HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

RESIDUAL ASSCO GROUP LIMITED PLAINTIFF

AND

JANIS GUNARS SPALVINS & ORS DEFENDANTS

Residual Assco Group Limited v Spalvins [2000] HCA 33
Date of Order: 25 May 2000
Date of Publication of Reasons: 13 June 2000
A5/2000

ORDER

1. *The questions in the case stated are answered as follows:*

    1. *Are s 11 of the* Federal Courts (State Jurisdiction) Act *1999 (SA) and rule 123A.05 of the Rules of the Supreme Court of South Australia invalid?*

        Answer: No.

    2. *Are any one or more (and, if so, which) of ss 6, 7, 8 and 10 of the* Federal Courts (State Jurisdiction) Act *1999 (SA) invalid?*

        Answer: Unnecessary to answer.

    3. *If any of ss 6, 7, 8, 10 or 11 of the* Federal Courts (State Jurisdiction) Act *1999 (SA) be invalid, as a consequence thereof, is any other provision thereof (and, if so, which) invalid?*

        Answer: Unnecessary to answer.

2. *The first, second and third defendants must pay the plaintiff's costs of the case stated.*

3. *Any other questions of costs in this Court are reserved for the consideration of the single Justice making orders consequential upon the answers to the questions reserved.*

Representation:

R J Whitington QC with M F Blue and A L McCartney for the plaintiff (instructed by Australian Securities and Investments Commission)

D F Jackson QC with A J Besanko QC and S B Lloyd for the first defendant (instructed by Thomson Playford)

D F Jackson QC with A J Besanko QC and S B Lloyd for the second and third defendants (instructed by Finlaysons)

No appearance for the fourth, fifth, sixth and seventh defendants

Interveners:

S J Gageler with M A Perry and C J Horan intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

P A Keane QC, Solicitor-General of the State of Queensland with G R Cooper intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor for the State of Queensland)

D Graham QC, Solicitor-General for the State of Victoria with P M Tate intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

B M Selway QC, Solicitor-General for the State of South Australia with K L Kelly intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

M G Sexton SC, Solicitor-General for the State of New South Wales with M J Leeming intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

CATCHWORDS

Residual Assco Group Limited v Spalvins

Constitutional law (Cth) – State law providing for order that a proceeding commenced in a federal court be treated as a proceeding in the Supreme Court – Whether State law invalid by reason of interference with the procedures of a federal court after order by that court that it had no jurisdiction – State law not invalid.

High Court and federal judiciary – Federal Court and Family Court – Original jurisdiction conferred under cross-vesting legislation of the Commonwealth held to be invalid in a previous decision – Original jurisdiction also conferred under other laws of the Commonwealth – Jurisdiction to make an order staying for want of jurisdiction a matter commenced under invalid cross-vesting legislation – Whether exercising jurisdiction conferred under invalid cross-vesting legislation or under other laws of the Commonwealth in making the order – Whether issue arises as to whether an order made under invalid legislation is a nullity or voidable.

Procedure – Courts – Supreme Courts of the States and federal courts – State law provided for Supreme Court to make an order that a proceeding commenced in a federal court in respect of which that federal court had made an order that it had no jurisdiction be treated as a proceeding in the Supreme Court – Effect of State law.

Constitution, ss 71, 76(ii), 77(i), 109.
Family Law Act 1975 (Cth), s 31(1)(d).
Federal Court of Australia Act 1976 (Cth), s 19.
Judiciary Act 1903 (Cth), s 39B(1A)(c).
Federal Courts (State Jurisdiction) Act 1999 (SA), s 11.
Rules of the Supreme Court of South Australia, r 123A.05.

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. The issue in this case stated arises out of legislation introduced by the State of South Australia and other States to remedy some of the effects of the decision of this Court in *Re Wakim; Ex parte McNally*[1]. In *Re Wakim*, this Court held that neither the federal Parliament nor the legislature of a State, alone or in combination, could vest State judicial power in a federal court. The critical issue in the case stated is whether s 11 of the *Federal Courts (State Jurisdiction) Act* 1999 (SA) ("the State Act") and r 123A.05 of the Rules of the Supreme Court of South Australia are invalid because they are a direct interference with the procedures and authority of the Federal Court of Australia.

2 On 21 September 1999, in respect of a proceeding commenced in the South Australian District Registry of the Federal Court, a Judge of that Court (O'Loughlin J) ordered that the proceeding be stayed for want of jurisdiction. The proceeding related to a matter in respect of which the *Corporations (South Australia) Act* 1990 (SA) had purported to confer jurisdiction on the Federal Court. Application was then made to the Supreme Court of South Australia under s 11 of the State Act and pursuant to r 123A.05. An order for removal into this Court from the Supreme Court was made under s 40 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") and the case stated was formulated.

3 Section 11 of the State Act provides:

> "(1) In this section –
>
> '**limitation law**' means –
>
> *(a)* the *Limitation of Actions Act* 1936;
>
> *(b)* any other law that provides for the limitation of liability or the barring of a right of action in respect of a claim by reference to the time when a proceeding on, or the arbitration of, the claim is commenced;
>
> '**relevant order**' means –
>
> *(a)* an order of a federal court, whether made before or after the commencement of this section, dismissing, striking out or staying a proceeding relating to a State matter for want of jurisdiction; or

---

1 (1999) 73 ALJR 839; 163 ALR 270.

(b) a declaration by a federal court, whether made before or after the commencement of this section, that it has no jurisdiction to hear and determine a proceeding relating to a State matter; or

(c) any other decision or determination by a federal court, whether made before or after the commencement of this section, that it has no jurisdiction to hear and determine a proceeding relating to a State matter.

(2) A person who was a party to a proceeding in which a relevant order is made may apply to the Supreme Court for an order that the proceeding be treated as a proceeding in the Supreme Court and the Supreme Court may make such an order.

(3) If the Supreme Court makes an order under subsection (2), the proceeding, despite the relevant order –

(a) becomes, and must be recorded by the Supreme Court as, a proceeding in the Supreme Court; and

(b) for the purposes of any limitation law and for all other purposes, is taken to have been brought in the Supreme Court on the day on which the proceeding was first recorded as a proceeding in the federal court.

(4) The Supreme Court may make such ancillary orders in relation to an order under subsection (2) as it considers necessary for the purposes of the proceeding being treated as, becoming and being recorded as, a proceeding in the Supreme Court."

4 Section 3 of the State Act defines some of the terms in s 11:

"'**federal court**' means the Federal Court of Australia or the Family Court of Australia;

...

'**proceeding**' includes an initiating application;

'**relevant State Act**' means any of the following Acts:

...

(d) *Corporations (South Australia) Act* 1990;

...

(f) *Jurisdiction of Courts (Cross-vesting) Act* 1987;

...

'**State matter**' means a matter –

(a) in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State or a Territory; or

(b) which has been removed to the Supreme Court under section 8 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987; or

(c) in respect of which a relevant State Act purports or purported to confer jurisdiction on a federal court; or

(d) arising under or in respect of an applied administrative law."

5 Rule 123A.05 provides:

"(1) An applicant for an order under Section 11(2) of the [State] Act ('the order') shall commence proceedings for the order by summons, joining as defendants all other parties to the proceeding in which the relevant order was made ('the relevant proceedings').

(2) Where the order is made:

(a) subject to any order of the Court:

(i) the Registrar or like Officer of the Court in which the relevant proceedings were brought will be requested to send the record of the proceedings to the Court; and

(ii) the Court shall proceed as if:

(A) the relevant proceedings had been originally commenced in the Court;

(B) the same steps had been taken in the Court as have been taken in any other Court or Courts in which the relevant proceedings were for the time being pending; and

(C) any order made by any other Court or Courts in which the relevant proceedings were for the time being pending had been made by the Court;

(b) the plaintiff shall, within 28 days of the order being made, apply to the Court for directions pursuant to Rule 55."

Rule 123A.02 defines "relevant order" to have the same meaning as in the State Act for the purposes of r 123A, unless the contrary intention appears.

Are "relevant orders" nullities?

6 Lurking in the background of the present case are important constitutional issues including whether an order of a federal court, or of a court exercising federal jurisdiction, made without constitutional authority is a nullity and of no effect. The parties and most of the interveners maintained that, although the order may be liable to be declared void *ab initio*, it nevertheless remains of full force and effect until quashed or otherwise set aside. The States of South Australia and Victoria maintained that such an order is a nullity and is not, and never was, of any effect. In the view that we take of the case, however, these issues do not arise.

7 It is true that South Australia also appears to contend that a "relevant order" of the kind referred to in s 11 was a nullity. South Australia submitted[2]:

> "Where the only 'semblance' for the jurisdiction of a court is an invalid statute then the court has no jurisdiction. The statute cannot be relied upon to confer any jurisdiction upon the court. This must include the jurisdiction for the court to determine its own jurisdiction.

---

2 Written submissions of the State of South Australia, par 13.

Where the only 'semblance' for the jurisdiction of the court is an invalid statute any order made in exercise of that purported jurisdiction is necessarily invalid *ab initio*."

8 However, s 19 of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") declares that the Federal Court "has such original jurisdiction as is vested in it by laws made by the Parliament." That grant of jurisdiction carries with it the power to determine whether any particular vesting of original jurisdiction was validly granted to it[3]. So too does s 39B(1A)(c) of the Judiciary Act which confers original jurisdiction on the Federal Court in any matter "arising under any laws made by the Parliament." Relevantly, s 9(2) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) ("the Commonwealth Cross-vesting Act") and s 56(2) of the *Corporations Act* 1989 (Cth) ("the Commonwealth Corporations Act") were the laws made by the Parliament which purported to vest jurisdiction in the Federal Court in respect of proceedings relating to State matters. The Federal Court therefore had jurisdiction under s 19 of the Federal Court Act and s 39B(1A)(c) of the Judiciary Act to determine whether the purported vesting under the Commonwealth Cross-vesting Act and the Commonwealth Corporations Act was valid. Accordingly, an order of the Federal Court falling within the definition of a "relevant order" in s 11 of the State Act was an order that the Federal Court had jurisdiction to make.

9 Similarly, s 31(1)(d) of the *Family Law Act* 1975 (Cth) ("the Family Law Act") conferred on the Family Court of Australia jurisdiction with respect to "matters ... with respect to which proceedings may be instituted in the Family Court under this Act or any other Act." That paragraph, therefore, gave the Family Court power to determine whether any particular vesting of original jurisdiction was validly granted to it[4]. By reason of s 31(1)(d), therefore, the Family Court had jurisdiction to determine whether the Commonwealth Cross-

---

3 *DMW v CGW* (1982) 151 CLR 491 at 507 per Mason, Murphy, Wilson, Brennan and Deane JJ; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194 per Gibbs CJ, 213 per Wilson and Dawson JJ, 215-216 per Brennan J, 222-223 per Deane J; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 374-375 per Mason J.

4 *DMW v CGW* (1982) 151 CLR 491 at 507 per Mason, Murphy, Wilson, Brennan and Deane JJ; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194 per Gibbs CJ, 213 per Wilson and Dawson JJ, 215-216 per Brennan J, 222-223 per Deane J; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 374-375 per Mason J.

vesting Act and the Commonwealth Corporations Act validly vested jurisdiction in it.

10 It follows that any "relevant order" made by a federal court, as defined, was an order that was within the jurisdiction of that federal court. Because that is so, it is unnecessary in these proceedings to determine whether an order of a federal court, or of a court exercising federal jurisdiction, made without constitutional authority is a nullity and of no effect.

11 The question whether "relevant orders" made by a federal court, as defined, are nullities is rested on the premise that they are made without jurisdiction. If they are made within jurisdiction, no such question arises, whether at the threshold or otherwise.

12 In his reasons for judgment, Kirby J appears to take the view that the question whether a "relevant order" is made within jurisdiction raises the same issue as asking whether an order purporting to determine rights and liabilities pursuant to the cross-vesting legislation is made within jurisdiction. In his Honour's view, neither is made within jurisdiction and, thus, the question whether "relevant orders" are nullities is a threshold question. There is, however, a distinction between the two orders and between the two very different classes of jurisdiction exercised or purported to be exercised by the Federal Court and the Family Court. And there are two very different sources of constitutional authority for the orders involved. In our view, the reasons of his Honour do not take this distinction into account.

13 The first of those classes of jurisdiction and sources of authority is concerned with the validity of jurisdiction, that is to say, the authority to decide, in respect of the class of orders which s 11 of the State Act calls "relevant orders". Those orders, as we have pointed out, were or are made under the authority of s 19 of the Federal Court Act and s 39B(1A)(c) of the Judiciary Act in the case of the Federal Court and s 31(1)(d) of the Family Law Act in the case of the Family Court. The constitutional basis for those sections is ss 71, 76(ii) and 77(i) of the Constitution. No one suggested, nor could they rationally suggest, that s 19 of the Federal Court Act, s 39B(1A)(c) of the Judiciary Act or s 31(1)(d) of the Family Law Act was invalid.

14 Before the enactment of any cross-vesting legislation, those sections (other than s 39B(1A)(c) of the Judiciary Act[5]) gave the Federal Court and the Family Court jurisdiction to make orders dismissing proceedings on the ground that they were not within the jurisdiction of the court. It mattered not whether the basis of the proceedings was the common law or valid or invalid State or federal legislation. If the proceedings were not within the jurisdiction of the Federal Court or the Family Court, those courts had authority to make binding orders that the proceedings were not within their jurisdiction. Want of jurisdiction might arise from the fact that no federal law vested the jurisdiction in the court or because the Parliament had no constitutional power to make laws with respect to the subject matter which it had purported to vest in the federal court. Under s 19 of the Federal Court Act or s 31(1)(d) of the Family Law Act, the Federal Court and the Family Court had jurisdiction, for example, to dismiss for want of jurisdiction a petition to wind up a company under State legislation, or to dismiss an action for damages for a tort or breach of contract which was not within the accrued jurisdiction of the court. The enactment of the cross-vesting legislation did not affect the jurisdiction of those courts, as superior courts of record, to hold that they had no jurisdiction to make orders in proceedings commenced in those courts.

15 The orders that s 11 calls "relevant orders" were or are made in the exercise of the jurisdiction conferred by s 19 of the Federal Court Act, s 39B(1A)(c) of the Judiciary Act or s 31(1)(d) of the Family Law Act. Those orders are therefore valid orders. Their constitutional validity is in no way dependent on whether an order made in purported exercise of the jurisdiction conferred by the cross-vesting legislation was or was not a nullity. The "relevant orders" do not "lack a valid constitutional source".

16 The second of the classes of jurisdiction and sources of authority to which we have referred is concerned with the validity of the jurisdiction which the Commonwealth Cross-vesting Act and the Commonwealth Corporations Act purported to vest in the Federal Court and the Family Court to determine proceedings relating to State matters. It was that purported conferral of jurisdiction on the Federal Court and the Family Court which *Re Wakim*[6] held

---

5 Section 39B(1A)(c) of the Judiciary Act was inserted by the *Law and Justice Legislation Amendment Act* 1997 (Cth) and came into effect on 17 April 1997.

6 (1999) 73 ALJR 839; 163 ALR 270.

was invalidly conferred. There is not and never was a valid source of authority for orders made in the exercise of that purported conferral of jurisdiction. As a result, questions arise, and may have to be determined in the future, as to whether the orders made in the purported exercise of that invalidly conferred jurisdiction are nullities.

17 But those questions do not arise in the present case. That is because the "relevant orders" to which s 11 refers were not made *in the exercise of* invalidly conferred cross-vesting jurisdiction. "Relevant orders" are orders of federal courts that dismiss for want of jurisdiction proceedings relating to State matters. They are to be contrasted with orders by those courts dismissing or upholding *on their merits* proceedings relating to State matters brought under the cross-vesting legislation. Orders of the latter kind were invalidly made because the jurisdiction to make them depended on invalid legislation. They were orders made or purported to be made in the exercise of State jurisdiction. They may or may not be nullities. But "relevant orders" are not orders that determine any State matter. On the contrary, those orders, when made by the Federal Court or the Family Court, assert that those courts have no jurisdiction – no authority – to decide proceedings relating to State matters. Those orders dispose of matters which arise in the exercise of validly conferred federal jurisdiction – the authority of a federal court to hear a proceeding relating to a State matter after this Court's decision in *Re Wakim*.

18 Because any "relevant order" within the meaning of s 11 was a valid order in no way dependent on the validity of or the jurisdiction conferred by the Commonwealth Cross-vesting Act or the Commonwealth Corporations Act, it is absolutely unnecessary, and almost certainly unfair to parties in other litigation, to determine whether other orders purporting to be made in the exercise of jurisdiction under those Acts are or are not nullities.

Section 11 does not interfere with the procedures of a federal court, as defined

19 Section 11 of the State Act operates only with respect to first instance proceedings in the Federal Court (or Family Court) which have not been determined on the merits. In particular, it does not apply to cases in which an order has been made in the Federal Court purporting to adjudge the rights and liabilities of the parties finally and from which an appeal to the Full Court of the Federal Court has been instituted but not determined on the merits. Cases of this latter kind may be said to engage, or be capable of engaging, other provisions of the State Act but they do not engage s 11. The Full Court of the Federal Court (or Family Court) on appeal has jurisdiction to determine whether a proceeding

at trial fell within the jurisdiction of the Court[7]. There would, therefore, be no occasion for the Full Court to order that the appeal before *it* should be dismissed, struck out, stayed, declared or otherwise decided or determined on the ground of want of jurisdiction. Accordingly, there would be no "relevant order" disposing of the *appeal* for want of jurisdiction of the Full Court (as opposed to a "relevant order" disposing of the proceeding at first instance).

20 Upon its proper construction, s 11 is not an interference with the procedures of a federal court, as defined. Whether or not other sections of the State Act, such as ss 6, 7, 8, 10 and 12, are wholly or partly invalid, s 11 operates independently of those sections. Because s 11 is valid, r 123A.05 is also valid.

21 The argument for the defendants would have it that, upon its proper construction, s 11 purports to effect through sub-s (3) a unilateral transfer to, or expropriation by, the Supreme Court of a proceeding in a federal court. If that was what s 11 did, it would be invalid for two reasons. The first is that Ch III of the Constitution forbids a State legislature to control or interfere with the procedures of a federal court[8]. The second is that s 11 would be inconsistent with the Federal Court Act and the Family Law Act because those Acts with their rule-making procedures plainly intend to provide for what shall be the law concerning proceedings in those courts[9]. However, s 11 does not have the effect for which the defendants contend. It takes as an historical fact that a federal court has made an order dismissing, staying or otherwise dealing with a proceeding relating to a State matter in that court because the federal court had no jurisdiction to determine that proceeding. If that historical fact applies, s 11

---

7 Federal Court Act, ss 24, 25 and 28; Family Law Act, ss 93A, 94 and 96; *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 125-127; *DMW v CGW* (1982) 151 CLR 491 at 507; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 374-375.

8 *Pedersen v Young* (1964) 110 CLR 162 at 165, 167; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 87; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 35; *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839; 163 ALR 270.

9 cf *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 at 415; *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 644-646, 648.

authorises a party to the federal court proceeding to apply to commence a proceeding in the Supreme Court of South Australia and, for the purposes of any limitation law and for all other purposes, deems the Supreme Court proceeding to have been commenced on the day that the federal court proceeding was commenced in that court.

22 The strength of the defendants' argument derives from the use in s 11 of the terms "becomes" and "becoming", and of the term "proceeding" in a context that suggests that, by force of a s 11(2) order, a federal court proceeding becomes a proceeding in the Supreme Court. To a lesser extent, the argument derives force from the use of the term "treated as". When s 11(2) says that an order may be made that the "proceeding" be treated "as a proceeding in the Supreme Court", the "proceeding" that is so to be treated is the federal court proceeding. In this context the words "be treated as" are ambiguous. They may mean that, although commenced in the federal court, once an order under s 11(2) is made the federal court proceeding henceforth becomes a Supreme Court proceeding. But those words in s 11(2) may simply mean that, once an order is made, the Supreme Court will treat the matter involved in the federal court proceeding as a matter for it to determine. In other words, the Supreme Court will act as if the federal court proceeding had been commenced in the Supreme Court. It will determine the matter involved in the proceeding as it would determine a similar matter commenced in the Supreme Court.

23 The defendants contend, however, that s 11(3) makes it plain that the purpose of s 11 is to transfer the federal court proceeding into the Supreme Court. When s 11(3) declares that "the proceeding, despite the relevant order ... becomes, and must be recorded by the Supreme Court as, a proceeding in the Supreme Court", the "proceeding" first referred to is the federal court proceeding. The defendants contend, therefore, that what "becomes" a proceeding in the Supreme Court is the federal court proceeding. What point is there, it may be asked, in s 11(3) declaring that, despite the order dismissing or otherwise disposing of the federal court proceeding, it becomes a Supreme Court proceeding unless the purpose of the section is to give life back to the moribund proceeding in the federal court?

24 These arguments have much force. But they must give way to two other considerations. The first is the enactment of s 11(3)(b). The second is the evident purpose of s 11.

25 The enactment of s 11(3)(b) of the State Act is only consistent with the Supreme Court proceeding being a proceeding linked to, but operating

independently of, the federal court proceeding. If the object and effect of s 11 was that, upon the making of an order under s 11(2), the federal court proceeding was transferred to the Supreme Court, there would be no need to make provision for the effect of a limitation law on the proceeding.

26 A limitation law operates on the commencement of a proceeding. If s 11 was intended to authorise a Supreme Court "take-over" of the federal court proceeding, the Supreme Court would be taking over or receiving proceedings already commenced. Any limitation law, whether applying directly under a law of the federal Parliament or through the agency of s 79 of the Judiciary Act[10], would apply as at the date that the federal court proceeding was commenced. There would be no need to declare, as s 11(3)(b) does, that, for the purpose of any limitation law, the proceeding "is taken to have been brought in the Supreme Court on the day on which" it commenced in the federal court. The enactment of s 11(3)(b) only makes sense if s 11 is dealing with a proceeding that is distinct and separate from the federal court proceeding that has been dismissed or otherwise disposed of. The purpose of s 11(3)(b) is to ensure that the proceeding which commences in the Supreme Court after a s 11(2) order is made is not defeated by a limitation law merely because the date of that order is after a relevant State limitation period had expired. If the proceeding was commenced in the federal court after a State limitation law had expired, s 11(3)(b) will not save it.

27 The purpose of s 11(3)(b) is a strong indicator that the purpose of s 11 is to enable a party to proceedings in a federal court relating to a State matter to bring new proceedings in the Supreme Court whenever the federal court has disposed of its proceedings on the basis that it had no jurisdiction to deal with them. That being so, the textual points upon which the defendants rely cannot prevail. In construing a statutory provision, we should always keep in mind what Learned Hand J said in *Cabell v Markham*[11]:

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a

---

10 See, generally, *The Commonwealth v Mewett* (1997) 191 CLR 471.

11 148 F 2d 737 (1945) at 739.

fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

28 Moreover, legislation "must not be read in a spirit of mutilating narrowness."[12] If the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open. Courts in a federation should approach issues of statutory construction on the basis that it is a fundamental rule of construction that the legislatures of the federation intend to enact legislation that is valid and not legislation that is invalid[13]. Here there are two competing constructions – one spells invalidity, one does not. That being so, we should adopt the construction that saves the section and reject the construction upon which the defendants rely.

29 It is unnecessary to express any conclusions concerning the validity of other provisions of the State Act, particularly ss 6, 7, 8, 10 and 12. Even if one or more or some part of those provisions is invalid, that cannot affect the validity of s 11. The provisions of ss 6, 7, 8, 10 and 12 of the State Act declare rights and liabilities not by reference to "relevant orders" (as does s 11) but by reference to

---

12 *United States v Hutcheson* 312 US 219 (1941) at 235 per Frankfurter J.

13 *Davies and Jones v The State of Western Australia* (1904) 2 CLR 29 at 43; *Federal Commissioner of Taxation v Munro; British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153 at 180; *Attorney-General (Vict) v The Commonwealth* ("the *Pharmaceutical Benefits Case*") (1945) 71 CLR 237 at 267; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 14.

"ineffective judgments" of a federal court[14]. They stand in a different category to s 11 which provides for the commencement of proceedings in the Supreme Court of South Australia in cases relating to State matters where a federal court has held that it has no jurisdiction to deal with the proceedings.

Orders

30 It is for these reasons that we joined in the order that the questions in the case stated be answered as follows:

Question 1: Are s 11 of the *Federal Courts (State Jurisdiction) Act* 1999 (SA) and r 123A.05 of the Rules of the Supreme Court of South Australia invalid? No.

Question 2: Are any one or more (and, if so, which) of ss 6, 7, 8 and 10 of the *Federal Courts (State Jurisdiction) Act* 1999 (SA) invalid? Unnecessary to answer.

---

14 Section 3 states "'**ineffective judgment**' has the meaning given by section 4". Section 4 states:

> "(1) A reference in this Act to an '**ineffective judgment**' is a reference to a judgment of a federal court in a State matter given or recorded, before the commencement of this section, in the purported exercise of jurisdiction purporting to have been conferred on the federal court by a relevant State Act.
>
> (2) If –
>
> *(a)* a Full Court of the Federal Court of Australia in its appellate jurisdiction has purported to affirm, reverse or vary an ineffective judgment; or
>
> *(b)* the Full Court of the Family Court of Australia has purported to affirm, reverse or vary an ineffective judgment,
>
> a reference in this Act to the ineffective judgment is a reference to the ineffective judgment in the form in which, and to the extent to which, it purports or purported to have effect from time to time."

> Question 3: If any of ss 6, 7, 8, 10 or 11 of the *Federal Courts (State Jurisdiction) Act* 1999 (SA) be invalid, as a consequence thereof, is any other provision thereof (and, if so, which) invalid? Unnecessary to answer.

and joined in the orders that the first, second and third defendants pay the plaintiff's costs of the case stated, any other questions of costs in this Court being reserved to the Justice making orders consequential upon the answers to the case stated.

31 KIRBY J. This case stated for the opinion of the Court[15] presents a number of puzzles demanding judgment about the requirements of the Constitution[16]. The puzzles arise in the aftermath of legislation enacted following the decision in *Re Wakim; Ex parte McNally*[17] (hereafter "*Re Wakim*"). That decision held that key provisions of federal[18] and State[19] cross-vesting legislation were unconstitutional.

32 I dissented from the decision[20]. I remain of the view which I expressed. However, the Court having spoken, it was not open to the governments and parliaments of Australia to ignore the effect of the change in the law following the earlier decision in *Gould v Brown*[21]. Nor may I ignore what has happened. I cannot treat the decision of the Court as "legally non-existent"[22]. Under our Constitution, court decisions, and the orders giving effect to them, have an authority derived from the powers and functions of the courts that pronounce them. This extends to cases where the decisions and orders give effect to an opinion about the unconstitutionality of specified legislation. Recognition of this fact is important for one of the key questions in these proceedings.

The facts and applicable legislation

33 In April 1994 in the Federal Court of Australia ("the Federal Court") Residual Assco Group Limited ("the plaintiff") commenced proceedings against Mr Janis Spalvins and a number of other persons. The proceedings purported to invoke the jurisdiction of the Federal Court in respect of a "State matter"[23]. It is

---

15 By order of Gummow J, 28 February 2000.

16 Post, "Justice for Scalia", cited in Zlotnik, "Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology", (1999) 48 *Emory Law Journal* 1377 at 1428.

17 (1999) 73 ALJR 839; 163 ALR 270.

18 *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth). See *Re Wakim* (1999) 73 ALJR 839 at 879; 163 ALR 270 at 325-256.

19 Relevantly, *Jurisdiction of Courts (Cross-vesting) Act* 1987 (SA).

20 *Re Wakim* (1999) 73 ALJR 839 at 876-890; 163 ALR 270 at 321-340.

21 (1998) 193 CLR 346.

22 *Calvin v Carr* [1980] AC 574 at 590 per Lord Wilberforce.

23 As defined in *Federal Courts (State Jurisdiction) Act* 1999 (SA) (hereafter "the State Act"), s 3.

common ground that the only basis for the jurisdiction of the Federal Court in the proceedings was that purportedly given by the cross-vesting legislation[24]. Over a period of five years the Federal Court made various interlocutory orders. The last of these was made on 11 June 1999 when the plaintiff was granted leave to further amend its statement of claim. Six days later, in *Re Wakim*, this Court held that the provisions of the cross-vesting legislation purporting to vest State jurisdiction in federal courts, and of federal law purporting to consent to such vesting, were invalid under the Constitution.

34 In response to the decision in *Re Wakim*, legislation was enacted by each of the States of Australia in an attempt to palliate the potentially devastating blow dealt to litigants in federal courts[25]. Such legislation followed a substantially identical template. There are some minor differences[26]. There are no relevant differences in the section which is principally in issue in these proceedings[27].

35 It was common ground that, apart from the provisions of the cross-vesting legislation found to have been invalid, the plaintiff's claim would properly have been within the jurisdiction of the courts of South Australia, relevantly the Supreme Court of that State ("the Supreme Court"). In South Australia, the statute, the validity of which is now in question, is the State Act. Consequent upon the enactment of that Act, the Rules of the Supreme Court of South Australia were enlarged by the making of r 123A.05[28].

36 The State Act came into operation in August 1999. On 21 September 1999, in the Federal Court at Adelaide, O'Loughlin J purported to make an order by which the proceedings between the parties were "stayed". His Honour's order also granted liberty to apply and reserved costs. It was not suggested that, since that order was made, such liberty had been exercised, that costs had been ordered or that there had been any appeal against such order.

---

24 *Jurisdiction of Courts (Cross-vesting) Act* 1987 (SA), s 4(1).

25 *Federal Courts (State Jurisdiction) Act* 1999 (NSW), (Vic), (Q), (SA), (WA), (Tas).

26 For example s 6(a)(ii) of the New South Wales and Tasmanian Acts when compared to s 6(a)(ii) of the South Australian Act.

27 s 11. The Western Australian Act, in s 11(3), makes special provision in relation to the Family Court of Western Australia, a State court capable of exercising both State and federal jurisdiction, but is otherwise identical with the template.

28 Set out in the reasons of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ (hereafter "the joint reasons") at [5].

37 Shortly after this step in the Federal Court, the plaintiff, on 23 September 1999, applied to the Supreme Court. It sought an order under s 11 of the State Act. As eventually expressed, the order sought was that the proceedings "formerly known as Federal Court of Australia proceeding No SG 3036 of 1994 be treated as a proceeding in the Supreme Court".

38 In December 1999, the first three defendants ("the contesting defendants") applied for dismissal of the plaintiff's application for want of jurisdiction of the Supreme Court. They relied on a contention that the relevant provisions of the State Act and of r 123A.05 were constitutionally invalid. That aspect of the Supreme Court proceedings was thereafter removed into this Court. It gives rise to the stated case.

39 It is unnecessary to elaborate the inconvenience to parties, some of them individuals and some corporations and government bodies, caught up in the problem presented by the *Re Wakim* decision. The complexity of their predicaments depends, in part, on the stage which their purported proceedings in federal courts had reached when the decision in *Re Wakim* was given. Some, like the present parties, had not yet proceeded to trial. Others had secured a "judgment" of a primary judge. Some of those may have lodged an "appeal" within the relevant federal court. Of these, some may have completed the hearing of such "appeal" but not received the "judgment" in the appeal[29] while others may have received an appellate "judgment". Some, reliant on such "judgment", may have sought special leave to appeal to this Court.

40 The State Act, in terms common to the template, seeks to provide for the consequences of the constitutional invalidity found in *Re Wakim* at each of the succeeding stages at which the problem is presented to particular cases. The overall objective of the State Act is expressed in the long title to be:

> "to provide that certain decisions of the Federal Court of Australia or the Family Court of Australia have effect as decisions of the Supreme Court and to make other provision relating to certain matters relating to the jurisdiction of those courts ... and for other purposes".

41 In the present proceedings no "ineffective judgment"[30] had been delivered by a primary judge of the Federal Court, still less by a Full Court of that Court. Accordingly, at this stage, despite the loss of five years and the accumulation of costs expended on the aborted proceedings in the Federal Court, the plaintiff

---

29 This was the case in *Re Transworld Marine Agency Company NV; Ex parte Rolfe* part-heard by the Court on 9 May 2000 but settled between the parties.

30 As defined in the State Act, s 4.

could theoretically have abandoned those proceedings, initiated entirely fresh proceedings in the Supreme Court and put the inconvenience and losses down to one of the unavoidable outcomes that sometimes attends constitutional adjudication in a federation. But at the point which the present proceedings had reached, there is frequently a difficulty resulting from the passage of time. This is the descent of a limitation bar applicable under State limitation legislation, either to put a party out of court or to confine that party's entitlements. In South Australia the applicable statute is the *Limitation of Actions Act* 1936 (SA).

42 It was to this potential injustice that the provisions of s 11 of the State Act were addressed. The plaintiff argued that all that was involved in its case was the validity of s 11 of the State Act. It contended that the section was little more than a procedural one designed to ensure, in the terms of the heading to the section, that "[c]ertain proceedings may be treated as proceedings in [the] Supreme Court". The sole substantive provision in s 11 was one protecting a party from any limitation bar under State law. This, it was submitted, was wholly within the power of the State Parliament. In the events that had occurred, it was scarcely surprising that it should have been enacted.

43 The contesting defendants submitted that s 11 was constitutionally invalid. Moreover, they also sought to obtain answers to the questions reserved addressed to the validity of ss 6, 7, 8 and 10 of the State Act upon the basis that s 11 was merely one provision of integrated and interdependent legislation purporting to repair the fallout from the post-*Wakim* invalidity of proceedings in federal courts and the "relevant orders"[31] and "ineffective judgments"[32] to which such proceedings had given rise.

44 The applicable provisions of the State Act, and of the rule of the Supreme Court in question, are set out in the joint reasons. I will not repeat them. Given the stage which these proceedings have reached, it is unnecessary, in my view, to detail the provisions of other sections of the State Act. However, I will need to refer to those provisions in dealing later with the contesting defendants' argument that, for constitutional purposes, s 11 cannot be viewed in isolation nor severed but must stand or fall as part of an Act purporting to afford a comprehensive response to *Re Wakim* at every stage of proceedings reached in federal courts, reliant on the cross-vesting legislation.

---

31 State Act, s 11(1), definition of "relevant order". See joint reasons at [3].

32 State Act, s 4.

Two constitutional issues

45 The objections of the contesting defendants to the validity of s 11 of the State Act and r 123A.05, were founded upon two related constitutional arguments which overlap to some extent.

46 *Intrusion in a Chapter III court:* The first argument was that s 11 of the State Act, upon its true construction, amounted to a direct interference by a State parliament with the procedures, and thus the authority, of a federal court, established by federal legislation and exclusively vested with such authority pursuant to the Constitution[33].

47 *Section 109 inconsistency:* The second argument was that s 11 of the State Act was, by reason of s 109 of the Constitution, inconsistent with the provisions of federal law conferring upon federal courts jurisdiction and powers and status as a superior court of record[34]. Such vesting was achieved in a manner which made it plain that such federal law was a comprehensive code governing the entire ambit of the consequences attaching to the judgments and relevant orders[35] of the named federal courts. The contention was advanced that, in this case, the inconsistency arose by virtue of the clear purpose of the Federal Court Act to "cover the field" of all proceedings in the Federal Court[36]. As a result, there was said to be an interference, by the purported provision of State law (both in the State Act and r 123A.05), with the process of appeal lying to a Full Court of the Federal Court from a single judge of that Court, as of right or by leave[37].

The threshold issue – validity of the Federal Court proceedings

48 *A "preliminary" or "lurking" question:* In order to reinforce the foregoing submissions, the contesting defendants advanced the argument that, notwithstanding the decision of this Court in *Re Wakim*, the proceedings in the

---

33 Chapter III, particularly s 71, and implicitly by s 51(xxxix).

34 *Federal Court of Australia Act* 1976 (Cth) (hereafter "the Federal Court Act"), ss 5(2), 18, 24(1), 25, 33, 43, 53.

35 State Act, s 11(1).

36 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 492; *Ex parte McLean* (1930) 43 CLR 472 at 483; *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 102-103, 105; *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 at 414-415; *Viskauskas v Niland* (1983) 153 CLR 280 at 291-293; *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 334-336.

37 Federal Court Act, s 24(1)(a) and s 24(1A).

Federal Court, and orders of that Court, were not void *ab initio*. Specifically, they were not nullities by reason of the constitutional defect revealed in that decision. Instead, the orders were merely voidable. That is, they remained binding on the parties to them until a valid order was made by the Federal Court disposing of the proceedings, as by an order dismissing them for want of jurisdiction or, perhaps, one permanently staying them on that ground.

49 In this respect, the contesting defendants found themselves in energetic agreement with the submissions of the plaintiff[38]. The submissions of the Commonwealth and most of the States[39] intervening were to like effect. This forensic alliance was forged because, for their purposes, the contesting defendants needed to demonstrate an impermissible or inconsistent intrusion of State law into the operation of federal law, namely the Federal Court Act. They therefore needed to show the continuing applicability of federal law to the parties' proceedings, notably to the relevant order of the Federal Court, notwithstanding the decision in *Re Wakim* exposing the fundamental flaw found in the jurisdiction of the Federal Court under the cross-vesting legislation.

50 On the other hand, two of the intervening States[40] presented arguments which, if accepted, would be fatal to the foregoing submissions so far as s 11 of the State Act is concerned. Those States submitted that, once the decision and order of this Court in *Re Wakim* established the constitutional invalidity of the provisions of the cross-vesting legislation which purported to vest jurisdiction in State matters in the Federal Court, that Court was wholly deprived of jurisdiction in the matter. The statutory provisions grounding such jurisdiction were invalid from the beginning (*ab initio*). All orders made in purported reliance upon the cross-vesting legislation were also invalid *ab initio*. The proceedings in the Federal Court were shown to have been fundamentally misconceived. The Federal Court Act, conforming to this constitutional understanding, would be read to invalidate any purported exercise whatsoever by the Federal Court of jurisdiction with respect to the matter.

51 If the latter argument were correct, there would be no possibility of an unconstitutional invasion by the State Act of the federal Judicature for there was

---

38 Who relied on the decision of the majority in *Re Wakim* (*Re Brown; Ex parte Amann*) (1999) 73 ALJR 839 at 843 per Gleeson CJ (agreeing with Gummow and Hayne JJ), 846 per Gaudron J (agreeing with Gummow and Hayne JJ), 873 per Gummow and Hayne JJ, 898 per Callinan J; 163 ALR 270 at 276, 281, 317, 352.

39 The States of New South Wales, Queensland and Western Australia.

40 The States of Victoria and South Australia.

not, and, in the eye of the law, never had been, any valid proceeding within that Judicature. Nor was there any inconsistency for the purposes of s 109 of the Constitution. In so far as it had formerly been thought that the Federal Court Act attached legal consequences to the proceedings commenced in that Court pursuant to the cross-vesting legislation, this was now shown to have been erroneous. Because the vesting of jurisdiction was constitutionally invalid, the Federal Court Act never applied to the proceedings. Thus, by reference to the historical fact of proceedings purportedly begun in, or relevant orders purportedly made by, the Federal Court, a State parliament could, without any constitutional inhibition, enact as it wished for the subsequent management of State proceedings in a "State matter"[41] before the State Supreme Court.

52 If the latter contentions are accepted, the submissions of the contesting defendants about s 11 of the State Act are revealed as completely misconceived. In this sense, the issue of the validity of the proceedings in the Federal Court, and of "relevant orders" of that Court[42], presents a threshold question. It is one potentially determinative of the first question reserved. On this basis, it is not, in my view, a point "[l]urking in the background of the present case"[43]. On the contrary, logically, it arises at the very beginning. It is usually necessary to determine whether there is a problem before purporting to give an answer to it.

53 *Reliance on legislation – "source" and "stream":* The issue presented by this last-mentioned argument cannot be avoided, in my view, by invoking powers given to the Federal Court (or the Family Court of Australia) by federal legislation[44]. If the argument for nullification is correct, the stream (of such legislation) cannot rise above the source (the Constitution)[45]. If the federal law purportedly conferring jurisdiction (including the claimed jurisdiction of a federal court to determine its own jurisdiction) is found, upon analysis, to lack a valid constitutional source, the argument would have it that, logically, the law and all that follows from it do not have, and never had, constitutional validity. It is a legal nullity.

---

41 Defined in State Act, s 3.

42 Defined in State Act, s 11(1).

43 Joint reasons at [6].

44 Joint reasons at [8]-[9].

45 *Heiner v Scott* (1914) 19 CLR 381 at 393 per Griffith CJ; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 258 per Fullagar J citing with approval *Shrimpton v The Commonwealth* (1945) 69 CLR 613 at 629-630.

54 The other members of the Court consider that the arguments of nullification of the "relevant order" can be avoided in this matter by relying on the distinction that the plaintiff's proceedings in the Federal Court, seeking the "relevant order", invoked only s 19 of the Federal Court Act and s 39B(1A)(c) of the *Judiciary Act* 1903 (Cth)[46] and involved no reliance on the cross-vesting legislation struck down in *Re Wakim*[47]. I hesitate to expound in a different way the consequences of the *Re Wakim* decision, given that I profoundly disagree with it[48]. Dixon J once acknowledged that the "meaning and implications" of reasoning, the correctness of which a judge denied, was "as a rule" better left to those responsible for that reasoning than to one who had dissented from it[49]. However, at the heart of *Re Wakim* was surely the notion of the exclusiveness of the federal Judicature and its constitutional immunity from invasion by matters wholly within State jurisdiction, except as the Constitution expressly permits.

55 The federal Judicature, as portrayed in *Re Wakim*, is a kind of judicial citadel. The drawbridge of Ch III is usually pulled up. No purely State judicial matter may lawfully enter except as the Constitution permits, in the case of appeals to this Court. If such entry is impudently attempted by ropes thrown to the citadel (as in this case) in the form of the cross-vesting legislation, the unwelcome entrant may not walk around freely, pretending entry via the drawbridge, using all the facilities of the citadel as if it were there by legal right. Cross-vesting was the plaintiff's sole mode of entry into the jurisdiction of the Federal Court. From first to last the character of its Federal Court proceeding was thereby stamped as a cross-vested matter. If the Constitution repels it, arguably, no legislation of the federal Parliament or of a State parliament or Territory legislature can confer on it the validity, for reasons of high principle, which the Constitution is said to deny. Given the course set by *Re Wakim*, this Court is bound to follow through its logic wherever it may lead, uncomfortable as that journey may sometimes be.

The severability issue

56 Assuming that the arguments for the invalidity of s 11 of the State Act are rejected, either on the fundamental ground just mentioned or, alternatively, by analysis of the meaning of the section and its operation, a final issue is presented.

---

46 In the case of the Family Court of Australia, the relevant section would be s 31(1)(d) of the *Family Law Act* 1975 (Cth).

47 See joint reasons at [14]-[15].

48 *Re Wakim* (1999) 73 ALJR 839 at 876; 163 ALR 270 at 321; see also *Gould v Brown* (1998) 193 CLR 346 at 465.

49 *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327 at 362-363.

It is relevant to the second and third questions reserved in so far as they refer to other provisions of the State Act in respect of which the contesting defendants raised separate constitutional objections. Upon one view, such objections do not arise in the present matter. Either they do not arise at all or, at least, they do not arise at the stage of the application at which the constitutional objection was taken that brings the matter to this Court. Must it be said that the provisions of s 11 of the State Act are part of an integrated legislative scheme which stands or falls in its entirety, necessitating consideration of the other sections? Or are the provisions of s 11 ultimately severable, so that this Court would not, at least now, be required to express an opinion on the constitutional validity of the remaining sections, important though such questions may be?

The argument for constitutional nullification

57 By virtue of the decision in *Re Wakim* it is now established that the Federal Court does not have, and never had, jurisdiction in a State matter pursuant to the cross-vesting legislation. But does that mean that "relevant orders"[50] of the Federal Court, and all other procedural steps taken in that Court, are wholly without legal effect? Or do they remain effective at least to the extent of forbidding the intrusion of State law and the enactment of provisions incompatible with the entire regulation of the Federal Court by federal law?

58 The accepted doctrine in this country is that where a statute is found to be constitutionally invalid, such invalidity operates from the moment that the statute in question purportedly came into force. It is thus invalid *ab initio*. In *South Australia v The Commonwealth*[51] Latham CJ expressed the rule in these terms:

> "Common expressions, such as: 'The courts have declared a statute invalid,' sometimes lead to misunderstanding. A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour – but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it – and thereafter invalid. If it is beyond power it is invalid *ab initio*."

---

50 State Act, s 11(1).

51 (1942) 65 CLR 373 at 408.

59 There are many similar expressions both in the reasons of this Court[52] and of the Privy Council[53] dealing with the effect of invalidity under the Constitution. As long ago as 1886 the Supreme Court of the United States in *Norton v Shelby County*[54] said, in like terms, that unconstitutional legislation "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed".

60 It is true that more recently the Supreme Courts of the United States[55] and Canada[56] have held back from accepting the full rigour of the nullification of judicial proceedings and orders following a holding that legislation, upon which they depended, was constitutionally invalid. However, such approaches were, it was submitted, fundamentally incompatible with established Australian constitutional doctrine. Thus, in Australia, it has never been accepted that a court exercising the judicial power may make orders having prospective effect only[57]. Nor has this Court ever embraced the suggestion that a statute found to be

---

52 *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83; *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633; *Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 267-268; *Mason v New South Wales* (1959) 102 CLR 108; *Cormack v Cope* (1974) 131 CLR 432 at 464-465; *Victoria v The Commonwealth and Hayden* (the *AAP Case*) (1975) 134 CLR 338 at 361; *Attorney-General (NSW); Ex rel McKellar v The Commonwealth* (1977) 139 CLR 527 at 550.

53 *Commissioner for Motor Transport v Antill Ranger & Co Pty Ltd* (1956) 94 CLR 177 at 180 (PC); [1956] AC 527 at 537.

54 118 US 425 at 442 (1886).

55 *Chicot County Drainage District v Baxter State Bank* 308 US 371 (1940); *Linkletter v Walker* 381 US 618 at 639-640 (1965); *Stovall v Denno* 388 US 293 (1967); *James B Beam Distilling Co v Georgia* 501 US 529 at 545 (1991); *Willy v Coastal Corp* 503 US 131 at 137 (1992); *Harper v Virginia Department of Taxation* 509 US 86 at 97, 113 (1993); Tribe, *American Constitutional Law*, 3rd ed (2000), vol 1 at 226.

56 *Reference re Manitoba Language Rights* [1985] 1 SCR 721 at 780.

57 *Ha v New South Wales* (1997) 189 CLR 465 at 503-504; cf *McKinney v The Queen* (1991) 171 CLR 468 at 476; Fitzgerald, "When Should Unconstitutionality Mean 'Void Ab Initio'?", (1994) 1 *Canberra Law Review* 205 at 211.

unconstitutional may nonetheless be accorded temporary validity until remedial arrangements can be put in place[58].

61 In the Court of Appeal of New South Wales, McHugh JA[59] (with whom I there agreed[60]) suggested that "[e]ven under the void ab initio doctrine ... a judgment of a court of record would seem to be binding upon private parties until set aside on appeal or judicial review even though the judgment was based on an unconstitutional statute". However, more recently, in this Court and in *Re Wakim* itself, McHugh J has expressed views apparently favourable to absolute nullification *ab initio*. Addressing the orders of this Court which followed its decision in *Gould v Brown*[61], his Honour said[62]:

> "The orders made in *Gould v Brown* have no constitutional effect. For constitutional purposes, they are a nullity. No doctrine of res judicata or issue estoppel can prevail against the Constitution."

This latter opinion was grounded on the principle that common law doctrines such as res judicata or issue estoppel cannot be at odds with the written Constitution but must conform to it[63].

62 In support of reasoning of this kind, two considerations may be invoked. The first is concerned with the origins of the doctrine, relied on by the parties, that the orders of a superior court, made in excess of jurisdiction, are voidable and not void. That doctrine derives ultimately from the laws of England. According to some analysts[64], its foundation lay in the "general jurisdiction" enjoyed by the superior courts of that country which claimed the power to determine the limits of their own jurisdiction.

---

58 As happened in *Reference re Manitoba Language Rights* [1985] 1 SCR 721 at 780; cf *Bilodeau v Attorney General of Manitoba* [1986] 1 SCR 449 at 457; *Gould v Brown* (1998) 193 CLR 346 at 501.

59 *Peters v Attorney-General (NSW)* (1988) 16 NSWLR 24 at 40.

60 *Peters v Attorney-General (NSW)* (1988) 16 NSWLR 24 at 32.

61 (1998) 193 CLR 346.

62 *Re Wakim* (1999) 73 ALJR 839 at 857; 163 ALR 270 at 295-296.

63 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 cited in *Re Wakim* (1999) 73 ALJR 839 at 857; 163 ALR 270 at 295.

64 eg Rubinstein, *Jurisdiction and Illegality*, (1965) at 11-12.

63 Federal courts, operating in Australia within the boundaries established by the Constitution, depend for their jurisdiction upon the existence of facts "which also mark the limits of the constitutional power to create the jurisdiction"[65]. In this sense, although such federal courts may be described as "superior courts of record" in the legislation constituting them[66], such legislation cannot render them, in law, courts of general jurisdiction. The only jurisdiction which such legislation can validly confer upon a federal court is that which derives from the Constitution. In this sense, a federal nation presents a problem different from that arising in the traditional superior courts of England.

64 Secondly, even if some circumstances might be imagined where a judgment of a federal court, founded ultimately upon a statute declared unconstitutional, may be binding (for example, as between the parties to it), such effectiveness could not be sustained where the statute in question was found to constitute a breach of a fundamental limitation on the exercise of federal legislative power or of a prohibition on such exercise established by the Constitution. Thus Sir Owen Dixon, in propounding a role for the de facto officers doctrine in the context of Australian constitutional law[67], did so on the footing that, like the doctrine of the voidable nature of the orders of superior courts, the de facto officers doctrine "operate[s] to curb the drastic logical implications of the traditional view that an unconstitutional statute is a complete nullity"[68]. Yet assuming this to be possible "there may be situations in which public inconvenience and the frustration of legitimate reliance" on an apparent but unconstitutional law "must give way to the retroactive invalidation of official acts in order to vindicate a constitutional boundary, or to guarantee a constitutional right"[69].

65 It is at this point that the fundamental basis of the ruling in *Re Wakim* must be remembered. No one disputed the convenience of the cross-vesting legislation. What moved the majority of this Court to declare that parts of it were

---

65 *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 393 per Dawson J.

66 For example in the Federal Court Act, s 5(2).

67 Dixon, "*De Facto* Officers", (1938) 1 *Res Judicatae* 285; cf *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR 1324 at 1357; 165 ALR 171 at 216; *Cassell v The Queen* (2000) 74 ALJR 535 at 547-548; 169 ALR 439 at 456-458.

68 Pannam, "Unconstitutional Statutes and De Facto Officers", (1966) 2 *Federal Law Review* 37 at 38.

69 Pannam, "Unconstitutional Statutes and De Facto Officers", (1966) 2 *Federal Law Review* 37 at 61-62.

unconstitutional was a belief that those parts involved an impermissible intrusion of State legislation and State judicial power into the federal Judicature established within Ch III of the Constitution[70]. It thus crossed a forbidden constitutional boundary. It interfered with the exercise of federal judicial power. To that extent it was prohibited by the Constitution. In part, this was because of the special importance assigned to the federal judiciary under the Constitution as an arbiter and umpire of constitutional disputes[71]. In such a context, the cross-vesting legislation, so far as it purported to confer State judicial power on federal courts, was enacted in breach of a fundamental limitation on the exercise of legislative power. That limitation governed both the Commonwealth and the States (and Territories). It therefore meant, so the argument was put, that "the orders which the Federal Court made in the exercise of powers invalidly conferred can never have had a valid operation. They cannot be rescued by the general doctrine that the orders of a superior court are at most voidable. The orders are void."[72]

66 Upon the basis of these arguments, if accepted, no purported "judgment" or "relevant order", or any other action of the Federal Court in pretended pursuance of the jurisdiction, purportedly conferred on that Court by the invalid parts of the cross-vesting legislation, had any constitutional efficacy whatsoever. No federal Act could validly confer such efficacy. No general doctrine of the common law imputed to a "superior court of record" or otherwise could do so in the face of the constitutional prohibition. There was thus no relevant jurisdiction of the Federal Court which the State Act impermissibly invaded. Nor was there any valid federal law with which the State Act was inconsistent in the constitutional sense. This being so, the contesting defendants' objection to s 11 of the State Act had no force. In enacting that Act, the State Parliament was entitled to disregard (save for any reference to the historical facts which it chose to make) the parties' mistaken venture into the Federal Court. There was no constitutional impediment to that Parliament's enacting a special limitation provision to cure any time difficulties that had arisen because of that unfortunate mistake.

---

70 *Re Wakim* (1999) 73 ALJR 839 at 843 per Gleeson CJ, 846 per Gaudron J, 851-854 per McHugh J, 862-863 per Gummow and Hayne JJ, 893 per Callinan J; 163 ALR 270 at 276, 281, 287-292, 302-304, 344.

71 See especially *Re Wakim* (1999) 73 ALJR 839 at 862-863 per Gummow and Hayne JJ; cf at 884-888; 163 ALR 270 at 303-304; cf at 333-337.

72 Written submissions of the State of Victoria.

The Court's orders were not void *ab initio*

67 Obviously the foregoing arguments have force. But they are rejected. This Court should not accept the contention that, by virtue of the constitutional defects found in *Re Wakim*, the "relevant orders" of the Federal Court, including those dismissing or permanently staying proceedings for want of jurisdiction in that Court, are null and void *ab initio*, to be treated in law as if they never existed.

68 The Constitution envisages the establishment of "courts", including this Court. Such courts will necessarily partake of the essential character traditionally belonging to "courts" in England but with an added function derived from the role of such courts to interpret and uphold the Constitution[73]. From the character of the "courts" envisaged in s 71 of the Constitution may be imputed a necessity, where there is any doubt (including a doubt arising under the Constitution), for such courts to satisfy themselves that they have jurisdiction[74]. It would be absurd if the ascertainment of a want of jurisdiction were then to deprive a federal court of the legal capacity to give effect to its conclusion, including where the absence of jurisdiction was based on a want of constitutional power or a perceived breach of a constitutional prohibition. Under our Constitution, these are precisely the circumstances in which the federal Judicature must speak with a clear and authoritative voice. If a federal court were silenced at such a moment, the scheme of the Constitution would be seriously wounded. The rule of law which the Constitution establishes would be undermined. This cannot be the meaning of the Constitution.

69 The foregoing difficulty was realised by one of the proponents of nullification[75]. It was prepared to qualify the general proposition that a federal court's "relevant orders" were complete nullities by recognising that this Court would have to enjoy the jurisdiction ultimately to determine the limit of its own jurisdiction[76]. This qualification was justified by the inference that "[i]t is inherent in the rule of law itself that somewhere in any judicial system there must be a court which possesses jurisdiction to determine the limits of its own jurisdiction"[77]. However, neither in its language nor in its structure does Ch III

---

73 *Marbury v Madison* 5 US 137 (1803).

74 *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 415; cf *Re Gilles Contracting Pty Ltd (in liq); Khatri v Price* (1999) 166 ALR 380 at 382.

75 The State of South Australia.

76 Written submissions of the State of South Australia.

77 *Canada Trust Co v Stolzenberg* [1997] 1 WLR 1582 at 1589 per Millett LJ; [1997] 4 All ER 983 at 989.

of the Constitution give any textual foundation for drawing a distinction between the powers of this Court and of other federal courts in this respect. Illogicalities abound when courts are asked to take the doctrine of nullification to its extreme conclusion. Proponents of nullification are driven to accept that an appeal may be brought from an order found ultimately to have been void[78]. Yet, if this were the case, the question is immediately posed as to why a federal court may not validly, by a relevant order, give effect to a conclusion that it has no jurisdiction and thereby bring to an end a purported invocation of its jurisdiction that was sufficiently "valid" for the purpose of procuring such a disposition of it.

70 There is a textual indication that this is the way that Ch III of the Constitution was intended to operate. The "courts" referred to within that Chapter are clearly intended to be "courts" having the general characteristics long pertaining to the courts of England and certain special characteristics belonging to "courts" established in a federal context under Art III of the United States Constitution.

71 Chapter III of the Australian Constitution makes no explicit distinction between "superior" and "inferior" courts. The United States Constitution empowers the Congress to create courts that are styled "inferior Courts". However, this phrase has been interpreted to mean no more than "inferior" in the sense of subordinate to the Supreme Court of the United States[79]. At the time of federation in Australia, it was anticipated that the power of the Parliament to "[invest] any court of a State with federal jurisdiction" in s 77(iii) would remove the necessity to create "inferior" federal courts in Australia[80]. Certainly, federal courts have been created which are designated a "superior court of record". It must be assumed that this was done in order to attract to such courts the features that long pertained to such "superior courts"[81]. Nothing in Ch III of the Constitution forbids that course.

72 In England, it was settled, long before the Constitution was adopted, that a judgment or order of a superior court was valid and effective unless and until set

---

78 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 601; *Platz v Osborne* (1943) 68 CLR 133 at 141; cf *Calvin v Carr* [1980] AC 574 at 589-591; *R v Dorking Justices; Ex parte Harrington* [1984] AC 743 at 751-753.

79 *Kempe's Lessee v Kennedy* 9 US 173 (1809).

80 See Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 726.

81 *Halsbury's Laws of England*, 4th ed, vol 10 at 320.

aside[82]. Whilst it is true that this doctrine was developed without reference to a written or federal constitution, that fact is not crucial. Although the Royal Courts in England enjoyed "general jurisdiction", they were still limited by their different respective functions[83].

73 The principle, descriptive of the validity of the judgments and orders of superior courts in England, has been accepted by this Court and applied to the judgments and orders of federal superior courts in Australia[84]. It has been referred to on many occasions without apparent disapproval[85]. It is not inconsistent with the limited jurisdiction of federal courts established under the Constitution[86]. A challenge to the jurisdiction of a federal superior court may be made by way of appeal or by proceedings under s 75(v) of the Constitution. But the foundation for such challenge is usually the judgment or order complained of. The jurisdiction to determine the challenge does not evaporate with an ultimate conclusion that the judgment or order in question was made without constitutional authority[87].

---

82 *Peacock v Bell and Kendal* (1667) 1 WMS Saund 73 [85 ER 84]; *Gosset v Howard* (1845) 10 QB 411 at 453-454 per Parke B [116 ER 158 at 173]; *Scott v Bennett* (1871) LR 5 HL 234 at 245 per Martin B; cf Wade, *Administrative Law*, 7th ed (1994) at 344; Lanham, "The Reviewability of Superior Court Orders", (1988) 16 *Melbourne University Law Review* 603; Campbell, "Inferior and Superior Courts and Courts of Record", (1997) 6 *Journal of Judicial Administration* 249.

83 *Gosset v Howard* (1845) 10 QB 411 at 453 [116 ER 158 at 173].

84 *Cameron v Cole* (1944) 68 CLR 571 at 590-591, 598-599, 607.

85 *Posner v Collector for Inter-State Destitute Persons (Vict)* (1946) 74 CLR 461 at 480, 489-490; *Brennan v Brennan* (1953) 89 CLR 129 at 134; *Sanders v Sanders* (1967) 116 CLR 366 at 376; *Wilde v Australian Trade Equipment Co Pty Ltd* (1981) 145 CLR 590 at 604; *DMW v CGW* (1982) 151 CLR 491 at 504-505; *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 119-120, 130, 150; *Ousley v The Queen* (1997) 192 CLR 69 at 99.

86 *Cameron v Cole* (1944) 68 CLR 571 at 599. See also *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 215.

87 *Crane v Public Prosecutor* [1921] 2 AC 299 at 329-330; cf *Russell v Bates* (1927) 40 CLR 209 at 213-214.

74 The decisions of the United States Supreme Court have repeatedly upheld the proposition that[88]:

> "[w]hatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination".

75 In the United States, this principle preceded the invention of prospective overruling[89]. There is nothing in the basis of the local rejection of that notion[90] that casts doubt upon the proposition that, in Australia, a superior federal "court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is *res judicata* in a collateral action"[91]. The same must hold for an order that upholds a challenge to jurisdiction and gives effect to that challenge. In *Stoll v Gottlieb*[92] the Supreme Court of the United States observed:

> "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. ... Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. ...

---

88 *Chicot County Drainage District v Baxter State Bank* 308 US 371 at 377 (1940). See also *Des Moines Navigation and Railroad Co v Iowa Homestead Co* 123 US 552 at 559 (1887); *Howat v Kansas* 258 US 181 at 189-190 (1922); *United States v United Mine Workers of America* 330 US 258 at 293 (1947); cf "Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments", (1977) 87 *Yale Law Journal* 164.

89 *Des Moines Navigation and Railroad Co v Iowa Homestead Co* 123 US 552 at 559 (1887).

90 As to the rejection of prospective overruling, see *Ha v New South Wales* (1997) 189 CLR 465 at 503-504.

91 *Chicot County Drainage District v Baxter State Bank* 308 US 371 at 377 (1940); cf Wright, Miller and Cooper, *Federal Practice and Procedure*, (1984), vol 13A at 537. In the United States this approach also appears to have found support in the constitutional requirement that full faith and credit must be given to the judgments of the courts; cf Covering cl 5 and Constitution, s 118.

92 305 US 165 at 171-172 (1938).

> Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation."

76 Therefore, textual and historical features of "courts" of the kind which Ch III of the Constitution envisages sustain the conclusion that, at least in the case of a court classified as a "superior court of record", judgments and orders made by it in disposing of proceedings found to lack jurisdiction for constitutional reasons are valid as between the parties until they are set aside. They are not complete nullities. They are not wholly void *ab initio*. Their constitutional validity in such circumstances derives from the fact that they are judgments and orders of "courts" created under the Constitution. By virtue of the Constitution, such courts are taken to have powers of judicial determination. To hold otherwise would be to deprive such "courts" of an essential function in a manner that would be incompatible with the constitutional text.

77 Whilst it is true that some remarks of McHugh J in *Re Wakim*[93] may be read to suggest that judgments and orders of a superior federal court, even of this Court, deprived of constitutional validity, are void not voidable, other remarks of his Honour appear to envisage that, notwithstanding such a constitutional flaw, courts may in some cases retain a discretion as to whether to extend time to allow a litigant to challenge an order when to exercise a discretion in favour of such a challenge would be unfair by reason of the lapse of time or intervening circumstances[94]. Once exceptions are allowed, they necessarily imply a limit on the full rigour of the constitutional nullification of judgments and orders of federal courts. Inevitably, they accept that, for some applications and in some circumstances, such judgments and orders, although made without constitutional authority, are nonetheless effective for particular and limited purposes.

78 If the reasons of the members of the majority of this Court in *Re Wakim* other than McHugh J are considered[95] it appears to be clear that absolute nullification of judgments and orders has been rejected. There, the Court declined to quash a winding up order notwithstanding that it was found to have

---

93 (1999) 73 ALJR 839 at 857; 163 ALR 270 at 295; cf *Peters v Attorney-General (NSW)* (1988) 16 NSWLR 24 at 41; *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd* (1998) 193 CLR 502 at 516.

94 *Re Wakim* (1999) 73 ALJR 839 at 857; 163 ALR 270 at 295-296.

95 (1999) 73 ALJR 839 at 846 per Gleeson CJ (agreeing with Gummow and Hayne JJ), 846 per Gaudron J (agreeing with Gummow and Hayne JJ), 873 per Gummow and Hayne JJ, 898 per Callinan J; cf at 857 per McHugh J; 163 ALR 270 at 281, 281, 317, 352; cf at 295-296.

been made without jurisdiction in the sense of constitutional authority. The Court took this position ostensibly to protect the rights and interests acquired by a liquidator and other third parties under the order. Such a decision cannot be reconciled with the doctrine of absolute nullification.

79 In addition to the foregoing considerations of authority, many arguments of legal principle and legal policy support the same conclusion. The maintenance of public confidence in the judgments and orders of federal courts argues strongly for accepting (at least between the parties and for the limited purposes indicated) that such judgments and orders, although made without jurisdiction, are binding until set aside or permanently stayed. In some cases, the rights of the parties may ostensibly have merged in a judgment or judicial order[96]. Pursuant to such judgment or order steps may have been taken affecting third parties. Years may have passed, which would make it grossly unfair, inconvenient or even impossible to attempt to restore the position of the parties affected as if the entire court proceedings had been a nullity. This would be a "recipe for chaos"[97]. Finality of litigation is a hypothesis upon which Ch III of the Constitution is founded[98]. The authority of this Court, including recent authority, upholds that principle[99].

80 It is therefore consonant with the Constitution to acknowledge in federal courts a residual power to dispose, by judgments or relevant orders, of misconceived proceedings found to be outside the jurisdiction of those courts, including on constitutional grounds. It is more consonant to accept the limited validity of such judgments and orders than to postulate a complete legal void which contradicts what such judgments and orders state on their face not only to the parties named in them but also to the public. When this Court holds legislation to be invalid by reason of the Constitution, it remains the case that the law in question is not, and never has been, a law[100]. But where in purported pursuance of that "law" apparent rights of parties have passed into judgment or become the subject of court orders, they take on a separate source of

---

96 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 106.

97 cf *M v Home Office* [1992] QB 270 at 299 per Lord Donaldson of Lymington MR.

98 *Fencott v Muller* (1983) 152 CLR 570 at 608; cf *Willy v Coastal Corp* 503 US 131 at 137 (1992).

99 *DJL v Central Authority* (2000) 170 ALR 659 at 684; cf "Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments", (1977) 87 *Yale Law Journal* 164 at 182-185.

100 *South Australia v The Commonwealth* (1942) 65 CLR 373 at 408.

constitutional validity for limited purposes. It is one derived, principally, from Ch III of the Constitution and the powers incidental thereto. Such a measure of validity does not extend to enforcing such judgments or orders as if nothing had happened affecting their constitutional or statutory foundation. The validity is confined, relevantly, to having them set aside or otherwise disposed of for want of jurisdiction. Until that is done such judgments and orders may not be ignored by the parties to them as if they never existed[101]. To that extent, the extreme version of the doctrine of nullification is modified.

81 Given the limited validity which the foregoing analysis accords to the "relevant orders" of the Federal Court, so that steps may be taken to terminate the proceedings in that Court for want of jurisdiction, can it nevertheless be said that, for relevant constitutional and statutory purposes, a *residuum* of the proceedings remained in the Federal Court in a case such as the present? If this is the case, does that *residuum* forbid any State law (such as the State Act) from enacting a provision which intrudes into the federal Judicature, or purports to confer rights and impose obligations by reference to such proceedings, in a way that is incompatible with the exclusive prescription and regulation of the proceedings by federal law? To answer these questions it is necessary first to identify the meaning and effect of the State Act[102].

Meaning of the State Act, s 11

82 The argument of the contesting defendants was that s 11(3) of the State Act attempted to effect a unilateral transfer to, or expropriation by, the Supreme Court of a proceeding which, by the foregoing analysis, remains to a limited extent a proceeding in the Federal Court. In support of this contention, the argument relied upon the provision in s 11(3) that "the proceeding" (that is, the proceeding in the Federal Court) "becomes" a "proceeding in the Supreme Court"[103].

83 Whilst it might be conceded that provisions to the effect that a proceeding "must be recorded" by a Supreme Court[104] or "is taken to have been brought in"

---

101 cf *Eastern Trust Company v McKenzie, Mann & Co Ltd* [1915] AC 750 at 760-761; *Isaacs v Robertson* [1985] AC 97 at 101-102; *Little v Lewis* [1987] VR 798 at 804-805.

102 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ; *R v Hughes* (2000) 171 ALR 155 at 173-174.

103 s 11(3)(a).

104 s 11(3)(a).

the Supreme Court and is to be recorded as such[105] could appear to be fictions addressed only to the Supreme Court, the opposite (so it was said) was the case because the word "becomes" had been used. That which "becomes" must be posited as still existing so as to be liable to change into that which it "becomes". In this sense, it was argued, the hypothesis of s 11(3) of the State Act was the continued existence of the Federal Court "proceeding" precisely so that it could "become" a proceeding in the Supreme Court. Yet, to the extent that the proceedings in the Federal Court maintained any residual existence, it was impermissible for State law to intrude into the federal Judicature[106]. It was inconsistent with the Federal Court Act for a State law to purport to do so.

84 In reinforcement of this argument, the contesting defendants referred to the choice by the State law of the Federal Court "proceeding" as the criterion of operation by which the State law took its effect. The State Act thus declared the rights and liabilities of parties by reference to "a proceeding in the federal court"[107]. Effectively (so it was put) it authorised the Supreme Court to "remove" the Federal Court proceeding into the Supreme Court. Once so removed, the State Act purported to continue such "proceeding" in the Supreme Court because it had "become" a proceeding in that Court by dint of State law. All of these steps were, according to the contesting defendants, incompatible with the exclusive regulation of the federal Judicature by federal law. Specifically, they were inconsistent with the applicable federal Act. Under the Constitution, the Federal Court Act, and it alone, governed all matters pertaining to "the proceeding" in the Federal Court, including "the proceeding" as determined by a "relevant order" to be invalid for want of jurisdiction.

85 Again, there is force in these arguments. In most constitutional puzzles of this kind the answer is not incontestable. It must be found by the exercise of judgment. A difficulty is presented to the validity of what is done by the reference to "the proceeding", that is, the proceeding in the Federal Court, by the use of the word "becomes"[108] and by the phrase "despite the relevant order"[109], all of which suggest the continued existence of the Federal Court proceedings despite its own order to the effect that the Court was without jurisdiction.

---

105 s 11(3)(b).

106 *Re Wakim* (1999) 73 ALJR 839; 163 ALR 270.

107 s 11(3)(b).

108 s 11(3)(a). See also "becoming" in s 11(4).

109 s 11(3).

86 However, I do not consider that the foregoing construction of s 11 of the State Act represents the preferable one. Whatever may be the effectiveness of "judgments" and "relevant orders" in the Federal Court proceedings, they certainly existed as an historical fact. No constitutional invalidity of legislation or of the jurisdiction and powers of federal courts under such legislation obliges a pretence that the proceedings were "legally non-existent"[110]. The selection by s 11(3) of the factual existence of such proceedings does not involve any purported interference by State law in the effectiveness of the "relevant order" which the Federal Court has made. Such order continues to have such force and effect as the law attributes to it.

87 The reference to the Federal Court proceeding "becoming" a proceeding in the Supreme Court must be understood in the context in which that word is used. It is a context which repeatedly makes it clear that its purpose is mechanical. It does not involve alteration of the rights of the parties to the proceedings save in respect of relief from any limitation bar of the State that might otherwise have descended[111]. This apart, the reference to the proceeding "being treated as" and "being recorded as" a proceeding in the Supreme Court sufficiently indicates that a fiction has been adopted. It is a fiction intended to secure the administrative recording of new proceedings in the Supreme Court and, for limitation purposes, to deem proceedings so recorded to have been commenced at an earlier time. The fact that that earlier time is fixed by reference to the historical fact of the first recording of the proceeding in a federal court[112] speaks exclusively to the Supreme Court. It involves no intrusion in, or interference with, the earlier proceedings in a federal court.

88 This impression, derived from an analysis of the language of s 11 of the State Act, is reinforced by two further textual considerations. The first is that each of the decisions of the federal court in question, defined to constitute a "relevant order", involves a decision of the applicable federal court that it has no jurisdiction because a matter is a "State matter"[113]. Moreover (as the joint reasons point out[114]) the very provisions that are made to afford relief in respect

---

110 *Calvin v Carr* [1980] AC 574 at 590 per Lord Wilberforce; cf Taggart, "Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences", in Taggart (ed), *Judicial Review of Administrative Action in the 1980s*, (1986) 70 at 90 where the author equates the extreme view of nullification with voidness in the sense of *factual* non-existence.

111 ss 11(1) and 11(2).

112 s 11(3)(b).

113 As defined in s 3.

114 Joint reasons at [26].

of State limitation law reinforce this interpretation. If "the proceedings" which "become" proceedings in the Supreme Court were the actual Federal Court proceedings, with all their incidents, these would include the limitation provisions applicable to such proceedings by force of federal law. Yet that is the opposite of what has been enacted.

89 It follows that the provision for the commencement of a new proceeding in the Supreme Court pursuant to s 11 of the State Act cannot be characterised as an impermissible interference by State law with, or intrusion into, the federal Judicature. Nor does it represent an inconsistent enactment by the State Parliament on a subject matter wholly dealt with by federal law. So far as the latter is concerned, by its "relevant order", the Federal Court has permanently stayed the "proceedings" for want of jurisdiction. Only in such a case does s 11 of the State Act have valid operation.

90 It is true that, under federal law, by leave[115], or by right[116], an appeal might be brought to the Full Court of the Federal Court in certain circumstances. However, that possibility does not suggest that the scheme of s 11 must fall. Where such an appeal was mounted from a "relevant order" (for example, where some basis for the jurisdiction of the Federal Court was propounded by an appellant other than the cross-vesting legislation) it must be envisaged that an order under the section would be refused in the Supreme Court[117]. Until any such appeal were disposed of, it can be safely assumed that the Supreme Court would decline to treat "the proceeding" as a proceeding before it. Clearly State legislation could not interfere with any right of appeal provided by the Federal Court Act. Section 11 of the State Act does not purport to do so. The State Act is careful to differentiate between a "relevant order" and an "ineffective judgment". Only the former is referred to in s 11. The latter is outside the scheme of that section.

91 There is one additional consideration which reinforces the foregoing construction of s 11 of the State Act. It is a consideration to which I referred in *Re Wakim*[118] and in other decisions since[119]. The Constitution envisages and permits the component parts of the Commonwealth to cooperate in a rational, harmonious and generally efficient way. In the circumstances brought about by

---

115 Federal Court Act, s 24(1A).

116 Federal Court Act, s 24(1)(a).

117 s 11(2).

118 (1999) 73 ALJR 839 at 878-879; 163 ALR 270 at 324-325.

119 *R v Hughes* (2000) 171 ALR 155 at 173-176.

the decision in *Re Wakim*, a serious problem was presented not just for the legislatures, governments and courts of the nation but also for litigants caught in the midst of proceedings that had been brought on the assumption that the cross-vesting legislation was constitutionally valid. When that assumption was ultimately found to have been erroneous, it was inevitable that governments and parliaments should attempt to lessen the inconvenience thereby occasioned. In the past, this Court has accepted legislative endeavours to respond to problems in some ways similar[120]. The State Act, and its equivalents in other States of Australia, are the product of the attempt in this instance. Unless forbidden by a constitutional prohibition or want of power, this Court should uphold the legislative amelioration contained in s 11.

92 Far from being a radical provision, intruding State law into the federal Judicature and enacting provisions incompatible with federal law, s 11 of the State Act has a modest and entirely limited function. It works no offence to the Constitution. On the contrary, in the circumstances that have occurred, it enacts a sensible and just arrangement of comparatively limited significance. I would reject the foregoing constitutional criticisms of s 11. Considered in isolation from the other provisions of the State Act, that section is a valid law.

The validity of s 11 may be separately determined

93 The final question arises as to whether it is necessary or desirable to answer those questions reserved in the stated case which relate to the provisions of the State Act other than s 11. Detailed submissions of the parties and of the interveners were addressed to the validity of those provisions. They concern so-called "ineffective judgments" of the federal courts made on the basis of the invalid provisions of the cross-vesting legislation. These attempt, indirectly, to accord significance to the rights and liabilities of the parties as found in such "ineffective judgments". Clearly, the remaining questions raise important constitutional issues which will have to be determined by this Court.

94 On the face of things, the legal issue presented by the dispute between the present parties is confined to the validity of s 11. Although certain orders were apparently made by the Federal Court during the five years that the proceedings were purportedly before it, no "ineffective judgment", as that expression is defined in the State Act[121], was entered by the Federal Court. None is relied on. There is no reference in s 11 to an "ineffective judgment" of a federal court as

---

120 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 246 following *Kotsis v Kotsis* (1970) 122 CLR 69 and *Knight v Knight* (1971) 122 CLR 114.

121 s 4(1).

there is in ss 6, 7, 8, 9 and 10. Such "ineffective judgments" arise at a stage of litigation later than that reached in the proceedings involving the present parties.

95 The questions presented by the treatment of "ineffective judgments" under the State Act are distinct. They are more difficult than those presented by s 11. The latter section has the procedural and time limitation consequences described. Nothing more. The provisions of s 11 could just as easily have been included as a new section, or Part, of the State limitation statute[122]. Even if all other provisions of the State Act were invalid, I see no reason why s 11 could not continue to operate according to its terms[123]. It would therefore be severable[124]. Although the Court does not have a valid delegation from the relevant parliament to perform "the legislative task of making a new law from the constitutionally unobjectionable parts of the old"[125], it is permissible in certain cases, where necessary, to read down the provisions of a statute by excising any invalid part, despite the fact that this may bring about a result different from, and more confined than, the statute taken as a whole as that parliament originally envisaged[126].

96 Because the problems presented by the State Act escalate at later stages of proceedings and because those problems are avoided where, as here, the proceedings are still at a comparatively early stage awaiting trial, there is no reason to grapple now with the other problems. They will return soon enough. This Court should confine its constitutional elaboration to those matters which must be decided to resolve the dispute between the present parties. In these proceedings that dispute is confined to the objection of the contesting defendants to the steps taken by the plaintiff and by the Supreme Court pursuant to s 11 of the State Act. Only the first question should therefore be answered.

---

122 *Limitation of Actions Act* 1936 (SA).

123 *Acts Interpretation Act* 1915 (SA), s 13.

124 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 113; *Re F; Ex parte F* (1986) 161 CLR 376 at 384-385.

125 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 372; see also *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 492, 503, 506.

126 *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111, 118; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 371. Moreover, the challenges to the other provisions may ultimately fail, leaving the legislation precisely as it was enacted.

Orders

97 On 25 May 2000, the Court announced the answers to the questions reserved and pronounced its orders as set out in the joint reasons. The foregoing are my reasons for joining in that disposition of the matter.