Eligibility

19.82 Another option for reform is to introduce conditions of eligibility for appeals, such as a minimum monetary amount. This option was canvassed during consultations and submissions.[791] The Commission also notes that in 1984 Ian Callinan QC (as he then was) proposed that rights of appeal to the High Court be restored, subject to financial and other criteria, to enable the Court to hear more appeals instead of hearing special leave applications.[792]

19.83 Under such an option, a matter that concerned an amount of less than, say, $100,000 would be ineligible for appeal to the High Court, or ineligible unless special circumstances justified its consideration. Similarly, appeals in which a matter had progressed from a magistrates court to a single judge of a federal court and then to a Full Court of that Court might also be excluded from appeal unless special circumstances could be shown.

19.84 Such a change would restore a situation similar to that which existed before 1984 when special leave to appeal became virtually the only means of bringing an appeal to the High Court. Under the previous law, appeals could be brought to the High Court as of right where the amount in question was more than a specified sum. In 1955 this sum was increased from £300 to £1,500,[793] and in 1976 it was increased further to $20,000, with some accompanying changes to the conditions of eligibility.[794]

19.85 The Commission does not support the idea of introducing conditions of eligibility to regulate the number of appeals and hence the number of special leave applications. If the criteria were highly restrictive, such a change could substantially reduce access to the High Court upon grounds that are arbitrary and indiscriminate. Not all civil appeals can or should be reduced to monetary amounts. The sum involved in an appeal may not accurately reflect its public importance or legal significance. Similar reasoning applies to other possible conditions of eligibility such as the number of appeals already pursued.

791 B Walker SC, *Consultation*, Sydney, 5 March 2001.
792 I Callinan (1994), 81, 111–112.
793 *Judiciary Act 1955* (Cth), s 2.
794 *Judiciary Amendment Act 1976* (Cth), s 6.

Allowing Lower Courts to Filter Appeals

19.86 Another option for managing the High Court's appellate workload is to allow the appeals to the High Court to be filtered by intermediate courts of appeal rather than by the High Court itself. This proposal might be based on an adaptation of the complex procedures used in relation to the House of Lords.

19.87 An appeal to the House of Lords can only be made with the leave of the court whose decision is being appealed or with the leave of the House of Lords.[795] If leave to appeal is granted by the court below, the matter goes directly for consideration by an Appeal Committee of the House of Lords. If leave to appeal is refused by the court below, a party may apply to the House of Lords for leave to appeal. The petition is referred to an Appeal Committee of the House of Lords to decide whether or not leave to appeal should be allowed. The Appeal Committee considers the matter on the papers and may at that stage either refuse leave or provisionally allow the petition.

19.88 Where provisional leave is given unanimously, the respondents named in the petition are invited to lodge any objections to the leave being granted. The Committee then takes into account these objections (if any) and decides whether leave should be granted or refused. If there are no objections, leave to appeal is granted. Where the Committee's decision is not unanimous, the petition is sent for hearing to a public meeting of the Committee. If leave to appeal is granted following this hearing, then the appeal is sent for hearing to the House of Lords as if leave had been granted by the court below.

19.89 The Commission does not consider that a process by which intermediate appellate courts filter appeals to the High Court is desirable. The High Court is in a unique position to assess the demands of its own workload and the relative importance of legal questions that arise in appeals from an array of courts within the Australian judicial system. The proposed mechanism would have the advantage of alleviating the pressure on the High Court in determining the large number of special leave applications. However, that benefit would come at the cost of the High Court losing control over the qualitative screening of appeals.

19.90 If such a system were introduced on the basis that the High Court must reconsider leave applications that are refused by the lower court, there would be additional cost and delay involved in the procedures. All applications in which leave was refused by an intermediate appellate court would have to be redetermined by the High Court, thereby adding an additional step in the appellate process. Bearing in mind that a very large proportion of special leave applications

795 *Appellate Jurisdiction Act 1876* (UK); *Administration of Justice (Appeals) Act 1934* (UK); *Judicature (Northern Ireland) Act 1978* (UK); *Administration of Justice Act 1969* (UK).

are refused (around 70–80% — see Chapter 18), the additional burden would be borne by the parties and the Court in a large number of cases.

19.91 Another problem with such a procedure is that lower courts may be either too liberal in granting leave, and thus overburden the High Court, or too reluctant to grant leave for fear of overburdening the Court, and thus deny the final court the opportunity to develop the law in appropriate cases.

Increasing the Number of High Court Justices

19.92 In extra-curial writings, Sir Anthony Mason has suggested that one option for addressing the High Court's workload in deciding special leave applications is to increase the number of justices of the Court from seven to nine.[796] He commented that such a move would provide a larger pool of judges to share the special leave applications. However, Sir Anthony also expressed doubt about whether this course would significantly reduce the workload of individual justices, unless the Court adopted the practice of publishing a single majority and a single minority judgment, a practice that has not commended itself to the Court thus far.

19.93 The option of increasing the number of justices of the High Court was raised in several consultations. Of those who considered that there should be an increase, the general view was that a bench of nine justices would be appropriate.[797] It was noted that there has been no increase in the number of justices since 1912. The Court commenced operation in 1903 with a Chief Justice and two justices. The number of justices was increased to five in 1907 and to seven in 1912.

19.94 One view expressed was that the impact of migration review cases (see Chapter 3) and special leave applications (see Chapter 18) meant that the High Court was labouring under a growing workload but with insufficient judicial resources to perform the work.[798] It was said that the growth of the Australian population, the level and complexity of legal disputes, and the escalating workload of the High Court merited serious consideration being given to increasing the number of justices by two.

19.95 The Commission considers that there is no present need to increase the number of High Court justices but that this option should be kept under review for possible future action, in consultation with the Court. The Commission has come to this view for the following reasons.

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796 A Mason (2000), 122.

797 Faculty of Law University of Adelaide, *Consultation*, Adelaide, 16 March 2001; South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001; Law Society of Western Australia, *Consultation*, Perth, 23 March 2001; Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001.

798 Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001.

19.96 First, the pressure to increase the number of justices may be ameliorated by other reforms that may substantially affect the High Court's workload. In Chapter 3 the Commission noted that the Attorney-General's Department and the Department of Immigration and Multicultural Affairs are considering proposals to reduce the burden on the High Court of immigration and refugee cases commenced in the Court's original jurisdiction under s 75(v) of the Constitution. In this Chapter the Commission recommends changes to the way in which special leave applications are determined, which will also have beneficial effects on the Court's workload.

19.97 Second, an increase in the number of justices will not automatically reduce the Full Court's workload: much depends on the sitting patterns of the Court, as determined by the Chief Justice. For example, in all constitutional cases and in other cases of great public importance the High Court sits *en banc*. There is no saving of judicial resources if all nine, rather than all seven, justices hear and determine such cases. Moreover, if the Court were expanded to nine justices it might be thought necessary to sit seven justices in routine appeals, rather than the current number of five justices. Were this not so, there may be too small a judicial representation of the Court in any given appeal. For example, if a bench of five is constituted from a Court of nine, a decision that is arrived at by a bare majority (ie 3:2) could only claim to have the assent of one third of the justices of the Court. The Commission acknowledges, however, that there may be significant advantages for the Court in determining special leave applications if the current practice were to continue of sitting two justices on most applications.

19.98 Third, an increase in the number of justices might also increase divergence of opinion among members of the Court and reduce the number of concurring judgments.[799] This would have negative repercussions on the ability of individuals and their legal advisers to ascertain the law with certainty. This potential problem might be remedied by adopting the practice of publishing a single majority and a single minority judgment. However, as Sir Anthony Mason has remarked, this would require a significant change in the Court's current practice.[800]

19.99 Finally, the Commission notes that there are practical difficulties associated with an increase in the number of justices, including additional salaries, ancillary personnel, libraries, chambers, travel costs and so on. The Commission does not regard these difficulties as insurmountable if such an increase were warranted for other reasons. Nevertheless, they are matters to be weighed in considering the merits of an increase in the size of the Court in comparison with other possible reforms.

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799 South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001.
800 A Mason (2000), 122.

Criteria for Special Leave to Appeal

19.100 Section 35A JA was enacted in 1984 and confers a broad discretion on the High Court to determine whether or not to grant special leave to appeal. The statutory discretion is structured by the requirement that in considering an application for special leave to appeal the Court 'may have regard to any matters it considers relevant but shall have regard to' the following factors:

> (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
>
> (i) that is of public importance whether because of its general application or otherwise; or
>
> (ii) in respect of which a decision of the High Court, as a final appellate court, is required to resolve differences of opinion between different courts, or within one court, as to the state of the law; and
>
> (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

Applying the criteria

19.101 The High Court has considered the scope of this discretion over the course of 17 years and has developed substantial jurisprudence on the area. The hallmark of most successful applications for special leave is that they raise a question of law of public importance. Generally, they are cases that raise the question of how a principle of law should be formulated rather than how that principle should be applied.[801]

19.102 Conflicting decisions in different courts may justify a grant of special leave. However, such a conflict may not justify a grant of special leave if the High Court considers the decision under challenge to be correct or not attended with sufficient doubt to warrant reconsideration. Courts may need to take steps within their own jurisdictions to resolve such conflicts, for example, by convening a court of five judges.[802]

19.103 A judgment of an intermediate appellate court may also warrant consideration in the interests of the administration of justice. This ground is not confined to cases that raise questions concerning the maintenance of procedural regularity but can apply to an error that affects the administration of justice generally or in a particular case.[803] Although the High Court is primarily concerned

801 A Mason (1996), 11. Contrast *Louth v Diprose* (1992) 175 CLR 621.
802 A Mason (1996), 15.
803 Ibid.

with the function of legal development, the interests of the administration of justice are specifically referred to as a relevant factor in s 35A(b). This is particularly important in criminal cases, where an applicant's liberty is at stake.

Grounds for refusal

19.104 The High Court generally focuses not upon the reasons for granting special leave but on the reasons for refusing it.[804] This follows from the wide discretion afforded to the High Court by s 35A and from the High Court's general practice of not stating reasons for granting special leave, but only for refusing it.

19.105 The reasons for declining special leave to appeal are varied but include the following:

- the judgment appealed from is correct or not sufficiently doubtful;
- the appeal is unlikely to succeed;
- the case has little or no relevance beyond the parties to the dispute;
- the case is not a suitable vehicle for the resolution of the legal issue;
- the appeal does not involve a question of law of sufficient public importance;
- an appeal is not in the interests of justice;
- the appeal is against an interlocutory order;
- the appeal challenges a previous decision of the High Court and there is insufficient reason to reconsider that decision; and
- the appeal turns on a question of fact.[805]

Issues and problems

19.106 In DP 64 the Commission asked whether there ought to be any change to the criteria for granting special leave to appeal for the purpose of regulating either the quantity or quality of special leave applications.[806] The Commission identified a number of possible changes, including the following.

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804 D O'Brien (1996), 55.
805 Ibid, 70–119.
806 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.175–4.177, 4.181.

- The criteria might place more emphasis on matters raising significant questions of private law.

- The criteria might expressly refer to workload considerations, given the Court's frank acknowledgment that this is a factor in its deliberations.

- The criteria might enable the High Court to consider a certificate granted by an intermediate appellate court stating that in its opinion the particular matter warrants a grant of special leave. The proposal for a certificate system was made in 1987 by an advisory committee to the Constitutional Commission as an alternative to a proposal that legislation enable intermediate appellate courts to grant leave to appeal to the High Court.[807]

Submissions and consultations

19.107 There was broad agreement that the criteria in s 35A were effective and appropriate. There was also a widely held view that changes to the section might increase the level of litigation and costs without providing additional guidance to the legal profession or litigants.[808] It was thought that the current criteria already extended to private disputes that raised issues of public importance. An example would be a major commercial case that had significant ramifications for the Australian economy.[809]

19.108 The Commonwealth Solicitor-General, David Bennett QC, supported explicit reference being made to the Court's workload. In his view, an appropriate means of doing so was for s 35A to identify the likely length of the appeal hearing as a criterion. This was said to be highly relevant because cases requiring long oral argument restricted the capacity of the Court to hear other appeals.[810]

19.109 The Family Court supported the introduction of a certificate process for intermediate appellate courts on the basis that it would allow such courts to inform the High Court of legal issues of public importance, particularly in a specialist jurisdiction such as family law.[811] A number of others did not support this proposal on the grounds that the High Court could already take into account the views expressed in the judgments of intermediate appellate courts, that certificates might encourage litigants to have unrealistic expectations about their prospects of gaining

807 Advisory Committee to the Constitutional Commission (1987), para 4.10.
808 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001; B Walker SC, *Consultation*, Sydney, 5 March 2001; G Griffith QC, *Consultation*, Melbourne, 16 February 2001.
809 Law Institute of Victoria, *Consultation*, Melbourne, 15 February 2001.
810 D Bennett QC, *Consultation*, Sydney, 20 February 2001.
811 Family Court of Australia, *Submission J041*, 1 May 2001.

leave, and that the failure of the High Court to grant leave where the lower court had suggested it might be embarrassing to the lower court.[812]

Commission's views

19.110 The Commission considers that the special leave criteria should remain as they are. The vast majority of consultations and submissions supported this view. In the Commission's view, it is important that the High Court have sufficient flexibility to take into account changed circumstances in its workload, in legal development, and in perceptions of what issues are of sufficient public importance to justify special leave. The Commission also notes that an examination of comparable overseas jurisdictions does not reveal any significantly different criteria in the screening of appeals to the highest court.

19.111 The Commission does not support the inclusion of explicit reference to the High Court's workload in the special leave criteria. It is true that this is a significant factor and that the Court has acknowledged it to be so. However, such a change is unlikely to assist the parties or their representatives in putting their case. Nor would it provide them with any better indication of whether a particular case is likely to attract special leave. It could result in fruitless efforts on the part of litigants or their representatives to convince the Court about its workload pressures at a given time, when the Court alone is in an effective position to make that assessment.

19.112 The Commission does not support the introduction of a certification process for intermediate appellate courts. The process has superficial appeal as a means of giving lower courts greater input in identifying questions of law suitable for the High Court's consideration. However, it would require an additional procedure, with attendant costs, because the certificate could only be issued by the intermediate appellate court at the conclusion of the case. Certificates might also raise litigants' expectations that special leave will be granted and in many cases this expectation would not be satisfied. The granting of a certificate would not determine the High Court's decision. Moreover, if the High Court disagreed with the assessment of the intermediate appellate court there is the potential for avoidable friction or embarrassment.

812 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; Faculty of Law University of Adelaide, *Consultation*, Adelaide, 16 March 2001.

Oral Argument and Special Leave to Appeal

Current position

19.113 Section 21 JA states that applications for special leave to appeal may be heard and determined by a single justice or by a Full Court of the High Court. It also states that the Rules of Court 'may provide for enabling such applications to be dealt with, subject to conditions prescribed by the Rules, without an oral hearing'. The procedures for determining special leave applications, including matters pertaining to oral argument, are thus found in the *High Court Rules*, principally O 69A HCR.

19.114 The *High Court Rules* are designed to identify the special leave issues in advance of the hearing.[813] Order 69A provides that an application for special leave shall be instituted by filing an application form within 28 days after the judgment below was pronounced. The application is to set out the parts of the judgment appealed from, the grounds of appeal and the orders sought if the appeal is successful.

19.115 The applicant must next file and serve a summary of argument and a draft notice of appeal on any party who filed a notice of appearance. They are the principal documents from which the court forms an impression of the case. The respondent is given the opportunity to file an argument in reply. Applicants' and respondents' summaries of argument are not to exceed 10 pages in length and replies are not to exceed five pages.

19.116 When the special leave application is listed for hearing, the party or a legal representative of the party may present oral argument. Oral arguments are limited in time. The applicant and respondent are each allowed 20 minutes, and the applicant is given a further five minute right of reply.[814] There is provision for the Court to extend this time as it thinks fit. In practice, the Court may also dispense with argument from a party, although for reasons of natural justice the Court only does so if it finds in favour of that party.

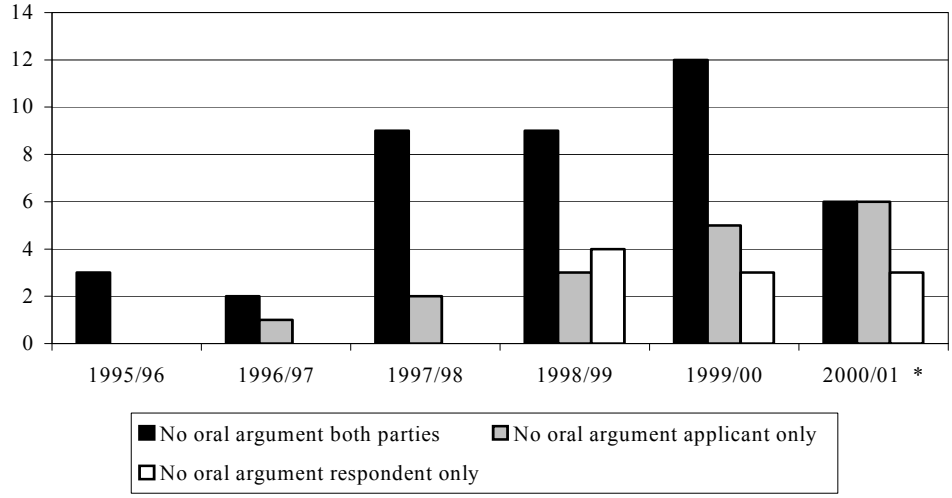
19.117 A party may elect not to present an oral argument, in which case the Court considers that party's case on the basis of the written summary of argument. Figure 19–3 shows that in the past six years there have been relatively few cases in which one or both parties elected to dispense with oral argument. For example, in 1999–2000 there were 20 such cases — 12 in which both parties dispensed with oral argument, five in which the applicant alone dispensed with oral argument, and three in which the respondent alone dispensed with oral argument. In the same year

813 D Jackson (1997), 193.

814 Sir Harry Gibbs has pointed out that it is essential for counsel to bring out clearly and quickly the points of importance in the case: H Gibbs (1986), 5.

the High Court heard 411 civil and criminal applications for special leave.[815] Thus, oral argument was dispensed with by at least one party in less than 5% of applications, and was dispensed with by both parties in less than 3% of applications. These statistics indicate that the parties' discretion to dispense with oral argument makes very little impact on the demands placed on the Court in determining special leave applications.

Figure 19–3 Election to Dispense with Oral Argument in Special Leave Applications in the High Court



Source: Data provided by the Registry of the High Court of Australia.
Notes: * Data for 2000–01 is to 30 April 2001 only.

Options for reform

19.118 In DP 64 the Commission suggested that one option to reduce the time taken to deal with special leave applications would be for the Court to dispense with oral argument altogether or to have the discretion to allow oral argument if the circumstances warranted it.

19.119 The United States Supreme Court and the Supreme Court of Canada have no automatic right to oral argument in their equivalent procedures. In the United States Supreme Court, once documents have been filed for petition for a writ of certiorari, the Supreme Court considers the papers and makes an appropriate order.[816] There is no opportunity for oral argument. Indeed, the justices often

815 High Court of Australia (2000), 66, Table 8.
816 <www.supremecourtus.gov> (14 August 2001).

consider little more than the brief 'pool memo', which summarises the facts and contentions.[817]

19.120 The Supreme Court of Canada has a discretion as to whether to order an oral hearing to determine an application for leave to appeal. Section 43(1) of the *Supreme Court Act RSC 1985* (Can) provides that applications for leave to appeal are made to the Court in writing. After considering the documents filed, the Court either:

- grants the application if it is clear from the written material that it does not warrant an oral hearing and that any question involved is one that ought to be decided by the Supreme Court; or

- dismisses the application if it is clear from the written material that it does not warrant an oral hearing and there is no question involved that warrants decision by the Supreme Court; or

- orders an oral hearing to determine the application in any other case.

19.121 During the inquiry, the Commission circulated two reform proposals to those who had been involved in consultations and submissions. Option A would allow the High Court power to determine special leave applications solely on the basis of written papers, irrespective of the parties' consent. Under this proposal the Court would also be given a discretion to list an application for oral argument in such circumstances as the Court thinks fit.

19.122 Option B would provide a two-stage process for determining applications for special leave to appeal. In the first stage, the High Court would determine applications solely on the basis of written papers without oral argument. Where special leave is granted on the papers, the matter would be listed for a full appeal hearing. In the second stage, which would apply only to those cases in which special leave is refused in the first stage, the applicant may apply to the Court to renew the application for determination after oral argument. Incentives should be built into the legislation to discourage an applicant who has been unsuccessful in the first stage of the process from proceeding to the second stage, for example through appropriate fees and costs structures.

19.123 The Law Council of Australia put forward its own options for reform, which were designed to reduce the amount of time the Court spent hearing special leave applications, while preserving an underlying right to oral argument. The first and preferred option of the Law Council was to retain the current regime for oral hearings at the choice of the parties but to reduce hearing times by:

817 W Rehnquist (2001), 232–234.

- the Court directing the applicant to address the principal factor that the Court considers, from a review of the papers, to be an obstacle to the grant of special leave;

- reducing the time allocated to the applicant and the respondent from 20 minutes to 15 minutes; and

- abolishing a right of reply except when invited to reply by the Court.

19.124 The Law Council's second option resembled the Commission's Option B. The Law Council proposed that each special leave application be initially reviewed on the papers by a panel of three justices. The panel would review the applicant's filed material and assign each case (in a non-appellable decision) to one of three categories.

- In the first category, three justices would certify a grant of special leave without an oral hearing.

- In the second category, at least two justices would consider that the case is clearly not suitable for the grant of special leave. The applicant could then request an oral hearing or withdraw the application. Incentives would be built in so that, if the application were withdrawn, no order for costs would be made and filing fees paid in respect of the application would be refunded.

- The third category would cover those applications which do not fall into categories one or two and an oral hearing would be held for these applications.

Submissions and consultations

19.125 There was a mixed response to the issue of reducing the current right to oral argument. A common view, especially among the Bar, was that oral argument was a well-established and accepted right of parties.[818] The presentation of oral argument was seen as an integral part of an applicant's access to justice and an important part of Australia's legal tradition.[819] There was also a concern that litigants, especially unrepresented litigants, should be able to see the High Court

818 D Jackson QC, *Consultation*, Sydney, 5 March 2001; B Walker SC, *Consultation*, Sydney, 5 March 2001; D Bennett QC, *Consultation*, Sydney, 20 February 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001.

819 D Bennett QC, *Consultation*, Sydney, 20 February 2001; Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001.

operating in a public forum and have the opportunity to address arguments to the Court in person.[820]

19.126 Oral argument was seen as a 'powerful tool',[821] which could assist the parties and the Court to identify relevant 'special leave points' and clarify issues or differences of view. It could expose weaknesses and problems in arguments.[822] In this regard there was often great value to be gained from the interaction of counsel and the bench.[823] The importance of oral argument was stated by the Commonwealth Solicitor-General, David Bennett QC, in the following terms:

> In my view one of the greatest virtues of the Australian legal system as opposed to those of Europe and, to an increasing extent, that of the United States, is the heavy reliance in Australia upon oral advocacy. I have no doubt that the high standard of Australian jurisprudence and the respect in which it is held in the rest of the world is largely due to this feature. …
>
> I would be very concerned at any 'reform' which might have the effect of reducing the High Court's heavy reliance on oral advocacy. I know that there has been in recent years increased reliance on written submissions. This is harmless and, indeed, useful so long as written submissions are regarded as a supplement to the real advocacy rather than as the primary tool of persuasion.[824]

19.127 A reliance on the papers would mean that additional time and costs would be spent on written materials. Some parties, particularly litigants in person, would be disadvantaged by the absence of an oral hearing because they lacked the skills necessary to present effective written submissions.

19.128 The opposing view was that oral argument is unnecessary in most cases. The Court can, and does, make up its mind about the vast majority of cases on the basis of written documents.[825] Oral argument in many cases is a waste of the Court's time.[826] The workload pressures on the Court make a requirement of oral argument no longer feasible.[827] If both sides are represented by counsel then normally all relevant issues are canvassed in the written papers.[828] Where there are points that need clarification, the Court should have a discretion to list the matter

820 B Walker SC, *Consultation*, Sydney, 5 March 2001; South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001; Law Society of Western Australia, *Consultation*, Perth, 23 March 2001.
821 R Gotterson QC, *Consultation*, Brisbane, 9 March 2001.
822 B Walker SC, *Consultation*, Sydney, 5 March 2001.
823 D Graham QC, *Consultation*, Melbourne, 15 February 2001; D Bennett QC, *Consultation*, Sydney, 20 February 2001; B Walker SC, *Consultation*, Sydney, 5 March 2001.
824 D Bennett QC, *Submission J026*, 16 March 2001.
825 Law Institute of Victoria, *Consultation*, Melbourne, 15 February 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001.
826 Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001.
827 A Asche, *Consultation*, Darwin, 1 March 2001.
828 M Moshinsky, *Submission J013*, 5 March 2001.

for oral argument.[829] The Court is in an effective position to determine which cases require oral argument as it has the opportunity to consider the written material.

19.129 As noted above, the Commission and the Law Council of Australia each floated alternative models that provided for tiered review of applications with incentives for parties to withdraw applications that had little or no merit. There were mixed responses to these options. Some favoured them on the basis that they maintained an underlying right to oral argument.[830] Others considered that they would make the process more confusing, costly and time consuming without delivering any benefit for the Court in terms of reducing its workload.[831]

Commission's views

19.130 The Commission considers that there is a need for an effective response to the increasing burden on the High Court arising from the escalation in the number of special leave applications. There is a genuine concern that the Court will not be able to deal appropriately with its other original and appellate work if present trends continue.

19.131 The Commission recommends that the *Judiciary Act* be amended to give the High Court power to determine special leave applications solely on the basis of written papers without oral argument, irrespective of the parties' consent. However, the Court should also be given a discretion to list a special leave application for oral argument in such circumstances as the Court thinks fit. This would give the Court a broad discretion to consider the full range of circumstances in which oral argument is necessary or desirable.

19.132 In coming to this view, the Commission acknowledges the view that oral argument is an important component of the Australian legal tradition. Not only does its availability affect public perceptions about access to justice, but it serves the practical function of assisting the Court in identifying and clarifying legal issues. Moreover, some parties, particularly litigants in person, may not be able to put their arguments satisfactorily in writing. For these reason the Commission rejects the approach adopted in the United States Supreme Court of requiring all applications to be determined on the basis of the papers without oral argument.

19.133 On the other hand, the Commission does not consider it desirable to require that all applications for special leave be determined only after oral argument. The present practice of hearing oral argument in all applications (bar the 3% in which both parties dispense with it) does not strike an adequate balance

829 D O'Brien, *Consultation*, Canberra, 22 February 2001; M Moshinsky, *Submission J013*, 5 March 2001.
830 Law Council of Australia, *Correspondence*, 14 May 2001; W Harris, *Correspondence*, 19 April 2001; D Graham QC, *Correspondence*, 26 April 2001.
831 G Griffith QC, *Correspondence*, 18 April 2001; H Burmester, *Correspondence*, 22 April 2001.

between the interests of the parties and the public interest in the administration of justice. In this regard, the Commission notes that any avoidable burden on the High Court in screening appeals has implications for the speed and quality of justice delivered by the Court in discharging its other constitutional responsibilities.

19.134 Australian circumstances require a more flexible approach. In the Commission's view, an appropriate approach is one in which the High Court has a wide discretion. This discretion should empower the Court to determine applications for special leave on the papers or to list them for oral argument, depending on which course the Court considers more appropriate in all the circumstances of the case. This approach is similar to that adopted in the Supreme Court of Canada, as discussed above.

19.135 The Commission regards the High Court as being in the best position to determine whether oral argument is necessary or desirable in any particular case. If the Court has doubts about the merits of an application or considers that an issue requires clarification, it can list the matter for an oral hearing. If the Court does not list the matter for oral argument, the conclusion must be drawn that the Court regards the merits of the application as clearly discernible from the papers. Oral argument in such cases would serve little purpose, other than a symbolic one.

19.136 The Commission considers it doubtful whether the opportunity for a short oral presentation in circumstances in which the Court has formed a strong initial impression about the merits of the case takes perceptions of a fair determination much further. In considering the issue of access to justice and perceptions of fairness it should be borne in mind that most special leave applications constitute at least the third judicial consideration of the case, following decisions by a court at first instance and an intermediate appellate court. Moreover, the perception of some litigants that they are entitled to be heard orally should not override the public interest in the High Court having the capacity to deal fairly and expeditiously with all matters that come before it.

19.137 The Commission considers that the proposed reforms would enhance the importance, and hopefully the quality, of written submissions put to the Court. The implications of this for legal costs are difficult to determine. There would be reductions in fees for appearances by counsel, and associated travel and accommodation expenses. However, this must be balanced against the potentially greater cost of preparing more thorough written submissions.

19.138 The Commission has carefully considered other options for reforming the High Court's special leave procedures, including the Law Council's second preference and the Commission's Option B. The principal difficulty with both options is that in the large majority of cases (ie those in which an application is or is likely to be unsuccessful), the Court would be required to consider each

application twice — once on the papers and then again in an oral hearing. This is especially wasteful of resources if the Court is differently constituted on each occasion. This difficulty is substantially avoided under the Commission's present recommendations because only the doubtful cases need go through both stages.

19.139 The Commission noted above that the only legislative reference to the High Court's procedure for determining special leave applications is that in s 21 JA. This section is permissive in nature and enables the Court to make Rules allowing applications to be determined without an oral hearing. The Commission considers that its recommendations in relation to special leave might be implemented without amendment to primary legislation. However, given the importance of the proposed changes to the Court's practice and procedure, the Commission recommends that the new procedure be expressly sanctioned by legislation.

19.140 The Commission also recommends that the High Court review its Rules of Court with respect to special leave procedures to assess whether they are appropriate in light of the proposed reforms. It may be, for example, that the length of written submissions should be extended, or that further guidance should be given as to their form and content.

19.141 In DP 64 the Commission asked whether it was desirable for the High Court to provide short written reasons when refusing an application for special leave to appeal.[832] During consultations some people remarked that this would add to the transparency of the process and assist litigants in understanding the reasons for the Court's decision.[833] This was said to be particularly important if the Court moved away from oral argument towards determining special leave applications on the basis of the papers.

19.142 The Commission considers it inappropriate to impose a legislative obligation on the Court to provide short written reasons; a view shared in many consultations.[834] There is a strong argument that any legislative attempt to require the Court to provide a particular form or style of reasons would infringe the doctrine of the separation of powers under Chapter III of the Constitution. Moreover, such a requirement would impose a significant additional burden on the Court and detract from, if not negate, the benefits of the proposed new procedure. If written reasons were to be more than formulaic and were to respond to the demands for individualised justice, the obligation would impose an unacceptable burden on the Court. If they were merely formulaic, they would be unlikely to assist the parties in understanding the reasons for the Court's decision.

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832 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.206–4.209.

833 M Sexton SC, *Submission J009*, 23 February 2001.

834 The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; B Walker SC, *Consultation*, Sydney, 5 March 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001.

Recommendation 19–6. The *Judiciary Act* should be amended to confer on the High Court an express power to determine applications for special leave to appeal on the basis of written papers without oral argument, irrespective of the parties' consent. However, the Court should be given a discretion to list an application for oral hearing in such circumstances as the Court thinks fit.

Recommendation 19–7. The High Court should review its Rules of Court for the purpose of determining whether they are appropriate for the special leave procedure proposed in Recommendation 19–6. In particular, the Court should review the procedures relating to the length and timing of written submissions and the length of oral argument.

Number of Justices to Determine Special Leave Applications

Current law and practice

19.143 Section 21 JA provides that applications for special leave to appeal may be heard and determined by a single justice or by a Full Court. Under s 19, a Full Court is constituted by two or more justices sitting together. Current practice is for the High Court to be constituted by two justices when hearing most applications for special leave to appeal in civil and criminal cases. A third justice may be brought in if there is disagreement between the two justices initially selected to determine the special leave application. In the past, the usual practice was for special leave applications to be heard by three justices in civil cases, five justices in criminal cases, and seven justices in cases of particular importance.[835] It should be noted that s 21 permits one justice to hear and determine a special leave application. However, according to information available to the Commission, this has rarely been done, if ever.[836]

19.144 The High Court's practice may be compared with that of other jurisdictions. In the Supreme Court of Canada, applications for leave to appeal are considered by three judges.[837] There is an exception by which five judges constitute a quorum in the case of an application for leave to appeal from a judgment of a court quashing a conviction for an offence punishable by death, or dismissing an appeal against an acquittal of an offence punishable by death. In the United States Supreme Court, applications for certiorari are considered by the entire Court of nine justices. According to accepted practice, a case may be set

835 H Gibbs (1986), 9.
836 D Graham QC, *Correspondence*, 26 April 2001.
837 *Supreme Court Act RSC 1985* (Can) (C S-26), s 43.

down for a full oral hearing if at least four justices of the Supreme Court identify the matter on the papers as being of sufficient importance.[838]

Issues and problems

19.145 The key issues identified in DP 64 were how many justices should determine special leave applications in civil matters and whether the number should vary depending on the nature or subject matter of the case.

19.146 One option raised was to reduce the number of justices hearing each application, possibly to a single justice in civil matters. Such a change would be likely to reduce the workload of the Court in determining special leave applications and would not require legislative amendment. However, if such a course were adopted it would seem desirable to amend s 34 to qualify the right of appeal that currently lies from a judgment of a single justice of the High Court exercising original jurisdiction to a Full Court. Were this not done, it would be possible to challenge every decision to grant or refuse special leave, and thereby negate the benefits accruing from a streamlined procedure.

Consultations and submissions

19.147 The Commission found no support for reducing from two to one the number of justices determining each special leave application. Such a change was seen as detracting from the perception that parties be given a fair and fresh consideration of their case. The view of one experienced counsel was that with the advent of video conferencing it should never be necessary for a special leave application to be heard and determined by a single justice.[839] Many thought that two justices was a sufficient number, given the Court's heavy workload.[840] Others thought that three justices was a suitable minimum.[841] It was generally agreed that the Court should have a discretion to increase the number of justices determining a special leave application where it considered it appropriate to do so.

19.148 A further issue identified during consultations was the confusion among some practitioners about the Court's practice of assigning justices to determine special leave applications. Consultations revealed that some practitioners had different views on whether two or three justices initially considered the applications on the papers, what happened after that initial consideration, and how it was determined whether two or more justices should hear oral argument. Two particular concerns were (a) whether, in applications decided by two justices, a

838 W Rehnquist (2001), 233–238.
839 D Graham QC, *Correspondence*, 26 April 2001.
840 The Hon Chief Justice AM Gleeson, *Consultation*, Sydney, 20 February 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001.
841 P Dowdy, *Submission J006*, 7 February 2001.

third justice considered the application on the papers but did not hear oral argument, and (b) whether, in applications decided by three justices, the third justice had an opportunity to consider the application on the papers before oral argument.

Commission's views

19.149 The Commission considers that s 21 should be amended to provide that an application for special leave to appeal must be determined by a Full Court comprising no less than two justices, whether that determination be made on the basis of written papers alone or after oral argument. Such a change would accord with the current practice of the High Court.

19.150 In the Commission's view, the use of a single justice to make an important decision about access to the final court of appeal is undesirable in terms of perceptions of justice, both for litigants and the general public. The use of two or more justices to determine each application brings with it a system of checks and balances, which improves the accountability of the Court's decision making. It assists in achieving greater consistency of approach, allows justices to scrutinise each other's opinions, and reduces the chance of idiosyncratic decisions in which the identity of the judge becomes an important consideration.

19.151 The Commission considers that the Chief Justice should also have discretion to list a special leave application for determination by more than two justices in appropriate circumstances. This reflects the fact that particular cases may have features requiring special treatment. For example, it may be appropriate in an urgent case to hear the application for special leave and the full appeal together. This flexibility can be accommodated within a legislative framework that identifies only the minimum number of justices.

19.152 Finally, the Commission notes the confusion among some practitioners about the High Court's practice of assigning justices to consider and determine special leave applications. The Commission does not regard this matter as warranting a formal recommendation. However, the Commission considers that it would be desirable for the High Court to publish material outlining the Court's procedures in special leave applications. This would improve the transparency of the system and increase the understanding of the parties, their advisers and the public of the High Court's functions and procedures.

Recommendation 19–8. Section 21 of the *Judiciary Act* should be amended to provide that an application for special leave to appeal must be determined by a Full Court comprising two or more justices, whether that determination is made on the basis of written papers alone or after oral argument.

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20. Appellate Jurisdiction of the Federal Court

Contents

Channels of Appeal to the Federal Court

20.1 Parliament has considerable latitude in regulating the appellate jurisdiction of the Federal Court, subject to constitutional requirements such as the requirement that the appellate jurisdiction concern a 'matter' and that the subject matter of any appeal fall within the terms of ss 75 or 76 of the Constitution.

20.2 The Federal Court has a diverse jurisdiction to hear and determine appeals under the *Federal Court of Australia Act 1976*. Statistics regarding the number of appeals to the Federal Court are discussed in Chapter 18. The Federal Court's appellate jurisdiction derives from the following sources.

- Appeals from judgments of the Federal Court constituted by a single judge (s 24(1)(a)). However, there is no appeal to a Full Court of the Federal Court from a judgment of a single judge of the Federal Court who exercises appellate jurisdiction in relation to an appeal from the Federal Magistrates Service (s 24(1AAA)).

- Appeals from judgments of the Supreme Court of the ACT or the Supreme Court of Norfolk Island (s 24(1)(b)). Prior to 1977, when the Federal Court commenced operation, appeals from the Supreme Courts of these Territories went directly to the High Court. Since 1977, the Federal Court has been the intermediate appellate court for these Territories. However, s 24(6) specifically exempts appeals from the Supreme Court of the Northern Territory from the Federal Court's appellate jurisdiction because first appeals in the Northern Territory go to the Northern Territory Court of Appeal.[842] Appeals from territory courts are discussed further in Chapter 39.

842 *Supreme Court Act 1979* (NT), s 51.

- Appeals from a judgment of a state court (other than a Full Court of a state Supreme Court) exercising federal jurisdiction in such cases as are provided for by any Act (s 24(1)(c)). Examples include intellectual property matters and extradition, both of which are discussed below.

- Appeals from judgments of the Federal Magistrates Service exercising original jurisdiction under any Commonwealth law, other than specified Acts relating to matters of family law (s 24(1)(d)). Where an appeal is brought to the Federal Court from a judgment of the Federal Magistrates Service, the Federal Court's appellate jurisdiction is exercised by a Full Court unless the Chief Justice considers that it is appropriate for the appellate jurisdiction to be exercised by a single judge (s 25(1A)).

Cross-Jurisdictional Appeals to the Federal Court

Current law and practice

20.3 As mentioned above, s 24(1)(c) provides that the Federal Court may hear and determine appeals from state courts exercising federal jurisdiction in such cases as are provided for by any other Act, other than appeals from a Full Court of a state Supreme Court. The section contemplates that decisions in certain federal matters will be made at trial level in state courts but that appeals from those decisions must be brought to the Federal Court. The principal rationale for cross-jurisdictional appeals is to achieve uniform interpretation of federal law.

20.4 A similar situation exists in relation to the Family Court of Australia, which hears and determines appeals from the Family Court of Western Australia in family law matters (see Chapter 21).[843]

20.5 The principal examples of cross-jurisdictional appeals to the Federal Court are described below. Appeals from territory courts to the Federal Court are considered separately in Chapter 39.

- State and territory Supreme Courts have jurisdiction at first instance in intellectual property matters.[844] The Federal Court has exclusive jurisdiction to hear appeals from decisions of state courts in intellectual property matters. Since 1987 the Federal Court has had concurrent original jurisdiction to hear and determine matters arising under federal intellectual property legislation.[845]

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843 s 94(1)(b) FLA.

844 See Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.59–4.61.

845 *Copyright Act 1968* (Cth), s 131B(1) and (2); *Designs Act 1906* (Cth), ss 31, 40I; *Trade Marks Act 1995* (Cth), ss 190, 191, 192, 195; *Patents Act 1990* (Cth), ss 154, 155, 158.

- Under the *Workplace Relations Act 1996* (Cth), District, County, Local or Magistrates Courts are given certain jurisdiction in relation to enforcement and remedies and contravention of awards and orders.[846] However, appeals lie to the Federal Court from a judgment of a state or territory court in any matter arising under the Act.[847]

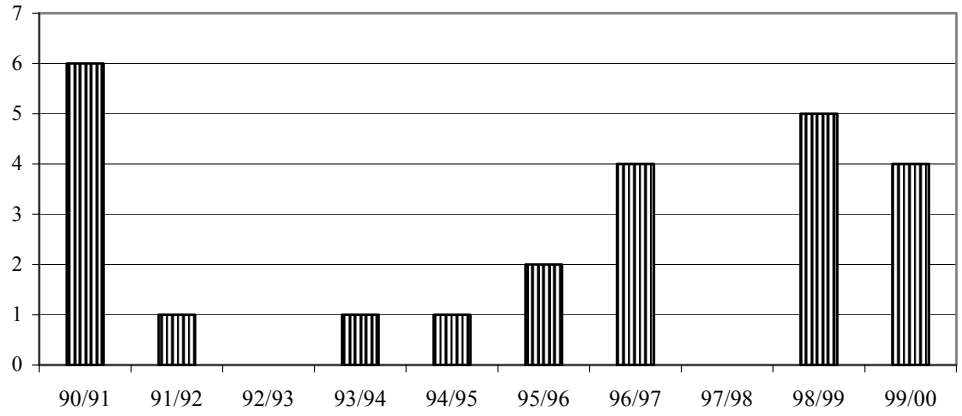
- The *Extradition Act 1988* (Cth) provides for applications for extradition to be made to a magistrate of a State or Territory.[848] An application may then be made to either the Federal Court or to the Supreme Court of the State or Territory for a review of the order made by the magistrate.[849] The application for review may be made by either the country or the person who is the subject of the order. The person or the country may appeal to the Full Court of the Federal Court from the order of the Federal Court or the Supreme Court.[850]

20.6 The Federal Court advised the Commission that most intellectual property cases in Australia are now commenced in the Federal Court. The Court stated that it is difficult to obtain accurate national figures but in the past three calendar years (1998, 1999 and 2000) over 500 cases involving the *Trade Marks Act 1995* (Cth), the *Designs Act 1906* (Cth), or the *Patents Act 1990* (Cth) were commenced in the Federal Court.[851] The best estimate of the total number of intellectual property cases commenced in the eight state and territory Supreme Courts in same period was 50. The ratio would thus seem to be in the order of ten new matters commenced in the Federal Court for every one commenced in a state or territory Supreme Court.

20.7 Figure 20–1 sets out the number of cross-jurisdictional appeals filed in the Federal Court from decisions of state courts over the ten year period from 1990–91 to 1999–2000. The statistics indicate that very few cross-jurisdictional appeals are brought to the Federal Court. This can be seen by comparing the data in Figure 20–1 with the total number of appeals filed in the Federal Court over the same period (see Chapter 18, Figure 18–4). For example, in 1999–2000 four cross-jurisdictional appeals were filed in the Federal Court compared with a total of 407 appeals filed in that year — representing less than 1% of the Federal Court's appellate work.

846 *Workplace Relations Act 1996* (Cth), ss 170NE, 177A.
847 Ibid, s 414(1), 422 and also see s 4 for definition of 'Court'.
848 *Extradition Act 1988* (Cth), ss 19, 34.
849 Ibid, ss 21(1), 35(1).
850 Ibid, ss 21(3), 35(3).
851 Federal Court of Australia, *Submission J039*, 20 April 2001. This figure excludes copyright matters.

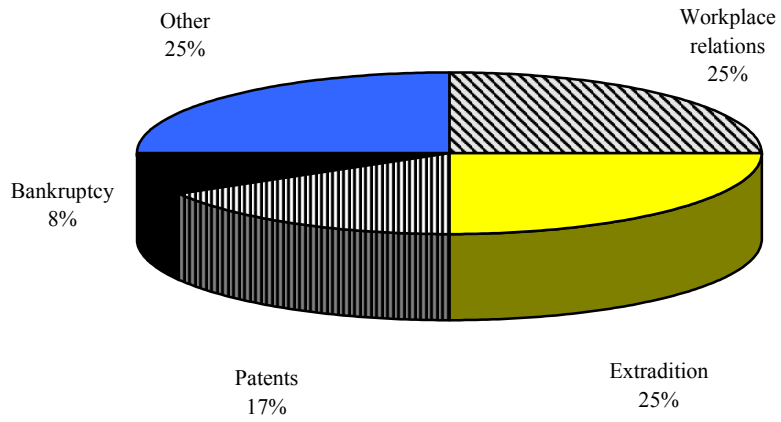
Figure 20–1 Number of Appeals from State Courts to the Federal Court



Source: Data provided by the Registry of the Federal Court of Australia.

20.8 Figure 20–2 shows the composition of cross-jurisdictional appeals to the Federal Court over the ten year period from 1990–91 to 1999–2000. During that period there were 24 such appeals, principally in the fields of workplace relations, extradition and patents.

Figure 20–2 Appeals from State Courts to the Federal Court by Type



Source: Data provided by the Registry of the Federal Court of Australia.

Issues arising from current practice

20.9 In DP 64 the Commission asked whether the Federal Court should continue to act as the intermediate appellate court from decisions of state courts exercising federal jurisdiction in specific fields.[852] The Commission noted that the rationale of cross-jurisdictional appeals was to increase uniformity in the interpretation of federal law but asked whether this might not be achieved by appeals to state courts.

20.10 The Commission identified two alternatives to the current arrangement: (a) conferring federal appellate jurisdiction on state courts, thereby making both the original and appellate jurisdiction of the Federal Court and state courts concurrent, but requiring parties to stay within the court system in which proceedings were initially commenced, or (b) conferring exclusive jurisdiction, both original and appellate, on federal courts in these matters.

Submissions and Consultations

20.11 A common view was that uniformity in specialised areas such as intellectual property was desirable and that the Federal Court's role in hearing appeals in these matters was the correct approach to ensuring uniformity.[853] This view was shared by a number of state Supreme Court judges and practitioners.[854] The fact that a state court had original jurisdiction did not necessarily mean that it should also have appellate jurisdiction.[855]

20.12 On the other hand, there was broad agreement that the perception that state courts lack the expertise or capacity to hear appeals in specialised federal matters is not as significant today as it may have been in the past.[856] One view was that if state courts are considered competent to find the facts and apply the law at first instance, they should be considered capable of determining an appeal.[857]

852 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.57–4.66.

853 The Hon Justice R Nicholson, *Consultation*, Perth, 23 March 2001; Federal Court of Australia, *Consultation*, Melbourne, 6 March 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001; D Graham QC, *Consultation*, Melbourne, 15 February 2001.

854 Supreme Court of South Australia, *Consultation*, Adelaide, 15 March 2001; Court of Appeal (NSW), *Consultation*, Sydney, 19 March 2001; Supreme Court of Victoria, *Consultation*, Melbourne, 16 February 2001; The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001; Faculty of Law University of Adelaide, *Consultation*, Adelaide, 16 March 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001.

855 D Jackson QC, *Consultation*, Sydney, 5 March 2001.

856 D Graham QC, *Consultation*, Melbourne, 15 February 2001; The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001; Supreme Court of South Australia, *Consultation*, Adelaide, 15 March 2001; Supreme Court of Victoria, *Consultation*, Melbourne, 16 February 2001.

857 Faculty of Law University of Adelaide, *Consultation*, Adelaide, 16 March 2001.

20.13 Justice Wheeler of the Supreme Court of Western Australia suggested that state courts should have appellate jurisdiction in addition to the original jurisdiction or else not have the first instance jurisdiction at all. She acknowledged, however, that some matters such as intellectual property might be better dealt with by the Federal Court than by state courts.[858]

20.14 The Supreme Court of Queensland was generally opposed to granting exclusive jurisdiction to federal courts.

> In our view it is important for constitutional and practical reasons to maintain, even to expand, the exercise of federal jurisdiction by state courts and to limit, if not eliminate, those areas where the federal court exercises exclusive jurisdiction.[859]

20.15 The Supreme Court of Queensland considered that there were several constitutional, theoretical and practical reasons for maintaining original jurisdiction in state courts in federal matters.

- The existence of the High Court at the apex of the judicial system meant that the civil, criminal and constitutional law of Australia was unified and kept consistent.
- Chapter III of the Constitution imposes limitations on the powers of the state parliaments to invest their own courts with incompatible jurisdiction.
- Each state court, when exercising federal jurisdiction, has regard to the decisions of other state courts. It is not necessary, or even desirable, to have a system of federal courts to maintain uniformity in interpretation.
- Uniformity is not difficult to achieve in a nation where there is a limited number of jurisdictions and judges are familiar with, or can easily find, the decisions of other jurisdictions. The doctrine of judicial comity requires the judges of any superior court to give due respect to the appellate decisions in another superior court within Australia.
- The law is further unified by the exercise of state and federal jurisdiction at the same time and not separately, as is usual in the United States.
- If the Federal Court has exclusive jurisdiction then any case in which a federal matter is even a minor aspect could not be tried in state courts. This could involve a massive shifting of resources from the state systems to the federal system. It could also involve a great waste of time and resources for parties where, for example, a jurisdictional dispute arose because a small part of a plaintiff's claim might be argued as being within federal jurisdiction.

858 The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001.
859 Supreme Court of Queensland, *Submission J021*, 13 March 2001.

- An argument in favour of exclusive jurisdiction for the federal courts in certain areas may be that it would encourage specialist knowledge and specialist judges. However, legal principles are best applied across subject matters. It can lead to a narrowing of legal principle to isolate one area of the law from the juridical mainstream.

- There is also the danger of 'agency capture' within a specialist jurisdiction, especially if a particular interest group is often represented, such as for example intellectual property owners in intellectual property cases. This applies to appellate as well as first instance work.

20.16 The Supreme Court of Queensland commented in particular on intellectual property matters.

> In the United States all intellectual property cases wherever they are tried, are heard on appeal in the appellate jurisdiction of the US Federal Court in the Washington DC circuit. The problems in the US are quite different. Firstly, first instance trials are commonly conducted before a jury with the obvious capacity for inconsistent results and secondly there are a much greater number of jurisdictions also creating a capacity for inconsistent results at first instance. Neither of those problems applies in Australia. Moreover, the Federal Court, unlike the state courts, has no specialist appellate court. … In these circumstances, it is more appropriate for all cases which are heard at first instance in the state courts to be subject to appeal within the state and not the federal system.[860]

20.17 The Supreme Court of Queensland considered that Supreme Courts, being courts of general jurisdiction, can hear a large body of cases efficiently and without delay. Moreover, state courts particularly in a decentralised state are much more accessible geographically than federal courts, which tend to maintain registries and sit only in the capital cities.

20.18 The Supreme Court of Queensland also doubted the validity of the argument that allocating cases involving federal jurisdiction to courts comprised of judges appointed by the Commonwealth government improved the accountability of the process. The Court considered that the independence of the judiciary is best maintained by there being as little connection as possible between the judiciary and the executive, which appoints the judges and is often a party in federal litigation.

20.19 The Federal Court opposed any change to the current arrangements by which appeals in intellectual property and extradition matters were heard exclusively by the Federal Court.[861] The Court noted that most intellectual property cases are commenced in the Federal Court and that cross-jurisdictional appeals in this area are very rare. The Court added that because intellectual property was a

860 Ibid.
861 Federal Court of Australia, *Submission J039*, 20 April 2001.

specialist area of federal law the Court's 'appellate benches are constituted so as to comprise at least one (and usually more) judges who have a specialist experience and expertise in the area'.[862] Moreover, in Melbourne and Sydney, where most of the intellectual property work arises, first instance intellectual property cases are allocated to members of an intellectual property panel who sit on appellate intellectual property benches nationally.

20.20 The Federal Court commented that its judgments in intellectual property cases are recognised internationally and the Court maintains significant international contacts in this area. The Court considered that in all these circumstances:

> It is clear that the original policy underlying the role of the Federal Court as the intermediate appellate court in intellectual property cases remains valid. Indeed, as the Federal Court has developed Australian law in this field and has become the jurisdiction of choice by practitioners, the arguments in support of that original policy are stronger than ever.[863]

20.21 The Court submitted that in relation to extradition, uniformity was very important because there is a significant international component to the jurisdiction. The Court stated that it is also a complex area of law that interacts closely with other fields of federal jurisdiction and that it is an area in which the Federal Court has developed particular expertise.[864]

Commission's Views

20.22 The Commission considers that the current jurisdictional arrangements in relation to cross-jurisdictional appeals to the Federal Court represent the *least* desirable of the available options. However, in choosing an alternative model the subject matter in question is of particular significance. Different areas of federal law raise distinct issues as to the preferable avenue for appellate jurisdiction.

Intellectual property

20.23 In relation to matters of intellectual property, the Commission recommends that federal legislation be amended to provide that original and appellate jurisdiction in matters arising under federal intellectual property laws be conferred exclusively on federal courts. The original jurisdiction presently exercised by state and territory courts in these matters should be abolished.

20.24 A fundamental consideration in relation to intellectual property matters is the importance of developing a uniform body of federal law in this specialised area in order to promote Australia's participation in the global information and

862 Ibid.
863 Ibid.
864 Ibid.

technology sectors. Intellectual property is a key element in the new global information economy. The Federal Court has already developed substantial expertise and an international standing in this area.

20.25 The link between the jurisdiction and management of courts and economic growth has been noted in the following terms:

> Emerging economic theory now posits that key social and political institutions, including the courts, may be as important to the working economy as the three factors in classical economic theory: money, people and resources. For example, leading researchers have documented the link between effective judicial management of intellectual property cases and the amount and kinds of technology transfer and direct investment, in both developed and developing countries. … Thus, the Federal Court plays a pivotal role in various aspects of economic activity — including such key aspects of the so-called 'new economy' as industrial and intellectual property … .[865]

20.26 Intellectual property disputes often have significant national and international consequences. Disputes can affect all stages of commerce including design, manufacture, marketing and retailing. Intellectual property may also be a crucial element in corporate strategy and integral to the customer focus required for business success at a national and global level.[866]

20.27 Alleged infringements of intellectual property rights are often factually and legally complex. For this reason, substantial judicial experience and expertise in the area are highly desirable. For example, designs law may involve complex questions about whether a particular visual appearance satisfies the definition of a design, whether another product has copied it, what damages, if any, have flowed and what is an appropriate remedy.[867] There may also be arguments about the relationship to other areas of intellectual property such as patents, trademarks and copyright.[868]

20.28 Statistics provided to the Commission indicated that over the past three years about 90% of all intellectual property matters (other than copyright) were commenced in the original jurisdiction of the Federal Court rather than in state courts. For most litigants, the Federal Court is already the court of choice in intellectual property matters. In these circumstances, the Commission considers it undesirable for state courts to be used on an occasional basis in a specialised field in which the uniform application of federal law is of high importance.

20.29 In coming to this conclusion, the Commission acknowledges the concerns expressed in consultations and submissions regarding any expansion of the exclusive jurisdiction of the Federal Court. However, available statistics

865 D Weisbrot (2000), 23–24.
866 Australian Law Reform Commission, Report No 74 (1995), para 2.5.
867 Ibid, para 2.8–2.33.
868 Ibid, para 2.20–2.23.

indicate that the removal of original jurisdiction from state courts in intellectual property matters is unlikely to have a significant impact on the workload of either the Federal Court or the state Supreme Courts.

20.30 The Commission's recommendation that original and appellate jurisdiction in matters arising under federal intellectual property laws be conferred exclusively on 'federal courts' intentionally leaves open the question of which federal courts are the most appropriate for discharging this judicial task. In relation to appellate jurisdiction, the Federal Court would clearly fulfil that function.

20.31 The Commission notes that there is scope for the Federal Magistrates Service to be utilised in determining less complex civil cases in intellectual property matters. In December 2000, the House of Representatives Standing Committee on Legal and Constitutional Affairs released a report on copyright enforcement.[869] One of the Committee's recommendations was that the Federal Magistrates Service should be given a small claims jurisdiction to hear less complex copyright matters. The report also concluded that the amendments should allow for matters to be transferred out of the small claims jurisdiction into the Federal Court in appropriate circumstances.[870]

20.32 The extent to which the Federal Magistrates Service might be used for determining less complex intellectual property claims merits further consideration. However, the conferral of such jurisdiction on the court would appear to be consistent with the objectives of Parliament in establishing the Federal Magistrates Service.

Extradition

20.33 The Commission also recommends that federal legislation be amended to provide that original and appellate jurisdiction in matters arising under the *Extradition Act 1988* be conferred exclusively on federal courts. In particular, jurisdiction to make orders determining a person's eligibility for surrender should be conferred on the Federal Magistrates Service. Jurisdiction to review such an order should be conferred on the Federal Court, and jurisdiction to hear an appeal from such a review should be conferred on the Full Court of the Federal Court.

20.34 Extradition matters are quasi-civil proceedings that have significant national and international elements. Under international law, extradition is regarded as a matter of comity rather than obligation, and therefore depends on a treaty or reciprocal agreements. The application of Australian extradition law has the potential to raise international sensitivities. Examples of these sensitivities are:

869 House of Representatives Standing Committee on Legal and Constitutional Affairs (2000).
870 Ibid, Rec 20.

- the role of a foreign state in applying for extradition of a fugitive offender;
- the need to interpret bilateral treaties or other reciprocal agreements; and
- the need to pass judgment on whether there is an objection to extradition based, for example, on the political nature of the offence in question, or the likelihood that the person may be prejudiced in the foreign country by reason of his or her race, religion, nationality or political opinions.[871]

20.35 Extradition is a field in which foreign countries are entitled to expect Australian courts to speak with one voice. Although the allocation of jurisdiction to state magistrates is not necessarily antithetical to that objective, in the Commission's opinion such an arrangement makes it more difficult to achieve. The more widely dispersed the jurisdiction, the less frequently it will be exercised in a particular court, and the greater the difficulty of maintaining uniformity.

20.36 As in the case of intellectual property, the Commission is also of the view that consideration should be given to utilising the Federal Magistrates Service in respect of those extradition matters currently dealt with by state magistrates. This would be consistent with the use of the Service as a lower tier federal court able to deal with less complex matters of federal jurisdiction. Jurisdiction to review orders of a federal magistrate should be conferred on the Federal Court, and jurisdiction to hear an appeal from such a review should be conferred on a Full Court of the Federal Court.

Workplace relations and other matters

20.37 In relation to cross-jurisdictional appeals in the area of workplace relations, the Commission recommends that there be no change to the existing jurisdictional arrangements. The relationship between the jurisdiction of federal, state and territory courts under the *Workplace Relations Act 1996* (Cth) is extremely complex. The Act created a new regime in which state and territory courts were given a more expansive role than had been the case under previous federal legislation. The complexity of the arrangements is heightened by the interplay between common law causes of action (such as actions in respect of economic torts) and federal statutory defences (such as claims that conduct is 'protected action').

20.38 These arrangements are relatively recent and the Commission received very little information during consultations or in submissions regarding the operation of the existing jurisdictional arrangements in federal industrial matters. On this basis, the Commission is not confident about recommending change, in the

871 *Extradition Act 1988* (Cth), s 7.

absence of further examination and inquiry. During consultations it was noted that industrial law is an area in which parties may be quick to exploit emerging differences of approach between the various courts. This is particularly so because of the leverage that parties gain in the bargaining process as a result of obtaining injunctions and other interlocutory orders. Given the broad areas of concurrent original jurisdiction and the willingness of parties to resort to legal action, the exclusive appellate jurisdiction of the Federal Court appears to dampen the potential for different approaches to federal legislation by imposing a single channel of appeal.

20.39 In relation to other areas of federal law subject to cross-jurisdictional appeals, the Commission recommends that state and federal courts be conferred with concurrent original and appellate jurisdiction but that parties be required to stay within the state or federal system in which proceedings were initially commenced.

20.40 The impact of this recommendation on the workload of state and federal courts is difficult to predict. Matters that are currently heard by the Federal Court on appeal from a state court would stay within the state court system. However, much will depend on whether a change to the appellate arrangements will influence the litigants' choice of court for commencing the original proceedings. In the Commission's view, the workload effects of such a change are unlikely to be significant in view of the small number of cross-jurisdictional appeals outside the areas of intellectual property, extradition and workplace relations.

20.41 The Commission's proposal for 'channelling' appeals would utilise the existing capacities of state courts. It would also recognise the appellate experience of state court judges, many of whom have commissions as permanent judges of appeal. The Commission considers that the proposal also has benefits for litigants by allowing the parties to choose the most suitable court for the determination of their dispute, and by respecting that initial choice in relation to appeals.

Recommendation 20–1. Federal legislation should be amended to provide that original and appellate jurisdiction in matters arising under federal intellectual property laws be conferred exclusively on federal courts. The original jurisdiction presently exercised by state and territory courts in these matters should be abolished.

Recommendation 20–2. Federal legislation should be amended to provide that original and appellate jurisdiction in matters arising under the *Extradition Act 1988* be conferred exclusively on federal courts. In particular, jurisdiction to make orders determining a person's eligibility for surrender should be conferred on the Federal Magistrates Service. Jurisdiction to review such an order should be conferred on the Federal Court, and jurisdiction to hear an appeal from such a review should be conferred on the Full Court of the Federal Court.

Recommendation 20–3. There should be no change to the present arrangements for determining appeals in federal industrial matters. Subject to this qualification and to Recommendations 20–1 and 20–2, federal legislation should be amended to abolish the jurisdiction of the Federal Court to hear appeals from state courts exercising original federal jurisdiction. Accordingly:

(a) Where civil proceedings have been commenced in a state court exercising original federal jurisdiction, the parties should be required to pursue any appeal within the state court system. To that end, the Supreme Court of each State should be invested with appellate federal jurisdiction in those matters.

(b) Where civil proceedings have been commenced in a federal court exercising original jurisdiction, the parties should be required to pursue any appeal within the federal court system. To that end, the Federal Court should be invested with appellate jurisdiction in those matters.

(c) The same jurisdictional principles should be applied to the Northern Territory as are applied to the States.

(d) Until such time as the ACT establishes its own intermediate appellate court (see Recommendation 39–1), the Federal Court should continue to act as an intermediate appellate court in matters originally commenced in the Supreme Court of the ACT. Thereafter, the same jurisdictional principles should be applied to the ACT as are applied to the States.

Access to a First Appeal

20.42 This section discusses whether access to a first appeal in Federal Court proceedings should be by right or by leave of the court and, where appeals are by leave, according to what criteria. The Commission deals with the same issues in

relation to the High Court in Chapter 19 and the Family Court in Chapter 21. This section examines whether the current approach of generally allowing appeals from the first judicial determination as of right is the most appropriate and effective model of appellate review or whether an alternative, based on greater use of discretionary leave requirements, should be considered.

Current law and practice

20.43 Leaving aside appeals in interlocutory matters, which are discussed further below, the Australian judicial system generally permits one appeal as of right and one further appeal by leave of the court. Under ss 24 and 25 FCAA, a first appeal from a decision of a single judge of the Federal Court is taken to a Full Court of the Federal Court, which is usually comprised of three judges.[872] A second appeal may then be taken, if special leave is granted, to the High Court comprised of five or seven justices.

20.44 Although an appeal to a Full Court of the Federal Court is generally available as of right, an appeal cannot be brought from an interlocutory judgment except with the Court's leave.[873] Where leave is required, applications for leave to appeal may be determined by a single judge or by a Full Court.[874] The Court has developed broad criteria to determine leave applications in interlocutory matters. The Court's approach is based on the view that appeals on procedural matters should be tightly confined because they do not alter the substantive rights of the parties and only serve to interrupt the usual course of proceedings.

20.45 The Federal Court has held that the major considerations in deciding whether to grant leave to appeal from an interlocutory order are whether in all the circumstances the judgment of the primary judge was attended by sufficient doubt to warrant it being reconsidered by a Full Court, and whether substantial injustice would result if leave were refused.[875]

Issues and problems

20.46 The legal system requires fair and effective appellate processes to ensure public confidence in the ability of the system to correct errors or injustices arising from a judicial decision.[876] Regulating access to intermediate appellate courts raises issues of principle from the perspectives of individual litigants, the courts and the administration of justice generally.

872 s 14 FCAA.
873 s 24(1A) FCAA.
874 s 25(2) FCAA.
875 *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397, 398–400.
876 Lord Oliver (1992), 68.

20.47 For litigants, appeals are the only effective mechanism for reviewing judicial decisions and correcting errors made at trial. However, appeals are costly for appellants and respondents. Lodging an appeal invariably lengthens litigation, delays final determination, and increases costs. It is unfair to one or both parties to be put to that expense unless the circumstances warrant it.

20.48 Appeals are also vital in developing a rational and coherent system of law, which helps individuals to plan their activities on the basis of known or predictable legal rules. However, an effective appellate system requires the outlay of considerable public expenditure, including judicial and court staff salaries, buildings and administrative services. The need for 'individualised justice'[877] for each litigant thus has to be balanced against the need to control the number of appeals brought.[878]

Arguments for a leave-based system

20.49 The major arguments for a leave-based system are as follows.

- A leave requirement would improve the filtering of appeals by acting as an additional hurdle to parties with weak cases, thereby reducing the number of unmeritorious appeals.[879] This would in turn reduce costs and delays for parties and improve the efficiency of the administration of justice.

- A leave requirement would reduce the demand for individualised justice, which has 'placed an immense strain' on the judicial system.[880] This would preserve the 'rule making' ability of an appellate court by conserving resources for those cases with a public interest in the legal outcome.

- A leave requirement would perform a valuable function in reducing unmeritorious appeals because a number of appeals are brought for tactical reasons, such as to bring about additional delay and expense.

- A leave requirement is likely to enhance the courts' capacities to manage their growing workloads, while reducing costs and delays — at least so long as the courts are able to balance the effort expended in determining leave applications with that expended in determining full appeals.

877 For a discussion of this term see P Atiyah (1978).
878 B Beaumont (1992).
879 G Bowman (1997), 31.
880 A M Gleeson (1995), 430.

Arguments for a right-based system

20.50 The notion of a right to appeal is attractive because it enables every litigant to seek review of his or her case for the purpose of remedying any errors made at trial.[881] As a matter of individual rights, everyone should be able to have potential judicial errors affecting final determination of their rights reviewed by a higher tribunal. This right is explicitly recognised in relation to criminal matters in the *International Covenant on Civil and Political Rights*[882] but has not been extended to date to civil actions.[883]

20.51 Whether discretionary leave would satisfy the demand for individualised justice may depend on the criteria used to determine leave applications. For example, criteria that are not directed to the individual merits of the appeal are unlikely to satisfy demands for individualised justice. An example of this is the criteria for special leave to appeal to the High Court under s 35A JA, which focus on the public importance of the particular case rather than its individual merits.

20.52 There are additional arguments for the maintenance of a right-based system that relate to the problems associated with the alternative of a leave-based system. One problem is that leave requirements impose an additional layer of review on those cases that are successful in attracting leave to appeal. There is also a danger that the leave process might substantially overlap with the full appeal process because an applicant would have to demonstrate an arguable case of error by the trial judge. This would involve an investigation of the merits of the original decision, which is also the function of a full appeal.

20.53 An additional problem is that considering applications for leave to appeal may impose a considerable burden on an intermediate appellate court, leaving courts with less time and resources to hear full appeals. Consequently, the suggested cost and time savings arising from a leave system will be reduced by the effort required to operate such a system. How these issues balance out will depend on the procedures adopted for assessing the leave applications. The significant burden on the High Court of determining special leave applications is discussed in Chapter 19.

20.54 A final problem is that leave requirements may encourage some potential appellants to make an application for leave because the threshold for success is lower than on an appeal and success may improve their negotiating position.[884]

881 J Crawford (1993), 198.
882 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force for Australia 13 November 1980).
883 See *Young v Registrar, Court of Appeal (No 3)* (1993) 32 NSWLR 262.
884 G Bowman (1997), 31.

The problem of limited data

20.55 There is very little published information regarding federal appellate proceedings in Australia. Currently, limited statistics are available regarding the success rate of appeals, but there is no material by which to assess the impact of a leave requirement.

20.56 Statistics on the success rate of appeals are important because they provide information on the effectiveness of intermediate appellate courts in achieving their purpose of correcting error at trial. In Chapter 16 the Commission discussed the success rate of appeals to a Full Court of the Federal Court. Information was supplied to the Commission regarding the six appellate sittings that were held in the 15 month period from August 1999 to November 2000, covering 445 appeals. The success rate in that period ranged between 20% and 30%. These statistics indicate that between 70% and 80% of cases demonstrate no error at trial, or insufficient error to warrant the decision being overturned on appeal. This suggests a substantial potential for a leave procedure to screen out unmeritorious appeals.

20.57 However, a failed appeal does not necessarily mean that the appeal is unmeritorious. A failed appeal may have raised an arguable case that merited consideration by a Full Court. For example, if an appeal resulted in a split decision in the appellate court, it would be difficult to say that the appeal completely lacked merit, even if it ultimately failed.

20.58 In assessing the potential of a leave requirement to screen out unmeritorious appeals, the Commission sought information from the Federal Court regarding the success rate of applications for leave to appeal in relation to interlocutory decisions, which is one category of appeal for which leave is currently required. However, the Commission was informed that such data are currently unavailable.[885]

Other issues relating to leave

20.59 If leave to appeal is required in relation to particular types of appeals, the following specific issues arise.

- What should be the criteria for granting leave?
- Should the criteria for granting leave be regulated by statute, rules of court, practice directions or left to judicial formulation?

885 Federal Court of Australia, *Correspondence*, 24 April 2001.

- To whom should applications for leave be made: the judge who made the order appealed from; another judge of the court from which the appeal is taken; or the appellate court?
- Should an order granting or refusing leave be immune from appeal?
- Should the appellate court have the power to rescind leave at some point after it has been granted and, if so, in what circumstances?

Developments in the United Kingdom

20.60 The view that a first appeal should always be available as of right has recently come under challenge in the United Kingdom.[886] The Bowman report, which reviewed appellate proceedings in the English Court of Appeal (Civil Division), suggested that significant savings of time and resources could be achieved through the use of a leave process in intermediate appeals.[887] The Bowman report took the view that the law should not confer an automatic right of appeal in all cases. However, an individual who has grounds for dissatisfaction with the outcome should always be able to have his or her case looked at by a higher court so that it can consider whether there appears to have been an injustice and, if so, allow an appeal to proceed.[888]

20.61 The Bowman report suggested that there should be a right to seek leave to appeal, but not necessarily a right to an appeal itself. The report considered that an extended leave requirement could reduce the large proportion of unsuccessful appeals as well as minimising the number of tactical appeals brought only to delay litigation and prejudice the other party, thereby helping the Court of Appeal to use its resources more efficiently.[889] The Bowman report recommended that leave to appeal be required for all interlocutory appeals.[890]

20.62 The Bowman report's empirical research indicated that appeals that had been through the leave filter consistently had a higher success rate than those that had not, suggesting that the leave requirement successfully filtered out some weak appeals.[891] The data showed that, in those cases in which leave was already required, around two-thirds of potential appeals were eliminated at the leave stage.[892] Moreover, where leave was obtained, the success rate in the full hearing

886 The Law Reform Commission of Western Australia has also recently supported the expansion of leave requirements in civil matters. See Law Reform Commission of Western Australia (1999), 276.
887 G Bowman (1997), 34.
888 Ibid, 24.
889 Ibid, 30–35.
890 Ibid, 142, rec 13. See also Lord Woolf (1996), 165. The Woolf Report did not consider appellate proceedings in any detail.
891 G Bowman (1997), 32.
892 Ibid, 34.

was uniformly higher across all categories of cases when compared with cases in which an appeal lay as of right.[893]

20.63 The impact of the Bowman report on the English appellate system is discussed in *Tanfern Ltd v Cameron-MacDonald*.[894] According to Brooke LJ, the *Access to Justice Act 1999* (UK) and the *Access to Justice Act 1999 (Destination of Appeals) Order 2000* have the effect of generally requiring permission for a first appeal. Permission to appeal will only be given where the court considers that an appeal would have a real prospect of success or that there is some other compelling reason why the appeal should be heard. However, permission will not be required in certain specified cases such as where the appeal concerns the liberty of an individual.

Submissions and consultations

Views on appeals by right or by leave

20.64 The view commonly expressed in submissions and consultations was that access to a first appeal in federal proceedings should continue to be by right in most circumstances.[895] This was seen as a traditional right, which accorded with community notions of access to justice. Concerns were also expressed that leave procedures would impose an additional layer of procedure with attendant costs and delays.[896] This would be particularly so for arguable cases, which would require careful analysis in the leave proceeding and a full appellate hearing as well.[897]

20.65 Another concern was that an application for leave can become a de facto appeal.[898] The parties may have to argue the substantive merits of the appeal in the course of the leave application because the court must consider whether the lower court was substantively in error.

20.66 Some doubts were expressed about whether the Federal Court's appellate caseload is so heavy as to warrant extending the use of leave procedures.[899] Doubts

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893 Ibid, 32.

894 *Tanfern Ltd v Cameron-MacDonald* [2000] 2 All ER 801, 806–807 (Brooke LJ).

895 Family Court of Australia, *Submission J041*, 1 May 2001; Family Court of Australia, *Consultation*, Melbourne, 14 March 2001; Family Law Council, *Submission J040*, 23 April 2001; D Graham QC, *Consultation*, Melbourne, 15 February 2001; G Griffith QC, *Consultation*, Melbourne, 16 February 2001; Law Institute of Victoria, *Consultation*, Melbourne, 15 February 2001; Federal Magistrates Service, *Submission J011*, 7 March 2001; D O'Brien, *Consultation*, Canberra, 22 February 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001; Victorian Bar Association, *Consultation*, Melbourne, 6 March 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001.

896 Federal Magistrates Service, *Submission J011*, 7 March 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001; The Hon Justice R Sackville, *Consultation*, Sydney, 12 February 2001.

897 The Hon Justice R Sackville, *Consultation*, Sydney, 12 February 2001.

898 P Nygh, *Consultation*, Sydney, 12 February 2001.

899 D Jackson QC, *Consultation*, Sydney, 5 March 2001; G Griffith QC, *Consultation*, Melbourne, 16 February 2001.

were also expressed about whether there were large numbers of clearly hopeless cases.[900] One common view was that there were other measures that appellate courts could take to deal with appellate lists, including giving more joint judgments, shorter reasons, striking out weak appeals, using time limits for oral presentations, and better use of case management practices.[901]

20.67 Some concerns were also expressed about the reliability of data from overseas and the extent to which such data, if accurate, could be used as a comparator for Australia.[902] Another view was that, although there were categories of appeals where there was a perception of a significant number of unmeritorious appeals (for example, unrepresented litigants in migration appeals), it would be difficult to single out these cases for differential treatment by requiring leave to appeal. Selecting particular categories of case for a leave requirement was not thought to be a long-term solution because the problematic categories change over time.[903]

20.68 There were some views to the effect that leave to appeal should not be excluded as an option, particularly in cases where there had already been two levels of review. An example is a social security matter that is reviewed first by the Social Security Appeals Tribunal, then by the Administrative Appeals Tribunal, and then by a single judge of the Federal Court.[904]

Leave to appeal in procedural matters

20.69 The Federal Court expressed concern about the scope of leave to appeal in relation to procedural matters.[905] The Court submitted that the term 'interlocutory' in O 52 r 10 FCR was an imprecise term and that legislation should prescribe more closely what types of matters should be dealt with by leave or by right.[906] The Law Council of Australia agreed that greater specification was needed of when leave to appeal was required.[907]

20.70 The Federal Court advised the Commission that it has already raised with the Attorney-General the desirability of clarifying what are interlocutory judgments and orders from which leave to appeal is required.[908] The Court provided the Commission with a copy of a proposal according to which O 52 r 10 would be amended to provide for specific types of judgments for which leave to appeal is necessary. These would include matters relating to transfer or consolidation of

900 D Graham QC, *Consultation*, Melbourne, 15 February 2001.
901 D Jackson QC, *Consultation*, Sydney, 5 March 2001.
902 The Hon Justice R Sackville, *Consultation*, Sydney, 12 February 2001.
903 Federal Court of Australia, *Consultation*, Sydney, 31 January 2001.
904 Ibid.
905 Federal Court of Australia, *Submission J039*, 20 April 2001.
906 Ibid.
907 Law Council of Australia, *Submission J037*, 6 April 2001.
908 Federal Court of Australia, *Submission J039*, 20 April 2001.

proceedings, service, default judgment, pleadings, striking out, discovery, costs, adjournments of trial, or where any judgment is less than $50,000.

Criteria for granting leave

20.71 The Federal Court queried the necessity for legislation to set out the criteria by which the discretion to grant or refuse leave should be exercised.[909] The Court stated that existing case law provides satisfactory guidance in the many different circumstances in which the question of leave can arise.[910]

20.72 In consultations, some Federal Court judges thought that criteria for leave might usefully be included in legislation.[911] One suggestion was that the criteria for leave could include: whether the appeal is outside the jurisdiction of the court; whether the matter is covered by binding High Court authority; whether the matter is patently frivolous or an abuse of process; and whether there is a risk of injustice if the matter is not heard on appeal.[912] Another view was that the test should be whether there is a 'seriously arguable case'.[913]

20.73 The Law Council of Australia agreed that criteria should be included but said the criteria must be sufficiently flexible to allow for ample discretion.[914]

Who should determine leave applications?

20.74 The Federal Court submitted that the common practice was that in cases in which a first appeal can be taken from a trial judge to an intermediate appellate court only by leave of the court, an application for leave to appeal may be granted by the trial judge but may be refused only by another judge.[915] The judge who made the decision at first instance was thought to be suitable for granting leave to appeal because he or she would be aware of the facts or legal complexities that might warrant review.

Immunity from appeal

20.75 The general view was that decisions about leave to appeal should themselves be immune from appeal.[916] Clearly, that should be the case where more

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909 Ibid.

910 *Decor Corp Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397; *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] FCA 1572 (Unreported, Federal Court of Australia, Beaumont, French and Finkelstein JJ, 8 November 2000).

911 Federal Court of Australia, *Consultation*, Sydney, 31 January 2001.

912 Ibid.

913 Ibid.

914 Law Council of Australia, *Submission J037*, 6 April 2001.

915 Federal Court of Australia, *Consultation*, Sydney, 31 January 2001.

916 Family Court of Australia, *Consultation*, Melbourne, 14 March 2001; Family Law Council, *Submission J040*, 23 April 2001.

than one judge reviewed the leave application because such an arrangement satisfied the need for public confidence in the fairness of the system.[917] No further appeal was necessary to meet the public interest. Immunity from appeal would appear to be consistent with existing case law concerning applications for leave to appeal in the Federal Court.[918]

Commission's views

20.76 The Commission considers that there should be no fundamental change to the right of appeal to an intermediate appellate court in proceedings in the Federal Court. The current law accords with traditional community perceptions of access to justice. Moreover, no evidence was presented to the Commission indicating that the Federal Court was unable to cope with its existing appellate workload, or that it would not be able to do so if modest reforms of the kind recommended in this report were implemented.

20.77 The Commission is of the view that a radical change to the system of appeals, such as a requirement of leave for all first appeals, should be based on sound empirical evidence. At present, there are insufficient data available to analyse right-based and leave-based systems of appeal. For this reason, any assessment of the proportion of current appeals that might be screened out by a leave process is speculative.

20.78 However, the Commission considers that it is necessary to delineate more clearly which procedural matters require leave. Currently there is considerable argument about what matters are interlocutory in nature, which adds unnecessary costs and delays to appellate determinations.

20.79 The Commission considers that the *Federal Court of Australia Act 1976* should be amended to expand the categories of cases in which a first appeal requires the leave of the Court. The categories should include other specified categories of procedural appeals in addition to interlocutory appeals. This change would improve the clarity and accessibility of the law. The Commission notes that the Federal Court has proposed amendments to its Rules of Court to provide for specific types of judgments for which leave to appeal is necessary.

20.80 The Commission favours legislation setting out the criteria for granting leave in such cases. The use of non-exhaustive criteria would provide the Federal Court with flexibility to deal with the circumstances of individual cases. It would

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917 D Graham QC, *Consultation*, Melbourne, 15 February 2001; Federal Court of Australia, *Consultation*, Sydney, 31 January 2001; Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.

918 *Thomas Borthwick & Sons (Pacific Holdings) Ltd v Trade Practices Commission* (1988) 18 FCR 424; *Reid v Nairn* (1985) 60 ALR 419; *Wati v Minister for Immigration & Multicultural Affairs* (1997) 78 FCR 543.

improve the accessibility and clarity of the law, and may assist litigants (particularly litigants in person) in assessing their chances of success. The fundamental test should be whether the applicant has an arguable case that the appeal would succeed if leave to appeal were granted.

20.81 The *Federal Court of Australia Act 1976* should also be amended to provide that an application for leave to appeal shall be determined by a court that does not include the judge whose decision is the subject of the application for leave to appeal. The Commission's recommendation would keep the trial and appellate processes distinct by ensuring that the judge whose decision is in question does not have to pass judgment on the likelihood of his or her decision being overturned on appeal. This recommendation entails a change to the Federal Court's current practice whereby the trial judge may grant leave to appeal.

20.82 Consultations and submissions strongly supported the view that the Federal Court's decision to grant or refuse leave to appeal should itself be immune from appeal. The Commission supports that view. The possibility of further appeal would protract a process that has been introduced for the purpose of streamlining the appellate system. The Commission notes that review of a leave determination would be a review of the exercise of a wide discretion. In accordance with established principles, any reviewing court would be limited in the grounds on which it could overturn the leave determination.[919] This suggests that there is little point in allowing review of a determination to grant or refuse leave to appeal from a decision regarding an interlocutory or procedural matter.

20.83 The Commission also considers, in accordance with a majority of consultations and submissions, that there is no need for a statutory power to rescind leave. The appellate court has the power to refuse leave. This appears to the Commission to be a satisfactory mechanism for disposing of unmeritorious leave applications.

Recommendation 20–4. An appeal to a Full Court of the Federal Court from a judge exercising original federal jurisdiction should continue to lie as of right and not by leave of the Court. However, the Attorney-General should order a review of this issue within five years of the publication of this Report. In the interim, the *Federal Court of Australia Act 1976* should be amended to expand the categories of cases in which a first appeal requires the leave of the Court to include, in addition to interlocutory appeals, other specified categories of procedural appeals.

919 *House v The King* (1936) 55 CLR 499.

Recommendation 20–5. In those cases in which a first appeal can be taken from a trial judge to a Full Court of the Federal Court only by leave of the Court, the *Federal Court of Australia Act 1976* should be amended to:

(a) set out non-exhaustive criteria by which the discretion to grant or refuse leave is exercised;

(b) provide that an application for leave to appeal shall be determined by a Court that does not include the judge whose decision is subject to the application for leave to appeal; and

(c) provide that an order granting or refusing leave to appeal should itself be immune from appeal.

Two Judge Courts of Appeal

20.84 Intermediate appellate courts in Australia are usually constituted by a bench of three judges.[920] However, in some Australian jurisdictions and in some foreign countries two judge appellate benches are used in an effort to improve the efficiency of the appellate system. This section examines whether the Federal Court should use two judge appellate benches and in what circumstances. The section also discusses the issue of how a difference of opinion should be resolved when two judges differ as to the outcome of the appeal.

Current practice in the Federal Court

20.85 Chapter 18 discussed the large and growing appellate workload of the Federal Court. In DP 64, the Commission observed that the use of appellate benches comprising two judges may be able to alleviate caseload pressures in the Federal Court.[921] Chapter 21 discusses two judge panels in the Family Court.

20.86 Section 25(1) FCAA provides that the appellate jurisdiction of the Federal Court shall be exercised by a Full Court. Section 14(2) provides that a Full Court consists of three or more judges sitting together, subject to a few minor exceptions. In practice, the overwhelming majority of Full Courts are comprised of three judges.

20.87 Provision is made in the *Federal Court of Australia Act 1976* for some appeals to be heard by a Full Court comprising five judges. One example of this is found in s 25(4), which provides that the jurisdiction of the Federal Court in an

920 Intermediate appellate courts may sit with more than three judges in special circumstances, such as to address apparent conflicts between earlier decisions of the court, or to issue warnings to the profession.

921 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.274–4.277.

appeal from a judgment of the Supreme Court of a Territory comprised of two or more judges shall be exercised by a Full Court constituted by not less than five judges.[922] Another example is the practice of sitting five judges on an appellate bench to resolve inconsistent decisions of different Full Courts. This practice is dealt with in more detail in the next section of this chapter.

20.88 The *Federal Court of Australia Act 1976* also provides for two judge panels, but only in very limited situations. Under s 14(3), if one of the judges constituting the Full Court dies, resigns his or her office or is otherwise unable to continue to sit as a member of the Full Court for the purposes of the particular proceeding, the two remaining judges can continue to hear the appeal as a Full Court, provided the parties consent.[923]

20.89 Some appeals may be heard by a single judge instead of a Full Court. If the appeal is from a court of summary jurisdiction, for example a state magistrates court, the Federal Court's appellate jurisdiction may be exercised by a single judge or by a Full Court.[924]

20.90 Additionally, where an appeal is brought to the Federal Court from a judgment of the Federal Magistrates Service, the Federal Court's appellate jurisdiction will be exercised by a Full Court. However, in appropriate cases the Chief Justice may direct that the appellate jurisdiction of the Court be exercised by a single judge (s 25(1A)). Broadly speaking, the Chief Justice examines the appeal and the extent to which the case involves complex or novel issues.

20.91 Finally, it should be noted that a number of procedural applications relating to appeals, while not themselves involving the exercise of appellate jurisdiction, may be determined by a single judge (s 25). These include applications for leave to appeal, for an extension of time within which to institute an appeal, or to amend the grounds of an appeal.

Alternative and comparative models

20.92 Several Australian jurisdictions currently allow for the hearing of certain appeals by panels comprised of only two judges.[925] Some of these make provision in legislation for the types of appeals that can be so determined and how an equal division of opinion is to be resolved.

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922 For an example of this, see *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.

923 *Silkfield Pty Ltd v Wong* [1998] FCA 1645 (Unreported, Federal Court of Australia, O'Loughlin and Drummond JJ, 17 December 1998). See also *Atlantis Corporation Pty Ltd v Schindler (No 3)* [2000] FCA 1758 (Unreported, Federal Court of Australia, Wilcox and Lindgren JJ, 6 December 2000).

924 s 25(5) FCAA.

925 See for example *Supreme Court Act 1935* (WA), s 57 and O 63A of the Rules of the Supreme Court (WA), which allow appeals on interlocutory matters to be heard by a Full Court of the Supreme Court constituted by two judges unless a judge or the Full Court directs otherwise; *Supreme Court Civil Procedure Act 1932* (Tas), s 14(a); *Supreme Court Act 1970* (NSW), s 46A.

20.93 In Western Australia, Tasmania, New South Wales and Victoria, the relevant legislation makes provision for certain civil appeals to be heard by two judges.[926] In Queensland, two judge Courts of Appeal are provided for in the rules of court.[927]

20.94 State legislation sets out the circumstances in which two judge panels may hear a case. In Victoria, the types of matters that can be heard by two judge panels are set out in the rules of court and include appeals from interlocutory applications and applications for expedition.[928] In Queensland, two or more judges can exercise the jurisdiction of the Court of Appeal in all civil proceedings except in relation to appeals from judgments or orders given or made by a Supreme Court judge.[929] In New South Wales, the categories include appeals from any court where the appeal is only in relation to the amount of damages awarded for the death of or injury to a person; appeals from the Compensation Court or Dust Diseases Tribunal in relation to the amount of compensation awarded; and appeals from a court or tribunal (other than the Supreme Court) where leave of the Court of Appeal is required in relation to the appeal and the appeal is not against a final judgment, order, award or decision of the court or tribunal.[930]

20.95 Legislation in Victoria and New South Wales stipulates who decides whether a bench of two appellate judges will be convened. In Victoria, the President of the Court of Appeal has the discretion to determine whether a matter is one that can be decided by a bench of two judges.[931] In New South Wales, the Chief Justice of the Supreme Court may direct that an appeal be decided by two judges.[932] The direction of the Chief Justice is only given, however, if he or she is of the opinion that the appeal is not likely to require the resolution of a disputed issue of general principle.[933]

20.96 There are three approaches to resolving a division of opinion of a two judge appellate bench, which are exemplified by the practice of different States.

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926 s 57 *Supreme Court Act 1935* (WA); s 14(a) *Supreme Court Civil Procedure Act 1932* (Tas); s 46A(1) *Supreme Court Act 1970* (NSW); s 11(1A) *Supreme Court Act 1986* (Vic).

927 s 30(4) *Supreme Court of Queensland Act 1991* (Qld) provides for a rule of court to allow the jurisdiction of the Court of Appeal to be exercised by less than three judges of appeal in particular kinds of proceedings.

928 *Supreme Court Act 1986* (Vic); O 64 r 27 *Supreme Court (General Civil Procedure) Rules 1996* (Vic).

929 *Supreme Court of Queensland Act 1991* (Qld); R 766(3) *Uniform Civil Procedure Rules 1999* (Qld). A two judge Court of Appeal may also hear applications in criminal proceedings for leave to appeal and in applications in criminal proceedings for an extension of time within which to appeal or to apply for leave to appeal.

930 s 46A(1) *Supreme Court Act 1970* (NSW).

931 s 11(1A) *Supreme Court Act 1986* (Vic).

932 s 46A(2) *Supreme Court Act 1970* (NSW).

933 s 46A(3) Ibid.

20.97 In Western Australia, in the event of an equal division of opinion, either party to the appeal may serve a notice requiring the appeal to be reheard before a Full Court of at least three judges.[934] In Tasmania, where there is equal division of opinion, the opinion of the senior judge prevails.[935] There is an exception where there is an appeal from a judgment or order of a judge who is not sitting as a member of the court hearing the appeal, in which case the judgment or order appealed from is affirmed.

20.98 In New South Wales, if two judges are divided in opinion, the method of resolution depends on whether the decision is one that determines the proceedings. If it is such a decision, the appeal must be reheard by a bench of three Judges of Appeal. If it is not such a decision, then the outcome is determined by the decision of the senior judge of the panel.[936] In Victoria, a division of opinion between two judges is resolved by a rehearing before at least three judges.[937]

20.99 The Bowman Report on the English Court of Appeal recommended that consideration be given to the greater use of two judge appellate courts, at least where no fundamental point of principle or practice is involved.[938] As a result of the recommendations of the Bowman Report, the *Access to Justice Act 1999* (UK) was enacted. Section 59 of that Act provides that, subject to certain discretions, a court is duly constituted for the purpose of exercising any of its jurisdiction if it consists of one or more judges.[939]

Options for constituting two judge intermediate appellate benches

20.100 The models currently employed in various Australian jurisdictions, together with the proposals suggested by the Federal Court and the Law Council of Australia, which are discussed below, point to a number of options for constituting intermediate appellate courts and resolving divisions of opinion between the judges.

20.101 In September 1999 a report on two judge appeal panels written by Justice von Doussa and Justice Sackville of the Federal Court proposed the introduction of two judge appeal panels for particular categories of case.[940] The report was considered at a judges' meeting in April 2000 and the Court's proposal has been sent to the Attorney-General for consideration. The main features of the proposal are as follows.

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934 s 62(2) *Supreme Court Act 1935* (WA).
935 s 15(9)(a) *Supreme Court Civil Procedure Act 1932* (Tas).
936 s 46A(6)(a) *Supreme Court Act 1970* (NSW).
937 s 12(1) *Supreme Court Act 1986* (Vic).
938 G Bowman (1997), 144, rec 36.
939 Prior to this, s 54(4) of the *Supreme Court Act 1981* (UK) provided that two judge benches may be constituted to hear certain types of appeals, including appeals against interlocutory judgments, applications for leave to appeal, county court appeals and appeals against any decision of a Lord Justice exercising the incidental jurisdiction of the Court of Appeal.
940 von Doussa J and Sackville R (1999).

- The categories of cases suggested for two judge appeal panels are: applications for leave to appeal; applications for extension of time within which to appeal or to apply for leave to appeal; appeals from the refusal of ex parte injunctions; proceedings involving matters of practice and procedure within the appellate jurisdiction; appeals on matters of practice and procedure; and (if practicable) appeals to the Court from a judgment of the Federal Magistrates Service.

- Division of opinion between judges of a two member panel is to be resolved by the panel calling in a third judge where it is considered desirable. This could occur either before or after the hearing and by consent of the parties. The Chief Justice would be consulted about the selection of the third judge and a provision would be included that a third judge must be called in when the two judge panel cannot agree.

- The Chief Justice retains the overriding discretion to convene a two judge bench or a three judge bench, even where the particular matter is not within the category of matters ordinarily heard by either a two judge panel or a three judge panel.

20.102 As part of an earlier review of the federal civil justice system, the Commission received a number of proposals on how two judge appellate benches could be introduced in the Federal Court. The Law Council of Australia submitted that instead of constituting two judge panels at the discretion of the Chief Justice, as the Commission had initially proposed, it would be more appropriate for legislation to provide categories of cases in which two judge appellate benches may be used, with the discretion left to the Chief Justice to constitute them. The Commission's final report made no specific recommendations on the topic.[941]

Submissions and consultations

20.103 Of those who favoured two judge appellate panels in the Federal Court, there was a preference for their use in procedural and interlocutory matters rather than in substantive matters.[942]

20.104 The Federal Court supported the option and advised that it had already proposed to the Attorney-General that the *Federal Court of Australia Act 1976* be amended to enable a Full Court to be constituted by a two judge panel in certain matters.[943] The categories of matters were similar to those proposed by Justice von Doussa and Justice Sackville.

941 Australian Law Reform Commission, Report No 89 (2000), para 7.37–7.40.

942 The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001; Law Society of Western Australia, *Consultation*, Perth, 23 March 2001; Law Institute of Victoria, *Consultation*, Melbourne, 15 February 2001.

943 Federal Court of Australia, *Consultation*, Sydney, 31 January 2001.

20.105 The Law Council of Australia favoured certain interlocutory and procedural appeals being decided by a Full Court of two judges but emphasised the need to clarify what is meant by a 'procedural appeal'.[944] There was also some opposition to the use of two judge appellate benches in any type of matter.[945]

20.106 The most controversial issue raised in consultations and submissions was how a division of opinion between the two judges should be resolved. The following alternatives were suggested:

- the opinion of the more senior judge should prevail;
- the decision appealed from should be affirmed;
- a third judge should be brought in to resolve the division of opinion; or
- a new bench of three should be constituted and the matter reheard.

20.107 There was a concern that where two judges do not agree, the reconstitution of the bench with three judges or a rehearing would be costly for the parties and the Court.[946] The Solicitor-General for Victoria, Douglas Graham QC, was in favour of reconvening the court with three judges to review a split decision as it 'would allow a concurrence of minds and judgment' and 'the communication between the three judges could result in a unanimous view'.[947]

20.108 There were differences of opinion as to whether the categories of case in which two judge benches may be used should be set out in legislation or left to the discretion of the Chief Justice. The Law Council of Australia and the Law Institute of Victoria were opposed to the Chief Justice having a discretion to determine the relevant categories of case.[948]

Commission's views

20.109 The Commission considers that the *Federal Court of Australia Act 1976* should be amended to permit certain interlocutory and procedural appeals to be determined by a Full Court comprising two or more judges. This recommendation does not involve a dramatic departure from the current practice of the Federal Court, given that one and two judge appellate panels are already used in some

944 Law Council of Australia, *Correspondence*, 20 April 2001.
945 W Bale QC, *Correspondence*, 23 April 2001; South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001.
946 R Gotterson QC, *Consultation*, Brisbane, 9 March 2001; Law Institute of Victoria, *Consultation*, Melbourne, 15 February 2001.
947 D Graham QC, *Consultation*, Melbourne, 15 February 2001.
948 Law Council of Australia, *Correspondence*, 20 April 2001; Law Institute of Victoria, *Consultation*, Melbourne, 15 February 2001.

circumstances. The types of matters in which this might be done include those identified above in relation to the Federal Court's proposal to the Attorney-General's Department.

20.110 There is established precedent for the use of two judge appellate benches in Australian courts. Many state Supreme Courts already have such an arrangement in place and, on the information available to the Commission, they appear to be working satisfactorily.

20.111 It is also significant that the Federal Court itself considers the proposal to be advantageous to its appellate case management. Availability of the facility would enable judicial resources to be better utilised, resulting in cost reductions and time savings for the Court and parties. There may also be practical advantages in terms of the convenience and speed with which a two judge bench can be convened in comparison with a conventional three member bench. Moreover, the experience of state courts to date is that disagreement between the two judges comprising the court is infrequent. Where it does arise, the Commission recommends suitable processes to resolve a split decision, as discussed below.

20.112 The Commission is of the view that within the classes of appeal that can be determined by a Full Court of two judges the *Federal Court of Australia Act 1976* should grant the Chief Justice a discretion to constitute a Full Court with two or more judges as he or she sees fit. This discretion would merely be an extension of the responsibility of the Chief Justice under s 15 to organise the business of the Court. This reflects the view of the Lord Chancellor's Department in responding to the recommendations of the Bowman Report on the English Court of Appeal.

> Valuable resources should not be devoted to cases which have no real need of them. A move towards allowing judicial discretion to determine the constitution of the court according to the individual nature of the case sits well with the general principle of introducing greater case management, which runs through the whole of the civil justice reforms.[949]

20.113 Where a Full Court is constituted by two judges, the Commission considers that the Court should adopt internal procedures to identify the likelihood of disagreement at an early stage of the appellate proceedings. These procedures would help to determine whether one or more additional judges should be added to the panel at an early opportunity, preferably before the hearing has commenced.

20.114 The Commission is also of the view that the legislation should set out the method of resolving a conflict where there is a division of opinion between the judges comprising a two judge panel. Legislation should provide for the appeal to be redetermined before a bench comprising three or more judges, who may include

949 Lord Chancellor's Department (1998), ch 2 para 2.

the judges who heard or were listed to hear the original appeal. In the Commission's view, other methods of resolving the impasse, such as having the opinion of the senior judge prevail, may adversely affect the public perception of justice by encouraging the view that only the opinion of the senior judge is significant.

Recommendation 20–6. The *Federal Court of Australia Act 1976* should be amended to permit certain classes of appeals (namely, certain interlocutory and procedural appeals) to be determined by a Full Court comprised of two or more judges. Within those classes, the Chief Justice should be granted a discretion to constitute a Full Court with such number of judges (being no less than two) as he or she thinks fit.

Recommendation 20–7. Where a Full Court of the Federal Court is constituted by two judges, the Court should adopt internal procedures to identify the likelihood of disagreement at an early stage of the appellate proceedings in order to facilitate the inclusion of one of more additional judges in the panel.

Recommendation 20–8. Where a Full Court of the Federal Court is constituted by two judges and there is a difference of opinion as to the outcome of the appeal, the *Federal Court of Australia Act 1976* should provide for the appeal to be redetermined before a bench comprising three or more judges, who may include the judges who heard the original appeal.

Decisional Harmony within the Federal Court

20.115 During the course of this inquiry concerns were raised about the degree of consistency in decision making in the Federal Court's appellate jurisdiction. These concerns focused on the effect of the size of the Court, its national jurisdiction, the high volume of appeals particularly in areas such as migration, and its current use of appellate panels with rotating membership.

20.116 This section of the chapter considers the current law and practice in the Federal Court regarding inconsistency of decisions, the Court's practice in composing appellate panels, and the structural alternatives to the current system of using appellate panels with rotating membership.

Current law and practice

20.117 The governing principle in determining whether an intermediate appellate court, such as a Full Court of the Federal Court, should depart from an established precedent is that a court should only do so where it considers that the previous

decision is 'plainly wrong'. In *Australian Securities Commission v Marlborough Gold Mines Ltd*, the High Court considered the failure of a Full Court of the Supreme Court of Western Australia to follow a decision of a Full Court of the Federal Court on the interpretation of a provision of the *Corporations Law*, which was at that time a national legislative scheme comprising federal, state and territory laws.[950] In relation to comity between intermediate appellate courts, the High Court remarked:

> uniformity of decision … is a sufficiently important consideration to require that an intermediate appellate court — and all the more so a single judge — should not depart from an interpretation … by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong.[951]

20.118 This principle applies not only to different intermediate appellate courts within the Australian judicial system but to differently constituted appellate panels within a single court, such as the Federal Court.

20.119 During the course of consultations, it became apparent that there were significant differences of opinion as to the extent of the problem of inconsistency in the Federal Court.

20.120 As one means of considering the extent of inconsistency, the Commission examined the number of times the Federal Court had specially constituted a Full Court of five judges during the five year period from 1996 to 2001. The use of five judge benches is one acknowledged response to the problem of inconsistency in an intermediate appellate court.

20.121 During this five year period, a five judge bench was used on 11 occasions and the resolution of inconsistency was a predominant feature in four of these, as follows.

- *Esso Australia Resources Ltd v Commissioner of Taxation* concerned an inconsistency in Full Court decisions on the interpretation of ss 118 and 119 of the *Evidence Act 1995* (Cth) in relation to the production of certain documents and the test of legal professional privilege.[952]

- *Transurban City Link v Allan* involved the question of a person's standing to sue in respect of an administrative decision.[953]

950 See now *Corporations Act 2001* (Cth).
951 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.
952 *Esso Australia Resources Ltd v Commissioner of Taxation* (1998) 83 FCR 511.
953 *Transurban City Link Ltd v Allan* (1999) 95 FCR 553.

- *Australian Steel Company (Operations) Pty Ltd v Lewis* related to what matters must be included in a bankruptcy notice.[954] Unusually, the case involved the exercise of original, not appellate, jurisdiction because the Chief Justice directed that the matter commenced in the original jurisdiction be heard before a Full Court pursuant to s 20(1A) FCAA.

- *Minister for Immigration and Multicultural Affairs v Singh* ('*Singh*'),[955] concerned the necessity for a tribunal to give reasons for rejecting evidence inconsistent with findings of material fact. This case is discussed below.

20.122 The identification of four occasions of inconsistency potentially underestimates the extent of the problem. Where a decision of a five judge bench is used to resolve inconsistency, there will generally be at least two other decisions of a Full Court in conflict with each other. Moreover, there may be cases in which inconsistency occurs but the issue is clarified by an appellate bench of three judges, or is resolved by a High Court decision or legislative change, or the issue is not pursued by the parties. In some cases the inconsistency may not yet be resolved. These situations are not picked up in the cases considered by the Commission.

20.123 Taking these additional considerations into account, the absolute number of inconsistent decisions in the Federal Court is still unlikely to be large. Whatever the precise figure, it must be seen against the fact that in the past five years 1,736 appeals were filed in the Federal Court as Full Court matters.[956]

20.124 In addition to the quantitative dimensions of the problem, consultations also raised the issue of the qualitative effect of inconsistent decisions on the rule of law. This aspect of the problem can be seen by examining the conflicting decisions given in the migration jurisdiction.

20.125 In *Singh*, a Full Court comprising five judges was convened to settle the inconsistency arising from two Full Court decisions handed down within a short time of each other in *Yusuf*[957] and *Xu*.[958] The inconsistency concerned a difference of opinion in the interpretation of ss 430 and 476 of the *Migration Act 1958* (Cth).

20.126 On 17 December 1999, a Full Court in *Xu* (Whitlam and Gyles JJ, RD Nicholson J not deciding) held that s 430 of the *Migration Act* did not require the Refugee Review Tribunal (RRT) to give reasons for rejecting evidence inconsistent with findings of material fact. Two weeks earlier, on 2 December 1999, a Full Court in *Yusuf* (Heerey, Merkel and Goldberg JJ) had held to the contrary.

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954 *Australian Steel Company (Operations) Pty Ltd v Lewis* [2000] FCA 1915 (Unreported, Federal Court of Australia, Black CJ, Lee, Heerey, Sundberg and Gyles JJ, 22 December 2000).
955 *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469.
956 Federal Court of Australia (2000), 142, Figure 6.9.
957 *Minister for Immigration and Multicultural Affairs v Yusuf* (1999) 95 FCR 506.
958 *Xu v Minister for Immigration and Multicultural Affairs* (1999) 95 FCR 425.

20.127 In their joint judgment in *Xu,* Whitlam and Gyles JJ acknowledged that they had received a copy of the *Yusuf* decision after their reasons in *Xu* were substantially written.[959] However, that decision did not affect their own conclusions as they stated that they had 'already dealt with the authorities referred to by their Honours'.[960] In *Xu*, RD Nicholson J stated that the *Yusuf* decision and the line of authorities referred to therein were in need of further argument.[961]

20.128 An important feature of the Full Court appeals in these two cases was that argument in *Xu* was heard five days before argument was heard by the differently constituted Full Court in *Yusuf*. At the time judgment was delivered in *Yusuf*, the Court's judgment in *Xu* was still reserved. Whether the Full Court in *Yusuf* was aware that an appeal had been heard and judgment reserved in *Xu* is not a matter of public record.

20.129 The inconsistency between these Full Court decisions had repercussions for subsequent Federal Court cases. In *Montes-Granados*,[962] Burchett J decided on 4 January 2000 that *Yusuf* was the preferable judgment and that the observations of Whitlam and Gyles JJ in *Xu* should not be read as anything more than obiter dicta. Furthermore, Burchett J stated that he was bound to follow the Full Court in *Yusuf*:

> If Whitlam and Gyles JJ had intended actually to overrule *Yusuf* and the array of authorities on which it depended, they would have needed to have found *Yusuf*, in particular, to be 'plainly wrong', a conclusion they do not approach in their brief mention of it.[963]

20.130 In a decision on 10 February 2000 in *Zheng*,[964] a Full Court comprising Hill, Whitlam and Carr JJ had to consider whether to follow *Xu* or *Yusuf*. Hill J said that it was apparent from a reading of the judgment in *Xu* that Whitlam and Gyles JJ were convinced that the decision in *Yusuf* was plainly wrong.[965] Hill J preferred to follow *Yusuf* but said that the whole question should be dealt with again by a Full Court.[966] Whitlam J adhered to the views he expressed in *Xu*.[967] Carr J expressed a provisional view that *Yusuf* should be followed.[968]

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959 Ibid, 436.
960 Ibid, 437.
961 Ibid, 452.
962 *Montes-Granados v Minister for Immigration and Multicultural Affairs* [2000] FCA 60 (Unreported, Federal Court of Australia, Burchett J, 4 February 2000).
963 Ibid, para 16.
964 *Minister for Immigration and Multicultural Affairs v Zheng* [2000] FCA 50 (Unreported, Federal Court of Australia, Hill, Whitlam and Carr JJ, 10 February 2000).
965 Ibid, para 32.
966 Ibid, para 33.
967 Ibid, para 46.
968 Ibid, para 60.

20.131 In *Singh*, a Full Court comprising five judges was specially convened to consider the merits of the competing decisions in *Xu* and *Yusuf.* In its decision on 30 June 2000 the Full Court commented:

> The principled, consistent and predictable development of the law ordinarily requires that in those infrequent and exceptional cases in which it can be said that departure from previous authority is warranted on the ground that it is clearly or plainly wrong … the question whether such a departure is warranted in accordance with the principles permitting it should be directly and specifically addressed.[969]

20.132 In *Singh* it was decided by a majority of four to one that *Yusuf* was to be preferred to *Xu*. This, however, was not the end of the matter. The High Court had granted special leave to appeal from the decision of the Full Court of the Federal Court in *Yusuf*. On 31 May 2001 the High Court gave judgment in which it effectively overruled *Singh*.[970]

Federal Court practice for determining appellate benches

20.133 Under s 15 FCAA, the Chief Justice of the Federal Court is responsible for ensuring the orderly and expeditious discharge of the business of the Court. Accordingly, he or she is required to make arrangements as to the judges who are to constitute the Court in particular matters or classes of matters, subject to such consultation with the judges as is appropriate and practicable.

20.134 The Federal Court does not have a permanent appellate court but instead draws from its general pool of judges in determining the composition of each appellate bench.

20.135 The Federal Court holds four appellate sessions annually of up to 100 cases per session, which means that the Court convenes about 400 appellate panels across Australia per year (see Chapter 18).

20.136 During consultations, the Federal Court advised the Commission that the allocation of judges to appellate benches was far from random.[971] It was noted that allocation was a complex exercise because of the number of judges involved, the number of annual appeals, and the desirability of organising the Court's appellate work on a national basis. The Commission was advised that the following considerations are taken into account in constituting appellate panels:

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969 *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469, 475 (Black CJ, Sundberg, Katz and Hely JJ). See also *Nguyen v Nguyen* (1990) 169 CLR 245, 269; *Transurban City Link Ltd v Allan* (1999) 95 FCR 553, 560.

970 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1.

971 Federal Court of Australia, *Consultation*, Sydney, 31 January 2001; Federal Court of Australia, *Consultation*, Melbourne, 6 March 2001.

- matching the subject matter of the appeal with the specialisation and interests of judges, particularly in intellectual property, taxation and admiralty;

- balancing the seniority of the judges on the appellate bench;

- balancing the seniority of the trial judge with that of the presiding judge in the appeal;

- the availability of judges in light of other judicial commitments;

- any conflicts of interest;

- the desirability of mixing judges from different geographic areas to consolidate the national character of the Court;

- the desirability of having a 'home state' judge on the bench;

- the need to hear appeals in the State or Territory in which the matter was originally heard and determined; and

- the capacity to write judgments quickly.

20.137 The process by which these factors are taken into account was said to be a time-consuming one. It involved the preparation of a draft by the Chief Justice's staff, review by the call-over judge in each State or Territory, revision by the Chief Justice, and circulation among the judges.

Structure of Appellate Courts

20.138 There are alternative models to that currently adopted by the Federal Court in the organisation of its appellate benches. In general terms, there are three basic models for the structure of an appellate court.

- Rotating membership. Under this model there is no permanent appellate court but instead appellate panels are constituted for each appeal from the general pool of judges at first instance. This is the model currently used by the Federal Court, and by the Supreme Courts of Western Australia,[972] South Australia and Tasmania.

972 *Supreme Court Act 1935* (WA), s 7.

- Permanent judges of appeal. Under this model, appellate work is carried out exclusively by judges of appeal, who do no routine work at first instance. The Court of Appeal of New South Wales and the Court of Appeal of Victoria are constituted in this fashion.[973]

- Hybrid model. The Family Court uses a hybrid model, combining the permanent and rotation models. The Family Court has distinct trial and appellate divisions. A Full Court of the Family Court may be comprised partly of permanent appellate judges from the Appeals Division, and partly of judges from the Court's General Division, who ordinarily hear cases at first instance but also sit on appeals in rotation.[974] This hybrid model is also adopted in some intermediate state appellate courts, such as the New South Wales Court of Criminal Appeal and the Queensland Court of Appeal.

20.139 These models are not rigidly followed in practice and courts have introduced changes to the basic structures. For example, some permanent state appellate courts can appoint trial judges as acting judges of appeal.[975] Conversely, the practice of the Federal Court in utilising the specialist expertise of particular judges produces an effect similar to a court comprising permanent judges of appeal.

20.140 In DP 64 the Commission asked whether a rotating membership model, such as that used by the Federal Court, has created problems in ensuring consistency in approach and outcome between different panels drawn from a pool of judges.[976] This issue was commonly addressed in consultations and submissions.

Consultations and Submissions

20.141 As discussed below, a number of those consulted were of the view that a rotating membership model of appellate structure was a significant factor underlying inconsistent judgments in the Federal Court. Others contended that where inconsistency did occur, the Federal Court sitting as an appellate bench of five, or the High Court, could resolve the inconsistencies satisfactorily.

20.142 Consultations revealed differences of opinion as to the causes of inconsistency in Full Court judgments. Some suggested that this was an issue of judicial culture and that changing the appellate structure of the Court would not deal with it.[977] Justice Drummond of the Federal Court submitted that inconsistency between Full Courts of the Federal Court was rarely accidental and was

973 M Kirby (1987); M Kirby (1988).
974 s 4 FLA, defining 'Full Court'.
975 Supreme Court of Victoria, *Consultation*, Melbourne, 16 February 2001.
976 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.265.
977 Federal Court of Australia, *Consultation*, Sydney, 31 January 2001.

generally the result of judges on a later Full Court deliberately disagreeing with the decision of an earlier court.[978] Others suggested that inconsistency arose because of basic disagreements about the way in which a particular area of law should develop.

20.143 There was some difference in opinion among Federal Court judges as to the significance of the problem of inconsistency. Some considered that it had not been demonstrated to be a major problem.[979] Others thought that the problem was more significant. One view was that inconsistency was largely limited to non-panel areas such as migration or to newer fields of jurisdiction where jurisprudence was less developed.[980] Justice Drummond suggested that inconsistency in the migration area appeared to be the result of the reaction of different judges to the problems thrown up by refugee litigation, exacerbated by Parliament's attenuation of the Federal Court's review powers in such cases.[981]

20.144 The Federal Court submitted that overwhelmingly there *was* consistent decision making and that instances of inconsistency were few, although regrettable.[982] In relation to inconsistency arising from differing interpretations of the 'plainly wrong' test, the Federal Court stated that:

> Differences in opinion between the scholarly but strong-minded people that constitute the members of the Supreme and Federal Courts will occur from time to time. … Differences will exist — not often, but sometimes — in all courts and more often between courts about the application of the 'clearly wrong' test in particular cases. …
>
> Moreover, inconsistency is found in all busy appellate courts … [A] few instances of divergence do not justify a change in the present structure. They must be placed in the context of what happens in all appellate courts of any size.[983]

20.145 The Federal Court also referred to the following measures that it had implemented to reduce inconsistencies.

- Appointment of a National Appeals Manager, whose responsibilities include identifying similar issues arising in different cases, and advising the Chief Justice how best to constitute appellate panels.
- A bi-monthly judges' newsletter that includes information about forthcoming cases.

978 The Hon Justice D Drummond, *Submission J024*, 16 March 2001.
979 Ibid.
980 The Hon Justice R Sackville, *Consultation*, Sydney, 12 February 2001; The Hon Justice D Drummond, *Submission J024*, 16 March 2001; W Soden, *Consultation*, Sydney, 13 March 2001.
981 The Hon Justice D Drummond, *Submission J024*, 16 March 2001.
982 Federal Court of Australia, *Submission J039*, 20 April 2001.
983 Ibid.

- The introduction of *Practice Note No. 1* (Appeals to a Full Court), which requires parties to advise the Court 'whether the issues raised in the matter highlight a question of law where there is currently a conflict within the Court'. This requirement enables the Court to ensure that an appellate bench is constituted so as to resolve the conflict.

- The use of five member appellate benches in appropriate cases.

20.146 Those who supported the Federal Court continuing with its rotating membership model suggested the following reasons for that view.

- The nature of the Federal Court's jurisdiction makes this model suitable because a substantial proportion of the work of the Court is either appellate in fact or in substance, or else involves legal questions of the same general character as those that arise commonly in appellate work.[984]

- Nearly all judges of the Federal Court had large appellate practices at the Bar and therefore have relevant experience in performing appellate work.

- The process of selection and constitution of appellate panels by the Chief Justice enables the Court to ensure that many matters are determined by judges with judicial experience and expertise in the particular type of case.

- The current model assists in attracting high quality judicial appointments because of the combination of appellate and trial work, which improves the quality and efficiency of the Court's performance.[985]

- The current model encourages judicial collegiality as all judges are seen as equal and are treated equally. There is not the sense of hierarchy that a permanent appellate bench can create.

20.147 The Family Court expressed the view that inconsistency in appellate decision making could be a significant problem for courts. The Family Court considered that the rotating membership model created greater problems in ensuring consistency in decision making.[986] This was said to be the principal reason for the Family Court moving away from that model to its present hybrid model.

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984 The Hon Justice D Drummond, *Submission J024*, 16 March 2001; A Tokley, *Submission J023*, 16 March 2001; Federal Court of Australia, *Consultation*, Sydney, 31 January 2001.

985 Federal Court of Australia, *Submission J039*, 20 April 2001; D Bennett QC, *Consultation*, Sydney, 20 February 2001.

986 Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.

20.148 Some state court judges considered that the experience throughout Australia indicates that permanent appellate courts overall produce better results, including greater consistency in judgments.[987] Over the past 40 years, Courts of Appeal have been introduced in New South Wales, Victoria and Queensland. There is also a proposal for a permanent Court of Appeal in Western Australia, which was said to be well advanced.[988]

20.149 There was a mixed response from the legal profession about the extent and significance of inconsistency in the Federal Court's appellate decision making and what should be done to reduce any inconsistency.

20.150 The Victorian Bar Association did not consider that inconsistency was a great problem.[989] It thought that better liaison within the Court, the use of five judge appellate benches, and reliance on the High Court's appellate jurisdiction could sort out any problems. The Bar Association saw no pressing need for a permanent appellate court, nor did it think that this was an issue for the legal profession or litigants.

20.151 There was a difference of opinion between the Law Society of South Australia and that State's Bar Association.[990] One view was that anecdotal evidence indicated that the Federal Court could benefit from the establishment of a permanent appellate court to reduce inconsistencies, especially in migration cases. The opposing view was that the current system was useful in enabling appellate judges to understand trial work and trial pressures. There was also acknowledgment that a change to the Court's appellate structure would cause difficulties during the transitional period.

20.152 Other legal practitioners considered that the changes to a permanent appellate court in New South Wales and Victoria had been very successful and demonstrated the superiority of a permanent appellate structure.[991] David Jackson QC commented that a permanent court was better because such a system ensured that appellate work was done by those judges who were best suited and qualified for it.[992] A permanent court model allows appeal judges to build their expertise so that they are able to deal with appellate cases with skill and efficiency. For example, they are better able to dispose of unmeritorious appeals. Another view was that the Federal Court had reached a size where a change in model was appropriate.[993]

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987 Court of Appeal (NSW), *Consultation*, Sydney, 19 March 2001.
988 Supreme Court of Western Australia, *Consultation*, Perth, 22 March 2001.
989 Victorian Bar Association, *Consultation*, Melbourne, 6 March 2001.
990 South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001.
991 D O'Brien, *Consultation*, Canberra, 22 February 2001; D Graham QC, *Consultation*, Melbourne, 15 February 2001.
992 D Jackson QC, *Consultation*, Sydney, 5 March 2001.
993 R Meadows QC, *Consultation*, Perth, 22 March 2001.

Commission's views

20.153 There is a well recognised need for consistency in appellate decision making. A number of adverse consequences flow from a situation in which two intermediate appellate courts, or two differently constituted panels of the one court, reach different conclusions on the same legal question. In particular, inconsistency:

- creates injustice in individual cases because it offends against the principle that like cases should be treated alike;
- makes it difficult for legal practitioners to give correct and reliable advice to clients;
- increases costs and delays in disposing of cases, occasionally requiring five judge appellate benches or a High Court decision; and
- damages perceptions about the administration of justice and the reputation of courts generally.

20.154 The history of Federal Court and High Court appeals culminating in the High Court's decision in *Yusuf*[994] demonstrates the dangers of appellate inconsistency. In that instance inconsistency led to uncertainty about the applicable law, different outcomes for litigants in similar circumstances, protracted litigation, and additional costs and delays for the parties and the administration of justice.

20.155 The Commission considers that the problem of inconsistency in appellate decision making is not unique to the Federal Court. All large and busy courts face the challenge of ensuring consistency in their appellate decisions. Examples can be cited of inconsistency between decisions of permanent Courts of Appeal in the States. Even the High Court, comprising only seven justices, renders decisions from time to time that overturn previous authority. That process is part of the incremental development of law through judicial decisions and is particularly important in a final court of appeal.

20.156 The Commission also considers that the extent of the problem in the Federal Court cannot be regarded as substantial in numerical terms. The Commission previously cited statistics showing that, between 1996 and 2000, in only four cases was a Full Court of five judges constituted to resolve inconsistency between panels of the Court. Over 1,700 appeals were filed in the Court in that period.

994 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1.

20.157 However, in the Commission's view, the qualitative effects of inconsistent decisions, even if small in number, merit the matter being given further consideration.

20.158 The Federal Court may be more prone to decisional disharmony than some other intermediate appellate courts for several reasons. First, the Court comprises a relatively large number of judges (approximately 50), each of whom may be allocated to sit on a Full Court appeal. In a court of 50 judges, there are 19,600 possible combinations of three member appellate benches; in a court of 10 judges there are only 120 combinations. As previously discussed, the allocation of Federal Court judges to appellate panels is far from random. Moreover, not all judges are available to sit on appeals at a given point in time — some, for example, have primary commissions on other courts or tribunals (see Figure 20–3). Nevertheless, it is true to say that the larger the number of judges on the Court, the less frequently a judge is likely to sit on a three judge panel comprising the same members of the Court.

20.159 Second, the Federal Court has some areas of high volume appellate litigation. It is significant that two of the four cases in which a five judge panel has been convened in the past five years have concerned migration and bankruptcy. In such high volume areas it is inevitable that the Court will have to make a large number of decisions, and that these may be made in close temporal proximity. Bearing in mind the national character of the Court, these decisions may also be made in geographically distant locations, where differently constituted panels may be less aware of similar cases being heard by other judges elsewhere.

20.160 Third, the jurisdiction of the Court requires a large amount of statutory interpretation, particularly in respect of matters arising under a law made by the Parliament (s 39B(1A)(c) JA). This may lead to greater scope for differences of opinion than in courts where matters generally revolve around the determination of facts and the application of established common law principles to those facts, for example in personal injury claims. The problem was identified in a recent Full Court decision in *Telstra Corporation Ltd v Treloar*, where Branson and Finkelstein JJ said:

> The problem [of when to review an earlier decision] is very real when what is at issue is the construction of a statute. For one thing, statutory language is often ambiguous. Courts can struggle to determine the legislative intent. It is often impossible to discover any legislative intent. In many instances the generality of the statutory language is deliberate and allows the courts to develop a body of law to fill the gaps. This may lead to disagreement among judges about what the statute means. It would be sound policy that once that intent has been discerned by an appellate court then that should be the end of the matter. …
>
> Accordingly, we venture to suggest it would be on a rare occasion that an intermediate appellate court … will allow an issue concerning the construction of a statute, past and closed and especially a repealed statute, to be thrown open, producing as it clearly

> will, uncertainty, disruption to the conduct of affairs, a sense of grievance in those who may consequently receive treatment less favourable than that received by others under the same statute and additional cost and expense.[995]

20.161 During the course of the inquiry a number of reform options were raised to reduce the risk of inconsistency in appellate decision making in the Federal Court. These included:

- sitting larger benches, for example of five judges, to resolve legal issues that involve or might give rise to inconsistency;
- relying on the High Court to resolve inconsistency between Federal Court decisions;[996]
- changing the appellate structure of the Federal Court to that of a permanent appellate court or a hybrid appellate model;
- improving communication between judges in order to reduce the potential for inconsistent decisions, particularly where it is likely that different panels may consider similar issues;
- addressing the judicial culture of the Court in relation to the ease with which different judges consider prior decisions to be 'plainly wrong'.

20.162 The Commission notes that the first of these options is already utilised by the Federal Court. The second is also used to some extent, although the capacity to do so is limited by the number of appeals the High Court can determine in any year (see Chapter 18). To that extent, inconsistencies in Full Federal Court decisions often may be left to internal resolution.[997] The High Court has also commented that in some specialised areas of federal law, such as intellectual property and taxation, the Federal Court is to be regarded as the final court of appeal in all but the most exceptional cases.[998]

20.163 The Commission does not believe, on the information available to it, that the problems of inconsistent decisions in the Federal Court are of sufficient magnitude to warrant an alteration to the Court's own preferred appellate structure.

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995 *Telstra Corporation Ltd v Treloar* (2000) 102 FCR 595, 601–603. This passage was adopted and applied by a Full Court in *Thayananthan v Minister for Immigration & Multicultural Affairs* FCA 831 (Unreported, Federal Court of Australia, Moore, Tamberlin and Goldberg JJ, 4 July 2001).

996 The existence of inconsistency is one ground for the grant of special leave to appeal to the High Court: see s 35A JA.

997 A Mason (1996), 15.

998 *Interlego AG & Lego Australia Pty Ltd v Croner Trading Pty Ltd* (1994) 68 ALJR 123; *Deputy Commissioner of Taxation v NSW Insurance Ministerial Corporation* (1994) 68 ALJR 616; *Federal Commissioner of Taxation v Westfield Ltd* (1991) 22 ATR 400; *Sonenco (No 87) Pty Ltd v Federal Commissioner of Taxation* (1993) 93 ATC 4828.

As discussed in DP 64, there are competing arguments about the relative merits of different appellate structures and there are different views about which model is most suitable for particular courts.[999]

20.164 However, future consideration of the structure of the Federal Court should not be closed off. The Commission notes that several reforms to the jurisdiction of the Court are currently under consideration. If implemented, these reforms may affect the capacity of the Federal Court to manage its appellate workload. Some of these reforms may moderate the Court's workload, including:

- the removal of the Federal Court's jurisdiction to hear appeals from the ACT Supreme Court;
- the introduction of two judge appellate benches in a broader class of procedural matters; and
- the transfer of less complex migration matters to the Federal Magistrates Service.

20.165 On the other hand, other recent developments may put greater pressure on the appellate workload of the Court. These include:

- expansion in new areas of jurisdiction such as native title and human rights;
- the re-conferral on the Federal Court of jurisdiction in corporations law;
- expansion in the number of appeals to the Federal Court from the recently established Federal Magistrates Service; and
- changes to jurisdiction foreshadowed in this report, such as those relating to intellectual property and extradition.

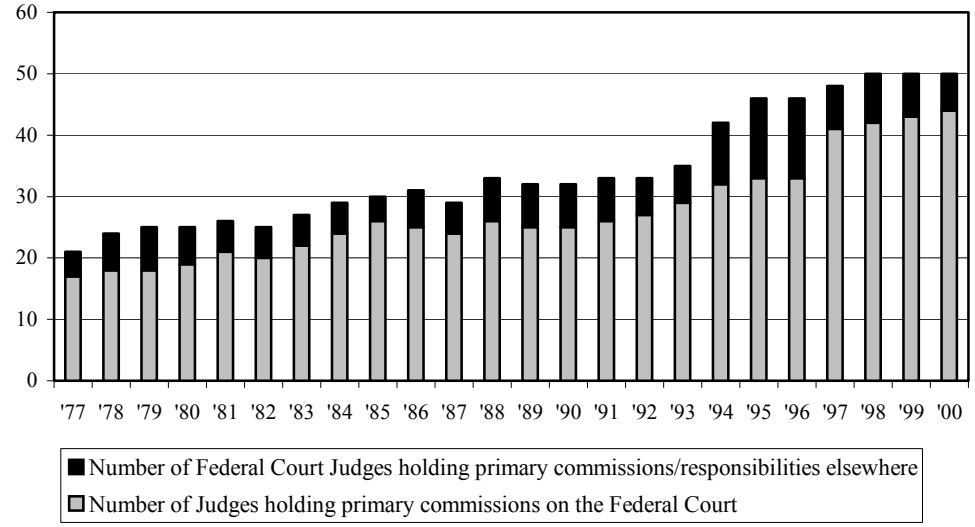
20.166 The collegial character of a court is essential to its successful operation, and collegiality can only be maintained in an institution of limited size. The Commission considers that if there were any significant expansion in the number of judges appointed to the Federal Court, there may be occasion to review the structure of the Court for the purpose of assessing the merits of establishing a permanent court of appeal. In this respect, the Commission notes that a projection of the historical trend in the number of judges suggests that future expansion is likely, although not inevitable (see Figure 20–3). The establishment of the Federal Magistrates Service may go some way toward halting the expansion of the Federal Court. A significantly larger court would make it more difficult to maintain

999 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.260–4.265.

collegiality and is likely to exacerbate the difficulties posed by inconsistent decisions.

20.167 For this reason, the Commission recommends that the effect on the Federal Court of changes to its jurisdiction be kept under review. In the event that there is a significant increase in the number of judges appointed to the Court or in the fundamental nature of the Court's workload, the Attorney-General should consider ordering a review of the most appropriate structure by which its appellate functions can be discharged.

Figure 20–3 Number of Federal Court Judges



Source: Data provided by the Registry of the Federal Court of Australia.
Note: Data relates to the years ending 31 December.

20.168 In considering the most appropriate means of promoting decisional harmony in the Federal Court, the Commission notes that inconsistency in recent cases has generally occurred in one of two ways. The first is where two differently constituted benches hand down conflicting decisions within a short time of each other, unaware of the other's decision. The second is where a later appellate bench consciously declines to follow a previous decision, in which case the 'plainly wrong' test should be applied.

20.169 In respect of the first issue, the Commission considers that the problem of inconsistency under the current appellate structure is best dealt with by improving information flows within the Court and by changes to listing practices in order to minimise the risk of inconsistency. To this end, the Federal Court should enhance its current efforts to disseminate information within the Court about appeals that

are listed for hearing, reserved, or recently decided, in order to minimise the risk of differently constituted panels of a Full Court giving judgment in ignorance of the decisions of each other.

20.170 Moreover, the Commission considers that it may be possible to adapt the listing practices used in relation to certain specialised areas of federal law, such as intellectual property and admiralty, to other areas. To this end, the Federal Court should review its internal procedures for allocating judges to appellate benches with a view to enhancing its current practice of using similarly constituted panels to hear similar kinds of appeals.

20.171 Where similar appeals are listed for hearing by differently constituted Full Courts, it may also be desirable for the Federal Court to develop a protocol to deal with the sequence of delivery of judgments. This might meet the problem encountered by the Court in *Xu* and *Yusuf* whereby argument was heard first in *Xu* but judgment was delivered first in *Yusuf*. A protocol might provide, for example, that a second Full Court should normally await the decision of the first Full Court unless the second appeal is urgent and there is reason to believe that judgment in the first appeal may be unduly delayed.

20.172 In relation to the second issue, the Commission notes the concern expressed both within and without the Court that some judges may take too liberal a view of when a previous Full Court decision is 'clearly wrong' or 'plainly wrong'. Although the High Court in *Australian Securities Commission v Marlborough Gold Mines Ltd*[1000] placed great importance on the value of uniform decisions, in the final analysis it is a matter for each judge to make an individual assessment of whether the test is satisfied in the circumstances of a particular case.

20.173 The Commission recognises the importance of not being overly prescriptive about this issue. Accordingly, the Commission recommends that the Federal Court itself consider additional ways in which it might address differences of approach between judges of the Court to the question of whether an earlier decision of a Full Court should be departed from because it is 'clearly wrong'.

Recommendation 20–9. The Commission does not consider that there is presently sufficient reason to alter the appellate structure of the Federal Court. However, the Attorney-General should keep under review the impact on the Federal Court of changes to its size and jurisdiction. In the event that there is a significant increase in the number of judges appointed to the Court or in the fundamental nature of the Court's workload, the Attorney-General should consider ordering a review of the most appropriate structure by which its appellate functions can be discharged.

1000 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485.

Recommendation 20–10. The Federal Court should continue to enhance its current efforts to disseminate information within the Court about appeals that are listed for hearing, reserved, or recently decided, in order to minimise the risk of differently constituted panels of the Full Court giving judgment in ignorance of the decisions of each other.

Recommendation 20–11. The Federal Court should review its internal procedures for allocating judges to appellate benches with a view to enhancing its current practice of using similarly constituted panels to hear similar kinds of appeals.

Recommendation 20–12. The Federal Court should consider additional ways in which it might address inconsistency between benches of the Full Court, including differences of approach between judges of the Court to the question whether an earlier decision of a Full Court should be departed from because it is 'clearly wrong'.

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21. Appellate Jurisdiction of the Family Court

Contents

21.1 This Chapter considers the appellate jurisdiction of the Family Court with particular reference to two issues. One is whether access to a first appeal should be by right or by leave; the other is whether a Full Court of the Family Court should be constituted by two judges in some circumstances, instead of the current general requirement of at least three judges.

21.2 Chapter 20 considered these issues in relation to the Federal Court. There the Commission recommended that access to a first appeal should generally be by right but that interlocutory and procedural appeals should be by leave. The Commission also recommended that the Federal Court be authorised to convene two judge courts of appeal for certain procedural and interlocutory matters.

21.3 This Chapter makes similar recommendations in relation to the Family Court. Reference should be made to Chapter 20 for a full consideration of the relevant arguments and views.

Channels of Appeal to the Family Court

21.4 Under the *Family Law Act 1975*, the Family Court may hear appeals in a variety of circumstances. In some cases, appellate jurisdiction is exercised by a Full Court; in others it is exercised by a single judge of the Court.

21.5 Section 94 FLA provides that an appeal lies to a Full Court of the Family Court from:

- a decree of the Family Court, constituted otherwise than as a Full Court, exercising original or appellate jurisdiction;

- a decree of a Family Court of a State (currently only the Family Court of Western Australia) or a Supreme Court of a State or Territory constituted by a single judge exercising original or appellate jurisdiction under the *Family Law Act 1975*;[1001] and

- a decree or decision of a judge exercising original or appellate jurisdiction under the *Family Law Act 1975* rejecting an application that he or she disqualify himself or herself from further hearing the matter.

21.6 In relation to appeals from the Federal Magistrates Service, s 94AAA FLA provides that an appeal lies to the Family Court from:

- a decree of the Federal Magistrates Service exercising original jurisdiction under the *Family Law Act 1975;* and

- a decree or decision of a Federal Magistrate exercising original jurisdiction under the *Family Law Act 1975* rejecting an application to disqualify himself or herself from further hearing a matter.

21.7 This jurisdiction may be exercised either by a Full Court or a single judge. Section 94AAA(3) provides that the jurisdiction of the Family Court in relation to an appeal from the Federal Magistrates Service is to be exercised by a Full Court unless the Chief Justice considers that it is appropriate for the jurisdiction of the Family Court in relation to the appeal to be exercised by a single judge.

21.8 The *Child Support (Assessment) Act 1989* (Cth) ('CSAA') provides that an appeal may be made to the Family Court, with leave of the Family Court, from:

- a decree of the Federal Magistrates Service exercising original jurisdiction under the CSAA; and

- a decree or decision of a federal magistrate exercising original jurisdiction under the CSAA rejecting an application to disqualify himself or herself from further hearing a matter.[1002]

21.9 There are similar provisions in s 107A(1) of the *Child Support (Registration and Collection) Act 1988* (Cth).

1001 Only the Supreme Court of Western Australia and the Supreme Court of the Northern Territory retain this jurisdiction. On 27 May 1976 the Governor-General issued a proclamation under s 96(3) FLA ending appeals to the Supreme Courts of all States and Territories other than Western Australia and the Northern Territory.

1002 s 102A(1) CSAA.

21.10 Section 96 FLA provides for an appeal from a court of summary jurisdiction exercising jurisdiction under the *Family Law Act 1975* to the Family Court or to the Supreme Court of that State or Territory.

Access to a First Appeal

Current law and practice

21.11 Under the current law, an appeal may be brought to a Full Court of the Family Court from a final judgment as of right, except in two cases.

- Appeals from interlocutory judgments require the leave of the Court, apart from those made in relation to a 'child welfare matter'.[1003]
- An appeal to a Full Court from a decision of a judge of the Federal Magistrates Service exercising jurisdiction under the CSSA or the *Child Support (Registration and Collection) Act 1988* (Cth) requires the leave of the Court.[1004]

21.12 In those circumstances where leave is required, an application for leave to appeal must be made in accordance with the *Family Law Rules*[1005] and must be determined by a Full Court of the Family Court. The Court may, however, make rules enabling applications for leave to appeal to be determined without an oral hearing.[1006] Once leave is granted, the procedure for appeals is identical to that for appeals as of right under s 94 FLA.

21.13 In at least one respect, rights of appeal to the Family Court are broader than those with respect to the Federal Court: appeals in relation to child welfare matters do not require leave even if they are interlocutory in nature. This difference is significant given that in 1999–2000, residence or contact issues were raised in 40% of notices of appeal.[1007]

21.14 The Family Court provided the Commission with data on the frequency with which the Court has decided applications for leave to appeal over the past four years. The details are shown in Figure 21–1. The total number of leave applications decided ranged from 19 in 1996–97 to 30 in 1999–2000. These figures are modest in comparison with the total number of appeals filed in the Court in the relevant years (see Chapter 18, Figure 18–5). For example, in 1999–2000, 301 appeals were filed in the Full Court from a decision of a single judge of the Family Court,

1003 s 94AA FLA. A 'child welfare matter' means a matter relating to the person or persons with whom a child is to live, contact between a child and another person or persons, or any other aspect of parental responsibility for a child: Reg 15A(3).

1004 *Child Support (Registration and Collection) Act 1988* (Cth), s 107A; *Child Support (Assessment) Act 1989* (Cth), s 102A.

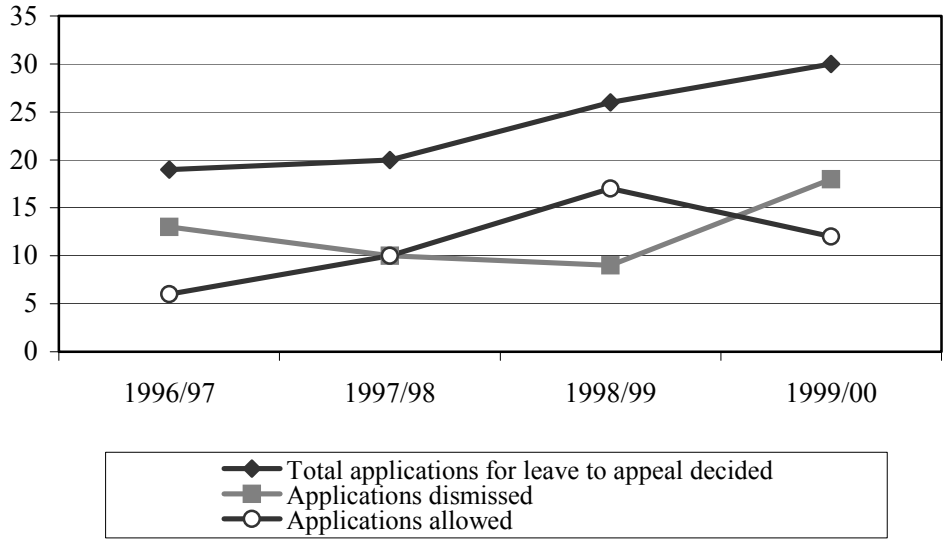
1005 O 32A FLR.

1006 s 94AA(3) FLA. See also O 32A r 6 FLR.

1007 <www.familycourt.gov.au/court/html/statappeals1.html> (18 August 2001).

reflecting the fact that most appeals to a Full Court lie as of right. Figure 21–1 also shows the number of leave applications that were allowed or dismissed in each year. In 1999–2000, 12 out of 30 leave applications decided by a Full Court were successful.

Figure 21–1 Applications for Leave to Appeal to a Full Court of the Family Court



Source: Data provided by the Registry of the Family Court of Australia.

21.15 The Family Court has developed broad criteria to determine leave applications in interlocutory matters, similar to those developed by the Federal Court. The Family Court adopts the principle that an appellate court should exercise caution in reviewing interlocutory decisions of a trial judge relating to matters of practice and procedure.[1008] This approach is based on the view that there should be few appeals on procedural matters because they do not alter the substantive rights of the parties and only serve to interrupt the usual course of proceedings. In making its assessment, the Family Court considers whether there has been an error of principle by the trial judge and whether the decision is one that results in a substantial injustice to one of the parties.[1009]

1008 *In the Marriage of Rutherford* (1991) 15 Fam LR 1, 5 referring to *Adam P Brown Male Fashions Pty Ltd v Phillip Morris Inc* (1981) 148 CLR 170, 177.

1009 *In the Marriage of Rutherford* (1991) 15 Fam LR 1.

Issues and problems

21.16 In DP 64 the Commission asked whether there should be greater use of leave to appeal in Family Court matters than is currently the case. This issue was raised on the basis of concerns about stretched court resources, growing appellate lists and the perception of an increasing number of unmeritorious appeals that are using up private and public resources.[1010]

21.17 The general arguments in relation to a right-based and a leave-based appellate system are canvassed in Chapter 20. They include:

- the importance of appeals for litigants and for the administration of justice;
- whether access to a first appeal by leave, rather than by right, would satisfy the demand for at least one review of a judicial determination;
- whether criteria for granting or refusing leave to appeal could address concerns about courts exercising broad or arbitrary discretions;
- whether leave to appeal would reduce overall costs and delays for the courts and parties by reducing the number of unmeritorious appeals; and
- problems of lack of data about the operation of the current system from which predictions might be made regarding the likely impact of leave requirements.

21.18 Questions were also raised in DP 64 about other matters relating to leave to appeal including: criteria for leave; where leave provisions should be located; to whom they should be made; whether leave applications should be immune from appeal; and whether there should be a power to rescind leave at some point after it has been granted. The Commission also discussed changes to the system of appeals in England following the Bowman report.[1011]

Submissions and consultations

21.19 The most common response in submissions and consultations was that access to a first appeal in most family law proceedings should continue to be by right and not by leave.[1012] This view was based on the merits of the traditional right of appeal, the importance of ensuring ready access to justice for litigants, and

1010 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 4.15–4.19, 4.89–4.120.
1011 G Bowman (1997); Australian Law Reform Commission, Discussion Paper No 62 (1999), para 4.121–4.126, 4.142.
1012 Family Court of Australia, *Submission J041*, 1 May 2001; Family Court of Australia, *Consultation*, Melbourne, 14 March 2001; Family Law Council, *Submission J040*, 23 April 2001.

concerns that leave procedures would constitute an additional layer of procedure with additional costs and delays. The Family Court expressed the view that if leave were generally required, cases that were problematic would find their way to a Full Court in any event.[1013] Another concern was that an application for leave can easily become a de facto appeal, with fuller argument than is warranted.[1014]

21.20 Concern was expressed about the scope of leave to appeal in relation to procedural matters. The Family Court considered that leave to appeal should be necessary for interim orders, interlocutory matters and cost orders.[1015] The Court stated that there was often sterile debate about whether a particular decision was an interlocutory order or whether it was substantive. The Court considered that it would be useful for legislation to define final or interim orders, or both. The Court also submitted that the current exception by which an appeal may be brought by right in interlocutory matters concerning child welfare ought to be repealed. The Court stated that this exception was becoming unwieldy because of the number of litigants who sought to appeal on every point.

21.21 The following comments were made in relation to other aspects of applications for leave to appeal.

- In relation to the test for granting leave to appeal, the Family Court stated that the best and simplest test was whether there was an 'arguable case'.[1016] Leave to appeal was thus to be equated with error at trial.

- The Family Law Council favoured a combination of rules of court and judicial formulation for leave provisions.[1017] The Family Court stated that the criteria for granting leave should be regulated by statute.[1018]

- The Family Court did not have a settled view as to who should determine leave applications.[1019] While one view was that applications for leave should be determined by two judges, this raised a concern about cases in which the two were divided in opinion. The Court also submitted that if an application were to be determined by a single judge, he or she should come from another region, registry or State.[1020] The Family Law Council favoured such applications being made to another judge of the court from which the appeal is taken.[1021]

1013 Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.
1014 P Nygh, *Consultation*, Sydney, 12 February 2001.
1015 Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.
1016 Ibid.
1017 Family Law Council, *Submission J040*, 23 April 2001.
1018 Family Court of Australia, *Submission J041*, 1 May 2001.
1019 Ibid.
1020 Ibid.
1021 Family Law Council, *Submission J040*, 23 April 2001.

- The general view was that decisions regarding leave to appeal should themselves be immune from appeal.[1022] This was seen to be clearly appropriate in circumstances where more than one judge reviewed the leave application.[1023]

- Submissions and consultations generally indicated that there was no need for a power to rescind leave.[1024] In its submission, the Family Court suggested that such a power might be useful when a Full Court considers that the statutory criteria for granting leave have not been met.[1025]

Commission's Views

21.22 The Commission considers that there should be no fundamental change to the right of appeal to an intermediate appellate court in family law proceedings. The current law accords with traditional community perceptions of access to justice. Moreover, no evidence was presented to the Commission indicating that the Family Court was unable to cope with its existing appellate workload. The Commission is of the view that a radical change to the system of appeals, such as a requirement of leave for all first appeals, should be based on sound empirical research. At present there is insufficient data available to analyse right-based and leave-based systems of appeal.

21.23 However, the Commission considers that it is necessary to delineate more clearly which procedural matters require leave. Currently there is considerable argument about what matters are interlocutory in nature, which adds unnecessary costs and delays to appellate determinations.

21.24 The Commission considers that the *Family Law Act 1975* should be amended to expand the categories of cases in which a first appeal requires the leave of the Court. The categories should include other specified categories of procedural appeals in addition to interlocutory appeals. This change would improve the clarity and accessibility of the law. In Chapter 20 the Commission noted that the Federal Court has made a similar proposal to the Attorney-General in relation to its interlocutory and procedural appeals. The Federal Court's proposal is to amend its Rules of Court to provide for specific types of judgments for which leave to appeal is necessary. These would include transfer or consolidation of proceedings, service, default judgment, pleadings, striking out, discovery, costs, adjournments of trial, and matters in which judgment was for less than $50 000. A similar approach could

1022 Family Court of Australia, *Consultation*, Melbourne, 14 March 2001; Family Law Council, *Submission J040*, 23 April 2001.

1023 D Graham QC, *Consultation*, Melbourne, 15 February 2001; Federal Court of Australia, *Consultation*, Sydney, 31 January 2001; Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.

1024 Family Law Council, *Submission J040*, 23 April 2001; Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.

1025 Family Court of Australia, *Submission J041*, 1 May 2001.

be adopted in relation to the Family Court, taking into account the important differences between the jurisdiction of the two Courts.

21.25 The Commission favours the legislation setting out the criteria for granting leave in such cases. The use of non-exhaustive criteria would provide the Family Court with flexibility to deal with the circumstances of individual cases. It would improve the accessibility and clarity of the law, and may assist litigants (particularly litigants in person) in assessing their chances of success. The fundamental test should be whether the applicant has an arguable case that the appeal would succeed if leave to appeal were granted.

21.26 The *Family Law Act 1975* should also be amended to provide that an application for leave to appeal shall be determined by a Court that does not include the judge whose decision is the subject of the application for leave to appeal. The Commission's recommendation would keep the trial and appellate processes distinct by ensuring that the judge whose decision is in question does not have to pass judgment on the likelihood of his or her decision being overturned on appeal.

21.27 Consultations and submissions strongly supported the view that a Court's decision to grant or refuse leave to appeal should itself be immune from appeal. The Commission supports that view. The possibility of further appeal would protract a process that has been introduced for the purpose of streamlining the appellate system. The Commission notes that review of a leave determination would be a review of the exercise of a wide discretion. In accordance with established principles, any reviewing court would be limited in the grounds on which it could overturn the leave determination.[1026] This suggests that there is little point in allowing review of a determination to grant or refuse leave to appeal from a decision regarding an interlocutory or procedural matter.

21.28 The Commission also considers, in accordance with a majority of consultations and submissions, that there is no need for a statutory power to rescind leave. The appellate court has the power to refuse leave. This appears to the Commission to be a satisfactory mechanism for disposing of unmeritorious leave applications.

Recommendation 21–1. Recommendations 20–4 and 20–5, which relate to the circumstances in which leave to appeal is required in the Federal Court, should be similarly applied to the Family Court by amending the *Family Law Act 1975* accordingly.

1026 *House v The King* (1936) 55 CLR 499.

Two Judge Appellate Panels

Current practice of the Family Court

21.29 The appellate jurisdiction of the Family Court is generally exercised by a Full Court, which is made up of three or more judges sitting together where a majority of those judges are members of the Appeal Division of the Court (s 4 FLA). However, there are several exceptions to these arrangements.

21.30 First, appeals from the Federal Magistrates Service in family law matters are heard by a Full Court of the Family Court unless the Chief Justice considers that it is appropriate for the appeal to be heard by a single judge.[1027] The Chief Justice assesses the merits of the appeal and the extent to which the case involves complex or novel issues. The Chief Federal Magistrate, Diana Bryant, advised the Commission that as at 16 February 2001 there had been 8 to 10 appeals from the Federal Magistrates Service to the Family Court. All of these appeals had been heard by single judges of the Family Court.[1028]

21.31 Second, a variety of procedural matters arising in an appeal from the Federal Magistrates Service may be dealt with by a single judge.[1029] These matters include joining or removing a party, directions about the conduct of an appeal, and applications for leave to amend the grounds of an appeal.

21.32 Third, the jurisdiction of the Family Court in an appeal from a court of summary jurisdiction may be exercised by one judge or by a Full Court.[1030]

21.33 Fourth, the *Family Law Act 1975* makes provision for two judge appellate courts to be constituted in situations in which a member of a Full Court is unable to continue hearing. Section 28(4) allows a hearing, which has commenced but has not yet been determined, to be completed in specified circumstances where one of the judges dies, resigns from the Court, ceases to be a member of the Court, or cannot continue as a member of the Full Court.

21.34 Section 30 provides for the resolution of a division in opinion where the judges are equally divided. Where the matter is on appeal from a judgment of a single judge of the Family Court, or of a Family Court of a State, or the Supreme Court of a State or Territory, the judgment appealed from is affirmed. In other matters the opinion of the most senior judge prevails.

1027 s 94AAA(3) FLA.
1028 Federal Magistrates Service, *Consultation*, Melbourne, 16 February 2001.
1029 s 94AAA(8), (10) FLA.
1030 s 28(2) FLA.

Problems with current practice

21.35 There are several reasons for considering the use of two judge benches in appeals to the Family Court. In Discussion Paper 62, *Review of the Federal Civil Justice System*,[1031] the Commission considered that the use of two judge panels could alleviate appellate caseload pressures in the Federal Court. Similar considerations apply to the Family Court, whose appellate workload continues to increase (see Chapter 18).

21.36 In Chapter 20, the Commission highlighted a number of issues that arise from the proposal for two judge courts of appeal in the context of the Federal Court. These issues include: what type of appeals should be decided by a Full Court comprising only two judges; who should decide whether such a Court should be convened; and how is a difference of opinion to be resolved if the judges are equally divided as to the outcome of the appeal. The same issues need to be considered in relation to the Family Court.

21.37 In 1998 the Family Court established a committee (the Future Directions Committee) to 'initiate, support and monitor projects that focus on the improvement of the efficiency and effectiveness of court services'.[1032] The work of the Committee was to include a review of the Court's procedures and services related to the management of appeals. This work was initially expected to be completed by December 2000.[1033] In April 2001 the Court advised the Commission that a study tour of the United Kingdom and the United States had been undertaken by Justice Ellis in order to investigate appellate procedures in those jurisdictions.[1034] In June 2001 the Commission was advised that the Committee's work was still in progress.[1035] The report of that Committee might include a consideration of two judge panels.

Submissions and consultations

21.38 In Chapter 20 the Commission discussed the observations that were made in submissions and consultations on the topic of two judge appellate panels in the Federal Court. Most of those comments were made in relation to federal appellate courts generally and are as much applicable to the Family Court as to the Federal Court.

21.39 The submission from the Family Court contained comments from individual judges as well as the Court's overview and summary of views. In relation to two judge appellate benches, the majority of judges who responded were

1031 Australian Law Reform Commission, Discussion Paper No 62 (1999), para 10.82–10.83.
1032 Family Court of Australia (2000), 15.
1033 Ibid, 47.
1034 Family Court of Australia, *Correspondence*, 11 April 2001.
1035 Family Court of Australia, *Consultation*, 26 June 2001.

in favour of the proposal for particular types of cases. These were cases where, for example, the Chief Justice is of the view that the appeal is unlikely to raise issues of significant public importance or factual or legal complexity.[1036] The Court noted, however, the difficulties associated with identifying the right cases for two judge appellate benches and refrained from making an overriding recommendation.

21.40 In relation to resolving a division of opinion in a two judge panel, some Family Court judges supported the view that the Court should be reconstituted by a three judge panel. The Court did not state an overall recommendation as to how to resolve a difference of opinion but suggested as one possibility that a third judge of the Appeal Division be added to the panel to consult with the two judges and cast a vote on the papers.[1037]

21.41 The Family Law Council noted that a Full Court could be constituted by two judges in interlocutory and procedural appeals.[1038] In relation to resolving a difference of opinion between two judges, the Family Law Council's preference was for the senior judge to have a casting vote.[1039]

Commission's views

21.42 The Commission's views in relation to the use of two judge appellate benches in the Family Court are the same as those contained in Chapter 20 in relation to the Federal Court and are not repeated here.

21.43 There are some additional matters that can be highlighted in relation to the Family Court. A number of Family Court judges and the Family Law Council supported the use of two judge benches in interlocutory or less complex matters, but acknowledged the difficulty of deciding which cases were suitable for this treatment. The Commission considers that this difficulty can be met by setting out in the *Family Law Act 1975* the types of appeals that can be determined by two judge panels. This change would be enhanced by allowing the Chief Justice to constitute a Full Court in the designated categories with two or more judges, as the Chief Justice thinks fit. The Commission's recommendation would be an extension of the Chief Justice's existing responsibility under s 21B FLA to ensure the orderly and expeditious discharge of the business of the Court.

21.44 The Commission acknowledges the variety of methods suggested in consultations and submissions for resolving a difference of opinion in a two judge panel. The Commission notes, in particular, the views of several Family Court judges that a reconstituted panel of three judges is the preferred option.

1036 Family Court of Australia, *Submission J041*, 1 May 2001.
1037 Ibid.
1038 Family Law Council, *Submission J040*, 23 April 2001.
1039 Another submission whilst not in favour of a two judge bench generally, felt that such benches could be used only for 'straightforward' cases, which cases would however be difficult to identify: Hon Justice R Chisholm, *Submission J008*, 15 February 2001.

21.45 The Commission considers that a difference of opinion between two judges comprising a Full Court can be satisfactorily resolved by reconstituting the Court with three or more judges. However, as in the case of the Federal Court, it is important that the Family Court adopt internal procedures to identify the likelihood of disagreement at an early stage. In the Commission's view, other proposed solutions might adversely affect the public's perception of justice. For example, having the opinion of the senior judge prevail might encourage the belief among parties or their legal representatives that only the opinion of the senior judge is of significance.

Recommendation 21–2. Recommendations 20–6 to 20–8, which relate to the circumstances in which a Full Court of the Federal Court may be constituted by two judges, should be similarly applied to the Family Court by amending the *Family Law Act 1975* accordingly.

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Part F

Claims Against the Commonwealth, States and Territories

22. A New Approach to Commonwealth Immunity

Contents

22.1 Part F deals with claims against the Commonwealth and claims against the States and Territories in so far as the Constitution permits. These issues were at the forefront of matters identified in the Commission's terms of reference, which specifically required the Commission to report on the appropriateness of Part IX of the *Judiciary Act* (ss 56–67).

22.2 This aspect of the reference raises important questions of policy regarding the immunities enjoyed by the executive branch of government from the operation of the law of the land, whether common law or statutory law. These immunities are often called 'crown immunities' but this report avoids that term where possible because of the uncertainties inherent in identifying the nature of the 'Crown'.

22.3 In the Australian federal context, the term 'Crown' does not refer to a single entity, but to the executive government of nine polities — the Commonwealth, the six States and the two internal self-governing Territories. In practical terms, the Crown refers to the collection of individuals and institutions that exercise the executive functions of each of these governments. 'The law sees these individuals and institutions as agents of the Crown and many executive functions as acts of the Crown'.[1040]

22.4 Immunity of the Crown is not a unitary concept but a constellation of separate immunities which may be relevant at different stages of the litigation process.

22.5 It was widely acknowledged in consultations and submissions that governmental immunity is a difficult and complex area of the law. The immunities recognised by the common law are of uncertain scope and continue to evolve

1040 P Hanks (1996), 160.

through judicial decisions. These are overlaid by federal, state and territory statutes that seek to remove certain immunities. The statutory principles are themselves subject to constitutional principles that affect not only the ambit of Commonwealth immunities but also the power of the Commonwealth to legislate with respect to the immunities enjoyed by the States and Territories.

Core Immunities under Review

22.6 Part F examines four core areas of immunity. The first area is the range of procedural immunities enjoyed by the Commonwealth. Immunity from being sued is an initial procedural hurdle for plaintiffs. At common law a plaintiff was unable to commence legal proceedings against the executive, regardless of the cause of action. If this immunity is overcome, other procedural immunities may operate in the course of proceedings, such as immunities from procedural orders for interim relief, discovery and interrogatories, or costs. A further procedural immunity prevents a court from ordering coercive remedies against the executive, such as injunction or specific performance (Chapter 23). Finally, the executive's procedural immunity from execution prevents a court from ordering that a judgment be enforced against the assets of the executive (Chapter 24).

22.7 The second area of inquiry is the immunity of the Commonwealth from substantive common law rules, and especially from liability in tort (Chapter 25).

22.8 The third area relates to the traditional presumption that executive government is immune from the operation of statutes. In a federation, this immunity arises in a number of situations, such as the application of Commonwealth statutes to the Commonwealth executive (Chapter 26); the application of Commonwealth statutes to the executives of the States and Territories (Chapter 27); and the application of state and territory statutes to the Commonwealth executive (Chapter 28). Each situation requires separate consideration because of the asymmetrical nature of the federal compact.

22.9 The fourth area of inquiry is the extent to which the immunities described above apply to a variety of persons or entities, ranging from those at the core of executive government to those at the periphery (Chapter 29). The principal question here is not the content of the immunities but to whom they apply. Chapter 29 focuses on the availability of immunities to bodies or instrumentalities established under federal law.

22.10 Whether modern governments may rely upon the traditional immunities of the Crown when sued by ordinary citizens is a complex and controversial question, affecting the role and function of executive bodies in their dealings with citizens, and the degree to which governments and citizens are equal before the

law. The policy considerations underlying these issues are considered in greater detail in this chapter.

Historical Background

The British Legacy

22.11 The common law rights and privileges — prerogatives — enjoyed by the British (and subsequently Australian) Crown originated around the 13th century. The prerogatives may be divided into two basic classes:[1041] first, the governmental powers required to administer the realm legally, militarily, socially and economically; and second, the rights that arise from the pre-eminence of the Sovereign over subjects. This second class of privileges, immunities, preferences, facultative powers and proprietorial rights gives rise to the issues of concern for this inquiry.

22.12 In its earliest manifestation, the doctrine that the King can do no wrong protected the monarch from claims by subjects for loss or damage. With the advent of a judicial system, the effect of this doctrine was that the King could not be sued in his own courts without his consent. With the creation of Parliament and the advent of legislation, the doctrine developed into the presumption the Crown was not bound by a statute.

22.13 As the range and scope of the activities of the British Crown expanded, so the interaction of the Crown with the public and its involvement in the marketplace grew. The need for a remedy for those suffering injury, loss or damage due to the negligence of the Crown was gradually recognised. The Crown initially permitted plaintiffs to sue it in contract and eventually in tort.

Crown immunity in the Australian context

22.14 In the Australian colonies, the active role of governments in establishing their own administration and infrastructure created a more urgent need for legal remedies against the Crown.[1042] Crown proceedings statutes increasingly removed the immunities of the colonial Crown from liability in tort and contract. A consistent national policy to this effect was established by the end of the 19th century and adopted by the Constitutional Convention of 1898. The policy of facilitating the removal of the Crown immunity by statute was recognised in the powers conferred by the Australian Constitution on the Commonwealth Parliament. Those powers were exercised soon after federation, including by the *Judiciary Act.*

1041 P Hogg and P Monahan (2000), 15–21.
1042 See P Finn (1987), 3, 142.

22.15 Federation created a new layer of complexity for Crown immunity in Australia. Not only did each Parliament take its own approach to the question of immunity, federation also raised the issue of whether the executive government of one polity was immune from the statute law of another. Resolving this issue has been extremely difficult for the courts because of the complex interaction between the common law, legislation and constitutional considerations.

Legal Framework and Issues

22.16 This section sets out the basic constitutional and legislative provisions and common law principles applicable to Commonwealth immunity in Australia. Many of these principles are considered in greater detail in subsequent chapters in Part F.

Constitutional provisions on immunity and liability

Section 78 of the Constitution

22.17 Section 78 of the Constitution provides as follows:

> The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

22.18 It is not clear whether this section was intended to give Parliament the power merely to create rights to proceed or also to create substantive rights that could give rise to a cause of action.

22.19 The significance of this debate for the *Judiciary Act* is that ss 56, 58 and 64 JA are often considered to have been enacted pursuant to s 78 of the Constitution and thus confined by it. If s 78 confers only the power to remove procedural immunities of the executive, ss 56, 58 and 64 are similarly confined. On the other hand, it may be argued that Parliament has inherent power to legislate to remove its own common law immunities.

22.20 Section 78 is more controversial with respect to the States because the Commonwealth Parliament is impliedly prohibited from enacting legislation that significantly impedes the States in the performance of their functions as States within the federal system of government. As a consequence, it is argued that ss 58 and 64 cannot remove the immunities of the States from liability at common law or otherwise. These provisions can only remove procedural immunities of the States, and only in respect of federal jurisdiction.

Section 75(iii) of the Constitution

22.21 Section 75(iii) of the Constitution provides for the jurisdiction of the High Court in claims against the Commonwealth.

> In all matters … (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party … the High Court shall have original jurisdiction.

22.22 The provision may be interpreted as impliedly conferring a right to sue the Commonwealth and thus restricting Commonwealth immunity. If this interpretation is correct, the right to proceed against the Commonwealth is entrenched in the Constitution and cannot be impaired by the *Judiciary Act* or other legislation. This interpretation was put forward in 1938 by Dixon J in *Werrin v Commonwealth*[1043] but it was largely ignored until endorsed in 1997 by a majority of the High Court in *Commonwealth v Mewett*. In that case, Gummow and Kirby JJ stated that:

> [T]he Constitution applies to deny any operation to what otherwise might be doctrines of Crown or executive immunity which might be pleaded in bar to any action to recover judgment for damages in respect of that common law cause of action.[1044]

22.23 This reasoning does not effect any dramatic alteration of Commonwealth rights — while the Commonwealth cannot prevent proceedings being commenced against it, it can still enact a statute that extinguishes its substantive liability under a particular cause of action.

Section 51(xxxi) of the Constitution

22.24 Where a cause of action against the Commonwealth exists, s 51(xxxi) of the Constitution impedes its extinguishment through its provision that the Commonwealth may make laws with respect to 'the acquisition of property on just terms from any state or person'. The High Court has held that Parliament may legislate in respect of Commonwealth liability generally.[1045] However, Parliament cannot limit the liability of the Commonwealth by extinguishing the right of a plaintiff to property in the form of a chose in action unless it provides just compensation. For example, a provision of a workers' compensation statute that extinguished the common law right of an employee to sue the Commonwealth for

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1043 *Werrin v Commonwealth* (1938) 59 CLR 150, 168 (Dixon J). See also *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 367 (Dixon J); *Johnstone v Commonwealth* (1978) 143 CLR 398, 405–406 (Murphy J).

1044 *Commonwealth v Mewett* (1997) 191 CLR 471, 550–551 (Gummow and Kirby JJ).

1045 *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1; *Magrath v Commonwealth* (1944) 69 CLR 156; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 173–4 (Mason CJ); *Nintendo Co Limited v Centronics Systems Pty Ltd* (1994) 181 CLR 134, 161 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ).

damages resulting from injury has been held to be an acquisition of property that is invalid unless on just terms.[1046]

22.25 This constitutional limitation applies only to the extinguishment of existing property rights. Legislation can extinguish future causes of action but cannot extinguish a cause of action that has already accrued when the provision comes into force without the provision of 'just terms'.[1047]

Section 61 of the Constitution

22.26 The special position of the Commonwealth under the Constitution is set out in s 61, which states that 'the executive power of the Commonwealth … extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.' An implied consequence is that the Commonwealth executive, by virtue of its nationally important functions, is different from the executive governments of the States and Territories and has a status that requires special immunity from their laws.

22.27 It was originally held that all constitutionally valid laws are binding on all people and on all manifestations of the Crown,[1048] but over time this has changed to the view that state legislation is invalid to the extent that it purports to regulate the activities of Commonwealth instrumentalities.[1049]

22.28 This view was significantly narrowed in 1997 by the High Court in *Henderson*,[1050] where it was held that the Commonwealth may be bound by any state legislation that is not expressly directed at it, does not 'detract from or adversely affect the very governmental rights of the Commonwealth',[1051] and does not conflict with a valid Commonwealth law.

Judiciary Act provisions on immunity and liability

22.29 Sections 56, 58 and 64 JA have been held to remove the executive immunities of the Commonwealth and the States to varying degrees. Although each provision deals with some aspect of claims against the Commonwealth, nowhere does the *Judiciary Act* expressly state that the Commonwealth may be sued or that it is subject to substantive liability at common law. The extent to

1046 *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297; *Commonwealth v Mewett* (1997) 191 CLR 471, regarding s 44 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (Comcare Act). See also *Smith v Australian National Line Ltd* (2000) 176 ALR 449, 472–474.

1047 *Smith v Australian National Line Ltd* (2000) 176 ALR 449, 473.

1048 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*'), 153.

1049 *Commonwealth v Cigamatic Pty Ltd (In Liq)* (1962) 108 CLR 372.

1050 *Re Residential Tenancies Tribunal (NSW) v Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

1051 Ibid, 473 (Gummow J).

which these provisions address immunities from liability under statute law is even less certain.[1052]

22.30 All States and Territories have crown proceedings Acts which erode various aspects of executive immunity, in most cases more clearly than the *Judiciary Act.* However, the relationship between these Acts and the various provisions of the *Judiciary Act* are unclear.

Sections 56 and 58 of the Judiciary Act

22.31 Section 56 specifies the courts in which a claim may be brought against the Commonwealth in tort and contract. Section 58 makes similar provision in respect of claims against a State.[1053]

> 56(1) A person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth
>
> (a) in the High Court;
>
> (b) if the claim arose in a State or Territory — in the Supreme Court of that State or Territory or in any other court of competent jurisdiction of that State or Territory; or
>
> (c) if the claim did not arise in a State or Territory — in the Supreme Court of any State or Territory or in any other court of competent jurisdiction of any State or Territory. …
>
> 58. Any person making any claim against a State, whether in contract or in tort, in respect of a matter in which the High Court has original jurisdiction or can have original jurisdiction conferred on it, may in respect of the claim bring a suit against the State in the Supreme Court of the State, or (if the High Court has original jurisdiction in the matter) in the High Court.

22.32 It has been held that these sections remove by implication the executive immunity from suit in tort and contract.[1054] It has also been held that this removal of immunity extends to other common law claims such as actions to recover income tax; compensation for resumed land; claims for restitution and repayment of monies; and claims in quasi-contract and for breach of trust.[1055]

1052 See *Baume v Commonwealth* (1906) 4 CLR 97; *Maguire v Simpson* (1977) 139 CLR 362.

1053 See also s 67B, discussed in Chapter 37, in respect of claims against the Northern Territory.

1054 *Breavington v Godleman* (1989) 169 CLR 41, 152–153 (Dawson J); *Suehle v Commonwealth* (1967) 116 CLR 353, 355 (Windeyer J); *James v Commonwealth* (1939) 62 CLR 339, 359 (Dixon J).

1055 See H Renfree (1984), 534; *Deputy Commissioner of Taxation v Establissements Lecorche Freres* [1954] St R Qd 314; *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83, 103; *Victoria v Hansen* [1960] VLR 582. See also *Schweppes Ltd v Commonwealth* (1945) 45 SR (NSW) 35; *Froelich v Howard* [1965] ALR 1117; *Daly v Victoria* (1920) 28 CLR 395, 399; *Werrin v Commonwealth* (1938) 59 CLR 150; *Mason v New South Wales* (1959) 102 CLR 108.

Section 64 of the Judiciary Act

22.33 Section 64 provides as follows.

> In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

22.34 Section 64 is one of the most important statutory provisions with respect to executive immunity. Modelled on 19th century colonial legislation, it was clearly intended to abrogate at least some of the common law immunities by making the rights in a suit involving a polity the same as those in a suit between 'subject and subject'.

22.35 However, s 64 has also had a controversial operation because it contains many phrases whose language can be interpreted in a variety of ways.

- It is unclear whether the equality that s 64 seeks to achieve arises only when a 'suit' is commenced or whether it can exist in the absence of a suit.
- The qualification 'between subject and subject' does not address the fact that some suits in which the Commonwealth or a State is a party have no counterpart in relation between subject and subject. Accepting that there are necessarily differences between suits involving the Commonwealth or a State and those involving 'subject and subject', what kinds of difference should be allowed to remain?
- The phrase 'as nearly as possible' could be intended simply to allow for differences in the kinds of facts that arise, or to overcome technicalities that might exclude the Commonwealth from liability.

Common law principles of immunity and liability

22.36 Earlier in this chapter, it was noted that executive immunity has its origin in the common law rules developed centuries ago by the courts of England and that these immunities have been narrowed to a greater or lesser extent in Australia by the Constitution and legislation.

22.37 One aspect of the common law immunities that has given rise to considerable interest is the presumption that a statute does not bind the executive. This presumption may be rebutted by an appropriate expression of legislative intent. A statute may expressly bind the executive, placing the issue beyond doubt. However, where there is no express provision, an inference must be drawn from the terms and nature of the statute. These rules of construction have changed considerably over the years and have been difficult to apply to particular cases.

22.38 In *Bropho v Western Australia*[1056] the High Court developed a new test for determining whether an Act binds the executive based on the subject matter, policy and purpose of the Act. A problematic issue is whether an Act that impliedly binds the executive of one polity binds the executive of other polities. For example, it is unclear whether the rule in *Bropho*, which determined that a Western Australian Act bound the State of Western Australia, applies in the same way to determine that the Commonwealth is bound by a Western Australian Act. Recent cases have suggested, but not clearly held, that a stricter rule should be applied in determining whether an Act of one polity binds the executive of another (see Chapters 27–28).

Practical issues of modern government affecting immunity and liability

22.39 The doctrine of immunity of the Crown was developed at a time when governments engaged in only a narrow range of activities, and rarely so in respect of the kinds of activities carried on by ordinary persons or commercial entities. The immunity of the Crown was accepted as a general rule because its impact on citizens was modest. However, the executive government 'carries out in modern times multifarious functions involving the use and occupation of many premises and the possession of many things'.[1057] Government entities increasingly affect the lives of citizens through sophisticated administrative functions and government engagement in commercial activities, often in competition with private players in the marketplace. In *Bropho*, the High Court stated:

> The historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavours and where it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their servants and agents … to compete and have commercial dealings on the same basis as private enterprise.[1058]

Underlying Policy Considerations

22.40 During the course of this inquiry, the Commission heard consistent and compelling opinions about the inadequacy of the current state of the law with respect to executive immunity. The principal points of concern related to:

- the changing scope of the common law principles;
- the lack of clarity of relevant statutes;

1056 *Bropho v Western Australia* (1990) 171 CLR 1.
1057 *Jacobsen v Rogers* (1995) 182 CLR 572, 587.
1058 *Bropho v Western Australia* (1990) 171 CLR 1, 19.

- the uncertain constitutional underpinnings of executive immunity;
- the extent to which the Commonwealth can or should regulate the immunities of state or territory executives; and
- the type of entities that are entitled to claim executive immunities.

22.41 Many observers remarked that the uncertain state of the law imposed significant costs on individuals and governments. This was in part because the tests for determining immunity are fact-sensitive and their application requires a case-by-case assessment, often by the judiciary in legal proceedings, and in part because the underlying uncertainty of the legal principles themselves invited legal challenge, irrespective of the application of these principles in particular circumstances.

22.42 Some people with whom the Commission consulted were less concerned with the direction of any reform than with the need for the reform to provide clear guidance, whatever its direction. Others with whom the Commission consulted endorsed the need for greater clarity in the law, but thought that this should be achieved through reforms that significantly restricted existing immunities. A typical view was that of Solicitor-General for South Australia, Brad Selway QC.

> What is needed is a clear, coherent code on the liability of the Commonwealth and the States in federal jurisdiction. On any view the current provisions are wholly deficient for the purpose.[1059]

22.43 In this section, the Commission identifies the fundamental policy considerations that it believes should underlie any review of executive immunity.

The executive should be subject to law

22.44 Underlying all questions of Commonwealth immunity is the fundamental legal relationship between the executive and the citizen, and the degree of equality with which legal rights and obligations apply. The principle is widely accepted that governments, as representatives of the people, should be subject to the same laws as the people, unless Parliament provides otherwise.[1060] It is inherent in the rule of law that equality under the law extends to officers and agents of government in respect of conduct in their official capacity.[1061] It was emphasised in consultations and submissions that this principle is at odds with the traditional common law

1059 B Selway QC, *Submission J028*, 20 March 2001.

1060 New South Wales Law Reform Commission, Report No 24 (1976), 74; New Zealand Law Commission, Report No 17 (1990), 65–67; Law Reform Committee of South Australia (1987), 1–2, 22; P Hogg and P Monahan (2000), 1–3; J Peden (1977); S Price (1990), 227; J Wolffe (1990), 22–23.

1061 A Dicey (1948), 193. See generally R David and J Brierley (1985), 81–84.

principle that the executive is generally presumed to be immune from the operation of the law.[1062]

22.45 The increase in the number and variety of government enterprises operating in the market place also raises issues of equality under the law. The concept of a 'level playing field' or 'competitive neutrality' between government and private entities is widely supported, and it is seen as discriminatory that statutes do not apply equally to government entities and private entities when they are in competition with each other.[1063]

22.46 The Commission recognises that the need for equality is qualified by the fact that governments differ from ordinary persons in key respects. Governments perform unique functions and have obligations that do not attach to citizens, and the effective discharge of these functions may require special powers and privileges.[1064] Principles of private law may not always be appropriate to relations between government and citizen, in which notions of public good, community, and distributive justice come into play.[1065] For these reasons, the executive should not be regarded as equal to citizens in all circumstances.

22.47 However, considerations of transparency and accountability require that in circumstances in which the government determines that it should not be bound by the same law as citizens, the extent of its immunity should be expressly stated. It follows that if executive immunities are removed, Parliament should use its legislative powers to enact provisions that exempt the executive from particular laws or in particular circumstances, where necessary and appropriate.

The need for a clear, simple, general rule

22.48 The Commission was told repeatedly in submissions and consultations that it is difficult to apply the existing rules on executive immunity in practice,[1066] or to predict in a given case whether the application of these rules to the facts will result in the executive being liable. This uncertainty is both costly and time consuming for litigants and courts. It is also unnecessary.

1062 D Graham QC, *Consultation*, Melbourne, 15 February 2001; ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001; S Churches, *Submission J017*, 16 March 2001; P Johnstone, *Submission J016*, 6 March 2001; B Horrigan, *Consultation*, Canberra, 29 March 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001; B Dunphy, *Consultation*, Brisbane, 8 March 2001; Law Institute of Victoria, *Consultation*, Melbourne, 15 February 2001.

1063 See Independent Committee of Inquiry (1993); N Seddon (1998), 474.

1064 P Hogg and P Monahan (2000), 326–329; S Price (1990), 219, 228.

1065 D Cohen (1987), 391.

1066 D Graham QC, *Consultation*, Melbourne, 15 February 2001; Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001; G Taylor and J Williams, *Submission J020*, 19 March 2001; M Sexton SC, *Submission J009*, 23 February 2001; ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001; Victorian Bar Association, *Consultation*, Melbourne, 6 March 2001; Law Council of Australia, *Submission J037*, 6 April 2001.

22.49 The Commission considers that any reform in this area should aim to make the law clearer and simpler. For example, in relation to the presumption of immunity from statute, this goal could be achieved by replacing the current fact-sensitive rule with one that subjects the executive to statute unless legislation expressly exempts the executive.[1067] Greg Taylor and John Williams expressed it in their submission:

> This would also be a clear rule. The *Bropho* rule may be criticised for allowing too much to depend on judicial impression. Because the presumption that statutes do not bind the Crown has been watered down, a wide variety of factors have to be taken into account in considering whether [the presumption of immunity] is rebutted, and the outcome can therefore be quite uncertain. The application of the *Bropho* standard in inter-polity cases is still quite uncertain ... Uncertainty in such an important area can and should be avoided.[1068]

22.50 Under this proposal, the Commonwealth would be required to state expressly in legislation any intention that the Commonwealth executive not be bound by one of its own statutes or a state or territory statute. The Senate Standing Committee on Legal and Constitutional Affairs has noted that 'one important advantage of this approach would be the creation of greater certainty in the application of territory, state and federal laws to Commonwealth and state corporations'.[1069]

22.51 The Commission is also concerned to ensure that any change to the law avoids creating new complexities. Legislation implementing a new rule regarding immunity should also clarify the interpretation of existing statutes that were drafted on the basis of the previous rule. Parliament should therefore have ample opportunity to review existing Acts before a new rule is applied to existing legislation.

Federalism and the dominant position of the Commonwealth

22.52 Principles of executive immunity should also take into account Australia's federal system of government, including the asymmetrical nature of the federal relationship. In a federal system one expects a polity to make laws for the citizens it represents, but one does not necessarily expect it to make laws that bind another polity. As Gibbs ACJ explained it in *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*:

> It is a consequence of our federal system that 'two governments of the Crown are established within the same territory, neither superior to the other'. Legislation of the Commonwealth may have a very different effect when applied to the government of a

1067 New South Wales Law Reform Commission, Report No 24 (1976), 75–76. See Ontario Law Reform Commission (1989), 107–109; P Hogg and P Monahan (2000), 326–329; G Williams (1948), 53–54; S Price (1990), 225, 227, 241.

1068 G Taylor and J Williams, *Submission J020*, 19 March 2001.

1069 Senate Standing Committee on Legal and Constitutional Affairs (1992).

> State from that which it has in its application to ordinary citizens. It seems only prudent to require that laws of the Parliament should not be held to bind the States when the Parliament itself has not directed its attention to the question whether they should do so.[1070]

22.53 These concerns are particularly important when considering whether a state executive is subject to a Commonwealth Act. Under the present law, a state executive is presumed to be immune from a Commonwealth Act unless the Act binds the State expressly or by necessary implication. If this immunity were removed, all Commonwealth Acts would bind the States unless the Commonwealth Parliament expressly exempted a state executive. Given the primacy of Commonwealth legislation over state legislation under s 109 of the Constitution, a state parliament would be powerless to exclude the State from a binding Commonwealth law.

22.54 The Commission recognises that it in many cases state executives ought to be subject to Commonwealth laws. This can be achieved by the inclusion in a Commonwealth statute of a clear statement that it binds the state executives. As Taylor and Williams put it:

> [T]he Commonwealth should not pass legislation which binds the States without even thinking about whether that is a desirable result or not. In the usual case, attention will be directed by those promoting a new piece of legislation to the effect of the Bill on private persons, rather than on the States … The existence of the presumption helps to combat this tendency.[1071]

22.55 The opposite consideration applies in respect of the immunity of the Commonwealth executive from the operation of state law. A general principle of immunity is not needed to protect the Commonwealth from being inappropriately subjected to state law. The Commonwealth can exempt itself from the provisions of a state law by enacting a provision that is inconsistent with it: s 109 of the Constitution ensures that the state law is rendered inoperative to the extent of the inconsistency. Again, this point was made in consultations and submissions:

> The issues involved in the application of State legislation to the Commonwealth do not raise such vital questions. This is because the Commonwealth, unlike the States, can always legislatively disapply unsuitable legislation from other levels of government using its paramount powers under s 109.[1072]

22.56 In the words of the Attorney-General for New South Wales:

1070 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 123, citing *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in Liq)* (1940) 63 CLR 278, 312 (Dixon J).

1071 G Taylor and J Williams, *Submission J020*, 19 March 2001. See also ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001; M Sexton SC, *Submission J009*, 23 February 2001; Attorney-General (NSW), *Submission J019*, 14 March 2001; Attorney-General (Qld), *Submission J031*, 26 March 2001.

1072 G Taylor and J Williams, *Submission J020*, 19 March 2001.

> It is a matter of some importance to the State that the Commonwealth (and any other government) should observe and be bound by the laws of this State, particularly those relating to public health and safety and environmental protection. As regards the Commonwealth, of course, it may immunise itself from the application of those laws by valid inconsistent legislation.[1073]

Transparency with flexibility

22.57 The Commission considers that if executive immunity is removed, the Commonwealth should nevertheless be able to exclude itself from liability where necessary. If the executive wishes to be placed in a more advantageous position than that of individuals generally, it should be required to justify this in Parliament, where there is democratic accountability through open debate. The legislature would also have greater incentive to address issues of executive immunity from statute if silence on the issue in a statute had the effect of exposing the Commonwealth rather than protecting it. Removal of Commonwealth immunity avoids the injustice that may result from the non-application of a statute to the Commonwealth because of parliamentary inadvertence.[1074]

22.58 The Commission also recognises that Parliament needs the flexibility to act quickly where a statute binds the Commonwealth in circumstances in which this is considered to be inappropriate. Concern was expressed in consultations and submissions that in the absence of immunity the Commonwealth would find itself exposed to unexpected liability under state laws.[1075] Dr Gavan Griffith QC stated:

> [P]ost *Evans Deakin* experience has shown that it is hard to amend to provide immunity if it subsequently is found necessary … It is practically impossible to review all possible applications of all State laws prospectively. The application can be unexpected, and there should be a power in the Commonwealth to deal with such situations.[1076]

22.59 For example, a state planning law may prohibit a particular type of building, thus preventing the Commonwealth from operating an essential facility for purposes of defence or national security. In such a case, the legislative process may be too lengthy to be effective in exempting the Commonwealth executive from the effect of the state law.

1073 Attorney-General (NSW), *Submission J019*, 14 March 2001. See also B Selway QC, *Submission J028*, 20 March 2001; S Churches, *Submission J017*, 16 March 2001.

1074 New South Wales Law Reform Commission, Report No 24 (1976), 73–74; Ontario Law Reform Commission (1989), 108; P Hogg and P Monahan (2000), 326–327; G Williams (1948), 54; C McNairn (1978), 22; S Price (1990), 227; J Wolffe (1990), 23.

1075 M Sexton SC, *Consultation*, Sydney, 19 February 2001; Attorney-General's Department (Cth), *Consultation*, Canberra, 22 February 2001; Australian Government Solicitor, *Consultation*, Canberra, 5 June 2000.

1076 G Griffith QC, *Correspondence*, 25 April 2001.

22.60 The Commission considers that such problems can be accommodated by enabling the Commonwealth to exclude itself from state legislation by regulation in respect of either a particular state Act or a particular subject area covered by state Acts. The subjection of regulations to disallowance by Parliament provides an adequate degree of accountability in these circumstances.

Comparative Approaches to Reform

22.61 Law reform bodies in Australia and overseas have consistently recommended removing executive immunity and replacing it with a rule that subjects the executive to the common law as if it were an ordinary citizen. These agencies have also consistently recommended that the executive be bound by statute.[1077] The arguments raised in support of these reforms have focussed on subjecting the executive to the law equally with citizens, and simplifying, clarifying and modernising the law. Recommendations that the executive be bound by statute have generally included the proviso that the executive can be exempted in certain situations, by clear legislation.

22.62 As noted above, the Commonwealth, States and Territories have all enacted legislation that either expressly or impliedly removes executive immunity from common law claims. There is a remaining area of immunity, discussed in detail in Chapter 25, which prevents the Commonwealth from being liable for torts committed by its officers or agents if they are acting with 'independent discretion' pursuant to a statutory power. This immunity has been completely removed in New South Wales, but removed only in respect of torts committed by police officers in the other Australian polities.

22.63 South Australia[1078] and the ACT[1079] are the only Australian polities to have enacted provisions that remove executive immunity from statute. Overseas, British Columbia and Prince Edward Island have done so.[1080] Other Australian governments have varied in their policies regarding executive immunity from statute. On some occasions Bills have been introduced into parliament to remove immunity and on others to strengthen it.

1077 Law Reform Committee of South Australia (1987), 22–23; New South Wales Law Reform Commission, Report No 24 (1976), 76; Law Reform Commission of British Columbia, Project 3 (1972), 67; Ontario Law Reform Commission (1989), 111–113; Alberta Law Reform Institute, Report 71 (1994); New Zealand Law Commission, Report No 17 (1990), 52; New Zealand Law Commission, Report No 37 (1997), 2–3.

1078 *Acts Interpretation Act 1915* (SA), s 20.

1079 The *Interpretation Act 1977* (ACT) provides that ACT Acts bind the ACT Crown, but the *Australian Capital Territory (Self-Government) Act 1988* (Cth) states that ACT Acts do not bind the Commonwealth.

1080 *Interpretation Act*, RSBC 1979, c 238, s 14; *Interpretation Act*, RSPEI 1981, c 1–8, s 14.

22.64 The motivation to change the law has often been a landmark judicial decision. In South Australia, it was only after the High Court's decision in *Bropho v Western Australia*[1081] in 1990 that the Law Reform Committee's earlier recommendation was followed by Parliament. The West Australian Parliament considered a Bill to negate the effect of the High Court's decision in *Bropho* and to restore the previous stricter presumption of immunity from statute, but the Bill was not passed.

22.65 The Commonwealth government presented three Bills to Parliament between 1989 and 1991 seeking to amend s 64 JA. As discussed further in Chapter 29, these amendments would have reversed the effect of the High Court's decision in C*ommonwealth v Evans Deakin Industries Ltd*[1082] that a state Act may bind the Commonwealth executive regardless of whether it binds the state executive. All three Bills were unsuccessful in the Senate. In 1992, the Senate Standing Committee on Legal and Constitutional Affairs recommended that Commonwealth bodies should be bound by all Commonwealth, state and territory laws, unless legislation explicitly states otherwise.[1083] These recommendations have not been implemented.

22.66 In Chapters 23 to 29, the Commission considers the law regulating the immunity of the Commonwealth executive in Australia. In conformity with the views expressed by other law reform agencies in Australia and overseas, the Commission considers that the existing law is in need of major reform. These reforms seek to strike a balance between the desirability of subjecting government to law and recognising the power of parliament to exempt the executive from liability in appropriate circumstances.

Recommendation 22–1. Part IX of the *Judiciary Act* should be repealed and a new Part inserted dealing with claims against the Commonwealth and claims against the States and Territories in federal jurisdiction in accordance with the recommendations set out in Part F. Sections 61–63 of the Act should be re-enacted in any new Part.

Recommendation 22–2. The *Acts Interpretation Act 1901* should be amended to include cross-references to the relevant provisions of the *Judiciary Act,* where appropriate.

1081 *Bropho v Western Australia* (1990) 171 CLR 1.
1082 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.
1083 Senate Standing Committee on Legal and Constitutional Affairs (1992), 115–117.

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23. Procedural Immunities and Privileges

Contents

23.1 At common law the executive is entitled to the benefit of a number of procedural immunities. These include immunity from:

- being sued;
- coercive orders concerning discovery, interrogatories and costs;
- interim orders such as temporary injunctions;
- coercive remedies such as permanent injunctions and specific performance; and
- execution of judgment (see Chapter 24).

Procedural Immunities of the Commonwealth

Immunity from being sued

23.2 The source of the right to sue the executive is not clearly understood. Although it is accepted in Australia that the common law immunity no longer operates, the source of the abrogation of the rule is unclear.

23.3 The procedural immunity of the British Crown derived from the doctrines that the King can do no wrong and that a King cannot be sued in his own court.[1084] The erosion of this immunity began in the 13th century with the introduction of the petition of right[1085] by which a subject could seek the monarch's consent (or 'Royal fiat') to bring an action against the Crown.[1086] As the substantive liability of the Crown was increasingly recognised at common law, the general policy of the Crown was to consent to proceedings if an arguable case was presented.[1087]

1084 W Holdsworth (1922); S Kneebone (1998), para 7.3.1.
1085 A process formalised by the *Petitions of Right Act 1860* (UK).
1086 L Jaffe (1963), 3–5.
1087 At least by the 19th century, see M Leeming (1998), 215; P Finn (1987).

23.4 In Australia, early colonial legislation[1088] introduced a petition of right procedure limited to actions for damages for breach of contract.[1089] This was gradually replaced in the latter half of the 19th century by an entitlement as of right to commence proceedings (including claims in tort) against the Crown as if it were an ordinary subject.[1090] The right was confirmed by the Privy Council in 1887 in *Farnell v Bowman.*[1091]

23.5 The right to sue the Commonwealth executive has been variously said to derive from the common law, the Constitution and the *Judiciary Act*, as discussed below. Whichever view is preferred, it is clear that Parliament retains the power to 'extinguish any accrued right of action in tort against itself'.[1092]

23.6 Section 78 of the Constitution empowers Parliament to confer 'rights to proceed against the Commonwealth or a State'. The *Claims Against the Commonwealth Act 1902* (Cth) was enacted pursuant to this provision, reflecting the earlier colonial crown proceedings Acts, but retaining the petition of right procedure.[1093] In 1903 the *Judiciary Act* repealed the *Claims Against the Commonwealth Act* and replaced the petition of right requirement with ss 56 and 64. These provisions did not solve the problems associated with immunity and the interpretation of the provisions has been a continuing source of uncertainty.

23.7 A common view has been that ss 56 and 64 remove the immunity of the Commonwealth from being sued. There are three versions of this theory.

- The right to proceed is conferred by s 56 alone. The statement in s 56 that if a claim is made in tort or contract, jurisdiction is conferred on certain courts necessarily implies that a claim may be made.[1094] The right is regarded as arising from s 56 rather than s 64 because s 56 refers to the substantive rights underlying a suit whereas s 64 may be read as applying only to rights that exist once a suit has been brought.

1088 *Claims Against the Local Government Act 1853* (SA); *Claims Against the Government Act 1857* (20 Vic 15).

1089 P Finn (1987), 141–142.

1090 *Claims Against the Government Act 1866* (Qld), 29 Vic No 238; *Claims Against the Colonial Government Act 1876* (NSW); *Crown Remedies Act 1891* (Tas). But note that Western Australia retained the Governor's discretion until 1898: *Crown Suits Act 1898* (WA); and Victoria retained immunity from tort. See P Finn (1996), 30.

1091 *Bowman v Farnell* (1886) 7 NSWLR 1; *Farnell v Bowman* (1887) 12 App Cas 643.

1092 *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297, 326 (McHugh J).

1093 Clause 2(1) of the Act stated that claimants must petition the Governor-General to appoint a nominal defendant to answer claims against the Commonwealth. If this occurred, the rights of the parties were those between subject and subject (cl 3(2)) in similar terms to those subsequently set down in s 64 JA.

1094 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 271 (Brennan J); *Breavington v Godleman* (1989) 169 CLR 41, 488 (Dawson J); *Suehle v Commonwealth* (1967) 116 CLR 353, 355 (Windeyer J); *James v Commonwealth* (1939) 62 CLR 339, 359 (Dixon J).

- The right to proceed is conferred by s 64 alone.[1095] Section 64 refers to '*any suit* to which the Commonwealth or State is a party' and for this reason is preferred to s 56, which may be read as merely conferring jurisdiction and as being limited to tort and contract claims only.

- The right to proceed is conferred by ss 56 and 64 read together.[1096] This approach generalises the practical operation of s 56 to allow the conferral of rights in 'any suit', not just tort and contract. It also extends the rights conferred by s 64 to the claim underlying the suit, as well as those arising once the suit has commenced.

23.8 An alternative theory, developed by the majority of the High Court in *Commonwealth v Mewett*,[1097] is that the Commonwealth's immunity from being sued is removed by s 75(iii) of the Constitution (see Chapter 22). On this view, the *Judiciary Act* provisions merely reflect rights that are entrenched in the Constitution.

23.9 There is a significant difference between the views centred on the *Judiciary Act* and those centred on the Constitution. Under *Mewett*, the Commonwealth may legislate to extinguish its liability but not to prevent the commencement of proceedings relating to liabilities that have not been extinguished.[1098] The substantive and procedural immunities of the Commonwealth are thus distinct concepts with separate legal sources.[1099]

23.10 This distinction leaves the purpose and effect of ss 56 and 64 JA in a state of uncertainty. Regarding the Commonwealth's substantive liability, the majority in *Mewett* stated that s 56 'recognises, rather than provides the source of, Commonwealth liability', that source being the common law.[1100] Regarding the

1095 *Sargood Bros v Commonwealth* (1910) 11 CLR 258, 309–310 (Higgins J); *Moore v Commonwealth* (1958) 99 CLR 177, 182–183; *Maguire v Simpson* (1977) 139 CLR 362, 381, 404–405; *Groves v Commonwealth* (1982) 150 CLR 113, 119. See also *Commonwealth v Mewett* (1997) 191 CLR 471, 502 (Dawson J); *Parker v Commonwealth* (1965) 112 CLR 295; *Suehle v Commonwealth* (1967) 116 CLR 353.

1096 *Baume v Commonwealth* (1906) 4 CLR 97, 110, 118; *Pitcher v Federal Capital Commission* (1928) 41 CLR 385, 391, 392–393, 395–396; *Shaw Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, 352–353; *Parker v Commonwealth* (1965) 112 CLR 295, 300; *Downs v Williams* (1971) 126 CLR 61, 99; *Groves v Commonwealth* (1982) 150 CLR 113, 121–122; *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297.

1097 *Commonwealth v Mewett* (1997) 191 CLR 471.

1098 This aspect of the decision in *Mewett* was confirmed in *Smith v Australian National Line Ltd* (2000) 176 ALR 449, 453–454 (Gaudron and Gummow JJ).

1099 See also *Abebe v Commonwealth* (1999) 197 CLR 510, 562; *Werrin v Commonwealth* (1938) 59 CLR 150, 167–168 (Dixon J); *Commonwealth v Mewett* (1997) 191 CLR 471, 549–550 (Gummow and Kirby JJ).

1100 *Commonwealth v Mewett* (1997) 191 CLR 471, 551 (Gummow and Kirby JJ).

immunity from being sued, their Honours stated that s 64 serves only to 'further advance the denial by the Constitution of the immunity doctrine'.[1101]

23.11 It follows that, although there is an established right to commence proceedings against the Commonwealth, the source of this right is uncertain. In so far as the right may be seen to depend on legislation, the adequacy of ss 56 and 64 in defining the right is doubtful.

Immunity from procedural orders in the course of litigation

23.12 Once the initial procedural hurdle of suing the Commonwealth has been overcome, a number of other procedural immunities remain. Some immunities continue to apply unaltered; others have been eroded by developing common law and statutory rules.

23.13 The removal of executive immunity that was achieved by the Privy Council's decision in *Farnell v Bowman* was initially read down in subsequent cases.[1102] When interpreting the crown proceedings Acts, colonial courts held that procedural orders such as discovery and interrogatories could not be made or were unenforceable against the executive.[1103]

23.14 Following federation, cases on Commonwealth immunity took a different direction.[1104] The common law immunities from discovery and interrogatories were overturned by courts of equity.[1105] Subsequently it was held that s 64 removed the immunities by guaranteeing that the procedural rights of parties suing the Commonwealth were the same as in proceedings between subjects.[1106]

23.15 The executive's immunity from coercive orders such as injunctions also had a significant impact upon the procedural rights of plaintiffs. This immunity protected the executive from temporary injunctions made in the course of legal proceedings. As Peter Hogg put it, 'the most unfortunate result of the Crown's immunity from injunction is that no interlocutory relief is available against the Crown'.[1107]

23.16 Today, courts consistently hold that the Commonwealth's immunity from procedural orders has been removed by the *Judiciary Act,* except where claims are made for public interest immunity in respect of evidence (discussed below). As a

1101 Ibid, 552 (Gummow and Kirby JJ).
1102 *Farnell v Bowman* (1887) 12 App Cas 643. See also P Finn (1987).
1103 The precedent was overturned in *Morissey v Young* (1896) 17 LR (NSW) Eq 157, in which the court also held that such orders, if made, were enforceable.
1104 *Strahorn v Williams* (1908) 25 WN (NSW) 49a; *Bradley v Commonwealth* (1973) 128 CLR 557.
1105 *Commonwealth v Baume* (1905) 2 CLR 405, 412-413 (Griffith CJ).
1106 *Commonwealth v Miller* (1910) 10 CLR 742; N Seddon (1999), 163.
1107 P Hogg and P Monahan (2000), 38.

result, the Commonwealth is subject to interlocutory orders made in the course of legal proceedings.[1108] This principle is derived from s 64, but only by implication. It may be argued that the *Judiciary Act* should be amended to clarify that the Commonwealth is not immune from these orders.

Immunity from coercive remedies

23.17 A further procedural hurdle for a plaintiff making a claim against the Commonwealth executive concerns the availability of particular remedies. The right of a court to make coercive orders against the executive is now rarely in issue,[1109] but the basis of this right is not clearly expressed in the Constitution or legislation.

23.18 In the early decisions of colonial courts, the right to sue the executive carried with it the right to receive damages if the suit was successful.[1110] This right was not extended to most other remedies[1111] because coercive orders against the Crown were seen as imposing a burden in addition to the Crown's liability to be sued. Put simply, at common law the Crown could not be made to do something by its own courts.

23.19 In early cases the words 'as nearly as possible' were seen by the courts as excluding coercive orders from the operation of s 64. Damages were not considered coercive in nature, nor were declarations;[1112] but the courts held that they were prevented from ordering an injunction,[1113] or specific performance[1114] against the Commonwealth. This view gradually receded as it was recognised that s 64 removes Commonwealth immunity generally.

23.20 It is now clear that the Commonwealth's immunity from coercive remedies is removed by s 64, which provides that 'judgment may be given … as in a suit between subject and subject'.[1115] It follows that any remedy that may be ordered by a court in a civil judgment may be ordered against the Commonwealth.[1116]

23.21 As mentioned above, s 56, which confers jurisdiction in claims against the Commonwealth in tort and contract, has been held to remove the Common-

1108 N Seddon (1999), 163. See also *Hooker Corporation Ltd v Commonwealth* (1985) 61 ACTR 37.
1109 N Seddon (1999), 161; *Capricornia Electricity Board v John M Kelly Pty Ltd* [1992] 2 Qd R 240. See also *Maguire v Simpson* (1977) 139 CLR 362, 393–394 (Stephen J); *Northern Territory v Skywest Airlines Pty Ltd* (1987) 48 NTR 20, 44, 49; *Hooker Corporation Ltd v Commonwealth* (1985) 61 ACTR 37.
1110 *Thomas v The Queen* (1874) LR 10 QB 31; *R v Doutre* (1884) 9 App Cas 745. See also *Yeoman v The King* [1904] 2 KB 429.
1111 *Evans v O'Connor* (1891) 12 NSWLR 81.
1112 P Hogg and P Monahan (2000), 26.
1113 *Commonwealth v Baume* (1905) 2 CLR 405, 417 (Griffith CJ).
1114 *Commonwealth v Miller* (1910) 10 CLR 742; *Maguire v Simpson* (1977) 139 CLR 362, 393 (Stephen J); N Seddon (1999), 162; P Hogg and P Monahan (2000), 40.
1115 See P Finn (1987), 146 in respect of writs of mandamus.
1116 P Hogg and P Monahan (2000), 38–98; N Seddon (1999), 161.

wealth's immunity from liability.[1117] Since damages are the usual remedy for tort and contract claims, this remedy necessarily flows from s 56. Courts have held that s 56 extends beyond claims in tort and contract to allow other common law claims against the Commonwealth. Section 56 might also be extended to remedies other than those that arise from tort and contract claims.

23.22 Injunctions are specifically mentioned in s 75(v) of the Constitution. By extension of the reasoning in *Mewett*, s 75(v) arguably provides a constitutional basis for removing the immunity of a Commonwealth officer from injunctions. However, in *Mewett* the High Court left the effect of s 75(v) on Commonwealth immunity unresolved.[1118]

23.23 Although the courts have consistently held that the *Judiciary Act* has removed the immunity of the executive at common law from civil remedies, in most cases this has been done by implication from legislation rather than from its express terms. It is only with respect to injunctions that a specific constitutional source can be identified, and neither s 56 nor s 64 expressly includes remedies. It may therefore be necessary to amend the *Judiciary Act* to clarify the law with respect to the availability of remedies against the Commonwealth.

Consultations and submissions

23.24 It was clear from the consultations held by the Commission, and from the submissions received, that the procedural immunities of the Commonwealth are no longer a live issue as they have been removed either by the *Judiciary Act* or the Constitution itself.[1119]

23.25 However, the Commission was told that the legislative provisions which address procedural immunities — ss 56 and 64 — are opaque in their language and give rise to confusion. It is unclear whether they specify the venues to commence proceedings, identify the applicable law, or remove immunity. Consultations and submissions strongly favoured amending the *Judiciary Act* to clarify these matters.[1120]

23.26 The Law Council of Australia noted that s 75(iii) of the Constitution ensures that the Commonwealth may be sued in respect of any common law claim, according to present High Court jurisprudence. However, it expressed concern that future decisions might return to the view that s 56 is the source of liability to sue the Commonwealth, in which case it would be necessary to clarify that the section's coverage is not limited to claims in tort and contract. Accordingly, the Council recommended that:

1117 See Chapter 25.
1118 M Leeming (1998).
1119 ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001.
1120 Ibid; D Jackson QC, *Consultation*, Sydney, 19 March 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; B Horrigan, *Consultation*, Canberra, 29 March 2001.

> s 56 of the *Judiciary Act* be amended so that the section clearly provides that any claim for relief on any ground may be brought against the Commonwealth.[1121]

23.27 Andrew Tokley of the South Australian Bar noted that clarification of the *Judiciary Act* was required for 'obvious practical reasons' to ensure that 'neither judges nor lawyers need to spend an inordinate amount of time trying to work out whether the Commonwealth is immune from suit'.[1122]

23.28 The Solicitor-General for South Australia, Brad Selway QC, stated that:

> what is needed is a clear, coherent code on the liability of the Commonwealth and the States in federal jurisdiction … It should be accepted as axiomatic that the Commonwealth and its employees and agencies do not enjoy any immunity from suit.[1123]

23.29 The comments made to the Commission regarding procedural immunity seldom considered the immunities from being sued, interlocutory orders or civil remedies separately. Comments generally referred to the immunity from being sued but appeared to include the other procedural immunities.

Commission's views

23.30 There is no pressing need to legislate with respect to the procedural immunities of the Commonwealth. Case law establishes that the procedural immunities have in fact been abrogated. However, there is little consensus as to the basis for this view because of the imprecise language of the provisions relating to claims against the Commonwealth, both in the Constitution and in the *Judiciary Act*. The Commission considers that the *Judiciary Act* should be amended to improve the transparency and clarity of the law.

23.31 Prevailing High Court jurisprudence holds that the Constitution removes some aspects of Commonwealth procedural immunity. However, the decision in *Mewett* was given by a bare majority, has not been reconsidered by the High Court, and is contrary to a number of decisions that attribute the removal of Commonwealth immunity to the *Judiciary Act* alone. Taking this into account, and given that s 78 of the Constitution empowers the Commonwealth Parliament to enact legislation allowing a 'right to proceed' against the Commonwealth, procedural rights should be expressly set out in the *Judiciary Act*.

23.32 The Commission considers that the Commonwealth's procedural immunities should be expressly abolished, subject to the right of Parliament to confer such immunities by legislation. The Commission notes that the procedural immunities are rarely applicable in practice.

1121 Law Council of Australia, *Submission J037*, 6 April 2001.
1122 A Tokley, *Submission J023*, 16 March 2001.
1123 B Selway QC, *Submission J028*, 20 March 2001.

23.33 The principle of equality between the Commonwealth and other litigants should apply to each type of procedural immunity. Although this chapter has discussed procedural immunities in the context of claims *against* the Commonwealth, orders in the course of proceedings may also be made against the Commonwealth as plaintiff. Removal of the Commonwealth's procedural immunities should therefore apply equally to the Commonwealth as plaintiff and defendant.

23.34 The Commission acknowledges that there may be circumstances in which the Commonwealth may seek to retain a procedural immunity recognised at common law. To this end, the Commonwealth has power to reinstate an immunity if it wishes by expressly enacting legislation to this effect.

23.35 Nothing in the Commission's recommendations is intended to affect the law relating to public interest immunity by which the Commonwealth may refuse to produce evidence in legal proceedings if to do so would be contrary to the public interest. This immunity can be claimed, for example, in respect of defence department documents or Cabinet working papers. Public interest immunity lies outside the scope of the present inquiry. It arises in well-defined circumstances and is not confined to the executive. In particular, the immunity does not operate as a general exclusion from procedural rules attaching by virtue of the claimant's status as the executive arm of government.

Recommendation 23–1. The Commonwealth's procedural immunity from being sued should be expressly abolished by legislation. The *Judiciary Act* should be amended to provide that proceedings may be commenced against the Commonwealth in any Australian court that has jurisdiction with respect to that matter in the same manner as proceedings may be commenced against a person of full age and capacity, except as specifically provided by a Commonwealth Act.

Recommendation 23–2. The procedural immunities enjoyed by the Commonwealth at common law in the course of civil litigation (such as those relating to discovery, interrogatories, interim orders and costs) should be expressly abolished by legislation. The *Judiciary Act* should be amended to provide that the procedural rights of persons in legal proceedings in which the Commonwealth is a party should be the same as those in a claim between persons of full age and capacity, except as specifically provided by a Commonwealth Act. However, nothing in this recommendation is intended to affect the laws of evidence relating to public interest immunity.

Recommendation 23–3. The procedural immunities enjoyed by the Commonwealth at common law with respect to coercive remedial orders (such as those relating to injunctions and specific performance) should be expressly abolished by legislation. The *Judiciary Act* should be amended to provide that the remedies that may be awarded in legal proceedings against the Commonwealth should be the same as those in a claim between persons of full age and capacity, except as specifically provided by a Commonwealth Act.

Procedural Immunities of the States and Territories

State issues

23.36 Section 78 of the Constitution empowers the Commonwealth Parliament to make laws conferring rights to proceed against the States, as well as against the Commonwealth, 'in respect of matters within the limits of the judicial power'. There is considerable controversy over the extent to which s 78 empowers the Commonwealth to affect the substantive liabilities or immunities of the States (see Chapter 25).

23.37 If s 78 of the Constitution is the only source of Commonwealth power to legislate in respect of the immunities enjoyed by state executives, the Commonwealth is limited to conferring 'rights to proceed' against the States. This raises the question of whether discovery, injunctions or specific performance are 'rights to proceed' given that proceedings are already on foot when such orders are sought. Section 78 also speaks of rights 'against' the States, implying that the State must be a defendant and that such rights are not applicable when the State is a plaintiff.[1124] Because the Commonwealth Parliament probably has no power to confer substantive rights against the States, procedural rights that are coercive (and therefore have substantive effect) may also be called into question.

23.38 All Australian States and Territories have enacted legislation to remove the procedural immunity of the executive in matters arising in state or territory jurisdiction. These provisions are typically couched in terms that clearly extend to procedural orders, whether coercive or not.[1125] These provisions highlight the semantic inadequacies of the federal legislation, and also raise the question of

1124 The Constitutional Commission concluded that s 78 only empowers the Commonwealth to affect the immunities of the States within federal jurisdiction in those matters where the State is a defendant: Constitutional Commission (1988), 421–424.

1125 *Crown Proceedings Act 1972* (SA), s 5; *Crown Proceedings Act 1993* (Tas), s 5; *Crown Proceedings Act 1992* (ACT), s 5; *Crown Proceedings Act 1993* (NT), s 5; *Crown Proceedings Act 1988* (NSW), s 5; *Crown Proceedings Act 1958* (Vic), ss 11, 25; *Crown Proceedings Act 1980* (Qld), s 9; *Crown Suits Act 1947* (WA), ss 5, 9. There is an exception for mandatory injunctions in South Australia, Tasmania, the ACT and the Northern Territory.

whether it is prudent for the Commonwealth Parliament to legislate on the immunities of the States at all.

23.39 In the absence of federal legislation, the state and territory Acts would presumably be picked up and applied as surrogate federal law pursuant to ss 79 and 80 JA (see Chapter 34).

23.40 Certain other provisions in Part IX JA also affect suits against the States. Section 60 gives the High Court injunctive powers against the States in matters in its original jurisdiction; and s 63 states that process must be served upon the state Attorney-General when a State is a party to a suit.

23.41 Nothing in s 78 of the Constitution, nor ss 58 and 64 JA, empowers the Commonwealth to confer rights to proceed against the States in matters of state jurisdiction, and the courts have consistently held that these provisions only operate in federal jurisdiction.[1126] This limitation is not clearly expressed in the provisions.

Territory issues

23.42 Section 78 of the Constitution does not apply to Territories; nor do ss 56, 58 and 64 JA. The relevant Constitutional power is found in s 122, which states that Parliament 'may make laws for the government of any Territory'. The power in s 122 is clearly wider than the power in s 78. In particular, s 122 empowers the Commonwealth Parliament to confer rights in respect of territory jurisdiction as well as federal jurisdiction. The Commonwealth's power to legislate on the procedural immunities of the Territories is not subject to the jurisdictional limitation that limits its legislative power over the States.[1127]

23.43 The procedural immunities of the Territories are dealt with in Part IXA JA, but this does not contain any provisions equivalent to ss 56, 58 and 64. While the territory crown proceedings Acts do confer such rights, the question remains whether the *Judiciary Act* should be amended to clarify the law on procedural rights in claims against the Territories.

1126 *China Ocean Shipping v South Australia* (1979) 27 ALR 1, 24 (Gibbs J); L Zines (1997), 370; *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 264. See also *Maguire v Simpson* (1977) 139 CLR 362, 401.

1127 See Part H for a detailed discussion of territory jurisdiction.

Consultations and submissions

23.44 Those who addressed the issue in submissions and consultations accepted that the Commonwealth may validly legislate to remove the States' procedural immunities from suit in federal jurisdiction.[1128] As Peter Johnstone expressed it:

> [The Commonwealth] may legislate to remove State immunity from suit. The Commonwealth may do so under s 78 [of the Constitution], or perhaps under s 51(xxxix) in execution of matters incidental to the execution of the judicial power (suits in federal jurisdiction).[1129]

23.45 Submissions and consultations firmly supported the view that the Commonwealth cannot alter state immunity except in matters in federal jurisdiction, or (more narrowly) 'only in those matters outlined in ss 75 and 76 of the Constitution where the State is a defendant'.[1130]

23.46 It was noted that the crown proceedings Acts of the States and Territories have 'effectively removed the Crown's entitlement to immunity from suit'.[1131] However, as in relation to the procedural immunities of the Commonwealth executive, it was thought that the *Judiciary Act* lacked clarity with respect to the procedural immunities of the States:

> Amendment should make it clear that the expression 'as nearly as possible' [in s 64] does not function as indicating a contrary intent that treats a State as *not deprived* of its privileged Crown status when sued as a constitutional entity.[1132]

> Section 64 of the *Act* should be amended to clarify its role in a manner consistent with the purpose to be served by s.78 of the Constitution.[1133]

Commission's views

23.47 The Commission considers that the law concerning procedural immunities should be the same for the States as for the Commonwealth, to the extent that the Constitution permits. Consistently with the ambit of Commonwealth power, federal laws removing the procedural immunity of the States should apply only to matters in federal jurisdiction. The *Judiciary Act* should be amended to clarify this.

1128 ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001; Attorney-General (NSW), *Submission J019*, 14 March 2001; B Selway QC, *Submission J028*, 20 March 2001; Attorney-General (Qld), *Submission J031*, 26 March 2001.

1129 P Johnstone, *Submission J016*, 6 March 2001.

1130 M Sexton SC, *Submission J009*, 23 February 2001; Attorney-General's Department (Cth), *Consultation*, Canberra, 28 March 2001.

1131 P Johnstone, *Submission J016*, 6 March 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001.

1132 P Johnstone, *Submission J016*, 6 March 2001.

1133 Attorney-General (Qld), *Submission J031*, 26 March 2001.

23.48 There are both practical and policy-based reasons for the view that the Commonwealth should be able to impose procedural obligations on the States in federal jurisdiction. The exercise of federal jurisdiction would be frustrated if a State could erect a barrier to a suit by relying on a common law procedural immunity, for example in a suit between two States. On the other hand, federalism considerations suggest that States should be free to determine the extent of their substantive liability.

23.49 The Commission considers that the law concerning procedural immunities of the executive of a Territory should be the same as that applicable in respect of the States. Accordingly, the Commonwealth should legislate with respect to the procedural immunities of the Territories only in federal jurisdiction, notwithstanding the wider power available to it under s 122 of the Constitution.

Recommendation 23–4. The procedural immunities enjoyed by the States and Territories at common law in relation to being sued, procedural orders made in the course of litigation, and coercive remedies should be expressly abolished by legislation in matters of federal jurisdiction.

Recommendation 23–5. The *Judiciary Act* should be amended to provide that, in matters of federal jurisdiction:

(a) proceedings may be commenced against a State or Territory in any Australian court that has jurisdiction with respect to that matter in the same manner as proceedings may be commenced against a person of full age and capacity, except as specifically provided by a Commonwealth Act;

(b) the procedural rights of persons in legal proceedings against a State or Territory should be the same as those in a claim between persons of full age and capacity, except as specifically provided by a Commonwealth Act; and

(c) the remedies that may be awarded in legal proceedings against a State or Territory should be the same as those in a claim between persons of full age and capacity, except as specifically provided by a Commonwealth Act.

However, nothing in this recommendation is intended to affect the laws of evidence relating to public interest immunity.

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24. Immunity from Execution

Contents

Commonwealth and State Immunity from Execution

24.1 Execution is a procedure for the enforcement of judgments, usually involving seizure and sale by the sheriff or other court official of the judgment debtor's property to pay the sum due to the judgment creditor.[1134]

24.2 The executive is generally immune from the procedure for executing judgments. Immunity from execution in respect of state jurisdiction is set out in the state crown proceedings Acts.[1135] In respect of federal jurisdiction, s 65 JA provides as follows:

> No execution or attachment, or process in the nature thereof, shall be issued against the property or revenues of the Commonwealth or a State in any such suit; but when any judgment is given against the Commonwealth or a State, the Registrar or other appropriate officer shall give to the party in whose favour the judgment is given a certificate in the form of the Schedule, or to a like effect.

24.3 The reference to claims 'in any such suit' alludes to s 64, and it can therefore be assumed that s 65 applies only to matters in federal jurisdiction.[1136] It would appear to follow that state crown proceedings Acts apply only to claims against a state executive that fall outside federal jurisdiction. In the event of any inconsistency with the state law, s 65 will prevail by virtue of s 109 of the Constitution.

1134 See P Hogg and P Monahan (2000), 51; B Cairns (1996), Ch 21.

1135 Similar provisions are found in the *Crown Proceedings Act 1947* (UK).

1136 See *Maguire v Simpson* (1977) 139 CLR 362, 370 (Barwick CJ); *China Ocean Shipping v South Australia* (1979) 27 ALR 1, 24 (Stephen J).

Comparative Approaches

24.4 Unlike other procedural immunities, the executive's immunity from execution, which is a form of immunity from coercive order, has long been supported by statute.[1137] In colonial Australia, crown proceedings Acts in Queensland and New South Wales were initially denied Royal Assent because they permitted execution against Imperial property in the event of unsatisfied judgments. They received assent only after they were amended to confirm the traditional immunity from execution.[1138]

24.5 In all States and Territories except Queensland, the crown proceedings Acts provide that the state executive is immune from execution.[1139] There are similar provisions in the crown proceedings statutes of the United Kingdom,[1140] Canada and each of its provinces,[1141] and New Zealand.[1142]

24.6 The Queensland Act is unusual in providing that execution is expressly permitted 'on any property vested in Her Majesty in right of the State of Queensland', excepting only the property occupied by the Governor, the legislative buildings, court houses and prisons.[1143] It has been argued that further exceptions are probably necessary to ensure that all appropriate categories of Crown property are exempt from private seizure and sale.[1144] More importantly, an anomalous situation is created by which plaintiffs receiving judgment against the Queensland executive are entitled to execute judgment if the suit is within state jurisdiction but not if it is within federal jurisdiction.

24.7 There is limited case law on immunity from execution in Australia and the United Kingdom, but all relevant cases clearly recognise the existence of the immunity.[1145] In Canada, where there has been greater controversy, the line of precedent acknowledging the immunity from execution is long and unwavering.[1146]

1137 J Chitty (1820), 376; *R v Central Railway Signal Co* [1933] SCR 555.
1138 P Finn (1987), 144.
1139 *Crown Proceedings Act 1972* (SA), s 10; *Crown Proceedings Act 1993* (Tas), s 11; *Crown Proceedings Act 1992* (ACT), s 13; *Crown Proceedings Act 1993* (NT), s 11; *Crown Proceedings Act 1988* (NSW), s 7; *Crown Proceedings Act 1958* (Vic), s 26; *Crown Proceedings Act 1980* (Qld), s 11; *Crown Suits Act 1947* (WA), s 10.
1140 *Crown Proceedings Act 1947* (UK) s 25.
1141 *Crown Liability Act*, RSC 1970, C–38. See P Hogg and P Monahan (2000), 52.
1142 *Crown Proceedings Act 1950* (NZ), s 24.
1143 *Crown Proceedings Act 1980* (Qld), s 11(2).
1144 P Hogg and P Monahan (2000), 55.
1145 See for example *Commonwealth v Mewett* (1997) 191 CLR 471, 541–542; *Commonwealth v Anderson* (1960) 105 CLR 303, 312 (Dixon CJ), 318–321 (Windeyer J).
1146 Law Reform Commission of Canada (1987), 18; *Titts v Pilon* (1868) 12 LCJ 289; *R v Central Railway Signal Co* [1933] SCR 555, 563; *Public Service Alliance of Canada v CBC* [1976] 2 FC 145.

The Obligation to Satisfy Judgment Debts

24.8 The adverse effect on judgment creditors of the executive's immunity from execution is significantly diminished by the fact that, in most cases, the immunity is coupled with a statutory obligation on the executive to pay the judgment debt. Section 66 JA states:

> On receipt of the certificate of a judgment against the Commonwealth or a State the Minister for Finance or the Treasurer of the State as the case may be shall satisfy the judgment out of moneys legally available.

24.9 Similar provisions apply under state and territory legislation,[1147] except in Victoria.[1148] In the great majority of cases, therefore, legislation provides for payment to be made out of funds appropriated for the purpose. Enforcing a judgment against the executive in these circumstances presents no great difficulty.

24.10 It is rarely, if ever, the case that the duty under s 66 to pay a judgment debt is not satisfied. Governments may enact legislation to deny or cap their liability for a particular kind of damage, or retrospectively reverse or modify a judgment, but there are constitutional limits on their power to do so.[1149] The Commission was not made aware of any case in which a judgment debt has been avoided in this manner.

24.11 The authority of the executive to satisfy judgment debts is limited by constitutional restrictions on appropriation of money. Section 83 of the Constitution states that '[n]o money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law'.[1150] Similar restrictions apply under state constitutions. Section 66 JA does not itself authorise an appropriation that would satisfy s 83,[1151] but the two provisions have operated together without difficulty in practice. Payment of a judgment debt can be authorised by a subse-

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1147 *Crown Proceedings Act 1972* (SA), s 10; *Crown Proceedings Act 1993* (Tas), s 11; *Crown Proceedings Act 1988* (NSW), s 7; *Crown Proceedings Act 1980* (Qld), s 11; *Crown Suits Act 1947* (WA), s 10. The ACT and Northern Territory crown proceedings Acts seem to imply such an obligation, but the language is ambiguous, stating only that the Chief Minister 'shall give directions as to the manner in which the judgment is to be satisfied' and that these directions must be followed. See *Crown Proceedings Act 1993* (NT), s 11; *Crown Proceedings Act 1992* (ACT), s 13.

1148 Victorian legislation states that 'it shall be lawful' for the Crown to pay a judgment debt but imposes no obligation to do so: *Crown Proceedings Act 1958* (Vic), s 26.

1149 Chapter III of the Constitution prevents legislative interference with the judicial process. See J Quick and R Garran (1901), 722; G Winterton (1994), 204; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *R v Humby; Ex parte Rooney* (1973) 129 CLR 231, 250 (Mason J); *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96; *Liyanage v The Queen* [1967] 1 AC 259, 290.

1150 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 572–573 (Mason CJ, Deane, Toohey And Gaudron JJ).

1151 G Lindell, *Submission J012*, 5 March 2001; see also *Alcock v Fergie* (1867) 4 Wy W & a'B (L) 285, cited in P Finn (1987), 158, which dealt with the effect of the Victorian provisions similar to those of ss 65 and 66 JA.

quent appropriation where necessary.[1152] In *Commonwealth v Mewett*, Gummow and Kirby JJ commented that:

> Sections 65 and 66 of the *Judiciary Act* accommodate [s 83] in respect of judgments given against the Commonwealth and States. There is to be no execution or attachment, but upon receipt of a certificate of judgment, the Commonwealth Minister for Finance or State Treasurer, as appropriate, shall satisfy the judgment out of moneys legally available.[1153]

Policy Considerations

24.12 A number of arguments have been made in favour of retaining executive immunity from execution.

- The right to execution against the executive is unnecessary because the executive is obliged by legislation to satisfy, and does in fact satisfy, its judgment debts.[1154]

- The seizure of Crown property, such as defence force hardware, public transport, power stations, libraries and sporting grounds, could cause intolerable disruption to public services.[1155]

- The ability of governments to defeat enforcement is limited because they cannot move many assets out of the jurisdiction.

- A public official who refuses to pay a judgment debt may be compelled to do so through administrative law remedies.

24.13 The principal argument for removing the immunity from execution relates to the executive's capacity to 'passively resist'.[1156] Canadian reports have noted that governments wishing to delay payment of a judgment debt have a number of options. In particular, Ministers of State could 'invoke accounting requirements to postpone payment to another fiscal year', or 'make a series of instalment payments so as not to exceed the limits of various budgets'.[1157] However, there is no evidence that such tactics have been used in Australia.

24.14 Addressing these concerns, the Canadian Law Reform Commission recommended limiting the number of instalment payments made by governments in satisfaction of a debt, requiring the government to justify any public interest

1152 *Vass v Commonwealth* (2000) 96 FCR 272.
1153 *Commonwealth v Mewett* (1997) 191 CLR 471, 541 (Gummow and Kirby JJ).
1154 *Franklin v The Queen (No 2)* [1974] 1 QB 205, 218 (CA).
1155 Law Reform Commission of Canada (1985), 76.
1156 Law Reform Commission of Canada (1987), 23.
1157 Ibid, 12.

concerns to the court within a time limit, and imposing monetary penalties on the government for refused, delayed or incomplete compliance.[1158]

24.15 Legislation in the Australian States and Territories may provide another answer to this problem. The New South Wales Act mirrors the language of s 66 JA in providing that judgments must be satisfied directly by the Treasurer.[1159] However, the legislation in South Australia, Tasmania, the Australian Capital Territory and the Northern Territory provides that the Governor, Attorney-General, Chief Minister and Administrator, respectively, 'shall give directions as to the manner in which the judgment is to be satisfied'.[1160] This flexibility could be of benefit by making it easier for the government to honour its obligations and more likely that it will do so in a timely manner.

Consultations and Submissions

24.16 In consultations and submissions the Commission was told that executive immunity from execution of judgments is appropriate and ought to be retained.[1161] The Law Council of Australia stated:

> The Law Council is also concerned at the issue of the interruption of government services if Commonwealth assets are made the subject of execution. The Law Council appreciates that execution could be allowed only against certain assets, for example commercial assets, but believes that such an approach would involve further effort to address an issue which the Law Council does not consider to be 'live', given the Commonwealth's compliance with judgments.[1162]

24.17 Removal of the immunity was seen as likely to expose the government to risks contrary to the public interest. Andrew Tokely put this view in the following terms:

> Those seeking to enforce judgments often engage in 'stand over' tactics to extract the maximum amount of money. Such tactics are quite inappropriate in case of a body which is supposed to represent the interests of the whole country. However, once immunity from execution is removed the Commonwealth is exposed to such tactics. It may also be seen as a 'soft target' or 'deep pocket' and be joined in instances where the chance of liability is remote or in cases where, for political reasons, the Commonwealth is seen as a suitable target.[1163]

1158 Ibid, 83–87. The Commission also recommended that all state property should be subject to compulsory execution with some exceptions where 'the property in question is essential to the organization and operation of the public service': Law Reform Commission of Canada (1987), 74, 84–85.

1159 *Crown Proceedings Act 1988* (NSW), s 7(2).

1160 *Crown Proceedings Act 1972* (SA), s 10(3); *Crown Proceedings Act 1993* (Tas), s 11(3); *Crown Proceedings Act 1992* (ACT), s 13(4); *Crown Proceedings Act 1993* (NT), s 11(3).

1161 G Griffith QC, *Consultation*, Melbourne, 16 February 2001; Attorney-General's Department (NT), *Consultation*, Darwin, 1 March 2001; Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001.

1162 Law Council of Australia, *Submission J037*, 6 April 2001.

1163 A Tokley, *Submission J023*, 16 March 2001.

24.18 The Commission was advised there were no significant practical problems arising from immunity of the executive from execution. No examples were offered of failure by governments to satisfy judgment debts either at the Commonwealth or state level.

24.19 There was agreement that the immunity from execution should be coupled with an obligation to pay judgment debts and that this obligation should adequately address potential problems with delay in payment.[1164] The Solicitor-General for South Australia, Brad Selway QC, stated in his submission that the *Judiciary Act* should provide that:

> The Commonwealth is not liable to execution, but the Governor-General shall direct that any court order against the Commonwealth which [has] not been subject to review shall be paid from General Revenue. There should be a special appropriation to meet such a payment.[1165]

Commission's Views

24.20 The Commission shares the view that the executive's immunity from execution of judgment should remain. In coming to this view the Commission notes that the function of execution is to ensure that the debt owed to the judgment creditor is duly satisfied from available assets. In the case of the executive, the statutory obligation to meet the judgment debt satisfies this concern in a manner that also protects the public interest. The seizure and sale of Commonwealth assets for the purpose of meeting a judgment debt is apt to create disorder and disruption, given the public purpose of most state-owned assets. Moreover, the concerns expressed in Canada about delays by the executive in satisfying judgment debts have not been reflected in Australian experience.

24.21 In some respects, the Commission considers that s 66 warrants clarification. First, s 66 should be amended to provide that a judgment should be satisfied within a reasonable time. However, it is not suggested that specific time periods be designated because these could not account for the range of circumstances in which the provision might apply.

24.22 Second, the section should clarify the meaning and effect of the condition that judgments debts be paid from 'monies legally available'. To this end the section should indicate that the moneys must be lawfully appropriated by Parliament, or be otherwise legally available.

1164 Attorney-General's Department (NT), *Consultation*, Darwin, 1 March 2001; Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001; Supreme Court of the ACT, *Submission J018*, 7 March 2001.

1165 B Selway QC, *Submission J028*, 20 March 2001.

24.23 Third, the Commission recommends introducing a degree of flexibility in cases where a judgment is given against a Commonwealth body with separate legal personality. In these circumstances, the relevant Minister should be entitled to direct the Commonwealth body to satisfy the judgment debt within a reasonable time.

24.24 Fourth, s 66 should provide specific public law remedies to compel compliance with the statutory obligation in the event of default. In the case of remedies against Commonwealth officers, this may do little more than supplement the jurisdiction identified in s 75(v) of the Constitution. In the case of the States, the recommendation would provide additional remedies, to the extent that s 78 of the Constitution authorises coercive orders to be made against state officers.

24.25 Finally, the Commission considers that ss 65–67 should comport with the language of s 78 of the Constitution, on which they are founded. To this end, the sections should be amended to provide expressly that they apply to judgments given against a State only in matters of federal jurisdiction.

Recommendation 24–1. Section 66 of the *Judiciary Act* should be amended to provide that the obligation of the Minister for Finance or the Treasurer to satisfy a judgment given against the Commonwealth or a State must be discharged within a reasonable time.

Recommendation 24–2. Section 66 of the *Judiciary Act* should be amended to provide that a judgment given against the Commonwealth or a State shall be satisfied out of moneys that have been lawfully appropriated by the relevant Parliament or are otherwise legally available, in accordance with the Australian Constitution and federal law, or the State's Constitution and state law, as the case may be.

Recommendation 24–3. Section 66 of the *Judiciary Act* should be amended to provide that, where a judgment is given against a body that has separate legal personality but is entitled to the privileges and immunities of the Commonwealth or a State, the Minister for Finance or the Treasurer may give directions to that body to satisfy the judgment debt within a reasonable time. Section 66 should further provide that the body is authorised and required to carry out any such direction.

Recommendation 24–4. Section 66 of the *Judiciary Act* should be amended to provide that, if a judgment against the Commonwealth or a State is not satisfied within a reasonable time, a judgment creditor may seek a writ of mandamus or an equivalent order:

(a) against the Minister for Finance or Treasurer of the Commonwealth or a State; or

(b) where the Minister for Finance or Treasurer gives a direction to a body pursuant to Recommendation 24–3, against that body or a relevant officer of that body.

Such a writ or order may be sought in any Australian court that has jurisdiction with respect to that matter. However, the section should provide that no writ of mandamus, or an equivalent order, shall issue to compel a person or body to satisfy a judgment debt from moneys that have not been lawfully appropriated or are not otherwise legally available in accordance with 24–1.

Recommendation 24–5. Sections 65, 66 and 67 of the *Judiciary Act* should be amended to clarify that, in so far as the sections apply to judgments given against a State or to judgments given in favour of a State, the provisions extend only to judgments relating to matters of federal jurisdiction.

Immunity from Execution Against a Territory

Current law and practice

24.26 The *Judiciary Act* provisions relating to the execution of judgments against a Territory are inconsistent with those concerning execution against the Commonwealth or a State on a number of levels. In respect of the Northern Territory, s 67E JA provides:

> No execution or attachment, or process in the nature thereof, shall be issued against the property or moneys of the Territory.

24.27 This provision differs in two important respects from s 65. Section 67E does not provide for a certification procedure such as that identified in s 65; nor is it combined with an equivalent to s 66 imposing an obligation on the Territory to satisfy a judgment against it 'out of moneys legally available'. Section 11 of the *Crown Proceedings Act 1993* (NT) imposes an obligation on the government to satisfy judgments but it is not clear whether the obligation applies to claims in federal jurisdiction.

24.28 There is no statement in either the *Judiciary Act* or the *Australian Capital Territory (Self-Government) Act 1988* (Cth) that the traditional immunity against execution applies to the ACT executive. It is not clear whether the provisions of the *Crown Proceedings Act* 1992 (ACT), which contain both an immunity and an obligation to pay, extend to federal jurisdiction.

24.29 As a result of these provisions, there are presently three different rules on immunity from execution — one for the Commonwealth and the States, one for the Northern Territory, and one for the ACT. There is no obvious reason why the Northern Territory should have an immunity from execution that is unaccompanied by an obligation to meet its judgment debts. Although it has not been suggested that an Australian government has ever refused to satisfy a judgment debt, or used 'passive resistance' techniques to delay payment, the anomalous provisions for the Northern Territory leave this possibility open. Moreover, the silence of the *Judiciary Act* as to execution of judgments against the ACT creates further uncertainty for judgment creditors.

Consultations and submissions

24.30 In most consultations in the Territories, the Commission was told that the Northern Territory's immunity from execution was appropriate and that public assets should not be subject to seizure and sale. However, all of those consulted agreed that the immunity should be coupled with an obligation upon governments to satisfy the judgment debt.[1166] The Law Council of Australia remarked:

> The *Judiciary Act* should provide general immunity from execution in respect of both the ACT and Northern Territory. This should be coupled with statutory enforcement provisions in the *Judiciary Act* for both the ACT and Northern Territory analogous to those in respect of the Commonwealth.[1167]

24.31 None of those consulted by the Commission provided examples of cases in which any territory government had refused to satisfy a judgment debt. However, the Commission was told that delays in receiving payment in satisfaction of judgment debts against territory governments had occurred from time to time. The view was expressed that legislation should remove potential difficulties of this sort with respect to the payment of judgment debts.[1168]

24.32 It was generally agreed that the inconsistencies in the treatment of the Northern Territory and the ACT regarding execution were anomalous and warranted corrective amendment. Chief Justice Miles of the ACT Supreme Court stated:

1166 Attorney-General's Department (NT), *Consultation*, Darwin, 1 March 2001; Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001; Supreme Court of the ACT, *Submission J018*, 7 March 2001.

1167 Supreme Court of the ACT, *Submission J018*, 7 March 2001.

1168 Attorney-General's Department (NT), *Consultation*, Darwin, 1 March 2001; Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001.

> In relation to the execution of judgments, it should be observed that this has not proved to be a problem in practice, but it would follow from the desirable policy goal of putting citizens of the territories in the same position as citizens of the states that the same provision should apply to the execution of judgments in suits to which the Commonwealth, a state or a territory is a party.[1169]

24.33 Wendy Harris of the Victorian Bar stated in her submission:

> Consistently with the above approach of generally conforming the treatment of self-governing territories with those of the states, I suggest that there is no reason why section 67E should not be folded into ss 65 and 66 and these sections expanded to encompass the ACT. It seems desirable that immunity from execution and the terms thereof should be uniform across the board, and the only way to achieve this is via federal law.[1170]

Commission's views

24.34 The Commission considers that there should be parity of treatment between the States and the self-governing Territories, as far as constitutionally possible. The Commission considers the underlying principle to be that the executive should be immune from execution but obliged by legislation to satisfy any judgment debt. The preferable model is one that effects this principle for all Australian polities. Consistency requires that immunity from execution in federal jurisdiction be extended to the ACT, and that both the Northern Territory and the ACT be subject to a legislative obligation to satisfy their judgment debts. This can be achieved in one of two ways:

(d) s 67E could be extended to include the ACT and amended to include an obligation to satisfy judgment debts in the same terms as s 66; or

(e) s 67E could be repealed and ss 65 and 66 extended to cover the ACT and the Northern Territory.

24.35 The Commission prefers option (b) as it would promote clarity and accessibility of the law.

24.36 Finally, s 67, which expressly provides for the Commonwealth and the States to enforce judgments in their favour, should also be extended to the Territories. This right is uncontroversial. However, for clarity, and again in the interests of parity, the section should apply equally to the States and self-governing Territories.

1169 Supreme Court of the ACT, *Submission J018*, 7 March 2001.
1170 W Harris, *Submission J014*, 26 February 2001.

Recommendation 24–6. Sections 65, 66 and 67 of the *Judiciary Act* should be amended to extend those provisions to the Northern Territory and the ACT, and s 67E should consequently be repealed. [See Recommendations 24–1 to 24–5 in relation to execution of judgments against the Commonwealth or a State.]

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25. Liability of the Commonwealth at Common Law and in Equity

Contents

25.1 Historically, the Crown was immune at common law from any substantive claim arising in contract or tort, or any other cause of action for which a remedy might be sought in court. However, these immunities have gradually been eroded to the point where they are now the exception rather than the rule.

25.2 The executive's immunity from contract was expressly removed by statute early in Australia's colonial history[1171] and has not been a source of controversy. The immunity of the executive from claims in tort has been more problematic.

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United Kingdom

25.3 The erosion of Crown immunity from liability at common law and in equity began in the middle ages in the form of waiver of immunity by the Crown (a petition of right) to empower a subject to enforce property rights against the Crown. The need typically arose where the King had seized or otherwise taken possession of land to which the petitioner had lawful tenure. The Queen's Bench considered and approved the remedy of petition of right in contract in 1874 in *Thomas v The Queen*.[1172]

25.4 The right to sue the Crown in tort developed more slowly than the right to sue in contract. For many centuries plaintiffs were unable to seek remedies for torts committed by the Crown because the Crown's substantive liability was extin-

1171 *Claims Against the Government Act 1866* (Qld); *Claims Against the Colonial Government Act 1876* (NSW); *Claimants Relief Act 1853* (SA); *Claims Against the Crown Act 1858* (Vic); *Crown Redress Act 1859* (Tas); *Crown Suits Act 1898* (WA).

1172 *Thomas v The Queen* (1874) LR 10 QB 31.

guished by the maxim that the King can do no wrong.[1173] In the 19th century, the expansion of government activity in constructing and maintaining public works and facilities dramatically increased the need for remedies for torts committed by the Crown. However, Crown immunity from tort continued in the United Kingdom until enactment of the *Crown Proceedings Act 1947* (UK), which abolished the petition procedure and placed the Crown, subject to certain provisions, in the same position as its subjects.

Australia

25.5 In Australia, the executive's immunity from tort was removed by the colonial crown proceedings Acts much earlier than in England. These Acts allowed plaintiffs to proceed with 'any just claim or demand' against the Crown but they were not interpreted consistently. The Supreme Court of Queensland recognised the liability of the Crown to be sued in tort quite early but it was not until 1886 in *Bowman v Farnell*[1174] that the New South Wales Supreme Court followed suit.

25.6 After federation, in *Baume v Commonwealth,*[1175] the High Court established that ss 56 and 64 JA conferred a substantive right of action in tort against the Commonwealth. However, the language of these provisions is unclear and their interpretation has varied (see Chapter 23).

Vicarious Liability and the *Enever* Principle

25.7 Vicarious liability arises where one person is held responsible for the tortious conduct of another person who is under his or her control. A typical example is an employer's liability for the acts of an employee carried out in the course of employment. The employer's liability arises from the relationship of employment and from risks arising in the course of conducting the employer's business.[1176] Consequently there is no need to prove fault on the part of the employer — the liability is strict.[1177]

25.8 In many cases the executive attracts vicarious liability for torts committed by government officers or agents. However, an exception was created by the High Court in *Enever v The King.*[1178] In that case, a policeman acting under statutory authority admitted making a wrongful arrest in the exercise of his authority. The High Court held that the government was not vicariously liable to pay damages for the wrongful arrest because the government did not exercise control, and was not in a master-servant relationship, where a public officer exercised a statutory

1173 P Hogg and P Monahan (2000), 108; W Holdsworth (1922), 293.
1174 *Bowman v Farnell* (1886) 7 NSWLR 1.
1175 *Baume v Commonwealth* (1906) 4 CLR 97.
1176 P Hogg and P Monahan (2000), 114–115; P Atiyah (1967).
1177 S Kneebone (1998), 319.
1178 *Enever v The King* (1906) 3 CLR 969.

duty.[1179] The arrest 'was [the police officer's] own act, done in the exercise of his duty', not an act 'on behalf of the government'.[1180]

25.9 It has been argued that the principle in *Enever* has been applied by the courts with 'undue zeal'.[1181] Following *Enever* it was held that the acts of a person could not be imputed to the executive under the usual principles of vicarious liability where that person was acting beyond the control of the Commonwealth,[1182] under 'original authority,'[1183] with 'absolute duty' and with 'independent discretion'. The *Enever* principle has been used to immunise the executive from liability in cases regarding a legal aid officer,[1184] a Crown prosecutor,[1185] a court security officer,[1186] a tax commissioner,[1187] and a ship's pilot.[1188]

25.10 The Federal Court recently confirmed *Enever* in *Cubillo v Commonwealth (No 2)*.[1189] O'Loughlin J acknowledged criticisms of *Enever* but restated the rule and its limitations as follows:

> As the law presently stands, the independent discretion rule represents a limitation upon the vicarious liability of the Commonwealth at common law for the torts of its servants. If an officer or employee of the Crown, acting in the course of his or her service under the authority of the Crown, commits a tort, the Crown will, *prima facie*, be liable, unless the officer or employee was exercising or fulfilling an independent duty or power … this principle of independent discretion, as originally enunciated in *Enever*, applies to any public officer with a discretion in the exercise of an independent legal duty. However, the employee does not have that necessary independent discretion if the employee is subject to the control of the relevant Minister.[1190]

25.11 The *Enever* principle has been abrogated by statute in New South Wales. The *Law Reform (Vicarious Liability) Act 1983* (NSW) provides that where the officer committed the tort in the course of serving the Crown and incidental to a Crown activity:

1179 Ibid. Consequently, the only cause of action lay against the police officer himself. See also *Thompson v Williams* (1915) 32 WN (NSW) 27; *Jobling v Blacktown Municipal Council* [1969] 1 NSWR 129.

1180 *Delacauw v Fosbery* (1896) 13 WN (NSW) 49, 51 cited in S Kneebone (1998), 303.

1181 J Fleming (1998), 418; *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237, 284 (Fullagar J).

1182 *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1, 343; *Bennett v Minister for Community Welfare* (1988) Aust Torts Reports 80-210.

1183 *Oriental Foods (Wholesalers) Co Pty Ltd v Commonwealth* (1983) 50 ALR 452.

1184 *Field v Nott* (1939) 62 CLR 660.

1185 *Grimwade v Victoria* [1997] Aust Torts Reports 81-422.

1186 *Skuse v Commonwealth* (1985) 62 ALR 108.

1187 *Carpenters' Investment Trading Co Ltd v Commonwealth* (1952) 69 WN (NSW) 175.

1188 *Actieselskabet Bannockburn v Williams* (1912) 12 SR (NSW) 665; *Fowles v Eastern & Australian Steamship Co Ltd* (1913) 17 CLR 149; *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626.

1189 *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1.

1190 Ibid, 343 (O'Loughlin J).

> the Crown is vicariously liable in respect of the tort committed by a person in the service of the Crown in the performance or purported performance by the person of a function (including an independent function)…[1191]

25.12 The Commonwealth, Queensland and the Northern Territory have abrogated the *Enever* principle in respect of police officers alone.[1192] The relevant Commonwealth provision is set out in s 64B(1) of the *Australian Federal Police Act 1979* (Cth), which provides that the Commonwealth is liable for the torts of officers:

> in like manner as a person is liable in respect of a tort committed by his or her employee in the course of his or her employment, and shall, in respect of such a tort, be treated for all purposes as a joint tortfeasor with the member.

Issues arising from the *Enever* principle

25.13 The *Enever* principle has been criticised as outdated, unjustifiable and contrary to public policy, creating an anomalous repository of immunity that applies regardless of the circumstances of a case. The principle has been described as based on 'dubious reasoning ... not distinguish[ing] between situations in which the creation of an independent discretion arises purely by chance, and those in which it is deliberate'.[1193] Fleming has argued that to re-establish vicarious liability in respect of public functions might 'serve the cause of deterrence and could often offer the only means of redress because of the difficulty of identifying the individual culprit'.[1194] In *Cubillo v Commonwealth,* O'Loughlin J cited 'substantial' and 'cogent' criticisms of the *Enever* principle from literary and judicial sources — including its characterisation as 'the much reviled "independent discretion" rule'.[1195]

25.14 Administrative mechanisms have ensured that *Enever* has relatively little practical effect. Parliament has indemnified Ministers and other officers from personal liability in circumstances where the *Enever* principle would prevent vicarious liability from being imputed to the Commonwealth. The *Parliamentary Entitlements Regulations (Amendment) Act 1998* (Cth) establishes a scheme for Commonwealth assistance to Ministers, including payment of costs and damages arising from legal proceedings against them.

25.15 Officials employed in departments and agencies covered by the *Financial Management and Accountability Act 1997* (Cth) may be financially assisted with

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1191 *Law Reform (Vicarious Liability) Act 1983* (NSW) ss 5(1) and 8. See *Holly v Director of Public Works* (1988) 14 NSWLR 140, 146–147 (Mahoney JA).

1192 *Police Service Administration Act 1990* (Qld), s 10.5; *Police Administration Act 1979* (NT) s 163. In South Australia and Tasmania, legislation provides that the Crown is directly liable for the torts of police officers. See S Churches (1990), 701.

1193 S Kneebone (1998), 305.

1194 J Fleming (1998), 418.

1195 *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1, 343. See also P Finn and K Smith (1992), 145; *Konrad v Victoria Police* [1999] 91 FCR 95.

legal proceedings, particularly where there is a 'limitation of the Commonwealth's vicarious liability'.[1196] 'Non Commonwealth officials' are also assisted by methods including payment of legal costs and damages under Finance Circular 1997/19 *Indemnification of Persons Acting in an Official Capacity on Behalf of the Commonwealth or Commonwealth Bodies*. In addition, government departments are generally required to take out indemnity insurance.

25.16 These measures alleviate the practical need to amend the law to revoke the independent discretion rule. On the other hand, it might be said that they are evidence of a policy position on the part of the Commonwealth that supports revocation of the rule.

Consultations and submissions

25.17 Most who commented to the Commission in consultations and submissions said that the *Enever* principle should be removed.[1197] For example, Stephen Churches indicated in his submission that statutory office holders were not unique.

> Doctors, schoolteachers and ships' masters all have independent discretions, subject to general instructions or bounds set by employers, and in the absence of 'frolic' such employers are bound. There is simply no room for *Enever*.[1198]

25.18 As noted above, the Commission was also advised that Commonwealth officers are generally indemnified from liability in respect of torts.[1199] Accordingly, it was suggested that the independent discretion exception no longer serves a useful function in modern law.

Commission's views

25.19 The Commission considers that the *Enever* principle is outdated and creates an inappropriate exception to the general abrogation of the Commonwealth's immunity from tort. The decision in *Enever* had the effect of preventing the tortious acts of a police officer being imputed to the Crown. The Commission notes that the Commonwealth and most States and Territories have abolished the principle in respect of the acts of police officers. The Commission was not made aware of any criticisms or practical problems that have arisen in Australian jurisdictions as a result of the abrogation of the rule in respect of police officers. Nor do any such problems appear to have arisen in New South Wales, where the rule has been abrogated in a broader context.

1196 Legal Services Directions, Appendix E, made pursuant to s 55ZF JA.

1197 S Churches, *Submission J017*, 16 March 2001; D Jackson QC, *Consultation*, Sydney, 19 March 2001; ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001; J Basten QC, *Correspondence*, 14 May 2001.

1198 S Churches, *Submission J017*, 16 March 2001.

1199 Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001.

25.20 The Commission considers that the exception to the Commonwealth's vicarious liability created by the *Enever* principle is inappropriate. Although administrative measures have been taken to ensure that Commonwealth officers and employees are indemnified from personal liability in most cases where the *Enever* principle would apply, the principle should be clearly abolished in respect of the Commonwealth by amendment to the *Judiciary Act*.

Recommendation 25–1. The principle in *Enever v The King* (1906) 3 CLR 969, namely, that the Commonwealth is not vicariously liable for the tortious conduct of Commonwealth officers who act with independent discretion pursuant to statute, should be expressly abolished in relation to the Commonwealth.

Other Bases of Executive Liability in Tort

Non-delegable duty and direct liability

25.21 The *Enever* principle concerns the application to the executive of the principles of vicarious liability. However, the executive may also have direct liability in tort in some cases. Direct liability arises where there is a breach of a duty of care by the person held liable for the damage. A breach of duty may be indicated by an accident that could have been directly prevented — for example, where children are injured in an inadequately supervised school playground.

25.22 The direct liability of the executive arises where organisational, administrative or structural inadequacies are the underlying cause of injury, loss or damage. Direct liability usually arises as a 'non-delegable duty' — one that is too 'personal'[1200] in nature to be avoided by delegation, particularly where the injured party is particularly dependent or vulnerable,[1201] and where the executive might reasonably have been expected to exercise due care for the safety of a person.[1202] Such a duty can be owed by employers to employees injured by workplace dangers such as asbestos;[1203] by school authorities to students injured in the playground or to teachers injured by students; by hospitals for death caused by the lack of a proper system of drug administration; or by prison authorities to prisoners injured by other prisoners.[1204]

1200 *Kondis v State Transit Authority* (1984) 154 CLR 672, 687 (Mason J). See also *Commonwealth v Introvigne* (1980) 150 CLR 258.
1201 See *Commonwealth v Introvigne* (1980) 150 CLR 258; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.
1202 *Kondis v State Transit Authority* (1984) 154 CLR 672, 687 (Mason J).
1203 *Western Australia v Watson* [1990] WAR 248.
1204 P Hogg and P Monahan (2000), 133–135.

25.23 A finding that the executive has direct liability avoids the operation of the *Enever* principle, which applies only as an exception to principles of vicarious liability. Direct liability is not subject to the *Enever* principle: liability cannot be severed from the executive by a finding that an individual responsible for the tort was exercising independent statutory authority. This is true even where the Crown is directly liable for a tort that arises from a particular act or omission by its employee or agent, for which the Crown would otherwise have been vicariously liable.[1205]

Administrative wrongs

25.24 Torts for which the executive may be liable due to the erosion of its immunities from claims at common law are distinct from claims for damages resulting from an act or omission of the executive, for which no common law cause of action exists.

25.25 Where a person has suffered loss as a consequence of administrative or public law error, a remedy in damages is presently available only if a private law action is available, that is, where negligence can be established in accordance with ordinary principles.[1206] This rule is seen as protecting government officers who perform administrative functions from a more onerous liability than that to which the general public is subject.[1207] However, the requirement that a private law action be available has been criticised due to the rapid increase in the exercise of administrative power in recent years. It has been said that there is:

> increasing frequency with which irrecoverable losses are suffered by individuals or corporate organizations following the wrongful exercise of administrative power.[1208]

25.26 There is a wide range of social conduct for which government might be seen to be responsible because of a failure to regulate an activity in a way that would prevent or minimise harm. This might include the regulation of employers, drivers, manufacturers, and so on. However, a finding of government liability in such situations would require expansion of notions of causation to include instances where government has failed 'to discharge what some will claim to be its moral opportunity or its legal responsibility to take preventative action to protect those at risk'.[1209]

25.27 The absence of remedies for such potential torts does not conflict with the notion that the executive should be treated in the same way as private citizens. The question raised is whether a new substantive ground of executive liability should

1205 *Scott v Davis* (2000) 175 ALR 217, 218–221 (Gleeson J).
1206 See for example *Dunlop v Woollahra Municipal Council* [1982] AC 158; *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700; *Northern Territory v Mengel* (1995) 129 ALR 1.
1207 See P Craig (1978).
1208 G McCarthy (1996), 7.
1209 J McMillan (2000), 1.

be created in respect of things that private citizens do not do because of their inherent difference in functions. Section 64 JA, which refers to rights 'between subject and subject' in claims against the Commonwealth, cannot be applied to such administrative wrongs.

25.28 The Law Council of Australia noted that this issue is important and warrants careful consideration, but advised the Commission that a further inquiry would be desirable to examine the possibility of legislating for such torts.[1210] This view echoed those expressed in other consultations.

25.29 The Commission considers that these issues lie beyond the questions of immunity raised in this inquiry, but that these matters merit further consideration. Accordingly, the Commission recommends that the Attorney-General order a review of the law relating to claims for compensation for loss arising from wrongful federal administrative action.

Recommendation 25–2. The Attorney-General should order a review of the law relating to claims for compensation for loss arising from wrongful federal administrative action.

Sections 56 and 64 of the *Judiciary Act*

25.30 It is generally accepted that ss 56 and 64 JA remove the Commonwealth's substantive immunity from common law claims.[1211] According to the minority in *Commonwealth v Mewett,* both the liability of the Commonwealth and its exposure to suit were created by ss 56 and 64, pursuant to the power conferred by s 78 of the Constitution. McHugh J has remarked that 'causes of action against the Commonwealth in tort owe their existence entirely to federal legislation'.[1212] *Enever* aside, plaintiffs face few practical difficulties when suing the Commonwealth in respect of common law causes of action. However, technical inadequacies in both sections leave it unclear how each provision affects Commonwealth immunity.

25.31 Read narrowly, s 56 simply allocates jurisdiction in tort and contract claims against the Commonwealth to the High Court or to state and territory Supreme Courts, depending on where the cause of action arose. It is doubtful whether s 56 affects the Commonwealth's substantive immunity from common law claims. Section 56 is often read together with s 64 (see Chapter 23). However, s 64

1210 Law Council of Australia, *Submission J037*, 6 April 2001.
1211 Compare *Commonwealth v Mewett* (1997) 191 CLR 471, discussed in Chapter 22.
1212 Ibid, 532 (McHugh J).

has been interpreted as removing the Commonwealth's substantive immunities at common law 'unaided by s 56'.[1213]

25.32 To the extent that s 56 confers a right of action against the Commonwealth, there is an issue whether the words 'whether in contract or in tort' are words of limitation and intended to exclude other common law claims.[1214] A narrow interpretation of s 56 has been criticised as being contrary to the parliamentary debates and to s 64,[1215] and founded on the illogical premise that the Commonwealth would submit to some kinds of civil liability but not to other less onerous kinds.[1216] Accordingly, s 56 has been interpreted over the years to apply to a range of claims other than these in tort and contract (see Chapter 22).

25.33 Section 64 has been held to confer substantive common law and equitable rights against the Commonwealth, as well as procedural rights,[1217] although the extent to which the section confers substantive rights is controversial (see Chapter 28). The only significant issue regarding the application of s 64 to common law claims is whether the words 'between subject and subject' and 'as nearly as possible' imply that the provision confers rights to sue the Commonwealth in some, but not all, types of claim. Clearly, some potential claims against the Commonwealth could not arise in analogous circumstances between 'subject and subject'. Examples include claims for priority over Crown debts,[1218] claims over Commonwealth defence force land,[1219] and claims concerning intergovernmental agreements.[1220] In *Commonwealth v Evans Deakin Industries Ltd*, the High Court broadened the scope of s 64 so that there are now very limited circumstances in which the Commonwealth could successfully assert that a claim against it was not of a kind possible against an ordinary citizen.[1221]

Consultations and submissions

25.34 Consultations and submissions widely favoured the removal of residual Commonwealth immunities from the common law. The Commission was told that these immunities were no longer a live issue as a result of the judicial interpretation of ss 56 and 64, but that the removal of immunity should be effected clearly and

1213 *Maguire v Simpson* (1977) 139 CLR 362, 381. See also *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397, 419 (Dixon CJ, McTiernan, Williams JJ), 427 (Kitto J); *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 264–267.

1214 See *Washington v Commonwealth of Australia* (1939) 39 SR (NSW) 133, 141; *Froelich v Howard* [1965] ALR 1117, 1119; P Hogg (1970), 426.

1215 L Katz (1977).

1216 P Hogg and P Monahan (2000), 189–191.

1217 *Maguire v Simpson* (1977) 139 CLR 362; *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254; *Baume v Commonwealth* (1906) 4 CLR 97.

1218 *Commonwealth v Lawrence* (1960) 77 WN (NSW) 538, 540. See S Kneebone (1998), 287.

1219 *Commonwealth v Western Australia* (1999) 196 CLR 392.

1220 *South Australia v Commonwealth* (1962) 108 CLR 130 ('*Railways Standardisation Case*'), 140–141.

1221 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

unambiguously by these provisions.[1222] The question that remained was whether these provisions, as drafted, achieve this end.

25.35 Some of those who made comments to the Commission considered that ss 56 and 64 achieve what they ought to as a statement of the law and do not require amendment.[1223] However, the majority agreed that ss 56 and 64 are unclear, that the law is consequently uncertain, and that these provisions ought to be amended to remedy the uncertainty.[1224] The Law Council of Australia stated that:

> it would be beneficial if section 56 of the *Judiciary Act* clearly included claims additional to those in contract and in tort … The Law Council recommends section 56 of the *Judiciary Act* be amended so that the section clearly provides that any claim for relief on any ground may be brought against the Commonwealth.[1225]

25.36 In respect of s 64, the Law Council went on to comment:

> The historical terminology of 'subject and subject' is inappropriately anachronistic. The phrase jars with the civic reality of the contemporary Australian polity. The Law Council prefers the term 'citizen and citizen' or 'natural person and natural person' in preference to 'subject and subject' in section 64 of the *Judiciary Act* … [A] claim against the Commonwealth should be able to be made even if the claim could not arise between subject and subject.[1226]

25.37 The Solicitor-General for South Australia, Brad Selway QC, expressed the view that the current *Judiciary Act* provisions regarding claims against the Commonwealth are deficient in their purpose.

> It should be accepted as axiomatic that the Commonwealth and its employees and agencies do not enjoy any immunity from suit and are not immune from liability in tort (both direct and vicarious). Instead its liability should be the same as if the Commonwealth were a subject.[1227]

25.38 The Commission asked whether the emphasis in case law upon the primacy of s 64 in removing common law immunities nullified the utility of s 56. Most who responded stated that s 56 is unnecessary to remove Commonwealth immunity and could be repealed without derogating from the essential function of

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1222 D Graham QC, *Consultation*, Melbourne, 15 February 2001; ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001; S Churches, *Submission J017*, 16 March 2001; P Johnstone, *Submission J016*, 6 March 2001; B Horrigan, *Consultation*, Canberra, 29 March 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001; B Dunphy, *Consultation*, Brisbane, 8 March 2001; Law Institute of Victoria, *Consultation*, Melbourne, 15 February 2001.

1223 M Sexton SC, *Submission J009*, 23 February 2001.

1224 ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001; Law Council of Australia, *Submission J037*, 6 April 2001; D Graham QC, *Consultation*, Melbourne, 15 February 2001, Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001.

1225 Law Council of Australia, *Submission J037*, 6 April 2001.

1226 Ibid.

1227 B Selway QC, *Submission J028*, 20 March 2001.

s 64.[1228] Some, however, considered that s 56 serves a useful purpose with respect to venue. The Australian Government Solicitor advised the Commission that s 56 protected the Commonwealth from having to defend actions in other forums that are unconnected with the action and thus inconvenient or inexpensive to use.[1229] The Law Council of Australia was also cautious, stating:

> The Law Council is not convinced, at this time, of the need to amend section 56 of the *Judiciary Act* in relation to specifying venue for actions against the Commonwealth. However, the Law Council recognises that there may be such a need in the future depending on what amendments may be made to the *Judiciary Act*. [1230]

Commission's views

25.39 The Commission considers that the *Judiciary Act* should be amended to remove the Commonwealth's immunity from substantive liability at common law and in equity in clear and unambiguous terms. Sections 56 and 64, as currently drafted, do not achieve this goal. The Commission considers that a change in drafting would significantly improve the clarity of the law.

25.40 There are strong policy arguments for replacing the existing law, in which traditional common law principles are intertwined with uncertain statutory provisions, with express statutory provisions. The law on executive immunity from common law claims has developed in a piecemeal fashion. What was once a general rule of immunity no longer applies in most cases, but nor has it been replaced by a coherent legislative regime. The implied effect of ss 56 and 64 upon common law immunities can be identified only by reading the provisions together with, and by referring to, a weighty body of case law. The need for transparent and accessible law, and for an unambiguous foundation for Commonwealth liability at common law, should be met by the enactment of a single provision that consolidates the disparate elements of the present legal regime.

Recommendation 25–3. The *Judiciary Act* should be amended to state expressly that the Commonwealth is subject to the same substantive obligations at common law and in equity as apply to persons of full age and capacity, except as specifically provided by a Commonwealth Act. The Attorney-General should order a review of the circumstances in which a statutory exception is considered necessary or desirable.

1228 ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001; Law Council of Australia, *Submission J037*, 6 April 2001.
1229 Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001.
1230 Law Council of Australia, *Submission J037*, 6 April 2001.

Ancillary Common Law Immunities

25.41 Some areas of Commonwealth immunity 'relate uniquely to the Crown's position as a government'[1231] and are thus ancillary to its general immunity from laws that regulate ordinary citizens. The Commission has already considered public interest immunity in the context of procedural immunities (see Chapter 23). There are also several substantive immunities that may be considered to have enduring significance.

25.42 One of these is the doctrine of 'executive necessity' by which 'a contract cannot, despite its binding nature, fetter the Crown's ability to govern'.[1232] The rule has been confirmed by the High Court.[1233] Judicial and academic opinion holds that the application of this doctrine is limited by crown proceedings legislation to matters of 'overriding public interest'[1234] but it has been argued that the rule is applied too freely.[1235]

25.43 The Commission received very few comments in consultations and submissions regarding the doctrine of executive necessity, or other substantive immunities at common law. The Commission notes that Parliament is free to legislate to provide for any common law immunities that it considers should be retained. In the interests of transparency and clarity of the law in this field, the Commission considers that all exceptions to Commonwealth liability from common law claims should be expressly provided for by legislation, rather than depend on common law rules of uncertain scope and application.

The Immunity of the States

25.44 Section 64 is directed to both the Commonwealth and the States. Section 58 makes similar provision to s 56, but in respect of claims against the States in contract or tort. It is clear that these provisions, in so far as they apply to the States, are confined to matters of federal jurisdiction. However, even within the field of federal jurisdiction, it is debatable whether the Commonwealth has the constitutional power to legislate with respect to the substantive liability of the States.

25.45 The question of whether the power in s 78 of the Constitution to confer 'rights to proceed' against a State extends to substantive rights has given rise to a range of judicial opinion.[1236] On its face, the power in s 78, as exercised by ss 64,

1231 N Seddon (1999), 167.
1232 Ibid.
1233 *Ansett Transport Industries (Operations) v Commonwealth* (1977) 139 CLR 54.
1234 *Northern Territory v Skywest Airlines Pty Ltd* (1987) 48 NTR 20, 46–47; N Seddon (1995), 171; M Allars (1989), 123.
1235 N Seddon (1999), 170–171.
1236 See *Maguire v Simpson* (1977) 139 CLR 362; *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254; *Dao v Australian Postal Commission* (1987) 162 CLR 317; *Bropho v Western Australia* (1990) 171 CLR 1; *Commonwealth v Western Australia* (1999) 196 CLR 392.

56 and 58, applies equally to the Commonwealth and the States. In *Mutual Pools* McHugh J stated:

> The primary purpose of s 78 was to ensure that federal Parliament could remove the immunity of the Crown in right of the Commonwealth *or the States* from actions of tort or breach of contract.[1237]

25.46 Addressing the effect of s 78 of the Constitution, Gibbs J commented in *China Ocean Shipping v South Australia* that 'it seems clear that the Parliament has no power to legislate so as to affect the substantive rights of a State in respect of any matter *outside* the limits of federal jurisdiction'.[1238] Professor Zines has stated that 'it is doubtful whether s 64 can validly prescribe the law to be applied in suits by or against a State' because s 78 does not refer to suits brought by the Commonwealth or a State and thus cannot authorise all the operation of s 64 against a State.[1239] In *Commonwealth v Evans Deakin Industries Ltd*, the majority of the High Court doubted 'whether the Commonwealth Parliament has a general power to legislate to affect the substantive rights of the States in proceedings in the exercise of federal jurisdiction'.[1240] In 1988 the Constitutional Commission concluded that the Commonwealth has only limited power to legislate in respect of the substantive rights of a State and may do so only within federal jurisdiction, in those matters where the State is a defendant, and which arise strictly under ss 75 and 76 of the Constitution.[1241]

25.47 In contrast, in *Commissioner for Railways (Qld) v Peters,*[1242] the New South Wales Court of Appeal held that s 64 was a source of substantive liability of the State to a claim under the *Workers Compensation Act 1926* (NSW). The Court referred to s 78 of the Constitution in support of this finding, despite its additional finding that the claim did not fall within s 58 because the claim was not one in contract or tort.[1243]

Consultations and submissions

25.48 Some views presented to the Commission held that s 78 empowers the Commonwealth to impose substantive liability on the States, within the limits set by ss 75 and 76 of the Constitution.[1244] Those adopting this interpretation emphasised the limitations on the Commonwealth's capacity to impose liability on States. The Solicitor-General for South Australia, Brad Selway QC, stated:

1237 *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 215 (emphasis added).
1238 *China Ocean Shipping v South Australia* (1979) 27 ALR 1, 24 (emphasis added).
1239 L Zines (1997), 370.
1240 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 263. See also *Maguire v Simpson* (1977) 139 CLR 362, 401.
1241 Constitutional Commission (1988), 421–424.
1242 *Commissioner for Railways (Qld) v Peters* (1991) 24 NSWLR 407.
1243 Ibid, 429 (Kirby P).
1244 M Sexton SC, *Submission J009*, 23 February 2001; Constitutional Commission (1988).

> It seems likely that section 78 is restricted to laws dealing with the State's immunity from suit and immunity from tort. It does not seem likely that section 78 deals with general liability of the States (if it did it would be equivalent to a new legislative power 'with respect to the States').[1245]

25.49 A further view was that s 64 should apply to the States but that 'there may be constitutional constraints on the Commonwealth legislating to affect state immunity'.[1246]

25.50 Most of those who commented on this matter held the view that the Commonwealth cannot and should not legislate to impose substantive liability on the States.[1247] As the New South Wales Attorney-General, Bob Debus, stated:

> I submit that the Commonwealth cannot legislate with respect to substantive liability of the States and that any Commonwealth legislation exposing government to suit in federal jurisdiction should not confer more than procedural rights in claims against States.[1248]

25.51 The Queensland Attorney-General, Rod Welford, put forward a similar view:

> Section 78 does not confer on the Commonwealth Parliament the power to impose any and all substantive liabilities on the States and is relevantly confined in its operation to laws 'conferring rights to proceed 'against … a State'.[1249]

Commission's views

25.52 The Commission considers that there is insufficient certainty in the language of s 78 and the case law to maintain that the Commonwealth has power to legislate with respect to the substantive immunities of the States at common law. For this reason, the Commission makes no recommendation on this issue.

25.53 It is doubtful whether the same uncertainty applies to the Commonwealth's power to legislate with respect to the substantive rights of the Territories by reason of its power in s 122 of the Constitution. Exercise of this power by the Commonwealth would work against the aim of parity of treatment between the polities of the Commonwealth, as discussed in Part H of this report. For this reason, the Commission considers that it would be preferable for the Commonwealth to refrain from exercising the power in respect of the Australian Capital Territory and the Northern Territory.

1245 B Selway QC, *Submission J028*, 20 March 2001.
1246 P Johnstone, *Submission J016*, 6 March 2001.
1247 Faculty of Law University of Adelaide, *Consultation*, Adelaide, 16 March 2001; Attorney-General (NSW), *Submission J019*, 14 March 2001; Attorney-General (Qld), *Submission J031*, 26 March 2001; A Tokley, *Consultation*, 5 March 2001. See also ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001.
1248 Attorney-General (NSW), *Submission J019*, 14 March 2001.
1249 Attorney-General (Qld), *Submission J031*, 26 March 2001.

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26. Application of Commonwealth Statutes to the Commonwealth

Contents

Current Law

26.1 This chapter considers whether the Commonwealth executive should be bound by legislation enacted by the Commonwealth Parliament. There is no constitutional impediment to a Commonwealth statute binding the Commonwealth executive. The question is primarily one of statutory construction. Under current law the position of the executive is determined first by applying the common law presumption of immunity and, second, by ascertaining whether that presumption has been rebutted in the circumstances of the particular case. If an Act does not bind the executive as a matter of construction, it may nevertheless do so by virtue of s 64 JA.

The presumption and its rebuttal

26.2 At common law there is a rule of construction by which the executive government is presumed immune from the operation of a statute. This immunity may be removed by the express terms of the statute itself or by other statutes, such as the *Judiciary Act* or a crown proceedings statute.

26.3 In the absence of an express legislative statement that a statute binds the executive, the presumption of immunity may be removed by implication. Historically, the English courts were reluctant to find such an implication.[1250] The *Bombay* principle, established by the Privy Council in *Province of Bombay v Municipal Corporation of Bombay*,[1251] states that an Act does not bind the Crown unless it does so by express words or by necessary implication. However, a necessary implication would only be found if the intention to bind the Crown was

1250 *Willion v Berkley* (1561) 75 ER 339 (KB); *Magdalen College* (1615) 11 Co Rep 66 b, 72a (Lord Coke).
1251 *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58.

'manifest from the very terms of the statute'.[1252] Under this rule, the presumption of crown immunity prevailed unless the purpose of the statute would be 'wholly frustrated' by the Crown's immunity from it.[1253] In *Lord Advocate v Dumbarton District Council,*[1254] the House of Lords affirmed the *Bombay* principle, rejecting the notion that the subject matter of an Act might imply that the Crown is bound.

26.4 The *Bombay* principle was adopted as a general rule of construction by Australian courts, though it was not applied with the same rigour as in England. In *Commonwealth v Rhind*, the High Court held that 'in the construction of statutes ... the Crown is not included in the operation of a statute unless by express words or by necessary implication', but went on to state that 'the implication will be found, if at all, by consideration of the subject matter and of the terms of the particular statute'.[1255]

26.5 The *Bombay* principle was recast by the High Court in 1990 in *Bropho v Western Australia*,[1256] with the result that it became significantly easier to imply that a statute binds the executive.

26.6 In *Bropho* the appellant sought an injunction to restrain the State of Western Australia from redeveloping Crown land that was claimed to be an Aboriginal site protected under the *Aboriginal Heritage Act 1972* (WA).[1257] The respondents resisted the injunction on the ground that the provisions of the Act did not bind the Crown in right of Western Australia.

26.7 The High Court held that the 'necessary implication' required to bind the Crown might be found in the 'subject matter and disclosed purpose and policy' of the Act[1258] and in the overall operation of the Act in relation to its subject matter; it need not be specifically stated in the terms of the Act. In the Court's view, the general rule of statutory construction was still to be applied but 'if … a legislative intent that the Crown be bound is apparent notwithstanding that those tests are not satisfied, that legislative intent must prevail'.[1259]

26.8 The High Court held that the *Aboriginal Heritage Act 1972* (WA) did apply to the Western Australian executive. The disclosed policy and purpose of the Act — to preserve traditional Aboriginal places and objects — supported this conclusion. Given that 93% of Western Australian land is Crown land, the Act would be ineffective to preserve Western Australian Aboriginal sites and objects if it applied only to land other than Crown land.

1252 Ibid, 61.
1253 L Katz (1994).
1254 *Lord Advocate v Dumbarton District Council* [1989] 3 WLR 1346.
1255 *Commonwealth v Rhind* (1966) 119 CLR 584, 598.
1256 *Bropho v Western Australia* (1990) 171 CLR 1.
1257 *Aboriginal Heritage Act 1972* (WA), ss 6, 10, 17.
1258 *Bropho v Western Australia* (1990) 171 CLR 1, 21–22.
1259 Ibid, 23.

26.9 Although *Bropho* concerned the relationship between a Western Australian statute and the Western Australian executive, the case has since been applied in cases concerning the immunity of other Australian governments, including the Commonwealth, from the operation of their own statutes.[1260]

Legislative developments

26.10 In addition to these judicial developments, some Australian jurisdictions have legislated with respect to executive immunity from statute. In South Australia and the Australian Capital Territory the immunity has been removed altogether.

26.11 The Law Reform Committee of South Australia recommended in 1987 that the presumption of immunity from statute be 'replaced with a presumption in favour of the Crown being bound'.[1261] The Committee described the effect of the proposed reform as transferring 'the onus of rebutting the presumption from subject to Crown, the latter being the party best qualified to establish why it should not be affected by the legislation in question'.[1262] The South Australian Parliament did not follow the recommendation at the time but in 1990, following the High Court's decision in *Bropho*, s 20 of the *Acts Interpretation Act 1915* (SA) was amended to provide:

> 20(1) Subject to subsection (2), an Act passed after 20 June 1990 will, unless the contrary intention appears (either expressly or by implication), be taken to bind the Crown, but not so as to impose any criminal liability on the Crown.

26.12 In the Australian Capital Territory, the *Crown Proceedings Act 1992* (ACT) states that 'each Act binds the Crown to the extent that it is capable of doing so unless it or another Act provides otherwise'.[1263]

26.13 Reforms to the law relating to executive immunity from statute have been initiated in other Australian jurisdictions, although they have not been brought to fruition. The Law Reform Commission of New South Wales recommended in 1976 that executive immunity from statute be abolished and replaced by a provision that would bind the Crown by statute in most circumstances,[1264] but the recommendation was not implemented.

1260 *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1; *Registrar, Accident Compensation Tribunal (Vic) v Federal Commissioner of Taxation* (1993) 178 CLR 145; *Jacobsen v Rogers* (1995) 182 CLR 572; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; *Commonwealth v Western Australia* (1999) 196 CLR 392; *Qantas Airways Limited v Christie* (1998) 193 CLR 280; *X v Commonwealth* (1999) 167 ALR 529.

1261 Law Reform Committee of South Australia (1987), 22–23.

1262 Ibid, 23.

1263 *Crown Proceedings Act 1992* (ACT) s 7.

1264 New South Wales Law Reform Commission, Report No 24 (1976), 76.

26.14 In response to the decision in *Bropho*, the Western Australian government introduced a Bill to overturn the decision and strengthen the earlier rule in *Bombay*. The Bill was unsuccessful. Had it been enacted, it would have created a situation similar to that in Queensland, where pre-*Bropho* legislation provides that no Act binds the Crown unless 'express words are included in the Act for that purpose'.[1265]

26.15 Overseas law reform agencies have favoured removal of the executive's immunity from statute.[1266] The Canadian provinces of British Columbia and Prince Edward Island have implemented such recommendations by amending interpretation legislation to provide that the Crown is bound by any Act that does not specifically provide otherwise.[1267]

Section 64 of the *Judiciary Act*

26.16 Where an Act does not bind the Commonwealth as a matter of statutory construction — determined according to the rule in *Bropho* — the question remains as to whether s 64 nevertheless subjects the Commonwealth to liability. Section 64 states that the rights of parties in suits against the Commonwealth are 'as nearly as possible' the same as those between 'subject and subject'. Arguably, s 64 confers rights under statute on a plaintiff suing the Commonwealth. In *Baume v Commonwealth*[1268] and *Maguire v Simpson,*[1269] the High Court held that s 64 applies to both substantive and procedural rights. Other cases have held that a suit establishing a right to proceed against the Commonwealth must already exist before s 64 can have effect.[1270]

26.17 In *Commonwealth v Evans Deakin Industries Ltd* ('*Evans Deakin*'),[1271] the High Court stated that s 64 recognises a liability that existed prior to the suit, including statutory liability, but does not retrospectively create rights and obligations. In *Evans Deakin* it was held that the Commonwealth was bound by the *Subcontractors Charges Act 1974* (Qld) when contracting with a builder, and was therefore required to indemnify the builder for monies not paid to a subcontractor.

26.18 It is clear that 'the rights of the parties' in s 64 extend beyond procedural rights to substantive rights, but there are limits to the operation of the section in this regard. It has been held that ss 56 and 64 do not subject the Commonwealth to

1265 *Acts Interpretation Act 1954* (Qld) s 13.
1266 Law Reform Commission of British Columbia, Project 3 (1972), 67; Ontario Law Reform Commission (1989); Alberta Law Reform Institute, Report 71 (1994); Law Reform Commission of Canada (1985), 14–16; New Zealand Law Commission, Report No 17 (1990), 52; New Zealand Law Commission, Report No 37 (1997), 2.
1267 See, for example, *Interpretation Act RSBC 1996* (British Columbia), Chapter 238, s 14.
1268 *Baume v Commonwealth* (1906) 4 CLR 97.
1269 *Maguire v Simpson* (1977) 139 CLR 362.
1270 *Australian Postal Commission v Dao* (1985) 3 NSWLR 565, 604 (McHugh J).
1271 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

all statutes that would have applied to a private party. For example, s 64 does not remove the Commonwealth's immunity from claims that are created entirely by a statute, unless the statute expressly or impliedly binds the Commonwealth.[1272]

26.19 Recent cases decided by the High Court reflect the substantial difficulty in determining when s 64 makes a statute applicable to the Commonwealth executive notwithstanding the immunities recognised at common law.[1273]

Problems with the Current Law

The uncertainty of *Bropho*

26.20 The rule in *Bropho* is inherently uncertain because it requires courts to discern from a statute whether the 'subject matter', 'apparent legislative intent', and 'disclosed purpose and policy' subject the executive to liability when the express words of the statute fail to do so. As discussed in Chapter 22, the application of the test requires a case-by-case analysis. The fact-sensitive nature of this inquiry leaves ample room for difference of opinion and, ultimately, for litigation.

26.21 The recent High Court case of *Commonwealth v Western Australia* demonstrates the difficulties of using the rule in *Bropho* to determine whether the Commonwealth executive is subject to federal legislation. The justices in *Commonwealth v Western Australia* differed as to whether to apply *Bropho* or a stricter test to determine immunity. Gummow J, with whom Kirby J agreed, held that if it were intended that the Commonwealth be bound by the statute, 'it would be expected that the legislature would have plainly indicated that intention', rather than relying on implication from the subject matter, purpose or policy of the Act.[1274] It has been suggested that Gummow J's view might be seen as a reference to the more stringent pre-*Bropho* test of construction.[1275]

26.22 As a result of the confusion surrounding *Bropho*, legal practitioners are faced with a difficult task when advising clients whether the Commonwealth executive is bound by a federal Act that makes no express provision to that effect. Section 64 makes no mention of rights under statute, and the operation of the section is uncertain in that regard.

1272 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 351.

1273 Ibid; *Commonwealth v Western Australia* (1999) 196 CLR 392.

1274 *Commonwealth v Western Australia* (1999) 196 CLR 392, 435 (Gummow J), 447 (Kirby J). See also 474–475 (Hayne J).

1275 G Taylor (2000), 119.

The temporal application of executive liability

26.23 The majority of the Court in *Bropho* held that the new test of immunity from statute should not be applied retrospectively to legislation that was enacted in light of a different and stronger common law presumption.[1276] The Court articulated a graduated scale of immunity, depending on the date on which the legislation was enacted. The *Bropho* test could be applied to statutory provisions enacted before the Privy Council's 1946 decision in *Bombay* because the strict test was not then in force in Australia.[1277] For legislative provisions enacted between 1946 and 1990, a stronger presumption existed at the time of enactment.[1278] Exactly how much account should be taken of the stricter presumption during this period is not clear. Some statutes from this period have been interpreted by courts according to the *Bombay* principle. This puts them in a different category from statutes enacted during the same period whose application to the executive has yet to be considered by the courts.[1279] For statutes enacted after 1990, the *Bropho* test applies.

26.24 Different approaches have been taken to this temporal problem in jurisdictions in which the executive's immunity from statute has been removed by legislation, or recommended for removal by law reform bodies. In South Australia, s 20 of the *Acts Interpretation Act 1915* (SA) provides that only Acts passed after a designated date will be binding on the executive government in accordance with the new rule.

26.25 In the Canadian province of Prince Edward Island, the immunity differs depending on the year of enactment of the statute. The former presumption of immunity applies for the life of statutes enacted prior to the removal of the immunity in 1981. The presumption is reversed for post–1981 statutes. Concern has been expressed that the co-existence of opposing presumptions, without the prospect of future consolidation of the law, might create confusion.[1280]

26.26 British Columbia took the approach of removing the immunity with immediate effect for all statutes, including existing ones. The Ontario Law Reform Commission preferred the approach of implementing the reversal at the next revision of Ontario statutes. However, the next revision was to be only one year later in 1990 — too soon to achieve the necessary changes. The subsequent review in 2000 was thought to be 'an unnecessarily long wait for a much-needed re-

1276 *Bropho v Western Australia* (1990) 171 CLR 1, 29.
1277 Ibid, 22–23.
1278 *Jacobsen v Rogers* (1995) 182 CLR 572, 586; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253, 270.
1279 *Jellyn Pty Ltd v State Bank of South Australia* (1995) 129 ALR 521, 526–527; *Woodlands v Permanent Trustee Co Ltd* (1996) 68 FCR 213, 224. See also *Commonwealth v Western Australia* (1999) 196 CLR 392, 472 (Hayne J).
1280 Ontario Law Reform Commission (1989), 112.

form'.[1281] The Ontario Law Reform Commission therefore recommended that the immunity be removed in respect of all statutes, with the onus upon the responsible ministries to restore executive immunities by legislation where necessary.[1282] A possible problem with this approach is that government may find itself subject to statutes without having had an adequate opportunity to preserve its immunity by amending the legislation.

Consultations and Submissions

26.27 In consultations and submissions, the Commission was widely advised that the immunity of the Commonwealth executive from the operation of Commonwealth statutes should be removed by the *Judiciary Act* or by the *Acts Interpretation Act 1901* (Cth). The Law Council of Australia recommended that 'the presumption of immunity from statute be reversed by legislation so that the Crown in right of the Commonwealth is *prima facie* presumed to be subject to federal laws'.[1283]

26.28 The *Bropho* principle was seen as difficult to apply as a general rule, and its effect difficult to predict in the circumstances of particular cases. It was noted that s 64 removed the immunity in many cases, but the operation of that provision was seen to be unclear.[1284]

26.29 Commentators acknowledged that many Commonwealth statutes ought not bind the Commonwealth, but they considered that exceptions to the general rule of liability should exist only as a result of clear legislative provisions. A number of those with whom the Commission consulted held the view that the Commonwealth's obligation to legislate for such exceptions was the stronger because fulfilling the obligation placed no great burden on the Commonwealth.[1285] Many of those who made submissions considered that the ease with which the Commonwealth legislature may exclude the executive from the operation of its own statutes eliminates any need for immunity at common law.

1281 Ibid, 112.
1282 Ibid, 112.
1283 Law Council of Australia, *Submission J037*, 6 April 2001.
1284 ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001; Law Council of Australia, *Submission J037*, 6 April 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001; Victorian Bar Association, *Consultation*, Melbourne, 6 March 2001; B Selway QC, *Submission J028*, 20 March 2001; S Churches, *Submission J017*, 16 March 2001; A Tokley, *Submission J023*, 16 March 2001. Note that some disagreed with this view: D Jackson QC, *Consultation*, Sydney, 19 March 2001; M Sexton SC, *Consultation*, Sydney, 19 February 2001.
1285 The Hon Justice R Nicholson, *Consultation*, Perth, 23 March 2001; ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001; S Churches, *Submission J017*, 16 March 2001.

> The Commonwealth should be astute enough to consider the effect of legislation on itself before enacting it … It is not something which requires a presumption of statutory interpretation … The ideal rule, from our point of view, would therefore be that the Commonwealth is bound by its own legislation …[1286]

> If government requires to be excluded from the operation of statute law, let that be plain and express on the face of the legislation. The presumption is a first class example of the 'mystery' which enables common lawyers to segregate themselves from the wider community. When a professional bauble becomes as socially dangerous as this one plainly is, the only appropriate course is extirpation.[1287]

26.30 Some from whom the Commission sought comment noted that removing the Commonwealth's immunity from statute would create difficulties when construing past Acts and applying past judicial decisions regarding their effect on the Commonwealth. One view was that the removal of immunity should apply only to future Acts.[1288] For example, the Law Council of Australia said:

> an appropriate approach for reversing the presumption of immunity from statute would be that of s 20 of the *Acts Interpretation Act 1915* (SA). On that approach, all Acts passed after a certain date (other than Acts which amend Acts passed before that date) would bind the Crown unless the contrary intention appears (either expressly or by implication).[1289]

26.31 There was support for the resolution of this transitional issue by reviewing statutes individually and amending them as appropriate. As Greg Taylor and John Williams put it, 'as far as transitional issues are concerned, the best option would be a review of all existing Commonwealth legislation within a set time frame'.[1290]

Commission's Views

26.32 A number of policy arguments favour the removal of the immunity currently enjoyed by the Commonwealth executive from the operation of Commonwealth statutes. The immunity from statute conflicts with the principle of equality and the premise that government should be subject to law unless Parliament exempts it.[1291] These general arguments have been considered in detail in Chapter 22 and need not be repeated here.

1286 G Taylor and J Williams, *Submission J020*, 19 March 2001.
1287 S Churches, *Submission J017*, 16 March 2001.
1288 Law Council of Australia, *Submission J037*, 6 April 2001; M Sexton SC, *Consultation*, Sydney, 19 February 2001.
1289 Law Council of Australia, *Submission J037*, 6 April 2001.
1290 G Taylor and J Williams, *Submission J020*, 19 March 2001.
1291 New South Wales Law Reform Commission, Report No 24 (1976), 70–71.

26.33 Other policy arguments relate specifically to immunity from statute. A practical argument for removing this immunity derives from the aim of simplifying the law. The rule in *Bropho* is uncertain in scope and difficult to apply, yet it is said that there are an increasing range and number of situations in which the courts have found immunity from statute to be removed.[1292] This suggests that a simpler, more effective approach would be to reverse the existing rule of immunity and to specify any exceptions where immunity should apply.

26.34 The Commission supports the view that if the legislature intends the executive to benefit from immunities that are not available to citizens, it should clearly indicate its intention.[1293] Peter Hogg and Patrick Monahan have made the point that immunity from statute has prevailed in the law without 'either proper understanding of the old cases or discussion of the reasons behind them', and that no logical basis for the immunity exists.[1294] When Parliament enacts legislation, it would be relatively simple to include a provision stating that the legislation does not bind the executive, if this is considered appropriate.

26.35 If it is accepted that the executive ought generally to be subject to law, it is logical that Parliament should consider and actively provide for those situations in which the executive is not to be bound. The Ontario Law Reform Commission noted:

> the broad and various exceptions and distinctions that have been created with respect to the presumption of Crown immunity have nearly eaten away the rule. By virtue of these developments, most statutes now, in fact, apply to the Crown. To the extent that the change is one of substance, removing Crown immunity, we expect that it will generally be desirable. Crown immunity should be the exception and not the rule.[1295]

26.36 The decision to exclude the Commonwealth executive from the requirements of a Commonwealth statute should be transparent, accountable and open to public scrutiny. The Commission considers that this decision should be made by Parliament. At present, where a statute is silent as to whether it binds the executive, the common law immunity presumptively frees the executive from any obligations under it, unless the required implication can be found in the subject matter or purpose of the Act. In the absence of an express statement in the Act, it is difficult to know whether the legislature intended to exempt the executive or simply failed to advert to the issue of executive immunity.[1296]

1292 P Hogg and P Monahan (2000), 326–330.

1293 D Kinley (1990), 824.

1294 P Hogg and P Monahan (2000), 326; see also H Street (1948).

1295 Ontario Law Reform Commission (1989), 112.

1296 New South Wales Law Reform Commission, Report No 24 (1976), 73–74; Ontario Law Reform Commission (1989), 108; G Williams (1948), 54; C McNairn (1978), 22; S Price (1990), 227; J Wolffe (1990), 23.

26.37 In 1975, the Law Reform Commission of New South Wales indicated that executive immunity was seldom specifically considered at the time legislation was prepared, as a result of the time pressure under which legislation is drafted and debated; the complexity of the immunity issue; and the low priority of such questions compared with other substantive provisions of the legislation.[1297] As a result, the Commission considered that no rational or consistent legislative policy regarding Crown immunity could be discerned in most cases.[1298] Drafting practice appears to have advanced considerably since 1975, at least in the Commonwealth sphere. During consultations, the Office of Parliamentary Counsel advised the Commission that it regularly seeks drafting instructions in respect of executive immunity from the government department sponsoring a Bill.[1299] However, it was acknowledged that occasionally such instructions cannot be attained. The Commission considers that if the presumption of immunity were removed, Parliament would be forced to consider the terms of every statute from which it considered the executive should be immune.

26.38 It is widely argued that the expansion of government activity makes it appropriate to subject the executive to most legislation that regulates the marketplace. Since the Australian colonies were established, government functions have expanded to cover a vast range of commercial and other activities, often in competition with private citizens and corporations.[1300] This consideration was a key factor in the High Court's decision in *Bropho*.[1301]

26.39 The Commission concludes that the Commonwealth executive should be bound by Commonwealth Acts, except for those that contain an express provision to the contrary. The Commonwealth's immunity from its own legislation should be removed by amendment to the *Judiciary Act.*

26.40 In reaching this conclusion, the Commission recognises the need to avoid creating new complications in place of old ones. For this reason, the Commission does not favour adopting the South Australian approach of removing immunity 'unless the contrary intention appears (either expressly or by implication)'.[1302] Much of the confusion in the existing law stems from the principle that the executive may be bound by an Act by implication in the absence of express words to that effect. The Commission considers that any exceptions to the proposed new rule that the executive be bound by statute should be provided for expressly and not by implication. The Commission leaves open the question of whether the

1297 New South Wales Law Reform Commission, Report No 24 (1976), 73–74.
1298 Ibid, 72–73; S Price (1990), 227.
1299 Office of the Parliamentary Counsel, *Consultation*, Canberra, 28 March 2001.
1300 New Zealand Public and Administrative Law Reform Committee, Report No 14 (1980), 67; Ontario Law Reform Commission (1989), 108; D Kinley (1990), 822–823; C McNairn (1978); J Peden (1977), 758–759, 763; S Price (1990), 219–220.
1301 *Bropho v Western Australia* (1990) 171 CLR 1, 19.
1302 *Acts Interpretation Act 1915* (SA) s 20.

requirement that immunity be provided for 'expressly' leaves any room for judicial discretion in those circumstances in which the statute does not make provision 'in terms'.[1303]

26.41 In relation to the temporal application of the proposed new rule, the Commission recommends that the rule apply to all new statutes enacted after a specified date (other than those that amend existing legislation). The new rule should also be applied to existing Acts after sufficient time has passed to enable the Commonwealth to review all statutes, decide whether or not they should bind the Commonwealth, and make any necessary amendments. The Commission considers that five years is a reasonable period of review. This approach ensures that account is taken of the fact that existing statutes may have been enacted in light of a different common law presumption of immunity.

New Commonwealth legislation

Recommendation 26–1. The rule of statutory construction that the Commonwealth is presumed to be immune from the operation of Commonwealth legislation should be abolished. The *Judiciary Act* should be amended to provide that the Commonwealth is bound by every Commonwealth Act that is enacted after the date on which this amendment comes into force unless that Act states expressly that the Commonwealth is not bound by the Act in whole or part.

Existing Commonwealth legislation

Recommendation 26–2. The *Judiciary Act* should be amended to provide that, upon the expiration of a period of five years, every Commonwealth Act existing at the date on which these amendments come into force shall bind the Commonwealth unless the Act states expressly that the Commonwealth is not bound by the Act in whole or part.

Recommendation 26–3. The Attorney-General should order a review of all existing Commonwealth legislation for the purpose of determining whether, and to what extent, each Act should bind the Commonwealth. Following such a review, each Act should be amended, as necessary, to state expressly whether it does not bind the Commonwealth in whole or part. The review should be completed and any amendments to legislation enacted within five years.

1303 *Chorlton v Lings* (1868) LR 4 CP 374, 393. See also *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

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27. Application of Commonwealth Statutes to the States and Territories

Contents

Current Law

27.1 A problematic aspect of executive immunity from statute is the question of whether a statute enacted by the legislature of one polity is binding on the executive of other polities in the federation. In this inquiry, this question arises in two different contexts. This chapter discusses the extent to which the executive of each State and Territory is bound by Commonwealth laws. Chapter 28 discusses the extent to which the Commonwealth executive is bound by state and territory laws.[1304] This question is generally one of statutory construction but constitutional and policy issues are also relevant. In a central decision on the issue of statutory construction, the High Court described the problem in the following terms:

> [D]oes the rule apply to the Crown in all its capacities, or only to the Crown in right of the community whose legislation is under consideration? When construing a Commonwealth statute does 'the Crown', for the purpose of this rule, mean only the Crown in right of the Commonwealth or does it include the Crown in right of a State?[1305]

Constitutional issues

27.2 In the context of the Australian federation, two constitutional issues arise from the question of whether one polity can legislate to bind the executive branch of another polity. One issue is what are the limits, if any, on the ability of the Commonwealth Parliament to regulate state executives. The second is the degree to which state Parliaments can regulate the Commonwealth executive.

1304 Another issue, beyond the scope of this reference, is the extent to which States are bound by the laws of other States. See *Commissioner for Railways (Qld) v Peters* (1991) 24 NSWLR 407.

1305 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 116.

27.3 As originally conceived, the doctrine of intergovernmental immunities embodied a conception of federalism that respected the mutual independence of the States and the Commonwealth. However, the balance between the polities comprising the federal system of government has fluctuated considerably since 1901. Initially, the Commonwealth was held to be immune from state law,[1306] and this principle expanded such that the Commonwealth and the States came to be regarded as immune from each other's laws.[1307] The *Engineers' Case* in 1920 brought about a fundamental realignment of the immunities doctrine.[1308] The States were no longer treated as immune from the operation of Commonwealth laws, although the Commonwealth continued to enjoy a significant degree of constitutional immunity from the operation of state laws.[1309] This asymmetry has continued, although it has been significantly lessened by the High Court in *Henderson*[1310] (see Chapter 28).

27.4 Two principles of intergovernmental immunity, which give some protection to state executives from the operation of Commonwealth laws, were developed by the High Court in *Melbourne Corporation v Commonwealth*.[1311] The Court held that the Commonwealth Parliament cannot discriminate against a State by placing a special burden or disability upon it; nor can it enact a law of general application that operates to destroy or curtail the continued existence of the States or their capacity to function as governments.[1312] Each principle has proved to be 'a fragile safeguard for state interests'.[1313] Cases of discrimination are rare — there have been few successful challenges on this ground.[1314] Impairment of a State's capacity to function as a government is an abstract notion that has generally resisted useful definition and, again, there have been few successful challenges on this ground.[1315]

Statutory construction

27.5 In Chapter 26 the Commission considered the rule of construction by which the executive is presumed to be immune from the operation of statutes enacted by the legislature of the same polity.

1306 *D'Emden v Pedder* (1904) 1 CLR 91.
1307 *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488.
1308 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*').
1309 *Commonwealth v Cigamatic Pty Ltd (In Liq)* (1962) 108 CLR 372.
1310 *Re Residential Tenancies Tribunal (NSW) v Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410.
1311 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.
1312 Ibid. See also *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 231.
1313 A Mason (1986), 18.
1314 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192.
1315 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; *Victoria v Commonwealth* (1996) 187 CLR 416.

27.6 In *Bradken,*[1316] the High Court considered how this established rule of construction applied between polities within the Australian federation. In *Bradken* the applicants commenced an action against the Queensland Commissioner for Railways and other parties, claiming that the respondents had engaged in conduct in breach of the *Trade Practices Act 1974* (Cth). In the High Court, the question arose as to whether the *Trade Practices Act* bound the Queensland Commissioner for Railways.[1317] Although the Act expressly stated that it bound the Crown in right of the Commonwealth, it was silent as to whether it bound the Crown in right of a State.

27.7 The majority of the Court held that the presumption of crown immunity from statute extended to the Crown in all its capacities. The Queensland executive was therefore presumed to be immune from the *Trade Practices Act* unless the statute's express words or a necessary implication compelled a different conclusion. In the circumstances of the case, the Court held that there was no ground for such an implication. The effect of the decision was to place the commercial activities of the Queensland Commissioner for Railways beyond the reach of federal legislation that applied to private corporations.

27.8 The High Court has reaffirmed the wide view of executive immunity. In *Jacobsen v Rogers* the Court stated:

> It must, we think, now be regarded as settled that the application of the presumption that a statute is not intended to bind the Crown extends beyond the Crown in right of the enacting legislature to the Crown in right of the other polities forming the federation. Thus, in construing a Commonwealth statute, there is a presumption that it is not intended to bind the Crown in right of the various States as well as the Crown in right of the Commonwealth.[1318]

Section 64 of the *Judiciary Act*

27.9 The broad immunity that a state executive enjoys from the operation of Commonwealth law, following *Bradken*, raises the question of whether s 64 may nevertheless subject a state executive to a Commonwealth Act.

27.10 The Commonwealth's power to make the States substantively liable to federal law is generally limited by the ambit of s 78 of the Constitution (see Chapter 25). The extent to which s 64 confers substantive rights on plaintiffs to sue States under Commonwealth Acts that are not binding on the States as a matter of construction is similarly restricted. In *Bass v Permanent Trustee Co Ltd*, the High Court held that s 64 could not subject New South Wales to provisions of the *Trade*

1316 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107.
1317 The Court unanimously held that the Commissioner represented the Crown in right of Queensland and so was entitled to such immunities as were available to the Queensland executive.
1318 *Jacobsen v Rogers* (1995) 182 CLR 572, 585.

Practices Act. These provisions were enacted later than s 64, were clearly not intended to bind the States, and were thus not modified by s 64 in this respect.[1319]

27.11 Moreover, the extent to which s 64 may subject any polity to a statute that does not bind it as a matter of statutory construction is limited by the use in s 64 of phrases such as 'in any suit', 'between subject and subject' and 'as nearly as possible'. As discussed in Chapter 26, these phrases have been interpreted as preventing s 64 from conferring substantive statutory rights upon parties suing the Commonwealth or the States in certain cases, such as when a right exists only under the statute in question.

Issues Arising from the Current Law

27.12 The primary issue arising from the current law is whether the decision in *Bropho v Western Australia*[1320] is to be read together with the decision in *Bradken*. The question in *Bropho* was whether legislation of one polity bound the executive of the same polity. Should *Bropho* be applied to determine whether a Commonwealth Act binds a state executive, given that *Bradken* held that the prevailing rule of construction should apply to the executive in all its capacities?

27.13 This issue would have arisen in *Bropho* if the plaintiff had opposed the Western Australian government's proposed development of the Swan Brewery site on the basis of Commonwealth, rather than state, legislation protecting Aboriginal heritage. It would then have been necessary to determine whether the executive of Western Australia was immune from the operation of a Commonwealth statute.

27.14 Decisions of the High Court appear to suggest that the reasoning in *Bropho* does apply to the inter-polity situation. In *Registrar, Accident Compensation Tribunal (Vic) v Federal Commissioner of Taxation*,[1321] the question arose as to whether the *Income Tax Assessment Act 1936* (Cth) applied to the Victorian Accident Compensation Tribunal, an instrumentality of the Victorian government. The High Court suggested that *Bropho* applied to determine whether the state executive was bound by the federal Act.

> Whatever may have been the situation in earlier times, it is clear from *Bropho* that the presumption that general words do not bind the Crown is one that must now yield to 'the circumstances (involved), including the content and purpose of the particular provision and the identity of the entity in respect of which the question of the applicability of the provision arises'.[1322]

1319 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 351. Compare *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

1320 *Bropho v Western Australia* (1990) 171 CLR 1.

1321 *Registrar, Accident Compensation Tribunal (Vic) v Federal Commissioner of Taxation* (1993) 178 CLR 145.

1322 Ibid, 171.

27.15 In *Jacobsen v Rogers*, the High Court emphasised that its decision not to re-examine its reasoning in *Bradken* was made 'particularly in the light of its decision in *Bropho v Western Australia*'.[1323] On this basis, the Court later stated that *Bropho* was applicable to determine whether the right of search and seizure under the *Crimes Act 1914* (Cth) was binding on a state executive in the form of the Western Australian Department of Fisheries. In *Bass v Permanent Trustee Co Ltd,* the Court agreed that 'in *Bropho* ... the presumption discussed in *Bradken* was no longer to be treated as an inflexible rule involving a stringent test of necessary implication'.[1324]

27.16 It appears to be settled that the rule in *Bropho* must be applied to determine whether a state executive is bound by a Commonwealth statute. However, because it is much easier to rebut the presumption of immunity under the *Bropho* test than under the prior *Bombay* test,[1325] the effect of applying *Bropho* in an inter-polity context is to significantly weaken the immunity that a state executive enjoys from the operation of federal statutes. Whether or not this is appropriate in a federal system of government was the subject of diverse opinion in consultations and submissions.

Consultations and Submissions

27.17 The majority of comments received by the Commission in consultations and submissions supported the principle that executive government should, as a general rule, be bound by law in the same way as ordinary citizens (see Chapter 26).

27.18 The Commission received a variety of views in respect of immunity from statute in the inter-polity case. Some felt that the arguments based upon equality and the rule of law should also apply to the States,[1326] and therefore that the States' immunity from Commonwealth laws should also be removed. On this view, if the Commonwealth executive was subject to law as a result of being bound by Commonwealth statute, the state executives should be subject to law in the same manner.

27.19 However, there was support for the view that removing the immunity of the States from Commonwealth statutes would not be appropriate. Greg Taylor and John Williams identified the inequitable burden that would be placed upon the States if their immunity from Commonwealth Acts was removed as a matter of course. They noted that '[t]he ideal rule, from our point of view, would therefore be that the Commonwealth is bound by its own legislation, but that an express mention

1323 *Jacobsen v Rogers* (1995) 182 CLR 572, 585.
1324 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 346.
1325 *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58. See Chapter 26.
1326 Law Council of Australia, *Correspondence*, 14 May 2001.

of the States is necessary if they are to be bound by it'.[1327] They recognised that retaining the immunity does not prevent the Commonwealth from subjecting a state executive to a Commonwealth Act:

> Of course, if the Commonwealth wishes to rebut the presumption protecting the States, it need only say so expressly. That is not a demanding requirement. It should be a requirement only so that attention is focused on the question in the interests of the States.[1328]

27.20 It was said in consultations and submissions that the rule of construction from *Bropho* is unclear and difficult to apply in practice. There was near unanimous agreement that a clearer rule is needed to determine executive liability in inter-polity cases.[1329] There was support for the view that the rule should reinforce the immunity of the States on the grounds that state executives carry out essential governmental functions not engaged in by private individuals, and they should be subject to Commonwealth law only where federal Parliament has expressly decided that this is appropriate.

> The presumption that statutes do not bind the Crown, when applied in inter-polity cases, is an effective means of ensuring that thought is given to this question before legislation is enacted. If it is decided that legislation is to bind the States, the presumption requires that a clause to that effect must be inserted in the relevant Bill. This, in turn, ensures that the issue is drawn to Parliament's attention and can be made the subject of debate. It also ensures that it is drawn to the attention of the department responsible for the Bill and to the attention of the States.
>
> This is as it should be, as the Commonwealth should not pass legislation which binds the States without even thinking about whether that is a desirable result or not. In the usual case, attention will be directed by those promoting a new piece of legislation to the effect of the Bill on private persons, rather than on the States … The existence of the presumption helps to combat this tendency.[1330]

27.21 The Queensland Attorney-General supported this view, adding that the power of the Commonwealth Parliament to subject the States to procedural laws under s 64 does not empower it to remove the immunity of the States from Commonwealth statute in a discriminatory manner.

1327 G Taylor and J Williams, *Submission J020*, 19 March 2001. Similar views were expressed by ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001; M Sexton SC, *Submission J009*, 23 February 2001; Attorney-General (NSW), *Submission J019*, 14 March 2001.

1328 G Taylor and J Williams, *Submission J020*, 19 March 2001.

1329 Ibid; M Sexton SC, *Submission J009*, 23 February 2001; ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001 Victorian Bar Association, *Consultation*, Melbourne, 6 March 2001; Law Council of Australia, *Submission J037*, 6 April 2001. Professor Lindell disagreed with this view: G Lindell, *Submission J012*, 5 March 2001.

1330 G Taylor and J Williams, *Submission J020*, 19 March 2001.

> Having regard to the text and to the mischief to which s 78 [of the Constitution] is directed, the words 'rights to proceed' refer to the right to take proceedings against the Crown notwithstanding the Crown's prerogative immunities and not the subjection of the States to statutes (including their own) which otherwise would not apply to them.[1331]

27.22 The view that s 64 does not remove the immunity of the States from Commonwealth statutes was widely held.[1332]

Commission's Views

27.23 The Commission considers the question of whether a state executive should be bound by a Commonwealth statute to be of a fundamentally different character to the question of whether the executive should be bound by a statute enacted by the same polity. The former raises issues of federalism which are entirely absent from the latter.

27.24 Taking these considerations into account, the Commission recommends that a Commonwealth statute should not bind the executive of a State unless the Commonwealth Parliament expressly states that the statute is to do so. The same principles should be applied in respect of the executives of the ACT and the Northern Territory.

27.25 In *Bradken*, Gibbs J stressed that the effect of a Commonwealth Act upon a State may be very different from its effect upon an ordinary citizen. His Honour considered that the Commonwealth Parliament should therefore consider the effect of the Act upon state executives before making the Act binding on a State.[1333] This was the principal reason that *Bradken* adopted a rule of construction by which state executives are presumed to be immune from the operation of Commonwealth statutes, in the absence of express words or a necessary implication to the contrary.

27.26 The Commission considers that the policy underlying *Bradken* is a sound one in a federal system of government. Although a legislature commonly makes laws to regulate the conduct of citizens comprising the polity, one does not normally expect one legislature to make laws regulating the conduct of the executive of another polity in the federation.

1331 Attorney-General (Qld), *Submission J031*, 26 March 2001.

1332 B Selway QC, *Submission J028*, 20 March 2001. See also, Attorney-General (Qld), *Submission J031*, 26 March 2001; G Taylor and J Williams, *Submission J020*, 19 March 2001.

1333 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 123 (Gibbs J), citing *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (in Liq)* (1940) 63 CLR 278, 312 (Dixon J).

27.27 As noted above, the effect of the new test in *Bropho* is to make it substantially easier to rebut the presumption of executive immunity from statute. In the inter-polity case this has the effect, which the Commission considers to be undesirable, of enabling a Commonwealth statute to bind a state executive in the absence of an express indication that the statute is intended to do so.

27.28 The Commission's recommendation would introduce greater transparency into this area of law. It would prevent a state executive from being bound by a Commonwealth statute by default. Where the Commonwealth Parliament has not considered the appropriateness of binding the States and expressed its intention to do so in clear words, the Commonwealth statute would not bind the States.

27.29 The appropriateness of such a rule is evident from the imbalance between the legislative powers of the Commonwealth and the States. In the large areas in which the Commonwealth and the States have concurrent legislative power, any inconsistency between the two laws is resolved, under s 109 of the Constitution, in favour of the supremacy of Commonwealth law. If a Commonwealth statute is interpreted as binding a state executive, no legislative action on the part of a State can free the State from the operation of the federal law. The Commission considers this to be entirely appropriate where the Commonwealth Parliament has considered the matter and expressed its intention to bind the state executive. However, the Commission does not consider it appropriate to bind a State in this manner through the application of the liberal test in *Bropho* when Parliament may not have adverted to the effect of the law on the States.

27.30 In consultations and submissions the view was expressed that prime importance should be placed on subjecting governments to law, including state governments. The Commission considers that the present recommendation is consistent with the objective of achieving equality before the law. Under the Commission's recommendation, the immunity of state executives from the operation of Commonwealth statutes can be removed by the Commonwealth Parliament expressing its intention to bind the States. It may be that as a matter of policy the Commonwealth Parliament should so provide in all but exceptional cases. The Commission's recommendation does not affect the capacity of Parliament to achieve the substantive outcome of subjecting States to the same laws to which citizens are subject. Rather, it marks out a process by which this outcome is achieved expressly and transparently, instead of by implication.

27.31 Finally, as in Chapter 26, the Commission considers that there is a need for a staged approach to implementing the proposed reforms. The Commission recommends that the new rule be applied to all statutes enacted after a specified date (excepting those that merely amend existing statutes), but that the new rule be applied to existing statutes only after a five-year review period has expired. During the review period, all existing Commonwealth legislation should be reviewed for

the purpose of determining whether, and to what extent, each Act should bind the States and Territories.

New Commonwealth legislation

Recommendation 27–1. The rule of statutory construction that the States and Territories are presumed to be immune from the operation of Commonwealth legislation should be given legislative effect. The *Judiciary Act* should be amended to provide that the States and Territories are not bound by any Commonwealth Act that is enacted after the date on which this amendment comes into force unless that Act states expressly that the States and Territories are bound in whole or part.

Existing Commonwealth legislation

Recommendation 27–2. The *Judiciary Act* should be amended to provide that, upon the expiration of a period of five years, no Commonwealth Act existing at the date on which these amendments come into force shall bind the States and Territories unless the Act states expressly that the States and Territories are bound in whole or part.

Recommendation 27–3. The Attorney-General should order a review of all existing Commonwealth legislation for the purpose of determining whether, and to what extent, each Act should bind the States and Territories. In conducting the review, the States and Territories should be consulted, so far as practicable. Following such a review, each Act should be amended, as necessary, to state expressly whether it binds the States and Territories in whole or part. The review should be completed and any amendments to legislation enacted within five years.

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A Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1.

28. Application of State and Territory Statutes to the Commonwealth

Contents

Current Law

28.1 This chapter considers the manner and extent to which state and territory statutes bind the Commonwealth executive. This is the converse of the situation considered in Chapter 27, which examined the application of Commonwealth statutes to the executives of the States and Territories. Although both situations are examples of the operation of executive immunity between polities within the federation, there are significant differences between them.

28.2 The application of state and territory statutes to the Commonwealth executive is regulated at three levels. First, there are constitutional principles that determine the extent to which state statutes are capable of binding the Commonwealth executive. Until recently, these principles imposed significant constraints on the States, but the High Court's decision in *Henderson* has significantly expanded the circumstances in which state law may bind the Commonwealth.[1334]

28.3 Second, there are common law principles of construction that determine how the traditional presumption of immunity from statute is applied between polities. These principles are considered in Chapter 27 in the context of the High Court's decision in *Bradken*.[1335] However, questions remain as to the manner in which those principles are applied to the issue of whether a state or territory statute binds the Commonwealth.

28.4 Third, s 64 JA removes the Commonwealth's immunity in some circumstances by applying a constitutionally valid state statute to the Commonwealth even though the statute does not bind the Commonwealth as a matter of statutory construction.

1334 *Re Residential Tenancies Tribunal (NSW) v Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

1335 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107.

Constitutional issues

Intergovernmental immunities

28.5 The constraints imposed by the Constitution on the ability of state laws to bind the Commonwealth have fluctuated significantly over time. In the early years of federation there was an assumption that state and federal governments had independent spheres of authority with little opportunity for interaction between them. Each sphere was considered immune from the operation of the other's laws.

28.6 In 1920 the *Engineer's Case* adopted a different mode of interpreting the Constitution in which there were no preconceived notions about the nature of the 'federal balance'.[1336] Rather, the Constitution should take effect according to its language. Accordingly, there was no reason to assume that the Commonwealth lay outside the field of operation of state laws. In *Pirrie v McFarlane*, for example, the High Court upheld the application of Victorian law to a federal soldier who was charged with driving without a licence on a Victorian road.[1337]

28.7 In 1962, the High Court made a partial return to the doctrine of implied immunities in *Commonwealth v Cigamatic Pty Ltd (in Liq)*.[1338] The Court considered whether a New South Wales statute could exclude the Commonwealth from priority in the winding up of a company. The Court held that the States have no 'legislative power to control legal rights and duties between the Commonwealth and its people' or to 'directly derogate from the rights of the Commonwealth with respect to its people'.[1339] The effect of this case was to reduce significantly the extent to which state law could bind the Commonwealth. However, Dixon CJ did recognise that the Commonwealth might be affected by state law in some circumstances. Dixon CJ affirmed the remarks he made in an earlier case in which he commented that:

> General laws made by a State may affix legal consequences to given descriptions of transaction and the Commonwealth, if it enters into such a transaction, may be bound by the rule laid down.[1340]

28.8 In 1997, the High Court departed from the *Cigamatic* doctrine and reformulated the test of intergovernmental immunity. In *Henderson*[1341] the question arose as to whether the owner of residential premises in Sydney was entitled to gain access to the premises during the lease. State law expressly

1336 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers' Case*').
1337 *Pirrie v McFarlane* (1925) 36 CLR 170.
1338 *Commonwealth v Cigamatic Pty Ltd (In Liq)* (1962) 108 CLR 372.
1339 Ibid, 377 (Dixon CJ).
1340 *Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 528.
1341 *Re Residential Tenancies Tribunal (NSW) v Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 458–459 (McHugh J), 446–447 (Dawson, Toohey and Gaudron JJ), 507–509 (Kirby J).

conferred such a right but the lessee, the Defence Housing Authority ('DHA'), objected on the ground that it was not bound by the state Act. In upholding the lessor's right of entry under the state Act, a majority of the High Court distinguished between state laws that purport to modify the capacities of the Commonwealth executive and those that merely seek to regulate the exercise of those capacities.[1342] State laws in the former category are invalid because the States have no legislative power to regulate the executive capacities of the Commonwealth, for example, by altering the Commonwealth's prerogative of priority in a winding up. On the other hand, state laws in the latter category are valid because they are of general application and do not seek to modify the executive power of the Commonwealth.

28.9 The test developed in *Henderson* substantially erodes the Commonwealth's former constitutional protection from state laws. However, the precise extent to which it does so remains unclear because of differences in the reasoning of members of the Court.[1343]

Section 109 of the Constitution

28.10 A further constitutional issue arises from the operation of s 109 of the Constitution. That section provides that '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

28.11 In *Henderson*, the DHA argued that s 109 prevented the *Residential Tenancies Act 1987* (NSW) from binding the Commonwealth. The DHA claimed that the New South Wales Act was inconsistent with the *Defence Housing Authority Act 1987* (Cth) because the federal Act provided a comprehensive and exclusive code regulating relevant aspects of tenancy. This argument was not accepted by the majority of the High Court. The Court held that s 109 was not intended to oust state laws of general application and that the federal Act 'does not intend to be exhaustive or exclusive in relation to the means by which the DHA's function is to be performed'.[1344]

28.12 The most important effect of s 109 in the present context is the power it gives the Commonwealth Parliament to exempt the Commonwealth executive from the operation of state laws. If a state Act purports to bind the Commonwealth executive, the Commonwealth Parliament can enact a contrary statute which takes priority by virtue of s 109.

1342 Ibid, 439 (Dawson, Toohey, Gaudron JJ).

1343 M Gladman (1999), 158–159.

1344 *Re Residential Tenancies Tribunal (NSW) v Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 433 (Dawson, Toohey, Gaudron JJ).

Statutory construction

28.13 In Chapter 27 the Commission considered the common law principles of construction that determine how the traditional presumption of immunity from statute is applied between polities. In *Bradken*, the High Court held that the presumption of executive immunity from statute applied to the executive in all its capacities.[1345] As a result, the Queensland executive was presumed to be immune from the operation of a Commonwealth statute, subject to an express provision or a necessary implication to the contrary. In *Bropho*, the High Court relaxed the test for determining the necessary implication, thus making it easier for a Commonwealth statute to bind a state executive by implication.[1346]

28.14 There is nothing in either *Bradken* or *Bropho* to suggest that the same principles of construction do not apply to the converse situation, namely, the application of state and territory statutes to the Commonwealth executive. However, recent decisions have cast doubt on this proposition.

28.15 In *Commonwealth v Western Australia*,[1347] the High Court considered whether a Commonwealth defence area could be subject to the *Mining Act 1978* (WA), which granted the use of certain Crown land and private land for mining. The state Act contained no provision expressly binding the Commonwealth. The Court held that the Commonwealth was immune from grants made over its land pursuant to the state Act.

28.16 There were important differences between the justices in their application of *Bropho* and *Bradken*. Gleeson CJ and Gaudron J cited *Bradken* as authority that the general rule of construction applies to the Crown in all capacities and stated that the rule should not be treated as an inflexible rule involving a stringent test of necessary implication.[1348] However, their Honours held that *Bropho* did not determine Commonwealth liability under the state Act in the circumstances of the case.

28.17 Hayne J considered that the application of the rule in *Bropho* was less relevant in this case than the rule that one polity in a federation does not intend to bind another polity.[1349] His Honour referred to *Bropho* but did not apply it, concluding that there was not a sufficiently 'powerful indication of an intention that the *Mining Act* should extend to land held by the Commonwealth'.[1350] Gummow J also appeared to depart from the liberal test in *Bropho*, stating that

1345 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107.
1346 *Bropho v Western Australia* (1990) 171 CLR 1.
1347 *Commonwealth v Western Australia* (1999) 196 CLR 392.
1348 Ibid, 410 (Gleeson CJ and Gaudron J).
1349 Ibid, 469, 473–475.
1350 Ibid, 473 (Hayne J).

there must be a 'plainly indicated intention' for the Commonwealth to be bound.[1351]

28.18 The approach taken by the High Court in *Commonwealth v Western Australia* appears to contrast with that in *Jacobsen v Rogers.*[1352] In the latter case the rule in *Bropho* was said to apply to determine whether statutes of one polity are binding on the executive of another polity in the federation. Greg Taylor has suggested that these inconsistencies demonstrate that Australian cases regarding the immunity of the executive from statute are in a state of flux.[1353] These difficulties underline the need for law reform in this area.

Section 64 of the *Judiciary Act*

28.19 Section 64 JA may operate to apply a state Act to the Commonwealth even if the Act does not bind the Commonwealth as a matter of statutory construction. This view arises from the requirement in s 64 that the Commonwealth be treated 'as nearly as possible' as if the suit were one between 'subject and subject'. Where a state statute codifies or modifies a common law right, this consequence of s 64 is relatively uncontroversial. However, the effect of s 64 upon rights that are created entirely by statute is uncertain.

28.20 In *Australian Postal Commission v Dao*,[1354] a claim was made against the Australian Postal Commission under the *Anti-Discrimination Act 1977* (NSW). The New South Wales Court of Appeal held that s 64 does not begin to operate against the Commonwealth unless a cause of action already exists under a validly binding state Act.[1355] It was reasoned that if s 64 were able to create a cause of action under a statute, the Commonwealth would be retrospectively subject to every state Act whenever a suit was commenced against the Commonwealth under the Act. McHugh JA stated that 'it would be remarkable if the Commonwealth intended to subject itself to such far reaching liability by the words of s 64'.[1356]

28.21 In *Evans Deakin*,[1357] the High Court disagreed with the reasoning in *Dao*. The Court stated that if the Commonwealth is liable under a state Act once a suit has commenced, 'the events which have happened have created a liability which will be recognized and enforced in legal proceedings'. This does not mean that s 64

1351 Ibid, 435 (Gummow J).
1352 *Jacobsen v Rogers* (1995) 182 CLR 572.
1353 G Taylor (2000), 122.
1354 *Australian Postal Commission v Dao* (1985) 3 NSWLR 565.
1355 Ibid, 604 (McHugh JA).
1356 Ibid.
1357 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

has a retrospective operation because 'at all times before a suit is commenced it can be known what the rights of the parties will be once the suit is commenced'.[1358]

28.22 The decision in *Evans Deakin* was confined in the recent case of *Bass v Permanent Trustee Co Ltd.*[1359] The Court cited the statement that:

> where a Commonwealth legislative scheme is complete upon its face, s 64 will not operate to insert into it some provision of state law for whose operation the Commonwealth provisions can, when properly understood, be seen to have left no room.[1360]

28.23 The cases require a distinction to be drawn between (a) the capacity of s 64 to provide substantive statutory rights to parties in furtherance of existing rights and (b) the inability of s 64 to subject the Commonwealth to a claim by conferring a new substantive right created wholly by a state statute. In *Commonwealth v Western Australia*, the claim for mining entitlements was held not to be a 'suit' and thus to be outside the ambit of s 64 because:

> an application for the grant of a mining tenement is not an application to determine existing legal rights and obligations. Rather, it is an application for the creation of new rights and obligations.[1361]

28.24 The ambiguous language of s 64 has contributed to the variety of interpretations given to it by the High Court. The differences of opinion in *Dao, Evans Deakin* and *Bass* as to the width of s 64 arose in part because s 64 confers rights 'in any suit'. This raises the issue of whether rights that are not the subject of proceedings may be conferred by s 64.

28.25 The High Court has also taken various approaches to the question of whether the statutory right in question is 'as nearly as possible' one that could be held in a suit between 'subject and subject'. In *Evans Deakin*, the High Court noted that the natural meaning of the phrase 'as nearly as possible' is 'as completely as possible'.[1362] This applies to substantive and procedural laws, whether statutory or otherwise. As the High Court remarked, 'the Commonwealth acquires no special privilege except where it is not possible to give it the same rights and subject it to the same liabilities as an ordinary subject'.[1363] However, in *Commonwealth v Western Australia* the Court qualified this interpretation of s 64, stating that:

1358 Ibid, 266. See also *Whiteford v Commonwealth* (1995) 38 NSWLR 100; *Strods v Commonwealth* [1982] 2 NSWLR 182.
1359 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334.
1360 *Deputy Commissioner of Taxation (Qld) v Moorebank Pty Ltd* (1988) 165 CLR 55, 64.
1361 *Commonwealth v Western Australia* (1999) 196 CLR 392, 414 (Gleeson CJ and Gaudron J).
1362 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 264.
1363 Ibid, 263.

> [t]he phrase 'as nearly as possible' cannot operate to alter the nature of respective rights in relation to different subject matter. Further, here the Commonwealth acquired the freehold and leasehold titles for defence purposes and was thus performing a function peculiar to government. The phrase 'as nearly as possible' does not embrace such a situation.[1364]

Attempts at Reform

28.26 The High Court's interpretation of s 64 in *Evans Deakin* gave rise to concerns that the section could subject the Commonwealth to 'the risk of incurring unforeseeable kinds of liabilities under whatever legislation the States and self-governing Territories might enact from time to time in relation to ordinary persons'.[1365]

28.27 Three attempts were made to amend s 64 following the decision in *Evans Deakin*. All the Bills were opposed in the Senate and were ultimately unsuccessful.[1366] The Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill 1989 (Cth) sought to amend s 64 by specifying that it does not pick up rights created by a written law if that law does not apply to the Commonwealth as a matter of its own construction. The Bill also provided that the Commonwealth could make exceptions to the new rule either by legislation or by regulation as 'this provides the necessary flexibility to respond quickly to new ... legislation'.[1367] A 1990 Bill by the same name was to similar effect.

28.28 The Law and Justice Legislation Amendment Bill (No 2) 1991 (Cth) sought to amend s 64 by extinguishing a claim against the Commonwealth arising under state or territory law which was not available against that State or Territory. This was thought to 'overcome one of the main anomalies of the *Evans Deakin* case'.[1368] This Bill was less protective of the Commonwealth's immunity than earlier Bills because it allowed the Commonwealth executive to be bound by a state or territory law in most cases where the state or territory executive was itself bound.

28.29 On each occasion the Government argued that the proposed amendments were necessary to prevent the Commonwealth from becoming liable to:

1364 *Commonwealth v Western Australia* (1999) 196 CLR 392, 438–439 (Gummow J).

1365 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 1989, 3299 (Bowen).

1366 Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill 1989 (Cth); Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill 1990 (Cth); Law and Justice Legislation Amendment Bill (No 2) 1991 (Cth).

1367 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 May 1989, 3299 (Bowen).

1368 Law and Justice Legislation Amendment Bill (No 2) 1991 (Cth), Explanatory Memorandum, 5.

> possibly very large damages on the basis of new state or territory laws which have been enacted primarily from a state viewpoint and without adequate regard to the Commonwealth's special needs or problems.[1369]

28.30 In opposing the Bills, the Opposition claimed that the underlying motive of the Bills was to subvert the intention of s 64 that government and citizen be equal before the law. It was also argued that the Bills unjustly placed the Commonwealth above the law by allowing the Commonwealth to change the law in its favour through the mechanism of regulation. The Bills were also said to replace a well understood rule whose problems in practical application are best resolved by the courts.[1370]

Consultations and Submissions

28.31 The Commission was consistently told in consultations and submissions that the rules in *Bradken* and *Bropho* are unclear, confusing to apply in practice, and an unsatisfactory means of determining whether or not the Commonwealth executive is bound by a state or territory statute in a particular case. Greg Taylor and John Williams stated that '[a]ny solution adopted must not lead to too great a dependence on judicial impression, as is arguably the case with the *Bropho* rule'.[1371]

28.32 There was agreement in consultations and submissions that the degree to which s 64 operates to subject the Commonwealth to state laws is unclear. This lack of clarity was attributed to the ambiguous language of the section.[1372]

28.33 As to the nature of the Commonwealth's liability or immunity, there was strong support for the view that the Commonwealth should be bound by state laws in the same way as an ordinary citizen.[1373] The Solicitor-General for South Australia, Brad Selway QC, remarked:

> It should also be accepted as axiomatic that the Commonwealth and its employees and agencies are subject to any laws (including State laws) upon which it relies to assert its own rights (eg the Real Property Acts) or which govern civil rights and proceedings (eg Limitation of Actions Acts, the Wrongs Acts or the Law of Property Acts).

1369 Commonwealth, *Parliamentary Debates*, Senate, 7 November 1991, Second Reading Speech, 2712 (Senator Collins).

1370 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 1989, 883 (Spender).

1371 G Taylor and J Williams, *Submission J020*, 19 March 2001. Others expressing similar views were Attorney-General (NSW), *Submission J019*, 14 March 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; Victorian Bar Association, *Consultation*, Melbourne, 6 March 2001; ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001.

1372 B Horrigan, *Consultation*, Canberra, 29 March 2001; D Jackson QC, *Consultation*, Sydney, 19 March 2001.

1373 R Meadows QC, *Consultation*, Perth, 22 March 2001; B Walker SC, *Consultation*, Sydney, 5 March 2001; B Selway QC, *Submission J028*, 20 March 2001; Law Council of Australia, *Submission J037*, 6 April 2001; G Taylor and J Williams, *Submission J020*, 19 March 2001; Attorney-General (NSW), *Submission J019*, 14 March 2001. Some disagreed with this view: Australian Government Solicitor, *Consultation*, Canberra, 5 June 2000.

> It should be accepted that the Commonwealth and its employees and agencies are bound by any statutes (including State statutes which are not inconsistent with a Commonwealth statute) from which it has not specifically excluded itself by regulation.[1374]

28.34 Support for the removal of Commonwealth immunity from state legislation was accompanied by a recognition that the Commonwealth can and should be able to exclude itself from a state Act by express provision — in effect, to reinstate its immunity.[1375] The New South Wales Attorney-General, Bob Debus, stated in his submission:

> It is a matter of some importance to this State that the Commonwealth (and any other government) should observe and be bound by the laws of this State particularly those relating to public health and safety and environmental protection. As regards the Commonwealth, of course, it may immunise itself from the application of those laws by valid inconsistent legislation.[1376]

28.35 It was said that this situation was very different from the application of Commonwealth legislation to state executives 'because the Commonwealth, unlike the States, can always legislatively disapply unsuitable legislation from other levels of government using its paramount powers under s 109'.[1377]

28.36 Concern was expressed about the potential for state laws to bind the Commonwealth inappropriately if the Commonwealth's immunity were removed. It was said that the Commonwealth may on occasions have very short notice of circumstances that trigger inappropriate liability under a state Act and the legislative process may be too protracted to address the issue in time to avert the problems. The Commonwealth engages in so many and varied activities that it is not reasonable to expect Parliament to be able to predict all possible effects of state laws upon those activities.[1378] Gavan Griffith QC noted:

> Post *Evans Deakin* experience has shown that it is hard to amend [federal legislation] to provide immunity if it subsequently is found necessary … It is practically impossible to review all possible applications of all State laws prospectively. The application can be unexpected, and there should be a power in the Commonwealth to deal with such situations.[1379]

1374 B Selway QC, *Submission J028*, 20 March 2001.

1375 Ibid; Law Council of Australia, *Submission J037*, 6 April 2001; G Taylor and J Williams, *Submission J020*, 19 March 2001; ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001; Australian Government Solicitor, *Consultation*, Canberra, 5 June 2000.

1376 Attorney-General (NSW), *Submission J019*, 14 March 2001.

1377 G Taylor and J Williams, *Submission J020*, 19 March 2001.

1378 M Sexton SC, *Consultation*, Sydney, 19 February 2001; Attorney-General's Department (Cth), *Consultation*, Canberra, 22 February 2001; Australian Government Solicitor, *Consultation*, Canberra, 5 June 2000.

1379 G Griffith QC, *Correspondence*, 25 April 2001.

28.37 Most submissions and comments on this matter supported giving the Commonwealth the power to exclude itself from a state Act by regulation. Gavan Griffith emphasised the importance of an ongoing regulatory power.[1380] The Law Council of Australia stated that:

> recognising the complexities that can arise from the *Evans Deakin* decision, [the Law Council] would support the Commonwealth having the ability to immunise itself from state legislation by way of regulation. The mechanism of parliamentary disallowance would provide for appropriate parliamentary oversight of 'immunisation'. [1381]

28.38 Greg Taylor and John Williams agreed but added that the ordinary procedures for disallowance should ensure that regulations do not inappropriately nullify the application of state Acts.

> [W]e would have no objection to the concept of a regulation-making power enabling the Commonwealth to disapply State legislation to which it is currently subject under s 64 of the Act, provided, of course, that such regulations remain disallowable. It should be provided that the regulations are required to be in a form which permits either House of Parliament to disallow a reference to individual pieces of State legislation in them, even if the regulations deal with more than one piece of State legislation. This is to prevent motions relating to one piece of State legislation included in 'omnibus' regulations being defended on the grounds that the disallowance of all the State statutes dealt with in the regulations would create too much inconvenience.[1382]

Commission's Views

28.39 The High Court's decision in *Henderson* has removed many of the constitutional obstacles to the ability of a state law to bind the Commonwealth executive. This development has placed greater emphasis on the question of whether a particular state law purports to bind the Commonwealth as a matter of construction or by the operation of statutory provisions such as s 64. *Henderson* has also expanded the opportunity for federal legislation such as the *Judiciary Act* to ensure that there are appropriate rules for determining the circumstances in which a state or territory law may bind the Commonwealth.

28.40 The Commission considers that the present law does not provide appropriate guidance and that it requires reform for the following reasons.

- The legal test for deciding whether state legislation applies to the Commonwealth executive as a matter of statutory construction is uncertain, especially in light of *Commonwealth v Western Australia.*[1383]

1380 Ibid.
1381 Law Council of Australia, *Submission J037*, 6 April 2001.
1382 G Taylor and J Williams, *Submission J020*, 19 March 2001.
1383 *Commonwealth v Western Australia* (1999) 196 CLR 392.

- Whatever its precise terms, the test usually requires a highly fact-sensitive determination of whether a state statute impliedly binds the Commonwealth executive by reason of the nature and subject matter of the Act. This may lead to 'too great a dependence on judicial impression'.[1384]

- Section 64 is unclear in so far as it operates to apply state legislation to the Commonwealth.

- The foregoing considerations leave the law in a state of considerable uncertainty, create an environment that is conducive to needless litigation, and result in resources of litigants and courts being wasted unnecessarily. Simplicity and clarity of the law are strong practical justifications for reforming the immunity. As Peter Hogg and Patrick Monahan have stated, '[t]he reason for the complexity of the law is that the courts, resisting the conclusion that the Crown is not bound by statutes, have engrafted many exceptions onto the basic rule'.[1385]

28.41 The Commission considers that statutory rules can be formulated in a manner that would replace the current confusion with clear principles. In formulating those principles, the Commission has had regard to the general policy considerations identified in Chapter 22. However, there are several additional considerations that apply in the particular context of state laws binding the Commonwealth executive.

- The Commonwealth can exempt itself from the operation of state laws by which it does not wish to be bound by enacting inconsistent legislation pursuant to s 109 of the Constitution.

- The capacity of the Commonwealth to exempt itself from the application of state laws is limited by the requirement in s 51(xxxi) of the Constitution that any acquisition of property (eg a chose in action) be on just terms. Rights accrued under state legislation may be difficult to divest without significant cost.

- The mechanism by which the Commonwealth may exempt itself from the operation of state laws must be both transparent and flexible. The need for flexibility arises from the dynamic nature of state law and the difficulty of foreseeing how myriad state laws may impact on the Commonwealth in different circumstances.

1384 G Taylor and J Williams, *Submission J020*, 19 March 2001.
1385 P Hogg and P Monahan (2000), 327.

28.42 Bearing in mind these considerations, the Commission recommends that the *Judiciary Act* be amended to provide that the Commonwealth is bound by every state and territory Act that is enacted after the date on which this amendment comes into force, subject to three identified exceptions. This primary rule reflects the Commission's view that the Commonwealth should generally be subject to law, including the operation of state and territory law, unless it expressly exempts itself.

28.43 The first exception is that the Commonwealth should be able to exempt itself from state and territory law by regulation. This exception recognises the superior constitutional position of the Commonwealth in relation to the States and Territories. However, in allowing the exemption to be done by way of regulation rather than primary legislation, the Commission recognises the need for flexibility and speed of response. This need arises from the difficulty of predicting the impact of state and territory laws on Commonwealth interests. The capacity for a flexible response would also be enhanced by enabling the Commonwealth to identify state or territory laws from which it is exempt, either by name or general subject matter.

28.44 The Commission considers that the Commonwealth's power to exempt by regulation would be made more effective if the Commonwealth is informed of pending state or territory legislation at an early stage. This would enable the Commonwealth to make a timely determination of the desirability of exempting the state or territory legislation by regulation. The Commission considers that the use of information technology or an intergovernmental protocol might facilitate access to Bills pending in state and territory legislatures, with the aim of enabling any federal exemption to be put in place before the state or territory legislation comes into force.

28.45 The mechanism by which the Commonwealth exempts itself from state and territory legislation must also be sufficiently flexible to allow the Commonwealth to extinguish its liability under a state or territory Act without contravening s 51(xxxi) of the Constitution. To avoid this problem, the primary provision by which the Commonwealth accepts the application of state and territory Acts to the Commonwealth should be made conditional on there being no subsequent regulation exempting the relevant state or territory law.

28.46 The second exception to the application of state and territory statutes to the Commonwealth executive is that the Commonwealth should not be bound by any state or territory Act that does not bind that State or Territory. This exception meets the concern that was raised by the High Court's decision in *Evans Deakin* and addressed unsuccessfully by the Law and Justice Legislation Amendment Bill (No 2) 1991 (Cth), discussed above. The rationale for the exception is that there is no sound reason for *compelling* the application of state or territory law to the Commonwealth executive if the state or territory legislature has determined that the law should not apply to the executive in its own polity. However, if the Common-

wealth chooses to apply such a law to itself, no objection can be raised to allowing it to do so.

28.47 The third exception recognises that a state or territory statute should not apply as a matter of course to the Commonwealth executive if the statute expressly states that it does not bind the Commonwealth. However, in much the same way as s 79 JA picks up and applies state and territory law as 'surrogate federal law' in the exercise of federal jurisdiction (see Chapter 34), the Commonwealth should be permitted to apply state or territory law to the Commonwealth executive notwithstanding restrictions in the terms of the state or territory law.

28.48 In conformity with the approach to reform taken in other chapters in Part F, the Commission recommends that changes to the application of state and territory legislation to the Commonwealth should be effected in stages. The new rule should be applied to new state and territory legislation with effect from a specified date. However, the application of the new rule to existing state and territory legislation should be delayed for five years until the Commonwealth has had sufficient opportunity to review existing state and territory legislation and make regulations to exclude itself from the operation of such legislation where necessary.

New state and territory legislation

Recommendation 28–1. The rule of statutory construction that the Commonwealth is presumed to be immune from the operation of state and territory statutes should be abolished. The *Judiciary Act* should be amended to provide that the Commonwealth is bound by every state and territory Act that is enacted after the date on which this amendment comes into force, subject to the exceptions identified in Recommendations 28–2 to 28–4.

Recommendation 28–2. The *Judiciary Act* should be amended to provide that the Commonwealth shall not be bound by any state or territory Act that has been prescribed by Commonwealth regulation not to bind the Commonwealth. The regulation-making power should provide as follows.

(a) Regulations may identify state or territory Acts either specifically by name or generally by subject matter.

(b) Regulations may exclude the application of state or territory Acts to the Commonwealth either wholly or in part.

Recommendation 28–2 cont'd

(c) Regulations may be made either before or after the relevant state or territory Act has come into force.

(d) Where the state or territory Act has come into force, the regulations may, if so expressed, have retrospective effect and apply from the date on which the state or territory Act came into force. In order to make any such retrospective regulation effective, the primary provision by which the Commonwealth accepts the application of state and territory Acts to the Commonwealth should be made conditional on there being no subsequent regulation excepting the relevant state or territory law. [See 28–1].

(e) Regulations are subject to ordinary procedures for disallowance.

Recommendation 28–3. The *Judiciary Act* should be amended to provide that the Commonwealth shall not be bound by any state or territory Act that does not bind that State or Territory, unless that Act is prescribed by Commonwealth regulation as an Act by which the Commonwealth shall be bound in whole or part.

Recommendation 28–4. The *Judiciary Act* should be amended to provide that the Commonwealth shall not be bound by any state or territory Act that expressly states that it does not bind the Commonwealth, unless that Act is prescribed by Commonwealth regulation as an Act by which the Commonwealth shall be bound in whole or part.

Recommendation 28–5. The Attorney-General should refer to the Standing Committee of Attorneys-General the following issues for the purpose of ensuring that the Commonwealth is informed of pending state or territory legislation at a sufficiently early stage to enable a timely determination to be made of the desirability of exempting the state or territory legislation by regulation in accordance with 0.

(a) Whether an intergovernmental protocol might be established by which the Commonwealth is informed of Bills pending in either House of a state parliament or a territory legislature; and

(b) The use of information technology to facilitate access to Bills pending in either House of a state parliament or a territory legislature at the time of, or as soon as practicable after, their introduction to the House.

Existing state and territory legislation

Recommendation 28–6. The *Judiciary Act* should be amended to provide that, upon the expiration of a period of five years, the Commonwealth is bound by all state and territory Acts existing at the date on which these amendments come into force, subject to the exceptions identified in Recommendations 28–2 to 28–4 in respect of new state and territory legislation.

Recommendation 28–7. The Attorney-General should order a review of existing state and territory legislation for the purpose of determining whether particular Acts or particular subject areas should be excepted by regulation from binding the Commonwealth in accordance with 28–6. In conducting the review, the States and Territories should be consulted, so far as practicable. The review should be completed and any necessary regulations promulgated within five years.

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29. Liability of Commonwealth Bodies

Contents

Introduction

29.1 Part F of the report has so far dealt with the various kinds of immunity available to the Commonwealth and, in more limited circumstances, to the States and Territories. However, because the Commonwealth is an abstract legal entity, claims made against it must in fact arise from conduct taken by agents or instrumentalities of the Commonwealth. A threshold question may therefore arise as to whether a defendant is 'the Commonwealth' and able to claim any immunities that attach to the Commonwealth.

29.2 This question is complicated by the fact that the Commonwealth executive, like all modern governments, carries out its functions through an array of entities. These include the following.

- ***Commonwealth Ministers, officers, servants and agents.*** Commonwealth liability for the acts of servants and agents is often vicarious, rather than direct (see Chapter 25). Vicarious liability cannot generally be established unless it can be shown that the person whose conduct is in question was subject to Commonwealth control. Furthermore, as discussed in Chapter 25, vicarious liability does not apply to agents who are authorised to act with independent discretion.[1386]

- ***Government Business Entities ('GBEs')***. Commonwealth GBEs control approximately one quarter of the Commonwealth's total assets and provide a range of services, including communications, transport, employment and health services.[1387] Generally, GBEs satisfy three criteria: they are commercial, they trade outside the public sector, and they are not primarily regula-

1386 *Enever v The King* (1906) 3 CLR 969, 983–984 (Barton J).

1387 The Department of Finance and Administration reported in 1998–99 that Commonwealth GBEs generated revenue of nearly $25 billion, provided dividends of $4.5 billion and controlled assets of some $40 billion: Parliament of the Commonwealth of Australia, Report 372 (1999). The following discussion of GBEs is derived from this report, and in particular, para 1.11–1.12, 1.26–1.27, 2.34–2.40.

tory bodies. A Commonwealth GBE may be a body corporate established by legislation for a public purpose, or a company established under Corporations Law in which the Commonwealth has a controlling interest. Most GBEs are companies or Government Owned Corporations ('GOCs').[1388] GOCs must be distinguished from statutory authorities. They may also be distinguished from statutory corporations such as Australia Post and Telstra, which are bodies established under legislation with similar policy objectives to those of a GOC.[1389]

- ***Private corporations under government contract***. Private corporations that have been contracted to perform government services may also be able to claim executive immunity. Companies that merely supply to the government may be able to claim derivative immunity[1390] where that is necessary to protect Commonwealth immunity.

29.3 GOCs have grown considerably in number and diversity and are increasingly likely to compete with private enterprise. The extent to which the activities of an entity are commercial may determine whether it ought to attract special privileges when dealing in the marketplace. Recent government policy has seen the privatisation of major public utilities and a tendency to contract out what were previously governmental activities. The nexus between the Commonwealth and the GOC can be difficult to characterise in such cases.

Problems with the Current Law

Identifying an entity as the Commonwealth

29.4 The Commonwealth carries out its activities through various entities whose functions may vary from time to time, and whose activities are not always attributable to the Commonwealth.[1391] The nature of these functions and activities is important in determining whether GBEs attract the shield of the Crown. The varied circumstances of individual cases have impeded the development of clear and simple principles, resulting in uncertainty in claims of executive immunity.

29.5 The issue of whether an entity is the 'Commonwealth' need not be complicated. If legislation states that an entity is entitled to the immunities of the Crown, the issue ends there.[1392] The value of clarifying the law in this way is amplified by the uncertainty of the tests for determining the entitlement to immunity by implication alone.

1388 In 1999, 10 of the 14 Commonwealth GBEs were companies, two were in the process of being corporatised and two are expected to remain authorities. In 1995, only nine of the then 20 GBEs were companies: Ibid.

1389 D McGann (1998).

1390 N Seddon (1998), 475.

1391 Senate Standing Committee on Legal and Constitutional Affairs (1992), 9, 12.

1392 See, for example, *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107.

29.6 In the absence of an express statutory provision, the question of whether an entity is entitled to the immunities of the Commonwealth is determined by implication according to two criteria: the nature of the activities carried out by the entity and the degree of control exercised by the executive (usually a Minister) over the entity. These criteria are well established in the common law but may not be adequate to address the changing nature of governmental activity.

The control test

29.7 The right of an entity to claim Commonwealth immunity depends upon the capacity of the executive government to control the entity's most important functions. The test is analogous to the test for vicarious liability in employment — 'does the employer have sufficient control over the employee so that the acts of the employee should be attributed to the employer?'[1393]

29.8 In *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*, Stephen J expressed the test as follows:

> If a corporation is no more than the passive instrument of the Crown, subject in a high degree to control by the executive, it is appropriate enough that its acts be viewed as those of its master and that it be itself treated as the alter ego of the Crown, enjoying accordingly those immunities and privileges with which the Crown is clothed. If, on the contrary, a statutory corporation is essentially autonomous, its acts being in no sense the outcome of directions by the executive but truly its own, there will be little reason to clothe it with any of those immunities or privileges.[1394]

29.9 The courts have often been reluctant to extend executive immunity to statutory authorities. In *Townsville Hospitals Board v Council of the City of Townsville*, for example, the High Court held that, although there was a degree of ministerial control over the Board, the Board retained a substantial amount of decision-making power and was not entitled to executive immunity.[1395]

29.10 The element of control may be difficult to establish where the entity is incorporated under companies legislation.[1396] In *Commonwealth v Bogle*, the Commonwealth exercised executive power over the defendant company; the Minister controlled the board and the business; all subscribers to the memorandum of association were Commonwealth public servants; the company relied on public revenue and controlled Commonwealth property — yet it was not immune from regulation by a Victorian statute. The High Court held that:

1393 N Seddon and S Bottomley (1998), 293–294.
1394 *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330, 348.
1395 *Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR 282, 291.
1396 N Seddon and S Bottomley (1998), 292.

> none of these things can affect the legal character of the company as a person suing in the courts. If the company were a company limited by shares, it could make no difference that the Commonwealth held ninety-nine per cent of the shares.[1397]

The governmental function/activity test

29.11 The degree to which the functions and activities of an entity can be characterised as those of the Commonwealth can be a decisive factor in determining the availability of Commonwealth immunities. On this view, immunities are more likely to be attached to an entity performing governmental functions than to one performing non-governmental functions.

29.12 However, as the High Court has often observed, there is no reliable guide to what are purely governmental functions. Views about the functions of government have changed significantly over time, from the rise of the welfare state in the 1930s and 1940s, to the increased use of privatisation in more recent times. The High Court has commented on this as follows:

> It has been said that in deciding the question whether a person or body is entitled to the privileges and immunities of the Crown it is necessary to consider all the circumstances of the case and that '(t)he fact that function has been a traditional function of government and that no intention of "alienating" it appears is sufficient to answer the question in many cases' … However, many functions formerly regarded as matters of private concern are now carried out by instrumentalities of government and the question whether the functions in question are traditionally or peculiarly governmental is likely to be increasingly unhelpful in deciding whether the body formed to carry out those functions enjoys the privileges and immunities of the Crown.[1398]

29.13 The legal difficulties in attributing Commonwealth immunity to GBEs has been particularly challenging because of their character as 'hybrid entities which straddle the division between public law and private law'.[1399] GBEs operate within a government framework, yet are involved in commercial activities; and it has been said that 'corporatisation and commercialisation of governmental activities has altered the very basis upon which the law relating to crown immunity and privilege was once framed'.[1400] The Senate Standing Committee on Legal and Constitutional Affairs described the doctrine of immunity as:

> inconsistent with two principal concepts of corporatisation: first the idea of competitive neutrality; and second, the high degree of operational autonomy and responsibility needed to achieve improved efficiency and performance. Where GBEs or statutory corporations engage in purely commercial activities and compete with private enterprise it may be desirable to eliminate the operation of the shield doctrine altogether.[1401]

1397 *Commonwealth v Bogle* (1953) 89 CLR 229, 267–268 (Fullagar J).
1398 *Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR 282, 288–289.
1399 B Horrigan (1998), 287.
1400 S Kenny (1996), 237.
1401 Senate Standing Committee on Legal and Constitutional Affairs (1992), 101.

29.14 If the enacting legislation of a GBE contains no express provision granting it immunity, the courts are generally reluctant to conclude that it is an agency or emanation of the Commonwealth.[1402] If its activities are commercial in nature, then, even if they are usual functions of government and the Commonwealth has the requisite degree of control, the entity may not be immune from laws that would apply to private persons. On the other hand, if the body has a non-commercial, public interest nature, it is more likely to be entitled to the immunities of the Commonwealth.[1403]

29.15 This issue is rarely straightforward because even though a GOC may have a commercial orientation, it will often have responsibility for some traditional government services, known as community service obligations ('CSOs'). CSOs are generally non-profit activities performed in fulfilment of some social obligation of government to the community. CSOs are performed at the direction of government and thus 'it is arguable that when performing these activities a GOC should be entitled to the immunity of the Crown'.[1404]

29.16 In the absence of an express legislative provision, it is necessary to take account of the particular functions of the GBE and the activities it performs to determine whether it attracts executive immunity. In *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)*, Stephen J stated:

> On occasions the legislative intent may be a complex one, especially where a corporation has conferred upon it a number of quite distinct functions. The intention may be that only some of these should attract the immunities and privileges of the Crown. Again, whether a corporation possesses one or more functions, the intention of the legislation may be that only some of the Crown's immunities and privileges should attach to it.[1405]

29.17 The commercial or non-commercial nature of the functions and activities of an entity are not always sufficient to determine whether it attracts Commonwealth immunity. In *Deputy Commissioner of Taxation v State Bank of New South Wales*,[1406] it was held that government banking, although commercial in nature, can be a government function which attracts the immunity of the Commonwealth.

> Decisions of this Court establish not only that the Parliament may set up a corporation to carry out any of the executive functions of government on the footing that it is an agency or instrumentality of government but also that the Commonwealth Trading Bank is the Commonwealth notwithstanding that it is a body corporate.[1407]

1402 J McCorquodale (1992), 410.
1403 B Horrigan (1999), 225.
1404 D McGann (1998), 60–61.
1405 *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330, 349–350 (Stephen J).
1406 *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219, 231–233.
1407 Ibid, 232.

Issues with corporations law

29.18 Commonwealth GOCs are bodies that are incorporated under the corporations law rather than under specific legislation that defines the powers and functions of that corporation. As GOCs are not established by a specific Commonwealth Act, there is generally no legislative provision that determines whether or not they benefit from Commonwealth immunities. It may be necessary to enact specific legislation addressing the immunity of Commonwealth GOCs, as has been done in some state jurisdictions.[1408]

29.19 As the number of GOCs has grown, more attempts have been made to use the shield of the Crown to protect them from unwelcome legislative provisions. A parliamentary committee has remarked that there is 'a perception that the shield doctrine [is] allowing statutory corporations and their private enterprise associates to evade the provisions of companies and securities legislation'.[1409]

29.20 In *Commonwealth v Bogle*, an entity incorporated under Victorian law was found not to attract Commonwealth immunity because the level of Commonwealth control and the governmental nature of its function could not overcome the form and 'legal character' of the entity.[1410] In different circumstances, the High Court has held that a Corporations Law entity can benefit from Crown immunity.[1411]

Issues with trade practices law

29.21 Difficult questions have also arisen regarding the application of the *Trade Practices Act 1974* (Cth) to the Commonwealth. The *Trade Practices Act* generally regulates the conduct of financial or trading corporations. The Act also appears to contemplate the regulation of the Commonwealth in its commercial dealings in the same way as non-governmental businesses.[1412] Section 2A(1) of the Act states that:

> this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.

29.22 Where the Commonwealth 'carries on a business' it is subject to the *Trade Practices Act* and treated in the same way as other corporations. Uncertainties arise from the lack of a clear definition of the term 'carries on a business'. Few cases have dealt with the meaning of this term in relation to the liability of the

1408 GOCs of the States and Territories are generally regulated by GOC Acts. In New South Wales, the *State Owned Corporations Act 1990* (NSW) states that such corporations are not representatives of the Crown nor entitled to executive immunity. See D McGann (1998).
1409 Senate Standing Committee on Legal and Constitutional Affairs (1992).
1410 *Commonwealth v Bogle* (1953) 89 CLR 229, 267–268.
1411 *Deputy Commissioner of Taxation v State Bank of New South Wales* (1992) 174 CLR 219, 230–233.
1412 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 May 1977, 1447.

Commonwealth under the *Trade Practices Act*.[1413] Cases that have considered the application of s 2A have held that 'carrying on a business' covers the activities of the Australian Telecommunications Commission, [1414] the Australian Postal Corporation[1415] and the Australian Broadcasting Corporation,[1416] as well as those of the Department of Administrative Services in developing a property site. By contrast, the Trade Practices Commission has been held generally not to carry on a business,[1417] and the Australian Government Publishing Service has been held not to carry on a business when disposing of plant and equipment and inviting private sale.[1418]

29.23 Nick Seddon has argued that the term 'carries on a business' should be removed or given a wider interpretation, 'so as to accord with the evident purpose behind the provisions which were meant to ensure that governments could no longer hide behind Crown immunity'.[1419]

Derivative immunity

29.24 Private sector companies under contract to the Commonwealth have been held to benefit from a derivative form of executive immunity because 'the application of the legislation to them would have prejudiced the interests of the Crown', for example, by voiding the contract.[1420] In effect, a failure to extend executive immunity to private contractors would undermine the immunity of the executive itself.

29.25 The issue of whether a private contracting party was immune from the *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1987* (NSW) was considered by the Federal Court in *Bass v Permanent Trustee Company Ltd*.[1421] Although relief in this case would not have invalidated the contract with the executive,[1422] the Court stated that in some cases 'it is necessary to look beyond the type of relief sought in the proceeding and consider the effect of the proceeding on the position of the Crown'. Executive immunity may extend to circumstances where the Crown is not a direct party to the contract, but:

> the legislation must significantly prejudice the Crown, eg by restricting actions it would otherwise be free to undertake or diminishing the value of its property … [I]t is not enough that the interests of the Crown will be indirectly affected by the application of the statute. There would be a multitude of cases wherein that could be demon-

1413 N Seddon (1998), 470.
1414 *Tytel Pty Ltd v Australian Telecommunications Commission* (1986) 67 ALR 433, 436 (Jackson J).
1415 *Suatu Holdings Pty Ltd v Australian Postal Corporation* (1989) ATPR 40-937, 50,190 (Gummow J).
1416 *Sun Earth Homes Pty Limited v Australian Broadcasting Corporation* (1991) ATPR 41-067, 52,035 (Burchett J).
1417 *Thomson Publications (Australia) v Trade Practices Commission* (1979) 27 ALR 551.
1418 *JS McMillan Pty Ltd v Commonwealth* (1997) 147 ALR 419, 438.
1419 N Seddon (1998), 407.
1420 *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107, 124.
1421 *Bass v Permanent Trustee Co Ltd* (1996) 139 ALR 127.
1422 Ibid, 142 (Wilcox, Burchett, Olney JJ).

> strated, eg compliance with a statute will commonly diminish a taxpayer's income and, therefore, Commonwealth tax revenue.[1423]

29.26 It has been argued that derivative immunity stretches the shield of the Crown too far:

> How can companies contracted to the government under a contracting out arrangement possibly claim a sort of 'vicarious' or derivative immunity? With the huge emphasis by all governments on contracting out to private enterprise, the possibility that Crown immunity goes with the package is truly alarming.[1424]

Consultations and Submissions

29.27 In consultations and submissions, the Commission was told that Commonwealth statutes that create entities should state expressly whether the entity is entitled to the immunities of the Commonwealth.[1425] The Law Council of Australia stated in its submission that:

> legislation establishing Commonwealth statutory bodies, offices and agents should specify expressly
>
> (a) what, if any, privileges or immunities extend to the entity, and
>
> (b) what functions of the entity are authorised by the Commonwealth.[1426]

29.28 The Office of Parliamentary Counsel advised the Commission that when drafting legislation to establish a new statutory body it regularly considers whether the body is entitled to executive immunities. However, the extent to which immunities are addressed in legislation depends on the advice obtained from the relevant government department; in the rare event that such advice is not forthcoming, the issue of immunity is not addressed in the statute.

29.29 A number of comments expressed the view that entities that perform commercial activities on behalf of the Commonwealth should not benefit from executive immunities in respect of those activities. The law in this area was said to be complex and unclear because many such entities perform both commercial and public activities, and some act on behalf of the Commonwealth for only part of the time.[1427] An entity with mixed functions should benefit from immunities only in respect of non-commercial functions.[1428]

29.30 The Law Council of Australia stated:

1423 Ibid, 144.
1424 N Seddon (1998), 474.
1425 Law Council of Australia, *Submission J037*, 6 April 2001; ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001.
1426 Law Council of Australia, *Submission J037*, 6 April 2001.
1427 Ibid; B Horrigan, *Consultation*, Canberra, 29 March 2001.
1428 A Tokley, *Submission J023*, 16 March 2001; Law Council of Australia, *Submission J037*, 6 April 2001.

> Generally speaking, government business entities (GBEs) which engage in commercial activities should not have the benefit of Crown immunities … however … the Law Council would not object to a GBE which engaged in commercial activities, but which also performed non-commercial functions, having the benefit of Crown immunities in relation to its non-commercial functions …. [T]he Law Council would support legislative amendment to clarify which functions and activities attract Crown immunities in situations where entities have multiple functions and activities.[1429]

29.31 There was agreement in consultations and submissions that the liability of Commonwealth bodies incorporated under the Corporations Law is unclear, as is the application of the *Trade Practices Act* to these bodies.[1430]

Commission's Views

29.32 When a body seeks to rely on an immunity from the application of a Commonwealth statute two questions must be asked. The first is whether the Commonwealth executive is entitled to immunity from that statute; the second is whether the particular body in question is able to benefit from any such immunity enjoyed by the Commonwealth executive. The questions are closely related: the narrower the immunities afforded to the executive, the fewer the occasions on which a body that claims to be an emanation of the executive will have the benefit of immunity.

29.33 The first of these questions has been addressed in previous chapters in Part F. In Chapter 26 the Commission considered the application of Commonwealth statutes to the Commonwealth executive and recommended that the Commonwealth executive be bound by all Commonwealth legislation unless expressly exempted. If this recommendation were implemented, the occasions on which a body could seek to benefit from executive immunity from a Commonwealth statute would be limited to those in which the statute expressly binds the Commonwealth.

29.34 Consistently with this recommendation, the Commission considers that the *Judiciary Act* should be amended to clarify the basis on which bodies established by Commonwealth law should be entitled to the privileges and immunities of the Commonwealth. In particular, the *Judiciary Act* should provide that no body established by Commonwealth law should be entitled to the privileges and immunities of the Commonwealth unless legislation states expressly that the body is so entitled. Since bodies may perform a variety of functions — governmental and commercial — legislation should also indicate the *extent* to which the body is entitled to Commonwealth immunities. The most appropriate place to indicate a legislative intent to confer immunities on a body is in the Act that establishes that body.

1429 Law Council of Australia, *Submission J037*, 6 April 2001.

1430 Ibid; B Horrigan, *Consultation*, Canberra, 29 March 2001; ANU Faculty of Law, *Consultation*, Canberra, 23 February 2001.

29.35 This approach to the immunity of Commonwealth bodies accords with judicial decisions. In *Townsville Hospitals Board v Council of the City of Townsville*, Gibbs CJ stressed that the presumption ought to be that a body benefits from executive immunity only if this is expressly provided for in its enacting legislation.

> It has more than once been said in this Court that 'there is evidence of a strong tendency to regard a statutory corporation formed to carry on public functions as distinct from the Crown unless Parliament has by express provision given it the character of a servant of the Crown' ... It is not difficult for the legislature to provide in express terms that a corporation shall have the privileges and immunities of the Crown, and where it does not do so it should not readily be concluded that it had that intention.[1431]

29.36 Similarly, in 1992 the Senate Standing Committee on Legal and Constitutional Affairs concluded that express provisions would provide certainty and 'allow the legislature rather than the judiciary to determine whether or not non-profit, public interest or regulatory bodies can benefit from the Shield of the Crown'.[1432] The Committee recommended that:

> All new enactments, or modifications to legislation, should explicitly state whether a relevant organisation is entitled to Crown immunities from Commonwealth, State, Territory and/or local government laws. If no such statement were made then it would be presumed that the organisation would be bound by those laws. One important advantage of this approach would be the creation of greater certainty in the application of Territory, State and Federal laws to Commonwealth and State corporations.[1433]

29.37 The Commission shares the view that where Commonwealth law creates a body it should state expressly what Commonwealth immunities extend to that body. In the absence of such an indication, executive immunities should not extend to that body.

29.38 The Commission further recommends a staged approach to implementing the proposed reforms. The Commission recommends that the new rule be applied to all new bodies created by Commonwealth law after a specified date and that the new rule be applied to existing bodies created by Commonwealth law only after a five-year review period has expired. During the review period, all existing Commonwealth legislation by which bodies are established should be reviewed for the purpose of determining whether, and to what extent, each body should be entitled to the privileges and immunities of the Commonwealth.

29.39 This chapter has identified a range of problems arising from the manner in which modern governments perform their complex functions. These problems included: the nature of immunities enjoyed by corporations that are owned by government but incorporated under the Corporations Law rather than under statute; the application of trade practices legislation to the Commonwealth; and the derivative immunities enjoyed by private persons who contract with the Common-

1431 *Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR 282, 291.
1432 Senate Standing Committee on Legal and Constitutional Affairs (1992), 113.
1433 Ibid, 113–114.

wealth. The Commission has not been able to formulate recommendations to address these complex issues within the time frame of this inquiry. However, it is apparent from the comments made to the Commission in consultations and submissions that these issues clearly merit further investigation.

29.40 Finally, in making these recommendations the Commission is aware that from 15 July 2001 corporations that were previously incorporated under each State and Territory's Corporations Law will be incorporated under the *Corporations Act 2001* (Cth). The recommendations in this chapter are intended to apply to bodies that have a separate legal personality, are established by Commonwealth law and owe their existence, powers and functions to that law. However, the recommendations are not intended to apply to corporations incorporated under the *Corporations Act 2001* (Cth).

New Commonwealth bodies

Recommendation 29–1. The *Judiciary Act* should be amended to provide that no body that is established by Commonwealth legislation after the date on which this amendment comes into force shall enjoy the privileges and immunities of the Commonwealth unless the legislation states expressly that the body is entitled to enjoy the privileges and immunities of the Commonwealth and to what extent.

Recommendation 29–2. The Commonwealth should adopt a policy, applicable to all its Departments, to ensure that every Act that establishes a new Commonwealth body states expressly whether the body is entitled to enjoy the privileges and immunities of the Commonwealth and, if so, to what extent. The Office of Parliamentary Counsel should review its legislative drafting practice to ensure compliance with this policy.

Existing Commonwealth bodies

Recommendation 29–3. The *Judiciary Act* should be amended to provide that, upon the expiration of a period of five years, no body that is established by Commonwealth legislation shall enjoy the privileges and immunities of the Commonwealth unless the legislation states expressly that the body is entitled to enjoy the privileges and immunities of the Commonwealth and to what extent.

Recommendation 29–4. The Attorney-General should order a review of all existing Acts that establish a Commonwealth body for the purpose of determining whether each body should be entitled to enjoy some or all of the privileges and immunities of the Commonwealth. Following such a review, each relevant Act should be amended, as necessary, to state expressly whether the body is entitled to enjoy the privileges and immunities of the Commonwealth and to what extent. The review should be completed and any amendments to legislation enacted within five years.

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Part G

The Law Applicable in Federal Jurisdiction

30. Introduction to the Applicable Law

Contents

30.1 The Commission's terms of reference require the Commission to examine whether the provisions of Pt XI Div 2 JA (ss 79–81), relating to proceedings involving the exercise of federal jurisdiction, continue to be appropriate to modern circumstances. In particular, the terms of reference ask:

> whether Commonwealth legislation should deal in greater detail or differently with the law that is to apply in proceedings involving the exercise of federal jurisdiction, including matters relating to or affecting claims against the Commonwealth, instead of placing continued reliance on the various State/Territory laws. In this connection, particular consideration should be given to whether provision should be made in relation to:
> (i) limitation periods applicable to actions against the Commonwealth; and
> (ii) the basis on which interest is awarded in relation to judgments against the Commonwealth.

30.2 Sections 79 and 80 raise difficult issues regarding the law to be applied in the exercise of federal jurisdiction. The difficulties stem from the complexity of these sections; changes of judicial approach to the relationship between the two sections; the interrelationship between these sections and common law choice of law rules; and the unsettled constitutional foundations for regulating the law to be applied by courts exercising federal jurisdiction. This chapter provides an overview of the central issues. Subsequent chapters in Part G examine particular issues in greater detail.

Choice of Law Rules

30.3 Many legal disputes have factual connections with more than one State, Territory or country. Choice of law rules are the rules a court applies in such circumstances to determine which of two or more laws should be applied to resolve the legal questions at issue.

30.4 Australian choice of law rules are derived from the English common law principles that were applied to resolve conflicts between laws of different countries. The common law rules generally determine the relevant law by first

categorising the subject matter of the cause of action as one in tort, contract, succession to property, and so on. The rule then identifies a connecting factor, which indicates the 'law district' whose law it is to be applied. The law selected pursuant to such a rule is known as the law of the cause or the governing law.

30.5 For example, if a question is categorised as involving succession to movable property, the common law choice of law rule is that the law of the deceased's domicile at the time of his or her death should be applied. Questions concerning immovable property are governed by the law of the place where the property is situated, and so on. The connecting factor — the deceased's domicile in the first case and the location of property in the second — are distillations of a policy to find the system of law with the closest connection to the legal issue to be resolved.

30.6 The common law choice of law rules also recognise that certain matters are so closely entwined with the policy and interests of the court adjudicating the claim that they should be subject to its law, that is, the law of the forum. Procedural matters are the principal example of matters requiring the application of the law of the forum.

30.7 The result is that two distinct laws may apply to a given case: the law of the forum to procedural matters and the law of the cause to substantive matters. Depending on the circumstances of the case, the law of the cause may also be the law of the forum, so that the same system of law applies to resolving both procedural and substantive matters.

30.8 One difficulty with procedural matters being governed by the law of the forum is that courts have different procedural laws. This is as true between jurisdictions within Australia as it is between Australia and other countries. The possibility then exists for plaintiffs to obtain the benefit of particular procedural rules by filing suit in the most advantageous jurisdiction, a process known as 'forum shopping'. A plaintiff's chosen court may have only a slender connection with the subject matter of the action and so unfairness may result to the defendant. The distinction between procedural matters and substantive matters is therefore critical.

30.9 Until recently, Australian courts took a very broad view of what was procedural, including in the concept both statutory caps on damages and statutes of limitation that barred the remedy but not the right.[1434] This view has now been abandoned. In *John Pfeiffer Pty Ltd v Rogerson* the High Court remarked that:

1434 *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433.

> matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. Or to adopt the formulation put forward by Mason CJ in *McKain*, 'rules which are directed to governing or regulating the mode or conduct of court proceedings' are procedural and all other provisions or rules are to be classified as substantive.[1435]

30.10 The common law choice of law rules outlined above are generally uniform throughout Australia, but they may be modified by the Constitution, or by federal, state or territory legislation. In practice, the Constitution has not been regarded as having a significant impact on Australian choice of law rules. Similarly, legislation has made only modest changes to the common law choice of law rules. The potential remains for significant expansion of federal, state or territory legislation specifying choice of law rules for Australia. In particular, in its report on *Choice of Law*,[1436] the Commission recommended the enactment of a substantial number of choice of law rules to be applied by courts when exercising federal jurisdiction, with parallel choice of law rules to be enacted by the States in the exercise of state jurisdiction. To date these recommendations have received only minor implementation.[1437] The Commission's earlier report is discussed in more detail in Chapter 33.

The Law Applicable in Federal Jurisdiction

30.11 Choice of law problems in Australia may arise in any case with factual connections with more than one State or Territory, whether the case falls within state or federal jurisdiction. Where the matter is one of state jurisdiction, the principles briefly outlined above will be applied. Where the matter is one of federal jurisdiction, the same principles may be relevant, but there is an additional layer of complexity which arises for two reasons.

Filling the gaps in federal law

30.12 The first reason for complexity is that the Commonwealth Parliament is one of limited legislative powers and so can only make valid laws in the exercise of powers specifically conferred on it by the Constitution. It is not constitutionally possible for Parliament to make laws governing every substantive issue that may arise in the exercise of federal jurisdiction.

30.13 Some matters within federal jurisdiction may properly fall within specific heads of federal legislative power. For example, the Commonwealth's legislative power over trade marks (s 51(xvii) of the Constitution) would underpin federal

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1435 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, 651.

1436 Australian Law Reform Commission, Report No 58 (1992).

1437 See, for example, *Choice of Law (Limitation Periods) Act 1993* (NSW) and cognate legislation in other States and Territories by which the common law categorisation of limitation statutes as 'procedural' was set aside in favour of a 'substantive' classification.

regulation of the substantive rights and liabilities in a dispute between residents of different States over the use of a trade mark. However, if a matter falls within federal jurisdiction because a contractual dispute arises between residents of different States (s 75(iv)) or because a tort claim is brought against the Commonwealth (s 75(iii)), this alone does not empower Parliament to make comprehensive laws regulating contracts or torts, such as would be necessary for the resolution of those disputes on their merits.

30.14 Moreover, even if Parliament possesses the legislative power to enact a law, it may not in fact have exercised that power. It is arguable, for example, that Parliament possesses the power to regulate procedural matters that arise in the exercise of federal jurisdiction whether they are adjudicated in state or federal courts. Yet there are many procedural issues on which federal law is silent (see Chapter 32).

30.15 Accordingly, in many matters of federal jurisdiction there will be gaps in federal law, either because federal law cannot constitutionally provide the relevant legal principles or because it does not do so in practice. If all legal issues in dispute between the parties are to be resolved, it is necessary to fill the gaps by reference to some other body of law. The question then becomes: to which legal system does the court refer in filling the gaps? The available options are discussed in the following section of this chapter.

30.16 The need to select a body of law to fill the gaps has often resulted in recourse to the convenient expression 'choice of law in federal jurisdiction', but the choice in question is fundamentally different from that involved in a regular conflict of laws case. In the regular case, choice of law rules serve the function of selecting between two or more systems of law, each of which has some claim to application by virtue of the connections between that system and the factual circumstances of the case. However, in relation to federal jurisdiction there is generally no competition between federal law and another law based on the closeness of connection. The problem is rather that federal law requires supplementation by reference to some other body of law because the case requires resolution of legal issues for which federal law makes no relevant provision. This problem arises irrespective of whether the dispute has factual connections with more than one State or Territory. This has led the High Court to observe recently that 'in federal jurisdiction, the question is not so much a question as to choice of law, but identification of the applicable law'.[1438]

1438 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, 638.

Choice of law rules for intra-Australian conflicts

30.17 The second reason for complexity arises from the difficulty in identifying the relevant choice of law rules, properly so-called, when dealing with those cases in federal jurisdiction that do have factual connections with more than one State or Territory. Federal choice of law rules might provide these rules but, as mentioned above, there is currently no body of choice of law rules designed specifically for use by courts when exercising federal jurisdiction.

30.18 In 1992 the Commission recommended that Parliament enact statutory choice of law rules for all courts exercising federal jurisdiction, but these proposals remain largely unimplemented. In *Commonwealth v Mewett* Gaudron J discussed the judicial creation of common law choice of law rules for federal jurisdiction, based on the notion that in federal jurisdiction there is a 'need to ensure that the one set of facts occurring in Australia gives rise to only one possible legal consequence, regardless of the location of the court in which the proceeding are brought'.[1439] However, more recently in *John Pfeiffer Pty Ltd v Rogerson*[1440] the High Court stated that the common law choice of law rules with respect to torts, limitation statutes and questions of quantification of damages apply equally in state and federal jurisdiction.

30.19 The absence of special federal choice of law rules, whether based in statute or the common law, necessitates recourse to a body of law to fill that gap. The question here is: to which legal system does the court refer to supply choice of law rules for matters of federal jurisdiction that have factual connections with more than one State or Territory?

Options for Reform

30.20 The previous discussion suggests several possible directions for reform of the law applicable in federal jurisdiction. The matters listed below are not necessarily mutually exclusive, and several options may be explored in conjunction with each other. The options are examined further in subsequent chapters of Part G.

Expand substantive federal laws

30.21 The first option is to extend the range of substantive matters that are regulated by federal law. One advantage of this approach is that, in respect of those matters covered by federal law, there is uniformity among all courts exercising federal jurisdiction in Australia, regardless of whether they be federal, state or territory courts. However, as previously discussed, it is not constitutionally

1439 *Commonwealth v Mewett* (1997) 191 CLR 471, 527.
1440 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.

possible for federal law to cover every substantive issue that might arise in federal jurisdiction, so that reliance on some body of law other than federal law can never be wholly excluded.

30.22 There have been some legislative developments in this direction. For example, in 1984 the High Court and the Federal Court were given the power to award interest from the date a cause of action accrues until the date of judgment.[1441] Previously these courts had to rely on the application of state law through the operation of s 79 JA.

30.23 The application of limitation statutes to claims in federal jurisdiction has also been problematic and might be amenable to regulation by federal law. Some federal statutes contain their own limitation periods and it is possible that such an approach might be adopted more widely (see Chapter 31).

30.24 In pursuing this option it must be borne in mind that many issues that were once considered to be procedural (such as awarding interest on damages, and limitation statutes) are now properly regarded as substantive because of the effect they have on the outcome for the parties.[1442] This revised classification may make federal regulation constitutionally more difficult because Parliament's power to regulate procedural matters in the exercise of federal jurisdiction is more extensive than its power to regulate matters of substance. Regulation of procedure may properly be regarded as 'incidental' to the exercise of federal judicial power (s 51(xxxix)), whereas regulation of substantive matters may require an independent head of power under s 51 of the Constitution, as discussed further below.

Expand procedural federal laws

30.25 A second option is to extend the range of procedural matters that are governed by federal law by regulating procedure in federal courts or, more widely, procedure in all courts exercising federal jurisdiction. This would give the benefits of uniformity (either among federal courts, or across all courts exercising federal jurisdiction), possibly without the constitutional impediments relevant to the regulation of substantive law.

30.26 Steps have also been taken in this direction in recent years. A prime example is the enactment of the *Evidence Act 1995* (Cth), which sets out a comprehensive code on the law of evidence for all federal courts in Australia. Previously federal courts had to rely on the application of state laws of evidence through the operation of s 79 JA. The expanded use of federal laws of procedure is considered in further detail in Chapter 32.

1441 s 77MA(1)(a) JA (High Court); s 51A FCAA (Federal Court).
1442 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.

Enact federal choice of law rules

30.27 A third option is to enact comprehensive federal choice of law rules, as the Commission recommended in 1992 in its *Choice of Law* report. Federal choice of law rules may apply either to all courts exercising federal jurisdiction (as the Commission recommended in 1992) or more narrowly to all federal courts. By providing its own choice of law rules, Parliament would avoid reliance on the common law or on various written laws of the States or Territories.

30.28 Parliament made some moves in this direction in enacting special choice of law rules in 1987 for courts exercising jurisdiction pursuant to the national scheme for the cross-vesting of jurisdiction.[1443] Federal choice of law rules may be enacted in conjunction with an extension of substantive or procedural federal laws, as mentioned above. The expanded use of federal choice of law rules is considered in further detail in Chapter 33.

Rely on state and territory laws

30.29 A fourth approach is to rely exclusively on the application of state and territory laws in matters of federal jurisdiction, whether these laws be substantive, procedural, or choice of law rules. The process by which state or territory law may be picked up and applied in federal jurisdiction as 'surrogate federal law' is considered in further detail in Chapter 34.

30.30 Under this alternative it is necessary for federal law to identify some criterion by which the laws of a particular State or Territory are chosen to resolve the legal issues arising in federal jurisdiction. The traditional approach, which is adopted in s 79 JA, is to select the laws of the State or Territory in which federal jurisdiction is being exercised. The policy behind this approach is that uniformity of outcome should be achieved between all courts exercising jurisdiction in the one State or Territory, irrespective of whether those courts are exercising state or federal jurisdiction. However, this comes at the cost of imposing disunity on the exercise of federal jurisdiction across different States or Territories in Australia.

30.31 Reliance on the laws of the State or Territory where jurisdiction is being exercised is by no means inevitable. The cross-vesting legislation, for example, provides two alternatives to the mechanical application of the law of the State or Territory where the court exercises federal jurisdiction. Section 11(1)(b) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) states that if the matter 'is a right of action arising under a written law of another State or Territory, the court shall, in determining that matter, apply the written and unwritten law of that other State or Territory'. The law so applied clearly need not be that of the State or Territory in which jurisdiction is being exercised.

1443 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), s 11, and cognate state and territory legislation.

30.32 Even more liberally, s 11(1)(c) of the Act authorises a court exercising cross-vested jurisdiction to apply such rules of evidence and procedure as it 'considers appropriate in the circumstances', provided that the rule is one applied in a superior court in Australia or an external territory. This approach moves away from the rigid application of the law of the place at which federal jurisdiction is exercised in favour of greater judicial discretion in selecting the applicable law.[1444]

30.33 If reliance were to be placed on state or territory laws, a different approach would be to pick up the laws in force in one particular State or Territory. This approach is adopted, albeit in a different context, in relation to the non-self-governing Territories, whose laws are generally stated to be those in force in a proximate State or Territory. It is on this basis that Commonwealth law provides that the law in force in Western Australia applies in two Commonwealth Territories, the law in force in the ACT applies in four other Territories, and the law in force in the Northern Territory applies in one other Territory (see Chapter 35).

Combine federal, state and territory laws

30.34 A fifth approach is to rely on a combination of state, territory and federal laws to supply the rules necessary for resolving a matter within federal jurisdiction. This is the current position under ss 79 and 80 JA in so far as the sections speak of the application of state law or territory law 'except as otherwise provided by the laws of the Commonwealth' or 'so far as the laws of the Commonwealth are not applicable'.

30.35 The difficulty with this combined model is that it is difficult to cast a provision in a way that adequately defines the relationship between the potentially applicable state, territory and federal laws. The complex and often conflicting judicial decisions on the interpretation of ss 79 and 80 are evidence of the confusion that can arise when federal law must be supplemented to resolve legal questions arising within federal jurisdiction.

Rely on Australian common law

30.36 A final approach to these issues is to acknowledge the role of the common law in supplying substantive laws, procedural laws, and choice of law rules, irrespective of the enactments of any Australian legislature.

30.37 Recent jurisprudence of the High Court has held that there exists a uniform common law in Australia, rather than separate common law systems in each of the States and Territories.[1445] The rationale for this view is that the

1444 The provision has not been interpreted as liberally as its terms suggest: see *Wilton v Jarvis* (1996) 133 FLR 354; *Reidy v Christian Bros* (1995) 12 WAR 583.

1445 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 563.

Australian colonies inherited the same body of common law from England and have always been subject to judicial correction by an ultimate appellate court. Prior to federation, that court was the Privy Council and after federation it was, for a time, the Privy Council and the High Court. Since the passage of the *Australia Act 1986* (Cth) it has been the High Court alone. Consequently, it is said that there is a single common law operating throughout Australia, whatever the court or the nature of the jurisdiction it exercises.[1446]

30.38 The significance of a unified Australian common law in the present context is that it may provide a body of law (whether on substantive, procedural, or choice of law issues) that is not tied to a particular level of government. Its national character, and its utility in resolving legal issues arising in federal jurisdiction, may explain its resurgence in the High Court's recent decisions on ss 79 and 80 (see Chapter 34). However, the common law of Australia cannot itself solve choice of law problems that require the application of statute law. Where the common law is modified by a relevant state or territory Act, the Act will prevail.

Constitutional Limitations

30.39 The power of the Commonwealth to legislate with respect to the law applicable in federal jurisdiction operates as an important constraint on any proposed reform in this area. These legislative powers may vary according to:

- the type of legislation in question (substantive, procedural, or choice of law);
- the court in which the jurisdiction is exercised, being a federal, state or territory court; and
- the type of jurisdiction invoked, namely federal, state or territory jurisdiction.

30.40 At one end of the spectrum, Parliament has undoubted power to regulate the procedure of federal courts when exercising federal jurisdiction. At the other end, the power of Parliament to regulate substantive matters in state courts exercising federal jurisdiction may be subject to significant constraints.

30.41 By way of background to subsequent chapters, this section briefly surveys the constitutional basis for the Commonwealth Parliament's regulation of the law applicable in federal jurisdiction. The principal arguments have revolved around whether Parliament may legislate pursuant to the territories power (s 122), the recognition of laws power (s 51(xxv)) or the incidental power (s 51(xxxix)).

1446 Compare L Priestley (1995).

Territories power (s 122)

30.42 Section 122 of the Constitution confers on Parliament the power to 'make laws for the government of any Territory' (see Chapter 35). In the exercise of this power, the Commonwealth has undoubted competence to lay down substantive, procedural and choice of law rules to be applied in courts of the Territories. This power may also extend to laying down the choice of law rules applicable in other Australian courts in so far as those rules require the application of territory law to a particular case before the other court.

30.43 The reason for the Commonwealth's expansive power in this context is that s 122 has been accepted as a plenary power for the government of the Territories, subject only to a requirement that there be a sufficient nexus between the law and the territory.[1447]

Recognition of laws power (s 51(xxv))

30.44 Section 51(xxv) of the Constitution grants Parliament power to make laws with respect to 'the recognition throughout the Commonwealth of the laws, the public Acts and records and judicial proceedings of the States'.

30.45 This section has been the subject of surprisingly little judicial consideration. It is arguable that choice of law rules fall within the terms of the section because they determine, in a particular court, whether rights arising under the laws of some other jurisdiction are to be recognised in the forum. In *Breavington v Godleman,* Mason CJ took an expansive view of the section's potential in commenting that:

> If any provision of the Constitution is to be regarded as the source of a solution to inter jurisdictional conflicts of laws problems within Australia, it is perhaps s 51(xxxv).[1448]

30.46 In its Discussion Paper, *Choice of Law Rules* (DP 44), the Commission expressed a similarly positive view in the following terms:

> The Commission's view is that the 'recognition' of laws clearly encompasses choice of law rules and that the enactment of choice of law rules applicable throughout Australia in reliance on s 51(xxv) would be a valid exercise of Commonwealth power. Indeed it appears that the Commonwealth has already enacted such a rule in the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) s 11(1)(b).[1449]

1447 *Spratt v Hermes* (1965) 114 CLR 226, 242 (Barwick CJ).
1448 *Breavington v Godleman* (1989) 169 CLR 41, 83 (Mason CJ).
1449 Australian Law Reform Commission, Discussion Paper 44 (1990), para 1.10.

30.47 In its final report, *Choice of Law Rules*, the Commission reiterated this view, but ultimately preferred a more cautious approach suggested by a number of consultants. Accordingly, the Commission recommended parallel uniform legislation — the federal component dealing with choice of law in federal courts, territory courts, and state courts exercising federal jurisdiction, and the state component dealing with choice of law in state courts exercising state jurisdiction.[1450]

30.48 The views of some other bodies have echoed the Commission's caution about taking a robust approach to s 51(xxv). In 1988, the Constitutional Commission acknowledged some uncertainty about the issue and recommended the insertion into the Constitution of a new head of power (s 51(xxvA)), giving the Commonwealth Parliament power to make laws with respect to 'principles of choice of law'. The Constitutional Commission also recommended the explicit extension of s 51(xxv) to the Territories.[1451]

30.49 The Commission presently shares the view expressed in DP 44, namely, that s 51(xxv) authorises the Commonwealth Parliament to enact federal choice of law rules throughout Australia, whether the court that applies them exercises federal or state jurisdiction. However, for present purposes it is not necessary to go that far — the Commission's current terms of reference ask only that the Commission address the law applicable in the exercise of federal jurisdiction.

Incidental power (s 51(xxxix))

30.50 Chapter III of the Constitution confers considerable legislative power on Parliament with respect to the federal judicial system. It may be argued that Commonwealth power to enact choice of law rules and to regulate procedure in courts exercising federal jurisdiction exists by virtue of ss 71 and 77 of the Constitution, either on their own account or in combination with the incidental power in s 51(xxxix) of the Constitution. The argument is that Parliament's power to create federal courts (s 71), to confer federal jurisdiction on federal courts (s 77(i)) and to invest state courts with federal jurisdiction (s 77(iii)) includes the incidental power to regulate both choice of law and procedure in the exercise of federal jurisdiction. To the extent that the incidental power is not already implicit in the grant of power in ss 71 and 77, it is supplemented by s 51(xxxix).

30.51 The High Court has stated that the Commonwealth has power under Chapter III of the Constitution, when investing state courts with federal jurisdiction, to control the nature of such jurisdiction, including the manner and exercise of

1450 Australian Law Reform Commission, Report No 58 (1992), para 3.25–3.26.
1451 Constitutional Commission (1988) Vol 2, para 10.326–10.331.

any rules of procedure for the hearing of a matter.[1452] For example, it has been remarked that ss 79 and 80 JA, which presently regulate the law applicable in federal jurisdiction, are supported by s 51(xxxix) of the Constitution as an incident of the power to invest federal jurisdiction in federal and state courts.[1453]

30.52 Reliance on the incidental power carries important limitations. In *Re Wakim; Ex parte McNally*, the High Court stated that the incidental power may be used to support federal legislation that assists or makes effective the exercise of the principal power, provided that the legislation does not create new powers.[1454] Some observers have expressed doubts about over-extending the reach of the incidental power in this respect. Pryles and Hanks, for example, remark that:

> The notion that power to legislate in relation to federal jurisdiction does not by itself confer power to legislate in respect of the law to be applied in that jurisdiction carries some persuasion and cannot lightly be dismissed.[1455]

30.53 The Commission has previously noted the doubts of some commentators as to whether the incidental power 'could stand the weight of a near codification of choice of law'.[1456] The Commission's view is that the incidental power, operating on Chapter III, would support federal legislation enacting choice of law rules for federal courts and for state courts exercising federal jurisdiction. It would also support federal legislation enacting rules of procedure for federal and state courts exercising federal jurisdiction, provided those rules conform with the High Court's restricted interpretation of what is 'procedural'[1457] and do not purport to reach beyond the limited class of matters relating to the mode or conduct of court proceedings. When investing state courts with federal jurisdiction, Parliament cannot interfere with the structure or organisation of state courts (see Chapters 2 and 6). However, regulation of state court procedure in matters of federal jurisdiction would not appear to transgress this principle.

30.54 It would appear that the incidental power could not support federal legislation stipulating choice of law rules applicable by state courts exercising state jurisdiction since such laws would not make effective the exercise of *federal* judicial power. Similar reasoning was applied by Gummow and Hayne JJ in *Re Wakim; Ex parte McNally*[1458] to reject the contention that the incidental power supported a Commonwealth law that consented to the conferral of state jurisdiction on federal courts. It was said that such a law might make the exercise of state

1452 *Russell v Russell* (1976) 134 CLR 495, 505–506 (Barwick CJ), 519 (Gibbs J); 530–531 (Stephen J); 536 (Mason J); 554 (Jacobs J).
1453 Australian Law Reform Commission, Report No 58 (1992), para 3.23, citing B O'Brien (1977).
1454 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 545–546 (Gleeson CJ), 562–563 (McHugh J), 579–580 (Gummow and Hayne JJ, with whom Gaudron J agreed).
1455 M Pryles and P Hanks (1974), 173.
1456 Australian Law Reform Commission, Report No 58 (1992), para 3.23.
1457 See *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.
1458 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 579.

jurisdiction more effective, but it could not be said to enhance the effectiveness of federal jurisdiction.

30.55 If the incidental power were the only source of power to enact choice of law rules, Parliament's lack of power to enact choice of law rules in the exercise of state jurisdiction would result in disunity in choice of law rules within Australia. This factor influenced the High Court in *John Pfeiffer Pty Ltd v Rogerson* to propose that any new common law choice of law rules developed by the courts be expressed to apply to both state and federal jurisdiction.[1459] This factor also underpinned the Commission's approach to reform of choice of law rules in its 1992 report, *Choice of Law*, which is discussed in further detail in Chapter 33.

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L Priestley, 'A Federal Common Law in Australia' (1995) 6 *Public Law Review* 221.

M Pryles and P Hanks, *Federal Conflict of Laws* (1974) Butterworths, Sydney.

1459 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, 650–651.

31. A Federal Limitation Statute

Contents

31.1 Limitation statutes set out the time limits within which plaintiffs must commence civil proceedings. If an action is not commenced within the specified time it is said to be time-barred. Limitation statutes generally provide a commencement date for the limitation period, the length of the limitation period, and the circumstances in which the period may be extended or postponed.

31.2 The principal aims of limitation periods are to encourage parties to resolve claims expeditiously and to avoid the uncertainty arising from the continuing threat of litigation. This is in the public interest because stale claims may be harder to adjudicate reliably due to loss of evidence and witnesses. It is also in the interest of defendants because it relieves them from the uncertainty that claims may be brought against them at any time in the future.[1460]

31.3 The terms of reference specifically require the Commission to consider the limitation periods applicable in actions against the Commonwealth. DP 64 raised the issue of whether there was a need for separate limitation laws in all matters of federal jurisdiction or, more particularly, in claims against the Commonwealth.

Limitation of Actions in State Jurisdiction

31.4 Every State and Territory has a limitation statute applicable to matters of state and territory jurisdiction. These statutes are applied as a matter of course in civil claims whose factual connections are localised within the State or Territory.

1460 *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1, 24 (Mason CJ).

31.5 However, these statutes are not directly applicable where an action has connections with more than one jurisdiction. In that case, choice of law rules must be used to determine which State or Territory's limitation law applies to the action in question.

31.6 Under common law principles of the conflict of laws, a distinction used to be made between limitation laws that barred the remedy but not the right, which were classified as procedural, and those that extinguished the underlying right, which were classified as substantive. In the case of procedural matters, the law of the forum would be applied; in the case of substantive matters, the law of the cause would be applied (see Chapter 30). If a court were faced with a limitation law of the forum, which was classified as procedural because it barred the remedy and not the right, the court would apply the limitation period no matter how tenuous the connection between the action and the forum.

31.7 In 1993 the law with respect to limitation statutes was changed fundamentally in intra-Australian cases by the enactment of uniform choice of law legislation. The legislation was a response to recommendations of the Commission in its report, *Choice of Law*.[1461] The *Choice of Law (Limitation Periods) Act 1993* of each State and Territory classifies limitation periods of other Australian States and Territories as substantive.

31.8 In 2000 this was followed by a change in the common law position as a result of the High Court's decision in *John Pfeiffer Pty Ltd v Rogerson.* In that case the Court restated the common law in the following terms:

> [M]atters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. …
>
> [G]iving effect to [these principles] has significant consequences for the kinds of case in which the distinction between substance and procedure has previously been applied. … [T]he application of any limitation period, whether barring the remedy or extinguishing the right, would be taken to be a question of substance not procedure (which is the result arrived at by the statutes previously referred to). The application of any limitation period would, therefore, continue to be governed (as that legislation requires) by the *lex loci delicti*.[1462]

Limitation of Actions in Federal Jurisdiction

31.9 There is no general federal limitation statute applicable to all actions in federal courts or, more broadly, to all actions in federal jurisdiction. Some federal statutes contain limitation periods for particular causes of action created by

1461 Australian Law Reform Commission, Report No 58 (1992).

1462 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, 651. The *lex loci delicti* is the law of the place where the wrong was committed.

Commonwealth law. However, because these provisions do not establish a complete code governing the limitation of actions in federal matters, some other law must be applied to fill the gap.

31.10 In Chapter 30, the Commission identified ss 79 and s 80 JA as the principal mechanisms by which state and territory law is picked up and applied as surrogate federal law in federal jurisdiction.[1463] In particular, s 79 requires all courts to apply the law of the State or Territory in which they exercise federal jurisdiction, subject to exceptions that are considered further in Chapter 34.

31.11 Where a case has no factual connections with another jurisdiction, the effect of these sections is that the substantive and procedural law of the State or Territory where federal jurisdiction is exercised will be applied.

31.12 Where a case does have factual connections with another jurisdiction, the situation is more complex because of the interaction between the statutory provisions and the common law choice of law rules. It has been held that the state or territory laws 'picked up' by s 79 include the common law choice of law rules applicable in that jurisdiction.[1464] As a result of s 79 and the decision in *John Pfeiffer Pty Ltd v Rogerson*, a court exercising federal jurisdiction in a State or Territory (whether it be a federal, state or territory court) will apply the limitation law of that State or Territory as surrogate federal law only if that state or territory's law is the law of the cause.

Limitation Periods in Federal Statutes

31.13 Some federal statutes contain limitation periods in relation to causes of action created by the statute. However, limitation laws in federal statutes differ significantly from limitation laws in state and territory statutes. The former generally lack important machinery provisions such as those enabling the limitation period to be extended[1465] or providing for contribution and indemnity between joint tortfeasors.[1466] Federal statutes rarely do more than indicate the length of the limitation period and specify the time at which the period begins to run.

31.14 In relation to the length of the limitation period, different federal statutes contain different limitation periods. For example:

- s 34 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) specifies a limitation period of two years in an action against a carrier for damages for personal injury or damage to property;

1463 P Nygh (2000).
1464 *Musgrave v Commonwealth* (1937) 57 CLR 514, 551 (Evatt and McTiernan JJ).
1465 See eg s 58(2) *Limitation Act 1969* (NSW).
1466 Ibid s 26(1).

- s 82 of the *Trade Practices Act 1974* (Cth) specifies a three year limitation period in an action for damages for contravention of a provision of Parts IV, IVB or V, or s 51AC of the Act; and

- s 134 of the *Copyright Act 1968* (Cth) specifies a limitation period of six years in an action for infringement of copyright.

31.15 The fact that federal statutes make different provision for the length of the limitation period is not necessarily problematic — there may be legitimate policy reasons for the difference. However, as discussed below, there may be grounds for reviewing these laws to ensure consistency of approach.

31.16 Federal statutes also make diverse provision in relation to the time from which the limitation period begins to run. Sometimes there are significant differences within the one statute. For example, the *Trade Practices Act 1974* (Cth) contains a number of provisions specifying the date at which different causes of action accrue. Under s 74J(2), a cause of action against a manufacturer is deemed to have accrued on the day on which the consumer first became aware, or ought reasonably to have become aware, of the defect in the goods. By contrast, under s 75AO, a person may commence a liability action at any time within three years after the time the person became aware, or ought reasonably to have become aware, of the alleged loss, the defect and the identity of the person who manufactured the goods. Defences are available in some cases and not others.

Problems and Issues

31.17 During consultations, the existing law was said to give rise to a number of significant problems.

- Federal statutes that provide for the limitation of actions do not contain the complete legislative machinery necessary to make limitation laws fair and effective.

- Federal statutes that provide for the limitation of actions make diverse provision with respect to those matters that are covered in the legislation, namely, the limitation period and the date on which the period commences.

- In the majority of situations (that is, those in which federal law makes no provision), reliance must be placed on the operation of ss 79 and 80 JA to supply surrogate federal laws for courts exercising federal jurisdiction. The interpretation of those sections is also unclear.

- The law governing the limitation of actions is complex because of the amalgam of federal provisions and state provisions that operate as surrogate federal law. These complexities promote an environment in which potential litigants may be wrongly advised of the relevant limitation period.

- Reliance on state and territory law creates inequality — parties who are in exactly the same situation may be treated differently by virtue of the different operation of state limitation statutes. This is particularly problematic in respect of class actions in product liability claims where the relevant failure to warn occurred (and hence the tort was committed) where each plaintiff purchased or consumed the product.[1467]

Options for Reform

31.18 The Commission considered two possible solutions to the problems identified above.

31.19 One option is for uniform limitation laws to be enacted in all Australian jurisdictions pursuant to a national legislative scheme. This item was on the agenda of the Standing Committee of Attorneys-General (SCAG) for six years but no action has been taken in relation to it. In 1994 SCAG considered a report on uniform limitation periods but postponed substantive consideration of the issue until the Law Reform Commission of Western Australia released its report, *Limitation and Notice of Actions*, in 1997.[1468] SCAG reviewed the matter again in December 1997, June 1998 and October 2000.[1469] The view was taken that many of the choice of law problems associated with limitation periods had been resolved by the passage of the uniform *Choice of Law (Limitation Periods) Act 1993* and by the High Court's decision in *John Pfeiffer Pty Ltd v Rogerson*.[1470] The matter was accordingly dropped from the Committee's agenda.

31.20 A second option is for Parliament to enact a federal limitation statute. Such a statute might harmonise the existing limitation provisions in federal law and extend them to provide comprehensive machinery for regulating the limitation of actions. The scope of any such legislation would require careful consideration. The statute might apply to all matters of federal jurisdiction or only to a class of them. Similarly, it might apply to all courts exercising federal jurisdiction or only to federal courts.

31.21 Underlying the scope of operation of such a statute are important constitutional questions regarding the power of Parliament to enact limitation laws regulating proceedings in federal jurisdiction. Prior to *John Pfeiffer Pty Ltd v*

1467 P Cashman, *Consultation*, Sydney, 19 March 2001.
1468 Law Reform Commission of Western Australia, Project No 36 Part II (1997).
1469 P Griffiths, *Correspondence*, 5 April 2001.
1470 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.

Rogerson, limitation laws were classified as procedural and it was probably easier to argue that a federal limitation law was supported as incidental to Parliament's power to regulate court procedure under Chapter III of the Constitution (see Chapter 30). Since the High Court's decision in that case, the classification of limitation laws as substantive may complicate the task of finding an appropriate head of power.

31.22 Notwithstanding these difficulties, there are aspects of the constitutional questions that are beyond doubt. Parliament has undoubted competence to lay down substantive and procedural rules to be applied in courts in Commonwealth Territories (s 122). Parliament also has power to enact limitation laws in respect of matters falling within the heads of legislative power in s 51 of the Constitution. For example, the power to regulate substantive law on trade practices under the trade and commerce power (s 51(i)) and the corporations power (s 51(xx)) would also support a limitation law on that subject. Similarly, the power to regulate copyright law under (s 51(xviii)) would support a limitation law in respect of copyright infringement.

Submissions and Consultations

31.23 The Commission found broad support for the introduction of a federal statute of limitations in consultations and submissions.[1471] Some observers stated that uniform state and federal limitation legislation would be ideal but considered this too difficult to achieve in practice.[1472]

31.24 Professor Geoffrey Lindell observed that a significant advantage of a federal limitation law would be that it would reduce the need to rely on ss 79 and 80.[1473] However, it was recognised that provisions such as these were still necessary to deal with the residue of matters not covered by federal law.[1474]

31.25 As to the content of a federal limitation law, limitation periods of three years, with provision for extension,[1475] and six years[1476] were suggested. It was also said that a federal limitation statute should provide full machinery for determining the limitation of actions and should expressly override state limitation laws in respect of matters covered by federal legislation.

1471 H Heuzenroeder, *Submission J033*, 30 March 2001; G Lindell, *Submission J012*, 5 March 2001; P Cashman, *Consultation*, Sydney, 19 March 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001; D Jackson QC, *Consultation*, Sydney, 19 March 2001; Victorian Bar Association, *Consultation*, Melbourne, 6 March 2001; South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001; R Meadows QC, *Consultation*, Perth, 22 March 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001; G Griffith QC, *Correspondence*, 4 May 2001.

1472 Attorney-General's Department (Cth), *Consultation*, Canberra, 28 March 2001.

1473 G Lindell, *Submission J012*, 5 March 2001.

1474 D Jackson QC, *Consultation*, Sydney, 19 March 2001; H Heuzenroeder, *Submission J033*, 30 March 2001; Victorian Bar Association, *Consultation*, Melbourne, 6 March 2001.

1475 P Cashman, *Consultation*, Sydney, 19 March 2001.

1476 South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001.

31.26 As to the scope of a federal limitation law, there was general agreement that the law should not extend to all matters of federal jurisdiction. However, different views were held as to the precise scope of the limitation. Justice Christine Wheeler of the Supreme Court of Western Australia suggested that the application of a federal limitation law should be confined to federal courts and should not extend to state courts exercising federal jurisdiction.[1477] The Solicitor-General for South Australia, Brad Selway QC, commented that a federal limitation statute should only extend to causes of action created by Commonwealth law.

> The Federal Parliament does not have significant legislative power in relation to Chapter III, save where the matter arises under a law of the Commonwealth. For example, in an action between the residents of different States the Commonwealth has no legislative power to create a cause of action, to extinguish a cause of action etc. It can confer jurisdiction and it can make laws incidental to that. This would include usual procedural laws. Following *Pfeiffer* it would not include the power to enact a limitation of actions statute in relation to such an action.
>
> Consequently, apart from causes of action that arise under a law of the Commonwealth (where the Commonwealth can specify whatever it wants) the Commonwealth lacks power to prescribe time limits.[1478]

31.27 The Commission's terms of reference specifically asked whether special provision should be made for the limitation of actions in respect of claims against the Commonwealth. During consultations, the Commonwealth was described as being in an unusual position because of its presence throughout Australia and the number and variety of claims made against it. However, the Commonwealth was not unique in this respect and several people remarked that the problems faced by the Commonwealth as a defendant were little different from those of any corporation with Australia-wide activity. Special treatment for the Commonwealth was seen as difficult to justify in principle. This view was shared by the Law Council of Australia, which stated that simplifying limitation periods for the Commonwealth could lead to complexity for members of the public and their lawyers.

> The Law Council also notes that it is not disposed towards the enactment of a federal Statute of Limitations to govern claims against the Commonwealth. The Law Council is concerned that the enactment of a federal Statute of Limitations is likely to cause confusion to legal practitioners who do not regularly practise against the Commonwealth.
>
> Although lawyers should be aware of the relevant limitation period, there is a danger that, if a federal Statute of Limitations were introduced, lawyers who do not regularly practise against the Commonwealth might think mistakenly that the state or territory Statute of Limitations would apply. If the federal limitation period were shorter than the state or territory period, then such a mistake would generate additional litigation,

1477 The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001.
1478 B Selway QC, *Correspondence*, 8 May 2001.

> as litigants would seek leave for an extension of time to bring their action against the Commonwealth … .[1479]

31.28 More generally, some commentators asked why another limitation statute should be enacted when there were already many different state and territory limitation statutes.[1480] There was also a concern that a federal limitation statute might impose a burden on solicitors less familiar with federal legislation.[1481]

Commission's Views

31.29 The Commission considers that the limitation law applicable to matters of federal jurisdiction warrants further review.

31.30 In the Commission's view, uniform federal, state and territory legislation on the limitation of actions would be a desirable means of providing certainty and equality in this area of the law. The Commission notes that this matter has been considered intermittently by SCAG over the past six years without resolution and it has recently been removed from that Committee's agenda. In light of this recent experience, the Commission does not recommend that the matter be returned to that Committee for reconsideration. However, the Commission would support a reconsideration of the issue by SCAG at an appropriate time if circumstances proved auspicious.

31.31 In the absence of a uniform national scheme, the Commission considers that there is merit in a federal limitation statute governing certain aspects of federal jurisdiction. The Commission notes the problems identified above regarding federal limitation laws, namely, their absence, incompleteness or inconsistency.

31.32 Lack of clarity in limitation statutes may impose significant costs on individuals and on the judicial system as a whole. A party who has been incorrectly advised may lose entirely the benefit of a just claim for compensation. Poor legal advice may also lead to a waste of public and private resources if parties who are time-barred have to apply to a court for an extension of time to file suit. Actions by clients against their former legal advisors for professional negligence will also ensue.

31.33 A federal limitation statute cannot prevent the giving of incorrect legal advice but it can clarify the law in a way that minimises the risk of incorrect advice. This can be done by avoiding reliance on the application of state and territory limitation statutes as surrogate federal law under ss 79 and 80, and by substituting a federal limitation law that is comprehensive in respect of the class of

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1479 Law Council of Australia, *Submission J037*, 6 April 2001.

1480 M Sexton SC, *Consultation*, Sydney, 19 February 2001; Australian Government Solicitor, *Consultation*, Canberra, 5 June 2000.

1481 Supreme Court of South Australia, *Consultation*, Adelaide, 15 March 2001.

matters covered by the Act. This approach would have the added virtue of substituting national consistency for the disparate treatment of plaintiffs from one State or Territory to another.

31.34 It is not possible in the context of this inquiry to provide detailed recommendations as to the scope or content of a new federal limitation statute. The Commission supports such a reform in principle but recommends that the Attorney-General order a comprehensive review of this area for the purpose of determining the details. Without seeking to prejudge the outcome of that review, the Commission makes the following observations based on consultations and submissions during the course of this inquiry.

31.35 First, the Commission believes that it would be inappropriate to extend a federal limitation law to all matters of federal jurisdiction. For example, it is difficult to justify the application of a state limitation law to a tort claim between two residents of that State, but a federal limitation law (with potentially different time periods) to a tort claim between residents of different States. The latter claim falls within federal diversity jurisdiction pursuant to s 75(iv) of the Constitution (see Chapter 2) but is otherwise indistinguishable from the former. To make the outcome of a case depend on a fortuitous circumstance such as the diverse residence of the parties is to rely on a distinction without difference.

31.36 Second, the Commission's preliminary view is that a federal limitation statute should not make special provision for claims against the Commonwealth. The Commonwealth may face particular difficulties as a defendant by virtue of its national presence and its amenability to suit in any State or Territory.[1482] However, as noted in consultations and submissions, this problem is shared by other organisations that have Australia-wide operation. Such a statute would create the undesirable impression that the Commonwealth should receive favoured treatment as a litigant, particularly if the federal limitation period were shorter than that applicable to other legal persons.

31.37 Finally, on the information available to the Commission, the preferred approach would appear to be for federal law to specify the limitation periods applicable to causes of action created by Commonwealth law. Examples mentioned previously include claims under the *Trade Practices Act 1974* (Cth) and the *Copyright Act 1968* (Cth). This approach would meet any constitutional objection because a law that extinguishes a cause of action would be supported by the same head of legislative power as the law that creates the cause of action.

31.38 The review should examine the feasibility of harmonising existing federal statutes that provide for limitation periods for specific federal claims. It should also consider the enactment of general machinery provisions such as those providing for the circumstances in which a limitation period may be extended or postponed.

1482 Compare s 56 JA; *Breavington v Godleman* (1989) 169 CLR 41.

Finally, the review should consider the policy question of whether a federal limitation statute should be enacted for proceedings in federal courts or, more broadly, for all courts exercising federal jurisdiction.

Recommendation 31–1. The Commonwealth Parliament should enact a general limitation statute with respect to causes of action created by Commonwealth law. The Attorney-General should order a review to consider:

- the desirability of harmonising existing federal provisions with respect to limitation of actions;
- the enactment of general legislative provisions for determining, among other things, when a limitation period begins to run and the circumstances in which it may be postponed, suspended or extended; and
- whether a federal limitation statute should be enacted for proceedings in federal courts or, more broadly, for all courts exercising federal jurisdiction.

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32. Federal Laws on Procedure

Contents

The Diversity of Procedural Laws

32.1 This chapter examines the application of procedural laws in courts exercising federal jurisdiction. As with the limitation of actions discussed in Chapter 31, the Commission's terms of reference ask whether Commonwealth legislation should deal in greater detail, or differently, with the law that is to apply in proceedings involving the exercise of federal jurisdiction.

32.2 These issues are given a particular focus by s 79 JA, which requires all courts exercising federal jurisdiction in a State or Territory to apply the law of that State or Territory, 'including the laws relating to procedure, evidence, and the competency of witnesses'.

32.3 The procedural laws applied by federal courts and by state courts exercising federal jurisdiction are diverse in both their source and content. Some procedural laws are contained in primary legislation relating to particular courts. For example, the *Judiciary Act* contains two Parts dealing with procedure in trials (Pt XA) and appeals (Pt XB) in the High Court.

32.4 However, most procedural laws are set out not in primary legislation but in rules of court. The power to make rules of court is generally granted by statute to the judges of those courts or to statutory rule committees, which may comprise judges and practitioners.[1483]

32.5 A typical provision is s 86 JA, which provides that a majority of justices of the High Court are authorised to make 'Rules of Court necessary or convenient to be made for carrying into effect the provisions of this Act or so much of the provisions of any other Act as confers jurisdiction on the High Court or relates to the practice or procedure of the High Court'. The section then sets out a number of

1483 See eg *Supreme Court Act 1970* (NSW) ss 123, 124.

particular issues about which rules may be made. This power is supplemented by a rule-making power in s 48 HCAA.[1484]

32.6 The Federal Court, the Family Court and the Federal Magistrates Service have similar powers to make rules of court for regulating their practice and procedure.[1485] The rules of court made thereunder are comprehensive procedural codes and leave little room for the operation of state or territory rules as surrogate federal law by virtue of s 79 JA.

32.7 State and territory courts also have procedural rules which are authorised by legislation.[1486] These rules of court apply directly when those courts exercise state or territory jurisdiction. However, when they exercise federal jurisdiction, s 79 comes into operation because there are no federal codes of procedure applicable to state and territory courts exercising federal jurisdiction. Section 79 operates to 'pick up' state and territory laws of procedure and to apply them as surrogate federal laws when state and territory courts exercise federal jurisdiction (see Chapter 34).

32.8 Because there is substantial commonality between litigation in all Australian courts, the rules of court in each jurisdiction cover very similar subject matters, touching on all aspects of the litigation process from commencement of a proceeding to execution of judgment. However, there are also significant differences between rules of court. These may reflect historical disparities or conscious experimentation in order to address issues faced by particular courts.

Harmonisation of Procedural Rules

32.9 Little formal effort has been made in the past to consider the extent to which rules of court might be standardised or harmonised across Australian jurisdictions, whether in the exercise of federal jurisdiction or more broadly.

32.10 Recently there have been moves towards the harmonisation of rules of court in certain areas. In 1996 a Committee was established under the auspices of the Council of Chief Justices ('CCJ') to harmonise the Corporations Law rules of court.[1487] The Committee was chaired by Justice Kevin Lindgren of the Federal Court. The problem addressed by the Committee was that, without uniform rules of court, the national legislative scheme would receive diverse application in different jurisdictions. After substantial discussion and negotiation, draft rules of court were approved by the CCJ and sent to the Rules Committee of each participating court. In due course, the rules were adopted by state and territory courts in identical terms, with only minor exceptions.

1484 In Chapter 41 the Commission recommends that s 86 JA and s 48 HCAA be amalgamated. See Recommendation 41–9.
1485 FCAA s 59, FLA ss 123–124, FMA ss 81–88.
1486 For a general discussion, see E Campbell (1985).
1487 The Hon Justice K Lindgren, *Consultation*, Sydney, 2 May 2001.

32.11 The success of the project in relation to the Corporations Law rules of court has recently led to the establishment of a further Committee under the CCJ. The Harmonisation of Rules of Court Committee, again chaired by Justice Lindgren, is currently reviewing rules of court relating to subpoenas, discovery of documents, and service of process outside the jurisdiction. In time, other areas may also be considered.[1488]

32.12 The present approach of the CCJ has been to review discrete areas of procedural law rather than attempt to harmonise all rules of court. The areas currently under review were chosen because of their significant cross-border aspects. A broader approach, albeit one expressly rejected by the CCJ, might be to harmonise rules of court in all areas throughout federal, state and territory courts with the objective of achieving a uniform code of civil procedure in Australia. A less extensive, but nonetheless ambitious, approach might be to harmonise rules of civil procedure for all courts exercising federal jurisdiction.

32.13 The program established by the CCJ has been directed solely toward the harmonisation of rules of court to the exclusion of other procedural laws. Rules of court are considered to be uniquely suitable to determination by judges, who have day-to-day experience in managing litigation in the courts.[1489] There has been no attempt, for example, to harmonise statutory provisions relating to procedure.

32.14 Whether procedural law should be further harmonised across Australian jurisdictions is a contested issue. On the one hand, it might be argued that harmonisation can promote certainty, efficiency, and accessibility of the judicial system. It can benefit legal practitioners and their clients by avoiding the necessity to familiarise oneself with different approaches to similar procedural issues. Diversity of practice and procedure can create avoidable confusion, particularly in complex litigation that may involve proceedings in more than one jurisdiction.

32.15 On the other hand, inappropriate harmonisation can stifle development of the law by discouraging legal and social experimentation. Harmonisation might also fail to accommodate important regional differences between States and Territories. The process of harmonisation may be slow and difficult to achieve because it involves agreement between different courts, each of which is accustomed to regulating proceedings in its own way.[1490]

Consultations and Submissions

32.16 The general response in consultations and submissions was that a selective and gradual process of harmonisation of civil procedure in Australia was

1488 Ibid.
1489 Ibid.
1490 See generally B Opeskin (1998), 356–358.

a worthwhile objective.[1491] Dr Gavan Griffith QC thought that there should be a capacity for the Commonwealth to secure basic procedural uniformity in state courts exercising federal jurisdiction. However, he considered that the best approach to achieve that objective would be to seek a system that was acceptable to both the Commonwealth and the States.[1492]

32.17 The Chief Justice John Phillips of the Supreme Court of Victoria expressed support for the CCJ's harmonisation project, which he said was based on co-operation and goodwill and had already secured broad agreement.[1493]

32.18 Justice Lindgren advised the Commission that the general preference of the CCJ was to identify particular areas in which harmonisation would be useful and to deal with these one by one. He advised that:

> It remains to be seen how many rule topics will be found to lend themselves to harmonisation. The desirability of harmonisation of rules of court governing proceedings under the *Corporations Law* was, perhaps, obvious because the legislation was uniform throughout the country.[1494]

32.19 Justice Lindgren further noted that, even if harmonisation is not achieved, there is merit in the process because it provides a systematised review of the relevant rules, sets out the possible options for reform, and provides examples of best practice in Australia.[1495]

32.20 Some negative responses were received during consultations and submissions in relation to the possibility of a federal code of civil procedure covering state courts exercising federal jurisdiction.[1496] Chief Justice John Doyle of the Supreme Court of South Australia commented that he doubted the desirability of attempting a model code of civil procedure. Such a code was likely to be more trouble than it was worth.[1497] Justice Christine Wheeler of the Supreme Court of Western Australia also doubted the assumption that uniformity between courts in matters of procedure was always desirable. Her Honour said that on some occasions litigants could be well served by having a choice, which could include a search for the court with procedures best adapted to the particular case or providing a speedier hearing.[1498]

32.21 A common view was that expressed by the New South Wales Attorney-General's Department, which said:

1491 G Griffith QC, *Consultation*, Melbourne, 16 February 2001; Supreme Court of Victoria, *Consultation*, Melbourne, 16 February 2001; The Hon Justice K Lindgren, *Correspondence*, 4 May 2001.
1492 G Griffith QC, *Consultation*, Melbourne, 16 February 2001.
1493 Supreme Court of Victoria, *Consultation*, Melbourne, 16 February 2001.
1494 The Hon Justice K Lindgren, *Correspondence*, 4 May 2001.
1495 Ibid.
1496 The Hon Chief Justice J Doyle, *Correspondence*, 11 May 2001; The Hon Justice C Wheeler, *Correspondence*, 23 June 2000.
1497 The Hon Chief Justice J Doyle, *Correspondence*, 11 May 2001.
1498 The Hon Justice C Wheeler, *Correspondence*, 30 October 2000.

> If the Commonwealth is not prepared to accept the practice and procedure of a State court as it currently exists, then the Commonwealth might utilise its own court system for a particular area of jurisdiction rather than attempting to dictate to a state court how it might exercise a particular area of federal jurisdiction.[1499]

32.22 Andrew Tokley of the South Australian Bar similarly stated:

> The Commonwealth Parliament should not dictate nor should it attempt to dictate the practice and procedure of a State court exercising federal jurisdiction. Such matters should be dealt with by a process of consultation with the State and Commonwealth Attorneys-General, State Chief Justices and, if need be, other relevant parties before deciding upon the practice and procedure of a State court exercising federal jurisdiction.[1500]

32.23 The Solicitor-General for South Australia, Brad Selway QC, agreed with these views:

> The interest of the Commonwealth Government is more likely to be reflected in administrative arrangements, backed up by the potential for Commonwealth legislation when its interests are not achieved. There are already structures in place by which those administrative arrangements could be given effect, e.g. joint rules committees of the courts etc. Properly funded and organised, these committees provide a useful mechanism for the Commonwealth to have an input into rules and procedures adopted by the State Courts.[1501]

32.24 It was also noted that the extent to which the Commonwealth may regulate state courts is a matter of constitutional interpretation, and that relevant issues, including those raised by the High Court in *Kable*,[1502] are yet to be clarified.[1503]

Commission's Views

32.25 The Commission supports the current approach of the CCJ in reviewing particular areas of procedural law with a view to seeking harmonisation of rules of court. The selection of particular topics for consideration, such as subpoenas, discovery and service out of the jurisdiction, is far more conducive to success than the broader approach of seeking a model code of civil procedure.

32.26 A comprehensive review of the procedural laws applicable in courts exercising federal jurisdiction is likely to involve significant practical difficulties. One difficulty is that state and territory courts may be faced with two codes of civil

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1499 Attorney-General's Department (NSW), *Submission J002*, 28 June 2000. See also Court of Appeal (NSW), *Consultation*, Sydney, 19 March 2001.

1500 A Tokley, *Submission J023*, 16 March 2001.

1501 B Selway QC, *Submission J028*, 20 March 2001.

1502 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

1503 Attorney-General's Department (NSW), *Submission J002*, 28 June 2000; The Hon Justice C Wheeler, *Correspondence*, 23 June 2000.

procedure — one for matters of state or territory jurisdiction and another for matters of federal jurisdiction. Given the difficulties of distinguishing between the basis of jurisdiction (see Chapter 2), such an approach is likely to entail significant problems for judges, legal practitioners and litigants.

32.27 At this stage such a proposal seems unlikely to attract widespread support from state and territory courts. As the submissions and consultations indicated, the development of a model code would need to be based on a process of co-operation and negotiation between federal, state and territory courts.

32.28 Finally, the Commission considers the processes by which procedural laws are harmonised should be monitored and assessed. It may be that the speed or scope of harmonisation could be increased, particularly as the benefits of harmonisation become evident through the work of the CCJ's harmonisation committee. The appropriate body to consider whether a wider program of harmonisation is feasible is the Standing Committee of Attorneys-General.

Recommendation 32–1. The Attorney-General should monitor the progress of the Council of Chief Justices' Committee on the Harmonisation of Rules of Court. In the light of that Committee's progress, the Attorney-General should consider the appropriateness of referring to the Standing Committee of Attorneys-General the following issues:

(a) extending the process of harmonisation of Rules of Court beyond the topics selected by the Council of Chief Justices; and

(b) extending the process of harmonisation to Acts and regulations that relate to matters of practice and procedure.

References

E Campbell, *Rules of Court* (1985) The Law Book Company Limited, Sydney.

B Opeskin, 'The Architecture of Public Health Law Reform: Harmonisation of Law in a Federal System' (1998) 22 *Melbourne University Law Review* 337.

33. Federal Choice of Law Rules

Contents

Introduction

33.1 Conflicts may arise between laws of different jurisdictions within Australia in a number of contexts. There may be conflicts between:

- a federal law and a state law;
- a federal law and a territory law;
- a state law and another state law;
- a territory law and another territory law; and
- a state law and a territory law.

33.2 In the case of a federal law and a state law, the Constitution itself provides the solution. Because the Commonwealth Parliament can make laws that bind the courts and people in every part of the Commonwealth,[1504] and because s 109 of the Constitution provides that federal law shall prevail over state law to the extent of any inconsistency, no real conflicts can arise within Australia to the extent that proceedings are governed by a federal statute. In the case of a conflict between a federal law and a territory law, a similar result is achieved by the doctrine of repugnancy, which precludes territory laws from operating inconsistently with federal provisions from which they derive their ultimate authority.[1505]

33.3 However, the resolution of conflict in the last three categories is more complex and may be achieved through the operation of the Constitution, legislation, or common law choice of law rules.

1504 *Commonwealth of Australia Constitution Act 1900* (Imp), s 5.
1505 *Northern Territory v GPAO* (1999) 196 CLR 553; *Webster v McIntosh* (1980) 49 FLR 317, 320–321.

The Constitution and choice of law

33.4 It has been suggested that s 118 of the Constitution (the full faith and credit clause) may require one state court to recognise and enforce the laws of another State in certain circumstances. This provision was copied almost verbatim from the United States Constitution and has received a chequered interpretation by the High Court.

33.5 The suggestion by some justices in *Breavington v Godleman*[1506] that the full faith and credit clause provides a constitutional solution to intra-Australian choice of law problems has been rejected in subsequent High Court decisions, albeit over vigorous dissent.[1507]

33.6 Despite rejection of a significant role for s 118, it has been recognised that the section has a residual effect on choice of law in Australia. In *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd,*[1508] the High Court held that the common law principle that a forum may exclude the operation of foreign law on the ground that it is contrary to the forum's public policy does not apply to conflicts within Australia. Five justices in *Breavington v Godleman* confirmed the correctness of this view based on the effect of s 118.[1509]

33.7 More recently, the High Court expressed sympathy in *John Pfeiffer Pty Ltd v Rogerson* for the idea that the Constitution may inform the development of common law choice of law rules in Australia.

> The matters we have mentioned as arising from the constitutional text and structure may amount collectively to a particular constitutional imperative which dictates the common law choice of law rule which we favour. It may be that those matters operate constitutionally to entrench that rule, or aspects of it concerning such matters as a 'public policy exception'. If so, the result would be to restrict legislative power to abrogate or vary that common law rule.[1510]

33.8 The implications of this statement for the development of choice of law rules in Australia have yet to be worked out.

Legislation and choice of law

33.9 The Commonwealth Parliament has participated to only a minor degree in establishing choice of law rules in Australia. There is currently no body of legislation that sets out choice of law rules designed specifically for courts exercising federal jurisdiction. A small number of federal statutes contain choice of

1506 *Breavington v Godleman* (1989) 169 CLR 41.
1507 *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433.
1508 *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565.
1509 *Breavington v Godleman* (1989) 169 CLR 41, 70 (Mason CJ), 96–97 (Wilson and Gaudron JJ), 116 (Brennan J), 150 (Dawson J).
1510 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, 644.

law rules in particular contexts. For example, the *Family Law Act 1975* (Cth) and the *Trusts (Hague Convention) Act 1991* (Cth) contain some choice of law rules, which implement international conventions to which Australia is a party.[1511]

33.10 Similarly, there has been only sparse legislative activity regarding choice of law in the States and Territories. A notable exception was the introduction in 1993 of uniform legislation relating to the classification of limitation periods in intra-Australian conflicts cases, which is discussed in Chapter 31.[1512]

33.11 In 1992 the Commission recommended that the Commonwealth Parliament enact statutory choice of law rules for all courts exercising federal jurisdiction.[1513] The objectives of the recommendations were to remove current uncertainties in the common law choice of law rules and to provide a uniform approach through a national legislative scheme. These proposals are discussed further below.

Common law choice of law rules

33.12 Most conflicts between the laws of two States, two Territories, or a State and a Territory within Australia are resolved not by recourse to the Constitution or legislation but by application of common law choice of law rules.

33.13 As discussed in Chapter 30, common law choice of law rules derive from English common law principles that were developed to resolve conflicts between the laws of different countries. Generally, they determine the applicable law first by categorising the subject matter of the cause of action (for example, as one of tort or contract) and then by identifying a connecting factor that indicates the law district whose law is to be applied.

33.14 In matters of federal jurisdiction, common law choice of law rules are applied by virtue of ss 79 or 80 JA. In particular, the latter section provides that the common law in Australia governs all courts exercising federal jurisdiction, as modified by the Constitution or the statute law in force in the State or Territory where the jurisdiction is exercised (see Chapter 34).

33.15 The High Court has held that the common law is uniform throughout Australia,[1514] and this applies equally to common law choice of law rules. However, the content of those rules has been in a state of flux. One area of recent development is the choice of law rule in torts, where there has been uncertainty and

1511 See P Nygh (1995), 10.
1512 See *Choice of Law (Limitation Periods) Act 1993* (NSW) and cognate legislation in other States and Territories.
1513 Australian Law Reform Commission, Report No 58 (1992).
1514 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.

confusion in the case law for many years. Some of this uncertainty has been laid to rest in *John Pfeiffer Pty Ltd v Rogerson,*[1515] which is discussed further below.

The Commission's Report on Choice of Law (ALRC 58)

33.16 In 1992 the Commission released its report, *Choice of Law* (ALRC 58).[1516] The report recommended that changes be made to the *Judiciary Act* to implement new choice of law rules for federal courts and for state and territory courts exercising federal jurisdiction. The report also recommended complementary legislation for the States and Territories with the object of achieving a comprehensive national scheme.

33.17 The Commission considered that it was better to build on existing common law choice of law rules than attempt to codify all choice of law rules. Accordingly, in ALRC 58 the Commission recommended specific changes to the choice of law rules relating to torts, contracts, statutory compensation schemes (such as motor vehicle accidents and workers' compensation), succession and trusts. The Commission also recommended that limitation statutes be re-classified as 'substantive' in lieu of their typical common law classification as 'procedural'.

33.18 One recommendation of relevance to the present report was that relating to the choice of law rule for intra-Australian torts. The Commission recommended that the applicable law should be the law of the place where the tort occurred, subject to an exception in limited circumstances.[1517] The law of the place where the tort occurred would be displaced if (a) the circumstances of the claim, or of a question arising in the claim, had a substantially greater connection with another law district, and (b) the purposes or objects underlying the law in force in both places would be promoted by the application of the law of the law district with the greater connection.[1518]

Alternative Approaches

33.19 The proposals in ALRC 58 remain largely unimplemented and could form the basis of new choice of law legislation, once reviewed and updated. The scope of new legislation might conform to any one of three alternatives.

33.20 First, legislative reforms could be applied on a national basis, as the Commission recommended in 1992. Federal legislation would be required to implement choice of law rules for courts exercising federal jurisdiction; state and territory legislation would be required to complement this for the exercise of state or territory jurisdiction.

1515 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.
1516 Australian Law Reform Commission, Report No 58 (1992).
1517 Ibid, para 6.27. Separate rules were recommended for defamation.
1518 Ibid, Appendix B cl 6(8).

33.21 Second, a federal choice of law statute might be confined to courts exercising federal jurisdiction, whether they be federal, state or territory courts. This option could be implemented without the participation of state and territory legislatures. However, state and territory courts would then have to apply different choice of law rules according to whether they exercised state or territory jurisdiction in a particular case.

33.22 Third, a federal choice of law statute might be confined even more narrowly to apply only to federal courts and not to state or territory courts exercising federal jurisdiction.

Submissions and Consultations

33.23 There was considerable support for a federal choice of law statute.[1519] It was noted that since *John Pfeiffer Pty Ltd v Rogerson*[1520] the common law choice of law rules were clearer in some respects, although difficulties remained.

33.24 The scope of legislation relating to choice of law was the subject of divergent views. There was support in submissions and consultations for uniform choice of law rules.[1521] It was noted that uniformity would produce benefits in terms of savings of time and cost to the public.[1522] To achieve uniformity in federal, state and territory jurisdiction, the enactment of Commonwealth legislation would need to be complemented by legislation in the States and Territories. However, the difficulty of enacting uniform state and territory legislation was acknowledged.[1523]

33.25 Others considered that in the absence of a national approach a federal choice of law statute should be limited to federal courts. It was said that the statute should not apply to state courts exercising federal jurisdiction because of the practical difficulty of state courts being required to ascertain whether or not federal jurisdiction was being exercised.[1524]

33.26 Whatever the scope of legislation, there was considerable support for a review of the recommendations in ALRC 58.[1525] Some submissions commented on the issue of the 'flexible exception' to the choice of law rule in torts. It was pointed out that in *John Pfeiffer Pty Ltd v Rogerson* the High Court rejected the idea of a

1519 H Heuzenroeder, *Submission J033*, 30 March 2001; The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001; G Griffith QC, *Correspondence*, 4 May 2001.
1520 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.
1521 A Tokley, *Submission J023*, 16 March 2001; Federal Court of Australia, *Consultation*, Melbourne, 6 March 2001.
1522 A Tokley, *Submission J023*, 16 March 2001.
1523 Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001.
1524 P Nygh, *Consultation*, Sydney, 12 February 2001.
1525 Ibid; Law Council of Australia, *Correspondence*, 14 May 2001.

flexible exception in tort in order to promote certainty [1526] and that such an exception should not be included in choice of law legislation.[1527] The point was made that there might be constitutional limitations on enacting a federal choice of law statute that is inconsistent with the principles established in *John Pfeiffer Pty Ltd v Rogerson*, although the extent of these limitations was not clear.[1528]

33.27 It was noted that the issue of a flexible exception had been referred by the Standing Committee of Attorneys-General to a Special Committee of Solicitors-General.[1529] The latter Committee had reported that, following *John Pfeiffer Pty Ltd v Rogerson,* there should be no flexible exception to the choice of law rule for intra-Australian torts.

33.28 It was also commented that, if a federal choice of law statute could not be achieved, there would need to be reform to ss 79 and 80 JA.[1530]

Commission's Views

The need for a federal choice of law statute

33.29 The Commission reiterates the view it expressed in ALRC 58 that 'legislation is necessary to reform choice of law rules in Australia'.[1531] The Commission notes that some of the worst problems of the traditional common law rules have been ameliorated by legislation and judicial decision since the *Choice of Law* report was published in 1992. In particular, the classification of limitation statutes as substantive and the removal of the law of the forum as an element in the choice of law rule in torts have been important developments.

33.30 Notwithstanding these developments, difficulties remain.

- The application of traditional choice of law rules in international cases has not been affected by the recent legislative and judicial developments, with the result that acknowledged difficulties remain in this context.

- The effect of recent developments on the classification of some matters as substantive or procedural is uncertain, for example, the requirement that a contract be evidenced in writing.

- Common law choice of law rules remain unsatisfactory in other areas, such as in contracts, where existing rules produce substantial uncertainty.

1526 B Selway QC, *Correspondence*, 8 May 2001.
1527 M Sexton SC, *Correspondence*, 14 May 2001; D Bennett QC, *Correspondence*, 4 May 2001.
1528 M Sexton SC, *Correspondence*, 14 May 2001.
1529 D Bennett QC, *Correspondence*, 4 May 2001.
1530 P Nygh, *Consultation*, Sydney, 12 February 2001.
1531 Australian Law Reform Commission, Report No 58 (1992), para 2.13.

- Choice of law rules do not make adequate provision for areas of law that are analogous to tort claims but are regulated by statute, such as workers' compensation, motor vehicle accident schemes and fair trading laws.

33.31 The Commission considers that the introduction of a federal statute would reduce the complexity of the current process of determining choice of law in federal jurisdiction by narrowing reliance on ss 79 and 80 JA. This would substantially remove the need to consider common law rules (or any modification effected by state and territory legislation) in determining the applicable law. Federal law would indicate directly which substantive law should be applied to resolve disputes that have connections with more than one law district in Australia, where the matter is one of federal jurisdiction.

33.32 While the Commission continues to support the proposal in ALCR 58 for a federal choice of law statute, the Commission also considers that there is a need to review the detailed proposals contained in the report. Nearly ten years have passed since the report was published and there have been important developments during this time. In particular, there are two issues on which the Commission now supports a different approach to that taken in ALRC 58. These are discussed immediately below and relate to the scope of any federal Act and the nature of the choice of law rule in torts.

Narrowing the scope of a federal choice of law statute

33.33 As noted above, in ALRC 58 the Commission recommended that changes be made to the *Judiciary Act* to enact new choice of law rules for federal courts and for state and territory courts exercising federal jurisdiction. The report also recommended complementary legislation for the States and Territories to achieve uniform choice of law rules in Australia.

33.34 There are well-recognised difficulties in achieving uniform national solutions through cooperative legislation. Such an approach requires agreement between the Commonwealth, States and Territories, not only on broad policy but also on the content and form of legislation. Small areas of disagreement may significantly delay or compromise the achievement of a uniform solution.

33.35 The difficulties experienced in implementing ALRC 58 lead the Commission to the view that the Commonwealth Parliament should now proceed with its own choice of law statute, irrespective of legislative action taken by the States and Territories. As noted in Chapter 30, the Commission considers that s 51(xxv) of the Constitution authorises the Commonwealth Parliament to enact federal choice of law rules throughout Australia, whether the court that applies them exercises federal or state jurisdiction. However, for present purposes it is not necessary to go that far — the Commission's current terms of reference ask only

that the Commission address the law applicable in the exercise of federal jurisdiction.

33.36 The Commission noted above that statutory choice of law rules may be enacted either for all courts exercising federal jurisdiction or, more narrowly, for all federal courts. There are practical reasons for refraining from extending federal choice of law rules to state courts exercising federal jurisdiction in the absence of a national legislative scheme. If the relevant choice of law rules were dependent on the type of jurisdiction exercised, the court would be required to distinguish whether or not the matter was one of federal jurisdiction. In Chapter 2 the Commission identified the difficulties of this course, including the complex intermingling of federal and state issues, the unwarranted emphasis it places on issues that are unrelated to the merits of the case, and the ease with which the jurisdictional basis of a case may change during the course of the proceedings.

33.37 For these reasons, the Commission is of the view that federal choice of law legislation should extend only to federal courts and not to state courts exercising federal jurisdiction. The Commission took a similar approach in its recommendations with respect to the law of evidence.[1532]

33.38 In relation to choice of law in Commonwealth Territories, the Commission notes that the territories power in s 122 of the Constitution would clearly support a Commonwealth choice of law statute extending to the Territories. However, as discussed in Part H of this report, the Commission generally favours parity of treatment between the States and the internal self-governing Territories (that is, the ACT and the Northern Territory). For this reason, the Commission does not recommend that choice of law legislation apply to these Territories in circumstances in which it does not apply to the States.

Rejecting the flexible exception in torts cases

33.39 The second area in which the Commission takes a different view from that expressed in ALRC 58 is in relation to the flexibility of the choice of law rule applicable to intra-Australian torts.

33.40 As noted above, in ALRC 58 the Commission recommended that there be a 'flexible exception' to the choice of law rule in torts in intra-Australian cases. Under its 1992 proposal, a court would apply the law of the place where the tort occurred as the primary rule. However, a court could depart from the primary rule if a matter were more closely connected with another place. This option was preferred by the Commission on the basis that it would provide a sufficient degree of certainty and predictability but still allow flexibility where there were strong and

1532 Australian Law Reform Commission, Report No 26 (1985); Australian Law Reform Commission, Report No 38 (1987).

compelling reasons to displace the primary rule.[1533] The Commission's reasoning was also based on dissatisfaction with the complexities and ambiguities of the case law existing at the time of the report.[1534]

33.41 Until recently, the choice of law rule applicable to intra-Australian torts was based on the rule enunciated in a 19th century English case, *Phillips v Eyre.*[1535] That case required the satisfaction of a two-limbed test: the wrong must be actionable in the place where the action is brought (the forum), and the wrong must not be justifiable according to the law of the place where it was done. In England, a flexible exception was introduced to this rule in 1971[1536] but the application of that exception in Australia has been subject to considerable uncertainty. In the cases in which the question has been considered in Australia, High Court justices have given inconsistent answers.[1537]

33.42 The High Court has recently rejected a flexible exception for intra-Australia torts and suggested that this new approach may be mandated by the Constitution. In *John Pfeiffer Pty Ltd v Rogerson,* the High Court stated that a flexible exception would lead to practical difficulties. In particular, a flexible exception:

> will not give sufficient guidance to the courts, to parties or to those, like insurers, who must order their affairs on the basis of predictions about the future application of the rule.[1538]

33.43 In consultations and submissions strong objections were raised to the possible re-introduction of a flexible exception through the implementation of the proposals in ALRC 58. In addition to concerns about the merits of such an exception, it was noted that there may now be constitutional restrictions on the Commonwealth's ability to legislate in respect of choice of law rules in a manner inconsistent with *John Pfeiffer Pty Ltd v Rogerson*.

33.44 The Commission now supports the view that there should be no flexible exception to the choice of law rule in torts in intra-Australian cases. In the light of the potential constitutional considerations to which the High Court referred in *John Pfeiffer Pty Ltd v Rogerson*, the introduction of a legislative exception is likely to produce unnecessary uncertainty. Accordingly, the Commission recommends that there be no flexible exception to the choice of law rule applicable to tort-like claims and motor vehicle accident claims, as identified by the Commission in clauses 81D(8) and 81E(2) of its 1992 draft amendments to the *Judiciary Act*.

1533 Australian Law Reform Commission, Report No 58 (1992), para 6.24–6.27.
1534 Ibid, para 6.3–6.14.
1535 *Phillips v Eyre* (1870) LR 6 QB 1.
1536 *Chaplin v Boys* [1971] AC 356.
1537 *Breavington v Godleman* (1989) 169 CLR 41; *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1993) 176 CLR 433.
1538 *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625, 646.

Recommendation 33–1. The Attorney-General should consider implementing the Commission's recommendations in its 1992 Report on *Choice of Law* (ALRC 58) by enacting a federal choice of law statute, subject to the following qualifications.

(a) In view of the difficulties experienced in achieving a uniform national solution through cooperative legislation, the federal choice of law statute should be confined in its operation to matters arising in federal courts.

(b) There should be no 'flexible exception' to the choice of law rule applicable to tort-like claims and motor vehicle accident claims, as identified by the Commission in clauses 81D(8) and 81E(2) of its 1992 draft amendments to the *Judiciary Act*.

References

Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985), ALRC, Sydney.

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P Nygh, *Conflict of Laws* 6th ed (1995) Butterworths, Sydney.

34. State and Territory Law as Surrogate Federal Law

Contents

Current Provisions

34.1 In Chapter 30 the Commission indicated that the Commonwealth Parliament lacks the constitutional power to enact the substantive law required to resolve all disputes arising in federal jurisdiction. Moreover, States and Territories cannot direct that their laws be applied in matters of federal jurisdiction, at least where those matters arise in federal courts.[1539]

34.2 Sections 79 and 80 JA have traditionally performed the function of filling the resulting gap in federal law by directing federal, state and territory courts as to which law to apply when exercising federal jurisdiction.

34.3 Section 79 is in the following terms:

> The laws of each State or Territory, including the laws relating to procedure, evidence and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

34.4 Apart from the addition of the reference to Territories in 1979,[1540] the section is in the same form in which it was enacted in 1903. The law applied by virtue of s 79 is not state or territory law as such but what has been aptly termed 'surrogate federal law'.[1541] The extent to which s 79 may alter the meaning of state or territory law when applying it in federal jurisdiction continues to be a live issue.

34.5 Section 80 provides:

1539 *John Robertson and Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65, 87 (Gibbs J), 93 (Mason J); *Northern Territory v GPAO* (1999) 196 CLR 553, 575 (Gleeson CJ and Gummow J), 628 (McHugh and Callinan JJ).

1540 *Judiciary Amendment Act (No 2) 1979* (Cth), s 14.

1541 The term appears to have been coined in *Maguire v Simpson* (1977) 139 CLR 362, 408 (Murphy J) in relation to s 64 JA.

> So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

34.6 Apart from the addition of the reference to Territories in 1979,[1542] and the substitution of 'common law in Australia' for 'common law of England' in 1988,[1543] this section also is in the same form in which it was enacted in 1903.

34.7 Section 80A extends ss 79 and 80 to certain suits against the Commonwealth in territory courts.

34.8 Sections 79 and 80 were closely modelled on provisions of United States law.[1544] In particular, s 79 was based on s 34 of the *Judiciary Act 1789* (US), which by 1903 had become s 721 of the United States Revised Statutes. Section 80 was based on s 3 of the *Civil Rights Act 1866* (US), which by 1903 had become s 722 of the United States Revised Statutes. Both provisions survive in modified form in United States law today.[1545]

Problems and Issues

34.9 Sections 79 and 80 have been subject to conflicting judicial interpretation and critical academic commentary. For example, Edward Sykes and Michael Pryles have commented that 'it is difficult to discern the relationship between [the two provisions] … in fact they have a prima facie appearance of being to some extent inconsistent',[1546] while Peter Nygh has noted that 'at first sight the provisions are somewhat puzzling'.[1547]

34.10 This chapter examines the conflicting judicial interpretations of the sections and the reform issues that arise from them. The chapter first considers s 79, then s 80, and finally the interrelationship between them. The traditional approach to s 79 was that it was the central provision[1548] and the one to which reference should first be made.[1549] However, as discussed below, recent High Court decisions have given primacy to s 80.

1542 *Judiciary Amendment Act (No 2) 1979* (Cth), s 14.
1543 *Law and Justice Legislation Amendment Act 1988* (Cth).
1544 L Priestley (1995), 226.
1545 See 28 USC s 1652 (formerly s 721) and 42 USC s 1988 (formerly s 722).
1546 E Sykes and M Pryles (1991), 308.
1547 P Nygh (1995), 77.
1548 P Nygh (2000), 338–340.
1549 *Commissioner of Stamp Duties (NSW) v Owens (No 2)* (1953) 88 CLR 168, 170 (Dixon J).

Section 79 of the *Judiciary Act*

Does s 79 encompass substantive and procedural matters?

34.11 One issue concerning the interpretation of s 79 is whether it encompasses substantive as well as procedural matters. The general approach of courts has been to apply s 79 to pick up both procedural[1550] and substantive[1551] matters without distinction. Some judges have explicitly stated that the provision applies to both issues.[1552]

34.12 However, an alternative view is possible. It is arguable that the reference to 'procedure, evidence and the competency of witnesses' creates a class of procedural matters, which controls the interpretation of the preceding words 'the laws of each State or Territory'. This view has been accepted by at least one member of the High Court[1553] and by some academics[1554] but has not yet received general judicial endorsement.

34.13 In the light of these ambiguities, in DP 64 the Commission asked whether it would be clearer to limit the operation of s 79 to procedural matters and leave s 80 to apply to substantive matters or whether, if s 79 is to have an extended operation, this should be made explicit in the section.

Does s 79 pick up both statutory and common law?

34.14 Another issue to consider is whether s 79 picks up both statutory law and common law. In *Commissioner of Stamp Duties (NSW) v Owens (No 2),* Dixon J suggested that it does. His Honour stated that:

> the purpose of [s 79] is to adopt the law of the State where federal jurisdiction is exercised as the law by which, except as the Constitution or federal law may otherwise provide, the rights of the parties to the *lis* are to be ascertained and matters of procedure are to be regulated.[1555]

1550 *Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd (in liq)* (1999) 96 FCR 217, 226–227 and *Smith v Australian National Line Ltd* (1998) 159 ALR 431, 452 (limitation of actions); *Bell Group Ltd v Westpac Banking Corp* (2000) 173 ALR 427 (leave to proceed against a company in liquidation); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 and *Solomons v District Court (NSW)* (2000) 49 NSWLR 321 (statutory assistance with costs for defendants); *Northern Territory v GPAO* (1999) 196 CLR 553 (obligation on statutory officer to produce documents in court); *Bailey v Manos* (Unreported, Federal Court of Australia, von Doussa J, 6 May 1992) (documents liable to stamp duty inadmissible in court if not stamped).

1551 *Austral Pacific Group Ltd (in Liq) v Airservices Australia* (2000) 173 ALR 619; *Matthews v ACP Publishing Pty Ltd* (1998) 87 FCR 152, 160–161 (damages under the NSW equivalent of the Lord Cairns Act).

1552 *Solomons v District Court (NSW)* (2000) 49 NSWLR 321, 324 (Mason P); 344 (Foster AJA); *Metropolitan Health Services Board v Australian Nursing Federation* (1999) 94 FCR 132, 134–136 (Lee J).

1553 *Commonwealth v Mewett* (1997) 191 CLR 471, 492–493 (Brennan CJ).

1554 See, for example, P Nygh (2000), 340–341.

1555 *Commissioner of Stamp Duties (NSW) v Owens (No 2)* (1953) 88 CLR 168, 170 (Dixon J).

34.15 However, given the High Court's acceptance of the view that Australia has a single common law, it seems inappropriate that the expression 'the law of each State' in s 79 should include reference to the common law.

34.16 As discussed below, some members of the High Court have suggested that the idea of a single Australian common law has implications for the interpretation of ss 79 and 80.[1556] In particular, the picking up of common law rules in federal jurisdiction is effected by s 80 not s 79, and s 79 is consequently limited to picking up state and territory statutes. One issue for consideration is whether s 79 should be amended consistently with this approach. A further issue is whether the section should be amended to pick up the common law of Australia in force in a State or Territory, rather than the common law of a State or Territory.

Which state laws are picked up?

34.17 Section 79 is expressed to pick up state and territory laws and apply them 'in all cases to which they are applicable'. The case law suggests that s 79 can only attract local law to the extent that the law is directly related to the resolution of the issues in dispute, that is, to the extent that it is 'part of the adjudicative process of the court'.[1557]

34.18 It follows that provisions of state or territory law that are not directly relevant to the resolution of the matter before the court are not attracted by s 79. For example, in *Commissioner of Stamp Duties (NSW) v Owens (No 2)*[1558] the High Court had to consider whether a New South Wales statute that provided for financial assistance to parties in appellate proceedings[1559] applied to an action in federal jurisdiction. The Court found that such a law fell outside s 79 because it was not directly related to the resolution of the issues in dispute in the case.

34.19 A similar result was reached by the New South Wales Court of Appeal in *Solomons v District Court (NSW)* ('*Solomons*').[1560] That case involved an applicant who was tried and acquitted in a state court for offences under a Commonwealth statute. The question arose as to whether a New South Wales statute that provided for financial assistance to persons acquitted of offences applied in the exercise of federal jurisdiction. The Court of Appeal found that the New South Wales statute was not picked up by s 79 because the provision was not directly related to the resolution of the substantive issues in the case.

1556 *Commonwealth v Mewett* (1997) 191 CLR 471, 522 (Gaudron J).
1557 *Solomons v District Court (NSW)* (2000) 49 NSWLR 321, 348 (Foster AJA).
1558 *Commissioner of Stamp Duties (NSW) v Owens (No 2)* (1953) 88 CLR 168.
1559 *Suitors Fund Act 1951* (NSW).
1560 *Solomons v District Court (NSW)* (2000) 49 NSWLR 321.

34.20 One difficulty with this interpretation of s 79 is that it defeats the object of ensuring uniform treatment of all cases in state courts, regardless of whether state or federal jurisdiction is being exercised. In *Solomons* a different result would have been reached if the Court of Appeal had been applying a New South Wales statute. On the other hand, there may be constitutional reasons for confining the operation of s 79 to a 'matter' as that term is understood in Chapter III of the Constitution.

34.21 In DP 64, the Commission asked whether s 79 should be expressed to apply only to those state and territory laws that are relevant to the disposition of the matter before the court exercising federal jurisdiction.

Are state and territory laws picked up with their meaning unchanged?

34.22 Another aspect of whether state and territory laws are picked up in federal proceedings and applied 'in all cases to which they are applicable' concerns the ambit of the local laws themselves.

34.23 An early view was that s 79 'does not purport to do more than pick up state laws with their meaning unchanged'.[1561] Read literally, such a statement would mean that no state statute that was expressed to apply to the courts of that State could ever apply in federal jurisdiction.[1562] This would severely narrow the available field of state laws and restrict the capacity of s 79 to utilise state law as surrogate federal law when federal jurisdiction is being exercised.

34.24 However, in *John Robertson and Co Ltd v Ferguson Transformers Pty Ltd,* Mason J stated that:

> To ensure that State laws dealing with the particular topics mentioned in the section are applied in the exercise of federal jurisdiction by courts other than State courts, it is necessary that State laws be applied according to the hypothesis that federal courts do not necessarily lie outside their field of application. Section 79 requires the assumption to be made that federal courts lie within the field of application of State laws on the topics to which it refers, at least in those cases in which the State laws are expressed to apply to courts generally.[1563]

34.25 The Federal Court has applied this view in a number of cases. Where a state statute is expressed to apply to courts generally, the assumption is made that it also applies to proceedings in federal courts. Examples include the power of a court to award interest on damages,[1564] to stay court proceedings in breach of an

1561 *Pedersen v Young* (1964) 110 CLR 162, 165 (Kitto J).
1562 P Nygh (2000), 348.
1563 *John Robertson and Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65, 95 (Mason J).
1564 *Neilson v Hempstead Holdings Pty Ltd* (1984) 65 ALR 302, 311.

arbitration agreement,[1565] to make unstamped documents inadmissible in civil proceedings[1566] and to grant leave to proceed against a company in liquidation.[1567]

34.26 By contrast, where a state statute specifically identifies a particular state court, such as the Supreme Court of New South Wales, s 79 is sometimes interpreted as not attracting the state provision.[1568] This approach focuses on the literal description of 'court' in the state statute and has been criticised as ignoring the purpose of the particular provision to be picked up.[1569]

34.27 In *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd,* the High Court acknowledged the limitations inherent in the conventional interpretation of s 79 and preferred a more expansive approach. McHugh J stated:

> The fact that a state statute either expressly or as a matter of construction provides only for state courts to enforce its provisions does not mean that it cannot be 'picked up' and applied by s 79 of the *Judiciary Act* in the exercise of federal jurisdiction. …
>
> [C]ourts exercising federal jurisdiction should operate on the hypothesis that s 79 will apply the substance of any relevant state law in so far as it can be applied. The efficacy of federal jurisdiction would be seriously impaired if state statutes were held to be inapplicable in federal jurisdiction by reason of their literal terms or verbal distinctions and without reference to their substance.[1570]

34.28 These statements recognise that s 79 is a federal provision that operates to apply state and territory law as surrogate federal law. The Commonwealth Parliament has a paramount interest in determining the circumstances in which a state or territory law will be picked up and applied as federal law by courts exercising federal jurisdiction. To this end, it may not be sufficient to rely on indications of legislative intent expressed in state or territory legislation.

34.29 In view of these uncertainties, DP 64 asked whether s 79 should be amended to enable state and territory laws to be picked up regardless of whether they nominate a particular court or refer to courts in general terms. DP 64 also asked whether an 'interests analysis' test should be included in the legislation in relation to adoption of surrogate laws under s 79. Such a test might focus on the subject matter of the claim and ask how the interest of the State or Territory is affected by application of the statute to federal proceedings.

1565 *Bond Corp Ltd v Theiss Contractors Pty Ltd* (1987) 14 FCR 193.

1566 *Bailey v Manos* (Unreported, Federal Court of Australia, von Doussa J, 6 May 1992).

1567 *Grollo & Co Pty Ltd v Nu-Statt Decorating Pty Ltd* (1980) 47 FLR 44, 52; *Bell Group Ltd v Westpac Banking Corp* (2000) 173 ALR 427.

1568 *Australian National Airlines v Commonwealth* (1975) 132 CLR 582, 435–436 (Mason J); *Weiss v Barker Gosling* (1993) 16 Fam LR 728. Compare *Matthews v ACP Publishing Pty Ltd* (1998) 87 FCR 152.

1569 P Nygh (2000), 349.

1570 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 177 ALR 329, 336–367 (McHugh J).

Does a Commonwealth law 'otherwise provide'?

34.30 Section 79 applies state and territory law as surrogate federal law 'except as otherwise provided by the Constitution or the laws of the Commonwealth'. A question that has recently been considered by the courts is what test should be applied in determining whether a Commonwealth law 'otherwise provides' for the purposes of s 79.

34.31 In *Northern Territory v GPAO* ('*GPAO*'),[1571] the High Court stated that the question to be asked is whether the operation of the Commonwealth law would so reduce the ambit of the surrogate federal law that the provisions of the Commonwealth law are irreconcilable with the surrogate provisions. The Court expressly rejected the view that the 'cover the field' test from the decisions on s 109 of the Constitution applied, a view that had been suggested in earlier decisions of the High Court.[1572] Arguably, the test of 'irreconcilability' is closer to the s 109 test of direct inconsistency.[1573]

34.32 In *GPAO* the High Court said that in resolving a conflict between a Commonwealth law and a surrogate federal law for the purposes of s 79, it had to be remembered that the two statutes had the same source — they are both federal laws.[1574] By contrast, in the case of the test for inconsistency between state and federal laws under s 109 of the Constitution, the competing laws do not emanate from the same source. Accordingly, it was said to be appropriate that a more liberal test of exclusion applies in the s 109 context, where paramountcy is to be given to the laws of the federal legislature over those of the States.

34.33 The consequence of the stricter test in relation to s 79 is that it is more difficult for a federal statute to displace the surrogate federal law. A federal law will not 'otherwise provide', and hence exclude the operation of state or territory law, unless it regulates the same issues as the state or territory law in such a way that the two laws are irreconcilable.

34.34 This strict approach to s 79 is also evidenced in another recent decision of the High Court. In *Austral Pacific Group Ltd v Airservices Australia,*[1575] the High Court found that the relevant federal law was silent on the specific issue covered in the state enactment. The Court said that this silence was consistent with a federal legislative intention to leave such matters for the operation of state or territory

1571 *Northern Territory v GPAO* (1999) 196 CLR 553, 587–9 (Gleeson CJ, Gummow and Hayne JJ), 606 (Gaudron J).

1572 *De Vos v Daly* (1947) 73 CLR 509, 514–515 (Latham CJ), 517–518 (Starke J); *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20, 39 (Menzies J).

1573 See *Colvin v Bradley Bothers Pty Ltd* (1943) 68 CLR 151.

1574 *Northern Territory v GPAO* (1999) 196 CLR 553, 588 (Gleeson CJ and Gummow J).

1575 *Austral Pacific Group Ltd (in Liq) v Airservices Australia* (2000) 173 ALR 619.

legislation picked up by s 79.[1576] The rationale for this view seems to be a concern to give weight and operation to state and territory laws, and to avoid using s 79 as an alternative to s 109 of the Constitution.

34.35 A number of other decisions have followed the test of irreconcilability.[1577] However, where virtually identical laws exist at both the federal level and the state or territory level, there is no obstacle to federal laws applying to the exclusion of state or territory laws that would otherwise have been picked up by s 79.[1578]

Section 80 of the *Judiciary Act*

34.36 Until recently, s 80 has been the subject of very little judicial consideration. The primary reason for this has been the traditional view of the relationship between ss 79 and 80, which laid emphasis on s 79 to the exclusion of s 80. On this view, s 80 was largely ineffective and accordingly escaped judicial scrutiny.

34.37 A further reason for the lack of attention to s 80 was that until 1988 s 80 referred to 'the common law of England' rather than to 'the common law in Australia'.[1579] This anachronism may have discouraged application of the section.[1580]

34.38 The alteration of the wording of s 80 to its current form together with the High Court's revision of the relationship between ss 79 and 80 has significant implications for the function of s 80. The current trend is to give primary place to s 80. On this view, the common law in Australia (including common law choice of law rules), as modified by state and territory legislation, will resolve many questions of the law applicable in federal jurisdiction.

34.39 In DP 64 the Commission drew attention to several textual ambiguities in s 80 including the following.

- The expression 'so far as the laws of the Commonwealth are not applicable' is unclear. Is the word 'laws' intended to refer only to statutory laws of the Commonwealth? If so, should the section make this clear? If not, what distinction is intended between statutory and non-statutory laws of the Com-

1576 Ibid, 627 (Gleeson CJ, Gummow and Hayne JJ). See also 633 (McHugh J), 646 (Callinan J).
1577 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; *Chapman v Luminis Pty Ltd* (1998) 86 FCR 513; *Vink v Schering (No 2)* [1991] ATPR 41-073. Compare *Pritchard v Racecage* (1997) 72 FCR 203.
1578 *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344, 356–7 (Sackville J); *Trade Practices Commission v George Weston Foods Ltd (No 2)* (1980) 43 FLR 55, 56–7 (Davies J); compare *Rasomen Pty Ltd v Shell Co of Australia Ltd* (1997) 75 FCR 216, 223 (von Doussa, Drummond and Finn JJ).
1579 *Law and Justice Legislation Amendment Act 1988* (Cth).
1580 *Adams v Eta Foods Ltd* (1988) 19 FCR 93, 95 (Gummow J).

monwealth, on the one hand, and 'the common law in Australia' on the other?

- The meaning of the phrase 'or so far as their provisions are insufficient to carry them into effect' is obscure. When is a provision of a law insufficient to carry the law into effect? How can a Commonwealth law be applicable and yet insufficient to carry itself into effect?

- It is unclear when a statute in force in a State or Territory 'modifies' the common law in Australia. Does the expression include the creation of a statutory right where none existed at common law, for example a no-fault compensation scheme?

- How does one identify the 'State or Territory in which the Court in which the jurisdiction is exercised is held'?

- The relevance and meaning of the words 'so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth' is unclear. This phrase purports to indicate that the common law (as modified) does not apply in federal jurisdiction in so far as it is inconsistent with the Constitution or federal law. However, these qualifications might be considered implicit in the operation of the Australian judicial system — the High Court has frequently remarked that the common law must conform to the Constitution;[1581] federal law can modify the common law; and state or territory statutes that modify the common law must in every case give way to contrary provisions in the Constitution (covering cl 5) and federal law (s 109 of the Constitution).[1582]

The relationship between sections 79 and 80

34.40 There are competing views on the relationship between ss 79 and 80.

The traditional view

34.41 The traditional interpretation of s 79 is that a court exercising federal jurisdiction in a State or Territory will apply state or territory law in as similar fashion as possible to a state or territory court exercising non-federal jurisdiction. The laws so applied include state or territory choice of law rules. The rationale for this approach is the desirability of uniformity of outcome between all courts sitting in the same State or Territory, regardless of whether they exercise state, territory or federal jurisdiction.

1581 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 566; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 126 (Mason CJ, Toohey and Gaudron JJ).

1582 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 6.118.

34.42 The effect of the traditional view is that s 79 effectively covers the field so far as the application of non-federal sources of law in federal jurisdiction is concerned. There is little scope remaining for the application of s 80. If a matter arises that is properly classified as procedural, it will be determined by the law of the forum (that is, by the law in force in the State or Territory in which the court is sitting). If a substantive matter is involved, the forum's choice of law rules will select the system of law applicable to that particular class of matter. Depending on the factual circumstances, that system of law may be the common law or statute law of the forum or of another jurisdiction.[1583] Where the forum's common law choice of law rules have been replaced by a mandatory statute in the forum, then this law will be applied. In each situation, s 79 exhausts the scope of applicable laws in federal jurisdiction, leaving s 80 redundant.

34.43 At least two High Court justices have recently endorsed the traditional view. In *Commonwealth v Mewett* ('*Mewett*'), Dawson J (with whom Toohey J agreed) declared that 'the effect of [ss 79 and 80] is to apply to each proceeding the whole body of law in the relevant State, except to the extent to which it is inconsistent with Commonwealth laws'.[1584]

The single common law view

34.44 Recent High Court decisions establish that there exists a uniform common law in Australia rather than separate common law systems in each of the States and Territories.[1585] This approach is relevant to the law applicable in federal jurisdiction given that s 80 was amended in 1988 to refer to 'the common law in Australia' rather than 'the common law of England'.

34.45 The acceptance of an Australia-wide common law has been recognised by some judges as having implications for the interpretation of ss 79 and 80. According to Gaudron J in *Mewett*:

> If choice of law rules for matters involving the exercise of federal jurisdiction are recognised as part of the common law in Australia their application is directed by s 80. And as s 80 is one of 'the laws of the Commonwealth' to which s 79 is expressly subjected, there is then no need to resort to s 79 to 'pick up' State or Territory choice of law rules. Rather, s 79 will operate to 'pick up' State or Territory laws only to the extent that the statute law of the Commonwealth and the common law in Australia need to be supplemented to enable the matter in issue to be determined.[1586]

34.46 This passage suggests that instead of using s 79 as the starting point, s 80 is to be considered first. A court applies 'the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory' in

1583 See *Musgrave v Commonwealth* (1937) 57 CLR 514.
1584 *Commonwealth v Mewett* (1997) 191 CLR 471, 506 (Dawson J), 512 (Toohey J).
1585 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 563.
1586 *Commonwealth v Mewett* (1997) 191 CLR 471, 522.

which the court sits, and only turns to s 79 where a gap appears.[1587] In *Mewett*, Gummow and Kirby JJ expressed support for Gaudron J's view but preferred not to apply the approach in that case because submissions had not addressed the issue.[1588]

34.47 The practical result of this approach to ss 79 and 80 is that in all matters where common law choice of law rules can identify the applicable law, s 80 will cover the field without any need to rely on s 79.[1589] If this is so, when is s 79 ever engaged? In *Mewett*, Gaudron J said that s 79 would be relevant where the common law in Australia needed 'to be supplemented to enable the matter in issue to be determined'.[1590] The High Court has not specifically addressed this matter since *Mewett.*[1591]

The Brennan view

34.48 In *Mewett,* Brennan CJ took the view that ss 79 and 80 each had a distinct operation and that they did not overlap.[1592] Section 79 applied to procedural matters and s 80 to substantive matters. His Honour drew this conclusion from the use of the words 'procedure, evidence and the competency of witnesses' in s 79. On the question of substantive law, his Honour's view comports with Gaudron J's view that the uniform common law, as amended by statute in the place of sitting, should be applied.[1593]

Assessing these views

34.49 In *GPAO*,[1594] the High Court considered whether a provision in Northern Territory legislation should be applied in a proceeding in the Family Court sitting in Darwin. Three justices (Gleeson CJ, Gummow and Hayne JJ) noted, consistently with Gaudron J's approach in *Mewett,* that the starting point in considering the operation of ss 79 and 80 is the 'common law in Australia', as referred to in s 80.[1595] Their Honours stated that 'section 80 directs all courts exercising federal jurisdiction where they "shall go for the substantive law" and is supplemented by s 79'.[1596] The other justices forming the majority did not discuss the question of the

1587 B O'Brien (1977), 78–79.
1588 *Commonwealth v Mewett* (1997) 191 CLR 471, 554.
1589 See, for example, *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.
1590 *Commonwealth v Mewett* (1997) 191 CLR 471, 522.
1591 See P Nygh (2000), 340-346. Nygh argues that s 79 will continue to be relevant to pick up procedural statutes of a State or Territory.
1592 *Commonwealth v Mewett* (1997) 191 CLR 471, 492 (Brennan CJ).
1593 Ibid, 522.
1594 *Northern Territory v GPAO* (1999) 196 CLR 553.
1595 Ibid, 574 (Gleeson CJ and Gummow J), 650–651 (Hayne J).
1596 Ibid, 574 (Gleeson CJ and Gummow J), citing *South Australia v Commonwealth* (1962) 108 CLR 130 ('*Railways Standardisation Case*'), 140.

respective roles of ss 79 and 80 but simply assumed that s 79 applied to the facts.[1597]

34.50 A more recent decision of the High Court has done little to clarify the relationship between ss 79 and 80. In *Austral Pacific Group Ltd (in Liq) v Airservices Australia,*[1598] the Court considered an action for contribution against a Commonwealth instrumentality in circumstances where the original accident had occurred in Queensland. No right to contribution between tortfeasors exists under either Commonwealth law or the common law. However, such a right exists under the statute law of the States and Territories, including Queensland. All members of the High Court stated that the question was whether s 79 operated to pick up the Queensland contribution statute. No reference was made to s 80, apart from McHugh J, who said it was 'not relevant in these proceedings'.[1599] It is noteworthy that the issue of contribution among tortfeasors is substantive, not procedural, and arguably should have been resolved by reference to 'the common law in Australia as modified by … the statute law in force in the State … in which the Court in which the jurisdiction is exercised is held' — in other words, by reference to s 80.

34.51 Other recent decisions have shed little further light on the relationship between ss 79 and 80. In some cases there has been an apparent reliance on the traditional pre-eminence of s 79.[1600] In others, it is not clear whether the court was expressing a preference because the issues involved in the particular case were characterised as procedural and would not be picked up by the application of common law choice of law rules under s 80.[1601]

34.52 In DP 64 the Commission asked, in the light of the complex relationship between ss 79 and 80, whether there was a need to retain both provisions and, if not, how they might best be combined.

Consultations and Submissions

34.53 It was generally agreed that ss 79 and 80 were necessary in some form because federal law could not fill all the possible gaps in the exercise of federal

1597 *Northern Territory v GPAO* (1999) 196 CLR 553, 606 (Gaudron J), 632, 635 (Kirby J).
1598 *Austral Pacific Group Ltd (in Liq) v Airservices Australia* (2000) 173 ALR 619.
1599 Ibid, 633 (McHugh J).
1600 *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1; *Matthews v ACP Publishing Pty Ltd* (1998) 87 FCR 152; *Solomons v District Court (NSW)* (2000) 49 NSWLR 321.
1601 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334. See also *Violi v Berrivale Orchards Ltd* (2000) 173 ALR 518.

jurisdiction.[1602] If ss 79 and 80 did not exist, the High Court would have had to develop similar principles at common law.[1603]

34.54 The view was widely held that ss 79 and 80 were complex and needed redrafting.[1604] It was also agreed that redrafting to make the provisions simpler and clearer would be a difficult task.[1605] Care had to be taken to ensure compliance with constitutional constraints and to avoid unintended results.[1606] The primary objective was seen to be to improve the level of clarity of the provisions.[1607]

34.55 Richard Garnett suggested that any redrafting should make only minimal changes but should, for example, remove unnecessary duplication such as the reference in s 79 to procedure and the competency of witnesses.[1608]

34.56 The Law Council of Australia expressed the view that s 79 should be amended to make it clear that it applied to procedural matters only, and that it encompassed both common law and statute law. The Law Council was opposed to any other amendments to s 79.[1609]

34.57 The general view was that ss 79 and 80 should be amalgamated into one provision.[1610] This would have the advantage of reducing the complexities of determining the relationship between them. Amalgamation would be helpful to parties, practitioners and the courts because it would clarify the operation of the provisions.[1611]

1602 D Jackson QC, *Consultation*, Sydney, 19 March 2001; D Graham QC, *Consultation*, Melbourne, 15 February 2001; R Garnett, *Consultation*, Melbourne, 16 February 2001; Victorian Bar Association, *Consultation*, Melbourne, 6 March 2001.

1603 D Graham QC, *Consultation*, Melbourne, 15 February 2001.

1604 P Nygh, *Consultation*, Sydney, 12 February 2001; D Graham QC, *Consultation*, Melbourne, 15 February 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; R Garnett, *Consultation*, Melbourne, 16 February 2001; South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001; Family Court of Australia, *Consultation*, Melbourne, 14 March 2001; P Cashman, *Consultation*, Sydney, 19 March 2001.

1605 D Graham QC, *Consultation*, Melbourne, 15 February 2001; Federal Court of Australia, *Consultation*, Melbourne, 6 March 2001.

1606 D Graham QC, *Consultation*, Melbourne, 15 February 2001.

1607 Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; D Graham QC, *Consultation*, Melbourne, 15 February 2001; R Garnett, *Consultation*, Melbourne, 16 February 2001; Victorian Bar Association, *Consultation*, Melbourne, 6 March 2001.

1608 R Garnett, *Consultation*, Melbourne, 16 February 2001.

1609 Law Council of Australia, *Submission J037*, 6 April 2001.

1610 P Nygh, *Consultation*, Sydney, 12 February 2001; R Garnett, *Consultation*, Melbourne, 16 February 2001; South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001; The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001; D Jackson QC, *Consultation*, Sydney, 19 March 2001.

1611 South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001.

34.58 David Jackson QC suggested that if ss 79 and 80 were amended, the new provision should clearly list the sources of law to be applied and the priority for the application of laws.[1612]

34.59 One major problem identified was determining to what extent state laws should be applicable in federal jurisdiction. It was commented that it was often difficult to discern whether particular state legislation was intended to apply to federal jurisdiction because state legislatures did not usually consider whether their legislation should or should not apply in federal jurisdiction.[1613] On one view, unless state legislatures expressly stated that state laws were to apply, it could be assumed that they were not intended to apply to federal jurisdiction.[1614] The Family Court considered that a clear test was needed for determining when state provisions were picked up and applied as surrogate federal law.[1615] Dr Peter Nygh stated that the test for picking up state laws should indicate that such laws are picked up unless they conflict with a federal law according to the principles established under s 109 of the Constitution.[1616]

34.60 The general view was that s 79 should not include an 'interest analysis' test for the adoption of state law as surrogate federal law under s 79. Such a test would focus on the subject matter of the claim and ask whether the interests of the State or Territory are affected by the application of the statute to federal proceedings.[1617] The Law Council of Australia submitted that such a test would be difficult to draft, would not cover the wide variety of factors that might be relevant, and would be likely to lead to additional legal dispute.[1618]

34.61 Although this inquiry was confined to civil matters, a number of comments were made about the operation of s 68 JA, which relates to the law applicable in the exercise of federal criminal jurisdiction. Section 68 states that the laws of a State or Territory respecting the arrest and custody of offenders, and related procedures, shall be applied so far as they are applicable to persons who are charged with Commonwealth offences when state and territory courts exercise that jurisdiction. Most federal criminal offences are determined in state and territory courts. The general view was that s 68 was difficult to apply and had led to inconsistencies in treatment across Australia.[1619] It was not clear, for example, to

1612 D Jackson QC, *Consultation*, Sydney, 19 March 2001.
1613 South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001; R Garnett, *Consultation*, Melbourne, 16 February 2001.
1614 R Garnett, *Consultation*, Melbourne, 16 February 2001.
1615 Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.
1616 P Nygh, *Consultation*, Sydney, 12 February 2001.
1617 R Garnett, *Consultation*, Melbourne, 16 February 2001; Law Council of Australia, *Submission J037*, 6 April 2001; M Sexton SC, *Submission J009*, 23 February 2001.
1618 Law Council of Australia, *Submission J037*, 6 April 2001.
1619 R Meadows QC, *Consultation*, Perth, 22 March 2001; A Tokley, *Consultation*, 5 March 2001; South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001.

what extent s 68 picked up appeal rights provided for by state and territory law.[1620] It was remarked that s 68 allowed for differential treatment of federal criminal offences across the country on matters such as bail, the use of majority verdicts and sentencing.[1621]

Commission's Views

34.62 The Commission considers that there is a pressing need to clarify the terms and operation of ss 79 and 80. The two provisions are complex, confusing and lead to uncertainty in the application of the law. There was broad support for such a change in consultations and submissions.

34.63 The problems of complexity and uncertainty arise not merely from ambiguities and interpretational difficulties within each section but from the uncertain relationship between the sections. As discussed above, there is continuing debate as to which section should be given priority.

34.64 The Commission is of the view that these difficulties could be reduced by repealing ss 79 and 80 and replacing them with a single provision.

34.65 The function of the new section, like that of the existing provisions, should be to identify the circumstances in which gaps in federal law are to be filled by state or territory law when a court exercises federal jurisdiction. However, the ambiguous language and duplication of the current provisions should be removed.

34.66 The Commission considers that the new section should clearly identify the sources of law to be applied by a court exercising federal jurisdiction, and the order in which those sources are to be applied. The sources should include the Australian Constitution; relevant Commonwealth Acts and regulations; relevant state and territory Acts and regulations; and the common law of Australia. The specification of a hierarchy of sources would improve the structure and clarity of the provision. It would also provide better guidance to courts and parties as to the process to be considered in identifying the law applicable in federal jurisdiction.

34.67 The Commission also considers that the provision should define the circumstances in which certain state or territory laws are to be included or excluded from application as surrogate federal law, with a view to removing the difficulties that have arisen under the current law.

34.68 A persistent problem has been the extent to which state or territory laws are picked up with their meaning unchanged when applied in federal jurisdiction as surrogate federal law. The Commission considers that state and territory laws

1620 Australian Government Solicitor, *Consultation*, Canberra, 5 June 2000.
1621 South Australia Law Society and Bar Association, *Consultation*, Adelaide, 16 March 2001.

should be included notwithstanding that they may be expressed to apply only to courts of that State or Territory or to a particular court of that State or Territory.

34.69 This would eliminate the difficult and often futile task of attempting to determine whether state or territory legislation was intended to apply only to state or territory courts or to particular courts of the State or Territory. In many circumstances, state or territory legislatures will have given no consideration to the question whether certain rules should apply in the exercise of federal jurisdiction. Moreover, in the Commission's view, to rely on expressions of state legislative intention is to misconstrue the function of s 79 in specifying the law to be applied as surrogate federal law. The central question is not what the state legislature intends in respect of the exercise of federal jurisdiction but what the federal legislature intends in identifying a body of law to be picked up and applied by federal, state and territory courts exercising federal jurisdiction.

34.70 The Commission also considers that, when a court exercising federal jurisdiction is required to apply state or territory law as surrogate federal law, the state or territory laws to be applied should expressly exclude those that do not form part of the adjudicative process by which the court resolves the federal matter before it. This proposal is consistent with existing case law and is based on strong constitutional considerations. The law applied by a court to resolve a dispute involving the exercise of federal jurisdiction must be part of the 'matter' as that term is understood in Chapter III of the Constitution.

34.71 The Commission does not support the inclusion of an 'interest analysis' test for adoption of state and territory law as surrogate federal law. The Commission agrees with the submissions and consultations that such a test would be difficult to draft, hard to apply in practice, and likely to result in additional complexity and legal dispute. For example, ascertaining the 'interests' of a State or Territory might involve assessing broad political, financial and social factors, which would be a difficult and arguably inappropriate task for courts.

34.72 In relation to the test of irreconcilability, the Commission recommends that the *Judiciary Act* be amended to provide that when a court exercises federal jurisdiction, a state or territory law will not be applied as surrogate federal law if it is directly inconsistent with a Commonwealth law or if a Commonwealth law evinces an intention to cover the relevant field exclusively. This amendment would make the test compatible with that for inconsistency under s 109 of the Constitution.

34.73 The High Court has adopted the test of irreconcilability in recognition of the fact that the relevant inconsistency is not between a federal law and a state law, but between one federal law and another federal law (s 79), whose effect is to pick up state and territory law and apply it in federal jurisdiction. While the Commission does not doubt the correctness of the irreconcilability test as a matter of legal

principle, it considers that it is not the most appropriate test as a matter of policy. If a federal law evinces an intention to cover a particular field exclusively there appears to be no sound policy reason for declining to give effect to this intention by picking up a state law on a similar topic. The function of s 79 is to fill gaps in federal law when courts exercise federal jurisdiction. If federal law makes provision by entering a particular field and evincing its intention to do so exclusively, there should be no need to have recourse to surrogate federal law.

34.74 The Commission also considers that it would be desirable to review the analogous provisions in s 68, relating to the law applicable in the exercise of federal criminal jurisdiction. As noted above, comments were made during the course of the inquiry about the fact that s 68 is beset with problems similar to those arising under ss 79 and 80. This inquiry was confined to civil matters and, accordingly, the Commission makes no substantive recommendations regarding s 68. However, having regard to the comments made during the inquiry and the similarity of the issues, the Commission considers that the Attorney-General should order a review of s 68 with a view to making the application of state and territory law in federal criminal matters compatible with the approach suggested in this report in relation to ss 79 and 80.

Recommendation 34–1. Sections 79 and 80 of the *Judiciary Act* should be repealed and replaced by a single section that specifies the law to be applied by federal courts and by state and territory courts exercising federal jurisdiction. The new section should indicate the sources of law to which any court exercising federal jurisdiction should have regard and the order in which they should be applied. The sources should include:

(a) the Australian Constitution;

(b) relevant Commonwealth Acts and regulations;

(c) relevant state and territory Acts and regulations; and

(d) the common law of Australia.

Recommendation 34–2. In so far as a court exercising federal jurisdiction is required to apply state or territory laws as surrogate federal law pursuant to Recommendation 34–1:

(a) The state or territory laws to be applied should expressly include procedural and substantive laws, and statutory choice of law rules. They should also include state and territory laws notwithstanding that

they may be expressed to apply only to courts of that State or Territory or to a particular court of that State or Territory.

(b) The state or territory laws to be applied should expressly exclude those that do not form part of the adjudicative process by which the state or territory court resolves the federal matter before it.

Recommendation 34–3. The *Judiciary Act* should be amended to provide that when a court exercises federal jurisdiction, a state or territory law will not be applied as surrogate federal law pursuant to Recommendation 34–1 if:

(a) it is directly inconsistent with a Commonwealth law; or

(b) a Commonwealth law evinces an intention to cover the relevant field exclusively.

Recommendation 34–4. The Attorney-General should order a review of s 68 of the *Judiciary Act* with a view to making the application of state and territory law in federal criminal matters compatible with the approach in Recommendation 34–1.

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E Sykes and M Pryles, *Australian Private International Law* 3rd ed (1991) LBC, Sydney.

Part H

Judicial Power in the Territories

35. Judicial Power in Commonwealth Territories: Overview

Contents

35.1 The terms of reference require the Commission to report on a number of matters specifically relating to the jurisdiction of territory courts. Those matters are:

- the conferral of jurisdiction on territory courts under Commonwealth laws;
- the impact of self-government on the exercise of jurisdiction in territory courts under Commonwealth laws; and
- whether it is appropriate or necessary for provisions of Part IXA JA relating to the Northern Territory to be replicated for the Australian Capital Territory (ACT).

35.2 This aspect of the reference raises complex issues as to the nature of judicial power in Commonwealth Territories. The views taken on this issue by the High Court have shifted significantly since the Court first dealt with the issue in the early twentieth century. The point of debate is whether, or to what extent, the exercise of judicial power in the Territories is separate from the judicial power of the Commonwealth, defined and regulated by Chapter III of the Constitution. The reference also involves significant questions of policy regarding the extent to which the *Judiciary Act* should treat those Territories that have achieved a degree of self-government in the same manner as the States in respect of the exercise of judicial power.

Commonwealth Territories

35.3 The Commonwealth has a number of Territories under its control. These Territories vary dramatically in location and population, and may be self-governing or non-self-governing.

35.4 The Commonwealth currently has three self-governing and seven non-self-governing territories.[1622] The non-self-governing territories are:

- Ashmore and Cartier Islands;
- Australian Antarctic Territory;
- Christmas Island;
- Cocos (Keeling) Islands;
- Coral Sea Islands;
- Heard Island and McDonald Islands; and
- Jervis Bay.

35.5 Non-self-governing Territories lack their own legislature and, pursuant to Commonwealth law, are governed by the laws in force from time to time in a specified Australian State or Territory, usually the most geographically proximate. Each Territory is administered by a separate Act of Parliament, which specifies the relevant arrangement.[1623] Four of the above Territories are governed by the law in force in the ACT, two by the law of Western Australia, and one by the law of the Northern Territory.

35.6 There are three self-governing Territories in Australia — the ACT, Norfolk Island Territory and the Northern Territory. Self-governing Territories have local legislatures with wide but not unlimited power to make laws for that Territory.

35.7 The Commission's terms of reference direct it to consider the legal status of the ACT and the Northern Territory in particular. While there are important differences between them, these Territories are the largest in terms of population and the most similar to the States in their political structure, administration and judicial systems. The ACT has a population of approximately 310,000 and the Northern Territory has a population of approximately 193,000 — 1.6% and 1.0% of the national population respectively.[1624]

1622 The Territory of Papua and the Territory of New Guinea were territories of the Commonwealth until they achieved independence in 1975. The Commonwealth also exercised powers in relation to Nauru between 1920 and 1967, although it never became a Territory of the Commonwealth for the purposes of s 122 of the Constitution: R Garran (1935), 30; *Nauru Island Agreement Act 1919* (Cth); *Nauru Island Agreement Act 1932* (Cth); *Nauru Act 1965* (Cth); *Nauru Independence Act 1967* (Cth).

1623 *Ashmore and Cartier Islands Acceptance Act 1933* (Cth); *Australian Antarctic Territory Act 1954* (Cth); *Christmas Island Act 1958* (Cth); *Cocos (Keeling) Islands Act 1955* (Cth); *Coral Sea Islands Act 1969* (Cth); *Heard Island and McDonald Islands Act 1953* (Cth); *Jervis Bay Territory Acceptance Act 1915* (Cth).

1624 Australian Bureau of Statistics Population Distribution: <www.abs.gov.au/ausstats> (4 June 2001).

35.8 The legal status of Norfolk Island and non-self-governing Territories are not dealt with in detail in this report.[1625] It should be noted, however, that these Territories may be affected incidentally by changes to the law in force in the jurisdiction whose laws are picked up and applied in the specified Territory.

Australian Capital Territory

35.9 At the time of federation, the land that is now the ACT formed part of New South Wales. Pursuant to s 111 of the Constitution, the land was surrendered by the State and accepted by the Commonwealth with effect from 1 January 1911 in order to provide a Territory in which the seat of government could be located.[1626] In 1901 the Australian Constitution had left open the location of the seat of government, specifying in s 125 only that it had to be located in New South Wales and 'distant not less than 100 miles from Sydney'. Unlike the Northern Territory, the ACT probably cannot progress to statehood because it contains the seat of government of the Commonwealth,[1627] and because s 52(i) of the Constitution confers exclusive power on the Commonwealth to make laws for the seat of government.[1628]

35.10 Between 1911 and 1989, the ACT was governed directly by the Commonwealth under the *Seat of Government (Administration) Act 1910* (Cth). The ACT was granted self-government in 1989.[1629] The *Australian Capital Territory (Self-Government) Act 1988* (Cth) established the ACT as a separate body politic under 'the Crown by the name of the Australian Capital Territory' (s 7). The ACT Legislative Assembly has power to 'make laws for the peace order and good government of the Territory' (s 22), subject only to certain express exclusions. These exclusions include laws with respect to the acquisition of property other than on just terms, corporations, classification for the purposes of censorship (s 23(1)) and laws allowing euthanasia (s 23(1A)–(1B)).[1630] The Governor-General also has power to disallow territory laws within six months of their enactment (s 35).

35.11 Executive power in the ACT is exercised by the ACT Executive, which is made up of the Chief Minister and other Ministers of the government (ss 36–

1625 Norfolk Island became a Territory of the Commonwealth in 1914 under the *Norfolk Island Act 1913* (Cth) and has been granted a significant degree of self-government under the *Norfolk Island Act 1979* (Cth). See Australian Law Reform Commission, Discussion Paper No 64 (2000), para 7.17.

1626 *Seat of Government Surrender Act 1909* (NSW); *Seat of Government Acceptance Act 1909* (Cth). The determination of the seat of government is described in W Harrison Moore (1910), 590–592; J Ewens (1951).

1627 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 266, 273; *R v Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 331. See also the argument in *Spratt v Hermes* (1965) 114 CLR 226, 232.

1628 *Svikart v Stewart* (1994) 181 CLR 548, 560.

1629 The political process leading to the grant of self-government is described in P Grundy and others (1996).

1630 G Williams and M Darke (1997).

39, 43). Unlike the States and the Northern Territory, executive government in the ACT does not involve a representative of the Crown.[1631]

35.12 The ACT Supreme Court was created in 1933. From that date until 1992 the Supreme Court was established and empowered by a Commonwealth statute — the *Australian Capital Territory Supreme Court Act 1933* (Cth).[1632] Responsibility for the Court was transferred to the ACT in 1992 when that Act, renamed the *Supreme Court Act 1933* (ACT), was converted into a territory enactment subject to repeal or amendment by the territory legislature.[1633] At the same time, the continued jurisdiction of the ACT Supreme Court was protected by the inclusion of provisions in the *Australian Capital Territory (Self-Government) Act 1988* (Cth) relating to the jurisdiction of the Supreme Court and the removal of judicial officers (s 48A–48D). In particular, s 48A provides:

> 48A(1) The Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory.

35.13 Because this provision is located in a Commonwealth Act, the ACT Legislative Assembly cannot amend it. This has the effect that the jurisdiction of the ACT Supreme Court is entrenched so far as the ACT Legislative Assembly is concerned.[1634]

35.14 The ACT Supreme Court presently comprises a Chief Justice, three resident judges, a Master and nine additional judges who are judges of the Federal Court.[1635] The additional judges sit only when the workload of the ACT Supreme Court requires it and in practice they spend most of their time as Federal Court judges. Since 1993, a number of acting judges have been appointed.[1636]

35.15 The ACT Supreme Court also has jurisdiction in relation to the Jervis Bay Territory, the Australian Antarctic Territory and the Territory of Heard Island and McDonald Islands, being three other Territories in which ACT law is applied.[1637]

1631 G Lindell (1992), 13–15.

1632 The history of judicial power in the ACT is described in J Miles (1992); D Mossop (1999).

1633 *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 34; *ACT Supreme Court (Transfer) Act 1992* (Cth), s 13.

1634 See also *R v Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 363; compare J Miles (1992), 564.

1635 <http://www.supremecourt.act.gov.au> (12 July 2001).

1636 Most notably Carruthers AJ, the validity of whose appointment was challenged unsuccessfully in *R v Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322. See *Supreme Court Act 1933* (ACT), s 4A.

1637 A fourth, the Coral Sea Islands Territory, is governed by ACT law but jurisdiction is conferred on the courts of Norfolk Island. See *Coral Sea Islands Act 1969* (Cth), s 8.

35.16 As discussed in Chapter 39, appeals from the ACT Supreme Court are presently to a Full Court of the Federal Court,[1638] but the establishment of an ACT Court of Appeal is expected.

Northern Territory

35.17 At the time of federation what is now the Northern Territory formed part of South Australia. It was surrendered by South Australia and accepted by the Commonwealth with effect from 1 January 1911 — the same day on which the ACT became a Commonwealth Territory.[1639] Between 1911 and 1978, the Northern Territory was governed by the Commonwealth pursuant to the *Northern Territory (Administration) Act 1910* (Cth), although there had been increasing local involvement in government over time.[1640]

35.18 The Northern Territory was granted self-government in 1978.[1641] It is possible that the Northern Territory could move beyond self-government and be admitted as a new State pursuant to s 121 of the Constitution.[1642] There have been considerable efforts on the part of the government of the Territory to promote the move to statehood, including the drafting of a proposed Constitution and the holding of an unsuccessful referendum on the issue.[1643]

35.19 Under the *Northern Territory (Self-Government) Act 1978* (Cth), the Territory is established as a body politic under 'the Crown by the name of the Northern Territory of Australia' (s 5). The Legislative Assembly has general legislative power, subject to the requirement that either the Administrator or the Governor-General assent to those laws (ss 6–8) and to the power of the Governor-General to disallow laws (s 9). Executive power is vested in the Administrator, the Executive Council and the Ministers of the Territory (ss 31–34). There is thus a significant difference between the ACT and the Northern Territory in the area of executive power. There is no representative of the Crown involved in government in the ACT, whereas there is, in the form of the Administrator, in the Northern Territory.

35.20 The Northern Territory Supreme Court was established by the Northern Territory *Supreme Court Ordinance 1911,* which was repealed and replaced by the *Northern Territory Supreme Court Act 1961* (Cth). At the time of self-government,

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1638 s 24 FCAA. But see *Kelly v Apps* [2001] ACTSC 27 (Unreported, Supreme Court (ACT), Miles CJ, 4 April 2001), stating at [17] that an appeal can be taken directly to a Full Court of the ACT Supreme Court. See further Chapter 39.

1639 *Northern Territory Surrender Act 1907* (SA); *Northern Territory Acceptance Act 1910* (Cth).

1640 H Renfree (1984), 749; R Lumb (1978), 555–556.

1641 *Northern Territory (Self-Government) Act 1978* (Cth).

1642 The potential operation of s 121 in relation to the Northern Territory is discussed in P Loveday and P McNab (1988), especially Appendices 2–4.

1643 R Gray (1998); A Heatley and P McNab (1998); A Heatley and P McNab (1999).

responsibility for the Court was passed from the Commonwealth to the Territory. This involved the repeal of the Commonwealth Act and the enactment by the territory legislature of the *Supreme Court Act 1979* (NT). The Northern Territory Supreme Court presently comprises a Chief Justice, five judges, two additional judges and a Master.[1644] There is also one acting judge appointed pursuant to s 32(2) of the *Supreme Court Act 1979* (NT).

35.21 There are significant differences between the ACT and the Northern Territory in terms of judicial power. The jurisdiction of the ACT Supreme Court is described in the Commonwealth legislation granting self-government.[1645] However, the scope of the Northern Territory Supreme Court's jurisdiction is not generally defined in Commonwealth legislation (though specific aspects are defined in Part IXA JA), but by the *Supreme Court Act 1979* (NT).[1646]

35.22 Until 1986, appeals from the Northern Territory Supreme Court were taken to the Federal Court and then to the High Court. Since that time, appeals from a single judge of the Supreme Court have been to the Court of Appeal of the Northern Territory[1647] and then, pursuant to s 35AA JA, to the High Court (see Chapter 39).

Judicial Power in Commonwealth Territories

The territories power

35.23 The constitutional basis for the government of all Territories is s 122 of the Constitution. That is so in the case of the ACT, even though it contains the seat of government.[1648] Section 122 provides:

> The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

35.24 This power has been accepted as a plenary power to make laws for the government of the Territories, subject only to a requirement that there be a sufficient nexus between the law and the Territory.[1649] In *Spratt v Hermes,* Barwick CJ said s 122:

1644 <http://www.nt.gov.au/ntsc/judges.html> (18 July 2001).

1645 *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 48A.

1646 The courts of the Northern Territory also exercise jurisdiction in relation to the Territory of Ashmore and Cartier Islands: *Ashmore and Cartier Islands Acceptance Act 1933* (Cth), s 12.

1647 *Supreme Court Act 1979* (NT), s 51.

1648 *R v Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.

1649 *Buchanan v Commonwealth* (1913) 16 CLR 315, 327; *R v Bernasconi* (1915) 19 CLR 629, 637; *Porter v The King; Ex parte Yee* (1926) 37 CLR 432, 440, 448; *Australian National Airways Pty Ltd v Common-*

> is not only plenary but is unlimited by reference to subject matter. It is a complete power to make laws for the peace, order and good government of the territory ... This is as large and universal a power of legislation as can be granted.[1650]

35.25 In *Berwick Ltd v Gray* Mason J, with whom the other justices agreed, said:

> The power conferred by s 122 is a plenary power capable of exercise in relation to Territories of varying size and importance which are at different stages of political and economic development. It is sufficiently wide to enable the passing of laws providing for the direct administration of a Territory by the Australian Government without separate territorial administrative institutions or a separate fiscus; yet on the other hand it is wide enough to enable Parliament to endow a Territory with separate political, representative and administrative institutions, having control of its own fiscus.[1651]

35.26 There are two general problems in the interpretation and application of s 122. The first is whether the section must be read down by reason of the limitations found elsewhere in the Constitution. For example, does the Commonwealth have plenary power to acquire property in the Territories, or is it limited by the words of s 51(xxxi), namely, that the acquisition be on 'just terms'?[1652] Even if s 122 is not construed as being qualified by limitations found elsewhere in the Constitution, there is a second problem of how to deal with Commonwealth laws that purport to apply throughout Australia but which could only be valid if enacted for the Territories. The choice for the courts in such cases is to read down the laws so that they apply only in the Territories or to strike them down altogether.[1653]

35.27 In determining the appropriate scope and operation of the *Judiciary Act,* it is also important to understand the relationship between the power to make laws for the government of a Territory in s 122, and the 'judicial power of the Commonwealth' referred to in s 71, and described in the remaining provisions of Chapter III of the Constitution.[1654] The important question is whether the exercise of judicial power in a Commonwealth Territory is part of the judicial power of the Commonwealth or not. If the power in s 122, including the power to make laws about the exercise of judicial power in Territories, is not qualified by the requirements relating to the judicial power of the Commonwealth identified in Chapter III, then the Commonwealth Parliament is not constrained in the arrangements that it

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wealth (1945) 71 CLR 29, 62; *Lamshed v Lake* (1958) 99 CLR 132, 141, 153; *Spratt v Hermes* (1965) 114 CLR 226, 242; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591, 625; *Attorney-General (WA) ex rel Ansett Transport v Australian National Airlines Commission* (1976) 138 CLR 492, 514, 526; *Berwick Ltd v Gray* (1976) 133 CLR 603, 607; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, 266, 269.

1650 *Spratt v Hermes* (1965) 114 CLR 226, 242.

1651 *Berwick Ltd v Gray* (1976) 133 CLR 603, 607.

1652 Compare *Teori Tau v Commonwealth* (1969) 119 CLR 564 with *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

1653 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.

1654 The relationship between s 122 and the rest of the Constitution is discussed in P Nygh (1963); L Zines (1966); C Comans (1971); Z Cowen and L Zines (1978), 141–173; C Horan (1997); A Hopper (1999).

makes for the exercise of judicial power in the Territories. If, on the other hand, territory judicial power is within the scope of Chapter III, then that power must be given in accordance with Chapter III, or at least in accordance with those provisions of Chapter III that apply to it. Various provisions of Chapter III require that:

- judicial power be exercised only by the types of courts specified in s 71 and not by other bodies;
- judges hold tenure until age 70 (or such lesser age as is prescribed by Parliament) unless removed by the Governor-General on an address of both Houses of Parliament (s 72);
- there be a constitutional right of appeal from certain courts to the High Court (s 73(ii)); and
- trials on indictment for offences against a law of the Commonwealth must be by jury (s 80).

Early decisions on judicial power

35.28 The most influential early decision on the relationship between Chapter III and the exercise of judicial power in the Territories was *R v Bernasconi.*[1655] The question in that case was whether s 80 of the Constitution (which requires that trials on indictment be by jury) applied to a trial in the Territory of Papua. The High Court unanimously held that it did not, but went further and suggested that Chapter III was wholly inapplicable to the exercise of judicial power in the Territories. Griffith CJ said:

> Chapter III is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to the territories.[1656]

35.29 This view involved a strict separation between the exercise of judicial power in respect of Territories and the judicial power of the Commonwealth dealt with in Chapter III. In *Re Judiciary and Navigation Acts,*[1657] the High Court held that Chapter III was an exhaustive statement of the judicial power that could be exercised by Chapter III courts. Combined with the *Bernasconi* approach, which suggested that Chapter III had no application to the Territories, this would mean that Chapter III courts, including the High Court, could not exercise jurisdiction in territory matters. However, despite *Re Judiciary and Navigation Acts*, the High Court held in *Porter v The King; Ex parte Yee*[1658] that jurisdiction to hear appeals

1655 *R v Bernasconi* (1915) 19 CLR 629.
1656 Ibid, 635.
1657 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.
1658 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432.

from territory courts could be given to a Chapter III court — in that case, the High Court.

35.30 The approach of the High Court to these issues in the 1920s was not uniform and involved an apparent inconsistency with *Re Judiciary and Navigation Acts.*[1659] Nevertheless, in later years, the pragmatic interpretation adopted in *Porter* was accepted and affirmed in a series of cases,[1660] including by the High Court and the Privy Council in the *Boilermakers' Case*.[1661] The accepted position was thus that the exercise of judicial power in Territories was outside Chapter III, although jurisdiction in appeals from territory courts could be vested in Chapter III courts.

35.31 The approach in these cases, which emphasised the separation of the territories power from the rest of the Constitution, was also adopted in cases dealing with subjects other than judicial power. In *Teori Tau v Commonwealth*[1662] it was held that the requirement in s 51(xxxi) of the Constitution, namely, that any Commonwealth law for the acquisition of property provide 'just terms', did not qualify the power of the Commonwealth to acquire property in Territories pursuant to s 122 of the Constitution.[1663] This was consistent with the approach that characterised s 122 as separate from and not qualified by the 'federal' provisions of the Constitution, namely, those that distributed powers between the Commonwealth and the States.

35.32 Following these decisions, the High Court held in *Spratt v Hermes*[1664] that s 72 of the Constitution (which provides for the tenure of federal judges) did not apply to the appointment of magistrates in the ACT. This was because the Magistrates Court is not a federal court within the meaning of that section. As a result, there was no need to give territory magistrates and judges life tenure. Moreover, they could be removed by means other than an address of both Houses of the Commonwealth Parliament.

35.33 In *Capital TV and Appliances Pty Ltd v Falconer*[1665] the High Court held that the Supreme Court of the ACT was neither a federal court nor a court exercising federal jurisdiction for the purposes of Chapter III. As a result, there was

1659 *Mainka v Custodian of Expropriated Property* (1924) 34 CLR 297 held that the Central Court of New Guinea was a federal court for the purposes of s 73 of the Constitution. *Edie Creek Pty Ltd v Symes* (1929) 43 CLR 53 held the opposite.

1660 *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582, 584-585; *Ffrost v Stevenson* (1937) 58 CLR 528, 556, 566; *Waters v Commonwealth* (1951) 82 CLR 188; *Lamshed v Lake* (1958) 99 CLR 132, 142.

1661 *R v Kirby; Ex parte the Boilermakers' Society of Australia* (1956) 94 CLR 254, 290; *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 ('*Boilermakers Case*'), 545.

1662 *Teori Tau v Commonwealth* (1969) 119 CLR 564.

1663 Ibid, 570.

1664 *Spratt v Hermes* (1965) 114 CLR 226.

1665 *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.

no constitutional right of appeal from that Court to the High Court pursuant to s 73(ii) of the Constitution. Any right of appeal needed to be granted by statute.

35.34 The cases of *Spratt* and *Capital TV and Appliances* reluctantly confirmed the earlier approach that characterised the exercise of judicial power in the Territories as separate from the judicial power of the Commonwealth, as described in Chapter III. However, since 1997 that approach has been undermined by a series of High Court decisions, which reject the separation of territory judicial power from Chapter III.

Recent decisions on judicial power

35.35 *Kruger v Commonwealth*[1666] was a challenge by Northern Territory Aborigines to the lawfulness of their removal as children from their parents, and their detention in institutions or reserves for Aboriginal people. One issue that arose was whether the children could have been detained without the exercise of judicial power in accordance with Chapter III of the Constitution. This raised two questions: (a) whether or not the removal and detention was something that could only be achieved by the exercise of judicial power; and (b) whether Chapter III applied in the Northern Territory so as to require that such judicial power be exercised by a Chapter III court. Three of the six justices indicated that they were attracted by the proposition that the exercise of judicial power in Territories was governed by Chapter III and, in particular, by the separation of powers implied from the structure of the Constitution.[1667] However, because those justices held that the removal and detention of the children in the circumstances of the case did not involve the exercise of judicial power,[1668] it was unnecessary for this issue to be decided. The other three justices rejected the application of Chapter III to the exercise of judicial power in the Territories.[1669]

35.36 Soon after this decision, and despite the decision of *Teori Tau v Commonwealth*,[1670] the Court held in *Newcrest Mining (WA) Ltd v Commonwealth*[1671] that a Commonwealth law operating in the Northern Territory, which incorporated certain mining leases into Kakadu National Park without compensation on just terms, was invalid. In doing so, three of the seven justices held that *Teori Tau* was wrong and should not be followed.[1672] The majority relied upon the fact that the law in question was supported not only by s 122 of the Constitution but by the external affairs power (s 51(xxix)) and therefore incorporated some 'federal' power, which could pick up the operation of s 51(xxxi). However, the

1666 *Kruger v Commonwealth* (1997) 190 CLR 1.
1667 Ibid, 80–84 (Toohey J), 107–109 (Gaudron J), 174–176 (Gummow J). The application of the separation of powers doctrine to state courts is discussed in Chapter 6.
1668 Ibid, 84–85 (Toohey J), 109–111 (Gaudron J), 161–162 (Gummow J).
1669 Ibid, 43–44 (Brennan CJ), 62 (Dawson J), 141–142 (McHugh J).
1670 *Teori Tau v Commonwealth* (1969) 119 CLR 564.
1671 *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513.
1672 Ibid, 565 (Gaudron J), 613–614 (Gummow J), 651–652 (Kirby J).

doubts expressed about *Teori Tau* and the approach adopted were consistent with a trend towards seeing s 122 as qualified by other provisions of the Constitution, and not as a separate and distinct plenary power, which operated free from those qualifications.

35.37 In 1999, *Northern Territory v GPAO*[1673] raised the issue of whether the Family Court, when hearing a matter in the Northern Territory involving an ex-nuptial child, was exercising 'federal jurisdiction' within the terms of s 79 JA. A majority of the Court held that, when exercising judicial power in a matter arising under a law made by the Commonwealth Parliament pursuant to s 122 of the Constitution, the Family Court was exercising 'federal jurisdiction' within the meaning of s 79 JA. The majority of the Court recognised that matters arising under laws made pursuant to s 122 were 'matters arising under a law made by the Parliament' within the terms of s 76(ii) of the Constitution.[1674]

35.38 *Spinks v Prentice*[1675] involved a challenge to the validity of the provisions of the *Corporations Act 1989* (Cth) — a law made for the ACT pursuant to s 122 — which invested jurisdiction in the Federal Court. The High Court followed *Northern Territory v GPAO* and held that matters arising under a Commonwealth law made pursuant to s 122 could be invested in a federal court pursuant to s 77(i) of the Constitution because they fell within s 76(ii) of the Constitution.

35.39 Finally, in *R v Governor, Goulburn Correctional Centre; Ex parte Eastman*[1676] there was a direct challenge to the decisions of the High Court in *Spratt* and *Capital TV and Appliances*. In that case, Eastman sought a writ of *habeas corpus* to have himself released from prison following his trial and conviction for murder by an acting judge of the ACT Supreme Court. It was argued that only persons holding the tenure required by s 72 of the Constitution could exercise judicial power in the ACT. This argument was rejected by a majority of six to one, although the different reasoning adopted by the majority justices is significant.

35.40 Three of the justices, Gleeson CJ, McHugh and Callinan JJ, held that *Spratt* and *Capital TV and Appliances* should not be overruled, at least in so far as the narrow question of the application of s 72 to territory courts was concerned.[1677] Gaudron J also considered that *Spratt* and *Capital TV and Appliances* should not be overruled in respect of the application of s 72, but on the basis that judicial power in the Territories formed part of the judicial power of the Commonwealth within

1673 *Northern Territory v GPAO* (1999) 196 CLR 553.
1674 Ibid, 589–592 (Gleeson CJ and Gummow J), 604–605 (Gaudron J), 650–651 (Hayne J).
1675 *Spinks v Prentice* (1999) 198 CLR 511.
1676 *R v Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.
1677 Ibid, 331–333.

the meaning of s 71 of the Constitution, and territory courts were courts invested with federal jurisdiction within the terms of that section.[1678]

35.41 Gummow and Hayne JJ adopted a similar view in a joint judgment. Their Honours considered the 'preferable construction' of the Constitution to be that a territory court is not a federal court but one of the 'other courts' that may be invested with federal jurisdiction; the power to invest the jurisdiction coming from s 122.[1679] Their Honours did not need to decide this point finally because they considered that, at least by 1995, the ACT Supreme Court was, in relevant respects, not 'a court created by the Parliament' within the meaning of s 72 of the Constitution. As a result, even if it were otherwise applicable, s 72 would not apply to an acting judge of the Court.[1680]

35.42 Kirby J dissented. His Honour would have overruled both *Spratt* and *Capital TV and Appliances* and held that territory courts were federal courts within the meaning of ss 71 and 72 of the Constitution.[1681]

Consequences of recent decisions for this inquiry

35.43 It is clear from the decisions in *Kruger, GPAO*, *Spinks* and *Eastman* that the High Court has moved away from its earlier insistence on the separation of judicial power in the Territories from the judicial power of the Commonwealth. It would be consistent with the new approach to hold that either the whole or part of the exercise of judicial power in the Territories forms part of the judicial power of the Commonwealth referred to in s 71 of the Constitution. However, it is not clear whether the more recent cases demonstrate a clear trend in judicial decisions or merely a pragmatic reconsideration of some difficult legal questions on a case-by-case basis. In the view of the Solicitor-General for South Australia, Brad Selway QC:

> There is no coherent answer to the relationship between Section 122 and Chapter III. Nevertheless, it is plain following *Ex parte Eastman* that the Court is not going to attempt a major rewrite of the previous cases, no matter how unsatisfactory they may be.[1682]

35.44 If territory judicial power were held to form part of the judicial power of the Commonwealth, then federal legislative amendments might be necessary. For example, it would probably be necessary to ensure that a Commonwealth statute, rather than a territory statute, invests federal jurisdiction in territory courts. That is because s 71 of the Constitution requires the Commonwealth Parliament to invest

1678 Ibid, 338–340.
1679 Ibid, 348–349.
1680 Ibid, 349–350.
1681 Ibid, 365–368.
1682 B Selway QC, *Submission J028*, 20 March 2001.

federal jurisdiction, and the investiture of jurisdiction in a territory court by a territory legislature pursuant to self-government legislation may not be sufficient to satisfy this requirement.

35.45 Moreover, if the High Court were to hold that territory judicial power formed part of the judicial power of the Commonwealth, then it might be subject to the separation of powers doctrine confirmed in the *Boilermakers' case*.[1683] This would also have implications for the scope of legislation investing judicial powers. It would need to be clear that such powers could be invested only in bodies that were 'courts' for the purposes of s 71 of the Constitution.

35.46 Until the High Court reaches a settled position on the relationship between territory judicial power and the judicial power of the Commonwealth, doubts will remain. The approach that should be taken in the *Judiciary Act* to the exercise of judicial power in the Territories, which is explored in the following chapters, will thus be subject to some uncertainty.

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1683 *R v Kirby; Ex parte the Boilermakers' Society of Australia* (1956) 94 CLR 254.

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36. Conferring Federal Jurisdiction on Territory Courts

Contents

Parity Between the Territories and the States

36.1 The *Judiciary Act* contains a range of provisions relating to the exercise of judicial power in the Northern Territory, principally in Part IXA. The Commission's terms of reference ask whether these provisions should be replicated for the ACT. The answer to that question depends on the broader question of whether the Territories, or some of them, should be treated in a similar manner to the States in the arrangements made for the exercise of federal judicial power. Accordingly, this Chapter addresses the question whether federal jurisdiction should be conferred on territory courts in the same manner in which federal jurisdiction is invested in state courts.

36.2 At the time of federation in 1901 the Commonwealth had no Territories. As described in Chapter 35, in 1911 the ACT and the Northern Territory were carved out of the area of the original states of NSW and South Australia, respectively. During the course of their development, the ACT and the Northern Territory have gradually been given more autonomy, leading to the granting of self-government in 1978 in the Northern Territory and 1989 in the ACT. They had previously been granted more limited forms of local input into their governments[1684] and steps had been taken to put their residents on a more equal footing with residents of the States by granting them both political representation in the Commonwealth Parliament[1685] and a role in constitutional referendums.[1686]

1684 R Lumb (1978), 555; G Nicholson (1992), 51–52; P Grundy and others (1996), 7, 35–40, 218–219.

1685 *Northern Territory Representation Act 1922* (Cth); *Australian Capital Territory Representation Act 1948* (Cth); *Australian Capital Territory Representation (House of Representatives) Act 1973* (Cth); *Senate (Representation of Territories) Act 1973* (Cth). See also *Western Australia v Commonwealth* (1975) 134 CLR 201; *Queensland v Commonwealth* (1977) 139 CLR 585.

1686 *Constitution Alteration (Referendums) Act 1977* (Cth).

36.3 The schemes for granting self-government to the ACT and the Northern Territory put those polities in a similar position to the States in many respects. Both Territories have plenary legislative power to make laws for the peace, order and good government of their jurisdictions, subject only to specific exclusions, which are described in Chapter 35. Some of these exclusions are intended to put the Territories in the same position as the States. For example, neither the ACT nor the Northern Territory has legislative power to impose duties of excise, just as s 90 of the Constitution removes that power from the States.[1687] The rationale for the limitation is that the ACT and the Northern Territory should be part of the free trade area created by the Constitution because they were carved out of the area of the original States.[1688] Other sections of the Acts granting self-government to these Territories seek to replicate other constitutional limitations on state legislative power, such as the prohibition on the States raising or maintaining a naval or military force, or coining money.[1689]

36.4 However, some limitations on the legislative power of the Territories put them in a different and more restricted position than the States. These limitations tend to be greater in the case of the ACT because it contains the seat of government.[1690] For example, the Commonwealth has used the ACT as a base for national legislative schemes such as the *Corporations Law* and the scheme for classification of films, publications and computer games. These fields are consequently excluded from the scope of the legislative powers conferred on the ACT Legislative Assembly.[1691] The Commonwealth also retains significant control over land management in Canberra.[1692] A further example of disparity between the States and the Territories is that neither the ACT nor the Northern Territory legislature is empowered to make laws for the acquisition of property otherwise than on just terms.[1693] Under s 51(xxxi) of the Constitution, this limitation currently applies to acquisitions by the Commonwealth but not to those by the States.

36.5 Although much Commonwealth legislation treats the ACT and the Northern Territory in the same manner as States,[1694] it is clear that the Commonwealth retains greater legislative control over the Territories because of their different constitutional status. An example of this was Commonwealth legislation

1687 *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 69; *Northern Territory (Self-Government) Act 1978* (Cth), s 49.

1688 *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; compare D Mossop (1998).

1689 *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 23(1)(d), (e), replicating ss 114 and 115 of the Constitution as they apply to the States.

1690 Ibid, s 23.

1691 *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

1692 *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth).

1693 *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 23(1)(a); *Northern Territory (Self-Government) Act 1978* (Cth), s 50.

1694 For example, *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 69A(1); *Northern Territory (Self-Government) Act 1978* (Cth), s 51(1); s 78AA JA.

that followed the enactment in the Northern Territory of the *Rights of the Terminally Ill Act 1995* (NT). That Act allowed persons with a terminal illness to undergo active voluntary euthanasia in limited circumstances. In response to this, the Commonwealth Parliament passed the *Euthanasia Laws Act 1997* (Cth), which not only overrode the effect of the Northern Territory Act but also removed the power to enact euthanasia laws from the legislative assemblies of the Northern Territory, the ACT and Norfolk Island. The passage of the *Euthanasia Laws Act 1997* emphasised that the Commonwealth Parliament retains power to legislate in relation to the Territories, despite the grant of self-government and the views of the local legislature.[1695]

Federal Jurisdiction in Territory Courts — Current Law

36.6 Chapter 6 of this Report discusses the manner in which federal jurisdiction is invested in state courts pursuant to s 77(iii) of the Constitution. Federal jurisdiction is also invested in territory courts, although the mechanisms for doing so are obscure and differ between the ACT and the Northern Territory.

36.7 In relation to the Northern Territory, s 67C JA provides:

> The jurisdiction of the Supreme Court of the Territory extends to: …
>
> (c) matters in which the Supreme Court of the Territory would, but for the repeal of the *Northern Territory Supreme Court Act* 1961, have jurisdiction by virtue of subsection 15(2) of that Act.

36.8 Section 15 of the now repealed *Northern Territory Supreme Court Act 1961* (Cth) provides as follows:

> 15(1) The Supreme Court –
>
> (a) has, subject to this and any other Act and to any Ordinance, in relation to the Territory, the same original jurisdiction, both civil and criminal, as the Supreme Court of South Australia had in relation to the State of South Australia immediately before 1 January 1911; …
>
> (c) has jurisdiction in matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth, being matters arising in, or under the laws in force in the Territory; …
>
> (2) The jurisdiction of the Supreme Court of South Australia referred to in paragraph (a) of the last proceeding sub-section includes jurisdiction that the Court had as federal jurisdiction.

1695 G Williams and M Darke (1997). A similar issue has arisen in relation to mandatory sentencing in the Northern Territory. See Senate Legal and Constitutional References Committee (2000).

36.9 The combined effect of s 67C(c) JA and s 15 of the *Northern Territory Supreme Court Act 1961* is to include in the jurisdiction of the Northern Territory Supreme Court the jurisdiction that was invested in the Supreme Court of South Australia on 1 January 1911, including the latter court's federal jurisdiction.[1696]

36.10 There is no provision equivalent to s 67C(c) in relation to the ACT. However, s 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) arguably confers broad federal jurisdiction on the ACT Supreme Court.[1697] The section states that the ACT Supreme Court has all jurisdiction, whether original or appellate, necessary for the administration of justice in the Territory.[1698] Where a matter arises in federal jurisdiction, which relates to the administration of justice in the Territory, s 48A may be construed as sufficient to give the ACT Supreme Court jurisdiction to determine the matter.

Options for reform

36.11 The extent to which state courts are invested with federal jurisdiction is determined principally by the *Judiciary Act*. Currently, conditions are imposed on that investiture, such as those in s 39(2) JA. As discussed in detail in Chapter 6, the Commission recommends that the jurisdiction of state courts be extended by removing the exclusivity of the High Court's jurisdiction under s 38 JA. The Commission also recommends removing the conditions on the exercise of federal jurisdiction by state courts imposed by s 39(2) JA, other than that relating to the qualifications of state magistrates.

36.12 In consultations, the Commission canvassed several approaches to reforming the law governing the exercise of federal judicial power in territory courts. One approach is to decide on a regime for the Territories which differs from that adopted in relation to the States. It is also possible to treat some Territories, such as the ACT and the Northern Territory, in a similar fashion to States and others in a different fashion, more appropriate to their dependent circumstances. Finally, it is possible to differentiate between the ACT and the Northern Territory on the basis that the ACT, while self-governing, contains the seat of government whereas the Northern Territory does not.

Submissions and Consultations

36.13 The Commission heard overwhelming support in its consultations and submissions for reforms that were aimed at achieving parity between the States and Territories regarding the conferral of federal jurisdiction on their courts. Generally,

1696 Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001.
1697 D Mossop, *Submission J025*, 15 March 2001.
1698 s 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) is quoted in Chapter 35.

amendments to the *Judiciary Act* that removed or minimised differences between the States and Territories were favoured. In some circumstances, this might result in paring back the existing jurisdiction of territory courts, in others in extending that jurisdiction.[1699]

36.14 In his submission to the Commission on this issue, the Chief Justice of the ACT, Chief Justice Miles, stated:

> The desirable policy goal would be that the citizens of the Australian Capital Territory and the Northern Territory should enjoy the same rights of access to justice as the citizens of other parts of the federation, and accordingly the *Judiciary Act* should, as far as constitutionally possible, place both the ACT and the Northern Territory in the same position as the states, and the allocation between federal courts and territory courts should, so far as the Constitution permits, be done in the same way as federal jurisdiction is presently allocated between federal courts and state courts. It would follow from this proposition that we would … [recommend] that the ACT Supreme Court and the Northern Territory Supreme Court be in the same position as a state Supreme Court.[1700]

36.15 The Chief Justice of the Northern Territory, Chief Justice Martin, distinguished the ACT as being in a different constitutional position from that of the Northern Territory but remarked as follows:

> It is a logical 'next step' to invest the courts of the Northern Territory with general federal jurisdiction in a similar manner to the States. This step would be consistent with both the legal and political direction in which the Northern Territory is headed. Such a result should not depend upon the uncertainty of waiting for the High Court to reach a settled position on the issue.[1701]

36.16 In similar vein, Wendy Harris of the Victorian Bar stated in her submission that:

> There does not seem to be any good policy reason why the respective jurisdictions of the state Supreme Courts and the Northern Territory and ACT Supreme Courts should differ in this respect and it is probably desirable that there should be some degree of conformity across the Commonwealth. Accordingly, it is suggested that the *Judiciary Act* ought to be amended to confer on each of the Northern Territory and ACT Supreme Courts jurisdiction with respect to matters within the scope of ss 75 and 76 of the Constitution, as set out in section 39 of the *Judiciary Act* in respect of state courts.[1702]

1699 D O'Brien, *Consultation*, Canberra, 22 February 2001; Federal Court of Australia, *Consultation*, Melbourne, 6 March 2001; Supreme Court of the Northern Territory, *Consultation*, Darwin, 1 March 2001; Attorney-General's Department (NT), *Consultation*, Darwin, 1 March 2001; Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001; Supreme Court of the ACT, *Consultation*, Canberra, 23 February 2001; D Mossop, *Consultation*, Canberra, 23 February 2001.

1700 Supreme Court of the ACT, *Submission J018*, 7 March 2001.

1701 Supreme Court of the Northern Territory, *Submission J029*, 15 March 2001.

1702 W Harris, *Submission J014*, 26 February 2001.

36.17 The Law Council stated:

> The *Judiciary Act* should invest the courts of the Northern Territory and the ACT with jurisdiction in matters within the scope of ss 75 and 76 of the Constitution only to the extent that this is presently done in relation to the state courts.[1703]

36.18 David Mossop of the ACT Bar was of a similar view:

> The structure of the Australian federation over the last 25 years has gradually evolved so that in relation to financial and political aspects of government the two self governing Territories are in a similar position to States. That may or may not be a desirable outcome but it is empirically one that has occurred. Given that development, unless there are some good reasons specific to those Territories why there should not be a uniform regime in relation to the exercise of federal judicial power as between the States and Territories then the goal should be for uniform scheme.[1704]

36.19 Many consultations and submissions acknowledged that the constitutional position of the States and Territories differs. They also acknowledged that the impact of these differences on the exercise of judicial power is not entirely settled (see Chapter 35). However, a common view was that these uncertainties should not stand in the way of desirable reforms, at least where those reforms would not be jeopardised by any changed constitutional understanding. This view was expressed by Wendy Harris in the following terms:

> I do not think that it is appropriate to postpone any desirable amendments to the *Judiciary Act* concerning the nature of judicial power in the territories until the High Court clarifies the constitutional position of territory courts. It may be a long time until a suitable vehicle arises which could facilitate "clarification" and, even then, there can be no guarantee of a conclusive or authoritative decision … It would seem more appropriate to make such amendments to the *Judiciary Act* as may be necessary to ensure that, while the law is in a state of flux, the jurisdiction of territory courts is not left uncertain.[1705]

Commission's Views

36.20 The Commission considers that the views expressed in the course of consultations and submissions have substantial merit. Parity of treatment would ensure that federal jurisdiction is treated as a national jurisdiction, and that it is exercised uniformly throughout the States and Territories that comprise the Commonwealth. It would also have the advantage of removing the arcane jurisdictional provisions that currently apply to the Northern Territory, and the uncertainties that surround the exercise of federal jurisdiction in ACT courts.

1703 Law Council of Australia, *Submission J037*, 6 April 2001. See also P Brazil, *Submission J010*, 22 February 2001.

1704 D Mossop, *Submission J025*, 15 March 2001.

1705 W Harris, *Submission J014*, 26 February 2001.

36.21 Accordingly, the Commission recommends that the courts of the ACT and the Northern Territory be treated in a similar fashion to those of the States in respect of the exercise of federal jurisdiction. A necessary corollary is that the ACT and the Northern Territory should themselves be treated alike in the arrangements made for the exercise of the judicial power of the Commonwealth.

36.22 The Commission considers that the most effective means of achieving this goal in respect of the Northern Territory is to repeal s 67C(c) JA. Federal jurisdiction should then be conferred directly on the courts of the Northern Territory by extending the operation of s 39 JA to the Territory. Similarly, the operation of s 39 should be extended to the ACT.

36.23 In Chapter 6, the Commission makes a number of recommendations regarding the exercise of federal jurisdiction by state courts. In particular, the Commission recommends that two of the conditions presently imposed by s 39(2) on the exercise of federal jurisdiction be repealed. The Commission also recommends that a third condition be amended to require that federal jurisdiction may be exercised by state magistrates only if the magistrate is qualified for admission as a legal practitioner in the Supreme Court of that State. The arguments for parity compel the same conclusion in relation to the ACT and the Northern Territory. Accordingly, the Commission recommends that s 39(2)(d) be extended to the courts of these Territories.

36.24 Subsequent chapters set out amendments to other provisions of Part IXA JA, such as are necessary to ensure parity of treatment in the exercise of federal judicial power in state and territory courts.

Recommendation 36–1. Section 39 of the *Judiciary Act* should be amended to invest federal jurisdiction in the courts of the ACT and the Northern Territory in the same manner and to the same extent as federal jurisdiction is invested in the courts of the States.

Recommendation 36–2. Section 39(2)(d) of the *Judiciary Act* should be amended to provide that federal jurisdiction may be exercised by a territory magistrate only if the magistrate is eligible for admission as a legal practitioner in the Supreme Court of that Territory. [See Recommendation 6–6 in relation to the States.]

Recommendation 36–3. Section 67C(c) of the *Judiciary Act*, which confers jurisdiction on the Supreme Court of the Northern Territory in matters that were part of the Supreme Court's jurisdiction under s 15(2) of the *Northern Territory Supreme Court Act 1961*, should be repealed.

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37. Part IXA of the *Judiciary Act*

Contents

Background to Part IXA of the *Judiciary Act*

37.1 The *Northern Territory (Self-Government) Act 1978* (Cth) granted self-government to the Northern Territory with effect from 1 July 1978. Soon afterwards, the Commonwealth passed a group of related Acts to enable the Northern Territory government to assume responsibility for the administration of the Territory's courts. One of these Acts repealed the Commonwealth legislation that had established the Northern Territory Supreme Court as a superior court of record.[1706] This was done in contemplation of Northern Territory legislation to establish a Supreme Court in its own right. Another of the Acts amended the *Judiciary Act* by inserting a new Part IXA.[1707]

37.2 The establishment of a Supreme Court for the Northern Territory under local legislative and executive control carried with it the assumption that Commonwealth legislation would generally not be applied directly to the Court.[1708] However, an exception was made for the conferral of jurisdiction on the Supreme Court in matters that were not within the competence of the Northern Territory legislature. In particular, Part IXA confers jurisdiction on the Northern Territory Supreme Court in relation to:

- suits between the Commonwealth and the Northern Territory (s 67B);
- prerogative writs sought by the Commonwealth against the Northern Territory or its officers (s 67C(a));
- prerogative writs sought against the Commonwealth or its officers in matters arising in the Northern Territory (s 67C(b)); and

1706 *Northern Territory Supreme Court (Repeal) Act 1979* (Cth).
1707 *Judiciary Amendment Act 1979* (Cth).
1708 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 August 1979, 461 (Viner).

- certain other matters that were historically part of the Supreme Court's jurisdiction when it was established under Commonwealth law (s 67C(c)), as discussed in Chapter 36.

37.3 The Commission's terms of reference ask it to report on whether it is appropriate or necessary for similar provisions to be enacted for the ACT. When the ACT was granted self-government in 1989, it was initially proposed that the transfer of responsibility for the judicial system from the Commonwealth to the Territory be delayed indefinitely.[1709] However, as a result of amendments in the Senate, the legislation ultimately required the final transfer of judicial power to be achieved by 1992. Responsibility for inferior courts was transferred in 1990 and responsibility for the Supreme Court was transferred in 1992.[1710] However, no jurisdiction analogous to that in Part IXA JA was conferred on the ACT Supreme Court at that time.

37.4 This Chapter examines each head of jurisdiction conferred on the Northern Territory Supreme Court by Part IXA and asks whether that jurisdiction should be extended to the ACT, removed from the Northern Territory, or otherwise made to conform to the jurisdictional arrangements currently in place or recommended for the States.

Suits between the Commonwealth and a Territory

Current law and practice

37.5 The jurisdiction of the Northern Territory Supreme Court to hear suits between the Commonwealth and the Northern Territory is unique among superior state and territory courts in Australia. State courts cannot hear suits between the Commonwealth and the State because such jurisdiction is excluded from the States by s 38 JA (see Chapter 7). By contrast, s 67B JA provides as follows:

> The Commonwealth may bring a suit against the Territory, and the Territory may bring a suit against the Commonwealth, in the Supreme Court of the Territory in respect of a cause of any description, whether at law or in equity, including (but without limiting the generality of the foregoing) a claim in tort.

37.6 The operation of s 67B overlaps with s 56 JA, which allows suits against the Commonwealth in tort or contract to be brought in the Northern Territory Supreme Court if the claim arose in that Territory.

1709 D Mossop (1999), 20–21.
1710 *ACT Supreme Court (Transfer) Act 1992* (Cth).

37.7 There are no provisions that expressly confer jurisdiction on the ACT Supreme Court to hear suits between the Commonwealth and the ACT, in counterpart to s 67B. However, s 56 JA also operates in relation to the ACT by allowing suits brought against the Commonwealth in contract or tort to be commenced in the ACT Supreme Court in certain circumstances.[1711]

37.8 It is also arguable that s 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), which confers on the ACT Supreme Court 'all original and appellate jurisdiction that is necessary for the administration of justice in the Territory', is broad enough to grant jurisdiction to hear cases between the ACT and the Commonwealth.[1712] While such cases are rare, they have been determined from time to time without jurisdictional obstacles being raised.[1713] However, the basis of the Court's jurisdiction in such cases may not be beyond doubt.

Issues arising from the current law

37.9 The effect of s 67B is to create an inconsistency between the Northern Territory and the ACT, as well as between the Northern Territory and the States, in relation to the jurisdictional boundaries of their Supreme Courts. The privileged position of the Northern Territory Supreme Court runs counter to the principle of parity among the Territories and the States, favoured by the Commission in Chapter 36. However, this does not mean that this jurisdiction ought to be removed — parity can equally be achieved by extending the jurisdiction to the States and the ACT.

37.10 In Chapter 7, the Commission discusses the allocation of jurisdiction in suits between the Commonwealth and the States. The Commission there recommends that s 38(c) and s 38(d) JA be repealed in order to permit suits between the Commonwealth and a State to be determined in state courts. If implemented, this recommendation would place the state Supreme Courts in the same position as that currently enjoyed by the Northern Territory Supreme Court.

37.11 In the Commission's consultations it was remarked that there is no clear contemporary rationale for the exclusivity of s 38(c) and s 38(d), nor for confining to the Northern Territory the type of jurisdiction identified in s 67B. On the one hand, any suits between the Commonwealth and the States that are commenced in the High Court may be remitted to a state or territory court pursuant to s 44 JA in appropriate cases (see Chapter 11). On the other hand, the High Court may remove

1711 *Commonwealth v Silverton Ltd* (1997) 130 ACTR 1, 18–19.

1712 D Mossop, *Consultation*, Canberra, 23 February 2001; Supreme Court of the ACT, *Consultation*, Canberra, 23 February 2001.

1713 *Attorney-General (ACT) v Commonwealth* (1990) 100 FLR 426; *Attorney-General (ACT) v Commonwealth* (1990) 26 FCR 82.

matters raising constitutional or other important issues from lower courts pursuant to s 40 JA. If the ACT and state Supreme Courts were given jurisdiction similar to s 67B, the operation of s 40 would continue to provide for the removal into the High Court of certain classes of case.

37.12 A further issue raised in consultations was whether the Commonwealth should be compelled to defend a claim between polities in a state or territory court, or whether it should be able to have the matter transferred to a federal court if it so elects. This issue arises from the present situation in the Northern Territory under s 67B, and from any proposed expansion of the jurisdiction of the ACT and state Supreme Courts along similar lines.

Consultations and submissions

37.13 In consultations, the Commission was informed that claims between the Territories and the Commonwealth are relatively rare, though more frequent in the Northern Territory than in the ACT. It was also thought that claims between the Northern Territory and the Commonwealth might become more frequent because of the expansion of Commonwealth facilities in the region.[1714]

37.14 The view was widely held that there are no substantive reasons why territory Supreme Courts should not have jurisdiction to hear claims between a Territory and the Commonwealth, notwithstanding that state courts did not currently possess an equivalent jurisdiction.[1715] For example, the Chief Justice of the Northern Territory, Martin CJ, stated in his submission that 'the Supreme Court of the Northern Territory should have jurisdiction in suits between the Commonwealth and the Territory.'[1716] The notion that state or territory courts might have some homeward bias in litigation between that polity and the Commonwealth was seen as outdated and without foundation.[1717]

37.15 In some Northern Territory consultations it was suggested that issues of access to justice might justify the extended jurisdiction of the Northern Territory Supreme Court under s 67B. This was especially so given the absence of a resident Federal Court judge in the Northern Territory.[1718] In other consultations, the

1714 Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001.

1715 Supreme Court of the ACT, *Submission J018*, 7 March 2001; Attorney-General's Department (NT), *Consultation*, Darwin, 1 March 2001; R Andruszko, *Consultation*, Darwin, 2 March 2001; Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001; Supreme Court of the Northern Territory, *Consultation*, Darwin, 1 March 2001; Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001. The Law Council disagreed: Law Council of Australia, *Submission J037*, 6 April 2001.

1716 Supreme Court of the Northern Territory, *Submission J029*, 15 March 2001.

1717 The Hon Justice C Wheeler, *Consultation*, Perth, 23 March 2001; Supreme Court of South Australia, *Consultation*, Adelaide, 15 March 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 30 January 2001; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001.

1718 Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001; Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001; D Mossop, *Consultation*, Canberra, 23 February 2001.

Commission was told that the availability of judges from the Adelaide registry of the Federal Court presented few practical problems of access, particularly with the use of video conferences for urgent applications.[1719] It was widely agreed, however, that a resident Federal Court judge for the Northern Territory was seen as desirable by the practising profession.[1720]

37.16 Views were mixed on the question of whether the Commonwealth should be able to elect to have suit heard in a federal court. Some government lawyers with whom the Commission consulted were in favour of such a right, but the contrary view was common in other consultations. Amongst the latter group it was argued that there is no reason for the Commonwealth to opt out of a hearing in a state or territory Supreme Court. The justification for doing so would presumably be to gain some advantage from the transfer, and doubts were raised about whether the motivation would be legitimate.

Commission's views

37.17 The Commission considers that the jurisdiction currently conferred upon the Northern Territory Supreme Court by s 67B should be extended to the ACT. This comports with the Commission's recommendations in Chapter 7 for extending the jurisdiction of state courts to include suits between a State and the Commonwealth. This package of reforms would achieve parity among the Territories and the States in relation to their jurisdiction in this class of matters.

37.18 In practical terms, the Commission's recommendation might be achieved in one of two ways:

(f) s 67B could be amended to include the ACT in its operation; or

(g) s 67B could be repealed and s 39 extended to include the ACT and the Northern Territory in its operation.

37.19 The Commission further recommends that jurisdiction be conferred on the Federal Court to hear and determine suits between the Commonwealth and a Territory. This jurisdiction would complement the recommendation in Chapter 7 that jurisdiction be conferred on the Federal Court in matters between a State and the Commonwealth.

37.20 The Commission agrees with the views expressed in consultations and submissions that the Commonwealth should not have a statutory right to elect to have a matter transferred to a federal court in a suit between it and a Territory. The

1719 Supreme Court of the Northern Territory, *Consultation*, Darwin, 1 March 2001.

1720 Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001; Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001.

Commission considers that existing mechanisms for transfer, including those under the cross-vesting scheme, are adequate to deal with cases that are more appropriately determined in another forum. On the views advanced, the Commission sees no justification for an additional right of transfer if a matter is not otherwise suitable for transfer according to existing legal principles.

Recommendation 37–1. The *Judiciary Act* should be amended to confer on each of the Supreme Court of the Northern Territory and the Supreme Court of the ACT jurisdiction to hear and determine suits between the Commonwealth and the Northern Territory and suits between the Commonwealth and the ACT. The *Federal Court of Australia Act 1976* should also be amended to confer on the Federal Court the same jurisdiction. The stay or transfer of such a proceeding should be determined in accordance with established principles. [See Recommendations 7–4 and 7–5 in relation to the States].

Public Law Remedies Against Commonwealth Officers

Current law and practice

37.21 Prerogative relief refers to the traditional forms of relief available at common law for the purpose of preventing courts or officials from exceeding the limits of their power or compelling them to exercise their powers according to law. Such relief is issued in the form of a writ directed to the person or body who is the subject of a complaint of error. Prerogative relief includes writs of mandamus, certiorari, prohibition, habeas corpus and quo warranto.

37.22 Section 67C JA confers jurisdiction on the Supreme Court of the Northern Territory to grant prerogative relief against the Commonwealth and its officers. The section provides:

> The jurisdiction of the Supreme Court of the Territory extends to: …
>
> (b) matters in which a writ of mandamus or prohibition or an injunction is sought against the Commonwealth or an officer of the Commonwealth, being matters arising in, or under the laws in force in, the Territory.

37.23 Section 67C(b) re-enacts a jurisdiction that the Supreme Court has possessed since at least 1961.[1721] The power to grant writs of mandamus or prohibition against Commonwealth officers was clearly appropriate prior to self-government, when Commonwealth officials undertook the administration of the

1721 *Northern Territory Supreme Court Act 1961* (Cth), s 15(1)(c).

Territory. However, since 1978, when the Northern Territory attained self-government, the bulk of administration of the Territory has been carried out by officers of the Territory. In DP 64 the Commission asked whether s 67C(b) continued to be relevant or appropriate in the light of these changed circumstances.

37.24 The position of the Northern Territory stands in marked contrast to that of the States. As discussed in Chapter 7, no proceedings may be brought in a state court for mandamus or prohibition against an officer of the Commonwealth. Section 38(e) JA makes that aspect of federal jurisdiction exclusive of the courts of the States. Moreover, in relation to relief other than mandamus or prohibition, s 9 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) precludes review by state courts of administrative decisions to which that Act applies, other than by a writ of habeas corpus.[1722]

37.25 The position of the ACT Supreme Court is more complex. There is doubt about the ability of the ACT Supreme Court to entertain applications for prerogative relief against Commonwealth officers, in the absence of a specific provision in a Commonwealth Act authorising the Court to do so.

37.26 Prior to the transfer of responsibility for the ACT Supreme Court from the Commonwealth to the ACT, the jurisdiction of the Supreme Court was defined by the *Australian Capital Territory Supreme Court Act 1933* (Cth).[1723] This Act provided in s 11 that the ACT Supreme Court had the same jurisdiction in relation to the ACT as the Supreme Court of New South Wales had in relation to New South Wales immediately before 1 January 1911 (the date on which the Territory came into being). This jurisdiction would have included the federal jurisdiction invested in the New South Wales Supreme Court by s 39 JA,[1724] but equally it would have excluded those matters that were made exclusive of the courts of the States by s 38 JA. The excluded matters included those in which a writ of mandamus or prohibition was sought against an officer of the Commonwealth (s 38(e)). The absence of jurisdiction to grant prerogative relief against officers of the Commonwealth was remedied by the *Supreme Court Ordinance 1952* (ACT), which expressly gave the ACT Supreme Court that jurisdiction.[1725]

1722 These limits on the jurisdiction of state courts may have incidental effects on certain Commonwealth Territories. For example, the courts of Western Australia ordinarily exercise jurisdiction in respect of Christmas Island and the Cocos (Keeling) Islands, but those courts are limited in their power to restrain the conduct of Commonwealth officials in respect of those Territories.

1723 As originally enacted, this Act was entitled the *Seat of Government Supreme Court Act 1933* (Cth).

1724 In relation to the Northern Territory, the *Northern Territory Supreme Court Act 1961* (Cth), s 15(2), expressly included federal jurisdiction. Section 11 of the *Australian Capital Territory Supreme Court Act 1933* (Cth) probably had the same effect.

1725 *Supreme Court Ordinance 1952* (ACT), s 3. The explanatory memorandum for the Ordinance stated: 'There is considerable doubt as to whether the Supreme Court of the Australian Capital Territory has jurisdiction to entertain a suit for prohibition against a Commonwealth officer'.

37.27 However, soon after self-government, the provision was altered so as to allow the ACT Supreme Court to grant relief against officers of the Territory rather than the Commonwealth.[1726] After control of the ACT Supreme Court was transferred to the Territory, the provision was relocated to the *Supreme Court Act 1933* (ACT).[1727] The provision by which the ACT Supreme Court was given the same jurisdiction as the Supreme Court of New South Wales possessed before 1 January 1911 was repealed. In its place, a general jurisdictional provision was enacted by the Commonwealth Parliament in s 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). The ACT legislature replicated the provision in s 20 of the *Supreme Court Act 1933* (ACT). As noted in Chapter 35, s 48A gives the Supreme Court all the original and appellate jurisdiction that is necessary for the administration of justice in the Territory.

37.28 The precise scope of s 48A is unclear because the nature and extent of the powers necessary for the administration of justice 'in the Territory' are nowhere defined. It is not clear whether the jurisdiction is broad enough to allow the Commonwealth or officers of the Commonwealth to be bound by orders of the Court. Section 27 of the *Australian Capital Territory (Self-Government) Act 1988* provides that, except as provided by the Regulations, an enactment does not bind the Crown in right of the Commonwealth. Given that the *Supreme Court Act 1933* is now a Territory enactment, it would appear that the powers exercised under that Act cannot bind the Commonwealth unless the power to do so is given by s 48A of the *Australian Capital Territory (Self-Government) Act 1988*. Section 64 JA might have that effect, although the relationship between that provision and ss 27 and 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) is also unclear.[1728]

37.29 In relation to the ACT and the Northern Territory, the Federal Court has power to hear matters in which prerogative relief is sought against an officer of the Commonwealth.[1729] It is also clear that the prohibition on reviewing Commonwealth decisions in s 9 of the *Administrative Decisions (Judicial Review) Act 1977* does not apply to the Supreme Courts of these Territories.[1730]

1726 *Self-Government (Consequential Amendments) Ordinance 1990* (ACT), Sch 1.

1727 The *Supreme Court Act 1952* (ACT) was repealed and s 34B was inserted in the *Supreme Court Act 1933* (ACT) by the *Supreme Court Amendment Act (No 2) 1993* (ACT).

1728 The ACT Supreme Court has jurisdiction in relation to three other Territories (Australian Antarctic Territory, Heard Island and McDonald Islands, and Jervis Bay Territory), so that there is also uncertainty as to the Court's jurisdiction to grant writs against Commonwealth officers in relation to those Territories. See Chapter 35.

1729 s 39B(1) JA.

1730 *Kelson v Forward* (1995) 60 FCR 39, 60.

Consultations and submissions

37.30 In the Commission's consultations there was no indication of a need to extend the Northern Territory's jurisdiction under s 67C(b) to the ACT Supreme Court, particularly if this were achieved at the expense of parity with the States.[1731] The Law Council was firmly against such an extension of jurisdiction,[1732] and the Australian Government Solicitor expressed its concern that an extension of jurisdiction might subject Commonwealth officers to orders made by courts other than federal courts.[1733]

37.31 It was generally agreed that the impact of expanded prerogative writ jurisdiction would be greater in the ACT than in the Northern Territory, given the prevalence of Commonwealth officers in the seat of government.[1734] In his submission, David Mossop of the ACT Bar noted that expanding the ACT Supreme Court's jurisdiction to grant prerogative relief against Commonwealth officers

> would be inconsistent with the view that officers of a polity should only be restrainable by the judicial bodies of that polity and the fact that the ACT has been granted self-government and the Commonwealth retains no control over the appointment of its judiciary. It could only be justified if access to the federal courts in the ACT was such that there was an 'access to justice' reason for allowing proceedings to be commenced or continued in the ACT Supreme Court.[1735]

37.32 Similarly, Wendy Harris of the Victorian Bar stated in her submission:

> Notwithstanding observations in [DP 64] with respect to the desirability of 'restraining excesses of power' on the part of Commonwealth officers and maintaining the rule of law, it should be remembered that the Federal Court has jurisdiction with respect to matters where prerogative relief is sought against an officer of the Commonwealth. As before, the most suitable course seems to be to conform the treatment of territory and state courts by excluding the ACT and Northern Territory courts from granting prerogative relief against the Commonwealth or an officer of the Commonwealth.[1736]

37.33 On the other hand, some with whom the Commission consulted in the Northern Territory expressed the view that the lack of a resident Federal Court judge was a key justification for maintaining the Northern Territory Supreme Court's jurisdiction in respect of claims against the Commonwealth and its

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1731 Supreme Court of the ACT, *Submission J018*, 7 March 2001; W Harris, *Submission J014*, 26 February 2001.
1732 Law Council of Australia, *Submission J037*, 6 April 2001.
1733 Australian Government Solicitor, *Consultation*, Canberra, 5 June 2000.
1734 Ibid.
1735 D Mossop, *Submission J025*, 15 March 2001.
1736 W Harris, *Submission J014*, 26 February 2001.

officers.[1737] The geographical isolation of the Northern Territory and resulting difficulties of access to justice were considered important factors.[1738]

37.34 The Commission was informed that the number of claims for prerogative relief against Commonwealth officers in the Northern Territory was small but significant. The Northern Territory was seen as distinctive in this regard, having resident Commonwealth officers such as the Aboriginal Land Commissioner and the Administrator of the Northern Territory.[1739] The incidence of claims for public law remedies against Commonwealth officers was expected to increase with new Commonwealth facilities in relation to defence and migration.[1740] Against this view, some Northern Territory lawyers advised that they preferred to bring claims against Commonwealth officers in the Federal Court.[1741]

37.35 The Commission was also told that the need for the Northern Territory Supreme Court to exercise jurisdiction under s 67C(b) had decreased since self-government because the Northern Territory is increasingly administered by territory officers rather than Commonwealth officers.[1742]

37.36 In most Northern Territory consultations, reluctance was expressed about the possibility of repealing s 67C(b). The choice of federal and territory forums was seen as beneficial to litigants, and as creating a valuable sense of competition between courts, which was thought to increase their quality and service. However, most considered that the repeal of s 67C(b) was justifiable if this formed part of a wider set of reforms aimed at achieving parity between the Territories and the States.[1743] It was also remarked that appointment of a resident Federal Court judge for the Northern Territory would reduce the need for Supreme Court jurisdiction by addressing access to justice concerns.[1744]

37.37 Finally, as regards the ACT, a number of those with whom the Commission consulted raised the argument that s 48A of the *Australian Capital Territory (Self-Government) Act 1988* may confer jurisdiction on the ACT Supreme Court to

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1737 Supreme Court of the Northern Territory, *Consultation*, Darwin, 1 March 2001; Supreme Court of the Northern Territory, *Submission J029*, 15 March 2001; Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001.

1738 Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001; D Mossop, *Consultation*, Canberra, 23 February 2001; Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001.

1739 Attorney-General's Department (NT), *Consultation*, Darwin, 1 March 2001; Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001.

1740 Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001.

1741 Attorney-General's Department (NT), *Consultation*, Darwin, 1 March 2001; R Andruszko, *Consultation*, Darwin, 2 March 2001; Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001.

1742 Attorney-General's Department (NT), *Consultation*, Darwin, 1 March 2001; Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001.

1743 Attorney-General's Department (NT), *Consultation*, Darwin, 1 March 2001; Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001; Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001.

1744 Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001; Supreme Court of the ACT, *Submission J018*, 7 March 2001.

grant public law remedies against the Commonwealth. It was suggested that, if that jurisdiction were considered inappropriate, s 48A may need to be amended to clarify this.[1745]

Commission's views

37.38 In Chapter 7, the Commission expressed the view that public law remedies should not be available to compel or constrain the actions of government officers, except through the courts of the same polity. This view was informed by considerations of both principle and practice regarding the exercise of governmental power in a federal system of government. The Commission recommended that the exclusion of state courts from granting public law remedies against Commonwealth officers should be retained.

37.39 The same policy concerns inform the Commission's views regarding the appropriateness of the Northern Territory Supreme Court's jurisdiction to grant such remedies against the Commonwealth or its officers. In the absence of strong arguments to the contrary, the Commission is of the view that the jurisdiction conferred on the Northern Territory Supreme Court by s 67C(b) should be repealed.

37.40 Leaving to one side the special position of the High Court, the Commission affirms its support for the principle that the executive of one polity in a federation should not generally be subject to restraint by judges appointed by the executive of another polity. The present position of the Northern Territory Supreme Court is at odds with the position of the States under s 38(e) JA and thus runs counter to the Commission's preference for parity in the exercise of federal judicial power in the States and Territories, as far as constitutionally possible.

37.41 The Commission has not heard compelling evidence of an 'access to justice' problem in the Northern Territory, such as might justify the preservation of s 67C(b). While there is presently no resident Federal Court judge in the Northern Territory, most consultations suggested that the Federal Court made adequate arrangements to service the Northern Territory community, including the use of video-conferencing in urgent cases. The Commission notes that Tasmania also lacks a resident Federal Court judge. If the principle contended for were to be applied consistently, s 67C(b) ought to be extended to that State. However, as the Commission has observed, there is little evidence of a significant problem in either jurisdiction.

1745 W Harris, *Submission J014*, 26 February 2001; D Mossop, *Consultation*, Canberra, 23 February 2001.

37.42 Consistent with the recommendations in Chapter 7, the Commission further recommends that the *Judiciary Act* be amended to preclude the Supreme Court of the ACT from granting an order against an officer of the Commonwealth for the purpose of ensuring that the officer's powers or duties are exercised or performed according to law. Any such amendment should clarify that the broad conferral of jurisdiction on the Court by s 48A of the *Australian Capital Territory (Self-Government) Act 1988* should take effect subject to the stated limitation.

Recommendation 37–2. Section 67C(b) of the *Judiciary Act* should be repealed. Subject to Recommendation 37–5, the Act should be amended to preclude the Supreme Court of the Northern Territory from granting an order against an officer of the Commonwealth for the purpose of ensuring that the officer's powers or duties are exercised or performed according to law, in the same manner as that jurisdiction is excluded from the States. [See Recommendation 7–6 in relation to the States.]

Recommendation 37–3. Subject to Recommendation 37–5, the *Judiciary Act* should be amended to preclude the Supreme Court of the ACT from granting an order against an officer of the Commonwealth for the purpose of ensuring that the officer's powers or duties are exercised or performed according to law, in the same manner as that jurisdiction is excluded from the States. This amendment should take effect notwithstanding anything in s 48A of the *Australian Capital Territory (Self-Government) Act 1988*. [See Recommendation 7–6 in relation to the States.]

Public Law Remedies Against Territory Officers

37.43 In Chapter 7, the Commission considered the allocation of jurisdiction in matters in which public law remedies are sought against officers of a State. The Commission concluded that federal courts, other than the High Court, should not generally be able to grant such relief. That view was informed by the same considerations underlying the Commission's recommendation regarding the availability of public law remedies against Commonwealth officers, namely, that it is inappropriate in a federation for courts of one polity to grant public law remedies against the public officers of another polity. Accordingly, in Recommendation 7–7, the Commission stated that the *Judiciary Act* should be amended to provide that federal courts (other than the High Court) do not have jurisdiction to grant an order to ensure that the powers or duties of an officer of a State are exercised or performed according to law.

37.44 Section 67C(a) JA has a bearing on the analogous jurisdiction of the Northern Territory Supreme Court. The section provides:

> The jurisdiction of the Supreme Court of the Territory extends to:
>
> (a) matters in which an injunction or declaratory order or writ of mandamus, prohibition or certiorari is sought by the Commonwealth against the Territory or an officer of the Territory; …

37.45 There is no doubt that the superior court of a polity should have jurisdiction to grant public law remedies against officers of that polity. This jurisdiction is an aspect of the rule of law and assists in ensuring that governments are subject to law. In the Northern Territory, this jurisdiction is expressly conferred by s 67C(a), at least in that class of cases in which the remedy is sought by the Commonwealth.

37.46 A related issue, which is the focus of the present section, is whether federal courts ought to have jurisdiction to grant public law remedies against territory officers. As discussed in Chapter 4, under s 39B(1) JA, the Federal Court has jurisdiction to grant such remedies against Commonwealth officers. In addition, s 39B(1A)(a) confers jurisdiction on the Federal Court in any matter in which the Commonwealth is seeking an injunction or a declaration. This provision appears wide enough to encompass injunctions or declarations against territory officers, at least where they are sought by the Commonwealth.

37.47 As noted above, there was substantial agreement in consultations and submissions that it is inappropriate for a superior court of one polity to grant public law remedies against officers of another polity within the federation.[1746] This principle was considered to apply equally to remedies sought against Commonwealth, state or territory officers. The Commission considers that the *Judiciary Act* should accordingly be amended to ensure that federal courts (other than the High Court) do not have jurisdiction to grant public law remedies against territory officers.

37.48 However, the Commission recommends that an exception be made for cases in which territory officers exercise both territory and Commonwealth functions pursuant to an intergovernmental arrangement. Where the exercise of functions is intermingled, both federal and territory courts should have jurisdiction to grant public law remedies in appropriate cases.

37.49 In this regard, the Commission notes that it is not uncommon for Commonwealth officers to perform territorial functions pursuant to intergovernmental arrangements. A notable example is the performance of community policing by the Australian Federal Police ('AFP') in the ACT, Jervis Bay and the external Territories. The ACT has entered into an arrangement with the Common-

1746 See also Attorney-General's Department (NT), *Consultation*, Darwin, 1 March 2001. The Law Council disagreed, preferring the Commonwealth to have wide jurisdiction in this area: Law Council of Australia, *Submission J037*, 6 April 2001.

wealth government in relation to policing services. As a result, the AFP provides policing services in the ACT both in relation to federal functions arising in the Territory as the seat of the Government and in relation to territory functions arising from its position as a self-governing Territory.[1747] Conversely, territory officers may perform Commonwealth functions in Australian Territories. For example, the Commission was advised that the AFP has designated some local recruits on Christmas Island as 'special members' under the *Australian Federal Police Act 1979* (Cth) to undertake Commonwealth customs and immigration functions.[1748]

Recommendation 37–4. Subject to Recommendation 37–5, the *Judiciary Act* should be amended to provide that federal courts (other than the High Court) do not have jurisdiction to grant an order to ensure that the powers or duties of an officer of a Territory are exercised or performed according to law. [See Recommendation 7–7 in relation to the States.]

Recommendation 37–5. The *Judiciary Act* should be amended to provide that, where an officer of a Territory or an officer of the Commonwealth may exercise both territory and Commonwealth functions pursuant to an intergovernmental arrangement, an order to ensure that the powers or duties of that officer are exercised or performed according to law may be sought in the following courts:

(a) where the order is sought in respect of territory functions alone — in a territory court;

(b) where the order is sought in respect of Commonwealth functions alone — in a federal court;

(c) where the order is sought in respect of intermingled territory and Commonwealth functions — in either a territory court or a federal court.

[See Recommendation 7–8 in relation to the States.]

References

D Mossop, 'The Judicial Power of the Australian Capital Territory' (1999) 27 *Federal Law Review* 19.

1747 s 8 *Australian Federal Police Act 1979* (Cth).
1748 s 40E Ibid.

38. Common Law and Statutory Claims Arising in the Territories

Contents

Current Law and Practice

38.1 The original and appellate jurisdiction of the Federal Court has a statutory basis, which is ultimately derived from the authority of Chapter III of the Constitution (see Chapters 4 and 20). Traditionally, the Court has been regarded as having no jurisdiction to adjudicate common law claims unless those claims form part of the Court's accrued jurisdiction. As discussed in Chapter 2, accrued jurisdiction allows a federal court to determine issues arising under the common law provided that those issues are attached to and not severable from a federal claim within the Court's jurisdiction. In such a case, the federal and non-federal claims form part of the one 'matter' and the federal court may adjudicate the whole claim so as to do complete justice between the parties.

38.2 A recent decision of the Federal Court has raised the possibility of the Federal Court having a more extensive jurisdiction over common law claims arising in the Territories than previously may have been thought. In *O'Neill v Mann*[1749] Finn J held that an action for defamation arising under the common law in force in the ACT was a matter arising under a law made by Parliament because of the course taken by Commonwealth law in erecting the legal system of the Territory.[1750] In his Honour's view, the legal system of the ACT:

> was put on a statutory footing from the outset with no operative difference in this regard being ascribed to the common law continued in force on the one hand and continued New South Wales statutes on the other. Both became the law in force in the Territory by force of a Commonwealth Act. The rights and duties countenanced by each owed their existence in the Territory to a Commonwealth law. To the extent that one or other or a combination of both provided rights and duties in justiciable controversies (or 'matters'), those matters arose under laws made by the Parliament.[1751]

1749 *O'Neill v Mann* (2000) 101 FCR 160.

1750 *Seat of Government Acceptance Act 1909* (Cth), s 6(1); *Seat of Government (Administration) Act 1910* (Cth), s 4.

1751 *O'Neill v Mann* (2000) 101 FCR 160, 168.

38.3 The decision in *O'Neill v Mann* was confined to common law claims arising in the ACT, but the reasoning makes the argument equally applicable to the Northern Territory.

38.4 The essential elements of the argument are as follows. First, when the ACT was established out of land forming part of New South Wales, federal legislation 'continued in force' all the laws of New South Wales that were in force in the Territory prior to its creation as a Territory.[1752] The same was done for the Northern Territory in respect of the laws in force in South Australia.[1753] Second, no distinction was made between statutory law and other laws in force in the State, with the effect that the common law in New South Wales was given statutory force in the newly created Territory. Third, following the High Court's decision in *Northern Territory v GPAO*,[1754] a matter arising under a law made pursuant to s 122 of the Constitution (the territories power) is a matter 'arising under any laws made by the Parliament' for the purposes of s 76(ii) of the Constitution. Finally, s 39B(1A)(c) JA confers jurisdiction on the Federal Court in matters falling within s 76(ii) of the Constitution (subject to exceptions in criminal matters, which are not presently material). As a result, common law claims arising in the Territories fall within the jurisdiction of the Federal Court, even if not part of the Court's accrued jurisdiction.

38.5 The decision in *O'Neill v Mann* has yet to be tested, either by application in other cases or review on appeal. The Commission is not aware of any proceedings in the Federal Court in which this decision is the only basis of the Court's jurisdiction. As it stands, the decision would allow a party to commence proceedings in a common law matter unrelated to any federal claim that is otherwise within the jurisdiction of the Federal Court. This might include contractual claims, motor accident claims and other personal injury claims.

Issues Arising from Current Law and Practice

38.6 During the course of consultations and submissions, the Commission received numerous comments about the impact of *O'Neill v Mann* on the role of the Federal Court, the territory courts, and the relationship between them. The Commission does not comment on the correctness of the decision, which is a matter for the courts. The Commission notes that in *Eastman v The Queen,* McHugh J identified the jurisdiction of the Federal Court in relation to matters arising under the common law in a territory as raising 'difficult questions'.[1755] There are also comments in the *Western Australia v Commonwealth (The Native Title Act Case)* that cast doubt on the capacity of Parliament to convert the

1752 *Seat of Government Acceptance Act 1909* (Cth), s 6(1).
1753 *Northern Territory Acceptance Act 1910* (Cth), s 7.
1754 *Northern Territory v GPAO* (1999) 196 CLR 553.
1755 *Eastman v The Queen* (2000) 172 ALR 39, 74 at fn 141.

common law into a law of the Commonwealth.[1756] However, the potential consequences of the decision, if affirmed by an appellate court, were seen to be significant.

38.7 The principal advantages of a broad Federal Court jurisdiction over common law claims in the Territories were seen to be as follows:

- Broad concurrent jurisdiction of federal and territory courts can address concerns about access to justice in parts of the country that may be seen as under-serviced.

- Concurrent jurisdiction of territory and federal courts can benefit the administration of justice by fostering competition between courts, and hence improving the quality of service they provide.

- The jurisdiction of the Federal Court in common law claims can avoid 'arid jurisdictional disputes' by enabling the Federal Court to do complete justice between the parties without regard to the jurisdictional divisions between courts within the federal judicial system.

- The adjudication of common law claims lends diversity to the docket of a federal court judge, which can both enhance a judge's skills and job satisfaction.

- The Federal Court has adequate mechanisms to ensure that this jurisdiction is not misused by litigants. In particular, the transfer provisions under the cross-vesting scheme may enable matters to be transferred to a territory Supreme Court, while the higher fee structure of the Federal Court is likely to discourage parties from commencing claims that could be commenced more economically in the Supreme Court.

38.8 However, a number of arguments were also made against the Federal Court having general jurisdiction in common law matters arising in the Territories.

- The principal function of the Federal Court is to exercise the judicial power of the Commonwealth in particular areas of federal law. The adjudication of common law claims arising in the Territories conflicts with the spirit of this function, even if it is consistent with it as a matter of law.

- The Federal Court already has jurisdiction to adjudicate common law claims that are part of a matter arising under a federal law through its accrued jurisdiction. Consequently, the Court does not presently lack jurisdiction to do complete justice between the parties.

1756 *Western Australia v Commonwealth* (1995) 183 CLR 373, 484–488.

- The Federal Court has no general jurisdiction in common law matters arising in a State. The existence of such jurisdiction in relation to the Territories detracts from the goal of achieving parity between the States and Territories wherever constitutionally possible.

- The Federal Court's historical specialisation in federal matters means that its judges are comparatively less experienced in many areas of the common law. This may make the Federal Court a less appropriate forum than a territory Supreme Court for determining general common law claims.

- The existence of alternative federal and territory forums for commencing a particular claim may encourage forum shopping. While this may encourage better institutional performance by courts, it can be costly for the judicial system by creating fertile ground for jurisdictional arguments and venue disputes.

- The statutory foundation for the common law in the ACT and the Northern Territory is an historical anomaly, which arises from technical considerations concerning the way in which State laws were continued for the newly created Territories nearly 90 years ago. They should not form a contemporary foundation for redefining the jurisdiction of the Federal Court.

Consultations and Submissions

38.9 The Commission's consultations in the ACT confirmed that there was no proceeding on foot in respect of which the Federal Court's jurisdiction arose purely under the principle established in *O'Neill v Mann.* It was suggested that litigants would be reluctant to test the rule because a decision based on this jurisdiction was likely to be appealed, making it an expensive venture.[1757]

38.10 The Commission heard a range of views as to the legal and practical consequences of the Federal Court exercising general common law jurisdiction. Most with whom the Commission consulted agreed that it had the potential for a negative impact on territory Supreme Courts. Most also considered an amendment to s 39B(1A)(c) JA, so as to exclude Federal Court jurisdiction in common law matters arising in the Territories, to be the preferred solution. However, there was also some strong support for allowing this jurisdiction to stand.

38.11 In opposing the decision in *O'Neill v Mann*, the Law Council recommended that s 39B(1A)(c) be amended to exclude common law matters arising in the Territories from the jurisdiction of the Federal Court. It stated:

1757 D Mossop, *Consultation*, Canberra, 23 February 2001.

> Common law matters arising in the territories should not be in the jurisdiction of the Federal Court. Hearing such matters is a central function of the territory Supreme Courts, and the Law Council would anticipate that neither the territory Supreme Courts nor the Federal Court would be prepared for any significant shift of such workload to the Federal Court.
>
> It can also be anticipated that allowing plaintiffs/applicants the choice to commence common law matters in the Federal Court or the relevant territory Supreme Court will generate additional litigation as to the appropriate forum if defendants/respondents perceive the choice of forum as being merely tactical.[1758]

38.12 The Chief Justice of the ACT, Chief Justice Miles, endorsed this solution:

> There seems to be no public benefit in the unusual position that the Federal Court should have a parallel general jurisdiction with the Supreme Courts of the ACT and the Northern Territory. Removal of this jurisdiction would be consistent with the proposition that citizens of the Territories so far as constitutionally possible enjoy the same rights as citizens of a State in respect to access to justice. There seems to have been little use made of this jurisdiction to date, but potential for mischief and confusion indicates that amendment is appropriate.[1759]

38.13 Similarly, the Chief Justice of the Northern Territory, Chief Justice Martin, stated:

> Expanding the jurisdiction of the Federal Court to the point where litigants are required to choose between courts exercising the same jurisdiction is clearly undesirable. It encourages forum and Judge shopping. In addition, the Federal Court has no such jurisdiction in relation to the States and it is undesirable to further distinguish between the Northern Territory and the States.[1760]

38.14 Wendy Harris of the Victorian Bar stated in her submission:

> Again, for the purposes of parity of treatment between the states and territories, it appears preferable to exclude from the jurisdiction of the Federal Court all common law claims (particularly if there is a corresponding amendment making the Northern Territory Supreme Court's jurisdiction with respect to common law claims clear). Of course, such amendment would not preclude the Federal Court from exercising jurisdiction with respect to common law claims falling within its pendant jurisdiction.[1761]

38.15 The Solicitor-General for the Northern Territory, Tom Pauling QC, doubted whether the decision in *O'Neill v Mann* was supported by the High Court's most recent pronouncements on judicial power in the Territories.[1762]

1758 Law Council of Australia, *Submission J037*, 6 April 2001.
1759 Supreme Court of the ACT, *Submission J018*, 7 March 2001.
1760 Supreme Court of the Northern Territory, *Submission J029*, 15 March 2001.
1761 W Harris, *Submission J014*, 26 February 2001. See also P Brazil, *Submission J010*, 22 February 2001.
1762 T Pauling QC, *Submission J035*, 23 March 2001.

38.16 Despite this general view, some in the Northern Territory saw benefits in the Federal Court exercising jurisdiction in common law claims. It was said that difficulties of access to justice could be improved in a small and remote community like the Northern Territory if litigants had more options by reason of a broader jurisdiction of the Federal Court.[1763]

38.17 Practitioners stated that, while the Northern Territory Supreme Court was of high quality, the size of the Territory and the relatively small number of cases restricted the development of precedent and gave judges few opportunities to benefit from exposure to the expertise of other judges. These problems might be alleviated by expanding the Federal Court's jurisdiction over common law matters in the Territory.[1764] As a rule, practitioners who were more familiar with the Federal Court, and who preferred it as a forum generally, were more open to the prospect of being able to commence common law claims there.[1765]

38.18 The Federal Court advised the Commission during consultations that acquiring general common law jurisdiction may cause problems with judges' workload and the organisation of dockets.[1766] In its submission, the Court favoured jurisdiction being extended to common law claims in the Territories. The Court saw this as being beneficial to its judges, effective in reducing jurisdictional disputes, and controllable through transfer under the cross-vesting scheme.

> There is no demonstrated need to exclude territory common law matters from the jurisdiction of the Federal Court. It is unlikely that there would be many and if they were inappropriately commenced in the Federal Court they could be transferred under cross-vesting provisions. Some general common law matters are good for the development of any superior court; the Federal Court has some work of this character and a little more would be a good thing.
>
> There is, however, a more fundamental reason why the Federal Court should have general common law jurisdiction in the territories. The reason is that, in practical terms, this would maintain the position in relation to the territories as it was thought to exist with respect to the States prior to the decision of the High Court of Australia in *Re Wakim; Ex parte McNally (Spinks v Prentice)* (1999) 198 CLR 511. Since that decision 'arid jurisdictional arguments' have re-emerged in the Federal Court. At least in respect of the territories, the opportunity exists to avoid these arguments and to maintain the beneficial position that existed under the full cross-vesting scheme without any transgression of constitutional limitations. Under the full cross-vesting scheme cases were heard where, as a matter of practical allocation of jurisdiction, one would expect them to be heard. The cross-vesting scheme was not subject to abuse and hardly any common law cases were commenced in the Federal Court merely in reliance upon it.[1767]

1763 Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001; Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001.
1764 Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001.
1765 R Andruszko, *Consultation*, Darwin, 2 March 2001.
1766 Federal Court of Australia, *Consultation*, Melbourne, 6 March 2001.
1767 Federal Court of Australia, *Submission J039*, 20 April 2001.

38.19 In correspondence, Finn J observed that if the Commission were minded to recommend the removal of the Federal Court's jurisdiction over common law matters arising in the Territories, the same reasoning should be applied to claims in the Federal Court arising under territory enactments.[1768] This was presumably because the Federal Court's jurisdiction in these matters ultimately depended on Commonwealth legislation granting legislative powers to the Territories. For this reason, a matter arising under a territory enactment would also be a matter arising under a law made by the Parliament within the meaning of s 39B(1A)(c) JA and s 76(ii) of the Constitution. Although his Honour expressed a clear preference for the continuation of the jurisdiction identified in *O'Neill v Mann*, it was not possible, in his view, to distinguish such a claim from the Federal Court's jurisdiction under territory enactments.

Commission's Views

38.20 The Commission considers that legislative amendment is warranted to clarify the jurisdiction of the Federal Court in respect of common law claims arising in the Territories. Whatever view one takes of the merits of the outcome in *O'Neill v Mann*, it is clear that there is likely to be continuing jurisdictional uncertainty until the matter is resolved. This might be achieved by the courts if an appropriate vehicle arose in which the matter could be tested before an appellate court. However, this may be a time-consuming process and one that might put individual litigants to unnecessary expense and delay.[1769] By way of analogy, it took 11 years for the constitutionality of the cross-vesting scheme to be determined by the High Court despite predictions that the matter would be put to the test soon after the legislation came into force.[1770]

38.21 The Commission is of the view that it is undesirable for the Federal Court to have broad jurisdiction to adjudicate common law claims arising in the Territories, at least where the claim is unrelated to a matter otherwise within the Court's jurisdiction. The Commission accordingly recommends that s 39B(1A)(c) JA be amended to clarify that the Federal Court's jurisdiction in matters 'arising under any laws made by the Parliament' exclude common law claims arising in the ACT or the Northern Territory, where those claims are not attached to a federal claim otherwise within the jurisdiction of the Court.

38.22 As a matter of policy, the Commission agrees that there are significant difficulties in maintaining the Federal Court's common law jurisdiction in the Territories. Such a jurisdiction is an historical anomaly; it is at odds with the

1768 The Hon Justice P Finn, *Correspondence*, 17 April 2001.

1769 Supreme Court of the ACT, *Consultation*, Canberra, 23 February 2001.

1770 The *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) came into force on 1 July 1988 and was held to be invalid in part on 17 June 1999 by the High Court's decision in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

federal character of other matters within the Court's original jurisdiction; and it creates unnecessary disparities between the adjudication of common law claims arising in the States and the Territories. Given the high fee structure of the Federal Court when compared with territory Supreme Courts, the Commission considers it unlikely that concurrent jurisdiction in common law claims will produce any practical benefits from heightened competition between the courts. Moreover, any benefits are likely to be outweighed by the difficulties created for the parties and the courts from new opportunities for forum shopping.

38.23 The principal argument advanced in consultations in favour of retaining a common law jurisdiction for the Federal Court was that it enabled justice to be administered in the Territories without regard to jurisdictional boundaries, in the same way the cross-vesting scheme sought to bring about an integrated judicial system prior to the decision in *Re Wakim; Ex parte McNally*.[1771] In this respect, the Commission notes that the accrued jurisdiction of the Federal Court permits, or even compels, the Court to adjudicate common law claims forming part of a matter within the Court's jurisdiction.[1772] Although the Federal Court may no longer have jurisdiction in common law claims by virtue of the cross-vesting legislation, if a lasting solution is to be found to that problem, it is best done in a way that encompasses the States and Territories in a situation of equality.

38.24 For similar reasons, the Commission considers that there is merit in the suggestion that the Federal Court's jurisdiction in matters arising under territory enactments should be curtailed. The Commission recommends that the *Judiciary Act* be amended to exclude from the jurisdiction of the Federal Court statutory claims arising under a law made by the legislature of the ACT or the Northern Territory, unless they form part of the Court's accrued jurisdiction.

Recommendation 38–1. Section 39B(1A)(c) of the *Judiciary Act* should be amended to exclude from the jurisdiction of the Federal Court:

(a) common law claims arising in the ACT or the Northern Territory; and

(b) statutory claims arising under a law made by the legislature of the ACT or the Northern Territory;

where those claims are not attached to a federal claim otherwise within the jurisdiction of the Federal Court.

1771 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

1772 On the discretionary or mandatory nature of accrued jurisdiction, see Chapter 2.

39. Appeals from Territory Courts

Contents

Current Law and Practice

39.1 Before the Federal Court was established in 1976, the High Court heard all appeals from the Supreme Court of the Northern Territory and the Supreme Court of the ACT. When the Federal Court was established it became the intermediate appellate court for the Territories in an effort to alleviate the burden on the High Court. This situation still exists in relation to the ACT but not the Northern Territory.[1773]

Appeals from the ACT Supreme Court

39.2 The *Federal Court of Australia Act 1976* confers jurisdiction on the Federal Court to hear appeals from judgments of the Supreme Court of a Territory, other than the Northern Territory.[1774] Such appeals are by right except in the case of interlocutory judgments, which require the leave of the Court.[1775] A decision of the Federal Court exercising appellate jurisdiction may in turn be appealed to the High Court with special leave in accordance with the principles discussed in Chapter 19.

39.3 When the Federal Court hears an appeal from a judgment of the ACT Supreme Court, the Chief Justice of the Federal Court allocates Federal Court judges to sit on the appeal, in accordance with his statutory responsibility to ensure the orderly and expeditious discharge of the business of the Court.[1776]

39.4 In practice, certain Federal Court judges have a special interest in appeals from the ACT. In the first place, some Federal Court judges have primary

1773 The Federal Court also has jurisdiction to hear appeals from the Supreme Court of Norfolk Island but this is not considered in this Report.
1774 s 24(1)(b), s 24(6) FCAA.
1775 s 24(1A) FCAA.
1776 s 15 FCAA.

commissions as judges of the ACT Supreme Court. Until 1999, it was a requirement that at least one such judge sit on every Federal Court appeal from the ACT.[1777] However, since the transfer of responsibility for the ACT Supreme Court from the Commonwealth to the ACT in 1992, the Commonwealth government has adopted a policy of not appointing ACT Supreme Court judges as judges of the Federal Court. At present, only two of the four resident judges of the ACT Supreme Court also hold commissions as judges of the Federal Court. As a consequence of the decreasing availability of ACT Supreme Court judges with dual Federal Court commissions, the *Federal Court of Australia Act 1976* was amended in 1999 to remove the requirement that a resident judge of the ACT Supreme Court sit on appeals from the ACT. Rather, the Chief Justice of the Federal Court is required to adopt that course unless it is impractical to do so.[1778]

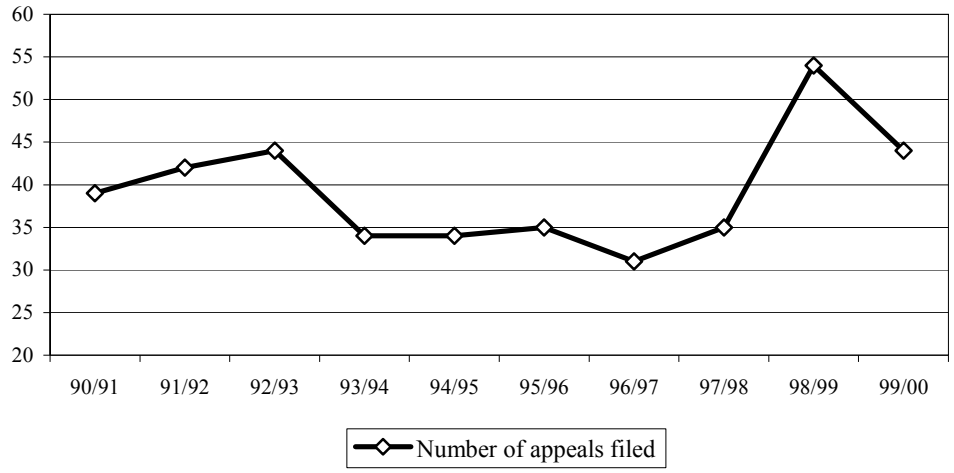
39.5 A second reason for the special interest of some Federal Court judges in appeals from the ACT is that seven Federal Court judges have dual commissions as additional judges of the ACT Supreme Court.[1779] In that capacity, these Federal Court judges hear and determine matters within the original jurisdiction of the ACT Supreme Court. Given that there are presently only four judges with primary commissions on the ACT Supreme Court, the use of additional judges (whether from the Federal Court or elsewhere) would appear to be a practical necessity for discharging the business of the Supreme Court.

39.6 Figure 39–1 shows the number of appeals from the ACT Supreme Court that were filed in the Federal Court over the 10-year period from 1990–1991 to 1999–2000. The graph shows that appeals from the ACT Supreme Court have fluctuated over time but have tended to increase in recent years. In 1999–2000, 44 appeals were filed in the Federal Court from the ACT Supreme Court out of a total of 407 appellate filings in that year from all sources. This represents a little under 11% of the Federal Court's appellate workload.

39.7 Figure 39–2 shows the composition of appeals from the ACT Supreme Court that were filed in the Federal Court over the same period. Of a total of 392 appeals, 55% related to matters arising under ACT Acts or Ordinances, and an additional 41% were criminal appeals. It is clear that the vast majority of Federal Court appeals from the ACT are non-federal in character.

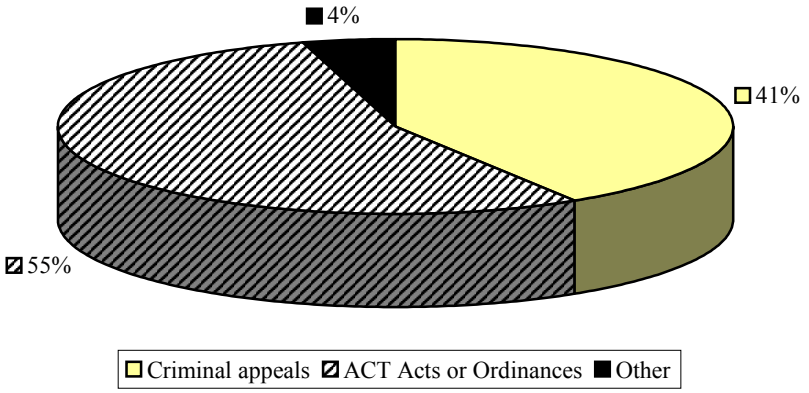
1777 s 25(3) FCAA.
1778 *Law and Justice Legislation Amendment Act 1999* (Cth), s 3, Sch 7, amending s 25(3) FCAA.
1779 <http://www.fedcourt.gov.au/aboutct/aboutct_judgS.html> (20 July 2001). These judges are Beaumont, Wilcox, Spender, Ryan, von Doussa, Whitlam and Madgwick JJ.

Figure 39–1 Number of Appeals from the ACT Supreme Court to the Federal Court



Source: Data provided by the Registry of the Federal Court of Australia.

Figure 39–2 Appeals from the ACT Supreme Court to the Federal Court by Type



Source: Data provided by the Registry of the Federal Court of Australia.

39.8 As these figures show, the jurisdiction of the Federal Court to hear appeals from the ACT Supreme Court has been frequently invoked. However, the Chief Justice of the ACT recently suggested that there is an alternative channel of appeal from judgments of the Supreme Court. In *Kelly v Apps,*[1780] Miles CJ observed that the ACT Supreme Court has concurrent jurisdiction with the Federal Court to hear appeals from a single judge of the ACT Supreme Court. The basis of this view was that s 48A of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) grants the Supreme Court 'all original and appellate jurisdiction that is necessary for the administration of justice in the Territory'. This provision is repeated in s 20(1)(a) of the *Supreme Court Act 1933* (ACT) and encompasses the hearing of appeals within the Territory. Miles CJ said that this was supported by the fact that s 24 FCAA, which confers jurisdiction on the Federal Court to hear appeals from the ACT, does not purport to make that jurisdiction exclusive to the Federal Court.

39.9 If this reasoning is accepted, appeals from the ACT could be heard by a Full Court of the ACT Supreme Court without the need to establish a separate Court of Appeal. This could be achieved administratively by the Chief Justice acting under s 7 of the *Supreme Court Act 1933* (ACT) to ensure the orderly and expeditious discharge of the business of the Court. Litigants might then be faced with a choice between two avenues of appeal — one to the Federal Court, the other to the ACT Supreme Court.

39.10 The Commission notes one further anomaly regarding appeals from the ACT Supreme Court. Where an appeal is taken from a decision of the Master of the Supreme Court, it must go first to a Full Court of the ACT Supreme Court[1781] and only then to a Full Court of the Federal Court, constituted by not less than five judges.[1782] The Commission was advised that the jurisdiction of the Master of the Supreme Court is broad and expanding,[1783] bringing with it the potential for avoidable expense and delay.[1784]

Appeals from the Northern Territory

39.11 Appeals from a judgment of the Northern Territory Supreme Court presently lie to a Full Court of the Supreme Court rather than to the Federal Court. When a Full Court of the Supreme Court exercises appellate jurisdiction, it is known as the Court of Appeal.

1780 *Kelly v Apps* [2001] ACTSC 27 (Unreported, Supreme Court (ACT), Miles CJ, 4 April 2001).
1781 *Supreme Court Act 1933* (ACT), s 9(2).
1782 s 25(4) FCAA.
1783 Supreme Court of the ACT, *Consultation*, Canberra, 23 February 2001.
1784 See, for example, *John Pfeiffer Pty Ltd v Rogerson* (2000) 172 ALR 625.

39.12 In 1976, the channel of appeal from a judgment of the Northern Territory Supreme Court was redirected from the High Court to the newly established Federal Court. When the Northern Territory attained self-government in 1978, legislation was enacted in ss 51–60 of the *Supreme Court Act 1979* (NT) to establish the appellate jurisdiction of the Northern Territory Court of Appeal and to require that this be exercised by not less than three judges of the Supreme Court.

39.13 However, there was political disagreement over the appointment of Northern Territory Supreme Court judges as judges of the Federal Court for the purpose of hearing appeals.[1785] It was not until 1985 that the change to the system of appeals for the Northern Territory was put into place to allow first appeals to be heard by the Northern Territory Court of Appeal rather than the Federal Court. In that year, s 24 FCAA was amended to state that the Federal Court's jurisdiction to hear appeals from the Supreme Court of a Territory did not include the Northern Territory.[1786]

39.14 In 1985 the *Judiciary Act* was also amended to include s 35AA, which regulates appeals to the High Court from the Supreme Court of the Northern Territory. The section provides that the High Court has jurisdiction to hear and determine appeals from judgments of the Supreme Court, subject to the grant of special leave to appeal.

39.15 Section 35AA simply refers to the 'Supreme Court of the Northern Territory' and not to the Full Court of that Court, or to its Court of Appeal. If the High Court grants special leave, it is possible to bring an appeal directly to the High Court from a judgment of a single judge of the Supreme Court of the Northern Territory exercising original jurisdiction. In practice, special leave to appeal is unlikely to be granted in such a case because the High Court prefers to have the benefit of the views of an intermediate appellate court. As pointed out in Chapter 19, the same issue arises in relation to appeals to the High Court from state Supreme Courts under s 35 JA.

Problems with Current Law and Practice

Appeals from the ACT

39.16 The ACT is the only State or mainland Territory in which a first appeal lies to a Full Court of the Federal Court rather than to a Full Court or Court of Appeal of a Supreme Court. This has created a number of practical problems.

1785 J Crawford (1993), 137.
1786 *Statute Law (Miscellaneous Provisions) Act (No 1) 1985* (Cth).

39.17 As mentioned above, in the past, all ACT Supreme Court judges were appointed with dual commissions on the Federal Court. Where an appeal was taken from a judgment of an ACT Supreme Court judge, a Full Court of the Federal Court would generally include one resident ACT Supreme Court judge among its members. The practice of granting ACT Supreme Court judges dual commissions on the Federal Court ceased in 1997, leaving just two ACT judges (Chief Justice Miles and Justice Higgins) as members of the Federal Court. The two judges most recently appointed to the ACT Supreme Court (Justices Crispin and Gray) cannot sit on the Full Court of the Federal Court to hear appeals from the ACT.

39.18 Section 25(3) FCAA requires a Full Court of the Federal Court, when hearing an appeal from the ACT Supreme Court, to include at least one judge of the ACT Supreme Court unless the Chief Justice of the Federal Court considers it impracticable to do so. One consequence of this is that an appeal from a decision of Chief Justice Miles is generally heard by a bench including Higgins J, while an appeal from a decision of Justice Higgins is generally heard by a bench including Chief Justice Miles. In consultations and submissions, this was widely regarded as unsatisfactory.[1787] This structural problem was thought to encourage litigants to view the outcome of an appeal as unduly dependent on the composition of the appellate bench.

39.19 In 1997, the ACT government released a discussion paper, which listed the following additional disadvantages of the present system of appeals from the ACT Supreme Court.[1788]

- Under the present system, the ACT government has no control over the appeals process. Remedies for any problems in the system can only be provided by the 'cumbersome and time consuming' process of achieving Commonwealth legislative amendment. This situation is contrary to the concept of the ACT as 'a separate body politic responsible to its own electors'.

- The ACT government has no control over the selection of judges who hear appeals as all judges who sit on Full Federal Court appeals from the ACT are allocated to such appeals by the Chief Justice of the Federal Court.

- The Federal Court has a different focus from the ACT Supreme Court and many judges sitting on appeals may have little familiarity with the issues arising on appeal. For example, Federal Court judges may lack the judicial

1787 Supreme Court of the ACT, *Consultation*, Canberra, 23 February 2001; The Community Law Reform Committee of the Australian Capital Territory, Report No 14 (1997).

1788 The Community Law Reform Committee of the Australian Capital Territory, Report No 14 (1997).

experience needed to exercise discretions to ensure fairness in jury trials and sentencing in criminal appeals.[1789]

- Lack of experience and familiarity of Federal Court judges with ACT appeals could create the perception on the part of litigants and lawyers that the resident ACT judge who sits on an appeal has 'disproportionate influence over his less experienced colleagues'. Appeals are thus seen to lie from one resident judge to another, and the prospects of success are seen as dependent upon the tendencies of the resident judge on appeal.[1790]

- There is an anomaly in the availability of appeals from some decisions of a Full Court of the Supreme Court to a Full Court of the Federal Court, which may protract an already expensive and lengthy appellate process. For example, an appeal from a Master of the ACT Supreme Court lies to the Full Court of the ACT Supreme Court and then to the Full Court of the Federal Court constituted by a panel of five judges, before progressing to the High Court.

39.20 In relation to the third point, data on the type of appeals heard by the Federal Court, which is shown in Figure 39–2, confirms that almost all Federal Court appeals from the ACT arise under local territory laws, and very few would otherwise be within the Federal Court's appellate jurisdiction.

39.21 The Federal Court took a different view of its role in relation to appeals from the ACT. In its submission to the Commission, the Court considered it appropriate to:

> acknowledge the contribution made by Federal Court judges since 1977 in appellate work in the ACT. This contribution has been of the highest quality. Moreover, in recent years, the Federal Court judges exercising appellate jurisdiction in criminal matters in the ACT have, in general, been selected on account of their experience in those matters … These, and all other appellate benches in the ACT, have been constituted in consultation with the Chief Justice of the ACT Supreme Court.[1791]

39.22 In consultations, others took the view that proposed changes to the present appellate structure for the ACT were motivated less by actual or perceived deficiencies with the current system than by a desire to fulfil the ideal of self-government. As David Mossop of the ACT Bar pointed out:

> The rationale for moving away from the Federal Court as the appellate court for the ACT is, apparently, that as the territory is self-governing it should provide its own appellate hierarchy … this is endorsed by the ACT and the Commonwealth.[1792]

1789 Ibid, 1–2.
1790 Ibid, 2.
1791 Federal Court of Australia, *Submission J039*, 20 April 2001.
1792 D Mossop, *Correspondence*, 28 May 2001.

Appeals from the Northern Territory

39.23 The system of appeals in the Northern Territory appears to have occasioned little difficulty in practice. In contrast to the situation in the ACT, the bringing of appeals from a single judge of the Supreme Court to the Court of Appeal has largely insulated the federal judicial system from problems since 1985.

39.24 One issue identified in DP 64 was the subject of some discussion during consultations, namely, the ability of a party to bring an appeal from a single judge of the Supreme Court directly to the High Court under s 35AA JA, subject to the grant of special leave.

39.25 The Commission has not been made aware of any occasion on which special leave has been granted in such a case, and it is unlikely that the High Court would grant leave without the matter first having been considered by an intermediate court of appeal. Nevertheless, the question was raised whether s 35AA should be amended to make it clear that appeals to the High Court from the Northern Territory Supreme Court can be brought only from a decision of that court exercising appellate jurisdiction. Similar questions can be raised in relation to appeals from state Supreme Courts under s 35 JA.

39.26 It is perhaps an open question whether Parliament can block the channel of appeal to the High Court from a single judge of a territory court exercising federal jurisdiction. The answer depends in part on whether a territory court is a federal court or a court exercising federal jurisdiction,[1793] and in part on whether the prohibition can be regarded as an 'exception' or 'regulation' of the right of appeal conferred by s 73 of the Constitution. By way of analogy, the *Federal Magistrates Act 1999* purports to prohibit an appeal to the High Court directly from a federal magistrate, but does so in a manner that recognises the contested nature of the constitutional question.[1794]

Consultations and Submissions

Appeals from the ACT

39.27 The Commission consulted with a range of judicial officers and practitioners in the ACT, all of whom favoured the establishment of an ACT Court of Appeal. In its submission, the ACT Supreme Court observed:

> The Court supports the proposition that the Federal Court of Australia should cease to be an intermediate appellate court for appeals from the ACT, and that this jurisdiction should be exercised by a Full Court of this Court, with appeal then by way of special

1793 *Northern Territory v GPAO* (1999) 196 CLR 553.
1794 s 20(1), (3) FMA. See Chapter 4.

> leave to the High Court, in the same way as an appeal lies from a State Supreme Court or the Supreme Court of the Northern Territory.[1795]

39.28 The need for change was said to arise primarily from the problems generated by the current arrangements. In particular, the limited number of ACT judges with dual Federal Court commissions was seen as detrimental to the administration of justice in the Territory.[1796]

39.29 The Commission was informed that the preferred structure for a Court of Appeal was a Full Court comprised of three judges. On this model, the bench might consist of resident ACT judges and additional judges, some of whom might hold primary commissions of the Federal Court or state Supreme Courts. This model was seen as maximising the benefits of an ACT appellate court while minimising the disruption to the ACT legal system — the model was considered an improved version of the current system rather than a radical change. The possibility of an exchange of judges between the Northern Territory and the ACT was mentioned, but not considered realistic due to distance and cost.[1797]

39.30 The only argument that the Commission heard against the establishment of an ACT Court of Appeal came from the Northern Territory. While those consulted considered that the Northern Territory Court of Appeal was performing well and that the quality of the bench was very high, some nevertheless expressed regret that the Territory had moved away from Federal Court appeals in 1985.

39.31 The Commission was told that the judicial experience of the Federal Court could not be matched by a local appellate court, with its small cohort of Supreme Court judges.[1798] The Northern Territory Supreme Court is presently comprised of nine judges — a Chief Justice, five judges, two additional judges and one acting judge.[1799]

39.32 While there was no suggestion that the Northern Territory Court of Appeal be abolished and appeals to the Federal Court reinstated, doubt was expressed about whether it was advisable for the ACT to establish its own appellate court.

1795 Supreme Court of the ACT, *Consultation*, Canberra, 23 February 2001.

1796 Ibid; R Cahill, *Consultation*, Canberra, 22 February 2001; D Mossop, *Consultation*, Canberra, 23 February 2001.

1797 Supreme Court of the ACT, *Consultation*, Canberra, 23 February 2001; R Cahill, *Consultation*, Canberra, 22 February 2001; D Mossop, *Consultation*, Canberra, 23 February 2001.

1798 A Asche, *Consultation*, Darwin, 1 March 2001; Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001; D Jackson QC, *Consultation*, Sydney, 5 March 2001.

1799 <http://www.nt.gov.au/ntsc/judges.html> (21 July 2001).

Appeals from the Northern Territory

39.33 In its consultations in the Northern Territory, the Commission was told that the avenue of appeal from a single judge of the Supreme Court to the High Court was rarely used. The majority with whom the Commission consulted saw the avenue as an anomaly, and considered that appeals from a single judge would be most unlikely to be granted special leave by the High Court.[1800]

39.34 A recent example of an attempt to use s 35AA JA illustrated the point. In *Northern Territory v Mengel,*[1801] an application was made for special leave to appeal to the High Court from a decision of a single judge of the Northern Territory Supreme Court. The High Court refused the application. An appeal was then brought to the Northern Territory Court of Appeal, and from there to the High Court. On the second attempt, special leave was granted. The Commission was advised that this example showed the High Court's reluctance to grant special leave without the benefit of a judgment of an intermediate appellate court.[1802] Despite this, some members of the Northern Territory Bar and Supreme Court offered the opinion that this avenue of appeal caused no mischief, might be of utility in the future, and ought to be retained.[1803]

Commission's Views

Appeals from the ACT

39.35 The Commission understands that an agreement has been reached between the Commonwealth and ACT governments regarding the establishment of a Court of Appeal for the ACT.[1804] Media reports suggest that a Court of Appeal may be operational by 2002, at which time the avenue of appeal from the ACT Supreme Court to the Federal Court will be abolished.[1805]

39.36 The Commission supports this initiative but in doing so acknowledges the high standard of service that the Federal Court has provided to the ACT over the 24 years in which it has been the intermediate appellate court for the Territory. Although Miles CJ's decision in *Kelly v Apps*[1806] suggests that an intermediate

1800 Attorney-General's Department (NT), *Consultation*, Darwin, 1 March 2001; Supreme Court of the Northern Territory, *Consultation*, Darwin, 1 March 2001; Northern Territory Law Society, *Consultation*, Darwin, 1 March 2001.

1801 *Northern Territory v Mengel* (1995) 129 ALR 1.

1802 Attorney-General's Department (NT), *Consultation*, Darwin, 1 March 2001; Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001.

1803 Northern Territory Bar Association, *Consultation*, Darwin, 2 March 2001; Supreme Court of the Northern Territory, *Consultation*, Darwin, 1 March 2001.

1804 Supreme Court of the ACT, *Consultation*, Canberra, 23 February 2001; Attorney-General's Department (Cth), *Consultation*, Canberra, 28 March 2001.

1805 P Clack, 'Interstate Judges for ACT Appeal Court', *Sunday Canberra Times* 4 March 2001, 2.

1806 *Kelly v Apps* [2001] ACTSC 27 (Unreported, Supreme Court (ACT), Miles CJ, 4 April 2001).

appellate court for the ACT might be established within the existing legislative framework, the Commission considers it preferable to place a new structure on an unequivocal legislative footing.

39.37 In the Commission's view, the establishment of a Court of Appeal for the ACT would help fulfil the aspirations of self-government by creating local institutions to exercise the judicial power of the Territory. This may provide practical benefits in so far as it would give the Chief Justice of the ACT control over the listing of appeals and the allocation of resources for that task. The proposed change would also encourage political accountability by ensuring that elected representatives of the ACT are ultimately responsible for the administration of justice, including appellate justice, in the Territory.

39.38 The Commission considers that the establishment of an ACT Court of Appeal would also benefit the Federal Court by reducing the amount of federal judicial resources expended in adjudicating non-federal claims. Although criminal and other appeals from the ACT may lend diversity to the appellate work of Federal Court judges, the Commission considers it more appropriate for the Federal Court to focus on its core federal appellate functions. This would not prevent Federal Court judges from participating in ACT appeals if they were commissioned as additional judges of the ACT Supreme Court. However, it would ensure that those judges do not undertake substantial non-federal work in their capacity as Federal Court judges. The proposed change may also reduce the administrative problems for the Federal Court in listing appeals that generally involve at least one Federal Court judge whose primary judicial commission is with another court.

39.39 The structure of an ACT Court of Appeal is a matter for the ACT legislature. However, from the Commission's consultations, it seems likely that the only sustainable model for an intermediate appellate court in a small jurisdiction is one in which a Full Court is constituted from a rotating pool of judges. That pool might include judges from other courts, who may be given dual commissions as additional judges of the ACT Supreme Court. If those additional judges included a number of Federal Court judges, the proposed change in structure might be achieved with little disruption to the system by which justice is presently administered in the Territory. For example, Federal Court judges who presently hear appeals from the ACT might still do so, albeit in their capacity as additional judges of the ACT Supreme Court rather than as Federal Court judges.

39.40 If an ACT Court of Appeal were to take over responsibility for hearing appeals currently heard by the Federal Court, other consequential amendments might be necessary. In Chapter 35 the Commission noted that the courts of the ACT have jurisdiction in relation to three other Commonwealth Territories — the Jervis Bay Territory, the Australian Antarctic Territory and the Territory of Heard

Island and McDonald Islands, being three other Territories in which ACT law is applied.[1807] By virtue of s 24 FCAA, the Federal Court currently hears appeals from the ACT Supreme Court, including appeals in relation to matters arising in those Territories. If that avenue of appeal were removed upon the establishment of an ACT Court of Appeal, alternative arrangements should be made for the exercise of original and appellate jurisdiction in relation to the three Territories. The need for change may not be pressing, given the small population and scale of activity in these Territories.[1808] However, environmental protection, scientific research and resource development are of growing importance in these Territories. It would be appropriate to implement any jurisdictional changes at the same time as amendments are made in respect of appeals to the Federal Court from the ACT Supreme Court.

Appeals from the Northern Territory

39.41 The Commission considers that the right of appeal to the High Court from a judgment of a single judge of the Northern Territory Supreme Court should be repealed, in so far as it is constitutionally permissible to do so. A mechanism for enabling first appeals to go directly to the High Court has little practical benefit, particularly when one bears in mind the existence of other mechanisms, such as removal, to ensure that appropriate cases may be brought directly to the High Court (see Chapter 15).

Recommendation 39–1. The ACT legislature should consider establishing an intermediate appellate court for the ACT with jurisdiction to hear appeals from a single judge of the Supreme Court of the ACT. Once established, s 24 of the *Federal Court of Australia Act* should be amended to preclude appeals being taken to the Federal Court from the Supreme Court of the ACT, in like manner to the exclusion of appeals to the Federal Court from the Supreme Court of the Northern Territory.

Recommendation 39–2. Section 35AA of the *Judiciary Act* should be amended to provide that appeals from a decision of a single judge of the Supreme Court of the Northern Territory may be made only to the Northern Territory Court of Appeal, and then by special leave to the High Court. Similar provision should be made in relation to the ACT once an intermediate appellate court has been established for the ACT.

1807 *Jervis Bay Territory Acceptance Act 1915* (Cth), s 4D; *Australian Antarctic Territory Act 1954* (Cth), s 10; *Heard Island and McDonald Islands Act 1953* (Cth), s 9. See Chapter 35, para 35.15.

1808 The Territory of Heard Island and McDonald Islands is uninhabited; the Australian Antarctic Territory is populated by a small community of scientists.

References

The Community Law Reform Committee of the Australian Capital Territory, *Appellate Structure of the ACT Supreme Court*, Report No 14 (1997), Publications and Public Communication for the ACT, Canberra.

J Crawford, *Australian Courts of Law* 3rd ed (1993) Oxford University Press, Melbourne.

40. Drafting Issues

Contents

40.1 During the course of this inquiry, the Commission was made aware of numerous anomalies and inconsistencies in the way in which the *Judiciary Act* treats the Territories, as a matter of drafting practice. This Chapter draws attention to these anomalies and recommends that the Act be reviewed for the purpose of providing consistency of approach.

40.2 When the *Judiciary Act* was enacted in 1903, there were no Commonwealth Territories. The first of these, the Territory of Papua, was acquired by the Commonwealth in 1906.[1809] The ACT and the Northern Territory were not formed until 1911 (see Chapter 35). For this reason the *Judiciary Act*, as enacted, did not need to confront the practical and theoretical difficulties associated with the jurisdiction of territory courts. The way in which the Act has subsequently confronted this issue reveals a very piecemeal approach.

40.3 The *Acts Interpretation Act 1901* (Cth) has some bearing on the application of the *Judiciary Act* to the Territories, but in practice it gives only limited assistance. Section 17(o) defines a 'State' as simply 'a State of the Commonwealth', and thus does not include Territories. Section 17(p) defines 'Territory' as 'a Territory referred to in section 122 of the Constitution', which thus includes internal and external Territories. These definitions are subject to the expression of a contrary intention.

Disparate Treatment of States and Territories

40.4 The *Judiciary Act* reflects a number of drafting approaches to the question whether the Territories should be included or excluded from the ambit of the Act.

1809 *Papua Act 1905* (Cth). The acquisition took effect from 1 September 1906.

- Some provisions refer only to States or state courts and have never been amended to include Territories or territory courts. Examples are s 39, which confers federal jurisdiction on state courts; s 17, investing state Supreme Courts with jurisdiction in Chambers; and s 21, regarding the quorum in appeals from a Full Court of a state Supreme Court to the High Court.

- Some provisions refer only to States but have been substantially replicated in provisions that refer to one or more Territories in similar terms. For example, ss 65 and 67E grant immunity from execution of judgments to the States and the Northern Territory, respectively.

- In some Parts of the Act, provisions have been amended to extend their operation to the Territories, although others have not. For example, Part IX, s 56 JA deals with claims against the Commonwealth arising 'in a State or Territory'. All other provisions in Part IX refer only to 'a State'.

- In other cases, the term 'States' has been defined by later amendment to include a reference to certain Territories. For example, in Part XI, Div 1A, s 78AA provides that 'State' includes the Australian Capital Territory and the Northern Territory. In other cases, the term 'Territory' has been defined to refer only to defined Territories. For example, in Part IXA, s 67A provides that 'Territory' means the Northern Territory.

- Some sections apply only to Territories and in so doing establish a unique regime for a Territory. For example, s 67B and 67C(b), respectively, confer jurisdiction on the Northern Territory Supreme Court to hear suits between the Commonwealth and the Northern Territory, and to grant prerogative relief against Commonwealth officers.

What is a 'Territory'?

40.5 Running across these issues is the fact that, when extending the *Judiciary Act* to the Territories, the question of which particular Territories are included is dealt with differently in various sections of the Act. The Commission notes that s 3A JA states that 'This Act extends to all the Territories'. However, it is unclear how this provision interacts with other provisions of the Act.

40.6 Examples of the disparate treatment of Commonwealth Territories may be seen below.

- Section 67A extends Part IXA to the Northern Territory, but not the ACT.

- Section 78AA extends Part XI, Div 1A, to the Northern Territory and the ACT by defining 'State' to include those Territories. However, s 78B, which falls within Div 1A, refers to a cause pending 'in a court of a State or Terri-

tory', then to 'the Attorneys-General of the Commonwealth and of the States'. Section 78B might thus refer to courts of Territories other than the ACT and the Northern Territory, including external Territories. It might be argued that different language is used in respect of notices to Attorneys-General as no external Territory has an Attorney-General. It is unclear whether the difference in language is a minor drafting error or a deliberate difference in the application of different parts of the provision.

- For the purpose of Part VIII, s 46 defines 'Australia' to include the external Territories, though s 17(a) of the *Acts Interpretation Act 1901* defines Australia, when used in a geographical sense, to include the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but no other external Territory.

- For the purpose of Part VIII, s 48 binds the Crown in the right of the Commonwealth, the States, the Northern Territory and Norfolk Island. However, no mention is made of the ACT.

Commission's View

40.7 The Commission's view, which was supported in consultations and submissions,[1810] is that the *Judiciary Act* should be reviewed and amended as necessary to clarify the extent to which each provision is intended to apply to the States and Territories. The drafting of the *Judiciary Act* has evolved in a piecemeal fashion over the course of a century to take into account the acquisition of new Territories, and the grant of self-government to some of them. Numerous inconsistencies have arisen as a result. The Commission considers that clarity of the law would be promoted by a review of the Act in order to standardise its application to Commonwealth Territories.

Recommendation 40–1. The Attorney-General should order a review of the use of the terms 'Territory' and 'State' in the *Judiciary Act* with a view to clarifying the application of the Act to the internal and external Territories. The review should consider the relationship between these terms, as used in the *Judiciary Act*, and the definitions used in the *Acts Interpretation Act 1901*.

1810 Supreme Court of the ACT, *Consultation*, Canberra, 23 February 2001; Law Council of Australia, *Correspondence*, 20 April 2001.

Part I

Location, Consolidation and Simplification

41. Location, Consolidation and Simplification

Contents

Introduction

41.1 The terms of reference ask the Commission to consider:

- the need for clear and comprehensive legislative provisions for the exercise and distribution of the judicial power of the Commonwealth; and

- whether the procedural provisions dealing with the High Court included in the *Judiciary Act* would be better placed in another Act.

41.2 In DP 64, the Commission considered the location, consolidation and simplification of a number of provisions of the *Judiciary Act*. It also considered whether some of those provisions would be better placed in other legislation or repealed altogether.[1811]

41.3 The Commission also has an obligation under s 21 of the *Australian Law Reform Commission Act 1996* (Cth) to consider 'simplifying the law', 'proposals for consolidating Commonwealth laws' and 'proposals for the repeal of obsolete or unnecessary laws' in relation to matters referred to it by the Attorney-General.

41.4 In DP 64, the Commission discussed the need for clear structure, objectives and operation of legislation in order to enhance accessibility for potential users of the legislation. In addition, the Commission noted that contempo-

1811 Australian Law Reform Commission, Discussion Paper No 64 (2000), Chapter 8.

rary legislative drafting practice suggests that, as far as possible, all provisions that are concerned with the same subject matter should be located within a single piece of legislation. Moreover, unnecessary or obsolete provisions should be repealed, and unrelated provisions should be relocated to more appropriate legislation.

41.5 The Commission has applied these principles in reviewing the content of the *Judiciary Act* in the context of the terms of reference and the Commission's obligations under s 21 of the *Australian Law Reform Commission Act 1996.* The Commission has also taken into account the comments made in consultations and submissions regarding the desirability of notes, cross-references and sequential numbering. As a result, in this Chapter the Commission recommends that a number of provisions be repealed, relocated into existing legislation or relocated into new Acts because they do not reflect the underlying theme of the allocation and exercise of the judicial power of the Commonwealth. In other Chapters, the Commission has recommended that repeals and amendments be made to a number of jurisdictional provisions in the Act.

General Issues

41.6 During the course of the inquiry, the Commission considered a number of general issues relating to the location, consolidation and simplification of the *Judiciary Act*. This section considers general matters relating to amending, renaming and renumbering provisions of the *Judiciary Act*, as well as the inclusion of notes or cross-references in that Act or related legislation.

Issues arising from the current law

Underlying theme of the Act

41.7 When the *Judiciary Act* was enacted in 1903, the long title described it as 'An Act to make provision for the exercise of the judicial power of the Commonwealth'. At the time, the High Court was the only federal court in existence and no Territories had yet been acquired by the Commonwealth.

41.8 The central place of the *Judiciary Act* in establishing the federal judicial system made it certain that the Act would require amendment as that system evolved. The Act has been amended by approximately 70 separate pieces of legislation over its 98-year lifetime. Many of the amendments are consistent with the purpose of the Act, as stated in its long title. However, several Parts of the Act do not relate to the exercise of the judicial power of the Commonwealth, and their inclusion has transformed the Act into one of far broader compass than originally envisaged. These Parts are the subject of more detailed analysis later in this Chapter.[1812]

1812 For example, Parts VIII, VIIIA, VIIIB and VIIIC.

Renumbering the sections

41.9 In its present form, the Act bears the hallmarks of any Act that has been subject to frequent legislative amendment. There are gaps in the numbering of sections (ss 4–14 are missing) and many sections are identified by one or more letters.[1813] The *Judiciary Act* is by no means unique in this respect, nor is it a particularly bad example of the phenomenon, when compared with statutes in the areas of taxation or corporate regulation. In DP 64 the Commission asked whether the sections of the Act should be renumbered if extensive amendments were made to the Act as a result of the recommendations in this report.

Renaming the Act

41.10 The title of the *Judiciary Act* was borrowed from the United States legislation of the same name.[1814] Whatever the meaning of the title at the time it was enacted in 1903, today the title does not accurately reflect its content. The term 'judiciary' is more often used to denote the judges who comprise a court system, rather than to the court itself, or its jurisdiction. In DP 64 the Commission asked whether the title of the Act should be altered.

Cross references and notes

41.11 Another problem with the Act is that it does not contain comprehensive cross-references or notes to other relevant sources of law, although occasional cross-references can be found as a result of piecemeal amendment.[1815] In a modest way, s 30 of the *Judiciary Act* uses cross-referencing by indicating that the High Court's jurisdiction comes from the Constitution as well as from statutory sources. A recent example of the inclusion of notes and cross-references to other relevant legislation can be found in the *Federal Magistrates Act 1999* (Cth).[1816] In DP 64 the Commission asked whether increased use of notes and cross-references would make the *Judiciary Act* more accessible to users of the legislation.

Submissions and consultations

41.12 Of those who commented on this aspect of the reference, there was general agreement that changes were required to the content of the Act to better reflect the underlying theme of the exercise of federal judicial power. There was also some support for renaming the Act and the inclusion of notes and cross-references in both the *Judiciary Act* and related legislation.

1813 For example, ss 33A, 35A, 35AA, 55A–55ZI, 77A–77V and 78AA.

1814 *Judiciary Act 1789* (US). For an historical account see M Marcus (1992).

1815 For example ss 55M, 55N JA.

1816 See, for example, the Note to s 8 FMA, which states 'The Parliament may create federal courts under Chapter III of the Constitution', and the Note under s 20 FMA, with cross references to s 94 FLA and s 24 FCAA.

41.13 The Law Council of Australia recommended that the content of the Act be changed to reflect the unifying theme of making provision for the exercise of the judicial power of the Commonwealth.[1817] The Supreme Court of Western Australia agreed that there was doubt about the consistency of the amendments to the *Judiciary Act* with the original purpose of the Act.[1818] The Court also suggested that if the long title of the Act were changed, the Act could be confined to provisions that relate to inter-jurisdictional aspects of federal judicial power and its exercise.

41.14 In relation to renaming the Act, the Law Council noted that the current name is misleading. It suggested the 'Administration of Justice Act' as an alternative, although the Council did not have a final view on what the name of the Act should be.[1819] Andrew Tokley of the South Australian Bar also suggested that the *Judiciary Act* be renamed, and proposed the 'Federal Jurisdiction (State Courts) Act' as an alternative.[1820]

41.15 The Commission also heard the opposing view, namely, that the historical significance of the title justified its retention in any revised Act. For example, Dr Gavan Griffith QC was strongly opposed to renaming the Act. In his opinion, the central role of the *Judiciary Act* in the evolution of the Australian judicial system should be reflected in the retention of the original name as a link to the past.[1821]

41.16 As to the issue of renumbering the sections of the Act, the Law Council stated that they should be renumbered if major amendments were made to the *Judiciary Act*.[1822] Andrew Tokley expressed a similar view. He suggested that a table of concordance be appended to the Act, showing old and new section numbers, for ease of reference.[1823] The Law Council also advocated the use of notes and cross-references in new legislation relating to the judicial power of the Commonwealth.[1824]

Commission's views

41.17 The Commission considers that the *Judiciary Act* should comprise only those provisions that relate to the allocation and exercise of the judicial power of the Commonwealth. In its current form, the Act has become a repository for miscellaneous provisions that have no direct connection to that underlying theme.

1817 Law Council of Australia, *Submission J037*, 6 April 2001.
1818 Supreme Court of Western Australia, *Submission J036*, 5 April 2001.
1819 Law Council of Australia, *Submission J037*, 6 April 2001.
1820 A Tokley, *Submission J023*, 16 March 2001.
1821 G Griffith QC, *Correspondence*, 18 April 2001.
1822 Law Council of Australia, *Submission J037*, 6 April 2001.
1823 A Tokley, *Submission J023*, 16 March 2001.
1824 Law Council of Australia, *Submission J037*, 6 April 2001.

If the Act were amended in accordance with this recommendation, it would be desirable to renumber the sections to promote ease of reference for users of the legislation.

41.18 The Commission is also of the view that judges, practitioners and litigants would benefit from the use of appropriate cross-references and notes. There is a particular need for notes and cross-references because of the close relationship of the *Judiciary Act* to the Constitution and to specific Acts that regulate the exercise of federal jurisdiction, such as the *Federal Court of Australia Act 1976*, the *Family Law Act 1975* and the *Federal Magistrates Act 1999*.[1825]

41.19 In relation to the name of the Act, the Commission is conscious of the heritage of the Act, including the role of Sir Samuel Griffith (later the first Chief Justice of the High Court) and Alfred Deakin (the first Commonwealth Attorney-General) in drafting it. While these historical links are important, on balance the Commission considers it of paramount importance that the name of the Act reflects its content in a way that maximises its accessibility to the current generation of Australians. The Commission does not have a fixed view as to what that revised name should be. The Law Council's suggestion — the 'Administration of Justice Act' — would be suitable, as would the 'Judicial Power of the Commonwealth Act'.

Recommendation 41–1. The *Judiciary Act* should be amended to reflect the Act's underlying theme, namely, the allocation and exercise of the judicial power of the Commonwealth. Existing provisions that do not comport with this theme or are obsolete should be relocated or repealed, as recommended below. In order to describe its content more accurately, the *Judiciary Act* should be renamed.

Recommendation 41–2. The sections of the *Judiciary Act* should be renumbered in light of the extensive amendments recommended in this Report.

Recommendation 41–3. Legislation that relates to the allocation or exercise of the judicial power of the Commonwealth should include notes and cross-references to relevant provisions of the Constitution and other Acts of Parliament to promote the clarity and accessibility of the law.

1825 See Australian Law Reform Commission, Discussion Paper No 64 (2000), para 1.1–1.5, 1.12.

Obsolete Provisions — The ASIS Provisions

Current law and practice

41.20 Part VIII JA comprises ss 46–51 and was inserted into the *Judiciary Act* in 1984 to provide for the 'Enforcement of certain orders concerning court proceedings'.[1826] The legislation arises out of a raid conducted by the Australian Secret Intelligence Service (ASIS) at the Sheraton Hotel in Melbourne on 30 November 1983. As a result of that incident, some members of ASIS were prosecuted for breaches of Victorian criminal law.[1827] The Victorian Parliament sought to protect Australia's national security by authorising a court to make various orders to suppress publication of any confidential information in relation to any criminal proceedings in that State arising out of the incident.[1828]

41.21 The purpose of inserting Part VIII into the *Judiciary Act* was to ensure that any order made by a Victorian court was effective beyond the territorial limits of Victoria. To this end, the *Judiciary Act* extends the territorial reach of an order of a Victorian court to all natural persons, whether or not they are Australian residents or citizens, and to all bodies corporate, whether or not they are incorporated in Australia (s 47). The Federal Court is also given the same powers to punish a person for contravention or failure to comply with an order as are possessed by a Victorian court (s 49(4)). Although the provisions of Part VIII take their colour from the context of Victorian criminal prosecutions, the extended territorial effect of the suppression orders does not itself involve the exercise of criminal jurisdiction, and for that reason falls within the Commission's terms of reference.[1829]

41.22 Section 51 is a sunset clause limiting the application of Part VIII to orders made within two years after the commencement of the Victorian legislation. That period expired on 27 March 1986, so that Part VIII continues to apply only to orders of a Victorian court made before that date.[1830]

Problems with current law and practice

41.23 Some of the orders to which Part VIII applies relate to events occurring *during* the conduct of a criminal proceeding. Examples are orders that a proceeding is to take place in a closed hearing (s 49(3)(a)), or that a person is to be excluded from a proceeding (s 49(3)(b)). In DP 64, the Commission questioned whether

1826 *Judiciary Amendment Act (No 2) 1984* (Cth). The circumstances giving rise to the amendment were considered by the High Court in *A v Hayden (No 2)* (1984) 156 CLR 532.

1827 Parliament of the Commonwealth of Australia, *Royal Commission on Australia's Security and Intelligence Agencies: Report on the Sheraton Hotel Incident* (1984).

1828 *Criminal Proceedings Act 1984* (Vic).

1829 The terms of reference confine the inquiry to civil proceedings. See Chapter 1.

1830 The *Criminal Proceedings Act 1984* (Vic) came into force on 27 March 1984.

there were continuing criminal proceedings related to the events of 1983 and, if not, whether those provisions could be repealed as obsolete.[1831]

41.24 The Commission has since received advice from the Supreme Court of Victoria and the Magistrates' Court of Victoria that there are no continuing or outstanding proceedings pending in those courts relating to the ASIS raid.[1832]

41.25 The other provisions in Part VIII refer to orders prohibiting the disclosure of information about a proceeding, prohibiting the publication of a report about a proceeding, or prohibiting access to documents related to a proceeding (s 49(3)(c)–(e)). In DP 64, the Commission expressed the view that more information was needed about such orders, which might still be justified in the interest of national security, notwithstanding the passage of nearly 18 years since the relevant events.[1833]

41.26 If Part VIII is retained in the *Judiciary Act*, the issue of the location of the Part remains problematic, particularly if the content of the *Judiciary Act* is to be streamlined in accordance with its underlying purpose.

Commission's views

41.27 In DP 64, the Commission expressed the preliminary view that Part VIII of the *Judiciary Act* should be repealed to the extent that it contains provisions that are unnecessary or obsolete.[1834] The Commission did not receive any submissions or comments in consultations to the contrary. As noted above, there are no outstanding criminal proceedings in Victoria arising from the ASIS incident in 1983, and the sunset clause in s 51 has long expired. The Commission's view in relation to Part VIII is that the sections relating to the conduct of criminal proceedings should be repealed as obsolete.

41.28 The Commission did not receive any information in the course of this inquiry indicating that repeal of s 49(3)(c)–(e) would have implications for national security. However, it is not for the Commission to assess whether this section continues to be justified in the interests of national security. The government should make this assessment on the light of advice from the Minister responsible for ASIS, namely, the Minister for Foreign Affairs and Trade.

1831 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 8.60.

1832 Supreme Court of Victoria, *Correspondence*, 23 February 2001; Magistrates' Court of Victoria, *Correspondence*, 7 March 2001.

1833 Australian Law Reform Commission, Discussion Paper No 64 (2000), para 8.60.

1834 Ibid, para 8.61.

Recommendation 41–4. The Attorney-General should inquire of the Minister for Foreign Affairs and Trade, as the Minister responsible for the Australian Secret Intelligence Service (ASIS), whether any national or international security interest continues to be served by Part VIII (ss 46–51) of the *Judiciary Act*. If not, Part VIII of the Act, which relates to certain orders made in connection with an ASIS raid in Melbourne in 1983, should be repealed.

Obsolete Provisions — Venue for Penalties and Taxes

Current law and practice

41.29 Three sections of the *Judiciary Act* provide for venue in suits concerning pecuniary penalties and forfeiture (s 82), taxes (s 83), and seizures made on the high seas (s 84). These provisions were included in the *Judiciary Act* when originally enacted and remain in the same terms, except for amendments in 1959 to extend the provisions to the Territories as well as the States.[1835]

Problems with current law and practice

41.30 These provisions raise three issues — their relevance to Australian circumstances; their uncertain language and scope; and their utility in legal proceedings. Each of these issues leads to the broader question of whether the provisions are still necessary and, if so, where they should be located.

41.31 Each of these provisions appears to have its origins in United States law. Sections 82 and 83 are almost verbatim reproductions of sections of the United States Code,[1836] which was first consolidated with the publication of the Revised Statutes in 1875. It is likely that the statutory codification would have been available to the drafters of the *Judiciary Act* in 1903. The current United States Code still contains very similar provisions.[1837]

41.32 The origin of these provisions in United States law raises the question of their continued suitability to Australian circumstances. The reason for the potential unsuitability is that the United States District Court and the United States Courts of Appeals are organised on a territorial basis, which has no Australian equivalent. In the United States, venue provisions may serve a purpose in specifying some link

1835 *Judiciary Act 1959* (Cth), s 11.

1836 The marginal notes to ss 82, 83, 84 and 85 of the 1903 print of the *Judiciary Act* contain references to US 732, 733, 734 and 934, respectively.

1837 See 28 USC s 1395(a), 1396, 1395(c) (1994, Supp 3) with respect to venue in suits for penalties, taxes and forfeiture, respectively.

between an action and a place, for the purpose of preserving the territorial basis of a federal court's jurisdiction. Yet, even in the United States it has been remarked of special venue provisions that there is a 'need for careful pruning of the great mass of these generally ill-advised and often confusing exceptions to the general venue statutes'.[1838]

41.33 There is considerable doubt about the intended scope of ss 82–84 JA. There is no case law that considers their meaning. It is not clear whether the provisions are concerned with the recovery of penalties (that is, fines) in relation to criminal offences, or with the recovery of civil penalties such as provided by certain customs and taxation laws, or both.

41.34 There is no evidence before the Commission that any of the provisions have been relied on in court proceedings. However, as discussed below, the Australian Customs Service indicated that s 82 has been used prior to proceedings to dissuade defendants from seeking a change of venue.

Submissions and consultations

41.35 The Commission distributed DP 64 widely among Commonwealth departments and agencies. It also sought the views of the Australian Customs Service ('Customs'), the Australian Taxation Office ('ATO') and the Australian Federal Police ('AFP') on the use that each made of the provisions, and whether they should be repealed. The Commission received a written reply from Customs but not from the other agencies, perhaps suggesting that the latter agencies neither used the provisions nor objected to their repeal. No other consultation or submission objected to the repeal of ss 82–85.

41.36 Customs opposed the repeal of s 82, which relates to venue in suits for penalties, because it was seen as giving Customs a choice of venue. Customs submitted that s 82 is a valuable tool in resolving jurisdictional issues before an action is heard. For example, s 82 was reported to have been used recently in preliminary discussions to ensure that proceedings were issued in the State where Customs had conducted an investigation, notwithstanding that the defendant had sought to have the proceedings transferred to another State. This was seen as reducing the cost and inconvenience of proceedings for Customs.

41.37 Customs also opposed the repeal of s 83 JA, which relates to venue in suits for taxes. Section 83 is cast in similar terms to s 82, and presumably might be put to the same use in relation to taxes as s 82 in relation to pecuniary penalties and forfeiture.

1838 American Law Institute, Tentative Draft No 4 (2001), addressing the revision of venue and transfer provisions in the United States Code.

41.38 In relation to s 84, Customs acknowledged that the section is not commonly used but stated that there might be circumstances in which the provision would be valuable in establishing jurisdiction. For that reason, Customs also opposed the repeal of s 84. The section ensured that proceedings of the kind contemplated by that provision may, at the option of Customs, be issued in the State or Territory into which the seized property is brought. Section 84 was thought to make it more difficult for a respondent to have a proceeding transferred to another State or Territory.

Commission's views

41.39 The Commission acknowledges the concerns of Customs in relation to ss 82–84 and is conscious of Customs' interest in ensuring that customs laws are effectively enforced. However, the Commission considers that there are no reasons of law or policy sufficient to warrant retention of these sections.

41.40 The Commission considers that ss 82–84 are not needed in Australia today. Several mechanisms exist to ensure that matters are heard in the most appropriate forum and venue. The policy reflected in current legislation is to allow the plaintiff to commence an action virtually anywhere in Australia, but to supplement this freedom with mechanisms to ensure the matter is heard in the most appropriate Australian forum. As discussed in Chapter 8, s 20 of the *Service and Execution of Process Act 1992* (Cth) enables a court to grant a stay of a proceeding commenced inappropriately in that court, while s 5 of the cross-vesting legislation enables certain matters to be transferred to a more appropriate court.[1839] There are also flexible provisions relating to change of venue within national courts, removal and remitter. The sorts of 'hard' connecting factors identified in ss 82–84 could now be taken into account as relevant considerations in the discretionary process under the various stay and transfer procedures.

41.41 Civil actions that would give rise to the application of ss 82, 83 and 84 can now be brought in the Federal Court under s 39B(1A)(c) JA, which gives the Federal Court jurisdiction in any matter arising under any laws made by Parliament (see Chapter 4). State courts are invested with federal jurisdiction by s 39 JA in all matters falling within ss 75 and 76 of the Constitution, including matters arising under Commonwealth laws (see Chapter 6). Every court considering a penalty, tax or forfeiture would be able to consider the most appropriate venue for the trial of the action. In so doing, courts would consider the convenience of the parties, their place of business or residence, the location of witnesses, and the interest in the efficient administration of justice.

1839 See *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and cognate state and territory legislation.

41.42 In its correspondence with the Commission, Customs did not refer to any proceedings in which a court found it necessary to rely on ss 82–85. Instead, it suggested that ss 82, 83 and 84 might act as a limitation on venue by discouraging defendants from seeking to change the venue.

41.43 The Commission does not consider this to be a legitimate reason for retaining the sections. Courts should have a broad discretion to determine the most appropriate forum and venue for the trial of an action, taking into account the interests of all the parties and the ends of justice. Customs and other agencies may have a legitimate reason for preferring a proceeding to be heard in one place rather than another, for example, because its investigations took place there. It should be entitled to put this argument to a court, just as the defendant should be entitled to put an alternative view. The Commission considers that a court should be able to determine the most appropriate venue for the trial of an action for penalties, taxes or forfeiture, free from the restrictive and anomalous venue provisions in ss 82–85 JA.

Recommendation 41–5. Sections 82–85 of the *Judiciary Act*, which provide for venue in suits for pecuniary penalties, taxes and forfeiture, are unnecessary and should be repealed.

Relocating Provisions to Related Legislation

Current law and its problems

41.44 The Commission's terms of reference required consideration of whether certain procedural provisions relating to the High Court, which are located in the *Judiciary Act,* would be better placed in another Act.

41.45 The history of these provisions is somewhat unusual and demonstrates the piecemeal nature of amendments to the *Judiciary Act*. In 1979, two Parts of the *Judiciary Act*, which had been in the Act since its inception, were relocated to the *High Court of Australia Act 1979* (Cth).[1840] These Parts concerned the constitution and membership of the High Court, and were thought to be more appropriate for the new Act, which made provision for structural and organisational aspects of the High Court.

1840 These were Part II (Constitution and Seat of the High Court) and Part VIII (Members and Officers of the High Court).

41.46 Conversely, in 1979, two Parts of the *High Court Procedure Act 1903* (Cth), which had been enacted contemporaneously with the *Judiciary Act*,[1841] were moved into the *Judiciary Act*.[1842] Those parts are still located in the *Judiciary Act* as Part XA (Procedure of the High Court) and Part XB (Appeals to the High Court). Part XA concerns trials, including directions as to whether trials are to be with juries, the giving of evidence, amending defects or errors, reserved judgments, judgment and execution, and appointing receivers and managers in particular cases. Part XB provides for the giving of security for appeals, stays of proceedings, and the death of a party to an appeal.

41.47 In the course of the Commission's inquiry, it became clear that the location of provisions relating to High Court procedure was just one of many instances of problematic location. Accordingly, in DP 64 the Commission asked how provisions of the *Judiciary Act* and related legislation might be reorganised to provide greater logic and coherence. Any proposed reorganisation would necessarily involve a reconsideration of the *High Court of Australia Act 1979*, the *Federal Court of Australia Act 1976*, the *Family Law Act 1975*, and the *Federal Magistrates Act 1999.*

41.48 The existing location of jurisdictional provisions gives rise to several distinct problems. First, there is a problem of fragmentation, whereby some provisions relating to a topic are located in one Act and other provisions relating to the same topic are located in another Act. This creates problems of accessibility, since only practitioners who are well versed in the legislation may be aware of the existence of, and relationship between, the dispersed provisions. An example of this occurs in relation to the original jurisdiction of the Federal Court, which is defined in the *Judiciary Act* (s 39B), the *Federal Court of Australia Act 1976* (ss 19 and 32), and in approximately 150 other federal Acts (see Chapter 4). Similarly, the appellate jurisdiction of the High Court is defined, inter alia, in the *Judiciary Act* (Part V), the *Federal Court of Australia Act 1976* (ss 33 and 33ZD), the *Family Law Act 1975* (s 95) and the *Federal Magistrates Act 1999* (s 20).

41.49 A second problem is duplication of provisions, with the attendant possibility of inconsistency. For example, the High Court currently possesses two sources of power to make Rules of Court — one in the *Judiciary Act* (s 86), the other in the *High Court of Australia Act 1979* (s 48). Section 86 JA gives the High Court a broad power to make Rules of Court necessary or convenient for carrying into effect the provisions of the *Judiciary Act,* and lists seven non-exclusive categories in which this might be done. Section 48 HCAA is narrower in scope. It extends the rule-making power of the justices under s 86 JA to anything that is

1841 The *Judiciary Act* was Act No 6 of 1903; the *High Court Procedure Act 1903* (Cth) was Act No 7 of 1903.

1842 The *High Court Procedure Act 1903* was repealed upon enactment of the *High Court of Australia Act 1979* (Cth).

necessary or convenient for carrying into effect the provisions of the *High Court of Australia Act 1979*.

41.50 A third problem arises from the mislocation of provisions, as judged by the criteria of logic and coherence. An example of this is a section in the *Federal Court of Australia Act 1976* (ss 24(2)), which states that no appeal may be brought to the High Court from a judgment of the Supreme Court of a Territory except in accordance with special leave given by the High Court. To the uninitiated, the *Federal Court of Australia Act 1976* is not an obvious place to look for the law regulating the right of appeal between a territory court and the High Court.

Submissions and consultations

41.51 A number of submissions and consultations favoured having all provisions relating to the jurisdiction of a particular court located in the Act establishing that court. For example, it was generally agreed that s 39B JA should be relocated to the *Federal Court of Australia Act 1976* so that, together with ss 19 and 32 FCAA, all general provisions conferring original jurisdiction on the Federal Court would be located in one Act.[1843]

41.52 The Law Council of Australia was in favour of locating the High Court's power to make Rules of Court in the *High Court of Australia Act 1979*. In the Law Council's view, that power should be expressed in terms of s 86 JA, which was seen to be broader than s 48 HCAA.[1844] However, the Council did not support the view that provisions in the *Judiciary Act* relating to the jurisdiction and powers of a court should generally be relocated to the Act constituting that court. Nor did it agree that provisions relating to appeals from one court to another should be located in the legislation establishing the court to which the appeal is made.

41.53 Other consultations and submissions emphasised the importance of full cross-referencing in all relevant legislation if the provisions dealing with appeals from the Federal Court to the High Court were moved from the *Federal Court of Australia Act 1976* to the *High Court of Australia Act 1979.*

Commission's views

41.54 There was widespread agreement in consultations and submissions that the current location of jurisdictional provisions is confusing and makes the law difficult to access — even for experienced legal practitioners. The Commission considers that these difficulties are likely to waste the time and resources of

1843 D Jackson QC, *Consultation*, Sydney, 19 March 2001; Federal Court of Australia, *Consultation*, Sydney, 21 February 2001; The Hon Sir Anthony Mason, *Consultation*, Sydney, 15 August 2000; Law Reform Commission of Western Australia, *Consultation*, Perth, 22 March 2001; Australian Government Solicitor, *Consultation*, Canberra, 23 February 2001; A Tokley, *Submission J023*, 16 March 2001.

1844 Law Council of Australia, *Submission J037*, 6 April 2001.

litigants, legal practitioners and the courts. The rising proportion of unrepresented litigants before many Australian courts makes it important that the law be clear and accessible. This is particularly so in relation to jurisdictional issues, which do not go to the merits of a party's claim but may nevertheless consume substantial resources.

41.55 The Commission acknowledges that greater coherence in the location of provisions might be achieved in different ways. For example, laws regulating channels of appeal might be located in the Act constituting the court from which the appeal is taken, in the Act constituting the court to which the appeal is brought, or in the substantive legislation regulating the subject matter in respect of which the appeal is brought.

41.56 Many factors may be relevant in choosing between these options. These include an assessment of who is likely to use the legislation, and whether a particular option might lead to the fragmentation or consolidation of closely related provisions. Whichever option is chosen, it is important that the principles underlying the choice are clear and that they are applied consistently.

41.57 In light of the views expressed in consultations and submissions, the Commission considers that the preferable approach to the issue of location is to ensure that each federal court is constituted by a dedicated Act of Parliament. Such an Act should establish the court, define its original and appellate jurisdiction, grant powers appropriate for the administration of justice, provide for the court's practice and procedure, and set up the framework for its finance and management.

41.58 In accordance with this view, the Commission recommends that provisions of the *Judiciary Act* relating to the jurisdiction and powers of the High Court be relocated to the *High Court of Australia Act 1979*. Additionally, provisions of the *Judiciary Act* relating to the jurisdiction and powers of the Federal Court should be relocated to the *Federal Court of Australia Act 1976.*

41.59 For similar reasons, Part XA and Part XB of the *Judiciary Act*, and any other provision relating to the High Court's practice and procedure, should be relocated to the *High Court of Australia Act 1979*. The Commission notes that it has not investigated the merits of each provision contained within these Parts. For this reason, the Commission recommends that the Attorney-General order a review of the provisions to determine whether they are necessary or desirable, prior to relocation.

41.60 The Commission further recommends that the power of the High Court to make Rules of Court should be located in only one piece of legislation, namely, the *High Court of Australia Act 1979*. The wording of that provision should be cast broadly, as in s 86 JA, to ensure that the Court has at its disposal the power to manage itself and administer justice effectively.

41.61 Finally, the Commission recommends that provisions that regulate appeals from one court to another be located in the Act establishing the court to which the appeal is brought. The Commission acknowledges the view, expressed by some observers, that users of legislation may be better served if provisions regulating appeals are located in the Act constituting the court from which the appeal is taken.[1845] However, the Commission is concerned that this approach may result in unnecessary fragmentation of a court's jurisdictional provisions. The benefits of notes and cross-references in legislation are discussed earlier in this Chapter. The Commission is of the view that appropriate use of notes and cross-references may facilitate the use of legislation by potential appellants and respondents, without sacrificing the advantages of consolidating each federal court's jurisdictional provisions.

Recommendation 41–6. Provisions of the *Judiciary Act* that relate to the jurisdiction and powers of specific federal courts should be relocated to the Act constituting the relevant court. In particular:

(a) Part III of the *Judiciary Act* (Jurisdiction and powers of the High Court generally) should be relocated to the *High Court of Australia Act 1979*;

(b) Part IV of the *Judiciary Act* (Original jurisdiction of the High Court) should be relocated to the *High Court of Australia Act 1979*; and

(c) Section 39B of the *Judiciary Act* (Original jurisdiction of the Federal Court of Australia) should be relocated to the *Federal Court of Australia Act 1976*. [See Recommendation 4–1.]

Recommendation 41–7. Provisions relating to appeals from one court to another should be relocated to the Act establishing the Court to which the appeal is made. To promote the clarity and accessibility of the law, notes or cross-references identifying the available channels of appeal should be inserted in the Act establishing the court from which an appeal may be brought. In particular:

(a) Part V of the *Judiciary Act* (Appellate jurisdiction of the High Court) should be relocated to the *High Court of Australia Act 1979*;

(b) Sections 33 and 33ZD of the *Federal Court of Australia Act 1976* (appeals to the High Court from the Federal Court) should be relocated to the *High Court of Australia Act 1979*; and

1845 Office of the Parliamentary Counsel, *Consultation*, Canberra, 28 March 2001.

Recommendation 41-7 cont'd

(c) Section 20 of the *Federal Magistrates Act 1999* (appeals to the High Court from the Federal Magistrates Service) should be relocated to the *High Court of Australia Act 1979.*

Recommendation 41–8. Part XA and Part XB of the *Judiciary Act*, and any other provision relating to the High Court's practice and procedure, should be relocated to the *High Court of Australia Act 1979*. Prior to relocation, the Attorney-General should order a review of these provisions to determine whether they are necessary or desirable.

Recommendation 41–9. The delegation of legislative power to the High Court to make Rules of Court should be effected by a single provision located in the *High Court of Australia Act 1979*. The provision should be cast sufficiently broadly to enable the Court to make rules necessary or convenient for carrying that Act into effect. The present duplication between s 86 of the *Judiciary Act* and s 48 of the *High Court of Australia Act 1979* should be removed by appropriate legislative amendment.

Relocating Provisions to New Acts — The Family Court

Current law and practice

41.62 The Family Court of Australia was established by the *Family Law Act 1975* (Cth) and came into operation on 5 January 1976. The Act introduced two fundamental changes to family law in Australia — it removed fault-based grounds of divorce and replaced this with a single 'no fault' ground of irretrievable breakdown of marriage; and it established a specialised federal court to adjudicate matters of family law. With the exception of Western Australia, where a separate state family court was established,[1846] the Family Court operates throughout Australia and has responsibility for the vast bulk of family law matters. In these circumstances, it was thus natural for the *Family Law Act 1975* to contain both the new principles of family law and the laws establishing the new court to administer that law.

41.63 However, the nexus between substantive family law and the court administering that law has been steadily weakened by two developments. The first development is that substantial family law jurisdiction is now exercised by courts other than the Family Court, including state magistrates courts and the Federal

1846 s 41 FLA; *Family Court Act 1975* (WA).

Magistrates Service. State magistrates courts exercise considerable family law jurisdiction, particularly in rural areas.[1847] The cross-vesting scheme, which commenced in 1988, has also seen an increase in the transfer of family law proceedings between Australian courts (see Chapter 8).

41.64 The second development is that the Family Court's jurisdiction is not strictly confined to family law matters. The Court's associated jurisdiction (under s 33 FLA) and its accrued jurisdiction (under the Constitution) have increased the breadth of subject matter dealt with by the Court (see Chapters 2 and 5). Additionally, in 1988 legislation was introduced to enable the Family Court to exercise jurisdiction in certain proceedings transferred to it by the Federal Court under a number of federal Acts.[1848] As a result of these developments, the Family Court may deal with some matters of bankruptcy, corporations law, taxation, trade practices and immigration. In Chapter 5 the Commission recommends that the Attorney-General order a review of the Family Court's original jurisdiction, with a view to assessing whether any further expansion is warranted, particularly in relation to bankruptcy.

Issue arising from current law and practice

41.65 The trends described above raise the issue of whether the provisions dealing with the Family Court should be relocated from the *Family Law Act* to a new Act, for example, under the name of the 'Family Court of Australia Act'. This would reflect the divergence between the substantive law and the courts administering it. Such a change would place the Family Court in a similar legislative position to the High Court, the Federal Court and the Federal Magistrates Service, each of which has separate legislation that establishes the court and defines its jurisdiction over laws whose substantive content is elsewhere defined. The High Court is provided for under the *High Court of Australia Act 1979,* the Federal Court under the *Federal Court of Australia Act 1976* and the Federal Magistrates Service under the *Federal Magistrates Act 1999.*

Submissions and consultations

41.66 The Family Court strongly supported the proposal for a separate piece of legislation dealing with the Court.[1849] The Court stated that many litigants were not able to draw a sufficient distinction between family law and the Family Court. The Court noted that it was often subject to criticism regarding the substance of family law, such as child support, when the Family Court was limited to its official role in interpreting and applying that law. The Court's view was that it would be beneficial to have greater demarcation between the Court and the law it administers.

1847 s 39(6) FLA, as originally enacted, invested the courts of summary jurisdiction of each State with jurisdiction to determine matrimonial causes, not being proceedings for principal relief.

1848 *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988* (Cth).

1849 Family Court of Australia, *Consultation*, Melbourne, 14 March 2001.

41.67 The Court also commented that the *Family Law Act 1975* was becoming more dense and complex and that it was in need of a significant overhaul, including redrafting and renumbering of provisions. The relocation of provisions relating to the Court and its jurisdiction would assist in making the *Family Law Act* more accessible and comprehensible. The Court also considered that the separation of the Family Court and the substantive law would promote parity of treatment with the Federal Court.

41.68 The Commission received no other submissions on this issue.

Commission's views

41.69 The Commission considers there is considerable benefit in creating a new Act for the Family Court by transferring Parts IV and IVA of the *Family Law Act 1975* to a new Act. Such an Act might be named the 'Family Court of Australia Act'. The relocation would recognise the diversity of courts that currently deal with family law matters. It would also assist in drawing a clearer distinction between the substance of family law and the function of the Family Court — a distinction that is clearly not sufficiently understood in the community. The relocation might also provide the occasion for a revision of the organisation and structure of the *Family Law Act,* with a view to making it more accessible to users.

Recommendation 41–10. Federal legislation should draw a clearer division between the Family Court of Australia and the substantive law that the Court administers. Accordingly, the *Family Law Act 1975* should be amended to transfer Parts IV and IVA from that Act to a new Act entitled the *Family Court of Australia Act*. The new Act should specify the Family Court's constitution, jurisdiction, management and procedure.

Relocating Provisions to New Acts — AGS and Legal Services Directions

41.70 In DP 64 the Commission discussed the provisions of the *Judiciary Act* that deal with legal practitioners (Part VIIIA), the Australian Government Solicitor (Part VIIIB) and the Attorney-General's Legal Services Directions (Part VIIIC), and asked whether these Parts should be retained in the *Judiciary Act* or relocated to new legislation.

Current law and practice

41.71 A number of amendments to the *Judiciary Act* have made important changes to the legal services provided by the federal government. These changes have established the Australian Government Solicitor ('AGS') as a corporate

entity,[1850] enabled legal services to be provided to the government by private sector practitioners, and given the Attorney-General power to issue Legal Services Directions for regulating the conduct of government legal work.

41.72 The impetus for the reforms to government legal services brought about by the *Judiciary Amendment Act 1999* (Cth) was the report of the *Review of the Attorney-General's Legal Practice* in March 1997.[1851] That report recommended that the legal services provided by the Attorney-General's Department Legal Practice be restructured under the name of the AGS, while the policy sections of the Practice remain within the Attorney-General's Department.[1852]

41.73 During the passage of the *Judiciary Amendment Act 1999*, the Attorney-General announced that the legislation would significantly reform the legal services market for Commonwealth legal work and establish the AGS as a statutory corporation, operating as a government business enterprise.[1853] The AGS now operates under the *Commonwealth Authorities and Companies Act 1997* (Cth) and is financially independent of the Commonwealth.[1854]

41.74 Part VIIIB JA contains provisions concerning the establishment and functions of the AGS, the appointment and terms of its Chief Executive Officer and staff, and the practice of the AGS. In particular, ss 55E–55G deal with the practice rights and obligations of lawyers engaged by the Attorney-General's Department.

41.75 The *Judiciary Amendment Act 1999* also inserted a new Part VIIIC into the *Judiciary Act*, providing for the Attorney-General's Legal Services Directions. These are directions issued by the Attorney-General in relation to the conduct of Commonwealth legal work (s 55ZF). A number of Directions have been issued pursuant to the section.[1855] The Directions are intended to ensure the efficient and effective delivery of legal services to the Commonwealth and its agencies by the providers of those services. The Directions include guidelines for engaging counsel, reporting significant issues that arise in litigation (such as the size of the claim), and the general conduct of litigation.

Submissions and consultations

41.76 The Commission received very little comment in submissions and consultations about the location of Parts VIIIB and VIIIC, perhaps because the

1850 See *Judiciary Amendment Act (No 2) 1984* (Cth); *Law and Justice Legislation Amendment Act (No 3) 1992* (Cth); *Judiciary Amendment Act 1999* (Cth).
1851 Logan Committee (1997).
1852 <http://law.gov.au/aghome/legalpol/olsc/jab-em.htm> (27 July 2001).
1853 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 1998, 1274.
1854 <http://law.gov.au/aghome/legalpol/olsc/reforms/reforms.html> (27 July 2001).
1855 <http://law.gov.au/aghome/legalpol/olsc/legalservices/directionsnew.pdf> (27 July 2001).

issue was not seen as affecting many people outside those involved in the provision of government legal services. There were some general comments, however, to the effect that it was anomalous to have the AGS provisions in the *Judiciary Act.*[1856]

41.77 The Law Council of Australia agreed that Parts VIIIB and VIIIC should be relocated, but suggested that they be included in separate legislation — one Act dealing with the AGS and another with the conduct of Commonwealth legal work.[1857]

Commission's views

41.78 The establishment of the AGS as a statutory corporation, albeit practising in federal legal matters, appears to have little direct connection with the exercise of federal judicial power. As noted above, the AGS is now financially and administratively separate from the Attorney-General's Department and operates as a government business enterprise.

41.79 Where the Commonwealth has established other statutory authorities, this has generally been done under separate legislation. Examples include Australia Post, the Defence Housing Authority and the Snowy Hydro Company.[1858]

41.80 Similarly, the parliamentary debates do not contain any discussion of the reason the amendments with respect to the Attorney-General's Legal Services Directions were located in the *Judiciary Act*. As with the amendments relating to the AGS, Part VIIIC does not relate to the exercise of federal judicial power.

41.81 The Commission considers that it is difficult to reconcile Part VIIIA (ss 55E–55G), Part VIIIB and Part VIIIC with the underlying object of the *Judiciary Act.* The Commission's view is that these provisions should be relocated to new legislation that deals with the provision of legal services by, and to, the Commonwealth.

Recommendation 41–11. The provisions of the *Judiciary Act* relating to the Australian Government Solicitor, Attorney-General's Legal Services Directions, and Attorney-General's lawyers (Part VIIIB, Part VIIIC and ss 55E–G respectively) should be relocated to a new Act dealing with the provision of legal services by and to the Commonwealth.

1856 B Dunphy, *Consultation*, Brisbane, 8 March 2001; Department of Justice (Vic), *Consultation*, Melbourne, 15 February 2001.
1857 Law Council of Australia, *Submission J037*, 6 April 2001.
1858 *Australian Postal Corporation Act 1989* (Cth); *Defence Housing Authority Act 1987* (Cth); *Snowy Hydro Corporatisation Act 1997* (Cth).

Relocating Provisions to New Acts — Legal Practitioners

Current law and practice

41.82 One of the earliest amendments to the *Judiciary Act* extended the rule-making power of the High Court to include the admission to practice of barristers and solicitors.[1859] Since then, there have been a number of amendments dealing with legal practitioners, most importantly in 1966.[1860]

41.83 Currently, Part VIIIA JA concerns the right of legal practitioners admitted in federal courts to practise in those courts (s 55A). It also concerns the rights of legal practitioners admitted in state or territory courts to practise in any federal court, any state court exercising federal jurisdiction (s 55B), and any territory court (s 55D). Other provisions in Part VIIIA deal with the right to practise and the obligations of lawyers engaged by the Attorney-General's Department.

41.84 Part VIIIA also provides for the establishment of a register of practitioners who have a right to practise in federal courts and courts exercising federal jurisdiction. Section 55C requires the Chief Executive and Principal Registrar of the High Court to maintain such a register, and s 55C(5) enables the High Court to strike a legal practitioner off in certain circumstances.

Issues arising from current law and practice

41.85 Legal practitioners in each State and Territory are admitted as officers of their respective Supreme Courts. There is no automatic right flowing from such admission to practise in the courts of another State or Territory, or to practise in federal courts. Part VIIIA provides such a right in relation to federal courts and other courts exercising 'federal-type' jurisdiction.[1861]

41.86 Different views might be taken of the appropriateness of locating the provisions regarding legal practitioners in the *Judiciary Act*. On the one hand, the current location might be seen as appropriate. By establishing a legal practitioner's right to practise in federal courts, territory courts and state courts exercising federal jurisdiction, Parliament makes effective the conferral of federal jurisdiction on those courts. On the other hand, the provisions might be seen as peripheral to the core purpose of the *Judiciary Act* in providing for the exercise of the judicial power of the Commonwealth.

1859 *Judiciary Act 1906* (Cth).
1860 *Judiciary Act 1966* (Cth), inserting ss 55A–55E.
1861 'Federal-type jurisdiction' is defined in s 55B(10) JA.

Submissions and consultations

41.87 The Commission received very little comment in submissions and consultations about the location of Part VIIIA. Two submissions suggested that the provisions in Part VIIIA should be relocated to a new Act concerning the right of solicitors and barristers to practise in federal courts.[1862]

Commission's views

41.88 The Commission is of the view that the provisions of Part VIIIA relating to the right of solicitors and barristers to practise should remain in the *Judiciary Act* because of their relevance to the effective exercise of the judicial power of the Commonwealth.

41.89 During consultations, the Commission noted a lack of satisfaction with the provisions in Part VIIIA. One source of dissatisfaction related to the wording of those provisions. At present, the register maintained by the High Court records 'solicitors' and 'barristers', while the practising certificates issued by some States and Territories refer only to 'legal practitioners'.[1863] Similarly, ss 55A, 55B and 55D refer to the right to practise as a barrister or solicitor, while s 55C refers to a 'Register of Practitioners'. The legislation requires amendment to ensure uniformity within Part VIIIA as well as harmony with the relevant state and territory legislation.

41.90 Another source of dissatisfaction related to the difficulty of ensuring that practitioners who appear in federal courts are entitled to do so. Judges appear to have no convenient means of discovering, at the time of appearance, whether a particular practitioner is entitled to practise before the court. For these reasons, the Commission also considers that the Attorney-General should order a review of the effectiveness of these provisions in regulating legal practitioners in matters of federal jurisdiction.

Recommendation 41–12. The provisions of Part VIIIA of the *Judiciary Act*, relating to the rights of practice of solicitors and barristers, should be retained in that Act because of their relevance to the effective exercise of the judicial power of the Commonwealth. However, the Attorney-General should order a review of the effectiveness of these provisions in regulating legal practitioners in matters of federal jurisdiction.

1862 A Tokley, *Submission J023*, 16 March 2001; Law Council of Australia, *Submission J037*, 6 April 2001.
1863 *Legal Profession Act 1987* (NSW); *Legal Practitioners Act 1970* (ACT).

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Appendix A
List of submissions

Name	*Submission number*
Mr Alex Proudfoot, Public Policy Assessment Society Inc	J001
Mr Laurie Glanfield, Attorney-General's Department (New South Wales)	J002
Mr Peter Clarke, Attorney-General's Department (Queensland)	J003
Professor Michael Coper, Australian National University	J004
Mr Paul Devlin	J005
Mr Phillip Dowdy, New South Wales Bar	J006
Mr Alex Proudfoot, Public Policy Assessment Society Inc	J007
The Hon Justice Richard Chisholm, Family Court of Australia	J008
Mr Michael Sexton SC, Solicitor-General for New South Wales	J009
Mr Patrick Brazil, Phillips Fox, Solicitors	J010
Mr Peter May, Federal Magistrates Service	J011
Professor Geoffrey Lindell, University of Melbourne	J012
Mr Mark Moshinsky, Victorian Bar	J013
Ms Wendy Harris, Victorian Bar	J014
Ms Wendy Harris, Victorian Bar	J015
Mr Peter Johnston, University of Western Australia	J016
Mr Steven Churches, New South Wales Bar	J017
The Hon Chief Justice Jeffrey Miles AO, Supreme Court of the Australian Capital Territory	J018
The Hon Bob Debus MP, Attorney-General for New South Wales	J019
Mr Greg Taylor and Dr John Williams, University of Adelaide	J020
The Hon Chief Justice Paul de Jersey, Supreme Court of Queensland	J021
Mr Robert Drummond, Insurance Council of Australia	J022
Mr Andrew Tokley, South Australian Bar	J023
The Hon Justice Douglas Drummond, Federal Court of Australia	J024
Mr David Mossop, Australian Capital Territory Bar	J025

Appendix B

Australian Constitution

Chapter III

The Judicature

Judicial power and Courts

71 The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Judges' appointment, tenure and remuneration

72 The Justices of the High Court and of the other courts created by the Parliament —

(i) Shall be appointed by the Governor-General in Council:

(ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:

(iii) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General.

Nothing in the provisions added to this section by the *Constitution Alteration (Retirement of Judges)* 1977 affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation.

Appellate jurisdiction of High Court

73 The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences —

(i) Of any Justice or Justices exercising the original jurisdiction of the High Court:

(ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:

(iii) Of the Inter-State Commission, but as to questions of law only:

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

Appeal to Queen in Council

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

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

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

Original jurisdiction of High Court

75 In all matters —

(i) Arising under any treaty:

(ii) Affecting consuls or other representatives of other countries:

(iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

(iv) Between States, or between residents of different States, or between a State and a resident of another State:

(v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction.

Additional original jurisdiction

76 The Parliament may make laws conferring original jurisdiction on the High Court in any matter —

(i) Arising under this Constitution, or involving its interpretation:

(ii) Arising under any laws made by the Parliament:

(iii) Of Admiralty and maritime jurisdiction:

(iv) Relating to the same subject-matter claimed under the laws of different States.

Power to define jurisdiction

77 With respect to any of the matters mentioned in the last two sections the Parliament may make laws—

(i) Defining the jurisdiction of any federal court other than the High Court:

(ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:

(iii) Investing any court of a State with federal jurisdiction.

Proceedings against Commonwealth or State

78 The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

Number of judges

79 The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

Trial by jury

80 The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

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