HIGH COURT OF AUSTRALIA

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

MOBIL OIL AUSTRALIA PTY LTD PLAINTIFF

AND

THE STATE OF VICTORIA & ANOR DEFENDANTS

Mobil Oil Australia Pty Ltd v Victoria [2002] HCA 27
26 June 2002
M141/2000

ORDER

Each of the demurrers to the amended statement of claim is allowed with costs.

Representation:

D F Jackson QC with G R Kennett for the plaintiff (instructed by Blake Dawson Waldron)

D Graham QC, Solicitor-General for the State of Victoria with C M Kenny for the first defendant (instructed by Victorian Government Solicitor)

J B R Beach QC with B F Quinn and L M Nichols for the second defendant (instructed by Slater & Gordon)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with K L Eastman and G A Hill intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

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

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

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

CATCHWORDS

Mobil Oil Australia Pty Ltd v Victoria

Practice and procedure – Group proceedings – Defendant to group proceeding manufactured defective aviation fuel – Group proceeding commenced against manufacturer alleging breach of contract and negligence – Proceeding arose out of the same or similar circumstances and gave rise to a substantial common question of law or fact – Originating process served on manufacturer within the jurisdiction.

Constitutional law – State – Legislative powers of State parliament – Whether statute providing for group proceedings to bind unaware claimants in other States beyond the legislative power of a State parliament – Whether statute offends the territorial limitations of a State parliament.

Constitutional law – Federal – Whether State group proceedings involve the impermissible exercise of the judicial power of the Commonwealth – Whether judgment given in a group proceeding gives rise to a "judgment, decree, order or sentence" within the meaning of s 73 of the Constitution – Whether group proceedings otherwise incompatible with Ch III of the Constitution.

Constitution, s 73.
Constitution Act 1975 (Vic), ss 16, 75.
Courts and Tribunals Legislation (Miscellaneous Amendments) Act 2000 (Vic), s 13.
Supreme Court Act 1986 (Vic), Pt 4A.

1 GLEESON CJ. Demurrers by each of two defendants to an Amended Statement of Claim were set down for hearing before a Full Court. The plaintiff, Mobil Oil Australia Pty Ltd ("Mobil"), commenced an action in this Court seeking a declaration that the provisions of Pt 4A of the *Supreme Court Act* 1986 (Vic), which were inserted by the *Courts and Tribunals Legislation (Miscellaneous Amendments) Act* 2000 (Vic), are beyond the legislative power of the Parliament of Victoria and are invalid. Two grounds of invalidity were advanced. They were that the provisions:

(a) exceed the territorial limits on the legislative power of the State arising under the Constitution or otherwise; and

(b) are inconsistent with the requirements for the exercise of judicial power by the Supreme Court arising under the Constitution.

2 The essential ground of each demurrer is that Pt 4A is within the legislative power of the Victorian Parliament and is valid.

3 Part 4A provides for the commencement and conduct of group proceedings. Mobil, a company incorporated in Victoria, is the defendant in group proceedings commenced in the Supreme Court of Victoria by Schutt Flying Academy (Australia) Pty Ltd ("Schutt"). The second defendant in the action in this Court was later substituted for Schutt as plaintiff in the group proceedings. The group proceedings arose out of the manufacture in Victoria, by Mobil, of allegedly contaminated aviation fuel, and the subsequent supply of that product to consumers of aviation fuel in Victoria and in other Australian States and Territories. The case is based on allegations of breach of contract and negligence. The contracts of supply were made in various States, and reliance is placed upon terms implied by the Sale of Goods Acts of a number of States. The plaintiff in the group proceedings sues as representative of all the persons to whom contaminated aviation fuel was supplied.

4 The provisions of Pt 4A are substantially the same as those previously found in O 18A of the Supreme Court (General Civil Procedure) Rules 1996 (Vic), which had been subject to unsuccessful challenge in *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd*[1]. They are also generally along the lines of Pt IVA of the *Federal Court of Australia Act* 1976 (Cth), which was considered by this Court in *Wong v Silkfield Pty Ltd*[2].

5 The features of Pt 4A to which Mobil directs particular attention may be summarised as follows:

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1 (2000) 1 VR 545.

2 (1999) 199 CLR 255.

1. A person does not need to give his or her consent in order to be a group member.

2. It is not necessary for the originating process to have, or specify the number of, group members. Part 4A envisages group proceedings being conducted in which not all members of the group have been identified, and even proceedings in which the number of group members is not known.

3. Section 33ZE suspends the limitation period in relation to each claim of a group member to which the group proceeding relates. Time begins to run again if the group member "opts out" or if the group proceeding is determined without disposing of that claim.

4. A group member may "opt out" of a group proceeding.

5. Under s 33KA(1) the Court has a discretion to order that a person cease to be a group member, or not become a group member. That discretion arises when the Court is of the opinion that either the person does not have a sufficient connection with Australia to justify inclusion as a group member or for any other reason it is just and expedient that the person not be or become a group member. This confirms that connection with Victoria is not a test for inclusion in the group and that the location of persons outside Victoria, or even outside Australia, is not necessarily a barrier to their inclusion.

6. The Court also has a discretionary power to order that a proceeding no longer continue as a group proceeding under Pt 4A.

7. The Court is given power to deal with a situation in which resolution of the common issues will not determine all claims, including by establishing sub-groups, giving directions for the determination of remaining questions, allowing an individual group member to participate, and giving directions for the commencement of further proceedings.

8. The Court has power to substitute another group member for the plaintiff if it appears that the plaintiff is not able adequately to represent the interests of the group members. This is not a mechanism for the plaintiff to be replaced on the application of group members who disagree with the way the case is being run.

9. The judgment in a group proceeding may determine questions of law and fact, make a declaration of liability, and grant equitable

relief, damages or other monetary relief. Damages may be awarded as specific amounts to individuals or in an aggregate amount.

10. The judgment must identify the group members who will be affected by it, and binds all persons who are such group members at the time the judgment is given.

6 In order to put the matter into perspective, it is necessary to bear in mind that there is no novelty in the conferring of jurisdiction to hear and determine actions or suits in which a plaintiff or a defendant is appointed to represent others who are not parties to the proceedings. The history of representative actions, and the considerations of justice and convenience which they serve, were matters examined by this Court in *Carnie v Esanda Finance Corporation Ltd*[3]. The purpose of more modern provisions, of the kind found in Pt IVA of the *Federal Court of Australia Act*, was explained in *Wong v Silkfield Pty Ltd*[4]. Subject to the capacity of the court managing representative proceedings to control the proceedings in such a manner as to ensure fairness, a capacity usually conferred by wide discretionary powers in relation to the conduct of the action, persons represented in such proceedings were not necessarily residents of the local territory in which the proceedings were taken; and they were not even necessarily aware of the proceedings[5].

Extra-territorial reach

7 Mobil contends that Pt 4A represents a constitutionally impermissible attempt to confer upon the Supreme Court of Victoria "a national jurisdiction in group proceedings". Group members may be persons who are non-residents of Victoria, whose claims against Mobil arise from transactions or events outside Victoria, and who have not chosen Victoria as the forum for resolution of those claims in any sense other than that they have failed to "opt out" of the group proceedings, perhaps without knowing that the proceedings were on foot. As to group members who are residents of Victoria, Mobil appears to accept that the fact of such residence would empower the Parliament of Victoria to enact provisions of the kind found in Pt 4A if they were confined to Victorian residents, even though such residents may not know of the group proceedings. But the application of such provisions to group members resident in other States

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3 (1995) 182 CLR 398 at 415-417 per Toohey and Gaudron JJ, 427-429 per McHugh J.

4 (1999) 199 CLR 255.

5 As to the practice concerning representative orders in proceedings in Chancery, see *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34 at 74-79 per Starke J.

or Territories is said to exceed legislative power. The position of group members who may reside outside Australia was not explored.

8 There were two strands, different but related, to the argument advanced on behalf of Mobil. The first concerns territorial limits upon the law-making capacity of State Parliaments. The second concerns implications from the federal structure of the Australian Constitution.

9 The history, rationale and scope of territorial limitations on the legislative competence of State Parliaments was explained in *Union Steamship Co of Australia Pty Ltd v King*[6]. What was there described as a "new dispensation" in s 2(1) of the *Australia Act* 1986 (Cth)[7] was said perhaps to do no more than recognize what had already resulted from judicial decisions. Typical of such decisions was that of Gibbs J in *Pearce v Florenca*[8], who pointed out that a power to make laws for the peace, order and good government of a State is not limited to laws which operate or apply only to persons or events within the State. Such a power requires a relevant territorial connection between the law and the State, but the test of relevance is to be applied liberally, and even a remote or general connection will suffice.

10 The *Constitution Act* 1975 (Vic), in s 16, provides that the Parliament of Victoria "shall have power to make laws in and for Victoria in all cases whatsoever". That power, although differently expressed, is not different in substance from the corresponding powers conferred upon other State legislatures. The *Australia Act* 1986 (Cth), in s 2(1), provides that each State has "full power to make laws for the peace, order and good government of that State that have extra-territorial operation". The territorial connection between Pt 4A and Victoria is neither remote nor general. It is direct and specific. It concerns the jurisdiction of the Supreme Court of Victoria. It only operates in relation to claims in respect of which the Supreme Court otherwise has jurisdiction. By s 85(1) of the *Constitution Act* 1975 (Vic) the Supreme Court "shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction". Historically, the primary basis of the Court's jurisdiction in an action *in personam* was service of originating process on a defendant within the jurisdiction (such as Mobil). The *Service and Execution of Process Act* 1992 (Cth) extended the area within which service on a defendant may be effected, and there are rules of court relating to substituted service and service outside the

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6 (1988) 166 CLR 1.

7 See also *Australia Act* 1986 (UK), s 2(1).

8 (1976) 135 CLR 507 at 517-518.

jurisdiction. Subject to immaterial exceptions, the rules relating to the amenability of a defendant to the jurisdiction of the Supreme Court in group proceedings are the same as those applicable in any other proceedings, including proceedings commenced as representative actions under the old rules. No one could fairly describe the jurisdiction involved in the present case, where product liability claims are brought against a company incorporated in Victoria, in respect of goods manufactured in Victoria, as long-arm jurisdiction. But, in any event, Pt 4A takes the jurisdiction of the Supreme Court of Victoria, in terms of the amenability to process of a defendant, as it finds it.

11 The focus of attention in the argument of Mobil is not the defendant, but the group members. That inverts the usual principle as to the jurisdiction of a court, which is the capacity to exercise power over a defendant. In *Laurie v Carroll*[9], Dixon CJ, Williams and Webb JJ quoted the statement of Viscount Haldane[10] that "[t]he root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and that therefore whoever is served with the King's writ, and can be compelled consequently to submit to the decree made, is a person over whom the Courts have jurisdiction".

12 The legislative policy underlying group proceedings may be open to legitimate difference of opinion, but the primary object is clear enough. It is to avoid multiplicity of actions, and to provide a means by which, where there are many people who have claims against a defendant, those claims may be dealt with, consistently with the requirements of fairness and individual justice, together. The discretionary powers conferred upon the Court in dealing with a group proceeding are consistent with that objective. To point to the theoretical possibility that in a particular case those powers might not be exercised wisely, or might operate unfairly, is not to deny the existence of the legislative power to establish such a regime. Possible abuse of legislative power is not a reason for denying the existence of the power[11]. And possible misuse of the discretionary powers built into the scheme of Pt 4A does not negate the plain territorial connection between that scheme and Victoria. The litigation against Mobil illustrates the nature of the interests of Victoria in legislating for group proceedings. The Supreme Court of Victoria is a natural forum for claims against Mobil arising out of the manufacture in Victoria of contaminated aviation fuel, even though some of the fuel was supplied in other States and Territories. If

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9 (1958) 98 CLR 310 at 323.

10 *John Russell & Co Ltd v Cayzer, Irvine & Co Ltd* [1916] 2 AC 298 at 302.

11 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 151.

every person who suffered harm as a result of buying or using such fuel were to bring a separate action in the Supreme Court, then in each such action there would be litigation, and re-litigation, of common issues of fact and law. The State has an interest in preventing this, so far as that can be done consistently with the requirements of justice to all parties. The procedures of the Federal Court of Australia provided a precedent for an acceptable solution. To complain that what is involved is an attempt to confer on the Supreme Court of Victoria a "national jurisdiction" is merely to say that its existing jurisdiction has been adapted to permit group proceedings of the kind available in the Federal Court. That is hardly a disturbing prospect, especially when regard is had to the expansion of jurisdiction that had previously occurred by reason of the *Service and Execution of Process Act*, and the cross-vesting legislation in its operation between State and Territory courts.

13 The second strand of Mobil's argument invokes an established, although somewhat vague and ill-defined, qualification to the general principle concerning the extra-territorial legislative competence of State Parliaments. That principle is subject to the Constitution, and "cannot affect territorial limitations of State legislative powers inter se which are expressed or implied in the Constitution"[12]. It is argued that there is a territorial limitation of State legislative powers implied from the federal structure of the Constitution. So much was expressly acknowledged by Brennan CJ, Dawson, Toohey and Gaudron JJ in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*[13].

14 In *Melbourne Corporation v The Commonwealth*[14], Dixon J said:

> "The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities. Among them it distributes powers of governing the country. The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them. The Constitution on this footing proceeds to distribute the power between State and Commonwealth and to provide for their inter-relation, tasks performed with reference to the legislative powers chiefly by ss 51, 52, 107, 108 and 109."

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12 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14.

13 (1996) 189 CLR 253 at 271.

14 (1947) 74 CLR 31 at 82.

15 Legislative, executive, and judicial powers are exercised by different governmental authorities in different localities, or in respect of different purposes in the same locality[15]. State legislative, executive and judicial power is territorially based; in the case of legislative power, the requirement of territorial connection is applied in accordance with the principle earlier discussed. The necessary implications which are involved in the federal structure of the Australian Constitution are influenced by the kind of federal structure we have. The Constitution gives the federal Parliament enumerated powers, some of them exclusive, and s 109 operates in the event of inconsistency between federal and State laws. There is no corresponding provision to deal with the possibility of inconsistency between State laws, but there are choice of law principles which come into play when rights and liabilities are potentially affected by different State laws[16]. Commonwealth legislative power, in its application to the States, is qualified by the principle that prohibits both the imposition on the States of special burdens and disabilities and the enactment of laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments[17]. That principle is founded upon an implication which also has significance in relation to an exercise of State legislative power which destroys or weakens the legislative authority of another State or its capacity to function as a government[18].

16 Mobil submits that an implication from federalism prohibits State legislation which, if given extra-territorial effect, would affect the relationship between another State or a Territory and its residents or would determine the legal consequences of actions in another State or Territory. That proposition is far too broad. There is nothing either uncommon, or antithetical to the federal structure, about legislation of one State that has legal consequences for persons or conduct in another State or Territory. An example is to be found in the provisions of the *Clean Waters Act* 1970 (NSW) considered in *Brownlie v State Pollution Control Commission*[19]. That legislation was held to apply to acts or omissions (in that case, trans-border pollution) outside New South Wales which

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15 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 152.

16 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

17 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 217 per Mason J.

18 cf *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 451 per McHugh J.

19 (1992) 27 NSWLR 78.

had, or were likely to have, consequences within New South Wales. The idea that all transactions and relationships giving rise to legal consequences can be located "in" one particular State or Territory is unrealistic. Furthermore, the concept of the relationship between a State and its residents requires a much narrower focus if it is to be of assistance in the resolution of a problem such as arises in the present case. For the claim of a resident of New South Wales against a Victorian company which has manufactured, in Victoria, a defective product that was later supplied in New South Wales to be brought into representative proceedings in a Victorian court does not impinge on the relationship between the New South Wales resident and the New South Wales Government. Different considerations might arise, for example, if the New South Wales Parliament, adopting a policy hostile to group proceedings, or class actions, set out to prevent residents of New South Wales from participating in litigation of that kind. But no such problem arises here.

17 Legislation and rules of court in Australian States and Territories, as well as in federal jurisdiction, have for a long time made provision for service outside the jurisdiction, joinder of parties, consolidation of actions, and a variety of procedural devices aimed at avoiding multiplicity of actions and unnecessary and expensive inefficiency in resolving legal disputes. Typically, they are accompanied by procedural safeguards which vest in courts discretionary powers aimed at ensuring that attempts to promote efficiency in the administration of justice do not result in injustice to individuals. Part 4A includes safeguards of that kind. Such a scheme is not incompatible with federalism. It helps to make it work.

18 The first ground of challenge to the validity of the legislation has not been made out.

Judicial power

19 Mobil's second ground of challenge is based upon s 73 of the Constitution, which defines the appellate jurisdiction of this Court. That jurisdiction includes jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Court of any State. The contention involves two steps: first, that s 73 requires that State Supreme Courts determine controversies only in accordance with the proper exercise of judicial power; secondly, that there are aspects of Pt 4A that are repugnant to the exercise of judicial power. The argument fails at both steps.

20 Section 73 of the Constitution does not require that every exercise of judicial power by a State Supreme Court be a "judgment, decree, order or sentence" of a kind referred to in s 73, or that all decisions of State Supreme

Courts be appealable to this Court. State courts may exercise non-judicial power[20].

21 The provisions of Pt 4A are not repugnant to the exercise of judicial power. Reference has earlier been made to the long history of representative proceedings, and to the supervisory powers in relation to such proceedings that have always existed. In *Carnie v Esanda Finance Corporation Ltd*[21], Brennan J pointed out that it was "precisely because of the flexible utility of the representative action that judicial control of its conduct is important, to ensure not only that the litigation as between the plaintiff and defendant is efficiently disposed of but also that the interests of those who are absent but represented are not prejudiced by the conduct of the litigation on their behalf".

22 Certain of Mobil's objections to Pt 4A proceedings would apply with equal, and perhaps even greater, force to representative proceedings of a more traditional kind. Limitation on the ability of group members to control the manner in which the proceedings are conducted, and potential lack of involvement in or even awareness of proceedings, were features of the procedural rules considered in *Carnie*, and the provisions of Pt 4A contain much stronger protections against the possibility of resulting unfairness than were available under those rules. Indeed, the capacity for members to opt out is a considerable advance upon rules of court of the kind considered by Fletcher Moulton LJ in *Markt & Co Ltd v Knight Steamship Co Ltd*[22]. It is not unknown for judicial decisions to determine the rights of people who were unaware of their existence, or even of people who were unborn at the time of the decision[23].

23 A particular objection was raised concerning the provisions of s 33Z and the assessment of damages. But there is nothing in s 33Z that requires damages to be assessed otherwise than in accordance with recognized legal principles[24].

24 The second ground of challenge to the validity of the legislation also fails.

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20 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 80 per Dawson J, 109-110 per McHugh J, 142 per Gummow J.

21 (1995) 182 CLR 398 at 408.

22 [1910] 2 KB 1021 at 1039.

23 cf *In re Freme's Contract* [1895] 2 Ch 778 at 780-781.

24 *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545 at 558-560 [35]-[37] per Ormiston JA.

Conclusion

Each demurrer should be allowed with costs.

26 GAUDRON, GUMMOW AND HAYNE JJ. Section 13 of the *Courts and Tribunals Legislation (Miscellaneous Amendments) Act* 2000 (Vic) ("the Courts Legislation Amendment Act") amended the *Supreme Court Act* 1986 (Vic) by inserting, as Pt 4A of the latter Act, provisions governing "group proceedings" in the Supreme Court of Victoria. Mobil Oil Australia Pty Ltd ("Mobil"), the plaintiff in this Court, alleges that the enactment of s 13 of the Courts Legislation Amendment Act was beyond the legislative power of the Parliament of Victoria and invalid. For the reasons that follow, that contention should be rejected.

The proceedings in the Supreme Court and in this Court

27 In January 2000, Schutt Flying Academy (Australia) Pty Ltd ("Schutt") commenced a proceeding in the Supreme Court of Victoria as plaintiff against Mobil as defendant. Mobil is incorporated in Victoria and argument of the matter in this Court proceeded on the basis that the writ in the Supreme Court proceeding had been served on Mobil in Victoria. Schutt's action against Mobil was brought as a group proceeding under O 18A of the Supreme Court (General Civil Procedure) Rules 1996 ("the 1996 Victorian Rules"), it being alleged that seven or more persons had claims against Mobil which were claims arising out of the same or similar circumstances and giving rise to a substantial common question of law or fact. Schutt alleged breach of contract and negligence by Mobil in connection with aviation fuel manufactured by it (in Victoria) and supplied to numerous persons at various places in Victoria, New South Wales, Queensland, the Australian Capital Territory and other, unspecified, places in Australia. Schutt commenced the proceeding as representing all of those persons.

28 Mobil challenged the validity of O 18A of the 1996 Victorian Rules. In June 2000, the Court of Appeal of Victoria, by majority (Ormiston, Phillips and Charles JJA, Winneke P and Brooking JA dissenting), held[25] that the Rules were valid. Mobil filed an application for special leave to appeal to this Court from the orders of the Court of Appeal. Its application for special leave was discontinued.

29 After the application for special leave had been filed, the Courts Legislation Amendment Act was passed. The amendments inserting Pt 4A in the *Supreme Court Act* were deemed to have commenced on 1 January 2000[26]. It

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25 *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545.

26 *Courts and Tribunals Legislation (Miscellaneous Amendments) Act* 2000 (Vic), s 2(2).

follows that if the relevant provisions of the Courts Legislation Amendment Act are valid, the commencement and further conduct of the proceeding brought in the Supreme Court by Schutt would be regulated by Pt 4A.

30 In December 2000, an order was made in the Supreme Court that Schutt cease to be the plaintiff in the proceeding in that Court, and that Tasfast Air Freight Pty Ltd ("Tasfast") be substituted as plaintiff. Soon after that order was made, Mobil began the present action in the original jurisdiction of this Court seeking a declaration that s 13 of the Courts Legislation Amendment Act was beyond the legislative power of the Parliament of Victoria and invalid or, alternatively, a declaration that one particular provision of Pt 4A, as introduced by that amending Act (s 33ZK), was beyond power and invalid. The State of Victoria, the first defendant to the proceeding in this Court, and Tasfast, the second defendant, each demurred to Mobil's statement of claim on the ground that the impugned provisions are within the legislative power of the Victorian Parliament. Those demurrers were set down for hearing by a Full Court.

31 At the hearing of the demurrers, Mobil, by leave, amended its statement of claim by deleting the particular allegations made in respect of s 33ZK and the alternative claim for relief confined to that provision. Demurrers to the amended pleading should be allowed.

Former provisions for joinder of plaintiffs and for representative proceedings

32 Rules of court drawn on the pattern of the English rules of 1883[27] have long provided for the joinder as plaintiffs in one action of all persons "in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist"[28]. The relevant rule was interpreted as allowing the joinder of plaintiffs in one action where two conditions were satisfied: (i) that the right of relief arose in each case out of the same transaction or series of transactions, and (ii) that some common question of law or fact arose[29]. It permitted several plaintiffs to bring a single action against a defendant for the determination of the individual claims of the plaintiffs.

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27 Rules of the Supreme Court 1883 (Eng) ("the 1883 English Rules").

28 See, for example, Rules of Procedure in Civil Proceedings 1957 (Vic), O 16 r 1 ("the 1957 Victorian Rules"); the 1883 English Rules (as amended in 1896), O 16 r 1; cf High Court Rules, O 16 r 1(1)(a).

29 See, for example, *Stroud v Lawson* [1898] 2 QB 44 at 52 per Chitty LJ; *Universities of Oxford and Cambridge v George Gill & Sons* [1899] 1 Ch 55 at 59 per Stirling J.

33 Further, rules of court drawn on the 1883 English pattern made provision for representative proceedings modelled on the former Chancery practice[30]. That former Chancery practice "required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy"[31] and was a rule of convenience[32]. A common example of its use was by one or more creditors of a deceased person seeking an account of the deceased's estate, ascertainment of the deceased's debts and an order for their payment[33], and its use extended to cases in which members of the class on whose behalf the suit was brought were "perfectly ignorant of the proceedings, and of what is really going on"[34]. The Chancery practice and the rules governing representative proceedings permitted the bringing of a single action that would decide the rights and duties of all who fell within the class of persons represented by the representative plaintiff.

34 The rules permitting joinder of plaintiffs in one action and the rules providing for representative actions of the kind for which rules on the pattern of the 1883 English Rules had provided came, so it would seem, to be seen as not flexible enough to accommodate all cases in which it would be convenient for there to be only one action to determine all the claims that were or could be made by a large number of persons against a defendant. It is not necessary to pause to consider the validity of the assumption that these earlier forms of procedure were inadequate. Provision has now been made in more than one Australian jurisdiction for "class" or "group" actions[35]. By this kind of action the claims that are made, or *could be* made, against the defendant by all those in the "class" or "group" that is identified in the proceeding would be decided. The provisions introduced into the *Supreme Court Act* by s 13 of the Courts Legislation Amendment Act provided for this kind of action.

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30 The 1957 Victorian Rules, O 16 r 9; the 1883 English Rules, O 16 r 9.

31 *Duke of Bedford v Ellis* [1901] AC 1 at 8 per Lord Macnaghten.

32 *Harvey v Harvey* (1841) 4 Beav 215 [49 ER 321], (1842) 5 Beav 134 [49 ER 528]; *Hawkins v Hawkins* (1842) 1 Hare 543 [66 ER 1147]; *Smart v Bradstock* (1844) 7 Beav 500 [49 ER 1159].

33 Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill*, 4th ed (1827) at 166-167; *Leigh v Thomas* (1751) 2 Ves Sen 312 [28 ER 201].

34 *Powell v Wright* (1844) 7 Beav 444 at 446-447 per Lord Langdale MR [49 ER 1137 at 1138].

35 For example, *Federal Court of Australia Act* 1976 (Cth), Pt IVA.

Part 4A of the *Supreme Court Act*

35 Consideration of the validity of the amendment which introduced the provisions of Pt 4A of the *Supreme Court Act* must begin by examining the provisions that were introduced. Of those provisions, s 33C, which identifies when a group proceeding may be instituted, is central. That section provides that if seven or more persons have claims against the same person, those claims are "in respect of, or arise out of, the same, similar or related circumstances" and the claims of all of those persons "give rise to a substantial common question of law or fact … a proceeding may be commenced by one or more of those persons as representing some or all of them".

36 A group proceeding may be commenced whether or not the relief claimed is or includes equitable relief[36], consists of or includes damages[37], includes claims for damages that would require individual assessment[38] or is the same for each person represented[39]. Such a proceeding may be commenced whether or not the proceeding concerns separate contracts or transactions between the defendant and individual group members[40] or involves separate acts or omissions of the defendant done, or omitted to be done, in relation to individual group members[41].

37 The persons who commence the proceeding are the plaintiffs. (In the Supreme Court proceeding out of which the matter in this Court arises, there has always been only the one plaintiff – first, Schutt and now Tasfast.) Obviously, those who are named as plaintiffs in a group proceeding must know of and require the commencement of the proceeding. In general, it is they who may appeal[42] and who are liable in costs[43]. They stand to gain from any benefit obtained by the proceeding but they are at risk of bearing the burden of costs.

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36 s 33C(2)(a)(i).

37 s 33C(2)(a)(ii).

38 s 33C(2)(a)(iii).

39 s 33C(2)(a)(iv).

40 s 33C(2)(b)(i).

41 s 33C(2)(b)(ii).

42 s 33ZC.

43 s 33ZD.

38 The position of the plaintiffs in the proceeding may be contrasted with those whom they represent – the group members. Subject to some exceptions that do not matter for present purposes, the consent of a person to be a group member is not required[44]. Group members may neither know of the commencement of the proceeding nor wish that it be brought or prosecuted, although Pt 4A does provide for notice to be given to group members of (among other things) the commencement of the proceeding[45].

39 The Supreme Court may dispense with the giving of that notice if the relief sought in the proceeding does not include a claim for damages[46] and, if notice is to be given, it may be given by press advertisement, radio or television broadcast or any other means[47]. Unless the Supreme Court is satisfied that it is reasonably practicable, and not unduly expensive, to do so the Court may not order that notice of the proceeding is to be given personally to group members[48]. There is, therefore, a real possibility that some group members would remain "perfectly ignorant of the proceedings, and of what is really going on"[49]. That is, some of those who would benefit from success in the proceeding (but thereby lose the opportunity to pursue their individual claim in some way, or to some effect, different from the group proceeding) may have their rights affected without their knowing or consenting to that being done.

40 So much follows from the fact that Pt 4A provides for what is sometimes called an "opt out", rather than an "opt in", procedure. That is, persons who are group members may opt out of the proceeding and, if they do, they are taken never to have been a group member (unless the Court otherwise orders)[50]. Group members, however, need take no positive step in the prosecution of the proceeding to judgment to gain whatever benefit its prosecution may bring.

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44 s 33E.

45 s 33X(1).

46 s 33X(2).

47 s 33Y(3).

48 s 33Y(4).

49 *Powell v Wright* (1844) 7 Beav 444 at 446-447 per Lord Langdale MR [49 ER 1137 at 1138].

50 s 33J(5).

41 Provision is made for the Court to fix a date before which a group member may opt out[51] and, except with the leave of the Court, trial of the proceeding may not begin before that date[52]. The Court, on the application of a party to the proceeding, or of its own motion, may at any time, before or after judgment, order that a person cease to be, or not become, a group member[53]. The circumstances in which the Court may make such an order are stated in very wide terms. It may do so if it is of the opinion that the person does not have "sufficient connection with Australia to justify inclusion as a group member", or that for any other reason it is "just or expedient" that the person should not be or become a group member[54]. And if a person who is a group member does not opt out, either before or after judgment, a judgment given in the proceeding binds that person along with all other persons who are group members at the time judgment is given[55].

42 The persons bound by the judgment may, or may not, have some connection with the State of Victoria. The claims which such persons had against the defendant, if considered separately from the claims of the plaintiffs in the proceeding, or the claims of other group members, may or may not have some connection with the State. This follows from the circumstances in which a group proceeding may be brought. It may be brought when the claims dealt with by it arise out of similar circumstances and those claims give rise to a substantial common question of law or fact[56], conditions which are much less restrictive than requiring that the circumstances from which the claims arise, or the questions of law or fact that are raised, be identical. The claims of some claimants may, therefore, arise out of transactions and events occurring wholly outside Victoria, and the claimants may have no connection with the State.

43 Nonetheless, it may be noted that all group members in the group proceeding which gives rise to this matter were alleged to have claims in

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51 s 33J(1).

52 s 33J(4).

53 s 33KA(1).

54 s 33KA(2).

55 s 33ZB.

56 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 266-267 [27] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

negligence against Mobil arising out of the negligent manufacture, in Victoria, of the fuel which it was alleged was defective. Moreover, it should also be noted that Mobil was not only served with the relevant process in Victoria, it is a company incorporated in that State. Thus, all of the claims with which this group proceeding seeks to deal are claims having at least these links (the place of commission of the alleged breach of duty and the defendant's place of incorporation) with Victoria.

Mobil's contentions

44 Mobil's contention that s 13 of the Courts Legislation Amendment Act was beyond the power of the Parliament of Victoria and invalid rested upon two propositions, one about territorial limitation of the powers of the Victorian Parliament and the second about the effect to be given to s 73 of the Constitution.

Extraterritoriality

45 The *Constitution Act* 1975 (Vic) provides[57] that the Parliament of Victoria "shall have power to make laws in and for Victoria in all cases whatsoever". It further provides that[58]: "A Court shall be held in and for Victoria and its dependencies which shall be styled 'The Supreme Court of the State of Victoria' …".

46 Other State Constitutions use expressions other than "in and for" the State in describing the power of the State legislature. "[F]or the peace, welfare, and good government" of the State[59], or "for the peace, order, and good Government"[60] of the State are expressions in some State Constitutions. But just as a power to make laws for the peace, welfare, and good government (or peace, order, and good government) of a State is a plenary power[61] so, too, is the power of the Victorian Parliament to make laws "in and for Victoria". Neither the

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57 s 16.

58 s 75.

59 For example, *Constitution Act* 1902 (NSW), s 5.

60 For example, *Constitution Act* 1889 (WA), s 2.

61 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ; *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501 at 503 [9] per Gaudron, McHugh, Gummow and Hayne JJ; 177 ALR 436 at 439.

words "peace, welfare [or order], and good government" nor the words "in and for" the State are to be read as words of limitation[62]. Nor is there any reason to give the words "in and for Victoria" some narrower meaning when used in s 75 of the *Constitution Act* 1975 in relation to the Supreme Court.

47 It has been said, however, that it is in the words "peace, order and good government" or, in this case "in and for Victoria", that some territorial limitation on the power of a State parliament is to be found[63]. Or, perhaps, territorial limitations on the parliaments of the States are to be found by reference to the federal structure of which each State is a part[64].

48 It is clear that legislation of a State parliament "should be held valid if there is any real connexion – even a remote or general connexion – between the subject matter of the legislation and the State"[65]. This proposition has now twice been adopted in unanimous judgments of the Court[66] and should be regarded as settled. That is not to say, however, that there may not remain some questions first, about what is meant in a particular case by "real connexion" and, secondly, about the resolution of conflict if two States make inconsistent laws[67].

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62 *Union Steamship* (1988) 166 CLR 1 at 10 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

63 *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 307. See also *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 at 375 per Dixon J; *Union Steamship* (1988) 166 CLR 1 at 12-13 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ; *Johnson v Commissioner of Stamp Duties* [1956] AC 331; *Thompson v Commissioner of Stamp Duties* [1969] 1 AC 320 at 335-336; *Australia Act* 1986 (Cth), s 2(1).

64 *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 271 per Brennan CJ, Dawson, Toohey and Gaudron JJ. See also *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 369-373.

65 *Pearce v Florenca* (1976) 135 CLR 507 at 518 per Gibbs J.

66 *Union Steamship* (1988) 166 CLR 1 at 14; *Port MacDonnell* (1989) 168 CLR 340 at 372.

67 *Port MacDonnell* (1989) 168 CLR 340 at 374; *State Authorities Superannuation Board* (1996) 189 CLR 253 at 285-286 per McHugh and Gummow JJ.

49 Mobil contended that it was necessary to decide in this case the extent of the territorial limitations on a State parliament and that, so far as relevant to this case, those limitations stemmed from the nature of a federation in which the States must continue to co-exist. Central to Mobil's contentions was the proposition that Pt 4A attempted to make the Supreme Court of Victoria "a national court for the conduct of class actions". It did so, Mobil submitted, because it drew residents of other States and Territories into proceedings in the Supreme Court, as plaintiffs, in circumstances where their claims had no necessary connection with Victoria and they had not invoked the jurisdiction of that Court. This, so it was said, denied these persons the chance to bring claims in the courts of the State or Territory in which each lived and bound them in the result of proceedings over which they had no control.

50 This is not an accurate representation of the operation of Pt 4A. The provisions of Pt 4A do not seek to make the Supreme Court of Victoria a national court. They do not deny anyone the opportunity to institute proceedings in any other court. A group member is not a plaintiff. It is right to say that a judgment obtained in the proceeding would bind those who had not opted out but to say that such persons had "no control" over their part in the proceeding falls well short of fully describing the way in which Pt 4A works.

51 Although a proceeding under Pt 4A may affect the rights both of those who know of and support the prosecution of the proceeding and of those who do not know of it, Pt 4A does not compel the unwilling to continue to remain a group member. The unwilling may seek to opt out. Further, in affecting the rights of those who know of the proceeding and those who do not, a proceeding under Pt 4A is no different from representative proceedings of a kind common in the State Supreme Courts since federation and in their colonial predecessors.

52 Mobil submitted that Pt 4A was invalid because of the nature of a federation in which the States must continue to co-exist. Although not articulated in this way, the contention appeared to be that unless the authority of a State Supreme Court to decide a civil claim were confined in some way, the federal structure would, in some way, be affected. Mobil contended that a State court's authority should be confined by holding that those whose claims may be determined by the court must voluntarily invoke its jurisdiction or either have some connection with the State or make a claim having some connection.

53 At once it can be seen that Mobil's submission, if accepted, would require a radical departure from the hitherto accepted understanding of the basis upon which State and federal courts exercise authority to decide personal actions. That

authority stems from the amenability of the defendant to the court's process. As was said in *John Pfeiffer Pty Ltd v Rogerson*[68]:

> "In by far the majority of cases, the jurisdiction of Australian courts in personal actions depends on the defendant's presence in the territorial jurisdiction at the time of service of the originating process. *In such cases it is not necessary to show any other connection with the jurisdiction.*" (emphasis added)

For the purposes of its challenge to the validity of s 13 of the Courts Legislation Amendment Act, Mobil sought to shift attention from the significance of a defendant's connection with the State at the time of service of the Court's process upon it, to the connection with the State of the claims dealt with by the proceeding or the connection of those whose claims would be determined or affected by it.

54 Mobil accepted that there was no adverse effect on the federal structure if, as so often happens now, a person having no connection with the State seeks to invoke the jurisdiction of a State Supreme Court to determine a claim that arose outside the territorial limits of the State and invokes that jurisdiction by instituting proceedings in the Court against a defendant who is then served with the Court's process within the State. That is, Mobil accepted that where a plaintiff actively invokes the jurisdiction of a State Supreme Court, service of process on the defendant within the State would satisfy any requirement of territorial nexus for State legislation which permitted the adjudication of such proceedings.

55 Although Mobil emphasised the fact that, in a case of the kind just mentioned, the plaintiff actively sought the adjudication of the Court in which the proceedings were instituted, the constitutional significance of the plaintiff seeking the Court's adjudication was not elucidated. Why it should be constitutionally significant to shift the focus of attention from the defendant's amenability to process (because of its presence in the State) to the connection of the claim or the claimants with the State was not explained. The continued co-existence of the States in the federation does not require that shift to be made. If the defendant is served within the jurisdiction, any requirement for a territorial nexus of the State legislation which empowers the Court to decide the proceeding is to be found in the defendant's connection to the jurisdiction by its presence at

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68 (2000) 203 CLR 503 at 517 [14].

the time of service of process[69]. The sufficiency of that connection is not affected by whether every claim which is to be adjudicated in the proceeding is actively promoted by the person who is entitled to make it.

56 It is because jurisdiction in personal actions may be established by service of process on the defendant while the defendant is within the relevant territorial area that it has been necessary to develop a body of choice of law rules. The connection, or absence of connection, of either the claimant, or the claimant's claim, with the State is irrelevant to whether the court's authority to decide the claim that is made against a defendant served within the jurisdiction can be exercised, though the presence or absence of such connections may bear, directly or indirectly, upon the choice of law to be applied. Thus, the determination of the proper law of a contract may require the examination of the factors which connect the transaction, and thus the parties to it, to one rather than another jurisdiction[70].

57 The very existence of that body of choice of law rules, by which State and federal courts in Australia decide what law is to be applied to determine the consequences of acts or omissions which occurred in a State or Territory other than that in which proceedings are brought[71], denies the validity of a proposition that State courts must confine their attention to cases in which the subject matter arises within the geographical area in which the court's writ runs if the States are to be able to co-exist in the federation. Yet a proposition of this kind appeared to inform much of Mobil's contention about want of territorial nexus.

58 It is also necessary to notice another consequence of the fact that a State court may take jurisdiction in a personal action when its originating process is served on the defendant within the bounds of its territorial jurisdiction. It inevitably follows from that fact that there can be cases in which similar, even identical, issues can be raised in the courts of two States between the same or related parties. It is inevitable, therefore, that there can be overlapping, even conflicting, procedures and judgments of the courts concerned. Those are difficulties that have hitherto been resolved by the application of principles

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69 *Laurie v Carroll* (1958) 98 CLR 310; *Gosper v Sawyer* (1985) 160 CLR 548 at 564-565; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 517 [13] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

70 *Bonython v The Commonwealth* (1948) 75 CLR 589 and, in the Privy Council, (1950) 81 CLR 486; [1951] AC 201.

71 For example, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

concerning abuse of process or, more recently, by the application of cross-vesting legislation[72]. They are not, however, difficulties that have so far been, or should now be, understood as stemming from some limitation on, or want of power in, the parliament of one or other of the States to regulate the procedures of its Supreme Court. Indeed the content, if not the existence, of the whole body of law that has developed about forum non conveniens[73], denies that the question is to be understood as one rooted in some territorial limitation on the powers of State parliaments which would require that either the plaintiff or the plaintiff's claim be connected with the State. If the question were one of legislative power, it would be entirely irrelevant and wrong to ask whether the defendant seeking a stay of proceedings had demonstrated that the forum chosen by the plaintiff was clearly inappropriate[74].

59 The fact that some of the claims that are to be adjudged in a proceeding are claims by persons who have taken no active step to bring or prosecute the proceeding does not require some different conclusion about the sufficiency of the connection of that proceeding with the State, or the power of the Victorian Parliament to enact the provisions of Pt 4A of the *Supreme Court Act*. That connection rests in the fact that the proceeding regulated by the legislation is a proceeding in a personal action in the Supreme Court held "in and for" the State where that Court's authority to decide the matter stems from the amenability of the defendant to its process.

60 In the ordinary case, where service of the proceeding is effected within the State, the territorial nexus between the proceeding and the State is evident. In some cases of so-called "long arm jurisdiction"[75] where service is effected outside Australia, unless the defendant voluntarily submits to the jurisdiction, there must be some nexus between the subject matter and the State or between the defendant and the State. By contrast, where service is effected within Australia, under the *Service and Execution of Process Act* 1992 (Cth), no nexus must be shown[76]. There may be some questions of construction of that Act in its

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72 For example, *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Vic), s 5(2).

73 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

74 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 247-248 per Deane J; *Voth* (1990) 171 CLR 538 at 564-565 per Mason CJ, Deane, Dawson and Gaudron JJ.

75 As, for example, under O 7 of the 1996 Victorian Rules.

76 *Service and Execution of Process Act* 1992 (Cth), s 15.

application to Supreme Court proceedings – especially some of the provisions made by ss 20 and 21 – but it is not necessary to address those questions now. It may be noted, however, that the defendant to a proceeding in a Supreme Court, served under the *Service and Execution of Process Act*, may always seek to have it cross-vested to another State Supreme Court.

61 These three bases upon which the Supreme Court of Victoria may assume jurisdiction over a defendant in a personal action are untouched by the provisions now made for group proceedings. It was not suggested that any of those bases for assumption of jurisdiction was infirm. It follows that a law which regulates the procedure for dealing not only with claims that are made, but also claims that could be made, against a defendant thus amenable to the jurisdiction of the Supreme Court of Victoria is a law "in and for" Victoria.

62 For these reasons Mobil's contentions about want of territorial connection between Pt 4A and Victoria should be rejected.

Section 73 of the Constitution

63 Section 73 of the Constitution provides for the appellate jurisdiction of this Court. It provides that this Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences of, among other courts, the Supreme Court of any State. It further provides that no exception or regulation prescribed by the Parliament shall prevent this Court from hearing any appeal from the Supreme Court of a State "in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council". It is well established that "judgments, decrees, orders and sentences" is to be understood as confined to decisions made in the exercise of judicial power[77]. It follows that not every form of "judgment" or "order" for which the governing statute or rules of a State Supreme Court may make provision can be the subject of an appeal to this Court.

64 Mobil contended that because the judgment which the Supreme Court of Victoria may give under Pt 4A may decide the claims of those group members who do not know of, and do not actively pursue the prosecution of, a group

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77 *Holmes v Angwin* (1906) 4 CLR 297; *Consolidated Press Ltd v Australian Journalists' Association* (1947) 73 CLR 549; *Saffron v The Queen* (1953) 88 CLR 523; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289; *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566; *Wong v The Queen* (2001) 76 ALJR 79; 185 ALR 233.

proceeding, it would not be a judgment exercising judicial power. From this premise it was contended that it followed that it is beyond the powers of the parliament of a State to "treat as judgments" or as "decisions which purport to bind people as judgments of a court" decisions which are incapable of being the subject of an appeal to this Court.

65 Neither the premise nor the predicate should be accepted. As has been pointed out earlier in these reasons, dealing with representative claims, and doing so by adjudicating the rights of all who are in a class of persons, has long been a feature of the ordinary practice of courts. The order that results from representative proceedings of the traditional kind, and the order that results from proceedings of the kind for which Pt 4A provides will, absent some order to the contrary, finally bind all those in the class concerned, regardless of their particular state of knowledge of the proceeding. It is a judgment made in the exercise of judicial power.

66 Further, even if, contrary to the view just expressed, Mobil's premise (that a judgment given in a group proceeding of the kind for which Pt 4A provides does not give rise to a "judgment, decree, order or sentence" within s 73 of the Constitution) were to be accepted, it by no means follows that the Victorian Parliament has no power to pass a law empowering the Supreme Court to hear and determine proceedings in accordance with Pt 4A. So much follows from the cases in this Court, like *Holmes v Angwin*[78], in which it has been held that an appeal to this Court does not lie from a particular kind of decision of a State Supreme Court or a judge of a State Supreme Court. It has not been held in those cases that the law permitting the making of the decision was invalid. Rather, all that has been held is that s 73 is not engaged. Indeed, to hold that the State law was invalid would amount to concluding that Ch III of the Constitution, or s 73 in particular, requires that State courts can exercise no power other than judicial power, a conclusion that has not been reached, and is not required by the Constitution[79].

67 The argument founded on s 73 of the Constitution should, therefore, be rejected. A separate but related argument founded on *Kable v Director of Public Prosecutions (NSW)*[80] which may have been raised by Mobil's statement of claim

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78 (1906) 4 CLR 297.

79 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

80 (1996) 189 CLR 51.

in the form in which it stood before the amendment made at the hearing of the demurrers was not pursued and need not be noticed.

Conclusion and orders

68 Each demurrer to the amended statement of claim should be allowed with costs.

69 KIRBY J. The decision of this Court in *Re Wakim; Ex parte McNally*[81] contradicts the proposition that the conferral by statute of jurisdiction and power on a superior court is immune from the restrictions of the Constitution. Any deployment of public power in Australia must conform to the Constitution. This applies to a purported conferral of jurisdiction and power upon a State court as well as on a federal court, as considered in *Wakim*.

70 It will not be a sufficient answer to a challenge to the constitutionality of a State law that the purported repository of power is a court which can be assumed to exercise the jurisdiction conferred upon it properly and in accordance with rules laid down by, or under, a statute or in accordance with the rules of the common law or equity. Where a challenge is made, there is no alternative but to measure the impugned law against the Constitution and its express provisions and implications that divide lawmaking power in Australia. In a federal nation, a State's legislative power must necessarily adapt to, and be consistent with, the legislative powers of the other States, as well as of the Commonwealth.

The facts and the proceedings

71 Pursuant to the Constitution[82], Mobil Oil Australia Pty Ltd ("Mobil") has commenced proceedings in this Court. It seeks declaratory relief that s 13 of the *Courts and Tribunals Legislation (Miscellaneous Amendments) Act* 2000 (Vic) ("the amending Act") is beyond the legislative power of the Parliament of Victoria and therefore invalid. That section inserted Pt 4A into the *Supreme Court Act* 1986 (Vic) ("the Act"). That Part provides for the commencement and conduct of "group proceedings" in the Supreme Court of Victoria ("the Supreme Court").

72 Prior to the commencement of the amending Act, a predecessor to Tasfast Air Freight Pty Ltd ("Tasfast") in the litigation had begun proceedings in the Supreme Court, pursuant to Order 18A of the Supreme Court (General Civil Procedure) Rules 1996 (Vic). That Order permitted and regulated "group proceedings". The validity of the Order, within the rule-making power under the Act[83], was challenged by Mobil. It was upheld by the Court of Appeal of Victoria[84]. However, the Court of Appeal was divided on the point[85].

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81 (1999) 198 CLR 511.

82 Constitution, s 76(i).

83 s 25.

84 *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545.

85 Ormiston, Phillips and Charles JJA; Winneke P and Brooking JA dissenting.

73 Subsequently, the Parliament of Victoria enacted the amending Act introducing Pt 4A into the Act. It did so in response to an earlier suggestion by the judges of the Supreme Court that Parliament should legislate for group proceedings along the lines of Pt IVA of the *Federal Court of Australia Act* 1976 (Cth)[86]. An application for special leave to appeal to this Court from the Court of Appeal's judgment was initiated. However, before it could be heard, and ostensibly to set at rest the issue of validity upon which the Court of Appeal had differed[87], the amending Act was brought into effect. It provided that the new Part would be deemed to have commenced on 1 January 2000[88]. This was some time prior to the day on which Tasfast's statement of claim was filed in the Supreme Court. That process asserted breaches of contract and negligence by Mobil in connection with aviation fuel manufactured by it and supplied to numerous persons in Victoria, New South Wales, Queensland, the Australian Capital Territory and elsewhere in Australia. It was accepted that, if valid, the Act, as amended, would authorise the continuance of Tasfast's proceedings as "group proceedings" in the Supreme Court within Pt 4A of the Act. To that end, Mobil initiated its action in this Court seeking a declaration of invalidity of the amending Act. It discontinued its application for special leave to appeal concerned with the validity of O 18A.

74 The facts involved in the dispute between the parties, as disclosed by the pleadings, are described elsewhere[89]. So are the relevant provisions of the Act inserted by the amending Act[90]. In addition to Tasfast, Mobil named the State of Victoria as a defendant to its proceedings. The State appeared, with Tasfast, to defend the validity of the amending Act. In this, Tasfast and Victoria were supported by the Attorney-General of the Commonwealth and the Attorneys-General of several of the States[91].

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86 Explained by Brooking JA in *Schutt* (2000) 1 VR 545 at 549 [9]. See also at 548 [7] per Winneke P.

87 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 31 October 2000 at 1252.

88 The Act, s 33ZK.

89 Reasons of Gaudron, Gummow and Hayne JJ at [27]-[31]; reasons of Callinan J at [146]-[154].

90 Reasons of Gleeson CJ at [5]-[6]; reasons of Gaudron, Gummow and Hayne JJ at [35]-[43]; reasons of Callinan J at [155]-[167], [176].

91 The Attorneys-General of New South Wales, South Australia and Western Australia intervened.

Three suggested bases of invalidity

75 *Invalid excess of State legislative power*: Expressed generally, Mobil's complaints about the constitutional validity of the provision inserting Pt 4A into the Act fell into three basic categories. First, Mobil argued that the Act, as so amended, on its face, went beyond the legislative power of the Parliament of Victoria. It did this because the amended Act purported to permit an exercise of one State's legislative power with respect to matters which, constitutionally speaking, were within the legislative power of other States of the Commonwealth. It therefore represented an over-reach of legislation, passing beyond matters having the requisite connection with the State of Victoria as envisaged by the federal Constitution.

76 This first submission was put in various ways:

- That the "group proceedings" provided for in Pt 4A of the Act conferred on the Supreme Court a "national jurisdiction" which would allow it to determine claims having no applicable constitutional connection with Victoria;

- That the "opt out" procedure provided for in Pt 4A of the Act would enable the Supreme Court to assume and exercise jurisdiction over members of the designated "group" not resident in Victoria who had not chosen to invoke the Supreme Court's jurisdiction, were unaware of the group proceedings' existence and possibly not desirous of being part of them; and

- That Pt 4A constituted the Supreme Court a "national court for the conduct of class actions" and in doing so infringed the limits on the legislative powers of the States as between each other, which limitations flowed from the language and structure of the federal Constitution.

77 *Invalid alteration of choice of law rule*: Secondly, and assuming that the first complaint was rejected, Mobil submitted that the provisions of Pt 4A of the Act were inconsistent with requirements implicit in the federal Constitution, specifically with s 118 read with s 51(xxiv) and (xxv). It was argued that Pt 4A purported to impose the substantive law of Victoria upon parties not resident in, nor relevantly connected with, Victoria, contrary to the choice of law regime which flowed from the federal Constitution, as recently laid down by the decision of this Court in *John Pfeiffer Pty Ltd v Rogerson*[92]. The attempt by a State Parliament to do this was said to be in breach of the constitutional basis for the choice of law rule stated in that decision.

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92 (2000) 203 CLR 503 at 535-540 [72]-[87].

78 *Invalid inconsistency with Ch III*: Thirdly, and assuming that the other complaints were to fail, Mobil submitted that the provisions of Pt 4A of the Act were incompatible with the federal Constitution governing the exercise of judicial power within the integrated Judicature of the Commonwealth:

- It was inconsistent with s 73 of the Constitution which provides for appeals to this Court "from all judgments, decrees, orders, and sentences" of a Supreme Court of a State. The inconsistency arose, so it was argued, because the determination of "group proceedings", envisaged by Pt 4A of the Act, included the determination of the rights of parties "roped in" as plaintiffs, although they had, or might have, no controversy with Mobil. Any such determination, it was submitted, would not qualify as a "judgment" or "order" within s 73. Although in other respects it might appear to be a conclusive determination of the rights of parties, so far as the law was concerned it was not. Part 4A of the Act was thus an invalid attempt to impose on a State Supreme Court a power to affect rights and obligations insusceptible of appeal to this Court. Hence, it was invalid as inconsistent with the appellate provisions of s 73; and

- It was also inconsistent with the exercise by the Supreme Court of the judicial power because Pt 4A of the Act was contrary to the principle established in *Kable v Director of Public Prosecutions (NSW)*[93]. That principle controls the functions and powers that may be conferred upon State courts. It limits such functions and powers to those that are compatible with the continuing exercise by such courts of the federal jurisdiction envisaged for them by the federal Constitution[94].

Narrowing the scope of the contest

79 The State of Victoria and Tasfast demurred to Mobil's amended statement of claim. The demurrers were ordered to be heard before the Full Court. On the return of the demurrers, Mobil abandoned its argument addressed to what I might call the *Kable* objection. That issue can therefore safely be put to one side.

80 Without abandoning its argument based on *Pfeiffer*, Mobil addressed no oral submissions to advance that contention. In *Pfeiffer*, the joint reasons left unresolved the question whether the choice of law rule there favoured was a consequence of the Constitution or simply a rule of the common law influenced

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93 (1996) 189 CLR 51.

94 Constitution, s 77(iii).

by "the constitutional text and structure"[95]. In my concurring opinion, I expressed a view[96] that the Constitution did not itself provide a choice of law rule. "The emerging rule must thus be subject to the Constitution; but the Constitution does not yield its precise content."[97] Consistently with this approach, there is in my opinion no constitutional basis for challenging the power of the Parliament of Victoria, if otherwise acting within its constitutional authority, to enact a law varying in a particular respect in the case of "group proceedings" the choice of law rule stated in *Pfeiffer*, assuming that is what it has done. Accordingly this issue too may be put aside.

The suggested incompatibility with s 73 of the Constitution

81 *Invalid deprivation of the right to appeal*: The foregoing analysis confines Mobil's constitutional objections to the legislation to what might be described as the implication of the essential territoriality of State laws and the suggested incompatibility of the new Pt 4A of the Act with the proper functioning of a Supreme Court as envisaged by s 73 of the Constitution. It is convenient first to deal with the second contention.

82 To make its s 73 submission good, Mobil was obliged to persuade this Court to take two steps, namely (1) to hold that a judgment or order made in "group proceedings" is not such a resolution of a controversy between parties as to amount to a "judgment" or "order" of a Supreme Court for constitutional purposes; and (2) to hold that the attempt to impose on a Supreme Court the function or power of giving such a "judgment" or "order", insusceptible of appeal to this Court, breached the requirements of s 73 of the Constitution.

83 The first step in this reasoning is flawed. It is not uncommon for "judgments" and "orders" of courts in Australia to affect, and indeed bind, persons who took no active part in the proceedings and who may even have been ignorant of the proceedings[98]. Some such persons might not even have been born

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95 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 535 [70].

96 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 555-558 [137]-[143].

97 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 558 [143].

98 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 557 [143]. The history of representative actions, and the defects that occasioned the legislation on group proceedings in Australia, are explained in Australia, Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46, (1998) at 18-26 [40]-[61]. See also Yeazell, "From Group Litigation to Class Action", (1980) 27 *University of California at Los Angeles Law Review* 514, 1067 and the passage

(Footnote continues on next page)

at the time that the proceeding resulting in the judgment or order was decided[99]. Yet it would indisputably be a "judgment" or "order" within s 73 of the Constitution.

84 *Appeals from State Supreme Courts*: It follows that this ground of objection to the validity of Pt 4A of the Act cannot succeed. I would prefer to confine my decision on this part of Mobil's argument to this point. I do this because I am not at present convinced that the authority upon which Victoria and Tasfast relied to repel the second step in this part of Mobil's argument, namely *Holmes v Angwin*[100], is applicable to a case such as the present. *Holmes* was a decision in which, in effect, electoral questions had been submitted to a State Supreme Court by the Parliament of a State. Such proceedings did not result in something, on any view, intended to be a "judgment" or "order" in the ordinary sense. So much is made clear by the observation of Barton J[101]:

> "Thus the Act of this State makes provisions as to the effect to be given to the decision of the Court, but it does not make the decision of the Court enforceable in the ordinary way as a judgment."

85 When one examines the terms of Pt 4A of the Act, it is clear[102] that the Victorian Parliament contemplated that a consequence of a judgment entered in "group proceedings" was that it would be a "judgment" or "order" within the ordinary meaning of those terms[103]. In *Holmes*, Griffith CJ[104], after referring to s 73 of the Constitution, stated that:

> "This is an absolute right of appeal given to suitors, and no State legislation can deprive them of that right."

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from *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 429-430 cited by Callinan J at [172], fn 204.

99 As in the decision of a court on the meaning of a trust deed which will be binding on members of the class, even if not represented in the proceedings, indeed even if not born at the time of the judicial determination.

100 (1906) 4 CLR 297.

101 (1906) 4 CLR 297 at 308. See also at 310 per Higgins J; cf *Sue v Hill* (1999) 199 CLR 462 at 560 [257]-[258], 568-569 [278]-[280].

102 See esp the Act, ss 33Z and 33ZB.

103 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-357 [45]-[49].

104 (1906) 4 CLR 297 at 302.

86 It is true that federal legislation can, as the Constitution expressly contemplates, prescribe exceptions to, and regulation of, this Court's jurisdiction to hear and determine appeals from judgments and orders, relevantly, of a Supreme Court of a State[105]. However, as Griffith CJ pointed out long ago, there is no equivalent power in a State Parliament to provide exceptions to, and regulation of, appeals from the Supreme Court of a State to this Court from a "judgment" or "order" of that court[106]. Moreover, even in the case of exceptions or regulations prescribed by the Federal Parliament, s 73 provides that none "shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council".

87 Given the centrality for the rule of law of the superintendence by this Court of the "judgments" and "orders" of the Supreme Courts of the States, as provided by the Constitution, I would not wish to indicate any concurrence in the whittling down of the obligatory jurisdiction of this Court based on that constitutional postulate. *Holmes* is a very flimsy foundation for such a large consequence. It is unnecessary to go to the second step of Mobil's argument in this regard for the submission fails at the threshold.

88 *Postponing other possible Ch III questions*: It is ordinarily desirable that, where invalidity of legislation is suggested, this Court should deal only with the constitutional arguments which the parties advance[107]. There may, for example, be other unstated arguments, in respect of particular provisions of Pt 4A which later cases, and more promising factual circumstances, will present to be decided by reference to the provisions of Ch III of the Constitution.

89 For example, I could envisage in a particular case that a party, originally unaware of the group proceedings commenced in the Supreme Court of a State (being a State other than that of the party's residence), not conscious of joinder as a plaintiff, refused permission to opt out and subject to a judgment with which that party was discontented, wishing to proceed in the State of residence, might raise an argument that the implied requirements of due process in Ch III of the

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105 Constitution, s 73; cf *Abebe v The Commonwealth* (1999) 197 CLR 510 at 530 [37]-[38], 588-589 [226]-[228], 603 [273]-[274].

106 Constitution, s 73. See *Holmes v Angwin* (1906) 4 CLR 297 at 302.

107 In *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 no party advanced an argument that the federal legislation there considered was inconsistent with the requirements of Ch III of the Constitution.

Constitution[108] had not been observed. Such an argument, if accepted, might render the judgment or order affecting that party (and any law that purported to sustain it) invalid when measured against the Constitution. But the time to consider such a case, and the severability or reading down of a State enactment that purported to permit it to occur, would be a proceeding in which the party complaining was adversely affected and presented that complaint for resolution by a court.

90 Approaching Mobil's arguments, as they were advanced in these proceedings, it is enough to say that the premise upon which Mobil submitted that s 73 of the Constitution was offended by Pt 4A of the Act, is not made out. It follows that each of the arguments connected with the second and third categories of Mobil's challenges to the validity of Pt 4A of the Act fails. This leaves the first category. Because I approach it differently from the way adopted by other members of the Court, I am bound to explain why.

An unpromising factual foundation

91 It is first necessary to recapitulate the unpromising factual foundation presented for Mobil's argument concerning the suggested want of territorial connection with Victoria of Tasfast's proceedings. On the facts as pleaded, which must be accepted for the purpose of deciding Mobil's demurrer[109], there were many connections between the State of Victoria and the subject matter which Tasfast's statement of claim tendered to the Supreme Court for resolution.

92 Tasfast is a company incorporated in Victoria. It carries on business in that State. Mobil is also a company incorporated in Victoria. It likewise carries on business there. The claim brought by Tasfast concerns the alleged release of contaminated aircraft fuel by Mobil at Yarraville in Victoria. Mobil had manufactured and supplied that fuel from Victoria as fit for use in aircraft. The fuel was either directly sold by Mobil to owners and operators of aircraft or sold by Mobil to fuel distributors who on-sold it to users. The claim brought by Tasfast against Mobil was pleaded in terms of a breach of contract to supply fuel

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108 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 487-490 per Deane and Toohey JJ, 501-503 per Gaudron J; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 112-114 per Gaudron J (diss); *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209 [73]-[74]; *Ebner v Official Trustee in Bankruptcy* (2000) 75 ALJR 277 at 289-290 [79]-[82], 295-296 [115]-[116]; 176 ALR 644 at 661-662, 670-671.

109 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142, 152; *Levy v Victoria* (1997) 189 CLR 579 at 648-649; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 367-368 [81].

of merchantable quality and negligence for failing to take reasonable care in the manufacture, testing and supply of fuel to users.

93 Mobil was clearly present in the State of Victoria and served with process there. It did not contest that it was at all relevant times within, and subject to, the jurisdiction of the Supreme Court of that State. Upon the primary argument of Tasfast, the foregoing facts and concession concluded against Mobil any constitutional argument that there was no territorial connection to support the exercise of the jurisdiction and power of the Supreme Court. Plainly there was a connection, sufficient for those purposes, simply because Mobil had been served in Victoria with the process of that State's Supreme Court and thus was subject to any judgment or order which that Court might enter against it in accordance with a law made by the Parliament of Victoria.

94 It was not suggested, by evidence or argument, that the proceedings initiated by Tasfast gave rise to any operational inconsistency with any proceedings brought under the legislation of any Parliament of another Australian State which conflicted with Pt 4A of the Act. Nor was a single instance cited to demonstrate actual inconsistency between the potential consequences for a plaintiff "roped into" the group proceedings commenced by Tasfast under Pt 4A of the Act and proceedings brought, or intended to be brought, by such a plaintiff in a court of another Australian State. The objections of Mobil were, at all times, presented at a higher level of abstraction. They attacked Pt 4A of the Act in terms of the offence which that Part allegedly occasioned to the legal entitlements of potential plaintiffs having rights of action against Mobil, control over which they stood to lose by being included involuntarily (and perhaps without their knowledge) in Tasfast's group proceedings.

95 Upon becoming aware of Tasfast's group proceedings, a plaintiff who objected to being "roped in" to them enjoys substantial rights under Pt 4A of the Act to "opt out" of the proceedings[110]. It may do so simply by giving a notice in writing, so long as this was given before the date fixed by the Court for such opting out[111]. Even after such date, the Supreme Court is empowered to extend the period within which such a group member might opt out of the group proceedings[112]. Once that person has opted out of such proceedings, he or she "must be taken never to have been a group member"[113]. So the prospect of

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110 The Act, s 33J(1).

111 The Act, s 33J(2).

112 The Act, s 33J(3).

113 The Act, s 33J(5).

involuntary subjection to the jurisdiction of the Supreme Court looks, on the face of Pt 4A of the Act, to be a fairly remote one.

96 Mobil was entitled to respond to the foregoing with the argument that the absence of objecting plaintiffs might be a consequence of the very lack of knowledge of the proceedings from which Mobil was endeavouring to protect such "roped in" parties. However, one would infer that Mobil would have had access to information by which, if it had wished, it could have traced the purchasers of the allegedly contaminated fuel to identify an objecting group member, if one actually existed.

97 This Court is not concerned with the wisdom or fairness of Pt 4A of the Act. Nor is it concerned with the judgments or orders about membership under that Part[114]. Nor with whether, in the particular circumstances, proceedings should, or should not, continue under the Part[115]. The sole issue tendered by Mobil's remaining constitutional argument is one of legislative power. Enough has been said to demonstrate that the argument arises in a proceeding which, on its face, as pleaded, has extremely strong factual connections with the State of Victoria. The threshold question is whether such connections without more, are sufficient to dispose of Mobil's remaining constitutional objection. In my view they are not.

Distinguishing authority and validity

98 Mobil did not contest that it was subject to the judgment or orders of the Supreme Court in proceedings properly constituted to render it liable for a breach of contract or for negligence in respect of supply of contaminated fuel. Its objection to the legislation introducing Pt 4A into the Act rested on a different, and more basic, footing. This was that Pt 4A acknowledged no differentiation between parties in group proceedings in respect of whom the Parliament of Victoria *had*, constitutionally speaking, legislative competence (of whom Tasfast might be one) and other parties in other States in respect of whose potential claims against Mobil, the Parliament *did not have* competence.

99 For reasons that I will explain, I do not agree that Mobil has made this argument good. However, I do agree with its submission that the mere fact that Mobil is amenable to a judgment and orders of the Supreme Court of Victoria does not dispose of its argument that the legislation to which it objects might represent an over-reach of power by the Victorian Parliament and, to that extent, be constitutionally invalid.

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114 The Act, s 33KA.

115 The Act, s 33N.

100 The authority of the Supreme Court over Mobil cannot expand the power of the Parliament of Victoria so as to enlarge the ambit of those matters in respect of which, consistently with the federal Constitution, that Parliament may validly make laws. Because the authority, jurisdiction and powers of the Supreme Court may be traced to, and must ultimately be sustained by, the provisions of the federal Constitution[116], no statute, federal or State, and no rule of the common law or equity could expand the legislative powers of the Parliament of Victoria beyond those that the federal Constitution provides or permits. To this extent, the jurisdiction of State courts in Australia is different from that traditionally asserted by the courts of England[117]. In a nation, like Australia, where sovereignty is divided between the political units making up the federation, it is not to the point to refer to English notions that the judges in their courts stand in the place of the Sovereign. In Australia, the question remains – which Sovereign? Or which attribute of the Sovereign? A law of a single State (or Territory) cannot ultimately exceed the operation permitted by its constitutional source. Subject to valid federal law, which in turn must be compatible with the geographical division of the Commonwealth, this proposition is not altered by the fact that the law in question purports to grant powers to a court of a State (or Territory).

101 It follows that where, as here, a party (Mobil) has submitted that Pt 4A of the Act includes provisions that go beyond the legislative competence of the Parliament of Victoria and cannot be severed, it is no answer to say that sufficient power with respect to all potential plaintiffs wherever residing in Australia derives from the fact that the Supreme Court has jurisdiction in the sense of lawful authority over Mobil. Certainly, the Court has such authority over Mobil. But the question is how far that authority extends and precisely what it permits. If, as Mobil submits, Pt 4A of the Act impermissibly extends too far when measured against the Constitution, containing offending provisions that cannot be read down or severed, this Court would be bound to so hold. It could not avoid that duty simply because Tasfast had served process on Mobil in Victoria. If Pt 4A of the Act is invalid, Tasfast might doubtless continue proceedings against Mobil on its own behalf. But its endeavour to do so by group proceedings for itself and others under the Part would be brought to an end if the Constitution, properly understood, so required.

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116 cf *Yougarla v Western Australia* (2001) 75 ALJR 1316 at 1329 [64], 1333-1336 [83]-[98]; 181 ALR 371 at 388, 393-397.

117 cf *Laurie v Carroll* (1958) 98 CLR 310 at 323. See reasons of Gleeson CJ at [11].

Foundations for the territorial argument

102 *Express geographical limitations*: The federal character of the Constitution is one of its central features. The Commonwealth of Australia is a polity in which governmental powers are shared[118]. Except in relation to the Territories, which constitute a special case[119], the lawmaking powers of the Federal Parliament may apply to the entirety of the Commonwealth but only in respect of the designated subjects. The lawmaking powers of a State are derived from the Constitution of each State. Such Constitution is, in turn, continued in force by the federal Constitution[120]. It is subject to the power of amendment enjoyed by the Parliament of each State. Such power also now derives from the federal Constitution[121]. After federation, the Parliaments of the States of Australia were not merely the Parliaments of the colonies, renamed. They assumed a new legal character. It is one derived from the new source of their constitutional power. This is the federal Constitution adopted with the authority of the Australian people and maintained in force by that authority, subject to the power of the electors of the Commonwealth to approve its alteration[122].

103 The States of the Commonwealth refer to identifiable geographical parts of the territory of the Commonwealth. When, therefore, in s 107 of the Constitution, it is provided that "[e]very power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth", the provision clearly refers to the power of the Parliament of the State with respect to that State as a geographical portion of the entire Commonwealth.

104 The federal Constitution[123] clearly envisaged that, whatever had been the position before federation, thereafter each State Parliament would operate as a

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118 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 514-515 [2]-[3], 555-558 [137]-[143].

119 Constitution, s 122; cf *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 330-331 [5]-[7]; cf at 355-356 [88]; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 556 [139].

120 Constitution, s 106. See *Yougarla v Western Australia* (2001) 75 ALJR 1316 at 1329 [64], 1333-1336 [83]-[98]; 181 ALR 371 at 388, 393-397.

121 Constitution, s 107.

122 Constitution, s 128.

123 Constitution, s 107.

legislature within the "one indissoluble Federal Commonwealth under the Crown"[124]. These provisions and others in the covering clauses[125], and in the Constitution itself[126], make it clear that it was intended that the Parliaments of the States would enjoy legislative powers, the exercise of which was to be compatible with the governance of a united federal nation comprising the Commonwealth, its Territories and the States. It would be inconsistent with this scheme of divided legislative power for the Parliaments of the States to enjoy legislative powers in ways incompatible with the exercise by other States of their own legislative powers within the one federal nation.

105 *Implied geographical restrictions*: The foregoing appears, clearly enough, from the express language of the Constitution[127]. However, it is reinforced by implications derived from the language, structure and purpose of the Constitution. Such implications include that the several parts of the federal polity will operate with a high level of cooperation with the other parts that make up the governmental organs of the one nation[128]. This is a basic assumption upon which the Constitution is written. It is implied in the type of federation that the Constitution creates[129].

106 Inherent in the foregoing implications is the constitutional assumption that each State Parliament, in the exercise of its legislative powers, will avoid what might be described as an impermissible intrusion into the legislative concerns that properly belong to the Parliament of another State. Self-evidently, if the Parliament of one State were to enact laws that purported to impose obligations upon persons resident in other States, by reference to events occurring in such other States, the result could be legislative chaos. Such chaos is denied not by statute or common law but by the federal Constitution itself.

107 It is out of recognition of this fact that, with few exceptions, the legislation enacted by the Parliaments of the several Australian States has generally avoided unwelcome (and constitutionally invalid) intrusions into the legislative concerns

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124 Preamble to the *Commonwealth of Australia Constitution Act* 1900 (UK).

125 *Commonwealth of Australia Constitution Act* 1900 (UK), ss 5, 6.

126 See eg Constitution, s 118; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 532-534 [59]-[65], 556-558 [138]-[143].

127 Notably ss 106 and 107. See also s 108.

128 *R v Hughes* (2000) 202 CLR 535 at 557 [45], 566-571 [67]-[81].

129 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 451.

of other States. In the entire history of the Commonwealth, there have been comparatively few instances of alleged legislative "over-reach" by the laws of one State, asserting purported operation in what is properly the legislative domain of another State. Only occasionally has the legislation of a State been struck down as extending beyond the legislative powers of the Parliament of that State.

108 One such case was *Commissioner of Stamp Duties (NSW) v Millar*[130]. There, the majority of this Court[131] held that the provisions of the *Stamp Duties Act* 1920 (NSW)[132] which purported to authorise the inclusion in the dutiable estate of a person who died resident and domiciled in another State, of shares held by that person in a company incorporated out of (and having no share register within) the taxing State (New South Wales) exceeded the legislative powers of the Parliament of New South Wales. Normally, challenges of invalidity of such a kind are avoided by the observance by the government and Parliament of each State of a proper mutual respect that reflects the express terms and implied limitations of the federal Constitution. The fact that that Constitution makes express reference to what is to occur in the case of inconsistency between a law of the Commonwealth and a law of a State[133] but makes no equivalent provision for what is to occur in the case of inconsistency between competing laws of two or more States, indicates that, at the time the Constitution was written, conflicts of the latter kind were considered either to be legally inadmissible or practically unlikely or both. By and large, the history of the Australian federation has borne out this assessment. Legislative over-reach by one State into the lawmaking competence of another State has not been a feature of the Australian Commonwealth[134].

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130 (1932) 48 CLR 618.

131 Rich, Starke, Dixon and McTiernan JJ; Gavan Duffy CJ and Evatt J dissenting.

132 s 103(1)(b).

133 Constitution, s 109.

134 For the territorial waters cases see *Pearce v Florenca* (1976) 135 CLR 507; *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340; for the taxation cases see *Commissioner of Stamp Duties (NSW) v Millar* (1932) 48 CLR 618; *Trustees Executors & Agency Co Ltd v Federal Commissioner of Taxation* (1933) 49 CLR 220; *Australasian Scale Co Ltd v Commissioner of Taxes (Q)* (1935) 53 CLR 534; *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337; and for the road transport cases see *Welker v Hewett* (1969) 120 CLR 503; *Cox v Tomat* (1972) 126 CLR 105; cf *SGH Ltd v Commissioner of Taxation* (2002) 76 ALJR 780 at 798 [92]; 188 ALR 241 at 266.

109 *Constitutional anticipation of limits inter se*: This said, the possibility of such conflict cannot, in logic, be denied. Indeed, there are some provisions in the Constitution that indicate that, notwithstanding the more rigid view of territorial limitations on legislative competence observed by Imperial and colonial authorities at the time the Constitution was adopted[135], the prospect of occasional conflicts between the laws of the Australian States *inter se* was not ruled out. Thus in s 74 of the Constitution, the now moribund provision[136] providing for appeals to the Queen in Council, an exception was included for appeals from decisions of this Court upon any question "howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth". This well known and previously important exception went on to exclude from the Privy Council's jurisdiction from Australia (except with a certificate of this Court) "any question … as to the limits inter se of the Constitutional powers of any two or more States". Thus, the federal Constitution clearly envisaged, in this collateral way, the possibility which Mobil submits has now arisen.

110 Although the possibility of such questions was contemplated, how they were to be resolved was not spelt out. Yet it is clear that s 74 of the Constitution assumed that such questions would be resolved by "a decision of the High Court" and that, save for a certificate, its decision would be final. It is therefore equally clear that it was assumed that the Constitution, or possibly a law made under it, would afford the principle by reference to which such a question would be decided. Such a question would not be resolved, at least exclusively, by reference to the grant of power conferred on the Parliament of one State by a State Constitution. To the extent that, after federation, a State Constitution Act expressed "the Constitution of each State" of the Commonwealth[137], any such Act derived its contemporary authority ultimately from the federal Constitution[138] not from any Imperial Act that had preceded it.

111 *The growth of extraterritoriality*: At the time of federation, the prevailing view was that the colonial legislatures were incompetent to enact legislation having an extraterritorial operation[139]. That view was reflected in the early

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135 Explained in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 11-12.

136 *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461 at 464. See also *Australia Act* 1986 (Cth) (UK), s 11.

137 *Yougarla v Western Australia* (2001) 75 ALJR 1316 at 1329 [64], 1333-1336 [83]-[98]; 181 ALR 371 at 388, 393-397.

138 Constitution, s 106.

139 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10-11 citing *Kielley v Carson* (1842) 4 Moo PC 63 at 85 [13 ER 225 at 233]; *Phillips v Eyre*

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decisions of this Court concerning the legislative powers of the States[140]. However, in 1932 this approach was abandoned, so far as the dominions of the Crown were concerned, by the decision of the Privy Council in *Croft v Dunphy*[141]. Although, as this Court later remarked, it "might have been possible to confine the authority of *Croft v Dunphy* to the legislatures of the Dominions as distinct from those of the colonies and States"[142], that is not "how things have turned out". In Australia, it thus became accepted that the Parliaments of the States had the power to make laws with extraterritorial operation[143].

112 Nevertheless, inescapably, there remained a territorial restriction on State Parliaments, although one limited to "a very small compass indeed"[144]. Much previous analysis assumed that the source of the restriction was to be found in the words of the grant of State legislative power, as for the "peace, order and good government" of the designated territory constituting the State concerned[145]. However, the restriction is more fundamental than this. That fact becomes obvious when it is remembered that the Parliaments of the States have the power, in accordance with the Constitution of the State, to alter the Constitution of the State but "subject to this Constitution", ie the federal Constitution[146]. Indeed, the words of grant differ as between the States, a fact brought to light by these proceedings. Whereas in other States the formula is the same as, or close to, that provided in ss 51 and 52 of the federal Constitution, in the case of Victoria it is

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(1870) LR 6 QB 1 at 20; *Ray v M'Mackin* (1875) 1 VLR(L) 274 at 280; *Macleod v Attorney-General (NSW)* [1891] AC 455; *Ashbury v Ellis* [1893] AC 339; *Peninsular and Oriental Steam Navigation Co v Kingston* [1903] AC 471; and *Attorney-General (Canada) v Cain* [1906] AC 542.

140 *Delaney v Great Western Milling Co Ltd* (1916) 22 CLR 150 at 161-162.

141 [1933] AC 156 at 163.

142 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 12.

143 *Bonser v La Macchia* (1969) 122 CLR 177 at 189, 224-225; *R v Bull* (1974) 131 CLR 203 at 263, 270-271, 280-282; *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 468-469, 494-495; *Pearce v Florenca* (1976) 135 CLR 507 at 514-520, 522.

144 *Trustees Executors & Agency Co Ltd v Federal Commissioner of Taxation* (1933) 49 CLR 220 at 235.

145 *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337 at 375; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 13.

146 Constitution, s 106.

different. The Parliament of that State is, by its own Constitution Act, empowered to make laws "in and for Victoria in all cases whatsoever"[147].

113 Nothing turns on this difference. The grant of legislative power to the Victorian Parliament is as ample as that given to the Parliaments of other States. But the question presented by these proceedings is not the extent of the power granted by the Constitution of a State but the extent of any implied limitation derived from the federal Constitution controlling the exercise of that power. It is because that issue presents a different question that it is not enough, in my opinion, for those who opposed Mobil's case to point either to the Victorian Constitution or the provisions enacted under it creating the jurisdiction of the Supreme Court in the broadest language[148]. Here, Mobil raised a more basic objection to the validity of what was attempted. This depended on a limitation inherent in the federal Constitution itself to which the Constitutions of the States, and State legislation enacted pursuant to them, are necessarily subject.

Lessons from other federal constitutions

114 *Limits of English decisions*: In resolving questions such as that presented by the demurrer, it is often useful for this Court to examine the ways in which courts, considering similar constitutions, have tackled like problems. This is especially so where the problem is one inherent in a federal constitution (as this one is). In such cases the law of the United Kingdom, otherwise long the principal source of comparative law instruction for Australian courts, is unlikely to cast much light. Especially where relevant decisions of this Court are few (as is the case in this instance) it is useful to examine the jurisprudence of other federal systems to see if they have developed rules that can be adapted and applied within the Australian federation[149]. This was the approach adopted before and at the beginning of the Commonwealth[150]. Of course, care must be taken to ensure that the constitutional circumstances are analogous.

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147 *Constitution Act* 1975 (Vic), s 16. See also now *Australia Act* 1986 (Cth) (UK), s 2(1).

148 *Constitution Act* 1975 (Vic), s 85(1) which provides for the jurisdiction of the Supreme Court "in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever" and that the Supreme Court "shall be the superior Court of Victoria with unlimited jurisdiction".

149 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 76 ALJR 203 at 227 [117], 229-233 [125]-[143]; 185 ALR 335 at 368, 371-376.

150 eg Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 963.

115 Unfortunately, little guidance for the applicable Australian constitutional principle can be derived from a study of the way in which other federal systems have upheld territorial limitations upon the lawmaking activities of their constituent parts. The differences between the respective constitutional provisions of the United States of America and Canada, on the one hand, and Australia, on the other, make it risky to seek local instruction from the way in which the courts of those countries have approached suggested inconsistency as between the laws of the States or provinces *inter se*.

116 *United States decisions*: In the United States, *Pennoyer v Neff*[151] concerned the capacity of the courts of one State to exercise *in personam* jurisdiction over a defendant resident in another State who had not been served with process. In Australia, such an issue would be resolved by the *Service and Execution of Process Act* 1992 (Cth), enacted by the Federal Parliament pursuant to s 51(xxiv) of the Constitution. There was no equivalent either in the Constitution of the United States or of Canada[152]. It was the perceived gap in the existing constitutional systems that had led to the inclusion in the powers of the Federal Parliament in Australia of the power to make laws with respect to "the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States"[153]. Nevertheless, the observations of the United States Supreme Court in *Pennoyer* draw attention to a consideration equally present in Australia. This is the equality of the States with respect to each other in their power to regulate relationships, activities and properties within, or in relation to, their respective boundaries[154].

117 In the United States, questions as to the territorial limits of State legislative power normally arise in litigation concerning the commerce clause of the federal Constitution[155]. That clause has been treated as implicitly limiting State legislative power to regulate interstate commerce. Given the provisions of

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151 95 US 714 (1878).

152 A fact appreciated at the time of the establishment of the Commonwealth. The provision first appeared in the *Federal Council of Australasia Act* 1885 (Imp), s 15. See Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 614.

153 Constitution, s 51(xxiv).

154 Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law", (1992) 92 *Columbia Law Review* 249 at 315-322.

155 United States Constitution, Art I, s 8: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". See Tribe, *American Constitutional Law*, 2nd ed (1988), Ch 6.

s 92 of the Australian Constitution, it was conceded by Mobil, properly in my view, that United States authority on such questions was unlikely to provide assistance in determining the limits of the legislative powers of the Australian States given the significantly different terms in which the Australian Constitution is expressed[156]. Nonetheless, in some of the United States decisions judicial dicta appear suggesting that there may be a more fundamental (ie federal) limitation on State legislative power. In one case, this was expressed in terms of the lack of a (legislative) "interest in protecting nonresident shareholders of nonresident corporations"[157].

118 The United States Constitution contains a provision from which s 118 of the Australian Constitution was derived[158]. However, the Supreme Court has repeatedly insisted that the only "faith and credit" to State laws and action under such laws required by that constitutional injunction is to *valid* State laws and acts[159]. Thus, citing a contemporary United States text (*Rorer on Inter-State Law*), Quick and Garran in 1901 explained the United States position in these terms:

> "The Act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States does not require that they shall have any greater force and efficacy in other courts than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there[160].
>
> This section of the Constitution does not prevent an inquiry into the jurisdiction of the court in which a judgment is rendered, to pronounce the judgment, nor into the right of the State to exercise authority over the parties or the subject-matter, nor whether the judgment is founded in and impeachable for a manifest fraud. The Constitution did not mean to confer any new power on the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence."

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156 cf *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 468-472.

157 *CTS Corporation v Dynamics Corporation of America* 481 US 69 at 93 (1987).

158 United States Constitution, Art IV, s 1.

159 Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) at 963.

160 *Robertson v Pickrell* 109 US 608 (1883).

119 *Canadian decisions*: In the case of the Canadian Constitution[161], there is an even more fundamental difference that makes the authority of the courts of that country of little assistance in Australia. There, a number of enumerated legislative powers are conferred on the legislatures of the provinces[162] with residual powers to the Federal Parliament[163]. Of these, some heads of provincial power are described as "exclusive"[164]. Each of those heads, as well as the additional powers conferred on the legislatures of the provinces, have been regarded as expressly or impliedly "restricted to the provincial territory"[165]. Of particular relevance to the present proceedings is the constitutional grant of provincial power with respect to "the Administration of Justice in the Province"[166]. By reason of such provisions, the provinces of Canada have been treated as generally unable to make laws regulating matters outside their respective boundaries or making such matters a criterion of legal liability[167]. In such circumstances, Mobil's concession that the Canadian decisions are of very limited direct relevance to Australia is also a proper one.

120 Nevertheless, Mobil argued that one point of differentiation that has emerged in the Canadian decisions was relevant to the present case. In Canada, a distinction has been drawn between the "Administration of Justice in the Province" (legislation in respect of which belongs to the provincial legislature) and the substantive law which the courts must then apply. It has been held that legislation in respect of the latter must be derived from other enumerated heads of constitutional power[168]. By parity of reasoning, Mobil argued that the fact that as a matter of *process* a defendant (such as itself) was amenable to the jurisdiction and power of a Supreme Court of a State (perhaps, in another case,

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161 *Constitution Act* 1867 (formerly *British North America Act* 1867 (UK)).

162 eg ss 92, 92A, 93 and 95.

163 s 91.

164 ss 92 and 92A.

165 *Interprovincial Co-operatives Ltd v The Queen* [1976] 1 SCR 477 at 512-513.

166 *Constitution Act* 1867, s 92(14).

167 *Interprovincial Co-operatives Ltd v The Queen* [1976] 1 SCR 477 at 508-509; *Royal Bank of Canada v The King* [1913] AC 283.

168 *Interprovincial Co-operatives Ltd v The Queen* [1976] 1 SCR 477 at 508: "[T]he fact that a party is amenable to the jurisdiction of the Courts of a province does not mean that the Legislature of that province has unlimited authority over the matter to be adjudicated upon."

pursuant to the *Service and Execution of Process Act*) did not necessarily render it amenable, without constitutional limitations, to the *laws* enacted by the State concerned. I agree with this submission.

121 *Conclusion*: It remains in every case to consider whether the substantive law that the courts of one State are required by the law of that State to apply is compatible with the implied constitutional limitations on the legislative power of that State's Parliament. The existence of jurisdiction in the State court is only the beginning of constitutional analysis. It cannot foreclose it. If the State law contains a constitutional flaw that deprives it of validity, the injunction in s 118 of the Constitution says nothing about it. Service of the court's process upon a party before the court, pursuant to federal legislation, cannot then repair the flaw. The State law in such a case is invalid to the extent that it exceeds the constitutional power of the Parliament of the State concerned.

The supposed scope of the implied federal limitation

122 *The continuing territorial limits*: Mobil did not dispute that the strict colonial view controlling the extraterritorial reach of the legislation of an Australian State had been rejected by the 1930s. Having regard to the unanimous decision of this Court in *Union Steamship Co of Australia Pty Ltd v King*[169], it also acknowledged that the residual territorial restrictions to be derived from the federal Constitution were "of somewhat obscure extent"[170]. Mobil agreed that this Court, in the cases that had considered the matter following *Croft v Dunphy*, had accepted that a "remote and general connection" with the State concerned would be sufficient to sustain, as constitutionally valid, the provisions of a State statute having operation outside the State concerned, viewed as including the dependencies and the areas geographically adjacent to the State[171]. Mobil nevertheless submitted that a continuing territorial connection with the State of the persons, things and events upon which the legislation operated remained inherent in the federal Constitution that created the States as elements of the single unified nation rather than as sovereign bodies with their own separate international personalities.

123 There is little guidance in the Australian authorities as to where precisely the point is reached that distinguishes a valid law of a State Parliament from one

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169 (1988) 166 CLR 1 at 12-14.

170 Adapting Viscount Sankey LC in *British Coal Corporation v The King* [1935] AC 500 at 520.

171 *Constitution Act* 1975 (Vic), s 85(1).

which impermissibly exceeds its territorial competence. In *Union Steamship*, this Court said[172]:

> "[A]s each State Parliament in the Australian federation has power to enact laws for its State, it is appropriate to maintain the need for some territorial limitation in conformity with the terms of the grant, notwithstanding the recent recognition in the constitutional rearrangements for Australia made in 1986 that State Parliaments have power to enact laws having an extraterritorial operation[173]. That new dispensation is, of course, subject to the provisions of the Constitution[174] and cannot affect territorial limitations of State legislative powers inter se which are expressed or implied in the Constitution. That being so, the new dispensation may do no more than recognize what has already been achieved in the course of judicial decisions. Be this as it may, it is sufficient for present purposes to express our agreement with the comments of Gibbs J in *Pearce*[175] where his Honour stated that the requirement for a relevant connexion between the circumstances on which the legislation operates and the State should be liberally applied and that even a remote and general connexion between the subject-matter of the legislation and the State will suffice."

124 *Impermissible severance of connection*: Mobil argued that the present was a case in which the challenged legislation snapped the necessary "connexion between the enacting State and the extra-territorial persons, things and events on which [the] law operates"[176]. Even allowing for the breadth of the test, it submitted, Pt 4A of the Act contained provisions that envisaged no real connection – not even a remote or general connection – between the subject matter of the legislation and the State of Victoria[177]. Although this could not be said of all of the provisions of Pt 4A, the Part was intended to operate as a whole. It was not susceptible to reading down or severance. Thus it must fail as a whole. It will be observed that this argument involves two steps: (1) demonstration that the legislation included provisions exceeding the essential

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172 (1988) 166 CLR 1 at 14.

173 See *Australia Act* 1986 (Cth) (UK), s 2(1).

174 See s 5(a) of each Act.

175 *Pearce v Florenca* (1976) 135 CLR 507 at 518.

176 *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 372.

177 *Pearce v Florenca* (1976) 135 CLR 507 at 518.

territorial connection with the State; and (2) demonstration that it was impossible to sever the offending words and save the rest of Pt 4A.

125 So far as the first step was concerned, Mobil complained that s 33X of the Act necessarily involved the possibility that persons in another State of the Commonwealth, with no knowledge, interest or desire to be "roped in" as plaintiffs to proceedings in the Supreme Court of Victoria, could find themselves as parties to the group proceedings. They might perhaps do so after judgment in those proceedings was recovered by or against the group. Such parties would nevertheless be bound by the course of the proceedings and the judgment[178]. Their individual causes of action would purportedly merge in the judgment. In the present case, issues dealt with by the judgment would then be *res judicatae* between such group members and Mobil[179]. After the judgment was recovered in the group proceedings, any attempt to commence separate proceedings, based on an individual cause of action, might, so Mobil argued, face a plea of issue estoppel if the claim were one that could have been pursued in the group proceedings[180].

126 According to this argument, if Pt 4A were valid, the person in another State could be subject to the assessment of damages in accordance with the Act of the Victorian Parliament, purporting thereby to take away rights and obligations as provided by the law of that person's State of residence or choosing, which might be a law different from those in Pt 4A. Mobil submitted that it was beyond the power of a State Parliament to impose such consequences, possibly unknown and unwanted, on persons whose causes of action arose in another State and who had no relevant connection with the State of Victoria. By purporting to bring before the Supreme Court of Victoria, notionally as a plaintiff, an individual who had neither been personally served with the Court's process nor chosen to invoke the Court's jurisdiction, Mobil submitted, Pt 4A severed the necessary territorial connection with Victoria upon which the constitutional competence of the legislation of that State's Parliament ultimately depended.

127 *Impermissible over-reach of regulation*: Proof of the argument of excess of jurisdiction, Mobil argued, was to be found in the assertion of an Australia-wide jurisdiction of the Supreme Court in s 33KA of the Act, a provision introduced by the amending Act. Relevantly, s 33KA(1) permits the Supreme Court, at any time before or after judgment, to order that a person not become, or

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178 The Act, s 33ZB.

179 cf Spencer Bower, Turner and Handley, *The Doctrine of Res Judicata*, 3rd ed (1996), par 220.

180 cf *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589.

cease to be, a group member. However, the criteria for such an order are stated in s 33KA(2) (with emphasis added):

> "The Court may make an order under sub-section (1) if of the opinion that -
>
> (a) the person does not have sufficient connection *with Australia* to justify inclusion as a group member; or
>
> (b) for any other reason it is just or expedient that the person should not be or should not become a group member."

128 Mobil submitted that, if every State Parliament enacted laws asserting such an excess of jurisdiction, pretending in effect to be a law-maker for the whole of Australia, the consequences would be confusion and uncertainty of legal obligations which it was the purpose of the federal Constitution to avoid. Accordingly, by purporting to govern the rights and obligations of persons in other States in ways that might be prejudicial to the interests and wishes of persons in those states, Pt 4A went beyond the lawmaking power of the Victorian Parliament. It presented, in a concrete text, the spectre foreseen by this Court of the laws of two or more States asserting power over the same subject matter[181]. In doing so, Pt 4A exceeded the limits on the legislative power of the Parliament of Victoria inherent in the federal Constitution.

129 Mobil then argued that because Pt 4A included general words or expressions which applied both to cases within power and to cases beyond power (and did not afford a clear criterion by which its provisions could be read down so as to avoid invalid extraterritorial operations[182]), severance of the offending provisions was impossible[183]. The entirety of Pt 4A was therefore invalid.

Conclusion: no impermissible extraterritoriality demonstrated

130 In my opinion, Mobil has not demonstrated that the provisions of Pt 4A of the Act confer on the Supreme Court an impermissible extraterritorial operation that is incompatible with the federal Constitution. It has not demonstrated that any conflict exists between different State laws. The most that it has shown is

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181 *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 374.

182 *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111.

183 *Re F; Ex parte F* (1986) 161 CLR 376 at 385; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 502.

that there is a potential for conflicting State laws, not yet proved. Even the latter possibility has about it the air of theory rather than reality.

131 In the past, this Court has approached suggestions about inconsistency between the laws of different States *inter se* by asking whether there is a "real question of any real inconsistency"[184] rather than whether in legal theory it is possible to imagine such an inconsistency presenting in another case at some later stage. There is good sense in maintaining that approach. Whereas inconsistency between federal and State laws, for which express provision is made in the Constitution, is the staple diet of a court such as this, the fact that a century has passed with so few suggestions of inconsistency between the laws of the Australian States *inter se* confirms the wisdom of avoiding precipitate intervention.

132 A suggested case of operational inconsistency between State laws might conceivably be imagined in the context of Pt 4A of the Act. It could, for example, arise after judgment in a particular case by reference to differing State laws governing limitation periods[185]. Or it could manifest itself after judgment in respect of procedural matters such as the rules to be observed in particular States in prosecuting to judgment a claim by a person under a legal disability. However, the occasion to consider such cases of inconsistency would be one where the concrete facts required that the issue be addressed. The current proceedings do not present such a case.

133 Mobil's solicitude for potential plaintiffs in other States, allegedly deprived of rights by the illegitimate intrusion of the Victorian Parliament into the legislative powers of other State Parliaments, would be more convincing if voiced by such persons for themselves. The fact that not a single one appeared suggests that, at least in these proceedings, there is no real example, actual or potential, of over-reaching orders of the court provided with jurisdiction by Pt 4A of the Act. It will be time enough for this Court to consider the constitutional rule for dealing with operational conflict between competing State laws if and when a demonstrated instance of conflict of that kind arises.

134 However, operational inconsistency is not the only form of constitutional inconsistency. Inconsistency of laws can also arise where it is shown that the valid law of another jurisdiction covers a field of rights and obligations into

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184 *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 374.

185 A schedule of differing periods provided by limitations legislation in the different States of Australia was tendered by Mobil.

which the contested law attempts to intrude[186]. Is there an inconsistency of Pt 4A of the Act in this sense? The fact that Pt 4A of the Act confers jurisdiction on the Supreme Court carries with it an implication that the statutory discretions thereby reposed in that Court will be exercised consistently with the territorial limitations implied in the federal Constitution, as supplemented by powers conferred on the Supreme Court by federal legislation, such as the *Service and Execution of Process Act*.

135 Mobil did not dispute the constitutional validity of the latter Act, which is designed to give practical effect to ss 51(xxiv), (xxv) and 118 of the Constitution. However, Mobil complained that Pt 4A of the Act had consequences not only for *defendants* (who are the usual subjects of the *Service and Execution of Process Act*) but also for *plaintiffs*.

136 There is nothing in the foregoing provisions of the Constitution (or s 5 of the covering clauses which is also relevant) that limits their operation to defendants or to judicial proceedings affecting defendants. Even before Pt 4A of the Act was enacted, it was unlikely that the claim of any person living in Australia, although outside Victoria, would not potentially be within the jurisdiction of the Supreme Court[187]. That Court might, in some circumstances, choose not to exercise its jurisdiction where to do so would be oppressive, vexatious or unjust having regard to the claims of a competing Australian forum[188]. Or where Victoria was an inappropriate forum or clearly inappropriate forum by comparison to a competing foreign forum propounded by a party[189]. Reposing the discretions and powers provided in Pt 4A in the Supreme Court and permitting orders to be made by that Court exempting or excluding a person from a "group" affords an assurance, in the case of this State law, that it would not be administered in a way contradictory to any inconsistent and valid law of another State.

137 One of the requirements for bringing proceedings under Pt 4A of the Act is that the group members' claims should give rise to a substantial common

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186 cf *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 480-481, 489; *Ex parte McLean* (1930) 43 CLR 472 at 483.

187 cf *Flaherty v Girgis* (1987) 162 CLR 574.

188 *Maritime Insurance Co Ltd v Geelong Harbor Trust Commissioners* (1908) 6 CLR 194; *Pegasus Leasing Ltd v Balescope Pty Ltd* (1994) 63 SASR 51 at 57-58.

189 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; cf *Regie National des Usines Renault SA v Zhang* (2002) 76 ALJR 551 at 556-557 [24]-[26], 567 [87], 577 [135], 587 [179]; 187 ALR 1 at 8-9, 22-23, 37, 51.

question of law or fact[190]. This requirement, and the court in which its implementation is reposed, affords a strong assurance against the possibility that the claims of a group member, covered by an order under Pt 4A, would not have a sufficient connection with Victoria. It is true that, in an analogous context, the word "substantial" in the foregoing criterion has been read as meaning no more than "real or of substance"[191]. However, it is impossible to believe that if, by reason of differences in the laws of different States, different group members' claims were affected by different substantive rules, such claims would not be classified as unlikely to give rise to a "common question of fact". And if only part of an interstate group member's claim had a sufficient connection with Victoria, the Supreme Court could make orders under ss 33Q or 33S of the Act[192], excluding or exempting those persons whose rights or obligations were differently provided for under another State's laws.

138 Does the foregoing reasoning imply that there could never be a case where a State law, such as that contained in Pt 4A of the Act, exceeded the legislative power of a Parliament of a State? Not necessarily. If, for example, there were demonstrated an operational inconsistency between the law of one State and the law of another, such inconsistency would have to be resolved in accordance with the Constitution. Moreover, the law of one State could, on its face, clearly express a territorial "over-reach" which this Court would disallow. An extreme instance, cited by Mobil, was of a law of the Parliament of Victoria which sought to regulate traffic flow in Brisbane, Queensland. Even if such a Victorian law purported to demonstrate a territorial nexus by confining the rights and obligations for which it provided to vehicles manufactured in Victoria, such a law would self-evidently offend the territorial limitations inherent in the

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190 The Act, s 33C(1)(c).

191 *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at 267 [28] by reference to the *Federal Court of Australia Act*.

192 Section 33Q provides that, where the determination of the common questions of law or fact will not finally resolve the claims of all group members, the Court may give directions in relation to the determination of the remaining questions (including by way of individual questions: s 33R). Section 33S provides that, if a question cannot properly or conveniently be dealt with under ss 33Q or 33R, the Court may give directions for the commencement and conduct of another proceeding. Section 33ZE(2) specifically contemplates that a group proceeding may not finally dispose of a group member's claim. It is constitutionally permissible for a court to exercise jurisdiction over, and to determine, only part of a plaintiff's claim (see, in the federal context, *Abebe v The Commonwealth* (1999) 197 CLR 510). The suggested limitations rejected in *Abebe* have no relevance to a State court exercising State jurisdiction.

Constitution. The same could be said of a law of one State that purported to regulate beyond that State's borders the exercise of the jurisdiction and powers of an organ of government of another State[193]. Or of an attempt by the law of one State to acquire land compulsorily in another State for the first State's purposes[194].

139 However, one has only to identify the type of law that would attract the implied constitutional restriction to see how unlikely it is, as a matter of practicality, that such a law would be enacted. In the history of the Commonwealth, laws of such a kind have never been attempted. Such extreme laws should therefore remain in the realm of the hypothetical.

140 Nonetheless, experience in the case of inconsistency between federal and State laws suggests that disputes over alleged incompatibility of laws are more likely to arise in cases closer to the boundaries of constitutional power. To the extent that one State's Parliament exercises its legislative power over extraterritorial subjects by reference to persons, events or things beyond its territory, it is inevitable that it will eventually run the risk of impinging upon matters that are, or may become, the subject of the laws of an adjoining State or States. In such a case nothing in legislation, including the provisions of the *Australia Acts*[195], could repair the constitutional flaw.

141 It follows that the basic proposition that Mobil advanced can be accepted. A point will indeed be reached in the legislation of one State having extraterritorial effect upon persons, events or things in another State, that will contradict the implied limitations on State legislative power inherent in the federal Constitution. Mobil fails in these proceedings because it has not demonstrated that Pt 4A of the Act involves such an impermissible excess of legislation. The most that it has shown is that, in certain hypothetical circumstances, orders might possibly be made, pursuant to the provisions of Pt 4A, that could irreversibly affect the legal rights of persons in other States who might otherwise have wished to bring their own proceedings. Looked at as a whole, Pt 4A of the Act includes adequate protections for that class of person against that kind of risk. Such protections are sufficient to save Pt 4A of the Act

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193 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 54; *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 127-128; *Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission* (1993) 40 FCR 409 at 439; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 451.

194 *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 543, 586.

195 *Australia Act* 1986 (Cth) (UK), s 2(1).

from characterisation as having no "real connection" with the State of Victoria whose Parliament enacted it.

142 If at some later stage, for example in cases involving incompatible State statutory[196] provisions governing the assessment of damages[197] or limitation periods[198], an operational inconsistency of laws were established, the present conclusion, based on the materials now before this Court, could be reviewed. Inconsistency might also arise if the Parliament of another State enacted "group proceedings" legislation of its own, containing provisions that contradicted those in Pt 4A of the Victorian Act in respect of persons, events and things within that State or purporting to forbid the Victorian Act from having any operation within that State. The emerging inconsistency would then have to be resolved by the application of the federal Constitution. It would be resolved, ultimately, by this Court, if the almost inevitable intergovernmental negotiations did not obviate that necessity.

143 Ultimately, the extraterritorial legislation of one State could challenge the legislative power of the Parliament of another State. So much is self-evident. It is the result of "the predominantly territorial interest of each [State] in what occurs within its territory"[199]. But no such inconsistency has been shown at this stage with respect to the legislation of the Victorian Parliament in question in these proceedings. Accordingly, Mobil has not demonstrated its entitlement to the relief that it seeks.

Orders

144 I therefore agree in the orders proposed in the joint reasons.

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196 There is a single Australian common law: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563-564; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 540 [86].

197 See the Act, s 33Z(1)(f).

198 See the Act, s 33ZE; cf *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 543 [98].

199 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 534 [64].

145 CALLINAN J. Victoria has enacted legislation for the institution and management of class or group actions in that State with an apparent reach far beyond its political boundaries. The question that this case raises is whether the enactment is valid.

Facts

146 These proceedings are brought in the original jurisdiction of the High Court. In its statement of claim, the plaintiff, a company incorporated in Victoria and carrying on business there, refers to other proceedings instituted in Victoria by Schutt Flying Academy (Australia) Pty Ltd ("Schutt") as plaintiff ("the Victorian proceedings"). Those proceedings were brought as group proceedings pursuant to O 18A of the Supreme Court (General Civil Procedure) Rules 1996 (Vic). Some months after the institution of the Victorian proceedings, Schutt ceased to be the plaintiff and Tasfast Air Freight Pty Ltd ("Tasfast") the second defendant to the proceedings in this Court was substituted as plaintiff.

147 The second defendant in this Court, as plaintiff in the Victorian proceedings alleged various causes of action against the plaintiff in connexion with aviation fuel processed by the plaintiff and supplied to numerous persons at various places in Australia in and outside Victoria. It will be necessary to say something further about the causes of action alleged in the Victorian proceedings later.

148 A question arose in the Victorian proceedings whether O 18A was validly made. That question was reserved for the consideration of the Court of Appeal of Victoria on which five members of the Court sat. By a narrow majority (Ormiston, Phillips and Charles JJA, Winneke P and Brooking JA dissenting), the question was answered affirmatively. Their Honours who dissented did so on the basis that two of the rules of O 18A were beyond the rule making power conferred by s 25 of the *Supreme Court Act* 1986 (Vic), because, by authorizing the Court to assess damages otherwise than according to law, the rules affected substantive rights[200].

149 The present plaintiff then filed an application seeking special leave to appeal to this Court. Before the application could be heard, a new Act, the *Courts and Tribunals Legislation (Miscellaneous Amendments) Act* 2000 (Vic) ("the Victorian Act") as an amendment to the *Supreme Court Act* was enacted, no doubt in order to remove any question that might arise following the division of opinion in the Court of Appeal with respect to the validity of the measures the subject of the rules of court, and substantially now, therefore of an enactment.

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200 *Schutt Flying Academy (Australia) Pty Ltd v Mobil Oil Australia Ltd* (2000) 1 VR 545 at 557.

The Victorian Act is not only in a materially similar form to O 18A but also to the provisions in the *Federal Court of Australia Act* 1976 (Cth) relating to class actions. Indeed, in general, the numbering of the sections inserted in the *Supreme Court Act* by the Victorian Act coincides with the numbering of analogues or near analogues of the *Federal Court of Australia Act* upon which the Victorian legislation is based. By s 2(2) of the Victorian Act, that Act is deemed to have commenced on 1 January 2000, and is accordingly applicable to the Victorian proceedings even though they were commenced before its enactment.

150 By its statement of claim in this Court, the plaintiff contends that the Victorian Act (which introduced a new Pt 4A) is beyond the legislative power of Victoria in that its provisions exceed the territorial limits on that power conferred by the Victorian Constitution or otherwise, and that they are incompatible with the exercise of vested federal judicial power by the Supreme Court of Victoria.

151 I earlier made some reference to the causes of action pleaded in the Victorian proceedings. In order the better to understand the claims made there, it is necessary to examine the statement of claim in those proceedings. By consent, that document was made available to this Court and may be regarded as relevantly incorporated into the plaintiff's statement of claim here.

152 The persons on whose behalf the Victorian proceedings are brought are all persons who owned or operated aircraft, or were licensed aircraft pilots of aircraft which used aviation fuel "released" from the plaintiff at Yarraville in the State of Victoria on certain specified occasions at various places in, and outside Victoria, in Australia. The Victorian statement of claim further alleges that the fuel was sold pursuant to contracts for the supply of fuel by agents of the present plaintiff. Terms of merchantability and reasonable fitness for purpose were alleged to be implied by the Sale of Goods Acts of Victoria, New South Wales and Queensland. The claims therefore of Tasfast and the members of the group are, in the first instance, made in contract.

153 Claims are also made in the statement of claim in the Victorian proceedings in tort on the basis of product liability.

154 Tasfast, and the State of Victoria which is also a defendant in the present proceedings in this Court, have demurred to the plaintiff's statement of claim. The demurrer asserts the validity of the Victorian Act and it is that demurrer which was argued and which now falls for decision in this Court.

155 The key provisions of Pt 4A which the Victorian Act inserted in the *Supreme Court Act* should be noted.

156 Section 33A defines a group member as a member of a group of persons on whose behalf a group proceeding has been commenced, and a group proceeding as a proceeding commenced under Pt 4A.

157 Section 33C provides as follows:

"**Commencement of proceeding**

(1) Subject to this Part, if-

(a) seven or more persons have claims against the same person; and

(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and

(c) the claims of all those persons give rise to a substantial common question of law or fact-

a proceeding may be commenced by one or more of those persons as representing some or all of them.

(2) A group proceeding may be commenced-

(a) whether or not the relief sought-

(i) is, or includes, equitable relief; or

(ii) consists of, or includes, damages; or

(iii) includes claims for damages that would require individual assessment; or

(iv) is the same for each person represented; and

(b) whether or not the proceeding-

(i) is concerned with separate contracts or transactions between the defendant and individual group members; or

(ii) involves separate acts or omissions of the defendant done or omitted to be done in relation to individual group members."

158 Section 33D is in the following form:

"**Standing**

(1) A person referred to in paragraph (a) of section 33C(1) who has a sufficient interest to commence a proceeding on the person's own behalf against another person has a sufficient interest to commence a group proceeding against that other person on behalf of other persons referred to in that paragraph.

(2) If a person has commenced a group proceeding, that person retains a sufficient interest-

(a) to continue the proceeding; and

(b) to bring an appeal from a judgment in the proceeding-

even though the person ceases to have a claim against the defendant."

159 Section 33E provides as follows:

"**Consent of a group member**

(1) Subject to sub-section (2), the consent of a person to be a group member is not required.

(2) None of the following persons is a group member unless the person gives consent in writing to being so-

(a) the Commonwealth, a State or a Territory; or

(b) a Minister of the Commonwealth, a State or a Territory; or

(c) a body corporate established for a public purpose by a law of the Commonwealth, a State or a Territory, other than an incorporated company or association; or

(d) any judge, magistrate or other judicial officer of the Commonwealth, a State or a Territory; or

(e) any other officer of the Commonwealth, a State or a Territory, in his or her capacity as an officer."

160 The effect of s 33F is that a person under a disability may be a member of a group (but not an active participant in group proceedings) without a litigation guardian.

161 Section 33J deals with members of a group who elect not to be parties to the proceedings:

"**Right of group member to opt out**

(1) The Court must fix a date before which a group member may opt out of a group proceeding.

(2) A group member may opt out of the group proceeding by notice in writing before the date so fixed.

(3) The Court, on the application of a group member, the plaintiff or the defendant, may extend the period within which a group member may opt out of the group proceeding.

(4) Except with the leave of the Court, the trial of a group proceeding must not commence earlier than the date before which a group member may opt out of the proceeding.

(5) Unless the Court otherwise orders, a person who has opted out of a group proceeding must be taken never to have been a group member.

(6) The Court, on the application of a person who has opted out of a group proceeding, may reinstate that person as a group member on such terms as the Court thinks fit."

162 Section 33KA confers very broad powers upon the Supreme Court of Victoria:

"**Court powers concerning group membership**

(1) On the application of a party to a group proceeding or of its own motion, the Court may at any time, whether before or after judgment, order-

(a) that a person cease to be a group member;

(b) that a person not become a group member.

(2) The Court may make an order under sub-section (1) if of the opinion that-

(a) the person does not have sufficient connection with Australia to justify inclusion as a group member; or

(b) for any other reason it is just or expedient that the person should not be or should not become a group member.

(3) If the Court orders that a person cease to be a group member, then, if the Court so orders, the person must be taken never to have been a group member."

163 There is some possible overlap between s 33KA and s 33N which provides as follows:

"**Proceeding not to continue under this Part**

(1) The Court may, on application by the defendant, order that a proceeding no longer continue under this Part if it is satisfied that it is in the interests of justice to do so because-

(a) the costs that would be incurred if the proceeding were to continue as a group proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceeding; or

(b) all the relief sought can be obtained by means of a proceeding other than a group proceeding; or

(c) the group proceeding will not provide an efficient and effective means of dealing with the claims of group members; or

(d) it is otherwise inappropriate that the claims be pursued by means of a group proceeding.

(2) If the Court dismisses an application under this section, the Court may order that no further application under this section be made by the defendant except with the leave of the Court.

(3) Leave for the purposes of sub-section (2) may be granted subject to such conditions as to costs as the Court thinks fit."

164 Sections 33V and 33X should be noted. Section 33V provides:

"**Settlement and discontinuance**

(1) A group proceeding may not be settled or discontinued without the approval of the Court.

(2) If the Court gives such approval, it may make such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement or paid into court."

165 Section 33X provides:

"**When notice to be given**

(1) Notice must be given to group members of the following matters in relation to a group proceeding-

(a) the commencement of the proceeding and the right of the group members to opt out of the proceeding before a specified date, being the date fixed under section 33J(1);

(b) an application by the defendant for the dismissal of the proceeding on the ground of want of prosecution;

(c) an application by the plaintiff seeking leave under section 33W.

(2) The Court may dispense with compliance with any or all of the requirements of sub-section (1) if the relief sought in a proceeding does not include any claim for damages.

(3) If the Court so orders, notice must be given to group members of any offer to compromise the proceeding.

(4) Unless the Court is satisfied that it is just to do so, an application for approval under section 33V must not be determined unless notice has been given to group members.

(5) The Court may, at any stage, order that notice of any matter be given to a group member or group members.

(6) Notice under this section must be given as soon as practicable after the happening of the event to which the notice relates."

166 Further provisions of relevance are as follows.

"**33ZA Constitution etc of fund**

(1) Without limiting the operation of section 33Z(2), in making provision for the distribution of money to group members, the Court may provide for-

(a) the constitution and administration of a fund consisting of the money to be distributed; and

(b) either-

(i) the payment by the defendant of a fixed sum of money into the fund; or

(ii) the payment by the defendant into the fund of such instalments, on such terms, as the Court directs to meet the claims of group members; and

(c) entitlements to interest earned on the money in the fund.

(2) The costs of administering a fund are to be borne by the fund or the defendant, or by both, as the Court directs.

(3) If the Court orders the constitution of a fund mentioned in sub-section (1), the order must-

(a) require notice to be given to group members in such manner as is specified in the order; and

(b) specify the manner in which a group member is to make a claim for payment out of the fund and establish the group member's entitlement to the payment; and

(c) specify a day (which is 6 months or more after the day on which the order is made) on or before which the group members are to make a claim for payment out of the fund; and

(d) make provision in relation to the day before which the fund is to be distributed to group members who have established an entitlement to be paid out of the fund.

(4) The Court may, if it is just, allow a group member to make a claim after the day fixed under sub-section (3)(c) if the fund has not already been fully distributed.

(5) On application by the defendant after the day fixed under sub-section (3)(d), the Court may make such orders as it thinks fit for the payment from the fund to the defendant of the money remaining in the fund."

167 Section 33ZE is a far reaching provision:

"**Suspension of limitation periods**

(1) Upon the commencement of a group proceeding, the running of any limitation period that applies to the claim of a group member to which the proceeding relates is suspended.

(2) The limitation period does not begin to run again unless either the member opts out of the proceeding under section 33J or the

> proceeding, and any appeals arising from the proceeding, are determined without finally disposing of the group member's claim."

168 It is true, as the joint judgment of Gaudron, Gummow and Hayne JJ points out, that rules of court have long provided for the joinder of plaintiffs in one action, of all persons having a right to relief arising out of the same transactions or events. It is also true that representative proceedings have been available under rules of court modelled on the former Chancery practice for more than 100 years.

169 But, it is relevant to note that there are differences between group, or as they are more familiarly known, class actions, and litigation of a more conventional kind, including even currently generally available representative actions, particularly with respect to the considerations relevant to the exercise of a court's discretion whether to allow the proceedings to be carried on. This Court recently gave consideration to conventional representative proceedings in New South Wales in *Carnie v Esanda Finance Corporation Ltd*[201]. Although the Court (contrary to the opinion of the Court of Appeal of New South Wales) took the view that the absence of detailed legislative provision for the regulation of the proceedings there was not fatal to their maintenance, it held that relevant to the exercise of the power of the Court to disallow their continuation, were a number of matters which serve to indicate some of the differences between class or group proceedings, and representative proceedings. Mason CJ, Deane and Dawson JJ said this[202]:

> "Relevant to that question [whether proceedings should go forward] are some of the comments of Gleeson CJ in the course of explaining his concern about the absence of a detailed legislative prescription. In that context, Gleeson CJ mentioned the need to deal with such important matters as[203]: (1) whether or not consent is required from group members; (2) the right of such members to opt out of the proceedings; (3) the position of persons under a disability; (4) alterations to the description of the group; (5) settlement and discontinuance of the proceedings; and (6) the giving of various notices to group members."

170 Group proceedings may be brought under the Victorian Act even though separate contracts may be involved. A person who has commenced group proceedings under the *Supreme Court Act* may appeal in them, even though that

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201 (1995) 182 CLR 398.

202 *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 405. For a history of representative actions see at 416 per Toohey and Gaudron JJ.

203 *Esanda Finance Corporation Ltd v Carnie* (1992) 29 NSWLR 382 at 388.

person no longer has any claim against the defendant. A person who is under a disability may be a member of the group although that person does not have a litigation guardian. The onus is upon a group member to opt out, and unless he or she does so by a certain date, that person will continue to be a member. No proceedings may be settled or discontinued without the approval of the Court, and the Court solely decides how any settlement fund, if there has been a settlement, will be distributed among members of the group. An onerous requirement is imposed upon any defendant wishing to apply for dismissal of a group action for want of prosecution, to give a prior notice thereof to group members, that is presumably, all group members. A further potentially onerous requirement is that the cost of the administration of a settlement fund may have to be borne by the defendant.

171 The most striking of all of the differences between group proceedings and other generally available proceedings is however that on the commencement of the former, the operation of (presumably all) statutes of limitation is suspended.

172 The question here is not whether, by their nature, group or class proceedings are oppressive to defendants, give rise to entrepreneurial litigation, in fact proliferate and prolong court proceedings, undesirably substitute private for public law enforcement or are contrary to the public interest, with disadvantages outweighing a public interest in enabling persons who have been damnified but who would not, or could not bring the proceedings themselves, to be compensated for their losses[204]. The question simply is whether the Victorian Act is valid.

The plaintiff's argument

173 The plaintiff accepts that persons outside Victoria could, independently of Pt 4A of the *Supreme Court Act*, pursue any of the causes of action pleaded by Tasfast in Victoria, because the plaintiff carries on business in that State and may

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204 In *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398 at 429-430, McHugh J put this view:

> "[T]he recent cases have been more liberal in allowing representative actions to proceed. In the Age of Consumerism, it is proper that this should be so. The cost of litigation often makes it economically irrational for an individual to attempt to enforce legal rights arising out of a consumer contract. Consumers should not be denied the opportunity to have their legal rights determined when it can be done efficiently and effectively on their behalf by one person with the same community of interest as other consumers. Nor should the courts' lists be cluttered by numerous actions when one action can effectively determine the rights of many."

be served there. The effect, however, of s 33X is that a person outside Victoria who might not receive actual notice of the group proceeding, may not have an opportunity to opt out, and is accordingly in a different position from an interstate plaintiff deliberately choosing to invoke the jurisdiction of the Supreme Court of Victoria rather than some other Australian court.

174 The plaintiff points to the fact that a group member will be bound by the judgment in the proceeding (s 33ZB). If the judgment finally determine the matter (for example, if there be a judgment for the defendant, or if damages be ordered in an aggregate sum) his or her damages and rights thereto would merge in that judgment. It is also conceivable that a group member pursuing a claim in another Supreme Court under another appropriate, but different regime for damages in that court, might have his or her damages assessed in a greater sum than the sum assessed in the group proceedings in Victoria, or than would be available on a division of an aggregate sum, or a settlement fund assessed or approved, and administered by the Victorian Supreme Court. There is another potential problem to which the plaintiff refers. Even if the judgment does not finally determine the matter, for example, if only a common question of law or fact is decided, the decision of law, or with respect to that fact, may give rise to a defence of *res judicata* between every member of the group and the defendant. A group member seeking to commence proceedings against the defendant following the determination of the group proceeding based on a different cause of action will arguably at least have to overcome an estoppel argument if the claim is of a kind that could have been pursued in the group proceeding[205].

175 The plaintiff refers to the recent decision of this Court in *John Pfeiffer Pty Ltd v Rogerson*[206] which holds that the law to be applied in proceedings brought in one jurisdiction in tort will ordinarily be the law of the place of the tort, and will include, as matters of substantive law the heads and quantum of damages, and the statutory law of the place of the tort including statutes of limitation. The Victorian Act has the capacity therefore to affect the substantive rights of group members outside Victoria, even though those people may wish to litigate, and would be entitled to litigate their claims in another State.

176 The plaintiff submits that the *Constitution Act* 1975 (Vic) must be read subject to the Australian Constitution and does not provide a sound basis for the exercise of jurisdiction by the Victorian Supreme Court over unwitting or unwilling group members in other States. Section 85 provides as follows:

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205 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

206 (2000) 203 CLR 503.

"**Powers and jurisdiction of the Court**

(1) Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction.

(2) [Repealed]

(3) The Court has and may exercise such jurisdiction (whether original or appellate) and such powers and authorities as it had immediately before the commencement of the *Supreme Court Act* 1986.

(4) This Act does not limit or affect the power of the Parliament to confer additional jurisdiction or powers on the Court.

(5) A provision of an Act, other than a provision which directly repeals or directly amends any part of this section, is not to be taken to repeal, alter or vary this section unless-

(a) the Act expressly refers to this section in, or in relation to, that provision and expressly, and not merely by implication, states an intention to repeal, alter or vary this section; and

(b) the member of the Parliament who introduces the Bill for the Act or, if the provision is inserted in the Act by another Act, the Bill for that other Act, or a person acting on his or her behalf, makes a statement to the Council or the Assembly, as the case requires, of the reasons for repealing, altering or varying this section; and

(c) the statement is so made-

(i) during the member's second reading speech; or

(ii) after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or

(iii) with the leave of the Council or the Assembly, as the case requires, at any time before the third reading of the Bill.

(6) A provision of a Bill which excludes or restricts, or purports to exclude or restrict, judicial review by the Court of a decision of another court, tribunal, body or person is to be taken to repeal, alter or vary this section and to be of no effect unless the requirements of sub-section (5) are satisfied.

(7) A provision of an Act which creates, or purports to create, a summary offence is not to be taken, on that account, to repeal, alter or vary this section.

(8) A provision of an Act that confers jurisdiction on a court, tribunal, body or person which would otherwise be exercisable by the Supreme Court, or which augments any such jurisdiction conferred on a court, tribunal, body or person, does not exclude the jurisdiction of the Supreme Court except as provided in sub-section (5).

…"

177 The Australian Constitution and the federal structure for which it provides, must of necessity contemplate and ensure the unfettered exercise of jurisdiction of the courts of each of the States according to accepted notions of territoriality. All of the State Constitutions contain similar provisions to s 85 of the Victorian Constitution. The plaintiff accepts that the language used in s 85 of the Victorian Constitution and like provisions in other States should not be read in any narrow fashion[207]. However, a consistent, expansive reading and application of all State Constitutions has the capacity to cause, and will inevitably do so, conflicts of jurisdiction, and forum poaching: it is only when the jurisdiction of one State is under consideration, that there may be no immediately apparent problem. The Victorian legislature, by the Victorian Act, has attempted to make the Supreme Court of Victoria a national court for the conduct of class actions: this is so because it has the potential, if the *Supreme Court Act* is valid, to draw residents of other places into proceedings in Victoria as plaintiffs in circumstances in which their claims have no necessary connexion with Victoria, they have not invoked the jurisdiction of that Court and they might wish, for perfectly valid reasons, to bring proceedings in jurisdictions other than Victoria.

178 The plaintiff accepts that there is a body of choice of law rules to apply to cases in which jurisdiction is founded simply upon service of process on the defendant whilst the defendant is in the relevant jurisdiction. The plaintiff does not accept however that the existence of that body of rules denies the force of its argument that there must be some limit upon the jurisdiction of a State Supreme Court, and that limit should be imposed by this Court, if its exercise has a tendency to interfere with, or impinge upon the extra-territorial jurisdiction and powers of another State. The plaintiff's proposition does not go so far as to seek to confine a State Supreme Court's jurisdiction to cases in which the subject

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207 See *Pearce v Florenca* (1976) 135 CLR 507 at 518 per Gibbs J; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 372.

matter arises within the State in which the jurisdiction is being exercised. The plaintiff's submissions are made in the context of this case, and with a degree of particularity which is related to the breadth and reach of the Victorian Act and its presumption in, among other things, purporting to suspend the operation of all statutes of limitation, including those of other jurisdictions. It is no answer, the plaintiff submits, that already there are cases in which similar, if not identical issues, can be raised in the courts of two States between the same or related parties, and that the difficulties to which they give rise can be resolved by the application of principles concerning abuse of process, or by the application of cross-vesting legislation. What distinguishes those cases is that the plaintiffs in them are ordinarily fully voluntary, moving parties, pursuing proceedings of their choice in jurisdictions which they have chosen and are entitled to choose.

The resolution of the demurrer

179 In my opinion, several matters, some of which were adverted to in the plaintiff's submissions, do have to be taken into account in resolving the issues in this case.

180 First, *Pfeiffer*[208] holds that the law to be applied in cases of tort is the law of the place of the commission of the tort. What is not completely settled in cases of torts of product liability is how the place of the commission of the tort is to be determined, whether by reference to the place of design, manufacture, assembly, supply, consumption, or even of advertisement. True it is in a case of tort that damage is said to be the gist of the action, but equally, there will be no damage but for the defective design, manufacture, assembly or supply, as the case may be, wherever that occurred. Arguments can be persuasively advanced to locate the tort in any of the suggested places. This Court on balance appears to have adopted a test which is tantamount to asking the question, "where, in substance, did the act take place?"[209] Four Justices[210], although they did not refer in terms to the "substance" of the cause of action, an expression used by the Privy Council in *Distillers Co (Biochemicals) Ltd v Thompson*[211], in looking to "the act on the part of the defendant which gives the plaintiff his cause of complaint", were effectively adopting the same or a very similar approach to their Lordships in that case. The proposition that the best place for a trial will usually be the

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208 (2000) 203 CLR 503.

209 See *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 567-568 per Mason CJ, Deane, Dawson and Gaudron JJ. See also *Macgregor v Application des Gaz* [1976] Qd R 175 at 176.

210 Mason CJ, Deane, Dawson and Gaudron JJ.

211 [1971] AC 458.

place where the defendant misconducted itself or omitted to do something (except in cases to which longstanding different rules based on different considerations apply, such as defamation and injurious falsehood cases), rather than where seven people are able to congregate to start an action, is I think, the preferable one.

181 Secondly, even though the availability of "long arm" jurisdiction is an accepted legal fact of life recently affirmed by this Court in an international setting[212], a serious question remains whether, or, as to the extent to which, the arms of one State should, in a federation, be permitted to reach into and pick the pockets of the jurisdiction of another.

182 Thirdly, given the realities of competition between the States, which in many respects may by no means be undesirable, I would expect that other States will perceive the Victorian legislation to be a pre-emptive grab for national ascendancy in class actions, and therefore to be met with the enactment of similar legislation to confer upon their own courts the same jurisdiction. And because many business people carry on business in all States and Territories of the Commonwealth, the potential for confusion and uncertainty in the courts in that likely event will be great.

183 Fourthly, the problems to which I have just referred are likely to be aggravated by the increasingly competitive entrepreneurial activities of lawyers undertaking the conduct of class or group actions, in which, in a practical sense, the lawyers are often as much the litigants as the plaintiffs themselves, and with the same or even a greater stake in the outcome than any member of a group. This reality is likely to be productive of a multiplicity of group actions throughout the country.

184 Fifthly, s 118[213] of the Constitution must be given effect, and the question is how that may be achieved when one or more States legislate as Victoria has. Five Justices of this Court (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) in *Pfeiffer*[214] referred to the problems of applying the statute law of two law areas when the laws differ. In that case it was unnecessary to reach a

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212 *Regie National des Usines Renault SA v Zhang* (2002) 76 ALJR 551; 187 ALR 1.

213 "**Recognition of laws etc of States**

Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State."

214 (2000) 203 CLR 503 at 515 [3].

concluded view of the operation of s 118 of the Constitution but their Honours said this of it[215]:

> "In its terms, s 118 does not state any rule which dictates what choice is to be made if there is some relevant intersection between legislation enacted by different States. Nor does it, in terms, state a rule which would dictate what common law choice of law rule should be adopted. It may well be, however, that s 118 (and in some cases s 117, or even s 92 in its protection of individual intercourse[216]) deals with questions of competition between public policy choices reflected in the legislation of different States – at least by denying resort to the contention that one State's courts may deny the application of the rules embodied in the statute law of another State on public policy grounds[217].
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> In *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd*[218], Rich and Dixon JJ and Evatt J suggested that s 118 precludes the courts of one State from concluding (as the primary judge had in that case) that the application of the statute of another State 'would at the stage and in the circumstances in which it was invoked work manifest injustice to or, in effect, a fraud on one of the parties'[219]. And in [*Breavington v Godleman*], six members of the Court appear to have accepted that s 118 may preclude the refusal of one State to apply the law of another on the grounds of public policy where the law of that other State is otherwise applicable[220]. However, it may also be that s 118 suggests that the constitutional balance which should be struck in cases of intranational tort claims is one which is focused more on the need for each State to acknowledge the predominantly territorial interest of each in what occurs within its territory than it is on a plaintiff's desire to achieve maximum compensation for an alleged wrong.

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215 (2000) 203 CLR 503 at 533-534 [63]-[65].

216 *AMS v AIF* (1999) 199 CLR 160.

217 cf *Loucks v Standard Oil Co of New York* 120 NE 198 at 202 (1918).

218 (1933) 48 CLR 565 at 577, 587-588.

219 *Moolpa Pastoral Co Pty Ltd v Merwin Pastoral Co Pty Ltd* unreported, Supreme Court of Victoria per Macfarlan J cited (1933) 48 CLR 565 at 577 per Rich and Dixon JJ.

220 (1988) 169 CLR 41 at 81, 96-97, 116, 133-134, 150.

> It has been said that the giving of full faith and credit to the law of another State only when the choice of law rules of the forum point to that law 'is to give full faith and credit to one's own law rather than to that of the sister-state, a fact which the unity of the common law in Australia has so far concealed'[221]. And there was a deal of debate in the oral argument in the present case about the effect of s 118. Some of those questions were considered in *Breavington*[222] but not resolved by the formulation of a choice of law rule deriving its force from s 118. However, the terms of s 118 indicate that, as between themselves, the States are not foreign powers as are nation states for the purposes of international law. That apart, it is not necessary in the present matter to resolve other questions respecting s 118. The matter is to be resolved, in our view, by developing the common law to take account of federal jurisdiction as delineated in Ch III of the Constitution and, also, to take account of the federal system in which sovereignty is shared between the Commonwealth and the member States of the federation."

185 It is also relevant in this context to refer to their Honours' reflections upon the difficulties of application of the rules for choice of law that can arise when plaintiffs have two or more causes of action or choices of jurisdiction[223].

> "Difficulty will arise in locating the tort when an action is brought, for example, for product liability and the product is made in State A, sold in State B and consumed or used by the plaintiff in State C[224]. And the tort of libel may be committed in many States when a national publication publishes an article that defames a person[225]. These difficulties may lead to litigants seeking to frame claims in contract rather than tort (as the [*Workers Compensation Act* 1987 (NSW)] anticipated[226]) or for breach of

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221 D St Leger Kelly, "Chief Justice Bray and the Conflict of Laws", (1980) 7 *Adelaide Law Review* 17 at 27-28.

222 (1988) 169 CLR 41 at 81-82, 95-100, 116-117, 129-136, 150.

223 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 538-540 [81]-[85].

224 cf *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458; *Buttigeig v Universal Terminal & Stevedoring Corporation* [1972] VR 626; *Macgregor v Application des Gaz* [1976] Qd R 175; *Jacobs v Australian Abrasives Pty Ltd* [1971] Tas SR 92.

225 *McLean v David Syme & Co Ltd* (1970) 72 SR (NSW) 513; *David Syme & Co Ltd v Grey* (1992) 38 FCR 303; *Berezovsky v Michaels* [2000] 1 WLR 1004; [2000] 2 All ER 986.

226 s 151E.

s 52 of the *Trade Practices Act* 1974 (Cth) or some similar provision. Characterising such actions may be difficult and may raise questions whether the private international law rules about tort or some other rules are to be applied[227].

Moreover, even if the place of the tort can be located in a single jurisdiction, it will often enough be entirely fortuitous where the tort occurred. Why, so the argument goes, should the rights of Victorian residents injured when the car in which they are driven (by another Victorian) differ according to whether, if a driver falls asleep and the car runs off the road near the Victorian border, it does so south of Wodonga or north of Albury? But for every hard case that can be postulated if one form of universal rule is adopted, another equally hard case can be postulated if the opposite universal rule is adopted.

It is as well then to compare the consequences of the application, in cases of intranational torts, of the lex loci delicti with the consequences of applying the lex fori. If the lex loci delicti is applied, subject to the possible difficulty of locating the tort, liability is fixed and certain; if the lex fori is applied, the existence, extent and enforceability of liability varies according to the number of forums to which the plaintiff may resort and according to the differences between the laws of those forums and, in cases in federal jurisdiction, according to where the court sits.

From the perspective of the tortfeasor (or in many cases an insurer of the tortfeasor) application of the lex loci delicti fixes liability by reference to geography and it is, to that extent, easier to promote laws giving a favourable outcome by, for example, limiting liability. If the lex fori is applied, the tortfeasor is exposed to a spectrum of laws imposing liability.

From the perspective of the victim (the plaintiff) application of the lex loci delicti can be said to make compensation depend upon the accident of where the tort was committed, whereas, if the lex fori is applied, the plaintiff can resort to whatever forum will give the greatest compensation."

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227 Collins, "Interaction between Contract and Tort in the Conflict of Laws", (1967) 16 *International and Comparative Law Quarterly* 103; Pryles, "Tort and Related Obligations in Private International Law", (1991) II *Recueil des Cours* 9 at 166-191.

186 On an earlier occasion, in 1989, this Court[228] (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) discussed, without resolving, the difficulties that can arise when States legislate in respect of matters with which each has a legitimate connexion:

> "A problem of greater difficulty would have arisen if the fishery defined by the arrangement had a real connexion with two States, each of which enacted a law for the management of the fishery. The Constitution contains no express paramountcy provision similar to s 109 by reference to which conflicts between competing laws of different States are to be resolved. If the second arrangement had been construed as extending to waters on the Victorian side of the line of equidistance, there would obviously have been grounds for arguing that the Victorian nexus with activities in these waters was as strong as or stronger than the South Australian nexus. As has been seen, however, the second arrangement does not extend into such waters. Where, as here, there is no suggestion of the direct operation of the law of one State in the territory of another, the problem of conflicting State laws arises only if there be laws of two or more States which, by their terms or in their operation, affect the same persons, transactions or relationships. In the present case, there is no competing law of a State other than South Australia purporting to apply to or in relation to the fishery to which the second arrangement applies. That being so, there is no real question of any relevant inconsistency between the law of South Australia and the law of another State."

187 Sixthly, although it is now settled that there is only one common law for the whole of Australia, the States' relevant enactments are different in many

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228 *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 374.

respects. Some have capped or otherwise limited[229] or even abolished[230] damages for personal injuries. In New South Wales exemplary damages are not recoverable[231] in defamation actions. In Queensland they are. Provisions for the enlargement of periods of limitation are perhaps more generous, or may be more generously applied in New South Wales[232] than they are in Queensland. These are examples of significant differences of both substantive and perhaps procedural law that immediately come to mind. In current practice, and in the

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229 Section 131 of the *Motor Accidents Compensation Act* 1999 (NSW) puts limits on recoverable damages in respect of non-pecuniary loss suffered from motor accidents. Those losses are recoverable only if the claimant's ability to lead a normal life is substantially impaired by the injury. Should damages be recoverable, a statutory ceiling has been set to limit the maximum amount of damages recoverable.

In South Australia, there are similar limits on the amount of damages recoverable at common law in motor accident claims: *Wrongs Act* 1936 (SA), s 35A(1).

In Victoria, common law actions may be brought for motor accidents only if the victim suffers a "serious injury": *Transport Accident Act* 1986 (Vic), s 93(2). Like New South Wales and South Australia, that State places statutory limits on maximum damages awards: *Transport Accident Act* 1986 (Vic), ss 44-62.

230 *WorkCover Queensland Act* 1996 (Q), s 11, s 50, s 207, s 252, s 253, s 256, s 259, s 262, s 302; *Bonser v Melnacis* [2002] 1 Qd R 1.

From 1 July 1984 common law actions for transport related accidents were abolished for Northern Territory residents by s 5 of the *Motor Accidents (Compensation) Act* 1979 (NT). The Act defines a "resident" as a person resident in the Northern Territory for three months prior to the accident: *Motor Accidents (Compensation) Act* 1979 (NT), s 4.

Further, actions for loss of consortium are no longer allowed in New South Wales (*Law Reform (Marital Consortium) Act* 1984 (NSW), s 3) and Tasmania (*Common Law (Miscellaneous Actions) Act* 1986 (Tas), s 3). By contrast, in Queensland (*Law Reform Act* 1995 (Q), s 13) and South Australia (*Wrongs Act* 1936 (SA), s 33), the consortium action has been extended to permit wives to recover for the loss of their husband's services. The action for loss of consortium continues in an unamended form in Victoria – it is available only to husbands who lose the consortium of their wife.

231 *Defamation Act* 1974 (NSW), s 46(3)(a).

232 See discussion *Agar v Hyde* (2000) 201 CLR 552 at 601 [130]-[131] per Callinan J.

future, there are, and will be many others[233]. If each State were to enact, and the courts were to be required to give full effect to the potentially imperialistic legislation of the kind now to be found in Pt 4A of the *Supreme Court Act*, then the courts of the States will be confronted with endless conflicts that will defy satisfactory resolution.

188 As the majority judgment[234] points out, the claims of some claimants may arise out of events and transactions occurring wholly outside Victoria, and the claimants may have no connexion at all with that State: but as the plaintiff was incorporated, served with process, carried on business in, and "released fuel" from, Victoria, there is no doubt that the Victorian Supreme Court has jurisdiction. It is questionable however, whether it should have an unfettered right to exercise that jurisdiction in respect of group members outside Victoria who have either failed to become aware of the proceedings, or have not opted out.

189 Finally, whilst it has twice been unanimously held by this Court[235] that a remote or a general connexion between a State and the subject matter of the legislation will suffice to validate that legislation, it is significant that those holdings were not made in a setting of equal competing connexions of the kind in prospect here.

190 Having regard to the matters that I have enumerated I have formed the opinion that Pt 4A of the *Supreme Court Act*, although not invalid, must be read down so that its operation is confined to each of the following:

(i) group members resident in Victoria;

(ii) group members carrying on business in Victoria;

(iii) group members registered or incorporated in Victoria;

(iv) group members wherever resident, registered or carrying on business outside Victoria, positively electing (and not merely not opting out) to be group members:

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233 For instance, as each State develops its workers' compensation, transport accident compensation, criminal injuries compensation and sporting accident compensation legislative schemes.

234 Reasons of Gaudron, Gummow and Hayne JJ at [42].

235 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 374.

in cases in which, by reason of service there, or for other good and settled principle of common law, or by statute, the defendant is amenable to the jurisdiction of the Victorian Supreme Court.

191 To go beyond those groups would, in my opinion be to go beyond what is properly to be regarded as even a remote connexion with Victoria. I find myself forced to this conclusion in particular: because of the great, if not insurmountable, but unnecessary difficulties to which the uninhibited exercise of the jurisdiction conferred by the *Supreme Court Act* and like State Acts by more than one State over transnational causes of action would give rise; the operation of s 118 of the Constitution which would be offended if, for example, the Victorian Supreme Court were able to disregard or suspend a limitations provision of another State which would otherwise immediately apply to the cause of action, or were permitted to disregard the requirements for a guardian *ad litem* of another State, or were free to distribute damages from a fund, different, as to its heads or the quantum thereof, from those to which a plaintiff might be entitled in other proceedings in another State.

192 In practice, having regard to the Court's extensive powers over group litigation, and the practical control exerted by the named seven group members and their lawyers, other group members out of Victoria are unlikely to have any real influence, let alone control over the proceedings. The reality of the difference between a voluntary and an involuntary plaintiff is not to be minimized. Section 118 of the Constitution at the very least requires as a matter of comity between States due deference to the reasonable exercise of the jurisdictions of the courts of each of them. The unrestricted operation of Pt 4A of the *Supreme Court Act* would fail to pay that deference. Victoria may authorize the conscription of its own plaintiffs but not those of other States.

193 That at present there can be overlapping aspects of procedures, rules and judgments of courts within the federation which have hitherto been resolved by current principles and rules (not always, it may be added, readily capable of clear articulation and application and often involving discretionary matters upon which minds often differ) as to stays, prevention of abuses of process and cross-vesting, provides no reason for the compounding of conflicts.

194 Subject to the correctness or otherwise of the plaintiff's second argument, because the legislation is valid to the extent that I have indicated, no question of severability arises.

195 The plaintiff's other argument is based upon *Kable v Director of Public Prosecutions (NSW)*[236]: that the *Supreme Court Act* purports to vest in the

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236 (1996) 189 CLR 51.

Victorian Supreme Court powers incompatible with the exercise of judicial power and in particular the investment of Commonwealth judicial power. In view of the decision of the majority allowing the demurrer, any decision by me on this aspect of the case could not affect the outcome of the demurrer. That, taken with the desirability of considering such an argument in the context of a particular ruling on a particular section or event, means that this is not an occasion for the resolution of that issue.

196 Part 4A of the *Supreme Court Act* should be regarded as valid but it should be read so that its operation is confined in the way that I have stated. I would allow the demurrer in part. Both parties have therefore had some success. I would accordingly make no order as to costs.