



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 09 May 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: S106/2023
File Title: HBSY Pty Ltd ACN 151 894 049 v. Lewis & Anor
Registry: Sydney
Document filed: Form 27F - A-G Cth's Outline of oral argument
Filing party: Intervener
Date filed: 09 May 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

**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

**OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF
THE COMMONWEALTH (INTERVENING)**

PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

10 2. Contrary to the Full Court’s conclusion (**J[41]**), s 7(5) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) (**Cross-Vesting Act**) should be given its literal meaning: **CS[6]**. So construed, it requires an appeal from a decision of a single judge of a Supreme Court of a State or Territory in a matter arising under a Scheduled Act to be instituted only in a federal court, whether or not the State or Territory Supreme Court was exercising cross-vested jurisdiction. Unlike the construction favoured by the Full Court, that construction both gives effect to the settled meaning of the words “matter arising under” (**J[26], [28]**), and achieves the manifest purpose of s 7(5).

The Cross-Vesting Scheme and appellate jurisdiction

20 3. At the time the cross-vesting scheme was enacted, the Federal Court had very limited original jurisdiction. It primarily exercised appellate jurisdiction in matters determined at first instance by Territory Supreme Courts or by State Supreme Courts when exercising

federal jurisdiction in matters of particular federal concern: **CS[29]**. Original jurisdiction in such matters for the most part continued to be exercised by State and Territory Supreme Courts: Second Reading Speech for the Federal Court of Australia Bill (**JBA 6, Tab 67**).

4. The enactment of s 4(1) of the Cross-Vesting Act had the potential to remove the exclusive appellate role of the Federal Court with respect to matters of particular federal concern, because it conferred the previously exclusive appellate jurisdiction of the Federal Court upon State and Territory Supreme Courts. The purpose of s 7(5) was to ensure that, notwithstanding that conferral of jurisdiction, appeals in relation to those matters would ordinarily continue to be instituted in, and determined by, federal courts: Second Reading Speech to the Jurisdiction of Court (Cross-Vesting) Bill (**JBA 6, Tab 65**) p 2556; Revised Explanatory Memorandum to the Jurisdiction of Courts (Cross-vesting) Bill (**JBA 6, Tab 64**) pp 2, 4; *NEC Information Systems Australia Pty Ltd v Iveson* (1992) 36 FCR 258 at 265-266 (**JBA 5, Tab 54**); **CS[26]**.
5. Prior to the enactment of the Cross-Vesting Act, State and Territory Supreme Courts had original jurisdiction to hear matters arising under every one of the 13 original Scheduled Acts, and a federal court (normally the Federal Court) had exclusive appellate jurisdiction with respect to those matters: see **Table 1 (attached)**; **CS[28], [30]-[31]**.

The Full Court's reasoning

6. Once it is recognised that State and Territory Supreme Courts did not exercise cross-vested jurisdiction in matters under any of the Scheduled Acts, it is apparent that on the Full Court's construction of s 7(5) it completely fails to achieve its purpose. On that construction, it would not have preserved the exclusive appellate role of federal courts in appeals in matters arising under any of the Scheduled Acts: **CS[35]**.
7. Section 7(5) does not partially repeal s 39(2) of the Judiciary Act. It assumes that other provisions have conferred appellate federal jurisdiction on State and Territory Supreme Courts in matters arising under the Scheduled Acts, and it regulates the exercise of that jurisdiction by directing most such appeals to federal courts: **CS[22], [25]**. The conclusion that s 7(5) does not deprive those courts of jurisdiction is confirmed by s 7(7) and (8): **CS[27]**.
8. The Full Court's reliance upon s 7(3) to determine the proper construction of s 7(5) was erroneous: **J [31]-[33], [38]-[40]**. Like s 7(5), s 7(3) assumes a prior grant of appellate jurisdiction to State and Territory Supreme Courts, and then regulates the exercise of that

jurisdiction: **CS[22]-[24]**. There is therefore no basis to read it down to avoid overlap with s 39(2) of the Judiciary Act. The proper construction of s 7(3) also requires recognition that it was enacted on the assumption that s 4(1) in each State Cross-Vesting Acts was valid, and that State Parliaments each enacted s 7(3) in materially identical terms to s 7(3) of the Cross-Vesting Act: e.g. *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) (**JBA 2, Tab 9**), **CS[23]**.

Over-inclusivity of s 7(5)

9. The effect of s 7(5) of the Cross-Vesting Act, on its proper construction, is not perfectly co-extensive with the effect of the provisions in the Scheduled Acts that conferred exclusive appellate jurisdiction on federal courts at the time the Cross-Vesting Act was enacted: **CS[32]**. The difference reflects the heterogeneity of the jurisdictional provisions of the 13 Scheduled Acts: see **Table 2 (attached)**. Section 7(5) sought to capture the effect of the various pre-existing provisions using a single formula that aligned with the widest of the pre-existing jurisdictional provisions, so as not to dilute pre-existing exclusive appellate jurisdiction: **CS[34]**. That avoided the need for amendment to the Cross-Vesting Act every time there was a change to the jurisdictional provisions in the Scheduled Acts.
10. The literal construction of s 7(5) aligns much more closely with the purpose of s 7(5) than does the construction favoured by the Full Court. That is a further reason why the literal construction should be adopted: *Acts Interpretation Act 1901* (Cth) s 15AA.

Response to defendant's alternative construction

11. The alternative construction proposed by the first defendant at **DS[46]-[52]** has no foundation in the text. Indeed, it would require a departure from the well-established understanding of the phrase "matter arising under": *Bramco Electronic Pty Ltd v ATF Electrics Pty Ltd* (2013) 86 NSWLR 115 (**JBA 5, Tab 42**) at [5].

Dated: 9 May 2024


Stephen Donaghue

Christine Ernst

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

COMMONWEALTH ATTORNEY-GENERAL

TABLE 1: JURISDICTIONAL PROVISIONS FROM A REPRESENTATIVE SAMPLE OF THE SCHEDULED ACTS

Relevant provisions	Pre-Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)	Present Wording
Bankruptcy Act 1966 (Cth)		
Section 27 (‘Bankruptcy courts’)	(1) The Courts having jurisdiction in bankruptcy ⁱ are: (a) the Federal Court of Australia; (b) the Supreme Court of the State of New South Wales; (c) the Supreme Court of the State of Victoria; [...etc]	(1) The Federal Court and the Federal Circuit and Family Court of Australia (Division 2) have concurrent jurisdiction in bankruptcy , and that jurisdiction is exclusive of the jurisdiction of all courts other than: [the High Court and Federal Circuit and Family Court of Australia (Division 1)]. [...] ⁱⁱ
Section 38 (‘Appeal to Federal Court of Australia’)	An appeal from a judgment, order or sentence given or pronounced... by a State Court exercising jurisdiction in bankruptcy or by the Federal Court of Bankruptcy may be brought to the Federal Court of Australia and not otherwise .	[The provision was repealed in 1996 by the <i>Bankruptcy Legislation Amendment Act 1996</i> (Cth) (see item 101 of Sch 1).]
Commonwealth Electoral Act 1918 (Cth)		
Section 383 (‘Injunctions’)	(1) Where a person has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of, or an offence against, this Act or any other law of the Commonwealth in its application to elections, a prescribed court may, [...] grant an injunction restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the court it is desirable to do so, requiring that person to do any act or thing. [...] (8) A prescribed court (being a court of a State) is invested with federal jurisdiction and, to the extent that the Constitution permits, jurisdiction is conferred on a prescribed court (being a court of a Territory), with respect to all matters arising under this section . [...] (9) An appeal lies to the Federal Court of Australia from a judgment or order of a prescribed court exercising jurisdiction under this section.	<i>Restraining injunctions</i> (1) Where a person has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of, or an offence against, this Act or any other law of the Commonwealth in its application to elections, the Federal Court of Australia (the Federal Court) may, [...] grant an injunction restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Federal Court it is desirable to do so, requiring that person to do any act or thing. [...] ⁱⁱⁱ [Subsection 8 was repealed in 2001 by the <i>Electoral and Referendum Amendment Act (No. 1) 2001</i> (Cth) (see item 69 of Sch 1).] [Subsection 9 was repealed in 2004 by the <i>Electoral and Referendum Amendment (Access to Electoral Roll and Other Measures) Act 2004</i> (Cth) (see item 30 of Sch 1).]

Relevant provisions	Pre-Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)	Present Wording
Copyright Act 1968 (Cth) Part V ('Remedies for Infringement of Copyright')		
Section 115 ('Actions for infringement')	(1) Subject to this Act, the owner of a copyright may bring an action for an infringement of the copyright. [...]	(1) Subject to this Act, the owner of a copyright may bring an action for an infringement of the copyright. [...] ^{iv}
Section 131A ('Exercise of jurisdiction')	The jurisdiction of the Supreme Court of a State or Territory in an action under this Part [Part V – Remedies for Infringements of Copyright] shall be exercised by a single Judge of the Court. [Note: for conferral of jurisdiction on Supreme Courts in such actions see s 39(2) of the <i>Judiciary Act 1903</i> (Cth).]	(1) The jurisdiction of the Supreme Court of a State or Territory in an action under this Part shall be exercised by a single Judge of the Court. [...] ^v
Section 131B ('Appeals')	(2) An appeal lies from a decision of a court under this Part (a) to the Federal Court of Australia ; or (b) by special leave of the High Court, to the High Court.	(2) An appeal lies from a decision of a court of a State or Territory under this Part (a) to the Federal Court of Australia ; or (b) by special leave of the High Court, to the High Court. ^{vi}
Section 131C ('Jurisdiction of Federal Court of Australia')	[Not inserted into the Act until 26 May 1987]	Jurisdiction is conferred on the Federal Court of Australia with respect to actions under this Part. ^{vii}
Patents Act 1952 (Cth)		Patents Act 1990 (Cth) ss 154–155
Section 146 ('Jurisdiction of prescribed courts')	(1) [...] every prescribed court has jurisdiction with respect to matters arising under this Act in respect of which actions or proceedings may, under this Act, be instituted in a prescribed court. [...] [Note: "Prescribed court" was defined in s 6 of the <i>Patents Act 1952</i> to mean "the Supreme Court of a State, the Supreme Court of the Australian Capital Territory, the Supreme Court of the Northern Territory of Australia or the Supreme Court of Norfolk Island".] [Note: s 146(1) was subject to an exception in sub-s 146(1)(2) that is not presently relevant.]	154 Jurisdiction of Federal Court (1) The Federal Court has jurisdiction with respect to matters arising under this Act. [...] 155 Jurisdiction of other prescribed courts (1) Each prescribed court (other than the Federal Court) has jurisdiction with respect to matters arising under this Act in respect of which proceedings may, under this Act, be started in a prescribed court. [...] ^{viii}

Relevant provisions	Pre- <i>Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)</i>	Present Wording
Section 148 (‘Appeals’)	(1) [...] An appeal lies to the Federal Court of Australia from a judgment or order of a prescribed court exercising jurisdiction under this Act [...]. [...] (4) Except as provided in the foregoing provisions of this section, no appeal lies from a judgment or order referred to in sub-section (1).	158 Appeals (1) An appeal lies to the Federal Court against a judgment or order of (a) another prescribed court exercising jurisdiction under this Act [...]. (4) Except as otherwise provided by this section an appeal does not lie against a judgment or order referred to in subsection (1). ^{ix}

Petroleum Retail Marketing Franchise Act 1980 (Cth)

Section 26 (‘Jurisdiction of courts’)	(1) The Supreme Court of each State is invested with federal jurisdiction, and jurisdiction is conferred on the Federal Court of Australia and, to the extent that the Constitution permits, on the Supreme Court of each Territory, with respect to all matters arising under this Act . [...] (4) An appeal lies to the Federal Court of Australia from a judgment or order of a State or Territory exercising jurisdiction under this Act. [...] (6) Except as provided in sub-section (4) or (5), no appeal lies from a judgment or order referred to in sub-section (4).	[The Act was repealed in 2007 by the <i>Petroleum Retail Legislation Repeal Act 2006 (Cth)</i> .]
--	--	---

ⁱ ‘Section 5 of the *Bankruptcy Act 1966* provides that “**bankruptcy**, in relation to jurisdiction or proceedings, means jurisdiction or proceedings under or by virtue of this Act’.

ⁱⁱ Section 27(1) of the *Bankruptcy Act 1966 (Cth)* in its substantive current form was introduced by the *Bankruptcy Legislation Amendment Act 1996* (see item 89 of Sch 1). There have been no relevant amendments to the provision since that amending Act commenced.

ⁱⁱⁱ Section 383(1) of the *Commonwealth Electoral Act 1918 (Cth)* in its substantive current form was introduced by the *Electoral and Referendum Amendment Act (No. 1) 2001* (see item 58 of Sch 1). There have been no relevant amendments to the provision since that amending Act commenced.

^{iv} Section 115(1) of the *Copyright Act 1968 (Cth)* has not been amended since enactment in 1968.

^v Section 131A(1) of the *Copyright Act 1968* (Cth) in its substantive current form was introduced by the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1979* (see s 4). There have been no relevant amendments to the provision since that amending Act commenced.

^{vi} Section 131B(2) of the *Copyright Act 1968* (Cth) in its substantive current form was introduced by the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1979* (see s 4). There have been no relevant amendments to the provision since that amending Act commenced.

^{vii} Section 131C of the *Copyright Act 1968* (Cth) in its substantive current form was introduced by the *Jurisdiction of Courts (Miscellaneous Amendments) Act 1987* (see the Schedule). There have been no amendments to the provision since that amending Act commenced.

^{viii} Section 154 and s 155(1) of the *Patents Act 1990* (Cth) have not been amended since the enactment of the Act in 1990.

^{ix} Section 158 of the *Patents Act 1990* (Cth) has not been amended since the enactment of the Act in 1990.

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

COMMONWEALTH ATTORNEY-GENERAL

**TABLE 2: TERMS USED TO CONFER JURISDICTION ON SUPREME COURTS IN
THE THIRTEEN ORIGINAL SCHEDULED ACTS**

Act and provision conferring original jurisdiction on Supreme Courts as at 25 May 1987 (immediately prior to the enactment of the <i>Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth)</i>)	Terms conferring jurisdiction
<i>Advance Australia Logo Protection Act 1984 (Cth)</i>	Section 13(1) ‘all matters arising under section 11 or 16’
<i>Bankruptcy Act 1966 (Cth)</i>	Section 27(1) ‘jurisdiction in bankruptcy’
<i>Commonwealth Electoral Act 1918 (Cth)</i>	Section 383(8) ‘all matters arising under this section’ [ie s 383]
<i>Copyright Act 1968 (Cth)</i>	Section 131A ‘an action under this part’ [ie Part V]
<i>Designs Act 1906 (Cth)</i>	Section 40G(1) ‘matters arising under this Act in respect of which actions or proceedings may, under this Act, be instituted in a prescribed court’
<i>Family Law Act 1975 (Cth)</i>	Section 39(5) ¹ ‘Subject to this part...matters arising under this Act in respect of which (a) matrimonial causes are instituted under this Act’; also such causes continued under s 9 (see s 39(5)(b)); various kinds of proceedings provided for in the regulations or under the Rules of Court (see s 39(5)(c)-(e); and proceedings instituted under s 117A (see s 39(5)(e))
<i>Health Insurance Act 1973 (Cth)</i>	Section 107A(2) ‘an application made to that Court in accordance with Division 4’
<i>Liquid Fuel Emergency Act 1984 (Cth)</i>	Section 48(2) ‘Subject to subsection (1)...all matters arising under this Act’ ²
<i>Patents Act 1952 (Cth)</i>	Section 146(1) ‘with respect to matters arising under this Act in respect of which actions or proceedings may, under this Act, be instituted in a prescribed court’
<i>Petroleum Retail Marketing Franchise Act 1980 (Cth)</i>	Section 26(1) ‘all matters arising under this Act’
<i>Referendum (Machinery Provisions) Act 1984 (Cth)</i>	Section 139(8) ‘all matters arising under this section’
<i>Shipping Registration Act 1981 (Cth)</i>	Section 81 ‘applications made...under section 47B, 47C, 59, 66 and 70’
<i>Trade Marks Act 1955 (Cth)</i>	Section 112(1) ‘with respect to matters arising under this Act in respect of which actions or proceedings may, under this Act, be instituted in a prescribed court’

¹ Proclamations made under ss 40(3) and 41(2) of the *Family Law Act 1975 (Cth)* 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 jurisdiction under s 39(5) (see the discussion in *Testart v Testart (No 2)* [2023] FCA 209 at [32]).

² Note that s 48(1) conferred exclusive jurisdiction on the Federal Court in matters arising under sections 34 or 37, subject only to the jurisdiction of the High Court in such matters under s 75 of the Constitution.