HIGH COURT OF AUSTRALIA

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

BHP BILLITON LIMITED APPELLANT

AND

TREVOR JOHN SCHULTZ & ORS RESPONDENTS

BHP Billiton Limited v Schultz
[2004] HCA 61
7 December 2004
S108/2003

ORDER

1. Appeal allowed.

2. Set aside Order 1 of the orders of the Supreme Court of New South Wales entered on 30 October 2002, and in its place order that:

(a) Proceeding No 308 of 2002 in the Dust Diseases Tribunal of New South Wales be removed into the Common Law Division of the Supreme Court of New South Wales; and

(b) The proceeding so removed thereupon be transferred to the Supreme Court of South Australia.

3. The appellant pay the costs of the first respondent in this Court.

On appeal from the Supreme Court of New South Wales

Representation:

B W Walker SC with T G R Parker and K M Richardson for the appellant (instructed by Piper Alderman Lawyers)

D F Jackson QC with J L Sharpe and A S Bell for the first respondent (instructed by Turner Freeman Lawyers)

No appearance for the second to fifth respondents

Interveners:

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

W C R Bale QC, Solicitor-General of the State of Tasmania, with C E Prideaux intervening on behalf of the Attorney-General of the State of Tasmania (instructed by the Solicitor-General of Tasmania)

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 Law Division, Department of Justice)

R J Meadows QC, Solicitor-General for the State of Western Australia with K H Glancy intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor's Office (Western Australia))

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

C J Kourakis QC, Solicitor-General for the State of South Australia, with C Jacobi intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor's Office (South Australia))

CATCHWORDS

BHP Billiton Limited v Schultz

Courts and judges – Courts – Concurrent jurisdiction of different courts – Cross-vesting legislation – Plaintiff alleges that his asbestos-related disease resulted from exposure to asbestos while working in South Australia – South Australia identified as the place of the alleged wrong – Plaintiff commenced proceedings in Dust Diseases Tribunal of New South Wales – Plaintiff a resident of South Australia – Whether Supreme Court of South Australia a "more appropriate" forum – Whether proceeding to be transferred "in the interests of justice" – Relevance of circumstance that jurisdiction of the Dust Diseases Tribunal was regularly invoked – Relevance of plaintiff's choice of forum – Relevance of circumstance that law of other State less favourable to plaintiff than the law of the forum – Relevance of circumstance that the forum has particular experience and facility in dealing with the specific type of claim – Relationship between cross-vesting applications and forum non conveniens.

Private international law – Choice of law – Lex loci delicti – New South Wales statute empowers Dust Diseases Tribunal to award further damages at a future date if the injured person develops dust-related condition – South Australian statute provides for a once and for all assessment of damages – Whether New South Wales law procedural or substantive in character.

Constitutional law (Cth) – State Parliaments – Powers – Whether State Parliaments competent to legislate in a manner which curtails or interferes with the exercise of the powers of another State – Whether State Parliaments competent to legislate for the exercise of adjudicative functions by their courts outside their geographical territory.

Constitutional law (Cth) – Full faith and credit – Choice of law – Lex loci delicti – Whether requirement that full faith and credit be given to the laws, the public Acts and records, and the judicial proceedings of every State, places it beyond competence of one State to require its courts or tribunals to determine the action by any system of substantive law other than the lex loci delicti.

Words and phrases: "more appropriate forum", "interests of justice".

Constitution, ss 73, 74, 75(v), 107, 118.
Service and Execution of Process Act 1992 (Cth), ss 15, 20.
Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW), ss 5, 8, 9, 13.
Dust Diseases Tribunal Act 1989 (NSW), ss 10, 11, 11A, 13.
Jurisdiction of Courts (Cross-vesting) Act 1987 (SA), s 11.
Supreme Court Act 1935 (SA), s 30B.

1 GLEESON CJ, McHUGH AND HEYDON JJ. This is an appeal from a judge of the Supreme Court of New South Wales, who dismissed the appellant's application to have an action pending in the Dust Diseases Tribunal of New South Wales ("the Tribunal") removed from the Tribunal to the Supreme Court of New South Wales, and then transferred to the Supreme Court of South Australia. The power of transfer is conferred by s 5 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) ("the Cross-vesting Act").

The proceedings in the Tribunal

2 The first respondent suffers from asbestosis and asbestos-related pleural disease. Between 1957 and 1964, and between 1968 and 1977, he worked for the appellant at Whyalla in South Australia. He claims that his condition is the result of exposure to asbestos over those periods. He commenced proceedings in the Tribunal against the appellant, alleging negligence, breach of contract and breach of statutory duty, and against four other corporations, also respondents to this appeal, who were allegedly negligent in the manufacture and supply of the materials that ended up at Whyalla.

3 At the time of the commencement of the proceedings, the first respondent was a resident of South Australia. The appellant is incorporated in Victoria, and carries on business both in South Australia and in New South Wales. The second respondent is incorporated in the United Kingdom, and is registered as a foreign corporation in New South Wales. The third and fourth respondents are incorporated in the Australian Capital Territory. The fifth respondent is incorporated in New South Wales. According to the first respondent, products containing the asbestos were manufactured, sold and supplied to the appellant and the second respondent in New South Wales by the fifth respondent. According to the appellant, the products were supplied to the appellant in South Australia. There are cross-claims between the appellant and the respondents other than the first respondent.

4 The appellant was the moving party in the application before Sully J. The respondents other than the first respondent took no active role before Sully J or before this Court. In argument in this Court, the focus of attention was the first respondent's case against the appellant. That, however, does not mean that the claims against the other respondents, and the cross-claims, are to be ignored. Sully J identified South Australia as the place where the first respondent's causes of action against the appellant arose. In this Court, the first respondent did not challenge the view that the law of South Australia would be the substantive law that would govern his claim against the appellant, but asserted that the law of New South Wales could govern some of the claims against the other respondents and the cross-claims.

5 Subject to proof of exposure and diagnosis, liability will not be in issue between the first respondent on the one hand and the appellant and the other respondents on the other hand. Subject to the qualification mentioned, the only issues affecting the first respondent will relate to damages and a claim that a limitation period has expired. The lay witnesses, and most (but not all) of the medical witnesses, reside in South Australia.

6 Sully J pointed out that s 11A of the *Dust Diseases Tribunal Act* 1989 (NSW) ("the Tribunal Act"), a provision unique to the Tribunal, empowered the Tribunal to make an award of damages in stages. That section provides:

> "(2) The Tribunal may ...
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> (a) award damages assessed on the assumption that the injured person will not develop another dust-related condition, and
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> (b) award further damages at a future date if the injured person does develop another dust-related condition."

The first respondent sought from the Tribunal an order preserving his right to make a future and additional claim for damages should he develop any of the conditions of asbestos-induced lung cancer, asbestos-induced carcinoma of any other organ, pleural mesothelioma, or peritoneal mesothelioma.

The Cross-vesting Act

7 The purpose of the proposed removal of the proceedings from the Tribunal to the Supreme Court of New South Wales under s 8 of the Cross-vesting Act was so that it could then be transferred to the Supreme Court of South Australia under s 5 of the same Act. The criterion for transfer established by s 5 is that it is in the interests of justice that the proceedings be determined in the Supreme Court of South Australia.

8 From the outset, it has been recognised by courts applying the Cross-vesting Act that, although an application for transfer under s 5 will often involve evidence and debate about matters of the same kind as arise when a court is asked to grant a stay of proceedings on the ground of forum non conveniens, there are differences between the two kinds of application. Because of one controversial aspect of the reasoning of Sully J, it is useful to refer to some matters of history in order to explain those differences.

9 The current English common law on the subject of forum non conveniens was established by the decision of the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*[1]. The current Australian common law is to be found in the decision of this Court in *Voth v Manildra Flour Mills Pty Ltd*[2]. To the extent to which they differ, the difference can be traced to a view about the nature of the power to stay proceedings.

10 The earlier English view, overturned later by the House of Lords, was expressed by Scott LJ in *St Pierre v South American Stores (Gath & Chaves) Ltd*[3]: "A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused." That approach, which stressed the duty of a court to exercise a jurisdiction that had been regularly invoked, was abandoned in England. In *Spiliada*[4], Lord Goff of Chieveley said that a stay would be granted on the ground of forum non conveniens "where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice."

11 When *Spiliada* was first considered by this Court, in *Oceanic Sun Line Special Shipping Company Inc v Fay*[5], some members of the Court expressed concern about the "duty of an Australian court to exercise its jurisdiction".[6] Deane J said: "It is a basic tenet of our jurisprudence that, where jurisdiction exists, access to the courts is a right. It is not a privilege which can be withdrawn otherwise than in clearly defined circumstances."[7] Later, in *Voth*[8], this Court settled upon the "clearly inappropriate forum" test as the basis of granting a stay

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1 [1987] AC 460.

2 (1990) 171 CLR 538.

3 [1936] 1 KB 382 at 398.

4 [1987] AC 460 at 476.

5 (1988) 165 CLR 197.

6 (1988) 165 CLR 197 at 238 per Brennan J.

7 (1988) 165 CLR 197 at 252.

8 (1990) 171 CLR 538.

of proceedings. The reason for adopting a test somewhat stricter than the English test emerges from the joint judgment of Mason CJ, Deane, Dawson and Gaudron JJ in *Voth*, which referred back to what Deane J had said in *Oceanic*, and stated that "[t]he selected forum's conclusion that it is a clearly inappropriate forum is a persuasive justification for the court refraining from exercising its jurisdiction."[9] This emphasis upon the need for justification of a judicial refusal to exercise a jurisdiction that has been regularly invoked underlay the selection of the "clearly inappropriate forum" test, in contrast to the modern English test. It has overtones of what Scott LJ said in *St Pierre* about the right of access to a court being something that is not lightly refused.

12 The national scheme of legislation, of which the Cross-vesting Act is a part, was intended to operate, and to be applied, in a different juridical context. This was clearly stated in the first case to come before the Court of Appeal of New South Wales under the Cross-vesting Act, *Bankinvest AG v Seabrook*[10]. It has been recognised by the Court of Appeal in later cases in which jurisdiction of one kind or the other has been invoked[11].

13 In *Bankinvest*[12], Street CJ said:

> "The cross-vesting legislation passed by the Commonwealth, the States and the Territories both conferred on each of the ten courts Australia-wide jurisdiction and set up the mechanism regulating the transferring of proceedings from one of these ten courts to another. In relation to transfer, the common policy reflected in each of the individual enactments is that there must be a judicial determination by the court in which proceedings are commenced either to transfer or not to transfer the proceedings to one of the other nine based, broadly speaking, upon consideration of the interests of justice ... It calls for what I might describe as a 'nuts and bolts' management decision as to which court, in the pursuit of the interests of justice, is the more appropriate to hear and determine the substantive dispute."

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9 (1990) 171 CLR 538 at 559.

10 (1988) 14 NSWLR 711.

11 Compare, for example, *Goliath Portland Cement v Bengtell* (1994) 33 NSWLR 414 with *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357.

12 (1988) 14 NSWLR 711 at 713-714.

14 In the context of the Cross-vesting Act, one is not concerned with the problem of a court, with a prima facie duty to exercise a jurisdiction that has been regularly invoked, asking whether it is justified in refusing to perform that duty. Rather, the court is required by statute to ensure that cases are heard in the forum dictated by the interests of justice. An application for transfer under s 5 of the Cross-vesting Act is brought upon the hypothesis that the jurisdiction of the court to which the application is made has been regularly invoked. If it appears to that court that it is in the interests of justice that the proceedings be determined by another designated court, then the first court "shall transfer" the proceedings to that other court. There is a statutory requirement to exercise the power of transfer whenever it appears that it is in the interests of justice that it should be exercised. It is not necessary that it should appear that the first court is a "clearly inappropriate" forum. It is both necessary and sufficient that, in the interests of justice, the second court is more appropriate.

15 The reason why a plaintiff has commenced proceedings in a particular court might, or might not, concern a matter related to the interests of justice. It might simply be that the plaintiff's lawyers have their offices in a particular locality. It is almost invariably the case that a decision as to the court in which an action is commenced is made by the plaintiff's lawyers, and their reasons for making that choice may be various. To take an example at the other extreme, it might be because a plaintiff is near death, and has a much stronger prospect of an early hearing in one court than in another. The interests of justice are not the same as the interests of one party, and there may be interests wider than those of either party to be considered. Even so, the interests of the respective parties, which might in some respects be common (as, for example, cost and efficiency), and in other respects conflicting, will arise for consideration. The justice referred to in s 5 is not disembodied, or divorced from practical reality. If a plaintiff in the Tribunal were near to death, and, in an application such as the present, it appeared that the Supreme Court to which transfer was sought could not deal with the case expeditiously, that would be a consideration relevant to the interests of justice. Justice would ordinarily dictate that the interest of the plaintiff in having a hearing would prevail over the interest of the defendant in such benefit as it might obtain from the plaintiff's early death. The capacity of the Tribunal to deal expeditiously with cases has always, and rightly, been regarded as relevant to the interests of justice, bearing in mind the condition of many sufferers from dust diseases.

16 On the other hand, there may be conflicting interests of such a kind that justice would not attribute greater weight to one rather than the other. The advantage which a plaintiff might obtain from proceeding in one court might be matched by a corresponding and commensurate disadvantage to a defendant. The reason why a plaintiff commenced proceedings in one court might be the same as the reason why the defendant seeks to have them transferred to another

court. In such a case, justice may not dictate a preference for the interests of either party.

17 As was pointed out in *John Pfeiffer Pty Ltd v Rogerson*[13], the ordinary basis of jurisdiction of common law courts in personal actions is the presence of the defendant within the court's territory, and the defendant's resulting amenability to the court's process. In most cases, the jurisdiction of an Australian court, in the sense of authority to decide, depends upon the location of the defendant, rather than that of the plaintiff. Suing a large corporation in the place where it has its headquarters would not ordinarily be regarded as "forum-shopping", although the location of the headquarters would not necessarily be decisive as to which was the most appropriate forum. *John Pfeiffer Pty Ltd v Rogerson* involved an action brought in the Supreme Court of the Australian Capital Territory, against a company which had its principal place of business in the Territory, for damages for personal injury arising out of a work-related accident in New South Wales. No one suggested that the Australian Capital Territory was an inappropriate forum. The decision of this Court established that the law governing the quantum of damages, which was treated as a matter of substance, was the lex loci delicti, the law of New South Wales.

18 There is nothing unusual, either in the State or the federal judicature, about actions between residents of different Australian law areas. Federal diversity jurisdiction is an obvious example. Actions in New South Wales courts are commonly brought by residents of other States, especially when the residence or principal place of business of the defendant is New South Wales. Reference is sometimes made to one forum or another being the "natural forum". Such a description is usually based upon a consideration of "connecting factors", described by Lord Goff in *Spiliada*[14] as including matters of convenience and expense, such as availability of witnesses, the places where the parties respectively reside or carry on business, and the law governing the relevant transaction. Lord Templeman described such factors as "legion", and said that it was difficult to find clear guidance as to how they are to be weighed in a particular case[15]. Thus, New South Wales might well be the "natural forum" for an action for damages brought by a passenger in a motor vehicle against the driver if they were both residents of New South Wales, even though the injury

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13 (2000) 203 CLR 503 at 517 [13], referring to *Gosper v Sawyer* (1985) 160 CLR 548 at 564-565.

14 [1987] AC 460 at 478.

15 [1987] AC 460 at 465.

resulted from a collision that occurred on the other side of the Queensland or Victorian border.

19 In many cases, there will be such a preponderance of connecting factors with one forum that it can readily be identified as the most appropriate, or natural, forum. In other cases, there might be significant connecting factors with each of two different forums. Some of the factors might cancel each other out. If the action is between two individuals, and the plaintiff resides in one law area and the defendant in another, there may be no reason to treat the residence of either party as determinative, although, as already noted, it will ordinarily be the residence of the defendant that is important to establish jurisdiction. Weighing considerations of cost, expense, and convenience, even when they conflict, is a familiar aspect of the kind of case management involved in many cross-vesting applications.

20 The case of *Spiliada*, decided as it was in a different context, provides an example of the difficulty that might attend an identification of a "natural" forum for litigation. It involved an action by shipowners against shippers for damages resulting from the condition of cargo when loaded, which caused corrosion to the vessel. The cargo was loaded in Canada, for transportation to India. The shipowners were Liberian. Their management was in Greece, although some part of the management took place in England. The shippers carried on business in Canada. Process was served in Canada. The contract of carriage was governed by English law, a factor which the House of Lords said might be of great importance in some cases and of little importance in others[16]. The contention that Canada was a more appropriate forum than England was rejected. A decisive consideration was said to be the experience of the English trial judge, the trial lawyers, and the experts, gained in dealing with earlier complex litigation arising out of the same events. That experience was regarded as crucial even though "the convenience of the parties and the witnesses probably tilted the scales towards British Columbia".[17] Lord Templeman regarded it as significant that the insurers of both the parties to the litigation were English[18]. That may be a practical reason why a high proportion of commercial litigation in London involves foreign parties. The conclusion of the House of Lords, that England was no less appropriate a forum than Canada, illustrates the wide range of factors that might govern appropriateness.

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16 [1987] AC 460 at 481.

17 [1987] AC 460 at 484-485.

18 [1987] AC 460 at 465.

21 There will often be overlapping, but there is no necessary coincidence, between factors which connect litigation to a forum, and factors which motivate one party to prefer, and another party to resist, litigating in that forum. In the context of the Cross-vesting Act, the treatment by the Court of Appeal of New South Wales, in *James Hardie & Coy Pty Ltd v Barry*[19], of the special procedural powers of the Tribunal is illuminating. The Court of Appeal pointed out that these were not merely forensic advantages to one party that represented a corresponding disadvantage to the other party, but were factors relevant to a decision under s 5 because they have the capacity to assist both plaintiffs and defendants in the efficient and economical resolution of disputes, and therefore serve the public interest. It will be necessary to return to this matter. Their Honours were not referring to s 11A of the Tribunal Act, but to the Tribunal's powers to use evidence and experience in past cases.

The reasoning of the primary judge

22 The reasoning of Sully J in the present case must be read together with his reasons in an earlier case of *BHP Co Ltd v Zunic*[20], which he imported by reference. Sully J acknowledged the difference between an application for a stay of proceedings on forum non conveniens grounds and a transfer application under s 5 of the Cross-vesting Act. In *Zunic*, he referred to *Bankinvest AG v Seabrook*[21] and *James Hardie & Coy Pty Ltd v Barry*[22] as the principal authorities for him to follow. He was correct to do so. In *Zunic*, he described the ultimate question as being: which is the more appropriate forum, upon a fair balancing of all the factors defining the relevant "interests of justice".[23] No one suggests that was erroneous. In both *Zunic* and the present case, he listed a series of factors relevant to the interests of justice, and explained how he took them into account. Most of those factors are uncontroversial.

23 There were differences between *Zunic* and the present case. In particular, the plaintiff in *Zunic* was an elderly man with a short life expectancy. The position of the first respondent is somewhat different. In the present case, Sully J

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19 (2000) 50 NSWLR 357.

20 (2001) 22 NSWCCR 92.

21 (1988) 14 NSWLR 711.

22 (2000) 50 NSWLR 357.

23 (2001) 22 NSWCCR 92 at 103.

placed particular stress on the Tribunal's powers under s 11A of the Tribunal Act. He referred to a medical prognosis of a possible future deterioration in the first respondent's condition. The prognosis was uncertain. He said that the first respondent's case was "very different" from that of Mr Zunic in that it did not require an expedited hearing. He said, however, that it was "important ... to keep open to Mr Schultz the very unusual advantages that are conferred by s 11A of the Tribunal Act." This observation was made against the background of a statement of principle, expressed in *Zunic*, and incorporated by reference in the present case, that a plaintiff's own choice of forum "ought not lightly to be overridden".

24 This, on the appellant's submission, is where the primary judge fell into error. Notwithstanding his general reference to a fair balancing of all the factors defining the relevant interests of justice, the exercise was weighted in favour of the plaintiff in two ways that worked in combination: first, the plaintiff's choice of forum was "not lightly to be overridden"; secondly, the "unusual advantages" conferred on a plaintiff by s 11A were to be kept open.

25 As to the first of those considerations, it is, as the appellant submits, redolent of the Australian forum non conveniens approach, which begins from the premise that a court whose jurisdiction has been regularly invoked needs to justify a refusal to exercise that jurisdiction. For the reasons explained earlier, and developed at some length in *Bankinvest*, that is not the starting point for a consideration of a transfer application under the Cross-vesting Act, where a court is simply applying a statute without any kind of presumption as to where the balance of the interests of justice might come down. The idea that a plaintiff's choice is not lightly to be overridden echoes the statement of Scott LJ in *St Pierre* that a right of access to a court must not be lightly refused. That idea is still influential in the Australian approach to forum non conveniens, but it is out of place in a decision about s 5 of the Cross-vesting Act.

26 The second, and closely related, consideration gives rise to a number of difficulties. Sully J accepted that the substantive law governing the action, whether it was dealt with in the Tribunal or in the Supreme Court of South Australia, would be the law of South Australia, not the law of New South Wales. The law of South Australia concerning the assessment of damages in actions for personal injury is partly common law and partly statute. The statute law includes s 30B of the *Supreme Court Act* 1935 (SA), which is set out in the reasons of Callinan J. That section empowers the Supreme Court to make interim awards of damages. Sully J was not referred to it. There was debate in this Court as to whether the two statutory provisions, s 11A of the Tribunal Act, and s 30B of the South Australian Supreme Court Act, are substantive or procedural. They are significantly different, although both modify the common law, and could have an important effect on the rights of a plaintiff or a defendant. The assumption by

Sully J that, if the action proceeded in the Tribunal, the assessment of damages would be governed by s 11A was challenged. It is unnecessary to resolve that question because, even if the assumption were correct, there is no warrant for concluding that the interests of justice dictate that the first respondent should be given, as against the appellant, the benefit of s 11A, or that s 11A of the Tribunal Act should be regarded as a more just dispensation than s 30B of the South Australian Supreme Court Act. They are different approaches to a similar problem by two legislatures within the Australian federation. No doubt the existence of s 11A enables the first respondent to rebut any charge that he is "forum-shopping". Let it be accepted that the first respondent has, or at least believes he has, a valid reason for preferring to commence proceedings in the Tribunal. His good faith is not in question. The question is where the interests of justice lie. If, in a particular respect, the first respondent's assumed advantage and the appellant's assumed disadvantage are commensurate, the one simply being the converse of the other, then that does not advance the matter. The scales are inappropriately weighted in favour of a plaintiff if a possibility of what might ultimately turn out to be a higher total award of damages is treated as a consideration of justice which argues against transfer and if, in addition, the plaintiff's choice of venue is treated as a matter not lightly to be overridden. Although Sully J was not given the opportunity to consider how s 30B might operate in this case, the problem would be compounded if a judge were to become involved in comparing the respective merits of New South Wales and South Australian legislation. From whose point of view would those merits be judged? How could a judge form a preference between the public policy reflected in an Act of the Parliament of New South Wales and the public policy reflected in an Act of the Parliament of South Australia? If it came to that point, the appropriate course would be for the judge to draw back, and to consider the interests of justice by reference to more neutral factors.

27 As we have already indicated, we do not suggest that the interests of justice properly to be taken into account will be unrelated to the interests of one party or another. We do not doubt that, in the case of *Zunic*, it was entirely appropriate for Sully J to take into account the plaintiff's short life expectancy, and the prospect of expedition in the Tribunal. There are cases in which justice may dictate that an interest of one party be given weight. Although in a different context, Lord Goff's discussion in *Spiliada*[24] of the "legitimate personal or juridical advantage" shows the kinds of consideration that might sometimes be relevant to a judgment as to the appropriateness of a forum. Yet, in the present case, the combination of the importance that was attached to the first respondent's choice of forum, and the treatment of s 11A as a factor relevant to the interests of justice, involved error in the application of s 5 of the Cross-vesting Act.

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24 [1987] AC 460 at 482-484.

28 There are two further matters that should be mentioned. For the reasons given by the Court of Appeal in *James Hardie & Coy Pty Ltd v Barry*, Sully J was right to attach importance to the procedural and evidentiary advantages offered to all parties in the Tribunal. In assessing the weight to be given to those advantages, however, his Honour may have overlooked the fact that all defendants undertook to give Mr Schultz the benefit of those provisions if the proceedings were transferred. Those undertakings are recorded in the evidence, but they were not mentioned in his Honour's reasons. Additionally, his Honour was entitled to have regard to the Tribunal's specialisation and expertise. If there were any doubt about the relevance of that to the appropriateness of the Tribunal as a forum, then it is only necessary to pay attention to the facts of *Spiliada*, the actual decision in that case, and the consideration that was regarded there as determinative.

Conclusion and Orders

29 The decision of the primary judge was affected by material error. That being so, it is unnecessary, and therefore inappropriate, to decide the constitutional issues argued in this Court. One of those issues related to the capacity of the Tribunal to sit in South Australia. We agree with what Gummow J has said on that subject.

30 The first respondent, by Notice of Contention, invited this Court to hold that, even if the decision of Sully J were affected by error, it should nevertheless be upheld because the Tribunal is, on any possible view, a more appropriate forum than the Supreme Court of South Australia. That ambitious submission should be rejected. Alternatively, the first respondent submitted that the matter should be remitted to the Supreme Court of New South Wales for further consideration. Unless the case was completely clear, or there were other compelling reasons to take a different course, that would be the usual outcome. On this alternative, the first respondent did not invite this Court, out of consideration for his age and illness, to decide the s 5 issue itself. In fact, in support of a submission that the matter should be remitted, the first respondent attempted to adduce further evidence to show that he is now a resident of New South Wales. That evidence was challenged, both as to form and substance, and its tender was rejected.

31 It is far from clear that the interests of justice require that the proceedings be transferred to South Australia. In that respect, regard may be had to the specialist nature of the Tribunal, and the procedural facilities peculiar to it. Regard should also be had, not merely to the issues that may arise between the first respondent and the appellant, but also to the issues between the first

respondent and the other respondents, and the cross-claims. Those questions received little attention in argument in this Court. The matter should be remitted.

32 We would allow the appeal on the terms as to costs pursuant to which special leave was granted and set aside the orders of the Supreme Court of New South Wales of 30 October 2002. The matter should be remitted to that Court for further consideration in accordance with the reasons of this Court.

33 GUMMOW J. By summons in the Supreme Court of New South Wales, BHP Billiton Limited ("BHP") sought an order pursuant to s 8 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) ("the Cross-vesting Act"). The order sought was that a proceeding pending in the Dust Diseases Tribunal of New South Wales ("the Tribunal") between Mr Schultz as plaintiff and BHP and others as defendants be removed into the Common Law Division of the Supreme Court. BHP further sought a consequential order under sub-par (iii) of s 5(2)(b) of the Cross-vesting Act; this was that the proceedings when removed into the Supreme Court thereupon be transferred to the Supreme Court of South Australia.

34 By order entered 30 October 2002, a judge of the Supreme Court (Sully J) dismissed the summons. On 22 October his Honour had delivered reasons in support of that order[25]. By special leave BHP appeals directly to this Court. The appeal joins Mr Schultz as first respondent. The second, third, fourth and fifth respondents were, with BHP, defendants in the proceeding in the Tribunal. They entered submitting appearances in the Supreme Court and have taken no active part in the appeal.

35 It was a condition of the grant of special leave by this Court that BHP pay Mr Schultz's costs of the appeal in any event and not seek to disturb costs orders made in the Supreme Court.

The Tribunal

36 The Tribunal is established as a court of record by s 4 of the *Dust Diseases Tribunal Act* 1989 (NSW) ("the DDT Act"). The Tribunal has, wherever sitting, "jurisdiction throughout New South Wales" (s 10(3)). In the exercise of their functions, members of the Tribunal have the same protection and immunity as a judge of the Supreme Court of New South Wales (s 8). Witnesses have the same protection and are subject to the same liabilities as witnesses before the Supreme Court (s 20(4)). The Tribunal has the contempt powers of the Supreme Court (s 26).

37 Sections 10(1) and 11 confer upon the Tribunal what is called "exclusive jurisdiction" to hear and determine proceedings under ss 11 and 11A. Section 11 deals with what might shortly be identified as claims for damages for those suffering from a dust-related condition which is attributable or partly attributable to a breach of duty, whether imposed under the common law or by statute. Reference is made hereafter to s 11A.

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25 *BHP Billiton Limited v Schultz* [2002] NSWSC 981.

38 In *Goliath Portland Cement Co Ltd v Bengtell*[26], Gleeson CJ said of the DDT Act:

> "The scheme of the legislation is to create a specialist tribunal to deal with a certain type of claim for damages, to constitute that tribunal a court of record, and to give it the exclusive jurisdiction to hear and determine claims of the specified kind. Such proceedings would otherwise be heard in the Supreme Court or the District Court. In that respect, the Tribunal's jurisdiction replaces that formerly exercised by those courts."

His Honour added[27]:

> "There is nothing in the [DDT] Act which expressly limits the Tribunal's jurisdiction to claims arising out of events that occurred, or causes of action that arose, in New South Wales. The jurisdiction of the Supreme Court is certainly not so limited, and it is not easy to understand why parliament would have intended such a limited transfer of jurisdiction, leaving the residue in this Court."

The facts

39 Mr Schultz was born in 1941 in Whyalla in South Australia and was living there at all relevant times. He is a long-term heavy smoker. By his statement of claim in the Tribunal, Mr Schultz pleads that between 1957 and 1964, and again between 1968 and 1977, he was employed by BHP at its premises at Whyalla and that, as a result of his exposure there to asbestos, he suffered asbestos-related personal injury. In addition to claiming damages for that injury, he makes a claim for prospective loss and damage under s 11A of the DDT Act.

40 Mr Schultz's action against BHP is for negligence, for breach of an implied term in his contract of employment, and for breach of statutory duty. The statutory duty is said to have been imposed upon BHP by South Australian legislation as it stood at the relevant times. Specifically, Mr Schultz relies on the provisions of the *Industrial Code* 1920 (SA), the *Industrial Code* 1967 (SA), the *Industrial Safety Health and Welfare Act* 1972 (SA) and on certain regulations made thereunder. No law was pleaded as the proper law of the contract[28]. However, in his consideration of the matter, Sully J directed his attention to the

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26 (1994) 33 NSWLR 414 at 417.

27 (1994) 33 NSWLR 414 at 417.

28 See *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 517-518 [68].

tort claim and to the law in force in South Australia as the *lex loci delicti* and that course was not criticised in this Court.

41 This is not a case in which any difficulty arises in locating the place of the tort, a prospect mentioned in *John Pfeiffer Pty Ltd v Rogerson*[29]. South Australia is the only candidate. Nor, as the above facts show, was it entirely fortuitous that the tort occurred in that State. In its submissions to the primary judge, BHP indicated that, subject to proof by Mr Schultz of his exposure and his diagnosis, liability will not be an issue and the trial will be limited to the assessment of damages.

42 It should be observed that, in *Goliath*, the New South Wales Court of Appeal was dealing with an appeal against the dismissal by the Tribunal of an application, one of the grounds of which had been that it should decline to exercise its jurisdiction because, within the sense of the term given by *Voth v Manildra Flour Mills Pty Ltd*[30], the Tribunal was "a clearly inappropriate forum"[31]. That is not the nature of the proceeding before the primary judge or of the present appeal, which turns principally on the construction and application of provisions of the Cross-vesting Act. The distinction between an application for a stay on the ground of *forum non conveniens* and a transfer application under the legislation is developed and explained in the reasons of Gleeson CJ, McHugh and Heydon JJ. It also will be necessary to make further reference to the distinction later in these reasons.

The Cross-vesting Act

43 This New South Wales statute, together with legislation passed in 1987 by the Commonwealth and each of the other States is misdescribed in the short title. This is because the legislation was designed to establish the two systems described in the preamble to the statutes. The first was a system of cross-vesting of jurisdiction between federal, State and Territory courts, without detracting from the existing jurisdiction of any court (pars (a) and (b) of the preamble). The second (par (c) of the preamble) was a system to apply where a proceeding is instituted in a court "that is not the appropriate court" and to require transfer "to the appropriate court". The present dispute concerns the operation of the second system.

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29 (2000) 203 CLR 503 at 538-539 [81].

30 (1990) 171 CLR 538.

31 See (1994) 33 NSWLR 414 at 416, 418-420, 431-439.

44 The Cross-vesting Act does not define the sense or senses in which it employs the term "jurisdiction"[32]. In particular, there is no distinction expressly drawn between the uses of "jurisdiction" to identify the amenability of the defendant to the court's process, and to identify the subject-matter of actions entertained by the court. As is illustrated by *Flaherty v Girgis*[33], the legislative derivation of the one may be quite distinct from that of the other.

45 However, from a perusal of the statute it appears that, when dealing with the first system (of cross-vesting jurisdiction), "jurisdiction" is used in the latter sense. This is indicated by the reservation respecting "special federal matters" (s 6), by the provision made in s 11 for the exercise of cross-vested jurisdiction, and by (A) and (B) of the transfer provision of sub-par (b)(ii) of s 5(2), which is set out later in these reasons[34]. The cross-vesting provisions assume service of the proceeding in question, whether, as in this case from the existence of a place of business conducted by BHP in New South Wales (which may be assumed), from the personal presence of a transient defendant, or from the operation of Pt 2 (ss 13-27) of the *Service and Execution of Process Act* 1992 (Cth) ("the Process Act"), or of State "long-arm" jurisdiction[35].

46 However, as noted earlier, this appeal concerns the second system, that dealing with transfer of proceedings. It should be emphasised that here the subject-matter of the proceeding which is transferred to the "appropriate court" may have been within the competence of the transferor court in which it was instituted without any supplementation of its jurisdiction by the cross-vesting system. The litigation of an "interstate tort" is within the jurisdiction derived by the Tribunal from the State Supreme Court. *Goliath* so decided.

47 In *Re Wakim; Ex parte McNally*[36], this Court held that s 9(2) of the federal cross-vesting statute[37] was invalid; this provision had authorised the Federal Court to exercise jurisdiction (whether original or appellate) conferred on it by State law relating to cross-vesting of jurisdiction. However, that portion of the legislative scheme which remains in operation includes the provisions for the transfer of pending proceedings between the Supreme Courts of the States. No

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32 *Lipohar v The Queen* (1999) 200 CLR 485 at 516-517 [78]-[79].

33 (1987) 162 CLR 574 at 598, 609.

34 See also the like provisions in s 5(1), s 5(3) and s 5(4).

35 Section 8(4) of the Process Act excludes the operation of such State laws in certain respects.

36 (1999) 198 CLR 511.

37 *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth).

question arises respecting the cross-vesting of subject-matter jurisdiction between State courts.

The transfer application

48 The present litigation was instituted in the Tribunal; hence the first step in the application to the primary judge, that based upon s 8 of the Cross-vesting Act. Where a proceeding is pending in a court of New South Wales other than the Supreme Court, or in a tribunal established by or under a law of New South Wales, and "it appears to the Supreme Court" that an order removing the proceeding into the Supreme Court should be made so that consideration can be given to its transfer to another court, the Supreme Court "may" make a removal order (s 8(1)); the Cross-vesting Act then applies as if the proceeding were pending in the Supreme Court (s 8(2)).

49 The next step in BHP's application to the Supreme Court was to seek an order under sub-par (iii) of s 5(2)(b). This required the Supreme Court to transfer the proceeding to the Supreme Court of South Australia if it appeared to the Supreme Court that it was in the interests of justice that this be done.

50 In his reasons, Sully J did not emphasise any distinction between the two steps involved in BHP's application to the Supreme Court. The order for removal appears to have been refused because no consequential order for transfer would be made and any removal thus would be futile.

The effect of a transfer order

51 Section 9(b) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (SA) ("the SA Cross-vesting Act") provides that the Supreme Court of that State may hear and determine a proceeding transferred to it under a provision of a law of a State "relating to cross-vesting of jurisdiction". The New South Wales statute answers that description.

52 Further, s 11 of the SA Cross-vesting Act may have an application to the proceeding when so transferred. Section 11 would apply if it appeared to the South Australian court that it would, or would be likely to, be "exercising *jurisdiction conferred*" by that statute or any other law "relating to cross-vesting of jurisdiction" (emphasis added). There is a question whether, in the circumstances of this case, where subject-matter jurisdiction already subsisted in the South Australian transferee court and BHP was amenable to its process by, at least, the use of the Process Act, the court, after the transfer, would have been exercising jurisdiction "conferred" by any cross-vesting law.

53 It is unnecessary to resolve this question of construction of the cross-vesting legislation. If s 11 of the SA Cross-vesting Act did apply, par (a) thereof would require the application of the law of South Australia as the *lex fori* but that

is also the *lex loci delicti*. Paragraph (b) is an exception to par (a) but only applies to cases, unlike the action here, which arise under the written law of another State or Territory. Paragraph (c) is another exception to par (a), and it states:

> "the rules of evidence and procedure to be applied in dealing with that matter shall be such as the court considers appropriate in the circumstances, being rules that are applied in a superior court in Australia or in an external Territory".

54 A question could arise as to whether s 11A of the DDT Act is a rule of evidence and procedure within the meaning of par (c), so that the South Australian court could consider it appropriate in the circumstances to apply it to the transferred action. The dichotomy drawn in *John Pfeiffer*[38] between substance and procedure does not necessarily control the interpretation of par (c). There is no occasion further to consider this question of the applicability of s 11A. As will appear later in these reasons, s 11A favours the interests of Mr Schultz. If not a rule of evidence and procedure, s 11A would not apply; if s 11A does answer that description, then its application would favour Mr Schultz and not provide a reason against the transfer sought by BHP.

The appeal to this Court

55 From the decision of the presiding judge refusing BHP's application for removal and then for transfer, no appeal lay to the New South Wales Court of Appeal. Section 13 of the Cross-vesting Act states that an appeal does not lie from a decision of a court in relation to the transfer or removal of a proceeding under that statute. However, that provision is ineffective to curtail the jurisdiction of this Court, conferred by s 73(ii) of the Constitution. This confers on the High Court jurisdiction, with such exceptions and subject to such regulations as the Parliament of the Commonwealth prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Court of any State. The grant by this Court of special leave satisfied the exceptions and regulations prescribed by s 35 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act").

56 In his written submissions, the Attorney-General for New South Wales, who intervened in this Court, sought to classify s 13 of the New South Wales statute as surrogate federal law by reason of it being picked up by s 79 of the Judiciary Act; s 13 was said thereby to acquire the quality of an exception or regulation prescribed by the Parliament of the Commonwealth within the meaning of s 73 of the Constitution. That submission necessarily presupposed

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38 (2000) 203 CLR 503 at 542-544 [97]-[100].

the exercise of federal jurisdiction at the stage of the litigation in the Supreme Court so as to attract the operation of s 79.

57 In the Supreme Court, no point was taken which had the consequence of rendering the proceeding a matter arising under the Constitution or involving its interpretation; constitutional questions first appeared in this Court and appropriate notices then were given under s 78B of the Judiciary Act. Nor was the proceeding in the Supreme Court a matter between residents of different States within the meaning of s 75(iv) of the Constitution, given the corporate character of the defendants[39]. Mr Schultz, the party with the interest in doing so, did not challenge the competency of the appeal to this Court. In these circumstances, it is unnecessary further to consider the submission for New South Wales respecting the operation of s 79 of the Judiciary Act as achieving for s 13 of the Cross-vesting Act the character of an exception or regulation within the meaning of s 73 of the Constitution.

58 It appeared to be accepted in the submissions of the parties that no distinct questions arose respecting the removal provision of s 8 of the Cross-vesting Act. The assumption was that if no case for transfer under s 5(2)(b)(iii) were made out, no removal order should be made, and if a case for transfer was established, then a removal order would be made.

Section 5(2) of the Cross-vesting Act

59 Accordingly, the primary issue to be considered concerns the construction of s 5(2) of the Cross-vesting Act. Sub-paragraph (iii) of s 5(2)(b) opens with the words "it is *otherwise* in the interests of justice" (emphasis added). This directs attention to sub-pars (i) and (ii) of s 5(2)(b).

60 Sub-paragraph (i) postulates the circumstance that the relationship between the relevant proceeding and another pending proceeding in the transferee court renders it more appropriate that both proceedings be determined by that second court. Sub-paragraph (ii) poses the issue whether it is "more appropriate" that the pending proceeding in New South Wales be determined by the other Supreme Court having regard to three matters stated as follows:

> "(A) whether, in the opinion of the first court, apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being

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39 *British American Tobacco Australia Ltd v Western Australia* (2003) 77 ALJR 1566 at 1574 [37]; 200 ALR 403 at 413.

instituted in the first court and capable of being instituted in the Supreme Court of another State or Territory;

(B) the extent to which, in the opinion of the first court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the State or Territory referred to in sub-subparagraph (A) and not within the jurisdiction of the first court apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction; and

(C) the interests of justice".

61 These criteria stipulated in par (b)(ii) of s 5(2) attach significance to the existence of jurisdiction cross-vested in the transferor court.

62 If "it appears" to the Supreme Court that, by reason of the criteria stipulated in sub-par (i) or (ii) of par (b), "it is more appropriate" that the relevant proceeding be determined in the other designated Supreme Court, then the Supreme Court "shall transfer the relevant proceeding". The requirement to order transfer thus is imperative once the identified criteria "appear" to the Supreme Court[40]. No question of discretion arises[41].

63 This appeal concerns in particular the application of sub-par (iii) of s 5(2)(b). Unlike sub-pars (i) and (ii), there is no requirement of a pending proceeding in the transferee court or the presence of cross-vested jurisdiction in the transferor court. Sub-paragraph (iii) is more broadly expressed. However, as with the other sub-paragraphs, the issue on an appeal to this Court is not accurately identified as whether the primary judge erred in the exercise of a discretion. If it "appears" to the Supreme Court to be "otherwise in the interests of justice" that there be a transfer, then the Supreme Court "shall transfer the relevant proceeding". Again, no question of discretion arises. The word "shall" imposes a duty which must be performed[42]. Rather, the issue for this Court is whether his Honour erred in the content he gave in this case to the phrase "otherwise in the interests of justice".

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40 cf *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 299-300 [33]; *Samad v District Court of New South Wales* (2002) 209 CLR 140 at 152 [32], 160-161 [66]-[67].

41 cf *Norbis v Norbis* (1986) 161 CLR 513 at 518, 533-534, 537; *Wong v The Queen* (2001) 207 CLR 584 at 613 [79].

42 *Interpretation Act* 1987 (NSW), s 9(2).

The reasons of the primary judge

64 In his reasons, Sully J followed a path which he described as consistent with that which he had taken in *Broken Hill Proprietary Company Ltd v Zunic*[43]. His Honour there had dealt with applications by BHP under the Cross-vesting Act of the same nature as those now before him. In *Zunic*, his Honour had identified nine considerations to be taken into account in striking "the final balance" which his Honour saw as required by the expression "the interests of justice" in sub-par (iii) of s 5(2)(b) of the Cross-vesting Act[44]. The first was the personal circumstances of the plaintiff in the Tribunal; the second, the regular invocation of the jurisdiction of the Tribunal by the plaintiff; the third, any delay by the party seeking removal and transfer; the fourth, the particular expertise and facility of the Tribunal in dealing with dust disease claims; the fifth, the *locus delicti* of the torts pleaded; the sixth, the comparative availability in the Tribunal and in the proposed transferee court of an appropriately expedited hearing; the seventh, comparative cost considerations; the eighth, comparative evidentiary considerations; and the ninth, "The matter of forum shopping"[45].

65 It will be observed that these considerations do not include the respective provisions made for appeals against decisions at trial by the Tribunal and by the proposed transferee court. Section 32(1) of the DDT Act limits the appeal as of right (to the Supreme Court[46]) to points of law and to questions as to the admission or rejection of evidence. Section 32(4) confers an appeal by leave in limited cases. The right of appeal to the Full Court conferred by s 50 of the *Supreme Court Act* 1935 (SA) ("the SASC Act") is more broadly expressed.

66 In *Zunic*, Sully J considered the actions of the applicants in making an application under the Cross-vesting Act to be a form of "forensic approbating and reprobating" which told against granting the application[47]. By contrast, in this case, Sully J held there had been nothing dilatory in the conduct of BHP in seeking orders under the Cross-vesting Act[48].

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43 (2001) 22 NSWCCR 92.

44 (2001) 22 NSWCCR 92 at 97.

45 (2001) 22 NSWCCR 92 at 98-103.

46 Appeals are assigned to the Court of Appeal (*Supreme Court Act* 1970 (NSW), s 48).

47 (2001) 22 NSWCCR 92 at 99.

48 [2002] NSWSC 981 at [23].

67 In *Zunic*, Sully J held that the identification of South Australia as the *locus delicti* had "obvious weight" but was not of itself determinative of where the interests of justice lay[49]. His Honour repeated this observation in this case and relied on his analysis from the earlier case[50].

68 Evidence of comparative cost considerations between a trial in the Tribunal and in the Supreme Court of South Australia did not indicate a relevant cost difference which was "so grossly disproportionate" as to give significant weight in favour of BHP's application[51]. The medical evidence that Mr Schultz's lung function already had a 30 per cent deficit and his uncertain prognosis made it important to ensure that any just claim of Mr Schultz be dealt with as simply, speedily and efficiently as the circumstances would permit. If Mr Schultz were to develop a catastrophic condition, something "at least on the cards in a real sense", then the Tribunal would be able to move with a degree of expedition that "could not fairly be expected" of the Supreme Court of South Australia[52].

"Regular invocation of jurisdiction"

69 It is convenient at this stage to consider further those considerations dealing with "regular invocation" by Mr Schultz of the jurisdiction of the Tribunal and the absence of forum shopping in any offensive form. The primary judge appears to have treated these matters as giving to Mr Schultz "legitimate interests" in the "unusual advantages" conferred on him as a plaintiff in the Tribunal, which it was for BHP to satisfy the primary judge should be displaced and a transfer order made[53]. However, that was not an approach to BHP's application which the Cross-vesting Act supported. That statute does not ask, as would be consistent with the general law principles pronounced in *Voth* and applied in *Goliath*, whether the Tribunal is "a clearly inappropriate forum". The stance taken by the statute is quite different.

70 The preamble to the Cross-vesting Act states in par (c) that it is desirable "if a proceeding is instituted in a court that is not the appropriate court, to provide a system under which the proceeding will be transferred to the appropriate court".

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49 (2001) 22 NSWCCR 92 at 100-101.

50 [2002] NSWSC 981 at [26].

51 [2002] NSWSC 981 at [31].

52 [2002] NSWSC 981 at [28].

53 [2002] NSWSC 981 at [33]-[34].

In the Second Reading Speech on the Bill for what became the Cross-vesting Act, the Attorney-General for New South Wales said[54]:

> "Under the scheme, if proceedings are commenced in an inappropriate court, or if related proceedings are begun in separate courts, the courts will have power to transfer proceedings to the most appropriate court, having regard to the nature of the dispute, the laws to be applied and the interests of justice."

The Attorney-General went on[55] to describe cl 5 as operating "to ensure that proceedings are always dealt with by the most appropriate court."

71 That legislative policy is implemented by s 5(7). This provides that an order for transfer may be made not only on application by a party to the proceeding, but by the court, either of its own motion or on the application of the Attorney-General of the Commonwealth or of a State. Section 5(7) indicates that it is inapt to speak of the applicant for an order for transfer as bearing a burden of persuasion analogous to an onus of proof[56]. However, it would be inaccurate to describe the decision upon a transfer application as administrative, by some analogy to the orders made with no *lis inter partes* in the administration of assets or of trusts by courts of equity[57].

72 Section 5 assumes the regular invocation of jurisdiction, both as to amenability of the defendant to process and as to subject-matter. Therefore, regular invocation of jurisdiction itself does not favour the disposition of a transfer application by refusing it on the basis that to allow it could not be in the interests of justice. Section 5 does not manifest a legislative policy in favour of any species of "forum shopping", or of what in the United States has been called a "venue privilege" of plaintiffs, which it is for defendants to displace on a transfer application[58]; the emphasis on the selection of the appropriate court indicates the contrary. The Second Reading Speech and par (c) of the preamble

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54 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 29 April 1987 at 10750.

55 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 29 April 1987 at 10751.

56 *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 727.

57 See *R v Davison* (1954) 90 CLR 353 at 368; cf *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 715, 717.

58 cf Wright and Kane, *Law of Federal Courts*, 6th ed (2002) at 286; *Jumara v State Farm Insurance Company* 55 F 3d 873 at 879 (1995).

indicate that the State Parliament in enacting the Cross-vesting Act, in particular the provisions of s 5, was concerned to provide a means of ensuring that, by use of the transfer mechanism, proceedings be dealt with by the appropriate court.

73 However, in remarks in *Zunic*[59] which the primary judge adopted in the present case, his Honour took a different, and erroneous, view of the scope of s 5(2). He referred to the phenomenon of claims in respect of South Australian torts being brought by South Australian residents in the Tribunal and to the establishment by the Tribunal in South Australia of a "South Australian circuit". Sully J continued:

> "It cannot be supposed that the Parliament of New South Wales is not well aware of the state of affairs to which attention is thus drawn. Nor can it be supposed that the Parliament of New South Wales either could not, or would not, intervene by appropriate legislation in order to correct that state of affairs if Parliament were of the opinion that there was good reason, as a matter of public policy, to do so. And yet Parliament has not intervened. It seems to me that such considerations at least take some of the pejorative sting out of the term 'forum shopping'."

74 In construing s 5(2) and in particular par (b)(iii), the Attorney-General of the Commonwealth, who intervened, emphasised the interrelation between such provisions and the Process Act. Under Pt 2, Div 1 (ss 13-21) thereof, civil process issued in one State may be served in another without a requirement to establish a link between the State of issue and the subject-matter of the proceedings or the defendant (s 15(1))[60]. In a proceeding in which the court of issue is a court of a State below the Supreme Court, s 20 of the Process Act provides for orders staying the proceeding.

75 Section 20(3) states:

> "The court may order that the proceeding be stayed if it is satisfied that a court of another State that has jurisdiction to determine all the matters in issue between the parties is the appropriate court to determine those matters."

The matters to be taken into account are then specified but expressly exclude the fact that the proceeding is commenced at the place of issue (s 20(4)). Where the court of issue is the Supreme Court, this procedure under s 20 is not available;

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59 (2001) 22 NSWCCR 92 at 102-103.

60 The term "State" is so defined as including the Northern Territory and the Australian Capital Territory (ss 5(1), 7(2)).

reliance is to be placed upon s 5 in the various cross-vesting statutes of the States. Section 20(10) of the Process Act so stipulates.

76 It is with this in mind that the significance of the following statement by Professor Nygh appears. Writing in 1995 on sub-par (iii) of s 5(2)(b), he said[61]:

> "The third category, perhaps the most important, is based on a residual clause that can be invoked by a defendant even though there are no related proceedings and no question of cross-vested jurisdiction.[62] Although prima facie the court is given a wide discretion as indicated by the words 'otherwise in the interests of justice',[63] some judges have taken the view that a transfer should be ordered only when the forum chosen by the plaintiff is 'clearly inappropriate'.[64] Others have taken the view that the formula allows the court to choose the more appropriate forum without any specific emphasis in favour of the plaintiff's choice.[65] Because s 20(4) of the [Process Act] clearly prohibits any bias in favour of the plaintiff's choice, it would be unfortunate if the method of challenging jurisdiction indicated by s 20(3) of that Act were to employ a different test to that used in the cross-vesting legislation.[66]"

77 The phrase "otherwise in the interests of justice" in sub-par (iii) of s 5(2)(b) of the Cross-vesting Act requires the Supreme Court to determine a transfer application by identifying the more appropriate forum without any specific emphasis in favour of the choice of forum made by the plaintiff. That being so, error is disclosed in the treatment by the Supreme Court of BHP's application. The consequence is that the appeal to this Court should be allowed, unless this Court supports the primary judge's order on further or alternative grounds to those relied upon by his Honour. No such support appears.

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61 "Choice of Law Rules and Forum Shopping in Australia", (1995) 6 *Public Law Review* 237 at 243-244.

62 *Waterhouse v Australian Broadcasting Corporation* (1989) 86 ACTR 1.

63 [Cross-vesting Act], s 5.

64 *Baffsky v John Fairfax & Sons Ltd* (1990) 97 ACTR 1; *Mullins Investments Pty Ltd v Elliott Exploration Co Pty Ltd* [1990] WAR 531.

65 *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 730 per Rogers AJA, followed in *Amor v Macpak Pty Ltd* (1989) 95 FLR 10; *Sunbanc Australia v Multivest Corporation Ltd* (1989) 97 FLR 269; *Chase Corporation (Aust) Ltd v City of Melbourne* (1989) 97 FLR 258.

66 *McEntee v Connor* (1994) 4 Tas R 18; *Dawson v Baker* (1994) 120 ACTR 11.

Section 11A of the DDT Act

78 Upon that inquiry as to the existence of further grounds supporting the order made in the Supreme Court, two matters emphasised by the primary judge assume particular importance. The first matter concerns what his Honour identified as the "very unusual advantages" conferred on Mr Schultz by s 11A of the DDT Act[67]. This section was added to the statute in 1995[68] and states:

> "(1) This section applies to proceedings of the kind referred to in section 11(1) that are brought after the commencement of this section and in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the person who is suffering from the dust-related condition in respect of which the proceedings are brought (***the injured person***) will, as a result or partly as a result of the breach of duty giving rise to the cause of action, develop another dust-related condition.
>
> (2) The Tribunal may, in accordance with the rules:
>
> (a) award damages assessed on the assumption that the injured person will not develop another dust-related condition, and
>
> (b) award further damages at a future date if the injured person does develop another dust-related condition."

It is apparent from its terms that s 11A is addressed not to New South Wales courts generally, but to the Tribunal specifically. However, in this Court, reference was made also to special provision made by South Australian statute and addressed to the Supreme Court of that State. Section 30B of the SASC Act confers upon that court a power to make interim assessments of damages, by determining the question of liability and adjourning the final assessment thereof.

79 The provisions made in s 11A and s 30B are considered by Callinan J in his reasons and I agree with the analysis there given. This indicates that s 30B may operate more favourably to the interests of BHP and less favourably to those of Mr Schultz than would s 11A were it to be part of the *lex causae*.

80 It will be necessary to return to the question of the content of the *lex causae*. However, it should be indicated here that the emphasis placed by the primary judge upon s 11A as militating against the making of a transfer order

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67 [2002] NSWSC 981 at [33].

68 By the *Courts Legislation Amendment Act* 1995 (NSW), Sched 4(2).

was erroneous. To fix upon the advantages it conferred upon Mr Schultz, without any consideration of the operation of s 30B upon the interests of both parties, was to give further effect to the false notion of Mr Schultz's "venue privilege", to which reference has been made above.

The experience and facility of the Tribunal

81 The second matter emphasised by the primary judge appeared in the course of considering the Tribunal's "particular experience and facility in dealing with dust disease claims"[69]. Sully J reiterated his adoption in *Zunic*[70] of the following passage from the decision of the Tribunal in *Hearn v Commonwealth*[71]:

> "Subject to the readiness of the parties to litigation, the Tribunal will sit at any time and in any place in Australia to hear the cases of plaintiffs which are properly before it and who are unable to travel to Sydney. For this reason the Tribunal now regularly sits in Brisbane and regularly sits in Adelaide. It may be of interest to remark that sittings in Adelaide allocated for the future are slightly more than one week in each month."

82 Sully J relied upon these considerations as indicative of the particular experience and facility of the Tribunal in dealing with dust disease claims and, it appears, as responding to the contention of BHP that the appropriate forum was South Australia and this favoured transfer to the Supreme Court of South Australia.

83 BHP submits that the primary judge erred in giving any weight to a consideration that, in the present case, the Tribunal might hear the proceedings or any part thereof outside New South Wales and in South Australia. Before turning to evaluate that submission and the grounds urged in its support, there should be emphasised what the submission leaves untouched.

84 First, the *Evidence on Commission Act* 1995 (NSW) ("the Commission Act") contains in Pt 3 (ss 17-30) detailed provision for State courts, including the Tribunal, to order the taking of evidence elsewhere in Australia before, among others, a judge of the State court in question. Section 29 provides that Pt 3 does not exclude the operation of any other State law providing for the examination of witnesses outside the State. In respect of steps taken in South Australia in pursuance of an order under Pt 3 of the Commission Act, s 67AB of the *Evidence Act* 1929 (SA) ("the SA Evidence Act") would facilitate the taking of evidence.

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69 [2002] NSWSC 981 at [24].

70 (2001) 22 NSWCCR 92 at 99-100.

71 (2000) 21 NSWCCR 203 at 207-208.

A court established under the law of a place outside South Australia is a "foreign authority" (s 67AB(3)). Such a foreign authority may "take evidence" and for that purpose "administer an oath or affirmation to any witness" (s 67AB(1)). BHP expressly eschewed any attack upon the validity of these legislative arrangements were they to be utilised by the Tribunal.

85 Secondly, legislation of both States, the *Evidence (Audio and Visual Links) Act* 1998 (NSW) and Pt 6C (ss 59IA-59IP) of the SA Evidence Act, contains reciprocal provisions the effect of which would be to permit the Tribunal on the one hand, and the Supreme Court of South Australia on the other, to receive evidence by video link from the other State. In particular, Pt 6C contains detailed provisions for enforcement by the Supreme Court of South Australia of orders made by the recognised out-of-State court (s 59IL) and for the privileges, protection and immunity of participants in video-link proceedings (s 59IM). No criticism was directed to the use by the Tribunal or the Supreme Court of this legislation were they later minded to do so.

86 However, both statutes dealing with audio and visual links also expressly preserve (by s 59IC of the South Australian statute and s 5(1) of the New South Wales statute) the operation of other law providing for the taking of evidence outside the State.

87 Such a law, on its face, is found in s 13 of the DDT Act. The President of the Tribunal fixes the times and places for the holding of proceedings before the Tribunal (s 13(2)). The Tribunal "may adjourn its proceedings to any time or place" (s 13(3)). Then, s 13(7) states:

> "If the President is of the opinion that the balance of cost and convenience in the proceedings so requires, the President may direct that the hearing of the proceedings, or any part of the proceedings, take place outside New South Wales."

88 There appears to be no dispute that it was upon s 13 that reliance was placed for the statement in *Hearn*[72] which was adopted by Sully J as indicative of the particular facility of the Tribunal. However, BHP submits that his Honour erred in regarding s 13 as supporting the hearing by the Tribunal in South Australia of all or any part of the present proceeding, were the President later minded so to direct. The submission was that s 13 was invalid to the extent that it authorised the exercise outside New South Wales of the judicial power of that State by the conduct there by the Tribunal of its proceedings.

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72 (2000) 21 NSWCCR 203 at 207-208.

BHP's constitutional submissions

89 On its face, the provisions in s 13 answer the criterion for a sufficient territorial connection with New South Wales that it be at least "remote and general"[73]. Section 13 concerns the manner of exercise of the jurisdiction of a court established to assume part of the subject-matter jurisdiction of the State Supreme Court. The territorial connection is direct and specific[74].

90 The submission for BHP cannot properly found upon what may have been constraints placed by what might be called Imperial constitutional law upon the exercise by the self-governing colonies of governmental functions beyond their territorial limits. The Australian self-governing colonies became States in 1901 and any competence of the United Kingdom legislature, executive and judiciary in respect of the States ended in 1986[75]. The result is that BHP must found on a proposition that, for reasons drawn from the text and structure of the Constitution, any legislative power of New South Wales which would support s 13 in its full operation has been "withdrawn from the Parliament of the State" as provided in s 107 of the Constitution.

91 The courts of the States are an essential branch of the governments of the States[76]. In *Melbourne Corporation v The Commonwealth*, Starke J said[77]:

> "So we may start from the proposition that neither federal nor State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or 'obviously interfere with one another's operations'[78]."

It is far from clear whether, even if such a doctrine does apply between the States, a determination of the President of the Tribunal under s 13(7) of the DDT Act that all or part of the hearing of the present proceeding take place in South Australia would curtail, in any substantial manner, the exercise of their powers by the courts of that State. Further, it would be necessary in the situation just

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

74 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 23 [10], 38 [61].

75 *Sue v Hill* (1999) 199 CLR 462.

76 *Austin v Commonwealth* (2003) 215 CLR 185.

77 (1947) 74 CLR 31 at 74. See also *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 288-289.

78 See *Graves v New York; Ex rel O'Keefe* 306 US 466 (1939).

postulated to consider the impact upon the exercise of the governmental authority of South Australia of the obligation imposed by s 118 of the Constitution to give full faith and credit both to the laws and to the judicial proceedings of the other States, including a proceeding under s 13(7) of the DDT Act.

92 It also should be noted that no question could arise in the present case respecting the constitutional criterion for the judicial resolution of inconsistency or contrariety between the laws of the several States respecting the same subject-matter[79]. If anything, the law of South Australia, to which reference has been made, would permit the taking of evidence by the Tribunal and the administration of oaths and affirmation by witnesses before the Tribunal.

93 The submissions by BHP were variously expressed in argument. In the end, they must be that, as a consequence of the federal structure which the Constitution establishes, there is withdrawn any competency in one State to legislate for the exercise by its courts, beyond the geographical territory of the State, of their adjudicative functions in the exercise of non-federal jurisdiction. That would be a large proposition. It would not be made good merely on the ground that the exercise of judicial power can be fully effective only with the availability of coercive powers conferred by the law of the State of origin and exercisable there. The proven utility of the declaratory remedy suggests otherwise.

94 It is inappropriate here further to consider these constitutional questions. The appeal may be decided in favour of BHP, even assuming the questions were to be answered adversely to BHP and in favour of a construction of s 13(7) of the DDT Act which gave to the Tribunal the possibility of adjudication in South Australia of the present dispute. Authority indicates that in such a situation the Court should eschew determination of the constitutional questions[80].

95 The same is true of a further constitutional submission by BHP. This takes as a first step the undisputed proposition that under the common law choice of law rules in Australia the forum would apply the law of South Australia, the law of the place of the wrong, as the *lex causae* in respect of matters of substance[81]. Then it is said to be beyond the competence of the legislature of the forum State, here New South Wales, to require its courts to determine the action by its own substantive law which differs from that of the *lex loci delicti*, here that

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79 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 34 [48], 52-53 [110], 61 [131].

80 See *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [248]-[252].

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

of South Australia. The last step is to submit that s 11A of the DDT Act, in providing for awards of "provisional damages", deals with a matter of substance (the common law rules respecting merger in judgment and assessment of damages "once and for all") and does so in a way at variance with s 30B of the SASC Act.

96 There is a dispute between the present parties as to the characterisation of s 11A as substantive or procedural by application of what was said respecting that distinction in the joint judgment in *John Pfeiffer Pty Ltd v Rogerson*[82]. It was recognised in *Pfeiffer*[83] that the principles there explained may require further elucidation in subsequent decisions. *Pfeiffer* also left for later consideration any submission which restricted the legislative competence of the States to vary or displace the common law choice of law rules applicable to intra-Australian tort actions[84].

97 All of the above further constitutional issues may be assumed to have an unfavourable outcome to BHP and, as indicated above, the appeal then falls for decision nevertheless in BHP's favour. I turn to deal with the disposition of the appeal.

Conclusions

98 The decision of the primary judge was in error and a consideration of what the expression "otherwise in the interests of justice" involves in this case indicates not that the removal and transfer application by BHP should have been refused, but that it should have succeeded. This is an appropriate case for this Court, rather than to return the application to the Supreme Court for further consideration, to "give such judgment as ought to have been given in the first instance"[85].

99 This is not a case where there is any difficulty in locating the *lex loci delicti* of the tort action by Mr Schultz. It is South Australia and the courts of that State provide the forum which "gives effect to the reasonable expectation of parties"[86] and to the policy manifested in the transfer provisions of the Cross-vesting Act. That has the advantage for the ready resolution of the litigation that

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82 (2000) 203 CLR 503 at 542-544 [97]-[99].

83 (2000) 203 CLR 503 at 544 [100].

84 (2000) 203 CLR 503 at 535 [70].

85 Judiciary Act, s 37.

86 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 540 [87].

the *lex fori* and the *lex loci delicti* coincide, and debates as to classification of statutory provisions as substantive or procedural in nature cannot arise. The views expressed by the primary judge respecting the comparative speed and efficiency of the Tribunal and the Supreme Court of South Australia favoured the former, but did not proceed from the formation of any firm conclusion on the evidence. Nor did the views expressed as to comparative expense. It is true that the Tribunal is a specialised institution, but, notoriously, educated views differ as to the quality of results obtained in courts of general and of specialised jurisdiction. To a significant degree, the witnesses at the trial for the assessment of damages would come from South Australia. To the extent that witnesses reside elsewhere, then the facilities for audio and visual links specified in Pt 6C of the SA Evidence Act may be available. The appellate procedures in South Australia have a more generous scope to appellants than those in New South Wales, a circumstance which at this stage favours both parties.

100 The primary judge attached much significance to s 11A of the DDT Act. That provision would operate to the favour of one side in the litigation, and is specially designed to do so. The "interests of justice" are even-handed. In such a situation, remarks by Gibbs CJ, Wilson and Brennan JJ in *Pozniak v Smith*[87] are in point. Their Honours said[88]:

> "The only safe course, in a case where the relevant law in the competing jurisdictions is materially different in its effect on the rights of the parties, is to remit to the State whose law has given rise to the cause of action. As Brennan J observed in *Robinson v Shirley*, the power 'is intended to facilitate the course of litigation rather than to enhance or diminish a plaintiff's rights or correspondingly alter a defendant's obligations'[89]."

To that may be added remarks of Mason J which are particularly apposite to the legislative policy manifested in the transfer provisions of the cross-vesting legislation. Mason J said[90]:

> "I would resist the notion that in determining which court shall hear the case when there is a material difference in the laws of the States we should give effect to the so-called right of the plaintiff to select the place of hearing, subject only to the balance of convenience. It is inconsistent with

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87 (1982) 151 CLR 38.

88 (1982) 151 CLR 38 at 47. The Court was construing the remitter provision in s 44 of the Judiciary Act as it then stood.

89 (1982) 149 CLR 132 at 136.

90 (1982) 151 CLR 38 at 51.

> a just result that the plaintiff should be able to select the forum which applies the law most favourable to his cause, so long as he is not 'forum shopping'."

Orders

101 The appeal should be allowed. However, pursuant to the condition upon which special leave was granted, the appellant should bear the costs of the first respondent and the order for costs in the Court below should not be disturbed. Order 1 of the orders of the Supreme Court of New South Wales entered on 30 October 2002 should be set aside, and in place thereof it should be ordered that (a) proceeding No 308 of 2002 in the Tribunal be removed into the Supreme Court and (b) the proceeding so removed thereupon be transferred to the Supreme Court of South Australia.

102 KIRBY J. The Dust Diseases Tribunal ("The Tribunal") is a specialist body created by the Parliament of New South Wales under the *Dust Diseases Tribunal Act* 1989 (NSW) ("the DDT Act"). Its President and judges, all formerly judicial members of the Compensation Court of New South Wales, are now judges of the District Court of that State.

103 This appeal concerns the jurisdiction and powers of the Tribunal to determine claims under the DDT Act arising in, and having the most real and substantial connection with, a State of the Commonwealth other than New South Wales, the State in which the Tribunal was created. The issues in this appeal are whether, under the federal Constitution, the Tribunal *could* exercise jurisdiction and powers in such a case, and whether it *should* do so, having regard to the applicable legislation and common law principles. In my view, it *should* not, and this Court must provide relief accordingly.

Special features of dust-diseases litigation

104 Since its establishment, the Tribunal has earned a reputation for the efficiency and skill with which it discharges its functions. By their nature, those functions commonly involve profoundly sick litigants, suffering from "dust-related conditions" of various kinds, as defined by the DDT Act[91]. Some of these litigants are close to death. Without radical adaptation of the ordinary procedures of litigation to the needs of this class of case, justice between the parties would sometimes be denied. In the nature of things, the Tribunal cannot list matters for hearing in the usual orderly way. It must be ready to respond to emergencies. This has cast extra burdens on its judges, on lawyers appearing before it and on the parties. Bedside hearings have been common. The work is more than usually distressing. Necessarily, the judges have acquired expert knowledge about the aetiology, course and treatment of dust diseases. They have been obliged, more than most, to deliver their decisions in a timely fashion.

105 These features of the Tribunal have become known throughout Australia and beyond. Some of them are recorded in annual reports of the Tribunal[92]. Others appear in reported decisions[93]. Some have been reported in the public

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91 The DDT Act, s 3. See reasons of Callinan J at [229].

92 New South Wales, Dust Diseases Tribunal, *Annual Review*, (2004).

93 The decisions of the Tribunal were originally reported in the *New South Wales Compensation Court Reports*. Since 2004, following the change in New South Wales legislation governing workers' compensation, the reports appear in the *Dust Diseases and Compensation Reports*. By the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) a new Workers Compensation Commission of New South Wales was established. By that Act (ss 105, 366),

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media. Most are notorious within the legal profession. As with any judicial body today, there are critics. But the extra burdens of the Tribunal have earned it widespread respect.

106 The judge constituting the Supreme Court of New South Wales who decided the instant case (Sully J) would have known the foregoing. It has also become known to Australian litigants, sick with various dust diseases and to the legal practitioners advising them. It is of the nature of many such diseases that they do not manifest themselves quickly but have a long lead time. This too is well known. The general courts are regularly obliged to consider cases involving dust diseases as relevant to issues before them. This Court had to do so in *Crimmins v Stevedoring Industry Finance Committee*[94]. Mr Crimmins died whilst awaiting the final determination by the courts of his legal entitlements. This is a common feature of the law as it affects litigants who make claims in respect of dust diseases. The facility of a specialist tribunal has sometimes also been useful and convenient to defendants. Inevitably, the facilities and procedures of the Tribunal have attracted litigants, including some from outside New South Wales.

Recent authority on choice of jurisdiction

107 *Three recent decisions*: Recent decisions of this Court have upheld the entitlement of litigants in one Australian jurisdiction to invoke the jurisdiction of other State and Territory courts to sue for damages for personal injury suffered in another Australian jurisdiction[95]. A choice of law rule has been established to govern the exercise of such jurisdiction. Within the Commonwealth a national facility for court proceedings was acknowledged as appropriate to Australia's integrated court system[96]; constitutional presuppositions[97]; and available statutory facilities[98]. This approach represented a change from earlier understandings[99].

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exclusive jurisdiction was given to the Commission, from the appointed day, to hear and determine matters arising under that Act and residual cases under the *Workers Compensation Act* 1987 (NSW).

94 (1999) 200 CLR 1 at 44-45 [111], 65 [183].

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

96 See *Pfeiffer* (2000) 203 CLR 503 at 554-555 [135]. The existence of national or federal jurisdiction is also relevant: see at 529 [50], 532-533 [59]-[63].

97 *Pfeiffer* (2000) 203 CLR 503 at 556-557 [138]-[139].

98 For example, the enactment of the *Service and Execution of Process Act* 1992 (Cth), rendering parties within Australia amenable to the jurisdiction and orders of

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108 Somewhat more surprisingly, in *Régie Nationale des Usines Renault SA v Zhang*[100], this Court (over the dissents of Callinan J and myself) upheld the invocation by a resident injured overseas of the jurisdiction of a State court within Australia. The plaintiff sued defendants not present in Australia in respect of wrongs alleged to have occurred outside this country. Only the initiation of the litigation and the plaintiff's residence and damage connected the case to the Australian jurisdiction that was invoked.

109 This appeal concerns another instance of proceedings being brought outside what might be regarded as the "natural" forum for its resolution. In the present case, that forum was the proper court in South Australia, where the alleged wrong occurred, where the plaintiff lived and had lived for most of his life, where the defendant carried on business and where most of the witnesses resided and local laws had relevant provisions, some of them different from those in force elsewhere in Australia. Yet the plaintiff invoked the jurisdiction of the Tribunal in New South Wales. He wanted to secure the advantages of its procedures, expertise and powers.

110 If Mr Rogerson could bring his claim against John Pfeiffer Pty Ltd in respect of a personal injury suffered in New South Wales by proceedings commenced in the Supreme Court of the Australian Capital Territory[101], why, it might be asked, may the present plaintiff in South Australia not elect to bring his case in the Tribunal in New South Wales? If Mr Zhang, injured overseas, could bring his case against the Renault company in the Supreme Court of New South Wales (where, unlike the present defendants, that company had no presence whatever)[102], why should the present plaintiff not enjoy an entitlement to bring his claim in the only specialist judicial body so far established in Australia for cases of his kind? If the challenge by Mobil Oil Australia Pty Ltd to the

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the courts of other States and Territories. See *Pfeiffer* (2000) 203 CLR 503 and the reasons of Gummow J at [44].

99 cf *Pedersen v Young* (1964) 110 CLR 162 at 170 per Windeyer J. See *Pfeiffer* (2000) 203 CLR 503 at 549-550 [119].

100 (2002) 210 CLR 491. The decision of the Court in *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 has been portrayed as an instance of "the long-armed … approach, asserting jurisdiction over out-of-State [defendants]"; see "A 'Category-Specific' Legislative Approach to the Internet Personal Jurisdiction Problem in US Law", (2004) 117 *Harvard Law Review* 1617 at 1628-1629.

101 *Pfeiffer* (2000) 203 CLR 503.

102 *Zhang* (2002) 210 CLR 491.

allegedly unconstitutional over-reach of a Victorian statute that permitted proceedings to be brought in Victorian courts affecting strangers in other parts of Australia (who were not even aware of the proceedings) failed[103], how could it be said that the DDT Act offended territorial assumptions of the Australian Constitution so as to make the Tribunal's exercise of jurisdiction over a "South Australian case" invalid?

111 These are some of the questions raised by the present appeal. In *Pfeiffer*, I foreshadowed the possibility that they would arise in a future case[104]:

> "If … a claim depends wholly on statute and is enforceable only in a specified tribunal and in a specified way (for example, one concerning entitlements to workers' compensation benefits or dust diseases entitlements), an attempt to enforce such an entitlement in a court of another law area may fail as misconceived[105]. A court of the same or of another law area might have no jurisdiction to entertain such a claim."

112 *Application to this case*: This appeal concerns a case involving the opposite side of the coin identified in the quoted passage. Here, substantially, the alleged cause of action exists in both relevant law areas. However, each provides a different judicial body to decide it. Each such body (respectively the Tribunal and the Supreme Court of South Australia) would, in resolving the plaintiff's claim, be bound to apply statutory provisions that are different in significant ways, presenting the possibility of differing outcomes to the proceedings in at least some circumstances, depending on the court chosen.

113 What is the way through this forest of legal principles? The only sure way is by legal analysis addressed to the applicable legislation, read in the light of the provisions expressed in, or implied by, the Constitution. Constitutional norms cannot be ignored. They lie in the background of many contested legal questions. The primary task in this appeal is to decide whether Sully J, exercising the jurisdiction and powers of the Supreme Court of New South Wales under the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) ("the NSW Cross-vesting Act"), erred. If he did, and the error is capable of correction in this Court, possible constitutional questions (at least of invalidity) will not arise. Determination of the case in this way would conform to the settled approach of

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103 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1.

104 *Pfeiffer* (2000) 203 CLR 503 at 548-549 [116].

105 cf *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554 at 567-573.

this Court[106]. If he did not, his Honour's orders must stand, even if we might not have made the same orders as his Honour did, exercising his powers on the same materials and pronouncing the judgment those powers called forth.

The facts, legislation and decisional history

114 *The facts*: Mr Trevor Schultz (the first respondent) alleges that he developed asbestosis and asbestos-related pleural disease as a consequence of being negligently exposed to asbestos in the course of his employment with the Broken Hill Proprietary Company Ltd (now BHP Billiton Ltd) (the appellant). The exposure occurred at Whyalla in South Australia. It is alleged that the asbestos dust and fibres to which the first respondent was exposed derived from products manufactured and supplied by various other companies who are parties to these proceedings although not participating in this appeal.

115 At all material times, the first respondent lived in South Australia. He worked there for the appellant. He suffered there the consequences of any tort of negligence or any breach of contract or breach of statutory duties applicable to the case. He was treated there by medical practitioners.

116 At the adjourned hearing in this Court, the first respondent attempted to establish that he had recently moved to New South Wales to take up residence in Broken Hill. Conformably with this Court's authority concerning the nature of its appellate jurisdiction, proof of this new fact is legally inadmissible[107]. The case must be determined on the basis of the record in the Supreme Court. In any event, the belated change in the first respondent's residence is legally insignificant.

117 There is no question that, as between the first respondent, the appellant and the other respondents whom he has sued in the Tribunal, that body has jurisdiction in the sense of the power over such parties. The companies concerned were present in New South Wales. The appellant was regularly served with process there. Nevertheless, the majority of the "connecting factors" still link the case to South Australia. That conclusion would not be altered by any late change of residence on the part of the first respondent.

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106 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ; *R v Hughes* (2000) 202 CLR 535 at 565-566 [65]-[66]; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 662 [81].

107 *Mickelberg v The Queen* (1989) 167 CLR 259 at 265-271, 274-275, 298-299; *Eastman v The Queen* (2000) 203 CLR 1 at 12-13 [17]-[18], 24-25 [70], 51 [158], 54 [165], 63 [190], 96-97 [290]; cf at 93 [277], 117 [356].

118 Other facts describing the background to the proceedings appear in the reasons of other members of this Court[108]. I will not repeat those facts. Indeed, there was no real dispute about them. It was agreed that, subject to proof that the first respondent had been exposed to asbestos products and satisfactory proof of the diagnosis of his pathology, the liability of the appellant would not be contested. The case would be limited to the assessment of the damages to which the first respondent was entitled.

119 *The relevant legislation*: Set out in other reasons are the provisions of the NSW Cross-vesting Act that founded the jurisdiction which Sully J was called upon to exercise in the Supreme Court of New South Wales[109] together with the counterpart cross-vesting Act of South Australia[110] that permits the Supreme Court of that State to hear and determine a proceeding transferred to it from the Supreme Court of New South Wales[111].

120 Likewise, the relevant provisions of the *Service and Execution of Process Act* 1992 (Cth) ("SEPA") are described there[112]. It is pursuant to that last enactment that, within Australia (where it is necessary), parties may be served with court process and thereby rendered amenable to the orders of courts exercising their own jurisdiction in respect of States other than those in which those parties are ordinarily resident. Because of the residence of the appellant and other defendant respondents in New South Wales, no controversy arises in this case concerning such service or jurisdiction in that sense.

121 Most crucially, the other reasons contain sufficient extracts from the DDT Act[113] to relieve me of the necessity of repeating such material. Other statutes

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108 Reasons of Gleeson CJ, McHugh and Heydon JJ ("joint reasons") at [1]-[6]; reasons of Gummow J at [39]-[42]; reasons of Callinan J at [182]-[188].

109 Reasons of Gummow J at [43]-[50], [59]-[62]; reasons of Callinan J at [219]-[222].

110 *Jurisdiction of Courts (Cross-vesting) Act* 1987 (SA) ("SA Cross-vesting Act"). See reasons of Callinan J at [223].

111 It is not necessary to decide whether, once transferred to the Supreme Court of South Australia, the jurisdiction of that Court would derive from the order made under the NSW Cross-vesting Act in conjunction with the SA Cross-vesting Act or from the jurisdiction of the Supreme Court of South Australia under the Constitution and legislation of that State, such as the *Supreme Court Act* 1935 (SA) ("SASC Act"), s 17.

112 Reasons of Gummow J at [45], [74]-[75].

113 Joint reasons at [6]; reasons of Gummow J at [78]-[80], [87]-[88]; reasons of Callinan J at [210], [224], [228]-[240].

are mentioned, specifically those relating to the jurisdiction and powers of the Supreme Court of South Australia[114], and the laws on evidence[115] and other provisions governing interim assessments of damages by the Supreme Court of South Australia[116]. These provisions are included to compare and contrast the respective rights and obligations of litigants in proceedings commenced in New South Wales before the Tribunal and proceedings taken before the Supreme Court of South Australia.

122 As appears from other reasons, there are similarities in some of the lastmentioned provisions. However, in other respects, the provisions are different. This is most notably so in the facility of appeal to challenge a decision at trial and in the facility to return to court for an award of further damages in the light of progression of the dust-related condition[117]. On each of these matters, the DDT Act contains provisions significantly different from the law that would govern the rights of the parties, were they to be determined by the Supreme Court of South Australia and not the Tribunal[118]. Potentially, the provisions of the DDT Act enlarge the rights of the first respondent and increase the obligations of the appellant.

123 If the Tribunal's jurisdiction and powers were upheld in respect of the first respondent's action, there is legislation in South Australia that would arguably apply to facilitate the exercise of the Tribunal's jurisdiction in South Australia (in the matter of taking evidence and administering oaths or affirmations in South Australia[119]). The Tribunal (and before it, in New South Wales, the Workers' Compensation Commission and the Compensation Court of New South Wales) for a long time conducted hearings in States other than New South Wales in the exercise of the jurisdiction successively belonging to them[120]. It was a matter of

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114 SASC Act, s 50 (governing appeals). See reasons of Gummow J at [65], [78]; reasons of Callinan J at [223], [225].

115 *Evidence Act* 1929 (SA) ("SA Evidence Act"), s 67AB. See reasons of Callinan J at [195].

116 SASC Act, s 30B set out in the reasons of Callinan J at [223].

117 DDT Act, s 11A.

118 See reasons of Gummow J at [78]-[79], [100].

119 SA Evidence Act, s 67AB. See reasons of Callinan J at [195].

120 Judges of the Workers' Compensation Commission, as originally created by the *Workers' Compensation Act* 1926 (NSW), regularly sat in other States and occasionally overseas to take evidence as on commission when convenient and necessary. There was no specific statutory provision authorising this course,

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occasional pride that the successive New South Wales compensation courts, like the English judges in the reign of Henry II and thereafter, travelled to the litigants in the provinces instead of requiring them to travel to the court[121]. However, with rare exceptions, the New South Wales courts did so in cases concerned with claims brought by New South Wales residents, in respect of entitlements arising wholly within New South Wales, against employers resident in New South Wales, for acts and omissions that happened there. Interstate sittings were substantially designed to afford convenient opportunities to receive evidence from witnesses (mostly medical and expert) resident interstate.

124 No question of coercion of reluctant witnesses typically arose in the foregoing arrangements. Nor was the New South Wales court purporting to compete with the jurisdiction of a court or tribunal of another State, still less the Supreme Court of such a State provided for in the Constitution[122]. This last feature of the present proceedings gives rise to constitutional questions. They arise against a background of the decisions of this Court on the principles of private international law. The Court's decisions appear to give comfort to the notion that, especially within Australia, courts may more readily exercise a national jurisdiction (even when not vested with federal jurisdiction) because service of process may sometimes be facilitated by SEPA. The substantive law will then be governed by established rules of national application. The orders resulting from such judicial proceedings will be given "[f]ull faith and credit ... throughout the Commonwealth" as required by the Constitution[123].

125 *The "could" and "should" issues*: The appellant, however, suggested that there were basic flaws in viewing the Tribunal as a court capable of deciding the first respondent's claim against it. According to the appellant, it *could* not do this for constitutional reasons, and *should* not do it having regard to the intended operation of the cross-vesting Acts. Thus are presented the essential issues in these proceedings, although there are other issues that will have to be mentioned.

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although the 1926 Act, s 38(b) provided that the Commission could "adjourn the proceedings to any time or place". The 1926 Act was repealed by the *Workers' Compensation (Amendment) Act* 1984 (NSW). The Compensation Court of New South Wales was thereby created. By s 21(1) of the *Compensation Court Act* 1984 (NSW), it was provided that "[t]he Court shall sit at such places and times as the Chief Judge may direct."

121 As, for example, in *George (as tutor for Neil George) v Mechanical Advantage Group Pty Ltd* (2002) 23 NSWCCR 303 at 314 [43] per Neilson CCJ.

122 Constitution, s 73(ii). See also s 106.

123 Constitution, s 118.

126 *Three points of common ground*: Before listing the issues for decision, it is useful to refer to some matters of common ground.

127 First, it is clear that the NSW Cross-vesting Act purports to exclude any right of appeal to the Court of Appeal from the orders of a judge of the Supreme Court exercising jurisdiction under that Act[124]. The appellant invoked the appellate jurisdiction of this Court pursuant to s 73(ii) of the Constitution. The first respondent did not contest this Court's jurisdiction. Although provision is made in the Constitution for the Parliament to prescribe exceptions to, and regulation of, this Court's appellate jurisdiction[125], the reference is only to the Federal Parliament. A State Parliament is not competent, by its legislative prescription, to limit appeals to this Court from a Supreme Court in any way inconsistent with the Constitution. For the present purposes, Sully J constituted the Supreme Court. The only relevant federal "exception" or "regulation" governing this Court's jurisdiction is that requiring a grant of special leave[126]. A grant of special leave was made.

128 Secondly, it was accepted by all parties that the substantive law applicable in determining the respective rights of the parties is the law of South Australia. As South Australia was the place where the negligence causing the damage allegedly occurred; where the contract was made and the breach thereof was said to have happened; and where the events arose giving rise to statutory duties, this conclusion was correct[127]. The applicable law of South Australia includes the law governing the limitation of actions[128].

129 Thirdly, it was accepted that Sully J had approached the application in the present case in conformity with his earlier decision in *BHP Co Ltd v Zunic*[129]. This Court was told that the present was the third unsuccessful attempt on the part of employers to have like proceedings transferred so that they would proceed not before the Tribunal but before the courts of the State said to have the most

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124 NSW Cross-vesting Act, s 13; cf *NEC Information Systems Australia Pty Ltd v Lockhart* (1991) 22 NSWLR 518; *Gould v Brown* (1998) 193 CLR 346 at 496 [315].

125 Constitution, s 73.

126 *Judiciary Act* 1903 (Cth) ("Judiciary Act"), s 35.

127 *Pfeiffer* (2000) 203 CLR 503 at 515 [3], 540 [86]-[87], 542 [96], 562-563 [157]; cf at 576-577 [204].

128 *Pfeiffer* (2000) 203 CLR 503 at 544 [100], 563 [161].

129 (2001) 22 NSWCCR 92.

substantial connection with the parties and the action[130]. Clearly enough, without the intervention of this Court or the passage of clarifying legislation, it is unlikely that a different approach would be adopted by the Supreme Court of New South Wales. The absence of a facility of intermediate appeal would encourage that consequence.

The issues

130 Four issues arise in this appeal:

(1) *The constitutional validity issue*: Whether, so far as the DDT Act purports to permit the Tribunal to exercise its jurisdiction and powers, in respect of a claim such as the present, is it constitutionally invalid? Is it invalid because it affords jurisdiction and power to the Tribunal, to the effective exclusion of the jurisdiction and powers of the Supreme Court of South Australia? To that extent, does it exceed the legislative power of the Parliament of New South Wales? Alternatively, is it invalid as conflicting with the implications of the Constitution as to the limits upon the jurisdiction and powers of the courts and tribunals of one State operating in relation to another State?

(2) *The constitutional construction issue*: Whether (whatever be the resolution of the challenge to the constitutional validity of provisions in the DDT Act) such provisions should be read down and the jurisdiction to transfer a proceeding under the Cross-Vesting Act exercised in conformity with applicable provisions of, and implications arising from, the federal Constitution?

(3) *The cross-vesting issue*: Whether error has been shown in the exercise by the Supreme Court of New South Wales of the jurisdiction and power conferred on that Court by the NSW Cross-vesting Act, in deciding the appellant's application for transfer of the proceedings to the Supreme Court of South Australia in the present case?

(4) *The consequential orders issue*: Whether, in the event that an error of the lastmentioned type is shown, the matter should be remitted to the Supreme Court of New South Wales to exercise its jurisdiction and powers in accordance with correct principles? Or whether, alternatively, this Court should "give such order as ought to have been given in the first instance"[131] and, if so, in what terms?

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130 See reasons of Callinan J at [190].

131 Judiciary Act, s 37.

The constitutional validity issue

131 *Logic versus prudence*: Logic suggests that the appellant's "*could*" issue ought to be determined before its "*should*" issue. If, as the appellant asserts, the Tribunal had no power under the DDT Act, properly understood, to exercise its jurisdiction and powers in respect of the first respondent's proceedings, the other issues in this appeal do not arise. In effect, there is then no valid proceeding before the Tribunal. Before entering upon the exercise of jurisdiction and power, every court or tribunal must satisfy itself as to the existence of such jurisdiction and power. At least, it must do so where there is a contest or an apparent problem[132].

132 Even if, for the purpose of enlivening the jurisdiction and powers of the Supreme Court under the applicable cross-vesting Act, the "proceeding" commenced by the first respondent in the Tribunal enlivens that Act and founds an order of transfer in accordance with its terms[133], an established lack of constitutional authority for such proceedings (or a clear demonstration that, were they to proceed, they would conflict with the requirements stated in, or implied from, the Constitution) would arguably be relevant to the exercise of the power afforded to the Supreme Court of New South Wales by s 5(2) of the NSW Cross-vesting Act. Indeed, the lack of constitutional foundation for the proceedings would, effectively, *oblige* a conclusion that it was "otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State …"[134]. Such a conclusion mandates (by use of the imperative "shall"[135]) the transfer of the relevant proceeding to "that other Supreme Court". Upon this view, to ignore the suggested constitutional deficit is to ignore a highly

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132 *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 at 415; see also *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employés Association* (1906) 4 CLR 488 at 495; *Cockle v Isaksen* (1957) 99 CLR 155 at 161; *Re Boulton; Ex parte Construction, Forestry, Mining and Engineering Union* (1998) 73 ALJR 129 at 133 [21].

133 By analogy with cases such as *Calvin v Carr* [1980] AC 574. See *Spalvins* (2000) 202 CLR 629 at 645-646 [32], 657 [69], 663 [86]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at 125-126 [220]; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 610-611 [39], 612-613 [45], 631 [102].

134 NSW Cross-vesting Act, s 5(2)(b)(iii).

135 NSW Cross-vesting Act, s 5(2).

relevant, even critical, consideration upon which the procedures of the NSW Cross-vesting Act are founded.

133 There is also a reason of convenience that suggests the desirability of first considering the constitutional issues in this case. They have been fully argued. Several law officers intervened. The proceeding has been conducted upon conditions as to costs that protect the first respondent. The constitutional validity questions involve important matters of legal principle. If the appeal is disposed of on grounds limited to the miscarriage of the discretion in the particular case, the constitutional issues may some day have to be reargued. Were this to happen, the assistance to the Court and the protective costs orders might not exist on the next occasion.

134 *The settled approach of this Court*: However, whilst these are reasons for departing from the Court's normal rule of prudence that postpones decisions on constitutional questions that do not require determination to arrive at the Court's orders, it is this Court's established practice that it will normally postpone decisions on constitutional validity that do not need to be made to reach dispositive orders[136]. In effect, this approach conserves orders invalidating legislation under the Constitution to the occasions when they are truly essential. For a court to invalidate legislation is always a serious step. Behind the rule of restraint is the observance by the courts of respect for legislatures and the laws that they make. Courts thereby acknowledge that the legislatures of the nation will rarely enact laws deliberately that contradict the Constitution. Ordinarily, they will intend that the laws apply, and be administered, so as to remain within the bounds of constitutional validity.

135 *Conclusion: postpone the validity issue*: I am of the view that orders can be reached in this appeal without ruling on the appellant's challenges to the validity of the contested provisions of the DDT Act[137] in its purported application to a South Australian action[138]. Having come to a conclusion that the appeal can be decided on a footing other than constitutional invalidity, that is the course that I will take[139]. However, as will appear, it does not involve ignoring the relevance

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136 See, for example, *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 473-474 [248]-[252]. See also *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 noted in *Mobil* (2002) 211 CLR 1 at 45 [88].

137 Most especially the DDT Act, s 13(3) and (7), set out in the reasons of Gummow J at [87].

138 See also the DDT Act, s 11A.

139 See joint reasons at [29].

of the Constitution for the exercise of the jurisdiction and powers conferred on a Supreme Court by the NSW Cross-vesting Act[140].

The constitutional construction issue

136 *The interpretative presupposition*: It is a fundamental presupposition of Australia's constitutional arrangements that all enacted law – federal, State and Territory – must comply with the requirements of the federal Constitution. Those requirements include the express provisions governing, and the implications concerning, the way in which the Constitution, and its institutions, are intended to operate.

137 In some countries, constitutional law is set apart from other laws. Separate constitutional courts are created to give effect to constitutional law as a distinct body of doctrine[141]. In Australia, however, the Constitution is an integral part of a unified body of law. It is upheld by an integrated court system[142]. The common law must likewise conform to the Constitution[143] as must every rule of equity[144] and every act purportedly performed under law.

138 *Reading down legislation*: Because everyone knows the foregoing propositions – and because they lie at the heart of the observance of the rule of law throughout the Commonwealth – they find expression in an approach to the task of legislative interpretation as it is practised in this country. They do so by virtue of the requirements of legislation, expressed in general terms, that oblige judges to read statutory language, so far as they can, to avoid constitutional invalidity[145] and to uphold the legislation as operating within a constitutionally

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140 cf *Coleman v Power* (2004) 78 ALJR 1166 at 1195 [158], 1199 [182]-[184] per Gummow and Hayne JJ, 1205 [219]-[221] of my own reasons; 209 ALR 182 at 221-222, 226-227, 235-236; *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1136 [193] of my own reasons; 208 ALR 124 at 173-174.

141 As in the case of the Constitutional Court of South Africa, Germany and many European and other civil law countries.

142 Provided for in Ch III of the Constitution. See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

143 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-564.

144 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 279-280 [192].

145 *Acts Interpretation Act* 1901 (Cth), s 15A; *Interpretation Act* 1987 (NSW), s 31.

valid sphere[146]. To reinforce such general provisions, express statutory rules have been adopted providing that, where this is possible within the language chosen, courts should construe a law as operating with respect to matters of the constitutional competency of the enacting polity within the federation[147].

139 The foregoing statutory rules merely give effect to pre-existing principles of construction devised by the judges. As O'Connor J observed in this Court nearly a century ago, words in a statute may commonly, on their face, apply, in their terms, to the whole world. But courts understand that the Parliament which has enacted those words into law meant them, at least ordinarily, to apply only to the extent of the lawmaking power of that Parliament[148]. Legislatures did not mean, by enacting words of generality, to purport to make law for the whole world. Such an attempt would be a preposterous pretension; futile and incapable of enforcement. Such presumptions and absurdities will not be ascribed to the legislatures of Australia.

140 In Australia, courts take positive law seriously. It is intended to be obeyed and, where it has not been, to be enforced. Australian legislatures are not given to enacting, as law, broad pronouncements of imperfect obligation or non-obligation. The legislation in issue in the present case was enacted, without exception, upon the hypothesis that it would be enforced and enforceable, certainly within Australia. This fact imports an obligation to read such legislation so that it conforms to the Constitution and its postulates. This means, so that it does not exceed the boundaries of State legislative power in a way that would result in the law of one State having an operation within (or in respect of matters occurring in) another State in a way inconsistent with the constitutional powers and institutions of that other State.

141 Reading legislation, including State legislation, so as to comply with constitutional postulates is a regular feature of the performance by this Court of its constitutional functions[149]. It is the approach that should be taken in the

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146 *Interpretation Act* 1987 (NSW), s 31.

147 *Acts Interpretation Act* 1901 (Cth), s 21; *Interpretation Act* 1987 (NSW), s 12. See *O'Connor v Healey* (1967) 69 SR (NSW) 111 at 114 per Jacobs JA.

148 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363. See also *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 74, cited by Gummow J at [91] and *Ex parte Iskra* (1962) 80 WN (NSW) 923 at 934 per Brereton J.

149 A recent instance appears in *Coleman* (2004) 78 ALJR 1166 at 1173 [26], 1184-1185 [91], 1200 [188], 1201 [198], 1206-1207 [225]-[227], 1220 [294], 1226 [320]-[321]; 209 ALR 182 at 191, 207, 228, 230, 237-238, 256, 264-265.

present case. It does not involve invalidating provisions of the DDT Act. It simply involves confining the operation of that Act in a way that avoids the risk of constitutional invalidity. It is assumed that that was the purpose of the New South Wales Parliament in enacting the DDT Act.

142 *Appropriate territorial limitations*: It is inherent in a federal constitutional text that the lawmaking powers of the several States exist, and will be exercised, in conformity with the lawmaking powers of other States. If this were not so, individuals within Australia would be subjected repeatedly to conflicting legal obligations derived from the operation of incompatible State laws apparently having legal force and effect within Australia. Whilst the federal Constitution provides a specific formula for resolving a conflict between federal and State laws that are inconsistent[150], there is no equivalent express formula to resolve suggested inconsistencies as between competing State laws. However, the Constitution contemplates that "the limits inter se of the Constitutional powers of any two or more States" will sometimes arise for judicial determination[151]. Nowadays, the responsibility to chart those "limits" belongs, ultimately, to this Court. Having no express formula, this Court must derive the applicable criteria from an implication necessarily found in the Constitution.

143 The task of expressing this implication is made more difficult by the acceptance, since the establishment of the Commonwealth, of the large powers of the Parliaments of the States of Australia to enact laws with extra-territorial operation[152]. However, it is self-evident that the Constitution contains implied limits on the lawmaking powers of the Parliament of one State to enact laws having significant application to the rights, duties and interests of residents of other States in respect of matters that naturally fall within the lawmaking competence of those other States. The implication derives from necessity. Were it otherwise, there would be confusion and uncertainty about legal rights, duties and interests. In recognition of this fact, this Court said in *Union Steamship Co of Australia Pty Ltd v King*[153]:

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150 Constitution, s 109.

151 Constitution, s 74.

152 *Bonser v La Macchia* (1969) 122 CLR 177 at 189, 224-225; *R v Bull* (1974) 131 CLR 203 at 263, 270-271, 280-282; *New South Wales v The Commonwealth* (1975) 135 CLR 337 at 468-469, 494-495; *Pearce v Florenca* (1976) 135 CLR 507 at 514-520, 522. These cases follow the decision of the Privy Council in *Croft v Dunphy* [1933] AC 156 at 163, altering the previous Imperial rule. See also *Australia Act* 1986 (Cth), s 2(1) and *Australia Act* 1986 (UK), s 2(1).

153 (1988) 166 CLR 1 at 14 (citations omitted).

> "[A]s each State Parliament in the Australian federation has power to enact laws for its State, it is appropriate to maintain the need for some territorial limitation in conformity with the terms of the grant, notwithstanding the recent recognition in the constitutional rearrangements for Australia made in 1986 that State Parliaments have power to enact laws having an extraterritorial operation ... That new dispensation is, of course, subject to the provisions of the Constitution ... and cannot affect territorial limitations of State legislative powers inter se which are expressed or implied in the Constitution."

144 State laws may be construed as liberally as judges decide[154]. Those judges may reserve the intervention of the courts to cases of real, and not merely theoretical, conflict of laws[155]. Courts may withhold invalidation to clear cases. Such cases will include impermissible attempts to afford extra-territorial operation of a State law, involving an unavoidable clash between the intended scope of the respective laws of different States or a clearly demonstrated instance of operational inconsistency[156]. However, ultimately a point will be reached where the conflict between the laws of different States has to be resolved. When that happens, the guiding star will be found principally in the "territorial limitation" marked out by the geographical boundaries of the several States on the map of Australia. Short of the resolution of an unavoidable conflict of this kind, this Court will not pronounce the invalidity of a State's law. If the law can be construed (read down) so as to avoid such a conflict, the necessity of constitutional resolution of the apparent inconsistency disappears[157].

145 *The need to read down the DDT Act*: In my view, there is a potential conflict between the DDT Act in its application to the first respondent's action against the appellant and other respondents. It appears in the apparent conflict between the laws of South Australia and New South Wales applicable to the causes of action for which the first respondent has sued.

146 The potential inconsistencies are partly operational and partly inconsistencies of scope or field of operation. The choice of law rule in Australia

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154 *Pearce* (1976) 135 CLR 507 at 518.

155 See *Mobil* (2002) 211 CLR 1 at 64 [141]; *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 374.

156 *Mobil* (2002) 211 CLR 1 at 61 [132], 62 [134].

157 See *Coleman* (2004) 78 ALJR 1166 at 1199 [182]-[184] per Gummow and Hayne JJ, 1207 [227] of my own reasons; 209 ALR 182 at 226-227, 238; *Al-Kateb* (2004) 78 ALJR 1099 at 1136 [193] of my own reasons; 208 ALR 124 at 173-174.

allows the possibility that a party, by commencing in one State jurisdiction, may acquire procedural benefits that are to be found in that State's courts and not elsewhere[158]. But it does not envisage that, by choosing a court in one State jurisdiction over the court in another jurisdiction having the preponderance of "connecting factors" with the case, a party will be able unilaterally to alter the substantive law applicable to the case to its own advantage.

147 Allowing that the "dividing line is sometimes doubtful or even artificial … between substantive law and procedural law"[159], it nonetheless exists[160]. In cases of dispute, courts must find it. In the present case, I would not doubt that the substantial innovation introduced in the DDT Act by the Parliament of New South Wales for the benefit of claimants with established dust diseases (such as s 11A of the DDT Act) amounts to an alteration of the substantive law. It applies a different rule in relation to the entitlement to, and calculation of, such a claimant's damages. Damage is the gist of the first respondent's cause of action in negligence. As Callinan J has demonstrated in his reasons, the statutory regimes applicable for the calculation, and award, of damages against parties (such as the appellant) if they were found liable would be significantly different in the Supreme Court of South Australia when compared to the Tribunal[161].

148 As Callinan J has also shown, there are provisions of the DDT Act that expressly enlarge the rights of a claimant (or the claimant's family in the case of death) against the party found liable[162]. These are not matters of procedure that simply facilitate the bringing of claims[163]. They are not just adjectival rules that provide for quicker or better hearings in more efficient and appropriate ways[164].

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158 *Pfeiffer* (2000) 203 CLR 503 at 542-544 [97]-[99], 563 [160]-[161].

159 *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 40, affirmed in the joint reasons in *Pfeiffer* (2000) 203 CLR 503 at 542-543 [97].

160 *Pfeiffer* (2000) 203 CLR 503 at 553-554 [131].

161 See reasons of Callinan J at [225]-[226] by reference to comparisons between the DDT Act, s 11A and the SASC Act, s 30B.

162 See reasons of Callinan J at [231]-[234] by reference to the provisions of the DDT Act, ss 12A, 12B, 12C and 12D.

163 See *Mobil* (2002) 211 CLR 1 at 47-48 [95]-[97], a case concerned with "group proceedings".

164 As, arguably, s 13(5) of the DDT Act may be; see reasons of Callinan J at [234] and even possibly the appellate provisions in the DDT Act, s 32 when compared to the SASC Act, s 50. See reasons of Callinan J at [246]-[247].

These are significant alterations to the substantive rights and obligations of parties, depending upon the court or tribunal determining the causes of action upon which the first respondent has sued.

149 Such alterations in substantive rights suggest the need to read down the generality of the DDT Act where the result of its application would otherwise be to oust the jurisdiction of the Supreme Court of South Australia normally applicable to the case[165]. The reading down, to ensure compliance with the Constitution (and to avoid the risk of invalidity), is not difficult to perform. It involves no more than reading s 11 of the DDT Act that purports to make the jurisdiction of the Tribunal exclusive of "any other court or tribunal" as applicable only to other courts or tribunals *of New South Wales*. It involves the reading of other provisions of the DDT Act in a similar, orthodox manner.

150 Even where there is no operational inconsistency, it may still be clear, from a comparison of the intended scope or field of operation of competing State laws, that for a court in one State (such as the Tribunal) to exercise its jurisdiction and power in a particular case having stronger connecting factors with another State would involve constitutional inconsistency. In a sense, inconsistency of this kind derives from the specialised nature of the Tribunal, its highly specific powers and the potential that is presented, unless such powers are accurately deployed, of intruding upon the jurisdiction of the courts, specifically the Supreme Courts, of other States and Territories of the Commonwealth contrary to the postulate of the Constitution.

151 Unless the courts and tribunals of the several States and Territories of Australia substantially confine the exercise of their respective jurisdictions and powers with close attention to the territorial assumptions of the Constitution, the result would be confusion and uncertainty in the operation of law within the Commonwealth. It would involve an unseemly invasion by "foreign authorities"[166], albeit of other Australian jurisdictions, of judicial responsibilities that the Constitution contemplates and provides will be discharged by the courts of another State or Territory, notably in this case by a State Supreme Court.

152 Thus, it is one thing for the Tribunal, established by the Parliament of New South Wales to exercise its powers with respect to cases having the normal connections with New South Wales. Doing so, it may conduct proceedings

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165 Because of the purported effect of the DDT Act, s 11 excluding the jurisdiction of any other court or tribunal. See also the DDT Act, s 10; cf reasons of Gummow J at [37]-[38].

166 The words are those used in the SA Evidence Act, s 67AB**(**1), heading. See reasons of Callinan J at [195].

interstate, and elsewhere, as on commission, to gather evidence for such cases as the predecessors of the Tribunal long did. Doing this is entirely consistent with the scheme of the Constitution. However, it would be quite another thing for the Tribunal to embark upon a course, in competition with the courts of competent jurisdiction of other States or Territories so as to become, in effect, a national court of dust diseases, although created by the legislature of one State only, involving only judges appointed by the executive of that State and funded by the taxpayers of that State.

153 Reading down the DDT Act in that way avoids the risk of constitutional invalidation. Were the invocation of the Tribunal's jurisdiction successful in the present case, it would, in my view, raise issues of constitutional invalidity. It is always the duty of judges and officials in Australia to perform their functions conformably with the Constitution.

154 *Constitutional performance of functions*: In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[167] I expressed my opinion that Australian courts, asked to provide relief in accordance with powers expressed in general terms, are obliged to do so conformably with constitutional requirements[168].

155 In the present case, the Tribunal had jurisdiction over the first respondent's action, in the sense of the power to make orders binding on the appellant and other respondents, because they were served with process and present in the jurisdiction and thus before the Tribunal. However, in exercising that power, the Tribunal was required to do so in conformity with the DDT Act, read as a law made by the New South Wales Parliament complying with the requirements of the federal and State Constitutions.

156 Where an application is made to the Tribunal to refuse the exercise of jurisdiction over an action that substantially relates to parties and controversies with respect to another State or Territory, the test to be applied, on the present authority of this Court, is whether any such exercise of jurisdiction would involve the Tribunal becoming a "clearly inappropriate forum"[169]. I disagree with this test. I have said so many times both in this Court[170] and earlier[171].

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167 (2001) 208 CLR 199.

168 (2001) 208 CLR 199 at 284-285 [206]-[210].

169 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197.

170 *Zhang* (2002) 210 CLR 491 at 524-525 [94]-[96].

171 *Goliath Portland Cement Co Ltd v Bengtell* (1994) 33 NSWLR 414 at 436.

However, it is plainly the present legal requirement. Courts, including the Tribunal, are bound to conform to it.

157 It would obviously be "clearly inappropriate" for the Tribunal to exercise its jurisdiction and powers in a case where doing so would involve reading the DDT Act, and applying it to the parties, in a way inconsistent with the postulates of the federal Constitution. These postulates include the assumption that the courts and tribunals of the several States and Territories will not assert or exercise their jurisdiction and powers in respect of other States and Territories in ways incompatible with the jurisdictions and powers of such courts, most obviously the Supreme Courts of the States that enjoy express constitutional status under the federal Constitution.

158 There is a distinction in law between the resolution of inconvenient forum decisions (in a case such as the present by the Tribunal itself) and decisions made under the cross-vesting Acts (where an application is advanced to one Supreme Court for cross-vesting or transfer to another Supreme Court)[172]. The distinction between the procedures was noticed soon after the cross-vesting legislation came into force[173]. It is relevant to the present case.

159 This appeal does not involve a review of any decision of the Tribunal on an inappropriate forum ruling. Instead, it involves a challenge to a decision of the Supreme Court of New South Wales in the exercise of its powers under the NSW Cross-vesting Act. By law, those powers are to be exercised by reference to a stated criterion (whether there is a "more appropriate forum"). That criterion is more sensitive to the constitutional postulate which I prefer than the criterion presently applicable to convenient forum applications in Australia ("clearly inappropriate forum"). In exercising its powers under the applicable cross-vesting Act, the Supreme Court should do so consistently with the constitutional postulate that I have described.

160 I view the powers conferred on Supreme Courts by the cross-vesting legislation as a means, in effect, of carrying into operation the assumption of the Constitution that the courts of the several States and Territories will, in relation to each other, exercise their jurisdiction and powers in a way that fulfils, and does not undermine, the implication of the Constitution that the national judiciary

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172 Under the NSW Cross-vesting Act, s 8 (removal from the Tribunal into the Supreme Court) and s 5(2)(b)(iii) (transfer to the Supreme Court of South Australia).

173 *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 730; *Goliath* (1994) 33 NSWLR 414 at 438.

is integrated and unified under this Court, applying to every controversy a single, and ultimately ascertainable, law.

The cross-vesting issue

161 *The applicable criteria*: Whatever may be the differences of principle and policy that inform the respective approaches of this Court on the inappropriate forum issue (as stated in *Voth v Manildra Flour Mills Pty Ltd*[174]) and the principle applied by most other common law courts (as formulated by Lord Goff of Chieveley in *Spiliada Maritime Corporation v Cansulex Ltd*[175]), the clear purpose of the residual criterion expressed by the legislatures of Australia in the common form of the cross-vesting Acts has been, for this purpose, to follow the approach of Lord Goff. In *Bankinvest AG v Seabrook*, Rogers AJA said of s 5(2)(b)(iii) of the NSW Cross-vesting Act[176]:

> "What then are the 'interests of justice' which the legislature considers should be taken into account in this process? To my mind, the relevant matters and considerations are essentially the same as were specified by the House of Lords in the *Spiliada*. These considerations were criticised and held to be inapplicable [by the High Court] in *Oceanic*[177] on the basis that they are too uncertain. Yet, in my opinion, they have already, in effect, been made applicable in Australian courts in relation to transfers between Supreme Courts by the various Australian Parliaments.
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> …
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> Absent the presence of related proceedings or inter-State law, the inquiry directed by consideration of the 'interests of justice' encompass [sic] all the matters that determine which is the more appropriate forum that I have already discussed … [T]he principle of forum non conveniens [does not continue] to exist concurrently with the legislation. The former has been clearly subsumed by s 5(2)(b)(iii)."

162 The foregoing approach has been repeatedly upheld by the Court of Appeal of New South Wales, both in earlier days[178] and since[179]. It is also the

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174 (1990) 171 CLR 538.

175 [1987] AC 460 at 476-478, 482-484. The speech of Lord Goff was adopted unanimously by their Lordships.

176 (1988) 14 NSWLR 711 at 730, with the approval of Street CJ and of myself.

177 (1988) 165 CLR 197.

178 *Goliath* (1994) 33 NSWLR 414 at 438.

approach adopted in other Australian jurisdictions[180]. It is highly desirable that there should be consistency in the application of this principle throughout the Commonwealth. Especially is this so because the principle reflects, in a general way, the broad constitutional hypothesis that I have explained.

163 In *Spiliada*[181] Lord Goff endorsed a formula earlier used by Lord Keith of Kinkel in the resolution of the problems arising in *The Abidin Daver*[182]. This was to the effect that "more appropriate" forum was the "natural forum" for the trial of the action. This was described as being "that with which the action had the most real and substantial connection". In judging the action by reference to such a criterion, Lord Goff said that courts would first look to the "connecting factors" that point in the direction of the local or some other forum[183]:

> "[T]hese will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction … and the places where the parties respectively reside or carry on business."

164 Once it is clear that some "more appropriate" forum exists, "the plaintiff will have to take that forum as he finds it, even if it is in certain respects less advantageous to him than the [chosen] forum"[184]. So too for the defendant. An exception is allowed where it is clear that "substantial justice" cannot be done to the plaintiff in what is otherwise the "appropriate" forum[185]. However, whilst this may be a consideration that it is appropriate to take into account in inconvenient forum applications which seek orders that the proceedings be continued in another country[186], they scarcely apply to courts within the Australian Commonwealth. On the contrary, the suggestion that the first respondent could not obtain "substantial justice" in the relevant court of South

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179 *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357 at 361 [4], 377-378 [87]-[90].

180 *Schmidt v Won* [1998] 3 VR 435; *Dawson v Baker* (1994) 120 ACTR 11.

181 [1987] AC 460 at 477-478.

182 [1984] AC 398 at 415.

183 [1987] AC 460 at 478.

184 *Connelly v RTZ Corporation Plc* [1998] AC 854 at 872.

185 *Connelly* [1998] AC 854 at 873.

186 *Zhang* (2002) 210 CLR 491 at 503-504 [24]-[26]; cf at 548 [162].

Australia (the Supreme Court of that State) is not only contrary to common experience. It is inconsistent with the hypothesis of the Constitution.

165 I therefore agree with the remarks of Spigelman CJ in *James Hardie & Coy Pty Ltd v Barry*[187]:

> "To determine which court is, in the interests of justice, the appropriate court, it is necessary to inquire, in the case of a tort, as to what is the place of the tort. Indeed, in the context of administering the co-operative national scheme in the *Jurisdiction of Courts (Cross-vesting) Act*, where the place of the tort and the residence of the parties coincide, this will generally be determinative of the issue of 'appropriate court', although other factors may need to be assessed in the process of determining where the interests of justice lie."

166 Where, as here, the first respondent's claim is also framed in terms of breach of contract and of statutory duties, no different result would flow where the allegation is that the contract (of employment) was made and breached in South Australia and that the relevant statutory duties that were breached were those imposed on South Australian employers by the Parliament of that State[188].

167 *The postulate of equal justice*: Against the background of the foregoing analysis, the error of Sully J in exercising the powers of the Supreme Court under the Cross-vesting Act can be seen in sharp relief. It is, with respect, the same error as informed his Honour's earlier decision in *Zunic*[189]. It appears most clearly in his statement that the claimant's "own choice of forum ought not lightly to be overridden."[190]

168 I consider that this element unduly weighed the scales against the appellant's application before the Supreme Court. By hypothesis, where an application for transfer is made under a cross-vesting Act, one party has validly invoked the jurisdiction of a particular State court. In the disposition of the application, that fact must therefore be neutral. It cannot predominate in the

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187 (2000) 50 NSWLR 357 at 361 [7]; see also at 386 [126] per Priestley JA; *James Hardie and Co Pty Ltd v Hall as Administrator of Estate of Putt* (1998) 43 NSWLR 554 at 576-577; *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20 at 35-37.

188 *Industrial Code* 1920 (SA); *Industrial Code* 1967 (SA); *Industrial Safety Health and Welfare Act* 1972 (SA).

189 (2001) 22 NSWCCR 92.

190 *Zunic* (2001) 22 NSWCCR 92 at 98 [18].

evaluation of the "connecting factors" to be given weight on both sides of the ledger in ascertaining which of the competing fora "is more appropriate" having regard to "the interests of justice"[191]. That point remains to be decided.

169 Whether the case falls within the more particular provisions of s 5(2)(b)(ii) of the NSW Cross-vesting Act or the more general provisions of s 5(2)(b)(iii) of that Act, in each instance the competition of potential fora is a given. In each case, "the interests of justice" must be taken into account, as a general consideration. In each case, if the criteria are established, the court in which the proceeding is pending is required ("shall") to transfer it to the other Supreme Court. The "interests of justice" necessarily include justice to all parties. It would be incompatible with our notions of justice to apply the NSW Cross-vesting Act in a way that favoured the rights of one party to litigation over others, rewarding the party selecting the initial venue with significant substantive (as distinct from purely procedural) advantages for doing so[192].

170 *The judge's error in this case*: When these considerations inherent in the criteria stated in the NSW Cross-vesting Act are so understood, the assignment by Sully J of the weight that he gave to the regular invocation of the jurisdiction of the Tribunal by the first respondent constituted an error in a consideration that informed his exercise of the Supreme Court's powers. It is unnecessary to decide whether there were other errors, for this one is sufficient to vitiate the resulting decision. Normally, the "interests of justice" of all parties within Australia will require the transfer of proceedings to be determined by the Supreme Court of another State or of a Territory where that Court, rather than the court of the forum selected by the plaintiff, is the "natural forum" being that "with which the action has the most real and substantial connection". Usually that will be the place of the wrong, or of the contract or of the operation of the statutes sued upon and particularly where that is also the place of the residence of the parties[193].

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191 NSW Cross-vesting Act, s 5(2)(b)(ii)(C).

192 The International Covenant on Civil and Political Rights, done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23 provides in Art 14.1: "All persons shall be equal before the courts and tribunals." Australia is a party to the Covenant and to the First Optional Protocol referred to in Art 41.1. The influence of such provisions on the statements of Australian law has been acknowledged by this Court: *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

193 For an overview of relevant factors to consider in such proceedings, see Miller and Nicholls, "Cross-Vesting Civil Proceedings – A Practical Analysis of the Interests of Justice in the Determination of Cross-Vesting Applications", (2004) 30 *Monash University Law Review* 95.

171 Although the language of the NSW Cross-vesting Act is stated in the broadest terms, and should not be glossed by court decisions, read to achieve its purpose as one harmonious with the federal Constitution the foregoing constitutes a practical rule of thumb. The fact that applying it may deny a claimant substantive benefits available under the law of another Australian State or Territory is not a reason to withhold from the parties the neutral application of the policy to which the NSW Cross-vesting Act gives effect. It has been the history of federation in Australia that innovations in substantive rights and obligations (as well as in procedural arrangements) have been enacted in one State advantaging for a time only those of that State who could lawfully invoke them. Often, as experience is accumulated, other jurisdictions in the Commonwealth have copied the innovations. Indeed, this is often advanced as one of the principal advantages of the federal system of government[194].

172 I recognise that the decision of Sully J was not, as such, made in the exercise of a common law discretion. It involved the exercise of a power afforded to the Supreme Court by statute. By the same token, that power involved the judicial evaluation of a number of factors. It required an ultimate judicial decision framed in terms of criteria expressed in very general language ("the interests of justice", "more appropriate"). It is inherent in such general language that cases will arise where there is room for difference of judicial opinion. That fact would restrain a court such as this from disturbing the evaluation by the primary judge where the "connecting factors" were otherwise finely balanced. Had this been such a case, I would not have been persuaded to interfere in the determination made by Sully J. Certainly, any suggested verbal infelicity or mention of some remote irrelevancy would not have been sufficient to warrant intervention.

173 *Conclusion: the exercise miscarried*: It will be apparent that in my view the approach taken by his Honour is inconsistent with the language and purpose of the provisions for transfer of proceedings between State courts as stated in the NSW Cross-vesting Act. Especially is this so when that Act is understood, and the powers conferred by it are exercised, conformably with the implication in the federal Constitution governing the manner in which State and Territory courts will exercise their jurisdiction and powers with proper regard for the jurisdiction and powers of the courts of other States and Territories.

The consequential orders issue

174 Because error has been shown in the exercise by Sully J, as the Supreme Court of New South Wales, of the jurisdiction and power conferred on that Court by the NSW Cross-vesting Act, this Court should set aside that Court's orders.

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194 Craven, *Conversations with the Constitution*, (2004) at 74.

175 Normally, such an order would result in the return of the proceeding to the Supreme Court of New South Wales so that the law would be applied by that Court conformably with the opinion of this Court. In that way this Court would uphold the scheme of the NSW Cross-vesting Act which reposes the powers for which it provides in the relevant Supreme Court. However, in the present case, I agree with Gummow J and with Callinan J that it is appropriate for this Court to exercise the jurisdiction that has miscarried below. Not least amongst the considerations suggesting that conclusion is the age and illness of the first respondent and the desirability that his proceeding should be advanced without further delay of a technical kind. It should be advanced in the Supreme Court of South Australia. That is what the "interests of justice" to all parties requires. It is the "more appropriate" court in the circumstances.

Orders

176 I agree in the orders proposed by Gummow J.

177 HAYNE J. I agree with Gummow J that, for the reasons he gives, the appeal should be allowed, and orders made in the terms proposed. I also agree that it is not necessary, and it is therefore not appropriate, to decide the two constitutional issues which the appellant's arguments raised.

178 For my own part, however, I wish to make plain that whether State legislation can validly authorise a State court to conduct its proceedings outside the geographical territory of the State remains an open question. Its resolution may depend upon examining the validity and relevance of two related propositions. The first is whether a court's proceedings are sufficiently described by reference only to the taking of evidence, hearing of argument, and adjudicating, or whether account must be taken of what lies behind those steps. A court exercising judicial power asserts the power of the polity. As Sir John Salmond said, more than 80 years ago, the administration of justice is "the maintenance of right within a political community *by means of the physical force of the state*" (emphasis added)[195]. That this element of force has largely "become merely latent" because "it is now for the most part sufficient for the state to declare the rights and duties of its subjects, without going beyond declaration to enforcement"[196] may not mean that the relevant question is only whether steps associated with the exercise of judicial power are permitted (or not forbidden) by the law of the place where they are done.

179 The second proposition depends upon what territorial limitations of State legislative powers inter se are expressed or implied in the Constitution[197]. State and federal jurisdiction are distinct[198]. The several integers of the federation, whose "continued existence as independent entities"[199] is a constitutional premise, are polities each of which has its distinct judicial arm of government. Whether a State legislature may validly authorise the exercise of that form of coercive power within the boundaries of another State may require consideration of what implications must be drawn from the Constitution's adopting that structure for the judicial system of Australia. That question is different from asking whether the enacting State may make a law which is to operate as law in a place beyond its territorial boundaries, as distinct from making a law which has

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195 Salmond, *Jurisprudence*, 7th ed (1924) at 116.

196 Salmond, *Jurisprudence*, 7th ed (1924) at 112.

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

198 Sir Owen Dixon, "Sources of Legal Authority", *Jesting Pilate*, 2nd ed (1997) 198 at 201.

199 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82 per Dixon J.

effect within its territorial boundaries with respect to things done in a place outside those boundaries[200].

180 These questions need not be answered in this matter.

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200 *Australia Act* 1986 (Cth), s 2(1); *Croft v Dunphy* [1933] AC 156; *Trustees Executors & Agency Co Ltd v Federal Commissioner of Taxation* (1933) 49 CLR 220 at 232-236 per Evatt J; *Pearce v Florenca* (1976) 135 CLR 507 at 516-518 per Gibbs J; *Union Steamship* (1988) 166 CLR 1 at 14; *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340; Salmond, "The Limitations of Colonial Legislative Power", (1917) 33 *Law Quarterly Review* 117 at 121.

181 CALLINAN J. Several questions were argued in this appeal. An affirmative answer to the first of them would be determinative of it: whether the primary judge erred in rejecting an application by the appellant for the cross-vesting of a proceeding instituted in the New South Wales Dust Diseases Tribunal ("the Tribunal") to the Supreme Court of South Australia.

Facts

182 The first respondent who lives in South Australia, sued the appellant, the second to fourth respondents ("the Wallaby companies") and the fifth respondent in the Dust Diseases Tribunal of New South Wales. Two of those respondents were able to be, and were regularly served in New South Wales. The respondents other than the first respondent have notified the Court that they will abide the order of this Court on appeal. The first respondent claims to have contracted an asbestos-related disease as a result of exposure to asbestos in the course of his employment at the appellant's shipyard at Whyalla in South Australia during the years 1957 to 1964 and 1968 to 1977. Asbestos was used at the shipyard for insulation during those periods. The products used and containing the asbestos were supplied to the appellant in South Australia, allegedly by the Wallaby companies and the fifth respondent.

183 The first respondent framed his claim against the appellant in tort in negligence, breach of contract, and breach of statutory duties. He sued the other respondents in negligence. The factual basis of his claim was essentially the same in each instance: of negligence by each of the other respondents in the manufacture and supply of various materials, containing and exposing him to asbestos, and consequentially asbestos-related personal injury. He sought a further order, to preserve his right to make an additional claim for damages, should he develop any of the conditions of asbestos-induced lung cancer, asbestos-induced carcinoma of any other organ, pleural mesothelioma, and peritoneal mesothelioma. The particular illness with which the first respondent claims to be afflicted is asbestosis, or benign asbestos-related pleural disease. Neither of these is life-threatening.

184 It is accepted by all of the parties that, subject to proof by the first respondent of exposure and diagnosis, liability will not be in issue. The issues to be litigated will be damages and the application or otherwise of limitation periods. The lay witnesses on these issues, including the first respondent, and his medical witnesses all resided in South Australia. All of the parties seem to have accepted that the substantive law, certainly so far as questions of tortious liability and limitations are concerned, to be applied, is that of South Australia. It could hardly be otherwise, on the facts of the case and the necessary application to them of *John Pfeiffer Pty Ltd v Rogerson*[201]. The procedural law and practice to

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201 (2000) 203 CLR 503.

apply were presumably to be the procedural law and practice of the Tribunal under the Act by which it was established. As will appear however, more attention should have been paid to the difficulties of identifying, and distinguishing between, the procedural law to govern the Tribunal's processes, and the substantive law generally of South Australia, and of applying the latter to proceedings in the Tribunal.

185 The Tribunal was established by the *Dust Diseases Tribunal Act* 1989 (NSW) ("the Tribunal Act") as a specialist New South Wales tribunal for determining claims for damages for dust-related diseases and ancillary matters. One such disease may be caused by exposure to asbestos.

186 It is not controverted that in recent times plaintiffs from other States have instituted proceedings in the Tribunal rather than in the courts of the States in which they reside, or in which they have contracted dust-related diseases. A firm of solicitors which acts for plaintiffs in these matters has established branch offices in Adelaide and Brisbane to undertake some of this work. To enable such cases to be heard in the States of claimants' residence the Tribunal has established interstate "circuits".

187 The medical report upon which the first respondent relies was obtained in February 2002. Proceedings were not instituted in the Tribunal until 9 August. The application for cross-vesting was made promptly on 16 August by the appellant. There is apparently no particular need for urgency in this case however.

188 The Court was informed that if the case were to remain in the Tribunal, a judge of the Tribunal and the parties' lawyers would travel to Adelaide as part of the "South Australian circuit", to sit in a courtroom made available by the South Australian Supreme Court, to take evidence from South Australian witnesses, and to apply the substantive law of South Australia to determine the case.

The constitutional issues

189 During the hearing of the appeal, for the first time the possibility of a constitutional argument in favour of the appellant's position was raised. The argument was put in several ways, but in substance it was that the Tribunal Act and the Tribunal's practice of hearing cases under it in States other than New South Wales were an impermissible intrusion upon the legitimate governmental activities of the States, and involved the likelihood of breaches of the laws relating to the legal coercion of witnesses and the administration of oaths, and further exposed the judges of the tribunal, witnesses and parties to a risk of defamation suits without defences of absolute privilege usually available to such participants.

190 The Court was informed that this case is the third in a series of unsuccessful attempts to have proceedings instituted in the Tribunal by interstate plaintiffs transferred to the courts of their home States under s 8 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) ("the Cross-vesting Act").

191 There is, the first respondent submits, no "governmental right" of South Australia or indeed any State, to establish courts necessary for the administration of justice within a State: and, even if there were, it could not be an exclusive right. Equally, nothing in the Constitution proscribes the administration of justice within a state by a court of another state. For the latter proposition the first respondent cites *Union Steamship Co of Australia Pty Ltd v King*[202]; *Port MacDonnell Professional Fishermen's Assn Inc v South Australia*[203] and *Mobil Oil Australia Pty Ltd v State of Victoria*[204].

192 Each of these cases was concerned with the validity of State legislation intended to have extraterritorial operation. They establish that the concept of relevance to such legislation is not to be narrowly or illiberally confined, although why a question of extraterritoriality should be approached with any particular predisposition is not explained. Nor is it explained why an orthodox approach, of giving the words of the relevant, Constitutional statute, their ordinary and natural meaning, should not have been adopted. None of the cases directly addressed the question which was raised here, whether a State court may sit as a State court (and not as a commission) in another State applying its own, in this case the Tribunal's, peculiar rules and practices. Nor was it necessary in any of these cases to explore the special nature of courts as arms of, and fundamental to, the government of a State. A polity without power to establish its own courts, to confer jurisdiction, including exclusive jurisdiction with respect to matters occurring within the boundaries of the polity, and making available its executive arm for the enforcement of orders of the courts of the polity, would be a very weak polity, indeed, a polity far weaker than the colonies at federation, and the States as envisaged by the constitution.

193 In order to be effective as a court, wherever it is sitting, the Tribunal has to be able to summon witnesses, administer oaths and punish, if need be, for

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202 (1988) 166 CLR 1 at 14.

203 (1989) 168 CLR 340 at 372.

204 (2002) 211 CLR 1 at 22-23 [9] per Gleeson CJ, 33-34 [47] per Gaudron, Gummow and Hayne JJ, 58-59 [123] per Kirby J.

contempt. Each of these may require at some stage the assistance and support of the executive arm of government[205].

194 Could the Tribunal sitting in South Australia issue a warrant for the arrest of a contemnor and then detain him or her in custody until brought before the Tribunal? If so, how would the arrest be carried out and where would the contemnor be detained? Could the NSW Tribunal punish a contemnor with a sentence of imprisonment, and if so in the prison of which State? The first respondent provided no satisfactory answer to these questions. Nor was a sufficient answer given to the question of the availability or otherwise of immunity from suit for defamation of a judge of the Tribunal sitting in South Australia, and the witnesses, parties and counsel appearing before that judge.

195 The first respondent submits that the Tribunal is a "foreign authority" within the meaning of s 67AB (1) of the *Evidence Act* 1929 (SA):

> "**67AB Taking of evidence in this State by foreign authorities**
>
> (1) Subject to subsection (2) of this section, a foreign authority may –
>
> *(a)* take evidence; and
>
> *(b)* administer an oath or affirmation to any witness for the purpose of taking evidence,
>
> in this State."

Reliance is also placed on s 13 of the Tribunal Act which provides:

> "**13 Proceedings before the Tribunal**
>
> ...
>
> (7) If the President is of the opinion that the balance of cost and convenience in the proceedings so requires, the President may direct that the hearing of the proceedings, or any part of the proceedings, take place outside New South Wales."

196 It was submitted that the Tribunal may take evidence and administer oaths pursuant to s 67AB of the *Evidence Act* as a "foreign authority" for the purposes of that section, because it is a court established under the law of New South

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205 See ss 13(7) and 26 of the *Dust Diseases Tribunal Act* 1989 (NSW) and r 2 of the Dust Diseases Tribunal Rules (NSW) and Pt 55 of the Supreme Court Rules (NSW).

Wales. That State it may be observed, has enacted substantially similar legislation, the *Oaths Act* 1900 (NSW), s 26B, as have other States, for example, the *Evidence Act* 1958 (Vic), s 111A, and the *Evidence Act* 1977 (Q), s 24.

197 The submission does not assist the first respondent. The legislation if anything, to which the first respondent refers, points up the difference between a court and a foreign authority. No matter how a court may be regarded in the jurisdiction in which it was established, its role is different when it sits elsewhere. In the latter it sits by grace and favour, but as relevantly different from, and lacking in the trappings and apparatus of a court except to the extent authorized by the host polity.

198 The appellant submitted that federalism is concerned with the allocation of legislative power, and that it is a necessary implication of the Federal Constitution that no polity can legislate in a way that weakens the legislative authority of another polity of a federation[206]. The appellant sought to adapt the words of Dixon J in *In Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation*, "in a [federation] you do not expect to find either [state] government legislating for the other.[207]" Rather, it was put, it is implied in the Commonwealth Constitution that the powers of government are exercised by different governments in different localities[208].

199 It was argued that a New South Wales law that weakens the extent to which South Australia can provide for the good government of South Australia starkly interferes with South Australia's legislative capacity and competence. Inescapably, it also alters the relationship between South Australia and its subjects; with the result that the relationship between New South Wales and South Australia ceases to be one of equality.

200 This latter proposition has echoes of the doctrine of this Court, enunciated, in relation to the distribution of State and federal power, in *Melbourne Corporation v The Commonwealth*[209] and more recently in *Austin v The*

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

207 (1947) 74 CLR 508 at 529.

208 Selway, *The Constitution of South Australia* (1997) at 72; see also *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 451 per McHugh J.

209 (1947) 74 CLR 31.

Commonwealth[210]. Whether that doctrine may be applied to the allocation or appropriation of powers inter se between the States is another question. What would be odd in a federation however, would be the lawful toleration of a legislative and judicial usurpation by, for example, weight of numbers and resources, by one imperialistic State, of the legislative and judicial power of smaller, poorer and less intrusive other States.

201 I do not think that s 118 of the Constitution necessarily provides an answer in favour of the first respondent. Recognition under it is a two-way street. Section 118 is a section designed, among other things, to ensure comity between the States. It obliges each State to recognise and give effect to the laws, public acts, records and judicial proceedings of other States. It would be very curious, indeed unthinkable, that similar recognition would not be accorded to the institutions of the States from which these emanate, the Parliament, the Executive and the Judiciary.

202 These are all interesting and important questions. So too is the fundamental question: whether any or all of the controversial provisions of the Tribunal Act to which I have referred can properly be regarded, in their purported operation upon the conduct of the Tribunal's proceedings outside New South Wales, or upon the rights and obligations of persons living and conducting their affairs outside New South Wales in matters of no concern to New South Wales, as being for the peace, welfare and good government of New South Wales within the meaning of s 5 of the *Constitution Act* 1902 (NSW). None of these questions however have to be answered here, because, in my opinion, the appeal can and should be resolved in favour of the appellant on other grounds.

Proceedings at first instance

203 The application was heard and dismissed by Sully J. It is against that dismissal by that single judge of the Supreme Court that the appellant now appeals[211].

204 In giving his reasons his Honour said that the facts of this case were strikingly similar to the facts of *Broken Hill Pty Co Ltd v Zunic*[212] which he had

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210 (2003) 215 CLR 185 at 246-252 [116]-[131], 278-279 [214], 281-282 [223], 285 [233].

211 Section 13 of the Cross-vesting Act relevantly purports to deny appeals. It cannot however forbid an appeal to this Court; cf *Crampton v The Queen* (2000) 206 CLR 161 at 185 [57] per Gaudron, Gummow and Callinan JJ.

212 (2001) 22 NSWCCR 92.

decided in the preceding year, and that he intended to adopt the same approach to this case as he had to that one. He then went on to consider the nine factors that he had identified there as relevant to the issue of cross-vesting.

205 The first of these was the first respondent's personal circumstances. They did not include, as was the situation in *Zunic*, any of urgency. His Honour accepted that the appellant had not been dilatory in seeking cross-vesting. Although the first respondent's condition was not then catastrophic, if his condition were to deteriorate suddenly, the Tribunal would move, his Honour said, with a degree of expedition not fairly to be expected of the Supreme Court of South Australia. This was because the latter "could not reasonably be expected to have, the marked and practised experience of the Tribunal in ... changing procedural gears ... to accommodate sudden health emergencies in dust-disease cases."[213] As to the comparative expense of proceedings in the Tribunal and in the Supreme Court of South Australia, his Honour seemed to think this relevant only if there were a "grossly disproportionate" difference between them.

206 With respect to the other matters that his Honour considered to be relevant, invocation of jurisdiction by the first respondent, the particular experience and facility of the Tribunal, the place of the tort, comparative evidentiary advantages, and forum shopping, his Honour simply said that he adhered to what he had already stated in *Zunic*. It is to that case that I should accordingly now turn.

207 As to the regular invocation of the jurisdiction of the Tribunal his Honour there thought this a factor weighing in favour of the Tribunal because "those charged with his professional advising and representation perceive genuinely, and not unreasonably in the light of past experience, that there are legitimate procedural, evidentiary and cost advantages to be had from litigating in the Tribunal"[214].

208 In respect of the particular experience and facility of the Tribunal Sully J did little more than repeat[215] a statement of the President of the Tribunal in *Hearn v Commonwealth*[216] in which the latter said, in effect, that the Tribunal did its work diligently, expeditiously, and when required, regularly in Adelaide and Brisbane.

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213 *BHP Billiton Ltd v Schultz* [2002] NSWSC 981 at [28].

214 *Broken Hill Pty Co Ltd v Zunic* (2001) 22 NSWCCR 92 at 98 [17].

215 *Broken Hill Pty Co Ltd v Zunic* (2001) 22 NSWCCR 92 at 99-100 [23].

216 [2000] NSWDDT 12 (6 December 2000).

209 His Honour accepted that in *Zunic* and therefore in this case the "only sensible answer" was that the tort arose in substance in South Australia[217] and that this was a matter of obvious weight, but in the event he appears to have failed in fact to give it much, or indeed any weight at all.

210 His Honour's opinion on the comparative evidentiary advantages of the Tribunal in *Zunic* came down to this: despite the narrowing of the issues there the possibility of the application of ss 25(3), 25A and 25B of the Tribunal Act[218]

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217 *Broken Hill Pty Co Ltd v Zunic* (2001) 22 NSWCCR 92 at 100 [27].

218 "**25 Evidence in proceedings before the Tribunal**

...

(3) Historical evidence and general medical evidence concerning dust exposure and dust diseases which has been admitted in any proceedings before the Tribunal may, with the leave of the Tribunal, be received as evidence in any other proceedings before the Tribunal, whether or not the proceedings are between the same parties.

25A Material already obtained

(1) Material obtained for the purposes of proceedings before the Tribunal by discovery or interrogatories may:

(a) with the leave of the Tribunal, and

(b) with the consent of:

(i) subject to subparagraph (ii), the party who originally obtained the material or the party's solicitors, or

(ii) another person prescribed by the rules,

be used in other proceedings before the Tribunal, whether or not the proceedings are between the same parties.

(2) The rules may provide that subsection (1) does not apply in specified kinds of proceedings or in specified circumstances.

25B General issues already determined

(1) Issues of a general nature determined in proceedings before the Tribunal (including proceedings on an appeal from the Tribunal) may not be relitigated or reargued in other proceedings before the Tribunal without

(Footnote continues on next page)

gave rise to advantages: to whom, and of precisely what kinds were not identified, but presumably they were advantages to the first respondent, and were said not to be available in the Supreme Court of South Australia.

211 The so-called evidentiary advantage is in fact irrelevant here because the appellant and the other respondents have undertaken to take no objection to the reception of evidence which could be led pursuant to those sections no matter where the proceedings are heard. That the appellant and the other respondents had made that concession, in writing, in these proceedings in submissions to his Honour seems to have been overlooked.

212 His Honour dealt next with forum shopping. His response to the appellant's submission, that this was undesirable, was that, because the Parliament of New South Wales must know that it is occurring and had not legislated against it, some of the "pejorative sting [was taken out] of the term 'forum shopping'"[219].

213 His Honour did not deal with the relevance of s 30B of the *Supreme Court Act* 1935 (SA) (the "SASC Act") as he was not referred to it by any party.

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the leave of the Tribunal, whether or not the proceedings are between the same parties.

(2) In deciding whether to grant leave for the purposes of subsection (1), the Tribunal is to have regard to:

(a) the availability of new evidence (whether or not previously available), and

(b) the manner in which the other proceedings referred to in that subsection were conducted, and

(c) such other matters as the Tribunal considers to be relevant.

(3) The rules may provide that subsection (1) does not apply in specified kinds of proceedings or in specified circumstances or (without limitation) in relation to specified kinds of issues.

(4) This section does not affect any other law relating to matters of which judicial notice can be taken or about which proof is not required."

219 *Broken Hill Pty Co Ltd v Zunic* (2001) 22 NSWCCR 92 at 102-103 [32].

The appeal to this Court

214 No party has sought to argue that this Court does not have jurisdiction to entertain the appeal which has been the subject of a grant of special leave.[220]

215 The grounds of the appellant's appeal are as follows:

> "[1] The Court erred in holding that section 11A of the [Tribunal Act] would be applicable in the proceedings should they continue in the Tribunal.
>
> [2] Alternatively, the Court erred in taking section 11A into account as a factor against the transfer of the proceedings.
>
> [3] The Court erred in failing to give primacy, in the exercise of its powers under the [Cross-vesting Act], to the consideration that the case should proceed in:
>
> (a) the jurisdiction in which the cause of action arose; and
>
> (b) the jurisdiction in which the parties and the witnesses were to be found,
>
> which in this case was South Australia.
>
> [4] The Court erred in taking into account, or alternatively gave inappropriate weight, in the exercise of its powers under the [Cross-vesting Act], to the fact that the proceedings had been regularly instituted in the Dust Diseases Tribunal."

216 The first paragraph of the recital to the Cross-vesting Act itself identifies two of the consequences of forum shopping, "inconvenience and expense" and par (c) directs attention to the desirability of a hearing in "the appropriate court." The recital is as follows:

> "WHEREAS inconvenience and expense have occasionally been caused to litigants by jurisdictional limitations in federal, State and Territory courts, and whereas it is desirable:

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220 cf *Crampton v The Queen* (2000) 206 CLR 161 at 185 [57] per Gaudron, Gummow and Callinan JJ.

(a) to establish a system of cross-vesting of jurisdiction between those courts, without detracting from the existing jurisdiction of any court;

(b) to structure the system in such a way as to ensure as far as practicable that proceedings concerning matters which, apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction, would be entirely or substantially within the jurisdiction (other than any accrued jurisdiction) of the Federal Court or the Family Court or the jurisdiction of a Supreme Court of a State or Territory are instituted and determined in that court, whilst providing for the determination by one court of federal and State matters in appropriate cases; and

(c) if a proceeding is instituted in a court that is not the appropriate court, to provide a system under which the proceeding will be transferred to the appropriate court."

217 Despite what Sully J said of it the legislature did, in enacting the Cross-vesting Act, indicate that it regarded forum shopping as an evil. The Explanatory Note and second reading speech in respect of the Cross-vesting Act puts this beyond doubt and invites a ruthless response by courts to it. The Explanatory Note states[221]:

> "The Jurisdiction of Courts (Cross-vesting) Bill 1987 seeks to cross-vest jurisdiction in such a way that federal and State courts will, by and large, keep within their 'proper' jurisdictional fields. To achieve this end, the Commonwealth Bill, this Bill and the proposed legislation of other States make detailed and comprehensive provision for transfers between courts which should ensure that proceedings begun in an inappropriate court, or related proceedings begun in separate courts, will be transferred to an appropriate court. The provisions relating to cross-vesting will need to be applied only in those exceptional cases where there are jurisdictional uncertainties and where there is a real need to have matters tried together in the one court. The successful operation of the cross-vesting scheme will depend very much upon courts approaching the legislation in accordance with its general purpose and intention as indicated in the preamble to the Commonwealth and State legislation. Courts will need to be ruthless in the exercise of their transferral powers to ensure that litigants do not engage in 'forum-shopping' by commencing proceedings in inappropriate courts."

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221 Jurisdiction of Courts (Cross-vesting) Bill 1987 (NSW), Explanatory Note at 2.

218 The second reading speech also shows that the legislation formed part of a co-operative endeavour and represents a rather rare consensus of the Commonwealth and the States[222]:

> "The legislation now before the House has been developed by the Special Committee of Solicitors General and approved by the Standing Committee of Attorneys General as the most realizable and effective means of removing jurisdictional disputes across Australia. Similar legislation has been introduced into the Commonwealth Parliament, and either has been or will be introduced in each State, thereby achieving a truly national solution to this most important defect in Australian law. The bill now before the House will avoid inconvenience and expense currently faced by litigants by achieving the following reforms. First, uncertainties as to the jurisdictional limits of State and federal courts will be removed, particularly in the areas of trade practices and family law. Second, the lack of power in the courts to ensure that proceedings which are instituted in different courts, but which ought to be tried together, will be remedied, so that all related proceedings will be heard and determined in one court. It is not anticipated that the new legislation will be utilized on many occasions, but the cases in which difficulties have occurred to date warrant action being taken by respective governments."

219 I turn now to the substantive provisions of the Cross-vesting Act. Section 4(3) vests the jurisdiction of the Supreme Court of the State of New South Wales in the Supreme Courts of the other States[223]. Section 5(2) provides as follows:

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222 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 29 April 1987 at 10750.

223 "**4 Vesting of additional jurisdiction in certain courts**

...

(3) The Supreme Court of another State or of a Territory has and may exercise original and appellate jurisdiction with respect to State matters.

(4) The State Family Court of another State has and may exercise original and appellate jurisdiction with respect to State matters.

(5) Subsection (3) or (4) does not:

(a) invest a Supreme Court or a State Family Court with, or

(b) confer on any such court,

(Footnote continues on next page)

"**5 Transfer of proceedings**

...

(2) Where:

(a) a proceeding (in this subsection referred to as the 'relevant proceeding') is pending in the Supreme Court (in this subsection referred to as the 'first court'); and

(b) it appears to the first court that:

(i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Supreme Court of another State or of a Territory and it is more appropriate that the relevant proceeding be determined by that other Supreme Court;

(ii) having regard to:

(A) whether, in the opinion of the first court, apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the first court and capable of being instituted in the Supreme Court of another State or Territory;

(B) the extent to which, in the opinion of the first court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the State or Territory referred to in sub-subparagraph (A) and not within the jurisdiction of the first court

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jurisdiction with respect to criminal matters."

apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction; and

(C) the interests of justice,

it is more appropriate that the relevant proceeding be determined by that other Supreme Court, or

(iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State or of a Territory,

the first court shall transfer the relevant proceeding to that other Supreme Court."

220 The application at first instance here however had to be brought, first under s 8(1)(a)(ii) and (1)(b)(ii) of the Cross-vesting Act to bring the case into the Supreme Court because the proceedings were not pending in that superior jurisdiction, and then for cross-vesting to South Australia, under s 5(2)(b)(iii). Section 8 relevantly provides:

"**8 Orders by Supreme Court**

(1) Where:

(a) a proceeding (in this subsection referred to as the 'relevant proceeding') is pending in:

(i) a court, other than the Supreme Court, of the State; or

(ii) a tribunal established by or under an Act; and

(b) it appears to the Supreme Court that:

(i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Federal Court, the Family Court or the Supreme Court of another State or of a Territory and, if an order is made under this subsection in relation to the relevant proceeding, there would be grounds on which that other proceeding could be transferred to the Supreme Court; or

(ii) an order should be made under this subsection in relation to the relevant proceeding so that consideration can be given to whether the relevant proceeding should be transferred to another court,

the Supreme Court may, on the application of a party to the relevant proceeding or of its own motion, make an order removing the relevant proceeding to the Supreme Court.

..."

221 Section 11 should also be set out:

"**11 Conduct of proceedings**

(1) Where it appears to a court that the court will, or will be likely to, in determining a matter for determination in a proceeding, be exercising jurisdiction conferred by this Act or by a law of the Commonwealth or a State relating to cross-vesting of jurisdiction:

(a) subject to paragraphs (b) and (c), the court shall, in determining that matter, apply the law in force in the State or Territory in which the court is sitting (including choice of law rules);

(b) subject to paragraph (c), if that matter is a right of action arising under a written law of another State or Territory, the court shall, in determining that matter, apply the written and unwritten law of that other State or Territory; and

(c) the rules of evidence and procedure to be applied in dealing with that matter shall be such as the court considers appropriate in the circumstances, being rules that are applied in a superior court in Australia or in an external Territory.

(2) The reference in subsection (1)(a) to the State or Territory in which the court is sitting is, in relation to the Federal Court or the Family Court, a reference to the State or Territory in which any matter for determination in the proceeding was first commenced in or transferred to that court.

(3) Where a proceeding is transferred or removed to a court (in this subsection referred to as the 'transferee court') from another court (in this subsection referred to as the 'transferor court'), the transferee court shall deal with the proceeding as if, subject to any order of the transferee court, the steps that had been taken for the

purposes of the proceeding in the transferor court (including the making of an order), or similar steps, had been taken in the transferee court."

222 It is important to notice that s 5(2)(b)(iii) of the Cross-vesting Act uses mandatory language, " ... the first court shall transfer." A judge hearing an application for cross-vesting does not therefore have an unfettered discretion. Such a judge must apply his or her mind to the criteria stated in the Act, including the interests of justice, justice it may be observed, to *all* parties, and, if they are satisfied, must cross-vest the case.

223 In this Court the first respondent drew attention to s 30B of the SASC Act which provides as follows:

"**30B Power to make interim assessment of damages**

(1) Where in any action the court determines that a party is entitled to recover damages from another party, it shall be lawful for the court to enter declaratory judgment finally determining the question of liability between the parties, in favour of the party who is entitled to recover damages as aforesaid, and to adjourn the final assessment thereof.

(2) It shall be lawful for the court when entering declaratory judgment and for any judge of the court at any time or times thereafter –

(a) to make orders that the party held liable make such payment or payments on account of the damages to be assessed as to the court seems just; and

(b) in addition to any such order or in lieu thereof, to order that the party held liable make periodic payments to the other party on account of the damages to be assessed during a stated period or until further order:

Provided, however, that where the declaratory judgment has been entered in an action for damages for personal injury, such payment or payments shall not include an allowance for pain or suffering or for bodily or mental harm (as distinct from pecuniary loss resulting therefrom) except where serious and continuing illness or disability results from the injury or except that, where the party entitled to recover damages is incapacitated or partially incapacitated for employment and being in part responsible for his injury is not entitled to recover the full amount of his present or continuing loss of earnings, or of any hospital, medical or other expenses resulting from his injury, the court may order payment or payments not to exceed such loss of earnings and expenses and such payment or payments may be derived either wholly or in part from any damages to which the

party entitled to recover damages has, but for the operation of this proviso, established a present and immediate right or except where the judge is of opinion that there are special circumstances by reason of which this proviso should not apply.

(3) Any order for payment of moneys on account of damages made hereunder may be enforced as a judgment of the court.

(4) Where the court adjourns assessment of damages under this section, it may order the party held liable to make such payment into court or to give such security for payment of damages when finally assessed as it deems just.

(5) When damages are finally assessed credit shall be given in the final assessment for all payments which have been made under this section and the final judgment shall state the full amount of damages, the total of all amounts already paid pursuant to this section and the amount of damages then remaining payable, and judgment shall be entered for the last-named amount.

(6) Where the court adjourns assessment of damages under this section, any party to the proceedings may apply to any judge of the court at any time and from time to time –

(a) for an order that the court proceed to final assessment of the damages; or

(b) for the variation or termination of any order which may have been made for the making of periodic payments.

On the hearing of any such application the judge shall make such order as he considers just:

Provided that, in an action for damages for personal injury, upon an application for an order that the court proceed to final assessment of damages, the Judge to whom such application is made shall not refuse such order if the medical condition of the party entitled to recover damages is such that neither substantial improvement nor substantial deterioration thereof is likely to occur or if a period of four years or more has expired since the date of the declaratory judgment unless the judge is of opinion that there are special circumstances by reason of which such assessment should not then be made.

(7) If it appears to the court that a person in whose favour declaratory judgment has been entered has without reasonable cause failed to undertake such reasonable medical or remedial treatment as his case might have required or require, it shall not award damages for

such disability, pain or suffering as would have been remedied but for such failure.

(8) If at any time it appears to a judge that a person in whose favour declaratory judgment has been entered and who is incapacitated or partially incapacitated for employment, is not sincerely or with the diligence which should be expected of him in the circumstances of his case, attempting to rehabilitate himself for employment any payment or payments under subsection (2) of this section shall not include by way of allowance for loss of earnings a sum in excess of seventy-five per centum of such person's loss of earnings.

(9) –

(a) Notwithstanding anything in the *Survival of Causes of Action Act 1940*, when damages are finally assessed under this section for the benefit of the estate of a deceased person where the deceased person died after action brought and declaratory judgment has been entered in favour of such person, the damages finally assessed may include such damages in respect of any of the matters referred to in section 3 of that Act as the court deems proper.

(b) Where a party dies after declaratory judgment has been entered in his favour but before final assessment of his damages in circumstances which would have entitled any person to recover damages, *solatium* or expenses by action pursuant to Part 2 of the *Wrongs Act 1936-1959*, it shall be lawful for the executor or administrator of the deceased to proceed in the same action for the recovery of such damages, *solatium* or expenses for the benefit of such person notwithstanding the declaratory judgment or that the deceased has received moneys thereunder, provided, however, that in any such proceedings all moneys paid to the deceased pursuant to the declaratory judgment in excess of any actual and subsisting pecuniary loss resulting to him from the wrongful act of the party held liable shall be deemed to have been paid towards satisfaction of the damages, *solatium* or expenses awarded pursuant to the *Wrongs Act 1936-1959* and no further damages shall be payable in respect of the injury sustained by the deceased. In any proceedings hereunder, the declaratory judgment and any finding of fact made in the course of proceedings consequent thereupon shall enure as between the party held liable and the executor or administrator of the deceased.

(c) Where a party dies in the circumstances referred to in the preceding paragraph of this subsection except that the death of the deceased is not wholly attributable to the personal injury, the subject of the declaratory judgment, but was accelerated thereby, it shall be lawful for proceedings to be taken and for the court to assess damages, *solatium* or expenses as in the preceding paragraph but such damages, *solatium* or expenses shall be proportioned to the injury to the person for whom and for whose benefit the proceedings are taken resulting from such acceleration of death.

(d) The Court may, if the justice of a case so requires, assess damages under paragraph *(a)* of this subsection notwithstanding the commencement or prosecution of proceedings under paragraph *(b)* or *(c)* of this subsection and the damages so assessed shall be for the benefit of the estate of the deceased and no damages shall be awarded under paragraph *(b)* or *(c)* of this subsection.

(10) In the exercise of the powers conferred by this section the court shall have regard to the facts and circumstances of the particular case, as they exist from time to time, and any allowance, or the final assessment, as the case may be, shall be such as to the court may seem just and reasonable as compensation to the person actually injured or to his or her dependants as the case may be."

224 The appellant sought to compare that section with s 11A of the Tribunal Act which provides as follows:

"**11A Award of provisional damages**

(1) This section applies to proceedings of the kind referred to in section 11(1) that are brought after the commencement of this section and in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the person who is suffering from the dust-related condition in respect of which the proceedings are brought (***the injured person***) will, as a result or partly as a result of the breach of duty giving rise to the cause of action, develop another dust-related condition.

(2) The tribunal may, in accordance with the rules:

(a) award damages assessed on the assumption that the injured person will not develop another dust-related condition, and

(b) award further damages at a future date if the injured person does develop another dust-related condition."

225 There are notable differences between the two provisions. Section 30B of the SASC Act provides for only one assessment of damages, the final assessment. An interim assessment is purely provisional and does not bind the judge on making the final assessment[224]. Either party may at any time move for final judgment. By contrast, s 11A of the Tribunal Act contemplates conclusive judgment for the first medical condition or stage of it, followed, if the plaintiff seeks and the court grants it, by a further, distinct final judgment for an ensuing condition. Under s 30B, the Supreme Court may, on the application of either party, take into account the progression of the disease after the declaratory judgment in assessing final damages. If an interim payment of damages has been made, there can be an increase or a decrease in the damages so far assessed. It may even be that a plaintiff could be obliged to make a refund. This cannot occur under s 11A. A subsequent assessment is confined to the damages attributable to the second condition.

226 A particular matter of substantial difference is however that s 11A, if applicable, would operate to deprive the appellant of a defence that would otherwise be open: that the first respondent's damages had been assessed and judgment entered for him. Deprivation of a defence is a matter of substance, and a law which has that effect should be characterized as substantive. Accordingly, the parties' apparent acceptance of the substantive law of South Australia as the substantive law applicable would make any further reference to s 11A irrelevant.

227 In accepting, as they appear to have done, that the substantive law of South Australia is to apply no matter where the proceedings are heard and which court hears them, it seems to have been assumed by the parties that what is substantive and what is procedural here are readily distinguishable. It also seems to have been assumed that significant differences in procedural law between proceedings in the Tribunal and in the Supreme Court of South Australia are of little, or no relevance to a question of cross-vesting. In order to test the validity of these assumptions the Tribunal Act as a whole will need careful analysis. This is so despite s 11(1)(a) of the Cross-vesting Act which confers a discretion with respect to the rules of evidence and procedure to be applied. It is nonetheless to be expected that the "transferee court" would ordinarily apply its own rules with respect to these matters. Distinguishing between what is substantive and what is procedural will always however be a fundamental task of the court determining a matter of this kind.

228 The Tribunal is to be constituted by appointees from judges of the Compensation Court (s 7(1) and (2) Tribunal Act). A member is generally to enjoy the same immunity as a judge of the Supreme Court. Its decisions may be enforced in the same way as decisions of the Supreme Court (s 10(5)).

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224 *Settlement Wine v National & General Insurance* (1994) 62 SASR 40 at 47, 54-55.

229 The exclusive jurisdiction conferred by s 11 of the Tribunal Act is in respect of "dust-related condition(s)" which are defined by s 3 as:

> "(a) a disease specified in Schedule l, or
>
> (b) any other pathological condition of the lungs, pleura or peritoneum that is attributable to dust."

Schedule 1 identifies 14 diseases by name.

230 Section 11(4) confers in the nature of a pendant or ancillary jurisdiction in respect of claims arising out of the same cause of action as gave rise to the claim for damages for a dust-related condition.

231 Section 12A eliminates all periodic limitations upon the bringing of proceedings for damages for dust-related conditions and s 12B alters the common law, and is, if not unique, certainly an unusual provision enabling the recovery of damages for non-economic loss by the estate of a person dying after the institution of proceedings for damages with respect to a dust-related condition. The section expressly states that s 2(2)(d) of the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW)[225] does not apply to those proceedings.

232 Section 12C makes special provision regarding the rights and obligations of joint tortfeasors:

> "**12C Effect of settlement on proceedings by or against joint and several tortfeasors**

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225 "**2 Effect of death on certain causes of action**

> ...
>
> (2) Where a cause of action survives ... for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:
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> ...
>
> (d) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall not include any damages for the pain or suffering of that person or for any bodily or mental harm suffered by the person or for the curtailment of the person's expectation of life."

(1) For the avoidance of doubt, settlement with one or more joint tortfeasors in or in relation to proceedings before the Tribunal and who are liable in respect of damage as a result of a dust-related condition is not a bar to recovery against one or more other joint tortfeasors (whether or not they are defendants in the proceedings), unless the terms of the settlement otherwise provide.

(2) A tortfeasor who settles proceedings before the Tribunal that are brought against the tortfeasor by a plaintiff in respect of damage as a result of a dust-related condition is not precluded from recovering contribution in respect of that same damage under section 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* from any other tortfeasor (whether a joint tortfeasor or otherwise) who is not a party to the settlement only because a judgment giving effect to that settlement has been entered in favour of the plaintiff without the Tribunal having considered the merits of the case.

(3) This section does not affect the operation or interpretation of section 5(1)(a) of the *Law Reform (Miscellaneous Provisions) Act 1946*."

233 Section 12D could have the effect of allowing a form of double recovery in part at least of damages under some conventional heads of damage if, as is probably the case in some circumstances, compensation under the *Workers' Compensation (Dust Diseases) Act* 1942 (NSW) is intended to compensate wholly or partly for one or more of the heads of damages referred to in the section which is as follows:

"**12D Damages for non-economic loss not to be reduced by certain compensation payments**

(1) This section applies to proceedings before the Tribunal (including proceedings on an appeal from the Tribunal) for damages in relation to dust-related conditions.

(2) In determining damages for non-economic loss in any such proceedings, no deduction is to be made for any amount of compensation already paid or payable, or payable in the future, under the *Workers' Compensation (Dust Diseases) Act 1942*.

(3) In this section:

> ***damages for non-economic loss*** means damages or compensation for the following:
>
> (a) pain and suffering,
>
> (b) loss of amenities of life,
>
> (c) loss of expectation of life,
>
> (d) disfigurement,
>
> (e) the need for services of a domestic nature or services relating to nursing and attendance which have been or are to be provided to a person by another person, and for which the first person has not paid and is not liable to pay any fee or charge."

234 Sub-sections (1) to (4) of s 13 are consequential provisions. Sub-sections (5) and (6) which are as follows should be noted:

> "**13 Proceedings before the Tribunal**
>
> ...
>
> (5) A decision of the Tribunal is not liable:
>
> (a) to be vitiated because of any informality or want of form, or
>
> (b) to be questioned or appealed against in any court,
>
> except as provided by section 32 of this Act or section 48 of the *Supreme Court Act 1970*.
>
> (6) Whenever appropriate, the Tribunal may reconsider any matter that it has previously dealt with, or rescind or amend any decision that the Tribunal has previously made."

235 Section 32 confines rights of appeal to the Supreme Court to appeals on points of law or on questions of admissibility of evidence, and by leave only, appeals from interlocutory decisions, on costs, and decisions in cases of claims for, or questions relating to, an amount of $20,000 or more. Is this a substantive provision? A defendant deprived of a right of appeal that it might otherwise have in South Australia would surely think so.

236 Section 17(1) is unusual. It arguably at least allows a finding of liability to be made against a person who has not been served with process.

237 Section 20 makes provision for the service of subpoenas. Section 20(2) imposes an obligation upon a subpoenaed person required to produce a document, to produce it written in the English language even if that is not the language of the document itself.

238 The Tribunal may, pursuant to s 23 dispense with such rules of evidence "as might cause expense and delay arising from any commission to take evidence *or arising from any other circumstance*" and may also compel the making of admissions.[226] The same section empowers the Tribunal to allow other dispensations as to proof, including as to identity of parties and authority to act or bind. The Court was not referred to any like provisions in the statute law of South Australia.

239 One effect of ss 25, 25A and 25B is to allow the Tribunal to act on evidence received in other proceedings even though a party may not have had an opportunity of testing that evidence. Another is to preclude, in the Tribunal's discretion, the re-arguing of "issues of a general nature determined in [other] proceedings before the Tribunal" or an appeal from it.

240 The balance of the Tribunal Act, apart from s 32 to which I have already referred and Pt 6, is generally taken up with provisions with respect to contempt, dismissal of frivolous proceedings, costs, service of documents, the giving of directions, mediation, the making of rules, and arbitration. Part 6 among other things makes provision for interim payments of damages against an insurer on a number of bases, including the satisfaction of the Tribunal that a plaintiff has obtained judgment for substantial damages against the (insured) defendant (s 43(3)). The Part also makes provision for the resolution of some differences between insurers when interim damages have been paid.

241 There can be no doubt that both substantively and procedurally the Tribunal Act enacts a very special and largely unique regime for the assessment and recovery of damages by particular plaintiffs. No doubt for reasons thought to be good and valid by the legislature of New South Wales, the regime is one established for the benefit of sufferers of dust-related diseases. It is not a regime in which, as a practical matter, defendants are likely to have the same rights both procedurally and substantively, as plaintiffs, and as they would have in the ordinary course in proceedings in the Supreme Courts of the States. It is a regime not adopted by States other than New South Wales. It is one thing for

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226 In commercial causes in some jurisdictions a similar power is conferred. See the discussion in *Railway Commissioners of NSW v G & C Hoskins Ltd* (1918) 18 SR (NSW) 424 at 427-428 per Cullen CJ. See also Pt 18 of the *Supreme Court Act* 1995 (Q) and Pt 1 r 26(1) of the Supreme Court Rules (NSW). There appears to be no similar provision in South Australia.

one State to establish such a regime to govern the recovery of damages, and thereby affecting commerce, insurance and other activities and events occurring within it, but altogether a different matter to seek to impose it upon other States.

242 This observation may also be made. It is certainly not immediately apparent whether all of the sections of the Tribunal Act which I have noted are either exclusively substantive or exclusively procedural. It seems to me that ambiguity in this regard is a matter highly relevant to a decision under the Cross-vesting Act whether to allow the proceedings to continue in the Tribunal. The advancing of arguable contentions both ways is likely to lead to the sorts of delays, uncertainties and expense which the Tribunal Act is said to have been designed to avoid. The remarks of Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *Regie Nationale des Usines Renault SA v Zhang*[227] of the choice of substantive law to be applied under the Supreme Court Rules (NSW) in litigation in a jurisdiction different from the jurisdiction in which the tort occurred, as to the need for certainty are apposite here[228]:

> "The selection of the *lex loci delicti* as the source of substantive law meets one of the objectives of any choice of law rule, the promotion of certainty in the law. Uncertainty as to the choice of the *lex causae* engenders doubt as to liability and impedes settlement. It is true that to undertake proof of foreign law is a different and more onerous task than, in the case of an intra-Australian tort, to establish the content of federal, State and Territory law. But proof of foreign law is concomitant of reliance upon any choice of law rule which selects a non-Australian *lex causae*."

243 The appellant submitted that uncertainty, as to the constitutionality of some of the provisions of the Tribunal Act, the arguments in respect of which I have earlier summarized, is itself a further reason why the issue of cross-vesting should have been resolved in its favour. There is force in this. No constitutional issue would arise for consideration if the proceedings were to be transferred to South Australia.

244 Trial in South Australia by the Supreme Court under South Australian law both procedural and substantive is, as should already be apparent, much more likely to be conducive to certainty than trial in the Tribunal.

245 Section 11 of the Tribunal Act purports to oust the jurisdiction of any court or tribunal other than the Dust Diseases Tribunal. A Dust Diseases

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227 (2002) 210 CLR 491.

228 (2002) 210 CLR 491 at 517 [66].

Tribunal wherever sitting could not oust the jurisdiction of a South Australian court. The possibility of two or more proceedings being litigated in more than one court or tribunal therefore exists. One such proceeding might be a duly initiated application to the Supreme Court of South Australia for a prerogative writ to prohibit or quash an order or unlawful conduct of the Tribunal sitting in South Australia. It would be undesirable for there to be two proceedings on foot at the same time, a claim by a plaintiff in the Tribunal to be heard in South Australia, and, for example, an application for a declaration by the Supreme Court of South Australia made by a defendant to the former proceedings that the plaintiff's claim is statute-barred.

246 Section 50 of the SASC Act[229] which has analogues and near analogues in the other States of Australia would enable a person aggrieved by an order or

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229 "**Appeals against decisions of judges and masters**

50 (1) Subject to the rules of court an appeal shall lie to the Full Court against every judgment, including every declaratory judgment entered pursuant to section 30B of this Act and any final assessment made thereon, order, or direction of a judge, whether in court or chambers, and also from the refusal of any judge to make any order:

Provided that –

(1) No appeal shall lie from –

(a) an order allowing an extension of time to appeal from a judgment or order:

(b) an order giving unconditional leave to defend an action:

(c) any judgment or order which is by statute, or by agreement of the parties, final or without appeal.

(2) No appeal shall lie without the leave of the judge from any order –

(a) made by consent of the parties:

(b) as to costs only which by law are left to the discretion of the judge.

(3) No appeal shall lie without the leave of the judge or of the Full Court from –

(Footnote continues on next page)

judgment of the South Australian Supreme Court (subject to some non-relevant exceptions) to appeal to the Full Court of the Supreme Court of South Australia as of right. Section 32 of the Tribunal Act limits appeals from the Tribunal, effectively to points of law unless leave be given by the Supreme Court (of New South Wales), and excludes appeals in some matters entirely.

(a) an order on appeal from the Magistrates Court:

(b) any interlocutory order or interlocutory judgment except in the following cases, namely:

(i) Any order refusing unconditional leave to defend:

(ii) Where the liberty of the subject or the custody of infants is concerned:

(iii) Where an injunction or the appointment of a receiver is granted or refused:

(iv) Any decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the *Companies Act 1962*, as amended, or under any corresponding previous enactment, in respect of misfeasance or otherwise:

(v) The grant or refusal of a decree or order *nisi* in a matrimonial cause:

(va) Any assessment of damages not being a final assessment made pursuant to section 30B of this Act:

(vi) Such other cases to be prescribed by rules of court as are, in the opinion of the authority making such rules, of the nature of final decisions.

(2) Subject to the rules of court, an appeal shall lie to a judge against a judgment, order, direction or decision of a master."

247 Let it be assumed as I think must at least arguably be the position, that s 32 of the Tribunal Act is a substantive provision. The parties are agreed that the substantive law of South Australia is to apply. The Supreme Court of New South Wales cannot entertain a general appeal because s 32 precludes it from doing so. And no enactment of either State purports, even if it could do so, to provide for an appeal from the Dust Diseases Tribunal of New South Wales to the Full Court of the Supreme Court of South Australia. To deny a party a true and effective right of appeal is a serious and substantive matter. The effect and interaction of the two provisions to which I have just referred were not the subject of any argument by the parties and I need not express any concluded opinion as to them, but the arguable possibilities to which they give rise point strongly in favour of the cross-vesting of this case to the Supreme Court of South Australia.

248 It must now be accepted following *John Pfeiffer* that s 12A of the Tribunal Act is a substantive provision. The limitations law of South Australia as substantive law, would, as the parties accept, apply. In general it is better that the laws of a State be construed by the Supreme Court of that State for the obvious reason that that Court will be more familiar with, and will construe such laws on a frequent and consistent basis.

249 I am of the opinion that s 12B also of the Tribunal Act is a substantive provision. It effectively provides for a statutory head of damages. Except to the extent that South Australian legislation makes provision if any, of a similar kind, those damages could not be recovered in these proceedings in the Tribunal if it is to apply the substantive law of South Australia.

250 No attention was paid to s 12C of the Tribunal Act or to any South Australian provisions with respect to the recovery of indemnity or contribution by joint tortfeasors, and accordingly it would not be appropriate to say whether the law in each case is the same, or whether there is a difference as to a substantive matter between them. The possibility that there may be, again provides reason to prefer the South Australian Supreme Court as the appropriate forum.

251 It may be that in South Australia, as in other States, credit must be given by a successful plaintiff for the workers' compensation that he or she has received, by submitting to a reduction to that extent in the damages recoverable at common law. Section 12D of the Tribunal Act is to a contrary effect. The assessment of the quantum and heads of damages available are substantive matters. It may therefore be that in proceedings in the Supreme Court of South Australia a reduction would have to be made, if and to the extent that workers' compensation of any kind whether under the New South Wales *Workers' Compensation (Dust Diseases) Act* or any other Act, had been received.

252 Section 17 of the Tribunal Act is capable of producing a situation which justice and accordingly courts generally abhor, of judgment and enforcement of it against a person who has been found liable, even though he or she may not have been served with process in, and be unaware of the proceedings. This is a provision which on its face may appear to be merely procedural but which in fact is capable of producing real and substantive injustice. This Court was not referred to any substantive law of South Australia to a like effect.

253 Sections 23, 25, 25A and 25B do more than relax the rules of evidence. They alter, or at least would allow the Tribunal to depart from the *audi alteram partem* rule. Their effect is to enable the Tribunal to use against a party evidence and findings which it has had no opportunity of testing or controverting. However they may be expressed, provisions capable of producing that outcome, of denying natural justice, do not have the appearance of being merely procedural.

254 Accordingly for those, and these further reasons, the primary judge erred and the appeal must succeed.

255 First, the primary judge fell into error in overlooking that a concession as to the admission of evidence had been made, and in then comparing the South Australian evidentiary standards unfavourably with those of the Tribunal as enacted in the Tribunal Act.

256 In my opinion there was no basis for his Honour's conclusion that the Supreme Court of South Australia could not shift the "procedural gears" as effectively as the Tribunal. His Honour did not specify the procedural gears that he had in mind. This appears to be pure speculation. It is also to cast an unfortunate aspersion upon a Supreme Court of parallel jurisdiction. Contemporary Supreme Courts are more flexible procedurally than in the past. Bedside hearings can and do take place. Expedited hearings are frequently granted. Supreme Courts have a very great depth of experience of injuries and illnesses and the assessment of compensation for them. The fact that the Supreme Court of South Australia is located where the first respondent and most of the witnesses live gives that Court the advantage of proximity, an advantage to which proper regard should have been, but was not had.

257 In my view it was also erroneous to think difference in expense relevant only if the difference were "grossly disproportionate". Just what would constitute gross disproportionality was not spelled out. Any difference that was not minimal should have been weighed in the balance with other relevant considerations.

258 His Honour at first instance emphasized as a matter favouring the Tribunal as the forum, the regular invocation of its jurisdiction by the first respondent. He coupled that with the view of the first respondent's lawyers that their client could

get legitimate procedural evidentiary and cost advantage from litigating in the Tribunal. The party beginning proceedings will always be the party who selects the jurisdiction in which they are to be heard. It is to beg the question to say that because a plaintiff has chosen his or her forum, a defendant cannot ask, or should suffer a disadvantage in asking that it be changed to a more appropriate one. Furthermore, as I pointed out in *Agar v Hyde*[230] one person's legitimate advantage is another person's disadvantage. There should be no presumption in litigation in favour of any party. Courts are required to do equal justice. It is wrong to say that proceedings should be conducted in the, or indeed any Tribunal because a plaintiff, or for that matter a defendant, is likely to have a better chance of winning or more easily winning there. It seems that here, and the trial judge at first instance accepted, that the first respondent's professional advisers who had had considerable experience with the Tribunal, thought their client had better prospects as to liability and damages in the Tribunal than elsewhere. To give effect to that view if it be correct would not be to do equal justice in the cross-vesting application. Even if it be the case that the legislature of New South Wales were to think a claimant's advantage over a defendant a legitimate end, that could provide no basis for its imposition on other States and those entitled to litigate in the courts of them.

259 As I have already pointed out, the primary judge, whilst accepting that the tort arose in substance in South Australia, in the end failed to give this matter much, if any weight at all. In my opinion it will always be an important matter. In some of the cases the expression "natural forum" has been used[231]. I would take the expression to mean in most cases the forum of the jurisdiction in which the tort was committed. It seems to me to be only logical that at least *prima facie* that forum will be better equipped to deal with the issues. The events have taken place there. Some, if not most of the parties have had, and are likely to continue to have a presence there. Proximity to the courts there is likely to lead to both expedition, and savings in expense. But of at least equal importance to all of these is the fact that the events giving rise to the claim were at the time subject to, and regulated by the law of the jurisdiction where they occurred, and in respect of the evaluation of which the court of that place should be the most experienced and efficient. One relevant law will usually be the law relating to insurance. Policies are likely to have been implemented on the basis of the law there relating to damages, remedies, court and appeals. In other ways also, with respect, for example, to relations between employers and employees, the revenue

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230 (2000) 201 CLR 552 at 601-602 [131].

231 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at 641 [157] per Kirby J; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 478 per Lord Goff of Chieveley; *Airbus Industrie GIE v Patel* [1999] 1 AC 119.

laws and commercial laws, and compliance with safety and environmental standards, it may be assumed that the parties have organised their affairs with an eye to the State laws governing them. The parties' reasonable expectation would almost certainly be that in the event of a dispute about any of these matters, it would be resolved according to those laws as interpreted and applied by the court of that State. To these important matters the primary judge has made no reference.

260 His Honour relied on his earlier reasoning in *Zunic*. In my respectful opinion that reasoning was flawed. There his Honour passed over the legislative disapproval of forum shopping by, in effect, saying that it was perhaps not to be regarded as warranting pejorative reference. That was not the point. The point is that the legislature had in mind and expressly set out to reduce or eliminate forum shopping. Whether it was occurring in any particular case is a matter which should be at the forefront of a judge's assessment of an application under the Cross-vesting Act, but it was not in this case.

261 I cannot help observing that this expensive, prolonged, essentially procedural litigation is litigation of the kind against which I warned in *Mobil Oil Australia Pty Limited v Victoria*[232] and is the sort of litigation which will *inevitably* be provoked whenever a legislature, by ambitious long-arm legislation, or a court by too expansive a view of its own powers, or the powers of another court of the same polity, encourages or assists plaintiffs to pursue claims in a non-natural forum.

262 I would allow the appeal. The question remains however what order I should make. The matter could be remitted to the Supreme Court of New South Wales for reconsideration in accordance with these reasons. But I do not think I should do this. Time and expense will be saved by a decision now. It seems to me that this is a clear case for cross-vesting. The Supreme Court of South Australia is well equipped to handle the case. It can do equal justice between the parties. It can do it by applying South Australian substantive and procedural law without the necessity to distinguish between what is substantive and what is truly procedural in the unique, and far from unambiguous relevant provisions of the Tribunal Act. It will not need to decide any constitutional issues. It can determine the case leaving the parties to exercise their ordinary and generally unconstrained rights of appeal to the Full Court of the Supreme Court of South Australia. The Supreme Court of South Australia will be free to exercise its powers under s 30B of the SASC Act to the extent that it thinks it appropriate to do so. It is in the interests of justice within the meaning of s 5(2)(b)(iii) of the Cross-vesting Act, and necessary therefore that the proceedings instituted by the first respondent be determined by the Supreme Court of South Australia.

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232 (2002) 211 CLR 1 at 77 [181]-[183] per Callinan J.

263 I would order that the orders of the Supreme Court of New South Wales entered on 30 October 2002 be set aside and in lieu thereof, that: (a) proceedings number 308 of 2002 in the Dust Diseases Tribunal of New South Wales be removed to the Supreme Court of New South Wales; and (b) the proceedings so removed thereupon be transferred to the Supreme Court of South Australia.