IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No S6 of 2019

BETWEEN **MASSON**

Appellant

and **PARSONS**

First Respondent

PARSONS

Second Respondent

INDEPENDENT CHILDREN'S LAWYER

Third Respondent

FIRST AND SECOND RESPONDENTS' SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 Two issues arise on this appeal: first, whether the Full Court of the Family Court {AB 116.50-17.40} erred in holding that subsecs 14(2) and (4) of the *Status of Children Act 1996* (NSW) were picked up by subsec 79(1) of the *Judiciary Act 1903* (Cth); and, secondly, whether the trial judge {AB 25.40-26.40} erred in her construction and application of the term 10 'parent' in the *Family Law Act 1975* (Cth).

Part III: Notice under sec 78B of the *Judiciary Act 1903*

3 The appellant served a sec 78B notice on 8 January 2019 {AB 146-149}, and the first and second respondents do not consider that any further or other notice is required.

Part IV: Facts

4 The Full Court has ordered that the matter be remitted to the Family Court for rehearing {AB 130.60}. It follows that some of the factual matters set out in paras 8-11 of the Appellant's Submissions (**AS**), and in particular the parenthetical reference to the timing of the onset of the first and second respondents de facto relationship in AS para 44, may be

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revisited in the new trial. Subject to that possibility, the paraphrase of the first instance findings following the first trial in AS paras 6 – 11 is not contested.

5 The facts relevant to the disposition of this appeal, that will not alter following the new trial, are that the appellant was the sperm donor for the conception of B and was not the sperm donor for the conception of C, and that he was registered as the father of B on her birth certificate.

Part V: Argument

6 The argument in response to the appeal has three elements. First, subsecs 14(2) and (4) of the *Status of Children Act* are relevantly directed to the powers of a court considering a question of parentage, but of course cannot do so by force of State law with respect to federal jurisdiction. That "gap" in the legislative competence of New South Wales provides the occasion for the possible application of subsec 79(1) of the *Judiciary Act*.

7 Second, nothing in the *Family Law Act* has "otherwise provided" within the meaning of subsec 79(1) of the *Judiciary Act*, so as to make out the exception in that provision. It follows that subsecs 14(2) and (4) of the *Status of Children Act* will "pick up" as the Full Court held below.

8 Third, in any event, the *Family Law Act* cannot be read as providing that a sperm donor not married to the birth (and biological) mother is the father of the child so conceived and born, and thus a "parent" within the meaning of that expression in Part VII of the *Family Law Act*.

9 The appellant's argument at AS paras 49-58 depends on narrowing the scope of subsec 79(1) too much. This Court did not hold in *Rizeq v Western Australia* (2017) 262 CLR 1 that a State law which, as to any aspect, could be said to "have application independently of anything done by a court" (*Rizeq* at [105]) could not be picked up by the operation of subsec 79(1) as to other aspects of it apt "to facilitate the particular exercise of federal jurisdiction …" (*Rizeq* at 91, citing *Northern Territory v GPAO* (1999) 196 CLR 553 at 588 [80].

10 The provisions of subsecs 14(2) and (4) of the *Status of Children Act* no doubt bind of their own force New South Wales administrators – but they also regulate of their own force the way in which the judicial power of New South Wales should be exercised in adjudicating parentage in cases within their terms. The language and concept of presumption and rebuttal are more familiar currency in courts of law than in the bureaucracy. The gap in the legislative power of New South Wales to regulate the exercise of federal jurisdiction by means of these presumptions is the occasion for them to be picked up by subsec 79(1).

11 A test of the proposition that subsecs 14(2) and (4) fall outside the scope of subsec 79(1) is to contemplate, as that proposition entails, that (subject to sec 109 of the *Constitution*) they would apply of their own force as State legislation in the Family Court of Australia – say, as an offence-creating provision in a New South Wales statute would do so were the Family Court to be seized of an issue concerning the criminality of a person seeking a parenting order. It is not possible to conceive of the statutory prescription of how parentage should be determined, by means of an irrebuttable presumption in the specified circumstances, being other than a purported regulation of the exercise of federal jurisdiction by the Family Court. It is a standard example of the kind of legislation beyond the competence of a State.

12 For the reasons given by the Commonwealth Attorney-General in his submissions paras 8 - 13, therefore, subsecs 14(2) and (4) of the *Status of Children Act* regulate the jurisdiction of the court: see also *Harris v Harris* [1979] 2 NSWLR 252 at 255.

13 If that submission should not be accepted, the argument in the Commonwealth Submissions at para 22 requires consideration. It probably depends on a sufficient analogy between subsecs 14(2) and (4) of the *Status of Children Act* and the offence-creating para 6(1)(a) of the *Misuse of Drugs Act 1981* (WA) that was the subject of *Rizeq*. If, contrary to the first and second respondents' preferred position, subsecs 14(2) and (4) fall outside the scope of subsec 79(1), it would be because their character means that they are capable (subject to sec 109 of the *Constitution*) of applying of their own legal force.

14 However, contrary to the Commonwealth's further contention in its submissions para 22, there is no such inconsistency between subsec 14(2) and (4) of the *Status of Children Act* and the provisions of the *Family Law Act*. That would follow for broadly similar reasons as argued below concerning the "otherwise provided" subsec 79(1) issue.

15 The question whether the *Family Law Act* provides otherwise than subsecs 14(2) and (4) would provide, for the purposes of considering the application of subsec 79(1), may be approached in the historical context of legislative approaches to artificial conception.

16 There were no provisions dealing with artificial conception when the *Family Law Act* was first enacted. In its initial form (*Family Law Act 1975* (Cth), Act No 53 of 1975), the term 'parent' was not used in Part VII of the Act. The Act regulated the rights and duties of a 'child [or children] of a marriage' and 'party [or parties] to a marriage' (see, eg, sec 61 of Act No 53 of 1975). 'Child' was not defined, but sec 5 of that Act deemed certain children to be children of the marriage. These were (a) a child adopted since the marriage, (b) a child of the husband and wife born before the marriage, and (c) a child of one parent who was ordinarily a member

of the household of the marriage. In response to the High Court's decision in *Russell v Russell* (1976) 134 CLR 495, the *Family Law Amendment Act 1976* (Cth) (Act No 63 of 1976) replaced sec 5 with a narrower deeming provision that was limited to natural born children of a marriage and adopted children of both parties to the marriage.

17 Artificial conception was dealt with for the first time following amendments made by *Family Law Amendment Act 1983* (Cth) (Act No 72 of 1983). Section 5 was replaced with a new deeming provision, and sec 5A was inserted to address artificial conception. Paragraphs 5(c) and (d) provided respectively:

> Section 5(1) For the purposes of each application of this Act in relation to a marriage:
> ...
> (a) A child born to the wife, being a child who, under section 5A, is deemed to be the child of the husband;
> (b) A child born to a former wife of the husband, being a child who, under s 5A, is deemed to be the child of the husband, if at the relevant time, the child was ordinarily a member of the household of the husband and wife; ...
> shall be deemed to be a child of the marriage ... .
>
> Section 5A relevantly provided:
> (1) A child born to a woman as a result of the carrying out, during the period in which the woman was married to a man, of a medical procedure in relation to that woman, being a child who is not biologically the child of that man, shall, for the purposes of section, be deemed to be a child of that man if:
> (a) the medical procedure was carried out with the consent of that man; or
> (b) under an Act or under a law of a State or Territory the child is deemed to be the child of that man...

18 Two things of importance can be noted about this initial provision. First, the premise was that a 'child born to the wife' was a child of the wife. In circumstances of artificial conception, it was only the parentage of the husband that needed to be dealt with by the deeming provision. Secondly, para 5A(1)(b) picked up deeming provisions under State or Territory legislation. In NSW, the *Artificial Conception Act 1984* (NSW) was enacted to deal with parentage in circumstances of artificial conception. Pursuant to subsec 5(2) '[w]here a married woman ... has undergone a fertilisation procedure as a result of which she has become pregnant, the husband shall be presumed, for all purposes, to have caused the pregnancy and to be the father of any child born as a result of the pregnancy'. Section 6 further provided that '[w]here a woman becomes pregnant by means of artificial insemination ... any man (not being, in the case of a married woman, her husband) who produced the semen used for artificial insemination ... shall for all purposes, be presumed not to have caused the pregnancy and not to be the father of any child born as a result of the pregnancy'.

Both presumptions were irrebuttable. These provisions were the forerunners of subsecs 14(2) and (4) of the *Status of Children Act*.

19 In response to the referral by the States to the Commonwealth of power over ex-nuptial children, the *Family Law Amendment Act 1987* (Cth) (Act No 181 of 1987) repealed secs 5 and 5A and replaced them, relevantly, with sed 60B. That section provided:

> Section 60B
> (1) Where:
> (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure while the woman was married to a man; and
> (b) either of the following paragraphs apply:
> (i) the procedure was carried out with their consent;
> (ii) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman and of the man;
> then, whether or not the child is biologically a child of the woman and of the man, the child is their child.
> (2) Where:
> (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
> (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of the woman;
> then, whether or not the child is biologically a child of the woman, the child is her child.
> (3) Where:
> (a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and
> (b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;
> then, whether or not the child is biologically a child of the man, the child is his child.
> (4) Where a person lives with another person as the husband or wife of the first-mentioned person on a bona fide domestic basis although not legally married to that person, subsection (1) applies in relation to them as if:
> (a) they were married to each other; and
> (b) neither person were married to any other person. ...

20 The Explanatory Memorandum explained that '[n]ew sub-section 60B(1) re-enacts the substance of existing sub-section 5A(1)'.[1] Thus, the premise remained that 'a child born to a woman' was to be the child of that woman, and the subsections then dealt with the parentage rights of other persons by reference to the birth mother. The scope of the new sec 60B differed from the previous secs 5 and 5A in three important respects. First, the *Family Law Act* was broadened to cover parentage rights in relation to ex-nuptial children. Secondly, the provisions no longer picked up relevant State or Territory laws on the status of children.

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[1] Explanatory Memorandum, *Family Law Amendment Bill*, The Parliament of the Commonwealth of Australia, House of Representatives (1987) [62].

Instead, the relevantly applicable State and Territory laws were to be prescribed by Commonwealth regulations. Thirdly, the provisions moved beyond addressing the deemed rights of a husband to a marriage. Subsection 60B(1) now dealt with parentage rights of a married birth mother who was not the biological mother.[2] A de facto wife and husband were also now attracted the deeming provision in subsec 60B(1) (by operation of subsec 60B(4)). Additionally, the parentage rights of an unpartnered birth mother who was not the biological mother was dealt with in subsec 60B(2). Finally, the parentage rights of men who were not legal or de facto husbands were dealt with in subsec 60B(3).

21 The Explanatory Memorandum to the Bill explained that '[t]he provisions in Division 7 of the new Part VII provide for presumptions of parentage of children. Provision is now made under most State and Territory Laws for presumptions of paternity and parentage, but the provisions in Division 7 will provide a statement of relevant presumptions of parentage for the purposes of determination of these issues under the Family Law Act'.[3] The reference in the Explanatory Memorandum to 'presumptions' may not be entirely appropriate: more properly, they were deeming provisions. In this regard, their operation was arguably in contrast to the various presumptions of parentage which were inserted by the 1987 amendment in Part VII, Div 7 of the Act. The current presumptions are found in Part VII, Div 12, Subdiv D of the Act.

22 Section 60B was repealed when a new Part VII was substituted by the *Family Law Reform Act 1995* (Cth) (Act No 167 of 1995). Section 60H replaced sec 60B in relevantly identical terms. Thus, the form and structure of the provision remained. The assumption underlying the provisions was that the birth mother was a child's mother, and, on that premise, the various provisions dealt with parentage in particular situations.

23 Finally, the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) (Act No 115 of 2008) repealed subsecs 60H(1) and (4), and inserted subsec 60H(1) in its current form. These amendments effected two relevant changes. First, the gendered language describing the birth mother's partner was removed, so that subsec 60H(1) could cover female same sex couples who otherwise fell within the provision. Secondly, the language of subsec 60B(1) was altered to incorporate de facto partners who were previously included by virtue of the deeming provision in subsec 60B(4). Despite these

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[2] So much had been recommended by the Family Law Council to the Attorney-General, *Creating Children: A uniform approach to the law and practice of reproductive technology in Australia* (AGPS, 1985) [6.2.17] (recommendation 8) and the Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *IVF and The Status of Children* (Parliamentary Paper No 493/1985) [7.42].

changes, the form and structure of the provision otherwise remained. The birth mother is assumed to be the mother of the child. Subsection 60B(1) deals with a partnered birth mother who is not the biological mother of the child and the married or de facto partner of the birth mother (necessarily limited to heterosexual couples or female same sex couples); subsec 60B(2) deals with an unpartnered birth mother who is not the biological mother; and subsec 60(3) deals with the rights of a man who is not the legal or de facto husband of the birth mother. It was also at this point that the definition of 'child' was inserted in sec 4 (providing that 'Subdivision D of Division 1 of Part VII affects the situations in which a child is a child of a person or is a child of a marriage or other relationship').

24 The amendments were made in response to the recommendation of the Senate Legal and Constitutional Affairs Committee, that 'the parenting presumptions in sec 60H of the Family Law Act 1975 be amended to allow children of same-sex relationships to be recognised as a child of the relationship for the purposes of the entire Family Law Act 1975'.[4] The Explanatory Memorandum indicated that '[t]he Government amendments implement' the recommendation in the same terms.'[5]

25 Four observations may be made about this legislative history. First, the status of parentage in circumstances of artificial conception has warranted special legislative treatment. The successive amendments have responded to the changing technological, legal, social and familial context to which the provisions apply. The rights and duties that characterise the status of parentage in those circumstances have decidedly not been left by the Parliament simply to judicial interpretation of the bare word 'parent'.

26 Secondly, the rights and duties that accrue in circumstances of artificial conception have taken a consistent form and structure since artificial conception was first addressed by the Parliament in 1983. The birth mother has always been assumed to be the mother of the child, with the legislative scheme then setting out various legal rules to define the rights of others around the rights of the birth mother. Thirdly, there is an important difference between the legal operation of sec 60H and that of the presumptions which appear in Part VII, Div 12, Subdiv D of the Act and subsecs14(2) and (4) of the *Status of Children Act*. Section 60H sets out the *legal rules*, for the purposes of the *Family Law Act*, of parentage in circumstances of

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3 Explanatory Memorandum, *Family Law Reform Bill 1994,* The Parliament of the Commonwealth of Australia, House of Representatives (1994) [4].

4 Senate Legal and Constitutional Affairs Committee, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008* (2008) [3.168] (Recommendation 1).

5 Supplementary Explanatory Memorandum, *Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008*, The Parliament of the Commonwealth of Australia, House of Representatives (2008) 1.

artificial conception. By contrast, Div 12, Subdivision D of the Act and in Part 3, Division 1 of the *Status of Children Act*, operate as *presumptions*. Fourthly, and relatedly, sec 60H operates to transform the relevant legal presumptions from the *Status of Children Act*, where applicable, into legal rules for the purposes of the *Family Law Act*. It does not operate to pick up those presumptions as *presumptions*.

27 The test for the operation of the words of exception, 'otherwise provides', in subsec 79(1), has been settled. In *Northern Territory of Australia v GPAO* (1999) 196 CLR 553, the question for this Court was whether sec 79 of the *Judiciary Act* picked up subsec 97(3) of the *Community Welfare Act 1983* (NT) in proceedings in the Family Court of Australia. Pursuant to O 28, rr 1 and 8 of the *Family Law Rules 1984* (Cth), a Registrar of the Family Court had issued a subpoena ordering the Child and Family Protective Services to produce certain documents to the Court. The agency resisted the production and relied on subsec 97(3) of the *Community Welfare Act* that proscribed the production of such documents to 'a court'

28 Gleeson CJ and Gummow J explained the purpose of sec 79 and the test for its operation (at 196 CLR 588 [80]-[81] (emphasis added)):

> The objective of s 79 is to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements in which may comprise the laws of the State or Territory in which the jurisdiction is being exercised, together with the laws of the Commonwealth, but subject always to the overriding effect of the Constitution itself. Seen in that light, the notion of 'inconsistency' involved in the phrase 'otherwise provided' in s 79 is akin to that first identified by Mason J in the passage from the judgment in *University of Wollongong v Metwally* [(1984) 158 CLR 447 at 463] ... This is the need to resolve the problem that arises by conflict between conflicting statutes having the same source. The law of a State or Territory which is to operate as a surrogate law of the Commonwealth is to be measured beside other laws of the Commonwealth.
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> The issue whether the *Family Law Act* makes relevant provision otherwise to s 97(3) of the *Community Welfare Act* may be approached by asking whether the operation of the former *so reduces the ambit* of the latter that the provisions of the *Family Law Act* *are irreconcilable* with those of the Territory law, with the result that the *Family Law Act* 'otherwise provide[s]'.

29 Their Honours held that subsec 97(3) of the *Community Welfare Act* and the *Family Law Act* were not irreconcilable: the latter '[left] room for the operation of the immunity conferred by s 97(3)' (at 196 CLR 589 [84]). Their Honours accepted the submission that 'the immunity provided for by para 97(3)(a) provides a reasonable excuse for failure to comply with the requirement of a subpoena issued under the Rules of Court that a document be produced to the Family Court' (at 196 CLR 589 [84]). Hayne J agreed with those reasons (at 196 CLR 650 [254]).

30 Gaudron J said that sec 79 'directed attention, *not to inconsistency as such*, but to the question whether the Constitution or the laws of the Commonwealth "otherwise provide".' For present purposes, nothing turns on that distinction' (at 196 CLR 606 [134] (emphasis added)). Her Honour considered that, while the welfare jurisdiction of the Family Court was broad, 'that does not dictate the conclusion that the Family Court's powers are entirely at large'. Instead, her Honour considered how the respective provisions could work together. While sec 65E and subsec 67ZC(2) of the *Family Law Act* directed that the best interests of the child were to be paramount considerations in making parenting orders and welfare orders, those provisions had 'nothing to say' about the power to compel production (at 196 CLR 607 [139], 608 [143]).

31 Her Honour focused more particularly on whether, in their legal operation, subsec 97(3) of the *Community Welfare Act* and the power in O 28, r 8 to issue a subpoena were irreconcilable, and concluded (at 196 CLR 609 [146]):

> With perhaps one presently irrelevant exception [footnote omitted], no provision of the Act or of the Rules bears on the question whether a person can be compelled to produce specific documents, for example documents which are the subject of legal professional privilege or are privileged on public interest grounds. The Act and the Rules being relevantly silent in that regard, the issue is left to the general law. That being so, neither the Act nor the Rules provides otherwise for the purposes of s 79 of the *Judiciary Act*.[6]

32 The approach from the majority in *GPAO* was endorsed in *Austral Pacific Group Ltd (In Liq) v Airservices Australia* (2000) 203 CLR 136. The question for this Court was whether the District Court of Queensland, when exercising federal jurisdiction, was to apply the third-party contribution provisions in sec 6 and 7 of the *Law Reform Act 1995* (Qld) to an action for negligence against Austral Pacific. The plaintiff was employed by Airservices Australia and claimed damages for injuries sustained as a result of a fall from a fire-fighting appliance manufactured by Austral Pacific. Austral Pacific in turn sought contribution under sec 6 and 7 of the *Law Reform Act* from Airservices Australia. Federal jurisdiction was attracted by this contribution claim in part because Airservices was a Commonwealth agency or instrumentally which is included in the term 'the Commonwealth' for the purposes of sec 75(iii) of the Constitution. The question for this Court was whether sec 79 operated to pick up sec 6 and 7 of the *Law Reform Act,* or whether provisions of the *Safety, Rehabilitation and Compensation*

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[6] Kirby J dissented, concluding that there was repugnancy between the *Family Law Act* and the *Community Welfare Act*. His Honour indicated that he would have reached the same conclusion if required to consider whether the *Family Law Act* 'otherwise provided' for the purposes of the sec 79 question (at 649 [249]-[250]). McHugh and Callinan JJ did not consider the application of sec 79, having concluded that the Family Court was not exercising federal jurisdiction (609 [148]).

Act 1988 (Cth) 'otherwise provided'. Specifically, sec 44 of that Commonwealth Act provided that 'an action or other proceeding for damages' did not lie against the Commonwealth or a Commonwealth authority in respect of an injury sustained by an employee in the course of his or her employment. This Court held that the contribution claim under sec 6 and 7 of the *Law Reform Act* was not 'an action or other proceeding for damages' for the purposes of sec 44 of the *Safety, Rehabilitation and Compensation Act*: it was a new statutory entitlement to be indemnified (at 203 CLR 146-7 [26]). Accordingly, the *Safety, Rehabilitation and Compensation Act* did not otherwise provide so as to displace the operation of sec 79 picking up sec 6 and 7 of the *Law Reform Act.*

10 **33** On the question of whether the Commonwealth Act 'otherwise provided', Gleeson CJ, Gummow and Hayne JJ said (at 203 CLR 144 [17] (footnotes omitted)):

> The criteria to be applied are indicated in *Northern Territory v GPAO*. The question is whether the operation of the Compensation Act would so reduce the ambit of the Contribution Act that the provisions of the Compensation Act are irreconcilable with the other law. ... *GPAO* shows that the question is not answered by application of the doctrine identified, in the decisions construing s 109 of the Constitution, with the phrase 'covering the field'.

34 Since sec 44 of the *Safety, Rehabilitation and Compensation Act* was inapplicable, and 20 considering that the Act was otherwise 'silent respecting the rights and obligations inter se' of a Commonwealth authority and a third party, sec 79 operated to pick up the State contribution provisions (at 203 CLR 147 [28]). McHugh J agreed with these reasons for the operation of sec 79 (at 203 CLR 155 [53]).

35 Subsequent cases have endorsed the *GPAO* test.[7] In *Macleod v Australian Securities and Investments Commission* (2002) 211 CLR 287, ASIC had prosecuted the appellant in the Western Australian Court of Petty Sessions. After having been convicted by a magistrate, the appellant was successful on appeal to a single judge of the Supreme Court. ASIC appealed to the Full Court of the Supreme Court, which set aside the order of the single judge of the Supreme Court and reinstated the original conviction by the magistrate. The question for this

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7 Section 79 was considered without detailed analysis in *Chief Executive Officer of Customs v Labrador Liquor Wholesale* (2003) 216 CLR 161 (where sec 79 did not operate to pick up sec 92 of the *Evidence Act 1977* (Cth) to a prosecution of an offence under the *Customs Act 1901* (Cth) and the *Excise Act 1901* (Cth) because provisions of those Commonwealth Acts already provided for sec 92 of the State Act to apply), *British American Tobacco Australia v Western Australia* (2003) 217 CLR 30 (this Court held that sec 6 of the *Crown Suits Act 1947* (WA), which imposed a notice requirement on suits against the Crown, could not be picked up by sec 79 because it would deny the operation of sec 64 of the *Judiciary Act* by putting the State in a special position above that enjoyed by others bringing actions against the State. Again, the test was not considered in detail.

Court was whether ASIC was authorised to institute the appeal from the orders of the single judge to the Full Court of the Supreme Court.

36 There had been no power vested in ASIC under the *Australian Securities Commission Act 1989* (Cth) to institute the appeal. As a creature of statute, its functions and powers were only those set out in the empowering Act. Section 206A of the *Justices Act 1902* (WA) provided that an appeal lay to the Full Court from the unsuccessful party in the first appeal to the single judge of the Supreme Court. The question for this Court on appeal was whether sec 79 of the *Judiciary Act* picked up sec 206A permitting ASIC to institute the Full Court appeal. The joint judgment of six judges of the Court said that '[w]hat is involved in [the phrase 'otherwise provided'] in s 79 was considered in *Northern Territory v GPAO*' (at 211 CLR 297 [22]. The passages from *GPAO* set out above at 13 and 18 were all cited in support. Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ presented the *GPAO* question in the following way (at 211 CLR 296 [22]):

> [The *Australian Securities Commission Act*] provided for the creation, functions and powers of the [ASIC]. If the *Justices Act* would have added to or derogated from those powers and the functions created and conferred by the law of the Commonwealth, then it would not have been 'picked up' by s 79 because the Commonwealth law would otherwise have provided ...

Their Honours later concluded (at 211 CLR 302 [44]):

> A law of the Commonwealth ... is to be construed as requiring the officers or body in question to have and to exercise only such powers as the Parliament of the Commonwealth thereby has chosen to vest in them [*Bond v The Queen* (2000) 201 CLR 226 at 240-1 [25]-[26]]. Where the law of a State purports to grant some wider power or authority to such an officer or body, then the law of the Commonwealth will be one by which it is 'otherwise provided' for the purposes of s 79 of the *Judiciary Act.*

37 In *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, the respondent's husband had been killed in a plane crash in the Northern Territory, and she instituted proceedings in the Supreme Court of Victoria to recover damages. Part IV of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) created a statutory right to damages, but neither the writ nor the statement of claim invoked rights under that Act. Section 34 of the Commonwealth Act provided that any right to damages under the Act was extinguished if an action was not commenced within two years of the accident. If the Supreme Court proceedings were considered not to involve an action under the Commonwealth Act, the respondent would have been out of time to commence fresh proceedings. If that were the case, then a question would have arisen as to whether subsec 34(1) of the *Limitation of Actions Act 1958* (Vic) could be

picked up by sec 79 of the *Judiciary Act* to allow an amendment of the pleadings to make clear the respondent's reliance on the *Civil Aviation (Carriers' Liability) Act*. The sec 79 issue did not arise for determination because the Court considered that, as a matter of objective assessment, sufficient facts had been pleaded to raise a claim under the Commonwealth Act. Nonetheless, the Court offered observations on the sec 79 question, and concluded that sec 34 of the Commonwealth Act was 'an integral part of the federal statutory right to damages'. Accordingly, sec 79 could not pick up a provision that '"derogated from" the extinction wrought by s 34 of the federal statue' (at 223 CLR 271 [59], [60], quoting from *Macleod* at 211 CLR 296 [22], which in turn cited the *GPAO* statements set out above at 13 and 18.

10 **38** Thus, there is a clear line of authority commencing with *GPAO* for the test to apply when determining if a Commonwealth law 'otherwise provides' for the purposes of sec 79 of the *Judiciary Act*. Such an enquiry involves assessing the Commonwealth provisions that might 'otherwise provide' against the surrogate federal law to see whether the latter 'so reduces the ambit of' the former to make them 'irreconcilable'. That evaluative exercise might be illuminated by asking whether the Commonwealth provisions that might otherwise provide 'leave room' for the surrogate federal law to be picked up by sec 79, or whether the surrogate federal law 'derogates' from the Commonwealth provisions that might otherwise provide. Nonetheless, the assessment requires close consideration of the legal operation of the respective provisions, and whether their scope of operation can be reconciled.

20 **39** For the reasons given by Gleeson CJ and Gummow J in *GPAO*, this is the correct approach to take. The exercise required is to reconcile two Commonwealth Acts – the law that is said to 'otherwise provide' and the surrogate federal law. As Gleeson CJ, Gummow and Hayne JJ emphasised in *Austral Pacific*, a 'covering the field' approach derived from s 109 will not be sufficient to answer that question. To adapt the words of Fullagar J in *Butler v Attorney-General (Vic)* (1961) 106 CLR 268, 'where the comparison to be made is between two [Acts of the same legislature] there is a very strong presumption that the ... legislature did not intend to contradict itself, but intended that both Acts should operate' (at 106 CLR 276). In other words, every effort must be made to reconcile the provisions so that they are capable of working together. It is only in that way that the purpose of sec 79 is achieved 'to
30 facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements in which may comprise the laws of the State or Territory in which the jurisdiction is being exercised' (*GPAO* 196 CLR 443 at 588 [80], quoted with approval in *Rizeq v Western Australia* (2017) 262 CLR 1 at 36-7 [91]).

40 The appellant relies (at AS [27]) in particular on statements from *Bui v Director of Public Prosecutions (Cth)* (2012) 244 CLR 638, *Grant Samuel Corporate Finance v Fletcher* (2015) 254 CLR 477 and *R v Gee* (2003) 212 CLR 330 in support of an argument that the applicable test has shifted to include a covering the field type of inconsistency. However, none of these cases reconsider the earlier authorities. In *Bui*, the question was whether the common law principle of double jeopardy could be applied by the Court of Appeal of the Supreme Court of Victoria pursuant to sec 80 of the *Judiciary Act* when re-sentencing on appeal. Section 80 speaks of the common law (as modified by statute) applying if 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 and punishment'. This Court held that the express terms of sec 16A of the *Crimes Act 1914* (Cth) could not accommodate the application of the principle of double jeopardy (at 244 CLR 653 [29]): there was no 'gap or omission in Commonwealth statute law such as to bring s 80 into play' (at 244 CLR 653 [28]). There was no considered attention given to sec 79 of the *Judiciary Act*.

41 *Grant Samuel* concerned a reconciliation, for the purposes of sec 79, of sec 588FF of the *Corporations Act 2001* (Cth) and r 36.16(2)(b) of the *Uniform Civil Procedure Rules 2005* (NSW). Section 588FF of the Commonwealth Act provided for the making of an application to a court by a company's liquidator for certain orders where a transaction of the company is voidable because of sec 588FE. Paragraph 588FF(3)(a) set out the periods during which the application could be made. Paragraph 588FF(3)(b) permitted a longer period to be ordered by the court on an application made by the liquidator during the period specified in paragraph (a). On the facts in the case, the Supreme Court relevantly ordered that the period be extended, not under sec 588FF(3)(b), but under r 36.16(2)(b) of the *Uniform Civil Procedure Rules* which authorised the Court to vary an order. The application for the relevant extension would not have enlivened the extension power in sec 588FF(3)(b) as it was outside the period specified in paragraph (a). This Court said:

> Section 588FF(3) may be said to 'otherwise provide' if it is inconsistent with so much of the general rules of procedure in the UCPR as would permit variation of the times fixed by the extension order. Inconsistency in this sense may be taken to include that s 588FF(3) leaves no room for the operation of the UCPR [fn: cf *GPAO* at 589 [84]], which would be the case if s 588FF(3)(b) is clearly intended to be the exclusive source of power to extend time for the purposes of s 588FF(1) (at 254 CLR 483 [8]).

42 In determining whether subsec 588FF(3) 'otherwise provided', there was no analysis of whether the *Corporations Act* had covered any particular field. Indeed, the Court referred to its earlier decision in *Gordon v Tolcher* (2006) 231 CLR 224 at 348 [40] which held 'that

the procedural regulation of a matter, after the institution of an application, is left to the State or Territory procedural law' (*Grant Samuel* 254 CLR at 485 [15]). Rather, the question whether sec 588FF(3) otherwise provided, so as to displace the operation of sec 79 to pick up r 36.16(2)(b), depended on a particular consideration of the legal operation of the respective provisions. The time limit in para 588FF(3)(a) had been imposed for a policy reason of certainty (at 254 CLR 486 [19], [21]), and the language of the provisions indicated that extensions under para 588FF(3)(b) had to be made within the period identified in paragraph (a) (at 254 CLR 486-7 [22]-[23]). The application of r 36.16(2)(b) would 'vary' the legal operation of sec 588FF(3) (at 254 CLR 487 [2]). It was in this sense that it might be said that subsec 588FF(3) 'leaves no room' or was 'intended to be the exclusive source of power to extent time'. This outcome is perfectly consistent with the test in *GPAO*. Indeed, the Court in *Grant Samuel* contrasted the outcome in *GPAO*. There was no reconsideration of that authority.

43 *Gee* considered whether subsec 68(2) of the *Judiciary Act* conferred federal jurisdiction on the Full Court of the Supreme Court of South Australia to hear a question of law reserved by the District Court for the Full Court under sec 350 of the *Criminal Law Consolidation Act 1935* (SA) where the District Court was hearing a Commonwealth offence. In the course of considering that question, McHugh and Gummow JJ observed that (at 212 CLR 254 [62]):

> Provisions such as ss 64, 68(2) and 79 of the *Judiciary Act* do not operate to insert a provision of State law into a Commonwealth legislative scheme which is 'complete upon its face' where, on their proper construction, those federal provisions can 'be seen to have left no room' for picking up of State law.

The statement was made to support their Honour's disapproval of comments made by Rich, Dixon, Evatt and McTiernan JJ in *Seaegg v The King* (1932) 48 CLR 251 which described sec 72-77 of the *Judiciary Act* as setting out 'a code of procedure for an appeal by way of case stated' (at 48 CLR 256). Those statements cannot be viewed as a reconsideration of what their Honours said in *GPAO* and *Austral Pacific*.

44 The *GPAO* test is supported by this Court's approach to the analogous provision in subsec 68(1) of the *Judiciary Act*. In *Putland v The Queen* (2004) 218 CLR 174, the High Court considered whether s 68(1) could pick up an aggregate sentencing provision in s 52(1) of the *Sentencing Act* (NT), and apply it to the sentencing of a federal offender who had pled guilty to an indictment charging him with a Commonwealth offence. The appellant had argued that the Commonwealth sentencing provisions had left no room for s 68(1) to pick up s

52(1). In part, the appellant argued that s 4K of the *Crimes Act 1914* (Cth), which provided for aggregate sentencing for federal offences dealt with summarily, left no space for the operation of s 52(1) of the *Sentencing Act*.

45 The argument was rejected by a majority of the Court. While s 4K applied only to summary proceedings, s 52(1) applied to offences dealt with summarily *and* on indictment. The appellant had contended that s 4K gave rise to a negative implication, excluding the possibility of State aggregate sentencing provisions operating alongside sec 4K. A majority of the Court considered that subsec 68(1) could operate to pick up subsec 52(1) for Commonwealth offences dealt with on indictment alongside the operation of sec 4K for federal offences dealt with summarily ((2004) 218 CLR 174 at 185 [23] per Gleeson CJ), 190 [44], 192 [50] per Gummow and Heydon JJ, with Callinan J agreeing at 215 [121])).

46 The first and second respondents submit that, when the *GPAO* test is properly understood, the *Family Law Act* does not 'otherwise provide' so as to displace the operation of subsecs 14(2) and (4) of the *Status of Children Act*. The *GPAO* approach to subsec 79(1) is to ask whether the operation of subsec 14(2) and (4) of the *Status of Children Act* 'so reduces the ambit of' the *Family Law Act* that the provisions of the *Family Law Act* 'are irreconcilable' with the State provisions. Only then can it be said that there has been 'irreconcilability'.

47 The subject of regulation is the legal status of parentage in circumstances of artificial conception. There are two sets of provisions that deal with the relevant subject matter. First, sec 60H sets out the legal rules on parentage in circumstances of artificial conception for the purposes of the *Family Law Act*. Subsections 60B(1) and (2) are inapplicable on the facts as found by the trial judge, and no regulation has been made pursuant to subsec 60B(3). Thus, the legal rules in sec 60H do not apply on the facts as found by the trial judge. The picking up of the presumption in subsecs 14(2) and (4) will not affect the legal operation of sec 60H in any way. Thus, the respective provisions can be reconciled on the *GPAO* test.

48 Secondly, of the parentage *presumptions* set out in Part VII, Div 12, Subdiv D, the only one of relevance is in sec 69R of the *Family Law Act* – the presumption of the parentage arising from registration of birth. However, that is a rebuttable presumption. There is no irreconcilability in the application of the presumption in subsec 14(2) and (4) of the *Status of Children Act* and the presumption in sec 69R. While the presumption in sec 69R is rebuttable, the presumption in subsec 14(2) and (4) is irrebuttable. The operation of the respective provisions can be reconciled (cf: AS [46] and [47]; TRS [32])). It does not matter if other presumptions in the State Act might be irreconcilable with presumptions in the *Family Law*

Act. This Court's decision in *Putland* makes it clear that some provisions in State law might be picked up even though others cannot.

49 The Commonwealth (CS [16]) and the third respondent (TRS [22]-[33]) submit that the word 'parent' in the *Family Law Act* cannot be defined by reference to subsecs 14(2) and (4) of the *Status of Children Act*. However, parentage is a legal status at common law and the subject of regulation by State Parliaments. There is no reason in principle why the use of the term 'parent' in the *Family Law Act* cannot have assumed the application of relevant presumptions, including those in State legislation, for determining the existence of parentage. While it is accepted that the *Family Law Act* expressly refers to State law, for example, in relation to adoption and in s 60H itself, the State laws in these cases are picked up for the purpose of defining the legal rules to be applied in determining parentage rights and duties. Subsections 14(2) and (4) do not have that character when picked up by subsec 79(1): they continue to operate as presumptions.

50 Thus, an application of the *GPAO* test, as explained in the authorities of this Court, leads to the conclusion that there is no 'irreconcilability' between subsecs 14(2) and (4) and provisions of the *Family Law Act*. Accordingly, the Full Court was correct to conclude {AB 116.50-17.40} that subsec 79(1) of the *Judiciary Act* picked up subsecs 14(2) and (4) of the *Status of Children Act* and, consequently, the appellant is presumed irrebuttably not to be a parent.

51 The first and second respondents' alternative submission is that if, on a broader view of the exclusionary words in subsec 79(1) that displaces the operation of subsec 79(1), a proper understanding of sec 60H of the *Family Law Act* as an exhaustive provision dealing with parentage in circumstances of artificial conception leaves no room for the appellant to be considered a 'parent' for the purposes of that Act. The appellant views s 60H as providing 'examples' (at AS [42]-[43]) of inclusions and exclusions from the general meaning of the term 'parent'. Similarly, the Commonwealth (at CS [23]-[43]) concludes that sec 60H does not exhaustively deal with the legal status of parentage in circumstances of artificial conception and resort must be had to the ordinary meaning of the word 'parent' (see also TRS [34]-[38]). These submissions incorrectly characterise the operation of sec 60H.

50 The legislative history of sec 60H shows a consistent form and structure to the provisions dealing with artificial conception. The birth mother of a child consistently has been assumed to be the mother of the child, with other provisions dealing with the parentage rights of other persons by reference to the birth mother. The concept of 'a child … born to a woman' is the central thread that runs through the various subsections in sec 60B, and is the point of

reference by which the parentage rights and duties of others are defined. If there is a 'presuppose[d] … conception of parentage that can be identified' (CS [39]), at least in cases of artificial conception, it is that the birth mother is the parent of the child. From that premise, subsec 60H(1) deals with the parentage rights of a partnered birth mother and those of the legal or de facto (heterosexual or same sex) partners of the birth mother whether or not they are the biological mother or the other intended parent. Subsection 60H(2) deals with the rights of an unpartnered birth mother when she is not the biological mother. Finally, subsec 60H(3) deals with the rights of men who are not the legal or de facto partner of the birth mother. This has been a consistent form and structure since the 1983 amendments to the *Family Law Act* to deal with the rights and duties of parentage in circumstances of artificial conception.

51 Such a view of the operation of s 60H does not suffer from the 'absurd consequences and considerable inconvenience' suggested by the Commonwealth (CS [34]). A child (including in this case) is not left without parents. Indeed, as the 2008 report of the Senate Committee on Legal and Constitutional Affairs recognised, prior to the 2008 amendment of s 60H(1) to include female same-sex couples, 'a child born to a same-sex couple will often have only one legal parent for the purposes of the Family Law Act' (at [3.101]). The clear implication is that, prior to the 2008 amendments to remove the gendered language in s 60H(1), it was well understood that children would not be rendered parentless if their lesbian mother did not satisfy the heterosexual couple requirement of that subsection in the form it then took. The Commonwealth (CS [33]) also relies on the definition of 'child' in subsec 4(1) of the *Family Law Act*. That definition was not introduced until the 2008 amendments, at which time it accurately captured the expanded scope of the newly inserted subsec 60H(1), which was thereafter to include female same sex couples within its scope.

52 The first and second respondents' view of the operation of sec 60H means that male same sex couples cannot be considered to be parents under the current provisions (in the absence of a favourable regulation pursuant to subsec 60H(3)). However, this was well recognised at the time of the 2008 amendments. The Senate Committee noted that male same sex couples did not benefit from the operation of s 60H(1), and also that the Commonwealth was, at the time, 'considering a request from state and territory Ministers to consider amending section 60H of the Family Law Act to allow children of same-sex relationships to be recognised as a child of the relationship for the purposes of this section' (at [3.162]) Furthermore, the Explanatory Memorandum to the 2008 amendment noted that the amendment 'would mean that *female* same-sex de facto couples would be recognised as the parents of a child born where the couple consent to the artificial conception procedure and one

of them is the birth mother' (at [72] (emphasis added)). It was at no point contemplated that a male same sex couple could revert to the ordinary meaning of the word 'parent' to acquire parentage rights in relation to a child. It would be incongruent with that result if the appellant is entitled to parentage rights by appealing to the general meaning of the term 'parent'.

53 In summary, if the *Family Law Act* were considered to 'otherwise provide' and displace the operation of subsec 79(1) of the *Judiciary Act*, then, when properly understood, sec 60H sets out exhaustively the persons who are entitled to parentage rights and duties in circumstances of artificial conception. Consequently, the appellant would not be considered a parent for the purposes of the *Family Law Act*.

10 **54** The trial judge erred {AB 25.40-26.40} in her approach to determining whether the appellant was a parent. That error arose either because her Honour did not apply sec 79(1) to pick up subsec 14(2) and (4) of the *Status of Children Act*, or because sec 60H is an exhaustive statement of parentage rights and duties in circumstances of artificial conception. The first and second respondents' primary and alternative submissions provide a principled basis for resolving parentage rights in a changing technological, legal and social context. The legislatures at both the Commonwealth and State levels have turned their attention to the necessary adjustments to parentage rights and duties to respond to scientific advancements in reproductive technology and changes in the social and familial context in which children are born and raised. A principled approach according to tailored statutory rules or presumptions
20 would avoid a reversion to the unconstrained meaning of the word 'parent'. The approaches advocated by the appellant, the Commonwealth and the third respondent are unattractive because it would leave to the trial judge to discern the 'contemporary meaning' of the word 'parent' by reference to a range of factors (including 'the significance of different types of biological connections to a child and the social context of conception' (CS [41]) and which 'might extend to a person who contributes no genetic material to the conception of a child but acts, in all other ways, as a parent' (TRS [42])) that might result in consequences entirely unintended by the legislature.

Part VII: Time estimate

55 The first and second respondents would seek no more than 1 ½ hours for the presentation of their oral argument.

8th March2019

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