HIGH COURT OF AUSTRALIA

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

Matter No M20/2000

AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION APPLICANT

AND

EDENSOR NOMINEES PTY LTD & ORS RESPONDENTS

Australian Securities and Investments Commission v Edensor Nominees Pty Ltd
[2001] HCA 1
Date of Order: 30 August 2000
Date of Publication of Reasons: 8 February 2001
M20/2000

ORDER

1. *Special leave to appeal granted, and appeal treated as instituted and heard instanter and allowed.*

2. *Set aside paragraphs 1 and 2 of the declarations made by the Full Court of the Federal Court of Australia on 9 March 2000.*

3. *Remit the matter to the Full Court of the Federal Court of Australia for further hearing and determination.*

4. *The respondents to pay the appellant's costs.*

On appeal from the Federal Court of Australia

Representation:

D F Jackson QC with S D Rares SC and R D Strong for the applicant (instructed by Australian Securities and Investments Commission)

P R Hayes QC with I D Martindale for the first respondent (instructed by Clayton Utz)

N J Young QC with M C Garner and D J Batt for the second to seventh respondents (instructed by Freehills)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with M A Perry and J S Stellios intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria with S G E McLeish 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 (instructed by Crown Solicitor for South Australia)

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

HIGH COURT OF AUSTRALIA

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

Matter No M23/2000

EDENSOR NOMINEES PTY LTD APPLICANT

AND

AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION & ORS RESPONDENTS

Edensor Nominees Pty Ltd v Australian Securities and Investments Commission
Date of Order: 30 August 2000
Date of Publication of Reasons: 8 February 2001
M23/2000

ORDER

Application dismissed.

On appeal from the Federal Court of Australia

Representation:

P R Hayes QC with I D Martindale for the applicant (instructed by Clayton Utz)

S D Rares SC with R D Strong for the first respondent (instructed by Australian Securities and Investments Commission)

N J Young QC with M C Garner and D J Batt for the second to seventh respondents (instructed by Freehills)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with M A Perry and J S Stellios intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria with S G E McLeish 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 (instructed by Crown Solicitor for South Australia)

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

HIGH COURT OF AUSTRALIA

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

Matter No M24/2000

YANDAL GOLD PTY LTD & ORS — APPLICANTS

AND

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION & ORS — RESPONDENTS

Yandal Gold Pty Ltd v Australian Securities and Investments Commission
Date of Order: 30 August 2000
Date of Publication of Reasons: 8 February 2001
M24/2000

ORDER

Application dismissed.

On appeal from the Federal Court of Australia

Representation:

N J Young QC with M C Garner and D J Batt for the applicants (instructed by Freehills)

S D Rares SC with R D Strong for the first respondent (instructed by Australian Securities and Investments Commission)

P R Hayes QC with I D Martindale for the second respondent (instructed by Clayton Utz)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with M A Perry and J S Stellios intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria with S G E McLeish 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 (instructed by Crown Solicitor for South Australia)

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

HIGH COURT OF AUSTRALIA

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

Matter No M35/2000

RE EDENSOR NOMINEES PTY LTD & ORS RESPONDENTS

EX PARTE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
APPLICANT/PROSECUTOR

Re Edensor Nominees Pty Ltd; Ex parte Australian Securities and Investments Commission
Date of Order: 30 August 2000
Date of Publication of Reasons: 8 February 2001
M35/2000

ORDER

Application dismissed.

Representation:

No appearance for the first and second respondents

P R Hayes QC with I D Martindale for the third respondent (instructed by Clayton Utz)

N J Young QC with M C Garner and D J Batt for the fourth respondent (instructed by Freehills)

D F Jackson QC with S D Rares SC and R D Strong for the applicant/prosecutor (instructed by Australian Securities and Investments Commission)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with M A Perry and J S Stellios intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria with S G E McLeish 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 (instructed by Crown Solicitor for South Australia)

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

HIGH COURT OF AUSTRALIA

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

Matter No M38/2000

RE AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION & ORS RESPONDENTS

EX PARTE EDENSOR NOMINEES PTY LTD
APPLICANT/PROSECUTOR

Re Australian Securities and Investments Commission; Ex parte Edensor Nominees Pty Ltd
Date of Order: 30 August 2000
Date of Publication of Reasons: 8 February 2001
M38/2000

ORDER

Application dismissed.

Representation:

No appearance for the first respondent

S D Rares SC with R D Strong for the second respondent (instructed by Australian Securities and Investments Commission)

N J Young QC with M C Garner and D J Batt for the third respondent (instructed by Freehills)

P R Hayes QC with I D Martindale for the applicant/prosecutor (instructed by Clayton Utz)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with M A Perry and J S Stellios intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria with S G E McLeish 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 (instructed by Crown Solicitor for South Australia)

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

HIGH COURT OF AUSTRALIA

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

Matter No M39/2000

RE AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION & ORS RESPONDENTS

EX PARTE YANDAL GOLD PTY LTD & ORS
APPLICANTS/PROSECUTORS

Re Australian Securities and Investments Commission; Ex parte Yandal Gold Pty Ltd
Date of Order: 30 August 2000
Date of Publication of Reasons: 8 February 2001
M39/2000

ORDER

Application dismissed.

Representation:

No appearance for the first respondent

S D Rares SC with R D Strong for the second respondent (instructed by Australian Securities and Investments Commission)

P R Hayes QC with I D Martindale for the third respondent (instructed by Clayton Utz)

N J Young QC with M C Garner and D J Batt for the applicants/prosecutors (instructed by Freehills)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with M A Perry and J S Stellios intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria with S G E McLeish 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 (instructed by Crown Solicitor for South Australia)

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

CATCHWORDS

Australian Securities and Investments Commission v Edensor Nominees Pty Ltd

Courts and judges – Federal courts – Jurisdiction – Whether Federal Court exercising federal or State jurisdiction – Whether Federal Court had power to make orders pursuant to the Corporations Law of a State – Whether Australian Securities and Investments Commission "the Commonwealth" – Whether remedies sought were "an injunction or declaration".

Constitutional law (Cth) – Courts – Jurisdiction – Whether Federal Court exercising federal or State jurisdiction – Whether Australian Securities and Investments Commission "the Commonwealth".

Words and phrases – "jurisdiction" – "power" – "State jurisdiction" – "federal jurisdiction" – "accrued jurisdiction" – "the Commonwealth" – "an injunction or declaration".

Constitution, s 75(iii).
Australian Securities and Investments Commission Act 1989 (Cth).
Corporations Act 1989 (Cth), ss 49(1)(d), 56(2), 58AA.
Judiciary Act 1903 (Cth), ss 39B(1A)(a), 79, 80.
Corporations Law, ss 737, 739.
Corporations (Victoria) Act 1990 (Vic).

GLEESON CJ, GAUDRON AND GUMMOW JJ.

Introduction

1 The ultimate question in the proceedings in this Court is whether the Full Court of the Federal Court erred in holding that a judge of that Court had acted beyond its jurisdiction or powers in making certain orders in litigation arising from a company takeover bid. However, at the heart of the controversy lie basic principles of the Australian federal constitutional structure and the exercise of the authority of the judicial branch of government.

2 It is convenient to begin with the word "jurisdiction". This is a "generic term"[1] generally signifying authority to adjudicate. It is used in various senses. The jurisdiction of a court to hear and determine a personal action and to grant relief may depend upon no more than effective service of that court's process upon the defendant within the territorial bounds of its competence or pursuant to the exercise of a "long-arm" jurisdiction; or it may depend also upon the proceeding being with respect to a particular subject-matter[2].

3 The classification between State and federal jurisdiction is a consequence of the nature of Australian federalism; it assumes the existence of the criteria outlined above but supplements or displaces them. State jurisdiction may be described as "the authority which State Courts possess to adjudicate under the State Constitution and laws"[3]. Federal jurisdiction is "the authority to adjudicate derived from the Commonwealth Constitution and laws"[4] and, as will appear, it is attracted in some instances by subject-matter and in others by identity of parties or the nature of the relief sought.

4 The distinction between State and federal jurisdiction directs attention to considerations which underlie the issues for determination in these proceedings. The structure of the Constitution reflects notions of responsible and representative government as understood by the framers through experience of colonial self-government. However, the institutions of federalism perceived from study of the United States Constitution suggested a vertical division of

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1 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR (Pt 2) 1087 at 1142.

2 *Flaherty v Girgis* (1987) 162 CLR 574 at 598; *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1112 [13]-[14]; 172 ALR 625 at 630.

3 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR (Pt 2) 1087 at 1142.

4 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR (Pt 2) 1087 at 1142.

legislative, executive and judicial power across all three arms of government. Hence the distinction between federal and State jurisdiction, constitutional concepts with no immediate counterpart in the treatment by the common law of the term "jurisdiction".

5 This division between courts and jurisdictions may not be essential for a system of government properly to be identified as "federal" in nature. Sir Owen Dixon said that, while the framing of the Australian Constitution in this respect had been influenced by the plan of the United States Constitution, it was "not easy to see why the entire system of superior Courts should not have been organized and erected under the Constitution to administer the total content of the law"[5].

6 The federal division of the judicial function as adopted in Australia differed from that in the United States in two significant respects. First, s 73 placed this Court in the position to develop the common law for Australia[6] and, secondly, s 77(iii) expressly empowered the Parliament to confer on State courts the federal jurisdiction laid out in ss 75 and 76.

7 That latter aspect is important for these proceedings. A State court receives State jurisdiction under the constitution and laws of that State. It may also be invested with federal jurisdiction by a law made by the Parliament under s 77(iii) of the Constitution; s 39(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") is an example of such a law. The federal courts established by the Parliament, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court[7], exercise their jurisdiction, necessarily federal, by reason of its conferral by laws enacted under s 77(i) of the Constitution. A "matter" in respect of which that jurisdiction is conferred may, in a given case, include claims arising under common law or under the statute law of a State. But the jurisdiction invoked remains, in respect of all of the claims made in the matter, "wholly" federal; even in a State court "there is no room for the exercise of a State jurisdiction which apart from any operation of the *Judiciary Act* the State court would have had" and "there is no State jurisdiction capable of

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5 Dixon, "The Law and the Constitution", (1935) 51 *Law Quarterly Review* 590 at 607.

6 *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1122-1123 [66]-[75], 1135 [142]; 172 ALR 625 at 643-645, 662.

7 Created by s 8 of the *Federal Magistrates Act* 1999 (Cth).

concurrent exercise with the federal jurisdiction invested in the State court". These terms were used by Barwick CJ in *Felton v Mulligan*[8].

8 Further, State jurisdiction may not be conferred upon a federal court as an exercise of State legislative power and the federal legislative power is limited by the content of Ch III of the Constitution. That is what follows from *Re Wakim; Ex parte McNally*[9]. While the Constitution expressly enables the conferral of federal jurisdiction on State Courts, the converse does not apply.

9 In the present proceedings, whilst recognising that the Federal Court was seised of federal jurisdiction, the Full Court of the Federal Court denied the competency of orders made to resolve claims under State law which were elements of the controversy. The errors this involved, including the nature of "accrued" jurisdiction and confusion between notions of "jurisdiction" and "power", are explained in what follows in these reasons.

10 The Full Court misconceived the significance, for the dispute before it, of *Re Wakim*. The decision of this Court in that litigation, in one of its branches[10], affirmed and applied the authorities respecting the inclusion of non-federal claims in some "matters" within federal jurisdiction. With the significance of *Re Wakim* for the conferral of State jurisdiction on federal courts, the present litigation in the Federal Court was not concerned.

11 This litigation, unlike *Re Wakim* and other recent decisions[11], does not immediately involve the operation and validity of "co-operative" legislative schemes. Here, the consequence of the decision of the Full Court would be that no court, State or federal, would be competent in the exercise of federal jurisdiction to administer remedies such as those sought and obtained at first instance in the Federal Court. Even if the "co-operative" legislation at stake in *Re Wakim* had been upheld, the result here would be no different; by definition,

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8 (1971) 124 CLR 367 at 373-374.

9 (1999) 198 CLR 511.

10 (1999) 198 CLR 511 at 546 [25], 563-564 [72]-[78], 582-588 [129]-[150].

11 *Byrnes v The Queen* (1999) 73 ALJR 1292; 164 ALR 520; *Bond v The Queen* (2000) 74 ALJR 597; 169 ALR 607; *R v Hughes* (2000) 74 ALJR 802; 171 ALR 155.

the "co-operative scheme" considered in *Re Wakim* was concerned with the exercise of State not federal jurisdiction[12].

12 The significance of the decision in *Re Wakim* appears from the following statement[13]:

> "Australia is a federation of a dualist kind, consistently with the common law tradition. While some provisions in the Constitution provide for co-operation, they do not fundamentally alter its dualist character; indeed, if anything, they reinforce it. The nature of the Australian constitutional system needs to be borne in mind in designing co-operative procedures. The issues at stake essentially are questions of principle."

The litigation in the Federal Court

13 On 25 March 1999, Yandal Gold Pty Ltd ("Yandal Gold") declared unconditional the takeover offers and contracts arising from the acceptance of offers which had been made for all of the shares on issue in a listed company, Great Central Mines Ltd ("Great Central"). It appears that Great Central was a company incorporated or taken to be incorporated under the Corporations Law of Victoria ("the Corporations Law" or "the Corporations Law of Victoria"). That expression identifies the Corporations Law which is set out in s 82 of the *Corporations Act* 1989 (Cth) ("the Commonwealth Act") and which s 7 of the *Corporations (Victoria) Act* 1990 (Vic) ("the Victorian Corporations Act") applies as the Corporations Law of Victoria.

14 The offer and Pt A Statement had been served by Yandal Gold on Great Central on 12 January 1999. At that time, Yandal Gold had a "relevant interest" in 40.37 per cent of the shares in Great Central[14]. Yandal Gold was a wholly

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12 It also was decided in the *Re Wakim* litigation (in particular, in *Spinks v Prentice*) that, applying *Northern Territory v GPAO* (1999) 196 CLR 553, a "matter arising under" a law supported by s 122 of the Constitution attracts a conferral of federal jurisdiction under s 76(ii) of the Constitution.

13 Saunders, "Administrative Law and Relations Between Governments: Australia and Europe Compared", (2000) 28 *Federal Law Review* 263 at 290.

14 The term "relevant interest" is defined and explained in Div 5 (ss 30-45) of Pt 1.2 of Ch 1 of the Corporations Law. It is unnecessary for present purposes to pursue the text of this definition. Division 5 of Pt 1.2 of Ch 1 was repealed by Item 309 of Pt 9 of Sched 3 of the *Corporate Law Economic Reform Program Act* 1999 (Cth) ("the CLERP Act") with effect from 13 March 2000. Notwithstanding this repeal,

(Footnote continues on next page)

owned subsidiary of Yandal Gold Holdings Pty Ltd ("Yandal Holdings"). Edensor Nominees Pty Ltd ("Edensor") held, as trustee for a discretionary trust for the benefit of the Gutnick family, 50.1 per cent of the shares in Yandal Holdings. The balance of the shareholding in Yandal Holdings was held by Normandy Consolidated Gold Holdings Pty Ltd ("Normandy Consolidated"). This was a member of the Normandy Group, the ultimate holding company of which was a listed company, Normandy Mining Ltd ("Normandy").

15 When the offer and Pt A Statement were served, Edensor held 12.56 per cent of the shares in Great Central and a member of the Normandy Group, Normandy Mining Holdings Pty Ltd ("Normandy Holdings"), held 27.81 per cent of the shares in Great Central. The "relevant interest" in 40.37 per cent of the shares in Great Central held by Yandal Gold reflected those two percentages held by the other companies, and the operation of a Shareholders Agreement which had been made on 11 January 1999. The parties to that instrument included Edensor, Yandal Gold and Normandy Holdings, and it contained provisions relating to the bid then proposed to be made by Yandal Gold.

16 On 21 April 1999, the day after the closure of the takeover offers, Yandal Gold became "entitled" to 94.37 per cent of the shares in Great Central, including the 40.37 per cent referred to above. Thereafter, Yandal Gold was entitled to utilise the compulsory acquisition provisions of Div 6 (ss 701-703) of Pt 6.5 of Ch 6 of the Corporations Law.

17 Section 615 is found in Pt 6.2 of Ch 6 of the Corporations Law[15]. Chapter 6 is headed "Acquisition of Shares" and Pt 6.2 "Control of Acquisition of Shares". Part 6.10 (ss 737-744) is headed "Powers of Court". Sections 737 and 739 authorise the making of certain curial orders where provisions of Ch 6, including s 615, have been contravened. In each case the application for relief may, by express provision, be made by the Australian Securities and Investments Commission ("ASIC").

18 Sub-section (4) of s 615 states:

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the present tense will continue to be used in this judgment in respect of these sections.

15 Chapter 6 was repealed by Item 5 of Sched 1 of the CLERP Act with effect from 13 March 2000. The present tense will also be used in respect of these sections.

"A person shall not offer to acquire, or issue an invitation in relation to, shares in a company if the person is prohibited by subsection (1) from acquiring those shares."

Sub-section (1) of s 615 states that, except as provided by Ch 6 of the Corporations Law:

"[A] person shall not *acquire* shares in a company if:

(a) any person who:

(i) is not entitled to any voting shares in the company; or

(ii) is entitled to less than the prescribed percentage of the voting shares in the company;

would, immediately after the acquisition, be entitled to more than the prescribed percentage of the voting shares in the company; or

(b) any person who is entitled to not less than the prescribed percentage, but less than 90 per cent, of the voting shares in the company would, immediately after the acquisition, be entitled to a greater percentage of the voting shares in the company than immediately before the acquisition." (emphasis added)

The term "prescribed percentage" means 20 per cent or such a lesser percentage as is prescribed by regulation (s 615(7)).

19 It followed from the definition of "company" in s 9 of the Corporations Law, as interpreted by s 9 of the Victorian Corporations Act[16], that the prohibitions imposed by s 615 of the Corporations Law applied in respect of the takeover offers for shares in Great Central. ASIC formed the view that as a result of the Shareholders Agreement there had been contraventions of the prohibitions imposed by s 615. The Shareholders Agreement had been made on 11 January 1999, the day before Yandal Gold had served its offer and Pt A Statement.

20 ASIC contended that, by entering into the Shareholders Agreement, Yandal Gold, Normandy Holdings and Edensor each became respectively

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16 The effect of s 9 is that the expression "this jurisdiction" in the definition of "company" in the Corporations Law means "Victoria".

entitled to the relevant interest in the shares in Great Central held by Edensor and Normandy Holdings and that, in each case, there was an "acquisition" of that deemed relevant interest which contravened the prohibition in s 615. The relevant interest said to be acquired in respect of Yandal Gold was in 40.37 per cent of the shares in Great Central, being the shares held by Normandy Holdings and Edensor; in respect of Edensor in an additional 27.81 per cent of the shares in Great Central, being the shares held by Normandy Holdings; and in respect of Normandy Holdings, in an additional 12.56 per cent of the shares in Great Central, being the shares held by Edensor.

21 On 25 March 1999, ASIC instituted a proceeding in the Federal Court, Victoria District Registry. ASIC sought declaratory, injunctive and other relief. By amendment, ASIC later claimed that the parties to the Shareholders Agreement had had informal arrangements that Edensor and Normandy Holdings would not accept the takeover offers and would retain their shares for the purposes of the bid by Yandal Gold. This would enable Yandal Gold to reach the 90 per cent acceptance threshold which would entitle it to use the compulsory acquisition provisions of the Corporations Law to acquire the remaining shares in Great Central. ASIC alleged that this involved a second species of contravention of s 615.

22 ASIC also claimed in the Federal Court proceeding that Yandal Gold, in despatching the takeover offers, had engaged in conduct in trade and commerce that was misleading and deceptive. This was said to be in contravention of s 52 of the *Trade Practices Act* 1974 (Cth) ("the Trade Practices Act") or, alternatively, s 12DA of the *Australian Securities and Investments Commission Act* 1989 (Cth) ("the ASIC Act") and s 995(2)(b) of the Corporations Law[17]. Section 12DA of the ASIC Act forbids engagement by corporations in conduct in relation to "financial services" that is misleading or deceptive. The remedies which may be sought by ASIC in respect of contravention of s 12DA of the ASIC Act include the injunctive remedies provided by s 12GD. With effect from 1 July 1998, s 52 of the Trade Practices Act has not applied to "conduct engaged in in relation to financial services"[18]. There is a debate, which it will be unnecessary for this Court to resolve at this stage, as to which of these regimes

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17 Chapter 7 of the Corporations Law is headed "Securities" and s 995 forbids engagement in conduct in or in connection with dealings in securities which is misleading or deceptive.

18 Trade Practices Act, s 51AF(2)(a); see *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 74 ALJR 604 at 615 [61]; 169 ALR 616 at 631.

applied. It turns upon the meaning to be given to the legislative definition of "financial services".

23 The trial judge (Merkel J) delivered his reasons for judgment on 16 June 1999[19]. He found that there was no dispute that, by reason of the Shareholders Agreement, Edensor, Normandy Holdings, Yandal Holdings and Yandal Gold were deemed to have relevant interests, which each increased to 40.37 per cent, in shares in Great Central and that the relevant interests had increased to 40.37 per cent in a manner not provided for in Ch 6. His Honour said that the issue was whether the increased relevant interests were "acquired" in contravention of s 615[20]. His Honour held that there had been acquisitions in the necessary sense with the result that there had been contraventions of s 615[21].

24 Merkel J also found that ASIC had established its case with respect to the informal arrangements[22]. Pursuant to those arrangements, each of Yandal Gold, Normandy Holdings and Edensor had acquired a relevant interest in shares of Great Central, in contravention of s 615[23]. The result was that the primary judge upheld ASIC's case as to contravention of s 615 on the two bases it had alleged.

25 His Honour indicated that he was satisfied that, in the exercise of its federal jurisdiction, in particular its "accrued" jurisdiction, the Federal Court had "jurisdiction to grant all of the relief sought by ASIC in the present matter"[24].

26 Merkel J made various orders and declarations[25]. These included a declaration of contravention of s 615 by entry into the Shareholders Agreement (order 1) and a declaration of contravention of s 615 by Yandal Gold, Edensor and Normandy Holdings by reason of their entry into the informal arrangements (order 2). Order 7 thereof was in the following form:

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19 *Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 32 ACSR 317; 17 ACLC 1,126.

20 (1999) 32 ACSR 317 at 338; 17 ACLC 1,126 at 1,148.

21 (1999) 32 ACSR 317 at 342; 17 ACLC 1,126 at 1,151.

22 (1999) 32 ACSR 317 at 332-334; 17 ACLC 1,126 at 1,143.

23 (1999) 32 ACSR 317 at 335; 17 ACLC 1,126 at 1,146.

24 (1999) 32 ACSR 317 at 344; 17 ACLC 1,126 at 1,153.

25 (1999) 32 ACSR 317 at 358-362; 17 ACLC 1,126 at 1,163-1,167.

"Within 21 days, or such further period as the Court may within 21 days order, [Edensor] pay to [ASIC] the sum of $28.5 million for payment of that sum by [ASIC], on a pro rata basis, to the shareholders in [Great Central] (other than the respondents):

(a) who have accepted the said takeover offers of [Yandal Gold] and have not exercised their entitlement under these orders to withdraw that acceptance;

(b) who have had their shares acquired by [Yandal Gold] under s 703(2) of the *Corporations Law* and have not avoided the acquisition pursuant to these orders;

(c) who have had their shares compulsorily acquired under s 701(5) and have not avoided the acquisition pursuant to these orders."

His Honour described this as an order requiring Edensor to disgorge to shareholders deprived of receiving a higher offer at the time of the bid the value of the benefit Edensor received for its contravening conduct; the order was "just" under s 737 and protective of the interests of shareholders under s 739[26].

The Full Court of the Federal Court

27 An appeal against these orders was taken by Edensor to the Full Court of the Federal Court. In the meantime, on 17 June 1999, this Court had delivered its judgment in *Re Wakim*. Grounds 1, 2 and 3 of the Supplementary Notice of Appeal by Edensor (dated 24 August 1999) challenge the jurisdiction of the Federal Court to make the orders, including order 7, under the Corporations Law of Victoria. Other grounds attack the merits of the decision which had been adverse to Edensor.

28 After a hearing on 31 August and 1 September 1999, the Full Court (Hill, Sundberg and Mansfield JJ)[27] delivered reasons for judgment in which it dealt with what it described[28] as a "preliminary point" which had arisen as a result of

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26 (1999) 32 ACSR 317 at 354-355; 17 ACLC 1,126 at 1,161.

27 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42.

28 (1999) 95 FCR 42 at 46.

the decision in *Re Wakim*. Their Honours expressed their understanding of the holding in *Re Wakim* and its bearing on the "preliminary point" as follows[29]:

> "In that case, and the related cases which were heard with it, it was held that the *Corporations Law* was void to the extent that it was an Act of a State Parliament which purported to confer upon the Federal Court of Australia jurisdiction to entertain applications brought under it. The States of the Commonwealth could not confer jurisdiction upon a federal court where that jurisdiction was not provided for in ss 75, 76 and 77 of the Constitution. In consequence it was submitted that to the extent that the orders and declarations were made by the primary judge under the *Corporations Law*, he had no power to make them."

29 The Full Court went on to agree with Merkel J that "there was a common substratum of fact which conferred on the Court jurisdiction to decide the whole 'matter', the whole controversy between the parties"[30]. This would suggest acceptance by the Full Court that it was federal not State jurisdiction that was exercised; if that were so (and as will appear it was the case), *Re Wakim* has no immediate relevance. Their Honours went on to consider whether "the Court was not empowered to grant the relief sought under the *Corporations Law*"[31].

30 After reference to *Smith v Smith*[32] and other authorities, the Full Court concluded its reasons by stating that the appeal must be allowed and that the parties should file written submissions as to any further orders that should be made.

31 Thereafter, on 9 March 2000, after the Court had considered further oral and written submissions, the Full Court made orders and gave reasons for those orders. Their Honours said:

> "The focus has largely been upon whether the Court should now order that the $28.5 million to be paid to ASIC pursuant to the orders of the learned trial judge (and in fact paid into Court pending the hearing and determination of the appeal) be repaid to Edensor."

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29 (1999) 95 FCR 42 at 46.

30 (1999) 95 FCR 42 at 48.

31 (1999) 95 FCR 42 at 48.

32 (1986) 161 CLR 217.

32 In the interval between the delivery of reasons on 10 December 1999 and the reasons of 9 March 2000, the *Federal Courts (State Jurisdiction) Act* 1999 (Vic) ("the State Jurisdiction Act") had come into force. One of the issues considered in the later reasons was whether order 7 of the orders made by Merkel J was an "ineffective judgment" of a federal court in a State matter, within the meaning of the definition in s 4 of the State Jurisdiction Act. This presented the question whether the orders made by Merkel J had been made in a "State matter", ie one in respect of which a State law had purported to confer jurisdiction on the Federal Court. Their Honours answered that question in the affirmative so that the State Jurisdiction Act was engaged. Given the conclusions which had been reached by the Full Court in its reasons of 10 December, ASIC had sought to salvage its position by maintaining that order 7 was such an "ineffective judgment". The Full Court decided not to accede to the application by Edensor and related parties that the Full Court direct the $28.5 million be repaid to Edensor. Rather, their Honours said:

> "That is now properly a matter for the Supreme Court of Victoria."

They added that there remained for consideration "the further conduct of this appeal". The Full Court then made other orders and declarations. There has been debate as to the nature and effect of what was done, making it convenient to set out the text in full:

> "THE COURT DECLARES THAT:
>
> 1. Order 7 of the orders of the Court on 16 June 1999 is invalid for want of jurisdiction.
>
> 2. The Federal Court of Australia had no jurisdiction to hear and determine the proceedings brought by [ASIC] against [Yandal Gold], [Yandal Holdings], [Edensor], [Normandy], Normandy Mining Finance Ltd, Normandy Consolidated Gold Holdings Pty Ltd and [Normandy Holdings] under the *Corporations Law*.
>
> THE COURT FURTHER ORDERS THAT:
>
> Upon [ASIC] by its counsel undertaking to the Court that it will with all reasonable expedition:
>
> (a) make and prosecute an application to the High Court of Australia for special leave to appeal against the above declarations;
>
> (b) if special leave is granted to file and prosecute such an appeal,

this appeal be stood over until a date to be fixed following the hearing and determination of that application and, if the application is granted, that appeal."

The proceedings in this Court

33 ASIC sought from this Court special leave to appeal and full argument was heard on that application. In essence, ASIC submitted that the Full Court had erred in deciding both that order 7 of the orders made by Merkel J was invalid for want of jurisdiction and that the Federal Court had had no jurisdiction to hear and determine the proceeding brought by ASIC. In particular, ASIC relied upon the conferral of jurisdiction upon the Federal Court by s 39B(1A)(a) of the Judiciary Act. Section 39B(1A) relevantly provides:

> "The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:
>
> (a) in which the Commonwealth is seeking an injunction or a declaration".

ASIC referred to the declaratory and injunctive relief sought by it in the proceeding heard by Merkel J and submitted that ASIC was "the Commonwealth" within the meaning of this provision. It was said to follow that, independently of any ineffective conferral of jurisdiction under State law, (an issue determined by *Re Wakim*), the Federal Court had been exercising federal jurisdiction in respect of a matter comprising the proceeding in question. It followed that there had been no "ineffective judgment" (the expression used in the State Jurisdiction Act) and no occasion for the operation of that statute to provide a remedy involving further conduct of the litigation in the Supreme Court of Victoria.

34 At the conclusion of the hearing on 30 August 2000, this Court announced its opinion that the two declarations made by the Full Court respecting the lack of jurisdiction over the proceeding in that Court should be set aside and that the Full Court should now hear and determine the appeal by Edensor on the merits of the appeal. The merits lay in the matters raised by grounds 5-10 of Edensor's Supplementary Notice of Appeal to the Full Court, dated 24 August 1999.

35 Accordingly, this Court ordered that special leave to appeal be granted, the appeal by ASIC be treated as instituted, heard instanter and allowed, pars 1 and 2 of the declarations made on 9 March 2000 be set aside, the matter be remitted to the Full Court of the Federal Court for further hearing and determination and that the respondents pay ASIC's costs.

36 In addition or as an alternative to its appeal, ASIC sought from the Full Court orders absolute for certiorari and mandamus respectively to set aside the orders of the Full Court made on 9 March 2000 and oblige the Federal Court to consider and determine the appeal before it. These applications were dismissed, given the orders made on the appeal by ASIC.

37 There were before this Court other applications for special leave to appeal, one by Edensor and the others by Yandal Gold, Yandal Holdings and members of the Normandy Group. These applicants drew a distinction between "jurisdiction" and "power" and submitted that, while the Federal Court had been seised of jurisdiction, it had lacked the power to make order 7. Their complaint was that the Full Court should have decided the appeal on the footing that the Federal Court had had no power to make orders under s 737 or s 739 of the Corporations Law of Victoria and that the Full Court should have ordered payment out of the $28.5 million to Edensor. In addition, or in the alternative, these parties sought orders for certiorari and mandamus directed to the Federal Court. This Court ordered that all these applications be dismissed.

38 What follows are our reasons for joining in the making of those orders.

The status of ASIC and par (a) of s 39B(1A)

39 The first question which arises concerns the status of ASIC. It is established by ss 7 and 8 of the ASIC Act as a body corporate. That circumstance does not, of itself, deny the proposition that ASIC falls within the scope of the expression "the Commonwealth" in s 75(iii) of the Constitution. In an appropriate context, those words are of sufficient width to include a corporation which is an agency or instrumentality of the Commonwealth[33]. The ASIC Act provides (s 9) that its members are appointed by the Governor-General on the nomination of the Minister administering the ASIC Act[34]. Provision is made in s 12 of the ASIC Act for the giving by the Minister of written directions to ASIC respecting the exercise of its functions and powers. Those functions and powers are spelled out in ss 11 and 12A and pertain to the executive functions of government. Section 120 of the ASIC Act provides that the staff of ASIC are

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33 *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 232; *Austral Pacific Group Ltd v Airservices Australia* (2000) 74 ALJR 1184 at 1187-1188 [10], 1194 [48]; 173 ALR 619 at 622-623; 631-632.

34 See *Acts Interpretation Act* 1901 (Cth), ss 18C-19BA.

appointed as employees under the *Public Service Act* 1922 (Cth)[35]. The Parliament appropriates money for the purposes of ASIC (s 133) and its activities are inquired into by the Parliamentary Joint Committee on Corporations and Securities appointed pursuant to s 241 of the ASIC Act. ASIC is subjected to audit by the Auditor-General under s 8 of the *Commonwealth Authorities and Companies Act* 1997 (Cth).

40 This is a clear case of a corporation established by a law of the Commonwealth which answers the description of "the Commonwealth" in s 75(iii) of the Constitution[36]. Section 39B(1A)(a) of the Judiciary Act is a law supported by s 77(i) of the Constitution; it defines the jurisdiction of the Federal Court with respect to a limited class of the matters mentioned in s 75(iii). The limitation is expressed in two ways. First, by identifying matters where the Commonwealth sues but not those where it is sued, and, secondly, by the nature of the relief sought.

41 The moving party is identified as "the Commonwealth". The phrase in s 75(iii) "or a person suing … on behalf of the Commonwealth" was not reproduced in s 39B(1A)(a). It was submitted that this indicates an intention by the Parliament to exclude a body such as ASIC from the grant of jurisdiction by par (a) of s 39B(1A). This submission should be rejected.

42 The phrase in s 75(iii) upon whose absence in par (a) reliance is placed does not operate in s 75(iii) as words of limitation. The contrary is the case. In *Deputy Commissioner of Taxation v State Bank (NSW)*, it was said in the joint judgment of the whole Court, with respect to the expression in s 75(iii) beginning "or a person suing …", that[37]:

> "[n]o doubt these words were included in order to ensure that the jurisdiction conferred extended to cases in which the Commonwealth itself was not the nominal plaintiff or defendant. But that circumstance

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35 Section 120 was amended by the *Public Employment (Consequential and Transitional) Amendment Act* 1999 (Cth), effective from 5 December 1999. These amendments are immaterial.

36 cf, as to the status of the National Companies and Securities Commission, *The Broken Hill Pty Co Ltd v National Companies and Securities Commission* (1986) 160 CLR 492 at 504-505.

37 (1992) 174 CLR 219 at 232.

> cannot operate as a reason for reading the references to the Commonwealth in the Constitution in a restricted sense."

The jurisdiction conferred by the use of the phrase "the Commonwealth" in par (a) should not be construed more narrowly than that conferred on this Court by the same phrase in s 75(iii) "unless", in the words of Brennan J, "the restriction appears expressly or by necessary intendment"[38]. The Judiciary Act contains various provisions in which the term "the Commonwealth" is used. In *Maguire v Simpson*, Mason J said[39]:

> "There may be some question whether 'the Commonwealth' bears such a broad meaning in ss 61, 65, 66 and 67 of [the Judiciary Act], but these provisions are procedural in character, dealing with the name in which the Commonwealth may sue, and execution and satisfaction of judgments in suits in which the Commonwealth is a party. Likewise s 55E, which was inserted by Act No 55 of 1966, is a special provision setting out the persons or bodies for whom the Crown Solicitor may act. Even if in these provisions the expression 'the Commonwealth' should be more narrowly construed, I would not regard that circumstance as requiring that a similar interpretation be given to ss 56, 57 and 64."

The Judiciary Act did not then include s 39B in any form[40]. Moreover, the power of remitter by the Court to the Federal Court now conferred by s 44(2A) of the Judiciary Act[41] adopts as a whole the terms of s 75(iii) in describing the class of proceedings instituted in this Court which may be remitted.

43 However, it is now settled that in s 64 of the Judiciary Act "the Commonwealth" is not used in some restricted sense so as to exclude statutory corporations which are agencies or instrumentalities of the Commonwealth[42].

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38 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 193.

39 (1977) 139 CLR 362 at 399.

40 Section 39B was introduced by the *Statute Law (Miscellaneous Provisions) Act (No 2)* 1983 (Cth), s 3 and Sched 1. Sub-section (1A) of s 39B was added by the *Law and Justice Legislation Amendment Act* 1997 (Cth), s 3 and Sched 11.

41 By s 3 and the Schedule to the *Statute Law (Miscellaneous Provisions) Act (No 1)* 1984 (Cth).

42 See *Austral Pacific Group Ltd v Airservices Australia* (2000) 74 ALJR 1184 at 1188-1189 [15], 1194 [48]; 173 ALR 619 at 624, 631-632.

There is no apparent necessary intendment that the absence from par (a) of s 39B(1A) of words which in s 75(iii) of the Constitution do not restrict the scope of that provision confines the statutory conferral of jurisdiction on the Federal Court.

44 The second limitation upon the class of s 75(iii) matters in respect of which jurisdiction is conferred by par (a) of s 39B(1A) refers to the nature of the relief sought. The relief sought by ASIC in the proceeding instituted in the Federal Court included a declaration of contravention of s 615 of the Corporations Law. Interlocutory relief, plainly injunctive in nature in the traditional sense, was sought, together with final orders, mandatory in substance and form, sought under s 737 and s 739 of the Corporations Law. Neither of these provisions uses the term "injunction" to describe the orders for which it provides. Remedies styled "injunctions" in accordance with the terms of the relevant statutory provisions (s 80 of the Trade Practices Act and s 12GD of the ASIC Act) also were sought by ASIC. These statutory regimes do not replicate the general law.

45 However, the term "injunction" in par (a) of s 39B(1A) should not be restricted to remedies having the particular characteristics of the remedy given traditionally by courts of equity, nor to the injunctive remedy against officers of the Commonwealth provided for in s 75(v) of the Constitution. In Australia, the injunctive remedy is still the subject of development in courts of equity, particularly in public law[43]. The remedies created by legislation such as s 737 and s 739 are not fundamentally distinct from the equitable remedy. The same is true of s 80 of the Trade Practices Act and s 12GD of the ASIC Act[44]. The limitation in par (a) of s 39B(1A) expressed by requiring injunctive or declaratory relief to be claimed is apt to exclude from this grant of jurisdiction to the Federal Court, for example, actions in which the Commonwealth seeks damages in tort or contract and no relief which is equitable in nature.

46 Counsel for Edensor submitted that par (a) of s 39B(1A), and indeed the whole of s 39B, was excluded from any operation in the Federal Court

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43 *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

44 See *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 263-267; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 74 ALJR 604 at 616 [67]; 169 ALR 616 at 632-633.

proceeding. He referred to s 49(1)(d) and s 56(2) of the Commonwealth Act. These provisions are contained in Div 1 (ss 49-61A) of Pt 9 of the Commonwealth Act. Division 1 is headed "Vesting and cross-vesting of civil jurisdiction". Section 49 states:

> "(1) This Division provides in relation to:
>
> (a) the jurisdiction of courts in respect of civil matters arising under the Corporations Law of the Capital Territory; and
>
> (b) the jurisdiction of the courts of the Capital Territory in respect of civil matters arising under any Corporations Law of a State;
>
> and so provides to the exclusion of:
>
> (c) the *Jurisdiction of Courts (Cross-vesting) Act 1987*; and
>
> (d) section 39B of the [Judiciary Act].
>
> (2) Nothing in this Division affects any other jurisdiction of any court."

The litigation instituted by ASIC in the Federal Court was not a civil matter arising under the Commonwealth Act in its operation (pursuant to s 5 thereof) as the Corporations Law of the Capital Territory, nor was the jurisdiction of the courts of that Territory engaged. In any event, the enactment of sub-s (1A) of s 39B was later than that of s 49 of the Commonwealth Act. Finally, s 56(2), the other provision to which counsel referred, provides for the exercise by the Federal Court of jurisdiction conferred by State law. That conferral, by reason of the decision in *Re Wakim*, is ineffective. Moreover, the issue presently under consideration concerns the exercise by the Federal Court of federal, not State, jurisdiction. The provisions relied on by Edensor do not deny any operation par (a) of s 39B(1A) otherwise has in the present litigation.

47 Here, both limitations in par (a) of s 39B(1A) were satisfied and the proceeding in the Federal Court was one in which jurisdiction, necessarily federal, was conferred by that provision. That is not to deny that, concurrently, the Federal Court was exercising federal jurisdiction conferred by other laws of the Commonwealth supported by s 77(i) of the Constitution. Section 86(1) of the Trade Practices Act, s 12GJ of the ASIC Act (which confers exclusive jurisdiction in respect of proceedings such as those instituted by ASIC for contravention of s 12DA) and par (c) of s 39B(1A) (which confers jurisdiction in

respect of non-criminal matters arising under any laws made by the Parliament[45]) were all put forward by ASIC as additional sources of jurisdiction in this case.

48 A proceeding in which jurisdiction is conferred on a federal court by a law under s 77(i) of the Constitution fixing upon one category of matter in ss 75 and 76 may involve the concurrent operation of other federal laws conferring jurisdiction defined by reference to the same or another head of jurisdiction specified in ss 75 and 76[46]. Further, s 32 of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act") confers upon the Federal Court federal jurisdiction in matters "associated" with matters in which its jurisdiction is invoked, being matters not otherwise within its jurisdiction[47].

49 However, it is convenient to test the contentions of ASIC respecting the exercise in the subject proceeding of federal jurisdiction by the Federal Court by reference first to par (a) of s 39B(1A). If ASIC's contentions be accepted, there will be no need to consider its alternative or cumulative submissions as to jurisdiction. They should be accepted. For the reasons given above, federal jurisdiction had been conferred in the proceeding as a matter in which the Commonwealth was seeking an injunction or a declaration.

The content of the "matter" under par (a) of s 39B(1A)

50 What was the content of that matter? The observations by Toohey, McHugh and Gummow JJ in *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)* (adjusted to refer to s 75(iii) rather than s 76(ii)) are pertinent. Their Honours said[48]:

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45 The effect of s 11(7) of the ASIC Act was that ASIC had any functions expressed to be conferred upon it by the Corporations Law of Victoria, and thus by ss 737 and 739 of that legislation. ASIC submitted that, in its operation in the present litigation, s 11(7) was supported by s 51(i) and (xx) of the Constitution and that, in applying to the Federal Court, ASIC was embarked upon a matter "arising under" s 11(7); this then engaged par (c) of s 39B(1A) of the Judiciary Act.

46 See *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 361 [14].

47 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 278, 292.

48 (1995) 184 CLR 620 at 653. See also *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 74 ALJR 604 at 619-620 [86]-[87]; 169 ALR 616 at 637.

> "The matters mentioned in ss 75 and 76 identify federal jurisdiction by such characteristics as identity of parties (s 75(iii), (iv)), remedy sought (s 75(v) itself), content (interpretation of the Constitution – s 76(i)), and source of the rights and liabilities which are in contention (ss 75(i), 76(ii)). (The constitutional term 'matter' also extends to include accrued and pendent claims and pendent parties, but for immediate purposes nothing turns on this.) For this litigation, the particular jurisdiction of the Federal Court invoked by the applicants had been defined by the Parliament with respect to matters arising under laws made by it (s 76(ii)). The question then becomes one of identifying the metes and bounds of any matter said so to arise."

In *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*, Gaudron J observed that[49]:

> "'matters' is a word of such generality that it necessarily takes its content from the categories of matter which fall within federal jurisdiction and from the concept of 'judicial power'".

51 In the submissions in the present application to this Court, the term "accrued jurisdiction" was used to identify the claims by ASIC to relief for contravention of s 615 of the Corporations Law. The authorities in which that expression was given currency by this Court were all cases in which the Federal Court was seised of jurisdiction in a matter which, within the meaning of s 76(ii) of the Constitution, was one arising under a law made by the Parliament. In *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*[50], *Fencott v Muller*[51] and *Stack v Coast Securities (No 9) Pty Ltd*[52], the federal law was the Trade Practices Act and claims also were made based on one or more of contract, tort and breach of fiduciary duty. These non-federal claims were elements in the one controversy constituting the relevant "matter".

52 There is no harm in the continued use of the term "accrued jurisdiction" in such situations provided several matters are borne in mind. First, while there are various claims, in these cases there is but one "matter" in the constitutional sense and the court in question either does or does not have jurisdiction in respect of it.

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49 (2000) 74 ALJR 604 at 611 [42]; 169 ALR 616 at 626.

50 (1981) 148 CLR 457.

51 (1983) 152 CLR 570.

52 (1983) 154 CLR 261.

Moreover, in *Re Wakim*[53], Gummow and Hayne JJ (with whom Gleeson CJ and Gaudron J agreed generally) expressed doubts as to what was meant by statements in some of the cases that the "accrued jurisdiction" was "discretionary" rather than "mandatory". Ordinarily, questions of abuse of process, *forum non conveniens* and the like aside, jurisdiction conferred upon a court is to be exercised[54].

53 Secondly, the phrase "accrued jurisdiction" may be likely to mislead where federal jurisdiction is attracted, not by the existence of federal law as a source of substantive rights and liabilities, but by the identity of the parties or a party. The identity of a party as the Commonwealth, within the sense of s 75(iii) of the Constitution, may be a sufficient animating circumstance without any federal law supplying the substantive rights and liabilities which are tendered for adjudication. The present is one such case. Litigation between residents of different States, within the meaning of s 75(iv), would be another.

54 In the proceeding commenced here by ASIC, the Federal Court was seised of federal jurisdiction by reason of the identity of the moving party and the nature of the relief sought by that party. The "matter" was a justiciable controversy identifiable independently of the proceeding brought for its determination[55]. The focus of attention is that indicated by the joint judgment of five members of this Court in *Crouch v Commissioner for Railways (Q)*[56], namely "upon the substance of the dispute" and "the substantial subject matter of the controversy".

55 The controversy was to be determined, in the words of Deane and Gaudron JJ, "in accordance with the independently existing substantive law"[57]. That body of law will supply the measure of the rights and liabilities which are at stake. It will include the common law of Australia[58] (which incorporates choice

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53 (1999) 198 CLR 511 at 588 [149].

54 *Ward v Williams* (1955) 92 CLR 496 at 505-506; *Mitchell v The Queen* (1996) 184 CLR 333 at 345-346; *Gould v Brown* (1998) 193 CLR 346 at 458 [228].

55 *Fencott v Muller* (1983) 152 CLR 570 at 603-606.

56 (1985) 159 CLR 22 at 37.

57 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 205.

58 *The Commonwealth v Mewett* (1997) 191 CLR 471; *Austral Pacific Group Ltd v Airservices Australia* (2000) 74 ALJR 1184 at 1196 [56]; 173 ALR 619 at 634.

of law rules expounded in *John Pfeiffer Pty Ltd v Rogerson*) as modified by federal law or any applicable State law and, common law apart, the rights and liabilities created by applicable statute law. The resolution of the controversy by the Federal Court in the proceeding instituted by ASIC, as was pointed out in the joint judgment in *John Pfeiffer Pty Ltd v Rogerson*[59], strictly did not "involve any choice between laws of competing jurisdictions"; this is because the jurisdiction of the Federal Court is clearly Australia wide.

56 The substance of the dispute here was provided by ASIC's contention that there had been contraventions of s 615 of the Corporations Law in connection with the bid for Great Central and that the contraventions should be answered by the administration of declaratory and injunctive remedies. As indicated earlier in these reasons, the relevant statute containing s 615 was the Corporations Law of Victoria. A sufficient source of power for the Federal Court to grant declaratory relief is found in s 21 of the Federal Court Act. This states:

> "(1) The Court may, in relation to a matter in which it has original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.
>
> (2) A suit is not open to objection on the ground that a declaratory order only is sought".

Sections 737 and 739 of the Corporations Law provided the basis for the injunctive relief, including order 7.

57 The identification in this way of the independently existing substantive law for the determination of the controversy reflects the operation of Ch III of the Constitution. In *South Australia v The Commonwealth*[60], an action instituted in this Court in the exercise of jurisdiction conferred by s 75(iii) of the Constitution, Dixon CJ, after referring to s 64 of the Judiciary Act, observed that, in a suit between subject and subject, ss 79 and 80 of the Judiciary Act "direct where this Court shall go for the substantive law"[61]. Section 80 indicates that the starting point is the common law of Australia and is supplemented by s 79[62]. Section 79 states:

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59 (2000) 74 ALJR 1109 at 1119-1120 [53]; 172 ALR 625 at 640.

60 (1962) 108 CLR 130.

61 (1962) 108 CLR 130 at 140.

62 *Northern Territory v GPAO* (1999) 196 CLR 553 at 574-575 [30]-[32], 650 [254].

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

Two matters generally have been assumed concerning the adoption of State law by s 79. The first is that s 79 implements, or at least is consistent with, what in any event would flow from the operation of Ch III and covering cl 5 of the Constitution[63]. The second is that s 79 is to be supported under s 51(xxxix) of the Constitution as a law with respect to matters incidental to the execution of powers vested by Ch III in that Federal Judicature.

58 In the present litigation, s 79 operated to "pick up" the laws of Victoria because the Federal Court was exercising federal jurisdiction in that State. Great Central was a "company" for the purposes of s 615 of the Corporations Law of Victoria. A question respecting the operation of s 79 might have arisen if the Federal Court had been exercising jurisdiction in another State or in a Territory, for the purposes of the corporations law of which Great Central was not a "company" and s 615 did not apply. In such circumstances, would s 79 have denied the application of s 615 and other provisions of the Victorian statute to supply the relevant rules for resolution of the controversy, the essential character of which was alleged contravention of the Corporations Law of Victoria? It is unnecessary to pursue that question here, but it should be noted that s 79 is expressed to be subject to the Constitution and to render State and Territory laws binding only "in all cases to which they are applicable".

59 It should be emphasised that the law of a State cannot withdraw from this Court federal jurisdiction conferred by s 75 of the Constitution, nor the federal jurisdiction which a court (State or federal) otherwise may exercise under a conferral or investment of jurisdiction by a law made under s 76 or s 77 of the Constitution; nor may a State law otherwise limit the exercise of federal jurisdiction. These propositions were recognised (as established authority[64]

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63 Section 79 is derived from s 34 of the Judiciary Act of 1789 (1 Stat 73, 92 (1789)), now codified as amended at 28 USC §1652 (1994); the operation of s 34 is dictated by the Supremacy Clause of the United States Constitution: *Northern Territory v GPAO* (1999) 196 CLR 553 at 587-588 [78]-[80].

64 *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168 at 169; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 79, 84, 87, 93.

required) by Gibbs CJ, Wilson and Dawson JJ in *Smith v Smith*[65]. Their Honours, however, construed the State law relevant in that case, s 31 of the *Family Provision Act* 1982 (NSW), as one making the efficacy of an agreement depend upon approval by the State Supreme Court; it was as if, absent a seal or stamp, "the agreement is not effective, whether it is sought to be enforced in a State court or in a federal court"[66]. Mason, Brennan and Deane JJ pointed out[67] that the effect of s 31 was to qualify the pre-existing prohibition against contracting out of certain statutory benefits and s 31 laid down a precondition to the rendering effective of an agreement to contract out. It followed that the Family Court in the course of its exercise of federal jurisdiction to approve a maintenance agreement in substitution for rights under the *Family Law Act* 1975 (Cth) had no power to approve a release of rights under the State law; an application for curial approval under s 31 was not a justiciable controversy but a condition precedent to a binding contract.

60 The reasoning in *Smith v Smith* is inapplicable to the present litigation. Sections 737 and 739 of the Corporations Law, the remedial provisions relied upon for order 7 made by Merkel J, contemplated the exercise of federal jurisdiction. The legislature of Victoria did so by the inclusion of ASIC among the class of applicants for relief under those provisions[68]. This means that, contrary to the apparent basis upon which the reasoning of the Full Court proceeded, these provisions could never have had a "pure" State operation.

Jurisdiction and power

61 Section 737(1) of the Corporations Law states:

> "Where a person has acquired shares in a company in contravention of section 615, the Court, on the application of [ASIC], the company, a member of the company or the person from whom the shares were acquired, may make such order or orders as it thinks just, including but without limiting the generality of the foregoing:

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65 (1986) 161 CLR 217 at 240-241.

66 (1986) 161 CLR 217 at 241; cf *Feinstein v Massachusetts General Hospital* 643 F 2d 880 at 887-888 (1981).

67 (1986) 161 CLR 217 at 250.

68 cf the observations of Mason J with respect to the expression "any law" in s 292(1)(c) of the *Companies Act* 1961 (Q) in *State Government Insurance Office (Q) v Rees* (1979) 144 CLR 549 at 564.

(a) a remedial order[69]; and

(b) for the purpose of securing compliance with any other order made under this section, an order directing a person to do or refrain from doing a specified act."

Section 739(1) states:

"Where:

(a) a statement that purports to be a Part A statement relating to offers under a takeover scheme has been served on a target company or a takeover announcement has been made;

(b) an application for an order under this section is made to the Court by [ASIC], the offeror, the target company or a person who holds shares in the target company or held shares in the target company when the statement was so served or the takeover announcement was made; and

(c) the Court is satisfied that a provision of this Chapter has been contravened;

the Court may make such orders as it thinks necessary or desirable to protect the interests of a person affected by the takeover scheme or takeover announcement (including a person who is the holder of non-voting shares in, or renounceable options or convertible notes granted or issued by, the target company)."

Further, no order is to be made under provisions including ss 737 and 739 if the Court "is satisfied that the order would unfairly prejudice any person" (s 744(2)).

62 Counsel for the parties opposed to ASIC fixed, as had the Full Court, upon the use in these provisions of the term "the Court". They submitted that this term, after *Re Wakim*, could not be read as including, as a matter of the law of Victoria, the Federal Court.

63 In some circumstances, the relationship between "jurisdiction" and "power" may be important. The respondents to ASIC's leave application stressed a distinction between these notions which they maintained was decisive. It

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69 The term "remedial order" is defined in s 613. Nothing turns on the definition for present purposes.

followed, so it was said, that whatever "jurisdiction" the Federal Court may have had, it did not have the necessary "power" to act under ss 737 and 739 of the Corporations Law and the result was that order 7 had been made beyond power.

64 "Jurisdiction" and "power" are not discrete concepts. The term "inherent jurisdiction" may be used, for example in relation to the granting of stays for abuse of process, to describe what in truth is the power of a court to make orders of a particular description[70]. In *Harris v Caladine*, Toohey J said[71]:

> "The distinction between jurisdiction and power is often blurred, particularly in the context of 'inherent jurisdiction'. But the distinction may at times be important. Jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or impliedly conferred by the legislation governing the court and 'such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred'[72]."

65 Nevertheless, it is to be remembered, particularly in a case such as that before Merkel J, that, in the words of Brennan and Toohey JJ, "[c]haracteristically an exercise of jurisdiction is attended by an exercise of power"[73]. The claims for relief illuminate the scope of a controversy which constitutes a matter[74] and once the Federal Court has jurisdiction to determine a controversy it has power in the exercise of that jurisdiction to give the remedies sought[75].

66 There is a further point to be made here. A law may in the one provision create the norm of legal liability, and go on to provide (i) a remedy and (ii) a curial forum to administer that remedy. *R v Commonwealth Court of*

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70 *Williams v Spautz* (1992) 174 CLR 509 at 518-519.

71 (1991) 172 CLR 84 at 136; see also *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 450-452 [49]-[54]; *DJL v Central Authority* (2000) 74 ALJR 706 at 713 [30]-[31]; 170 ALR 659 at 668-669.

72 *Parsons v Martin* (1984) 5 FCR 235 at 241; see also *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 630-631.

73 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 487.

74 *Fencott v Muller* (1983) 152 CLR 570 at 608.

75 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 279-280.

Conciliation and Arbitration; Ex parte Barrett[76], in which s 58E of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) was construed and held valid, provides a classic instance of this species of law. Other laws may prescribe a norm of conduct, but leave to another law or laws the provision of a remedy and the conferral of jurisdiction. Section 52 of the Trade Practices Act is a well-recognised example of this species[77]. It prescribes the relevant norm of conduct and other provisions, such as ss 80, 82 and 87, provide remedies, while s 86 confers jurisdiction to administer them.

67 Section 615 of the Corporations Law is another law of the character of s 52 of the Trade Practices Act. In this litigation, s 615 prescribes the relevant norm of conduct and ss 737 and 739 provide remedies for contravention of it. Those two sections also speak of applications for those remedies being made to "the Court". Section 42(1) of the Victorian Corporations Act confers jurisdiction with respect to civil matters arising under the Corporations Law of Victoria on the Supreme Court of that State and of each other State and of the Australian Capital Territory. Sections 737 and 739 contemplate that ASIC may be an applicant for relief under those provisions. But the exercise of jurisdiction thereby involved would be federal. It might only be conferred on any court, federal or State, by a law made by the Parliament under s 77 of the Constitution, unless this Court were acting pursuant to the direct conferral of jurisdiction by s 75 of the Constitution. The Constitution and the laws made under it, in particular s 39B(1A) of the Judiciary Act, provided the Federal Court as a forum in which the remedies under ss 737 and 739 might be administered if ASIC were the moving party.

68 It is well established from the decisions under s 79 of the Judiciary Act, most recently that in *Austral Pacific Group Ltd v Airservices Australia*[78], that a State statute may be applicable as a source of rights and remedies in federal jurisdiction even though, on its own terms, that law identifies only the courts of the enacting State as the courts to provide those remedies. Indeed, as Gibbs J indicated in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*[79], were

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76 (1945) 70 CLR 141 at 155, 165-166. See also *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd* (1998) 196 CLR 53 at 64-65 [22]-[24].

77 *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 501 [8], 509 [33], 520-521 [76], 540 [130].

78 (2000) 74 ALJR 1184 at 1188 [13]; 173 ALR 619 at 624. See also *Northern Territory v GPAO* (1999) 196 CLR 553 at 575 [34].

79 (1973) 129 CLR 65 at 88.

that not so the operation of federal jurisdiction might readily be stultified. There might be withdrawn from courts exercising federal jurisdiction (including this Court) the effective authority to quell controversies in respect of which, by reason, for example, of the identity of parties, s 75 of the Constitution had conferred original jurisdiction upon this Court and s 77 empowered the Parliament to grant authority to the other federal courts and to State courts exercising federal jurisdiction. An attempt by State law to achieve that result would, as to this Court, be repugnant to s 75 of the Constitution. Where jurisdiction was conferred by a law made by the Parliament in exercise of its powers under s 77 of the Constitution, the State law also would be invalid for inconsistency under s 109 of the Constitution[80].

69 The relationship between federal jurisdiction and State jurisdiction is not to be approached from a vantage point where the Supreme Courts are seen as superior to the operation of the Constitution by reason of their earlier establishment by or pursuant to[81] Imperial legislation. It is, after all, s 73 of the Constitution which now ensures the continued existence of those Supreme Courts[82].

70 With respect to the exercise of federal jurisdiction pursuant to Art III of the United States Constitution, a position consistent with that outlined above was reached long ago. Professor Wright said[83]:

> "Article III of the Constitution and the Acts of Congress made pursuant thereto define the jurisdiction of the federal courts. State statutes are irrelevant in this connection. The states have not attempted to extend the jurisdiction of the federal courts. Their persistent attempts to limit federal jurisdiction have been almost uniformly unsuccessful."

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80 *Felton v Mulligan* (1971) 124 CLR 367 at 373, 412.

81 For example, the Supreme Court of New South Wales was established by an instrument issued by the Crown pursuant to power conferred by Imperial statute, not by an exercise of the Royal Prerogative. The matter is explained by Windeyer J in *Kotsis v Kotsis* (1970) 122 CLR 69 at 90-91, and by Professor Enid Campbell in "The Royal Prerogative to Create Colonial Courts", (1964) 4 *Sydney Law Review* 343 at 345.

82 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102-103, 110-111, 141-142.

83 *Law of Federal Courts*, 5th ed (1994) at 292-293; cf Hart and Wechsler, *The Federal Courts and the Federal System*, 4th ed (1996) at 737-743.

71 The "key case"[84] has been the decision in 1871 of the Supreme Court in *Railway Company v Whitton's Administrator*[85]. A wrongful death statute enacted by Wisconsin provided that the right it created was to be enforced only in a Wisconsin state court. Nevertheless, the Supreme Court held that an action in a federal court might be entertained in its diversity jurisdiction. The judgment of the Supreme Court was given by Field J, who said[86]:

> "It is undoubtedly true that the right of action exists only in virtue of the statute, and only in cases where the death was caused within the State. The liability of the party, whether a natural or an artificial person, extends only to cases where, from certain causes, death ensues within the limits of the State. But when death does thus ensue from any of those causes the relatives of the deceased named in the statute can maintain an action for damages. … In all cases, where a general right is thus conferred, it can be enforced in any Federal court within the State having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of State legislation that it shall only be enforced in a State court. … Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation."

This reasoning has been applied in subsequent cases[87].

72 Section 79 of the Judiciary Act renders State and Territory law binding only in cases to which they are applicable. As to State law, this may be taken to

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84 Wright, *Law of Federal Courts*, 5th ed (1994) at 293.

85 13 Wallace 270 (1871) [80 US 270]. This case is sometimes cited by the title of *Chicago and North-Western Railway Co v Whitton's Administrator*.

86 13 Wallace 270 at 285-286 (1871) [80 US 270 at 285-286].

87 For example, *McClellan v Carland* 217 US 268 at 281 (1910); *Rubel-Jones Agency Inc v Jones* 165 F Supp 652 at 654 (1958); *Beach v Rome Trust Co* 269 F 2d 367 at 372-373 (1959); *Greyhound Lines Inc v Lexington State Bank and Trust Co* 604 F 2d 1151 at 1154-1155 (1979). See also *Terral, as Secretary of State of the State of Arkansas v Burke Construction Co* 257 US 529 at 532 (1922) and cf *Feinstein v Massachusetts General Hospital* 643 F 2d 880 at 887-888 (1981).

reflect what otherwise would be the operation of Ch III. In *Kruger v The Commonwealth*, Gaudron J said[88]:

> "There may be statutory provisions couched in terms which make it impossible for them to be 'picked up' by s 79 of the *Judiciary Act*. Similarly, there may be provisions which impose functions which are beyond the reach of s 79. Even so, I see no reason why s 79 cannot 'pick up' limitation laws or other statutory provisions merely because they are expressed in terms applying specifically to State or Territory courts."

73 An example in the second category of provisions imposing functions beyond the reach of s 79 would be those insusceptible of exercise as part of the judicial power of the Commonwealth. In *Mellifont v Attorney-General (Q)*, Mason CJ, Deane, Dawson, Gaudron and McHugh JJ observed that[89]:

> "[I]n the absence of a constitutional separation of powers, there has existed the possibility that the Supreme Courts of the States might be entrusted with a jurisdiction that did not involve the exercise of judicial power."

74 As to the first category identified by Gaudron J, the provisions of the *Suitors Fund Act* 1951 (NSW) considered in *Commissioner of Stamp Duties (NSW) v Owens [No 2]*[90] may be an example of provisions expressed in terms making it impossible for them to be "picked up" by s 79 of the Judiciary Act. The grant of a certificate under s 6 of the State Act formed a step in machinery which had been established for the indemnification out of a fund set up and administered by New South Wales of an unsuccessful litigant in respect of costs. This Court held that s 79 could not operate to convert the function imposed on State courts into a provision imposing a function on federal courts.

75 The Attorney-General for the Commonwealth reserved his position on an appropriate occasion to challenge the correctness of *Thomas v Ducret*[91]. However, that case may fall into the same category as *Owens*. The question in *Thomas v Ducret* was whether a judge of the Federal Court sitting in Victoria might order imprisonment in default of payment of fines imposed by the Federal

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88 (1997) 190 CLR 1 at 140.

89 (1991) 173 CLR 289 at 300.

90 (1953) 88 CLR 168.

91 (1984) 153 CLR 506.

Court under a law of the Commonwealth. Section 18A(1) of the *Crimes Act* 1914 (Cth) ("the Crimes Act") had a scope analogous to that of s 79 of the Judiciary Act. This Court interpreted s 18A(1) as having the following effect[92]:

> "The laws of a State with respect to the enforcement of fines, including laws making provision for the awarding of imprisonment in default of payment of fines, shall, *so far as they are applicable* and not inconsistent with the laws of the Commonwealth, apply to an offender who has been convicted in a federal court of an offence against a law of the Commonwealth and ordered to pay a fine, notwithstanding that the State laws are in their terms confined to persons convicted in State courts of offences against the laws of the State. To that extent, and to that extent only, the State laws are given an expanded meaning." (emphasis added)

76 The relevant provision of the Victorian legislation provided that, where a magistrate imposed a fine, the magistrate should order that in default of payment the offender should be imprisoned for not more than a specified term. The applicant had pleaded guilty in the Federal Court to charges of offences created by the combined effect of s 5 of the Crimes Act and certain provisions of the Trade Practices Act. He was fined a total of $35,000 and, in reliance upon s 18A(1) and the Victoria law, par 2 of the order sentenced him to six months imprisonment in default of payment. However, the provision in the Victorian statute applied only to courts of summary jurisdiction, not to cases of offenders convicted, as it happened here, by a judge of a superior court. This Court set aside par 2 of the order, as beyond the power of the Federal Court.

77 To these decisions Edensor and related parties and the Normandy Group sought to add *Smith v Smith*[93]. They referred to the reliance upon that case by the Full Court. However, as has been indicated earlier in these reasons, *Smith v Smith* does not cut across the established line of authority that the identification of a State Supreme Court as the forum for the administration of a remedy created by State law does not exclude the administration of that remedy by courts in the exercise of federal jurisdiction.

78 The Attorney-General for the State of New South Wales emphasised in his submissions that State law may create remedies to be administered exclusively, in particular courts which are inferior to the Supreme Court. He then postulated the possibility of, say, the Supreme Court exercising federal jurisdiction and

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92 (1984) 153 CLR 506 at 511-512.

93 (1986) 161 CLR 217.

administering the remedy in question, thereby disrupting the distribution of business in the State court system. This spectre may not be as grim as it was suggested.

79 For any court of the State to be exercising federal jurisdiction, it would be necessary to find a conferral of jurisdiction by a law enacted pursuant to s 77(iii) of the Constitution. In the great majority of cases, this law would be found in s 39(2) of the Judiciary Act. The terms of that provision speak of the investment with federal jurisdiction of "[t]he several Courts of the States … *within the limits of their several jurisdictions* … as to *locality, subject-matter, or otherwise*" (emphasis added). In the example postulated, where the relevant "matter" included a claim for relief under the State law, the conferral of federal jurisdiction may, by reason of the ambulatory terms of s 39(2), be upon the particular inferior State court in question.

80 The Federal Court, seised as it was of jurisdiction in the matter, did not lack the power to make the orders in question, including order 7.

Section 58AA

81 In support of its conclusions, the Federal Court referred to s 58AA of the Corporations Law. Reliance was placed upon that provision in this Court by those parties seeking to uphold the finding of lack of power in the Federal Court to make order 7.

82 Upon analysis, s 58AA had no determinative operation in the litigation. It has had a compelling but delusive influence on the framing of submissions. We turn to explain why this is so.

83 The Full Court reasoned[94]:

> "Section 58AA of the *Corporations Law*, when read with the substantive provisions to which it attaches, including ss 737 and 739, purports to confer on this Court the jurisdiction of the State of Victoria. It empowers the Court to make orders under provisions such as ss 737 and 739 only when it is 'exercising the jurisdiction' of that State. That is not accrued federal jurisdiction but State jurisdiction."

It followed in the Full Court's opinion that, notwithstanding that it held that the Federal Court had jurisdiction with the whole of the controversy, there would be

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94 (1999) 95 FCR 42 at 49.

no jurisdiction or power to award remedies as identified in ss 737 and 739, in particular order 7.

84 It should be observed that the reasoning employed to this result would deny the relevant power or jurisdiction not only to the Federal Court but to the Supreme Court of Victoria itself were that Court exercising federal jurisdiction. The Supreme Court would have been exercising federal jurisdiction if the litigation in question had been instituted there by ASIC. Sections 737 and 739, on this reasoning, would apply only to litigation in the Supreme Court where that Court was exercising purely State jurisdiction.

85 This applies likewise with respect to the Federal Court, even if the legislative cross-vesting of State jurisdiction held invalid in *Re Wakim* had never been attempted. Upon the hypothesis advanced in the submissions under consideration here, were the Federal Court seised of federal jurisdiction, by reason, for example, of the presence of ASIC as the moving party, ss 737 and 739 of the Corporations Law could never be "picked up" by s 79 of the Judiciary Act. Hence, as was pointed out in argument, the submissions advanced in this Court against ASIC apparently still would have been put, even if *Re Wakim* had gone the other way.

86 One difficulty with the arguments based upon s 58AA is that federal jurisdiction exists by reason of the operation of the Constitution and the laws made under it, not by reason of State law. Secondly, and in any event, s 58AA is not a law purporting to confer jurisdiction on any court. Jurisdiction relevantly is conferred as a matter of State law by the Victorian Corporations Act, in particular with respect to civil matters arising under the Corporations Law of Victoria, by s 42(1) of that statute. Criminal jurisdiction is conferred by s 55.

87 Section 58AA of the Corporations Law is found in Div 7 of Pt 1.2. This Part is headed "INTERPRETATION" and Div 7 is headed "Interpretation of other expressions". In reading s 58AA it is to be borne in mind that in the Victorian Corporations Act, the term "courts", not "the Court", is used in Div 2 of Pt 9 (headed "Vesting and cross-vesting of criminal jurisdiction"). The same is true of the provisions in the Corporations Law of Victoria itself in Pt 9.4 (ss 1308-1317) dealing with offences[95].

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95 An example is the definition of "Corporations Law criminal proceeding" in s 1316A(3). That expression is defined as meaning:

> "(a) a proceeding in a court when exercising jurisdiction in respect of a criminal matter arising under the Corporations Law of this jurisdiction; or

(Footnote continues on next page)

88 It is convenient now to turn to the text of s 58AA. A starting point is s 58AA(3). This sub-section states, by way of explanation, that the jurisdiction that "courts" have in relation to matters under the Corporations Law of Victoria is dealt with in Pt 9 of the statutes listed in the sub-section, including the Victorian Corporations Act[96]. Part 9 of the Victorian Corporations Act includes s 42 (as to civil matters) and s 55 (as to criminal matters). The matters dealt with in Pt 9 include the applicability of limits on the jurisdictional competence of "courts". Section 58AA(4) of the Corporations Law of Victoria so explains. The term "court" is given a meaning in that section of "any court when exercising the jurisdiction of this jurisdiction" (s 58AA(1)). The expression "this jurisdiction" is to be interpreted, in accordance with s 9 of the Victorian Corporations Act, as meaning "Victoria", that is to say the body politic being the State of Victoria[97]. This includes the coastal sea of Victoria; this follows from the supplementary definition of "this jurisdiction" in s 9 of the Corporations Law of Victoria.

(b) a proceeding in a court of this jurisdiction when exercising jurisdiction in respect of a criminal matter arising under the Corporations Law of any jurisdiction."

96 The text of s 58AA(3) reads:

"The jurisdiction that courts have in relation to matters under this Law is dealt with in Part 9 of each of the following:

(a) the *Corporations Act 1989*;

(b) the Corporations (New South Wales) Act 1990 of New South Wales;

(c) the Corporations (Victoria) Act 1990 of Victoria;

(d) the *Corporations (Queensland) Act 1990* of Queensland;

(e) the *Corporations (Western Australia) Act 1990* of Western Australia;

(f) the *Corporations (South Australia) Act, 1990* of South Australia;

(g) the *Corporations (Tasmania) Act 1990* of Tasmania;

(h) the *Corporations (Northern Territory) Act 1990* of the Northern Territory."

97 Section 9 of the Victorian Corporations Act states that, in the Corporations Law of Victoria, "this jurisdiction" means "Victoria".

89 The Federal Court was not a "court" within the definition in s 58AA(1); it was not exercising, and could not exercise, the jurisdiction of the State of Victoria.

90 In ss 737 and 739, the expression used is not "court" but "the Court". Section 58AA(2) states:

> "Except where there is a clear expression of a contrary intention (for example, by use of the expression 'the Court'), proceedings in relation to a matter under this Law may, subject to the Acts mentioned in subsection (3), be brought in any court."

The effect of s 58AA(2), as presently relevant, is to emphasise that which in any event follows from s 42 of the Victorian Corporations Act. This is that jurisdiction is conferred with respect to civil matters arising under the Corporations Law of Victoria not upon any court exercising the jurisdiction of the State of Victoria, but on the Supreme Court of Victoria and the Supreme Court of each other State and of the Australian Capital Territory. There is a definition of "Court" in s 58AA(1). It serves to throw light only upon what follows from the use of the expression "the Court", this being a clear expression of intention that proceedings under statutes including the Corporations Law of Victoria may not be brought in all courts which exercise the jurisdiction of the State of Victoria, but only in a limited class thereof. The definition includes the courts we have described as identified in s 42(1) of the Victorian Corporations Act.

91 At the time of the institution of the litigation in the Federal Court, s 42 also included the purported conferral of jurisdiction upon the Federal Court, held invalid in *Re Wakim*. Likewise, the definition of "Court" in s 58AA(1) also included the Federal Court when exercising the jurisdiction of the State of Victoria.

92 The significance for the present litigation of the definition of "Court" in s 58AA(1) was solely in distinguishing those courts which, as confirmed by s 58AA(3), had jurisdiction in relation to matters under the Corporations Law of Victoria, being the jurisdiction dealt with in Pt 9 of the Victorian Corporations Act. Nothing in s 58AA conferred jurisdiction[98]. Nor did it impliedly amend the text of Pt 9 so as to produce "the need to conflate the two texts to arrive at the

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98 cf *Merribee Pastoral Industries Pty Ltd v ANZ Banking Group* (1998) 193 CLR 502 at 512 [21].

combined legal meaning"[99]. Rather, s 58AA assumes the full operation of Pt 9[100]. The provision was a somewhat tortuous means of directing the attention of the reader of the Corporations Law of Victoria to the consequences of the conferral of jurisdiction by Pt 9 of the Corporations Law of Victoria.

93 One evident purpose of Pt 9 (and its analogues) was, so far as possible, to ensure that the jurisdiction in corporations matters arising under the laws of any State or Territory could be exercised by the appropriate courts of every State and Territory and by the Federal Court and the Family Court of Australia. However, it does not follow that the failure fully to achieve that purpose produces the consequence arrived at by the Full Court in the present case.

94 The relevant principle of interpretation is that stated in *Residual Assco Group Ltd v Spalvins*[101]:

> "Courts in a federation should approach issues of statutory construction on the basis that it is a fundamental rule of construction that the legislatures of the federation intend to enact legislation that is valid and not legislation that is invalid."

Here, the legislation was designed to go further than was constitutionally permissible. However, it is erroneous to reason from this that the Federal Court could not, when seised of federal jurisdiction, exercise any of the powers conferred by ss 737 and 739.

95 To uphold the exercise of jurisdiction by the Federal Court in the present case and the orders made in pursuit of it is not to take any new step in the development of doctrine. This is apparent from *Fencott v Muller*[102] where, in the joint judgment of four members of the Court, there was an application of a dictum of Walsh J in *Felton v Mulligan*[103]. In respect of a cause removed into this Court under s 40 of the Judiciary Act from the Supreme Court of New South Wales, Walsh J had said[104]:

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99 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 353-354 [9], 376 [68].

100 cf *Austereo Ltd v Trade Practices Commission* (1993) 41 FCR 1 at 13, 37.

101 (2000) 74 ALJR 1013 at 1020 [28]; 172 ALR 366 at 374-375.

102 (1983) 152 CLR 570 at 606-607.

103 (1971) 124 CLR 367.

104 (1971) 124 CLR 367 at 399.

> "The foundation for the authority of this Court to deal with the 'cause' is that it involves the interpretation of the Constitution. Once it is clothed with that authority, this Court may do whatever is necessary for the complete adjudication of the cause and therefore it may exercise any relevant power which the Supreme Court would have had, whatever may be the source of that power."

96 There is no occasion to consider the other heads of federal jurisdiction upon which ASIC relied. There was no "ineffective judgment" to attract the operation of the State Jurisdiction Act.

Orders

97 It remains to consider the appropriate form of relief. In addition to its application for special leave to appeal, ASIC applied for orders for certiorari and mandamus. Where relief of this nature is directed to officers of the Commonwealth who are judges of a federal court and there is also before this Court appellate process, the preferable course is for the applicant to pursue its appellate remedy. This is so in the present situation, the jurisdiction of this Court having been regularly invoked by an application for leave to appeal against a judgment, decree, order or sentence of the Federal Court, within the meaning of s 73(ii) of the Constitution.

98 The orders made by the Full Court on 9 March 2000 included two final orders, declaratory in nature, respecting the lack of jurisdiction of Merkel J. An interlocutory order was then made standing over the Full Court appeal pending the outcome of an application to this Court for special leave to appeal against the declaratory orders. In these circumstances, ASIC has its appropriate relief by dismissing the applications for certiorari and mandamus and granting it special leave to appeal, with the consequences indicated earlier in these reasons.

99 The thrust of the relief sought by Edensor and by the Normandy Group is at variance with the outcome sought by ASIC. They sought to achieve a result whereby this Court set aside declarations 1 and 2 and in place thereof declared that the Federal Court had jurisdiction to hear the whole of the matter but no power to make orders of the kind specified in s 737 or s 739, so that the sum of $28.5 million held in the Registry of the Federal Court be released forthwith to Edensor. It follows from what has been said earlier in these reasons that the Federal Court did have power to make the orders in question and that, at this stage, no order should be made for the release of the sum of $28.5 million pending the determination by the Full Court of the appeal on the merits. The applications by Edensor and the Normandy Group should be dismissed. There is no occasion to burden ASIC with any adverse costs order in respect of those

applications. ASIC has succeeded in repelling the thrust of the attack directed to the exercise by the Federal Court of power derived under ss 737 and 739 of the Corporations Law. The costs in favour of ASIC are adequately met by the costs order in its favour on its successful appeal.

100 McHUGH J. On 30 August 2000, this Court granted special leave to appeal in matter M20 of 2000, one of a number of special leave applications and applications for constitutional relief that were before the Court. Upon the grant of leave in M20, the appeal was treated as having been heard instantly and an order was made allowing the appeal. The order allowing that appeal effectively disposed of the issues raised in the other applications with the result that those applications were dismissed. These are my reasons for joining in the orders that were made in respect of matter M20 and the other applications.

101 In matter M20, the principal issue for determination was whether ss 737 and 739 of the Corporations Law of Victoria ("the Law") authorised the Federal Court to order one of the respondents, Edensor Nominees Pty Ltd ("Edensor"), to pay $28.5 million to the Australian Securities and Investments Commission ("ASIC") to be paid, on a pro rata basis, to the shareholders of Great Central Mines Ltd ("GCM"). That order had been made by Merkel J in the Federal Court, sitting in Melbourne, after finding that a takeover offer for GCM and a related Part A statement contravened the Law. However, the Full Court of the Federal Court held that the Federal Court had no power to grant relief under ss 737 and 739 of the Law.

102 In my opinion, the Federal Court did have power to make the orders. ASIC is "the Commonwealth" for the purposes of s 75(iii) of the Constitution and various provisions of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") including s 39B(1A)(a) of that Act. Because the Commonwealth was a party to the proceedings, the Federal Court was exercising federal jurisdiction when ASIC sought declaratory and injunctive relief against the respondents. That being so, s 79 of the Judiciary Act – which applies to proceedings in federal jurisdiction – operated to "pick up" and apply the Law in the proceedings brought by ASIC. Accordingly, the Federal Court in the exercise of its federal jurisdiction (and without any issue of accrued[105] or associated jurisdiction[106] arising) had power to make orders under ss 737 and 739 of the Law.

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105 cf the conclusion of Merkel J (*Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at 344; 17 ACLC 1,126 at 1,153), affirmed by the Full Court, that "there was a common substratum of fact [in the various claims under the Law, the *Trade Practices Act* 1974 (Cth) and the *Australian Securities and Investments Commission Act* 1989 (Cth)] which conferred on the Court jurisdiction to decide the whole 'matter', the whole controversy between the parties": *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 48 per the Full Court.

On accrued jurisdiction, see: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261; *Fencott v Muller* (1983) 152 CLR 570; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*

(Footnote continues on next page)

The factual and procedural background

103 The proceedings in the Federal Court arose from a takeover offer for GCM which had been made by one of the respondents, Yandal Gold Pty Ltd ("Yandal Gold"), and the issuing of a Part A statement in relation to the offer. As a result, ASIC commenced proceedings in the Federal Court claiming:

(a) a declaration that s 52 of the *Trade Practices Act* 1974 (Cth) ("the Trade Practices Act") or alternatively s 12DA of the *Australian Securities and Investments Commission Act* 1989 (Cth) ("the ASIC Act") had been contravened;

(b) injunctions pursuant to s 80 of the Trade Practices Act or alternatively s 12GD of the ASIC Act;

(c) declarations that s 615 of the Law had been contravened; and

(d) orders pursuant to s 737 and/or s 739 of the Law.

104 Merkel J held that, in making the offer, Yandal Gold and some of the other respondents had contravened s 615 of the Law[107]. That section prohibited the acquisition of shares in a company in circumstances which his Honour found existed in the proceedings. Merkel J also found that, in dispatching the Part A statement, Yandal Gold had contravened s 52 of the Trade Practices Act or alternatively s 12DA of the ASIC Act and s 995(2)(b)(iii) of the Law[108].

105 Section 737 of the Law provided that, where a person has acquired shares in a company in contravention of s 615, "the Court", on the application of ASIC,

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(1981) 148 CLR 457; *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457.

106 See s 32(1) of the *Federal Court of Australia Act* 1976 (Cth).

On associated jurisdiction, see: *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261; *PCS Operations Pty Ltd v Maritime Union of Australia* (1998) 72 ALJR 863; 153 ALR 520.

107 *Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at 359; 17 ACLC 1,126 at 1,164.

108 *Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at 359; 17 ACLC 1,126 at 1,164-1,165.

"may make such order or orders as it thinks just". Section 739 provided that, where a statement that purported to be a Part A statement has been served on a target company and an application for an order under the section has been made to "the Court" by ASIC and the Court is satisfied that a provision of Ch 6 of the Law (which contained s 615) has been contravened, "the Court may make such orders as it thinks necessary or desirable to protect the interests of a person affected by the takeover scheme or takeover announcement".

106 Exercising the power conferred by ss 737 and 739, Merkel J ordered Edensor to pay ASIC $28.5 million to be distributed to the shareholders in GCM ("order 7"). His Honour held that order 7 was "'just' under s 737 and ... protective of the interests of the shareholders under s 739"[109]. Merkel J also made a number of declarations in addition to order 7.

107 Order 7 provided[110]:

> "Within 21 days, or such further period as the court may within 21 days order, [Edensor] pay to [ASIC] the sum of $28.5 m for payment of that sum by [ASIC], on a pro rata basis, to the shareholders in [GCM] (other than the respondents):
>
> (a) who have accepted the said takeover offers of [Yandal Gold] and have not exercised their entitlement under these orders to withdraw that acceptance;
>
> (b) who have had their shares acquired by [Yandal Gold] under s 703(2) of the Corporations Law and have not avoided the acquisition pursuant to these orders;
>
> (c) who have had their shares compulsorily acquired under s 701(5) and have not avoided the acquisition pursuant to these orders."

The argument of the respondents concerning order 7

108 The respondents contended that the Federal Court had no power to make order 7. They claimed that the Law precluded the Federal Court exercising the powers conferred by ss 737 and 739 of that Law because those sections gave powers only to those courts which were exercising the jurisdiction of the State of

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109 *Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at 354-355; 17 ACLC 1,126 at 1,161.

110 *Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 32 ACSR 317 at 360-361; 17 ACLC 1,126 at 1,166.

Victoria. The respondents argued that the "Court" which can exercise the powers conferred by ss 737 and 739 is defined by s 58AA of the Law and that such a Court is one "exercising the jurisdiction of this jurisdiction". The Law defined "this jurisdiction" to mean "Victoria". They contended that *Re Wakim; Ex parte McNally*[111] showed that the Federal Court could not exercise the jurisdiction of Victoria or the powers of that jurisdiction. Edensor also sought to challenge order 7 on the ground that neither s 737 nor s 739 authorised its making. That issue had been argued before the Full Court but was not decided by that Court. It is unnecessary to determine that issue, which should be dealt with by the Full Court when it commences to rehear the appeal by Edensor to that Court.

The cooperative scheme

109 To demonstrate that the respondents were incorrect in contending that the powers conferred by ss 737 and 739 of the Law could only be exercised by courts exercising the jurisdiction of Victoria, it is necessary to refer to the history and the provisions of a number of statutes of the Parliament, the States and the Northern Territory. These were the statutes by which the cooperative scheme for the administration of the Corporations Laws of the States and Territories was put in place. That cooperative scheme was and is an extraordinarily complex one, based on a number of assumptions one of which – that federal courts may exercise purely State jurisdiction – has been held by this Court to be erroneous[112]. The scheme was enacted in a context of earlier laws of the Commonwealth providing for the jurisdiction of the Federal Court. Those laws included the Judiciary Act and the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act")[113], as well as the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) ("the Commonwealth Cross-vesting Act").

110 In 1989, the Parliament enacted the *Corporations Act* 1989 (Cth)[114] ("the Commonwealth Corporations Act") and the ASIC Act. As initially enacted, the Commonwealth Corporations Act was to be a law for all the States and Territories. But that Act was not proclaimed in its original form pending the decision of this Court in *New South Wales v The Commonwealth* (*The*

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111 (1999) 198 CLR 511.

112 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

113 In regards to the jurisdiction of the Federal Court under s 19 of the Federal Court Act and s 39B(1A)(c) of the Judiciary Act, see *Residual Assco Group Ltd v Spalvins* (2000) 74 ALJR 1013; 172 ALR 366, and *Re Macks; Ex parte Saint* [2000] HCA 62.

114 No 109 of 1989.

Incorporation Case)[115] as to whether the power in s 51(xx) of the Constitution extended to the incorporation of companies. After this Court held that s 51(xx) did not extend to incorporation, the Parliament amended the Commonwealth Corporations Act and made the Corporations Law in s 82 of that Act a law for the Capital Territory only[116]. As part of the cooperative scheme that was then put in place, the State of Victoria enacted the *Corporations (Victoria) Act* 1990 (Vic) ("the Victorian Corporations Act"). By s 7 of that Act, the Corporations Law of the Capital Territory as in force for the time being applies as a law of Victoria. The other States and the Northern Territory enacted largely identical legislation.

111 In the Commonwealth Corporations Act as initially enacted in 1989, "Court" was defined as the Federal Court or the Supreme Court of a State or Territory. There was no definition of "court". As amended in 1990, the definition of "Court" in s 9 of the Corporations Law of the Capital Territory introduced the words "when exercising the jurisdiction of this jurisdiction". The Explanatory Memorandum stated[117]:

> "The replacement definition [of 'Court'] reflects the fact that jurisdiction under the Corporations Law will be jurisdiction under the Laws of the various States and the Northern Territory as well as the Commonwealth (and not simply Commonwealth jurisdiction)."

A definition of "court" was also inserted in s 9.

112 With effect from 16 October 1995, the definitions of "court" and "Court" in s 9 were omitted and a new s 58AA was inserted[118]. It provided:

> "**Meaning of 'court' and 'Court'**
>
> (1) Subject to subsection (3), in this Law:
>
> **'court'** means any court when exercising the jurisdiction of this jurisdiction;
>
> **'Court'** means any of the following courts when exercising the jurisdiction of this jurisdiction:

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115 (1990) 169 CLR 482.

116 *Corporations Legislation Amendment Act* 1990 (Cth), No 110 of 1990.

117 At par 299.

118 *Corporations Legislation Amendment Act* 1994 (Cth), No 104 of 1994.

(a) the Federal Court;

(b) the Supreme Court of this or any other jurisdiction;

...

(2) Except where there is a clear expression of a contrary intention (for example, by use of the expression 'the Court'), proceedings in relation to a matter under this Law may, subject to the Acts mentioned in subsection (3), be brought in any court.

(3) The jurisdiction that courts have in relation to matters under this Law is dealt with in Part 9 of each of the following:

(a) the *Corporations Act* 1989 [the Commonwealth Corporations Act];

...

(c) the *Corporations (Victoria) Act* 1990 of Victoria [the Victorian Corporations Act];

...

(4) The matters dealt with in those Parts of those Acts include the applicability of limits on the jurisdictional competence of courts."

113 Section 9 of the Victorian Corporations Act declared that in the Law "this jurisdiction" meant "Victoria".

114 Section 58AA(1) is made subject to sub-s (3). But that means no more than that the jurisdiction of the various courts included in the definition of "Court", in relation to matters under the Law, is found in Pt 9 of the Acts listed in sub-s (3). This conclusion is strengthened by the terms of sub-s (4). Section 58AA(1) is definitional only and does not confer jurisdiction. *Nor does it restrict* the jurisdiction that the various courts included in the definition of "Court" otherwise possess.

115 As part of the 1990 amendments which introduced the cooperative scheme, a new Pt 9 was inserted. The provisions of Div 1 of that Part (ss 49-61) expressly provided for the jurisdiction of courts to the exclusion of both the Commonwealth Cross-vesting Act and s 39B of the Judiciary Act. Section 49(1)(a) of the Commonwealth Corporations Act provided for the jurisdiction of courts in respect of civil matters arising under the Corporations Law of the Capital Territory. Section 49(1)(b) provided for the jurisdiction of the courts of the Capital Territory in respect of civil matters arising under any Corporations Law of a State. Section 51 conferred on the Federal Court, the

Supreme Court of each State and of the Capital Territory jurisdiction in respect of civil matters arising under the Corporations Law of the Capital Territory.

116 Thus, ss 49 and 51 provided, to the exclusion of s 39B of the Judiciary Act, for:

(a) the jurisdiction to be exercised by the courts of the Capital Territory in respect of civil matters arising under the Corporations Laws of the Capital Territory and of Victoria; and

(b) the jurisdiction to be exercised by the Federal Court in respect of civil matters arising under the Corporations Law of the Capital Territory.

117 But ss 49 and 51 said nothing as to the jurisdiction of the Federal Court in civil matters arising *purely* under the Law. The Parliament had sought to confer that jurisdiction on the Federal Court by s 56(2) of the Commonwealth Corporations Act, which provided that the Federal Court could "exercise jurisdiction (whether original or appellate) conferred on it by a law of a State corresponding to this Division with respect to matters arising under the Corporations Law of a State." A "law of a State corresponding to this Division" was s 42 of the Victorian Corporations Act, which provided in sub-s (1) that jurisdiction in civil matters arising under the Law was conferred on the Supreme Court of Victoria and on the Supreme Courts of each of the other States and of the Capital Territory, and in sub-s (3) that jurisdiction in respect of the same matters was also conferred on the Federal Court. Section 42(3) of the Victorian Corporations Act was the only provision in Div 1 of Pt 9 of that Act which purported to confer State jurisdiction on the Federal Court.

118 In *Re Wakim*, this Court decided that s 56(2) of the Commonwealth Corporations Act was invalid as beyond the power of the Parliament to make a law under Ch III or under s 51(xxxix) of the Constitution and that s 42(3) of the *Corporations (New South Wales) Act* 1990 (NSW) was invalid as repugnant to Ch III[119]. No relevant difference exists between s 42(3) of the New South Wales Act and s 42(3) of the Victorian Corporations Act.

119 Thus, the cooperative scheme failed it its attempt to confer *State jurisdiction* on the Federal Court in respect of civil matters arising purely under the Law. But the above provisions of the Commonwealth and Victorian Corporations Acts did not address the question of the Federal Court's *federal*

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119 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 557-558 [58]-[59] per McHugh J, 574-575, 582 [111], [127] per Gummow and Hayne JJ (with whom Gleeson CJ and Gaudron J agreed).

jurisdiction in a matter involving a claim under a law of the Commonwealth and a non-severable claim under the Law[120]. Nor did s 49(1) of the Commonwealth Corporations Act purport to exclude the conferral of jurisdiction on the Federal Court pursuant to s 39B of the Judiciary Act in respect of matters that are not "civil matters arising under the Corporations Law of the Capital Territory". Section 49(2) of that Act, which stated that "[n]othing in [Div 1 of Pt 9] affects any other jurisdiction of any court", puts that proposition beyond doubt.

120 At all relevant times, s 39B(1A)(a) of the Judiciary Act provided that the original jurisdiction of the Federal Court also included jurisdiction in any matter "in which the Commonwealth is seeking an injunction or a declaration". In proceedings where the Commonwealth seeks an injunction or a declaration, as it did in this case, the Federal Court is vested with *federal jurisdiction* pursuant to s 39B(1A)(a) of the Judiciary Act. The term "injunction" in s 39B(1A)(a) should not be restricted to injunctions as that term was understood in pre-Judicature courts of equity[121]. It is a wide term which should be given its ordinary meaning, a meaning wide enough to embrace any form of curial order which requires a person to refrain from doing or to do some act which infringes or assists in restoring another person's right, interest or property. It is wide enough to cover orders of the kind that can be made under ss 737 and 739 of the Law.

121 The jurisdiction conferred by s 39B(1A)(a) extends over the entire justiciable controversy before the Federal Court. It extends to "the substantial subject matter of the controversy"[122]. That controversy is identified by reference to the claims and the relief that the Commonwealth seeks in the proceedings[123]. Difficult questions of accrued jurisdiction or of severable claims may arise in some cases. It is unnecessary to explore those questions in the present case because, as will appear, the justiciable controversy extended to all the contraventions by the respondents of provisions of the Law as "picked up" by s 79 of the Judiciary Act.

122 As a matter of State law, the definition of "Court" in s 58AA of the Law identifies the Federal Court when exercising the jurisdiction *and only the jurisdiction* purportedly conferred by s 42(3) of the Victorian Corporations Act. The statement in the Explanatory Memorandum and the manner in which the provisions were drafted in Pt 9 of the Commonwealth and Victorian Corporations

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120 See, for example, the facts of *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

121 cf *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247.

122 *Crouch v Commissioner for Railways (Q)* (1985) 159 CLR 22 at 37.

123 *Fencott v Muller* (1983) 152 CLR 570 at 608.

Acts suggest that the drafters of the Commonwealth and Victorian legislation erroneously believed that the jurisdiction of the Federal Court was more limited than it is. Those matters suggest that they believed that in civil matters where rights and liabilities depended upon the terms of the Law the Federal Court would always, and only, be exercising State jurisdiction conferred by the operation of s 56(2) of the Commonwealth Corporations Act and s 42(3) of the Victorian Corporations Act. In other words, notwithstanding that the Judiciary Act was considered in some respects[124], it is possible that the drafters did not direct their attention to the possible conferral of federal jurisdiction on the Federal Court pursuant to other laws of the Commonwealth, for example, s 39B(1) of the Judiciary Act[125]. Because that is so, it is possible that drafters did not consider whether s 79 of the Judiciary Act could operate to "pick up" State laws when a court was "exercising federal jurisdiction in that State".

123 But it does not follow that, because one of the assumptions of the cooperative scheme has been demonstrated to be erroneous and certain provisions of that scheme purportedly conferring State jurisdiction on the Federal Court have been held invalid, the remainder of the scheme may not operate together with other laws of the Commonwealth – like s 39B(1A)(a) of the Judiciary Act – which validly confer *federal jurisdiction* on the Federal Court. Nor does it follow that, "in all cases to which [the Law is] applicable", s 79 of the Judiciary Act cannot operate to "pick up" that Law in so far as it imposes liability and grants curial relief.

The Federal Court exercised federal jurisdiction and had power to make orders pursuant to ss 737 and 739

124 The Federal Court was exercising federal jurisdiction under s 39B(1A)(a) of the Judiciary Act by reason of the specific relief claimed in this case and the identity of the party seeking that relief.

125 ASIC was seeking declarations in respect of contraventions of s 615 of the Law as well as s 52 of the Trade Practices Act or alternatively s 12DA of the ASIC Act. Reliance on contravention of s 615 and seeking a declaration was sufficient to attract the jurisdiction of the Federal Court under s 39B(1A)(a), provided ASIC was "the Commonwealth". And it is clear that ASIC is the Commonwealth for the purpose of s 39B of the Judiciary Act.

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124 See s 49 of the Commonwealth Corporations Act.

125 In 1990, s 39B of the Judiciary Act did not include sub-s (1A). Sub-section (1), however, provided that, subject to certain exclusions, the Federal Court had original jurisdiction in any matter in which a writ of mandamus or prohibition or an injunction was sought against an officer of the Commonwealth.

126 The ASIC Act provides for the establishment, nature, functions and powers of ASIC and for the control and supervision of ASIC by the Minister and by other executive authorities of the Commonwealth. Section 8 of that Act established ASIC as a body corporate but without corporators. One of the objects of the Act was to provide for ASIC to administer such laws of the States and Territories "as confer functions and powers under those laws on" it[126]. Its members are appointed by the Governor-General "on the nomination of the Minister"[127]. It must have a Chairperson and may have a Deputy Chairperson appointed by the Governor-General[128]. The Minister may give and ASIC is required to comply with "a written direction about policies it should pursue, or priorities it should follow, in performing or exercising any of its functions or powers under a national scheme law of this jurisdiction."[129] ASIC is funded by amounts appropriated by Parliament[130]. And the Minister may require ASIC to pay surplus money to the Commonwealth[131]. ASIC is audited by the federal Auditor-General[132]. These and other provisions of the ASIC Act identify ASIC as a Commonwealth authority required by a law of the Commonwealth to perform certain executive functions of the Commonwealth under the control and direction of a Minister. Such an authority is "the Commonwealth" for the purposes of s 75(iii) of the Constitution and s 39(1A)(a) of the Judiciary Act.

127 Where the Commonwealth has incorporated a body with no corporators which:

- carries out public functions and exercises public powers;
- is controlled by persons appointed by a Minister of the Commonwealth government;
- is under the ultimate direction and control of a Minister of the Commonwealth government;

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126 Section 1(1).

127 Section 9(2).

128 Section 10.

129 Section 12(1).

130 Section 133.

131 Section 135(5).

132 *Commonwealth Authorities and Companies Act* 1997 (Cth), s 8.

- is funded by the Commonwealth and can be required to pay its revenues, profits or surpluses to the Commonwealth; and

- is audited by the federal Auditor-General or is required to report to the Parliament of the Commonwealth,

it will be "the Commonwealth" for the purposes of Ch III of the Constitution and ss 39, 39B, 56, 57 and 64 of the Judiciary Act[133], unless there is some extraordinary provision or provisions in its constating statute that indicates that it is independent of the Commonwealth.

128 When ASIC filed proceedings in the Federal Court seeking declarations and injunctions and also orders in accordance with ss 737 and 739 of the Law, the entire proceedings were immediately in federal jurisdiction. That was because ASIC was the Commonwealth and was claiming relief falling within s 39B(1A)(a) of the Judiciary Act, as I have pointed out. Section 64 of that Act declares that in any proceedings in which the Commonwealth is a party "the rights of parties shall as nearly as possible be the same" as in proceedings "between subject and subject." Those rights include the substantive rights to be given effect to in the proceedings. To determine those rights requires a court exercising federal jurisdiction to refer to ss 79 and 80 of the Judiciary Act because in a proceeding "between subject and subject these sections direct where [the] Court shall go for the substantive law."[134] Here the substantive law included ss 615, 737 and 739 of the Law. Although ss 737 and 739 were couched in terms of remedies, they gave rise to substantive rights and liabilities. As Dixon J once pointed out[135], "[i]t is not unusual to find that statutes impose liabilities, create obligations or otherwise affect substantive rights, although they are expressed only to give jurisdiction or authority, whether of a judicial or administrative nature."

129 Section 79 of the Judiciary Act provides:

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133 See *Austral Pacific Group Ltd v Airservices Australia* (2000) 74 ALJR 1184; 173 ALR 619; *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219; *Maguire v Simpson* (1977) 139 CLR 362.

134 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 140. See also *Austral Pacific Group Ltd v Airservices Australia* (2000) 74 ALJR 1184 at 1195 [51]; 173 ALR 619 at 632.

135 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165-166.

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

The terms of s 79 are mandatory. Whenever a court – State or federal – is exercising federal jurisdiction in a State or Territory, the laws of that State or Territory are binding on the court unless the Constitution or the laws of the Commonwealth otherwise provide[136], or those laws are inapplicable to the particular case before the Court.

130 In these proceedings, neither the Constitution nor any law of the Commonwealth otherwise relevantly provided for the exclusion of laws "picked up" by s 79. Nor was this a case where ss 615, 737 and 739 of the Law, the sections which gave rise to "the substantial subject matter of the controversy", were not applicable to the case as surrogate federal law. By reason of ss 64 and 79 of the Judiciary Act, ss 615, 737 and 739 applied as federal law. State laws cannot be picked up by s 79 unless they facilitate the exercise of the judicial power conferred by Ch III of the Constitution. But where the Commonwealth or a State is a party to the proceedings, there would seem to be no limit to the State laws that the Parliament can make applicable in those proceedings[137]. By ss 64 and 79 it is the Parliament itself, and not the legislature of the State, which has provided the extent to which, consonant with Ch III and subject to the Constitution, State laws will be applicable as federal laws. When State laws apply as federal laws in proceedings in which the Commonwealth is a party and in their application affect the Commonwealth, they do so, as I have indicated, by force of a federal law, the Judiciary Act, enacted by the Parliament to facilitate the exercise of the judicial power of the Commonwealth.

131 There was never a moment in the proceedings when the liability of the respondents under s 615 of the Law was a purely State matter. Further, all the other contraventions committed by the respondents were contraventions of provisions of laws of the Commonwealth – the Trade Practices Act and the ASIC Act. This was not at any stage a case where the Federal Court was exercising accrued or associated jurisdiction. From the beginning, the Federal Court was exercising federal jurisdiction, a jurisdiction that arose out of the identity of the claimant for relief – ASIC – and the enforcement of rights under laws of the

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136 See generally *Austral Pacific Group Ltd v Airservices Australia* (2000) 74 ALJR 1184 at 1195 [51]-[52]; 173 ALR 619 at 632-633.

137 Constitution, ss 75(iii) and 51(xxxix), and s 78 in respect of laws "conferring rights to proceed against the Commonwealth or a State".

Commonwealth, including the Judiciary Act. Although some of those rights were identified by reference to ss 615, 737 and 739 of the Law, they were enforced as rights given by a law of the Commonwealth. The rights and liabilities conferred by these laws of the Commonwealth were "the substantial subject matter of the controversy" which called for determination in the exercise of federal jurisdiction.

132 Furthermore, the terms of ss 615, 737 and 739 applied to the material facts of the case. Merkel J was sitting in Victoria. Hence the law of Victoria was the law which s 79 of the Judiciary Act required to be applied. It is not disputed that GCM was a "company" within the meaning of that term in s 615 of the Law. Thus, the claims of ASIC had to be determined in accordance with s 615, the substantive law which governed the acquisition of shares in that company. The remedies given by ss 737 and 739 were a consequence of breaches of s 615 and other relevant provisions of the Law.

133 The respondents accepted that the Federal Court had federal jurisdiction in these proceedings, although they did not accept that the conferral of jurisdiction was pursuant to s 39B(1A)(a) of the Judiciary Act. The main contention of the respondents was that the Federal Court did not have *power* to make order 7 or any power to make an order under ss 737 and 739 of the Law. They submitted that those sections were sources of power only if a "Court" was exercising the "jurisdiction of this jurisdiction", meaning the jurisdiction of the State of Victoria. They submitted that s 79 of the Judiciary Act did not apply to "pick up" ss 737 and 739 of the Law. They argued that for s 79 to do so would require a "rewriting" of the definition of "Court" in s 58AA(1) of that Law by deleting the words "when exercising the jurisdiction of this jurisdiction". The respondents submitted that the authorities of this Court[138] establish that s 79 only "picks up" State laws with their meaning unchanged and that ss 737 and 739, when read with s 58AA, were not provisions which came within what they described as "the qualifying principle or exception referred to by Gibbs J in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*[139]."

134 The respondents' submissions were misconceived and had to be rejected. It is a truism, as Kitto J pointed out in *Pedersen v Young*[140], that s 79 of the

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138 *Pedersen v Young* (1964) 110 CLR 162; *Maguire v Simpson* (1977) 139 CLR 362; *The Commonwealth v Mewett* (1997) 191 CLR 471; *Northern Territory v GPAO* (1999) 196 CLR 553; *Austral Pacific Group Ltd v Airservices Australia* (2000) 74 ALJR 1184; 173 ALR 619.

139 (1973) 129 CLR 65 at 88.

140 (1964) 110 CLR 162 at 165.

Judiciary Act "does not purport to do more than pick up State laws with their meaning unchanged". Section 79, therefore, does not give to a State law a new or extended meaning when it is made applicable in federal jurisdiction. But as Mason J pointed out in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*[141]:

> "To ensure that State laws dealing with the particular topics mentioned in [s 79] are applied in the exercise of federal jurisdiction by courts other than State courts, it is necessary that State laws be applied according to the hypothesis that federal courts do not necessarily lie outside their field of application."

135 In *John Robertson*, Gibbs J said[142]:

> "It is also settled that s 79 does not give a new and more extensive meaning to State laws which it renders binding on a court exercising federal jurisdiction; it applies those laws with their meaning unchanged ... To that last proposition it is, however, necessary to add a qualification. Section 79 may render applicable in a court exercising federal jurisdiction a State statute which either by its express provisions or upon its proper construction is limited in its application to the courts of the State ... If the laws of a State could not apply if, upon their true construction as State Acts, they related only to the courts of the State, it would seem impossible ever to find a State law relating to procedure, evidence or the competency of witnesses that could be rendered binding on courts exercising federal jurisdiction, because most, if not all, of such laws, upon their proper construction, would be intended to apply in courts exercising jurisdiction under State law."

136 In *John Robertson*, Mason J limited his reasoning to "picked up" State laws on the topics expressly mentioned in s 79 (laws relating to procedure, evidence and the competency of witnesses). He considered that it was unnecessary to answer the broader question of whether "a similar approach is to be taken in applying s 79 to substantive as well as procedural laws"[143]. In my opinion, a similar approach should be taken in respect of substantive laws[144].

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141 (1973) 129 CLR 65 at 95.

142 (1973) 129 CLR 65 at 88.

143 (1973) 129 CLR 65 at 95.

144 cf *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1126-1127 [97]-[100]; 172 ALR 625 at 650-651.

137 The fact that a State statute either expressly or as a matter of construction provides only for State courts to enforce its provisions does not mean that it cannot be "picked up" and applied by s 79 of the Judiciary Act in the exercise of federal jurisdiction. The hypothesis to which Mason J referred in *John Robertson*, which must apply to substantive as well as procedural laws, will ensure its applicability in federal jurisdiction unless the statute is not applicable for some reason other than that State courts were intended by the State as the instruments for enforcing it. Its application might require, for example, the exercise of non-judicial power that is inconsistent with the exercise of the judicial power of the Commonwealth. Or as Gaudron J pointed out in *Kruger v The Commonwealth*[145], the language of a State statute may make it impossible for s 79 to "pick up" the statute, or the statute may impose functions which are beyond the reach of s 79. And, of course, s 79 cannot apply laws that go beyond what is necessary to facilitate the grant of judicial power conferred by Ch III of the Constitution. The Parliament cannot outflank the operation of ss 75, 76, 77 and 78 of the Constitution by conferring State jurisdiction on federal courts[146].

138 An example of a State law that was not picked up by s 79 is found in *Smith v Smith*[147], where the Court construed s 31 of the *Family Provision Act* 1982 (NSW) as requiring the validity of an agreement contracting out of the statutory benefits to be conditional on the approval of the Supreme Court of New South Wales. As a result, s 79 did not operate to authorise the Family Court in the exercise of its federal jurisdiction to approve the release of rights conferred by the State law. That was because the approval of the Supreme Court was a condition precedent to a valid contract and did not itself give rise to a controversy that could be determined in federal jurisdiction.

139 Similarly, in *Commissioner of Stamp Duties (NSW) v Owens [No 2]*[148], the Court construed the grant of a certificate under s 6 of the *Suitors' Fund Act* 1951 (NSW) as requiring an administrative function by New South Wales courts as a step in the course of indemnifying an unsuccessful litigant in respect of costs incurred in the litigation. The Court said[149] that it was no part of the purpose of s 79 "to pick up, so to speak, a provision of State law imposing on State courts such a function ... and convert it into a provision imposing a like function on federal courts."

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145 (1997) 190 CLR 1 at 140.

146 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

147 (1986) 161 CLR 217.

148 (1953) 88 CLR 168.

149 (1953) 88 CLR 168 at 170.

140 A more debatable decision is *Thomas v Ducret*[150], which construed s 18A(1) of the *Crimes Act* 1914 (Cth), a section analogous to s 79. There this Court held that, on a plea of guilty under two federal laws, the Federal Court, sitting in Victoria, could not apply the provisions of Victorian legislation which by their terms identified only courts of summary jurisdiction.

141 Whether or not *Thomas v Ducret* was correctly decided – and the Attorney-General of the Commonwealth made it clear that he did not consider it beyond challenge – courts exercising federal jurisdiction should operate on the hypothesis that s 79 will apply the substance of any relevant State law in so far as it can be applied. The efficacy of federal jurisdiction would be seriously impaired if State statutes were held to be inapplicable in federal jurisdiction by reason of their literal terms or verbal distinctions and without reference to their substance. In *Railway Company v Whitton's Administrator*[151], decided thirty years before our Constitution was enacted, the Supreme Court of the United States declared:

> "Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation."

Subject to the proviso that the nature of some State and Territory statutes may make them inapplicable to proceedings in federal jurisdiction, that statement of the Supreme Court is a sound guide as to the effect of s 79 of the Judiciary Act.

142 As a matter of State law – for the purposes of the Law as applicable in Victoria pursuant to s 7 of the Victorian Corporations Act – the "Court" in ss 737 and 739, read with s 58AA, could never be the Federal Court. That is because the Federal Court could never exercise State jurisdiction – it could never exercise "the jurisdiction of this jurisdiction", meaning the jurisdiction of the State of Victoria. Furthermore, when the Supreme Court of Victoria exercises federal jurisdiction and the "matter" also involves non-severable claims under the Law, the Supreme Court can never be a court within the definition of "Court" in s 58AA.

143 But once this construction of s 58AA is accepted, as it must be, the question still remains: when the Federal Court or the Supreme Court of Victoria is exercising *federal jurisdiction*, are ss 737 and 739 of the Law applicable in

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150 (1984) 153 CLR 506.

151 13 Wallace 270 at 286 (1871) [80 US 270 at 286].

proceedings before those Courts for the purposes of s 79 of the Judiciary Act? The answer must be yes, given that there is nothing in those sections which renders them not applicable[152].

144 The phrase "the jurisdiction of this jurisdiction" in s 58AA is no more than a definitional device. Whatever may have been the understanding of the drafters, that device does no more than restrict the courts identified in various provisions of the Law for the purposes of proceedings in State jurisdiction. But such a device does not of itself render those provisions of the Law which incorporate it inapplicable in proceedings in federal jurisdiction for the purposes of the closing words of s 79 of the Judiciary Act. Moreover, the fact that ASIC was a person who could make an application under ss 737 and 739 shows that the sections contemplated or should be taken as contemplating their use in the exercise of federal jurisdiction.

145 To hold that s 79 is excluded by the device of stating that ss 737 and 739 only apply in the exercise of the jurisdiction of Victoria, when there was no impediment to the Federal Court or the Supreme Court of Victoria applying them in proceedings in federal jurisdiction, would mean that the legislature of the State of Victoria could define the jurisdiction of the Federal Court or the jurisdiction of a State court exercising federal jurisdiction. That would contradict the negative implication in Ch III of the Constitution that only the Parliament may define the jurisdiction of the Federal Court or the federal jurisdiction of a State court[153]. In those cases, such as the present one, where there exists a law of the Commonwealth conferring federal jurisdiction on the Federal Court in respect of the justiciable controversy before that Court, such a construction of s 58AA would also give rise to inconsistency for the purposes of s 109 of the Constitution[154].

146 Pursuant to s 79 of the Judiciary Act, therefore, ss 737 and 739 of the Law applied in these proceedings where the Federal Court was exercising federal jurisdiction in the State of Victoria.

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152 cf the provisions of the *Suitors' Fund Act* 1951 (NSW) considered in *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168, and the provision of the *Family Provision Act* 1982 (NSW) considered in *Smith v Smith* (1986) 161 CLR 217.

153 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 558 [59].

154 *Felton v Mulligan* (1971) 124 CLR 367 at 373, 412.

Conclusion

147 When a Commonwealth authority exercises executive functions of the Commonwealth in a manner akin to that in which ASIC is required to do under the ASIC Act, that authority is "the Commonwealth" for the purposes of s 75(iii) of the Constitution and ss 39, 39B, 56, 57 and 64 of the Judiciary Act. As a result of ASIC commencing proceedings in the Federal Court, that Court had jurisdiction to determine the claims made and grant the relief sought by ASIC by reason of the conferral of federal jurisdiction pursuant to s 39B(1A)(a) of the Judiciary Act. Because it was exercising federal jurisdiction, the Federal Court had power to make orders pursuant to ss 737 and 739 of the Law which were "picked up" by s 79 of the Judiciary Act. That is sufficient for present purposes. It is unnecessary to consider the other bases on which ASIC, the respondents and the interveners argued that there existed jurisdiction (necessarily federal) of the Federal Court in these proceedings.

148 In one of its alternative submissions, ASIC argued that the Federal Court had power to make order 7 pursuant to s 23 of the Federal Court Act[155]. It is unnecessary to decide that question in this case. When jurisdiction is properly vested in the Federal Court, however, that Court may, and generally must, exercise all the powers it has to grant appropriate and full relief. In construing a provision such as s 23 of the Federal Court Act, it is erroneous to regard it as authorising only the kinds of relief available to the pre-Judicature courts[156]. Federal courts adjudicate on rights, duties and liabilities under laws of the Commonwealth or laws of the States "picked up" by the Judiciary Act. Those laws often establish complex statutory regimes which provide extensively and in detail for the kinds of orders which courts may make. But unless those laws of the Commonwealth[157] either expressly or impliedly amend or repeal general provisions of the Federal Court Act such as s 23, then those general provisions must be construed in as plenary a manner as the words of the statute permit.

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155 Section 23 of the Federal Court Act provided that the Federal Court had "power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate."

156 cf *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 393-394 [26].

157 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 29 [27]. Laws of the States may not, of course, amend or repeal a law of the Commonwealth.

149 It was for these reasons that I joined in the orders of the Court in these matters.

150 KIRBY J. These proceedings follow the decision in this Court in *Re Wakim; Ex parte McNally*[158] ("*Wakim*"). They began as applications for special leave to appeal brought by parties on both sides of the record who, on different grounds, were discontented with the judgment entered by the Full Court of the Federal Court of Australia ("the Full Court") in *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission*[159]. The special leave applications were referred to a Full Court of this Court. So, in due course[160], were applications made by several of the parties for constitutional writs of Mandamus and writs of certiorari, addressed to the judges of the Federal Court to quash the orders of the Full Court and to direct that the appeal to that Court be heard and determined according to law.

151 The foregoing applications were consolidated and argument was heard. At the end of it, orders were made and the reasons were reserved. Save for the order as to costs, I agreed in the orders of the Court as they were announced. I now state my reasons.

The facts, relevant legislation and course of proceedings

152 The background facts and applicable statutory provisions are stated in the reasons of other members of this Court[161]. I will not repeat more than is necessary to explain my points of departure from their conclusions. For the purposes of these proceedings, there were relatively few differences between the parties concerning the facts.

153 The underlying dispute followed a takeover offer in relation to a mining company, Great Central Mines Ltd. That offer had been preceded by a shareholders' agreement which, in the opinion of the Australian Securities and Investments Commission ("ASIC"), contravened s 615 of the Corporations Law of Victoria[162] ("the Corporations Law"), as it then stood. That section prohibited

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158 (1999) 198 CLR 511.

159 (1999) 95 FCR 42. See also *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* unreported, Federal Court, 9 March 2000.

160 By order of Hayne J dated 28 April 2000.

161 Reasons of Gleeson CJ, Gaudron and Gummow JJ at [13]-[20], [56]-[57], [61]; reasons of McHugh J at [103]-[107].

162 This is set out in s 82 of the *Corporations Act* 1989 (Cth) and applied in Victoria by virtue of s 7 of the *Corporations (Victoria) Act* 1990 (Vic). Chapter 6 of the Corporations Law (which included ss 737 and 739) was repealed and replaced by Item 5 of Sched 1 of the *Corporate Law Economic Reform Program Act* 1999

(Footnote continues on next page)

the acquisition of shares in specified circumstances. ASIC commenced proceedings in the Federal Court in March 1999. As finally amended, the relief sought by ASIC included declarations that the respondent companies had breached s 615 of the Corporations Law in entering the Shareholders Agreement and a declaration that one of the respondents, Yandal Gold Pty Ltd ("Yandal Gold"), had engaged in conduct in contravention of s 52 of the *Trade Practices Act* 1974 (Cth) (or alternatively s 12DA of the *Australian Securities and Investments Commission Act* 1989 (Cth) ("the ASIC Act")) and s 995(2)(b) of the Corporations Law. ASIC also sought an injunction against the respondent companies under s 80 of the *Trade Practices Act* (or alternatively s 12GD of the ASIC Act) and orders pursuant to ss 737 and 739 of the Corporations Law.

154 The foregoing claims proceeded to trial in the Federal Court before the primary judge (Merkel J). In his decision of 16 June 1999, his Honour found breaches of s 615 of the Corporations Law[163], as well as of s 52 of the *Trade Practices Act* (or alternatively s 12DA of the ASIC Act) and s 995(2)(b)(iii) of the Corporations Law[164]. Amongst the orders made by him was order 7. It became the focus of much attention in the Full Court. The terms of that order are set out in the reasons of other members of this Court[165].

155 His Honour described order 7 as a "disgorgement order" which, he said, was "compensatory in that it operates to mitigate the detriment the shareholders suffered as a result of the contravening conduct"[166]. Thus order 7 was made for the benefit of persons who were not parties to the action; in respect of whom no representative action had been brought by ASIC or otherwise; and, by whom no damage had been pleaded, proved or quantified in the proceedings.

156 At the time of the making of order 7, the power of a judge of the Federal Court to make such an order in such a case was generally believed to arise pursuant to the conferral on the Federal Court of State jurisdiction in accordance

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(Cth) which received the Royal Assent on 24 November 1999. References in these reasons to the Corporations Law are to that Law as in force at June 1999.

163 *Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 17 ACLC 1,126 at 1,146, 1,151; 32 ACSR 317 at 335, 342.

164 *Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 17 ACLC 1,126 at 1,152; 32 ACSR 317 at 343-344.

165 Reasons of Gleeson CJ, Gaudron and Gummow JJ at [26]; reasons of McHugh J at [107].

166 *Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 17 ACLC 1,126 at 1,161; 32 ACSR 317 at 355.

with the special cross-vesting provisions concerning corporations enacted in each State. The law of the State of Victoria contained the applicable cross-vesting powers[167] to which the Federal Parliament had given its assent[168].

157 However, on the day following the publication of the reasons and orders of the primary judge in the present case, this Court delivered its decision in *Wakim*[169]. Reversing the earlier decision in *Gould v Brown*[170], this Court, by majority, held that it was not competent to the Parliament of a State to confer on the Federal Court jurisdiction belonging to that State. The fragility of the cross-vesting schemes, including that of Victoria, was known to the parties. The possibility of invalidation occasioned attention by ASIC to alternative ways by which to establish the jurisdiction and relevant powers of the Federal Court[171]. Attention was also given by the primary judge to alternative, or additional, bases of jurisdiction and power. Specifically, the primary judge concluded that the Federal Court had "accrued jurisdiction to determine the whole of the matter in controversy"[172]. He expressed the opinion that "even if *Gould v Brown* [were] overruled by the High Court I am satisfied that the Federal Court has jurisdiction to grant all of the relief sought by ASIC in the present matter"[173].

158 Following the decision of the primary judge and the decision in *Wakim*, Edensor Nominees Pty Ltd ("Edensor"), the subject of order 7, appealed to the Full Court. It named ASIC as the respondent to its appeal. In the meantime, Edensor complied with order 7 and deposited the sum of $28.5 million in an interest bearing trust account. That sum remained in that account pending the outcome of these further proceedings. Subsequently, the other companies, which had been respondents to ASIC's suit, were added as respondents to the Federal

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167 *Corporations (Victoria) Act*, s 42(3).

168 *Corporations Act* 1989 (Cth), s 56(2).

169 (1999) 198 CLR 511.

170 (1998) 193 CLR 346.

171 Most especially the claim for relief under s 52 of the *Trade Practices Act* 1974 (Cth).

172 *Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 17 ACLC 1,126 at 1,153; 32 ACSR 317 at 344 referring to *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 482; *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 291-293.

173 (1999) 17 ACLC 1,126 at 1,153; 32 ASCR 317 at 344.

Court appeal. No attempt was made in the Federal Court, or in this Court, to add as respondents representatives of the shareholders referred to in order 7. Presumably it was concluded that ASIC would sufficiently protect their interests.

The decision and reasons of the Full Court

159 In its reasons, the Full Court accepted as "beyond doubt"[174] that if the Federal Court had jurisdiction to determine a matter arising under any law made by the Federal Parliament (and it nominated specifically the *Trade Practices Act*), such jurisdiction extended beyond the determination of the controversy which involved such federal law. It permitted the Federal Court to determine the "whole controversy between the parties of which the federal claim forms part"[175]. The Full Court accepted[176] the test for the ascertainment of any "accrued jurisdiction" as that stated by this Court in *Fencott v Muller*[177]. It considered objections to treating the claims of contraventions against s 52 of the *Trade Practices Act* as not "severable", "distinct" or "unrelated" to those brought by ASIC in reliance upon s 615 of the Corporations Law. It then made it clear that it regarded the Federal Court as having jurisdiction in the matter before it[178]:

> "The injunctive relief that was sought and granted against Edensor was enlivened by both the *Trade Practices Act* and the *Corporations Law*.
>
> In our view his Honour was correct in finding that there was a common substratum of fact which conferred on the Court jurisdiction to decide the whole 'matter', the whole controversy between the parties."

160 Edensor, the appellant before the Full Court, did not contest the *jurisdiction* of the Federal Court. On the contrary, it asserted that the Federal Court had, and retained, accrued and appellate jurisdiction in respect of the matters arising for decision under the Corporations Law. This was the basis

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174 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 47.

175 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 47 referring to *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261.

176 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 47.

177 (1983) 152 CLR 570 at 608.

178 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 48.

upon which it sought orders in this Court to ensure that the Federal Court exercised that jurisdiction. It asserted a distinction between *jurisdiction* (which the Federal Court had) and *power* to make an order such as order 7 (which on several grounds it did not)[179].

161 Reflecting this approach, the Full Court considered that it was necessary to decide whether or not the Federal Court was "empowered"[180] to grant the relief sought under the Corporations Law. Obviously, this was a reference to the relief granted by the primary judge in order 7 to which Edensor (which had to find the substantial funds required by that order) took its most emphatic objection. Accordingly, the Full Court turned to the language of the Corporations Law. It addressed the question whether, in terms of that language, the "conferral of power"[181] on the Federal Court under the Corporations Law was valid or invalid. After referring to other authority of this Court[182], the Full Court continued to maintain the distinction between the conferral of *jurisdiction* and the conferral of "the relevant *power*"[183]. Upon this basis, the Full Court concluded[184]:

> "As the *Corporations Law* provisions do not constitute a source of power for the orders of the Court apparently made under or by reference to ss 58AA, 737 and 739 of the *Corporations Law*, it is necessary to determine whether s 22 of the *Federal Court of Australia Act* provides that power."

162 Whilst accepting that the general powers conferred on the Federal Court by its own constituting Act were very broad, the Full Court decided that to have power to make an order such as order 7, the general grant of power in s 22 of the

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179 The distinction between power and jurisdiction has been made by this Court: *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 489-490.

180 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 48.

181 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 48.

182 *Wakim* (1999) 198 CLR 511 at 562-563 [71]; *Smith v Smith* (1986) 161 CLR 217 at 251.

183 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 49 (emphasis added).

184 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 50.

Federal Court of Australia Act 1976 (Cth) ("the Federal Court Act") was insufficient[185]:

> "[I]t is apparent that ss 737 and 739 of the *Corporations Law* are necessary sources of power for the making of orders of the nature now under review ... The circumstances in which the ancestors to s 22 [of the Federal Court Act] were born do not provide any warrant for the Court, when exercising its accrued jurisdiction, to be empowered to replicate particular forms of statutory relief available in another jurisdiction. It would not be suggested in the present circumstances that the Court could, under s 22, make orders of the kind under consideration if ss 737 and 739 had not been enacted in the *Corporations Law*."

163 What was lacking, then, was not *jurisdiction* over the parties to the suit or even in respect of the "matter" before the Court by way of its "accrued jurisdiction". What was missing, in the opinion of the Full Court, was the *power* to make an order such as order 7. Whilst noticing s 79 of the *Judiciary Act* 1903 (Cth)[186], the Full Court concluded its analysis without addressing that section.

The orders of the Full Court

164 On the basis of the foregoing reasoning, it might have been expected that the orders giving effect to the opinion of the Full Court would have set aside order 7 as made without power. Perhaps a declaration to that effect might also have been made. The Federal Court would certainly have had power as well as jurisdiction to provide such an order and declaration[187]. Then it would have been appropriate for the Full Court to proceed, in accordance with its holding of accrued jurisdiction, to determine so much of the balance of the appeal as remained within the jurisdiction of the Federal Court. At the least, upon its own reasoning, this would have included such jurisdiction and any powers as were contained in the *Trade Practices Act* and possibly such jurisdiction and powers conferred on the Federal Court by reason of the fact that ASIC was the Commonwealth or a person suing on behalf of the Commonwealth[188]. The Full Court assumed, without deciding, that ASIC was to be treated as the

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185 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 50-51.

186 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 51.

187 *Federal Court of Australia Act* 1976 (Cth), s 21.

188 Constitution, s 75(iii); *Judiciary Act*, s 39B(1); *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 232.

Commonwealth for such purposes[189]. A comprehensive consideration of matters raised in the appeal would have required that all the other grounds of the Federal Court's jurisdiction and power be exhausted before the Federal Court's part in the appeal was finally concluded.

165 However, instead of taking this relatively simple course (to which its reasons appeared to be directed) the Full Court called for written submissions from the parties as to the orders that should follow the publication of the foregoing reasons. It is here, unfortunately, that confusion entered the picture. Whereas the respondents continued, by their written submissions, to draw the distinction between invalidity for "want of jurisdiction" and invalidity "by reason of lack of power", and on that ground sought vacation of order 7, the submissions of ASIC were otherwise. ASIC's submissions were directed at securing the benefit of the by then enacted provisions of the *Federal Courts (State Jurisdiction) Act* 1999 (Vic)[190] ("the State Jurisdiction Act"). Accordingly, ASIC submitted that "it is sufficient that the Full Court at this stage [declare] the relevant order to have been invalid for want of *jurisdiction*". Subject to any possible intervention of this Court, this step would send the entire matter to the Supreme Court of Victoria.

166 One can sympathise with the attractions that such a course would offer to a busy court. If the funds ordered by the primary judge were in the meantime preserved, the invocation of the State Jurisdiction Act, if valid, could have the merit of avoiding any problems regarding jurisdiction and power. It would permit the Supreme Court of Victoria to deal with the matter unencumbered by the unfortunate difficulties for all concerned which *Wakim* had introduced.

167 Regrettably, the Full Court accepted the submissions of ASIC. The orders which it made substantially followed the draft which ASIC's counsel had provided.

168 Omitting the order standing the appeal before the Full Court over to a date to be fixed following a foreshadowed application for special leave to appeal to this Court, and, if granted, the determination of any appeal by this Court, the orders of the Full Court were in the form of declarations unsupported by substantive orders. The declarations are set out in other reasons[191].

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189 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 50.

190 This Act received the Royal Assent on 14 December 1999 and came into force on the following day.

191 Reasons of Gleeson CJ, Gaudron and Gummow JJ at [32].

169 The Full Court gave supplementary reasons for these orders[192]. Such reasons make plain the basic purpose of the Full Court in making the orders. This was to secure the application of the State Jurisdiction Act so as to send the case off packing to the Supreme Court of Victoria. Unfortunately, in doing this, the Full Court introduced the confusion between *jurisdiction* and *power* which had been avoided in its original reasons. In the supplementary reasons, the Full Court said[193]:

> "[I]t was the fact that the Federal Court could not exercise the jurisdiction of Victoria which led to the conclusion that the order for payment was beyond power. It is clear that, when the order was made, the learned judge at first instance was purporting to exercise the jurisdiction of Victoria that was believed to have been validly conferred on the Federal Court by the *Corporations (Victoria) Act 1990*. In our view, these circumstances lead to the conclusion that the order for payment amounts to an ineffective judgment under the State Jurisdiction Act.
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> …
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> ... [T]he future course of these proceedings should be dealt with by the Supreme Court of Victoria, at least in respect of the order for payment. It is doubtful whether this Court now has any *jurisdiction* to give any directions with respect to the further disposition of the $28.5 million. ... The State Jurisdiction Act discloses a clear intention that, in these circumstances, the ineffective judgment should be treated as a judgment of the Trial Division of the Supreme Court of Victoria and it is that court which becomes the appropriate court to deal with questions which arise out of the ineffective judgment, as if that judgment were an order of that court, and if there is an appeal from that order to entertain that appeal."

170 I have taken the trouble to describe what occurred, in translating the Full Court's substantive reasons into the orders which it ultimately entered as the judgment of the Federal Court, for three reasons. First, the foregoing passages illustrate the change in the reasoning of the Full Court, from the original reasoning expressed in terms of the lack of *power* to make an order such as order 7 to the reasoning which resulted in the orders eventually entered, which declared a want of *jurisdiction*. This distinction was critical for the issues which this Court was obliged to address in these proceedings.

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192 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* unreported, Federal Court, 9 March 2000.

193 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* unreported, Federal Court, 9 March 2000 at 4-5 (emphasis added).

171 Secondly, the history of the matter indicates that the source of the mistake, in diverting attention from the original reasoning of the Full Court and disposing of part of the appeal to it concerning order 7, was the submissions which the Full Court received from ASIC. That submission introduced the confusion between *jurisdiction* and *power* which the Full Court had earlier accurately avoided. It led to the entry of orders which did not accord with the original reasoning of the Full Court[194]. At the very least, the intervention of this Court was necessary to correct that record. The declaration concerning the want of *jurisdiction* was not only erroneous. It was also inconsistent with the repeated statements in the Full Court's original reasons that the Federal Court had *jurisdiction* of various kinds[195]. What was lacking was *power* to make order 7.

172 Thirdly, what happened in this instance reveals, in a singularly vivid way, the affront to constitutional principle into which the provisions of the State Jurisdiction Act lead the courts of Australia[196]. That Act operates substantially on a hypothesis about the effects of the decision in *Wakim* and the failure of parts of the former cross-vesting schemes. It assumes that it is possible to create an "ineffective judgment" from a judgment of the Federal Court which has been rendered invalid by the decision in *Wakim*. It assumes that the constitutional defects of such a judgment can be readily and simply overcome by treating proceedings in the Federal Court as proceedings in the relevant State Supreme Court and continuing it from there.

173 As these proceedings illustrate, reality in constitutional matters is rarely so simple. The jurisdiction of the Federal Court over the matter before it may sometimes be disputable. Appeals concerning such jurisdiction may be brought. Bases other than the cross-vesting legislation may be propounded to sustain the jurisdiction of the Federal Court and its power to make orders. The purported creation of a parallel system of hearings and appeals in a State Supreme Court defies the exclusive regulation of such matters in one court system as contemplated by the Constitution. In my opinion, where a matter is before the Federal Court, including on appeal, it is the duty of that Court to dispose of such proceedings by determining its own jurisdiction and deciding every basis to support the jurisdiction and power that is propounded by the parties affected and is reasonably arguable. The Full Court failed to deal with the submissions of the

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194 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42.

195 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 48.

196 cf *Re Macks; Ex parte Saint* [2000] HCA 62 at [245]-[246].

Yandal Gold interests concerning the suggested invalidity of the State Jurisdiction Act. It is because the proper course was not followed by the Full Court in these proceedings that I joined in the orders of this Court returning the appeal to the Full Court. That Court is then freed from the erroneous declarations entered and the premature termination of the appeal.

174 If the matter were left there, however, I would myself be failing to address the arguments which the parties advanced before this Court with a view to clarifying the approach that should be taken once the appeal is returned to the Full Court. All of the parties were in agreement that the declarations made by the Full Court should be set aside. Edensor and the Yandal Gold interests so submitted because, they argued, the orders, as entered, did not give effect to the conclusions of the Full Court that order 7, as made by the primary judge, was defective for want of relevant *power* in the Federal Court (and not for want of *jurisdiction*). Additionally, the Yandal Gold interests so argued because they perceived the declarations as no more than a vehicle to attract the State Jurisdiction Act which, they contended, was constitutionally invalid in several respects.

175 For its part, ASIC submitted that the declarations of the Full Court should be set aside because the Full Court's original reasoning was erroneous. According to ASIC, there was both *jurisdiction* and *power* to make order 7 in the terms used by the primary judge. ASIC supported this contention on a number of bases[197]. Because my reasoning on these points substantially confirms the approach which the Full Court took in its original reasons[198], and amounts to a minority viewpoint in this Court, I am obliged to explain that reasoning.

176 The difference between my view and that of the majority in this Court is important because it concerns the power of the Federal Court to make order 7. In my opinion, there was no such *power*. The Full Court was correct to so conclude. There was no power to make such an order under, or by reference to, ss 58AA, 737 or 739 of the Corporations Law. There was no power to do so pursuant to s 79 of the *Judiciary Act*. Nor did the power exist under the general powers of the Federal Court to grant relief in respect of a matter otherwise within its jurisdiction[199].

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197 Federal Court Act, ss 19, 20, 21, 22, 24; *Judiciary Act*, s 79.

198 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42.

199 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 50-51.

The Corporations Law gave no power to make order 7

177 It is important to approach the purpose and meaning of the Corporations Law keeping in mind that it was intended, at the time relevant to these proceedings, to take full advantage of the then cross-vesting legislation. Under that legislation, it was believed to be constitutionally possible for a Parliament of a State, with the concurrence of the Federal Parliament, to confer the jurisdiction of the State upon federal courts. *Wakim* destroyed that belief. But it did not expunge the historical fact which explains, and obviously affected, the terms in which the Corporations Law is expressed. Nor did it erase the way in which it was anticipated that the laws of the State concerning corporations would operate. Clearly enough, the assumed foundation for the primary judge's action in making order 7 was the combined operation of ss 737 and 739 of the Corporations Law, read together with s 58AA.

178 Put shortly, s 737 of the Corporations Law empowers orders to be made where a person is found to have acquired shares in a company in contravention of s 615 of the Corporations Law. But the power so granted is not at large. Section 737 purports to confer power to make an order or orders "as [the Court] thinks just", including a "remedial order". That power is conferred upon "the Court, on the application of [ASIC], the company, a member of the company or the person from whom the shares were acquired". Thus, the venue of the proceedings is identified. So is the limited class of applicants who may initiate such proceedings. The latter classification presents no problem in this case. Although the applicable law in question was a State law, there is no difficulty in the conferral by such a law upon a body such as ASIC of State functions and powers, so long as this was done with the consent of the Federal Parliament[200]. Such consent was indeed given in the ASIC Act which provided that ASIC "has any functions and powers that are expressed to be conferred on it by a national scheme law of another jurisdiction"[201]. Accordingly, no constitutional difficulty arose, as such, in relation to ASIC's application.

179 However, it is to be noticed that the "Court" referred to in s 737 of the Corporations Law appears in upper case in that section. The only venue for such an application by ASIC is the "Court", as defined. On the face of things, this is a deliberate choice. The powers afforded by s 737 are large and novel. They are an integral part of a national scheme law designed to afford redress, as the

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200 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 579-580; *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 127-131; *Gould v Brown* (1998) 193 CLR 346 at 381-382 [20]; *Wakim* (1999) 198 CLR 511 at 604-606 [197]-[201].

201 ASIC Act, s 11(7).

heading of the section states, "where prohibited acquisitions take place". The section is therefore to be read in a way that respects the particularity of the enactment, both as to the venue and the qualifying applicants.

180 Equally, attention needs to be paid to the provisions of s 739 of the Corporations Law. The heading to that section describes it as one which permits orders to be made "to protect rights under takeover schemes or announcements". Section 739(1)(b) is detailed and particular and confines the relief provided to a case where "an application for an order under this section is made to the Court by [ASIC], the offeror, the target company or a person who holds shares in the target company". The provision of relief is conditional upon the satisfaction of the "Court" that the provisions of Ch 6 have been contravened. The only body authorised by law to make orders as it "thinks necessary or desirable to protect the interests of a person affected by the takeover scheme or takeover announcement" under s 739(1) is the "Court".

181 The orders that may be made are expressed in extremely wide terms. They include the making of "a remedial order"[202]. Order 7 was obviously made by the primary judge as a judge of the Federal Court. It was made after proceedings had been commenced and finalised on the application of ASIC to rectify a contravention of s 615 of the Corporations Law. Order 7 was, in its ambit and purpose, a "remedial order" as contemplated by s 613 of the Corporations Law[203].

182 The question thus becomes whether, in law, the primary judge enjoyed the power to make that order. To answer this question, it is necessary to consider the definition afforded by the Corporations Law of the meaning of the "Court" where that word is used in upper case. That definition appears in s 58AA which is set out in full in other reasons[204]. I confine myself to repeating the relevant provisions of sub-s (1) of that section which provide that, subject to sub-s (3):

> "in this Law:
>
> '**court**' means any court when exercising the jurisdiction of this jurisdiction;
>
> '**Court**' means any of the following courts when exercising the jurisdiction of this jurisdiction:

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202 Corporations Law, s 739(3)(c).

203 See esp s 613(1)(b).

204 Reasons of McHugh J at [112].

(a) the Federal Court;

(b) the Supreme Court of this or any other jurisdiction".

183 To reinforce the significance of the use of the word "Court" in upper case, sub-s (2) of s 58AA provides that proceedings in relation to a matter under the Corporations Law may be brought in any court, except where there is "a clear expression of a contrary intention (for example, by use of the expression 'the Court')", and subject to Pt 9 of each of the Acts that together constitute the Corporations Acts of the Commonwealth, the States and the Northern Territory[205]. By sub-s (3) of s 58AA, it is provided that the jurisdiction that courts have in relation to matters "under this Law" is dealt with in Pt 9 of each of the Acts referred to in sub-s (2).

184 The result of these definition provisions is to make clear what in any case appeared on the face of ss 737 and 739 of the Corporations Law. The reference in those sections to the "Court" was not accidental or mistaken. It was a deliberate reference, relevantly, to identified courts "when exercising the jurisdiction of this jurisdiction"[206]. In the present proceedings, this meant the Federal Court and the Supreme Court of Victoria. Where the purpose of a provision of the Corporations Law was to permit proceedings to be brought in any court, this fact was indicated by the use of the word "court", in lower case. Section 58AA makes this absolutely plain.

185 In a flight of constructionist fancy, it was proposed that the only real reason for providing the definition that appears in s 58AA(1) might have been to ensure that proceedings, defined by reference to the "Court", were brought in a superior court of record and not in a District Court or Magistrate's Court. Such a purpose might help to explain why the specified Courts were chosen. But it does not expunge from the Corporations Law the names of the identified Courts which alone were to enjoy the stated jurisdiction and power.

186 The adjectival clause in s 58AA(1), qualifying "the Federal Court" and "the Supreme Court", was obviously deliberately chosen. The words "when exercising the jurisdiction of this jurisdiction" are awkward. But they represent the identification of the "Court" to which, alone, the power (relevantly) to make orders under ss 737 and 739 of the Corporations Law was afforded by the

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205 *Corporations Act* 1989 (Cth); *Corporations (New South Wales) Act* 1990 (NSW); *Corporations (Victoria) Act* 1990 (Vic); *Corporations (Queensland) Act* 1990 (Q); *Corporations (Western Australia) Act* 1990 (WA); *Corporations (South Australia) Act* 1990 (SA); *Corporations (Tasmania) Act* 1990 (Tas); *Corporations (Northern Territory) Act* 1990 (NT).

206 Corporations Law, s 58AA(1).

Victorian Parliament. At the time s 58AA was enacted, it was believed that it was constitutionally competent to that Parliament to confer jurisdiction and powers on the Federal Court to "exercis[e] the jurisdiction of this jurisdiction", that is, the jurisdiction of the State of Victoria. Clearly the "jurisdiction" referred to carried the ordinary legal meaning of the authority to decide a contested matter according to law[207]. What was referred to was not the authority in respect of or over a *geographical* area. It was the authority belonging to the *polity* of Victoria which it was the purpose of the Corporations Law to confer on the Federal Court and the Supreme Court.

187 Only this construction gives a sensible meaning to the qualifying phrase. Only this meaning is, in my respectful view, arguable in the context of a law enacted substantially in common form by the several legislatures of Australia which was envisaged to operate as part of the particular scheme of corporations cross-vesting. Only this interpretation accords with what, at the time of the enactment, was understood to be the constitutional right of the Victorian Parliament to confer "the jurisdiction of [its] jurisdiction" on the Federal Court[208].

188 Since *Wakim*, it is established that the purported conferral of State jurisdiction on the Federal Court is, and was, invalid and ineffective. The reference in s 58AA to "the Federal Court" must therefore now be treated as deleted by force of the decision in *Wakim*. But there is no reason for the other provisions of s 58AA(1), still less of the whole section, to fall. I agree that this Court should proceed on an assumption that a legislature, enacting such provisions, had the purpose that they should be valid and effective rather than invalid and ineffective[209]. The section therefore remains valid and effective in other respects and, in particular, in the specification of "the Supreme Court of this or any other jurisdiction" as included in the meaning of the "Court".

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207 *Lorenzo v Carey* (1921) 29 CLR 243 at 252; *Felton v Mulligan* (1971) 124 CLR 367 at 393; *Gould v Brown* (1998) 193 CLR 346 at 422 [120], 440-441 [178]; *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 at 589-590 [87]; *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510 at 523-524 [24]; cf *St Justins Properties Pty Ltd v Rule Holdings Pty Ltd* (1980) 40 FLR 282 at 284; *Parsons v Martin* (1984) 5 FCR 235 at 240-241; *Australian Health Insurance Association Ltd v Esso Australia Ltd* (1993) 41 FCR 450 at 459-460.

208 cf *Merribee Pastoral Industries Pty Ltd v Australia and New Zealand Banking Group Ltd* (1998) 193 CLR 502 at 513.

209 cf reasons of Gleeson CJ, Gaudron and Gummow JJ at [94]; *Residual Assco Group Ltd v Spalvins* (2000) 74 ALJR 1013 at 1020 [28]; 172 ALR 366 at 374-375.

189 It was suggested for ASIC that the reference to "the Federal Court" in s 58AA(1) should now be taken to include a reference to the Federal Court when exercising federal jurisdiction. However, I believe that this would constitute a complete rewriting of the section. It would not be merely surgery on s 58AA(1) designed to accommodate the decision in *Wakim*. It would involve the effective deletion from the section of the adjectival phrase "when exercising the jurisdiction of this jurisdiction". It would also amount to a rewriting of the legal history against which the definition was adopted in the first place[210]. Reading the reference to the Federal Court in such a way would ignore the language and purpose of s 58AA. It is not, as such, a substantive provision that itself confers jurisdiction on the Federal Court. It is no more than it appears to be – the provision of definitions for words used throughout the Corporations Law including, relevantly, the "Court" when it is used in upper case in ss 737 and 739.

190 I accept that the residual reference in the definition of the "Court" to "the Supreme Court of this or any other jurisdiction" when "exercising the jurisdiction of this jurisdiction" presents additional and different difficulties to which attention does not appear to have been given by the drafter. At the very least, there are difficulties where, as ss 737 and 739 contemplate, one of the applicants invoking the jurisdiction of the Supreme Court may be (as here) ASIC. Assuming, as I would be prepared to hold, that ASIC is for constitutional and statutory purposes "the Commonwealth" or "a person suing ... on behalf of the Commonwealth"[211], in such a case the Supreme Court would not be "exercising the jurisdiction of this jurisdiction", that is, of Victoria. Where ASIC is the applicant, the Supreme Court would be exercising federal jurisdiction. This point appears to have been overlooked by those who drafted s 58AA of the Corporations Law. The mysteries of federal jurisdiction are not always fully understood. If the drafters could make the error held to have occurred in *Wakim*,

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210 The Explanatory Memorandum to the Corporations Legislation Amendment Bill 1990 at [299] confirms this conclusion. It states: "The replacement definition [of Court] reflects the fact that jurisdiction under the Corporations Law will be jurisdiction under the Laws of the various States and the Northern Territory as well as the Commonwealth (and not simply Commonwealth jurisdiction)."

211 Constitution, s 75(iii). See also *Judiciary Act*, s 38(c); *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 362-363; *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 338-342; *Superannuation Fund Investment Trust v Commissioner of Stamps* (SA) (1979) 145 CLR 330 at 353-355; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 282-284; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 448; *Austral Pacific Group Ltd v Airservices Australia* (2000) 74 ALJR 1184 at 1187-1188 [10]; 173 ALR 619 at 622-623.

it is not entirely surprising that s 58AA should have fallen into a second error of the kind suggested.

191 However, the answer to this defect cannot be to ignore, or to revise the meaning of, the phrase which qualifies the specified courts and permits them to act only "when exercising the jurisdiction of this jurisdiction". That was a qualification which the Victorian Parliament was fully entitled to impose. It does not render the definition wholly inapplicable even in respect of applications under ss 737 and 739 of the Corporations Law[212]. Courts can perform modest repairs to legislation in such cases. But they are not authorised to redraft statutory provisions, particularly where the suggested redraft would produce a definition of the "Court" completely different from that which was expressly provided for. That power belongs only to the electors' representatives in Parliament.

192 The result of this analysis is that the Full Court was correct in its initial resolution of the Corporations Law issue. In so far as order 7 depended on ss 737 and 739 of the Corporations Law, those sections were only available, as a matter of power, in the "Court". That word, relevant to an application by ASIC, was confined by the original definition in s 58AA to "the Federal Court". Moreover, it was confined to that Court "when exercising the jurisdiction of [Victoria]". As, following *Wakim*, the Federal Court cannot exercise the jurisdiction of Victoria, whether under the Corporations Law or otherwise, the remedies provided by ss 737 and 739 of the Law were unavailable to ASIC.

193 The foregoing is obviously an unintended result; but so were the outcome and consequences of *Wakim*. In helping to repair the unfortunate results of *Wakim*, this Court should not, in my respectful view, stretch the relatively obvious and clear language of State legislation so as to twist it into service that it was never enacted to perform. My conclusion does not follow, as such, from the lack of *jurisdiction* of the Federal Court in respect of the parties and the matter which they brought to that Court. It follows rather from the constraints on the grant of *power* to the Federal Court in ss 737 and 739. The Federal Court was not entitled to make order 7 unless some source of power outside, and additional to, the Corporations Law could be invoked.

Section 79 of the *Judiciary Act* gave no power to make order 7

194 *Provisions of s 79 of the Judiciary Act*: Against the possibility of this conclusion, ASIC, the Commonwealth and a number of the intervening States propounded an alternative source of power for the Federal Court to make order 7.

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212 Thus the sections could apply where the application was brought by a specified non-federal applicant and not by ASIC.

It was submitted that ss 58AA, 737 and 739 of the Corporations Law were picked up and applied by the Federal Court, exercising federal jurisdiction, as a surrogate federal law. They would be classified, in the circumstances, as State laws applicable to the disposal of the case.

195 A number of points can be made about the language of s 79 of the *Judiciary Act*[213]. First, the "laws" which are to govern the exercise of federal jurisdiction are "[t]he laws of each State or Territory". It is now understood that (influenced by the constitutional arrangements for appeals to this Court[214]) the common law is Australia-wide and not peculiar to each State or Territory. Accordingly, the "laws" referred to in s 79 are laws made by, or under, legislation. This construction is reinforced by the terms of s 80 of the *Judiciary Act*.

196 Secondly, such laws as are declared "binding on all Courts exercising federal jurisdiction" are only the "laws of each State or Territory". They are not an amalgam of such laws created by inventive judicial redrafting[215]. At least, they are not where the product of such redrafting would be a hybrid that does not truly answer to the description of "laws of each State or Territory"[216].

197 Thirdly, the need for substantial identity between the "laws" that are binding and the "laws of each State or Territory" propounded is clear from the language and purpose of the section. What is contemplated by this enactment of Federal Parliament is a virtually automatic application, in federal jurisdiction, of laws as made by a State or Territory with their meaning unchanged[217]. Much clearer language would be required to permit significant judicial reformulation of such "laws". Any substantial reformulation would clearly fall outside the function of courts exercising federal jurisdiction. Allowing for the proper scope for interpretation and development of the law by such courts, they are not, by the

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213 The terms of the section are set out in the reasons of Gleeson CJ, Gaudron and Gummow JJ at [57]; reasons of McHugh J at [129].

214 Constitution, s 73. The position for appeals from Territory courts is anomalous: see *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR 1324 at 1349-1354 [123]-[143], esp [136]-[137]; 165 ALR 171 at 205-212.

215 *Pedersen v Young* (1964) 110 CLR 162 at 165.

216 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 556; *Austral Pacific Group Ltd v Airservices Australia* (2000) 74 ALJR 1184 at 1188 [13]; 173 ALR 619 at 624.

217 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 94-95; cf *Pedersen v Young* (1964) 110 CLR 162 at 168.

Constitution or the section, empowered to make new "laws". As reformulated, the "adapted" laws are made by the judges not by, or under, legislation of the States or Territories. This is fundamentally incompatible with the postulates of Ch III of the Constitution which *Wakim* was explained as defending.

198 Fourthly, the particular reference to "the laws relating to procedure, evidence, and the competency of witnesses" is not an exhaustive specification of the State and Territory laws to which s 79 applies. Those sub-categories are included in the more general description. Nevertheless, the mention of laws of an adjectival kind indicates the type of laws of each State or Territory that it was thought would attract the requirements of s 79. Because courts in Australia may exercise federal jurisdiction in a variety of circumstances that may have little to do with the factual and legal merits of the parties' dispute[218], care in the application of s 79 is necessary if capricious results are to be avoided[219].

199 Fifthly, an additional reason for such care is the need to avoid the uncertainties which an over-expansive application of s 79 would occasion. The scope of s 79 has been described as a "tangled and technical"[220] subject. This Court should not needlessly make it more so. Where courts are exercising federal jurisdiction, the Federal Parliament could ordinarily, by express law, provide its own legislation in respect of the law to govern the exercise of such federal jurisdiction. The mischief of extending s 79 beyond obvious cases of State or Territory laws, apt for immediate application, is that it creates a most significant uncertainty about the law by which individuals and corporations are to govern their affairs. It may also, in particular cases, promote forum shopping, which recent authority of this Court has discouraged[221].

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218 eg where the Commonwealth or an emanation of the Commonwealth is a party (s 75(iii)); where it arises under the Constitution or involves its interpretation (s 76(i)); or where it arises under any laws made by the Parliament (s 76(ii)).

219 The application of s 79 of the *Judiciary Act* to substantive and not solely to procedural matters is raised in Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, Discussion Paper 64, (2000) at 446-447.

220 *Suehle v The Commonwealth* (1967) 116 CLR 353 at 357 per Windeyer J. For the position in the United States, see *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 at 587 [78]. Section 79 of the *Judiciary Act* is broader than s 34 of the *Judiciary Act* 1789 (US) 1 Stat 73, 92 (1789), now codified as amended at 28 USC §1652 (1994).

221 *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1119-1120 [53]; 172 ALR 625 at 640 where the point is made that in matters of federal jurisdiction, the question arising is not strictly one of choice between laws of competing

(Footnote continues on next page)

200 Sixthly, the key criterion for the operation of s 79 is found in the last words of the section. The laws of each State or Territory are only binding in "cases to which they are applicable". This somewhat opaque instruction expresses, rather than solves, the problem. Obviously, the law in question will not have been applied (to the extent that this is constitutionally permissible) by its express terms. If it had been, there would be no need for s 79 to reinforce the application. Thus, by its language, the section only applies where a measure of uncertainty exists. Considerations such as the foregoing help to explain why, where s 79 has been invoked, it is sometimes difficult to detect clear guidance for later cases.

201 *Three categories of courts picked up by s 79*: There are at least three categories of courts appearing in State and Territory laws which it is helpful to keep in mind when deciding whether such laws are picked up and applied to a "Court"[222] exercising federal jurisdiction:

1. *References to courts generally*: Sometimes the legislation of a State or Territory may be expressed in general terms, referring to a "court" in a way which makes straightforward the task of applying the law in question where a court of the State or Territory is exercising federal jurisdiction and there is no equivalent federal law on the subject. Such was the case in *Austral Pacific Group Ltd v Airservices Australia*[223]. One of the questions that arose in that appeal was whether s 7 of the *Law Reform Act* 1995 (Q) applied to the exercise by the Supreme Court of Queensland of federal jurisdiction in a case in which there was a dispute about contribution between tortfeasors. The section in question was facultative. It permitted "the court" to determine any contribution as was just and equitable. Although reference to "the court" in a Queensland statute would ordinarily attract the presumption that only a "court" of the State of Queensland was being referred to, this presumption was insufficient to render the general provision inapplicable in federal jurisdiction.

2. *Confined to particular State courts*: A more difficult problem is presented when, by the express provisions of the State or Territory law, or upon the proper construction of that law, it is limited in its application to the courts,

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jurisdictions but of identification of the applicable law in accordance with ss 79 or 80 of the *Judiciary Act*.

222 The "Court" referred to here appears in upper case in s 79 of the *Judiciary Act*.

223 (2000) 74 ALJR 1184; 173 ALR 619.

or a particular court, of the State or Territory concerned[224]. Because s 79 adopts the law of the State or Territory, made substantively for that jurisdiction and extends its operation into federal jurisdiction, some degree of adaptation is obviously contemplated. But a point will be reached, because of the language of the legislation in question, the nature of the powers conferred on the particular court, or the specialised character of that court, where it will be concluded that the State or Territory law in question is not "applicable".

This is what occurred in *Commissioner of Stamp Duties (NSW) v Owens [No 2]*[225]. In that case, this Court decided that s 6 of the *Suitors' Fund Act* 1951 (NSW) did not apply in this Court when it was exercising federal jurisdiction. This was so although the Act and the section were expressed in perfectly general terms, addressed to an appellate court, and permitted the appellate court to grant indemnity certificates where an appeal succeeded on a question of law. The State law was not picked up. The "function" assigned to State courts by s 6 of the State Act could not, so it was held, be imposed on federal courts[226].

Similarly, the conferral of a special power, confined by State law to a particular court, has constituted a reason for this Court to refuse to regard the State law in question as one that was "applicable" by virtue of s 79. In *Thomas v Ducret*[227], the issue was whether a special power conferred on the Magistrate's Court of Victoria (or a stipendiary magistrate in that State) to order, in default of payment of a fine, that an offender shall be imprisoned[228] could be picked up and applied to an offender convicted in Victoria by a judge of the Federal Court. This Court held that the Victorian law had "no application"[229] to the Federal Court. It was classified as special in its language. It was thus confined to the particular cases to which it was made applicable by its terms. There are many

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224 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 88.

225 (1953) 88 CLR 168, contrast *Huddart Parker Ltd v The Ship Mill Hill* (1950) 81 CLR 502. See also *Lady Carrington Steamship Co Ltd v The Commonwealth* (1921) 29 CLR 596; cf *Kruger v The Commonwealth* (1997) 190 CLR 1 at 140 per Gaudron J.

226 (1953) 88 CLR 168 at 170.

227 (1984) 153 CLR 506.

228 *Magistrates (Summary Proceedings) Act* 1975 (Vic), s 106.

229 *Thomas v Ducret* (1984) 153 CLR 506 at 512.

instances where similar decisions have been made in claims for relief under State laws pursuant to s 79[230].

Where a State law confers on a particular State court, and no other, the power to make an order which is a condition precedent to the efficacy of an agreement otherwise ineffective, s 79 does not modify the operation of the State law so as to permit an order of a federal court to be made capable of satisfying the condition precedent[231]. Thus s 79 does not authorise a federal court to do what a State law, in terms, prevents State courts from doing or what a State law, in terms, requires only to be done by a particular, identified State court. In all such cases, the State or Territory law concerned is treated as not "applicable".

3. *Specific reference to federal courts*: A third category is that which, uniquely, arises in the instant case. Here, the Corporations Law, displacing the ordinary rule of construction, was expressed to apply not only to the "Supreme Court of this ... jurisdiction", that is, the Supreme Court of Victoria[232]. It was also expressed to refer to the Supreme Court of "any other jurisdiction" and to the Federal Court, the Family Court and a State Family Court[233]. It is true that, following *Wakim*, the reference to the Federal Court must now be treated as invalid and ineffective. The Victorian Parliament had no legislative power to enact such a law. But the excision from the Corporations Law of any reference to the Federal Court does not alter the historical facts. Those facts remain to explain part of the Corporations Law as it formerly stood. They help to identify the purpose of the relevant provisions of the Corporations Law. Specifically, this assists a court, even now, to understand the intended operation of ss 737 and 739 of the Corporations Law. The purpose of the Victorian Parliament may have ultimately failed to secure its end. But the former legislative objective lingers on because it is imprinted on the template of ss 737 and 739 and expressed in the language of those sections. It is relevant when considering the attempt by ASIC to pick up ss 737 and 739

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230 *The Rochester Communications Group Pty Ltd v Adler* (1996) 65 FCR 572; *Turner v Official Trustee in Bankruptcy* (1999) 97 FCR 241; *Jeffcoat v Queensland Coal and Oil Shale Mining Industry (Superannuation) Ltd* unreported, Federal Court, 19 May 2000 at [22]; *Blacker v National Australia Bank Ltd* unreported, Federal Court, 25 May 2000 at [26].

231 *Smith v Smith* (1986) 161 CLR 217.

232 Corporations Law, s 58AA(1)(b).

233 Corporations Law, ss 58AA(1)(a), (b), (c) and (d).

of the Corporations Law and to apply those state laws, relying on s 79 of the *Judiciary Act*, in the Federal Court exercising federal jurisdiction.

202 *Invocation of s 79 fails*: In my opinion, in this instance, the invocation of s 79 of the *Judiciary Act* fails. To hold s 79 applicable in this case would be to ignore the high particularity by which the "Court" is defined in the Corporations Law.

203 First, the jurisdiction of Victoria is not engaged in a case, such as this, where the applicant is ASIC. In such a case, I would hold that the Federal Court is not exercising the "jurisdiction of this jurisdiction", that is, of Victoria, as defined in s 58AA of the Corporations Law. It is exercising federal jurisdiction. It must be doing so once it is accepted (as I would do) that ASIC is the Commonwealth or suing on its behalf[234]. There is thus no State law applicable to this application to be picked up and applied at all.

204 Secondly, assuming that this problem could be overcome by assigning to the phrase in s 58AA "when exercising the jurisdiction of this jurisdiction" a geographical rather than a political content (a possibility which I would deny), the basic obstacle to the invocation of s 79 of the *Judiciary Act* remains. The purpose of the provisions enacted by the Victorian Parliament was clearly to restrict the application of its law in the Federal Court to the single instance in which it (invalidly) so provided. This was when the Federal Court was exercising the jurisdiction of Victoria. The Victorian Parliament did not contemplate (indeed it explicitly denied) the facility of access to the Federal Court where that Court was exercising *federal* jurisdiction. In my opinion, this Court would have to overrule *Thomas v Ducret*[235], *Smith v Smith*[236], and many other decisions to pick up and apply the State law here in question in the face of such an explicit indication in that law of the particularity with which it was to be available in identified courts at the suit of specified parties. I would point out that the words of s 58AA of the Corporations Law are not "when exercising the jurisdiction *in* this jurisdiction". The preposition used is "*of*". The phrase qualifying the jurisdiction identifies the *polity* whose jurisdiction is invoked. It does not, as such, identify merely the *geography* in which such jurisdiction is exercised.

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234 Constitution, s 75(iii); *Judiciary Act*, s 39B(1); *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 232.

235 (1984) 153 CLR 506.

236 (1986) 161 CLR 217.

205 It follows that the attempt to resuscitate ss 737 and 739 of the Corporations Law by the use of s 79 of the *Judiciary Act* fails. To apply those sections would amount not to the relatively modest adaptation of a State law which s 79 contemplates. It would involve this Court redrawing the State law and doing so in a way quite alien to the law as enacted by the elected Victorian Parliament. I respectfully regard such judicial surgery as unwarranted by the terms of s 79 of the *Judiciary Act*. Furthermore, such surgery would exceed the judicial function and intrude upon the lawmaking function which, in this case, is reserved by the Constitution to the Victorian Parliament. It would, in my opinion, amount to the triumph of remedial imperatives over the plain language and clear purpose of the legislation. To overcome the consequences of *Wakim*, large initiatives are indeed needed. But pushing s 79 of the *Judiciary Act* into excessive overreach is not one of them.

There is no other basis to support order 7

206 None of the other bases propounded by ASIC supports order 7. Support cannot be found in ss 64 or 80 of the *Judiciary Act*. Section 64 is inapplicable chiefly because there is no equivalent, in a suit between subject and subject, to the specialised, statutory relief which ASIC, accepting it to be the Commonwealth, sought in these proceedings by the combined operations of ss 58AA, 737 and 739 of the Corporations Law. So far as s 80 is concerned, there is no relevant common law which would sustain the exceptional terms of order 7.

207 Nor do I consider that the general powers of the Federal Court, to provide declarations of legal right or to grant injunctions[237], support order 7 in the terms made. So far as s 22 of the Federal Court Act is concerned, order 7 cannot be supported by that provision. I agree in the reasons given by the Full Court in this regard[238]. The difficulty for all of these arguments is found in the exceptional character of the powers contained in ss 737 and 739 of the Corporations Law. To address the complexity, urgency and magnitude of the problems which authorised courts may face in circumstances of contested takeover schemes, where it is judged essential to prohibit acquisitions from taking place and to protect the rights of the many persons who may be affected, it was inevitable that the legislative grant of power would travel far beyond the boundaries usual to remedies hitherto fashioned by courts of law out of their general grants of power. So it is in the case of ss 737 and 739.

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237 Federal Court Act, ss 21, 23.

238 *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission* (1999) 95 FCR 42 at 50-51.

208 The Full Court was therefore correct to conclude that the power to make order 7, if it was to be found at all, had to be found under the Corporations Law. Unfortunately, in my view, in the aftermath of *Wakim*, the legislative provisions propounded fall short of providing the necessary power. There being no other way of circumventing this conclusion, order 7 was, in my view, invalid. Edensor and the Yandal Gold interests were entitled, in the Full Court, to relief on that footing. They were entitled to such relief, not on the basis that the Federal Court lacked *jurisdiction* over the parties and the matter but on the basis that it lacked *power* to make order 7 as it did.

Conclusion: concurrence and variation of orders

209 It follows that, on my approach, it was necessary for this Court to set aside the two declarations made by the Full Court in the terms in which those declarations were expressed. That is why I joined in the orders of this Court to that end. I also joined in this Court's order that the Full Court should proceed with the hearing and determination of the appeal to it by Edensor on the merits raised by the appeal. To give effect to these conclusions, I concurred in all of the orders announced by this Court, except that order providing that Edensor and the Yandal Gold interests should pay the costs of the proceedings in this Court.

210 Once the Full Court severed order 7 for separate consideration, it was basically correct, so far as it went, in its original reasoning which addressed the power of the Federal Court to make that order. It was then misled into formalising its record in terms of erroneous declarations of a want of jurisdiction so as to facilitate the application of the State Jurisdiction Act. But this occurred because of the submissions of ASIC. It occurred in the face of the contrary submissions of the opposing parties.

211 In logic, and in law, the original reasoning of the Full Court required it to set aside order 7. The Full Court, if minded to sever the challenge to that order from the other grounds of appeal (still undetermined) should have afforded appropriate relief. It should have relisted the appeal for determination of such of the remaining grounds of appeal as raised questions within its jurisdiction over the parties and the matter. Clearly, to the extent that the Federal Court has jurisdiction on any basis, including the jurisdiction to determine its own jurisdiction, it must fully discharge that jurisdiction once it is invoked. This would be so even if the State Jurisdiction Act in its various provisions dealing with "ineffective judgment[s]"[239] were constitutionally valid. Because, in my opinion, it is not[240], the duty to exercise whatever jurisdiction the Federal Court

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239 State Jurisdiction Act, ss 3, 6-8, 10.

240 *Re Macks; Ex parte Saint* [2000] HCA 62 at [307]-[310].

has is paramount, unqualified and necessary. It should be performed with eyes firmly fixed on the Constitution, the Federal Court Act and other federal law. It should be discharged without undue attention to the siren song of the State Jurisdiction Act that, on this occasion, seems to have diverted the Full Court from completing its functions by making orders consistent with its original reasoning.

Orders

212 On 30 August 2000, the Court announced its orders. To give effect to my conclusions, I joined in all of the orders save order 4. In my opinion, that order should have read: The appellant, Australian Securities and Investments Commission, to pay the respondents' costs.

213 HAYNE AND CALLINAN JJ. The facts and circumstances giving rise to these matters are set out in the reasons of Gleeson CJ, Gaudron and Gummow JJ and we need not repeat them. We agree generally with the reasons of Gleeson CJ, Gaudron and Gummow JJ. We write separately only because there are some matters dealt with in their Honours' reasons about which we need reach, and express, no concluded view.

214 The course which this litigation has taken suggests that insufficient attention has been given to the fact that the Federal Court of Australia had jurisdiction in the matter. That the Federal Court did have jurisdiction in the matter was not disputed. Nor was it doubted that it was exercising federal jurisdiction. The consequences of this were not, however, explored. Once a court is exercising federal jurisdiction, the provisions of the *Judiciary Act* 1903 (Cth), which provide for the application of relevant State and Territory laws, must be considered. In particular, reference must be made to s 79 and its provision that "[t]he laws of each State or Territory … shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable".

215 It is as well to examine how the Federal Court had jurisdiction (necessarily federal) because this throws light on the issues of statutory construction which lie at the heart of these proceedings. For the reasons given by Gleeson CJ, Gaudron and Gummow JJ, the Australian Securities and Investments Commission ("ASIC") is, for the purposes of both s 75 of the Constitution and s 39B(1A)(a) of the *Judiciary Act*, "the Commonwealth". It follows that, because ASIC sought a declaration and an interlocutory injunction, s 39B(1A)(a) of the *Judiciary Act* gave the Federal Court jurisdiction in the matter. (The argument that either s 49 or s 56 of the *Corporations Act* 1989 (Cth) limited the operation of s 39B(1A) of the *Judiciary Act* in this case should be rejected.) The Federal Court had jurisdiction to quell the whole of the controversy between the parties. It is, therefore, unnecessary to say whether a claim only for statutory relief of the kind then provided for by ss 737 and 739 of the Corporations Law would provide a basis for jurisdiction under either s 75(v) or s 39B(1A)(a).

216 There is another path which leads to the conclusion that the Federal Court had jurisdiction. The subject matter of the controversy included claims under the *Trade Practices Act* 1974 (Cth) and the *Australian Securities and Investments Commission Act* 1989 (Cth). As the Full Court of the Federal Court pointed out, this meant that the *whole* matter was within its jurisdiction.

217 Central to the contentions of the parties who submitted that the primary judge had no power to make order 7 was the proposition that, despite the fact that the Federal Court had jurisdiction, the Corporations Law of Victoria did not give it authority to make orders under ss 737 and 739 of that Law. This proposition

was said to follow from the use of the expression "when exercising the jurisdiction of this jurisdiction" in the definition of "Court" in s 58AA. As Gleeson CJ, Gaudron and Gummow JJ point out, however, s 58AA does not seek to distinguish between federal and non-federal jurisdiction. It is a provision directed to distinguishing between provisions of the Corporations Law permitting curial relief which all courts in the judicial hierarchy of the State may grant and those provisions permitting relief which only superior courts in that hierarchy may grant.

218 That s 58AA is not concerned to treat federal and non-federal jurisdiction differently is evident once it is remembered that federal jurisdiction can be, and often is, attracted because of the identity of one or more of the parties. In matters arising under the Corporations Law of a State, federal jurisdiction will often be attracted, and exercised by a State court or a federal court, because ASIC is the Commonwealth. As Gleeson CJ, Gaudron and Gummow JJ point out, reference to "accrued jurisdiction" in a case where federal jurisdiction is attracted because of the identity of a party may distract attention from the central question, which is to identify the relevant "matter": the controversy which is to be quelled. As their Honours say, ordinarily, questions of abuse of process, *forum non conveniens* and the like aside, jurisdiction conferred upon a court is to be exercised. References to "accrued jurisdiction" being "discretionary" are apt to mislead[241].

219 The questions which would arise if a State attempted to preclude courts exercising federal jurisdiction from making particular kinds of order do not arise. They do not arise because the Corporations Law did not seek to limit the powers of courts exercising federal jurisdiction. The only questions are, therefore, whether and how ss 737 and 739 can be invoked by a court exercising federal jurisdiction. It is sufficient for present purposes to say that, for the reasons given by Gleeson CJ, Gaudron and Gummow JJ, s 79 of the *Judiciary Act* operated to pick up ss 737 and 739. Even if those sections had been cast in terms which spoke only of the courts of the State granting remedies under them, it would not mean that they were not, in the words of s 79, "applicable" to the litigation between these parties in the Federal Court[242]. We need not say whether this conclusion can be derived directly from the operation of Ch III of the Constitution. Nor do we need to consider the comparison that may be drawn with United States authorities.

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241 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 588 [149] per Gummow and Hayne JJ.

242 *Austral Pacific Group Ltd v Airservices Australia* (2000) 74 ALJR 1184 at 1188 [13]; 173 ALR 619 at 624.

220 The definition of "Court" in s 58AA, which must be read into ss 737 and 739, does refer to the Federal Court. That explicit reference to the Federal Court does not deny the operation of s 79 of the *Judiciary Act*. It does not make ss 737 and 739 any less applicable to this litigation than they would have been had s 58AA referred only to State courts.

221 It is for these reasons that we joined in the orders which were made.