



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

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Important Information

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PARTS II AND III BASIS OF INTERVENTION

2. The Commonwealth Attorney-General intervenes under s 78A of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) in support of the plaintiff's contention that the Full Court of the Federal Court in *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 (**J**) erred in finding that it did not have jurisdiction to hear the proposed appeal before it.
3. The constitutional issue arising in the proceedings is whether s 7(3) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) (**Cross-Vesting Act**) must be read down in order to conform to the limits on Commonwealth legislative power, addressed in [14]-[15] below. The Attorney-General on 22 February 2024 issued a notice under s 78B of the Judiciary Act identifying that issue.¹

PART IV ARGUMENT

4. The Attorney-General submits that the Full Court of the Federal Court should have found that it had jurisdiction to hear the proposed appeal because:
 - (a) the appeal concerned a matter arising under the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**);
 - (b) the proceeding was therefore in federal jurisdiction pursuant to s 76(ii) of the Constitution;
 - (c) the Full Court of the Federal Court has jurisdiction to hear appeals from judgments of a State Supreme Court exercising federal jurisdiction 'in such cases as are provided by any other Act' (*Federal Court of Australia Act 1976* (Cth) s 24(1)(c));² and

¹ The plaintiff's notice of 11 September 2023 identifies only the fact of this Court's jurisdiction under s 75(v) of the Constitution to determine the plaintiff's application.

² Section 24(1)(c) anticipates that an Act may provide for an appeal to the Federal Court without itself conferring jurisdiction: see, eg, *Morris Finance Ltd v Brown* (2017) 252 FCR 557 at [6] (Beach, Markovic and Moshinsky JJ). The Cross-Vesting Act is such an Act: see *NEC Information*

(d) s 7(5) of the Cross-Vesting Act relevantly directs to the Full Court of the Federal Court appeals from a decision of a single judge of the Supreme Court of a State in any matter arising under the Bankruptcy Act (being one of the Acts specified in the Schedule to the Cross-Vesting Act).

5. The Full Court proceeded correctly with respect to steps (a)-(c) above: J [16]-[17] (**CB 436-437**). It erred at step (d), because it concluded that s 7(5) of the Cross-Vesting Act does not have its ordinary or literal meaning, and that it is properly construed as directing appeals to the Full Court of the Federal Court *only* where a single judge of the Supreme Court of a State was exercising jurisdiction conferred by s 4 of the Cross-Vesting Act: J [40]-[41] (**CB 445**).

6. For the reasons developed below, the Full Court’s interpretation of s 7(5) departs unjustifiably from its text, and has the consequence that it fails to achieve its manifest purpose. The Full Court should have construed s 7(5) as operating in accordance with its terms, with the consequence that it requires any appeal from a single judge of a Supreme Court that arises under an Act listed in the Schedule to be instituted in and determined by the Full Court of the Federal Court, the Full Court of the Federal Circuit and Family Court of Australia (Division 1) or, with special leave, this Court, *irrespective* of the source of the federal jurisdiction exercised by the Supreme Court.

The scheme of the Cross-Vesting Act

7. The purpose of the Cross-Vesting Act is to establish a system of cross-vesting of jurisdiction between federal, State and Territory courts. It was enacted with the intention of avoiding the inconvenience and unnecessary expense to litigants that had arisen from uncertainties about the jurisdiction of federal, State and Territory courts.³ The system established was intended to ensure that no action would fail through want of jurisdiction and, as the Full Court acknowledged, to ‘eliminate what were regarded as “arid” jurisdictional disputes’: J [20] (**CB 438**).

Systems Australia Pty Ltd v Iveson (1992) 36 FCR 258 at 264 (Black CJ, Lockhart and Gummow JJ); *Bond v Sulan* (1990) 26 FCR 580 at 584 (Gummow J); *Courtice v Australian Electoral Commission* (1990) 21 FCR 554 at 557 (Pincus J).

³ Preamble to the Cross-Vesting Act, para (a); Explanatory Memorandum to the Jurisdiction of Courts (Cross-Vesting) Bill 1987 (Cth), p 1; *NEC Information Systems Australia Pty Ltd v Iveson* (1992) 36 FCR 258 at 260 (Black CJ, Lockhart and Gummow JJ).

8. In order to give effect to the above purpose, the Cross-Vesting Act relevantly:
- (a) vests State Supreme Courts with jurisdiction over civil matters in which the Federal Court has jurisdiction and in which State Supreme Courts would not, but for the Cross-Vesting Act, have jurisdiction (s 4).⁴ In practice, that is a very confined vesting of jurisdiction, because of the extensive federal jurisdiction vested in State Supreme Courts by s 39(2) of the Judiciary Act;
 - 10 (b) provides for the transfer of proceedings between State Supreme Courts and federal courts, so that proceedings can be determined in the more appropriate forum (s 5); and
 - (c) regulates the circumstances in which appeals in federal jurisdiction are to be directed to the Supreme Court of a State or Territory, or instead to the Federal Court, Federal Circuit and Family Court of Australia (Division 1), or this Court
20 (s 7).⁵
9. It is the last of those matters that is in issue in this proceeding. That directs attention to s 7 of the Cross-Vesting Act, which is headed ‘Institution and hearing of appeals’. Each of the provisions in s 7 regulates whether, and when, appeals from a decision of a judge of a State or Territory Supreme Court are to be directed to federal courts, and vice versa. It relevantly provides that:
- 30 (a) decisions of single judges of the Federal Court cannot be appealed to the Full Court of the Supreme Court of a State (s 7(1));
 - (b) appeals from decisions of single judges of State Supreme Courts are to be determined by the Full Court of the Supreme Court of that State, provided that ‘it appears that the only matters for determination’ in the appeal ‘are matters other than matters arising under an Act specified in the Schedule’ (s 7(3)); and
 - 40 (c) if it appears that a matter for determination in an appeal is a ‘matter arising under’ one of 13 Commonwealth Acts specified in the Schedule to the Cross-Vesting

⁴ Jurisdiction is not, however, vested in State Supreme Courts with respect to matters arising under the Acts listed in s 4(5).

⁵ Section 7(4) also contemplates that certain appeals may be directed to the Family Court of Western Australia, which has been declared by proclamation under s 41(2) of the *Family Law Act 1975* (Cth) to be an Act to which s 41 of that Act applies, and is thereby a ‘State Family Court’ within the meaning of s 3(1) of the Cross-Vesting Act.

Act, that appeal is required (except in particular circumstances specified in ss 7(7) and 7(8)) to be instituted in, and determined by, one of the three courts identified in that provision: namely, the Full Court of the Federal Court, the Federal Circuit and Family Court of Australia (Division 1) or, with special leave, this Court.

10. The Full Court recognised that the phrase ‘matter arising under’ an Act, which is used in both s 7(3) and s 7(5), ‘is used in s 76(ii) of the Constitution and has been part of the discourse of federal jurisdiction for a long time’ (J [26], **CB 439**), and that the drafters of the Cross-Vesting Act ‘must be taken to have been familiar with the case law ... and to have chosen the phrase with an eye to that body of law’ (J [28], **CB 440**). That case law establishes that a matter ‘arises under’ a Commonwealth law ‘if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement’ (J [27], **CB 440**).⁶
11. The Full Court correctly accepted that the proceeding before it clearly involved a ‘matter arising under’ the Bankruptcy Act: J [28] (**CB 441**). However, rather than giving effect to that conclusion by applying s 7(5) in accordance with its terms, the Full Court proceeded to read down s 7(5), holding that it applies *only* to appeals against decisions of a single judge of a State Supreme Court where that court is exercising the jurisdiction conferred by s 4(1) of the Cross-Vesting Act: J [40]-[41] (**CB 445**).
12. That reasoning has the practical consequence that s 7(5) has no operation with respect to appeals against judgments of State Supreme Courts where the single judge was exercising federal jurisdiction conferred by s 39(2) of the Judiciary Act, even if that jurisdiction was exercised in a matter arising under one of the Acts listed in the Schedule. By parity of reasoning, it also means that s 7(3) has no operation to prevent appeals from a single judge of the Supreme Court being taken to a federal court in cases where jurisdiction was exercised under s 39(2) of the Judiciary Act, even when those appeals are unrelated to any of the Acts specified in the Schedule.

⁶ *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154 (Latham CJ); *Moorgate Tobacco Co Ltd v Phillip Morris Ltd* (1980) 145 CLR 457 at 476 (Stephen, Mason, Aickin and Wilson JJ).

Section 7 applies only to appeals in matters in federal jurisdiction

13. The starting point for the Full Court’s reasoning in support of its construction of s 7(5) was s 7(3). That subsection was relevant because the Full Court proceeded, correctly, on the basis that, subject to contrary indication, the phrase ‘decision of a single judge of the Supreme Court of a State’ should be given the same meaning in both ss 7(3) and 7(5): J [39] (CB 445). That is consistent with the presumption that a phrase has the same meaning throughout an Act,⁷ particularly where it is used more than once in the same section.⁸ In the context of s 7 of the Cross-Vesting Act, there is nothing to indicate that Parliament intended the phrase to carry a different meaning in the different provisions.
14. The Full Court correctly recognised that s 7(3) should not be given its literal meaning: J [31], [33], [38] (CB 441-442, 444-445).⁹ That follows because, read literally, it purports to regulate appeals from all first instance decisions of the Supreme Courts of the States, even when those decisions have no federal component. If construed in that way, s 7(3) would exceed the legislative power conferred by s 77 of the Constitution (read with s 51(xxxix)), which extends only to laws with respect to matters of the kind mentioned in ss 75 and 76 of the Constitution.¹⁰ As s 15 of the Cross-Vesting Act provides that the Act should be read and construed not to exceed the legislative power of the Commonwealth, and to be valid to the extent to which it is not in excess of that power, s 7(3) must therefore be construed as extending to, but not beyond, the limits of Commonwealth legislative power.¹¹
15. While the Full Court was correct to perceive that s 7(3) ‘needs to be read down in some way’, it was not correct to read that provision (or, consequentially, s 7(5)) as confined

⁷ *Director of Public Prosecutions Reference No 1 of 2019* (2021) 274 CLR 177 at [50] (Gageler, Gordon and Steward JJ); *Regional Express Holdings Ltd v Australian Federation of Air Pilots* (2017) 262 CLR 456 at [21] (Kiefel CJ, Keane, Nettle, Gordon and Edelman JJ).

⁸ *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1 at 15 (Mason J, Aickin and Wilson JJ agreeing).

⁹ Cf the submissions of the plaintiff in this Court at [59].

¹⁰ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at [3] (Gleeson CJ), [26] (Gaudron J), [110]-[111] (Gummow and Hayne JJ).

¹¹ *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180 (Isaacs J); *Clubb v Edwards* (2019) 267 CLR 171 at [416] (Edelman J); *Monis v The Queen* (2013) 249 CLR 92 at [327] (Crennan, Kiefel and Bell JJ); *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at [66] (Gageler J).

to appeals against first instance decisions of the Supreme Court of a State made in the exercise of cross-vested jurisdiction (ie, jurisdiction conferred by s 4 of the Cross-Vesting Act): J [38(a)] (CB 444). Not only is that reading down unjustifiably wide for the reasons addressed below, it also fails to account for the possibility that federal jurisdiction could be attracted for the first time on appeal.¹² The better reading down is to construe the phrase ‘proceeding by way of an appeal’¹³ – wherever it is used in s 7 – as referring to an appeal in a matter involving federal jurisdiction. So construed, s 7(3) plainly would not exceed the legislative power conferred by s 77 of the Constitution (read with s 51(xxxix)).

Section 7(5) is not confined to appeals against decisions involving cross-vested jurisdiction

16. Even if s 7(3) is read down in the manner identified above, that has *no effect* on the proper construction of s 7(5), because the text of s 7(5) already confines it to appeals involving federal jurisdiction (because appeals in matters arising under an Act listed in the Schedule are necessarily matters of the kind identified in s 76(ii) of the Constitution). Accordingly, the fact that ‘s 7(3) needs to be read down in some way’ (J [38(a)], CB 444) does not support the Full Court’s construction of s 7(5).

17. For the reasons developed below, that construction – that s 7(5) applies *only* to matters where a single judge of the Supreme Court was exercising jurisdiction conferred by s 4(1) of the Cross-Vesting Act – involved a significant and unjustified departure from the plain meaning of the text, was not required by reading the provision contextually with s 39(2) of the Judiciary Act, and defeated the purpose of the provision.

Text

18. As to the text, as already noted the Full Court correctly recognised that the drafters of the Cross-Vesting Act, in using the phrase ‘matter arising under’ an Act, must be taken

¹² See *NEC Information Systems Australia Pty Ltd v Iveson* (1992) 36 FCR 258 at 264 (Black CJ, Lockhart and Gummow JJ), citing *Commonwealth v Rhind* (1966) 119 CLR 584. In such a case, s 7(7) would require a State appellate court, once federal jurisdiction was enlivened, to transfer the proceeding to the Full Court of the Federal Court or the Federal Circuit and Family Court (Division 1), unless the interests of justice required the State appellate court to proceed to determine the proceeding.

¹³ In this context, that phrase includes a reference to an application for leave to appeal: *Bramco Electronics Pty Ltd v ATF Mining Electrics Pty Ltd* (2013) 86 NSWLR 115 at [49] (Barrett JA, Meagher JA agreeing); *Macchia v Public Trustee* (2008) 251 ALR 385 at [24] (Steytler P, Le Miere AJA agreeing); *NEC Information Systems Australia Pty Ltd v Iveson* (1992) 36 FCR 258 at 272 (Black CJ, Lockhart and Gummow JJ).

to have ‘chosen the phrase with an eye to [the] ... body of law’ concerning s 76(ii) of the Constitution (J [28], **CB 440**). That strongly suggests that, when s 7(5) states that an appeal in ‘a matter arising under an Act specified in the Schedule’ may be instituted and determined only in (relevantly) the Federal Court, it draws upon a settled body of law to identify such matters.

19. The Full Court’s reasoning substitutes for the clear and familiar test that Parliament enacted a new test that is both different and narrower. On that new test, rather than directing attention to the connection between the subject matter of an appeal and the Acts specified in the Schedule (as the ‘arising under’ text of s 7(5) requires), the operation of s 7(5) is said to turn on the source of the jurisdiction exercised by a single judge of the Supreme Court in making the decision against which an appeal is brought. The Schedule is irrelevant to that inquiry.¹⁴ That highlights the extent to which the Full Court’s construction of s 7(5) departs from the legislated text. The effect is that many appeals that plainly ‘arise under’ the Acts specified in the Schedule are nevertheless untouched by s 7(5), not for any reason that is referable to the text, but because the single judge was exercising jurisdiction that was not derived from the Cross-Vesting Act (that being a consideration not mentioned in s 7(5)).
20. While it may in some circumstances be necessary to read a statute as though it contained additional words, that is appropriate only where it is apparent that the drafters and Parliament have by inadvertence overlooked, and omitted to deal with, an eventuality that must be dealt with if the purpose of a statute is to be achieved.¹⁵ It must be ‘plain’ that Parliament intended the statute to have the meaning that would be achieved by the insertion of the additional words.¹⁶ The factors identified by the Full Court in support of its construction of s 7(5) fell well short of satisfying these criteria.

¹⁴ By contrast, the different list in s 4(4) of the Cross-Vesting Act would be relevant.

¹⁵ *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105 (Lord Diplock), cited with approval in *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [39] (French CJ, Crennan and Bell JJ) and *Esso Australia Pty Ltd v Australian Workers’ Union* (2017) 263 CLR 551 at [52] (Kiefel CJ, Keane, Nettle and Edelman JJ).

¹⁶ *Esso Australia Pty Ltd v Australian Workers’ Union* (2017) 263 CLR 551 at [52] (Kiefel CJ, Keane, Nettle and Edelman JJ).

Context: existing appellate jurisdiction in federal matters

21. The principal factor identified by the Full Court as warranting its construction was to ‘avoid unnecessary overlap with s 39(2)’ of the Judiciary Act: J [38(b)] (CB 444-445). That concern was founded on the incorrect premise that s 7(3) of the Cross-Vesting Act purports to *confer* jurisdiction on the Supreme Court of a State, and that s 7(5) of the Cross-Vesting Act purports to *remove* jurisdiction: J [33]-[34] (CB 442). By proceeding in that way, the Full Court implicitly conflated the regulation of the forum in which proceedings may be instituted and heard, on the one hand, with the conferral of jurisdiction, on the other.
22. Section 7 of the Cross-Vesting Act neither supplements nor detracts from the jurisdiction of State Supreme Courts. That proposition is strongly supported by the fact that s 7 does not use the language of ‘investing’ jurisdiction (the language of s 77 of the Constitution), in marked contrast to s 4 of the Cross-Vesting Act.¹⁷ The absence of that language supports the conclusion that both ss 7(3) and 7(5) are properly construed merely as regulating jurisdiction that is conferred by other provisions.
23. Section 7(3) identifies some ‘appeals’ (meaning appeals in federal jurisdiction, as explained in paragraph 15 above) that are to be instituted and determined *only* in a State appellate court. In that operation, it does not duplicate ‘work that is already done by s 39(2)’ (cf J [33], CB 442). To the contrary, it presupposes that some other provision (which will ordinarily be s 39(2) of the Judiciary Act, but which might sometimes be another provision) has already conferred federal jurisdiction on the relevant State appellate court. However, it also recognises that s 4(2) of the Cross-Vesting Act will have operated to confer the same appellate jurisdiction on the Federal Court and the Federal Circuit and Family Court of Australia (Division 1).¹⁸ In those circumstances, the work done by s 7(3) of the Cross-Vesting Act is to stipulate that some appeals from single judges of State Supreme Courts (being those that do *not* involve a matter arising under a scheduled Act) are to be instituted in and determined *only* by the relevant State

¹⁷ The difference between regulating the exercise of jurisdiction, and conferring jurisdiction, is also readily apparent in s 5 of the Cross-Vesting Act, which repeatedly distinguishes between a court in which proceedings are ‘capable of being instituted’ and those in which the court has ‘jurisdiction’. As to the former, see Cross-Vesting Act, ss 5(1)(b)(ii)(A), 5(2)(b)(ii)(A), 5(3)(b)(ii)(A), 5(4)(b)(ii)(A) and 5(4)(b)(ii)(B). As to the latter, see ss 5(1)(b)(ii)(B), 5(2)(b)(ii)(B) and 5(2)(b)(ii)(C).

¹⁸ Unless those federal courts already had parallel appellate jurisdiction under some other provision.

Supreme Court in the exercise of its appellate federal jurisdiction. In that way, save in the case of appeals arising under a scheduled Act, it keeps appeals within a single court.

24. In light of the above, the Full Court was wrong to conclude that s 7(3) is ‘otiose’ to the extent to which it applies to cases where the jurisdiction of the Supreme Court is derived from s 39(2) of the Judiciary Act: cf J [33] (**CB 442**). To the contrary, that is when s 7(3) does its main work. It ensures that, in the many cases where a single judge of a Supreme Court has exercised jurisdiction under s 39(2) of the Judiciary Act in a matter unrelated to the Acts specified in the Schedule to the Cross-Vesting Act, any appeal will be determined *only* by the relevant State appellate court (itself exercising federal jurisdiction under s 39(2) of the Judiciary Act), notwithstanding the parallel appellate jurisdiction of federal courts conferred by s 4(2) of the Cross-Vesting Act.
25. Section 7(5) similarly does not abstract from, or effect an ‘implied partial repeal of’, the jurisdiction conferred by s 39(2) of the Judiciary Act: cf J [34] (**CB 442**). Again, it presupposes the existence of appellate jurisdiction (whether sourced in s 39(2) of the Judiciary Act or s 4(1) of the Cross-Vesting Act), and imposes ‘an obligation [on a State Supreme Court] ... as to the way in which its jurisdiction is to be exercised’.¹⁹ In that way, it serves the procedural function of channelling into (relevantly) the Full Court of the Federal Court appeals on a subset of matters in federal jurisdiction that Parliament has determined are appropriately determined by that Court, notwithstanding the fact that Parliament was content for those matters to be determined at first instance by State Supreme Courts exercising federal jurisdiction.
26. More specifically, s 7(5) reflects a legislative judgment that it is appropriate to preserve the ‘special role of the Federal Court ... in relation to appeal matters which presently lie within the exclusive appellate jurisdiction of the Federal Court’.²⁰ As the Full Court correctly identified (J [37(a)], **CB 443**), the purpose of s 7(5) was to ensure that the Federal Court and Family Court remained the primary fora for appeals in areas in which those courts had developed particular expertise.²¹ By itself, s 4(1) of the Cross-Vesting Act would have disturbed that exclusive appellate jurisdiction, because it confers

¹⁹ *2 Elizabeth Bay Road Pty Ltd v Owners - Strata Plan No 73943* (2014) 88 NSWLR 488 at [91] (Leeming JA, Basten JA agreeing).

²⁰ Second Reading Speech to the Jurisdiction of Courts (Cross-Vesting) Bill 1986 (Cth), Hansard, House of Representatives, 22 October 1986, p 2556.

²¹ Hansard, House of Representatives, 17 March 1987, p 918.

jurisdiction on State Supreme Courts in cases where they would *not otherwise have had jurisdiction* (which includes cases where their appellate jurisdiction under s 39(2) of the Judiciary Act had been deliberately excluded in order to give exclusive appellate jurisdiction to a federal court). Section 7(5) preserved the existing exclusive appellate jurisdiction of federal courts not by depriving State courts of jurisdiction in such appeals (whatever its source), but by directing appeals in matters arising under specific Acts (being the scheduled Acts) to federal courts. Amongst other things, that scheme assists ‘to achieve uniform interpretation of federal law’.²²

27. The proposition that s 7(5) does not abstract from the jurisdiction of State Supreme Courts is strongly supported by the terms of ss 7(7) and (8). Section 7(7) provides that a State appellate court that has commenced to hear a proceeding by way of appeal, being an appeal to which it subsequently appears that s 7(5) applies, may nevertheless proceed to determine the appeal if that is what the interests of justice require. Section 7(8) provides that, if the State appellate court determines an appeal in those circumstances (or if it determines an appeal to which s 7(5) applies through inadvertence), then ‘nothing in this section invalidates the decision of that court’. The fact that State appellate courts can validly exercise appellate jurisdiction even in cases to which s 7(5) applies points strongly against interpreting that provision as diminishing the jurisdiction of those courts.

The purpose of s 7(5): preserving the exclusive appellate jurisdiction of federal courts

28. The Full Court read down s 7(5) by reference to the original jurisdiction of State courts. That was a significant error because, for the reasons touched upon above and developed below, the focus required in order to give effect to the purpose of s 7(5) was upon the appellate jurisdiction of federal courts. It appears that the Full Court made that error because it overlooked the fact that, at the time when the Cross-Vesting Act was enacted, the Federal Court’s appellate jurisdiction did *not* correspond to the scope of its original jurisdiction. To the contrary, the Federal Court routinely heard appeals from State Supreme Courts in areas in which it had no original jurisdiction. For that reason, the original jurisdiction of State Supreme Courts provides no guidance as to the matters

²² Brian Opeskin, ‘Cross-vesting of Jurisdiction and the Federal Judicial System’ in Brian Opeskin and Fiona Wheeler, *The Australian Federal Judicial System* (2000, Melbourne University Press) p 328.

that Parliament intended to be determined on appeal only by federal courts, and therefore no guidance as to the intended operation of s 7(5).

29. When the Cross-Vesting Act was enacted in 1987, the Federal Court had been operating for approximately a decade.²³ A core aspect of the Federal Court's function throughout that time was to serve as an appellate court. This reflected Parliament's intention in establishing the Federal Court that it would serve as an appellate court from the decisions of Territory courts and 'from State courts in certain matters of special federal jurisdiction'.²⁴ In essence, the scheme was that State courts would largely continue to exercise their existing federal original jurisdiction (which for the most part was conferred by s 39(2) of the Judiciary Act) lest 'the status of those courts and the quality of the work dealt with by them' be diminished.²⁵ It was 'only where there are special policy or perhaps historical reasons for doing so should original federal jurisdiction be vested in a federal court'.²⁶ But, while the Federal Court initially had very limited original jurisdiction, from the time it was created it served 'as a court of appeal from State courts in certain matters of special federal jurisdiction'.²⁷

30. Illustrating the above (and merely by way of example):

(a) the Federal Court had appellate jurisdiction with respect to matters arising under the *Copyright Act 1968* (Cth), the *Designs Act 1906* (Cth), the *Patents Act 1952* (Cth) and the *Trade Marks Act 1955* (Cth) in the period from its creation until 1987.²⁸ Yet it was not until 1987 that it also acquired original jurisdiction to hear

²³ The jurisdictional history of the Federal Court is well summarised in Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (4th edition, 2016), pp 157-161.

²⁴ Second Reading Speech for the Federal Court of Australia Bill 1976 (Cth), Hansard, House of Representatives, 21 October 1976, p 2111.

²⁵ Second Reading Speech for the Federal Court of Australia Bill 1976 (Cth), Hansard, House of Representatives, 21 October 1976, p 2110.

²⁶ Second Reading Speech for the Federal Court of Australia Bill 1976 (Cth), Hansard, House of Representatives, 21 October 1976, p 2111. Two examples of the conferral of original jurisdiction concerned that previously undertaken by the Australian Industrial Court and the Federal Court of Bankruptcy, which was to be transferred to the Federal Court: see Hansard, House of Representatives, 21 October 1976, p 2111. See also Second Reading Speech for Bills Related to the Federal Court of Australia Bill, Hansard, House of Representatives, 3 November 1976, pp 2281-2282.

²⁷ Second Reading Speech for the Federal Court of Australia Bill 1976 (Cth), Hansard, House of Representatives, 21 October 1976, p 2111.

²⁸ On the commencement of the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987* (Cth).

certain applications under those Acts;²⁹

(b) applications could be made at first instance to State Supreme Courts³⁰ under s 383 of the *Commonwealth Electoral Act 1918* (Cth), but the judgments of those courts could be appealed to the Federal Court under s 383(9) of that Act; and

(c) only State and Territory courts could hear applications at first instance under s 139(8) of the *Referendum (Machinery Provisions) Act 1984* (Cth), but the judgments of those courts could be appealed to the Federal Court under s 139(9).

31. The 13 Commonwealth Acts originally specified in the Schedule to the Cross-Vesting Act were all Acts that conferred exclusive *appellate*, but not necessarily exclusive *original*, jurisdiction on the Full Court of the Federal Court or the Full Court of the Family Court.³¹ The selection of those Acts as those upon which s 7(5) would operate reflected a legislative judgment to preserve that exclusive appellate jurisdiction. As Black CJ, Lockhart and Gummow JJ put it, the purpose of s 7(5) was to give effect to ‘the manifest object that in some classes of matter the exclusive jurisdiction of ... [the Federal] Court should continue because, in the view of the Parliament, there is particular utility in maintaining that position’.³² Consistently with that explanation, the explanatory memorandum to the Cross-Vesting Act characterised each of ss 3, 6 and 7 of that Act as provisions which ‘recognise[d] the special role of the Federal Court in matters in which it now has, apart from the jurisdiction of the High Court, exclusive original or appellate jurisdiction’.³³

²⁹ Pursuant to the *Copyright Act 1968* (Cth), s 131B; *Designs Act 1906* (Cth), s 40I; *Patents Act 1952* (Cth), s 148; and the *Trade Marks Act 1955* (Cth), s 114.

³⁰ See the definition of a ‘prescribed court’ in s 383(11).

³¹ See *NEC Information Systems Australia Pty Ltd v Iveson* (1992) 36 FCR 258 at 265 (Black CJ, Lockhart and Gummow JJ). The scheduled legislation was, at the time of enactment, the *Advance Australia Logo Protection Act 1984* (Cth), the *Bankruptcy Act 1966* (Cth), the *Commonwealth Electoral Act 1918* (Cth), the *Copyright Act 1968* (Cth), the *Designs Act 1906* (Cth), the *Family Law Act 1975* (Cth), the *Health Insurance Act 1973* (Cth), the *Liquid Fuel Emergency Act 1984* (Cth), the *Patents Act 1952* (Cth), the *Petroleum Retail Marketing Franchise Act 1980* (Cth), the *Referendum (Machinery Provisions) Act 1984* (Cth), the *Shipping Registration Act 1981* (Cth) and the *Trade Marks Act 1955* (Cth). The *Petroleum Retail Marketing Franchise Act 1980* (Cth) was repealed on 1 March 2007 and removed from the Schedule. The *Dental Benefits Act 2008* (Cth) was added to the Schedule on 26 June 2008. The *Designs Act 2003* (Cth) replaced the *Designs Act 1906* (Cth) in the Schedule on 17 December 2003. Similarly, the *Patents Act 1990* (Cth) replaced the *Patents Act 1952* in the Schedule on 30 October 1990.

³² *NEC Information Systems Australia Pty Ltd v Iveson* (1992) 36 FCR 258 at 266.

³³ Revised Explanatory Memorandum to the Jurisdiction of Courts (Cross-vesting) Bill 1987, p 2 [8].

32. It is true that the text of s 7(5) – by referring to ‘a matter arising under an Act specified in the Schedule’ – does not align perfectly with the effect of the provisions that conferred exclusive appellate jurisdiction on one or a combination of the Full Court of the Federal Court,³⁴ the Full Court of the Family Court,³⁵ and this Court at the time when the Cross-Vesting Act was enacted. An example is the Bankruptcy Act, which conferred exclusive appellate ‘jurisdiction in bankruptcy’ on the Federal Court. As the present proceeding demonstrates, the expression ‘jurisdiction in bankruptcy’ was defined in such a way that it did not cover the universe of matters ‘arising under’ the Bankruptcy Act.³⁶ In that way, Parliament’s use of the ‘arising under’ formulation in s 7(5) somewhat expanded the category of appeals that are required to be instituted and determined in the Federal Court. That may be what Black CJ, Lockhart and Gummow JJ had in mind in *NEC Information Systems Australia Pty Ltd v Iveson*, when they stated that ‘the existing exclusive appellate jurisdiction of this Court ... is

³⁴ As at 26 May 1987 (which is the day the Cross-Vesting Act received royal assent), the provisions in the scheduled Acts providing for appeals to the Full Court of the Federal Court were as follows (note: what follows incorporates references to amendments made by the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987*, a statute which also received royal assent on 26 May 1987): *Advance Australia Logo Protection Act 1984* (Cth), s 13(4) (read with ss 13(1) and (1A)); *Bankruptcy Act* (Cth), s 38 (read with s 28(1)); *Commonwealth Electoral Act 1918* (Cth), s 383(9) (read with ss 383(8) and (11)); *Copyright Act 1968* (Cth), s 131B(2) (read with s 39(2) of the Judiciary Act); *Designs Act 1906* (Cth), s 40I(1) (read with ss 40G(1) and (1B)); *Health Insurance Act 1973* (Cth), s 124A (read with ss 107A(1)(c) and (2) and the definition of ‘prescribed court’ in s 107); *Liquid Fuel Emergency Act 1984* (Cth), s 48(4) (read with s 48(1)-(3)); *Patents Act 1952* (Cth), s 148(1) (read with ss 146(1) and (1B)); *Petroleum Retail Marketing Franchise Act 1980* (Cth), s 26(4) (read with ss 26(1)-(3A)); *Referendum (Machinery Provisions) Act 1984* (Cth), s 139(9) (read with ss 139(8) and (11)); *Shipping Registration Act 1981* (Cth), s 82 (read with s 81); *Trade Marks Act 1955* (Cth), s 114(1) (read with ss 112(1) and (1B)). With one exception, none of the above-mentioned appeal provisions exhaustively covered all appeals from all decisions of Supreme Courts in the exercise of original jurisdiction in matters arising under the Act in question (the exception is *Petroleum Retail Marketing Franchise Act 1980* (Cth), s 26(4), when read with s 26(1)). That is because the appeal provisions did not provide for appeals from all decisions made by Supreme Courts in the exercise of original jurisdiction conferred solely by s 39(2) of the Judiciary Act.

³⁵ The provision providing for appeals to the Full Court of the Family Court was the Family Law Act, s 94(1) (read with ss 31 and 39). On its face, s 39(5) of the Family Law Act has always conferred very substantial original jurisdiction on Supreme Courts. However, proclamations made under ss 40(3) and 41(2) mean that, in practice, since long before 26 May 1987 no Supreme Court save the Supreme Court of the Northern Territory (the latter being the only Supreme Court not covered by such proclamations) has been able to exercise such jurisdiction (see the discussion in *Testart v Testart (No 2)* [2023] FCA 209 at [32]). That significantly restricted the practical operation of the provision for appeal in s 94(1)(b)(ii) of the Family Law Act.

³⁶ See *Meriton Apartments Pty Ltd v Industrial Court (NSW)* (2008) 171 FCR 380 at [5] (Branson J), [172], [185]-[193] (Perram J).

undiminished and, indeed, it is enhanced by s 7(5) and (7) of the Act.³⁷

33. Another example that illustrates the same point is the *Family Law Act 1975* (Cth) (**Family Law Act**). That Act conferred exclusive appellate jurisdiction on the Full Court of the Family Court in respect of decrees of: (i) the Family Court; or (ii) a Family Court of a State, or a Supreme Court of a State constituted by a single Judge, exercising original or appellate jurisdiction under the Family Law Act.³⁸ However, that category of appeals is not co-extensive with matters ‘arising under’ the Family Law Act, as is illustrated by the fact that the Full Family Court’s jurisdiction over appeals from a court of summary jurisdiction exercising jurisdiction under the Family Law Act was not exclusive.³⁹ Again, Parliament’s use of the phrase ‘arising under’ in s 7(5) of the Cross-Vesting Act somewhat expanded the category of appeals that are required to be brought to the Full Court of the Family Court.

34. The fact that s 7(5), if interpreted literally, is slightly over-inclusive when compared with the exclusive appellate jurisdiction previously conferred upon federal courts under the 13 scheduled Acts does not deny that the literal interpretation of that subsection nevertheless achieves the undisputed purpose of the provision, being preventing ‘existing areas of exclusive appellate jurisdiction from being diluted’ (J [37], **CB 443**).

The Full Court’s construction defeats the purpose of s 7(5)

35. By contrast, the Full Court’s construction of s 7(5) – being that it ‘has nothing to say about proceedings involving the exercise of federal jurisdiction conferred by s 39(2)’ (J [40], **CB 445**) – does not achieve that purpose. That follows because, in respect of *every one* of the scheduled Acts, State and Territory Supreme Courts had original jurisdiction to hear matters arising under those Acts either pursuant to s 39(2) of the Judiciary Act, or by express conferral under the scheduled Act.⁴⁰ As a result, State

³⁷ (1992) 36 FCR 258 at 265-266 (emphasis added).

³⁸ *Family Law Act 1975* (Cth), ss 93A and 94.

³⁹ Such appeals could also be heard by State Supreme Courts: *Family Law Act 1975* (Cth), s 96.

⁴⁰ At the time of the enactment of the Cross-Vesting Act, the express conferrals of original jurisdiction on Supreme Courts under each of the scheduled Acts were as follows: *Advance Australia Logo Protection Act 1984* (Cth), s 13(1); *Bankruptcy Act 1966* (Cth), s 27(1) and (2); *Commonwealth Electoral Act 1918* (Cth), s 383(8); *Designs Act 1906* (Cth), s 40G(1B); *Family Law Act 1975* (Cth), s 39(5) (but see fn 34 above for the significant restrictions on the exercise of s 39(5) jurisdiction); *Health Insurance Act 1973* (Cth), s 107A(2); *Liquid Fuel Emergency Act 1984* (Cth), s 48(2); *Patents Act 1952* (Cth), s 146(1B) (read with the definition of ‘prescribed court’ in s 6); *Petroleum*

Supreme Courts would *not* have been exercising cross-vested jurisdiction in any such matters, meaning that, on the Full Court’s construction, s 7(5) would not have applied to those matters *at all*. It therefore plainly could not have directed appeals in those matters to the Full Federal Court. That highlights the extent to which the Full Court’s construction fails to achieve the purpose of s 7(5) that it had identified, being to ‘prevent *existing* areas of exclusive appellate jurisdiction from being diluted’ (original emphasis): J [37] (**CB 443**).

10 36. To give some concrete illustrations, when the Cross-Vesting Act was enacted, on the Full Court’s construction of s 7(5), it would not have had any application to appeals from decisions of a Supreme Court concerning:

- (a) ‘jurisdiction in bankruptcy’, because that jurisdiction was also vested in State Supreme Courts pursuant to s 27 of the Bankruptcy Act;⁴¹
- 20 (b) applications under s 383 of the *Commonwealth Electoral Act 1918* (Cth) or under s 139 of the *Referendum (Machinery Provisions) Act 1984* (Cth) (see [29] above).

That would have been so notwithstanding that, at that time, s 38 of the Bankruptcy Act, s 383(9) of the *Commonwealth Electoral Act 1918* (Cth) and s 139(9) of the *Referendum (Machinery Provisions) Act 1984* (Cth) each conferred exclusive appellate jurisdiction on the Federal Court in respect of those matters.

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 Retail Marketing Franchise Act 1980 (Cth), s 26(1); *Referendum (Machinery Provisions) Act 1984* (Cth), s 139(8) (read with the definition of ‘prescribed court’ in s 139(11)); *Shipping Registration Act 1981* (Cth), s 81; *Trade Marks Act 1955* (Cth), s 112(1B) (read with the definition of ‘prescribed court’ in s 6). In nearly all instances, these provisions conferred jurisdiction only in specific types of matters; ie they did not extend to all matters arising under those Acts (the only exception was the *Petroleum Retail Marketing Franchise Act 1980* (Cth), s 26(1)). However, for matters arising under those Acts which fell outside the specific grants of jurisdiction just listed, original jurisdiction was conferred on Supreme Courts by s 39(2) of the Judiciary Act. Most notable in this regard was the *Copyright Act 1968* (Cth), which contained no express conferral of original jurisdiction on Supreme Courts. Section 131A of the Copyright Act takes it as read that, in matters arising under the Copyright Act, original jurisdiction is conferred on Supreme Courts by s 39(2) of the Judiciary Act (cf s 131C, which does expressly confer jurisdiction on the Federal Court). A similar analysis applies with respect to the *Shipping Registration Act 1981* (Cth): s 81 conferred jurisdiction only on the Supreme Courts of ‘each Territory’ (ie not on the Supreme Court of any State, presumably on the basis that s 39(2) of the Judiciary Act was sufficient in that regard).

40 ⁴¹ While s 27 was subsequently amended to confer jurisdiction in bankruptcy exclusively on the Federal Court and what is now the Federal Circuit and Family Court of Australia (Division 2), the relevant amendments did not take effect until 16 December 1996: *Bankruptcy Legislation Amendment Act 1996* (Cth), Sch 1, items 89-90. The effect of those amendments is that a matter in ‘jurisdiction in bankruptcy’ is now a ‘special federal matter’: see *Truthful Endeavour Pty Ltd v Condon* (2015) 233 FCR 174 at [48] (Allsop CJ, Katzmann and Gleeson JJ).

37. Similarly, on the Full Court’s construction, s 7(5) would not have directed appeals in actions under Part V of the *Copyright Act 1968* (Cth) (**Copyright Act**) to the Full Court of the Federal Court, because such applications were, with limited exception,⁴² capable of being determined at first instance by State Supreme Courts exercising jurisdiction under s 39(2) of the Judiciary Act.⁴³ Yet s 131B of the Copyright Act has, since before the Cross Vesting Act was enacted, conferred exclusive appellate jurisdiction in such matters on the Federal Court and this Court.⁴⁴ The inclusion of the Copyright Act in the Schedule to the Cross-Vesting Act suggests an intention to preserve that position. Yet, on the Full Court’s construction of s 7(5), there would have been nothing to prevent a State appellate court from exercising the appellate jurisdiction vested in it by s 4 of the Cross-Vesting Act in such a matter, thereby allowing specialised appellate work under the Copyright Act to be diverted away from the Federal Court.⁴⁵

38. The same possibility would have arisen with respect to appeals in proceedings brought under the *Patents Act 1952* (Cth) (**Patents Act**). Section 146(1B) of that Act conferred on a ‘prescribed court’ (other than the Federal Court⁴⁶) jurisdiction with respect to certain matters arising under the Patents Act. A ‘prescribed court’ included a State Supreme Court.⁴⁷ That means that original jurisdiction in some matters under the Patents Act may be exercised by State Supreme Courts, without any reliance on cross-vested jurisdiction. However, s 148(1) of the Patents Act provided that appeals in such matters could be brought *only* to the Full Court of the Federal Court.⁴⁸ Again, on the Full Court’s construction of s 7(5), it would have no operation with respect to such appeals (because the Court at first instance would not have been exercising cross-vested jurisdiction). Accordingly, despite the inclusion of the Patents Act in the Schedule to the Cross-Vesting Act, there would have been nothing to prevent specialised appellate

⁴² There is now an exception for applications under s 115A for injunctions relating to online locations outside Australia: *Copyright Act 1968* (Cth), s 131A(2) (inserted by the *Copyright Amendment (Online Infringement) Act 2015* (Cth)).

⁴³ See, for example, *Metstech Pty Ltd v Park* (2022) 411 ALR 35; [2022] NSWSC 166 at [554]; *Lyndsay Edmonds & Associates Pty Ltd v Quest Sales Pty Ltd* (1979) 60 FLR 349 at 351-352.

⁴⁴ See s 131B of the *Copyright Act* at the time the Cross-Vesting Act was enacted.

⁴⁵ See the extrinsic materials extracted at J [37(a)] and [37(b)].

⁴⁶ The Federal Court already having had jurisdiction in such a matter by virtue of s 146(1).

⁴⁷ Patents Act, s 6, definition of ‘prescribed court’.

⁴⁸ Section 148(4) of the Patents Act confirmed that an appeal could not be brought otherwise than as provided by s 148.

work under the Patents Act from being directed away from the Full Court of the Federal Court.

39. An equivalent difficulty likewise would have arisen with respect to the *Trade Marks Act 1955* (Cth), which permitted original jurisdiction to be exercised in some matters arising under that Act by the Supreme Court of a State,⁴⁹ but which gave the Federal Court exclusive jurisdiction to hear and determine appeals.⁵⁰

10 40. These examples underscore the significance of the fact that ss 7(3) and (5) of the Cross-Vesting Act operate by reference to matters ‘arising under’ the scheduled Acts, and *not* by reference to the matters in which a Supreme Court of a State would not have had original jurisdiction but for the Cross-Vesting Act. Parliament could readily have framed s 7 by reference to that latter criteria had it wished to do so. Indeed, the Cross-Vesting Act already contains the concept of a ‘special federal matter’, which is used to encompass certain matters in which State courts did not have jurisdiction apart from cross-vested jurisdiction.⁵¹ But the Parliament chose not to use that concept in s 7. Nor did it invoke the formula, which is used in ss 5(2)(b)(ii)(B) and 5(4)(b)(ii)(C), of a matter over which a State court did not have jurisdiction ‘apart from this Act’.

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41. Instead, Parliament chose to make the operation of s 7(5) turn on whether an appeal ‘arises under’ an Act listed in the Schedule. Parliament’s choice to adopt the language of s 76(ii) of the Constitution, being language with a settled legal meaning, should be respected. There is no warrant for allowing appeals from a single judge of a State Supreme Court to be instituted in or determined by a court other than a federal court, even when that appeal plainly ‘arises under’ an Act listed in the Schedule. That is all the more so once it is recognised that such appeals were overwhelmingly within the exclusive jurisdiction of federal courts at the time when the Cross-Vesting Act was enacted. Yet – inconsistently with both the text and purpose of s 7(5) – that is the very result sanctioned by the Full Court in this case: J [28], [41] (**CB 441, 445**).

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⁴⁹ *Trade Marks Act 1955* (Cth), s 112(1B) (being the *Trade Marks Act 1955* (Cth) as amended by the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987* (Cth)), which received royal assent on the same day as the Cross-Vesting Act, ie 26 May 1987. Immediately prior to these amendments, s 112(1) of the *Trade Marks Act 1955* (Cth) was the relevant provision conferring original jurisdiction on Supreme Courts.

⁵⁰ *Trade Marks Act 1955* (Cth), s 114(1).

⁵¹ See Cross-Vesting Act s 6, and the definition of ‘special federal matter’ in s 3(1).

42. In summary:

- (a) Section 7(5) does not divest State courts of federal jurisdiction. Rather, it regulates how that jurisdiction is to be exercised by directing that certain appeals are to be instituted in and determined by federal courts. In light of ss 7(7) and (8), s 7(5) falls far short of the ‘contrariety’ or ‘repugnancy’ that would be required to conclude that it effects an implied repeal of s 39(2) of the Judiciary Act.⁵²
- 10 (b) The applicability of s 7(5) is *not* affected by the source of the federal jurisdiction exercised by a single judge of a State Supreme Court. Specifically, it is irrelevant whether that jurisdiction arose under s 39(2) of the Judiciary Act, or by reason of s 4 of the Cross-Vesting Act.
- (c) Section 7(5) directs appeals that ‘arise under’ any of the 13 Acts listed in the Schedule to the Full Court of the appropriate federal court. The result approximates (although is not precisely co-extensive with) the matters in which the Full Courts of those federal courts exercised exclusive appellate jurisdiction in appeals from single judges of State Supreme Courts immediately prior to the commencement of the Cross-Vesting Act.
- 20 (d) The Full Court therefore erred in concluding that s 7(5) is properly construed as applying ‘only to an appeal from a decision made in the exercise of cross-vested jurisdiction’, and in concluding that it has ‘nothing to say about proceedings involving the exercise of federal jurisdiction conferred by s 39(2)’: J [40]-[41] (CB 445).
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The Full Court’s construction departs from intermediate appellate authority

43. Authority supports the construction of s 7(5) of the Cross-Vesting Act that is advanced above. Specifically, the Full Court’s construction of s 7(5) is contrary to a series of intermediate appellate decisions which have proceeded, correctly, on the basis that s 7(5) should be given effect in accordance with its terms. On that construction, the operation of s 7(5) depends upon whether, applying the settled understanding of the

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⁵² *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 275 (Fullagar J) and 290 (Windeyer J), quoted in *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at [18] (Gummow and Hayne JJ).

circumstances in which a matter ‘arises under’ a Commonwealth Act, an appeal ‘arises under’ one of the Acts listed in the Schedule. So, for example:

(a) in *Guan v Li* (2022) 371 FLR 531, it was stated: ‘It is necessary to look at all the issues arising on appeal, before they are determined; if one of them is a matter arising under a specified federal enactment, the section applies’: [41] (Bell CJ, Ward P and Meagher JA agreeing);

10 (b) in *Karlsson v Griffith University* (2020) 103 NSWLR 131, the relevant question was identified as whether ‘the “only matters for determination” in the appeal are matters which do not arise under an Act in the Schedule’: [10] (Payne and White JJA); see also [11]-[14];

20 (c) in *Boensch v Pascoe* (2016) 311 FLR 101, it was observed that where “‘a matter for determination” in an appeal is a matter arising under an Act specified in the Schedule, then the dual prohibitions in s 7(5) apply’: [11] (Leeming JA); see also [14]-[15];

(d) in *Morris Finance Ltd v Brown* (2016) 93 NSWLR 551, it was stated that ‘where it appears that “a matter for determination” in an appeal is a matter arising under an Act specified in the Schedule then the prohibition in s 7(5) applies’: at [25] (Payne JA, Basten JA agreeing) (emphasis in original); see also [22]-[24];

30 (e) in *Eberstaller v Poulos* (2014) 87 NSWLR 394, it was determined that, as ‘[t]he whole of the subject matter of the appeal is a matter arising under the Family Law Act ... s 7(5) applies’: [25] (Beazley P, Meagher and Leeming JJA); and

(f) in *Bramco Electronics Pty Ltd v ATF Mining Electrics Pty Ltd* (2013) 86 NSWLR 115, it was observed that ‘[t]he question posed by s 7(5) ... is whether “a matter for determination in” the proceeding now before this court is a “matter arising under” the *Patents Act* (Cth)’: [50] (Barrett JA); see also [5]-[6] (Meagher JA).

40 44. The brevity with which the reasoning is expressed in these cases does not deny their authority. They give effect to the literal meaning of s 7(5) in a way that is entirely consistent with its purpose. Lengthy reasoning is not required to justify such a result. The fact that those cases did not address whether the phrase ‘a decision of a single judge of the Supreme Court of a State or Territory’ should be read down in the manner favoured by the Full Court does not deny their authority, for that reading down is neither

supported nor required by principles of construction or by constitutional limitation.

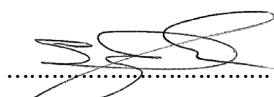
45. The Full Court’s reliance upon the reasoning of Brereton JA in *Singh v Khan* (2021) 363 FLR 88 does not advance matters, for that reasoning suffers from the same essential errors identified above. His Honour held that ‘the purpose of s 7 is to make provision in respect of the appropriate appellate court for appeals from a judgment of a first instance court which has been exercising cross-vested jurisdiction’, so as to ‘prevent cross-vesting from undercutting the exclusive character of the Full Federal Court’s appellate jurisdiction under the scheduled Acts’: [22]. That reasoning overlooks the fact that the Full Federal Court had exclusive appellate jurisdiction in cases where it did not have exclusive original jurisdiction (such that a single judge of a State Supreme Court might have been exercising jurisdiction under s 39(2) of the Judiciary Act, but where the appeal would nevertheless have been within the exclusive jurisdiction of a federal court). It also overlooks that, where a federal court had exclusive appellate jurisdiction, s 4(2) of the Cross-Vesting Act operated to confer parallel appellate jurisdiction on State Supreme Courts, which could have exercised that jurisdiction to circumvent the exclusive appellate jurisdiction of the federal court unless that was prevented by s 7(5).

46. For the foregoing reasons, the Full Court should have concluded that s 7(5) of the Cross-Vesting Act operates whenever an appeal from a decision of a single judge of the Supreme Court involves a matter arising under an Act listed in the Schedule. As the appeal before the Full Court was a matter arising under the Bankruptcy Act, the Full Court should therefore have proceeded to hear and determine the appeal.

PART V ESTIMATE OF TIME

47. The Attorney-General estimates that 1 hour will be required for oral argument.

Dated: 22 February 2024



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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

HBSY PTY LTD ACN 151 894 049
Plaintiff

AND

GEOFFREY LEWIS
First Defendant

**THE FEDERAL COURT OF AUSTRALIA
AND THE JUDGES THEREOF**
Second Defendant

**ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
COMMONWEALTH (INTERVENING)**

Pursuant to *Practice Direction No 1 of 2019*, the Attorney-General of the Commonwealth sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions
<i>Constitutional provisions</i>			
1.	<i>Commonwealth Constitution</i>	Current (Compilation No. 6, 29 July 1977 – present)	ss 51(xxxix), 75, 75(v), 76, 76(ii), 77
<i>Commonwealth statutory provisions</i>			
2.	<i>Advance Australia Logo Protection Act 1984</i>	As at 1 September 1987 (incorporating amendments assented to on 26 May 1987*) (Compilation No. 2, 26 May 1987 – 31 Aug 1987)	ss 13(1), 13(1A), 13(4)
3.	<i>Bankruptcy Act 1966</i>	Immediately prior to 26 May 1987 (Reprint No. 1, reprinted 31 July 1983)	ss 27, 27(1)-(2), 28(1), 38
4.	<i>Bankruptcy Act 1966</i>	As at 26 May 1987 (Reprint No. 2, reprinted as at 31 December 1991)	ss 27, 27(1)-(2), 28(1), 38

No.	Description	Version	Provisions
5.	<i>Bankruptcy Act 1966</i>	As at 16 December 1996 (16 December 1996 – 13 April 1997)	s 27
6.	<i>Bankruptcy Act 1966</i>	As at 14 July 2023 (Compilation No. 90, 28 September 2022 – 22 November 2023)	s 27
7.	<i>Bankruptcy Legislation Amendment Act 1996</i>	As at 16 December 1996 (No. 44 of 1996, assented to on 25 October 1996)	Sch 1, items 89-90
8.	<i>Commonwealth Electoral Act 1918</i>	Immediately prior to 26 May 1987 (Reprint No. 2, reprinted as at 30 September 1984)	ss 383, 383(8)-(9), 383(11)
9.	<i>Commonwealth Electoral Act 1918</i>	As at 26 May 1987 (Reprint No. 3, reprinted as at 31 October 1990)	ss 383, 383(8)-(9), 383(11)
10.	<i>Copyright Act 1968</i>	As at 30 June 1982 (Reprint No. 2, reprinted as at 30 June 1982)	s 131B
11.	<i>Copyright Act 1968</i>	As at 1 September 1987 (incorporating amendments assented to on 26 May 1987*) (Reprint No. 3, reprinted as at 30 September 1987)	ss 131A, 131B, 131B(2), 131C Pt V
12.	<i>Copyright Act 1968</i>	Current (Compilation No. 61, 1 July 2022 – present)	ss 115A, 131A(2)
13.	<i>Copyright Amendment (Online Infringement) Act 2015</i>	As enacted, at 26 June 2015 (No. 80 of 2015)	
14.	<i>Dental Benefits Act 2008</i>	As enacted, at 25 June 2008 (No. 41 of 2008)	
15.	<i>Designs Act 1906</i>	Immediately prior to 1 September 1987 (Reprint No. 2, reprinted as at 30 June 1982)	ss 40G(1), 40G(1B), 40I

No.	Description	Version	Provisions
16.	<i>Designs Act 1906</i>	As at 1 September 1987 (incorporating amendments assented to on 26 May 1987*) (Reprint No. 3, reprinted as at 30 September 1992)	ss 40G(1), 40G(1B), 40I
17.	<i>Designs Act 2003</i>	As enacted, at 17 December 2003 (Act No. 147 of 2003)	
18.	<i>Family Law Act 1975</i>	Immediately prior to 26 May 1987 (Reprint No. 2, reprinted as at 3 July 1985)	ss 31, 39, 39(5), 40(3), 41(2), 93A, 94, 94(1), 94(1)(b)(ii), 96
19.	<i>Family Law Act 1975</i>	As at 26 May 1987 (Reprint No. 3, reprinted as at 31 May 1992)	ss 31, 39, 39(5), 40(3), 41(2), 93A, 94, 94(1), 94(1)(b)(ii), 96
20.	<i>Family Law Act 1975</i>	Current (Compilation No. 97, 28 November 2023 – present)	ss 41, 41(2)
21.	<i>Federal Court of Australia Act 1976</i>	Current (Compilation No. 56, 18 February 2022 – present)	s 24(1)(c)
22.	<i>Health Insurance Act 1973</i>	As at 26 May 1987 (Reprint No. 2, reprinted as at 1 January 1988)	ss 107, 107A(1)(c), 107A(2), 124A
23.	<i>Judiciary Act 1903</i>	As at 31 August 1986 (Reprint No. 2, reprinted as at 31 August 1986)	s 39(2)
24.	<i>Judiciary Act 1903</i>	As at 26 May 1987 (Reprint No. 3, reprinted as at 30 April 1991)	s 39(2)
25.	<i>Judiciary Act 1903</i>	Current (Compilation No. 49, 18 February 2022 – present)	ss 39(2), 78A, 78B
26.	<i>Jurisdiction of Courts (Cross-Vesting) Act 1987</i>	As enacted, at 26 May 1987 (No. 24 of 1987)	ss 3, 4, 5, 6, 7, 7(5), Schedule

No.	Description	Version	Provisions
27.	<i>Jurisdiction of Courts (Cross-Vesting) Act 1987</i>	Current (Compilation No. 23, 6 February 2023 – present)	Preamble, para (a) ss 3(1), 4, 4(1)-(2), 4(4)-(5), 5, 5(1)(b)(ii)(A)-(B), 5(2)(b)(ii)(A)-(C), 5(3)(b)(ii)(A), 5(4)(b)(ii)(A)-(C), 6, 7, 7(1), 7(3)-(5), 7(7)-(8), 15 Schedule
28.	<i>Jurisdiction of Courts (Miscellaneous Amendments) Act 1987</i>	As enacted, at 26 May 1987 (No. 23 of 1987)	ss 2, 3, Schedule
29.	<i>Liquid Fuel Emergency Act 1984</i>	As at 26 May 1987 (Compilation No. 2, 27 March 1987 – 17 April 1995)	ss 48(1)-(4)
30.	<i>Patents Act 1952</i>	As at 31 August 1982 (Reprint No. 2, reprinted as at 31 August 1982)	
31.	<i>Patents Act 1952</i>	As at 1 September 1987 (incorporating amendments assented to on 26 May 1987*) (Reprint No. 3, reprinted as at 31 May 1988)	ss 6, 146(1), 146(1B), 148, 148(1), 148(4)
32.	<i>Patents Act 1990</i>	As enacted at 30 October 1990 (Act No. 83 of 1990)	
33.	<i>Petroleum Retail Marketing Franchise Act 1980</i>	As at 26 May 1987 (Reprint No. 2, reprinted as at 31 January 1994)	ss 26(1)-(3A), 26(4)
34.	<i>Referendum (Machinery Provisions) Act 1984</i>	As at 26 May 1987 (Reprint No. 1, reprinted as at 30 September 1990)	ss 139, 139(8)-(9), 139(11)
35.	<i>Shipping Registration Act 1981</i>	As at 26 May 1987 (Reprint No. 2, reprinted as at 31 May 1994)	ss 81, 82

No.	Description	Version	Provisions
36.	<i>Trade Marks Act 1955</i>	Immediately prior to 1 September 1987 (Reprint No. 2, reprinted as at 31 December 1986)	s 112(1)
37.	<i>Trade Marks Act 1955</i>	As at 1 September 1987 (incorporating amendments assented to on 26 May 1987*) (Reprint No. 3, reprinted as at 28 February 1993)	ss 6, 112(1), 112(1B), 114, 114(1)
38.	<i>Trade Marks Act 1995</i>	Current (Compilation No. 43, 18 November 2023 – present)	ss 190, 192(1), 195(1), 195(4)

* Amendments were effected by the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987* (Cth) and came into force on 1 September 1987.