HIGH COURT OF AUSTRALIA

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

CECIL GREGORY SOLOMONS APPELLANT

AND

DISTRICT COURT OF NEW SOUTH WALES & ORS RESPONDENTS

Solomons v District Court of New South Wales
[2002] HCA 47
10 October 2002
S150/2001

ORDER

1. *Appeal dismissed.*

2. *Appellant to pay the costs of the appeal of the three respondents.*

On appeal from the Supreme Court of New South Wales

Representation:

J Basten QC with M N Allars for the appellant (instructed by John Bettens & Co)

No appearance for the first respondent

M G Sexton SC, Solicitor-General for the State of New South Wales with M J Leeming and B K Baker for the second respondent (instructed by Crown Solicitor for the State of New South Wales)

S J Gageler SC for the third respondent (instructed by Director of Public Prosecutions (Commonwealth))

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth of Australia with R G McHugh intervening on behalf of the Attorney-General of the Commonwealth of Australia (instructed by Australian Government Solicitor)

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

R J Meadows QC, Solicitor-General for the State of Western Australia and J C Pritchard intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

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

CATCHWORDS

Solomons v District Court of New South Wales

Criminal law and practice – Costs – Trial and acquittal in State court on indictment charging offences under a law of the Commonwealth – Power of State court to grant certificate under s 2 of the *Costs in Criminal Cases Act* 1967 (NSW) ("the Costs Act") entitling defendant to apply to Under Secretary of Attorney-General's Department for payment of costs from State Consolidated Revenue Fund – Whether s 68 or s 79 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") rendered provisions of the Costs Act applicable so as to authorise grant of certificate in federal jurisdiction.

Constitutional law (Cth) – Jurisdiction and powers of State court exercising federal jurisdiction in the trial of a federal offender – Application of the Costs Act – Whether the Costs Act picked up and applied to federal jurisdiction by force of the Judiciary Act – Whether any such operation would be contrary to the provisions and requirements of the Constitution – Whether any such application would be inconsistent with the disposal of the constitutional matter within federal jurisdiction – Whether it would involve the purported exercise by a court of non-judicial functions incompatible with Ch III of the Constitution – Whether it would be incompatible with the Constitution to impose burdens on State Ministers and officers and on the Consolidated Revenue Fund of a State.

Constitution, Ch III.
Judiciary Act 1903 (Cth), ss 68, 79.
Costs in Criminal Cases Act 1967 (NSW), s 2.

1 GLEESON CJ, GAUDRON, GUMMOW, HAYNE AND CALLINAN JJ. This is an appeal from a decision of the New South Wales Court of Appeal[1]. By majority (Mason P and Foster AJA; Sheller JA dissenting), the Court of Appeal held that, in respect of a trial and acquittal in a New South Wales State court, on an indictment charging offences under a law of the Commonwealth, (i) the State court is not empowered by State law to grant a certificate under s 2 of the *Costs in Criminal Cases Act* 1967 (NSW) ("the Costs Act") and (ii) neither s 68 nor s 79 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") renders the provisions of the Costs Act applicable so as to authorise the grant of the certificate in the course of the exercise of federal jurisdiction. In this Court, the appellant accepts the first but contests the second of these propositions and advances further arguments respecting federal jurisdiction.

The proceedings in the New South Wales courts

2 On Wednesday, 22 July 1998, the appellant, at a trial in the New South Wales District Court, by direction was found not guilty on two counts of being knowingly concerned in the importation of a trafficable quantity of ecstasy contrary to par (d) of s 233B(1) of the *Customs Act* 1901 (Cth) ("the Customs Act").

3 The District Court had been exercising federal jurisdiction invested by s 68(2) of the Judiciary Act. This had come to pass as follows. Section 166 of the *District Court Act* 1973 (NSW) stated that the District Court had the criminal jurisdiction conferred on it by the *Criminal Procedure Act* 1986 (NSW). Section 11(2) of the latter statute[2] conferred on the District Court jurisdiction in respect of all indictable offences against the laws of New South Wales, including common law offences. The offence under s 233B(1)(d) of the Customs Act was punishable by a term of imprisonment exceeding 12 months; the consequence was that s 4G of the *Crimes Act* 1914 (Cth) rendered it an indictable offence. As the last step, the effect of s 68(2) of the Judiciary Act was that the District Court, exercising jurisdiction "with respect to" the trial and conviction on indictment of persons charged with offences against the laws of New South Wales, had, subject to s 68 itself and s 80 of the Constitution, "the like jurisdiction" with respect to persons charged with offences against s 233B(1) of the Customs Act. It will be necessary later in these reasons to set out the text of s 68(2) more fully.

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1 *Solomons v District Court of New South Wales* (2000) 49 NSWLR 321.

2 Read with the definitions of "offence" and "indictable offence" in s 3(1).

4 The prosecution in the District Court was conducted by the Director of Public Prosecutions ("the Director") in the name of the Queen and in exercise of the functions and powers conferred by ss 6(1)(a) and 9(1) of the *Director of Public Prosecutions Act* 1983 (Cth). On Friday, 24 July 1998, two days after the appellant had been discharged, he applied to the trial judge (Keleman DCJ) for the grant of a certificate pursuant to s 2 of the Costs Act. The Director appeared by counsel and told his Honour that he was present to assist the Court on the question of jurisdiction, and other matters if the Court held it had the necessary jurisdiction.

5 His Honour held that there was no power to grant the certificate in respect of the prosecution on indictment of a person charged with an offence against a law of the Commonwealth. Later, on 12 December 2000, an order was entered "Application refused". In the meantime, the Costs Act had been amended, with effect from 3 August 1998, by the *Courts Legislation Further Amendment Act* 1997 (NSW) and the *Courts Legislation Amendment Act* 1998 (NSW) ("the 1998 Act"). This litigation has been conducted on the basis that the relevant legislation is the Costs Act in its form on 24 July 1998.

6 The appellant commenced by summons a proceeding pursuant to s 69 of the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act"), seeking relief in the nature of certiorari to set aside the decision of the District Court and remit the application for a certificate to that Court to be considered according to law. The effect of s 48 of the Supreme Court Act was to assign the proceeding to the Court of Appeal; that Court thus was exercising original jurisdiction. The only party joined initially in the Court of Appeal was "the Queen", meaning the Director, who appears in this Court as third respondent. At the hearing in the Court of Appeal, the District Court of New South Wales and the State of New South Wales were added; the former entered a submitting appearance and the latter made no submissions. The State, the second respondent in this Court, has now taken an active role, appearing by the Solicitor-General.

7 In the Court of Appeal, no party submitted that there was involved a matter arising under the Constitution or involving its interpretation; the arguments turned purely on questions of statutory construction. The Court of Appeal dismissed the summons. In this Court, the argument assumed constitutional dimensions; the Attorneys-General of Queensland, Western Australia and South Australia and the Commonwealth Attorney-General intervened. However, as will appear, this appeal may be disposed of without entering upon a number of the constitutional issues which were debated. The central issues concern the construction of the Judiciary Act and the Costs Act.

The Costs Act

8 Section 2 thereof states:

> "The Court or Judge or Justice or Justices in any proceedings relating to any offence, whether punishable summarily or upon indictment, may –
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> (a) where a defendant, after a hearing on the merits, is acquitted or discharged as to the information then under inquiry; or
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> (b) where, on appeal, the conviction of the defendant is quashed and –
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> (i) the defendant is discharged as to the indictment upon which he or she was convicted; or
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> (ii) the information or complaint upon which the defendant was convicted is dismissed,
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> grant to that defendant a certificate under this Act, specifying the matters referred to in section 3 and relating to those proceedings."

It has been held that the judicial officer dealing with an application for a certificate need not be the trial judge[3].

9 There is a "general rule of construction" which would confine the State enactment to State proceedings and officers[4]. In any event, the "Justices" referred to in s 2 of the Costs Act are Justices of the Peace. This follows from the definition in s 21 of the *Interpretation Act* 1987 (NSW) ("the Interpretation Act"). The power conferred by s 2 "was clearly intended to be conferred on all New South Wales courts, at whatever level, exercising criminal jurisdiction"[5]. The "Court[,] Judge [and] Justices" identified in s 2 of the Costs Act, and the

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3 *R v Manley* (2000) 49 NSWLR 203.

4 *Seaegg v The King* (1932) 48 CLR 251 at 255. See also *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168 at 169.

5 *R v Manley* (2000) 49 NSWLR 203 at 215.

phrase therein "any proceedings relating to any offence", do not extend to federal courts created by the Parliament under Ch III of the Constitution or to this Court or to judicial officers of the Commonwealth, and the offences in question do not include offences under a law of the Commonwealth. This follows as a matter of construction of s 2 of the Costs Act in the light of s 12(1) of the Interpretation Act[6].

10 The form of the certificate is specified in s 3(1) of the Costs Act. This provides:

> "A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Justice or Justices granting the certificate –
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> (a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings; and
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> (b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances."

Section 3(2) is a special provision with respect to certificates granted by courts of summary jurisdiction and is not presently relevant.

11 Limited provision is made by s 3A(2) for the constitution of the application as a *lis inter partes*. The sub-section states:

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6 Section 12(1) of the Interpretation Act provides:

> "In any Act or instrument:
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> (a) a reference to an officer, office or statutory body is a reference to such an officer, office or statutory body in and for New South Wales, and
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> (b) a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales."

"Where, on an application for a certificate under section 2 in relation to any proceedings, the defendant adduces evidence to establish further relevant facts that were not established in those proceedings, the Court or Judge or Justice or Justices to which or to whom the application is made may –

(a) order that leave be given to the prosecutor in those proceedings or, in the absence of the prosecutor, to any person authorised to represent the Minister on the application, to comment on the evidence of those further relevant facts; and

(b) if the Court, Judge, Justice or Justices think it desirable to do so after taking into consideration any such comments, order that leave be given to the prosecutor or to the person representing the Minister to examine any witness giving evidence for the applicant or to adduce evidence tending to show why the certificate applied for should not be granted and adjourn the application so that that evidence may be adduced."

The course of the application heard by Keleman DCJ did not lead to the making of any order under s 3A(2).

12 Provision for payment under a costs certificate is made in s 4 of the Costs Act. A person to whom a certificate has been granted may apply to the Under Secretary of the Attorney-General's Department for payment from the Consolidated Revenue Fund of costs incurred in proceedings to which the certificate relates (s 4(2))[7]. There is no right conferred upon the holder of a certificate to receive payment from the Consolidated Revenue Fund. The making of a payment is conditioned by s 4(5) upon the formation by the Treasurer of the opinion "that, in the circumstances of the case, the making of a payment to the applicant is justified", and upon the consequent determination by the Treasurer of the amount of costs that should be paid[8]. Payments from the Consolidated

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7 The 1998 Act substituted reference to the Director-General of the Attorney-General's Department and to the Consolidated Fund. In any event, s 53 of the Interpretation Act provides for statutory references to an office with a changed name to be read as a reference to the office under its new name.

8 Section 4(5) of the Costs Act states:

(Footnote continues on next page)

Revenue Fund of the amount specified in the determination may be made without further appropriation than by the Costs Act (s 4(6)). Section 5 confers upon the Under Secretary a right of subrogation to the rights of the applicant to recover costs and requires payment to the Consolidated Revenue Fund of moneys recovered by the Under Secretary.

13 The references in s 4 to the Consolidated Revenue Fund reflect the provisions of Pt 5 (ss 39-46) of the *Constitution Act* 1902 (NSW) ("the NSW Constitution"). That statute provides that, except as otherwise provided by or in accordance with any New South Wales statute, all public moneys collected, received or held by any person for or on behalf of the State form one Consolidated Fund (s 39)[9]. Section 45 states:

> "The Consolidated Fund shall be subject to be appropriated to such specific purposes as may be prescribed by any Act in that behalf."

Section 4(6) of the Costs Act is such a law.

The construction of the Costs Act and the Judiciary Act

14 The Costs Act is not drafted with a close eye to the distinctions between jurisdiction and power, and between judicial and non-judicial power which are required by Ch III of the Constitution for the laws of the Commonwealth. The better view is that the statute confers on New South Wales courts a power which is exercisable after (i) acquittal or discharge as described in par (a) of s 2 or (ii) allowance of an appeal as described in par (b) of s 2. Section 3A makes provision for the adducing on the application for the certificate of "further relevant facts", and for examination of witnesses called by the applicant and the adducing of evidence tending to show why the certificate should not be granted.

> "Where the Treasurer, after receiving the Under Secretary's statement relating to any such application, considers that, in the circumstances of the case, the making of a payment to the applicant is justified, the Treasurer may pay to the applicant his or her costs or such part thereof as the Treasurer may determine."

9 The word "Revenue" was omitted by the changes made by the *Constitution (Consolidated Fund) Amendment Act* 1982 (NSW), Sched 1.

15 Section 2 of the Costs Act is not to be construed in isolation from the balance of the legislative scheme of which it forms part. The grant of a certificate under s 2 of the Costs Act has no purpose but the satisfaction of a necessary precondition for the exercise by a State officer of the discretions conferred by s 4, the favourable exercise of which may result in the making of a payment from the Consolidated Fund of the State. Despite the emphasis in the appellant's submissions upon the "picking up" of s 2 by federal law, what is involved on his case is the translation of the whole of the State legislative scheme and its transformation, by force of federal law, to a scheme for payments out of the State Consolidated Fund in respect of certain concluded prosecutions in State courts determined in the exercise of federal jurisdiction invested by laws supported by s 77(iii) of the Constitution.

16 The appeal should be determined on the footing that no federal law rendered applicable to the appellant the power, with respect to State prosecutions, created by s 2 of the Costs Act. Two steps are involved. The first is the identification of the law enacted pursuant to s 77(iii) of the Constitution, relevantly conferring federal jurisdiction with respect to any of the matters specified in ss 75 and 76 of the Constitution. This has been identified earlier in these reasons as s 68(2) of the Judiciary Act. Further, or in the alternative, the appellant also founded upon what was said to have been an investment of federal jurisdiction by s 39(2) of the Judiciary Act. In the event, it is unnecessary to pursue that line of inquiry.

17 Section 68(2) of the Judiciary Act provides:

> "The several Courts of a State or Territory exercising jurisdiction with respect to:
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> (a) the summary conviction; or
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> (b) the examination and commitment for trial on indictment; or
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> (c) the trial and conviction on indictment;
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> of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth."

18 It does not appear what was the state of the record in the District Court on 24 July 1998 after the appellant had on 22 July been found, by direction, not guilty. However, we assume for present purposes in the appellant's favour that, in entertaining in those circumstances with respect to a State prosecution an application under s 2 of the Costs Act, a State court would be exercising jurisdiction, in the opening words of s 68(2) of the Judiciary Act, which was "with respect to … the trial and conviction on indictment" of a person charged with an offence against State law[10]. The hypothesis assumed in the appellant's favour is that an application under s 2 of the Costs Act, after verdict and before judgment, is made when the jurisdiction with respect to the prosecution is not exhausted. The State court then remains invested by s 68(2) with "the like jurisdiction" where what is involved is a person tried for an offence against a law of the Commonwealth such as the Customs Act.

19 The difficulties for the appellant's submissions then begin with the phrase in s 68(2) "the like jurisdiction". Section 68 itself distinguishes between jurisdiction on the one hand and powers and procedures on the other. Sub-section (1) provides for State laws with respect to procedure to apply "so far as they are applicable". Sub-sections (4) and (5A) confer powers respectively to amend informations and, in appropriate circumstances, to decline to exercise jurisdiction. Sub-section (2) is concerned with the ambit of the jurisdiction rather than the content of the powers to be exercised under it.

20 If, as the appellant submits, the exercise of federal jurisdiction had not been spent with the verdict by direction of not guilty, the appellant then has to take the second of the steps referred to above. That is, to show that s 79 of the Judiciary Act rendered the Costs Act a surrogate federal law, the powers in which then were applicable in the exercise of that federal jurisdiction.

21 It is well settled, despite a contrary disposition apparent in some of the appellant's submissions, that State laws upon which s 79 operates do not thereby apply of their own force in the exercise of federal jurisdiction. The State laws apply, as Kitto J put it in *Pedersen v Young*[11], "as federal law".

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10 cf *Seaegg v The King* (1932) 48 CLR 251 at 256-257; *R v Murphy* (1985) 158 CLR 596 at 614.

11 (1964) 110 CLR 162 at 165. See also *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 610 [130].

22 Section 79 is couched in mandatory terms. It provides:

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

23 Counsel for the Director correctly pointed to three relevant limitations in the text of s 79. First, the section operates only where there is already a court "exercising federal jurisdiction", "exercising" being used in the present continuous tense. Secondly, s 79 is addressed to those courts; the laws in question "shall … be binding" upon them. The section is not, for example, directed to the rights and liabilities of those engaged in non-curial procedures under State laws. Thirdly, the compulsive effect of the laws in question is limited to those "cases to which they are applicable". To that it may be added, fourthly, the binding operation of the State laws is "except as otherwise provided by the Constitution".

Conclusions

24 The first limitation may, as is indicated above, be conceded as satisfied, but a combination of the second, third and fourth is fatal to the appellant's submissions. It was pointed out in *The Commonwealth v Mewett*[12] that, where a particular provision of State law is an integral part of a State legislative scheme, s 79 could not operate to pick up some but not all of it, if to do so would be to give an altered meaning to the severed part of the State legislation. The point was taken further in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* where Gleeson CJ, Gaudron and Gummow JJ said[13]:

> "Section 79 of the *Judiciary Act* renders State and Territory law binding only in cases to which they are applicable. As to State law, this may be taken to reflect what otherwise would be the operation of Ch III. In *Kruger v The Commonwealth*[14], Gaudron J said:

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12 (1997) 191 CLR 471 at 556.

13 (2001) 204 CLR 559 at 593-594 [72]-[74]. See also at 609-610 [129]-[130] per McHugh J.

14 (1997) 190 CLR 1 at 140.

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

An example in the second category of provisions imposing functions beyond the reach of s 79 would be those insusceptible of exercise as part of the judicial power of the Commonwealth. In *Mellifont v Attorney-General (Q)*[15], Mason CJ, Deane, Dawson, Gaudron and McHugh JJ observed that:

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

As to the first category identified by Gaudron J, the provisions of the *Suitors Fund Act* 1951 (NSW) considered in *Commissioner of Stamp Duties (NSW) v Owens [No 2]*[16] may be an example of provisions expressed in terms making it impossible for them to be 'picked up' by s 79 of the *Judiciary Act*. The grant of a certificate under s 6 of the State Act formed a step in machinery which had been established for the indemnification out of a fund set up and administered by New South Wales of an unsuccessful litigant in respect of costs. This Court held that s 79 could not operate to convert the function imposed on State courts into a provision imposing a function on federal courts."

25 Section 4(2) of the Costs Act emphasises that the grant of a certificate supplies the precondition for the making of an application to an officer of the Executive Government of the State. The seeking of a certificate from a court can be with no other end in view. The sub-section states:

> "Any person to whom a certificate has been granted pursuant to this Act may, upon production of the certificate to the Under Secretary, make

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15 (1991) 173 CLR 289 at 300.

16 (1953) 88 CLR 168.

application to the Under Secretary for payment from the Consolidated Revenue Fund of the costs incurred by that person in the proceedings to which the certificate relates."

Section 79 of the Judiciary Act is not addressed to officers of the executive governments of the States. It is directed to certain courts.

26 If a certificate were granted under s 2 as "picked up" by s 79, what would be the utility of the certificate, unless it might found an application under s 4 of the Costs Act? However, the authority to make an application under s 4 is conferred only upon the grantee of a certificate "pursuant to this Act". A certificate granted on the hypothesis under consideration would not have been granted under the Costs Act. It would have been granted by operation of federal law upon the Costs Act.

27 Moreover, no federal law effects a corresponding transmutation upon s 4 of the Costs Act. The operation of s 79 of the Judiciary Act does not reach the State officials specified in s 4 in the performance of their functions under that section.

28 Further, in these circumstances, the grant of a certificate by a court exercising federal jurisdiction would involve it in the exercise of power not provided by Ch III of the Constitution. It would be productive of a futility, not the resolution of any claim or controversy. The situation would resemble that criticised in *Bass v Permanent Trustee Co Ltd*[17]. Nor would the grant of a certificate be the exercise by the court of an administrative function "truly appurtenant" to the exercise by the court of its judicial power to conduct the trial of the applicant for the certificate[18]. The terms of s 79 expressly deny any operation which would require or empower courts exercising federal jurisdiction to pass beyond the limits of Ch III of the Constitution.

29 For this combination of reasons, it was correct for Keleman DCJ to conclude that the District Court was not empowered by s 79 to entertain the appellant's application under the Costs Act. There was no error by the District

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17 (1999) 198 CLR 334 at 355-357 [45]-[49].

18 cf *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation [No 2]* (1982) 152 CLR 179 at 186-187 per Brennan J.

Court attracting any remedy from the Court of Appeal under s 69 of the Supreme Court Act.

Orders

30 The appeal to this Court should be dismissed.

31 This outcome renders it unnecessary to consider any questions respecting the restraint the *Melbourne Corporation*[19] doctrine might place upon any federal legislative power to mandate payments from the Consolidated Fund to meet the costs of unsuccessful prosecutions in State courts exercising federal jurisdiction.

32 The appellant sought relief from the usual consequence regarding costs. No sufficient cause for this has been shown. The appellant should pay the costs of the appeal of the three respondents.

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19 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.

33 McHUGH J. The question in this case is whether a New South Wales court, invested with federal jurisdiction, has the jurisdiction and power to grant a costs certificate under the *Costs in Criminal Cases Act* 1967 (NSW) ("the Costs Act") to a person acquitted of a federal offence in that court. In my opinion, a court exercising federal jurisdiction has no jurisdiction to issue a costs certificate under that Act because upon its proper construction the Costs Act applies only to State offences and neither the *Judiciary Act* 1903 (Cth) nor any other federal Act purports to apply it in federal jurisdiction.

Statement of the case

34 The appellant was acquitted in the District Court of New South Wales of two charges of being knowingly concerned in the importation of a trafficable quantity of ecstasy, contrary to s 233B(1)(d) of the *Customs Act* 1901 (Cth). Two days after his acquittal, he sought a certificate under s 2 of the Costs Act from the trial judge, Keleman DCJ. The Costs Act provides machinery that enables a person who successfully defends a criminal charge to have his or her costs reimbursed from the State's Consolidated Revenue Fund.

35 Section 2 of the Costs Act provides that the Court or Judge may grant to a person, acquitted of a criminal offence, a certificate specifying the matters referred to in s 3 of the Act. Section 3 requires the Court or Judge to specify two matters. First, that instituting the proceedings would not have been reasonable if the prosecution had had all the relevant facts when it instituted the proceedings. Second, that any act or omission of the defendant that might have contributed to the prosecution was reasonable in the circumstances. A person who receives a certificate may apply to the Under Secretary of the Attorney-General's Department for payment, from the Consolidated Revenue Fund, of the costs certified[20]. A certificate is payable only if the Treasurer forms the opinion that, "in the circumstances of the case, the making of a payment to the applicant is justified". If the Treasurer considers the making of a payment is justified, the Treasurer "may pay to the applicant his or her costs or such part thereof as the Treasurer may determine"[21]. When a determination has been made under the Act, the payment may be made without further appropriation from the Consolidated Revenue Fund[22].

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20 s 4(2).

21 s 4(5).

22 s 4(6).

36 Keleman DCJ rejected the application for a certificate. He held that he had no power to grant the certificate. Subsequently, the Court of Appeal[23] dismissed the appellant's application for orders in the nature of *certiorari* and *mandamus* to quash the order refusing the certificate and require the District Court to reconsider the application according to law.

The Costs Act applies of its own force only to State offences

37 The trial judge and the Court of Appeal correctly held that the Costs Act does not purport to apply to criminal proceedings in federal jurisdiction. It is a long recognised rule of statutory construction[24] that a reference to courts, matters, things and persons in the legislation of a State is a reference to courts, matters, things and persons in that State. In New South Wales, that rule of construction is enshrined in legislation[25]. Consequently, the Costs Act applies of its own force only to offences against the laws of New South Wales. In this Court, the appellant did not dispute this proposition.

The Judiciary Act does not apply the Costs Act to proceedings in federal jurisdiction

38 The appellant contended, however, that the trial judge and the majority judges in the Court of Appeal erred in holding that neither s 39(2), s 68(2) nor s 79 of the *Judiciary Act* made the Costs Act applicable in criminal cases in federal jurisdiction. Accordingly, he contended that the power conferred by s 2 of the Costs Act applies in a prosecution for an offence against a law of the Commonwealth. In my opinion, however, the *Judiciary Act* does not pick up and apply the Costs Act to proceedings in federal jurisdiction.

39 Section 68(2) of the *Judiciary Act* invested the District Court with federal jurisdiction to hear the charges against the appellant. This was the result of the combined operation of that sub-section, s 166 of the *District Court Act* 1973 (NSW), s 11(2) of the *Criminal Procedure Act* 1986 (NSW), s 233B(1)(d) of the *Customs Act* and s 4G of the *Crimes Act* 1914 (Cth). Section 68(2) of the *Judiciary Act* applies to State courts exercising jurisdiction "with respect to" the trial and conviction on indictment of persons charged with offences against the laws of the State. It declares that those courts shall "have the like jurisdiction

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23 *Solomons v District Court of New South Wales* (2000) 49 NSWLR 321 at 326 per Mason P, 352 per Foster AJA, Sheller JA dissenting.

24 *Seaegg v The King* (1932) 48 CLR 251 at 255 per Rich, Dixon, Evatt and McTiernan JJ.

25 *Interpretation Act* 1987 (NSW), s 12.

with respect to persons who are charged with offences against the laws of the Commonwealth". Section 166 of the *District Court Act* declares that the District Court has the criminal jurisdiction conferred on it by the *Criminal Procedure Act*, and s 11(2) of that Act gave the District Court jurisdiction in respect of all indictable offences against the laws of New South Wales. By force of s 4G of the *Crimes Act*, the offence against s 233B(1)(d) of the *Customs Act* was an indictable offence. Accordingly, s 68(2) of the *Judiciary Act* invested the District Court of New South Wales with "like jurisdiction" to hear the offence against s 233B(1)(d) of the *Customs Act*. The "like jurisdiction", so invested, was federal jurisdiction[26].

40 The respondents submitted that, once the appellant was acquitted, the federal jurisdiction of the District Court was spent or, at all events, did not extend to an application under s 2 of the Costs Act, made two days after his acquittal. In my opinion, s 2 did not apply in federal jurisdiction. But this was not because the federal jurisdiction was spent when the appellant was acquitted. It was because neither the conferral of "like jurisdiction" by s 68(2) nor the laws applied in federal jurisdiction by s 79 of the *Judiciary Act* gave the District Court jurisdiction or power to apply the Costs Act in federal jurisdiction.

41 In s 68(2), "like jurisdiction" means a jurisdiction analogous to the State jurisdiction of the court. It is not the same jurisdiction as the District Court exercises when hearing indictable offences against State laws. Federal jurisdiction is not State jurisdiction. The Parliament has carefully and deliberately chosen the term "like jurisdiction" to distinguish between the State jurisdiction of the court and its invested federal jurisdiction. Jurisdiction is a protean term that "is used in a variety of senses and takes its colour from its context", as Diplock LJ pointed out when *Anisminic Ltd v Foreign Compensation Commission*[27] was in the English Court of Appeal. In s 77 of the Constitution, it means the authority to decide matters that are presented to it for formal decision[28]. That is also the meaning that is ordinarily given to it in a curial context[29]. It should be given that meaning wherever it appears in s 68(2) of the *Judiciary Act* which is a law made under ss 75-77 of the Constitution. In s 68(2),

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26 Constitution, s 77(iii).

27 [1968] 2 QB 862 at 889.

28 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 per Isaacs J; *The Commonwealth v New South Wales* (1923) 32 CLR 200 at 206 per Knox CJ; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 524-525 [25] per Gleeson CJ and McHugh J.

29 *The Commonwealth v New South Wales* (1923) 32 CLR 200 at 206 per Knox CJ.

therefore, "like jurisdiction" is the authority to decide "matters"[30] arising under federal laws in a manner similar to the authority of the court to decide matters arising under State law after allowance is made for the fact that the State jurisdiction arises under State law and federal jurisdiction arises under federal law[31].

42 What then was the relevant State jurisdiction of the District Court? It was not only the authority to decide the "matter" involved in an indictment alleging an offence against State law. It also included the authority to decide an application under s 2 of the Costs Act. On one view, s 2 of the Costs Act does not itself confer jurisdiction. On that view, it assumes jurisdiction in a Court or Judge or "in any proceedings relating to any offence" and merely confers power on that Court or judicial officer to grant a certificate. In *R v Manley*[32], for example, Simpson J referred to the "power conferred by s 2 ... [as] clearly intended to be conferred on all New South Wales courts, at whatever level, exercising criminal jurisdiction". But I think that the better view of s 2 is that it simultaneously confers both jurisdiction and power. Without s 2 of the Costs Act, the District Court would have no jurisdiction or power to decide whether a certificate should be granted after an acquittal in State jurisdiction. Without that section, the Court or Judge would have no jurisdiction to determine that a costs certificate should be granted. Nor would the grant of the certificate require the Treasurer to consider whether the costs certified, or some part of them, should be paid to the applicant.

43 The concept of power is different from the concept of jurisdiction as Toohey J pointed out in *Harris v Caladine*[33] when he said:

> "Jurisdiction is the authority which a court has to decide the range of matters that can be litigated before it; in the exercise of that jurisdiction a court has powers expressly or impliedly conferred by the legislation

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30 Constitution, ss 75, 76 and 77(iii).

31 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 per Isaacs J.

32 (2000) 49 NSWLR 203 at 215.

33 (1991) 172 CLR 84 at 136 cited with approval in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590 [64] per Gleeson CJ, Gaudron and Gummow JJ.

> governing the court and 'such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred'[34]."

In granting the Court or Judge power to grant the certificate, however, s 2 must also confer the jurisdiction to exercise the power. In particular contexts, jurisdiction and power can be indistinguishable[35]. And as the judgment of Toohey J in *Harris* indicates, a grant of jurisdiction carries with it implied power to do all that is necessary to make the grant of jurisdiction effective[36]. But just as the bare conferral of jurisdiction may imply powers or create substantive rights and duties[37], so may the bare conferral of a power give authority to decide, that is to say, give jurisdiction. Consequently, the effect of ss 2 and 3 of the Costs Act was to confer on courts, such as the District Court, jurisdiction to decide whether to grant a certificate.

44 But it is one thing to say that s 2 of the Costs Act gives the District Court jurisdiction to determine whether a certificate should be granted in the exercise of State jurisdiction. It is another question whether s 68(2) gives it "like jurisdiction" over the grant of a costs certificate in the exercise of federal jurisdiction. For present purposes, the invested federal jurisdiction – the "like jurisdiction" – is limited to jurisdiction "with respect to … the trial and conviction on indictment". It is also limited by the constitutional imperative that the "like jurisdiction" must be concerned with the exercise of judicial power.

45 The respondents contended that authority to grant a certificate under s 2 of the Costs Act was not jurisdiction with respect to the trial on indictment of the appellant. But to adopt that argument is to take an unnecessarily restrictive view of the phrase "with respect to … the trial" in s 68(2) of the *Judiciary Act*. That phrase has a very wide meaning. In the constitutional context, Latham CJ once said that "[n]o form of words has been suggested which would give a wider power"[38]. This Court has also given a wide meaning to the not dissimilar phrase

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

35 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590 [64]-[65] per Gleeson CJ, Gaudron and Gummow JJ. See also *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 487 per Brennan and Toohey JJ.

36 *Grassby v The Queen* (1989) 168 CLR 1 at 17 per Dawson J, Mason CJ, Brennan and Toohey JJ agreeing.

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

38 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186.

"in respect of", saying that it only requires "some discernible and rational link" between the matters in question[39]. In its natural and ordinary meaning, jurisdiction "with respect to … the trial" is wide enough to embrace applications made after an acquittal. Such applications include orders for the return of property or exhibits, for stays of sentences, for bail, for costs or for a certificate for costs under a statutory enactment. A discernible and rational link exists between the trial and applications for orders in respect of these matters.

46 *Seaegg v The King*[40], upon which the respondents relied, is not an authority for holding that s 68(2) of the *Judiciary Act* does not extend to an application for a certificate made after the applicant was acquitted. In *Seaegg*, the Court held that the phrase "with respect to … the trial and conviction on indictment" did not confer jurisdiction upon a court to hear an appeal against a conviction for an offence against a law of the Commonwealth[41]. But *Seaegg* does not govern this case. It is one thing to hold that the words "with respect to … the trial and conviction" do not confer jurisdiction on another court to hear an appeal against that conviction. It is an entirely different matter to hold that a jurisdiction to grant a costs certificate to a person who has been acquitted of an indictable offence is not "with respect to" the trial on indictment of that person. In my opinion, there is no relevant similarity between *Seaegg* and the issue in the present appeal.

47 The third respondent also submitted that the acquittal of the appellant quelled the federal controversy between the Crown and the appellant, that thereafter the District Court no longer had a "matter" before it, and that accordingly its federal jurisdiction was spent. However, to adopt that argument would give too restrictive a meaning to the constitutional term "matter". A "matter" is not at an end because the court has settled the controversy that is central to the matter. Inevitably, incidental matters and procedures may remain alive. In a civil action, for example, the parties may be given "liberty to apply". If the jurisdiction and power conferred by s 2 of the Costs Act would otherwise apply to a court exercising federal jurisdiction, the acquittal of the applicant would not prevent s 2 from applying in federal jurisdiction. Indeed, an application under s 2 could be made long after the fact of acquittal and even to a different judge of the court where the applicant had been tried[42].

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39 *Technical Products Pty Ltd v State Government Insurance Office (Q)* (1989) 167 CLR 45 at 47 per Brennan, Deane and Gaudron JJ.

40 (1932) 48 CLR 251.

41 (1932) 48 CLR 251 at 257 per Rich, Dixon, Evatt and McTiernan JJ.

42 On first impression, it might appear that only the judicial officer who presided over the proceedings has the jurisdiction and power to grant the certificate. However,

(Footnote continues on next page)

48 So the fact that the appellant had been acquitted of the s 233B(1)(d) offence was not itself sufficient to deprive the District Court of its federal jurisdiction to make grants of the kind described in s 2 of the Costs Act. Nor is the power exercised in granting a s 2 application of such a nature that it could not be invested in federal jurisdiction.

49 The jurisdiction of State courts under the Costs Act involves exercising judicial power. It is a jurisdiction that could be invested as "like jurisdiction" without contravening Ch III's requirement that the federal jurisdiction invested in State courts must be confined to the exercise of judicial power. The paradigm case of an exercise of judicial power involves the making of binding declarations of rights in the course of adjudicating disputes about rights and obligations as a result of the operation of the law upon events or conduct that have or has occurred[43]. The issue determined in a s 2 application is within that paradigm. No narrow view should be taken of what constitutes judicial power[44].

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s 11(1) of the *District Court Act* provides that all "criminal proceedings in the Court" shall "be heard and disposed of before a Judge, who shall constitute the Court". In combination, ss 11 and 166 of the *District Court Act* and s 2 of the Costs Act suggest that the District Court itself has jurisdiction to grant the certificate, the jurisdiction being exercisable by any judge of the Court. On that theory of s 2, the judge need not be the same judge who heard the proceedings. In *Allerton v Director of Public Prosecutions* (1991) 24 NSWLR 550 at 554-555, the Court of Appeal appears to have thought (at 554) that only the judge who heard the proceedings could grant a certificate. The Court thought it arguable that the reference to "Court" in s 2 was not a reference to the trial court but to an appellate court, which is given power to issue a certificate when an appeal leads to an acquittal. In *R v Manley* (2000) 49 NSWLR 203, however, the Court of Criminal Appeal (Wood CJ at CL at 204 and Simpson J at 215-216, Sully J dissenting) held that it had power to grant a certificate although it was differently constituted from the Court of Criminal Appeal that had quashed the applicant's conviction. Because the Supreme Court is the Court of Criminal Appeal for the purposes of the *Criminal Appeal Act* 1912 (NSW), I think that *Manley* was correctly decided. It should be regarded as establishing that, whenever a court is given jurisdiction to hear criminal proceedings, any member of that court may exercise the power conferred by the Costs Act.

43 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188.

44 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 300 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.

50 Under s 2 of the Costs Act, the Court or Judge must determine whether to grant a certificate that specifies the matters referred to in s 3 of that Act. By necessary implication, the grant declares that the applicant has the right to apply under s 4(2) of the Costs Act to the Under Secretary for reimbursement of the costs that the applicant incurred in his or her successful defence. Before granting a certificate, the Court or Judge must consider the matters in s 3 of the Act and make a determination as to whether the proceedings were reasonably instituted or maintained. Although reasonableness involves a value judgment, it is not inconsistent with the exercise of judicial power[45]. Nor does the objective test of reasonableness as prescribed by s 3 involve any reference to external policy considerations, considerations that often tell against the power invested being judicial power[46]. Moreover, although s 2 states the Court or Judge may grant the certificate, no discretionary decision is involved. Upon fulfilment of the conditions specified in s 3 of the Act, the Court or Judge must grant the certificate in accordance with the principles expounded by the House of Lords in *Julius v Lord Bishop of Oxford*[47] and affirmed by this Court in *Ward v Williams*[48].

51 If the Court is satisfied of the matters set out in s 3 and grants a certificate, its effect is to empower the applicant to apply to the Under Secretary for a compensatory payment out of the Consolidated Revenue Fund of New South Wales. It binds the Under Secretary and Treasurer to give consideration to such an application and to determine the eligibility of the applicant to receive payment. Under s 4(5), despite a determination of the Court or Judge as to an applicant's right to a certificate because of the prosecution's unreasonableness, the Treasurer has a discretion to refuse to pay the applicant. No doubt the Treasurer may have regard to policy factors – particularly the strength of competing demands on the Treasury – in determining whether to make a payment under the power conferred by s 4(5) of the Costs Act.

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45 See *R v Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368 at 383 per Kitto J, Dixon CJ agreeing; *R v Joske; Ex parte Australian Building Construction Employees & Builders' Labourers' Federation* (1974) 130 CLR 87 at 94 per Barwick CJ, Stephen and Mason JJ agreeing.

46 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189, 191. See also *R v Davison* (1954) 90 CLR 353 at 366-367 per Dixon CJ and McTiernan J citing the judgment of Lord Simonds in *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 at 149; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 377 per Kitto J.

47 (1880) 5 App Cas 214 at 225 per Earl Cairns LC.

48 (1955) 92 CLR 496 at 505-506.

52 However, the fact that the legislature has given the Treasurer the discretion to refuse payment does not mean that the Court or Judge does not exercise judicial power in determining an application under s 2. A court may exercise judicial power although it is reviewing an exercise of non-judicial power and its declaration of right is but a step to the exercise of a discretionary administrative power. That principle was affirmed by this Court in *Pasini v United Mexican States*[49] where the Court held that the Federal Court was exercising judicial power in determining whether a magistrate had erred in law in making an administrative decision under s 19 of the *Extradition Act* 1988 (Cth). This was so even though the Attorney-General had to make the ultimate decision as to whether the person, the subject of the magistrate's and Federal Court's decision, would be extradited. Similarly, a determination by a Court or Judge as to a person's entitlement to seek compensation from the Consolidated Revenue Fund of the State is an exercise of judicial power even though the Treasurer may refuse to act on a certificate granted under s 2.

53 Nevertheless, s 68(2) does not invest a court with federal jurisdiction to grant a costs certificate under s 2 of the Costs Act. That is because such a jurisdiction would not be "like jurisdiction" within the meaning of s 68(2). As I have pointed out, "like jurisdiction" means a jurisdiction that is similar to State jurisdiction when allowance is made for the fact that State jurisdiction is the authority to decide matters arising under State laws and federal jurisdiction is the authority to decide matters arising under federal laws[50].

54 State jurisdiction under s 2 of the Costs Act gives the Court or Judge authority to determine whether the applicant, as a person acquitted of an offence against State law, has the right to be granted a certificate, which is a condition for a compensatory payment out of the Consolidated Revenue Fund of New South Wales. The grant requires the Under Secretary and Treasurer to give consideration to an application, made on the basis of the certificate, whether the applicant should receive a payment. Thus, there can be no "like jurisdiction" in this context unless the applicant for a certificate has been acquitted of a federal offence and a federal law requires some official to consider whether the costs specified in the certificate should be paid. There is no federal law – and no State law – that authorises the reimbursement of costs after an acquittal and the grant of a certificate in federally invested criminal jurisdiction. Section 79 of the

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49 (2002) 187 ALR 409 at 413-414 [16]-[18] per Gleeson CJ, Gaudron, McHugh and Gummow JJ.

50 *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 per Isaacs J.

Judiciary Act does not do so because, as will appear, it binds only courts, not State or federal officials.

55 So although the District Court has jurisdiction "with respect to" the trial on indictment and the granting of a certificate under s 2 when the proceedings concern an offence against State law, its invested "like jurisdiction" under s 68(2) of the *Judiciary Act* does not include jurisdiction to grant a certificate to a person acquitted of an indictable federal offence. The appellant's answer is that the District Court had invested federal jurisdiction with respect to his trial on indictment and that, in exercising that federal jurisdiction, s 79 of the *Judiciary Act* gave the District Court *power* to grant a certificate under s 2 of the Costs Act.

56 Section 79 enacts:

> "The laws of each State … shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State … in all cases to which they are applicable."

57 By its express terms, s 79 applies only to courts and not to State officials such as the Treasurer. It does not purport to bind State officials in any way. The appellant contends that that is beside the point. It is enough for his purposes that s 79 binds the courts of New South Wales. That being so, he contends that s 79 required the District Court to determine whether or not he was entitled to a certificate.

58 The fact that the Costs Act is directed to State courts exercising State jurisdiction is not itself a ground for denying the application of s 79. The fact that a State statute expressly, or as a matter of construction, provides that it be enforced by State courts only does not prevent it being "picked up" and applied by s 79 of the *Judiciary Act* in the exercise of federal jurisdiction[51].

59 In *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*[52] I said:

> "courts exercising federal jurisdiction should operate on the hypothesis that s 79 will apply the substance of any relevant State law in so far as it

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51 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 88 per Gibbs J, 95 per Mason J; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 612 [137] per McHugh J.

52 (2001) 204 CLR 559 at 613 [141].

can be applied. The efficacy of federal jurisdiction would be seriously impaired if State statutes were held to be inapplicable in federal jurisdiction by reason of their literal terms or verbal distinctions and without reference to their substance. In *Railway Co v Whitton's Administrator*[53], decided thirty years before our Constitution was enacted, the Supreme Court of the United States declared:

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

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

60 However, s 79 cannot pick up s 2 of the Costs Act because to do so would give it a meaning different from that which it has in State jurisdiction. Section 79 "does not purport to do more than pick up State laws with their meaning unchanged"[54]. It does not operate to give a State law a new or extended meaning when it is made applicable in federal jurisdiction[55].

61 When the Costs Act applies as State law, it gives an acquitted person who obtains a s 2 certificate the right to have the certificate considered by the Treasurer. The Treasurer is bound to consider whether the applicant should be reimbursed the costs of successfully defending charges under State law. Under State law, the grant of the certificate by the Court or Judge also imposes a duty on the Treasurer, enforceable by *mandamus*, to consider whether a payment should be made. Because s 79 does not make any part of the Costs Act binding on the Treasurer as federal law, the Costs Act, if it applied in federal jurisdiction, would have a meaning different in that jurisdiction from its meaning in State jurisdiction. The Court's grant of a certificate in federal jurisdiction would

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53 13 Wallace 270 at 286 (1871) [80 US 270 at 286].

54 *Pedersen v Young* (1964) 110 CLR 162 at 165 per Kitto J. See also *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168 at 170; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 88 per Gibbs J.

55 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 611 [134] per McHugh J. See also *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 88 per Gibbs J.

impose no duty of any kind on the Treasurer who would be free to disregard it. Indeed, the Treasurer would have no right to make a payment under the Costs Act to a person acquitted of an indictable offence against a federal law. Of its own force, the Costs Act only authorises payments in respect of acquittals of offences against State law. And no other law – State or federal – authorises the Treasurer to make a payment in respect of an acquittal of an offence against a federal law.

62 Accordingly, the nature of the Costs Act is such that it cannot be "picked up" as federal law and made applicable in the exercise of federal jurisdiction. If s 79 "picked up" s 2 of the Costs Act, the Act would have a different meaning and a different legal effect in federal jurisdiction than it has in State jurisdiction. Even the grant of the certificate under s 2 would have a different legal effect in federal jurisdiction from what it has in State jurisdiction. In State jurisdiction, it requires State officials to whom it is submitted to consider whether the applicant's costs should be paid. In federal jurisdiction, it would have no legal effect whatsoever. Therefore, when the Costs Act is considered in its entirety, it is impossible to apply it in federal proceedings. Section 2 of that Act is merely part of a broad scheme provided by the New South Wales legislature for the recoupment of legal costs by some persons acquitted of charges under State law. No payment can be made under that scheme without the approval of the Treasurer of New South Wales. The scheme cannot apply to persons who are acquitted of charges under federal laws because no State or federal law authorises the reimbursement of costs incurred in defending a charge brought under a federal law.

Orders

63 The appeal should be dismissed.

64 KIRBY J. This appeal concerns the availability of a certificate under the *Costs in Criminal Cases Act* 1967 (NSW) ("the Costs Act") to a person tried and acquitted of a federal offence in a State court.

65 The primary judge in the District Court of New South Wales rejected the application for the certificate. He did so upon the ground that he had no power under the Costs Act to grant the certificate[56]. Application was then made to the Court of Appeal of New South Wales for orders in the nature of certiorari and mandamus to quash the order refusing the certificate and to require reconsideration of the application according to law[57]. The Court of Appeal divided. By majority, it dismissed the application[58]. However, Sheller JA favoured granting relief. In the Court of Appeal no constitutional notices were given pursuant to the *Judiciary Act* 1903 (Cth) ("the Judiciary Act")[59]. That Court was not favoured with arguments concerning the requirements, or implications, of the Constitution.

66 After special leave to appeal was granted, this Court, on the first return of the appeal, raised with the parties the possible implications of the Constitution for the issues to be decided. The hearing was adjourned[60]. Notices under the Judiciary Act were given. The Attorneys-General of the Commonwealth and most of the States intervened. This Court has therefore had the benefit of constitutional argument that was not advanced before the Court of Appeal.

67 In my view, that argument is determinative of the outcome of the appeal. If it were possible to ignore the requirements of the Constitution, I would, as a matter of construction, have been with Sheller JA. But with the advantage of the constitutional submissions, I agree that the appeal must be dismissed.

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56 He held that this was required by the decision of this Court in *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168.

57 Pursuant to the *Supreme Court Act* 1970 (NSW), s 69.

58 *Solomons v District Court of New South Wales* (2000) 49 NSWLR 321 at 326 [26] per Mason P, 352 [116] per Foster AJA ("*Solomons*").

59 *Solomons* (2000) 49 NSWLR 321 at 326 [25] per Mason P.

60 By order of the Full Court on 12 December 2001.

The facts and applicable legislation

68 The relevant facts and the procedural history of this case are stated in other reasons[61]. Also stated there are the applicable provisions of the Costs Act[62] and Judiciary Act[63], invoked by the appellant.

69 The offence of which the appellant had been charged, and in respect of which proceedings had been brought before the District Court, was a federal offence[64]. Accordingly, the appellant's trial was held by the District Court in the exercise of federal jurisdiction vested on that Court pursuant to the Constitution[65] and the Judiciary Act[66]. In the conduct of that trial, the District Court was performing functions envisaged in respect of federal matters, by what is commonly (possibly inaccurately) described as the "autochthonous expedient"[67]. The relevant "matter" that was the subject of the jurisdiction so conferred was "the claim or charge that the person charged has committed an offence against a particular law of the Commonwealth"[68].

The need for federal statutory authority

70 *Exercise of federal jurisdiction*: The District Court is created by a statute of the Parliament of New South Wales[69]. Being the creation of legislation, its

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61 Reasons of Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ ("the joint reasons") at [2]-[7].

62 Joint reasons at [8], [10]-[12]; reasons of McHugh J at [35]. The Costs Act is referred to as it stood on 24 July 1998, the date upon which the primary judge declined a certificate to the appellant. The Costs Act was subsequently amended.

63 Joint reasons at [17], [22].

64 *Customs Act* 1901 (Cth), s 233B(1)(d). The offence was being knowingly concerned in the importation of a trafficable quantity of the prohibited drug popularly known as ecstasy.

65 Constitution, ss 51(xxxix), 71 and 77(iii).

66 Especially the Judiciary Act, ss 39(2) and 68(2).

67 *Felton v Mulligan* (1971) 124 CLR 367 at 393 per Windeyer J.

68 *R v Murphy* (1985) 158 CLR 596 at 617.

69 *District Court Act* 1973 (NSW), s 8. The criminal jurisdiction conferred on the District Court exercising State jurisdiction is found in the *District Court Act* 1973 (NSW), s 166 and the *Criminal Procedure Act* 1986 (NSW), s 11.

powers are not at large. They are limited to the powers conferred by the constituting Act, by any other statutes and by any powers necessarily implied either from such express grants of powers or from that Court's character as a court[70]. Such a court has no inherent powers[71].

71 In conferring federal jurisdiction on the District Court, pursuant to the Constitution[72], it is implicit that the Federal Parliament accepts that Court as it finds it[73]. No jurisdiction or powers could be conferred, or imposed, on that Court which would be inconsistent, or incompatible, with the jurisdiction and powers enjoyed by that Court pursuant to State law. Federal law might supplement such jurisdiction and powers. However, it could not contradict the jurisdiction and powers otherwise enjoyed by the District Court[74]. So much is acknowledged, in terms, by the Judiciary Act[75].

72 *Power to order costs*: To make an order against a party binding on that party, a judge of a court such as the District Court must be able to point to the jurisdiction and power that sustains such an order. In criminal proceedings, before the enactment of relevant legislation, the basic common law principle

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70 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 625-626; *Stanton v Abernathy* (1990) 19 NSWLR 656 at 671; *R v Mosely* (1992) 28 NSWLR 735; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 422-423 [108]; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 479 [134].

71 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623-624; *Grassby v The Queen* (1989) 168 CLR 1 at 16; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 422-423 [108]; cf *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 490-491 [166].

72 Constitution, s 77(iii).

73 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142-1143; *Lorenzo v Carey* (1921) 29 CLR 243 at 251-252; *Garthwaite v Garthwaite* [1964] P 356 at 387-388.

74 *Le Mesurier v Connor* (1929) 42 CLR 481 at 495-496; *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 554; *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 64; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 547, 574-575, 592.

75 By s 39(2) of the Judiciary Act it is provided that the "several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction".

applied, that "the Crown neither pays nor receives costs"[76]. Against the background of that rule it was held, correctly, that the general provisions of the legislation constituting the District Court confer no power on that Court to make an order for the payment of costs in criminal proceedings[77].

73 In recent decades law-makers in this and other countries have come to recognise the "injustice inherent in the system"[78]. This recognition led to legislation in England[79], and later in New South Wales[80], to repair the perceived injustice of the common law. The appellant did not advance any separate argument that the District Court had any other, or different, source of power to order a party to pay his costs in the proceedings. His reliance was upon the provisions of the Costs Act.

74 A threshold question arises as to whether, without enabling federal legislation, the Costs Act applied to the appellant's application. To answer that question, I leave aside for the moment the issue of whether, once a matter is within federal jurisdiction, *any* State law applies of its own force. In my opinion, no State law applies, for federal jurisdiction involves a different realm of law[81]. Such jurisdiction would be restricted to that provided by the Constitution, federal legislation made applicable according to its own terms, or State laws made applicable as "surrogate" federal laws[82] by virtue of the consent and enactment of the Federal Parliament[83].

75 Yet even if one were able to confine attention to the language of the Costs Act, it would be impossible to contend that it would apply, without more, to the

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76 *Attorney-General of Queensland v Holland* (1912) 15 CLR 46 at 49; cf *Latoudis v Casey* (1990) 170 CLR 534 at 538.

77 *R v Mosely* (1992) 28 NSWLR 735 at 740.

78 *Latoudis v Casey* (1990) 170 CLR 534 at 545.

79 *Costs in Criminal Cases Act* 1952 (UK).

80 In *Fraser v The Queen (No 2)* (1985) 1 NSWLR 680 at 689 McHugh JA described the terms of s 2 of the Costs Act as "very curious"; cf *Allerton v Director of Public Prosecutions* (1991) 24 NSWLR 550 at 560-562.

81 cf *Pedersen v Young* (1964) 110 CLR 162 at 165. See joint reasons at [21].

82 "Surrogate" was the word used by Murphy J in *Maguire v Simpson* (1977) 139 CLR 362 at 408.

83 eg under the Judiciary Act, ss 39(2), 68 or 79.

appellant's proceedings in the District Court, viewing such "proceedings" in the most ample terms. By s 2 of the Costs Act, an application for a certificate under that Act can only be made in "proceedings relating to any offence". The word "offence" refers only to a State "offence".

76 This is so for at least four reasons. First, that is how the statute law of any polity, even one within a federation, would ordinarily be read. Secondly, such a reading is endorsed by the applicable Interpretation Act[84]. Thirdly, the State Parliament could probably not enact a law expressly governing the detail of what was to be done in respect of a federal offence. Any such law, without more, would have to run the gauntlet of s 109 of the Constitution. Fourthly, the context suggests that the Costs Act is addressing only State offences. This is because the Act goes on to provide for applications to be made to named State officials[85].

77 All members of the Court of Appeal so concluded. All rejected the argument that the phrase "in any proceedings relating to any offence" in the Costs Act was broad enough, without supplementation of federal law, to apply to the federal offence of which the appellant was acquitted[86]. They were correct to so decide.

78 *Lack of explicit federal provision*: In respect of proceedings relating to such federal offences, it would be open to the Federal Parliament, in circumstances such as those involving the appellant, to provide legal remedies for the costs incidental to such proceedings. Perhaps the considerations of justice mentioned in *Latoudis v Casey*[87] should by now have attracted legislative attention. However, no such legislation has been enacted. This default, and the foregoing conclusion about the non-applicability of the Costs Act according to its own terms, led the appellant to seek a foundation in federal law to provide for the costs incurred by him in defending himself against the federal charge of which he was acquitted. The spectacle of the appellant receiving no costs, despite his acquittal, when a person charged with a connected State offence would be entitled to a certificate under the Costs Act in equivalent circumstances, is not one that brings much credit on the Commonwealth or its laws.

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84 *Interpretation Act* 1987 (NSW), s 12; cf *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 516 [11].

85 Costs Act, ss 4(1) and (2) ("Under Secretary of the Department of the Attorney General and of Justice"); s 4(5) ("the Treasurer").

86 *Solomons* (2000) 49 NSWLR 321 at 323 [4] per Mason P, 341 [59] per Sheller JA, 342-343 [70] per Foster AJA.

87 (1990) 170 CLR 534 at 545.

79 In offences of which the appellant was charged and acquitted, it is not uncommon for prosecutors to couple federal and State offences in the indictment[88]. The lack of legislation similar to the Costs Act in some of the States of Australia is hardly a justification for the want of federal law. Keeping in mind the "injustice inherent in the system"[89] where no provision is made for the recovery of costs following acquittal of a serious criminal charge, I approach the appellant's arguments with as much sympathy for the construction urged by him as fidelity to legal principle permits.

Common ground and the issues

80 *Common ground*: Before stating the issues that must be decided in this appeal, it will be useful to collect a number of points upon which I did not detect any disagreement between the parties.

81 First, in so far as the appellant relied upon ss 39(2), 68(2) and 79 of the Judiciary Act to render the provisions of the Costs Act applicable to his proceedings, there was no dispute that he was obliged to demonstrate that the Costs Act applied to his case, with its provisions "picked up" by the Judiciary Act but with their "meaning unchanged"[90]. Whether this is so for constitutional reasons or not, it is all that the Judiciary Act purports to do. Nothing in that Act purports to authorise a court to perform significant surgery on the State law concerned. Were that required or permitted, it might take the judiciary, exercising federal jurisdiction, into an impermissible legislative function[91]. It might produce a hybrid to which the Judiciary Act would not attach. It could create impermissible uncertainty about the applicable law[92]. The Judiciary Act cannot be used to pick up bits and pieces of a State law in such a way as to alter its meaning[93].

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88 eg *Nicholas v The Queen* (1998) 193 CLR 173 at 180 [1], 240 [173].

89 *Latoudis v Casey* (1990) 170 CLR 534 at 545.

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

91 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 630-631 [197].

92 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 631 [199]; cf *Suehle v The Commonwealth* (1967) 116 CLR 353 at 356-357.

93 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 556 citing *Maguire v Simpson* (1977) 139 CLR 362 at 376.

82 Secondly, the postulate of the provisions of the Judiciary Act enacting the application in federal jurisdiction of specified State laws, requires some adaptation of the language of the latter so as to render them applicable in their different federal environment. This point was made by Mason J in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*[94]. Referring to s 79 of the Judiciary Act, his Honour said[95]:

> "If the laws of a State could not apply if, upon their true construction as State Acts, they related only to the courts of the State, it would seem impossible ever to find a State law relating to procedure, evidence or the competency of witnesses that could be rendered binding on courts exercising federal jurisdiction, because most, if not all, of such laws, upon their proper construction, would be intended to apply in courts exercising jurisdiction under State law."

83 In *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* ("*Edensor*")[96] the majority of this Court relied upon the above reasoning, being of the view that, were it not so, the operation of federal jurisdiction might too readily be stultified. There might then be withdrawn from courts exercising federal jurisdiction (including this Court) "the effective authority to quell controversies in respect of which … s 75 of the Constitution had conferred original jurisdiction upon this Court and s 77 empowered the Parliament to grant authority to the other federal courts and to State courts exercising federal jurisdiction"[97]. I adopted a narrower view about the adaptability, by analogy, of State legislation to the federal setting in that case. All other members of this Court embraced the broader view. No one in these proceedings questioned the approach of the majority of this Court in *Edensor*. I feel obliged to follow it.

84 Thirdly, in rejecting the application for a certificate, the primary judge did so on the footing that he regarded the request made to him as incompatible with the holding of this Court in *Commissioner of Stamp Duties (NSW) v Owens [No 2]*[98]. With respect, that decision turned on a different consideration, a fact pointed out in the Court of Appeal[99]. *Owens [No 2]* involved the availability to

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94 (1973) 129 CLR 65.

95 (1973) 129 CLR 65 at 88.

96 (2001) 204 CLR 559.

97 *Edensor* (2001) 204 CLR 559 at 591 [68].

98 (1953) 88 CLR 168.

99 *Solomons* (2000) 49 NSWLR 321 at 336-338 [43]-[47] per Sheller JA, 345 [84] per Foster AJA.

this Court of the provisions of the *Suitors' Fund Act* 1951 (NSW) when this Court had allowed an appeal from a New South Wales court on a point of law. In issue was whether the State Act could afford jurisdiction and power to this Court, imposing upon it a duty to hear and determine an application under the State Act. The inability of a State Parliament to impose such functions on this Court, a federal court, was the turning point of the decision in *Owens [No 2]*[100]. It was because the State Act could not apply to the High Court that it was held that it should not be construed as intended to do so.

85 The issue in the present matter is different. The State Act was intended to apply (relevantly) to the District Court of the State. It did so in terms. The true issue is thus whether, having regard to the language of the State Act, it did so in a case involving the exercise of federal jurisdiction. If it did, the primary judge's decision amounts to a constructive failure on the part of the District Court to exercise jurisdiction it had under the Costs Act to resolve the appellant's application for a certificate. On the face of things, any such error would entitle the appellant to succeed unless it would be futile to uphold his claim for relief because federal law, or the Constitution, denied its availability.

86 *Three issues*: This analysis brings me to the three issues that must be resolved:

(1) *The s 68 issue*: Whether s 68 of the Judiciary Act "picks up" and applies to the appellant's proceedings the provisions of the Costs Act, entitling him to a certificate. There is a subsidiary aspect of this question: whether s 39(2) of the Judiciary Act, expressed in like terms, affords the appellant a basis for invoking the Costs Act in his proceedings.

(2) *The s 79 issue*: Whether s 79 of the Judiciary Act "picks up" and applies to the appellant's proceedings the provisions of the Costs Act, entitling him to a certificate under that Act.

(3) *Constitutional issues*: Whether the provisions of the Constitution forbid any conclusion that might otherwise arise as to the applicability to the proceedings of the several provisions of the Judiciary Act, either individually or together.

Constitutionality and legislative construction

87 The constitutional issue presents a threshold question, agitated by some of the respondents and interveners. The Commonwealth and the States of New South Wales and Queensland urged that the appeal could and should be

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100 (1953) 88 CLR 168 at 169.

determined solely by reference to the construction and application of the provisions of the Judiciary Act invoked by the appellant.

88 It was argued that, if the appeal could be decided upon that basis, that was all that should be done, on the footing that issues of constitutionality should be left as a "last resort", approached only "as a necessity in the determination of real, earnest and vital controversy between individuals"[101]. It was submitted that this was the ordinary practice of this Court[102]. The recent practice of some of the Justices was referred to, although in several of the cases cited, those Justices were in dissent[103].

89 I agree that it is commonly useful, and sometimes essential, to construe legislation before questions of constitutional validity are tackled. This will often be prudent as, depending upon the construction adopted, it may obviate the necessity of considering any larger constitutional questions[104]. I have myself called attention to this beneficial practice and conformed to it[105].

90 Nevertheless, occasions arise where such a separation of the Constitution and federal legislation is neither sensible nor desirable. After all, federal legislation must always be such that, if challenged, its constitutional source can be demonstrated[106]. Federal legislation is normally written by the drafter with an eye on the Constitution, specifically on the ultimate source of the legislative power, any relevant prohibitions that appear expressly stated in the Constitution

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101 *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 773-774 citing *Chicago & Grand Trunk Railway Co v Wellman* 143 US 339 at 345 (1892). This remains the general practice of United States courts: *Denver Area Educational Telecommunications Consortium Inc v Federal Communications Commission* 518 US 727 at 778 (1996) per Souter J.

102 Referring to *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 491-492; *Universal Film Manufacturing Co (Australasia) Ltd v New South Wales* (1927) 40 CLR 333 at 356; *Lambert v Weichelt* (1954) 28 *Australian Law Journal* 282 at 283.

103 *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 361-362 [16]-[18], cf at 379 [64]; *Cheng v The Queen* (2000) 203 CLR 248 at 270 [58]; *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1439 at 1485-1486 [249]-[252]; 182 ALR 657 at 719-720.

104 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186.

105 *R v Hughes* (2000) 202 CLR 535 at 565-566 [66]; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 666 [94]-[96].

106 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 421-422 [175].

and other limitations that are implied from the Constitution's provisions, its federal character and structure. Where one interpretation of a federal statute would lead to constitutional invalidity and another would uphold the validity of the provision impugned, the latter construction will be preferred both by common law principle and by statutory enactment of that principle[107].

91 The Constitution is part of the law of the land. It is the fundamental law. It must be applied by every court of Australia and in every matter to which its provisions are relevant. Its provisions influence the interpretation of a great deal of legislation, particularly federal legislation. In a sense, it is artificial to attempt to put out of mind such a cardinal influence upon the meaning of the law. Nevertheless, acknowledging that the task I am involved in is an integrated one, requiring a reading of the federal legislation in question together with the Constitution and in the light of its requirements, I shall commence my analysis by referring, as the Court of Appeal did, to the provisions of the Costs Act and the Judiciary Act before turning to the requirements of the Constitution that I regard as ultimately determinative of this appeal.

The s 68(2) issue

92 *Features of s 68(2)*: Both ss 68(2) and 39(2) of the Judiciary Act invest federal jurisdiction in State courts. They do so independently of each other[108]. The relationship between the two provisions is not yet entirely clear. But perhaps because s 39 is addressed to State courts in their generality and s 68 concerns State (and Territory) courts in criminal cases, the appellant concentrated most of his argument on the latter. It was not suggested that a different, larger source of jurisdiction and power could be found in s 39(2).

93 Although s 68(2) is not expressed to create substantive rights, its provisions perform a double function. They confer and invest jurisdiction. With the support of s 68(1) the provision applies within such jurisdiction "[t]he laws of a State … respecting" nominated criminal procedures. Such laws are to "apply and be applied so far as they are applicable to persons who are charged with

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107 *Acts Interpretation Act* 1901 (Cth), s 15A which reads: "Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

108 *Adams v Cleeve* (1935) 53 CLR 185 at 190-191; *R v Bull* (1974) 131 CLR 203 at 258-259.

offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred … by this section".

94 *The respondents' arguments*: Leaving aside for the moment the requirements of the Constitution, the respondents submitted that the intersection of the Costs Act and the Judiciary Act took the application of the appellant outside the statutory conferral of jurisdiction contained in s 68 of the Judiciary Act, without which, on the present hypothesis, the State Act would not apply to the appellant's proceedings. So far as the Judiciary Act was concerned, the respondents argued that the jurisdiction of the District Court had expired by the time the application was made for the costs certificate after acquittal. This was because that Court was no longer exercising jurisdiction with respect to "the trial and conviction on indictment"[109] of a person charged with a federal offence. By virtue of the acquittal, the "charge" had been disposed of. The "trial" was concluded.

95 It must be conceded that there is some support for the respondents' approach in observations of this Court in early cases[110]. According to the respondents, the application for the costs certificate was a separate and distinct proceeding. It was divorced from the "trial" of the appellant on indictment. It was also separate from the "hearing and determination of appeals arising out of any such trial"[111]. The respondents submitted that, to acknowledge jurisdiction in the District Court to hear and determine an application under the Costs Act, would not involve the vesting of "the like jurisdiction with respect to persons who are *charged with* [federal] offences". Instead it would involve "like jurisdiction with respect to persons *acquitted* of such offences". It was argued that such a rewriting of the State Act, under the guise of applying federal law, was impermissible.

96 The respondents also submitted that, within s 68(1) of the Judiciary Act, the Costs Act could not be categorised as a State law "respecting the arrest and custody of … persons charged with offences" nor one respecting "the procedure for … their trial … on indictment". By the time the appellant had been acquitted he fell outside the provisions of that sub-section. Moreover, so it was submitted, the application for the costs certificate fell within none of the specified "procedures" spelt out in s 68(1).

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109 Judiciary Act, s 68(2)(c).

110 eg *Seaegg v The King* (1932) 48 CLR 251; *Gurnett v The Macquarie Stevedoring Co Pty Ltd [No 2]* (1956) 95 CLR 106.

111 Judiciary Act, s 68(1)(d).

97 *Preferred construction of s 68*: A narrow reading of s 68 of the Judiciary Act would sustain these arguments. However, for a number of reasons, confining myself for the moment to the statute, I would disagree.

98 First, it is increasingly accepted that the proper approach to statutory construction is, so far as the language of the text (and constitutional warrant) permits, to give effect to the purpose expressed in the legislation[112]. The obvious purpose of s 68 of the Judiciary Act is to ensure, so far as possible and in accordance with its terms, that the trial of federal offenders in State (and Territory) courts will closely mirror the trial in the same courts of State (and Territory) offenders. Section 68 should be read, so far as possible, to achieve that broad objective. It is one that is grounded in economy of specific federal criminal legislation, efficiency in the exercise of federal jurisdiction, and justice to persons tried on criminal charges in State courts, some of whom may be charged both with State and federal offences.

99 It may be accepted that there are limits. Some of them are expressly stated, being the requirements of s 80 of the Constitution[113] and the terms of s 68 itself. However, the need for a measure of adaptation and consequential analogical reasoning is indicated by the use of the words "like jurisdiction"[114]. As Dixon J pointed out long ago[115], this expression "recognizes that the adoption of State law must proceed by analogy".

100 Secondly, a reason for not confining the jurisdiction and power of a State court narrowly is the clear indication in s 68(1) of a general purpose of the Federal Parliament to cover all aspects of what might be called the criminal process in court. Following the decision of this Court in *Seaegg v The King*[116], to the effect that (as originally worded) the Judiciary Act did not confer jurisdiction with respect to appeals against convictions, s 68(1) was amended to include, in par (d), a reference to appeals. Thus the section, by its terms, now includes

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112 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70].

113 Judiciary Act, s 68(2). The Constitution, s 80 relates to the trial of any federal offence on indictment before a jury.

114 *Williams v The King [No 1]* (1933) 50 CLR 536 at 543.

115 *Williams v The King [No 2]* (1934) 50 CLR 551 at 561. Thus *Seaegg v The King* (1932) 48 CLR 251 at 256-257 related to appeals following convictions in a State court.

116 (1932) 48 CLR 251.

summary convictions, committals, trials on indictment and the hearing and determination of appeals. Whatever may have been the initial purpose of s 68(1), following the amendment in 1932 it was made plain that it was to cover the broad gamut of the criminal process involving federal offenders. This tells strongly against a narrow construction that would exclude a Costs Act application. Typically (although not universally), such an application would be made before the conclusion of the hearing of the trial of an accused and, certainly, normally before a hearing of any appeal.

101 Thirdly, the history of s 68 also tells strongly against a narrow reading of "offences" and "procedure" in s 68(1). A broad reading of the section was given by this Court to permit the adaptation and application of State laws enabling an Attorney-General to appeal against a sentence imposed on a convicted federal offender[117]. If the same ample view is adopted in this case, there is nothing in s 68 of the Judiciary Act that would exclude the federal jurisdiction conferred on the District Court extending to the hearing and determination of an application under the Costs Act.

102 It is true that at the time of any such application the applicant is no longer, in one sense, a person "charged with offences". However, the addition of provision for the hearing and determination of appeals makes it clear that that phrase cannot be given a narrow meaning. By definition, once an appeal is brought, the "charges" have merged either in a conviction or acquittal of the accused. Obviously therefore, in this context, the phrase "charged with offences" must be read distributively. Similarly, the word "procedure" must be read broadly to give effect to the large purpose and wide ambit stated in the section.

103 Fourthly, whilst acknowledging that earlier authority lends some support to the respondents' arguments about the construction of s 68, notably the reasoning of the majority in *Gurnett v The Macquarie Stevedoring Co Pty Ltd [No 2]*[118], each case of suggested adaptation of State law to federal jurisdiction must necessarily depend upon examination of its own particular statutory texts. The large number of dissenting opinions in this field of discourse indicates the scope for differences of view as to the statutory leeways for adaptation. Thus in *Gurnett*[119] Dixon CJ wrote a telling dissent. Later authority of this Court[120]

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117 *Peel v The Queen* (1971) 125 CLR 447; *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119.

118 (1956) 95 CLR 106.

119 (1956) 95 CLR 106 at 110.

120 *Peel v The Queen* (1971) 125 CLR 447; *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119.

seems more consonant with his Honour's approach. The most recent pronouncement of this Court on the subject of adaptation of State laws to federal jurisdiction, in *Edensor*[121], does not evidence a narrow view either as to the conferral of jurisdiction on federal courts or the grant of powers adapted from State law made applicable to the jurisdiction so conferred. So far as possible, this Court should endeavour to follow a consistent approach to such questions.

104 Fifthly, it is not consistent with long-established principle to construe narrowly legislation conferring jurisdiction and powers upon courts. Whatever may be the approach proper to other repositories of public power, courts are not, on conventional theory, closely confined[122]. This is because of the wide variety of circumstances with which they must deal in exercising a granted jurisdiction and because they can be entrusted to exercise powers properly and in accordance with the grant[123]. This principle applies with added force to s 68 of the Judiciary Act because of the variety of State courts and State laws affected by the section if it is to perform its stated purpose. Moreover, the use of broad words of connection ("respecting" and "so far as they are applicable" in s 68(1) and "with respect to" and "like jurisdiction with respect to" in s 68(2)) is an additional reason for avoiding a narrow reading of s 68.

105 Sixthly, when regard is had to the Costs Act, at least when read according to its terms without specific attention to constitutional limitations, there is nothing, so far as that Act goes, that repels application and adaptation to proceedings respecting charges of a federal offence in a State court. Indeed, the terms of s 2 of that Act make it plain that it contemplates that any application made under the Act is made "*in* … proceedings relating to any offence". It is inconsistent with that language to treat the application as being disconnected from, and subsequent to, the proceedings simply because the applicant has been acquitted. Such a view of the application cannot stand with the hypothesis expressed in s 2 of the Costs Act, which states that the application, notwithstanding the acquittal or discharge, is made "*in* [the] proceedings".

106 For the purposes of the Costs Act, the fact that the application may be made later in time, may concern other parties and (possibly) even involve a court differently constituted, is beside the point. The Costs Act treats such applications

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121 (2001) 204 CLR 559.

122 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 191-192, 205; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 423-424 [110]; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 479 [134].

123 *Gerlach v Clifton Bricks Pty Ltd* (2002) 76 ALJR 828 at 841 [67]-[68]; 188 ALR 353 at 371.

as still being "*in* [the] proceedings". For its purposes at least, such "proceedings" remain extant so that consideration can be given to the exercise of the discretion enlivened by the application for the certificate. Moreover, this view of the section is reinforced by the criteria by reference to which a certificate is to be considered. Such criteria concern the evidence in the proceedings[124] and, indeed, conduct that occurred before the proceedings were instituted[125].

107 The Costs Act does not purport to impose duties on officers of the Commonwealth. It does not purport to impose a burden on the Consolidated Revenue Fund of the Commonwealth[126]. Any payment that is to be made pursuant to the State law is made out of the State Consolidated Revenue Fund[127]. Provision is made in the Costs Act for appropriation from that fund[128]. Accordingly, within the four walls of the Costs Act and without for the moment referring to constitutional doctrine, there is no difficulty, in my view, in adapting the general provisions of the State law, according to its terms, for application in a State court with respect to the trial on indictment of a person, like the appellant, charged with a federal offence.

108 It is true that mention is made in the Costs Act of State officials. However, the certifying court is not immediately concerned with their supposed obligations or discretions. The issue presented relates only to the jurisdiction and power of the District Court. That is a question separate from any conduct or functions of officials in the Executive Government of the State, although obviously such conduct and functions are mentioned in the State Act propounded for federal application. I will consider the separate functions that would be cast on State officials when I turn to the constitutional implications of the supposed operation of the Judiciary Act to "pick up" and apply the Costs Act. However, so far as the jurisdiction and functions of the District Court are concerned, I discern no difficulty.

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124 Costs Act, s 3(1)(a).

125 Costs Act, s 3(1)(b).

126 Created by s 81 of the Constitution.

127 Established by the *Constitution Act* 1902 (NSW), s 39. See *New South Wales v Bardolph* (1934) 52 CLR 455 at 466 and also s 45 of the *Constitution Act* 1902 (NSW).

128 Costs Act, s 4(6).

109 I would therefore reject the statutory argument that was determinative for the majority in the Court of Appeal[129]. I do not consider that an application under the Costs Act is collateral to, separate from, and independent of, the trial of the appellant (and the exercise of federal jurisdiction) simply because it cannot be made until after the acquittal is ordered in that trial. By the scheme of the Costs Act, the application is still determined *in* the proceedings. Clearly it is incidental or adjunct to them. Any other view would be unduly narrow and artificial, paying insufficient attention to the practical realities of how trials are fought and how, typically, a legal defence, necessarily incurring costs, is essential to securing an acquittal.

110 *Conclusion*: It follows that, according to one reading of its terms, s 68 of the Judiciary Act is applicable to this case. It remains to consider whether such a reading would exceed, or be incompatible with, the requirements of the Constitution, thereby obliging a different reading. But first I shall deal with the appellant's arguments relying on s 79 of the Judiciary Act.

The s 79 issue

111 *Respondents' arguments*: Many of the arguments mounted for the respondents to rebuff the application of s 79 of the Judiciary Act are similar to those already rejected in the context of s 68.

112 First, the respondents submitted that the provisions of the Costs Act lay outside the scope of s 79 on the footing that the District Court, having entered an order for the appellant's acquittal, had then lost any federal jurisdiction to deal with any other issue. It was argued that the federal controversy or *lis* was concluded. Hence the Costs Act could not be "applicable" because the exercise of federal jurisdiction was complete. Reliance was placed on *Owens [No 2]*[130]. Secondly, it was submitted that the State law was "picked up" by s 79 but with its meaning unchanged[131]. Accordingly, it was argued that the Costs Act would still apply only to proceedings relating to an offence against State law, as its original terms contemplated. Thirdly, it was argued that it was impossible, within the language of the Costs Act, to regard it as a "surrogate" federal law because its

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129 *Solomons* (2000) 49 NSWLR 321 at 325 [21] per Mason P, 351-352 [113]-[115] per Foster AJA.

130 (1953) 88 CLR 168. See *Solomons* (2000) 49 NSWLR 321 at 325 [21] per Mason P.

131 *Pedersen v Young* (1964) 110 CLR 162 at 165; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 88; *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 143 [13].

machinery addressed State officials and, as it was put, "would lead nowhere". Any certificate granted under the Costs Act would not be "pursuant to this Act" (being the State Act) for the purposes of s 4(2) of the Costs Act.

113 *Construction of s 79*: These arguments concerning the application of s 79 of the Judiciary Act are rejected.

114 First, the notion that federal jurisdiction in the District Court was lost in this case at the moment of acquittal of the appellant involves too narrow a view of the conferral of such jurisdiction. It is by no means uncommon for ancillary questions to arise in a criminal court following a judgment of acquittal and discharge of a prisoner who had been charged with, and tried for, an offence. Questions can arise as to the return or safekeeping of exhibits; the return of property; the lodgment of appeals, including appeals on issues of legal principle that cannot affect the acquittal[132]; victim compensation and so forth. It would be seriously inconvenient for a court, such as the District Court in the proceedings involving the appellant, to lose jurisdiction in the matter at the instant an order of acquittal was pronounced. Nothing in the Judiciary Act obliges such an artificial construction.

115 Secondly, established authority of this Court that obliges acceptance, unchanged, of State laws "picked up" by s 79 of the Judiciary Act, necessarily involves some adaptation of those laws. Of their character, such laws were drawn to apply to State jurisdiction alone. Without adaptation, the hypothesis involved in s 79 (as in ss 39 and 68) could not be given effect. That hypothesis is integral to the efficient application in federal jurisdiction of State (and Territory) laws that are then necessarily read in a more ample way, freed from their provenance for the purpose. Such adaptation is also consistent with what this Court has repeatedly done[133]. The prohibition arises when the propounded adaptation would change or distort the State law, ignore unwelcome parts of it or involve such a legal hybrid that it could no longer answer to the description of a law "of each State or Territory"[134]. That was not the case here. The appellant simply asked for the application by a State court, in proceedings before it, of a State law burdening the State Consolidated Revenue Fund that would have applied to those proceedings if, and to the extent that, they were in State jurisdiction.

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132 eg *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289.

133 eg *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 88, 95; *Thomas v Ducret* (1984) 153 CLR 506 at 510.

134 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 556; *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 143 [13].

116 Thirdly, the argument that any certificate granted under the Costs Act would not be granted "pursuant to this Act" (as s 4(2) of that Act requires) is unpersuasive. For the appellant, the certificate would indeed be granted pursuant to the State Act but as that Act was made binding on the District Court exercising federal jurisdiction in a case to which, by the terms of that law, it was made "applicable" by federal law. This was not a case where any attempt was made to impose on a federal court jurisdiction extraneous, or alien, to its character as a federal court[135]. Nor was it a case where the jurisdiction was confined, by the terms of the State Act, to a particular State court[136]. The Costs Act is framed in deliberately wide terms to cover a broad variety of criminal proceedings at all levels of the State judicial hierarchy[137]. Nor, in my view, is the relevant conferral of jurisdiction and power to grant a certificate addressed, as such, to officers of the Executive Government of the State[138]. In terms, it is addressed to the court on which the power to grant the certificate was conferred. Such a certificate permits an application to named State officials. But for the moment we are only concerned with the application to the District Court and the certificate that that Court might issue.

117 Fourthly, it is important to remember the generality in which s 79 is expressed. Although the section makes special reference to "laws relating to procedure, evidence, and the competency of witnesses", these are mentioned only by way of illustration ("including"). Once it is accepted that the scope of "federal jurisdiction" is not narrowly or artificially confined, it is clear that a State law as to costs, determined after and in the light of a judgment disposing of the substance of the matter in federal jurisdiction, could, so far as its nature goes, be "picked up" and rendered available for use by the State court in concluding the discharge of such jurisdiction[139].

118 *Conclusion: a broad approach*: It follows that the operation of s 79 reinforces the earlier conclusion reached in terms of s 68 of the Judiciary Act. On the face of things, both sections, according to their terms, "pick up" and apply

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135 *Edensor* (2001) 204 CLR 559 at 594 [75]. Federal courts have the power to provide costs certificates in some circumstances: *Federal Proceedings (Costs) Act* 1981 (Cth), ss 6, 7, 7A, 8, 9, 10 and 11.

136 cf *Thomas v Ducret* (1984) 153 CLR 506 at 510.

137 See eg s 2: "Court or Judge or Justice or Justices".

138 cf joint reasons at [25]; reasons of McHugh J at [57], [61].

139 eg *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128 at 147.

the provisions of the Costs Act to the proceedings involving the appellant, incidental to his acquittal of the federal criminal offence with which he was charged. They do so in like manner, as if his case had been wholly or partly within State jurisdiction. Any other view of the legislative language would, in my opinion, be unduly narrow and contrary to the approach taken by this Court in *Edensor*.

119 *Residual constitutional issues*: There is within ss 39 and 68 of the Judiciary Act implicitly, and in s 79 explicitly, a reservation excluding the possibility of adaptation of a State law to federal jurisdiction where it is "otherwise provided by the Constitution"[140]. The explicit mention of the Constitution in s 79 (and the express mention of s 80 of the Constitution in s 68(2) of the Judiciary Act) were not strictly necessary. Like all federal laws, the Judiciary Act must be read subject to the Constitution. All State and Territory laws are likewise subject to its terms.

120 It is therefore necessary to consider the arguments advanced by the respondents and interveners in this Court to the effect that the Constitution requires a reading down of ss 39, 68 and 79 of the Judiciary Act, on the footing that the application of the Costs Act to the appellant's proceedings would, unless confined, be inconsistent with the Constitution, rendering invalid any purported operation of the Judiciary Act to provide differently.

The constitutional issues

121 *Respondents' arguments*: Four arguments were propounded to suggest that the foregoing conclusion about the "picking up" and application of the Costs Act in this case would take the Judiciary Act beyond federal constitutional power or involve it in an application incompatible with the Constitution:

(1) The application for the costs certificate, following acquittal of the appellant after a failed federal prosecution, was no longer in federal jurisdiction, having regard to the conclusion of the constitutional "matter";

(2) The grant of a costs certificate pursuant to the Costs Act would involve the imposition on a court exercising federal jurisdiction of non-judicial functions, incapable, as such, of being imposed on such a court conformably with the requirements of Ch III of the Constitution;

(3) The Federal Parliament lacks legislative power, whether under the Judiciary Act or otherwise, to cause the provisions of the Costs Act to apply to proceedings in federal jurisdiction; and

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140 Judiciary Act, s 79.

(4) The federal character of the Constitution and the express and implied limitations upon federal legislation affecting the States, prevents a federal law from validly imposing a burden on State Ministers and officers and on the Consolidated Revenue Fund of a State of the kind implicit in the suggested "picking up" and application of the Costs Act to a case in federal jurisdiction.

122 *The constitutional "matter" was not concluded*: It follows from my earlier reasons that, subject to the outcome of the other constitutional arguments, I do not accept the argument that the federal jurisdiction conferred on the District Court respecting the proceedings against the appellant terminated at the moment of his acquittal. In so far as the argument is repeated in terms of the requirements of the Constitution limiting the conferral of federal jurisdiction and the investing of it in any court of a State to laws "with respect to … matters"[141], it is not improved.

123 The concept of "matter" is elusive[142]. This is not the occasion to re-explore it. But it is a constitutional word. For that reason it is not to be subjected to a narrow or artificial meaning. The Commonwealth might regard the controversy between the parties to the appellant's trial as having been "quelled" by the order of acquittal. But in practical terms, from the point of view of the accused, the recoupment of the costs incurred in securing that outcome could, quite reasonably, be treated as a residual aspect of the controversy. Certainly, it would be incidental or appurtenant to it. So much is implicit in the recognition of the Costs Act itself that the court or judicial officer concerned is still engaged, after acquittal, *in* the proceedings. Common experience confirms that applications for such orders are normally made immediately the verdict is announced and the judgment entered. At that time the "matter" has not magically evaporated. Such occult notions can be left to theological disputation. The Constitution is a practical document. It is intended to operate in the real world of government, including in the courts. I would therefore reject the first constitutional argument[143].

124 *There is no offence to the judicial power*: Similarly, I am not convinced that there is any offence to Ch III in the scheme set out in the Costs Act that

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141 Constitution, s 77(iii).

142 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 585 [215]; cf *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 300, 312; *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 391 [84].

143 cf reasons of McHugh J at [47].

would render the application of that Act in federal jurisdiction incompatible with the exercise of the judicial power of the Commonwealth[144].

125 Nor do I regard it as arguable that the performance by a State court of the functions committed to it by the Costs Act would otherwise be incompatible with, or repugnant to, the discharge of federal jurisdiction by such a court[145]. The State of New South Wales so submitted. However, in my opinion there is no difficulty in a court, in federal jurisdiction, exercising powers of the kind conferred by the Costs Act. This is because the functions performed by the judicial officer under the Costs Act are "truly appurtenant" to the exercise of the judicial power. Federal courts themselves grant like certificates all the time[146]. No one suggested that, in doing so, they exceeded their judicial warrant. It would be seriously disruptive and unjust to parties if it were held otherwise.

126 The fact that such functions can lead to a further exercise by a Minister in the Executive Government (in this case the State Treasurer) of a discretion under the Costs Act[147] does not of itself alter the judicial character of what the judge is asked to do. In our legal tradition it is by no means unusual for the Executive Government to retain a final say after the disposal of judicial proceedings. So it has long been in respect of the exercise of the prerogative of mercy. So it is in relation to decisions made under the *Extradition Act* 1988 (Cth), recently upheld as constitutionally valid[148].

127 Even if this view were incorrect[149] (a possibility I find difficult to contemplate), there could be no doubt that certification by a court of a party's eligibility for relief in meeting costs incurred by him or her as a result of an erroneous prosecution would be "a function truly appurtenant to the exercise by

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144 *R v Murphy* (1985) 158 CLR 596 at 613-614; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 135.

145 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 106, 117-118.

146 *Federal Proceedings (Costs) Act* 1981 (Cth), ss 6, 7, 7A, 8, 9.

147 Costs Act, s 4(5).

148 *Pasini v United Mexican States* (2002) 187 ALR 409 at 414 [17]-[18], 425 [64], 426 [67]-[69].

149 cf *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation [No 2]* (1982) 152 CLR 179 at 183.

that court of its judicial power to determine" the proceedings and to award costs in them[150]. The second constitutional argument should also be rejected.

128 *Burden on State revenue would be impermissible*: Narrowing the constitutional objections in this way brings me to the critical arguments for the respondents. These were that, to the extent that provisions of the Judiciary Act were invoked to support a federal law imposing functions on State officials in the Executive Government of a State, and requiring payment from the State revenue of costs to a person acquitted of a federal offence, such provisions would:

(a) suffer from a want of legislative power in the Federal Parliament to enact a federal law so providing; and/or

(b) contravene the implied constitutional limitations on federal legislative power as expressed by this Court in *Melbourne Corporation v The Commonwealth*[151].

129 Each of these contentions is correct. Each represents the counterpart of the other. Each reinforces the strength of the other. These points were not argued in the Court of Appeal. Indeed, as that Court records, the State, with the most obvious interest to do so, declined an invitation to address the constitutional questions[152]. It is these arguments that, for me, are determinative of the appeal.

130 *The want of federal legislative power*: By force of s 77(iii) of the Constitution, the Federal Parliament is empowered to invest any State court with federal jurisdiction. But it is only so empowered "[w]ith respect to any of the matters mentioned" in ss 75 and 76 of the Constitution. Relevantly, this includes matters "arising under any laws made by the Parliament". Such laws include the *Customs Act* 1901 (Cth), which here created the offence with which the appellant was charged and the Judiciary Act which here invested the District Court with jurisdiction (and the necessary powers) to try the appellant on an indictment charging him with that federal offence.

131 Not only did the foregoing grant of constitutional authority carry with it legislative power incidental to making effective the investment of federal jurisdiction in a court of a State. By virtue of s 51(xxxix) of the Constitution

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150 *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation [No 2]* (1982) 152 CLR 179 at 187 per Brennan J.

151 (1947) 74 CLR 31.

152 *Solomons* (2000) 49 NSWLR 321 at 326 [25] per Mason P, 327 [28] per Sheller JA.

there was expressly conferred on the Parliament the power to make laws with respect to matters incidental to the execution of any power vested in the Parliament by the Constitution. Such incidental powers must be construed "with all the generality which the words used admit"[153].

132 I accept that discerning the point when the source of constitutional power is lost will sometimes be a matter of controversy. In the present case, the appellant, correctly, pointed to the undisputed vesting of federal jurisdiction in the State court, the intimate relationship of the subject of costs to the proceedings in such a court, the structure and language of the Judiciary Act and of the Costs Act and the large scope of the incidental power under the Constitution. Most especially, the appellant relied on the fact that the power to invest federal jurisdiction in State courts was a coercive one. Necessarily, the investing of federal jurisdiction in State courts has cost implications not only for State courts themselves but also for the duties and functions of State officials who exercise their powers in relation to State courts, although not officers of them. The States could not reject the jurisdiction so invested. They could not complain that it necessarily imposed upon the State and its officers (and ultimately the taxpayers in the State) the burdens of providing courts, judicial officers, officials, security guards, sheriffs and other officers, police and all the other administrative back-up and paraphernalia that goes with the compulsory imposition of jurisdiction on State courts pursuant to the Constitution[154].

133 The appellant submitted that the imposition of one further cost, namely (in proper cases) the possible reimbursement of legal costs authorised by a court and accepted by a State Minister to a person acquitted of a federal offence, was not different in terms of constitutional principle. By inference, it was suggested, any added financial burden upon the State Consolidated Revenue Fund might be the

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153 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225; *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16]; cf *Le Mesurier v Connor* (1929) 42 CLR 481 at 497.

154 *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 62. There would be similar cost implications in the duty cast on a State by s 120 of the Constitution to "make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth": *R v Turnbull; Ex parte Taylor* (1968) 123 CLR 28 at 37. Other constitutional sources of such impositions could include laws validly made under the defence power in times of war: *South Australia v The Commonwealth* (1942) 65 CLR 373 at 437, 456-458, 466-470, and cases where the State consents to the federal law for purposes of cooperation within the federation: *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 552.

subject of later inter-governmental negotiations and possible federal recoupment. The federal legislative power to so provide was thus (according to the appellant) merely incidental to the legislative power sustaining both the *Customs Act* and the Judiciary Act. There was no difference in kind so far as the marginal costs involved in a Costs Act certificate were concerned.

134 I disagree. There is a difference. It forbids any attempt (if that had indeed been ventured) to stretch the federal legislative power to the point needed by the appellant to render the Costs Act applicable to his case. At that point, the link to the federal legislative power is snapped. This is so because to "pick up" the Costs Act and to apply it, according to its terms, necessarily postulates the operation of a federal law that imposes a distinct and additional burden on the State Consolidated Revenue Fund not, as such, for the discharge of federal jurisdiction by a State court but for a related but different legislative purpose, namely the provision of legal aid to a person accused of a federal offence.

135 There was no equivalent provision in the United Kingdom nor in the exercise of State or federal jurisdiction by Australian courts at the time of federation. There is still no such provision in some States of Australia. There is no such provision in federal legislation. Many courts overseas exercise criminal jurisdiction without such provision. Accordingly, such provision is not involved, as such, in the exercise of the jurisdiction contemplated in s 77(iii) of the Constitution. At least it is not so involved at this stage of the understanding of that constitutional expression. It cannot be put there merely by notions of the incidental enlargement of the constitutional power. Constitutionally speaking, the provision for criminal costs is a separate subject matter of legislation.

136 Moreover, it was accepted by the Attorney-General of the Commonwealth, correctly in my view, that the Federal Parliament could not, by its laws, appropriate money from the Consolidated Revenue Fund of a State[155]. Nor could the Commonwealth impose a special burden or disability on a State; nor one that prevented, or interfered with, the functioning of a State as a polity created by the Constitution[156]. These rules rest, in part, on the preservation of the State Constitutions by s 106 of the Constitution. But they are reinforced by the implied limitations imposed upon the intrusion of laws made by the Federal

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155 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 353, 389-390, 392-393; *New South Wales v The Commonwealth [No 1]* (1932) 46 CLR 155 at 175-177, 185, 197-198; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 551-552.

156 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 226-228; cf *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 207, 217, 232.

Parliament into the matters properly belonging to the Parliaments of the States[157]. Where an imposition on the Consolidated Revenue Fund of a State is contemplated, it is essential to the representative democracies envisaged by the Constitution that any such imposition must have the clear authority of law. Ordinarily, appropriations must be approved by the Parliament representative of the electors from whom the revenue is raised. The principle "no taxation without representation" was a cause that ignited the War of Independence of the United States of America. It informed the establishment of the constitution of that country. But it also influenced the constitutions, colonial, federal and State, of Australia and elsewhere in the former British colonies and dominions. It is a principle reflected both in the federal[158] and State[159] Constitutions as they now stand.

137 Unless this principle were upheld in a case such as the present (where necessary by this Court) there would be a risk that legislation could undermine the accountability of the legislators in a given State for the appropriations from the Consolidated Revenue Fund of that State, disapproved by the electors in that State yet for which the Parliament of that State was not answerable at elections. There would be a risk that federal legislation could discriminate against the States by imposing special burdens or disabilities on them or by curtailing or impairing their continued existence by enacting laws burdening their Consolidated Revenue Funds[160]. Subject to the Constitution, the power of a State to control its finances, to raise income and expend moneys from out of its Consolidated Revenue Fund as it sees fit, is a prerequisite to the viability of the

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157 cf *McGinty v Western Australia* (1996) 186 CLR 140 at 173; *SGH Ltd v Commissioner of Taxation* (2002) 76 ALJR 780; 188 ALR 241; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 76 ALJR 926; 189 ALR 161.

158 Constitution, ss 53, 81, 82, 83: *Brown v West* (1990) 169 CLR 195 at 205; *Northern Suburbs General Cemetery Reserve Trust v The Commonwealth* (1993) 176 CLR 555 at 581; Selway, *The Constitution of South Australia*, (1997) at 124-125 traces the requirement for parliamentary authorisation of appropriations of public moneys to the *Bill of Rights* 1688 (UK).

159 *Constitution Act* 1902 (NSW), s 45: see *New South Wales v The Commonwealth [No 1]* (1932) 46 CLR 155 at 197-198; *Egan v Willis* (1998) 195 CLR 424 at 450-451 [40], 473-474 [96]-[97], 502-503 [155]; cf *Auckland Harbour Board v The King* [1924] AC 318 at 326-327.

160 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 60, 66, 78-79; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 227; *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 520-521; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 451, 507-508.

State as a polity within the Commonwealth[161]. It is essential to its capacity to function as a government[162]. If, in the name of investing a State court with obligatory federal jurisdiction, the Federal Parliament could, by provisions such as those contained in the Judiciary Act, tack unwanted burdens onto State Ministers and officials and the State Consolidated Revenue Fund that had not been expressly enacted by the State Parliament, the freedom of action of the State Parliament would thereby be diminished.

138 It is one thing to impose on a State the vesting of federal jurisdiction in its courts. This is done pursuant to s 77(iii) of the Constitution. That provision, and the necessary incidents to its discharge, have inescapable implications for State revenue. Inevitably, they burden State officers and the State Consolidated Revenue Fund. However, they do so by force of the Constitution itself. Although the special provision for criminal costs is, in practical terms, appurtenant or incidental to the investment of federal jurisdiction, it is not, constitutionally speaking, part of it. Any federal law providing such a burden on the State Consolidated Revenue Fund would therefore need additional constitutional support. Such support is missing here. Indeed, no explicit federal law even purports to deal with that subject matter. Neither the Attorney-General of the Commonwealth nor the prosecutor for the Commonwealth suggested otherwise.

139 *Conclusion*: The result is that, to the extent that the Judiciary Act might, read without appropriate regard to the Constitution, be thought to "pick up" and apply the Costs Act to the appellant's proceedings, when the former Act is read alongside the Constitution, it cannot validly have such an operation. To read it in such a way would sever its link with the federal legislative powers that sustain it. Moreover, so read, it would conflict with a fundamental postulate of the Constitution that respects and upholds the control over the State Consolidated Revenue Fund of the State Parliament, save to the extent that the federal Constitution or valid federal law expressly or implicitly provides otherwise. Here there is no such express or implied provision.

Orders

140 I would therefore dismiss the appeal. Because my grounds for doing so arise out of arguments which the respondents did not advance before the Court of Appeal (indeed, declined to raise when given the opportunity to do so) I do not

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161 cf *South Australia v The Commonwealth* (1942) 65 CLR 373 at 423; *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 138-139.

162 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 52-53, 75, 98.

consider that the appellant should bear the burden of the costs of the proceedings in this Court. The issue involved is one of general principle. The appellant has borne sufficient costs in consequence of the Commonwealth's failed prosecution. There should be no order as to costs in this Court.