HIGH COURT OF AUSTRALIA

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

Matter No A6/2000

RE PETER IVAN MACKS & ORS	RESPONDENTS
EX PARTE ANTHONY JOHN SAINT	APPLICANT

Matter No A9/2000

RE PETER IVAN MACKS & ORS	RESPONDENTS
EX PARTE ANTHONY FRANCIS JOHNSON & ORS	APPLICANTS

Re Macks; Ex parte Saint [2000] HCA 62
Re Macks; Ex parte Johnson
7 December 2000
A6/2000 and A9/2000

ORDER

1. *Order that time for the making of the applications for writs of certiorari be extended.*

2. *Order absolute in the first instance for a writ of certiorari to quash the order of Registrar Carey of 13 June 1995 in proceedings SG3057 of 1995 in the Federal Court of Australia, ordering the winding up in insolvency and the appointment of the first-named eighth respondent as liquidator in respect of one of the companies in the group of companies comprising the second-named eighth respondents.*

3. *Order absolute in the first instance for a writ of certiorari to quash the orders of Registrar Fisher of 20 June 1995, in proceedings SG3074, SG3075, SG3076, SG3077, SG3078 and SG3079 of 1995 in the Federal Court of Australia, ordering the winding up in insolvency and the appointment of the first-named eighth respondent as liquidator in respect of six of the companies in the group of companies comprising the second-named eighth respondents.*

4. *Order absolute in the first instance for a writ of certiorari to quash the orders of O'Loughlin J of 30 August 1995, von Doussa J of 19 December 1995, and Branson J of 21 December 1995 and 24 January 1996, in proceedings SG3080 of 1995 in the Federal Court of Australia, ordering the winding up in insolvency and the appointment of the first-named eighth respondent as liquidator in respect of 54 of the companies in the group of companies comprising the second-named eighth respondents, and declaring void pursuant to s 445G(2) of the Corporations Law any deed of company arrangement entered into by any of those companies.*

5. *Order absolute in the first instance for a writ of certiorari to quash the order of Registrar Carey of 15 August 1995, in proceedings SG3124 of 1995 in the Federal Court of Australia, ordering the winding up in insolvency and the appointment of the first-named eighth respondent as liquidator in respect of one of the companies in the group of companies comprising the second-named eighth respondents.*

6. *Order absolute in the first instance for a writ of certiorari to quash the order of Mansfield J of 8 December 1998 in proceedings SG3080 of 1995 in the Federal Court of Australia, ordering that the first-named eighth respondent, as liquidator of all 64 companies in the group of companies comprising the second-named eighth respondents, had power under the Corporations Law to enter into the funding arrangement with the Commonwealth Bank of Australia and GIO Insurance Ltd.*

7. *Liberty to apply on 21 days notice to a single Justice for the making of an order for a writ of certiorari to quash the order of O'Loughlin J of 31 July 1995 in proceedings SG3050 of 1995 in the Federal Court of Australia ordering the winding up in insolvency and the appointment of the first-named eighth respondent as liquidator in respect of one of the companies in the group of companies comprising the second-named eighth respondents.*

8. *Applications for writs of prohibition dismissed.*

9. *In Matter A6 of 2000, applicant to pay the costs of the first-named eighth respondent and of the ninth respondent.*

10. *In Matter A9 of 2000, applicants to pay the costs of the first-named eighth respondent and of the ninth respondent.*

Representation:

Matter No A6/2000

No appearance for the first to seventh respondents

R J Whitington QC with M F Blue for the eighth respondents (instructed by Ward & Partners)

D M J Bennett QC, Solicitor-General of the Commonwealth with S J Maharaj and C J Horan for the ninth respondent (instructed by Australian Government Solicitor)

M L Abbott QC with K G Nicholson for the applicant (instructed by Piper Alderman)

Matter No A9/2000

No appearance for the first to seventh respondents

R J Whitington QC with M F Blue for the eighth respondents (instructed by Ward & Partners)

D M J Bennett QC, Solicitor-General of the Commonwealth with S J Maharaj and C J Horan for the ninth respondent (instructed by Australian Government Solicitor)

D F Jackson QC with H A L Abbott for the applicants (instructed by Bonnins)

Interveners in both matters:

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

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

B M Selway QC, Solicitor-General for the State of South Australia with R F Gray intervening on behalf of the Attorney-General for the State of South Australia and the Attorney-General of the State of Queensland (instructed by Crown Solicitor for South Australia and Crown Solicitor for Queensland)

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

J L B Allsop SC with K M Guilfoyle intervening on behalf of GIO Insurance Limited (instructed by Corrs Chambers Westgarth)

CATCHWORDS

Re Macks; Ex parte Saint
Re Macks; Ex parte Johnson

Courts and judges – Federal courts – Jurisdiction – Orders made by Federal Court in exercise of jurisdiction conferred by cross-vesting legislation – Status of orders of Federal Court made without jurisdiction – Whether federal law can empower a federal court to make orders binding until set aside in proceedings in which that court had no jurisdiction.

Constitutional law – Inconsistency – State laws providing for rights and liabilities of persons affected by ineffective judgments of federal courts – Whether any inconsistency between State laws and *Federal Court of Australia Act* 1976 (Cth) and *Judiciary Act* 1903 (Cth) – Validity of State laws.

Constitutional law – Invalidity under Chapter III – State laws providing for rights and liabilities of persons affected by ineffective judgments of federal courts – Whether State laws confer jurisdiction upon a State court which is incompatible with Chapter III of the Constitution – Whether State laws repugnant to federal judicial power – Validity of State laws.

Constitutional writs – Applications out of time – Whether certiorari should issue to quash order of federal court made without jurisdiction.

Constitutional law – Interpretation – Substance and form – Significance of distinction – Application to elucidation of suggested inconsistency between federal and State laws and incompatibility of State laws with Chapter III of the Constitution.

Words and phrases – "ineffective judgment", "relevant order", "superior court of record".

Constitution, ss 51(xxxix), 71, 73, 75, 76, 77, 109.
Corporations (South Australia) Act 1990 (SA).
Corporations (Queensland) Act 1990 (Q).
Corporations Law, s 58AA.
Federal Courts (State Jurisdiction) Act 1999 (SA), ss 3, 4, 6, 7, 8, 9, 10, 11, 12, 14.
Federal Courts (State Jurisdiction) Act 1999 (Q), ss 3, 4, 6, 7, 8, 9, 10, 11, 12, 14.
Federal Court of Australia Act 1976 (Cth), ss 5(2), 24, 33.
Judiciary Act 1903 (Cth), ss 35, 39.

1 GLEESON CJ. Between 1987 and 1990, legislation was enacted by the Commonwealth, State and Territory legislatures to provide for cross-vesting of jurisdiction between federal, State and Territory courts. In 1987 the Advisory Committee on the Australian Judicial System, in its *Report to the Constitutional Commission*[1], expressed doubts as to the validity of the proposed legislation, and drafted a constitutional amendment to support it. In 1988, in its *Final Report*[2], the Constitutional Commission recommended that the Constitution be amended to permit cross-vesting. No such amendment was put to a referendum.

2 In 1990, the States of South Australia and Queensland enacted Corporations Laws which, as part of a scheme of cross-vesting, contained provisions purporting to confer jurisdiction on the Federal Court of Australia. The conferral by a State of judicial power on a federal court was the step that had been regarded as of doubtful validity. The South Australian statute was the *Corporations (South Australia) Act* 1990 (SA) ("the South Australian Corporations Act"). The Queensland statute was the *Corporations (Queensland) Act* 1990 (Q) ("the Queensland Corporations Act").

3 There were legal challenges to the validity of the legislation[3]. Finally, on 17 June 1999, in *Re Wakim; Ex parte McNally*[4], this Court held the legislation to be invalid.

4 In the meantime, the Federal Court, exercising jurisdiction purportedly conferred on it by State Acts, including the South Australian Corporations Act and the Queensland Corporations Act, had made orders under the Corporations Laws of the various States. Relevantly to the present proceedings, during 1995 and 1996 the Federal Court made orders that a number of companies in the Emanuel Group be wound up, and that Peter Ivan Macks be appointed liquidator. Some of those companies had been incorporated in South Australia, and some had been incorporated in Queensland. The orders were under the Corporations Law of South Australia and Queensland respectively. Further, in December 1998, the Federal Court made certain funding orders confirming arrangements made by Mr Macks to borrow money for the purpose of certain litigation in the Supreme Court of South Australia.

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1 (1987), pars 3.113-3.115.

2 Vol 1, pars 6.29-6.38.

3 *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451; *Gould v Brown* (1998) 193 CLR 346.

4 (1999) 198 CLR 511.

5 One feature of the scheme of legislation of which cross-vesting was a part, was that it contemplated that, although a company may be wound up by, for example, the Federal Court, orders varying the winding up order, or other orders in the winding up, might be made by, for example, the Supreme Court of South Australia[5].

6 In action 409 of 1998, commenced in the Supreme Court of South Australia by the companies in the Emanuel Group and Mr Macks as liquidator, the plaintiffs sued a firm of lawyers, and an associated company, alleging, amongst other things, breach of fiduciary duty and negligence. A similar action (number 410 of 1998) was commenced, also in the Supreme Court of South Australia, by the same plaintiffs against another firm of lawyers. Those actions were, at the time of the decision in *Re Wakim* on 17 June 1999, and still are, pending.

7 Understandably, having regard to the history of doubt about the validity of aspects of cross-vesting, the State Parliaments moved promptly, after 17 June 1999, to enact remedial legislation. Each State passed an Act entitled the *Federal Courts (State Jurisdiction) Act* 1999 ("the State Jurisdiction Acts"). The validity of part of that remedial legislation was considered, and upheld by this Court, in *Residual Assco Group Ltd v Spalvins*[6].

8 The scheme of the relevant provisions of the South Australian State Jurisdiction Act (which is not materially different from the Queensland State Jurisdiction Act) may be summarised as follows.

9 Section 3 defines the term "State matter" to include a matter in respect of which a relevant State Act purports or purported to confer jurisdiction on a federal court. The South Australian Corporations Act and the Queensland Corporations Act were such State Acts.

10 Section 4 defines the term "ineffective judgment" as a judgment of a federal court in a State matter given or recorded, before the commencement of s 4, in the purported exercise of jurisdiction purporting to have been conferred on the federal court by a relevant State Act. The winding up and funding orders the subject of the present case were ineffective judgments.

11 Sections 6 to 11 and 14 are as follows:

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5 Corporations Law, s 58AA(1) and ss 473 and 480.

6 (2000) 74 ALJR 1013; 172 ALR 366.

"6. The rights and liabilities of all persons are, by force of this Act, declared to be, and always to have been, the same as if –

(a) each ineffective judgment of –

(i) the Federal Court of Australia, otherwise than as a Full Court of the Federal Court of Australia; or

(ii) the General Division of the Family Court of Australia,

had been a valid judgment of the Supreme Court constituted of a single Judge; and

(b) each ineffective judgment of –

(i) a Full Court of the Federal Court of Australia; or

(ii) the Full Court of the Family Court of Australia,

had been a valid judgment of the Full Court of the Supreme Court.

7(1) A right or liability conferred, imposed or affected by section 6 –

(a) is exercisable or enforceable; and

(b) is to be regarded as always having been exercisable or enforceable,

as if it were a right or liability conferred, imposed or affected by a judgment of the Supreme Court.

(2) Without limiting section 6 or subsection (1) of this section, the rights and liabilities conferred, imposed or affected by section 6 include the right of a person who was a party to the proceeding or purported proceeding in which the ineffective judgment was given or recorded to appeal against that judgment.

(3) For the purposes of subsection (2), each ineffective judgment of –

(a) the Federal Court of Australia, otherwise than as a Full Court of the Federal Court of Australia; or

(b) the Family Court of Australia, otherwise than as a Full Court of the Family Court of Australia,

is taken to be a judgment of the Supreme Court constituted of a single Judge.

8(1) Any act or thing done or omitted to be done before or after the commencement of this section under or in relation to a right or liability conferred, imposed or affected by section 6 –

(a) has the same effect, and gives rise to the same consequences, for the purposes of any written or other law; and

(b) is to be regarded as always having had the same effect, and given rise to the same consequences, for the purposes of any written or other law,

as if it were done, or omitted to be done, to give effect to, or under the authority of, or in reliance on, a judgment of the Supreme Court.

(2) For the purposes of an enforcement law, any act or thing done or omitted to be done before or after the commencement of this section gives rise to the same consequences, and is to be regarded as always having given rise to the same consequences, as if each ineffective judgment were a valid judgment of the Supreme Court given in or in relation to the proceeding in or in relation to which the ineffective judgment was given or recorded.

(3) In this section –

'enforcement law' means a provision of a law (other than a law relating to contempt of court) that sets out a consequence for a person if the person –

(a) contravenes; or

(b) acts in a specified way while there is in force,

a judgment, or a particular kind of judgment, given by a court.

9(1) If –

(a) before the commencement of this section, a court gave or recorded an ineffective judgment ('the new judgment') on the basis that an earlier ineffective judgment ('the earlier judgment') was or might be of no effect; and

(b) the new judgment replaced the earlier judgment,

section 6 has no effect in respect of the earlier judgment.

(2) For the purposes of subsection (1)(b), the new judgment replaced the earlier judgment if the new judgment –

(a) purportedly conferred or imposed rights or liabilities similar to or different from those purportedly conferred or imposed by the earlier judgment; or

(b) purportedly affected rights or liabilities in a way similar to or different from the way in which they were purportedly affected by the earlier judgment.

10(1) The Supreme Court may vary, revoke, set aside, revive or suspend a right or liability conferred, imposed or affected by section 6 as if it were a right or liability conferred, imposed or affected by the Supreme Court in or in relation to proceedings of the kind in or in relation to which the ineffective judgment was given or recorded.

(2) In addition to its powers under subsection (1), the Supreme Court also has power to give a judgment achieving any other result that could have been achieved if –

(a) the ineffective judgment had been a valid judgment of the Supreme Court given in or in relation to proceedings of the kind in or in relation to which the ineffective judgment was given or recorded; and

(b) the Supreme Court had been considering whether –

(i) to vary, revoke, set aside, revive or suspend that judgment; or

(ii) to extend the time for the doing of any thing; or

(iii) to grant a stay of proceedings.

11(1) In this section –

'limitation law' means –

(a) the *Limitation of Actions Act* 1936;

(b) any other law that provides for the limitation of liability or the barring of a right of action in respect of a claim by reference to the time when a proceeding on, or the arbitration of, the claim is commenced;

'relevant order' means –

(a) an order of a federal court, whether made before or after the commencement of this section, dismissing, striking out or staying a proceeding relating to a State matter for want of jurisdiction; or

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

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

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

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

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

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

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

…

14. Nothing in this Act applies to –

(a) a judgment given or recorded by the Federal Court of Australia that has been declared to be invalid, or has been quashed or overruled, by a Full Court of the Federal Court of Australia before the commencement of this section (otherwise than on the ground that the Court had no jurisdiction); or

(b) a judgment given or recorded by the Family Court of Australia that has been declared to be invalid, or has been quashed or overruled, by the Full Court of the Family Court of Australia before the commencement of this section (otherwise than on the ground that the Court had no jurisdiction)."

12 The validity of s 11 was established in *Residual Assco*.

13 An accurate identification of the legal operation of s 6 is essential to a resolution of the issue which is now raised as to its validity. The legal effect of the section is expressed in a phrase which is used repeatedly in the succeeding sections when they refer back to s 6. It is to confer, impose, and affect rights and liabilities of persons.

14 The scheme of the remedial legislation was evidently modelled on legislation, which arose out of a similar form of necessity, held to be valid by this Court in *R v Humby; Ex parte Rooney*[7]. That case concerned legislation made necessary by the decisions in *Kotsis v Kotsis*[8] and *Knight v Knight*[9], which held that orders in matrimonial causes purportedly made by certain officers of State Supreme Courts were made without jurisdiction, because the jurisdiction which they purported to exercise could not lawfully be exercised by them. Following those decisions, it became necessary to deal with the rights, liabilities, obligations and status of persons affected by such orders. The *Matrimonial Causes Act* 1971 (Cth) was enacted. It applied in any case in which an officer of a State Supreme Court had made a purported decree, judgment or order. Section 5(3) provided that "[t]he rights, liabilities, obligations and status of all persons are … declared to be, and always to have been, the same as if … the purported decree had been made by the Supreme Court of that State constituted by a [judge]". This Court rejected an argument that such a provision was an interference with judicial power and infringed Ch III of the Constitution.

15 Central to the reasoning of the Court was the conclusion that the legislation did not purport to validate the invalid decrees but, rather, established, as was within legislative competence, rights, liabilities, obligations and status of persons. Historically, divorce was commonly effected by private Act of Parliament. The Parliament's power to make laws with respect to divorce extends to power to dissolve a particular marriage. It has power to declare that the rights and liabilities and status of persons whose marriages were purportedly

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7 (1973) 129 CLR 231.

8 (1970) 122 CLR 69.

9 (1971) 122 CLR 114.

but ineffectively dissolved by a person acting without jurisdiction are to be as if the dissolution had been by a person with jurisdiction. Similarly, it may be observed, the Parliaments of South Australia and Queensland have power, by legislative enactment, to wind up particular companies, or to declare that the rights and liabilities of persons in respect of an ineffective winding up order will be the same as if a winding up order had been made by a person with jurisdiction to do so.

16 In *R v Humby*, Mason J said[10]:

> "It is plain enough that the circumstance that a statute affects rights in issue in pending litigation has not been thought to involve any invasion of the judicial power. ...
>
> Here by legislative action the rights of parties in issue in proceedings which resulted in invalid determinations were declared. The rights so declared in form and in substance were the same as those declared by the invalid determinations. But the legislation does not involve an interference with the judicial process of the kind which took place in *Liyanage v The Queen*[11]".

17 The present proceedings before this Court are brought by the defendants in the two actions that have been brought in the Supreme Court of South Australia. The objective is to prevent those actions from going ahead. To that end, the applicants challenge the standing of Mr Macks who, as liquidator, caused the actions to be commenced. The issues which arise may be summarised as follows. As a first step, the applicants contend that, since the winding up and funding orders were made by the Federal Court without jurisdiction, this Court, in the exercise of its jurisdiction under s 75(v) of the Constitution, should grant certiorari to quash those orders and prohibit the members of the Federal Court from taking further steps in the winding up of the companies. In one respect, that claim is not contentious. If the State Jurisdiction Acts are valid, then orders of the kind just mentioned would not adversely affect the liquidator, or prevent the continuance of the proceedings in the Supreme Court of South Australia. They might even serve a purpose which assists the liquidator. Thus, the liquidator's response to the first part of the applicants' claim is that it is agreed that the winding up and funding orders are ineffective judgments. The major area of dispute concerns the next step in the applicants' claim. They seek an order prohibiting the liquidator from taking further steps in the winding up of the companies or in the prosecution of the actions in the Supreme Court of South Australia. That involves a contention that the State Jurisdiction Acts, and, in

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10 (1973) 129 CLR 231 at 250.

11 [1967] 1 AC 259.

particular, ss 6, 7 and 8 of those Acts, are invalid. That is where the substantial area of dispute in the matter lies. The making of orders of certiorari quashing the Federal Court orders gets the applicants nowhere. It is the order of prohibition directed to the liquidator that they need in order to achieve their objective in the present proceedings.

18 One ground upon which the argument of invalidity is based is that the State Jurisdiction Acts are inconsistent with the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"). Thus, it is said, s 109 of the Constitution applies. This contention has given rise to another subsidiary question as to which, once again, the liquidator is content to accept the premise relied upon by the applicants, although some of the interveners are not. As a step in their inconsistency argument, the applicants submit that the orders of the Federal Court made without jurisdiction are not nullities, and remain binding until set aside, for example, by an order of an appellate court, or by an order of certiorari made by this Court. The liquidator agrees and, indeed, acknowledges that for that reason there may be utility in making the orders of certiorari sought.

19 It is convenient to deal immediately with this subsidiary question. The Federal Court was created in the exercise of the power given to the Parliament by s 71 of the Constitution. Sections 77 and 51(xxxix) are also relevant. The Federal Court Act, in s 5(2), provides that the Federal Court is a superior court of record.

20 In *Cameron v Cole*[12] Rich J, with whom Latham CJ agreed, said:

> "It is settled by the highest authority that the decision of a superior court, even if in excess of jurisdiction, is at the worst voidable, and is valid unless and until it is set aside".

21 The decision of this Court in *DMW v CGW*[13] provides an example of the operation of that principle in relation to the Family Court of Australia.

22 Recently, in *Residual Assco*[14], it was held that the Federal Court has the authority to decide its jurisdiction, and that Parliament had the legislative power to confer such authority upon it. The powers given to the Parliament and, in particular, the power given by s 77 to define the jurisdiction of any federal court

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12 (1944) 68 CLR 571 at 590. See also at 598-599 per McTiernan J, 607 per Williams J.

13 (1982) 151 CLR 491.

14 (2000) 74 ALJR 1013; 172 ALR 366.

other than the High Court, extend to a power to confer the authority implicit in the legislative characterisation of the Federal Court as a superior court of record.

23 It may be accepted, therefore, in approaching the inconsistency argument, that the orders made by the Federal Court were not nullities, and that s 5(2) of the Federal Court Act meant that they were binding until set aside.

24 For the purposes of the present case, the question that must be decided is whether, having regard to the proposition just accepted, ss 6, 7 and 8 of the State Jurisdiction Acts are inconsistent with the Federal Court Act and, in particular, with s 5(2) of that Act.

25 It is at this point that the identification of the legal effect of those provisions, referred to earlier, becomes critical. The State Jurisdiction Acts operate to confer, impose and affect rights and liabilities of persons. They do that by reference to ineffective judgments of the Federal Court, as defined. They do not purport to affect those judgments. They do not purport to validate ineffective judgments of the Federal Court, or to deem such judgments to be judgments of the relevant State Supreme Court. The hypothesis upon which the judgments are defined as ineffective is that they were made without jurisdiction because the State Act purporting to confer jurisdiction was invalid (s 4). The rights and liabilities declared by s 6 are the same as if an ineffective judgment had been a valid judgment of a State court. They are rights and liabilities of a kind which State Parliaments have legislative power to impose.

26 There is no direct inconsistency involved in a State law declaring the existence of a right or liability which is the same as that arising, directly or indirectly, under a Commonwealth law[15]. The question is whether the Commonwealth law evinces an intention "to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed."[16]

27 Reference was earlier made to a feature of the cooperative legislative scheme relating to corporations: a winding up order made, for example, by the Federal Court, may be varied by order of a Supreme Court; or a Supreme Court may make orders in a winding up following from an order of the Federal Court. That scheme was not inconsistent with the Federal Court Act.

28 The Federal Court Act does not evince an intention to cover a field which includes the rights and liabilities of persons affected by orders, valid or infirm, of

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15 *McWaters v Day* (1989) 168 CLR 289.

16 *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J.

the Federal Court. In so far as s 5(2) of the Federal Court Act, in the respects considered above, carries certain consequences in the case of an infirm order, the Act does not deny the possibility of a State legislature also dealing with the rights and liabilities of the parties, especially where the infirmity resulted from an invalid attempt by the State to confer jurisdiction on the Federal Court.

29 It is unnecessary to decide whether there is inconsistency between the appeal rights purportedly given by the State Jurisdiction Acts and the Federal Court Act. If there were such inconsistency the State Acts could, and should, be read down[17].

30 In addition to the argument based on inconsistency, it was submitted for the applicants that the State Jurisdiction Acts represent an attempted interference with the jurisdiction of this Court, or the Federal Court, or an attempt to confer jurisdiction upon the State Supreme Courts, which is repugnant to Ch III of the Constitution. In relation to the last part of that submission, reliance was placed upon *Kable v Director of Public Prosecutions (NSW)*[18].

31 Reference has earlier been made to the decision of this Court in *R v Humby*[19]. The reason there given for rejecting a similar submission applies here. Once again, it is to be found in the legal operation of the impugned legislation. It does not purport to validate ineffective judgments. It creates rights and liabilities of persons. It does so by reference to such judgments; but it does not affect the judgments.

32 The case for the applicants substantially fails.

33 There is utility in making orders of certiorari quashing the orders of the Federal Court. I would extend time to allow that to be done, and make such orders. Apart from that, however, the orders sought by the applicants should be refused, and the applicants should pay the costs of the liquidator and of the ninth respondent.

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17 cf *Acts Interpretation Act* 1915 (SA), s 13; *Acts Interpretation Act* 1954 (Q), s 9.

18 (1996) 189 CLR 51.

19 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231.

34 GAUDRON J. Peter Ivan Macks, the first-named eighth respondent in each of these matters ("the Liquidator"), is the liquidator of companies in the Emanuel Group of Companies ("the companies"). He was appointed liquidator pursuant to winding up orders of the Federal Court of Australia ("the winding up orders"). The orders were made in the exercise of jurisdiction purportedly conferred by the *Corporations (South Australia) Act* 1990 (SA) ("the SA Corporations Act") and, in some cases, the *Corporations (Queensland) Act* 1990 (Q) ("the Qld Corporations Act").

35 Further orders were subsequently made by the Federal Court with respect to arrangements made by the Liquidator to fund two actions commenced in the Supreme Court of South Australia in the name of the companies and, also, in the name of the Liquidator ("the funding orders"). The funding orders were also made in the exercise of jurisdiction purportedly conferred by the SA Corporations Act and the Qld Corporations Act.

36 In *Re Brown; Ex parte Amann*[20] (reported sub nom *Re Wakim; Ex parte McNally* and hereafter referred to as "*Re Wakim*"), this Court held that jurisdiction was not validly conferred on the Federal Court or the Family Court of Australia with respect to matters arising under a State Corporations Act. Accordingly, as the parties accept, the Federal Court had no jurisdiction to make the winding up orders and the funding orders earlier referred to.

37 Since the decision in *Re Wakim*, each State has enacted legislation, the short title of which is the *Federal Courts (State Jurisdiction) Act* 1999 ("the State Jurisdiction Acts"). The State Jurisdiction Acts are, in substance, identical. In general terms, the Acts are designed to ensure that, where certain orders have been made by a federal court in purported exercise of jurisdiction conferred by a State law, including orders under a State Corporations Act, the rights and obligations of the parties are the same as those specified in those orders. It is that legislation which is in issue in these proceedings.

38 The applicants in each of these matters are, for practical purposes, the defendants in each of the actions commenced by the Liquidator in the Supreme Court of South Australia. They seek to prevent the further prosecution of those actions by obtaining relief from this Court pursuant to s 75(v) of the Constitution. In each case, they seek certiorari to quash the winding up orders and the funding orders and prohibition directed to members of the Federal Court preventing them from taking any further steps in relation to the winding up of the companies. Additionally, they seek prohibition directed to the Liquidator "prohibiting him from taking any further steps in the winding up of [the companies] and from taking any further steps pursuant to the [winding up orders and the funding]

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20 (1999) 198 CLR 511.

orders or, in the alternative, from taking any further steps in the prosecution of [the actions in the] Supreme Court of South Australia".

The issues

39 So far as concerns their applications for certiorari to quash the winding up orders and the funding orders and for prohibition directed to members of the Federal Court, the applicants rely on the decision in *Re Wakim*. So far as concerns their applications for prohibition directed to the Liquidator, they contend that, save for s 11, the validity of which was upheld in *Residual Assco Group Ltd v Spalvins*[21], the State Jurisdiction Acts are inconsistent with the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") and, thus, pursuant to s 109 of the Constitution, are invalid in their application to the Liquidator and the companies the subject of the winding up orders.

40 In addition to the argument based on s 109 of the Constitution, the applicants contend that the State Jurisdiction Acts constitute "an unlawful interference with the roles, responsibilities and standing of each of the State Supreme, Federal and High Courts in a manner repugnant to Ch III of the *Constitution*".

41 In the alternative to the constitutional arguments outlined above, it was argued for the applicants that, even if the State Jurisdiction Acts are valid, the winding up orders and the funding orders should be set aside and that, in that event, there will be nothing upon or by reference to which the State Jurisdiction Acts can operate.

42 The Liquidator, the Deputy Commissioner of Taxation and the Attorneys-General of the States, who intervened in these proceedings, contend that the State Jurisdiction Acts are not invalid, whether by reason of inconsistency with the Federal Court Act or repugnancy to Ch III of the Constitution. And on that basis, the Liquidator argues that the applicants are not entitled to prohibition against him and that, as a matter of discretion, relief should not issue by way of certiorari or prohibition directed to members of the Federal Court.

Relevant provisions of the State Jurisdiction Acts

43 Each State Jurisdiction Act[22] relevantly provides, in s 6:

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21 (2000) 74 ALJR 1013; 172 ALR 366.

22 There are minor differences between the various State Jurisdiction Acts. References will be to the South Australian legislation.

" The rights and liabilities of all persons are, by force of this Act, declared to be, and always to have been, the same as if–

(a) each ineffective judgment of–

(i) the Federal Court of Australia, otherwise than as a Full Court of the Federal Court of Australia;

...

had been a valid judgment of the Supreme Court [of the relevant State] constituted of [sic] a single Judge; and

(b) each ineffective judgment of–

(i) a Full Court of the Federal Court of Australia;

...

had been a valid judgment of the Full Court of the Supreme Court."

"Ineffective judgment" is defined in s 4(1) of the State Jurisdiction Acts as:

"... a judgment of a federal court in a State matter given or recorded, before the commencement of this section, in the purported exercise of jurisdiction purporting to have been conferred on the federal court by a relevant State Act."

And "federal court", "judgment", "relevant State Act" and "State matter" are defined in s 3 so as to include orders made by the Federal Court in purported exercise of jurisdiction conferred by a State Corporations Act[23].

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23 Relevantly, the State Jurisdiction Acts provide the following definitions:

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

"'**judgment**' means a judgment, decree or order, whether final or interlocutory, or a sentence";

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

...

(d) Corporations (South Australia) Act 1990".

"'**State matter**' means a matter–

(Footnote continues on next page)

44 The rights and liabilities to which s 6 of the State Jurisdiction Acts refers are elaborated in ss 7(1) and (2) as follows:

> "(1) A right or liability conferred, imposed or affected by section 6–
>
> *(a)* is exercisable or enforceable; and
>
> *(b)* is to be regarded as always having been exercisable or enforceable,
>
> as if it were a right or liability conferred, imposed or affected by a judgment of the Supreme Court.
>
> (2) Without limiting section 6 or subsection (1) of this section, the rights and liabilities conferred, imposed or affected by section 6 include the right of a person who was a party to the proceeding or purported proceeding in which the ineffective judgment was given or recorded to appeal against that judgment."[24]

45 One other provision of the State Jurisdiction Acts should be mentioned. Section 10 provides:

> "(1) The Supreme Court may vary, revoke, set aside, revive or suspend a right or liability conferred, imposed or affected by section 6 as if it were a right or liability conferred, imposed or affected by the Supreme Court in

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> *(a)* in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State or a Territory; or
>
> ...
>
> *(c)* in respect of which a relevant State Act purports or purported to confer jurisdiction on a federal court".

24 Section 7(3) provides as to the basis upon which an appeal lies as follows:

> " For the purposes of subsection (2), each ineffective judgment of–
>
> *(a)* the Federal Court of Australia, otherwise than as a Full Court of the Federal Court of Australia; or
>
> *(b)* the Family Court of Australia, otherwise than as a Full Court of the Family Court of Australia,
>
> is taken to be a judgment of the Supreme Court constituted of [sic] a single Judge."

or in relation to proceedings of the kind in or in relation to which the ineffective judgment was given or recorded.

(2) In addition to its powers under subsection (1), the Supreme Court also has power to give a judgment achieving any other result that could have been achieved if–

(a) the ineffective judgment had been a valid judgment of the Supreme Court given in or in relation to proceedings of the kind in or in relation to which the ineffective judgment was given or recorded; and

(b) the Supreme Court had been considering whether–

(i) to vary, revoke, set aside, revive or suspend that judgment; or

(ii) to extend the time for the doing of any thing; or

(iii) to grant a stay of proceedings."

Inconsistency: the binding effect of Federal Court orders

46 It should be noted at the outset that, leaving aside the "right of appeal" elaborated in s 7(2) of the State Jurisdiction Acts, s 6 does not involve any direct inconsistency or any possibility of direct inconsistency with orders made by the Federal Court pursuant to a State Corporations Act. Rather, and again leaving aside the "right of appeal", s 6 reinforces those orders by declaring the rights and liabilities to be the same as if the orders had been made by State Supreme Courts, which Courts undoubtedly had and continue to have jurisdiction to make orders under the State Corporations Acts. The consequence of that is that the statutory rights and liabilities created by s 6 are precisely the same as those embodied in the relevant orders of the Federal Court. However, that does not bear upon the applicants' main argument with respect to inconsistency. That argument was made by reference to s 5(2) of the Federal Court Act.

47 Section 5(2) of the Federal Court Act provides that the Federal Court "is a superior court of record". The applicants contend that, on that account, orders of the Federal Court, whether or not made within jurisdiction, are final and binding unless and until set aside on appeal or pursuant to s 75(v) of the Constitution. Further, they contend that, by declaring the Federal Court to be a superior court of record, s 5(2) of the Federal Court Act evinces an intention on the part of the Parliament to legislate exclusively and exhaustively as to the effect of Federal

Court orders – to "cover the field"[25], as it is sometimes said. Thus, according to the argument, a State law which purports to legislate on that subject is invalid pursuant to s 109 of the Constitution. Only if this argument fails is it necessary to consider the applicants' alternative argument that there is direct inconsistency between various provisions of the State Jurisdiction Acts and the Federal Court Act and that that inconsistency results in the total invalidity of the State Jurisdiction Acts.

48 On behalf of the Attorneys-General for Victoria, South Australia and Western Australia it was contended that, if made without jurisdiction, an order of a federal court is a nullity and the Parliament has no power to legislate to the contrary. Thus, according to the argument, s 5(2) of the Federal Court Act is invalid to the extent that it purports to give binding effect to orders made without jurisdiction and, in consequence, there is no inconsistency between that Act and the State Jurisdiction Acts.

49 The argument that orders of a federal court made without jurisdiction are nullities finds some support in general legal theory and, also, in a statement by Dawson J in *R v Gray; Ex parte Marsh*[26]. Traditionally, a superior court is a court of general jurisdiction and its orders are binding until set aside on appeal because it is presumed to have acted within jurisdiction[27]. However, a federal

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25 See *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466; *Ex parte McLean* (1930) 43 CLR 472; *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565; *Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54; *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399; *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237; *Viskauskas v Niland* (1983) 153 CLR 280; *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47; *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410.

26 (1985) 157 CLR 351 at 392-393.

27 See *Peacock v Bell and Kendal* (1667) 1 Wms Saund 73 at 74 [85 ER 84 at 87-88]; *Mayor, Etc, of London v Cox* (1867) LR 2 HL 239 at 259 per Willes J; *Revell v Blake* (1873) LR 8 CP 533 at 544-545 per Blackburn J; *Cameron v Cole* (1944) 68 CLR 571 at 590-591 per Rich J; *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 240-241 per Latham CJ; *DMW v CGW* (1982) 151 CLR 491 at 504-505 per Gibbs CJ, 509 per Dawson J; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 393 per Dawson J; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 618 per Wilson and Dawson JJ; *Ousley v The Queen* (1997) 192 CLR 69 at 107 per McHugh J.

court is not a court of general jurisdiction: its jurisdiction is confined to the matters referred to in ss 75 and 76 of the Constitution[28].

50 In *R v Gray; Ex parte Marsh*, Dawson J explained the position with respect to a federal court as follows:

> " Section 5(2) of the [Federal Court Act] makes the Federal Court a superior court of record but ... such a legislative assertion cannot be taken at face value when it is made in relation to a federal court created pursuant to the powers vested in the Federal Parliament by Ch III of the Constitution: *DMW v CGW*[29]. A federal court is necessarily a court of limited jurisdiction. Its powers can be no wider than is permitted by ss 75 and 76 of the Constitution and when jurisdiction is sought to be conferred under s 76(ii) in any matter arising under any laws made by Parliament,

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28 Section 75 of the Constitution provides:

> " In all matters:
>
> (i) arising under any treaty;
>
> (ii) affecting consuls or other representatives of other countries;
>
> (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
>
> (iv) between States, or between residents of different States, or between a State and a resident of another State;
>
> (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
>
> the High Court shall have original jurisdiction."

Section 76 of the Constitution provides:

> " The Parliament may make laws conferring original jurisdiction on the High Court in any matter:
>
> (i) arising under this Constitution, or involving its interpretation;
>
> (ii) arising under any laws made by the Parliament;
>
> (iii) of Admiralty and maritime jurisdiction;
>
> (iv) relating to the same subject-matter claimed under the laws of different States."

29 (1982) 151 CLR 491 at 509.

> the confines of the legislative powers of the Parliament provide a further limitation.
>
> No doubt it is within the competence of Parliament to bestow upon a federal court the attributes of a superior court to the extent that the Constitution permits. That is all that s 5(2) of the [Federal Court Act] can do in relation to the Federal Court."[30]

As the observations of Dawson J make clear, it is necessary to determine what the Constitution permits in order to determine what is involved in the notion that the Federal Court is "a superior court of record".

51 It was held in *Residual Assco*[31] that the Parliament has power to confer authority on a federal court to decide whether or not it has jurisdiction. In that case, s 19 of the Federal Court Act and s 39B(1A)(c) of the *Judiciary Act* 1903 (Cth) were identified as the sources of the Federal Court's power to decide its own jurisdiction[32]. And the Parliament's power to legislate to that effect was sourced to ss 71, 76(ii) and 77(i) of the Constitution[33]. In addition to those provisions, reference should be made to s 51(xxxix) of the Constitution. That sub-section confers legislative power with respect to "matters incidental to the execution of any power vested by this Constitution ... in the Federal Judicature".

52 The power vested by the Constitution in the Federal Judicature is the judicial power of the Commonwealth. And it is clearly incidental to that power for a federal court to decide whether or not it has jurisdiction in a matter and to make a binding determination in that regard. Of course, a decision of that kind is necessarily subject to the parties' constitutional right to seek relief pursuant to s 75(v) of the Constitution. Indeed, the presence of s 75(v) in Ch III of the

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30 (1985) 157 CLR 351 at 392-393. See also *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616 per Dixon J; *R v Blakeley; Ex parte Association of Architects &c of Australia* (1950) 82 CLR 54 at 89 per Fullagar J; *DMW v CGW* (1982) 151 CLR 491 at 501 per Gibbs CJ, 509 per Dawson J.

31 (2000) 74 ALJR 1013; 172 ALR 366.

32 (2000) 74 ALJR 1013 at 1016 [8] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; 172 ALR 366 at 369-370 referring to *DMW v CGW* (1982) 151 CLR 491 at 507 per Mason, Murphy, Wilson, Brennan and Deane JJ; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194 per Gibbs CJ, 213 per Wilson and Dawson JJ, 215-216 per Brennan J, 222-223 per Deane J; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 374-375 per Mason J.

33 (2000) 74 ALJR 1013 at 1017 [13] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; 172 ALR 366 at 371.

Constitution indicates, in my view, that the Constitution expressly contemplates that federal courts might be empowered to make decisions with respect to their own jurisdiction which are binding until set aside.

53 In establishing the Federal Court as a "superior court of record", the Parliament has, at the very least, validly authorised that Court to make a binding determination on the question whether or not it has jurisdiction in a matter, subject only to the parties' right to appeal or to seek relief pursuant to s 75(v) of the Constitution. And, if the Federal Court determines that it has jurisdiction, it is obliged, subject only to limited and well recognised exceptions[34], to exercise that jurisdiction to determine the rights and liabilities in issue. That is the nature of judicial power. The practical consequence of those two considerations is that, by operation of s 109 of the Constitution, orders of the Federal Court, even if made without jurisdiction, are final and binding unless set aside on appeal or pursuant to s 75(v) of the Constitution.

54 It is necessary to elaborate upon the process by which s 109 operates to make orders of the Federal Court final and binding until set aside. In the case of a Federal Court order made within jurisdiction, a State law providing that the rights and liabilities of the parties were other than as contained in that order or permitting a State court to provide in a manner contrary to it would be inconsistent with a law of the Commonwealth conferring jurisdiction on the Federal Court in the matter in which the order was made. A State law of the former kind would be invalid for direct inconsistency because it would "alter, impair or detract from" the operation of the law conferring jurisdiction on the

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34 In general terms, those exceptions relate to proceedings which are an abuse of process, including on grounds of *forum non conveniens*. See *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197; *Jago v District Court (NSW)* (1989) 168 CLR 23; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Williams v Spautz* (1992) 174 CLR 509; *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

Federal Court[35]. A State law of the latter kind would be invalid for what is usually referred to as "operational inconsistency"[36].

55 In the case of a Federal Court order made without jurisdiction, there would be an inconsistency of a different kind. To avoid inconsistency of the kind described in relation to Federal Court orders made within jurisdiction, a State law providing that the rights and liabilities of persons bound by an order of the Federal Court were other than as contained in that order or permitting a State court to provide in a manner contrary to it must proceed on the hypothesis that the Federal Court order was made without jurisdiction.

56 The hypothesis that a Federal Court order was made without jurisdiction, and, hence, a State law based on that hypothesis, would be directly inconsistent with s 5(2) of the Federal Court Act in so far as that sub-section confers authority on that Court to determine whether or not it has jurisdiction, subject only to appeal or the granting of relief pursuant to s 75(v) of the Constitution. And that is so even if the Federal Court's order is concerned only with the rights and obligations of the parties to the litigation because, by necessary implication, it would also embody a decision or order that the proceedings were within jurisdiction[37].

57 It follows from what has been said with respect to s 5(2) of the Federal Court Act that an order of the Federal Court made without jurisdiction is not a nullity. Rather, by reason that that Court has authority to make a binding

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35 See *Victoria v The Commonwealth* ("The *Kakariki*") (1937) 58 CLR 618 at 630 per Dixon J. See also *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136 per Dixon J; *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 at 406 per Stephen J; *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 642-643 per Gibbs CJ, Wilson and Dawson JJ; *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 at 337, 339 per Gibbs CJ, Mason, Brennan, Deane and Dawson JJ; *Commonwealth v Western Australia [Mining Act Case]* (1999) 196 CLR 392 at 415 [54] per Gleeson CJ and Gaudron J, 440 [139] per Gummow J, 449 [170] per Kirby J.

36 *Victoria v The Commonwealth* ("The *Kakariki*") (1937) 58 CLR 618; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 599-600; *Commonwealth v Western Australia [Mining Act Case]* (1999) 196 CLR 392 at 417 [61]-[62] per Gleeson CJ and Gaudron J, 439 [138] per Gummow J, 449 [171] per Kirby J.

37 See *Peacock v Bell and Kendal* (1667) 1 Wms Saund 73 [85 ER 84]; *DMW v CGW* (1982) 151 CLR 491; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 216 per Brennan J.

decision that it has jurisdiction in a matter, whether pursuant to s 5(2) alone, or s 5(2) in combination with s 19 of the Federal Court Act and s 39B(1A)(c) of the *Judiciary Act*, a Federal Court order is final and binding unless and until set aside on appeal or pursuant to s 75(v) of the Constitution. It is, thus, necessary to consider whether, as the applicants contend, there is inconsistency between the State Jurisdiction Acts and the Federal Court Act.

"Cover the field" inconsistency

58 As earlier indicated, a State cannot legislate inconsistently with a Federal Court order which has not been set aside. Moreover, a State cannot legislate with respect to the force or effect of a Federal Court order. That is not because of s 109 of the Constitution. It is because a State simply does not have any power to legislate with respect to the orders of a federal court[38]. However, the State Jurisdiction Acts are not invalid on that account. That is because they are not concerned with the force or effect of federal court orders.

59 The State Jurisdiction Acts proceed on the basis that certain federal court orders are infirm in the sense that they are liable to be set aside and, even if not set aside, their enforcement is liable to be prohibited[39]. Relevantly, the State Jurisdiction Acts operate by first conferring statutory rights and imposing statutory liabilities which correspond precisely with those embodied in the infirm orders (s 6) and, then, by assigning to those statutory rights and obligations the consequences that would have come about if those rights and obligations had been embodied in orders of a State Supreme Court (ss 7, 8 and 10).

60 Although the State Jurisdiction Acts are not concerned with the force or effect of federal court orders, they do operate with respect to the same rights and obligations as are embodied in those orders. It is, thus, necessary in this case to consider whether they are invalid in their application to rights and obligations embodied in orders of the Federal Court because s 5(2) of the Federal Court Act evinces an intention that that should be the only law on the field covered by that sub-section.

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38 See generally *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168 at 169 per Dixon CJ, Williams, Webb, Fullagar and Kitto JJ; *Pedersen v Young* (1964) 110 CLR 162 at 165 per Kitto J, 167 per Menzies J; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 79 per Menzies J, 84 per Walsh J, 87-89 per Gibbs J, 93 per Mason J; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 35 [41] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ.

39 See the orders in *Re Brown; Ex parte Amann* reported sub nom *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

61 It is convenient, at this stage, to proceed on the assumption that Parliament intended to legislate exclusively and exhaustively with respect to the field covered by s 5(2) of the Federal Court Act. On that assumption, it is necessary to identify "the field" which that sub-section covers[40]. It is clear that the only relevant field which it covers is that of the rights and liabilities of the parties bound by an order of the Federal Court which has not been set aside on appeal or pursuant to s 75(v) of the Constitution. It is not directed to their rights and liabilities if and when an order is set aside. Thus, to the extent, if any, that the State Jurisdiction Acts operate if and when an order of the Federal Court is set aside – a question that will be considered later in these reasons – there is no "cover the field" inconsistency between those Acts and s 5(2) of the Federal Court Act.

62 It is necessary now to consider the question whether, in enacting s 5(2) of the Federal Court Act, Parliament intended to legislate exclusively and exhaustively with respect to the rights and obligations of parties bound by an order of the Federal Court which, although made without jurisdiction, has not been set aside. As earlier indicated, an order of that kind is one that is liable to be set aside for want of jurisdiction, either on appeal or pursuant to s 75(v) of the Constitution and, even if not set aside, prohibition may issue pursuant to s 75(v) of the Constitution to prevent enforcement of the rights and obligations embodied in the order.

63 Given the very nature of the infirmity inherent in an order of the Federal Court which has been made without jurisdiction, it is not to be supposed that Parliament intended, by s 5(2) of the Federal Court Act, to evince an intention that, if it did not legislate with respect to the rights and liabilities of the parties to the order[41] or if it lacked legislative power in that regard, the Parliaments of the States should not legislate consistently with the order in question by conferring rights and imposing obligations corresponding precisely with those embodied in the order. And once that is accepted, it follows that Parliament did not intend to prevent a State from legislating to provide a means for the enforcement of those corresponding rights and obligations.

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40 See *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 489-490 per Isaacs J.

41 As it might have done with respect to the orders in issue in this case pursuant to s 51(xx) of the Constitution which authorises laws with respect to "foreign corporations, and trading or financial corporations" or pursuant to its power under s 51(xvii) to legislate with respect to insolvency.

64 As the State Jurisdiction Acts are not invalid by reason of "cover the field" inconsistency, it is necessary to consider whether, and, if so, to what extent there is direct inconsistency between those Acts and the Federal Court Act.

Direct inconsistency: ss 6, 7(2) and 10 of the State Jurisdiction Acts

65 It is not in issue that, to the extent that s 6 of the State Jurisdiction Acts confers rights and imposes liabilities which correspond with those embodied in a Federal Court order made without jurisdiction, there is no direct inconsistency between it and the Federal Court Act. Nor is there any direct inconsistency between s 7(1) of the State Jurisdiction Acts and the Federal Court Act. That is because s 7(1) is directed to the exercise and enforcement of the rights and liabilities which the State Jurisdiction Acts create, not those embodied in the Federal Court order. However, different considerations apply to s 6, to the extent that it purports to confer a right of appeal as elaborated in s 7(2), and, also, to s 10 of the State Jurisdiction Acts.

66 As already indicated, a Federal Court order is binding until set aside either on appeal or pursuant to s 75(v) of the Constitution. An order of the Supreme Court of a State providing for rights and obligations different from those embodied in a Federal Court order, whether made "on appeal" under s 6, as elaborated in s 7(2) of the State Jurisdiction Acts, or by way of variation under s 10, would be directly inconsistent with that Federal Court order. More precisely for the purposes of s 109 of the Constitution, which is concerned with inconsistency between laws[42], s 6, to the extent of the "right of appeal" elaborated in s 7(2), and s 10 of the State Jurisdiction Acts are inconsistent with s 5(2) of the Federal Court Act.

67 At one level, there would be operational inconsistency between the State Jurisdiction Acts and the Federal Court Act if, in exercise of the "appellate power" conferred by s 6 and elaborated in s 7(2), or, pursuant to the power of variation conferred by s 10 of the State Jurisdiction Acts, an order were made which was inconsistent with a subsisting Federal Court order. At a more fundamental level, however, there is direct inconsistency between s 6, to the extent of the "right of appeal" elaborated in s 7(2), and s 10 of the State Jurisdiction Acts and s 5(2) of the Federal Court Act because the former provisions proceed on the assumption that certain Federal Court orders are of no legal effect. And that assumption is inconsistent with s 5(2) of the Federal Court Act because the latter creates the Federal Court as a "superior court of record",

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42 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466; *Colvin v Bradley Brothers Pty Ltd* (1943) 68 CLR 151; *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253; *Mabo v Queensland* (1988) 166 CLR 186; *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373.

entailing, as that does, the consequence that its orders are final and binding until set aside.

68 It is important to note, however, that because s 5(2) of the Federal Court Act only entails the consequence that Federal Court orders are binding until set aside, there is no inconsistency between that sub-section and s 6, to the extent of the "right of appeal" elaborated in s 7(2), and s 10 of the State Jurisdiction Acts to the extent, if any, that those Acts operate by reference to orders that have been set aside.

69 Because there is direct inconsistency between, on the one hand, s 6, to the extent that it allows for the "right of appeal" elaborated in s 7(2), and s 10 of the State Jurisdiction Acts and, on the other, s 5(2) of the Federal Court Act, it is necessary to consider whether the State Jurisdiction Acts can be read down to the extent that they are not inconsistent with that Act. For the purposes of this case, it is necessary to consider that question only in relation to the South Australian and Queensland State Jurisdiction Acts. Before turning to that question, however, it is convenient to consider whether, as the applicants contend, the State Jurisdiction Acts have no effect on the rights and liabilities of persons who are parties to a judgment or order that has been set aside on appeal or pursuant to s 75(v) of the Constitution.

State Jurisdiction Acts: meaning of "ineffective judgment"

70 Because s 6 of the State Jurisdiction Acts confers rights and imposes liabilities by reference to an "ineffective judgment", the operation of those Acts is to be determined by the meaning of that term, the statutory definition of which is set out earlier in these reasons. For present purposes, it is sufficient to note that "ineffective judgment" is relevantly defined as "a judgment ... given or recorded ... in the purported exercise of jurisdiction purporting to have been conferred ... by a relevant State Act".

71 It is a fundamental rule of construction that statutory definitions are to be read according to their terms and not as subject to limitations or qualifications which their terms do not require[43]. There is nothing in the definition of "ineffective judgment" which would confine its meaning to judgments which have not been set aside. On the contrary, the words "given or recorded" indicate that that definition is concerned with judgments which, as a matter of historical fact, have been given or recorded, and not simply those which subsist as a matter

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43 See *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420-421. See also *Australian Softwood Forests Pty Ltd v Attorney-General (NSW); Ex rel Corporate Affairs Commission* (1981) 148 CLR 121 at 130 per Mason J; *Slonim v Fellows* (1984) 154 CLR 505 at 513 per Wilson J.

of law. Accordingly, in my view, the State Jurisdiction Acts operate with respect to ineffective judgments, whether or not they have been set aside.

State Jurisdiction Acts: reading down

72 For present purposes, it is only necessary to consider whether the South Australian and Queensland State Jurisdiction Acts can be read down so as to operate to the extent that they are not inconsistent with the Federal Court Act. In this regard it should be noted that the *Acts Interpretation Act* 1915 (SA) relevantly provides, in s 13:

> " A statutory ... instrument ... will be read and construed ... so that, where a provision of the instrument, or the application of a provision of the instrument to any person or circumstances, is in excess of ... power, the remainder of the instrument, or the application of the provision to other persons and circumstances, is not affected."

So, too, s 9(3) of the *Acts Interpretation Act* 1954 (Q) relevantly provides that:

> "... if the application of a provision of an Act to a person, matter or circumstance would, apart from this section, be interpreted as exceeding power, the provision's application to other persons, matters or circumstances is not affected."

73 No provision of the State Jurisdiction Acts would be given any different operation if read down so as not to confer a "right of appeal" or to permit of variation if an "ineffective judgment" has not been set aside[44]. The South Australian and Queensland State Jurisdiction Acts should be read down accordingly.

Repugnancy to Ch III

74 In considering whether the State Jurisdiction Acts are repugnant to Ch III of the Constitution, it is important to note, at the outset, what those Acts do not do. They do not and do not purport to interfere with the appellate jurisdiction of this Court, the Federal Court or the Family Court. The appellate jurisdiction of

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44 See generally with respect to reading down, *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 373-374 per Isaacs CJ; *Pidoto v Victoria* (1943) 68 CLR 87 at 107-111 per Latham CJ, 118 per Starke J, 130-131 per Williams J; *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 492-493 per Barwick CJ, 503-506 per Menzies J, 515-520 per Walsh J; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 501-503 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

this Court and of those Courts may be exercised to set aside an order that was made without jurisdiction. Moreover, the State Jurisdiction Acts do not and do not purport to interfere with this Court's jurisdiction under s 75(v) of the Constitution.

75 Further, the State Jurisdiction Acts do not, as was contended, "create appeals *across* jurisdictions". In this regard, it was held in *Residual Assco* that s 11 of the State Jurisdiction Acts does not permit appellate proceedings pending in the Federal Court or the Family Court to be treated as proceedings in a State Supreme Court[45]. And the "right of appeal" elaborated in s 7(2) of the State Jurisdiction Acts is, in truth, simply the vesting of original jurisdiction in State Supreme Courts to set aside or vary the statutory rights and liabilities conferred or imposed by s 6 of those Acts on the same basis that those Courts might set aside or vary an order on appeal.

76 Further and contrary to what was put in argument, the State Jurisdiction Acts do not purport to allow an appeal from the Full Federal Court to this Court "*via* a deemed Full State Supreme Court decision". The State Jurisdiction Acts do not deem a decision of the Full Federal Court to be a decision of a Full Court of a Supreme Court. Relevantly, they create statutory rights and liabilities which may be enforced as if an "ineffective judgment of ... a Full Court of the Federal Court ... had been a valid judgment of the Full Court of the Supreme Court" (s 6(b)) and provide for the enforcement of those rights and liabilities as if "conferred [or] imposed ... by a judgment of the Supreme Court" (s 7(1)).

77 Once it is appreciated that the State Jurisdiction Acts do not interfere with the jurisdiction of this or other federal courts, the argument that they are, on that account or to that extent, repugnant to Ch III of the Constitution must be rejected.

78 The argument that the State Jurisdiction Acts are repugnant to Ch III of the Constitution because of their impact on State Supreme Courts is based on the premise that the State Jurisdiction Acts "make judicial orders by legislative decree ... impose decisions on a Supreme Court which purport to have been made by that Court in the exercise of judicial power, but which [were] not; [and] dress-up a legislative decree as the *'order'* of a Court". It is put that, by reason of these considerations, the Acts undermine public confidence in the State Supreme Courts and, because the Constitution contemplates that those Courts may be invested with federal jurisdiction, they are repugnant to Ch III[46].

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45 (2000) 74 ALJR 1013 at 1018 [19] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; 172 ALR 366 at 372.

46 As to the effect of Ch III on the Supreme Courts of the States, see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

79 So far as concerns State Supreme Courts, the State Jurisdiction Acts do two things. Leaving aside the question of inconsistency, which does not bear on this aspect of the matter, the State Jurisdiction Acts first confer original jurisdiction on State Supreme Courts to set aside, vary or modify the statutory rights and liabilities conferred by those Acts either under ss 6 and 7(2), as if on appeal, or pursuant to s 10. They then allow for the enforcement of the rights and liabilities conferred by those Acts as if they were orders of a Supreme Court.

80 There is nothing novel in the conferral of jurisdiction on State Supreme Courts to vary rights and liabilities. For example, the Supreme Courts of the States have long had jurisdiction to order provision for the dependant of a deceased person out of his or her estate, thus varying both the dependant's rights on intestacy or pursuant to the testamentary disposition in question and, also, the rights of others entitled to share in the estate. There is, in my view, no relevant distinction between jurisdiction of that kind and the jurisdiction conferred by the State Jurisdiction Acts. More precisely, there is no basis upon which it can be said that the exercise by State Supreme Courts of the jurisdiction and powers conferred by the State Jurisdiction Acts would undermine public confidence in those Courts.

81 Nor, in my view, can it be said that the enforcement of the statutory rights and liabilities conferred and imposed by the State Jurisdiction Acts as if they were orders of a Supreme Court would undermine confidence in that Court. In this regard, it should be remembered that, in the case of a federal court order that has not been set aside, the rights and liabilities which may be enforced are rights and liabilities which correspond precisely with those embodied in the federal court order and which could have been the subject of an order made by the Supreme Court in the exercise of its judicial powers and functions. In the case of a federal court order that has been set aside, they are rights and liabilities which have been modified or are capable of modification by a Supreme Court, either pursuant to the "right of appeal" elaborated in s 7(2) or the power of variation conferred by s 10 of the State Jurisdiction Acts.

82 Given that the rights and liabilities which may be enforced have their origins in a court order and may be the subject of judicial modification if the anterior federal court order has been set aside, the enforcement of those rights and liabilities, "as if they were orders of the Supreme Court", involves no repugnancy to Ch III of the Constitution.

Conclusion and orders

83 The State Jurisdiction Acts are valid save to the extent that they purport to allow for the modification of rights and liabilities embodied in a federal court order that has not been set aside. As the winding up orders and the funding orders were made without jurisdiction and circumstances may arise which would

justify the modification of the rights and liabilities embodied in those orders, time should be extended for the bringing of the applications for certiorari and certiorari should issue to quash those orders which are the subject of applications in that regard. Additionally, there should be liberty to apply in respect of the order made in SG3050 of 1995. No question then arises as to prohibition to the Federal Court.

84 As the State Jurisdiction Acts are valid, save to the extent indicated, the applications for prohibition directed to the Liquidator must be dismissed. That being so, the applicants should pay the costs of the Liquidator and the ninth respondent (the Deputy Commissioner of Taxation), who was joined as a party to both applications by the order of Gummow J made on 3 April 2000, in these proceedings.

85 McHUGH J. The Federal Court of Australia, relying on what has become known as the cross-vesting legislation, purported to make orders in connection with the winding up and liquidation of the companies involved in these proceedings. In *Re Wakim; Ex parte McNally*[47], however, this Court held that the cross-vesting legislation was invalid in so far as it purported to confer jurisdiction on the Federal Court and the Family Court of Australia to determine matters arising only under State law. Consequently, the Federal Court lacked jurisdiction to make the orders. The State of South Australia and other States have enacted legislation to remedy some of the consequences that arise from that lack of jurisdiction. One remedy gives the parties to the invalid orders the same rights and liabilities as they would have had if the orders had been valid.

86 The applicants in these proceedings contend that the orders, having been made by a federal court without jurisdiction, should be quashed and that the State remedial legislation is invalid because it purports to interfere with proceedings in the Federal Court. They further ask this Court to prohibit any further steps being taken under the authority of those orders. The liquidator of the companies, on the other hand, contends that the orders are merely voidable and effective until set aside and that in any event the State legislation makes the rights and liabilities of parties the same as if the orders affecting them had been validly made.

87 The issue in these applications then is whether the liquidator is entitled to rely on the continuing effect of the orders until they are quashed or set aside or, alternatively, whether he can rely on the remedial State legislation to obtain what was given by those orders.

88 In my opinion, the impugned State legislation is valid. The invalid orders of the Federal Court are not nullities because that Court had jurisdiction to determine – even erroneously – that it had jurisdiction under a purported law of the Parliament. Nevertheless, the law of the Commonwealth authorising the making of the orders does not render inoperative the State legislation which created a fresh set of rights and liabilities by reference to, but without interfering with, those orders. The Parliament of the Commonwealth can only make laws within the powers assigned to it by the Constitution. If the Parliament has no power to give a federal court jurisdiction to make orders with respect to a subject matter, it cannot make a law that a federal court order with respect to that subject matter is binding until set aside. That being so, there is no conflict between the State legislation and the invalid orders of the Federal Court. Furthermore, although the State Supreme Court must determine whether an order of the Federal Court is valid or effective, it does so in the exercise of federal jurisdiction conferred by the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). Any determination that it makes is therefore made under a federal statute and the

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47 (1999) 198 CLR 511.

findings or orders of the State Supreme Court cannot raise any question of s 109 inconsistency – direct or operational.

The factual background

89 The facts which led to the Federal Court making various winding up orders, orders appointing Mr Macks as liquidator of certain companies, and an order that Mr Macks had power under the Corporations Law to enter into a funding arrangement ("the relevant orders") are summarised in the reasons of Hayne and Callinan JJ.

90 In June 1999, this Court delivered its reasons and orders in *Re Wakim*. Relevantly, the Court held that s 9(2) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) and s 56(2) of the *Corporations Act* 1989 (Cth) ("the cross-vesting legislation") were invalid. It is clear that the relevant orders were made by the Federal Court pursuant to the purported conferral of jurisdiction under the cross-vesting legislation and that they were made without jurisdiction. They were also all made before this Court delivered its reasons and orders in *Re Wakim*.

91 On 19 August 1999, the *Federal Courts (State Jurisdiction) Act* 1999 (SA) ("the State Act") came into effect. The other States have enacted largely identical legislation. The State Act is remedial legislation directed at preserving the rights and liabilities of persons as they had been determined by the Federal Court[48] in proceedings before it, despite the Federal Court's lack of jurisdiction to determine those proceedings.

The scheme of the State Act

92 It is convenient to give an outline of the scheme of the State Act and to give some indication of the interactions between groups of provisions before considering those provisions in more detail.

93 The idea underlying the scheme is that the State Act will give the parties to invalid judgments made by the Federal Court exactly the same rights and liabilities as they would have had if the judgments were valid. If the judgment of the Federal Court was ineffective, s 6 declares that the rights and liabilities of all persons (it will be convenient to refer to these as "s 6 rights and liabilities") are the same as if each ineffective judgment of the Federal Court had been a valid judgment of the Supreme Court of South Australia. The term "ineffective judgment" is defined in s 4. Sections 7 and 8 of the State Act are directed,

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48 Or the Family Court – see definition of "federal court" in s 3 of the State Act.

respectively, at the effect of s 6 rights and liabilities, and of things done or omitted to be done under or in relation to s 6 rights and liabilities.

94 Section 9 declares that, if an earlier "ineffective judgment" is replaced by a later "ineffective judgment", s 6 has no effect in respect of the earlier judgment. Section 10 gives broad powers to the Supreme Court to vary s 6 rights and liabilities. Section 12 makes provision for any interference, or failure to comply, with s 6 rights and liabilities. Section 14 declares that the State Act does not apply to a judgment of the Federal Court which, before the commencement of the section, has been declared invalid or quashed or overruled by the Full Court of the Federal Court on a ground other than of no jurisdiction.

The relief sought by the applicants

95 The applicants seek certiorari to quash the relevant orders on the ground that they were made without jurisdiction. Because the relevant orders were made more than six months before the filing of these applications, the applicants also seek an extension of time for the making of the applications for certiorari[49]. The applicants also seek prohibition against the Judges and Registrars of the Federal Court and the liquidator to prohibit them from taking any steps to enforce or give effect to the relevant orders. They seek prohibition on the same grounds as those relied on to support the grant of certiorari.

The arguments advanced for invalidity of the State Act and for the issue of certiorari and prohibition

96 The applicants argued that ss 6, 7, 8 and 10 of the State Act were invalid because of:

(a) direct inconsistency under s 109 of the Constitution with the provisions of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") and s 35 of the Judiciary Act, by reason of the State Act altering, impairing or detracting from the rights and liabilities which derive from a Federal Court order, including the rights of appeal to the Federal Court and to this Court;

(b) indirect inconsistency under s 109 with the relevant orders of the Federal Court together with the provisions of the Federal Court Act;

(c) conflict with Ch III of the Constitution by reason of a direct interference with the procedures and authority of the Federal Court;

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49 High Court Rules, O 55 r 17(1) and O 60 r 6(1).

(d) an infringement of s 73 and/or s 75(v) of the Constitution;

(e) conflict with Ch III of the Constitution in deeming one s 71 court's decisions as those of another s 71 court and in creating appeals across jurisdictions; and

(f) a legislative interference with the judicial power and authority of the Supreme Court of South Australia, contrary to an implied prohibition derived from Ch III by reason of the Supreme Court's status as a repository of federal judicial power[50].

97 On the other hand, the liquidator and the Deputy Commissioner of Taxation submitted that at most under the State Act there could be instances of operational inconsistency between the orders of the Federal Court, until set aside or quashed, and the rights and liabilities declared by the State Act, but that no such operational inconsistency had been demonstrated in the present cases.

98 The applicants submitted that, subject to the application for an extension of time, certiorari should go effectively as of right. They relied on what was said by Gibbs CJ in *R v Ross-Jones; Ex parte Green*[51] in relation to prohibition:

> "If ... a clear case of want or excess of jurisdiction has been made out, and the prosecutor is a party aggrieved, the writ will issue almost as of right, although the court retains its discretion to refuse relief if in all the circumstances that seems the proper course."

The applicants contended that the remedies of certiorari and prohibition are governed by the same or similar principles.

99 The liquidator and other parties, on the other hand, contended that certiorari should be refused on discretionary grounds, the rights of third parties having intervened since the relevant orders were made. They pointed out that in *Re Brown; Ex parte Amann*[52], decided together with *Re Wakim*, this Court refused to quash winding up orders because the rights of third parties would be upset or unsettled.

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50 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

51 (1984) 156 CLR 185 at 194.

52 Sub nom *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 546 [25] per Gleeson CJ, 546 [26] per Gaudron J, 565 [81] per McHugh J, 592 [164]-[165] per Gummow and Hayne JJ, 635 [304] per Callinan J.

100 The applicants also pointed out that this Court had often prohibited the Federal Court and federal tribunals from exceeding their jurisdictions – they referred to a long line of authority in this Court[53]. As to prohibition directed to the liquidator, the applicants relied on the orders directed to the liquidator in *Re Brown*[54]. Further, in respect of both certiorari and prohibition, the applicants submitted that the fact that the liquidator might seek to enforce or stand on the rights conferred under s 6 of the State Act (in effect, an argument about futility) is not a relevant consideration to the discretion of this Court because s 6 is invalid.

The State Act's scheme for the declaration of s 6 rights and liabilities

101 Section 6 is the central provision of the State Act, providing for the declaration of rights and liabilities. It provides:

> "**6 Rights and liabilities declared in certain cases**
>
> The rights and liabilities of all persons are, by force of this Act, declared to be, and always to have been, the same as if –
>
> (*a*) each ineffective judgment of –
>
> (i) the Federal Court of Australia, otherwise than as a Full Court of the Federal Court of Australia; ...
>
> had been a valid judgment of the Supreme Court constituted of a single Judge; and
>
> (*b*) each ineffective judgment of –
>
> (i) a Full Court of the Federal Court of Australia; ...
>
> had been a valid judgment of the Full Court of the Supreme Court."

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53 See, for example, *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1920) 28 CLR 456; *R v Spicer; Ex parte Waterside Workers' Federation of Australia [No 2]* (1958) 100 CLR 324; *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620.

54 Sub nom *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 546 [25] per Gleeson CJ, 546 [26] per Gaudron J, 564-565 [79], [81] per McHugh J, 592 [164] per Gummow and Hayne JJ. See also *R v Drake-Brockman; Ex parte National Oil Pty Ltd* (1943) 68 CLR 51 at 57-58 per Latham CJ, 64 per Williams J.

102 Section 4 provides:

"**4 Meaning of ineffective judgment**

(1) A reference in this Act to an '**ineffective judgment**' is a reference to a judgment of a federal court in a State matter given or recorded, before the commencement of this section, in the purported exercise of jurisdiction purporting to have been conferred on the federal court by a relevant State Act.

(2) If –

(*a*) a Full Court of the Federal Court of Australia in its appellate jurisdiction has purported to affirm, reverse or vary an ineffective judgment; ...

a reference in this Act to the ineffective judgment is a reference to the ineffective judgment in the form in which, and to the extent to which, it purports or purported to have effect from time to time."

103 The terms "relevant State Act" and "State matter" are defined by s 3 of the State Act:

"In this Act –

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

...

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

...

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

...

'**State matter**' means a matter –

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

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

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

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

104 Section 8(1) is a statutory declaration of the effect of things done or omitted to be done under or in relation to s 6 rights and liabilities.

"**8 Effect of things done or omitted to be done under or in relation to rights and liabilities**

(1) Any act or thing done or omitted to be done before or after the commencement of this section under or in relation to a right or liability conferred, imposed or affected by section 6 –

(*a*) has the same effect, and gives rise to the same consequences, for the purposes of any written or other law; and

(*b*) is to be regarded as always having had the same effect, and given rise to the same consequences, for the purposes of any written or other law,

as if it were done, or omitted to be done, to give effect to, or under the authority of, or in reliance on, a judgment of the Supreme Court."

105 Sections 9 and 14(a) provide:

"**9 Section 6 regarded as having ceased to have effect in certain cases**

(1) If –

(*a*) before the commencement of this section, a court gave or recorded an ineffective judgment ('**the new judgment**') on the basis that an earlier ineffective judgment ('**the earlier judgment**') was or might be of no effect; and

(*b*) the new judgment replaced the earlier judgment,

section 6 has no effect in respect of the earlier judgment.

(2) For the purposes of subsection (1)(*b*), the new judgment replaced the earlier judgment if the new judgment –

(*a*) purportedly conferred or imposed rights or liabilities similar to or different from those purportedly conferred or imposed by the earlier judgment; or

(*b*) purportedly affected rights or liabilities in a way similar to or different from the way in which they were purportedly affected by the earlier judgment."

"**14 Act not to apply to certain judgments**

Nothing in this Act applies to –

(*a*) a judgment given or recorded by the Federal Court of Australia that has been declared to be invalid, or has been quashed or overruled, by a Full Court of the Federal Court of Australia before the commencement of this section (otherwise than on the ground that the Court had no jurisdiction)".

106 The first question that arises is whether it is beyond the legislative power of the Parliament of South Australia to declare rights and liabilities by reference to the rights and liabilities found to exist under an order of a federal court made under invalidly conferred jurisdiction.

107 Subject to the Constitution, it is within the legislative power of either the Commonwealth *or of a State* to provide, by legislation, that the rights and liabilities of certain persons will be as declared by reference to the rights and liabilities as purportedly determined by an ineffective exercise of judicial power. "Subject to the Constitution" means, in the case of the Commonwealth, that there must be a relevant head of power under which the law is enacted and that the law must not offend Ch III or any express or implied prohibition in the Constitution. In the case of a State, "subject to the Constitution" means the law must not offend Ch III or any express or implied prohibition in the Constitution and that it must not be rendered inoperative by reason of s 109.

108 Sections 6 and 8(1) have similarities with ss 5(3) and (4) of the *Matrimonial Causes Act* 1971 (Cth), the validity of which was upheld by this Court in *R v Humby; Ex parte Rooney*[55]. *Humby* decides that the Parliament of the Commonwealth may impose a liability in respect of a subject matter within its constitutional power even though the liability is made commensurate with and by reference to a "liability" declared by a court which had no jurisdiction to make the declaration.

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55 (1973) 129 CLR 231.

109 In *Humby*, the Master of the Supreme Court of South Australia had purported to make an order for the payment of maintenance in proceedings which were a "matrimonial cause" as defined by the *Matrimonial Causes Act* 1959 (Cth). On the then authorities of this Court, the Master could not exercise the federal jurisdiction which had been vested in the Supreme Court[56] and the order for maintenance was made without jurisdiction. Subsequently, the Commonwealth enacted the *Matrimonial Causes Act* 1971. The effect of that legislation was that, if an officer of the Supreme Court of a State had purported to make an order in a "matrimonial cause", the rights and liabilities of all persons were legislatively declared to be the same as if the order had been made by the Supreme Court constituted by a single judge. It also provided that, if the order had subsequently been varied on appeal by the Supreme Court, it would have the same effect as if the order so varied had been made by the Supreme Court as constituted in that appeal – s 5(3). Furthermore, all proceedings, acts and things made or done or purported to be made or done, under the *Matrimonial Causes Act* 1959 or any other law, in relation to a party to the proceedings in which the purported order was made, were legislatively declared to have, and always have had, the same force and effect as they would have had if the purported order had been validly made by the Supreme Court – s 5(4). In *Humby*, the husband, who had been prosecuted for failing to pay the maintenance fixed by the Master, challenged the validity of this legislative declaration of rights and liabilities. This Court held that the legislation was valid.

110 Although *Humby* dealt with a Commonwealth law and not a State law, it is authority for the proposition that ss 6 and 8(1) of the State Act are valid enactments. The rights and liabilities declared by s 6 are within the power of the South Australian legislature to declare. It will later be necessary to consider whether the State Act is inoperative or invalid because the s 6 rights and liabilities are rendered inoperative by s 109 or contravene Ch III of the Constitution. However, subject to those matters, ss 6 and 8(1) are valid provisions which do not purport to validate "ineffective judgments" of the Federal Court. They do not, to use the applicants' expression, turn those purported judgments into "statutory judgments". As Stephen J said in *Humby*[57]:

> "[Section 5(3) of the *Matrimonial Causes Act* 1971] does not deem those decrees to have been made by a judge nor does it confer validity upon them; it leaves them, so far as their inherent quality is concerned, as they were before the passing of this Act. They retain the character of having

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56 *Kotsis v Kotsis* (1970) 122 CLR 69; *Knight v Knight* (1971) 122 CLR 114. Both decisions were overruled by this Court in *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49.

57 (1973) 129 CLR 231 at 243-244.

> been made without jurisdiction ... as attempts at the exercise of judicial power they remain ineffective. ...
>
> [Section 5(3) and (4)] is not concerned with any purported exercise of judicial power; its only connexion with that subject matter is the wholly innocent one of using the outcome of the exercise of judicial power, the resultant decree or order and its effect, as descriptive".

111 Section 6 of the State Act does not declare that a judgment of the Federal Court is or is not an "ineffective judgment" as defined in s 4. The "ineffective judgment" is used as an historical fact only. By reference to that fact, the legislature of South Australia has declared the rights and liabilities of all persons and the consequences in respect of things done or omitted to be done in relation to them. Any variation of the legislatively declared rights and liabilities is then left for the determination of the Supreme Court of South Australia. The enactment of these s 6 rights and liabilities is within the power of the legislature of South Australia to make laws for the peace, welfare and good government of that State. The Supreme Court may need to make a judicial determination as to whether a judgment of the Federal Court is or is not an "ineffective judgment". But s 6 does not purport to make such a determination legislatively.

112 The purpose of ss 6 and 8(1) strongly indicates that the definition in s 4 of "ineffective judgment" should be construed as dealing with orders where the Federal Court was purporting to exercise invalidly conferred jurisdiction and does not extend to a judgment where the Federal Court may have been exercising validly conferred jurisdiction. It does not extend, for example, to a Federal Court order deciding a matter (or part of a matter) in the exercise of accrued jurisdiction. As this Court said in *Residual Assco Group Ltd v Spalvins*[58]:

> "If the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a court must always choose the latter course when it is reasonably open."

To the extent that the applicants sought to rely on an overreaching definition of "ineffective judgments" to support their arguments that Ch III of the Constitution invalidated any or all of ss 6, 7, 8 and 10, they fail in that submission.

113 Because s 6 operates by reference to the "ineffective judgment" as an historical fact, the quashing or setting aside by the Full Court of the Federal Court or by this Court of the "ineffective judgment" would not prevent s 6 from operating and legislatively declaring the rights and liabilities of the parties.

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58 (2000) 74 ALJR 1013 at 1020 [28]; 172 ALR 366 at 374-375.

The State Act's scheme for the enforcement and variation of s 6 rights and liabilities

114 The enforcement provisions of the legislation are ss 7(1), 8(2) and (3), and 12. They provide respectively:

"**7 Effect of declared rights and liabilities**

(1) A right or liability conferred, imposed or affected by section 6 –

(*a*) is exercisable or enforceable; and

(*b*) is to be regarded as always having been exercisable or enforceable,

as if it were a right or liability conferred, imposed or affected by a judgment of the Supreme Court."

"**8 Effect of things done or omitted to be done under or in relation to rights and liabilities**

...

(2) For the purposes of an enforcement law, any act or thing done or omitted to be done before or after the commencement of this section gives rise to the same consequences, and is to be regarded as always having given rise to the same consequences, as if each ineffective judgment were a valid judgment of the Supreme Court given in or in relation to the proceeding in or in relation to which the ineffective judgment was given or recorded.

(3) In this section –

'**enforcement law**' means a provision of a law (other than a law relating to contempt of court) that sets out a consequence for a person if the person –

(*a*) contravenes; or

(*b*) acts in a specified way while there is in force,

a judgment, or a particular kind of judgment, given by a court."

"**12 Proceedings for contempt**

If, before or after the commencement of this section, a person has –

(*a*) interfered with a right conferred or affected by section 6; or

(*b*) failed to satisfy or comply with a liability imposed or affected by section 6,

the interference or failure is, and is taken always to have been, a matter that can be dealt with in the same manner as if the interference or failure had been in relation to a right conferred or affected, or a liability imposed or affected, by an order of the Supreme Court."

115 By s 7(1), s 6 rights and liabilities are enforceable "as if" they were rights or liabilities "conferred, imposed or affected by a judgment of the Supreme Court." In *R v Hughes*[59], this Court said that the use of the phrase "as if" was "a convenient device for reducing the verbiage of an enactment". But the expression always introduces a fiction or a hypothetical contrast. It deems something to be what it is not or compares it with what it is not. In s 7(1), it takes the statutory rights created by s 6 and declares that they are to be enforced in the same way as rights arising under a Supreme Court judgment. Nothing in the federal or State Constitution prohibits the legislature of South Australia from doing so. But s 7(1) does not convert those rights into a judgment. Section 7(1) is valid and, for similar reasons, ss 8(2) and (3) are also valid.

116 Under s 12, the fact of an interference with a s 6 right or of a failure to satisfy or comply with a s 6 liability must be determined judicially. But when such a judicial determination has been made, s 12 declares that the interference or failure can be treated by the State courts "as if" it had been an interference or failure "in relation to a right conferred or affected, or a liability imposed or affected, by an order of the Supreme Court." It is a determination which looks only at an interference or failure to comply with s 6 rights and liabilities. It does not look at any alleged interference or failure to comply with the rights or liabilities as found by the "ineffective judgment". Even if, after *Kable v Director of Public Prosecutions (NSW)*[60], the Parliament of South Australia may not legislatively determine the essentially judicial question of the existence of facts or circumstances upon which a finding of contempt by a court might result, s 12 does not legislate to that effect.

The State Act's scheme for appeals and varying or revoking s 6 rights and liabilities

117 Sections 7(2) and (3) provide for a "right of appeal":

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59 (2000) 74 ALJR 802 at 808 [24]; 171 ALR 155 at 162.

60 (1996) 189 CLR 51.

"**7 Effect of declared rights and liabilities**

...

(2) Without limiting section 6 or subsection (1) of this section, the rights and liabilities conferred, imposed or affected by section 6 include the right of a person who was a party to the proceeding or purported proceeding in which the ineffective judgment was given or recorded to appeal against that judgment.

(3) For the purposes of subsection (2), each ineffective judgment of –

(*a*) the Federal Court of Australia, otherwise than as a Full Court of the Federal Court of Australia; ...

is taken to be a judgment of the Supreme Court constituted of a single Judge."

118 Sub-section (3) identifies the "ineffective judgments" for the purposes of sub-s (2), and consequently, whatever might be the "right of appeal" contemplated by sub-s (2), judgments of the Full Court of the Federal Court fall outside it.

119 The applicants argued that the effect of the "right of appeal" provisions was that the State Act was invalid. They submitted:

(a) the validity of s 7 is inextricably bound up with the validity of s 6 because s 7(2) makes clear that the "right of appeal" contemplated is one of the rights of which s 6 speaks;

(b) the right of "appeal against that judgment" of which s 7(2) speaks is the conferral of a right of appeal to the Full Court of the Supreme Court against the "ineffective judgment" of the Federal Court;

(c) the words "is taken to be"[61] in s 7(3) must mean that an "ineffective judgment" of the Federal Court other than as a Full Court (that is, a "single judge ineffective judgment") is rendered into a "single judge statutory judgment";

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61 The *Federal Courts (State Jurisdiction) Acts* of New South Wales, Victoria, Queensland and Western Australia have adopted the phrase "is deemed to be" instead of "is taken to be".

(d) the legislative power of the State does not extend to directing the Full Court of the Supreme Court to hear an "appeal" from a "single judge statutory judgment";

(e) the section interferes with this Court's appellate jurisdiction because this Court may be forced to consider applications for special leave to appeal from either a "single judge statutory judgment" or, if the Supreme Court had proceeded to hear the "appeal" for which s 7(2) provides, from a judgment of the Supreme Court which dealt with a first instance "statutory judgment" not founded on the exercise of State judicial power; and

(f) the provisions of ss 7(2) and (3) of the State Act are inconsistent with:

(i) s 24 of the Federal Court Act, which provides for appeals to the Full Court of the Federal Court; and

(ii) s 33 of the Federal Court Act and s 35 of the Judiciary Act, which provide for appeals to this Court, subject to special leave, from judgments of the Full Court of the Federal Court and judgments of the Supreme Court (whether of a single judge or Full Court) respectively.

120 Proposition (a) is no doubt valid. But proposition (b) should be rejected. Although the language of ss 7(2) and (3) is ambiguous, the better construction of these provisions is that s 7 confers a right of appeal against the rights created by s 6 which naturally reflect the terms of the ineffective judgment. It does not confer a right of appeal against the judgment of the Federal Court. It would be surprising to find the legislature of South Australia seeking to confer a right of appeal to the Full Court of the Supreme Court of South Australia against a judgment of the Federal Court. In a federation, you do not expect to find one government legislating in respect of the courts of another government in the federation.

121 Although s 7(2) suggests that the right of appeal is against the ineffective judgment of the Federal Court, s 7(3) indicates that the ineffective judgment to which s 7(2) refers is a notional judgment of the Supreme Court which contains the reasons and orders of the Federal Court. The appeal is therefore against what "is taken to be a judgment of the Supreme Court" and not against the actual Federal Court judgment.

122 Nothing in Ch III prevents the Supreme Court examining the reasons that have given rise to the s 6 rights and liabilities. Chapter III cannot be read as containing a negative implication that the reasons for judgment of a federal court can only be examined in an appeal authorised by Ch III. Because that is so, it is

not offensive to Ch III that, of necessity, in an appeal under s 7(2) the Supreme Court of South Australia will need to consider the Federal Court's reasons for judgment.

123 Similarly, proposition (c) must be rejected. The introductory words "[f]or the purposes of subsection (2)" and the words "is taken to be" show that sub-s (3) is definitional only. The Parliament of South Australia has provided that, for the purposes of the mechanisms of appeals in the Supreme Court of South Australia[62], the "ineffective judgment" of a single judge of the Federal Court is to be treated "as if" it were "a judgment of the Supreme Court constituted of a single Judge". The words "is taken to be" do not create a Supreme Court judgment or convert the Federal Court judgment into one[63].

124 Once the proposition that the State Act turns an "ineffective judgment" into a statutory judgment of a single judge is rejected, propositions (d) and (e) lack a foundation and must be rejected.

125 Proposition (f) must also be rejected. There is no direct inconsistency between the provisions of the State Act and the provisions of the Federal Court Act that provide for appeals from judgments of the Federal Court. Section 6 and ss 7(2) and (3) of the State Act do not "alter, impair or detract from"[64] the right of appeal to the Full Court of the Federal Court or to this Court from those "ineffective judgments". Subject to s 24 of the Federal Court Act (providing for appellate jurisdiction) and the Rules of the Federal Court on time limitation and leave provisions, a person who was a party to the proceedings giving rise to the "single judge ineffective judgment" may still appeal against that "ineffective judgment" (or, at least, the implicit determination of jurisdiction) to the Full Court of the Federal Court. Subject to s 33 of the Federal Court Act (providing for appeals to this Court), such a person may also appeal against an "ineffective judgment" of the Full Court to this Court. Because the State Act does not create a "single judge statutory judgment", there is no direct inconsistency with s 35 of the Judiciary Act.

126 In their submissions on indirect inconsistency, the applicants identified the relevant field as that marked out by the Federal Court Act in its entirety and ss 24(1)(a) and (1A) of that Act in particular. Section 24 relevantly provides:

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62 See, especially, s 50 of the *Supreme Court Act* 1935 (SA).

63 See *R v Hughes* (2000) 74 ALJR 802 at 808 [24]; 171 ALR 155 at 162.

64 *Victoria v The Commonwealth* ("the *Kakariki*") (1937) 58 CLR 618 at 630 per Dixon J.

"**24 Appellate jurisdiction**

(1) Subject to this section and to any other Act, whether passed before or after the commencement of this Act (including an Act by virtue of which any judgments referred to in this section are made final and conclusive or not subject to appeal), the Court has jurisdiction to hear and determine:

(a) appeals from judgments of the Court constituted by a single Judge;

...

(1A) An appeal shall not be brought from a judgment referred to in subsection (1) that is an interlocutory judgment unless the Court or a Judge gives leave to appeal."

127 The applicants submitted that the Federal Court Act is intended to "cover the field" of proceedings, in particular appellate ones, in the Federal Court. The intention to cover the field was to be derived from the comprehensive nature of the Federal Court Act[65], and from its subject matter, being one of judicial proceedings permitting of only one system of regulation or administration[66].

128 In considering "covering the field" inconsistency, in addition to the provisions to which counsel for the applicants referred, s 7(1) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) ("the Commonwealth Cross-vesting Act") should also be considered. It provides:

"**7 Institution and hearing of appeals**

(1) An appeal shall not be instituted from a decision of a single judge of the Federal Court or the Family Court to the Full Court of the Supreme Court of a State or Territory."

129 However, s 7(1) of the Commonwealth Cross-vesting Act and s 24 of the Federal Court Act must be read subject to the Constitution – under s 77(i) and s 77(ii), the Parliament has power to make laws only "[w]ith respect to any of the matters mentioned in" ss 75 and 76 of the Constitution. It follows from this

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65 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 492; *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 102-103.

66 *Victoria v The Commonwealth* ("the *Kakariki*") (1937) 58 CLR 618 at 638; *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 119.

Court's decision in *Re Wakim*[67] that those provisions must be read down[68] so as not to provide a conferral of jurisdiction (and an exclusive one) in the Federal Court at least in respect of the order on the merits part of "a decision of a single judge of the Federal Court" that was purportedly given in the exercise of invalidly conferred jurisdiction.

130 When particular conduct or a particular matter falls within State legislation and also within the scope of a valid law of the Commonwealth, it is proper to consider whether the law of the Commonwealth evinces "the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter"[69] in determining inconsistency under s 109 of the Constitution. But a law of the federal Parliament cannot cover any field that is beyond the powers of the Parliament. Often the need to protect some activity or conduct which is the subject of federal law may mean that the scope of a relevant head of power has extended deep into areas which, standing alone, would seem to be wholly within the jurisdiction of the States[70]. But, however wide the reach of a valid federal law or the field that it seeks to cover may be, the operation of s 109 is spent in respect of that law once the boundary of federal power is reached. That this can sometimes produce inconvenient results can be seen from the decisions of this Court in *Airlines of NSW Pty Ltd v New South Wales*[71] and *Airlines of NSW Pty Ltd v New South Wales [No 2]*[72]. In the present case, no law of the federal Parliament could give the Federal Court jurisdiction over a purely State matter. That being so, s 109 could not operate into areas where the Federal Court had no power to make orders. The applicants have failed to demonstrate, therefore, that there is "a law of the Commonwealth" that is inconsistent with ss 7(2) and (3) of the State Act.

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67 (1999) 198 CLR 511.

68 Section 15A of the *Acts Interpretation Act* 1901 (Cth); s 15 of the Commonwealth Cross-vesting Act.

69 *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J.

70 *Airlines of NSW Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54 at 78; *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 195, 205-206.

71 (1964) 113 CLR 1.

72 (1965) 113 CLR 54.

Variations of s 6 rights and liabilities

131 Section 10 provides for the variation of s 6 rights and liabilities:

> "**10 Powers of Supreme Court in relation to declared rights and liabilities**
>
> (1) The Supreme Court may vary, revoke, set aside, revive or suspend a right or liability conferred, imposed or affected by section 6 as if it were a right or liability conferred, imposed or affected by the Supreme Court in or in relation to proceedings of the kind in or in relation to which the ineffective judgment was given or recorded.
>
> (2) In addition to its powers under subsection (1), the Supreme Court also has power to give a judgment achieving any other result that could have been achieved if –
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> (*a*) the ineffective judgment had been a valid judgment of the Supreme Court given in or in relation to proceedings of the kind in or in relation to which the ineffective judgment was given or recorded; and
>
> (*b*) the Supreme Court had been considering whether –
>
> (i) to vary, revoke, set aside, revive or suspend that judgment; or
>
> (ii) to extend the time for the doing of any thing; or
>
> (iii) to grant a stay of proceedings."

132 Section 10 necessarily requires the Supreme Court to determine whether the relevant judgment of the Federal Court is an "ineffective judgment". As discussed below, this is an exercise of federal jurisdiction and necessarily converts the Supreme Court proceedings into proceedings in federal jurisdiction. Because that is so, no question of s 109 inconsistency can arise. The better view is that the issue of variation also remains in federal jurisdiction[73]. If so, no question of invalidly interfering with the Federal Court order could arise because the Supreme Court's order would be made under the authority of the Parliament of the Commonwealth. If, however, the variation issue is severable[74] from the "ineffective judgment" issue and is an exercise of State judicial power, no

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73 *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 481.

74 See *Carter v Egg and Egg Pulp Marketing Board (Vict)* (1942) 66 CLR 557 at 580.

conflict with the Federal Court orders arises. On that hypothesis, s 10 does no more than confer a power on the Supreme Court, in the exercise of State judicial power, to vary, revoke, set aside or otherwise give a judgment dealing with s 6 rights and liabilities. Section 10 does not confer a power on the Supreme Court to interfere with a Federal Court order.

133 A different problem raised by s 10 is whether there will be a resulting operational inconsistency between the varied s 6 rights and liabilities and the rights and liabilities under the order of the Federal Court, if that order has not been quashed or set aside. For the reasons set out below, the Supreme Court has jurisdiction to determine whether or not the order on the merits part of the Federal Court's "ineffective judgment" was made without jurisdiction. Further, because the invalid part of the Federal Court order does not raise any question of s 109 inconsistency, no issue of operational inconsistency ever arises. Section 10 of the State Act is valid.

The effect of orders made by the Federal Court under a constitutionally invalid law

134 To support their argument that the State Act, and in particular s 6, is invalid for "covering the field" inconsistency, the applicants contended that an order of the Federal Court made without jurisdiction is not void or a constitutional nullity but is merely voidable. They contended that the orders are effective until set aside. The liquidator, the Deputy Commissioner of Taxation and most of the interveners supported this contention.

135 The argument involved a number of steps. First, the applicants argued that s 71 of the Constitution, in conjunction with s 51(xxxix) (and possibly also s 77(i)), confers a power on the federal Parliament to enact a law that renders the orders of a federal court, created pursuant to s 71, effective until set aside. Second, they argued that s 5(2) of the Federal Court Act, which declares the Federal Court to be a "superior court of record", is such a law because the reference to a "superior court" must be understood as a reference to a court possessed of such attributes as common law courts of general jurisdiction possess. A superior court will be presumed to have acted within jurisdiction[75]. Because its judgment "is conclusive as to all relevant matters thereby decided"[76], it has jurisdiction to determine its own jurisdiction. Certiorari does not go to

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75 *Peacock v Bell and Kendal* (1667) 1 Wms Saund 73 at 74 [85 ER 84 at 87-88].

76 *Mayor of London v Cox* (1867) LR 2 HL 239 at 262.

such a superior court[77], and, in general, prohibition[78] and mandamus do not go[79]. Third, the applicants claimed that it followed that the orders of the Federal Court are assumed to be valid until the contrary is proved[80].

136 A long line of authorities in this Court has not accepted that the orders of a federal court are to be equated with the orders of superior courts at common law. A federal court, created under s 71 of the Constitution, is a court of limited jurisdiction and its members attract the supervisory jurisdiction of this Court under s 75(v) of the Constitution. Hence, the constitutional writs of prohibition and mandamus issue to the judges of that court because they are Commonwealth officers for the purpose of s 75(v).

137 The applicants accepted that, under s 75(v) of the Constitution, this Court has power to quash Federal Court orders or prohibit steps being taken in respect of them. But they claimed that, because s 5(2) of the Federal Court Act declares the Federal Court to be a "superior court of record", its orders are nevertheless effective until set aside. They contended that s 71 and s 51(xxxix) of the Constitution authorised the Parliament to declare the Federal Court a superior court of record. They claimed that this Court's status as a superior court also depends on those heads of constitutional power, pointing out that s 5 of the *High Court of Australia Act* 1979 (Cth) declares this Court to be a "superior court of record". But the argument gains no support from the existence of s 5 of that Act. I doubt whether the Parliament has power to declare this Court to be one type of court or another. If that power exists, it would follow that the Parliament could declare this Court to be an "inferior court". That cannot be so now; nor could it have been the case at any time since 1900, notwithstanding that, under s 74 of the

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77 *R v Chancellor of St Edmundsbury and Ipswich Diocese; Ex parte White* [1948] 1 KB 195; *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 241 per Latham CJ; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 387 per Deane J, 395 per Dawson J.

78 *Mayor of London v Cox* (1867) LR 2 HL 239 at 262; *James v South Western Railway Co* (1872) LR 7 Ex 287 at 290; *R v Chancellor of St Edmundsbury and Ipswich Diocese; Ex parte White* [1948] 1 KB 195 at 205, 215; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 393 per Dawson J.

79 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 241 per Latham CJ. See also *DMW v CGW* (1982) 151 CLR 491 at 509-510 per Dawson J.

80 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 240 per Latham CJ; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 384-385 per Deane J.

Constitution, until the Parliament made "laws limiting the matters in which such leave may be asked"[81], appeals could be brought from this Court by special leave to the Privy Council. While the original jurisdiction of the Court may be increased by the Parliament under s 76, the nature and role of this Court are exclusively referable to the Constitution and not to any legislative enactment.

138 Nor do the applicants obtain assistance from the fact that at common law the orders of superior courts are valid until set aside. That is because "notions derived from the position of the pre-Judicature common law courts of Queen's Bench, Common Pleas and Exchequer, as courts of the widest jurisdiction with respect to subject matter and identity of parties and therefore superior courts, have no ready application in Australia to federal courts."[82]

139 Pursuant to s 71 and s 51(xxxix) of the Constitution, the federal Parliament may create a federal court that has certain characteristics of superior courts at common law, such as the power to punish for contempt or the status of a court of record. But it invites error to think that "notions derived from the position of the pre-Judicature common law courts" automatically apply to orders made by federal courts in Australia even if the Parliament has declared them to be superior courts of record.

140 In *DMW v CGW*[83], Dawson J rightly said that the legislative assertion in s 21(2) of the *Family Law Act* 1975 (Cth) ("the Family Law Act"), declaring the Family Court to be a "superior court of record", cannot be taken at face value. Neither federal courts created pursuant to s 71 nor this Court are courts of general jurisdiction. I leave aside whether this Court was created by the Commonwealth Parliament's enactment of the Judiciary Act in 1903 or was already created for the future in 1900 by s 71 of the Constitution[84]. The statutory nature of the federal courts identified in s 71 was noted by this Court very early on. In *The Tramways Case [No 1]*[85], Isaacs J, speaking about this Court, said that:

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81 See: *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975 (Cth); *Kitano v The Commonwealth* (1975) 132 CLR 231 (PC); [1976] AC 99; *Attorney-General (Cth) v T & G Mutual Life Society Ltd* (1978) 144 CLR 161.

82 *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (1995) 184 CLR 620 at 652. See also *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 626-627.

83 (1982) 151 CLR 491 at 509-510.

84 See Quick and Groom, *The Judicial Power of the Commonwealth*, (1904) at 8-14. See also *Hannah v Dalgarno* (1903) 1 CLR 1.

85 (1914) 18 CLR 54 at 75.

> "this Court is not a common law Court, but a statutory Court. To the Constitution and the laws made under the Constitution it owes its existence and all its powers".

Moreover, as Toohey and Gummow JJ and I pointed out in *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)*, since the enactment of the Judiciary Act not even the Supreme Courts of the States can be regarded as being courts of general jurisdiction[86].

141 The unique nature of Australia's federal judicature means that "notions derived from the position of the pre-Judicature common law courts" cannot be used as major premises to form conclusions about the status of federal courts or as conclusively indicating the powers that the Parliament can give to them. Nor can those notions be used to confer consequences on the orders of federal courts if to do so would be inconsistent with the Constitution. The scheme of Ch III of the Constitution is inconsistent with such notions, as Dawson J pointed out in *R v Gray; Ex parte Marsh* when he said[87]:

> "A federal court is necessarily a court of limited jurisdiction. Its powers can be no wider than is permitted by ss 75 and 76 of the Constitution and when jurisdiction is sought to be conferred under s 76(ii) in any matter arising under any laws made by Parliament, the confines of the legislative powers of the Parliament provide a further limitation.
>
> No doubt it is within the competence of Parliament to bestow upon a federal court the attributes of a superior court to the extent that the Constitution permits. That is all that s 5(2) of the *Federal Court of Australia Act* can do in relation to the Federal Court. Clearly enough those attributes include the power to punish for contempt (although the Federal Court has express power to punish contempts under s 31 of its Act) and the protection of officers of the Court in the execution of void orders[88]. There is more difficulty in extending some of the other characteristics of a superior court to a court, such as the Federal Court, created under Ch III of the Constitution."

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86 (1995) 184 CLR 620 at 653.

87 (1985) 157 CLR 351 at 392-393. See also at 384-385 per Deane J. See also *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 207-208 per Wilson and Dawson JJ, 215-217 per Brennan J.

88 *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 240-242 per Latham CJ.

142 In determining what is the effect of orders made by a federal court under a constitutionally invalid law, the focus must be on the unique nature of Australia's federal judicature. Federal courts are statutory courts whose authority is derived from Ch III and s 51(xxxix) of the Constitution. Section 71 gives the Parliament power to create federal courts. But the Parliament can give those courts jurisdiction only by reference to the matters referred to in ss 75 and 76 of the Constitution. As the decision in *Re Wakim* showed only too clearly, the federal courts cannot be given jurisdiction to deal with matters unless they are matters referred to in ss 75 and 76 or are issues involved in the determination of such matters. It is a large proposition then to contend that, although the Parliament cannot give those courts jurisdiction to deal with matters outside ss 75 and 76, it can give them power to make orders binding – until set aside – on the States and the people of the Commonwealth in respect of matters outside ss 75 and 76.

143 Nothing in s 71 expressly authorises the making of a law creating a federal court whose orders are binding until set aside. Section 71 gives the Parliament power to create federal courts. But given the limitations imposed by ss 75 and 76, it is impossible to conclude that the power to create those courts enables the Parliament to declare that the orders of those courts, made without constitutional authority, are binding until set aside. Just as the Parliament cannot extend the scope of its powers by making regulations binding until set aside or quashed, it cannot extend the scope of its powers – *even for a moment* – by giving the federal courts power to make binding orders that go beyond the constitutional authority of the Parliament. Section 51(xxxix) of the Constitution, which authorises the Parliament to make laws with respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament", does not advance the applicants' argument that the Parliament has power under the Constitution to declare orders of a federal court, made without constitutional authority, binding until set aside. The making of a law purporting to give such effect to those orders is not incidental to the *execution* of the legislative power in s 71 to create federal courts.

144 Yet the applicants contended that the Parliament has power to make a law declaring that an order of a federal court on a subject beyond the powers of the Parliament will be binding until set aside or quashed in further judicial proceedings. But consider what that means. It means that the law making the order binding until set aside or quashed is a law for the purpose of covering cl 5 of the Constitution. That is to say, it is a law "made by the Parliament of the Commonwealth under the Constitution [that] shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State". Thus, although *ex hypothesi* the Parliament has no power to authorise the federal courts to make any orders on the subject matter, by implementing its will through the mechanism of a court order it would have power to make the order binding on those specified in covering cl 5 until the order is set aside or quashed. I cannot accept that the Constitution permits that to be done.

145 The contention of the applicants also means that, as long as the federal court order stands, the laws of the State are rendered inoperative in so far as they are inconsistent with the federal court order. For the purposes of s 109 of the Constitution, an order of the federal court is the factum upon which "a law of the Commonwealth" operates[89]. A State law which is inconsistent with the order of a federal court becomes inoperative because it is inconsistent with the law of the Parliament that authorises the order. If the contention of the applicants is correct, the Parliament can do indirectly what it cannot do directly.

146 In my opinion, inconsistency between a State law and a federal court order can only arise when the federal law authorising the order is within the power of the Parliament. In *DMW v CGW*[90], Gibbs CJ said:

> "If a law of the Commonwealth, either expressly, or by implication, provides that a judgment of a federal court shall prevail over inconsistent decisions of State courts, that law will take effect accordingly and the decision of the federal court will be paramount. Such a law however *would only be valid if it related to the judgments of a federal court acting within limits which were assigned to it consistently with the Constitution*." (emphasis added)

147 Again, s 51(xxxix) of the Constitution does not take the matter any further. That paragraph authorises the Parliament to make laws with respect to "matters incidental to the execution of any power vested by this Constitution ... in the Federal Judicature". The Parliament may validly confer on a federal court a power to determine its jurisdiction. But it is not incidental to the *execution* of that power to make merits orders that are outside the Parliament's powers binding until set aside. That would have the remarkable result that what the Parliament cannot do permanently it can do temporarily. A law that makes binding an order made outside power is not a law incidental to the execution of a power vested in the federal judicature.

148 No doubt s 5(2) of the Federal Court Act by declaring the Federal Court to be "a superior court of record" intends to make the orders of the Federal Court binding until set aside. But in so far as it seeks to make orders of the Federal Court binding on persons affected by them in cases where the Parliament has no power to authorise those orders, s 5(2) cannot validly do so. The federal Parliament has power to provide that orders of the Federal Court under validly enacted legislation are effective until set aside. But that power is found in s 77(i)

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89 *P v P* (1994) 181 CLR 583 at 635.

90 (1982) 151 CLR 491 at 504.

and s 51(xxxix) of the Constitution and is limited by reference to the matters mentioned in ss 75 and 76, as the opening words of s 77 make clear. It is unnecessary to decide whether the Parliament can make binding until set aside those orders of the Federal Court that are outside its powers but within the power of Parliament.

149 Although the Parliament has no power to make orders of the Federal Court purportedly made under invalidly conferred jurisdiction binding until set aside, it does not follow that the orders of the Federal Court in this and similar cases are nullities. Section 19(1) of the Federal Court Act[91] and s 39B(1A)(c) of the Judiciary Act[92] give the Federal Court jurisdiction to determine whether any particular vesting of jurisdiction under any other law of the Commonwealth is valid. An order of the Federal Court – even an order made erroneously – that that Court has jurisdiction in a matter is a valid order[93].

150 The Federal Court has jurisdiction under s 19(1) of the Federal Court Act and s 39B(1A)(c) of the Judiciary Act to determine whether an order it might make is within its jurisdiction. More often than not, there will be an implied, rather than an express, determination by the Federal Court that the order is within its jurisdiction. If there is no express order concerning jurisdiction, the determination of jurisdiction will be implied by the orders that that Court makes in the proceedings. As a practical matter, therefore, it will not be possible to say that an invalid order is a nullity, because inherent in the order is a determination – erroneous but nevertheless made within jurisdiction – that the invalid order was within the jurisdiction of the Federal Court.

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91 Section 19(1) of the Federal Court Act provides:

> "The Court has such original jurisdiction as is vested in it by laws made by the Parliament."

92 Section 39B(1A)(c) of the Judiciary Act provides:

> "The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:
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> ...
>
> (c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter."

93 *Residual Assco Group Ltd v Spalvins* (2000) 74 ALJR 1013 at 1016 [8]; 172 ALR 366 at 369-370.

151 When the Federal Court made each of the relevant orders, it implicitly determined that it had jurisdiction to do so under the cross-vesting legislation, mistakenly believing that the jurisdiction conferred by that legislation was "original jurisdiction ... vested in it by laws made by the Parliament" within the meaning of s 19(1) of the Federal Court Act. Although it had no jurisdiction under the cross-vesting legislation, it was acting within jurisdiction when it erroneously determined by necessary implication that it had jurisdiction under the cross-vesting legislation. That is because it had jurisdiction under s 19(1) to determine whether any particular grant of original jurisdiction was validly conferred on it. In practical terms, it seems impossible to challenge the merits part of a relevant order and its continuing effect without also challenging the implied finding of jurisdiction. But it does not follow from this practical consequence that, in s 19(1) of the Federal Court Act or s 39B(1A)(c) of the Judiciary Act or even s 5(2) of the Federal Court Act, the federal Parliament has legislated for the order on the merits to have continuing effect until quashed or set aside and that the order can invalidate a State law by reason of s 109 inconsistency. If it has, those provisions must be read down in accordance with the principle that the Parliament cannot give binding effect to federal court orders made in respect of matters that are not covered by ss 75 and 76 of the Constitution.

152 Because the orders of the Federal Court carry an implied determination that they are made within jurisdiction, they cannot be regarded as wholly invalid even when they erroneously determine that that Court has jurisdiction in a matter. The orders of the Federal Court in the present proceedings, therefore, cannot be regarded as having no validity whatever. They are binding until set aside in so far as they impliedly determine that the Federal Court had jurisdiction. But that is all.

153 For the purpose of s 109 of the Constitution and for the reasons given by Gibbs CJ in *DMW v CGW*, however, so much of the orders as depended on the cross-vesting legislation for their validity cannot be treated as validly made. They cannot render inoperative any State law inconsistent with their terms. That is because they do not give rise to any rights and liabilities.

154 It follows from what this Court said in *Residual Assco*[94] and what I have said on the effect of orders made under a constitutionally invalid law that no issue of inconsistency arises between those orders and s 6 of the State legislation. It is of course true that the s 6 rights and liabilities and the rights and liabilities "determined" by reference to the "ineffective judgment" that has not been set aside are in theory the same. But the rights and liabilities "determined" by the Federal Court have no force or effect. Because the relevant orders of the Federal

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94 (2000) 74 ALJR 1013; 172 ALR 366.

Court have no force or effect, no question of "covering the field" inconsistency under s 109 of the Constitution can arise. Furthermore, s 6 does not "alter, impair or detract from the operation of"[95] the order of the Federal Court. There is no direct inconsistency between the s 6 rights and liabilities and the rights and liabilities said to have been determined by the "ineffective judgment".

155 Ultimately, any argument that in certain cases there might be an inconsistency must be based on a claim that operational inconsistency could arise between the rights and liabilities as "determined" by the Federal Court in the order on the merits part of its judgment and either the s 6 rights and liabilities varied, revoked, set aside or suspended by the Supreme Court pursuant to its powers under s 10, or the rights and liabilities determined by the Supreme Court upon hearing an appeal under s 7(2)**.**

156 As I have pointed out, the Federal Court had jurisdiction to determine that it had jurisdiction to adjudicate the matter in the proceedings before it. If the Federal Court had proceeded to make an order on the merits, then impliedly it had also made a determination that it had jurisdiction to adjudicate the matter before it. If the only semblance of jurisdiction of the Federal Court to decide on the merits was under invalidly conferred jurisdiction, then the Federal Court's determination that it had jurisdiction is incorrect but stands until quashed or set aside.

157 In the absence of an appeal to the Full Court of the Federal Court holding that the Federal Court did not have jurisdiction, the Supreme Court, in an application under ss 7(2) and 10 of the State Act, will have to determine for itself whether the order on the merits part of an "ineffective judgment" was made within or without jurisdiction. When the Supreme Court considers this threshold issue, there will be a matter arising under the Constitution – the question of the constitutionality of the vesting of jurisdiction exercised or purportedly exercised by the Federal Court.

158 Section 76(i) of the Constitution provides that original jurisdiction can be conferred upon the High Court "in any matter ... arising under this Constitution, or involving its interpretation". Subject to limitations not here relevant, s 39(2) of the Judiciary Act vests federal jurisdiction in the Supreme Court "in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it". It follows that the Supreme Court will have federal jurisdiction to decide whether or not the order on the merits part of an "ineffective judgment" was made without jurisdiction.

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95 *Victoria v The Commonwealth* ("the *Kakariki*") (1937) 58 CLR 618 at 630 per Dixon J.

159 If the Supreme Court holds that the order on the merits was made within jurisdiction, then by definition[96] the State Act has no application – s 6 will not operate to declare rights and liabilities, there will be no s 7(2) appeal right, and there will be no subject matter upon which the Supreme Court could exercise the powers conferred upon it by s 10. On any view, no question of inconsistency can arise.

160 If the Supreme Court determines that the Federal Court did not have jurisdiction to adjudicate the matter in the proceedings before it, the Supreme Court would be making that determination pursuant to the exercise of validly conferred federal jurisdiction. In the exercise of that jurisdiction, the Supreme Court may conclusively determine, subject to any order of this Court, that the Federal Court lacked jurisdiction to determine the matter before it. Because there can be no inconsistency under s 109 between two valid laws of the Commonwealth, there cannot be any inconsistency between this determination of the Supreme Court and the earlier determination of the Federal Court (which stands until quashed or set aside) that it did have jurisdiction.

161 Ultimately, this Court has supervisory jurisdiction under s 73 of the Constitution to hear and determine an appeal from the Supreme Court's determination. Because the Supreme Court's review of whether or not the Federal Court had jurisdiction to adjudicate the matter in the proceedings before it is a matter within s 76(i) of the Constitution, this Court also has original jurisdiction to issue prohibition, certiorari and mandamus to the judges of the Supreme Court[97]. That is a jurisdiction separate from the jurisdiction under s 75(v) of the Constitution, the latter jurisdiction not extending to the judges of the Supreme Court because, according to traditional doctrine, they are not officers of the Commonwealth even when exercising federal jurisdiction[98]. It may be, however, that State courts, exercising federal jurisdiction, should be seen as officers of the Commonwealth for the purpose of s 75(v) of the Constitution[99].

162 If, on the other hand, the Supreme Court wrongly held that there was an "ineffective judgment" and varied the s 6 rights and liabilities, there could be no

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96 Section 4 of the State Act.

97 *Ex parte McLean* (1930) 43 CLR 472; *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 465 per Starke J, 480, 482 per Williams J. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 779-780.

98 *R v Murray and Cormie* (1916) 22 CLR 437.

99 See Aronson and Dyer, *Judicial Review of Administrative Action*, 2nd ed (2000) at 26-28, and *The Tramways Case [No 1]* (1914) 18 CLR 54 at 68-69 per Barton J.

invalidity by reason of s 109 if the variation was made in federal jurisdiction, as I think it would be. On the other hand, if the variation issue was regarded as severable from the "ineffective judgment" matter, the variation of the s 6 rights and liabilities would then be wrongly made in the exercise of State judicial power. Although that variation by the State Court would be invalid, again there would be no s 109 inconsistency because the State Act only authorises the variation of s 6 rights and liabilities which result from "ineffective judgments". The order of the Supreme Court would be liable to be set aside because that order was inconsistent with the State Act, not because the State Act was inconsistent with a federal law.

163 For these reasons, no direct, indirect or operational inconsistency can arise between the rights and liabilities as purportedly sought to be determined by the Federal Court and the s 6 rights and liabilities as varied by the Supreme Court pursuant to s 10 or the rights and liabilities as determined by the Supreme Court upon hearing an appeal under s 7(2).

164 Properly understood, nothing in *DMW v CGW* is contrary to the above propositions. In that case, the Family Court had made an order "that until further order of the Court the husband have the care and control of KJW the child of the marriage on an interim basis"[100]. The issue before this Court was whether the Supreme Court of New South Wales had jurisdiction to entertain proceedings brought in that Court by the wife and her new partner and to make certain orders and declarations. For present purposes, it is sufficient to refer to the order which sought custody of the child. Legislation in the State of New South Wales provided that the Supreme Court could "upon the application of the mother of any minor, make such order as it may think fit regarding the custody of the minor and the right of access thereto of either parent"[101]. As Dawson J said[102], it was:

> "clear ... that the Supreme Court of New South Wales has jurisdiction to entertain the proceedings before it and to make the [order sought] unless that jurisdiction has been diminished in some relevant respect by the provisions of the *Family Law Act* 1975 (Cth)."

165 At the time, the Family Law Act and a proclamation made in accordance with that Act had the effect that exclusive jurisdiction in relation to matters dealing with the custody of children of a marriage was vested in the Family

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100 (1982) 151 CLR 491 at 498.

101 (1982) 151 CLR 491 at 507.

102 (1982) 151 CLR 491 at 508. See also at 498-499 per Gibbs CJ.

Court[103]. The Supreme Court was wholly deprived of jurisdiction in those matters[104]. However, the exclusive jurisdiction of the Family Court depended on the fact that the child was in fact a child of the marriage[105]. Absent that fact, at that time the Family Court did not have jurisdiction under the Family Law Act[106].

166 All the Justices in *DMW v CGW* found that the grant of jurisdiction to the Family Court carried with it the power to determine the existence of the fact upon which its jurisdiction depended[107]. All Justices except Gibbs CJ thought that the Family Court had exclusive jurisdiction in the matter. In the exercise of the power to determine the existence of the jurisdictional fact the Justices held that the Family Court might wrongly determine the question of its jurisdiction and, if that occurred, the determination stood but was subject to constitutional relief or appeal[108]. But nowhere in their Honours' reasons can support be found for an argument that, if the jurisdiction of a particular federal court has not been made exclusive, another court may not exercise federal jurisdiction properly vested in it to determine for itself whether that first federal court had vested in it the jurisdiction it implicitly determined it did have in making an order on the merits.

167 Chief Justice Gibbs said[109]:

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103 Although the provisions of the Family Law Act have changed, the position is still that the Supreme Courts of the States are divested of any jurisdiction in relation to children of a marriage. See ss 69B(1), 69H and 69J of the Family Law Act. See also *Australian Family Law*, vol 1, par [s 39.22].

104 (1982) 151 CLR 491 at 499, 502 per Gibbs CJ, 507 per Mason, Murphy, Wilson, Brennan and Deane JJ, 511 per Dawson J.

105 cf the differing views in *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 on whether the jurisdiction of the Federal Court depended upon the actual occurrence of some fact or circumstance.

106 (1982) 151 CLR 491 at 502 per Gibbs CJ, 507 per Mason, Murphy, Wilson, Brennan and Deane JJ, 510 per Dawson J.

107 (1982) 151 CLR 491 at 501 per Gibbs CJ, 507 per Mason, Murphy, Wilson, Brennan and Deane JJ, 511 per Dawson J.

108 (1982) 151 CLR 491 at 501-502, 504-505 per Gibbs CJ, 507 per Mason, Murphy, Wilson, Brennan and Deane JJ, 509-510 per Dawson J.

109 (1982) 151 CLR 491 at 502.

> "Although [the jurisdiction of the Supreme Court] was originally virtually unlimited, there are some areas in which exclusive jurisdiction has been given to other courts, and in those areas the Supreme Court no longer has jurisdiction. One such area ... is that occupied by 'proceedings by way of a matrimonial cause' within the meaning of the *Family Law Act*. ... It is only if the proceeding is in truth a matrimonial cause that the Supreme Court is deprived of jurisdiction. Where an application is made to the Supreme Court for the custody of a child, and a question arises whether the application is a matrimonial cause, the Supreme Court has the power and duty to decide whether the cause is a matrimonial cause."

168 His Honour thought that the Supreme Court at all times had the jurisdiction to[110]:

> "consider and decide the preliminary question whether it has jurisdiction. That means that in a case such as the present, each court must decide whether the child is a child of a marriage."

But he said that, before a determination by one court or the other was made, a "sensible application of the principles of judicial comity"[111] would prevent both courts from deciding the same question.

169 His Honour then considered the position when a determination by one court (in this case, the Family Court) had already been made. He found that, although the other court (the Supreme Court) did not have the power to set aside the order of the Family Court or ignore the existence of the order, which necessarily involved a finding that jurisdiction existed in the Family Court, this did not deprive the Supreme Court of jurisdiction to consider the issue of jurisdiction[112].

170 The majority Justices (Mason, Murphy, Wilson, Brennan and Deane JJ) said[113]:

> "So long as the order stands, the effect of the provisions of the *Family Law Act* 1975 (Cth), as amended, conferring exclusive jurisdiction will deny the existence of jurisdiction in another Court to adjudicate on KJW's status or custody. The reason for this is that there is implicit in the order

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110 (1982) 151 CLR 491 at 503.

111 (1982) 151 CLR 491 at 503.

112 (1982) 151 CLR 491 at 504-505.

113 (1982) 151 CLR 491 at 507.

> of the Family Court a finding that KJW is a child of the W marriage and a challenge to that finding would constitute a matrimonial cause ... Under [the *Family Law Act*] such proceedings may be instituted only under that Act."

According to their Honours, by reason of the provisions of the Family Law Act, as it then stood, the divesting of jurisdiction of the Supreme Court went so far as including a divesting in respect of jurisdiction to adjudicate on any challenge to the implicit finding by the Family Court of its jurisdiction.

171 Similarly, Dawson J said[114]:

> "If this Court were to determine upon examination of that question that KJW was not a child of the marriage between Mr and Mrs W, the order for custody made by the Family Court would have been made without jurisdiction and would be a nullity. It is difficult to avoid the further conclusion that if the same question were validly to be raised in proceedings in the Supreme Court of New South Wales, that Court would also be free to determine for itself whether the facts existed upon which the jurisdiction of the Family Court depended and, if not, treat the order of the Family Court as a nullity.
>
> However, whilst the *Family Law Act* does not and could not give to the Family Court power conclusively to determine its own jurisdiction, it does, together with the proclamation dated 29 May 1976, preclude in the manner described above, the hearing and determination of proceedings by way of a matrimonial cause in the Supreme Court of New South Wales".

172 It follows that nothing in *DMW v CGW* is inconsistent with the view I have taken of the jurisdiction of the Supreme Court of South Australia, under s 39(2) of the Judiciary Act, to determine for itself the question of whether an order on the merits part of an "ineffective judgment" of the Federal Court was in fact made without jurisdiction.

Orders

173 In my opinion, the orders of the Federal Court should be quashed. Although the orders have no force or effect (apart from the implicit but erroneous determination of jurisdiction), they were incorrectly made and are liable to mislead people into believing that they have effect. They give no rights and declare no liabilities. That being so, quashing the relevant orders will not affect the rights or liabilities of third parties. In that respect, the full argument we have

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114 (1982) 151 CLR 491 at 510-511.

heard in this case indicates to my mind that this Court erred in *Re Brown*[115] in refusing to quash certain orders on the ground that the rights of third parties might be affected. In any event, in these applications the rights of third parties cannot be affected by quashing the relevant orders, because they will be effectively provided for by the State Act.

174 I would extend the time for the applications for certiorari and grant an order absolute in the first instance for certiorari quashing:

(i) the order of Registrar Carey of 13 June 1995 in proceedings SG3057 of 1995 in the Federal Court of Australia, ordering the winding up in insolvency and the appointment of Macks as liquidator in respect of one of the companies;

(ii) the orders of Registrar Fisher of 20 June 1995, in proceedings SG3074, SG3075, SG3076, SG3077, SG3078 and SG3079 of 1995 in the Federal Court of Australia, ordering the winding up in insolvency and the appointment of Macks as liquidator in respect of six of the companies;

(iii) the orders of O'Loughlin J of 30 August 1995, von Doussa J of 19 December 1995, and Branson J of 21 December 1995 and 24 January 1996, in proceedings SG3080 of 1995 in the Federal Court of Australia, ordering the winding up in insolvency and the appointment of Macks as liquidator in respect of 54 of the companies, and declaring void pursuant to s 445G(2) of the Corporations Law any deed of company arrangement entered into by any of those companies;

(iv) the order of Registrar Carey of 15 August 1995, in proceedings SG3124 of 1995 in the Federal Court of Australia, ordering the winding up in insolvency and the appointment of Macks as liquidator in respect of one of the companies; and

(v) the order of Mansfield J of 8 December 1998 in proceedings SG3080 of 1995 in the Federal Court of Australia, ordering that Macks as liquidator of all 64 companies had power under the Corporations Law to enter into the funding arrangement with the Commonwealth Bank of Australia Ltd and GIO Insurance Ltd.

175 Certiorari having been granted, prohibition, in the terms sought, need not be directed to the Judges and Registrars of the Federal Court. Further,

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115 Sub nom *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

prohibition need not be directed to the liquidator prohibiting him from taking any further steps pursuant to the relevant orders. I would refuse prohibition directed to the liquidator prohibiting him from taking any further steps in the winding up of the companies or in the prosecution of the Supreme Court actions. The liquidator is entitled to rely on the relevant provisions of the State Act.

176 In each matter, the applicant or applicants must pay the costs of the liquidator and of the Deputy Commissioner of Taxation.

GUMMOW J.

The winding-up orders

177 In the period between 13 June 1995 and 24 January 1996, orders were made by the Federal Court of Australia in its South Australian District Registry for the winding up of 63 companies of what is known as the Emanuel Group. In each case, Mr P I Macks ("the Liquidator") was appointed liquidator. The orders were made by judges (von Doussa J, O'Loughlin J and Branson J) and by registrars. In respect of orders made by O'Loughlin J on 30 August 1995, unsuccessful appeals were taken to the Full Court[116] and to this Court[117].

178 Some of the companies were incorporated in South Australia; others in Queensland. The Federal Court was exercising jurisdiction purportedly conferred by s 42(3) of, respectively, the *Corporations (South Australia) Act* 1990 (SA) ("the South Australian Corporations Act") and the *Corporations (Queensland) Act* 1990 (Q) ("the Queensland Corporations Act"). Section 7 of each statute applied as a law of the State in question the Corporations Law ("the Law") set out in s 82 of the *Corporations Act* 1989 (Cth). Section 9 of the Law defines the term "company" as a company incorporated or taken to be incorporated under the Corporations Law of the enacting State.

179 Each winding-up application had been expressed as made under s 459P of the Law. Section 459P designates those who may apply for a company to be wound up in insolvency. The terms of some of the winding-up orders are inexplicit, but in all cases the orders should be understood as providing for winding up in insolvency. It follows that, while the laws under which the Federal Court acted were State laws, these laws were not made in the exercise of exclusive State legislative power. With respect to corporate insolvency, the Parliament of the Commonwealth had possessed, but had not exercised, power to make laws with respect to "bankruptcy and insolvency" (s 51(xvii)). In *The State of Victoria v The Commonwealth*[118], Dixon CJ referred to decisions construing the expressions "uniform Laws on the subject of Bankruptcies throughout the United States" and "Bankruptcy and Insolvency", in the Constitutions of the United States and Canada respectively, as extending to liquidations of insolvent trading bodies. The companies in question here also would appear to have been trading or financial corporations formed within the limits of the Commonwealth, within the meaning of s 51(xx) of the Constitution.

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116 *Emanuele v Australian Securities Commission* (1995) 63 FCR 54.

117 *Emanuele v Australian Securities Commission* (1997) 188 CLR 114.

118 (1957) 99 CLR 575 at 612.

180 Part 5.4B of the Law (ss 465A-489) was applicable to each winding up. The Liquidator was empowered to bring and defend any legal proceeding in the name and on behalf of each company (s 477(2)(a)). The exercise by the Liquidator of these powers was subject to the control of what s 477(6) identifies as the "Court". Further, Pt 5.7B of the Law (ss 588D-588Z) created and vested directly in the Liquidator rights to recover property or compensation for the benefit of creditors of the companies. In particular, s 588FF empowered the "Court" to make orders implementing a finding that a transaction of a company was voidable under s 588FE.

181 With reference to the companies in the Emanuel Group, the term "Court" was so defined by s 58AA of the Law[119] as to include, when exercising the jurisdiction of the enacting State, the Federal Court and the Supreme Court of any jurisdiction. In addition to the conferral by s 42(3) of jurisdiction upon the Federal Court, s 42(1) of the South Australian Corporations Act conferred jurisdiction with respect to civil matters upon other courts including the Supreme Courts of that State and the other States. Section 42(2) stated that this conferral was not subjected to any other jurisdictional limits of each Supreme Court. Section 42 of the Queensland Corporations Act was in corresponding terms.

182 It followed that, in the case of each company, whether or not it was incorporated in South Australia or Queensland, the power of curial control under s 477(6) of the Law and the power to make orders under s 588FF of the Law was conferred on, among other courts, the Supreme Court of South Australia. The exercise of these powers was not confined to the Federal Court as the court which had made the winding-up orders and had appointed Mr Macks as liquidator[120].

183 Section 479(3) was another such empowering provision. It provided that the Liquidator might apply to the "Court" for directions in any particular matter arising under a winding up. The Liquidator did so by motion filed in the South Australian District Registry of the Federal Court on 17 February 1998. On 8 December 1998, the Federal Court ordered that the Liquidator had power to enter into certain arrangements and transactions for the funding of actions in the Supreme Court of South Australia ("the funding orders"). As indicated above, it would have been competent for the Supreme Court to make the funding orders

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119 Section 58AA was substituted, by the *Corporations Legislation Amendment Act* 1994 (Cth), Sched 1, Pt 2, with effect from 16 October 1995, for the definition of "Court" in s 9 of the Law. There is no substantive difference between the two provisions for present purposes.

120 *Acton Engineering Pty Ltd v Campbell* (1991) 31 FCR 1.

but it was not approached to do so. No appeal was instituted against the funding orders, nor has any application been made to vary them.

The actions in the Supreme Court

184 The Liquidator instituted against various parties two actions in the Supreme Court of South Australia, Nos 409 and 410 of 1998. He did so in the name of companies in the Emanuel Group and in his own name. In this Court, the applicant in Matter No A6 of 2000 is Mr A J Saint, the third named of the first defendants in action No 409 of 1998. The first defendants practised under the name of "Thomsons, Barristers and Solicitors". The applicants in Matter No A9 of 2000 in this Court include Messrs A F Johnson, P D Slattery and J S Keeves, the first, third and fourth of the first defendants in action No 410 of 1998. The first defendants practised as solicitors under the name "Johnson Winter and Slattery".

185 In each of the Supreme Court actions, the Liquidator claims relief under s 588FF of the Law in respect of certain alleged insolvent transactions. Members of the Emanuel Group claim relief for various civil wrongs and for breaches of statutory duty and civil penalty provisions of the Law. The civil wrongs include breach of fiduciary duties owed to the companies, negligence, breach of contract, failure to account, and misleading or deceptive conduct contrary to s 56 of the *Fair Trading Act* 1987 (SA).

The applications in this Court

186 In this Court, the applicants challenge the status and authority of the Liquidator to bring and prosecute the Supreme Court actions in his own name and in the name of the companies. They do so by denying the validity of the orders of the Federal Court by which he was appointed and of the funding orders. It is common ground, following the delivery of judgment by this Court in *Re Wakim; Ex parte McNally*[121] on 17 June 1999, that s 42(3) of the South Australian and Queensland legislation were ineffective to confer the jurisdiction which the Federal Court had purported to exercise in making these orders.

187 Had these orders been made after the further conferral of jurisdiction on the Federal Court (with effect from 17 April 1997) by the addition of sub-s (1A) to s 39B of the *Judiciary Act* 1903 (Cth)[122] ("the Judiciary Act"), there would have been a question whether this concession was properly made. Certainly the

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121 (1999) 198 CLR 511.

122 By s 3 and Sched 11 of the *Law and Justice Legislation Amendment Act* 1997 (Cth).

process of the Federal Court indicates that it was exercising jurisdiction purportedly conferred in respect of matters arising under State law[123]. However, in some instances the applicant was the Commonwealth of Australia which was a creditor in respect of indebtedness under the *Income Tax Assessment Act* 1936 (Cth) ("the Tax Act"). In others, the Australian Securities Commission ("the ASC") was the applicant, although it was neither a creditor nor a contributory. The ASC had intervened in the exercise of statutory authority and in the circumstances narrated in *Emanuele v Australian Securities Commission*[124].

188 The ASC, as the Australian Securities and Investments Commission was then styled, was established by federal law, s 8 of the *Australian Securities Commission Act* 1989 (Cth) ("the ASC Act")[125]. Section 11 thereof provided that the ASC has functions and powers expressed to be conferred by State laws, including the South Australian Corporations Act and the Queensland Corporations Act. Section 11 provided a source in federal law for the intervention by the ASC in the winding-up applications to the Federal Court.

189 The proceedings in which the orders were made by the Federal Court may have been matters "arising under" laws of the Commonwealth (the Tax Act and the ASC Act) within the meaning of what is now par (c) of s 39B(1A) of the Judiciary Act[126]. It is unnecessary here to express any conclusion on that question. This is because, at the time the orders were made, there was no law of the Parliament then in force which conferred that broad head of jurisdiction on the Federal Court. Nor does there appear to have been any relevant conferral of federal jurisdiction which would have attracted the "associated matter" head of federal jurisdiction conferred by s 32 of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"). An order of a federal court which is expressed to have been made in the exercise of State jurisdiction is "ineffective". This is so

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123 See the discussion by Dawson J in *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 124-125.

124 (1997) 188 CLR 114 at 117-118, 124-125, 125-127, 133-135, 140-141.

125 From the commencement on 1 July 1998 of s 7(2) of the ASC Act, the ASC has been known as the Australian Securities and Investments Commission.

126 This provides that the original jurisdiction of the Federal Court includes jurisdiction in any matter "arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter". The qualification respecting criminal law was added by s 3 and Sched 10 of the *Law and Justice Legislation Amendment Act* 1999 (Cth). Paragraph (a) of s 39B(1A) confers jurisdiction in matters in which the Commonwealth seeks relief, but only where what is sought is an injunction or a declaration.

even though that federal court could have exercised federal jurisdiction in respect of the controversy had the necessary conferral of jurisdiction been made by a law of the Parliament under s 77(i) of the Constitution. There has been, in respect of federal courts, no conferral of jurisdiction in the general terms of the investment of State courts with federal jurisdiction by s 39(2) of the Judiciary Act.

190 For these reasons, I will proceed on the footing that the concession was properly made. I turn now to s 473 of the Law.

191 Section 473(9) of the Law states:

> "Subject to this Law, the acts of a liquidator are valid notwithstanding any defects that may afterwards be discovered in his or her appointment or qualification."

The expression "[s]ubject to this Law" may be a reference to s 532 of the Law which disqualifies certain persons, except with the leave of the "Court", from appointment as liquidator[127]. The term "defects" probably indicates that the sub-section relates only to a case where a slip has been made in the appointment and involves a distinction between such a case and one in which substantive provisions relating to an appointment have been ignored or overridden[128]. Section 473(9) does not apply where the relevant substantive provisions failed in the attempted conferral of jurisdiction on the court which appointed the liquidator in question.

192 The effect of s 581(1) of the Law in its respective operations as legislation of South Australia and Queensland, and with respect to winding up in insolvency, is to oblige the courts of each State to "act in aid of, and be auxiliary to" those courts "having jurisdiction in matters arising under corresponding laws". Section 581(1) has no operation with respect to the orders made by the Federal Court because the conferral of jurisdiction upon the Federal Court was ineffective.

193 The relief sought by notices of motion in this Court is widely drawn but, in substance, it is certiorari directed to the Federal Court to quash both the orders made for the winding up of the companies in the Emanuel Group and the appointment of Mr Macks as liquidator, and the funding orders, together with

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127 See Wallace and Young, *Australian Company Law and Practice*, (1965) at 667, 61-63 where reference is made to like provisions in ss 232(8) and 10 of the companies legislation of 1961 and 1962.

128 See the judgment of Kitto J in *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1 at 52-53.

prohibition against the Federal Court and also against Mr Macks taking any further steps in the prosecution of the actions in the Supreme Court of South Australia. The applications for certiorari are out of the time specified in O 55 r 17 of the Rules of this Court and an extension of time would be required. Applications for orders absolute are made in the first instance and to the Full Court. The jurisdiction of this Court is attracted by s 75(v) of the Constitution, together with s 76(i) of the Constitution and s 30(a) of the Judiciary Act.

194 The applications raise questions respecting the validity of both the *Federal Courts (State Jurisdiction) Act* 1999 (SA) ("the SA Act") and the *Federal Courts (State Jurisdiction) Act* 1999 (Q) ("the Queensland Act") which were passed after the decision in *Re Wakim*. For the orders made in respect of the members of the Emanuel Group incorporated in South Australia, the SA Act is material; for those incorporated in Queensland, it is the Queensland Act. The Queensland Act provides a source of the status and authority of the Liquidator to institute and carry on the actions in the Supreme Court of South Australia in respect of those companies incorporated in Queensland. Section 118 of the Constitution[129] requires full faith and credit to be given in that Supreme Court to the Queensland law[130]. The same result would obtain under the common law rules of private international law, Queensland being the place of incorporation and that law determining who is entitled to act on behalf of corporations incorporated there[131].

The South Australian Act

195 I turn first to consider the operation and validity of the SA Act in its application to the Federal Court orders respecting the companies in the Emanuel Group incorporated in South Australia.

196 The long title of the SA Act states its purpose as follows:

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

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129 And s 18 of the *State and Territorial Laws and Records Recognition Act* 1901 (Cth).

130 *Harris v Harris* [1947] VLR 44; *Censori v Holland* [1993] 1 VR 509 at 517-518.

131 Dicey and Morris, *The Conflict of Laws*, 13th ed (2000), §30-092. See also *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 287.

The legislation was introduced in South Australia, as in other States, to remedy some of the effects of the holding in *Re Wakim* that "neither the federal Parliament nor the legislature of a State, alone or in combination, could vest State judicial power in a federal court"[132].

197 In the past, various decisions of this Court or the Privy Council respecting legislative invalidity have been followed by legislation designed to overcome what federal and State Parliaments have perceived to be deleterious consequences if the situation disclosed by those decisions were left to stand. Some of that remedial legislation itself has been challenged, on occasion successfully[133], sometimes without success[134].

198 In these cases, the determination of the validity of the remedial legislation has been approached by application of settled doctrines in the Court. It is to be accepted, as in the present litigation is apparent from the statutory text itself, that the legislature has acted to overcome the legal consequences of the earlier decision. What is required of the Court is analysis of the statutory text to determine the rights, duties, powers and privileges which the new law creates, regulates or abolishes. To approach the matter in that way is, as Kitto J readily

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132 *Residual Assco Group Ltd v Spalvins* (2000) 74 ALJR 1013 at 1014 [1]; 172 ALR 366 at 367.

133 For example, in *Commissioner for Motor Transport v Antill Ranger & Co Pty Ltd* (1956) 94 CLR 177; [1956] AC 527, provisions of State legislation purporting to extinguish causes of action to recover moneys paid under legislation held invalid in *Hughes and Vale Pty Ltd v The State of New South Wales* (1954) 93 CLR 1; [1955] AC 241, themselves were held invalid. In addition, in *Hughes and Vale Pty Ltd v The State of New South Wales [No 2]* (1955) 93 CLR 127, State legislation designed to replace the licensing system struck down in the earlier litigation itself was held to be rendered invalid by s 92 of the Constitution. Eventually, further State legislation was upheld in *Armstrong v The State of Victoria [No 2]* (1957) 99 CLR 28 and *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280.

134 Examples include *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368 where this Court upheld the validity of the replacement s 140 of the *Conciliation and Arbitration Act* 1904 (Cth) which had been inserted after the power conferred by the previous s 140 was held in *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 to confer non-judicial power on a Ch III court; and *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, upholding legislation barring refund of taxes paid under a law which was invalid by reason of non-compliance with s 55 of the Constitution.

conceded in *Fairfax v Federal Commissioner of Taxation*[135], not to elevate form above substance. Rather, in the terms used by Higgins J in 1908, it is to recognise that "[t]he motives of the legislators are for their constituents to consider" and the Court "is to consider what the Act is in substance – what it does, what it commands or prescribes"[136]. Where the question is one arising under s 109 of the Constitution, the State law in question is to be construed, not artificially to avoid inconsistency with federal law, but according to its natural meaning, ascertained in this manner[137].

199 It should first be observed that the SA Act contains provisions whose operation is not at stake in the present litigation. No question arises respecting the operation of s 11, under which certain proceedings in which a "relevant order" of a federal court has been made, may, by order of the Supreme Court of South Australia, be treated as a proceeding in that Court. The validity of s 11 was upheld in *Residual Assco Group Ltd v Spalvins*[138].

200 The SA Act also contains (in s 6(b) and s 7(2)) provisions which treat "ineffective judgments"[139] of the Full Courts of the Federal Court and the Family

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135 (1965) 114 CLR 1 at 6-7.

136 *R v Barger* (1908) 6 CLR 41 at 118. Isaacs J spoke to the same effect in *The State of New South Wales v The Commonwealth* ("the *Wheat Case*") (1915) 20 CLR 54 at 98-99. Higgins J (with Isaacs J) dissented in *Barger*, but his Honour's judgment has been vindicated by time: see Zines, *The High Court and the Constitution*, 4th ed (1997) at 7-10.

137 *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136.

138 (2000) 74 ALJR 1013; 172 ALR 366.

139 Section 4(1) states:

> "A reference in this Act to an '**ineffective judgment**' is a reference to a judgment of a federal court in a State matter given or recorded, before the commencement of this section, in the purported exercise of jurisdiction purporting to have been conferred on the federal court by a relevant State Act."

The expression "relevant State Act" is so defined in s 3 as to include the South Australian Corporations Act and the term "State matter" to include a matter "in respect of which a relevant State Act purports or purported to confer jurisdiction on a federal court". Section 3 also defines "federal court" as meaning "the Federal Court of Australia or the Family Court of Australia"; "judgment" as meaning "a judgment, decree or order, whether final or interlocutory, or a sentence"; "right" as including "an interest or status"; and "liability" as including "a duty or obligation".

Court as if they had been valid judgments of the Full Court of the Supreme Court and specify that there is a right to appeal against that deemed State Full Court judgment. Further, where the ineffective judgment was not that of a Full Court, the treatment by s 6(a) of that judgment as a valid judgment of the Supreme Court constituted by a single judge thereof, carries with it (by operation of s 7) a right of appeal to the State Full Court. In addition, s 10 empowers the Supreme Court to vary, revise, set aside, revive or suspend a right or liability conferred, imposed or affected by s 6.

The issues

201 There arises in the present proceedings in this Court no question of appeal to the Full Federal Court, the Supreme Court of South Australia or this Court against any of the orders made by the Federal Court. Nor has any application been made to the Supreme Court for variation or other exercise of the powers in s 10. In argument, questions respecting the validity of s 10 and of the appellate provisions were canvassed. It may be that those sections were invoked whilst an ineffective order of a federal court remained on the record and had not been quashed or set aside on appeal to the Full Court of that Court. Were that to come to pass, then, in an actual controversy, being a matter arising under or involving the interpretation of s 109 of the Constitution, issues of "direct" or "operational" inconsistency or repugnance to Ch III might arise. In dealing with the issues under s 109, a question might arise as to whether the definition in s 4(1) of "ineffective judgment" (in its operation with respect to the appellate provisions of s 6(a), s 6(b) and s 7 described above and the variation provisions of s 10) was to be read down to exclude ineffective judgments of a federal court which have not been set aside on appeal or pursuant to relief granted under s 75(v) of the Constitution. There also was debate concerning the operation of s 73 of the Constitution respecting appeals to this Court against ineffective orders of federal courts and against orders of the Supreme Court made under powers conferred by the SA Act.

202 However, it is unnecessary to dispose now of any of these questions. None of them presently arises for the determination of the status and authority of the Liquidator and the efficacy of the funding orders. In instituting and prosecuting the Supreme Court proceedings which the applicants challenge in this Court, the Liquidator does not rely upon the appellate or variation provisions of the SA Act. That being so, there is now no occasion for this Court to consider any reading down of the definition of "ineffective judgment" in s 4(1). The proper course for this Court is to decline to investigate and decide such questions where there is lacking "a state of facts which makes it necessary to decide such a

question in order to do justice in the given case and to determine the rights of the parties"[140].

203 The questions that do arise concern only the Federal Court orders and the effect the State legislation gives to them as supplying the status and authority of the Liquidator to institute and prosecute the two actions in the Supreme Court. The orders were each an "ineffective judgment" within the meaning of the definition in s 4(1) of the SA Act because they were made by the Federal Court in a "State matter", being a matter in which a "relevant State Act", the South Australian Corporations Act (s 42(3)), purported to confer jurisdiction on the Federal Court. Section 6(a) then operates to declare that, by force of the SA Act, the rights and liabilities of all persons are and always have been the same as if each order of the Federal Court had been a valid order of the Supreme Court of South Australia[141] constituted by a single judge. A right or liability conferred or imposed or affected by s 6 is exercisable and enforceable and is to be regarded as always having been exercisable and enforceable as if it were a right or liability conferred, imposed or affected by a judgment of the Supreme Court of South Australia (s 7(1)). Further, s 8(1) of the SA Act states:

> "Any act or thing done or omitted to be done before or after the commencement of this section under or in relation to a right or liability conferred, imposed or affected by section 6 –
>
> (a) has the same effect, and gives rise to the same consequences, for the purposes of any written or other law; and
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> (b) is to be regarded as always having had the same effect, and given rise to the same consequences, for the purposes of any written or other law,
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> as if it were done, or omitted to be done, to give effect to, or under the authority of, or in reliance on, a judgment of the Supreme Court [of South Australia]."

204 Section 8(2) makes special provision concerning the operation of what in s 8(3) are defined as enforcement laws in respect of acts or omissions done before or after the commencement of s 8. An "enforcement law" does not

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140 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; see also *Cheng v The Queen* (2000) 74 ALJR 1482 at 1492 [58]; 175 ALR 338 at 350.

141 Section 6 and cognate provisions use the term "the Supreme Court" but, by force of s 4(1) of the *Acts Interpretation Act* 1915 (SA), this is to be understood as identifying the Supreme Court of South Australia.

include a law relating to contempt of court. It means a provision of another law which sets out the consequences when a person contravenes a judgment, or acts in a specified way whilst a judgment is in force. For the purpose of such an enforcement law, an ineffective judgment is treated as if it had been a valid judgment of the Supreme Court of South Australia. No question of the operation of any such enforcement law arises here with respect to the orders made by the Federal Court.

205 The other provisions I have identified, if valid, provide the necessary status and authority under the law of South Australia for the Liquidator to institute and carry on the two actions in the Supreme Court. They therefore provide an answer to the applications for prohibition to prevent the Liquidator taking any further steps in the prosecution of those actions. This is so irrespective of any grant of certiorari to quash what the SA Act already classifies as the ineffective orders of the Federal Court.

Validity

206 The question then becomes one of validity. This was challenged on several grounds. Reliance was placed upon the reasoning in *Kable v Director of Public Prosecutions (NSW)*[142] to support the proposition that, in their application to the Federal Court orders, ss 6 and 7 of the SA Act are invalid. The treatment by that statute of the ineffective orders was said to conscript the Supreme Court of South Australia to exercise a jurisdiction which was incompatible with the integrity, independence and impartiality of that Court as a court in which federal jurisdiction was invested by ss 39(2) and 68 of the Judiciary Act.

207 There are several answers to that submission. First, the reference to conscription does not advance analysis. State and federal courts are regularly and validly conscripted to adjudicate rights and liabilities established purely by statute, for example, in matters arising under laws made by the Parliament within s 76(ii) of the Constitution. Secondly, the ineffective orders of the Federal Court are orders which, had the applications in question been made to the Supreme Court, that Court would have been competent to make. The SA Act establishes rights and liabilities of all persons as if a judge of the Supreme Court had exercised the jurisdiction conferred by another law of the State, s 42(1) of the South Australian Corporations Act, with respect to the very matters in which the Federal Court made its orders. No one could impugn the orders if they had been made by the Supreme Court. The orders made by the Federal Court were of a kind long made by the Supreme Courts of the States.

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142 (1996) 189 CLR 51.

208 Thirdly, the provisions of the SA Act do not by legislative fiat convert the orders of the Federal Court to orders made by the Supreme Court. Rather, certain consequences are attached to them "as acts in the law"[143]; rights and liabilities are created as if orders had been made by a judge of the Supreme Court. There is ample legislative precedent at the State and federal level for providing, if stipulated conditions be satisfied, for the registration of foreign judgments in State Supreme Courts and in the Federal Court with the effect they would have if given in those courts and entered on the day of registration[144]. The functions performed by courts of federal jurisdiction under such laws of the Commonwealth or the States are not incompatible with the exercise of the judicial power of the Commonwealth by those courts[145]. The reasoning in *Kable* might be applicable where, for example, legislation of a State obliged its Supreme Court to enforce as if it were its own judgment an executive or legislative determination of a nature which was at odds with the fundamentals of the judicial process. That situation is far from that which is presented here.

209 Nor is there substance in the submission that, in its application to the Federal Court orders for the winding up in insolvency of companies in the Emanuel Group, the SA Act is invalid for repugnancy to the paramountcy given to the judicial power of the Commonwealth by Ch III of the Constitution and covering cl 5[146]. The SA Act creates rights and liabilities which, in the case of the orders here made by the Federal Court, could have been created pursuant to a conferral of federal jurisdiction under s 76(ii) and s 77(i) of the Constitution in respect of matters arising under a law supported by s 51(xvii) or by s 51(xx) of the Constitution. The Parliament of the Commonwealth had not moved to achieve such a result. What the SA Act achieves does not make the incidents and consequence of an exercise of the judicial power of the Commonwealth the subject of special burdens and disabilities under State law[147]. It has been truly said in *DMW v CGW*[148] of ineffective orders made by the Family Court (and the same applies to Federal Court orders) that, whilst they are subject to the relief now sought in this Court or to appeal (none was brought here within time or

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143 *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 243.

144 See *Foreign Judgments Act* 1971 (SA) and now *Foreign Judgments Act* 1991 (Cth), and, within Australia, Pt 6 (ss 104-109) of the *Service and Execution of Process Act* 1992 (Cth).

145 *Kable* (1996) 189 CLR 51 at 98, 106, 117, 132.

146 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268.

147 cf *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 681.

148 (1982) 151 CLR 491 at 507.

otherwise), they "cannot simply be ignored". The SA Act neither ignores them nor seeks to controvert them.

210 There was some discussion in submissions as to the significance for this litigation of *R v Humby; Ex parte Rooney*[149]. The Court there upheld the validity of s 5 of the *Matrimonial Causes Act* 1971 (Cth). This was enacted after the decisions in *Kotsis v Kotsis*[150] and *Knight v Knight*[151] that the Masters of the State Supreme Courts were not competent to exercise federal jurisdiction invested in those courts by the *Matrimonial Causes Act* 1959 (Cth). Like s 6 of the SA Act, s 5 did not attempt to validate orders made without the necessary federal jurisdiction; rather, s 5 attached the consequences the orders would have had if they had been made by a judge exercising federal jurisdiction. Further, it had been conceded in *Humby*[152] that the power of the Parliament under s 51(xxii) of the Constitution extended to provide for divorce without recourse to a judicial proceeding.

211 So also is the case with the winding up of companies in insolvency, at least as regards the change in status that is brought about by making of the winding-up order and the appointment of a liquidator[153]. This may be effected by legislative authority. Different considerations apply to provisions for the conduct of insolvent administration which attach sanctions which involve the determination of criminal guilt. That determination is a function appropriate exclusively to the exercise of judicial power[154]. No such question arises here.

212 The significance of *Humby* for this litigation is twofold. First, it assists in demonstrating that had the Parliament been so minded it would have been within its competence to enact a federal law which operated with respect to the orders appointing the Liquidator in similar fashion to the SA Act. Secondly, the circumstance that the SA Act applies, like the legislation in *Humby*, to a limited group of identifiable cases, does not involve an interference with the judicial

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149 (1973) 129 CLR 231.

150 (1970) 122 CLR 69.

151 (1971) 122 CLR 114.

152 (1973) 129 CLR 231 at 243.

153 See *R v Davison* (1954) 90 CLR 353 at 365-366, 375-376, 384, 389-390; *Gould v Brown* (1998) 193 CLR 346 at 404-405 [68].

154 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; *Nicholas v The Queen* (1998) 193 CLR 173 at 186 [16]; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109 [40].

process of the Federal Court of a kind resembling that which occurred in *Liyanage v The Queen*[155]. In *Humby*, Mason J said[156]:

> "Here by legislative action the rights of parties in issue in proceedings which resulted in invalid determinations were declared. The rights so declared in form and in substance were the same as those declared by the invalid determinations. But the legislation does not involve an interference with the judicial process of the kind which took place in *Liyanage v The Queen*[157] (see *Kariapper v Wijesinha*[158])."

213 The preferred basis of attack on validity was through s 109 of the Constitution and the force to be given to provisions of the Federal Court Act. If there be any inconsistency between the laws of the Commonwealth which create and confer jurisdiction upon a federal court and a State law, s 109 will invalidate the State law to the extent that it would directly or indirectly (for example by conferring a power upon a State court) preclude, override or render ineffective the exercise by the federal court of the jurisdiction conferred by federal law[159]. Any inconsistency will be between the federal law and the State law, not between the orders of the federal court made in exercise of its jurisdiction and the State law[160]. A starting point is the identification of the intended scope and operation of the federal law and, if the question arises, the extent to which it has a valid operation. I turn to consider matters respecting the validity of the relevant provisions of the Federal Court Act.

The Federal Court and its orders

214 The Federal Court is created by s 5 of the Federal Court Act as a "superior court of record" and is said to be "a court of law and equity". It has "such original jurisdiction as is vested in it by laws made by the Parliament", being jurisdiction in respect of matters arising under laws made by the Parliament (s 19(1)). The Federal Court is created pursuant to the power conferred by s 71

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155 [1967] 1 AC 259.

156 (1973) 129 CLR 231 at 250. See also *Nicholas v The Queen* (1998) 193 CLR 173 at 192 [28], 203 [57], 211-212 [83], 233 [147], 276-278 [246]-[249].

157 [1967] 1 AC 259.

158 [1968] AC 717.

159 *P v P* (1994) 181 CLR 583 at 601.

160 *P v P* (1994) 181 CLR 583 at 635.

of the Constitution[161]. The next legislative step is the conferral of jurisdiction and the marking out of its boundary or extent; this is the scope of the term "defining" in s 77(i)[162]. *Residual Assco*[163] confirms that the grant of jurisdiction by s 19 of the Federal Court Act carried with it the power to determine whether any particular vesting of jurisdiction in the Federal Court was a valid grant.

215 Further, it was said in the joint judgment in the *Boilermakers' Case*[164]:

> "Section 51(xxxix) extends to furnishing courts with authorities incidental to the performance of the functions derived under or from Chap III and no doubt to dealing in other ways with matters incidental to the execution of the powers given by the Constitution to the federal judicature. But, except for this, when an exercise of legislative powers is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chap III. For that reason it is beyond the competence of the Parliament to invest with any part of the judicial power any body or person except a court created pursuant to s 71 and constituted in accordance with s 72 or a court brought into existence by a State."

The decision in *Re Wakim* has re-emphasised the force of this statement as to the exhaustive nature of the jurisdiction identified in Ch III.

216 However, the power in s 51(xxxix) does empower the Parliament to endow the orders of a federal court with the characteristics of those of a superior court of record as understood at common law, to the extent that these characteristics are consistent with the Constitution, particularly Ch III. Those characteristics include the treatment of orders made in excess of jurisdiction (whether on constitutional grounds or for reasons of an inadequate legislative grant under s 77(i)) as effective until they are quashed or their enforcement is enjoined by this Court or they are set aside on appeal. The creation of the Federal Court by s 5 of the Federal Court Act as a superior court of record has this effect[165]. That does not mean that the stream has risen above its source.

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161 *Gould v Brown* (1998) 193 CLR 346 at 429 [137]; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR 1324 at 1335 [57]; 165 ALR 171 at 186.

162 *Gould v Brown* (1998) 193 CLR 346 at 444 [187]-[188].

163 (2000) 74 ALJR 1013 at 1016 [8]; 172 ALR 366 at 369-370.

164 (1956) 94 CLR 254 at 269-270.

165 *Cameron v Cole* (1944) 68 CLR 571 at 590-591, 598-599, 606-607; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 193-194, 222-223; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 374-375.

Rather, it is to recognise the relationship between Chs II and III of the Constitution and the reach of s 51(xxxix) in conjunction with s 71 and s 77(i).

217 The Attorneys-General for Victoria and South Australia, who intervene in support of the validity of the SA Act and the Queensland Act, submit that the well-settled proposition that the orders of a superior court of record are to be treated as valid until set aside[166] cannot apply in any sense to the orders made by the Federal Court. Rather, the orders upon which the Liquidator relies were "void ab initio" and nullities. This is said to be a consequence of the doctrine accepted in this Court in *Ha v New South Wales*[167] that the judicial power of the Commonwealth does not extend to the determination of invalidity of a law with prospective effect only. The Attorneys then submit that there is no occasion for the operation of s 109 with respect to the State laws in question here. This is because no provision of the Federal Court Act empowered the Federal Court to make the orders in question; they never had any force or effect.

218 It follows from what has been said above that the conclusions advocated by the Attorneys should not be accepted. In *DMW v CGW*, the Family Court had determined that a child was a child of a particular marriage and had made a custody order which remained in force. While those orders stood, the Supreme Court of New South Wales did not have jurisdiction to determine that the child had some other paternity. The South Australian Attorney accepts that his submissions are inconsistent with the reasoning and the decision in *DMW v CGW*[168] to the extent that they were based upon the orders of the Family Court in that litigation having a continuing effect.

219 The judicial power to determine the invalidity of legislation, such as that State legislation held invalid in *Re Wakim*, is exercised by adjudicating existing rights and obligations (including matters of status), rather than by creating rights and obligations with prospective effect. However, it does not follow that the provisions in s 51(xxxix) and Ch III of the Constitution to which reference has been made do not extend to the creation of a federal court with the power to make orders in respect of such existing rights and obligations which are binding until quashed by this Court or set aside on appeal as having been made without or in excess of a valid conferral of federal jurisdiction.

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166 See the discussion of principle by Parke B, giving the opinion of the Judges to the House of Lords, in *Dimes v The Proprietors of the Grand Junction Canal* (1852) 3 HLC 759 at 785-788 [10 ER 301 at 312-313].

167 (1997) 189 CLR 465 at 503-504.

168 (1982) 151 CLR 491 at 503, 504, 507.

220 The doctrine expressed in the metaphor that the stream cannot rise above its source and the proposition that in Australia it is the function of the judicial branch of government to determine matters in which such a question arises is founded partly in the structure of the Constitution and partly in the text of s 76(i). The notion of "nullity", as an expression of the consequences of the operation of that doctrine, does not overreach the power of the Parliament to create federal courts, to confer federal jurisdiction upon them and to give to orders suffering a constitutional or jurisdictional infirmity the limited effect that is identified in authorities such as *DMW v CGW*[169].

United States authority

221 Reference was made in argument to the treatment of related issues respecting federal jurisdiction in the United States[170]. In *Chicot County Drainage District v Baxter State Bank*[171], the Supreme Court upheld a plea of *res judicata* based upon an earlier decision in which a District Court had exercised jurisdiction conferred by a federal law later held by the Supreme Court in *Ashton v Cameron County District*[172] to be invalid. The Supreme Court rejected the proposition that there could be no basis for the earlier decree because the federal law had never conferred rights or imposed duties. Hughes CJ said that broad statements as to the effect of a determination of unconstitutionality were to be taken with qualifications and continued[173]:

> "The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, – with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which

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169 See also *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 193-194, 222-223; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 374-375; *Matthews v Australian Securities and Investments Commission* (2000) 97 FCR 396 at 401.

170 See Wright, *Law of Federal Courts*, 5th ed (1994), §16.

171 308 US 371 (1940).

172 298 US 513 (1936).

173 308 US 371 (1940) at 374.

> have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

222 The New South Wales Attorney-General, who also intervened to support the validity of the State legislation, made the point that some of the considerations which had moved Hughes CJ also were to be found in the judgment of Dixon J, delivered in 1931, in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*[174]. Speaking of a conviction based on a regulation made under a federal law but subsequently disallowed, Dixon J said[175]:

> "The conviction has become the source of his liability for his offence, and the conviction continues in force because its operation does not depend upon the law creating the offence, but upon the authority belonging to a judgment or sentence of a competent Court."

223 However, the Attorney-General for Victoria submitted that *Chicot County Drainage District* was to be understood as anticipating the development of the prospective overruling doctrine. This, in turn, at least with respect to civil cases[176], has gone into eclipse in recent years since *Harper v Virginia Department of Taxation*[177]. It is submitted that, given the position taken in *Ha v New South Wales*, this Court should not place reliance upon United States authorities which may be affected by doctrines which underpin the prospective overruling doctrine.

224 The actual holding in *Chicot County Drainage District*, respecting the application of the doctrine of *res judicata* where constitutional issues have been at stake, does not arise for consideration here. This Court has yet to express conclusions on the subject[178]. What is presently significant is that the general considerations referred to by Hughes CJ will arise equally in cases where a federal court acts in excess of jurisdiction validly conferred upon it. Here,

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174 (1931) 46 CLR 73.

175 (1931) 46 CLR 73 at 106. See also *Peters v Attorney-General for NSW* (1988) 16 NSWLR 24 at 40.

176 Tribe, *American Constitutional Law*, 3rd ed (2000), vol 1 at 218-232.

177 509 US 86 (1993).

178 *The State of Victoria v The Commonwealth* (1957) 99 CLR 575 at 654; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 597, 605, 614-615; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 564 [79], 590 [156].

"prospective overruling" is not an issue. That *Chicot County Drainage District* has this more general significance is confirmed by recent authority in the Supreme Court.

225 In *Willy v Coastal Corp*[179], the Supreme Court upheld the imposition by a District Court of sanctions (the awarding of attorney's fees) in a case where, contrary to the holding by the District Court, the case had not arisen under the particular federal law relied upon for the jurisdiction of the District Court[180]. The sanction was imposed under r 11 of the Federal Rules of Civil Procedure[181]. The Rules were adopted by the Supreme Court in exercise of a rule-making power conferred on it by *The Rules Enabling Act*[182]. Article I, §8, cl 18 of the United States Constitution was the source of power for that statute. This states:

> "The Congress shall have Power …
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Further, Art I, §8, cl 9 empowered the Congress to establish the lower federal courts. Clause 18 was a progenitor of s 51(xxxix)[183].

226 In *Willy*, the Supreme Court rejected the submission that the power conferred by cl 18 to enact laws for the regulation of the lower federal courts and the enforcement of their judgments did not extend to proceedings in which those courts wrongly had assumed jurisdiction. It held that such a law did not run foul of Art III[184]. No question of "prospective overruling" arose in *Willy*. The Court of Appeals had determined that the District Court had erred in its assumption of

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179 503 US 131 (1992).

180 cf Constitution, s 76(ii).

181 Rule 11 imposes sanctions in respect of abuses in the signing of pleadings which, as in this case, "created a blur of absolute confusion": 503 US 131 (1992) at 133.

182 28 USC §2072.

183 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 651.

184 cf Ch III of the Constitution.

"federal question" jurisdiction. However, the Supreme Court, citing for this purpose *Chicot County Drainage District*, held that this determination[185]:

> "does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction".

227 *Willy* provides analogical support for the conclusions expressed above respecting the authority provided by s 71, s 77(i) and s 51(xxxix) of the Constitution for the enactment of the Federal Court Act creating the Federal Court and, as a superior court of record, giving its infirm orders the limited effect discussed earlier in these reasons. It is on this basis, not that of the nullity of those orders, that the issues respecting s 109 of the Constitution are to be determined. To these I now turn.

Inconsistency

228 Commonly, judgments, decrees and orders are sources of rights and liabilities upon and by reference to which the legal system then operates. The orders made by the Federal Court which are "ineffective judgments" lack that character to a significant degree. The question whether rights and liabilities may be created by a State law which takes as its criterion of operation the existence of an "ineffective judgment" must, as a matter of necessary legal method, require close textual analysis.

229 Section 6(a) of the SA Act operates to declare the rights and liabilities of all persons to be the same as if the orders appointing Mr Macks as liquidator and the funding orders had been valid orders of the Supreme Court of South Australia, constituted by a single judge. Section 7(1) classifies those rights or liabilities as exercisable or enforceable as if they were conferred, imposed or affected by a judgment of the Supreme Court of South Australia. These provisions of the State law do not alter, impair or detract from the operation of federal law giving the orders their particular and limited effect.

230 The rights and liabilities which have their source in the State legislation do not deny or vary the operation of the orders of the Federal Court[186]. Rather, the State legislation takes the imperfect orders as the factum by reference to which it then creates certain rights and liabilities. The purported exercise of jurisdiction by the Federal Court is not directly or indirectly overridden[187]. Nor are the

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185 503 US 131 (1992) at 137.

186 cf *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 78 [31].

187 *P v P* (1994) 181 CLR 583 at 603.

present applications to this Court an instance where there coexist federal and State powers potentially capable of exercise with respect to the same subject-matter, but where no inconsistency can arise until there is an actual exercise of power[188]. The issues arising in the present applications do not involve any questions of "operational inconsistency" as it is called.

231 The terms and operation of the relevant federal law do not disclose a legislative intent to cover a field upon which the SA Act intrudes. For the argument in support of this species of inconsistency to prevail, it has to go so far as to assert in the Federal Court Act an intention that it state exhaustively the law respecting the consequences for the rights and liabilities of the parties and third parties of orders made by the Federal Court without or in excess of jurisdiction. True enough, State laws cannot regulate the practice and procedure of the Federal Court. Section 59(1) of the Federal Court Act confers upon the judges of that Court a rule-making power with respect to the conduct of any business in the Court which is expressed in broad terms. However, it would be a very real question whether this power extended to the making of rules having substantive consequences for the non-curial conduct dealt with in the SA Act. In any event, no effort has been made to use the rule-making power in this way.

232 The extent to which the subject of orders in excess of jurisdiction or without jurisdiction is dealt with by the legislation is found in the somewhat indirect means provided in s 5. This creates the Federal Court as a superior court of record. The appropriate conclusion to be drawn from the Federal Court Act is that the Parliament had no intention to mark out a wider field than the immediate curial consequences of an infirm order, so that it would be binding until set aside or quashed. When ss 6 and 7 of the SA Act operate by reference to the orders appointing the Liquidator and the funding orders, they do not enter upon a field marked out for exclusive occupation by the Federal Court Act. The submissions based upon s 109 of the Constitution should not be accepted.

233 It follows that there is no ground for prohibiting the further conduct by the Liquidator of the actions in the Supreme Court of South Australia, in so far as the Liquidator acts in respect of appointments to companies incorporated in that State.

The Queensland Act

234 Nor is the position any different respecting those companies in the Emanuel Group incorporated in Queensland. The Queensland Act declares the rights and liabilities of all persons to be, by force of that statute, the same as if

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188 *The Commonwealth v Western Australia* (1999) 196 CLR 392 at 417 [61], 421 [77], 439-440 [139], 478 [259].

the orders in question respecting the companies incorporated in that State were valid orders of the Trial Division of the Supreme Court of Queensland. Save for the identity of the Supreme Court, the terms of the Queensland Act are relevantly identical to those of the SA Act. The status and authority given by the Queensland Act to the Liquidator are to be recognised in South Australia in accordance with the reasoning outlined earlier in this judgment.

Orders

235 There remains the question of relief upon the applications to this Court. Certiorari should go in respect of the orders for which it is sought. (There should be liberty to apply to a Justice for certiorari to quash the winding-up order made in SG3050 of 1995; on the present state of the record in this Court, that relief is not sought.)

236 The reasons for delay in instituting the present applications for certiorari are sufficiently explained by the evidence. As a discretionary remedy, ordinarily certiorari should go where a federal court has acted in excess of or without jurisdiction. Considerations of potential prejudice to third parties, which were present in *Re Wakim*, do not arise in this case, given the operation of the SA Act and the Queensland Act. Furthermore, the grant of certiorari may have an advantage in avoiding possible disputes at some later stage respecting operational inconsistency. If certiorari be granted to quash the winding-up orders under which Mr Macks was appointed liquidator, and the funding orders, no question then arises of prohibition to the Federal Court. In continuing his conduct of the actions in the Supreme Court, the Liquidator is supported by the SA Act and the Queensland Act. No ground for prohibition against the Liquidator exists. In each application, the moving party or parties should pay the costs of the Liquidator.

237 The Deputy Commissioner of Taxation was joined as a respondent to both applications and has had substantial success on his submissions. In each application, the moving parties also should pay the costs (including reserved costs) of the Deputy Commissioner.

238 KIRBY J. These proceedings are part of the rich harvest of litigation that has followed this Court's decision in *Re Wakim; Ex parte McNally*[189]. That decision "struck asunder"[190] the cross-vesting legislation which, until then, had well served the purposes of cooperative federalism in Australia. As a consequence of *Wakim*, there have been legislative and judicial attempts to "stitch together"[191] the pieces of legislation that are left – and to add new ones – so as to reduce, as far as the Constitution allows, the inconvenience to the many litigants engaged in legal proceedings who had previously relied upon the invalid laws.

The inconvenience of *Wakim* and its aftermath

239 *Wakim* held that the provisions of the State cross-vesting legislation purporting to vest State jurisdiction in federal courts (and a federal law purporting to consent to such vesting) were invalid under the Constitution. The decision rested on the reasoning of the majority of the Court concerning the structure of the Constitution, especially of Ch III, and the negative implications that were drawn from the failure in the Constitution to provide for the vesting of State jurisdiction in federal courts, whereas the Constitution, in terms, allowed for the vesting of federal jurisdiction in any court of a State[192].

240 Parties who had relied on the cross-vesting legislation, and who were at different stages of litigation in federal courts, were caught by the decision in *Wakim*[193]. Countless orders had been made, steps taken and costs incurred in reliance on the legislation which was declared to be invalid. It was inevitable that the legislatures of Australia would endeavour to palliate the significant inconvenience that followed the decision in *Wakim*[194].

241 The principal legislative responses directed to this end were a series of statutes enacted by the Parliament of each State and brought into effect within weeks of the decision in *Wakim*. Each statute has a common short title.

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189 (1999) 198 CLR 511 ("*Wakim*").

190 Mason, "Judicial Review: A View From Constitutional and Other Perspectives", (2000) 28 *Federal Law Review* 331 at 342 ("Mason").

191 Mason, (2000) 28 *Federal Law Review* 331 at 342.

192 Constitution, s 77(iii).

193 *Residual Assco Group Ltd v Spalvins* (2000) 74 ALJR 1013 at 1021-1022 [39]; 172 ALR 366 at 377 ("*Residual Assco*").

194 *Residual Assco* (2000) 74 ALJR 1013 at 1021 [34]; 172 ALR 366 at 376.

Ominously enough, each is called the *Federal Courts (State Jurisdiction) Act*[195]. I say ominously because, as Gaudron J implies in her reasons[196], one would not normally expect State legislation to be addressed to matters concerning federal courts. Normally, State legislatures would lack the constitutional power to make such laws. Only an express provision in the Constitution would ordinarily authorise a Parliament of a State to affect the judicial functions of the Commonwealth and there is no such provision[197]. Specifically, following *Wakim*, State legislatures lack power to legislate with respect to State jurisdiction in federal courts. The present proceedings address the constitutional validity of some of the provisions of the State Jurisdiction Acts. The difficulty, signalled by the short title, has occasioned the constitutional challenges which this Court must now resolve.

<u>*Residual Assco* and approaching amelioration constructively</u>

242 Soon after the commencement of the State Jurisdiction Acts, proceedings were brought in *Residual Assco* to contest certain of their provisions. In *Residual Assco*, the Court unanimously concluded that, in that case, it was only necessary to determine the validity of s 11 of the applicable State Jurisdiction Act. The Court decided that that section (and the Rules of the Supreme Court of South Australia designed to give effect to its operation) were not invalid by reason of the Constitution. I joined in those conclusions. They afford the starting point for analysis of the present matter.

243 In *Residual Assco*, I set out the approach which it is proper for this Court to take in considering constitutional challenges to the provisions of the State Jurisdiction Acts. That approach was informed by a view of the Constitution which influenced my dissenting opinion in *Wakim*[198]. I have referred to the

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195 ("State Jurisdiction Acts"). Each of the State Acts conforms to a common template. Although there are minor variations in the several State provisions, none is significant. The particular Act at issue in these proceedings is the *Federal Courts (State Jurisdiction) Act* 1999 (SA). When citing particular provisions, I will refer to that Act.

196 Reasons of Gaudron J at [58].

197 cf *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 424, 440 concerning restrictions on or modifications of the executive capacities of the Commonwealth. The principle applies with equal or greater force to purported modifications affecting the federal Judicature; cf *Pedersen v Young* (1964) 110 CLR 162 at 165-166, 167; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 87.

198 (1999) 198 CLR 511 at 600-602 [189]-[192].

approach in decisions since[199]. The Constitution provides for, and envisages, cooperation between the component parts of the Commonwealth acting in a rational, harmonious and generally efficient way[200]. In the face of the serious problems presented by the decision in *Wakim*, measures such as the State Jurisdiction Acts are understandable. To the full extent permitted by the Constitution, this Court should uphold the validity of the amelioration provided. So it did, in *Residual Assco*, in relation to s 11[201].

244 Section 11 was, however, a somewhat special one. It could readily be isolated from the other provisions of the Act. It applied only to a proceeding in a federal court without jurisdiction to hear and determine the proceedings, where the federal court in question had declared, or otherwise decided or determined, that it had no such jurisdiction and thus, effectively, had terminated its assertion of jurisdiction over the matter[202]. Section 11 does not refer to an "ineffective judgment" of a federal court, as that expression is defined in the State Jurisdiction Act[203]. That was why it was unnecessary in *Residual Assco* to consider the validity of the other sections of that Act. In so far as the other sections referred to an "ineffective judgment", they presented problems arising "at a stage of litigation later than that reached in the proceedings involving the [relevant] parties"[204]. I observed in *Residual Assco* that the problems so raised would "escalate at later stages of proceedings" and "return soon enough"[205]. So it has proved. Still further challenges wait in a queue for the decision of this Court. Some of the problems yet to come are foreshadowed by Gummow J in his reasons[206]. But there are others.

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199 eg *R v Hughes* (2000) 74 ALJR 802 at 813-814 [53]; 171 ALR 155 at 170.

200 *Residual Assco* (2000) 74 ALJR 1013 at 1032 [91]; 172 ALR 366 at 392.

201 *Residual Assco* (2000) 74 ALJR 1013 at 1020 [28]; 172 ALR 366 at 374-375; cf reasons of McHugh J at [112].

202 See State Jurisdiction Act, s 11. The terms of s 11 are set out in *Residual Assco* (2000) 74 ALJR 1013 at 1015 [3]; 172 ALR 366 at 368.

203 State Jurisdiction Act, s 4(1). See *Residual Assco* (2000) 74 ALJR 1013 at 1020 [29], 1032 [94]; 172 ALR 366 at 375, 392-393.

204 *Residual Assco* (2000) 74 ALJR 1013 at 1032 [94]; 172 ALR 366 at 393.

205 *Residual Assco* (2000) 74 ALJR 1013 at 1033 [96]; 172 ALR 366 at 393.

206 Reasons of Gummow J at [201], [204].

Avoiding constitutional inconsistency and incompatibility

245 This Court should approach the problem of constitutional validity in a constructive way. But that approach must be tempered (as in all constitutional decisions) by adherence to basic principle. In endeavouring to repair the unfortunate consequences of *Wakim*, the Court must be vigilant to avoid inflicting or condoning wounds on constitutional doctrine that could return to damage the Constitution at a later time. As I understand the basic reasoning that lay behind the majority view in *Wakim*[207], and behind the reasoning in other cases before and since[208], it reflects a concern that the federal judiciary should be defended from impermissible incursions by federal or State legislatures or governments[209]. That concern is understandable. Substantially, I share it. But it would be a misfortune if, in attempting to solve the problems which have followed *Wakim*, this Court were to adopt an approach that undermined the very principle that the decision in *Wakim* was intended to uphold and safeguard.

246 This was the essence of the submission of the applicants in these proceedings. According to them, the State Jurisdiction Acts impermissibly intrude State law into areas concerning the federal judiciary which are exclusively the province of the Constitution and federal legislation made under it. The State Jurisdiction Acts do so by enacting provisions which are inconsistent with the *Federal Court of Australia Act* 1976 (Cth) ("Federal Court Act"). They do so by attempting to impose functions and obligations upon a State Supreme Court which are incompatible with the place of such a court in the integrated Judicature of the Commonwealth[210]. It is necessary to address each of these arguments in turn. In their several different manifestations[211], they present the two fundamental issues that fall for decision in these proceedings. The first is concerned with constitutional inconsistency. The second is concerned with constitutional incompatibility.

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207 See *Residual Assco* (2000) 74 ALJR 1013 at 1024 [54]; 172 ALR 366 at 381.

208 eg *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Abebe v Commonwealth* (1999) 197 CLR 510 at 555-558 [117]-[127] per Gaudron J, 569-575 [161]-[178] per Gummow and Hayne JJ.

209 cf *Residual Assco* (2000) 74 ALJR 1013 at 1024 [55]; 172 ALR 366 at 381.

210 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ("*Kable*").

211 The manifestations of the applicants' arguments are conveniently summarised in the reasons of McHugh J at [119].

The facts, legislation and common ground

247 The facts are set out in other reasons[212]. So are the relevant provisions of the applicable State Jurisdiction Act which are challenged[213]. It would be utterly pointless to repeat those provisions in my reasons, extending their length needlessly. In essence, the applicants for constitutional writs[214], and certiorari[215] to make that relief effective, seek nothing more than the application of the same logic applied in the decision in *Wakim*.

248 The orders which the applicants contest were made by the Federal Court of Australia. They provided for the winding up of the subject companies and the appointment of a liquidator to perform the functions of that office ("the winding up orders") and other orders ("the funding orders"). The orders were clearly made by the Federal Court in the exercise of its powers under the Federal Court Act and as part of the jurisdiction purportedly conferred on the Federal Court by the legislation struck down in Wakim[216]. No other legal basis was propounded to sustain the validity of the Federal Court's orders.

249 On the face of things, therefore, it is clear that, in these matters, the Federal Court did not have jurisdiction to make the winding up and funding orders that it did. The judges who made those orders were officers of the Commonwealth[217]. They are thus amenable to the constitutional writs and connected relief sought by the applicants. Where a constitutional defect in such orders is demonstrated, indeed uncontested, the provision of relief from such

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212 cf reasons of Gleeson CJ at [1]-[7]; reasons of Gaudron J at [34]-[38]; reasons of McHugh J at [89]-[91]; reasons of Hayne and Callinan JJ at [313]-[321].

213 Reasons of Gleeson CJ at [8]-[11]; reasons of Gaudron J at [43]-[45]; reasons of McHugh J at [101]-[105], [114], [117]; reasons of Hayne and Callinan JJ at [323].

214 Constitution, s 75(v). See *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57 at [135]-[149].

215 *Judiciary Act* 1903 (Cth), s 32; cf reasons of Gummow J at [193].

216 *Corporations (South Australia) Act* 1990 (SA), s 42(3); *Corporations Act* 1989 (Cth), s 56(2); cf reasons of Hayne and Callinan JJ at [314].

217 *The Tramways Case [No 1]* (1914) 18 CLR 54 at 62, 66-67, 82-83, 86; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 399.

orders is virtually automatic[218]. This is because the interests involved are not exclusively those private to the parties. Especially in the case of winding up orders, the interests extend to the status of the corporation involved, as well as the rights of non-parties and the interests of the public. Moreover, the relief contemplated by the Constitution serves the high purpose of upholding constitutional government and the rule of law[219]. Therefore (subject to an extension of time required for the provision of relief) the applicants are entitled to orders relieving them of the orders of the Federal Court made without jurisdiction. What stands in the way?

250 The only basis suggested for breathing retrospective validity into the otherwise invalid orders of the Federal Court was that purportedly afforded by the State Jurisdiction Acts. The validity of the provisions of those Acts is therefore presented for determination. I agree with Gummow J that there were other ways, including by valid federal legislation, that the salvage here attempted might have been lawfully accomplished[220]. But as that was not attempted, this fact is irrelevant to the present discourse. I also agree with Gummow J, for the reasons which he gives, that nothing in ss 473(9) and 581(1) of the Corporations Law assists to make the winding up and funding orders effective if otherwise found to be invalid[221].

251 The proceedings must be approached on the footing that no application had been made to the Full Court of the Federal Court for an order setting aside the winding up and funding orders. Also, no application has been made to the Supreme Court of South Australia to "vary, revoke, set aside, revive or suspend a right or liability conferred, imposed or affected"[222] by the operation of s 6 of the State Jurisdiction Act which validates the "rights and liabilities of all persons" contained in an "ineffective judgment" of the Federal Court[223]. Nor, at this stage,

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218 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194; *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57 at [149]; cf reasons of Hayne and Callinan JJ at [371].

219 *Re Carmody; Ex parte Glennan* (2000) 74 ALJR 1148 at 1149-1150 [2]-[5]; 173 ALR 145 at 146-147; *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57 at [135]-[149].

220 Reasons of Gummow J at [187]-[189].

221 Reasons of Gummow J at [191]-[192].

222 State Jurisdiction Act, s 10(1).

223 State Jurisdiction Act, s 6. See reasons of Gummow J at [201].

has any purported appeal[224] been taken against the "judgment of the Supreme Court"[225] which was created from the "ineffective judgment" of the Federal Court. For the applicants, these facts mattered not. According to them, with the exception of s 11, the State Jurisdiction Act effectively legislated with respect to judgments of the Federal Court which had been rendered invalid by the decision in *Wakim*.

252 As the applicants described this legislation, effectively it sought to circumvent the constitutional result of *Wakim* by rendering an "ineffective judgment" of the Federal Court as subject to the appellate supervision of the Supreme Court in place of the Full Court of the Federal Court. It involved a fiction which was as ineffective as it was dangerous. It was ineffective because it purported to enact a State law (the State Jurisdiction Act) which was inconsistent in many ways with a federal law (the Federal Court Act). It was dangerous because it effectively undermined the constitutional ruling of this Court in *Wakim*. It permitted a legislative judgment to be imposed on a State Supreme Court. By doing so, it endorsed a legislative intrusion into the functions of a State Supreme Court that is incompatible with such a court's independence and place in the integrated Australian Judicature.

The residual validity of the Federal Court orders

253 Two threshold issues arise. The first of these also arose in *Residual Assco*[226]. As explained elsewhere[227], some of the intervening States[228] proffered a solution to the applicants' contentions that might be described as fundamental. It was a solution which the applicants, the liquidator and the other interveners rejected. It arose from a strict application of the doctrine of constitutional "nullification"[229].

254 According to this view, if the Federal Court had no jurisdiction under the cross-vesting legislation to make the winding up and funding orders, nothing in the Constitution, nor any provision in the Federal Court Act or any other federal

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224 State Jurisdiction Act, s 7(2).

225 State Jurisdiction Act, s 7(3).

226 (2000) 74 ALJR 1013 at 1023-1024 [48]-[55]; 172 ALR 366 at 379-381.

227 Reasons of Gaudron J at [48]; reasons of Gummow J at [217].

228 Victoria, South Australia and Western Australia.

229 cf *Residual Assco* (2000) 74 ALJR 1013 at 1025-1027 [57]-[66]; 172 ALR 366 at 382-385.

law, could make up the deficit. The orders made were void ab initio. They were not sustained by any federal law. Therefore, they could not act as an impediment to a State legislature providing as it saw fit for the winding up of companies and the funding of litigation by a liquidator. There being no valid federal law in the field, State law could operate without the possibility of inconsistency with federal law arising under s 109 of the Constitution. This argument invoked separate allusions to constitutional sources and legislative streams.

255 I have already rejected this argument in *Residual Assco*[230]. The argument should again be rejected. I do not consider that it is necessary to address an analysis of the problem stated in the different context of administrative law[231]. There, it is true, it continues to present logical puzzles[232]. But in the distinct field of federal constitutional law, involving the division of governmental powers according to a written document upheld by courts such as this, there is an established jurisprudence. It addresses a basal concern about the presence, or absence, of constitutional power. Either such power exists to sustain the purported deployment of governmental functions or it does not. Where it does not exist, the results of nullification, however inconvenient, must follow. But in the case of courts established on the model of the English courts, there are sound reasons of legal history, authority, principle and policy for accepting that the Constitution sustains, as valid until set aside, the "judgments, decrees, orders, and sentences"[233] of such courts. At least it does so where those courts are, by law[234], superior courts of record. Provisions to that effect do not represent invalid attempts to confer on courts greater power than the Constitution envisages. Instead they represent nothing else than clarification of the character of "courts" that are provided for in the Constitution and therefore have constitutional validity, authority and power.

256 It follows that the judicial orders concerned in the present case are not wholly devoid of a constitutional source. That source is within the nature and functions of the "courts" for which Ch III of the Constitution provides[235], and in

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230 (2000) 74 ALJR 1013 at 1027-1030 [67]-[81]; 172 ALR 366 at 385-389.

231 Wade and Forsyth, *Administrative Law*, 7th ed (1994) at 339-344 noted in reasons of Hayne and Callinan JJ at [345].

232 Taggart, "Rival Theories of Invalidity in Administrative Law: Some Practical and Theoretical Consequences", in Taggart (ed), *Judicial Review of Administrative Action in the 1980s: Problems and Prospects*, (1986) 70.

233 Constitution, s 73.

234 Federal Court Act, s 5(2).

235 Particularly the Constitution, s 76(i). See reasons of Gummow J at [220].

the power conferred on the Federal Court by valid legislation to determine contested questions of jurisdiction affecting its own orders[236]. To the arguments which I advanced in *Residual Assco*, I would only add one which Gaudron J has suggested[237]. The very terms of s 75(v) of the Constitution, envisaging that this Court should have original jurisdiction to grant the constitutional writs of prohibition and Mandamus against "officers of the Commonwealth", including federal judges, necessarily contemplate that such judges will sometimes make orders devoid of constitutional validity. Yet such orders will still be amenable to the constitutional writs. It will be no answer to that relief to say that the orders are nullities. The Constitution itself denies that argument. The orders impugned will still ground the provision of judicial relief. This Court's jurisdiction in respect of them is undoubted. Such jurisdiction may be conferred on other federal courts by a law made by the Parliament[238]. The orders in this case, therefore, enjoy a limited validity, whatever might otherwise be their constitutional flaws.

257 Accordingly, it is necessary to approach the winding up and funding orders on the basis that, until set aside on appeal or quashed pursuant to s 75(v) of the Constitution, they are valid and binding orders of the Federal Court. They are not nullities that can be ignored by the parties, the public and State Parliaments. In particular, they remain subject to the appellate jurisdiction of the Full Court of the Federal Court. Such appellate jurisdiction might be invoked simply to secure an order setting aside another order made without jurisdiction. An order made without jurisdiction might also found an application in this Court for special leave to appeal from the Full Court of the Federal Court, for an order to set aside the order because it is invalid, or for an order to prohibit its enforcement.

258 In any such proceedings, it cannot be assumed that a respondent will simply nod its head to the making of such orders. If, for example, such a respondent could point, in a case such as the present, to a basis other than the invalid cross-vesting legislation to ground the jurisdiction of the Federal Court[239], it might be entitled to resist an appeal or an application for relief under s 75(v) of the Constitution. Because of the Federal Parliament's substantial legislative

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236 Federal Court Act, s 19; *Judiciary Act*, s 39B(1A)(c); cf *Residual Assco* (2000) 74 ALJR 1013 at 1017 [13]; 172 ALR 366 at 371.

237 Reasons of Gaudron J at [52].

238 Constitution, s 77(i).

239 As was suggested in *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42.

powers with respect to corporations[240], it would be possible, even at this stage, for federal legislation to be enacted which afforded the Federal Court jurisdiction and power to make, continue, vary or terminate orders with respect to some activities involving constitutional corporations[241]. Any such federal legislation would not be entering upon a virgin field. It would be entitled to attach its consequences to orders made earlier by the Federal Court, which are valid until set aside or quashed. The Parliament may or may not presently wish to do this. However that may be, current legislative intentions are irrelevant. Under the Constitution, the power exists. In the present proceedings, that fact is significant because the orders of the Federal Court have not to this time been terminated. They remain valid to the extent that I have described.

A matter of construction: "ineffective judgments"

259 A second threshold question needs to be dealt with. It concerns the construction of the State Jurisdiction Acts. It is an established principle in determining constitutional invalidity that the meaning and effect of the impugned legislation should first be identified[242]. This is because laws may be compatible with the Constitution if they are construed with a confined operation or read down when otherwise they would breach its requirements.

260 Other members of this Court[243] are convinced by the submission that the key provisions of the State Jurisdiction Act do not effectively render an "ineffective judgment" of the Federal Court as a "judgment of the Supreme Court"[244]. It is true that some of the provisions of the State Jurisdiction Act do not take as their express point of reference an "ineffective judgment" of the Federal Court. Instead, they refer to a "liability" or "right"[245], the "rights and

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240 Constitution, s 51(xx).

241 Those "corporations" within the meaning of s 51(xx) of the Constitution; cf *New South Wales v The Commonwealth* (*The Incorporation Case*) (1990) 169 CLR 482; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 364-367.

242 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 185-186 per Latham CJ; *R v Hughes* (2000) 74 ALJR 802 at 816 [66]; 171 ALR 155 at 173-174; *Residual Assco* (2000) 74 ALJR 1013 at 1030 [81]; 172 ALR 366 at 389.

243 Reasons of Gleeson CJ at [25]; reasons of Gaudron J at [58], [60]; reasons of McHugh J at [110]; reasons of Gummow J at [208]; reasons of Hayne and Callinan JJ at [351]-[353].

244 State Jurisdiction Act, ss 6, 7.

245 State Jurisdiction Act, s 3.

liabilities of all persons"[246], a "right or liability"[247], or "rights or liabilities"[248]. In that sense, those who drafted the legislation have endeavoured to take the spotlight off the Federal Court judgment and to refocus it on "rights" and "liabilities". The object of doing so is plain enough. It is to avoid drawing attention to the fact that the State legislation operates on, and by reference to, the Federal Court judgment. It is a drafting device which attempts to deny that the State legislation amounts to an intrusion into the operation of the Federal Court.

261 For several reasons, I am not convinced that this device escapes the problem of constitutional validity presented by the State Jurisdiction Acts. First, the transparency of what is attempted is revealed by an analysis of the purpose of the State Jurisdiction Act. That purpose is signalled, somewhat brazenly, by the short title of the Act and its counterparts in all of the other States. The boldness is given greater emphasis by the long title of the South Australian Act which explains that it is an "Act to provide that certain decisions of the Federal Court of Australia ... have effect as decisions of the Supreme Court and to make other provision relating to certain matters relating to the jurisdiction of those courts"[249]. The drafting technique may, in some provisions, attach consequences to "rights" and "liabilities". But the purpose, intended effect and operation of the Act could not have been more openly and boldly declared than in the long title.

262 Secondly, the "rights" and "liabilities" to which the State Jurisdiction Act refers[250] are not granted by the common law or under State, federal or Territory law. These "rights" and "liabilities" are only those enjoyed by operation of an "ineffective judgment" of the Federal Court. Thus, the shift of the spotlight cannot divert attention very far from the "ineffective judgment" of the Federal Court. On the contrary, that judgment remains at the centre of its focus. The invalidity of such a judgment is plainly the mischief which the State Jurisdiction Act is targeted to redress.

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246 State Jurisdiction Act, s 6.

247 State Jurisdiction Act, ss 7(1), 8(1), 10(1), 13.

248 State Jurisdiction Act, s 9(2)(a) and (b).

249 The long title in other versions of the State Jurisdiction Act is different. Thus the *Federal Courts (State Jurisdiction) Act* 1999 (Q) contains as its long title the less forthcoming words: "An Act relating to the ineffective conferral of jurisdiction on the Federal Court of Australia and the Family Court of Australia about certain matters". The South Australian Act is the statute in question in these proceedings. Its long title lets the cat out of the bag.

250 State Jurisdiction Act, ss 6, 7.

263 Thirdly, it is suggested that s 10 of the State Jurisdiction Act, which allows such "rights" and "liabilities" to be varied or otherwise changed, makes it clear that the Act is directed towards these "rights" and "liabilities" rather than to the "ineffective judgment" of the Federal Court[251]. There is a simple textual answer to this suggestion. Section 10 purports to permit the State Supreme Court to vary or otherwise change such "rights" or "liabilities", but only as "conferred, imposed or affected by section 6". Section 6, in turn, takes the reader to the effect on "rights and liabilities" of the "ineffective judgment of … the Federal Court of Australia". The fiction requiring the "rights" and "liabilities" to be treated "as if" determined by the State Supreme Court makes clear the fundamental objective of the State law. Although the Constitution necessitates the invalidity of the "rights and liabilities" created by the "ineffective judgment" of the Federal Court and forbids the enforcement of that judgment, the State legislation purports to confer effectiveness of its own on such an "ineffective judgment". Indeed, it is to become "as if" it were a judgment of the State Supreme Court. This is precisely so that it can be varied and otherwise changed by that Court. What, one might ask, is susceptible to such variation and change? Only the rights and liabilities of the parties as declared by the "ineffective judgment".

264 To make this point plain, it is only necessary to refer to the "ineffective judgment[s]" of the Federal Court impugned in this case. They are not "judgment[s]" at large. They involve specific orders under identifiable laws, affecting specified persons, in particular ways. All of this is defined in the judgments of the Federal Court. To suggest that the State Jurisdiction Act somehow attaches to "rights" and "liabilities", disjoined from the identified judgment of the Federal Court, is to surrender to a myopia of inventive construction born of remedial desires.

265 Fourthly, the State Jurisdiction Act, in s 7(2), purports to permit an "appeal against that judgment", being the "ineffective judgment" of the Federal Court. By s 7(3), such judgment is "taken to be a judgment of the Supreme Court constituted of a single Judge". Clearly s 7 travels far beyond a bare declaration of "rights" and "liabilities". It must do so in order to permit an appeal from "that judgment". No "appeal" could be taken from a bare declaration by statute of "rights" and "liabilities". This is why it is necessary to look beyond the provisions of the State Jurisdiction Act itself and to understand how the scheme of the entire Act operates.

266 Fifthly, where important provisions of the Constitution, as determined by this Court, are challenged, it is impermissible to defy them by reliance upon drafting devices involving patent fictions. What cannot be done in accordance

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251 See reasons of Hayne and Callinan JJ at [351]-[353].

with the Constitution directly can, it is true, sometimes be achieved indirectly[252], including to secure ends that almost certainly were outside the contemplation of those who drafted and adopted its text[253]. But where important constitutional prohibitions are involved, they may not so easily be circumvented[254]. This Court must stand as the guardian of obedience to them.

267 The constitutional provision that invalidates inconsistent State laws which intrude into a subject matter regulated by federal law[255] lies at the heart of the federal character of the Australian Commonwealth. It upholds the ascendancy, within Australia, of valid national laws. Attempts to invade the proper functions of the judiciary and to conscript State Supreme Courts by requiring them to accept, as decreed, an "ineffective judgment" imposed upon them by a legislature appear (on the face of things) to involve serious breaches of important constitutional prohibitions. Surely in such a case, where such breaches of fundamental constitutional norms are alleged, this Court's attention will be addressed not to the form of the impugned legislation but to its substance. The device of wording the impugned legislation so that it refers to "rights" and "liabilities" has convinced others that an intersection of federal and State laws has been avoided[256]. It does not convince me. The State Jurisdiction Act is exactly what it claims to be. Its provisions are concerned, as they state, with "certain decisions of the Federal Court of Australia". As this Court now holds, they are decisions of the Federal Court which, at the relevant time, may be (and in this case are) valid and effective until they are set aside. In such circumstances, only the most formalistic construction of the State Jurisdiction Act would, in my respectful view, perceive no invalidating intersection.

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252 eg by utilising the external affairs power under s 51(xxix) of the Constitution: *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1.

253 eg *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Sue v Hill* (1999) 73 ALJR 1016; 163 ALR 648.

254 *The Commonwealth and Commonwealth Oil Refineries Ltd v South Australia* (1926) 38 CLR 408 at 423; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 78; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 633, 662-663; *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at 522-523; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 305.

255 Constitution, s 109. This is made clear by *Commonwealth of Australia Constitution Act* 1900 (UK), s 5; cf Hanks, *Constitutional Law in Australia*, 2nd ed (1996) at 258.

256 Reasons of Hayne and Callinan JJ at [351]-[353].

268 I am indebted to Gummow J for drawing specific attention, in his reasons[257], to the explanation by Kitto J of the duty of this Court, in deciding great questions of constitutional validity, to approach them by reference to considerations of substance not form. In *Fairfax v Federal Commissioner of Taxation*[258], Kitto J pointed out that, in such matters, the search upon which the Court is engaged is one for the "true nature and character of the legislation" and for its "real substance". The need to distinguish between form and substance in such endeavours was traced by Kitto J to what had been said "long ago"[259] in *McCulloch v Maryland*[260]. The reasoning of Higgins J in *R v Barger*[261], also mentioned by Gummow J[262], is not different. It reinforces Kitto J's analysis. Higgins J stated that this Court "is to consider what the Act is *in substance* – what it does, what it commands or prescribes"[263]. This Court is not to be deceived by the name which a Parliament gives an Act – although, in the present case, that name adopted by all of the States, and the long title adopted by some of them, could not have been more clear and proclamatory of their constitutional excess. When these injunctions are remembered, that echo through the years of this Court's stewardship over the Constitution, our duty in the present case is clear. We should not be deceived by formalistic references to "rights" and "liabilities", nor blind to the realities of what the impugned legislation does, in substance, and indeed, even says that it does. The State Jurisdiction Act interferes in still valid orders of a federal court. This, under the Constitution, State laws cannot do.

269 Moreover, s 73 of the Constitution affords a guarantee that "all judgments, decrees, orders, and sentences" of a State Supreme Court are appealable to this Court, subject only to such exceptions and regulations as the Federal Parliament provides. The importance of this guarantee in Australia's constitutional arrangements has been stressed many times[264]. In the earliest days of this Court, the right of appeal from State Supreme Courts was described as an "absolute"

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257 Reasons of Gummow J at [198].

258 (1965) 114 CLR 1 at 7.

259 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7.

260 17 US 159 at 207 (1819).

261 (1908) 6 CLR 41.

262 Reasons of Gummow J at [198].

263 *R v Barger* (1908) 6 CLR 41 at 118 (emphasis added).

264 *Kable* (1996) 189 CLR 51 at 114 per McHugh J.

one[265]. Yet, both in respect of judgments taken to be of the State Supreme Court[266] entered at first instance pursuant to the State Jurisdiction Act and such judgments entered on the basis of an "ineffective judgment" of the Full Court of the Federal Court, appeal rights to this Court under the Constitution and federal law will purportedly be affected and even removed. In place of the constitutional right of appeal, there is substituted a different legislative right, in effect from a different court, that in substance was not the author of the judgment, decree, order, or sentence concerned. This cannot lawfully be done. This Court has a duty to say so in plain terms.

270 Defending the device adopted the respondents, and the intervening governments which supported them, invoked the decision of this Court in *R v Humby; Ex parte Rooney*[267]. Clearly enough, the drafters of the State Jurisdiction Act had their eyes focussed on the provisions of the *Matrimonial Causes Act* 1971 (Cth)[268] considered in that decision. That Act was enacted by the Federal Parliament to overcome a jurisdictional deficit in federal law exposed in *Kotsis v Kotsis*[269] and *Knight v Knight*[270]. In those decisions, it was held that certain officers of State Supreme Courts were not part of such courts. Accordingly, their orders were invalid because federal jurisdiction had been vested only in the relevant court. The federal law which attempted to correct this deficit declared that the rights and liabilities of persons were, and always had been, the same as if the purported decrees made by the officers in question had been made by the relevant Supreme Court constituted by a single judge. This Court in *Humby* upheld the validity of that law[271]. The attempt to validate a purported decree as a judicial determination (by inference, impermissible) was distinguished from a

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265 *Peterswald v Bartley* (1904) 1 CLR 497 at 499 per Griffith CJ. See also *The Adelaide Fruit and Produce Exchange Co Ltd v Adelaide Corporation* (1960) 105 CLR 428 at 434-435.

266 ie those which by force of the State Jurisdiction Act are declared to be determinative of the rights and liabilities of all persons "as if" the "ineffective judgment" of a federal court "had been a valid judgment of the Supreme Court": see s 6.

267 (1973) 129 CLR 231 ("*Humby*").

268 s 5.

269 (1970) 122 CLR 69.

270 (1971) 122 CLR 114.

271 (1973) 129 CLR 231 at 243-244 per Stephen J (with whom Menzies and Gibbs JJ agreed), 248-249 per Mason J (with whom Gibbs J agreed).

direct legislative alteration of the rights of parties by reference to identified rights (which was valid)[272].

271 As Gummow J has pointed out[273], in *Humby* it was conceded that, under s 51(xxii) of the Constitution, the Federal Parliament had the power to make laws providing for divorce without recourse to a judicial proceeding[274]. So, in respect of liquidation and perhaps other laws affecting constitutional corporations, the Federal Parliament enjoys legislative powers to enact laws remedying many of the problems presented by the invalidation of the cross-vesting legislation. But these possibilities are irrelevant because no such federal legislation has been enacted. This Court is not considering a federal law.

272 What is here attempted (unlike the case in *Humby*) is a State law. Moreover, it is a State law that intrudes into the concerns of federal law. Specifically, it intrudes in relation, and by reference, to an "ineffective judgment" of the Federal Court. Sub-ss (3) and (4) of s 5 of the *Matrimonial Causes Act*, considered in *Humby*, did not, directly or indirectly, deem purported decrees of officers of a State Supreme Court to be valid judgments of that Supreme Court. If an attempt had been made to repair the problem presented in 1971 by enacting a State law such as that at issue in the present case, I do not doubt that it would have been struck down. There is no reason for this Court to be more indulgent today.

273 It follows that the State Jurisdiction Act should be taken at its face value. It should be given the construction that its words require and that its provisions were plainly intended to secure. It is an attempt by State law to regulate the "rights" and "liabilities" in relation, and by reference, to an "ineffective judgment" of the Federal Court. For the reasons which Gaudron J has given, the State Jurisdiction Act, according to its terms, operates with respect to an "ineffective judgment" of the Federal Court, whether or not it has been set aside[275]. As her Honour points out, "the rights and liabilities which may be enforced are rights and liabilities which *correspond precisely* with those embodied in the federal court order"[276]. This fact presents, in the most stark way possible, the objections about which the applicants complain to this Court. What is the power of the State legislatures to make such laws with respect "precisely"

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272 *Humby* (1973) 129 CLR 231 at 243 per Stephen J.

273 Reasons of Gummow J at [210].

274 (1973) 129 CLR 231 at 243.

275 Reasons of Gaudron J at [70]-[71].

276 Reasons of Gaudron J at [81] (emphasis added).

to Federal Court judgments, whether described as "ineffective" or not? Are not any such laws inconsistent with the laws already made, in comprehensive terms, by the Federal Parliament concerning the Federal Court and its judgments? Are they not, in any case, incompatible with the integrity of the Judicature as established by Ch III of the Constitution?

The State law is inconsistent with federal law

274 *Inconsistency and valid laws*: Although the word "inconsistent" is not elaborated in s 109 of the Constitution, suggesting a single concept, this Court, from its early decisions[277], has evolved various ways of explaining whether constitutional inconsistency is established. The labels put on the tests are sometimes expressed as involving indirect ("cover the whole field"[278]) inconsistency; direct inconsistency; and its near relative, operational inconsistency[279]. There are still other ways of classifying the inconsistency involved.

275 In applying the several tests for inconsistency, it is obviously necessary to start with an elucidation of the meaning of the federal and State laws in question. That will sometimes dispel the complaint of impermissible intersection. Equally important is the ascertainment, apart from the s 109 point, of the validity of the laws which are said to be inconsistent. Self-evidently, if the federal law propounded as paramount lacks constitutional validity for some other reason (such as for a want of legislative power) there will be no intersection. The purported federal law will then lack validity and so will not engage the provisions of s 109. Similarly, if there is no constitutional foundation for a State law (either because it intrudes into an area expressly reserved by the Constitution to the Federal Parliament[280] or one by necessary implication so reserved[281]), intersection will not happen for inconsistency implies a competition between two laws otherwise valid. Only in that case is it necessary to refer to a constitutional provision to accord one of the laws paramountcy and, hence, legal validity.

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277 eg *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 500; *Ex parte McLean* (1930) 43 CLR 472 at 483.

278 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 489. See also *Ex parte McLean* (1930) 43 CLR 472 at 483.

279 *Victoria v The Commonwealth* (1937) 58 CLR 618 at 631; *Commonwealth v Western Australia* (1999) 196 CLR 392.

280 eg Constitution, ss 52, 90.

281 cf *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 426.

276 In the present proceedings, there is, in my view, following *Wakim*, a real question as to whether the Parliament of a State has any legislative power at all to make laws, as such, affecting in a direct way the federal judiciary and specifically the judgments of that judiciary. However, I put that question to one side. I assume that, by proper characterisation of the State Jurisdiction Act, it may be regarded as a valid State law within the residual powers belonging to a State Parliament, provided there is no valid federal law with which it is inconsistent. I therefore turn to the question of inconsistency. I do so adopting the interpretation of the State Jurisdiction Act that I have already explained[282].

277 *Indirect inconsistency*: Once the view of the meaning and operation of the State Jurisdiction Act is taken which its long and short titles proclaim, and which I would also adopt, a conclusion of constitutional inconsistency is virtually inevitable. When it is accepted that the State Jurisdiction Act amounts to an attempt by a State Parliament to make a law in relation, and by reference, to Federal Court judgments that may be (and in the present cases are) valid and effective, it is clear that the State Parliament is intruding into a field of legislation which the Federal Parliament has entered and upon which its voice is paramount and exclusive.

278 The Federal Parliament has enacted the Federal Court Act with the clear purpose of establishing that Court as a superior court of record, providing the procedures of appeal and otherwise comprehensively governing the activities of, and concerning, that Court. It is implicit in the Federal Court Act that its purpose is to "cover the field" of the process of that Court. Federal legislation has thus enacted a comprehensive and exclusive code for regulating the effect of Federal Court judgments, execution of such judgments, appeals from such judgments, variation or setting aside of such judgments and proceedings for contempt for non-compliance with them[283]. That code, and indeed the very nature of its real subject matter, being Federal Court judgments, permits of only one system of regulation and administration[284].

279 Once the foregoing conclusion is reached, it is impermissible for a State law to intrude on the enjoyment of a statutory power conferred by the applicable federal law. Any such State law represents an attempt to provide a parallel

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282 See above at [259]-[273].

283 Federal Court Act, ss 18, 24, 31, 33, 53, 59; Federal Court Rules, O 35 r 7, O 40.

284 cf *Victoria v The Commonwealth* (1937) 58 CLR 618 at 638; *Wenn v Attorney-General (Vict)* (1948) 77 CLR 84 at 119-120; *Miller v Miller* (1978) 141 CLR 269 at 276; *Viskauskas v Niland* (1983) 153 CLR 280 at 292.

scheme of regulation which, in particular cases, may have the effect of competing with federal law. The status and effect of the judgments of the Federal Court, certainly whilst those judgments are still valid for any purpose and binding on the parties to them, is a matter exclusively for the Federal Court or for this Court in discharging its constitutional functions of appeal from, or review of, such judgments. It does not become constitutionally acceptable for a State to legislate in relation, or by reference, to the use of the self-serving description of an "ineffective judgment" or by the invocation of patently evasive drafting devices.

280 Considerations of constitutional principle also support this conclusion. Courts are part of an independent branch of government of each polity. The Federal Court is one of the courts created by the Federal Parliament, as envisaged by the Constitution, to exercise the judicial power of the Commonwealth. The attachment, by State legislation, of substantive legal consequences to a judgment of a Federal Court, in ways that necessarily envisage variation of that judgment by a State Supreme Court[285], and even the possibility of effectively overruling by the State appellate court of that judgment[286] cannot be regarded as a constitutionally permissible way of giving effect to a valid Federal Court judgment in a State Supreme Court. On the contrary, the State Jurisdiction Act permits an "ineffective judgment" of the Federal Court to be altered otherwise than by the Federal Court. Moreover, it does so without the slightest indication of the concurrence of the Federal Parliament with whose laws it thereby conflicts. At least in *Wakim*, such concurrence was sought and given, although not ultimately (as it was held) with legal effectiveness. Here concurrence was not attempted. The legislatures of the States have proceeded unilaterally to make laws with respect to the most important product of federal courts, namely their judgments and orders.

281 To my mind, the excuse advanced to repel the argument that the field is covered by federal law is quite unconvincing. This excuse involved reference to the fact that certain orders could be made under the Corporations Law both by a judge of the Federal Court and by a judge of the Supreme Court[287]. It is one thing for the Corporations Law to contemplate the supplementation by a State Supreme Court of orders made by the Federal Court in its exercise of the judicial power of the Commonwealth. Such supplementary orders might be made, for example, in a situation of urgency and to ensure that the Federal Court's orders were rendered effectively. It is quite another thing to contemplate that a State Supreme Court could enter upon proceedings of the Federal Court to make orders

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285 State Jurisdiction Act, s 10.

286 State Jurisdiction Act, s 10.

287 Corporations Law, s 58AA; cf reasons of Hayne and Callinan JJ at [363].

affecting the rights established by such proceedings. Consistently with s 109 of the Constitution, it is unthinkable that a State Supreme Court could do so, varying or revoking Federal Court orders still in force, where procedures such as an appeal still remain available in the Federal Court or in this Court. I cannot accept that s 58AA of the Corporations Law was enacted for the purpose of allowing State Supreme Courts to make orders as they pleased, or as the parties sought, without regard to the engagement of the Federal Court if that had indeed happened. The propounded operation of that section would have been a formula for litigious chaos that ought not to be attributed to Parliament.

282 The benign objective of the State Parliaments to overcome the problems of *Wakim* cannot cure their intrusion into a field already occupied by federal law. If a State Parliament may attach legal consequences to actions or processes (such as judgments and orders) that are the subject of the Federal Court Act on this occasion, they can do so on other occasions. When constitutional principle is invoked, it is necessary to test the proposition by reference to other possible applications. Pure motives cannot expunge constitutional inconsistency. In my view, the first variety of inconsistency, indirect, is therefore established.

283 *Direct inconsistency*: Although the foregoing conclusion is sufficient to uphold the applicants' complaint of invalidity, it is reinforced by considering numerous instances of direct inconsistency between provisions of the State Jurisdiction Act and the Federal Court Act. I will mention but a few.

284 By s 5(2) of the Federal Court Act, the Federal Court is declared to be a superior court of record. By s 18 of that Act, the orders of the Federal Court have effect throughout Australia. Its judgments are therefore valid and binding on the parties throughout the Commonwealth until set aside or quashed. Yet by ss 6 and 10(1) of the State Jurisdiction Act, a State Supreme Court is purportedly authorised to vary or otherwise change the "rights" and "liabilities" of the parties and to do this by reference to an "ineffective judgment" of the Federal Court. If valid, such provisions would clearly permit a State Supreme Court to "alter, impair or detract from the operation" of the Federal Court Act[288]. It is not even as if it is a precondition to such actions by the State Supreme Court that the parties should first have sought an order of the Federal Court setting aside that Court's own judgment for constitutional invalidity. On the contrary, the judgment is preserved intact, although labelled by the State Jurisdiction Act (but not by federal law) as "ineffective". Accordingly, the State law attaches legal consequences to the disposition of the parties' "rights" and "liabilities" as declared in the Federal Court's "ineffective" judgment.

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288 *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630. See also *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136.

285 Notwithstanding that the Federal Court Act confers on the Federal Court the authority to determine its own jurisdiction (subject to the constitutional provisions governing appeal to, and review by, this Court) and to make judgments that are binding and effective until set aside or quashed, the State Jurisdiction Act purports to empower a State Supreme Court to vary or otherwise change "rights" and "liabilities" of the parties as determined by the Federal Court judgment. It does so notwithstanding that such a judgment may be (as it is here) still valid and binding on the parties. To render this exposition concrete, it contemplates the possibility that, in this case, the State Supreme Court could revoke the appointment of the liquidator made in the still valid judgment of the Federal Court, or revoke or vary the funding orders made by the Federal Court, although these remain valid and have not been lawfully set aside or quashed by the Federal Court or by this Court.

286 It is hard to see how one could have more blatant examples of direct inconsistency than this. If substance and not form guides this Court – as it has done in such matters for well nigh a century[289] – the object and effect of the State Jurisdiction Act is to permit State courts to vary and even revoke judgments of the Federal Court although, in legal terms, such judgments are still valid and effective. The applicants are therefore also entitled to succeed on their arguments of direct inconsistency.

287 *Operational inconsistency*: The same conclusion follows in respect of operational inconsistency. The potential for such inconsistency can scarcely be denied given that, until set aside, the Federal Court judgment is valid and effective according to its terms. The notion that, concurrently, an appeal might be taken[290] or an order might be made varying or otherwise changing the judgment of the Federal Court[291], clearly establishes the potential for operational inconsistency[292].

288 It is said, however, that this problem is overcome by the combined force of the fragility of the Federal Court's order, following *Wakim*, and the concurrent powers enjoyed by federal and State Supreme Courts under the Corporations Law[293]. With respect, neither of these considerations removes the constitutional problem which is incurred by proper legal analysis. Each Federal Court

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289 See above at [268].

290 State Jurisdiction Act, s 7(2).

291 State Jurisdiction Act, s 10.

292 cf reasons of Hayne and Callinan JJ at [360].

293 Corporations Law, s 58AA.

judgment affected by *Wakim* is, it is true, fragile. But under the Constitution, each judgment is only susceptible to correction by the processes of appeal available in the Federal Court or pursuant to this Court's appellate powers or powers of judicial review[294]. In our system of law, judgments, particularly of superior courts of record, are serious things. Once made, they prescribe the legal rights and liabilities of persons affected. Until set aside or quashed on appeal or review, such rights and liabilities are not susceptible to disposition by a State Parliament exercising State legislative power. Nor can they be ignored with impunity by parties. The legal effect on the rights and liabilities of parties contained in binding and valid judgments of the Federal Court cannot simply be wished away as if they were nullities ab initio. Least of all can they be ignored by labelling such a judgment in a State statute as an "ineffective judgment". The self-serving adjective carries the matter no further.

289 The applicants have, therefore, also made good their third complaint of inconsistency. Operational inconsistency is not just a potentiality. It is an established fact. It could quite readily arise in a case where a party, still bound by valid orders made by the Federal Court in apparent reliance on the cross-vesting legislation struck down in *Wakim*, sought to maintain the validity of such orders (and of the rights and liabilities of the parties they establish) upon some other basis of the Federal Court's jurisdiction. The State Jurisdiction Act purports to deprive that party of that right. This, under the Constitution, State legislation may not do.

290 *Conclusion – inconsistency of State laws*: Sections 6, 7, 8, 10 and 12 of the State Jurisdiction Act are therefore invalid because they are inconsistent with the provisions of the Federal Court Act. The provisions of the State Jurisdiction Act governing appeals and variations of rights and liabilities under a Federal Court judgment cannot be excised and consideration of that problem postponed to a case involving a purported appeal or variation[295]. The provision for appeals and variations is an essential part of the integrated scheme of legislation purporting to equate a so-called "ineffective judgment" of the Federal Court with a valid judgment of either the Supreme Court constituted of a single judge[296] or of the Full Court of the Supreme Court[297]. Whilst the latter provision, in relation

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294 Constitution, ss 73, 75(v).

295 As Gaudron J appears to favour at [46] and as Gleeson CJ at [29] and Gummow J at [202] consider should be done.

296 State Jurisdiction Act, s 6(a).

297 State Jurisdiction Act, s 6(b).

to appeals, runs into additional constitutional obstacles[298], it is impossible to perform surgery on the legislation to preserve the former. Were this Court now to sever the provisions for variation of, and appeal from, an "ineffective judgment" of the Federal Court from the rest of the Act, and later hold that those provisions are (as I believe) invalid under the Constitution, it would then be necessary to look again at the other provisions of the Act to consider whether, without the capacity to vary, or appeal from, such a "judgment", the State Jurisdiction Act can possibly operate as it was intended to do. In my opinion, this Court should consider the entire Act now. It should not turn a blind eye to the legislative scheme in its totality. Eventually, the blind eye will have to be opened.

291 With every respect, it is incorrect to suggest that no reliance may be had upon the appellate or variation provisions of the South Australian version of the State Jurisdiction Act because no application has been made to invoke these provisions[299]. The liquidator may not have relied on the provisions, but, with all due deference, that is irrelevant. The submissions for the applicants were addressed to this point. They suggested an offence to the Constitution apparent on the face of the State Jurisdiction Act. Even if the point had been ignored by the parties, it is so fundamental to the legislative scheme that it would, in my view, be the duty of this Court to examine it and to protect a basic requirement of the Constitution, namely that State legislation may not intrude into federal courts. State Parliaments may not enact provisions to govern appeals and vary rights and liabilities of parties in relation, or by reference, to the judgments of federal courts.

Incompatibility with Ch III of the Constitution

292 *Bases of incompatibility*: Because it raises important questions of constitutional principle, I should also express my opinion concerning the additional, and separate, argument which the applicants advanced to challenge the validity of the State Jurisdiction Act. This argument had a single theme. It was that the provisions concerned were fundamentally incompatible with the language, structure and purposes of Ch III of the Constitution. This proposition was advanced in two ways. The first way laid emphasis upon the direct contradiction between the provisions in the State Jurisdiction Act for appeals and

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298 s 73 of the Constitution preserves appeals to the High Court from any other federal court and from the Supreme Courts of the States and does not envisage substitution for the "judgments, decrees, orders, and sentences" of such courts by "judgments" not actually made by such courts as courts of law but by operation of State legislation.

299 Reasons of Gummow J at [202].

the requirements of the Constitution. The second way contended that the manner in which the State Jurisdiction Act permitted a State Parliament to intrude upon the functions of the State Supreme Court (imposing on it by legislative fiat an "ineffective judgment" of another body) was impermissible. This was so because that Act was incompatible with the fundamental implication of the Constitution that State Supreme Courts, as part of the integrated Judicature of the Commonwealth[300], and all State courts that may be called upon to exercise federal jurisdiction, must be manifestly independent and impartial[301]. According to this argument, such courts cannot be made subject to a legislative direction commanding that an "ineffective judgment" of another body be treated, as such, as legally equivalent to an effective judgment of a State Supreme Court.

293 *Appeals and the Constitution*: By s 73 of the Constitution, this Court has jurisdiction to hear and determine appeals from "all judgments, decrees, orders, and sentences" of any federal court and of the Supreme Courts of the States. So far as the Federal Court is concerned, no appeal lies to this Court from the judgment of a single judge[302]. However, an appeal does lie from the judgment of such a judge to the Full Court of that Court, either as of right or by leave[303]. Where an appeal, by right or leave, is taken to the Full Court of the Federal Court, a further appeal is available to this Court by special leave granted by this Court[304]. In the case of the Family Court, the position is similar, although that Court has an additional facility to certify that an "important question of law or of public interest"[305] is involved, in which event appeal lies to this Court without any action on its part. So far as a State Supreme Court is concerned, appeal lies from a single judge or from the Full Court (or Court of Appeal) but only by special leave of this Court[306]. The scheme of the appellate and variation provisions of the State Jurisdiction Act disturbs the foregoing constitutional and federal statutory arrangements. It diverts into a State Supreme Court an appeal

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300 Constitution, s 77(iii).

301 *Kable* (1996) 189 CLR 51 at 121-122; cf *Johnson v Johnson* (2000) 74 ALJR 1380 at 1386-1387 [37]-[40]; 174 ALR 655 at 664-666.

302 Federal Court Act, s 33(2).

303 Federal Court Act, ss 24(1)(a), 24(1A).

304 Federal Court Act, s 33(3).

305 *Family Law Act* 1975 (Cth), s 95(b); cf *DJL v Central Authority* (2000) 74 ALJR 706 at 709-711 [10]-[19], 721-724 [73]-[86], 736-737 [148]-[156]; 170 ALR 659 at 663-666, 680-683, 700-702.

306 *Judiciary Act*, s 35.

which in substance challenges the disposition of the rights and liabilities of the parties decided by a federal court. A State Parliament is not empowered to diminish or modify rights of appeal to this Court enjoyed pursuant to valid federal law or under the Constitution itself.

294 There are additional problems presented by the provisions of the State Jurisdiction Act in its attempt to equate what it labels an "ineffective judgment" of the Federal Court to a valid judgment of the Supreme Court[307]. In part, the difficulties represent another aspect of constitutional inconsistency. But in part, they illustrate the even deeper incompatibility of the State Jurisdiction Act with the fundamental postulates of the Constitution. Those postulates include the guaranteed rights of access from designated courts (by way of the appropriate appellate courts where necessary) to this Court[308] and the independence of such courts from the other branches of government. The State Jurisdiction Act challenges each of these postulates.

295 So far as the State Jurisdiction Act purports to equate an "ineffective judgment" of the Federal Court to a "valid judgment of the Supreme Court constituted of a single Judge"[309], it impermissibly detracts from, or supplements in a way not authorised by federal law, the right of appeal provided by the Federal Court Act itself. This fact reinforces the conclusions already reached concerning direct and operational inconsistency. But, assuming for the moment (as the majority in this Court finds) that the law is valid, the State Jurisdiction Act undoubtedly purports to deprive persons of rights of appeal to the Full Court of the Federal Court and thence to this Court which the Constitution is careful to preserve[310].

296 Moreover, this is done in a way that may have a sinister potential. Notwithstanding a continuing judgment of the Federal Court, valid at the very least for some purposes until set aside or quashed, an attempt is made, by State legislation, to change the character of such "judgment" to what is called "a valid judgment of the Supreme Court". If this attempt succeeds, it has at least two undesirable consequences. A judge of a State Supreme Court, unlike a judge of the Federal Court, has not, until now, been considered an "officer of the Commonwealth" within s 75(v) of the Constitution. If this provision were treated as valid, a judgment of the federal judge might thus effectively be placed outside

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307 State Jurisdiction Act, s 6(a) and (b).

308 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR 1324 at 1352-1354 [135]-[143]; 165 ALR 171 at 209-212.

309 State Jurisdiction Act, s 6(a).

310 Constitution, s 73.

the supervision of this Court under the Constitution. Such an attempt cannot succeed. It is a very bad precedent, with real dangers at its heart. McHugh J suggests[311] that State judges should now be regarded as "officers of the Commonwealth" when exercising federal jurisdiction. This proposal raises fundamental questions. It challenges longstanding authority of this Court. It was not argued in this case. And, in any case, the State Supreme Court's jurisdiction here is solely under the State Jurisdiction Act, a State law. It does not arise under any federal law; nor has federal law purported to permit it. No party to the proceedings is a manifestation of the Commonwealth. So even if, for some purposes, a State judge could now be regarded as an "officer of the Commonwealth" for s 75(v) purposes, this is not such a case. My concern remains unanswered.

297 As well, the object of the provision is, by legislative decision, to create a fictitious "judgment of the Supreme Court". Such a fictitious judgment is not one of the kind of "judgments, decrees, orders, and sentences" of which the Constitution speaks[312]. Nor is it one of the "judgments of the Supreme Court of a State" of which s 35(1) of the *Judiciary Act* speaks. The latter is federal legislation which obviously contemplates "judgments" of a State Supreme Court which are decided in the performance of the traditional functions of such courts involving the hearing of argument from both sides and reaching conclusions, independently, according to law. The State Jurisdiction Act purports to create a special kind of "judgment". But it is not, in truth, an emanation of a State Supreme Court at all. It is instead the product of a decision by a State Parliament. To say the least, it is extremely unlikely that such a "judgment" would engage the appellate jurisdiction of this Court, either under the Constitution or under the *Judiciary Act*. Yet if it does not, the legislative attempt by the State Parliament is revealed for what it is: an impermissible endeavour to alter basic constitutional and federal law governing appeals within the Australian judicial hierarchy[313].

298 *Incompatibility with State judicial independence*: In addition to these obvious problems, there is an even more deep-seated and fundamental difficulty. This Court has decided that it is not competent for a State Parliament to impose upon a State court requirements that are incompatible with the judicial character

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311 Reasons of McHugh J at [161].

312 Constitution, s 73.

313 An indication of the strict view of this Court concerning the essential features of the jurisdiction of the Supreme Court of a State from which an appeal may lie to this Court may be seen in *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 300; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232.

and independence of such courts[314]. State courts must retain such features, in the case of the Supreme Courts, because they are specifically named as part of the integrated Judicature of the Commonwealth in Ch III of the Constitution[315]. Other State courts that may be vested with federal jurisdiction must also exhibit the integrity, independence and impartiality of courts in which federal jurisdiction may be vested pursuant to the Constitution[316].

299 In evaluating the applicants' submissions on this point, it is essential to recognise that the rule established by this Court in *Kable* is not one limited to the extreme legislation that was involved in that instance. It is a rule of general application. It is derived from the language of the Constitution and the implications drawn from that language as to how the Judicature of Australia is to operate. One point central to that Judicature, as *Kable* emphasised, was that it should be, and be seen to be, independent[317]. A feature of independent courts is that they decide matters according to law and do so for themselves. They are not instructed to do so by other branches of government. They are not subjected to fictions whereby another branch of government can impose upon them decisions which thereafter, by force of legislation, are treated and even named as judgments of the judiciary.

300 What has been attempted in the State Jurisdiction Act is, in my view, unacceptable according to the standards of the Australian Constitution. It is incompatible with the scheme for independent courts (including State Supreme Courts) which Ch III of the Constitution enshrines. If the Parliaments of the States may lawfully direct that a decision which they describe as an "ineffective judgment" must be entered and recorded in a State Supreme Court as a judgment of such a court, they can do so in cases different from the present. They can impose such legislative judgments in respect of decisions of individuals and tribunals quite different from the Federal Court. In our constitutional tradition,

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314 *Kable* (1996) 189 CLR 51.

315 Constitution, s 73(ii).

316 Constitution, s 77(iii). See *Kable* (1996) 189 CLR 51 at 121-122.

317 cf International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, 1980 ATS 23, 6 ILM 368 (entered into force 23 March 1976), art 14.1; *Johnson v Johnson* (2000) 74 ALJR 1380 at 1386-1387 [37]-[40]; 174 ALR 655 at 664-666.

this Court has ordinarily been vigilant about the dangers of legislative judgments[318]. History demonstrates the wisdom of maintaining such vigilance[319].

301 The precedent set in the present case is liable to abuse. No Parliament in Australia is entitled, whether directly or indirectly, to make judgments of the courts by legislative decree. If this Court maintains that principle in a case such as the present, where the intrusion is unnecessary and where other means are available to solve the problem, it is less likely that it will be troubled in later cases. With respect to those of a different view, I can see no reason of principle to distinguish, in this context, a civil from a criminal case[320]. The Constitution does not draw such a distinction. It promises independent judgments of the Judicature to all litigants, civil and criminal alike. Nor is the analogy to the registration of foreign judgments an apt one[321]. Such judgments are themselves the outcome of valid proceedings that involve no constitutional defect affecting their validity. In the case of a foreign judgment, it is open to a party to resist the entry of such a judgment. A court must set the registration of the judgment aside if it is satisfied that the court which entered the judgment "had no jurisdiction in the circumstances of the case"[322]. Similar relief is not available under the State Jurisdiction Act. On the contrary, by force of the will of the State Parliament concerned, and without any relevant exceptions, each "ineffective judgment" of the Federal Court becomes a "valid judgment of the Supreme Court" in so far as it affected the "rights and liabilities of all persons"[323].

302 Nor, with respect, is there any analogy to the power which State Supreme Courts have long enjoyed to vary testamentary dispositions or beneficiaries' entitlements on intestacy, as Gaudron J appears to think[324]. Such orders are made

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318 *Nicholas v The Queen* (1998) 193 CLR 173 at 185-186 [15], 188 [20], 208 [73], 256 [201]; cf *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36-37.

319 See *R v Davison* (1954) 90 CLR 353; *Liyanage v The Queen* [1967] 1 AC 259 at 291; *Polyukhovich v The Commonwealth* (*War Crimes Act Case*) (1991) 172 CLR 501; *Nicholas v The Queen* (1998) 193 CLR 173 at 256 [201]; Zines, "Sir Anthony Mason", (2000) 28 *Federal Law Review* 171.

320 cf reasons of Gummow J at [211].

321 cf reasons of Gummow J at [208].

322 *Foreign Judgments Act* 1991 (Cth), s 7(2)(a)(iv).

323 State Jurisdiction Act, s 6.

324 Reasons of Gaudron J at [80].

by a judge of a State Supreme Court after hearing evidence and full argument. They are made on the merits in pursuance of the considered, independent exercise by the judge of the jurisdiction of that Court. They are not imposed on that Court, or on a judge thereof, by legislative direction, whatever the merits of the case and however differently that Court would, left to act as the court, have determined the matter for itself. The case propounded by Gaudron J gives rise to a judicial order in the normal way. The State Jurisdiction Act effectively imposes a judgment on a State Supreme Court by the will of the State Parliament.

303 *Avoiding compromise of the courts*: My conclusion on this point is different from that reached in the Supreme Court of New South Wales by Hodgson CJ in Eq. In *Incentive Dynamics Pty Ltd v Robins*[325], his Honour rejected the argument that s 6 of the State Jurisdiction Act of that State was incompatible with the place of that Court in Ch III of the Constitution. Essentially, he reasoned that s 6 did no more than to create rights and liabilities by reference to consequences flowing from the making of a judgment of the Supreme Court and the direction to that Court to give effect to such rights and liabilities. His Honour's approach is reflected in some of the reasoning in this Court, referring to the Federal Court orders variously as a "factum"[326] or mere "point of historical reference"[327] by virtue of which the State law gives effect to its own purposes without impermissible intersection with federal law.

304 For the reasons which I have given, and with respect to Hodgson CJ in Eq and those of like opinion, I consider that this conclusion is wrong. Even if, contrary to the terms of the State Jurisdiction Act, s 6 did no more than to create new rights and liabilities, it is necessary to have regard to the fact that such rights and liabilities might come to rival those determined in the Federal Court. The State Supreme Court would thus be made the instrument of a legislative plan, implemented by a non-judicial process. Competing State and federal provisions for variation and appeal are provided for. The State Supreme Court is conscripted to give effect to a legislative direction affecting the rights and liabilities of persons historically and undoubtedly as determined by a federal court. It is obliged to treat, as in this case, an "ineffective judgment" of the Federal Court as having the same status, force and effect as a "true" judgment of the State Supreme Court. This is so although there has been, and may be, no independent consideration of that "ineffective judgment" by the judges of the State Supreme Court.

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325 (2000) 169 ALR 536 at 551-552.

326 Reasons of Gummow J at [230].

327 Reasons of Hayne and Callinan JJ at [351].

305 By the application of different substantive procedural and evidentiary rules, those judges might have reached a different conclusion had the matter been heard in the State Supreme Court at first instance. The Full Court of the State Supreme Court may also be required to entertain an appeal from this "judgment". Its judges are, uniquely, to sit in judgment on an "ineffective judgment" of a Federal Court judge, unless, in the meantime, that judgment has been purportedly varied by the State Supreme Court. The institutional integrity of the State Supreme Court is thereby compromised. The position in the Judicature of the Federal Court and its judges is altered. If this can be done once, it can be done again. This Court should call a halt.

Conclusion: the applicants succeed

306 Each of the applicants' two challenges therefore succeeds. Following *Wakim*, the judgments of the Federal Court which the applicants impugn, the winding up and the funding orders, were fragile. They were liable to be set aside or quashed. But under the Constitution, those orders were not void ab initio[328]. Until lawfully set aside or quashed, they remain valid under the Constitution and the Federal Court Act and binding on the parties. They continue to establish the legal rights and liabilities of the parties. In law, the quietus may only be given by this Court or by the Full Court of the Federal Court, where applicable. It could not be given by a State Supreme Court. Still less could it be given by a State Parliament presuming to intrude into federal legislative provisions which already provide for appeal from, and variation of, such judgments of the Federal Court.

307 The intrusion by the State Parliament immediately offends the paramountcy accorded by the Constitution to federal law. In this case, it conflicts both with the Federal Court Act and the *Judiciary Act*. It represents an attempt by State law to invade the field of federal law that wholly covers the operation and functions of the Federal Court and Federal Court judgments. It introduces many instances of direct inconsistency. It envisages operational inconsistency which is far from hypothetical. These conclusions cannot be avoided by a legislative device of attaching some of the provisions of the State law to "rights" and "liabilities". When analysed, the substance of those "rights" and "liabilities", purportedly affected, "correspond precisely"[329] with those provided in a Federal Court judgment. It may be called "ineffective" in the State law, but that appellation cannot alter its real legal character. It is still effective under the Constitution until set aside or quashed by this Court or the Full Court of the Federal Court.

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328 So much appears to be accepted in the reasons of Gleeson CJ at [23]; reasons of Gaudron J at [52]; reasons of Gummow J at [219]; reasons of Hayne and Callinan JJ at [344].

329 Reasons of Gaudron J at [81].

308 In addition to the foregoing, the State law is deeply flawed in terms of fundamental constitutional principle. If valid, it would deprive parties of rights of appeal in the Federal Court and eventually to this Court. Those rights are protected by the Constitution and by federal law. Alternatively, it would be an endeavour to put those persons outside the purview of the constitutional writs available against "officers of the Commonwealth" under s 75(v) of the Constitution. Such attempts, and the legislation for appeals for which the State Jurisdiction Act provides, demonstrate still further reasons for upholding the present challenges to the validity of such laws.

309 Even more fundamentally still, the State Jurisdiction Act is contrary to basic principle in so far as it permits a State Parliament to require a State Supreme Court, within the integrated Australian Judicature, to treat an "ineffective judgment" of another body as a valid judgment of its own. If that can be done in the present proceedings, on grounds that are unnecessary, it can be done in other circumstances where the reasons are sinister. The imposition on courts of legislative judgments is incompatible with the independence of the courts as envisaged by Ch III of the Constitution. In Australia there is no precedent for it.

310 In repairing the unfortunate results of *Wakim*, this Court should not sanction legislation that sets such very bad precedents. It should not condone hastily cobbled together laws which offend the norms of federal paramountcy that lie at the heart of the Constitution and defy the principles of judicial independence within federal and State courts that is equally central to our system of constitutional government. It is not enough that the State Jurisdiction Acts were well intentioned. The path of good intentions did not carry the day in *Wakim*. The attempted cure in the present case is far worse than any error which that decision sought to prevent. A consistent adherence to principle is more important in constitutional doctrine than anywhere else in the law.

Orders

311 I agree with the other members of the Court that the time defaults of the applicants should be cured. I also agree that certiorari should issue to quash the orders of the Federal Court, now shown to have been made without jurisdiction. But for my own part I would grant additional relief.

312 The orders which I favour are: (1) extend time for the applications for prohibition and certiorari in each matter; (2) in the winding up order in SG3050 of 1995, where certiorari was not sought, liberty should be given to apply for certiorari; (3) otherwise order that orders for certiorari be made absolute in the first instance to quash the winding up and funding orders of the Federal Court; (4) order that the liquidator, his servants and agents be prohibited from taking any steps to give effect to, or to enforce, such winding up orders or funding

orders or otherwise purporting to act as liquidator of the named companies; and (5) declare that ss 6, 7, 8, 10 and 12 of the *Federal Courts (State Jurisdiction) Act* 1999 (SA) are invalid by reason of the Constitution. The liquidator should pay the applicants' costs in this Court.

313 HAYNE AND CALLINAN JJ. Between June 1995 and January 1996 the Federal Court of Australia made orders that 63 of the 64 companies which together were known as the Emanuel Group be wound up. Some of the orders took the form that a named company "be wound up by this Court under the provisions of the Corporations Law"[330]; others were in the form that a named company "be wound up in insolvency"[331]. Nothing was said to, or does, turn on the form of order made. Each is a form of compulsory winding up by the Court. In each case, Peter Ivan Macks was appointed liquidator.

314 Some of the companies had been incorporated in South Australia; some had been incorporated in Queensland. None of the orders identified which State's Corporations Law was invoked but it is apparent from a consideration of the Corporations Law that each order purported to be made under the Corporations Law of the State of incorporation of the company ordered to be wound up. So much follows from the definition of "company" in s 9 of the Law when read with ss 459A and 461. More importantly for present purposes, each winding up order was made by the Federal Court in the exercise of jurisdiction purportedly conferred on the Court by s 42(3) of the relevant State's *Corporations Act* 1990 and s 56(2) of the *Corporations Act* 1989 (Cth). This Court held, in *Re Wakim; Ex parte McNally*[332], that the purported conferral of jurisdiction on the Federal Court in matters arising under State Corporations Laws was invalid. It was accepted by all who appeared in the present proceedings that the Federal Court did not have jurisdiction to make the winding up orders we have mentioned.

315 In addition to the winding up orders, the Federal Court, in December 1998, made orders confirming arrangements which the liquidator had made with GIO Insurance Ltd and the Commonwealth Bank of Australia to borrow money to be used prosecuting two actions in the Supreme Court of South Australia. It is convenient to refer to these orders as the "funding orders".

316 In one of those actions in the Supreme Court (numbered 409 of 1998) the companies in the Emanuel Group (including the 63 in liquidation) and the liquidator sue, individually and in the firm name, those who practised as solicitors in partnership under the name "Thomsons Barristers & Solicitors" and a company associated with that firm. The liquidator claims (among other things) a declaration that certain transactions are voidable pursuant to s 588FE of the Corporations Law and consequential relief. The companies make a number of

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330 Corporations Law, s 461.

331 Corporations Law, s 459A.

332 (1999) 198 CLR 511.

claims to various remedies. Allegations are made of breach of fiduciary duty, negligence, breach of statutory duty, and misleading and deceptive conduct.

317 In the second action to which reference should be made (numbered 410 of 1998) the companies in the Emanuel Group and the liquidator sue, individually and in the firm name, those who practised as solicitors in partnership under the name "Johnson Winter & Slattery". Again, the liquidator claims that certain transactions are voidable pursuant to s 588FE and consequential relief. Allegations of a kind broadly similar to those made in action 409 of 1998 are made in this action.

318 After the Court's decision in *Re Wakim*, each State passed an Act entitled the *Federal Courts (State Jurisdiction) Act* 1999 ("the State Jurisdiction Acts"). To adopt the words of the long title of the South Australian Act, each was passed "to provide that certain decisions of the Federal Court of Australia or the Family Court of Australia have effect as decisions of the Supreme Court" of the enacting State. Central to the operation of the key provisions of the State Jurisdiction Acts is the term "State matter", which is defined in s 3 as a matter:

> "*(a)* in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State or a Territory; or
>
> *(b)* which has been removed to the Supreme Court under section 8 of the *Jurisdiction of Courts (Cross-vesting) Act 1987*; or
>
> *(c)* in respect of which a relevant State Act purports or purported to confer jurisdiction on a federal court; or
>
> *(d)* arising under or in respect of an applied administrative law."

The *Corporations Act* 1990 of each enacting State is a "relevant State Act". Accordingly, each of the matters in which the winding up orders and the funding orders were made fell within par (c) of the definition of State matter.

319 Section 11 of the State Jurisdiction Acts allows a party to a proceeding relating to a State matter which was instituted in a federal court, and in which that court has decided that it has no jurisdiction, to apply for an order that the proceeding be treated as a proceeding in the Supreme Court. The constitutional validity of s 11 was upheld in *Residual Assco Group Ltd v Spalvins*[333]. No order of the kind which engages s 11 of the State Jurisdiction Acts (referred to in those Acts as a "relevant order") has been made in any of the proceedings in the

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333 (2000) 74 ALJR 1013; 172 ALR 366.

Federal Court in which the winding up orders and funding orders were made. Section 11 of the State Jurisdiction Acts may, therefore, be put aside.

320 It was directed that the present applications (which are made by the defendants to the two actions in the Supreme Court of South Australia) should be made by Notice of Motion to a Full Court[334]. Each application seeks four kinds of relief. First, each seeks an order that the time for making application for a writ of certiorari should be extended[335] and, second, seeks certiorari to quash the winding up orders and the funding orders. The third application made is for prohibition directed to the Judges and Registrars of the Federal Court prohibiting them from taking any steps to give effect to or enforce the winding up and funding orders. Finally, application is made for prohibition directed to the liquidator prohibiting him from taking any further steps in the winding up of the companies, any further steps pursuant to the orders of the Federal Court and any further steps in the actions in the Supreme Court of South Australia which we have mentioned (actions 409 and 410 of 1998).

321 The issues which these applications raise require consideration of the validity of certain provisions of the State Jurisdiction Acts and consideration of whether the orders made by the Federal Court, which it is accepted were made without jurisdiction, still have effect. In order to understand the issues which were argued in these matters, it is necessary to say something further about the State Jurisdiction Acts.

The State Jurisdiction Acts

322 Although both the Queensland and the South Australian State Jurisdiction Acts are relevant, argument proceeded by reference to the South Australian Act. There being no relevant difference between the two Acts, it is convenient to refer to the text of the South Australian Act without noticing the minor differences between that Act and the Queensland Act.

323 Sections 6 and 7 of the South Australian Act (so far as relevant to these matters) provide that:

> "**6.** The rights and liabilities of all persons are, by force of this Act, declared to be, and always to have been, the same as if–
>
> *(a)* each ineffective judgment of–

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334 High Court Rules, O 55 r 2.

335 High Court Rules, O 55 r 17.

(i) the Federal Court of Australia, otherwise than as a Full Court of the Federal Court of Australia;

…

had been a valid judgment of the Supreme Court constituted of a single Judge; and

(b) each ineffective judgment of–

(i) a Full Court of the Federal Court of Australia;

…

had been a valid judgment of the Full Court of the Supreme Court."

"**7.** (1) A right or liability conferred, imposed or affected by section 6–

(a) is exercisable or enforceable; and

(b) is to be regarded as always having been exercisable or enforceable,

as if it were a right or liability conferred, imposed or affected by a judgment of the Supreme Court.

(2) Without limiting section 6 or subsection (1) of this section, the rights and liabilities conferred, imposed or affected by section 6 include the right of a person who was a party to the proceeding or purported proceeding in which the ineffective judgment was given or recorded to appeal against that judgment.

(3) For the purposes of subsection (2), each ineffective judgment of–

(a) the Federal Court of Australia, otherwise than as a Full Court of the Federal Court of Australia;

…

is taken to be a judgment of the Supreme Court constituted of a single Judge."

Section 6 is engaged if there has been an "ineffective judgment". That term is defined by s 4, sub-s (1) of which provides:

> "A reference in this Act to an '**ineffective judgment**' is a reference to a judgment of a federal court in a State matter given or recorded, before the commencement of this section, in the purported exercise of jurisdiction purporting to have been conferred on the federal court by a relevant State Act."

"Judgment" is defined[336] as "a judgment, decree or order, whether final or interlocutory, or a sentence" and "federal court" is defined[337] as the Federal Court of Australia or the Family Court of Australia. The winding up orders and the funding orders are judgments of a federal court that were, in each case, given or recorded before the commencement of s 4 of the State Jurisdiction Acts. They were made in matters in which the *Corporations Act* 1990 of the relevant State purported to confer jurisdiction on a federal court. Each of the orders which it is now sought to have quashed therefore falls within the literal terms of the definition of "ineffective judgment". Prima facie, then, s 6 operates to declare that the rights and liabilities of all persons "are … declared to be, and always to have been, the same as if" the orders in question "had been a valid judgment of the Supreme Court [of the jurisdiction] constituted of a single Judge".

324 The applicants for certiorari contended that ss 6 and 7 of the State Jurisdiction Acts (and ss 8 and 10 which deal with enforcement and variation of s 6 rights) are a direct interference with the procedures and authority of the Federal Court and thus incompatible with Ch III of the Constitution. They further submitted that these provisions of the State Jurisdiction Acts are directly or indirectly inconsistent with the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") and are, therefore, invalid by operation of s 109 of the Constitution. Particular attention was directed to s 5(2) of the Federal Court Act which provides (among other things) that the Federal Court "is a superior court of record".

325 The argument which those seeking certiorari advanced took several steps. First, it was said that the orders of a superior court of record are valid until they are set aside. It followed that, by making the Federal Court a superior court of record[338], the Commonwealth Parliament had provided for the effect which orders made by that Court would have. Accordingly, so it was submitted, the provisions of the State Jurisdiction Acts, which sought to attribute some other consequence to Federal Court orders, were inconsistent with a valid

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336 s 3.

337 s 3.

338 *Federal Court of Australia Act* 1976 (Cth), s 5(2).

Commonwealth law. Those provisions were therefore wholly invalid or, at least, invalid so long as the Federal Court's order had not been quashed or set aside in the exercise of federal judicial power. Each step of the argument requires separate consideration, but before turning to that task it is as well to say something more about why it is necessary to embark on it.

326 At first sight, the liquidator need not identify the source of his rights and liabilities. He holds office as liquidator in companies that are in liquidation, and has the benefits and burdens of the funding arrangements, either because the relevant Federal Court orders still have effect or because the State Jurisdiction Acts created rights and liabilities in him (and all persons) that are substantially the same as those that the Federal Court orders created. In those circumstances, why is it necessary for the liquidator to demonstrate that his rights and liabilities stem from one source rather than the other? Is it not enough to say that if the Federal Court orders no longer have effect, because, having been made without jurisdiction, they are to be treated as void, he has s 6 rights and liabilities and, conversely, that if the Federal Court orders still have effect and s 6 is invalid by operation of s 109, his rights and liabilities are to be traced to a root of title in the orders of the Federal Court?

327 That approach, attractive as it may seem at first sight, cannot be adopted. It assumes that one or other source of power is valid. To see whether that is so, it is necessary to identify the nature and extent of any inconsistency between the State and Commonwealth legislation. That process must begin by examining the legislation.

Orders of a superior court of record

328 It is apparent from the legislature's use of the expression "superior court of record" in s 5(2) of the Federal Court Act that reference was intended to the considerable body of English common law about such courts, including the proposition that, in general, orders made by such a court are valid and binding upon the parties until they are set aside[339].

329 There can, however, be no unthinking transplantation to Australia of the learning that has built up about superior courts of record in England. The constitutional context is wholly different. Due regard must be had to those differences. It may be right to say that, as a general rule, a decision of a superior court "even if in excess of jurisdiction, is at the worst voidable, and is valid

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339 *Scott v Bennett* (1871) LR 5 HL 234 at 245 per Martin B; *Revell v Blake* (1873) LR 8 CP 533 at 544-545 per Blackburn J.

unless and until it is set aside"[340], and that a superior court may, and an inferior court may not, "determine conclusively its own jurisdiction"[341]. But such general statements must always give way to any applicable constitutional limitation. In particular, the apparently general ambit of s 5(2) of the Federal Court Act must be considered against the question of the power of the Parliament to enact it.

330 Section 19 of the Federal Court Act declares that that Court "has such original jurisdiction as is vested in it by laws made by the Parliament". As was noted in the joint judgment in *Residual Assco*[342], this grant of jurisdiction carries with it the power of the Federal Court to determine whether any particular vesting of original jurisdiction was validly granted to it[343]. Section 39B(1A) of the *Judiciary Act* 1903 (Cth) goes further, directly conferring original jurisdiction on the Federal Court in any matter "arising under the Constitution, or involving its interpretation"[344] and in any matter "arising under any laws made by the Parliament"[345].

331 In *Residual Assco*, the joint judgment pointed out[346] that it is necessary to distinguish between separate sources of authority to decide different kinds of questions. The authority to decide whether the Federal Court has jurisdiction was said to stem immediately from s 19 of the Federal Court Act and s 39B(1A)(c) of the *Judiciary Act*, and ultimately from ss 77(i) and 76(ii) of the

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340 *Cameron v Cole* (1944) 68 CLR 571 at 590 per Rich J.

341 *Cameron v Cole* (1944) 68 CLR 571 at 598 per McTiernan J. See also at 604-605 per Williams J; *Ousley v The Queen* (1997) 192 CLR 69 at 107 per McHugh J, 129-130 per Gummow J; *DMW v CGW* (1982) 151 CLR 491 at 507 per Mason, Murphy, Wilson, Brennan and Deane JJ; *Ex parte Williams* (1934) 51 CLR 545 at 550; Campbell, "Inferior and Superior Courts and Courts of Record", (1997) 6 *Journal of Judicial Administration* 249.

342 (2000) 74 ALJR 1013 at 1016 [8]; 172 ALR 366 at 369-370.

343 See also *DMW v CGW* (1982) 151 CLR 491 at 507 per Mason, Murphy, Wilson, Brennan and Deane JJ; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 194 per Gibbs CJ, 213 per Wilson and Dawson JJ, 215-217 per Brennan J, 222-223 per Deane J; *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 374-375 per Mason J.

344 s 39B(1A)(b).

345 s 39B(1A)(c).

346 (2000) 74 ALJR 1013 at 1016-1017 [8], [12]-[13]; 172 ALR 366 at 369-371.

Constitution. If the question concerns the constitutional validity of conferral of jurisdiction it is also necessary to recognise that s 39B(1A)(b) and s 76(i) would be engaged. The question would be one arising under the Constitution or involving its interpretation. By contrast, orders which dealt with proceedings on their merits were said to be invalidly made if the jurisdiction to make them depended on invalid legislation[347].

332 In the argument of the present matters, principal attention was directed to s 5(2) of the Federal Court Act, rather than to s 19. So far as now relevant, s 5(2) deals, not with the ambit of the Federal Court's authority to decide matters, so much as with the consequences that are to be attached to the fact that a decision has been made. It was said to give particular effect (validity until set aside) to orders which the Court made in the exercise of a jurisdiction which it explicitly found to exist, or which, by making a substantive order, it must implicitly have found to exist. What is the power to make a law having that effect?

333 Those who contended that s 5 is to be given general operation, so that *all* orders of the Federal Court are valid until set aside, sought to attribute power to enact a provision having that effect to ss 71, 76 and 77 or s 51(xxxix) of the Constitution, or a combination of some of those provisions. Particular reliance was placed on s 71, and it is convenient to deal with that section first.

334 The argument based on s 71 contained several steps. First, it was submitted, correctly, that the reference in s 71 to "such other federal courts as the Parliament creates" empowers the Parliament to create federal courts. This was said to give the Parliament power to choose what type of court it will create. In particular, it was submitted that s 71 empowered Parliament to choose whether it will create a "superior court of record" (a type of court which is now, and was at the time of federation, well recognised). So much may be accepted. But it by no means follows that the Parliament is thus given power by s 71 to create a court all of whose features correspond with a superior court of record in England. In particular, it does not necessarily follow from the power implicitly given by s 71 to create federal courts that *all* of the orders, including those made in relation to matters beyond the Commonwealth's legislative competence, may be made binding until set aside.

335 There are several reasons for rejecting the contention that s 71 does have this effect. First, it gives great breadth of operation to what is an implied power. Secondly, it sits oddly with the express conferral of power to define the jurisdiction of federal courts (that is, their authority to decide) which is a power found in s 77(i). Thirdly, it gives rise to results which are at odds with the place

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347 (2000) 74 ALJR 1013 at 1017-1018 [13], [17]; 172 ALR 366 at 371-372.

and purpose of Ch III in the Constitution, for it must always be recalled that Ch III "is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested. … No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap III."[348] If a federal court can be given authority to decide only matters arising under any laws made by the Parliament, or in relation to the other matters mentioned in ss 75 and 76, it follows (as was held in *Re Wakim*) that it cannot, for example, be given authority to decide matters which arise under laws made by State legislatures. To read s 5 as giving binding effect (albeit temporarily) to all orders would be to read it as giving the Federal Court authority to decide matters that do not relate to any matter contemplated by Ch III. Truly, in the traditional metaphor, the stream would have risen above its source.

336 It was suggested that any apparent deficiency in the power given by s 71 could be sufficiently supplied by resort to s 51(xxxix) and the power to make laws with respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament … or in the Federal Judicature". It is necessary to identify the power vested *by the Constitution* in the Parliament or in the Federal Judicature to the execution of which the matter is incidental. In relation to the powers vested in the Federal Judicature, whatever may be the position in relation to this Court, the jurisdiction of other federal courts to decide their own jurisdiction derives not from the Constitution but from an act of Parliament[349]. It follows that s 51(xxxix) cannot provide power to make all orders of those courts binding until set aside, as an incident to the execution of a power vested in the Federal Judicature by the Constitution.

337 If attention is directed to the power vested by the Constitution in the Parliament to *create* federal courts, we do not accept that it is incidental to that power to make provision for the *effect* of orders made by those courts. It is unnecessary to consider the operation of the incidental power in connection with the other relevant power vested by the Constitution in the Parliament, the power to *define* the jurisdiction of federal courts. As these reasons will seek to demonstrate, to the extent to which the Parliament has legislative power so to provide, s 5 may give orders of the Federal Court validity until they are set aside. Section 5 has done so in respect of the orders now in question. That conclusion does not, in our view, depend upon s 51(xxxix) so much as upon ss 77(i) and 76(i) and (ii).

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348 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270.

349 *Residual Assco Group Ltd v Spalvins* (2000) 74 ALJR 1013 at 1016 [8]; 172 ALR 366 at 369.

338 Section 77(i) enables the Parliament to make laws "defining the jurisdiction of any federal court other than the High Court" with respect to any of the matters mentioned in ss 75 and 76. Of the matters identified in those sections, ss 76(i) and (ii) are of most relevance, referring respectively to matters "arising under this Constitution, or involving its interpretation" and matters "arising under any laws made by the Parliament".

339 Section 76(ii) requires identification of the "law made by the Parliament" in relation to which a "matter" is said to arise. That law must, of course, be a law which is itself supported by a head of Commonwealth power, whether found in s 51 of the Constitution or elsewhere. Because the law under which the matter arises must be a *valid* law of the Parliament, ss 77(i) and 76(ii) cannot empower the Parliament to enact a law which would give binding effect to *all* orders made by a federal court, regardless of whether they have a sufficient connection with a relevant head of power. It is, however, necessary to explore that conclusion further.

340 There seems little difficulty in concluding that a law which "defines" the jurisdiction of a federal court with respect to a matter arising under a law made by the Parliament could go on to attribute certain consequences to the judicial resolution of the matter. In particular, there seems little difficulty in saying that, as part of defining the authority of a federal court to decide a matter, the Parliament may provide that orders made to quell the controversy will be binding until set aside. Power to make such a provision is found in s 77(i) and the power to define the jurisdiction of federal courts with respect to s 76(ii) matters.

341 The inquiry must, therefore, focus upon the authority to decide which has been invoked. It is convenient to continue the discussion by reference to the particular orders now in question. Each of those orders was made under the Corporations Law in the exercise of jurisdiction which it was thought was conferred by the combination of s 56 of the Commonwealth *Corporations Act* and s 42 of the relevant State's *Corporations Act*. It was held in *Re Wakim* that this jurisdiction was not validly conferred. By making the orders the Federal Court must, however, implicitly have found there to be jurisdiction to make them[350]. The authority to decide whether it had *jurisdiction* was given to the Federal Court by the Federal Court Act and the *Judiciary Act*. It was not given by the Corporations Law. The contention now advanced, that the winding up and funding orders are invalid, is a challenge to the conclusion which the Federal

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350 *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 216 per Brennan J; *DMW v CGW* (1982) 151 CLR 491 at 507 per Mason, Murphy, Wilson, Brennan and Deane JJ.

Court reached about its jurisdiction. It is not a challenge to whether the orders were otherwise rightly made. That is, the challenge is to the Federal Court's exercise of the authority to decide conferred on it by s 19 of the Federal Court Act and s 39B(1A) of the *Judiciary Act*, and it is a matter arising under those laws.

342 The present challenge to the Federal Court's orders therefore turns on the scope of the authority given to the Court by those sections. That authority is not, in its terms, confined, and is therefore as extensive as Commonwealth constitutional power permits. The authority given by those sections is supported not just as an incident of each substantive head of legislative power[351] but, if there is a question whether any of those heads of power is validly engaged, by s 76(i). Section 76(i) is engaged in these matters because the question of whether the Federal Court had jurisdiction was itself a question arising under the Constitution and involving its interpretation.

343 It follows that so much of the order as asserts the existence of jurisdiction is an order made in a matter which arises under laws made by the Parliament (the Federal Court Act and the *Judiciary Act*) and in a matter arising under the Constitution and involving its interpretation. It is, therefore, competent for the Parliament to provide, pursuant to ss 77(i) and 76(i) and (ii), that the order quelling the controversy about jurisdiction will be binding until set aside. It is not to the point to say that the particular subject matter of the controversy was not in fact a subject matter which fell within jurisdiction validly conferred on the Court. What is relevant is that, in their present operation, the Federal Court Act and the *Judiciary Act* are within power, that the assertion of jurisdiction by the Court takes place pursuant to those Acts, and that as a result the Parliament can validly give the Court power to decide its jurisdiction in a way that will be valid until set aside.

344 The practical consequence of this conclusion is that orders made by the Federal Court are valid until they are set aside. That is so because implicit in an assertion of jurisdiction is the conclusion about the constitutional validity of that assertion. For the reasons given earlier, that authority to decide and the power to provide that the order is binding until set aside is sufficiently rooted in ss 77 and 76.

345 It follows that it is not helpful to examine the questions in terms of a distinction between void and voidable orders. That is a distinction which, as Wade points out, will often be of little use, and then, if at all, only as a shorthand way of describing a conclusion reached by a process of reasoning rather than as

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351 cf *R v Hughes* (2000) 74 ALJR 802; 171 ALR 155.

an analytical tool[352]. But whether or not that is so, it is a distinction which is not helpful in the present context.

346 Nor is it useful to consider the way in which the courts of the United States have approached the question of the effect to be given to orders made without a sufficient constitutional foundation. The approach adopted in those cases[353] is much affected by the different constitutional context in which they are decided, and by the development of notions of prospective overruling which have been rejected by this Court[354]. It is necessary, in this country, to consider the problem by reference to the provisions of Ch III.

Inconsistency

347 Section 6 of the State Jurisdiction Acts declares the rights and liabilities of all persons to be, and always to have been, the same as if each ineffective judgment of a single judge of the Federal Court had been a valid judgment of a single judge of the Supreme Court. Section 6 does not seek to add to or subtract from whatever may be the continuing effect of an order made by the Federal Court.

348 The rights and liabilities created by s 6 are, in almost all respects, parallel to and identical with the rights and liabilities under the Federal Court's order. But there is not complete identity. First, and most obviously, whatever rights and liabilities may flow from an "ineffective judgment" of the Federal Court are defeasible. They are not enforceable if the Federal Court's order is quashed or set aside. Secondly, the rights and liabilities which s 6 creates are the rights and liabilities that would flow from a Supreme Court judgment to the same effect. Thus the ancillary rights which might thereafter be exercised (as, for example, by way of enforcement) may differ from those that could be exercised in respect of the Federal Court order. Thirdly, and this may be no more than a particular species of the genus of differences referred to in the second point, any rights to dispute or vary s 6 rights differ from those that exist in respect of the Federal Court order. For example, there can be no resort to s 75(v) of the Constitution to quash s 6 rights and liabilities. The only means of challenge to the rights and liabilities created by s 6(a) is by appeal to the Supreme Court or by variation

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352 Wade and Forsyth, *Administrative Law*, 7th ed (1994) at 339-344.

353 *Chicot County Drainage District v Baxter State Bank* 308 US 371 (1940); *Harper v Virginia Department of Taxation* 509 US 86 (1993).

354 *Ha v New South Wales* (1997) 189 CLR 465 at 503-504 per Brennan CJ, McHugh, Gummow and Kirby JJ, 515 per Dawson, Toohey and Gaudron JJ.

under s 10. (It matters not for this purpose whether a right of appeal is implicit in s 6 or given by s 7.) Rights and liabilities declared by s 6(b) by reference to an order of a Full Court of the Federal Court may not be open to appeal.

349 It may well be that the differences to which we have pointed are differences which follow inevitably from the terms of s 6. Some of the differences are, however, emphasised by consideration of the appeal rights referred to in s 7 and the provision in s 10 for modification of s 6 rights. The applicants fastened upon these differences in aid of their contention that some provisions of the State Jurisdiction Acts (particularly ss 6 and 7) are inconsistent with the Federal Court Act and, therefore, invalid by operation of s 109 of the Constitution.

350 Several bases of inconsistency were advanced. It was said that there was direct inconsistency between the Federal Court Act (and the effect which it gives to extant orders of the Federal Court) and s 6. It was said that there was indirect inconsistency because the Federal Court Act covered the field of proceedings in the Federal Court and the State Jurisdiction Acts purported to enter that field by creating rights and liabilities by reference to Federal Court orders and then providing for appellate review of those rights otherwise than by the Federal Court. It was said that there would be operational inconsistency as the rights and liabilities of the parties under the State Jurisdiction Acts diverged from those which the Federal Court had created by its order. It is convenient to deal first with the arguments for direct and indirect inconsistency, and then to turn to questions of operational inconsistency.

Direct and indirect inconsistency

351 It is essential to bear steadily in mind that the State Jurisdiction Acts do not, in their terms, seek to "alter, impair or detract from"[355] the operation of an order made by the Federal Court. They seek to create separate rights and liabilities, using the order of the Federal Court only as a point of historical reference. They provide for the variation or adjustment of the rights and liabilities which are thus created, not for the variation or adjustment of Federal Court orders. For this reason, there is no direct inconsistency between that Act (or the Federal Court order, the factum through which the Federal Court Act operates[356]) and the State Jurisdiction Acts. They simply do not intersect.

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355 *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630 per Dixon J. See also *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136 per Dixon J.

356 See, for example, *T A Robinson & Sons Pty Ltd v Haylor* (1957) 97 CLR 177 at 182-183; *Ex parte McLean* (1930) 43 CLR 472 at 484 per Dixon J.

352 Any consideration of indirect, or covering the field, inconsistency requires the identification of the field which the Commonwealth legislation has marked out. It may be accepted that, as the applicants contended, the Federal Court Act is intended to cover the field of proceedings in the Federal Court. It may further be accepted that that Act is intended to be the only legislation which deals with the subject of the extent to which orders of the Federal Court are to have binding effect. Finally, it may be accepted that the bare fact that an identical rule of conduct is prescribed by Commonwealth and State legislation does not conclude the question of possible inconsistency[357].

353 Here, however, there is no intrusion by the State legislatures upon any field covered by Commonwealth law. The rights and liabilities which the State Acts create, and for the adjustment or variation of which they provide, do not derive from what the Federal Court has done. The order of the Federal Court is, as we have said, no more than a factual point of reference for the creation of those rights and liabilities.

354 In this respect, the position is not substantially different from the circumstances considered in *R v Humby; Ex parte Rooney*[358], which concerned s 5 of the *Matrimonial Causes Act* 1971 (Cth). As Stephen J said of the provisions of that section[359]:

> "Neither of these sub-sections purports to effect a 'validation' of purported decrees …
>
> What the two sub-sections do is this: sub-s (3) declares the rights, liabilities, obligations and status of individuals to be and always to have been the same as if purported decrees had in fact been made by a single judge of a Supreme Court. It does not deem those decrees to have been made by a judge nor does it confer validity upon them; it leaves them, so far as their inherent quality is concerned, as they were before the passing of this Act. They retain the character of having been made without jurisdiction, as was decided in *Knight v Knight*[360]; as attempts at the exercise of judicial power they remain ineffective. Instead, the sub-section operates by attaching to them, as acts in the law, consequences

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357 *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J.

358 (1973) 129 CLR 231.

359 (1973) 129 CLR 231 at 242-243.

360 (1971) 122 CLR 114.

which it declares them to have always had and it describes those consequences by reference to the consequences flowing from the making of decrees by a single judge of the Supreme Court of the relevant State.

Sub-section (4) deals similarly with all proceedings, matters, decrees, acts and things affecting a party to proceedings in which a purported decree was made. It does not validate them but instead attaches to them, retrospectively, the same force and effect as would have ensued had the purported decree been made by a judge of a Supreme Court."

355 *Humby* might be seen as the converse of the present case in that the legislation in issue there was Commonwealth legislation relating to purported decrees pronounced by State officers. But those differences do not suggest some different conclusion about inconsistency. What is important here, as it was in *Humby*, is that the rights created by the State Act are distinct from whatever may be the rights which flow from the Federal Court order and the State Acts do not seek to validate or vary the latter rights. We turn then to consider the arguments about possible operational inconsistency between the Acts.

Operational inconsistency

356 If application is made to a Supreme Court, whether by appeal, or in reliance upon the power given by s 10 of the State Jurisdiction Acts to vary, revoke, set aside, or suspend the rights or liabilities declared by s 6, the rights and liabilities which are then established on appeal or under s 10 may differ from those which were created by the order of the Federal Court. Because the only rights and liabilities which an appeal or s 10 application may affect are those created by the State Jurisdiction Act, not those created by the Federal Court order, there is no direct interference with those latter rights. As the order of the Federal Court has effect until it is set aside, however, there is the potential for inconsistency between the two Acts so long as that Federal Court order remains in force[361].

357 The application of the State Acts, including the provisions governing appeal and variation, depends upon the identification of a Federal Court judgment as an "ineffective judgment". That could be said to invite attention by a Supreme Court, in an appeal under s 7 or application under s 10, to whether the Federal Court judgment *was* legally ineffective (for want of jurisdiction in the Federal Court). This would require examination of the basis upon which the Federal Court acted in the particular matter. If that was required, a State

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361 *Victoria v The Commonwealth* (1937) 58 CLR 618 at 631; *Commonwealth v Western Australia (Mining Act Case)* (1999) 196 CLR 392.

Supreme Court would, by s 39(2) of the *Judiciary Act*, have invested federal jurisdiction to consider the questions of constitutional interpretation which such an inquiry would present.

358 Reading the definition of "ineffective judgment" in this way would, however, encounter some difficulties. First, for the reasons given earlier, the explicit or implicit conclusion of the Federal Court that it had jurisdiction in a matter would be binding on the parties to the matter until the order was set aside. That issue could *not* be re-litigated in a State Supreme Court and the definition of "ineffective judgment" should not be read as requiring that to be done. Secondly, it is necessary to give full effect to the use in the definition of "ineffective judgment" of the words "purported" and "purporting" in the phrases "purported exercise of jurisdiction" and "purporting to have been conferred". The use of "purported" and "purporting" reveals that the validity of neither the exercise of jurisdiction, nor the conferral of jurisdiction, is a matter for inquiry in the Supreme Court. All that must be demonstrated is a historical fact: that there was an exercise of jurisdiction by the Federal Court which *appears* to have been founded in a relevant State Act.

359 If that historical fact exists, s 6 rights are created. Those rights will not clash with any which are recognised in, or derived from, a Federal Court judgment even if it turns out that the Court in fact had jurisdiction to decide the matter. If the Federal Court did have jurisdiction, the rights and duties of the parties would find their root in the order of that Court and the laws of the Parliament which permitted its making and the existence of any s 6 rights would be irrelevant. If, however, the Federal Court did *not* have jurisdiction, the rights and duties of the parties would find their root in the relevant State Act. Because the rights and duties are, for most practical purposes, the same, identifying their origin will very often be unnecessary. The basis of the parties' rights and duties becomes important only in the limited circumstances mentioned earlier: if there is a dispute about a party exercising ancillary rights or seeking to vary the rights and duties recognised in, or created by, the Federal Court order in question.

360 One example given in oral argument was of a Federal Court order providing that a company be wound up and a later order, made by a State Supreme Court pursuant to a State Jurisdiction Act, that the winding up be terminated. How would the tension between the two orders be resolved? On its face, the later order of the Supreme Court alters, impairs or detracts from the order of the Federal Court and it was submitted that the statutes which give force to those orders (a State Supreme Court Act and the Federal Court Act) would, to that extent, be inconsistent. As these reasons will seek to demonstrate this problem can be resolved, at a practical level, very easily.

361 The existence and extent of an inconsistency depends upon the particular Federal Court order and upon the nature of the change which is made on appeal

or on application under s 10. Particular attention must be directed to the form and content of the Federal Court order. In cases such as the present, account must be taken of two features. First, a winding up order made under the Corporations Law is an order which the Corporations Law contemplates may be varied in certain respects. The liquidator named in the winding up order may be removed[362], released[363] or replaced[364]; the winding up may be stayed or terminated[365]. Ordinarily, it might have been expected that these steps would be solely in the power of the court which ordered the winding up. The Corporations Law provides, however, in s 58AA(1), that:

> "'**Court**' means any of the following courts when exercising the jurisdiction of this jurisdiction:
>
> (a) the Federal Court;
>
> (b) the Supreme Court of this or any other jurisdiction;
>
> …"

Accordingly, when provisions dealing with matters like removal or release of a liquidator, or stay or termination of the winding up, permit the "Court" to make such an order, it is clear that the Corporations Law contemplates that the order may be made by a court other than the court which ordered the winding up.

362 The winding up orders made by the Federal Court were made in purported exercise of jurisdiction conferred in respect of the Corporations Law of the State of incorporation of the company which was wound up. They were, therefore, orders which are to be understood as having been made subject to the various qualifications and limitations for which that Corporations Law provided. Those qualifications and limitations included not only matters such as the possible removal and replacement of the liquidator or termination of the winding up, but also, most importantly, the possibility that such orders may be made by a State Supreme Court. Orders of the latter kind would, therefore, not be inconsistent with the Federal Court order.

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362 Corporations Law, s 473(1).

363 Corporations Law, s 480(c).

364 Corporations Law, s 473(7).

365 Corporations Law, s 482(1).

363 In the case of the funding orders, there are not the obvious express powers of modification of the order that are to be found in the Corporations Law in relation to winding up orders. Nevertheless, to the extent that a single judge of the Federal Court could modify the funding orders, we consider that those orders are to be understood as being subject to qualification or modification by orders made by a single judge of a Supreme Court in accordance with s 58AA.

364 It will be noted that we have referred to modification of the winding up orders or funding orders by a single judge. Different considerations arise in relation to appellate review of such orders. Section 58AA did not alter the ordinary course of appeals in the Federal Court and it follows that the Federal Court orders are not to be understood as contemplating appellate review otherwise than by the Full Court of the Federal Court.

365 The argument for inconsistency therefore remains. Its acceptance would not result, however, in the conclusion that the State Jurisdiction Acts are invalid (except, that is, to the extent of, and for the duration of, the inconsistency). If there were an inconsistency, it would prevent reliance upon s 6 rights unless and until the Federal Court order is quashed or set aside. Upon that order being quashed or set aside, the inconsistency would be removed and the s 6 rights could be exercised. If a party affected by a Federal Court order (who seeks to have the s 6 rights and duties varied, revoked or set aside) can readily have the Federal Court order quashed or set aside any question of inconsistency can be resolved. In effect, then, there would be no more than a temporary suspension of the relevant operation of the State Jurisdiction Act pending the quashing or setting aside of the Federal Court order.

Kable v Director of Public Prosecutions (NSW)[366]

366 The argument based on *Kable's Case* that ss 6 and 7 of the State Jurisdiction Acts are invalid because they make State Supreme Courts an inappropriate receptacle for federal jurisdiction may be dealt with shortly. The argument is one which assumed, wrongly, that the State Jurisdiction Acts created what the applicants called a "statutory judgment" of the State Supreme Court. It was contended that Supreme Courts thus became "an instrument of the legislature/executive" and that judicial orders were made by legislative decree and then passed off as valid judgments of the Supreme Courts.

367 These arguments misstate the effect of s 6 of the State Jurisdiction Acts. That section creates no judgment, whether of the Supreme Court or any other

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366 (1996) 189 CLR 51.

court. It creates rights and liabilities. There is no basis for concluding that the Acts infringe a principle to be derived from *Kable's Case*.

Relief

368 For the reasons given above, there is no direct or indirect inconsistency between the Federal Court Act and the State Jurisdiction Acts. The liquidator has rights and liabilities from the Federal Court orders and the State Acts which are for present purposes identical. There may be operational inconsistency if application is made to change the rights and liabilities which arise under s 6 of the State Jurisdiction Acts. There could be no operational inconsistency if the Federal Court orders were quashed.

369 In these circumstances, what relief should now be granted? We deal first with certiorari to quash and the application for extension of time.

370 In *Re Wakim* an application to extend the time for making application to quash a winding up order made by the Federal Court was refused. It was refused because it was not shown that third parties would not be affected adversely if the winding up order were quashed[367]. No such considerations arise in this case. If the orders of the Federal Court are quashed, the rights and liabilities of all persons will be determined by s 6 of the State Jurisdiction Acts.

371 The orders of the Federal Court were made without jurisdiction and, as was said in *R v Ross-Jones; Ex parte Green*[368]:

> "If … a clear case of want or excess of jurisdiction has been made out, and the prosecutor is a party aggrieved, the writ [of prohibition] will issue almost as of right, although the court retains its discretion to refuse relief if in all the circumstances that seems the proper course."

That being so, in the circumstances of this case, we consider it better that a writ of certiorari issue to quash the orders. The application has been made, the orders were made without jurisdiction. If they are quashed there can be no remaining question of operational inconsistency.

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367 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 546 [25] per Gleeson CJ, 546 [26] per Gaudron J, 565 [81] per McHugh J, 592 [165] per Gummow and Hayne JJ, 635 [304] per Callinan J.

368 (1984) 156 CLR 185 at 194 per Gibbs CJ.

372 Accordingly, we would extend the time for application for certiorari and grant an order absolute for certiorari to quash the winding up and funding orders. No question would then arise of directing prohibition to the Federal Court and, given that the liquidator may act upon his s 6 rights, there should be no prohibition directed to him.

373 In many cases it will be unnecessary for any party affected by an "ineffective judgment" of a single judge of the Federal Court to seek to have that order set aside or quashed for want of jurisdiction, whether by appeal to the Full Court of the Federal Court or by application for prohibition and certiorari in this Court. As a general rule it would seem very probable that there would be a need to seek such relief only to avoid an operational inconsistency. As has been explained earlier in these reasons, that would arise only if a party were to bring about, by appeal or s 10 application, some divergence between the s 6 rights and liabilities and rights and liabilities created by the Federal Court order. In such circumstances, if the order in question was made by a single judge of the Federal Court, appeal to the Full Court of that Court (and, if necessary, application for extension of time to appeal) would ordinarily be the more appropriate course.

Costs

374 Substantially the applicants have failed notwithstanding that certiorari should issue to quash the winding up and funding orders. That being so, the applicant or applicants in each matter should pay the costs of the liquidator and the added respondent, the Deputy Commissioner of Taxation.