

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

AUSTRAL PACIFIC GROUP LIMITED
(IN LIQUIDATION)

APPELLANT

AND

AIRSERVICES AUSTRALIA

RESPONDENT

Austral Pacific Group Limited v Airservices Australia [2000] HCA 39
3 August 2000
B46/1999

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation:

P J Lyons QC with R N Traves for the appellant (instructed by Michael Stewart)

P A Keane QC with P A Freeburn for the respondent (instructed by Corrs Chambers Westgarth)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Austral Pacific Group Limited v Airservices Australia

Negligence – Action by employee against appliance manufacturer – Manufacturer issued third party proceedings against Commonwealth authority employer – Federal jurisdiction attracted – Application by Commonwealth authority to strike out manufacturer's third party notice against it – Whether Commonwealth authority was liable as a joint tortfeasor "in respect of the same damage" as manufacturer – Whether employee's non-compliance with the requirement of election in s 45 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ever subjected the Commonwealth authority to liability to the employee.

Federal jurisdiction – Whether s 64 of the *Judiciary Act 1903* (Cth) operated – Whether s 79 of the *Judiciary Act 1903* (Cth) "picked up" ss 6 and 7 of the *Law Reform Act 1995* (Q) – Whether ss 44 or 45 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) "otherwise provided" within the meaning of s 79 of the *Judiciary Act 1903* (Cth).

Words and phrases – "matter", "the Commonwealth", "otherwise provided".

Constitution, ss 75(iii), 76(ii).

Air Services Act 1995 (Cth), ss 7, 8.

Civil Aviation Act 1988 (Cth).

Civil Aviation Legislation Amendment Act 1995 (Cth), s 9.

Judiciary Act 1903 (Cth), ss 39(2), 64, 79.

Safety, Rehabilitation and Compensation Act 1988 (Cth), ss 44, 45.

Law Reform Act 1995 (Q), ss 6, 7.

- 1 GLEESON CJ, GUMMOW AND HAYNE JJ. This is an appeal from the Court of Appeal of the Supreme Court of Queensland¹. It raises issues respecting the operation of Pt IV (ss 42-52) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the Compensation Act") and the operation of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") to "pick up" a law of the State of Queensland respecting contribution between joint and several tortfeasors. The Queensland law is found in ss 6 and 7 of the *Law Reform Act* 1995 (Q) ("the Contribution Act"). The amount of contribution recovered under that legislation may amount to a complete indemnity (s 7). Issues similar to those arising on this appeal have been the subject of decisions by the New South Wales Court of Appeal in *The Commonwealth v Flaviano*² and the South Australian Full Court in *Coomblas v Gee*³.

The facts and the history of the litigation

- 2 In the present matter, the Court of Appeal (McPherson JA, Pincus JA, Ambrose J) allowed an appeal against the dismissal of an application by the present respondent, Airservices Australia ("Airservices"), to strike out a third party notice by the present appellant ("Austral Pacific"). Austral Pacific had been sued in the District Court by plaintiff dated 9 January 1997. The plaintiff, Mr Crockford, claimed damages against Austral Pacific in respect of injuries sustained by him on 26 February 1994 at the airport at Cairns, whilst an employee of the Civil Aviation Authority ("the CAA"), a body established by the *Civil Aviation Act* 1988 (Cth) ("the 1988 Act").
- 3 In the interval between 1994 and the institution of the action in 1997, the 1988 Act had been amended by the *Civil Aviation Legislation Amendment Act* 1995 (Cth) ("the Amendment Act") and Airservices had been established as a body corporate by s 7 of the *Air Services Act* 1995 (Cth) ("the Airservices Act"). Section 9 of the Amendment Act provided for the assets and liabilities of the CAA to become the assets and liabilities of Airservices. For the purposes of this appeal it may be taken that this provision operated upon the causes of action on

1 *Airservices Australia v Austral Pacific Group Ltd* (1998) 157 ALR 125.

2 (1996) 40 NSWLR 199.

3 (1998) 72 SASR 247.

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which the plaintiff later sued in 1997, and made Airservices an appropriate defendant⁴.

4 In allowing Airservices' appeal against the dismissal of its application to strike out the third party notice, the Court of Appeal held that the effect of the relevant provisions of the Compensation Act was that there was no time at which the plaintiff could have successfully brought an action against Airservices. This meant that Austral Pacific could not satisfy a necessary condition for a good contribution claim against Airservices under the Contribution Act. The Court of Appeal followed the decision of the New South Wales Court of Appeal in *Flaviano* and shortly thereafter, in *Coomblas*, the South Australian Full Court also followed *Flaviano*. *Flaviano* concerned the contribution provisions in the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) and *Coomblas* those in the *Wrongs Act 1936* (SA). No relevant distinction appeared between the State statutes.

5 Before turning to consider the relevant statutory provisions it is convenient first to consider the claims pleaded by the plaintiff against Austral Pacific in the District Court and then the nature of the jurisdiction exercised by the District Court and thus by the Court of Appeal.

6 The plaintiff claimed that he had suffered a knee injury, multiple bruises and abrasions in the following circumstances. Austral Pacific had manufactured and supplied to the CAA a fire-fighting appliance and the plaintiff sustained his injuries whilst alighting from that appliance. He stepped onto the rubber step tread moulding, the moulding separated from the aluminium step and as a result the plaintiff lost balance and fell to the ground. The plaintiff sued Austral Pacific. He did not sue Airservices. The plaintiff pleaded that the appliance was defective and dangerous to use and that Austral Pacific had failed to discharge its duty of care owed to persons such as the plaintiff to ensure that the appliance was safe for use by the employees of the CAA.

7 Particulars of the plaintiff's loss and damage and special damages were required by the relevant rules of court. They do not appear in the record. It may be assumed that the claim is for economic and non-economic loss. The global damages claim in the plaint was for \$200,000. In the Court of Appeal, Ambrose J said that it seemed likely that the plaintiff "will have an arguable case

4 See *Crimmins v Stevedoring Industry Finance Committee* (1999) 74 ALJR 1 at 4 [6]-[8], 4-5 [12]-[16], 26-29 [134]-[147], 35-36 [187]-[189], 48-50 [244]-[257]; 167 ALR 1 at 3-4, 4-5, 34-38, 46-47, 64-67.

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that significant permanent impairment" has resulted from a severe injury to his right knee⁵.

8 In the alternative, the plaintiff claimed damages against Austral Pacific for breach of the undertakings as to quality and fitness implied by s 71 of the *Trade Practices Act* 1974 (Cth) ("the Trade Practices Act") in respect of the supply of the appliance by Austral Pacific to the CAA. A claim also was made for breach of the warranty said to be implied by s 74 of the Trade Practices Act in a contract for the supply of services by Austral Pacific to the CAA. Provisions of that nature operate to regulate the contractual rights and liabilities of the contracting parties. They do not attract the operation of s 82 of the Trade Practices Act in favour of a person who suffers loss or damage by the conduct of another in contravention of a provision of Pt V of the Trade Practices Act⁶.

9 The claim in contract for damages for breach of obligations imposed by provisions such as ss 71 and 74 of the Trade Practices Act involved obligations that are statutorily created and take effect by a legal fiction, namely that the parties made a contract including the relevant obligations. That is how Brennan J analysed the matter in *Arturi v Zupps Motors Pty Ltd*⁷. It follows that a party claiming damages for breach of such an obligation asserts a right which owes its existence to federal law⁸ thereby, in a State court, attracting the exercise of federal jurisdiction invested under s 39(2) of the Judiciary Act. However, the plaintiff was a stranger to any contract respecting the appliance between Austral Pacific and the CAA. It is unnecessary further to pursue this aspect of the matter. In the submissions in this Court the dispute between the plaintiff and Austral Pacific was treated as turning upon the claim in negligence.

10 Further, the third party notice issued by Austral Pacific against Airservices clearly engaged the District Court in the exercise of federal jurisdiction. The action by the plaintiff against Austral Pacific and the claim by Austral Pacific against Airservices were comprised in the one "matter"⁹. Federal jurisdiction was attracted on two grounds. First, any liability of Airservices to Austral

5 (1998) 157 ALR 125 at 129.

6 *Arturi v Zupps Motors Pty Ltd* (1980) 33 ALR 243.

7 (1980) 33 ALR 243 at 246.

8 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581.

9 *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 868-871 [135]-[147]; 163 ALR 270 at 310-314.

Pacific depended for its existence upon the position of Airservices as the successor to the CAA. The third party notice, in par 5, recognised this in terms. That successorship arose solely by reason of the provisions of s 9 of the Amendment Act. Had it not been for that provision Airservices would have stood outside the dispute between the plaintiff and Austral Pacific. Accordingly, there was a matter arising under the law of the Commonwealth, within the meaning of s 76(ii) of the Constitution. Secondly, Airservices was established as a body corporate by s 7 of the Airservices Act to perform such functions as the provision of facilities to permit safe aircraft navigation within Australian-administered airspace (s 8(1)(a)). This and other provisions of the statute¹⁰ indicate that Airservices is a Commonwealth agency or instrumentality which is included in the term "the Commonwealth" in s 75(iii) of the Constitution¹¹.

Contribution and federal law

- 11 At common law there is no right to contribution or indemnity between tortfeasors. Such rights must be founded in an applicable statute. No law of the Commonwealth was pointed to as directly conferring such a right upon Austral Pacific against Airservices. The only federal law relied upon was the Judiciary Act. It may be assumed for present purposes, for the contrary was not argued, that the investment of the District Court with federal jurisdiction became operative with the commencement of the third party proceeding and that this enlivened s 79¹². There is a further assumption to be made. This is that it would be no answer to the application of the Contribution Act, if it otherwise were "picked up" as a surrogate federal law by s 79, that before that operation of s 79

10 Sections 13-18 and ss 20-22 respectively provide for a very significant role for the Minister in the performance by Airservices of its functions and the exercise of its powers and in the composition of the Board of Airservices. There is provision for the payment of dividends to the Commonwealth (s 46). The capital of Airservices is repayable to the Commonwealth at such times and in such amounts as the Minister determines in writing (s 44(3)).

11 *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 232. See also the *Commonwealth Authorities and Companies Act* 1997 (Cth), which applies to Airservices and deals with matters relating to Commonwealth authorities, including reporting and accountability, banking and investment, and conduct of officers.

12 *Felton v Mulligan* (1971) 124 CLR 367 at 373, 402-404.

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there had been no anterior "cause of action" for contribution against Airservices¹³.

- 12 Accordingly, but subject to what follows, it is to be taken that in the exercise of federal jurisdiction by the State court in this case, s 79 of the Judiciary Act operated to "pick up" the body of Queensland statute law. Section 79 states:

"The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, *except as otherwise provided by the Constitution or the laws of the Commonwealth*, be binding on all Courts exercising federal jurisdiction in that State or Territory *in all cases to which they are applicable*." (emphasis added)

- 13 The closing words of s 79 indicate, as the authorities confirm¹⁴, that the section does not enable a court exercising federal jurisdiction to give an altered meaning to a State statute which it is required to apply. The qualification expressed in those authorities, but inapplicable in this litigation, is that a State statute may be "picked up" in a federal court even though in its own terms the State statute is limited in its operation to the courts of the State in question. Here, of course, the federal jurisdiction was being exercised by a State court not a federal court.

- 14 Airservices is a body corporate which, while it is charged with the performance of what may be classed as governmental functions, is not part of the executive government of the Commonwealth¹⁵. Airservices is sued by Austral Pacific as the Commonwealth within the meaning of s 75(iii) of the Constitution but it does not necessarily follow that Airservices attracts the preferences,

13 cf the interpretation of s 64 of the Judiciary Act in *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 263-264 and see *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 438-439 [131]-[136].

14 *Maguire v Simpson* (1977) 139 CLR 362 at 376; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 556; *Northern Territory v GPAO* (1999) 196 CLR 553 at 574-575 [32]-[34].

15 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 458-460, 470-472.

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immunities and exceptions enjoyed by the executive government in respect of State laws and identified with the *Cigamatic* doctrine¹⁶.

15 There is, accordingly, a strong argument that the Contribution Act applied as a surrogate federal law to adjust the respective rights and liabilities *inter se* of the two tortfeasors, Austral Pacific and Airservices, and that this result was brought about by s 79 "picking up" the State law in its own terms. Even if Airservices were relevantly the Commonwealth, so that in its own terms the State law, when "picked up" by s 79, did not without more apply to Airservices, that would not be the end of the matter. This is because s 64 of the Judiciary Act¹⁷ would apply to render the contribution claim by Austral Pacific one to be resolved as it would be "between subject and subject". The reasoning which in *Maguire v Simpson*¹⁸ led to the conclusion that the Commonwealth Trading Bank was "the Commonwealth" for the purposes of s 64 would apply to Airservices.

16 It is true that the adjustment required by s 64 is qualified by the phrase "as nearly as possible". The effect of this is that the section cannot operate to alter the nature of respective rights in relation to different subject-matters¹⁹. The nature of the subject-matter involved in *The Commonwealth v Western Australia*²⁰ rendered s 64 inapplicable. No such obstacle is presented here. The dispute is between two tortfeasors in respect of an award of damages claimed by a plaintiff for personal injuries.

Does the Compensation Act "otherwise provide"?

17 The question remains whether s 79 was inapplicable because provision otherwise was made by another law of the Commonwealth, namely the

16 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 458, 464-465.

17 Section 64 states:

"In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject."

18 (1977) 139 CLR 362 at 390, 398-399, 406, 407.

19 *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 421 [81], 436-439 [126]-[137], 447 [165], 475-476 [246]-[248].

20 (1999) 196 CLR 392.

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Compensation Act. The criteria to be applied are indicated in *Northern Territory v GPAO*²¹. The question is whether the operation of the Compensation Act would so reduce the ambit of the Contribution Act that the provisions of the Compensation Act are irreconcilable with the other law. If so, the Compensation Act "otherwise provides" within the meaning of s 79 of the Judiciary Act. *GPAO* shows that the question is not answered by application of the doctrine identified, in the decisions construing s 109 of the Constitution, with the phrase "covering the field".

- 18 The Compensation Act does not "otherwise provide" within the meaning of s 79. We turn to explain why this is so. It is necessary to begin with reference to the terms of the Compensation Act. The effect of the immediately material provisions was explained by Toohey J in *Georgiadis v Australian and Overseas Telecommunications Corporation*²². His Honour said²³:

"In lieu of an action for damages, the Act introduced a scheme of compensation providing weekly payments for incapacity (s 19) and, in relation to permanent impairment, lump sums (s 24), interim payments (s 25) and certain additional sums for non-economic loss (s 27).

Where compensation is payable for permanent impairment and but for s 44(1) there would be liability for non-economic loss, an employee may elect to institute an action against the Commonwealth for damages for that non-economic loss rather than be compensated pursuant to the statutory scheme. The election is irrevocable. Section 44(1) does not then apply in relation to that action; the damages which may be awarded by a court for non-economic loss are limited to \$110,000²⁴."

- 19 Section 44 of the Compensation Act states:

"(1) Subject to section 45, an action or other proceeding for damages does not lie against the Commonwealth, a Commonwealth authority, a licensed corporation or an employee in respect of:

21 (1999) 196 CLR 553 at 587-589 [78]-[83], 606 [135], 650 [254].

22 (1994) 179 CLR 297.

23 (1994) 179 CLR 297 at 317. Nothing for present purposes follows from the fact that this was a dissenting judgment.

24 See generally s 45.

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- (a) an injury sustained by an employee in the course of his or her employment, being an injury in respect of which the Commonwealth, Commonwealth authority or licensed corporation would, but for this subsection, be liable (whether vicariously or otherwise) for damages; or
- (b) the loss of, or damage to, property used by an employee resulting from such an injury;

whether that injury, loss or damage occurred before or after the commencement of this section.

(2) Subsection (1) does not apply in relation to an action or proceeding instituted before the commencement of this section."

20 It is accepted that Airservices is a "Commonwealth authority" for the purposes of s 44²⁵. *Georgiadis* determined that, in respect of injury, loss or damage which had occurred before the commencement of s 44 but had not been followed by the institution of an action or proceeding before that commencement, the phrase in s 44(1), "an action ... does not lie", operated not to bar the action but to extinguish it. That gave rise to the issue under s 51(xxxi) of the Constitution that was determined in *Georgiadis*.

21 Here the relevant events occurred whilst s 44 was in force. No question of validity arises. But, consistently with the meaning given in *Georgiadis* to the phrase "an action ... does not lie", s 44 operated to deny from the outset the existence of a cause of action in respect of those relevant events. This was subject only to the operation of s 45(2). In the present case, as McPherson JA pointed out²⁶, consistently with the holding in *Georgiadis*, the effect of s 44 is not merely procedural, but substantive.

22 The effect of s 45 is to deem s 44 never to have applied in relation to an action or other proceeding to recover damages for non-economic loss which is instituted by the employee subsequently to the making of the election referred to in s 45(1). The result is that in respect of that action or proceeding events take the course they would have taken if s 44 had never been engaged. That course is qualified in two respects. First, after the date of the election compensation is not payable (s 45(2)(b)). Secondly, not only does the annihilating effect of s 44 still

25 The term is defined in s 4(1) of the Compensation Act.

26 (1998) 157 ALR 125 at 127.

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operate to prevent any right to recovery of economic loss, but an award for non-economic loss shall not exceed the amount specified in s 45(4).

23 The text of s 45 is as follows:

"(1) Where:

- (a) compensation is payable under section 24, 25 or 27 in respect of an injury to an employee; and
- (b) the Commonwealth, a Commonwealth authority, a licensed corporation or another employee would, but for subsection 44(1), be liable for damages for any non-economic loss suffered by the employee as a result of the injury;

the employee may, at any time before an amount of compensation is paid to the employee under section 24, 25 or 27 in respect of that injury, elect in writing to institute an action or proceeding against the Commonwealth, the Commonwealth authority, the licensed corporation or other employee for damages for that non-economic loss.

(2) Where an employee makes an election:

- (a) subsection 44(1) does not apply in relation to an action or other proceeding subsequently instituted by the employee against the Commonwealth, the Commonwealth authority, the licensed corporation or the other employee for damages for the non-economic loss to which the election relates; and
- (b) compensation is not payable after the date of the election under section 24, 25 or 27 in respect of the injury.

(3) An election is irrevocable.

(4) In any action or proceeding instituted as a result of an election made by an employee, the court shall not award the employee damages of an amount exceeding \$110,000 for any non-economic loss suffered by the employee."

24 In the present case, there is no evidence of an election by the plaintiff in respect of the pursuit of rights against Airservices. It follows that in respect of his injuries at no time did an action or other proceeding by the plaintiff for damages lie against Airservices. That is a significant matter in determining the

operation of the Contribution Act if it is "picked up" by s 79. To that question we return.

25 Part IV of the Compensation Act (ss 42-52) is headed "LIABILITIES ARISING APART FROM THIS ACT". A threshold question is whether the claim against Airservices by Austral Pacific under the Contribution Act, as "picked up" by s 79 of the Judiciary Act, answers the description in s 44(1) of "an action or other proceeding for damages ... in respect of ... an injury sustained by an employee in the course of his or her employment". If so, the claim would be annihilated and s 44 would indeed "otherwise provide" within the meaning of s 79.

26 The claim by Austral Pacific against Airservices was of entitlement to be "indemnified by [it] against, or contribution in respect of, any liability [Austral Pacific] may be found to have in respect of the [p]laintiff's claim, in such amount as may be found by the court to be just and equitable having regard to the extent of [Airservices'] responsibility for the damage alleged to have been suffered by the [p]laintiff". The claim was not one to recover damages. That was the character of the action instituted by the plaintiff against Austral Pacific. The claim against Airservices was brought in pursuance of new statutory rights, not to enforce a liability of Airservices sounding in damages at the suit of Austral Pacific. Nor was it in respect of acts or omissions on the part of Airservices which were wrongful against Austral Pacific²⁷.

27 Part IV of the Compensation Act contains a number of provisions, including ss 48, 50 and 51, designed to protect the financial position of Comcare when it has made payments of compensation and a third party is liable in damages in respect of the injury or other harm sustained by an employee. Comcare is the body established by s 68 of the Compensation Act among other things to determine claims for compensation upon that statute (s 69). Moreover, s 46 obliged the plaintiff in the present litigation to notify the Safety, Rehabilitation and Compensation Commission ("the Commission")²⁸ in writing of the proceedings he had instituted against Austral Pacific.

28 However, the Compensation Act is silent respecting the rights and obligations *inter se* of a Commonwealth authority or other party identified in s 44 and a third party where what is at stake is not the ultimate incidence of compensation payments, but the distribution between the tortfeasors of the

27 cf *Unsworth v Commissioner for Railways* (1958) 101 CLR 73 at 86.

28 The Commission is established by s 89A.

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burden of the common law liabilities in damages to the employee. This is consistent with a legislative intention to leave such matters for the operation of State or Territorial legislation "picked up" by s 79. Part IV does not "otherwise provide" in the sense required to render s 79 inapplicable.

The application of the Contribution Act

29 The Contribution Act thus was drawn into the litigation in the District Court. The remaining questions concern the operation of ss 6 and 7 thereof in respect of the position of Airservices and, in particular, given the absence of an election by the plaintiff under s 45 of the Compensation Act.

30 Sections 6 and 7 of the Contribution Act are relevantly similar to the New South Wales provisions which were recently considered by this Court in *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*²⁹ and which had been construed by the New South Wales Court of Appeal in *Flaviano*³⁰. The text of ss 6 and 7 is as follows:

"6. Where damage is suffered by any person as a result of a tort (whether a crime or not) –

- (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person *who would, if sued, have been liable as a joint tortfeasor in respect of the same damage*;
- (b) if more than 1 action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the spouse, parent, or child of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) – the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;

29 (1998) 196 CLR 53.

30 (1996) 40 NSWLR 199.

- (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by the person in respect of the liability in respect of which the contribution is sought.

7. In any proceedings for contribution under this division the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity." (emphasis added)

31 Austral Pacific contends that the expression in s 6(a) of the Contribution Act "who would, if sued, have been liable" extends to a party who, if appropriate steps had been taken by the plaintiff, would be found liable and submits that the failure of the plaintiff to give a notice required by statute is an "irrelevant circumstance". The phrase is taken from the judgment of Barwick CJ in *Brambles Constructions Pty Ltd v Helmers*³¹.

32 However, the election required by s 45 of the Compensation Act is more than the giving of a notice which is a condition precedent or necessary antecedent step to the maintenance of an action or the issue of initiating process³². As indicated earlier in these reasons, s 44 is a provision going, to adapt the words of Dixon J in *Harding v Lithgow Corporation*³³, "to the validity of the title to enforce the liability" not merely "to the mode of enforcing it, or the fulfilment of a preliminary procedural condition". In respect of the claim for non-economic loss, at no time had s 45 applied to deem s 44 never to have operated. The action in respect of economic loss was beyond recall and could never be enlivened by the operation of s 45.

31 (1966) 114 CLR 213 at 218.

32 cf *Harding v Lithgow Corporation* (1937) 57 CLR 186 at 192.

33 (1937) 57 CLR 186 at 195. See also the authorities referred to in *Rudolphy v Lightfoot* (1999) 73 ALJR 1619 at 1621 [9]-[12]; 167 ALR 105 at 107-108.

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33 If the employee makes the election in writing spoken of in s 45(1) then one consequence thereof (s 45(2)(a)) is that, if an action or proceeding is "subsequently instituted by the employee against ... the Commonwealth authority ... for damages for the non-economic loss to which the election relates", then s 44(1) does not apply to that action or proceeding. The statutory text specifies the taking of sequential steps, with the written election preceding the institution of the action and the obligation to notify the Commission in writing of the proceedings, imposed by s 46, arising "as soon as practicable but in any event not later than 7 days after the day on which" (in a case such as the present) the plaintiff employee "first became aware that those proceedings had been instituted".

34 It is unnecessary to determine whether, in addition to these sequential steps, the Compensation Act requires another, the service on the proposed defendant of the written election. The statute does not specify this as a requirement. The significance of the writing requirement for the election may be to emphasise its significance for the employee and his or her legal advisers that the step once taken is irreversible (s 45(3)). Further, the onus of demonstrating that an election had been made, if the point be raised as an issue in an action subsequently instituted, would rest on the plaintiff. The primary evidence on such an issue will be the written election.

Conclusion

35 Airservices at no time has been a tortfeasor who would, if sued by the plaintiff, have been liable as a joint tortfeasor in respect of the same damage as Austral Pacific.

36 The appeal should be dismissed with costs.

37 McHUGH J. Pursuant to the grant of special leave to appeal, Austral Pacific Group Limited ("the defendant") appeals against an order of the Court of Appeal of Queensland. That order resulted in the striking out of the defendant's claim for contribution or indemnity against Airservices Australia ("the third party").

38 The defendant has been sued in the District Court of Queensland for damages for personal injury. For the purposes of this appeal, the relevant claim of the plaintiff in that action is that he sustained injuries as the result of the defendant's negligence. The third party is a Commonwealth authority within the meaning of s 4(1) of the *Safety, Rehabilitation and Compensation Act* 1988 (Cth) ("the Compensation Act") which provides for compensation to employees of Commonwealth authorities who are injured at work. For the purposes of this appeal, the position of the third party is as if it had been, at all relevant times, the employer of the plaintiff.

39 The issue in this appeal is whether the third party is a tortfeasor "who is, or would if sued have been, liable" in respect of the same damage for which the defendant is liable. That issue arises in circumstances where the plaintiff has not received compensation under the Compensation Act, nor has he made an election to institute proceedings for damages against the third party.

40 In response to the plaintiff's claim, the defendant filed a third party notice as well as a defence. The notice claimed indemnity or contribution from the third party pursuant to ss 6 and 7 of the *Law Reform Act* 1995 (Q) ("the Contribution Act"). Subsequently, the third party moved to strike out the notice, but Trafford-Walker DCJ dismissed the application. On appeal, the Court of Appeal of the Supreme Court of Queensland (McPherson, Pincus JJA and Ambrose J) ordered that the notice be struck out³⁴.

The statutory background

41 Sections 6(c) and 7 of the Contribution Act relevantly provide:

"Proceedings against, and contribution between, joint and several tortfeasors

6. Where damage is suffered by any person as a result of a tort (whether a crime or not) –

...

34 *Airservices Australia v Austral Pacific Group Ltd* (1998) 157 ALR 125.

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- (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by the person in respect of the liability in respect of which the contribution is sought.

Amount of contribution and power of the court

7. In any proceedings for contribution ... the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

42 Sections 44(1) and 45 of the Compensation Act provide:

"Action for damages not to lie against Commonwealth etc. in certain cases

44. (1) Subject to section 45, an action or other proceeding for damages does not lie against the Commonwealth, a Commonwealth authority, a licensed corporation or an employee in respect of:

- (a) an injury sustained by an employee in the course of his or her employment, being an injury in respect of which the Commonwealth, Commonwealth authority or licensed corporation would, but for this subsection, be liable (whether vicariously or otherwise) for damages; or
- (b) the loss of, or damage to, property used by an employee resulting from such an injury;

whether that injury, loss or damage occurred before or after the commencement of this section.

Actions for damages – election by employees

45. (1) Where:

- (a) compensation is payable under section 24, 25 or 27 in respect of an injury to an employee; and

16.

- (b) the Commonwealth, a Commonwealth authority, a licensed corporation or another employee would, but for subsection 44(1), be liable for damages for any non-economic loss suffered by the employee as a result of the injury;

the employee may, at any time before an amount of compensation is paid to the employee under section 24, 25 or 27 in respect of that injury, elect in writing to institute an action or proceeding against the Commonwealth, the Commonwealth authority, the licensed corporation or other employee for damages for that non-economic loss.

- (2) Where an employee makes an election:

- (a) subsection 44(1) does not apply in relation to an action or other proceeding subsequently instituted by the employee against the Commonwealth, the Commonwealth authority, the licensed corporation or the other employee for damages for the non-economic loss to which the election relates; and
- (b) compensation is not payable after the date of the election under section 24, 25 or 27 in respect of the injury.

- (3) An election is irrevocable.

- (4) In any action or proceeding instituted as a result of an election made by an employee, the court shall not award the employee damages of an amount exceeding \$110,000 for any non-economic loss suffered by the employee."

43 Sections 24 and 25 of the Compensation Act set out the circumstances where compensation is payable to the employee in respect of injuries resulting in permanent impairment. If there has been permanent impairment, s 27 provides for additional compensation for non-economic loss to be paid to the employee.

The liability of the Commonwealth under a State law

44 How does the defendant obtain a right to bring proceedings against the third party (a Commonwealth authority) in a State court under a State law? Sections 39, 64 and 79 of the *Judiciary Act* 1903 (Cth) provide the mechanism. Section 39(2) relevantly provides:

"The several Courts of the States shall within the limits of their several jurisdictions ... be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it ..."

45 Section 64 provides:

"In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject."

46 Section 79 provides:

"The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

47 These provisions of the *Judiciary Act* do not apply to proceedings unless a court has jurisdiction to hear one of the matters specified in ss 75 and 76 of the Constitution.

48 Section 75(iii) of the Constitution vests original jurisdiction in the High Court in all matters "in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party". In a number of cases, the Court has held that various Commonwealth statutory corporations were persons "suing or being sued on behalf of the Commonwealth" for the purposes of s 75(iii)³⁵. In *Inglis v Commonwealth Trading Bank of Australia*³⁶, however, the Court expressed a difference of opinion on the question whether the Commonwealth Trading Bank was "the Commonwealth" or "a person suing or being sued on behalf of the Commonwealth". In *Maguire v Simpson*³⁷ the Court decided that the Commonwealth Trading Bank was "the Commonwealth" for the purposes of s 64 of the *Judiciary Act*. In a number of cases, a Commonwealth

35 *Repatriation Commission v Kirkland* (1923) 32 CLR 1 (although s 75(iii) was not directly raised, the action giving rise to the issue in this case was one where a person had sued the Repatriation Commission in tort, and the Court accepted that the Repatriation Commission was the Crown); *Bank of NSW v The Commonwealth* (1948) 76 CLR 1; *Steele v Defence Forces Retirement Benefits Board* (1955) 92 CLR 177; *State Bank (NSW) v Commonwealth Savings Bank* (1984) 154 CLR 579.

36 (1969) 119 CLR 334.

37 (1977) 139 CLR 362.

statutory corporation was simply held to be within some part of s 75(iii)³⁸. In *Deputy Commissioner of Taxation v State Bank (NSW)*, the Court said³⁹:

"No doubt [the words 'a person suing or being sued on behalf of the Commonwealth'] were included in order to ensure that the jurisdiction conferred extended to cases in which the Commonwealth itself was not the nominal plaintiff or defendant. But that circumstance cannot operate as a reason for reading the references to the Commonwealth in the Constitution in a restricted sense."

Although nothing turns on it in this appeal, the better view is that, in both s 75(iii) of the Constitution and s 64 of the *Judiciary Act*, "the Commonwealth" includes Commonwealth statutory corporations or authorities⁴⁰ like the third party in the present case.

49 Section 76(ii) of the Constitution provides that the Parliament may make laws conferring original jurisdiction on the High Court in "any matter ... arising under any laws made by the Parliament". The Compensation Act is such a law.

50 When the plaintiff initiated his common law action for damages for negligence against the defendant in the District Court of Queensland (a "Court of a State" for the purposes of s 39 of the *Judiciary Act*), that court had State jurisdiction⁴¹ to determine the issues between the plaintiff and the defendant. When the defendant issued the third party notice, however, that court became seized of federal jurisdiction⁴² which vested in it in accordance with s 39(2) of

38 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 458, 463; *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 73-74 [15]. See also s 4(1) of the Compensation Act.

39 (1992) 174 CLR 219 at 232.

40 Section 7(1) of the *Commonwealth Authorities and Companies Act* 1997 (Cth) relevantly defines a Commonwealth authority as a body that holds money on its own account and is a body corporate that is incorporated for a public purpose by an Act or by regulations under an Act.

41 "State jurisdiction is the authority which State Courts possess to adjudicate under the State Constitution and laws": *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 per Isaacs J.

42 "[F]ederal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws": *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 per Isaacs J. This simple exposition of the concept of "federal jurisdiction" gives no indication of the complexity it has
(Footnote continues on next page)

the *Judiciary Act*. That was because there was then a matter for the purposes of ss 75(iii) and 76(ii) of the Constitution before the District Court. Moreover, that vesting of federal jurisdiction displaced the State jurisdiction that had hitherto existed in respect of the action between the plaintiff and the defendant: henceforth the whole proceedings were in federal jurisdiction⁴³.

51 Sections 79 and 80 of the *Judiciary Act* apply to "all Courts exercising federal jurisdiction". They include State courts vested with federal jurisdiction under s 39(2) of the *Judiciary Act*. Sections 79 and 80 "facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law"⁴⁴. They provide a body of law consisting of the laws of the Commonwealth and, subject to certain limitations⁴⁵, the laws of the States and Territories, and the common law of Australia as modified by the Constitution and by the statute law of the States and Territories.

52 Section 80 is not relevant in these proceedings. Section 79 may operate to "pick up" a particular State law to govern the rights and liabilities of the parties if the Constitution or the laws of the Commonwealth have not "otherwise provided"⁴⁶. The parties in proceedings to which s 79 applies need not include the Commonwealth. In proceedings between a State and a resident of a different

assumed since then. See, for example, *Northern Territory v GPAO* (1999) 196 CLR 553.

43 *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 868-871 [133]-[149]; 163 ALR 270 at 310-314.

44 *Northern Territory v GPAO* (1999) 196 CLR 553 at 588 [80] per Gleeson CJ and Gummow J.

45 Section 79 directs the application of the laws of each State or Territory "except as otherwise provided by the Constitution or the laws of the Commonwealth". Section 80 directs the application of the common law of Australia "[s]o far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment" and "so far as [the common law of Australia] is applicable and not inconsistent with the Constitution and the laws of the Commonwealth".

46 To determine whether a Commonwealth law "otherwise provided" for the purposes of s 79, one looks at whether the operation of the Commonwealth law so reduces the ambit of the State law that the provisions of the Commonwealth law are irreconcilable with the provisions of the State law: *Northern Territory v GPAO* (1999) 196 CLR 553 at 588 [81]. This s 79 kind of "inconsistency" should be compared with the two kinds of s 64 "inconsistency" discussed later.

State (a s 75(iv) matter)⁴⁷, for example, a State court will be exercising federal jurisdiction by virtue of s 39(2). When s 79 does apply to proceedings, it "picks up" every relevant State law but with its meaning unchanged⁴⁸. If the State law does not or cannot bind the Commonwealth, for example, s 79 does not apply to the Commonwealth in respect of that law. Further, s 79 is not a law "conferring rights to proceed against the Commonwealth" for the purposes of s 78 of the Constitution. Nor, in my opinion, does a law "picked up" by s 79 confer a right to proceed against the Commonwealth. Rather, the law "picked up" by s 79 may, in an appropriate case, become the measure of the Commonwealth's liability. But s 79 does not itself make the Commonwealth liable, directly or through the "picked up" law. If the defendant is the Commonwealth, something more than s 79 is required to make the Commonwealth liable in the proceedings.

53 In this appeal, for the reasons given by Gleeson CJ, Gummow and Hayne JJ, the Compensation Act was not a Commonwealth law that "otherwise provided" within the meaning of s 79 of the *Judiciary Act*. Section 79, therefore, did not exclude, but operated to "pick up", ss 6 and 7 of the Contribution Act. If those sections apply to the third party, they give rise to a potential liability on its part to contribute to or indemnify the defendant in respect of any damages payable to the plaintiff. However, no proceedings under ss 6 or 7 of the Contribution Act can be brought against the third party unless the defendant can point to another law that enabled it to bring a claim under those sections as if they were a "surrogate Commonwealth law"⁴⁹. That is because ss 6 and 7 cannot of their own force give rise to a right against the third party even though s 79 makes them potentially determinative of the third party's liability to contribute or indemnify.

54 In *Maguire v Simpson*⁵⁰, this Court held that s 64 together with s 79 operated in that case to make a New South Wales limitation law binding on the Commonwealth. Gibbs J said⁵¹:

"[A] State law may be rendered applicable by s 79 to a court exercising federal jurisdiction ... [Section] 79 does not enable a court exercising

47 See, for example, the facts of *Commissioner for Railways (Q) v Peters* (1991) 24 NSWLR 407, although in that case s 79 was not addressed, only s 64.

48 *Pedersen v Young* (1964) 110 CLR 162 at 165-166 per Kitto J.

49 *Maguire v Simpson* (1977) 139 CLR 362 at 408 per Murphy J. See also *The Commonwealth v Mewett* (1997) 191 CLR 471 at 514 per Toohey J.

50 (1977) 139 CLR 362.

51 (1977) 139 CLR 362 at 376-377.

federal jurisdiction to give an altered meaning to a State statute which it is required to apply⁵². *Section 79 therefore has nothing to say on the question whether a State statute which is to be applied by a court exercising federal jurisdiction becomes binding on the Commonwealth. ...*

However, s 64 of the Judiciary Act provides as follows: ... *The effect of s 64, stated more directly, is that the Limitation Act, which is to be applied in the proceedings by virtue of s 79, is rendered applicable to the Commonwealth as though it were a subject, and therefore binds the Bank. The Limitation Act is so applied by force of Commonwealth law, and not by its own force as a State law.*" (emphasis added)

55 This passage brings out the important point that s 79 alone cannot make the Commonwealth or its instrumentalities liable in proceedings in federal jurisdiction. In the present case, the defendant relied only on s 64 of the *Judiciary Act* to make the Commonwealth liable. It becomes necessary therefore to determine whether s 64 makes the third party liable to contribute or indemnify in accordance with the provisions of ss 6 and 7 of the Contribution Act.

56 Some propositions concerning s 64 are beyond doubt. First, s 64 is a source of substantive, not just procedural, rights⁵³. Second, s 64 only applies in suits in federal jurisdiction⁵⁴. Third, s 64 requires for its operation an existing suit to which the Commonwealth is a party. Once a suit against the Commonwealth is commenced⁵⁵ the condition upon which s 64 operates is satisfied. The claimant does not need to prove that there is some other law which gave him or her a cause of action *before* the suit was commenced⁵⁶. Fourth, s 64 cannot confer a

52 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 80-81, 83, 88, 94-95.

53 *Maguire v Simpson* (1977) 139 CLR 362.

54 *Bass v Permanent Trustee Co Ltd* (1999) 73 ALJR 522 at 529 [26]; 161 ALR 399 at 409.

55 *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 263-264: on the requirement for an existing suit to which the Commonwealth is a party, following *The Commonwealth v Anderson* (1960) 105 CLR 303; on jurisdiction, referring to s 75(iii) of the Constitution and s 39(2) of the *Judiciary Act*.

56 Although there does not need to be some other law which has given the claimant a cause of action *before* the suit is commenced, there must be a liability sought to be enforced against the Commonwealth. As discussed later, the source of that liability may be the common law (as in *The Commonwealth v Mewett* (1997) 191 CLR 471), or it may be a law of a State that is "picked up" by s 79 of the *Judiciary Act*.

right by applying a State law if that law is inconsistent with a law of the Commonwealth so that it would be rendered inoperative by s 109 of the Constitution⁵⁷. Fifth, s 64 "enjoys no special authority among the statutes of the Commonwealth. It is neither a constitutional provision nor an entrenched law."⁵⁸ Sixth, it follows from the last proposition that inconsistency between s 64 and another Commonwealth law may prevent s 64 applying to the proceedings. Another law of the Commonwealth, for example, may expressly or impliedly amend or repeal s 64 because s 64 is a general law and the other law is a special law of the Commonwealth or because s 64 is the earlier law and is amended or repealed by the other law⁵⁹. Seventh, s 64 does not apply a State law to the Commonwealth if the State law expressly excludes the Commonwealth from its application⁶⁰.

- 57 Two matters that are not yet resolved in the jurisprudence of this Court are the extent to which s 64 validly applies to the States⁶¹, particularly when a State is the plaintiff, and the extent to which the operation of s 64 may conflict with the *Cigamatic*⁶² doctrine⁶³. Neither of these questions arise in this appeal.

57 *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 331-332; *Bass v Permanent Trustee Co Ltd* (1999) 73 ALJR 522 at 530 [29]-[30]; 161 ALR 399 at 410-411.

58 *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 63.

59 *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 63-64; *Bass v Permanent Trustee Co Ltd* (1999) 73 ALJR 522 at 530 [30]-[31]; 161 ALR 399 at 410-411.

60 "[I]t is the rights of parties as in a suit between subject and subject, not the law, that are to apply as nearly as may be": *The Commonwealth v Anderson* (1960) 105 CLR 303 at 310 per Dixon CJ.

61 See, for example, *Maguire v Simpson* (1977) 139 CLR 362 at 401 per Mason J, 404-405 per Jacobs J; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 203 per Gibbs J; *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 263 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ; cf *Commissioner for Railways (Q) v Peters* (1991) 24 NSWLR 407.

62 *The Commonwealth v Cigamatic Pty Ltd (In liq)* (1962) 108 CLR 372.

63 See, for example, *Maguire v Simpson* (1977) 139 CLR 362 at 390 per Gibbs J, 402 per Mason J, 403-404 per Jacobs J; *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 267 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ; *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing* (Footnote continues on next page)

58 If it were not for the decision in *The Commonwealth v Evans Deakin Industries Ltd*⁶⁴, it might seem difficult to use s 64 to apply ss 6 and 7 of the Contribution Act to the third party. Those sections could not bind a Commonwealth instrumentality of their own force; s 79 of the *Judiciary Act* does not change the meaning of a State law which it "picks up"; and, at the commencement of the plaintiff's action, s 64 had no application to the proceedings. Nor is there any common law basis upon which the third party could be made liable to contribute or indemnify.

59 In *The Commonwealth v Mewett*⁶⁵, the Court held that, in an action against the Commonwealth in tort, the common law provides the source of the liability and s 75(iii) "applies to deny any operation to what otherwise might be doctrines of Crown or executive immunity which might be pleaded in bar to any action to recover judgment for damages in respect of that common law cause of action."⁶⁶ A cause of action in tort or contract can be brought against the Commonwealth by virtue of the combined operation of the common law and the Constitution, without reference to s 78 of the Constitution or s 64 of the *Judiciary Act*. But the defendant cannot rely on any common law source in this case to make out its claim against the third party.

60 Nevertheless, even if no source of liability at common law can be shown, the Commonwealth or its instrumentalities may be made liable. The decisions of this Court, particularly *Evans Deakin*⁶⁷, show that ss 64 and 79 of the *Judiciary Act* can combine to make the Commonwealth and its instrumentalities liable⁶⁸ where the source of the rights and liabilities is State legislation. If there is no impediment to "picking up" a relevant State law, s 79 will "pick it up" so as to provide a substantive body of law for determining the rights and liabilities of the

Authority (1997) 190 CLR 410 at 428 per Brennan CJ, 460 per McHugh J, 474 per Gummow J.

64 (1986) 161 CLR 254.

65 (1997) 191 CLR 471.

66 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 551 per Gummow and Kirby JJ.

67 (1986) 161 CLR 254.

68 In *The Commonwealth v Mewett* (1997) 191 CLR 471 at 514, Toohey J said: "Sections 64 and 79 of the *Judiciary Act* in combination 'pick up' a State limitation statute which 'becomes, for this purpose, surrogate Commonwealth law'", adopting Murphy J's description (in *Maguire v Simpson* (1977) 139 CLR 362 at 408) of the State law becoming a "surrogate Commonwealth law" by operation of s 64.

parties "as in a suit between subject and subject". Section 64 then makes that body of law binding on the Commonwealth as if it were a Commonwealth law and gives a right to proceed against the Commonwealth.

61 There may seem to be a paradox in this process. There is no right to proceed until the State law, which is the source of the liability, is "picked up" and applied as if it were a "surrogate Commonwealth law". And the State law is only "picked up" by a person initiating proceedings against the Commonwealth. The initiating of proceedings would seem to presuppose the existence of a source of liability. Yet no such source of liability existed before the commencement of the suit to which the Commonwealth is a party. Given this Court's decision in *Evans Deakin*⁶⁹, however, no paradox exists.

62 When the Commonwealth or one of its instrumentalities is a party, the court is exercising federal jurisdiction. Sections 64 and 79 (and, in some cases, s 80) operate together and simultaneously in those cases where they can so operate. Once s 64 is engaged, it gives the right or cause of action by reference to the law which s 79 "picks up". This does not mean that s 64 "has the effect that upon the commencement of a suit the Commonwealth becomes subject to obligations which did not exist beforehand."⁷⁰ The reason is that "[i]f it is possible to say that once a suit is commenced the Commonwealth will be held liable, it follows that it can also be said, before the suit is commenced, that the events which have happened have created a liability which will be recognized and enforced in legal proceedings."⁷¹ Because that is so, the Commonwealth or its instrumentality can be made liable upon it becoming a party to proceedings even though immediately before the proceedings commenced it had no actual liability.

63 In some circumstances, however, s 64 or s 79 or both may not operate. If the Compensation Act, for example, had provided that "no action for damages or other statutory proceeding lies against the Commonwealth", then, on the same facts as in this appeal, no action would lie under ss 6 and 7 of the Contribution Act. On that hypothesis, when the defendant filed the third party notice:

69 (1986) 161 CLR 254.

70 *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 266.

71 *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 265-266.

25.

- (a) the jurisdiction of the State court would switch to federal jurisdiction;
- (b) s 79 would not "pick up" ss 6 and 7 of the Contribution Act because a law of the Commonwealth had "otherwise provided"; and
- (c) there would be no "picked up" law on which s 64 could operate or, to put it another way, the Compensation Act, as a later Commonwealth law, would be inconsistent with s 64 which would be impliedly repealed by the Compensation Act⁷².

64 Other examples readily come to mind. In some of the decided cases, the better view is that both ss 64 and 79 did not apply to the proceedings even though those cases were decided on the non-application of only one of those sections. Thus, in *Dao v Australian Postal Commission*⁷³, the Court held that s 64 did not apply to the proceedings because the State law was inconsistent with a Commonwealth law. In that case, it appears that s 64 was treated as the provision which would have "picked up" the State law but for the inconsistency⁷⁴. The effect of s 79 in that case was not addressed. If, as I think, s 79 is the provision that furnishes the body of law which is to be applied by a court exercising federal jurisdiction and s 64 is the provision that gives a right to proceed against the Commonwealth, then arguably in *Dao* the State law was not "picked up" by s 79. That is because, within the meaning of that section, the Constitution or a Commonwealth law "otherwise provided". Section 64 was equally inoperative, as there was no "picked up" law on which it could operate to expose the Commonwealth to a liability arising under a "surrogate Commonwealth law".

The defendant's claim fails

65 In this appeal, s 64 applied to give the defendant a right to proceed against the third party. And s 79 "picked up" the Contribution Act and applied it to the third party as a "surrogate Commonwealth law". However, the provisions of the Compensation Act so operated that, on its proper construction, the third party

72 *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 63-64; *Bass v Permanent Trustee Co Ltd* (1999) 73 ALJR 522 at 530 [30]-[31]; 161 ALR 399 at 410-411.

73 (1987) 162 CLR 317.

74 "[Section 64] was intended to fill what would otherwise be lacunae or gaps in the law of the Commonwealth": *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 331.

was not a tortfeasor "who is, or would if sued have been, liable" for the purposes of the Contribution Act.

66 At all relevant times:

- (a) the plaintiff had not made or purported to make an election to institute proceedings against the third party pursuant to s 45 of the Compensation Act; and
- (b) the plaintiff had not received compensation under ss 24, 25 or 27 of the Compensation Act.

67 No election having been made by the plaintiff, the Commonwealth could not be sued by the plaintiff. The defendant submits nevertheless that there was (or there could be in the future) a time when, all appropriate steps having been taken by the plaintiff under the Compensation Act to institute proceedings against the third party, the third party was (or could be in the future) a tortfeasor who "would if sued have been" liable. The defendant relies on *Brambles Constructions Pty Ltd v Helmers*⁷⁵, and in particular on the judgment of Windeyer J where his Honour said⁷⁶ that "a tort-feasor who if sued would have been liable, denotes any person who would have been held liable in tort had he been sued in a competent court, by proper process, at a proper time and on evidence properly presented". The provisions of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), which were considered by the Court in *Brambles Constructions*, are relevantly the same as those in the Contribution Act.

68 However, this submission of the defendant must be rejected. *Georgiadis v Australian and Overseas Telecommunications Corporation*⁷⁷ determined that s 44(1) of the Compensation Act operated not just to bar but to extinguish an action against the Commonwealth or a Commonwealth authority⁷⁸ in respect of an injury sustained by an employee in the course of his or her employment⁷⁹.

75 (1966) 114 CLR 213.

76 *Brambles Constructions Pty Ltd v Helmers* (1966) 114 CLR 213 at 221.

77 (1994) 179 CLR 297.

78 Sections 44(1) and 45 of the Compensation Act deal with an action for damages against the Commonwealth, a Commonwealth authority, a licensed corporation or an employee. For the purposes of this appeal, it is unnecessary to look at the position of licensed corporations and employees.

79 *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 306-307 per Mason CJ, Deane and Gaudron JJ, 310 per Brennan J.

Section 45(1) permits the employee, in certain circumstances, to elect in writing to institute an action against the Commonwealth or a Commonwealth authority. Section 45(2) has the effect that, "in relation to an action ... *subsequently instituted* by the employee", s 44(1) does not apply (emphasis added). Until the employee makes the election and subsequently institutes the action against the Commonwealth or the Commonwealth authority, however, there is not and has never been a time when the Commonwealth or the Commonwealth authority could be sued for damages in respect of the injury sustained by the employee. The plaintiff does not have and never has had a cause of action against the third party. The third party is not therefore a tortfeasor "who is, or would if sued have been, liable in respect of the same damage". Nothing said in *Brambles Constructions*⁸⁰ assists the defendant. Section 6 of the Contribution Act has no temporal connotation. But for that provision to apply there must be a recognisable liability of the party from whom contribution or indemnity is sought. Here there is none.

69 Accordingly, the Court of Appeal was correct in holding that the third party was not liable under the Contribution Act and in ordering that the third party notice be struck out.

Order

70 The appeal should be dismissed with costs.

80 (1966) 114 CLR 213.

- 71 CALLINAN J. This appeal raises questions as to the application of the statute law of the States in proceedings instituted by an "employee" within the meaning of s 5 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ("the Act") of an Authority of the Commonwealth for damages for personal injuries, and in which the defendant seeks to claim contribution or indemnity from that Authority.

The Facts

- 72 The plaintiff who is not a party to this appeal was employed in 1994 as a firefighter by the Civil Aviation Authority ("the CAA"), a Commonwealth Corporation, at Cairns airport in Queensland. He suffered injuries on 26 February of that year when, in alighting from a fire engine he stepped on to an aluminium step attached to the vehicle from which a tread became detached causing him to fall to the ground. He has, it is accepted by the parties, an arguable case that significant impairment has resulted from an injury that he suffered in the fall.
- 73 The plaintiff did not sue his employer. He chose to sue Austral Pacific Group Limited ("APGL") in the District Court of Queensland, alleging that it had supplied the appliance to the CAA and was legally responsible for the defective condition of the step. The plaintiff's claim was in tort, or alternatively, for breach of ss 71 and 74 of the *Trade Practices Act 1974* (Cth).
- 74 Since the accident the CAA has been abolished by statute and its assets and liabilities transferred to a third party, Airservices Australia ("AA")⁸¹, which is a Commonwealth Authority within the meaning of the Act.

81 *Air Services Act 1995* (Cth):

"Interpretation

3. (1) In this Act, unless the contrary intention appears:

...

'[A]uthority of the Commonwealth' includes the following:

...

- (d) a body, whether incorporated or not, established for a public purpose by or under a law of the Commonwealth or of a Territory;
- (e) the holder of an office established for a public purpose by or under a law of the Commonwealth or of a Territory;

(Footnote continues on next page)

75 In the proceedings in the District Court, APGL filed a defence, and delivered a Third Party Notice to AA, claiming indemnity or contribution on the basis that it failed to maintain the steps in a safe condition.

76 AA applied to strike out the Third Party Notice on the ground that it was not, within the meaning of s 6(c)⁸² of the *Law Reform Act 1995* (Q) a tortfeasor

-
- (f) a company in which the Commonwealth owns shares that carry more than half the voting power".

"Establishment of AA

7. (1) A body called Airservices Australia is established by this subsection.

(2) AA:

- (a) is a body corporate; and
- (b) must have a seal; and
- (c) may sue and be sued in its corporate name.

Note: The *Commonwealth Authorities and Companies Act 1997* applies to AA. That Act deals with matters relating to Commonwealth authorities, including reporting and accountability, banking and investment, and conduct of officers.

..."

82 "Proceedings against, and contribution between, joint and several tortfeasors

6. Where damage is suffered by any person as a result of a tort (whether a crime or not) –

- (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;
 - (b) if more than 1 action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the spouse, parent, or child of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) – the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the
- (Footnote continues on next page)

"who is, or would if sued have been, liable in respect of the same damage" as the defendant APGL. That contention was based on the provisions of s 44⁸³ and s 45⁸⁴ of the Act: its rationale was that unless and until an employee elected to

judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;

- (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by the person in respect of the liability in respect of which the contribution is sought."

83 "Action for damages not to lie against Commonwealth etc. in certain cases

(1) Subject to section 45, an action or other proceeding for damages does not lie against the Commonwealth, a Commonwealth authority, a licensed corporation or an employee in respect of:

- (a) an injury sustained by an employee in the course of his or her employment, being an injury in respect of which the Commonwealth, Commonwealth authority or licensed corporation would, but for this subsection, be liable (whether vicariously or otherwise) for damages; or
- (b) the loss of, or damage to, property used by an employee resulting from such an injury;

whether that injury, loss or damage occurred before or after the commencement of this section.

(2) Subsection (1) does not apply in relation to an action or proceeding instituted before the commencement of this section."

84 "Actions for damages – election by employees

- (1) Where:
 - (a) compensation is payable under section 24, 25 or 27 in respect of an injury to an employee; and
 - (b) the Commonwealth, a Commonwealth authority, a licensed corporation or another employee would, but for subsection 44(1), be
- (Footnote continues on next page)

sue his employer the employer was not a tortfeasor "who is, or would if sued have been, liable in respect of the same damage".

77 There is no evidence that the employee has elected to institute proceedings. He has not however, received such benefits under the Act as would preclude him from doing so.

78 The application to strike out the Third Party Notice was dismissed at first instance. On appeal to the Court of Appeal of Queensland (McPherson, Pincus JJA and Ambrose J) the application was allowed.

79 The arguments in the District Court and the Court of Appeal did not focus upon the question which was extensively argued in this Court, whether on its proper construction, Pt IV (ss 42-52) of the Act discloses an intention to state exhaustively the liabilities of the Commonwealth and its Authorities in a case such as the present.

80 In the Court of Appeal McPherson JA adopted what was said by the Court of Appeal of New South Wales (Sheller JA with whom Meagher JA and

liable for damages for any non-economic loss suffered by the employee as a result of the injury;

the employee may, at any time before an amount of compensation is paid to the employee under section 24, 25 or 27 in respect of that injury, elect in writing to institute an action or proceeding against the Commonwealth, the Commonwealth authority, the licensed corporation or other employee for damages for that non-economic loss.

(2) Where an employee makes an election:

(a) subsection 44(1) does not apply in relation to an action or other proceeding subsequently instituted by the employee against the Commonwealth, the Commonwealth authority, the licensed corporation or the other employee for damages for the non-economic loss to which the election relates; and

(b) compensation is not payable after the date of the election under section 24, 25 or 27 in respect of the injury.

(3) An election is irrevocable.

(4) In any action or proceeding instituted as a result of an election made by an employee, the court shall not award the employee damages of an amount exceeding \$110,000 for any non-economic loss suffered by the employee."

Beazley JA agreed) in *Commonwealth of Australia v Flaviano*⁸⁵ that the language of s 44(1) of the Act⁸⁶:

"forces the conclusion that unless and until an employee makes an election s 44(1) applies and no action lies. Put another way, until Mr Flaviano made an election in writing to institute an action, s 44(1) prevented him from suing the Commonwealth in respect of the injury sustained by him."

- 81 Pincus JA regarded the construction of the Act preferred by the Court of Appeal of New South Wales as "technical" and artificial but held that the Court should apply that decision as a decision of a co-ordinate court on the meaning of a federal statute⁸⁷. Ambrose J was of a similar mind to Pincus JA⁸⁸.

The Appeal to this Court

- 82 In this Court the appellant submits that the respondent is a person who if sued would have been liable under s 6(c) of the *Law Reform Act* because the expression "any other tortfeasor who is, or would if sued have been, liable" extends to a party who, if appropriate steps were taken by the plaintiff would be found to be liable: that the fact that the plaintiff may not have given a notice before action is an irrelevant circumstance. The appellant bases its argument upon the reasoning and decision of this Court in *Brambles Constructions Pty Ltd v Helmers*⁸⁹ and relies principally upon a statement made by Windeyer J in that case⁹⁰:

"The description, a tort-feasor who if sued would have been liable, denotes any person who would have been held liable in tort had he been sued in a competent court, by proper process, at a proper time and on evidence properly presented – that is anyone whose liability as a tort-feasor could have been ascertained in an action."

85 (1996) 40 NSWLR 199 at 204. See *Coomblas v Gee* (1998) 72 SASR 247.

86 (1998) 157 ALR 125 at 127.

87 (1998) 157 ALR 125 at 128.

88 (1998) 157 ALR 125 at 133.

89 (1966) 114 CLR 213.

90 (1966) 114 CLR 213 at 221.

83 There, the Court was concerned with the question whether the words in the
New South Wales contribution legislation, which are relevantly the same as those
to be construed here, should have imported into them any temporal element⁹¹.

84 Barwick CJ, with whom McTiernan J agreed, in reasoning similar to that of
Windeyer J held that they should not, as did Owen J⁹².

85 It was also part of the appellant's submission that the giving of a notice of
election as required by the Act should not be regarded as a necessary element of
the cause of action against a Commonwealth Authority such as the respondent:
that so to construe the Act produces the result that the characterisation of the
respondent as a tortfeasor or not depends on the whim of the plaintiff and not on
the tortious conduct of the Authority.

86 In order to decide this case it is necessary to consider Pt IV of the Act in
context with other sections of it.

87 Sections 1 to 9 are concerned with the application of the Act and the
calculation of wages, of employees covered by it, for the purposes of the Act.

88 Section 14 provides that Comcare, a body established by s 68 of the Act, is
liable to pay compensation in accordance with the Act, in respect of an injury
suffered by an employee covered by the Act. The following sections deal with
such matters as the circumstances giving rise to injury, or death, compensation
for medical expenses, and the method by which earnings are to be calculated⁹³.

89 By s 24, Comcare is liable to pay compensation to an employee in respect
of an injury resulting in permanent impairment. Section 25 makes provision for
payment of compensation after the determination of the degree of permanent
impairment. Section 26 requires that compensation be paid within 30 days after
the date of the assessment of the compensation payable. Section 27 establishes a
formula for the calculation of compensation for non-economic loss.

90 Sections 28 to 41A make provision for the payment of compensation to
enable employees to recoup certain other expenses such as home care expenses,
the redemption of a liability to pay period, that is, compensation by a lump sum
payment, rehabilitation, and reviews of compensation payable.

91 See (1966) 114 CLR 213 at 220 per Barwick CJ.

92 (1966) 114 CLR 213 at 225.

93 ss 14-23.

91 It may be noted that s 44(1) does not state that any employee may either elect to receive compensation or to sue for damages. It provides that⁹⁴:

"Subject to section 45, *an action for damages does not lie* against the Commonwealth, [or] a Commonwealth authority ... in respect of ... an injury sustained by an employee ... in respect of which the Commonwealth, [or] Commonwealth authority ... would, but for this subsection, be liable ... for damages" (emphasis added).

92 However, s 45 does make provision for such an election in the case of a claim for damages for non-economic loss, so long as it be made before any compensation under s 24, 25 or 27 is paid, and so long as the election be made in writing. The consequence of such an election is that the bar against an action against the Commonwealth imposed by s 44 is lifted and compensation is not to be payable under s 24, 25 or 27 in respect of the injury. The election may not be revoked and a ceiling of \$110,000 is imposed in respect of non-economic loss⁹⁵.

93 Section 46 provides that where compensation is payable under the Act, and the employee has instituted proceedings against some other party, the employee must give notice of those proceedings to the Safety, Rehabilitation and Compensation Commission established by s 89A of the Act.

94 Section 47 also obliges an employee who has instituted proceedings against a Commonwealth Authority to give notice to Comcare.

95 Section 48 relevantly provides as follows:

"Compensation not payable where damages recovered

(1) This section applies where:

- (a) an employee recovers damages in respect of an injury to the employee or in respect of the loss of, or damage to, property used by the employee, being an injury, loss or damage in respect of which compensation is payable under this Act; or
- (b) damages are recovered by, or for the benefit of, a dependant of a deceased employee in respect of the death of the employee and compensation is payable under this Act in respect of the injury that resulted in that death.

94 See s 44(1).

95 See s 45(4).

35.

(2) The employee or dependant shall, not later than 28 days after the day on which the damages were recovered, notify Comcare in writing of the recovery of the damages and the amount of the damages.

Penalty: \$1,000.

(3) If, before the recovery of the damages by, or for the benefit of, the employee or dependant, any compensation under this Act was paid to the employee in respect of the injury, loss or damage, or to, or for the benefit of, the dependant in respect of the injury that resulted in the death of the employee, as the case may be, the employee or dependant is liable to pay to Comcare an amount equal to:

- (a) the amount of that compensation; or
- (b) the amount of the damages;

whichever is less.

(4) Compensation is not payable under this Act to the employee in respect of the injury, loss or damage, or to, or for the benefit of, the dependant in respect of the injury that resulted in the death of the employee, after the date on which the damages were recovered by the employee or by, or for the benefit of, the dependant, as the case may be.

(4A) Subsection (3) does not apply where the damages were recovered in proceedings instituted by the employee as a result of an election by the employee under section 45, or by way of a settlement of such proceedings."

96 Section 49 is concerned with cases in which dependants of a deceased employee may have an entitlement to compensation.

97 There is no provision of the Act which deals with claims for indemnity or contribution by a tortfeasor or a joint tortfeasor against the Commonwealth or Commonwealth Authority, although s 50⁹⁶ in terms confers upon Comcare the

96 "Proceedings against third parties

(1) Where:

- (a) an amount of compensation under this Act:

(Footnote continues on next page)

-
- (i) is paid to an employee in respect of an injury to the employee or in respect of the loss of, or damage to, property used by the employee; or
 - ...
 - (b) the injury, loss, damage or death occurred in circumstances that appear to create a legal liability in a person to pay damages in respect of the injury, loss, damage ... ; and
 - (c) proceedings against that person for the purpose of recovering such damages have not been instituted by the employee or by or for the benefit of the dependant, or have been so instituted but have been discontinued or have not been properly prosecuted;

Comcare may institute proceedings or fresh proceedings against the person in the name of the employee or dependant for the recovery of damages in respect of the injury, loss, damage or death or may take over the conduct of the proceedings, as the case requires.

(2) Comcare is liable to pay all costs of or incidental to any proceedings taken over by it, being costs payable by the plaintiff in those proceedings, other than costs unreasonably incurred by the plaintiff.

(3) Where Comcare institutes, or takes over the conduct of, proceedings under this section, Comcare may:

- (a) settle the proceedings, either with or without obtaining judgment; and
- (b) if a judgment is obtained in the proceedings in favour of the plaintiff – take such steps as are necessary to enforce the judgment.

(4) The employee or dependant shall sign any document relevant to proceedings instituted or taken over by Comcare under this section (including the settlement of the proceedings), being a document that Comcare requires the employee or dependant to sign and, if he or she fails to sign any such document, the court or tribunal in which the proceedings are taken may direct that the document be signed on his or her behalf by a person appointed by Comcare for the purpose.

(5) Where Comcare institutes, or takes over the conduct of, proceedings under this section, the employee or dependant shall comply with any reasonable requirement of Comcare for the purpose of the proceedings and, where the employee or dependant fails to comply with any such requirement, the right of the

(Footnote continues on next page)

right to institute proceedings or fresh proceedings against a tortfeasor or joint tortfeasor, whenever an amount of compensation is paid under the Act to an employee, if the employee has not instituted proceedings, has discontinued them, or has not properly prosecuted them. The section is not concerned with circumstances in which damages (as opposed to compensation) are claimed in legal proceedings against the Commonwealth. In other words the section is not intended to operate in the same way as the contribution legislation in circumstances in which two tortfeasors are sued or in which one tortfeasor wishes to establish liability against another in third party proceedings.

employee or dependant to compensation under this Act in respect of the injury, loss, damage or death to which the proceedings relate is suspended until such time as the employee or dependant complies with that requirement.

(6) Where a right to compensation is suspended under subsection (5), compensation is not payable in respect of the period of the suspension.

(7) Any damages awarded under a judgment obtained in proceedings referred to in this section, or payable as a result of the settlement of such proceedings, shall be paid to Comcare and Comcare shall deduct from the amount of those damages:

- (a) an amount equal to the total of all amounts of compensation paid to the employee or dependant under this Act in respect of the injury, loss, damage or death to which the proceedings relate; and
- (b) the amount of any costs of or incidental to those proceedings paid by Comcare;

and shall pay the balance (if any) to the employee or dependant.

(8) Where Comcare pays an amount to an employee or dependant under subsection (7), the employee or dependant is not entitled to receive any further amounts of compensation under this Act in respect of the injury, loss, damage or death to which the proceedings related until the amount of compensation that would, but for this subsection, have been payable to the employee or dependant in respect of that injury, loss, damage or death equals the amount paid by Comcare to the employee or dependant under subsection (7).

(9) In this section:

'person' does not include the Commonwealth, a Commonwealth authority, a licensed corporation or an employee."

Section 51⁹⁷ does give some rights to Comcare to claim reimbursement from a tortfeasor liable to an employee but does not, taken with s 50, make provision for

97 "Payment of damages by persons to Comcare

- (1) Where a person appears to be liable:
 - (a) to pay damages to an employee in respect of an injury to the employee, or in respect of the loss of, or damage to, property used by the employee, being an injury, loss or damage in respect of which an amount of compensation has been paid under this Act; or
 - (b) to pay damages to a dependant of a deceased employee in respect of the death of the employee, where that death resulted from an injury in respect of which an amount of compensation has been paid under this Act;

Comcare may, by notice in writing given to the person, require that:

- (c) if the person agrees to pay damages to the employee in respect of the injury, loss or damage or to the dependant in respect of the death; or
- (d) if damages against the person are awarded to the employee in proceedings instituted in respect of the injury, loss or damage, or to the dependant in proceedings instituted in respect of the death;

the person pay to Comcare so much of the amount of the damages as does not exceed the amount that would be payable by the employee or dependant to Comcare under section 48 or 49 if the damages had been paid to the employee or dependant.

- (2) Subject to subsection (3), where:
 - (a) a person has agreed:
 - (i) to pay damages to an employee in respect of an injury to the employee, or in respect of the loss of, or damage to, property used by the employee, being an injury, loss or damage in respect of which an amount of compensation has been paid under this Act; or
 - (ii) to pay damages to a dependant of a deceased employee in respect of the death of the employee, where that death resulted from an injury in respect of which an amount of compensation has been paid under this Act; or
 - (b) damages against a person have been awarded:

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indemnity or contribution in anything like the same way as the contribution legislation does.

-
- (i) to an employee in proceedings instituted in respect of an injury to the employee or in respect of the loss of, or damage to, property used by the employee, being an injury, loss or damage in respect of which an amount of compensation has been paid under this Act; or
 - (ii) to a dependant of a deceased employee in proceedings instituted in respect of the death of the employee, where that death resulted from an injury in respect of which an amount of compensation has been paid under this Act;

Comcare may, by notice in writing given to the person, require the person to pay to Comcare so much of the amount of the damages as does not exceed the amount that would be payable by the employee or dependant to Comcare under section 48 or 49 if the damages had been paid to or in respect of the employee or dependant.

(3) Where, before a notice under subsection (2) was received by a person, the person had paid to or in respect of the employee or dependant, all or part of the damages to which the notice related:

- (a) if all of the damages had been paid – the notice has no force or effect; or
- (b) if part only of the damages had been paid – the reference in that subsection to the amount of the damages shall be read as a reference to so much of that amount as had not been paid.

(4) If a person fails to pay an amount to Comcare in accordance with a notice under this section, Comcare may recover that amount from the person in a court of competent jurisdiction as a debt due to Comcare.

(5) The payment of an amount to Comcare by a person in accordance with a notice under this section is, to the extent of the amount paid, a discharge of the liability of that person to the employee or dependant and of the liability (if any) of the employee or dependant to Comcare under section 48 or 49.

(6) In this section:

'person' does not include the Commonwealth, a Commonwealth authority, a licensed corporation or an employee."

98 Part V of the Act deals with claims for compensation, the form in which they should be made, their survival in the case of death and the obligations of claimants to provide information and to submit to medical examinations.

99 Reconsideration and review of determinations are the subject of Pt VI, and except to note that decisions may be subject to review under the *Administrative Appeals Tribunal Act 1975* (Cth) need no further comment.

100 Section 69 of the Act, which sets out the functions of Comcare, places emphasis upon the making of determinations accurately and *quickly*⁹⁸.

101 It is unnecessary to refer to the later sections of the Act which are concerned with the funding of Comcare and the Commission and of the financial obligations to employees for which the Act makes provision.

102 The Act does not expressly or in my opinion by implication provide a code, for the prosecution, by or against the Commonwealth, or a Commonwealth Authority, of claims for indemnity or contribution in orthodox litigation against the Commonwealth or against the Commonwealth and another party or parties. As I have pointed out, s 50 is concerned only with a case in which an amount of compensation is paid or payable and s 51 has a limited operation only.

103 As comprehensive as the Act is with respect to compensation payable to relevant employees, it has nothing to say about joint tortfeasors in proceedings for contribution or indemnity. No right to contribution or indemnity between joint tortfeasors existed at common law. Any foundation for such a right is entirely statutory.

104 In this case because the respondent was a Commonwealth Authority established under a Commonwealth Act to carry out functions as a Commonwealth Authority for and on behalf of the Commonwealth, and the claim of the appellant clearly relates to those functions, the District Court of Queensland was exercising federal jurisdiction in a civil matter in dealing with the respondent's application. The question then arises whether either of s 64 or 79 of the *Judiciary Act 1903* (Cth) has the effect of attracting the operation of the Queensland contribution legislation⁹⁹.

105 Section 79 of the *Judiciary Act* provides as follows:

98 See s 69(a).

99 *Law Reform Act 1995* (Q), s 6.

"State or Territory laws to govern where applicable"

The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

106 The section does operate to attract the operation of the Queensland Act because neither the Constitution nor any Commonwealth law otherwise provides. The Act certainly does not, and it was not argued that the respondent, although an Authority of the Commonwealth enjoyed any other immunity on that account.

107 Section 64 which provides as follows may also have an operation here on the application of the reasoning in *Maguire v Simpson*¹⁰⁰:

"Rights of parties"

In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject."

However, neither it nor s 79 of the *Judiciary Act* provides a solution to the appellant's difficulties.

108 In *The Commonwealth v Evans Deakin Industries Ltd*¹⁰¹ Gibbs CJ, Mason, Wilson, Deane and Dawson JJ in discussing the operation of s 64 of the *Judiciary Act* said¹⁰²:

"[I]n deciding whether a private person has a right against the Commonwealth, and the Commonwealth has a corresponding obligation, it must be remembered that once a suit is commenced between those parties the rights of the parties in that suit will as nearly as possible be the same as in a suit between subject and subject. If it is possible to say that once a suit is commenced the Commonwealth will be held liable, it follows that it can also be said, before the suit is commenced, that the events which have

100 (1977) 139 CLR 362.

101 (1986) 161 CLR 254.

102 (1986) 161 CLR 254 at 265-266.

happened have created a liability which will be recognized and enforced in legal proceedings."

109 In this case an event essential to the creation of a liability in the respondent Commonwealth Authority has simply not happened. Literally and substantively the appellant cannot bring itself within the passage from *Evans Deakin* that I have just quoted and which relevantly delineates the boundaries within which s 64 of the *Judiciary Act* is to operate.

110 The circumstances alone of the plaintiff's injuries in February 1994 did not give rise to a right of action against the respondent. It is only those circumstances together with the making of an election in compliance with s 45 of the Act that would do so. In *Georgiadis v Australian and Overseas Telecommunications Corporation*¹⁰³ Mason CJ, Deane and Gaudron JJ said that s 44 puts an end to a cause of action against the Commonwealth, or its agencies, and that it is inaccurate to describe s 44 as a provision which modifies the action of Commonwealth employees against Commonwealth employers. Earlier, I contrasted other introductory language which might have been used such as "an employee may either claim compensation or sue for damages" with the unequivocal words of s 44, "an action ... does not lie".

111 The result is somewhat anomalous and perhaps unintended. It seems unjust that although the Commonwealth or one of its Authorities may have been negligent and responsible in some measure for an employee's injuries, it may escape liability for such damages simply because an employee has chosen to sue a joint tortfeasor only.

112 The appellant also sought to rely upon *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*¹⁰⁴. However, as Gaudron and Gummow JJ¹⁰⁵ make clear in their judgment, that case was concerned with the question of the time at which one tortfeasor might pursue a claim against another, and not, as here, whether the plaintiff has a right of action against another tortfeasor.

113 I would accordingly dismiss the appeal with costs.

¹⁰³ (1994) 179 CLR 297 at 307.

¹⁰⁴ (1998) 196 CLR 53.

¹⁰⁵ (1998) 196 CLR 53 at 66-67 [30]-[31].