HIGH COURT OF AUSTRALIA

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

ROSS FORSYTH APPELLANT

AND

DEPUTY COMMISSIONER OF TAXATION RESPONDENT

Forsyth v Deputy Commissioner of Taxation [2007] HCA 8
1 March 2007
S543/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

R L Hamilton SC with R L Seiden for the appellant (instructed by Paul Bard Lawyers)

D M J Bennett QC, Solicitor-General of the Commonwealth with R S Quinn for the respondent (instructed by Australian Government Solicitor)

Intervener

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

CATCHWORDS

Forsyth v Deputy Commissioner of Taxation

Courts and judges – Federal jurisdiction in State courts – Whether s 39(2) of the *Judiciary Act* 1903 (Cth) conferred jurisdiction on the District Court of New South Wales to hear and determine an action to recover a penalty under the *Income Tax Assessment Act* 1936 (Cth).

Federal jurisdiction in State courts – Limitations on the jurisdiction of State courts – Whether s 44(1)(a) of the *District Court Act* 1973 (NSW) was a limit on the jurisdiction of the District Court of New South Wales within the meaning of the *Judiciary Act* 1903 (Cth).

Federal jurisdiction in State courts – Statutory interpretation – s 44(1)(a) of the *District Court Act* 1973 (NSW) gave the District Court of New South Wales jurisdiction to hear and dispose of certain classes of actions – Whether s 44(1)(a) should be given an ambulatory or fixed time construction.

Statutory interpretation – Subsequent regulatory change – s 44(1)(a) of the *District Court Act* 1973 (NSW) defined the jurisdiction of the District Court of New South Wales by reference to the allocation of work between the Divisions of the Supreme Court of New South Wales – Whether a subsequent reallocation of work between the Divisions of the Supreme Court of New South Wales alters the jurisdiction of the District Court of New South Wales.

Words and phrases – "ambulatory", "amount payable", "court of competent jurisdiction", "penalty".

Income Tax Assessment Act 1936 (Cth), Pt VI, Div 9, subdiv B; Pt VI, Div 2.
Judiciary Act 1903 (Cth), s 39(2).
Taxation Laws Amendment Act (No 3) 1998 (Cth).
Courts Legislation Further Amendment Act 1998 (NSW).
District Court Act 1973 (NSW), s 44(1).

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ. This is an appeal from the Court of Appeal of the Supreme Court of New South Wales[1] concerning the scope of the federal jurisdiction with which the District Court of that State has been invested. The question is whether, at the relevant time, the District Court had jurisdiction invested by s 39(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") to hear and determine an action by the Deputy Commissioner against the appellant to recover a penalty imposed by the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act").

2 Subject to certain exceptions, conditions and restrictions, none of which is presently relevant, s 39(2) of the Judiciary Act provides:

> "The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it".

3 It often has been said that s 39(2) is "ambulatory" in character and operation[2] and that, as Isaacs J said, the provision is "constantly speaking in the present"[3]. This appeal involves the corollary expressed as follows by Dixon J in *Minister for Army v Parbury Henty & Co; Carrier Air Conditioning Ltd. Brickworks Ltd v Minister for Army*[4]:

> "The limits of jurisdiction of any court so invested found their source in State law and, I presume, any change made by the State in those limits would, under the terms of s 39(2), *ipso facto* make an identical change in its Federal jurisdiction."

4 The appellant contends that the relevant limits under State law of the District Court's jurisdiction were such as to deny the investment of federal jurisdiction by s 39(2) in the matter. The relevant limit contended for is said in

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1 *Forsyth v Deputy Commissioner of Taxation* (2004) 62 NSWLR 132.

2 *Cowen and Zines's Federal Jurisdiction in Australia*, 3rd ed (2002) at 219-220.

3 *Le Mesurier v Connor* (1929) 42 CLR 481 at 503 (emphasis omitted).

4 (1945) 70 CLR 459 at 505.

particular to flow from s 44(1)(a)(i) of the *District Court Act* 1973 (NSW) ("the District Court Act"). For the reasons contained below, that contention must be rejected.

The penalty

5 It is necessary first to consider the nature of the penalty which the Deputy Commissioner sought to recover from the appellant, in particular its statutory source and the provisions of the 1936 Act governing its recovery. The task is not a simple one.

6 Part VI of the 1936 Act is headed "COLLECTION AND RECOVERY OF TAX". Division 9 of Pt VI, headed "Penalties for directors of non-remitting companies", was considered in *Deputy Commissioner of Taxation v Woodhams*[5]. The particular penalty at stake here was imposed by subdiv B (ss 222AOA-222AOJ) of Div 9. Subdivision B imposes penalties on directors of companies which fail to comply with their monthly obligation to remit to the Commissioner certain amounts deducted from the salary or wages of employees. Those amounts are required to be deducted by s 221C, which is located in Div 2 of Pt VI. Division 2 is headed "Collection by Instalments of Tax on Persons other than Companies". The dual obligations of deduction and remittance imposed upon employers were central features of the Pay As You Earn ("PAYE") system for the recovery of the taxation liabilities of employees in respect of their annual salary and wages.

7 The appellant was a director of a company, Premium Technology Pty Ltd ("Premium"). Between 1 August 1997 and 31 May 1999, Premium deducted PAYE instalments totalling $688,845.97 pursuant to Div 2 of Pt VI of the 1936 Act from the salary and wages of its employees. Premium failed to remit the whole of that amount to the Commissioner.

8 Which version of the 1936 Act must be considered? This question arises because the conduct of Premium in failing to remit the moneys straddled amendments made to the PAYE system by the *Taxation Laws Amendment Act (No 3)* 1998 (Cth) ("the 1998 Tax Amendment Act")[6]. These amendments

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5 (2000) 199 CLR 370 at 377-380 [14]-[22].

6 No 47 of 1998.

appear not to have altered the substance of the system, but they did change the apparatus applicable to remittance of amounts deducted on or after 1 July 1998[7]. The amendments had a flow-on effect on Div 9 of Pt VI, including subdiv B thereof[8], because that Division is expressed in terms derivative of obligations imposed elsewhere in the 1936 Act. Later amendments in 1999 transposed the apparatus into the *Taxation Administration Act* 1953 (Cth)[9], but with effect only in relation to "a tax-related liability that becomes due and payable on or after 1 July 2000"[10].

9 As will appear, the penalties were already due and payable by 1 July 2000. Therefore, the 1999 amendments are inapplicable and may be ignored for the purposes of these proceedings. Instead, the relevant versions of the legislation are the 1936 Act prior to the commencement of the 1998 Tax Amendment Act and the 1936 Act after those amendments. Which of the different versions speaks depends upon whether the deductions were made before or after 1 July 1998.

10 Notwithstanding the various amendments to the apparatus for the remittance of PAYE deductions and the recovery of the penalty referred to above, the basic structure of subdiv B of Div 9 of Pt VI remained unchanged at all material times. Subdivision B was enlivened, by force of s 222AOA, if a company had made "one or more deductions having a particular due date", under, relevantly, Div 2 of Pt VI, which included the PAYE machinery. Where subdiv B applied, s 222AOB imposed a continuing obligation upon a director to

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7 1998 Tax Amendment Act, s 3 and Sched 4. Schedule 4 commenced on 23 June 1998 and inserted a new Div 1AAA of Pt VI, entitled "Payment of RPS, PAYE and PPS deductions to Commissioner" (Sched 4, Item 1). The effect was to consolidate all the remittance provisions for the various types of deductions with effect from the 1998/1999 financial year. Consequential repeals and omissions were made to the 1936 Act relating to the former apparatus for the remittance of PAYE and other deductions (Sched 4, Items 6-47).

8 1998 Tax Amendment Act, s 3 and Sched 4, Items 63-65.

9 *A New Tax System (Tax Administration) Act* 1999 (Cth), s 3 and Sched 2.

10 *A New Tax System (Tax Administration) Act* 1999 (Cth), s 3 and Sched 2, Item 2(1).

cause the company to comply with its remittance obligations[11] (or to compound with the Commissioner, appoint an administrator or commence winding-up). This obligation corresponded in duration with the obligation of the company to remit.

11 Sections 222AOC and 222AOD imposed liability upon each director to pay a penalty for failure to comply with the obligation imposed upon the directors by s 222AOB:

> "**Penalty for directors in office on or before due date**
>
> **222AOC.** If section 222AOB is not complied with on or before the due date, each person who was a director of the company at any time during the period beginning on the first deduction day and ending on the due date is liable to pay to the Commissioner, by way of penalty, an amount equal to the unpaid amount of the company's liability under a remittance provision in respect of deductions:
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> (a) that the company has made for the purposes of [Divisions requiring remittance][12], as the case may be; and
>
> (b) whose due date is the same as the due date.
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> **Penalty for new directors**
>
> **222AOD.** If:

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11 In the case of amounts deducted prior to 1 July 1998, the obligation to remit was located in Div 2 of Pt VI of the 1936 Act. In the case of amounts deducted after 1 July 1998, the obligation to remit was located in Div 1AAA of Pt VI of the 1936 Act: 1998 Tax Amendment Act, s 3 and Sched 4, Item 60. Section 222AOB at all times reflected in its terms the precise source of the obligation to remit.

12 Section 222AOC(a) was amended by the 1998 Tax Amendment Act, s 3 and Sched 4, Item 65. The Divisions referred to in par (a) before that amendment were "Division 1AA, 2, 3A, 3B or 4". The Divisions referred to after that amendment were "Division 1AAA, 3B or 4". The amendments were consequential on the creation of the new Div 1AAA of Pt VI, and the consolidation into that Division of the provisions relating to remittance of different types of deductions which had previously been located in Divs 1AA, 2 and 3A.

(a) after the due date, a person becomes, or again becomes, a director of the company at a time when section 222AOB has not yet been complied with; and

(b) at the end of 14 days after the person becomes a director, that section has still not been complied with;

the person is liable to pay to the Commissioner, by way of penalty, an amount equal to the unpaid amount of the liability referred to in section 222AOC."

Both of these provisions applied in the case of the appellant, who had been a director of the company from 10 October 1994 to 21 December 1998, and after ceasing to be a director for a few weeks was appointed again from 1 February 1999.

12 Section 222AOE provided that the penalty was not due and payable until 14 days after a prescribed penalty notice was given to the director:

"The Commissioner is not entitled to recover from a person a penalty payable under this Subdivision until the end of 14 days after the Commissioner gives to the person a notice that:

(a) sets out details of the unpaid amount of the liability referred to in section 222AOC; and

(b) states that the person is liable to pay to the Commissioner, by way of penalty, an amount equal to that unpaid amount, but that the penalty will be remitted if, at the end of 14 days after the notice is given:

(i) the liability has been discharged; or

(ii) an agreement relating to the liability is in force under section 222ALA; or

(iii) the company is under administration within the meaning of the Corporations Law; or

(iv) the company is being wound up."

The Deputy Commissioner issued penalty notices to the appellant on 27 October 1998 and 15 June 1999. None of the actions referred to in s 222AOE(b) was taken. Therefore the effect of s 222AOE was that the penalties became due and payable 14 days after the penalty notices were issued. The "unpaid amount" was ultimately assessed at $414,326.45.

13 The penalty system may be summarised by reading the objects clause, s 222ANA, which relevantly stated:

> "(1) The purpose of this Division is to ensure that a company either meets its obligations under [Divisions including the PAYE remittance obligations], or goes promptly into voluntary administration under Part 5.3A of the Corporations Law or into liquidation.
>
> (2) The Division imposes a duty on the directors to cause the company to do so. The duty is enforced by penalties. However, a penalty can be recovered only if the Commissioner gives written notice to the person concerned. The penalty is automatically remitted if the company meets its obligations, or goes into voluntary administration or liquidation, within 14 days after the notice is given.
>
> (3) A penalty recovered under this Division is applied towards meeting the company's obligations under the relevant Division. Conversely, amounts paid by the company reduce the amount of a penalty."

What was referred to in sub-s (3) of s 222ANA is the feature that the liability of a director to the penalty and the liability of the company under the relevant remittance provisions were "parallel liabilities", such that payment in discharge of either liability operated *pro tanto* to discharge the other (s 222AOH).

The Deputy Commissioner's entitlement to sue

14 The statutory foundation of the Deputy Commissioner's entitlement to sue for the penalty was varied by the 1998 Tax Amendment Act. Nothing, however, turns on this.

15 In respect of unremitted deductions made before 1 July 1998, it must be recalled that both the obligation to deduct and the obligation to remit were located in Div 2 of Pt VI. Section 221R, also located in that Division, made

provision as to what was an "amount payable" for the purposes of Div 2 of Pt VI. Section 221R(1) then provided:

> "An amount payable to the Commissioner under the provisions of this Division shall be a debt due to the Commonwealth and payable to the Commissioner, and may be sued for and recovered in any court of competent jurisdiction by the Commissioner or a Deputy Commissioner suing in his official name."

Section 221R(1AA)(d) stated that "a penalty payable under Subdivision B of Division 9 in relation to a company's liability under this Division" was an "amount payable" under Div 2 of Pt VI. The penalty, in so far as it was in respect of amounts deducted prior to 1 July 1998, was, therefore, recoverable in "any court of competent jurisdiction" by the Deputy Commissioner as a debt pursuant to s 221R.

16 With the commencement of the 1998 Tax Amendment Act, the corresponding provision to s 221R became s 220AAZA. This was located in the new Div 1AAA of Pt VI of the 1936 Act, where the remittance provisions were now placed. The new Div 1AAA (ss 220AAA-220AAZG) is headed "Payment of RPS, PAYE and PPS deductions to Commissioner". Subdivision F (s 220AAZA) is headed "Recovery of amounts by Commissioner". Section 220AAZA(1)(e) defined the "penalty" which is a "recoverable amount" in terms almost identical to the previous s 221R(1AA)(d). Section 220AAZA(2), (3) and (4) provided a substantively identical basis for the Deputy Commissioner's right to sue as the previous s 221R(1). The penalty, in so far as it was in respect of amounts deducted after 1 July 1998, was therefore recoverable in "any court of competent jurisdiction" as a debt by the Deputy Commissioner pursuant to s 220AAZA(4).

The issue

17 Was the New South Wales District Court a court of competent jurisdiction within the above provisions of the 1936 Act? The Deputy Commissioner instituted an action against the appellant on 29 August 2001 by statement of liquidated claim in the District Court. No objection was then taken to the view that the District Court was "a court of competent jurisdiction" within the meaning of either s 221R(1) or s 220AAZA(4) of the 1936 Act, as the case may be. That objection was first pressed in the Court of Appeal.

18 The appellant's objection rests upon the proposition that State law had so altered the jurisdiction of the District Court, as, *ipso facto*, to effect a change in its federal jurisdiction invested by s 39(2) of the Judiciary Act and thus to put the Deputy Commissioner's action beyond jurisdiction. That proposition depends upon the relevant State law, to which we now turn.

19 But it may first be observed that success for the appellant would not guarantee permanent immunity from recovery of the penalty imposed by the 1936 Act. Counsel for the appellant accepted in the course of argument in this Court that a favourable outcome on the appeal would present no impediment to a fresh action by the Deputy Commissioner in a court of competent jurisdiction.

The jurisdiction of the District Court

20 The District Court is a court of record created by statute. It is a court of limited defined jurisdiction, in the sense discussed in *Pelechowski v Registrar, Court of Appeal (NSW)*[13]. By dint of s 9 of the District Court Act, the District Court has a civil jurisdiction consisting of "jurisdiction conferred by Part 3" of the District Court Act together with jurisdiction conferred under any other Act or law. The basic jurisdictional provision in Pt 3 is s 44. Paragraph (a) of s 44(1) prescribes the general jurisdiction of the District Court, with specific provision made in the balance of sub-s (1) for other specific kinds of actions.

21 On 29 August 2001, when the Deputy Commissioner commenced the present proceedings, s 44(1) was in the form substituted by the *Courts Legislation Further Amendment Act* 1997 (NSW) ("the 1997 Amendment Act")[14]. This had commenced on 2 February 1998. It omitted the previous s 44(1)(a), and enacted in its place a provision including the following:

> "Subject to this Act, the Court has jurisdiction to hear and dispose of the following actions:
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> (a) any action of a kind:
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> (i) which, if brought in the Supreme Court, would be assigned to the Common Law Division of that Court, and

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13 (1999) 198 CLR 435.

14 No 141 of 1997 (repealed), Sched 1, Item 1.5[2].

(ii) in which the amount claimed does not exceed $750,000, whether on a balance of account or after an admitted set-off or otherwise,

other than an action referred to in paragraph (d) or (e)".

Paragraphs (d) and (e) made specific provision for there to be no monetary jurisdictional limit in certain kinds of actions, and are not presently relevant. It may be noted that the introduction of s 44(1)(a) in the form it took after enactment of the 1997 Amendment Act represented a departure from the previous versions of s 44(1)(a)[15]. These had all been expressed in terms of "any personal action at law". This criterion had imported a different set of ideas, a matter explored by Priestley JA in *Vale v TMH Haulage Pty Ltd*[16].

22 This appeal turns on the construction of par (a) of s 44(1). The appellant submits that sub-par (i) of that paragraph must be given an ambulatory construction. The relevant question then is whether, if the particular action had been brought in the Supreme Court *at the time when it was brought on 29 August 2001*, it would have been assigned to the Common Law Division of that Court. The Deputy Commissioner (supported by the Attorney-General for New South Wales, who intervened in support of the jurisdiction of the District Court) submits that the sub-paragraph must be given a "fixed-date" construction. The relevant question then is whether, if the action had been brought in the Supreme Court *at the time when s 44(1)(a)(i) came into force on 2 February 1998*, it would have been assigned to the Common Law Division.

23 The Court of Appeal (Spigelman CJ, Giles JA and Gzell J) rejected the appellant's construction, favouring that propounded by the Deputy Commissioner[17]. The above question of construction is the critical issue on the appeal to this Court, although there is also a notice of contention to which some further reference will be made.

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15 The original s 44(1) including par (a) (as amended to increase the monetary limit of the Court) was substituted by s 3 and Sched 2 of the *Courts Legislation (Civil Procedure) Amendment Act* 1991 (NSW) (No 12 of 1991) (repealed). Section 44(1)(a) was then substituted by s 3 and Sched 1, Item [2] of the *District Court Amendment Act* 1997 (NSW) (No 58 of 1997) (repealed).

16 (1993) 31 NSWLR 702 at 707-708.

17 (2004) 62 NSWLR 132 at 139, 146.

The provisions governing the assignment of business within the Supreme Court

24 The construction of par (a)(i) of s 44(1) of the District Court Act turns on the statutory provisions governing from time to time the assignment of business within the Supreme Court of New South Wales. It is necessary to consider these in some detail. Again, the task is not a simple one.

25 Before the commencement on 1 July 1999 of Sched 10 of the *Courts Legislation Further Amendment Act* 1998 (NSW) ("the 1998 Amendment Act")[18], the assignment of business within the Supreme Court had been governed by the *Supreme Court Act* 1970 (NSW) ("the Supreme Court Act"). In Div 2 of Pt 3 (ss 52-55), this had detailed the assignment of business between the Divisions of the Court. Specific provision had been made for the assignment of business to the Equity Division (s 53(3)), the Family Law Division (s 53(3A)), the Administrative Law Division (s 53(3B)), the Criminal Division (s 53(3D)) and the Commercial Division (s 53(3E)). However, with respect to the Common Law Division, s 53(4) had provided:

> "Subject to the rules, there shall be assigned to the Common Law Division all proceedings not assigned to another Division by the foregoing provisions of this section."

Section 53 was expressed to be "[s]ubject to the rules". Further provision was made in Pt 12 of the Supreme Court Rules 1970 (NSW) ("the Rules") then in force for the assignment of business. Part 12 r 4 conferred jurisdiction on the Common Law Division under certain statutes. However, as a general rule, the Common Law Division had assigned to it the residue of the general business of the Court not specifically assigned elsewhere.

26 On the commencement on 1 July 1999 of Sched 10 of the 1998 Amendment Act, the Divisions of the Supreme Court were reduced to two, the Common Law Division and the Equity Division, and the business of the Court was re-assigned between them[19]. The purpose of these changes was said by the

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18 No 172 of 1998 (repealed).

19 1998 Amendment Act, s 3 and Sched 10, Items 1-4; cf Supreme Court Act, Sched 4, Pt 8, in relation to pending proceedings which had already been assigned

(Footnote continues on next page)

Attorney-General in his Second Reading Speech to be to "achieve administrative efficiencies in the operation of the court"[20]. Notwithstanding the introduction of a new s 53 governing the assignment, in general terms, of business between the Divisions, the 1998 Amendment Act also conferred expansive power upon the Rule Committee of the Supreme Court of New South Wales to make provision for the assignment of business within the Court[21]. A new sub-s (3) was added to s 124 of the Supreme Court Act, stating:

> "The rules may make provision for or with respect to the assignment of proceedings to the Court of Appeal or a Division. The assignment by the rules of any proceedings to the Court of Appeal or any Division has effect despite any contrary provision of this or any other Act or law."

27 The appellant submits that, in so far as the Rules permit variation of the business assigned to the Common Law Division of the Supreme Court from time to time, this had had a consequential effect on the content of the jurisdiction of the District Court identified in s 44(1)(a) of the District Court Act.

The assignment of business provisions and taxation claims

28 The dispute now before this Court has arisen because actions of the kind brought by the Deputy Commissioner have not been treated consistently in the assignment of business within the Supreme Court.

29 When the provisions of the 1997 Amendment Act enacting s 44(1)(a) of the District Court Act commenced on 2 February 1998, actions of the kind brought by the Deputy Commissioner against the appellant would have been assigned to the Common Law Division of the Supreme Court. This is by reason of s 53(4) of the Supreme Court Act as it then stood, to which reference has already been made; such proceedings were not assigned specifically elsewhere[22].

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to one of the abolished Divisions at the time of commencement of the 1998 Amendment Act.

20 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 1 December 1998 at 10872.

21 1998 Amendment Act, s 3 and Sched 10, Item 5.

22 Although Pt 12 r 6(1) and Pt 2 of Sched H of the Rules assigned to the Administrative Law Division proceedings "in respect of decisions of a public body

(Footnote continues on next page)

Therefore, if the Deputy Commissioner correctly construes s 44(1)(a), the action was within the jurisdiction of the District Court, s 39(2) of the Judiciary Act operated accordingly, and the appeal must be dismissed.

30 If, however, the appellant is correct, the contrary result would follow. This is because it is not in dispute that, before proceedings against the appellant were commenced, the Rule Committee, acting pursuant to the new s 124(3) of the Supreme Court Act, had made a critical provision in Pt 12 r 5(b)(vi) of the Rules. This assigned to the Equity Division proceedings "in relation to any provision in any Act or Commonwealth Act by which a tax, fee, duty or other impost is levied, collected or administered by or on behalf of the State or the Commonwealth". This rule took effect from 30 June 2000, and was in force when the Deputy Commissioner commenced proceedings.

31 The substance of that rule remains in force, subject to one important qualification[23]. That qualification was introduced on 26 November 2004, when a new Pt 12 r 4(4) of the Rules came into force[24], assigning to the Common Law Division all proceedings for debt arising under any Act (including any Commonwealth Act) "by which a tax, fee, duty or other impost is levied, collected or administered by or on behalf of the State or the Commonwealth". At the same time, such proceedings were excluded from the ambit of the business assigned to the Equity Division by Pt 12 r 5(b)(vi) of the Rules. That qualification would apply to cases such as the present, where what is sued for is a debt due to the Commonwealth and payable to the Commissioner. Such cases would not now be assigned to the Equity Division.

32 Therefore, if the appellant is correct, on 29 August 2001, an action if brought in the Supreme Court would not have been assigned to the Common Law

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or public officer", defined to include persons such as the Deputy Commissioner, actions for the recovery of a taxation debt, or a penalty, were not such proceedings. They may be contrasted with references and appeals against assessments which for some years were dealt with in the Administrative Law Division: Practice Note No 3 [1973] 1 NSWLR 185, rescinded by Practice Note No 44 (1987) 15 NSWLR 29.

23 cf Uniform Civil Procedure Rules 2005 (NSW), r 1.19(f).

24 cf Uniform Civil Procedure Rules 2005 (NSW), r 1.18(a).

Division, and so would not have been within the compass of s 44(1)(a) of the District Court Act. This argument by the appellant assumes for its acceptance that the proceedings are ones "by which" a tax, fee, duty or other impost is levied, collected or administered. This point is agitated by the Deputy Commissioner in the notice of contention in reliance upon doubts expressed by Gzell J in the Court of Appeal[25]. The argument was not supported by the Attorney-General for New South Wales, who intervened otherwise to support the submissions of the Deputy Commissioner.

The appellant's submissions

33 The appellant advanced six grounds in support of his contention that an ambulatory construction should be given to s 44(1)(a) of the District Court Act.

34 The appellant's first argument was that s 39(2) of the Judiciary Act itself is an ambulatory provision which recognises that the jurisdiction of State courts will fluctuate from time to time. This is not, however, a decisive consideration. An anterior federal law, operating at a different level, does not provide guidance as to the scope and purpose of the State legislation which provides the factum for a particular operation of that federal law.

35 Secondly, the appellant submitted that the text of s 44(1)(a) imported a notion of futurity through use of the expression "would be assigned" in sub-par (i). However, this is not so. The provision speaks to actions "of a kind" and asks where such actions "would be assigned". The Solicitor-General for the Commonwealth pointed out in oral submissions on behalf of the Deputy Commissioner that the provision is phrased in the subjunctive so as to identify what are hypothetical actions and that s 44(1)(a) says nothing as to time. This is a significant riposte to the appellant and further reference will be made to it.

36 Thirdly, the appellant submitted that s 68 of the *Interpretation Act* 1987 (NSW) ("the Interpretation Act") applied to this case. Section 68(1) relevantly states:

> "In any Act or instrument, a reference to some other Act or instrument extends to the other Act or instrument, as in force for the time being."

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25 (2004) 62 NSWLR 132 at 146-147.

The appellant submitted that, while there is no express reference in s 44(1)(a)(i) to another enactment, such a reference is implicit. This is so because the Supreme Court Act and the Rules determine which actions would be assigned to the Common Law Division of the Supreme Court. This submission cannot be accepted; there is no "reference to some other Act" within the meaning of s 68. Section 44(1)(a) of the District Court Act refers not to another statute, but to a state of the law as at some particular time; the issue in this case is what is that time.

37 Fourthly, the appellant submitted that, in enacting the 1997 Amendment Act, the Parliament of New South Wales must be taken to have been aware that s 53 of the Supreme Court Act as it then stood, in assigning business between the Divisions, was expressed to be "[s]ubject to the rules". This was said to show that it must have been expected that the jurisdiction of the various Divisions could change over time. If the jurisdiction of the District Court were to be fixed in time, this would have been addressed in the terms of s 44 of the District Court Act. However, no such inference should be drawn. As Spigelman CJ explained in the Court of Appeal, it is not clear that the expression "[s]ubject to the rules" authorised re-assignment of matters from one Division to another, as distinct from merely authorising the Rules to impose additional prerequisites before proceedings were instituted, and other constraints of that nature[26].

38 Fifthly, the appellant submitted that, when it enacted the 1998 Amendment Act which enlarged the rule-making power in s 124 of the Supreme Court Act, the legislature must be taken to have been aware of, and approved of, the corresponding effect that exercise of this power could have on the jurisdiction of the District Court. The appellant emphasised that an exercise of the power under s 124(3) was expressed to have "effect despite any contrary provision of this or any other Act or law". However, that provision goes to the validity of the internal arrangements made in the Rules pursuant to s 124(3), when read against any contrary enactments. It says nothing about the construction of the earlier statute, the 1997 Amendment Act, which inserted s 44(1)(a) of the District Court Act.

39 Sixthly, the appellant submitted that there was a principle of statutory construction at common law favouring the ambulatory approach for which he contended. The correctness of this proposition in its generality was denied by the

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26 (2004) 62 NSWLR 132 at 136.

Deputy Commissioner. The Deputy Commissioner did, however, acknowledge that a rebuttable "presumption" that a statute is "always speaking" had found some degree of academic[27] and judicial[28] support in the United Kingdom. The terminology of rebuttable presumption is apt to mislead. What it bespeaks is an exercise in statutory interpretation which seeks to discern what is called the intention of the legislature in enacting the specific provision, having regard to its context, scope and purpose[29]. To that task with respect to s 44(1)(a) we now turn.

Which construction is correct?

40 The extrinsic materials to which recourse may be had pursuant to s 34 of the Interpretation Act did not throw much light on the matter. Neither the Second Reading Speech[30] nor the Explanatory Note accompanying the Bill which became the 1997 Amendment Act provides any expansive explanation of what the legislature was trying to achieve in casting s 44(1)(a)(i) as it did. Innocent of what would transpire in the present litigation, the Explanatory Note confidently stated that the legislative purpose was "to remove any doubt as to the kinds of action with respect to which the District Court has jurisdiction"[31].

41 Regard must be had to the nature of the court upon which jurisdiction is conferred. There is no particular reason to assume that Parliament would have intended that the conferral of jurisdiction upon a court of limited and defined jurisdiction should be construed in an ambulatory or "always-speaking" manner.

42 If attention be directed to the mischief which the legislation was designed to remedy, the only indication of what this was thought to be is the reference in

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27 Bennion, *Statutory Interpretation*, 4th ed (2002) at 762-763.

28 *Victor Chandler International Ltd v Customs and Excise Commissioners* [2000] 1 WLR 1296 at 1303-1304; [2000] 2 All ER 315 at 322-323.

29 See *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

30 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 12 November 1997 at 1602-1603.

31 Explanatory Note to the Courts Legislation Further Amendment Bill 1997 at 4.

the Explanatory Note accompanying the 1997 Amendment Act to removing doubts as to the District Court's jurisdiction. An ambulatory construction would not serve that objective. If anything, it would introduce a new source of doubt, necessitating continual inquiries as to the assignment of business within the Supreme Court.

43 On the other hand, it is consistent with the removal of doubts that the jurisdiction of the District Court be fixed by reference to those actions which at the time of the enactment were not assigned to a specialist Division within the Supreme Court. The phrasing of sub-par (i) of s 44(1)(a) in the subjunctive is apt to accommodate future actions by asking whether, at the time of the commencement of s 44, they would have been assigned to the Common Law Division if commenced in the Supreme Court. On the other hand, the reference in sub-par (ii) to the limit of $750,000 was fixed. This secured the evident objective of equipping the District Court to handle many common law actions which before the enactment of s 44 would have been instituted and remained in the Supreme Court. The circumstance that the structure of the Supreme Court subsequently was altered does not detract from the cogency of these considerations.

44 Further, on any view, sub-par (ii) of s 44(1)(a), with the specification of the monetary limit to the District Court's jurisdiction, did not admit of an ambulatory construction. Consistency does not favour giving sub-par (i) of s 44(1)(a) such a construction, thereby differentiating between the two conditions which the hypothetical action spoken of in s 44(1)(a) must satisfy.

45 For all these reasons, the appellant's construction must be rejected. Sub-paragraph (i) of s 44(1)(a) of the District Court Act must be construed as referring to actions which would have been assigned to the Common Law Division of the Supreme Court as at the time when the 1997 Amendment Act was enacted. Accordingly, the District Court was invested with federal jurisdiction to determine the Deputy Commissioner's action, and the appeal must fail.

The notice of contention

46 Given the above conclusion, it is unnecessary to express any views upon the Deputy Commissioner's notice of contention to the effect that an action for the recovery of a penalty for which a director is liable pursuant to subdiv B of Div 9 of Pt VI of the 1936 Act is not a proceeding by which a "tax, fee, duty or

other impost" is levied, collected or administered, and so, in any event, would not have been assigned to the Equity Division of the Supreme Court.

Order

47 The appeal should be dismissed with costs.

48 KIRBY J. Giving meaning to legislation is an inherently disputable activity[32]. This is especially so where the problem has already engaged three levels of the judicial hierarchy[33]. It is not uncommon for differences of opinion to emerge during the litigious journey. Sometimes such differences can be explained by different responses to statutory language or to the context or the purpose discerned in the legislation. Intuitive judgments, often difficult to explain in words, are involved in the task. Different judicial values sometimes inform the resolution of the problem. In the present case all of the foregoing considerations play a part in the outcome.

Appeals and the disputable meaning of legislation

49 Where six Justices of this Court conclude that a contested construction of legislation must be decided in a particular way, their resolution becomes the only correct and lawful interpretation offered by our system of law. Such a high degree of unanimity and substantial concurrence on the point in the Court of Appeal of New South Wales, from which the appeal comes[34], suggest, at the least, a strongly arguable interpretation which (whatever one's doubts) a judge inclining to a differing view might accept. To do so eases the burden. It involves acceptance of majority wisdom. It recognises that questions of this kind rarely, if ever, have an objectively "correct" resolution. Why trouble to express a different view when it cannot alter the outcome of the proceedings or contribute to any binding legal principle for which the case will stand[35]?

50 There are particular reasons why rejecting this appeal might be attractive. The objection to the jurisdiction of the District Court of New South Wales that is now in contest, was not raised at the trial. When the appeal was before the Court of Appeal, it was not the sole point of resistance to the judgment of the District Court advanced by the appellant. Other points, also of a technical kind, were raised and successively rejected[36]. They are not now before this Court.

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32 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42] per McHugh J.

33 As in this case, the Court of Appeal of New South Wales; the Special Leave Panel of this Court; and the Full Court. The point was not raised or determined in the District Court of New South Wales.

34 *Forsyth v Deputy Commissioner of Taxation* (2004) 62 NSWLR 132. As is explained below at [109]-[111], Gzell J added an additional ground for dismissing the appeal. See at 146 [70].

35 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 417-418 [56].

36 *Forsyth* (2004) 62 NSWLR 132 at 139-146 [36]-[66] (the validity of notices and an argument of abuse of process). A further argument raised before this Court

(Footnote continues on next page)

51 The appellant's objection to jurisdiction is entirely technical. It is not concerned with the factual merits of his excuse (if there be one) concerning his liability, under ss 222AOC and 222AOD of the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act"), as a director in office of a company which failed to remit to the Commissioner the amounts it deducted from the salaries of its employees under the PAYE system for the instalment remission of employees' income tax[37]. That system is one of great importance for the integrity of the collection of tax payments in Australia, upon which the governmental system of the country depends.

52 Moreover, it was accepted during argument that there was no time bar or other limitation in the way of the later pursuit of a recovery from the appellant in fresh proceedings, were the present appeal to succeed[38]. A measure of irritation about the appellant's jurisdictional argument is therefore understandable. Especially so because, as it appears, if his argument is correct, supervening changes in the jurisdiction of the Common Law Division of the Supreme Court of New South Wales would result in the commencement of fresh proceedings in the District Court, the very court whose jurisdiction the appellant now challenges[39].

53 Yet it is of the first importance for the rule of law which underpins Australia's constitutional arrangements[40], that technical legal arguments, if found to be valid, should ordinarily be upheld. If they have merit in law, that is normally sufficient to attract relief from a court of law. Especially so where what is involved is the jurisdiction of a court within the integrated Judicature of the Commonwealth. The absence of such jurisdiction, if legally established, destroys the hypothesis upon which the binding force of the court's judgment and orders rests. This Court was informed that, apart from the position of the appellant, other cases wait in the wings for the resolution of this appeal.

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concerning the validity of the appointment of Acting Judges to the District Court of New South Wales was abandoned following the decision of the Court in *Forge v Australian Securities and Investments Commission* (2006) 80 ALJR 1606; 229 ALR 223.

37 See reasons of Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ ("the joint reasons") at [8]-[13].

38 Joint reasons at [19].

39 See joint reasons at [31].

40 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513-514 [104].

54 Also important for such resolution is the context of federal jurisdiction provided by the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"), s 39(2). The appellant argued that this had been given inadequate attention by the Court of Appeal as a contextual matter supporting his case[41]. It is central to the hypothesis upon which the integrated courts provided for in the Australian Constitution operate, that a court exercising federal jurisdiction shall "neither exceed nor neglect any jurisdiction which the law confers on" it[42].

55 Pursuant to special leave, the appellant now has his objection before the Full Court of this Court. The objection has been argued in full. Whilst a conclusion adverse to the appellant has found favour with the majority and will control the outcome of the appeal, it is my opinion that such conclusion is legally flawed. The correct interpretation of the legislation in issue is that urged for the appellant. Having reached that conclusion, I am obliged to give effect to it and to explain why. Other branches of government suppress differences and legitimately deal in compromises. In the discharge of the work of the judicial branch, the governing obligation of all members is individual honesty and transparent integrity. Process is important; not just outcomes.

The facts, legislation and common ground

56 *The facts and legislation*: The facts and the legislation necessary for an understanding of this appeal are set out in the reasons of Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ ("the joint reasons"). I will not repeat any of the descriptive material[43].

57 *The common ground*: None of the facts necessary to the resolution of the appeal was contested. Nor is it essential to add reference to any other legislation. The question for statutory construction presented by the appeal is a relatively confined and straight-forward one. Ultimately, it is directed to the issue of whether, when the Deputy Commissioner of Taxation ("the respondent") commenced proceedings in the District Court against Mr Ross Forsyth ("the

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41 In this matter the Court of Appeal recognised that the District Court was exercising federal jurisdiction as contemplated by the Constitution, ss 75(iii) and 76(ii) and by the Judiciary Act, s 39(2). See *Forsyth* (2004) 62 NSWLR 132 at 135 [6]-[7].

42 cf *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513-514 [104].

43 The facts appear in the joint reasons at [5]-[7]. The legislative scheme for the recovery of the "penalty" and for the jurisdiction of the District Court when exercising federal jurisdiction also appears there at [5]-[16].

appellant"), that Court was "invested with federal jurisdiction" within the meaning of s 39(2) of the Judiciary Act.

58 Unless, having regard to its "locality, subject-matter, or otherwise", the respondent's action was "within the limits of" the jurisdiction of the District Court, that Court had no power or authority under federal law to entertain the respondent's proceedings. Specifically, it had no power or authority to make orders or to enter judgment against the appellant. Although the point of jurisdiction was not pleaded or raised at trial, it is a fundamental one. It goes to the root of the validity of the orders made. The appellant might be penalised in costs for having failed to raise the objection at an earlier stage. However, if he could make good his arguments of law and demonstrate the invalidity of the District Court's assumption of jurisdiction whilst the proceedings are before the Judicature, he would ordinarily be entitled to relief against the judgment and orders concerned. No discretionary or like considerations would warrant withholding relief in the circumstances of this case.

59 Because the law providing for the investment of federal jurisdiction in the District Court refers to the "several Courts of the States" and to the "limits of their several jurisdictions", it is inherent in the scheme for conferring federal jurisdiction, as envisaged by the Constitution[44] and enacted by federal law, that regard must be had to the applicable State law providing for, and defining, the "limits of [the] several jurisdictions" of the State court concerned. Thereby, federal law "picks up" the relevant State law which then operates not by its own force but as a kind of "surrogate federal law" given effect by the Judiciary Act in order to fulfil the scheme of the Constitution's "autochthonous expedient"[45].

60 The State law so applied is, relevantly, s 44(1)(a)(i) of the *District Court Act* 1973 (NSW) ("the District Court Act")[46]. It follows that the focus of attention in this appeal has been on the meaning of that sub-paragraph. It is not the sub-paragraph as an item of State law to which this Court gives effect but as a provision envisaged by, and effectively given the force of federal law in, the Judiciary Act, s 39(2). Although I do not understand this point to be contested by the respondent (or disputed in the joint reasons), it is, as I shall show, an important consideration, with consequences for the meaning to be given to s 44(1)(a)(i) of the District Court Act. And it points to a construction opposite to that reached by the majority.

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44 Constitution, s 77(iii).

45 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

46 cf *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134-135 [24], 146 [60], 169 [139].

61 At the time s 44(1)(a)(i) took the form in which it appeared when the respondent commenced his proceedings[47], invoking the jurisdiction of the District Court, those proceedings "if brought in the Supreme Court" would not then "be assigned to the Common Law Division of that Court". By reason of changes to the inter-Divisional assignments of jurisdiction in the Supreme Court made before the filing of the statement of liquidated claim in the District Court, an action of that kind "would be assigned" to the Equity Division of the Supreme Court[48]. It was this change of assignment that occasioned the appellant's submissions critical to the fate of this appeal.

62 Put simply, the appellant argued that, if the respondent's action had been brought in the Supreme Court, it would not have been assigned to the Common Law Division of that Court but to the Equity Division. It followed that the precondition to the existence of jurisdiction in the District Court to "hear and dispose of" the respondent's action, as stated in s 44(1)(a)(i) of the District Court Act, was absent. The precondition to the existence of jurisdiction in the District Court was not enlivened either by the terms of the relevant federal law (the Judiciary Act, s 39(2)) or by the relevant State law which that federal law picked up and applied (the District Court Act, s 44(1)(a)(i)).

63 In an attempt to scramble out of the consequences of such a construction, suggested by the language of the federal and State laws as they intermesh, the respondent urged that the State law, engaged by the federal law, was to be given a "fixed time" interpretation and not the "ambulatory" interpretation urged for the

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47 On 29 August 2001. See joint reasons at [17], [21].

48 Joint reasons at [26] fn 19, [30]. On 30 June 2000, Pt 12 r 5(b)(vi) of the Supreme Court Rules 1970 (NSW) was added:

> "There shall be assigned to the Equity Division:
>
> ...
>
> (b) proceedings in the Court:
>
> ...
>
> (vi) in relation to any provision in any Act or Commonwealth Act by which a tax, fee, duty or other impost is levied, collected or administered by or on behalf of the State or the Commonwealth".

It was accepted by the parties that this Rule was in force when these proceedings were commenced.

appellant. That submission is accepted in the joint reasons[49]. With respect, I find it unconvincing.

64 As the joint reasons correctly acknowledge, there is nothing in the explanatory note or the Second Reading Speech introducing the amendment to s 44(1)(a) of the District Court Act[50], to support the favoured construction[51]. As I shall show, the respondent's construction is fundamentally inconsistent with (1) the language of the governing legislation; (2) the decisional background against which the amendment to the District Court Act was introduced; (3) the canons of construction that govern the ascertainment of the meaning of such legislation; and (4) various considerations of general principle that support the appellant's submission, however inconvenient the consequences which then follow in this case.

The issues

65 Two issues are presented by this appeal:

(1) *The ambulatory or fixed time meaning issue*: Whether, in the context of its application to the ascertainment of the limit of the jurisdiction of the District Court for the purposes of s 39(2) of the Judiciary Act, s 44(1)(a)(i) of the District Court Act is to be given an ambulatory construction, so that it speaks from time to time (relevantly, to the time at which the respondent commenced his proceedings against the appellant). Or whether s 44(1)(a)(i) is to be given a "fixed time" meaning so that it speaks only to the time at which it was enacted. It is not contested that an action of the kind brought by the respondent against the appellant at the time s 44(1)(a)(i) was enacted was one "which, if brought in the Supreme Court, would be assigned to the Common Law Division of that Court". Hence, if the correct construction of s 44(1)(a)(i) is that it should be given a "fixed time" meaning, the respondent's action was within the jurisdiction of the District Court when the respondent engaged that jurisdiction by filing his process against the appellant; and

(2) *The levying of the tax, fee, duty or other impost issue*: By a notice of contention, the respondent raised defensively an argument to support the orders of the Court of Appeal on an additional ground favoured only by

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49 Joint reasons at [40]-[45].

50 *Courts Legislation Further Amendment Act* 1997 (NSW), Sched 1 Item 1.5[2]. See joint reasons at [21].

51 Joint reasons at [40].

Gzell J in that Court[52]. That ground presents the issue whether, in terms of the applicable provisions of the federal tax legislation giving rise to the propounded obligation of the appellant to the respondent[53], such proceedings were ones by which a "tax, fee, duty or other impost is levied, collected or administered". If, properly characterised, the proceedings do not engage such a description, such proceedings would not have been assigned to the Equity Division of the Supreme Court even if an ambulatory meaning were given to the Rules of the Supreme Court of New South Wales applicable when the respondent's proceedings were commenced in the District Court. They would therefore have remained in the Common Law Division. Hence, they would have qualified under the District Court Act, s 44(1)(a)(i), to enliven the jurisdiction of the District Court "to hear and dispose of" such an action and to do so under federal law in this case.

66 The joint reasons conclude that s 44(1)(a)(i) of the District Court Act should be given a "fixed time" meaning, thereby sustaining dismissal of the appeal on the first issue without determination of the second issue. In my opinion, each of the issues should be answered adversely to the respondent.

The District Court Act s 44(1)(a)(i) is ambulatory

67 *The federal context*: In a beneficial and original provision, the Constitution of the Commonwealth envisages "investing any court of a State with federal jurisdiction"[54]. The Constitution also provides for the creation of federal courts, other than this Court, and for the definition of the jurisdiction of such courts and for the extent to which such jurisdiction should "be exclusive of that which belongs to or is invested in the courts of the States"[55].

68 The Constitution, and federal law made under it, might have proceeded to confine the exercise of all federal jurisdiction to federal courts. However, this was not done. Instead, the original notion of investing State courts with federal jurisdiction has persisted. The present is such a case. By s 220AAZA(4) of the 1936 Act[56], it is provided that:

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52 *Forsyth* (2004) 62 NSWLR 132 at 146 [70].

53 Subdiv B of Div 9 of Pt VI of the 1936 Act. See joint reasons at [46].

54 Constitution, s 77(iii).

55 Constitution, s 77(ii). See also s 77(i).

56 In respect of the deductions made prior to 1 July 1998, s 221R of the 1936 Act applies. See joint reasons at [15]-[16].

> "A recoverable amount may be sued for and recovered in a court of competent jurisdiction by the Commissioner or a Deputy Commissioner suing in his or her official name."

69 In the present case, it was pursuant to this federal law that the respondent sought to invoke the jurisdiction of the District Court. However, by the federal law mentioned, a precondition to that invocation is that the court must be a court "of competent jurisdiction". Such is required by the federal legislation particular to this case. It is also required by the general scheme for the exercise of federal jurisdiction, enacted by the Federal Parliament soon after the Constitution came into force. By s 39(2) of the Judiciary Act, the investment of federal jurisdiction in the "several Courts of the States" is confined to remaining "within the limits of their several jurisdictions".

70 The original constitutional idea of investing federal jurisdiction in State courts would not have worked successfully and efficiently if the Federal Parliament had purported to establish rules for the limits of jurisdiction different from those defined by State laws. Had the Federal Parliament conferred federal jurisdiction on a Local or Magistrates Court of a State in terms indifferent to the limits imposed on such courts by State laws, the result would have been to disrupt the orderly conduct by those courts of State jurisdiction and possibly to exceed the competence, powers, experience and any specialist expertise of the State court concerned.

71 So much is self-evident. But it is equally plain (and has been the experience of the Commonwealth since federation) that the number and identity of the "several Courts of the States" has changed over time. Particular State courts have been created, abolished, sometimes re-created in a new form, modified and renamed over time, in response to the perceived needs of the several States as determined by their Parliaments[57]. This was an inevitable development, and thus within the contemplation of the constitutional and statutory provisions in Australia for the exercise by State courts of federal jurisdiction. So was the alteration from time to time of the limits imposed by State law on the jurisdiction of State courts. Thus, over the decades of federation, the jurisdiction of the District Court of New South Wales has changed

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57 Examples include the Industrial Court of New South Wales. For the history of that Court see *Batterham v QSR Ltd* (2006) 80 ALJR 995 at 1010-1011 [71]-[72]; 227 ALR 212 at 230-231. There are many other examples including the former Land and Valuation Court of New South Wales created by the *Land and Valuation Court Act* 1921 (NSW); the then Workers' Compensation Commission, created by the *Workers' Compensation Act* 1926 (NSW); and the former Compensation Court of New South Wales created by the *Compensation Court Act* 1984 (NSW).

significantly[58]. The constitutional and federal legislative provisions must be taken to have anticipated such variations, and to have provided for them and adapted to them.

72 The scheme for the operation of the interactive federal and State legislation contemplated by the Constitution and by s 39(2) of the Judiciary Act is relatively simple. In order to discover whether one of the "several Courts of the States" shall be "invested with federal jurisdiction" a straight-forward criterion is expressed. The jurisdiction concerned is to be "within the limits" fixed by State law, "whether such limits are as to locality, subject-matter, or otherwise". Because such "limits" may be changed from time to time by State law, the measure of federal jurisdiction is provided by the expressed limits of State jurisdiction. Hence, Dixon J's correct inference that any change made by the State to the "limits" of the jurisdiction of a State court "would, under the terms of s 39(2), *ipso facto* make an identical change in its Federal jurisdiction"[59]. In *The Commonwealth v The District Court of the Metropolitan District Holden at Sydney*[60], this Court said:

> "The view that has been tacitly accepted is that the expression 'within the limits of their several jurisdictions' refers to the limits imposed by the relevant State law in operation *from time to time* whether enacted before or after the commencement of the *Judiciary Act*".

73 These features of the interactive provisions of the Constitution, of general and special federal legislation and of State law, do not, of themselves, resolve the present point of construction. However, they do suggest that the appellant has the better side of the argument. This is because the whole idea that lies behind the federal provisions for the conferral of federal jurisdiction on State courts contemplates that such conferral will accord with alterations in the limits provided by State law, as made from time to time. No other inter-relationship would work effectively or be consistent with the arrangement contemplated in the provisions of s 39(2) of the Judiciary Act.

74 Once it is appreciated that the "limits" of such jurisdiction may, and do, vary from time to time, thereby altering the availability of a State court for the

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58 The history of the District Court of New South Wales and of its powers, dating from the first creation of such courts by the *District Courts Act* 1858 (NSW), is described in *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 473-474 [118]-[119].

59 *Minister of State for the Army v Parbury Henty & Co Pty Ltd* (1945) 70 CLR 459 at 505.

60 (1954) 90 CLR 13 at 20 per Dixon CJ, Kitto and Taylor JJ (emphasis added).

investment of the federal jurisdiction applicable to the particular case, it can be understood that such jurisdiction will be altered from time to time. As would ordinarily be contemplated, the new limits provided by State law (given effect by the federal law) will normally apply to a federal action with reference to the date on which such proceedings purport to engage the jurisdiction of the court concerned.

75 The joint reasons state that the contemplation of fluctuation of jurisdiction from time to time, expressed in s 39(2) of the Judiciary Act, is not a "decisive consideration"[61]. It may not be "decisive", true. However, it is surely a very powerful contextual argument for the interpretation of a State law addressed to defining the "limits" of the jurisdiction of a State court that inevitably attracts the operation of s 39(2) of the Judiciary Act. State law-makers can be deemed to know that, under s 39(2), virtually since federation, alterations to the "limits of [the] several jurisdictions" of the "Courts of the States" *ipso facto* alter the capacity of such courts to be "invested with federal jurisdiction" in the designated matters. It must be remembered, also, that the integrated character of the federal and State courts within the Judicature of the Commonwealth[62] is a vitally important and beneficial feature of the Australian constitutional and legislative design. Accordingly, no interpretation should be adopted that would divorce the reading of State legislation relevant to the specification of the "limits of [the] jurisdictions" of State courts from the consequences that such alterations automatically have for the exercise of federal jurisdiction from time to time.

76 Authorities and analogies from other countries do not bear upon this important matter of the Australian constitutional context. That is a context highly significant for the interpretation of a provision such as s 44(1)(a)(i) of the District Court Act. The Court of Appeal was correct to note that the jurisdiction in this case, as exercised by the District Court, was federal jurisdiction[63]. However, it erred in failing to perceive the significance of that conclusion for the construction of the State law where, as in this case, that law became the means by which the limits of the District Court's jurisdiction were defined, from time to time, for the purposes of the Judiciary Act of the Commonwealth.

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61 Joint reasons at [34].

62 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 94-96 per Toohey J, 103 per Gaudron J, 115-118 per McHugh J, 137-139 per Gummow J.

63 In this respect, it did not fall into the error evident in several earlier proceedings in this Court where the point was overlooked. See eg *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 69 [98].

77 The provisions of s 39(2) of the Judiciary Act have been described as themselves continuing "in force from day to day as a law presently speaking, and [operating] upon the courts of a State as they are brought into existence and upon the limits of their respective jurisdictions as they are defined or redefined"[64]. Indeed, those provisions have been described as the means of continuing "to bring up to date federal jurisdiction in line with the latest State law on State jurisdiction"[65]. This, in my view, is how they should be construed.

78 This construction does not imply any power on the part of the Federal Parliament to alter the State courts in which jurisdiction is invested[66]. On the contrary, it involves a recognition that the Federal Parliament selects the State court concerned, with the appreciation that the "limits" of its jurisdiction may be altered unilaterally from time to time by State law. If the federal law-maker does not like subsequent changes, its remedy is to withdraw the investment of federal jurisdiction and to invest the jurisdiction concerned in a federal court. That remedy has been available since 1903 because of the existence of this Court. However, in recent times especially, it has become a much more viable proposition, following the creation of several federal courts with large jurisdictions and powers.

79 It follows that the scheme of the applicable federal legislation expressly envisages the enactment of ambulatory State provisions which, as enacted over time and as successively amended, will define the limits of jurisdiction that they provide to apply to actions which the parties initiate in the several courts of the States. To adopt a "fixed time" interpretation of s 44(1)(a)(i) of the District Court Act undermines the simple operation of State laws providing successive and different "limits" to the several jurisdictions of State courts. The ambulatory construction, urged by the appellant, avoids such an outcome. It fulfils the provision for the fluctuation in State laws long envisaged by the terms of the federal Judiciary Act.

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64 *The Commonwealth v The District Court of the Metropolitan District Holden at Sydney* (1954) 90 CLR 13 at 22, see also at 20; *Le Mesurier v Connor* (1929) 42 CLR 481 at 503.

65 *Lane's Commentary on The Australian Constitution*, 2nd ed (1997) at 633. See generally at 632-634.

66 *Le Mesurier v Connor* (1929) 42 CLR 481 at 496. But cf *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 545, 574, 592 noted in (1989) 63 *Australian Law Journal* 666.

80 *Textual indications*: The majority are not convinced by the textual considerations urged by the appellant[67]. However, in this respect, they are mistaken.

81 The language of s 44(1)(a)(i) is expressed in terms of the subjunctive mood ("*if* brought in the Supreme Court, *would be* assigned to the Common Law Division"). The use of the subjunctive mood suggests the contemplation of the hypothesis that the jurisdiction of the Common Law Division of the Supreme Court would be altered from time to time after the adoption of this version of s 44(1)(a).

82 Had it been the intention of the State Parliament to adopt a "fixed time" provision in s 44(1)(a)(i), it would have said so. Thus, it would have used the ordinary (or indicative) mood in the sub-paragraph. Thus, it would have said "which, if brought in the Supreme Court, *is* assigned to the Common Law Division of that Court". Such would have been the language appropriate to fixing the jurisdiction of the Common Law Division as that existing at the time of the enactment of the provision.

83 Instead, the subjunctive mood reflects the double hypothesis required of the reader of the sub-paragraph. First, the reader must hypothesise the bringing of the proceedings in the Supreme Court (although they are actually brought in the District Court). And secondly, the reader must ask where such hypothesised proceedings "would be assigned" within the Supreme Court, that is, would be assigned at the time that is relevant, namely on their commencement. In a provision expressed in the subjunctive mood and in such conditional and hypothetical terms, it is quite artificial to impose a meaning that is fixed in time.

84 Elsewhere in the joint reasons, it is argued that, as a matter of textual analysis, the definite and fixed language appearing in s 44(1)(a)(ii) suggests a similar construction for the immediately preceding sub-paragraph, s 44(1)(a)(i)[68]. I beg to differ. Where Parliament has intended a "fixed time" provision, it has said so expressly in plain language stated in the indicative mood and in the present tense ("in which the amount claimed *does not* exceed $750,000")[69]. This

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67 See joint reasons at [35]. See also at [43]-[44].

68 Joint reasons at [44].

69 District Court Act, s 44(1)(a)(ii) (emphasis added). By the *Civil Procedure Act* 2005 (NSW), the jurisdictional limit previously existing in s 44(1)(a)(ii) was amended by removing the fixed dollar amount existing at the time when these proceedings were commenced and replacing it with the present formulation expressed by reference to "the Court's jurisdictional limit". By s 4 of the District Court Act, the "jurisdictional limit" is defined to mean "$750,000".

makes the preceding sub-paragraph, stated in the subjunctive mood and conditionally ("*would be* assigned"), all the more clear as an express indication that Parliament has recognised that varying assignments will arise from time to time and that they must be given meaning as they arise in defining the jurisdiction of the District Court.

85 It is thus in the nature of the *discrimen* adopted in s 44(1)(a)(i) that it is variable and, indeed, capable of variation by subordinate legislation, namely the Rules of the Supreme Court of the State made by the Rule Committee of that Court[70]. Where the State Parliament intended a specific provision to govern the criterion of jurisdiction of the District Court, it said so, as it did in respect of the fixed financial limit of jurisdiction stated in s 44(1)(a)(ii). Where Parliament contemplated a particular character of the action as the *discrimen* for a District Court action, it said so by reference to a quality inherently variable over time (assignment to a specified Division of the Supreme Court) and in language that expressly recognised such variability ("*would be* assigned").

86 Textual analysis therefore supports the interpretation urged by the appellant. It negates the interpretation urged for the respondent.

87 *Assignment incorporates the Rules*: At the time of the enactment of the amendment that introduced s 44(1)(a)(i) into the District Court Act in its present substantive form, the provision for assignments of actions between the Divisions of the Supreme Court of New South Wales, contemplated by the *Supreme Court Act* 1970 (NSW), envisaged the assignment of business between the Divisions as "[s]ubject to the rules"[71]. Therefore, when Parliament chose assignment to the Common Law Division as one of the two criteria for ascertainment of the jurisdiction, in actions of a similar kind in the District Court, inferentially it did so fully aware that such assignment could be altered (as it commonly was[72]) by the simple expedient of the adoption of new Rules of Court.

88 The joint reasons accept what was said in the Court of Appeal[73] that "[i]t is by no means clear that the words '[s]ubject to the rules' in s 53 of the *Supreme Court Act* prior to 1998, authorised the reassignment of matters from one Division to another". They agree that the expression could also credibly concern

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70 *Supreme Court Act* 1970 (NSW), s 124(3).

71 *Supreme Court Act* 1970 (NSW), s 53.

72 See joint reasons at [28]-[32].

73 *Forsyth* (2004) 62 NSWLR 132 at 136 [14].

the imposition of additional prerequisites upon the institution of proceedings in another court[74].

89 This argument is also unconvincing. If the *discrimen* of assignment to a Division of the Supreme Court is adopted, and if such assignments may, by statute, be achieved by alteration of the Rules of Court, the provision for such assignment is picked up and applied as the applicable first criterion stated in the District Court Act. True, the making of a new Rule of Court might sometimes be difficult at first to ascertain. On occasion, there could be uncertainty as to the proper assignment of the action and whether it is to the Common Law Division or some other Division of the Supreme Court. However, the criterion itself is relevantly clear, objective and expressed as a matter of law. In practice, legal practitioners in the State would have to clarify the assignment if they were, in fact, to commence an action in the Supreme Court. All that s 44(1)(a)(i) of the District Court Act required was that they should make the same inquiry, albeit conditional and hypothetical, by reference to any decision to invoke the jurisdiction of the District Court for the purpose of commencing the action there. In terms of practicalities, a practitioner in doubt would consult the Supreme Court Rules, the Internet and, if necessary, a desk officer in the Registry of the Supreme Court. As an argument against the adoption of this objective standard, the suggested uncertainty should be rejected.

90 *Interpretation Act and statutory purpose*: The *Interpretation Act* 1987 (NSW) ("the Interpretation Act"), s 68(1) gives effect to the contemporary principle that legislation is now ordinarily to be construed as "always speaking", that is, speaking to those subject to it from time to time in terms that they can ascertain from the statutory text without the need to adopt the posture of a legal antiquarian, searching for meanings in books of legal history.

91 Section 68(1) states:

> "In any Act or instrument, a reference to some other Act or instrument extends to the other Act or instrument, as in force for the time being."

92 The joint reasons find this provision inapplicable on the ground that there is no "'reference to some other Act' within the meaning of s 68", in the language of s 44(1)(a)(i) of the District Court Act[75]. With all respect, this too is unconvincing. The word "reference" in a statute of general application, such as the Interpretation Act, is not to be limited to a case of express reference. That would be quite artificial. It would frustrate the achievement of the large purposes

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74 Joint reasons at [37].

75 Joint reasons at [36].

of the Interpretation Act and particularly of s 68(1). A "reference" may be specific. But it may also be general. It may also be express. It may be implied. To read s 44(1)(a)(i) of the District Court Act as not referring to another statute, but to a "state of the law"[76] at an earlier time, is artificial. Especially so where the "state of the law" concerned incorporates the assignment of actions between Divisions of the Supreme Court of the State, as varied from time to time. This is clearly contemplated by s 44(1)(a)(i) of the District Court Act.

93 Remedial legislation such as s 68(1) should not be read narrowly so as to undermine its operation. Possibly unpalatable outcomes do not authorise the adoption of artificial constructions. The duty of courts is to the neutral interpretation of legislative provisions and a purposive and constructive interpretation of statutes of general operation, such as the Interpretation Act. Especially so because the provisions of s 68(1) have been enacted precisely to overcome a previous common law presumption that, in the absence of a clear indication that a reference to another piece of legislation was to be ambulatory, the reference was to be taken as one to legislation in the "fixed time" form it took when the referring legislation was enacted[77].

94 Thus, the provisions of s 68(1) of the Interpretation Act were adopted to overcome the results of such decisions as *In re Universal Distributing Co Ltd (in liq)*[78] and *Commissioner for Government Transport v Deacon*[79]. The old common law rule produced outcomes contrary to the obvious and rational design of the legislators. Ordinarily, this is to the effect that legislation continues to speak from time to time so that reference in one statute to another will normally be taken as a reference to that statute as it is amended and varied from time to time.

95 Each of the Interpretation Acts of Australia now contains a provision similar to s 68 of the New South Wales Act[80]. If this Court adopts a construction of such a provision that undermines the achievement of its large purposes, we

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76 See joint reasons at [36].

77 Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 211 [6.19].

78 (1933) 48 CLR 171 at 173.

79 (1957) 97 CLR 535 at 546.

80 *Acts Interpretation Act* 1901 (Cth), s 10; *Interpretation of Legislation Act* 1984 (Vic), s 17; *Acts Interpretation Act* 1915 (SA), s 14B(3); *Acts Interpretation Act* 1954 (Q), s 14H; *Interpretation Act* 1984 (WA), s 16; *Acts Interpretation Act* 1931 (Tas), s 17; *Interpretation Act* (NT), s 50; *Legislation Act* 2001 (ACT), s 102.

will force legislators into expressing their will in statutory language of increasing particularity, specificity, detail and complexity. At the very least, in a statute of general application, such as the Interpretation Act, it behoves the Court to give the provision a full and ample operation because such an Act represents an attempt by Parliament to speak to the courts in the language of principles concerning the way in which (exceptional circumstances apart) Parliament has itself intended to express its statutory commands. If such Acts state the rules by which parliamentary counsel draft legislation, courts should generally be ready to interpret the legislation in accordance with the stated provisions.

96 The result of provisions such as s 68(1) of the Interpretation Act is that, if legislation is referred to in some other Act or instrument, the reference is ordinarily to be taken to adopt an ambulatory meaning. If a contrary meaning is to be accepted, and the provisions incorporated are to be fixed as at the date at which the referring legislation was made, this outcome will need to be spelt out in clear language. That certainly cannot be said of this case. Occasionally, a fixed time meaning will be accepted because of the clarity of the statutory reference[81]. Generally, however, the courts have given effect to what is now effectively the modern "statutory presumption" that legislation is to be treated as "always speaking" and thus to include reference to amendments and variations as made from time to time[82].

97 The present is not a case where the reference to another Act is to one that has since been repealed or remade in a substantially different form. The reference here is to inter-Divisional assignments within the Supreme Court. Self-evidently, such assignments have been altered from time to time. That is inherent in the very notion of assignments. There has thus been no repeal or revision of the fundamental idea contained in s 44(1)(a)(i). Its essential provisions were unaltered when, on 29 August 2001, the respondent commenced the present action in the District Court.

98 The object of incorporating the reference to the assignment to the Common Law Division of the Supreme Court, as the criterion for the jurisdiction of the District Court, can best be understood by referring to the explanation of the previous criterion ("any personal action at law") set out in the reasons of

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81 cf *Switzerland Insurance Australia Ltd v Mowie Fisheries Pty Ltd* (1997) 74 FCR 205 at 220-221.

82 *Promenade Investments Pty Ltd v New South Wales* (1992) 26 NSWLR 203 at 223-224; *Hore v Albury Radio Taxis Co-operative Society Ltd* (2002) 56 NSWLR 210 at 222-223 [40]-[44]; Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 211 [6.19]. Contrast *Forsyth* (2004) 62 NSWLR 132 at 138 [28]-[29].

Priestley JA in *Vale v TMH Haulage Pty Ltd*[83]. That decision clarifies the purpose of the amended terms of s 44(1)(a). The difficulty with the criterion "personal action at law" was that it took a court, obliged to give meaning to that expression, to "authority dating back to well before Blackstone"[84]. The clear object of Parliament, then, in substituting a criterion expressed by reference to the assignment to the Common Law Division of the Supreme Court, was to avoid such time-consuming and disputable historical inquiries. It would be a very odd result to conclude that, when Parliament amended s 44(1)(a) of the District Court Act, it simply substituted one historical inquiry for another.

99 *The "always speaking" principle*: Unfortunately, in my opinion, the joint reasons on this occasion have reverted to an approach to statutory construction which reflects the previous, and now usually discarded, principle expressed in the Latin maxim *contemporanea expositio est optima et fortissima in lege*[85]. Regrettably, this is an approach that is increasingly creeping back into statutory interpretation of contemporary Australian legislation in this Court[86]. I do not agree with it.

100 The approach favouring the ascertainment of statutory meaning by reference to its meaning at the time of the first enactment of progenitor provisions is generally inconsistent with the modern "purposive" construction of legislation, otherwise adopted by this Court[87]. It sits uncomfortably with developments in the enacted law on interpretation of legislation (illustrated by s 68 of the Interpretation Act). It is hard to reconcile with the repeated insistence of this Court, where enacted law governs the question, upon the primacy of

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83 (1993) 31 NSWLR 702 at 706-708.

84 *Vale v TMH Haulage Pty Ltd* (1993) 31 NSWLR 702 at 707.

85 2 Co Inst 11. (A contemporaneous exposition is the best and most powerful in law, that is, the best way to construe a document is to read it as it would have been read when made.) See Burke (ed), *Jowitt's Dictionary of English Law*, 2nd ed (1977), vol 1 at 441. See also *Broom's Legal Maxims*, 10th ed (1939) at 463; *Butterworths Australian Legal Dictionary*, (1997) at 259; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 322-323.

86 See eg *Coventry v Charter Pacific Corporation Ltd* (2005) 80 ALJR 132 at 148 [76]-[77], 153 [113]; 222 ALR 202 at 220-221, 227-228; *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1527-1528 [77]-[84]; 229 ALR 1 at 21-23; *Sons of Gwalia Ltd v Margaretic* [2007] HCA 1 at [104].

87 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71].

parliamentary commands to be derived from the actual legislative text[88]. It undermines the notion that rights and duties expressed in legislation should ordinarily be ascertainable from the text and should not require those subject to it to search through legal history and extraneous materials for the content of the governing law. It adds to the cost of litigation by requiring the discovery of the law as it stood at some earlier time rather than as it appears in the law in the books as now enacted. It diminishes the significance of the contemporary context of the written law. It puts a premium on searching through the annals of history which is even more inaccessible to people coming before the courts than is the text of presently binding statutes and subordinate legislation.

101 Considerations such as these have led courts in many countries to turn away from the previous approach encapsulated in the *contemporanea expositio* maxim[89]. Generally speaking, courts have done so except for the construction of ambiguous language used in some very old statutes where the language itself may have enjoyed a rather different denotation[90]. Because context is now increasingly seen as a very important influence on the ascertainment of statutory meaning[91], I respectfully disagree with the revived inclination on the part of the majority of this Court to construe contemporary Australian legislation by reference to historical inquiries rather than the elucidation of meaning from the text itself[92]. Regrettably, the present is another case where, instead of giving a legislative provision its natural meaning, as intended to operate from time to time, the majority have accepted an historical meaning, fixed at the moment that the legislation was enacted and ascertainable only by those with the skill and resources to search for how the law stood at that moment.

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88 *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1528 [84], fn 64; 229 ALR 1 at 22-23.

89 For example, in India, the Supreme Court has declined to apply that approach. See *Senior Electric Inspector v Laxminarayan Chopra* AIR 1962 SC 159 at 162-163; *Raja Ram Jaiswal v State of Bihar* AIR 1964 SC 828 at 836; cf *National and Grindlays Bank Ltd v Municipal Corporation for Greater Bombay* AIR 1969 SC 1048; Singh, *Principles of Statutory Interpretation*, 9th ed (2004) at 296.

90 *Campbell College, Belfast (Governors) v Commissioner of Valuation for Northern Ireland* [1964] 1 WLR 912 at 941-942; [1964] 2 All ER 705 at 727 (HL).

91 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 548 [28] per Lord Steyn who stated that "[i]n law, context is everything". See also *Al-Kateb v Godwin* (2004) 219 CLR 562 at 624 [174].

92 *Coleman v Power* (2004) 220 CLR 1 at 95-96 [245]-[246] applying *Ahmad v Inner London Education Authority* [1978] QB 36 at 48 per Scarman LJ. See also Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 122-124 [4.9]-[4.10]; Bennion, *Statutory Interpretation*, 4th ed (2002) at 762-763.

102 The approach favoured by the majority is so antithetical both to the developments reflected in the statutory presumption now contained in the Interpretation Act, s 68 and to the modern principles of statutory interpretation, that I cannot agree to it. It involves attributing to the commands of Parliament, intended to operate from time to time, a circumscribed and unnatural limitation that runs counter to the general (and in my view beneficial) development of modern principles of statutory construction which the Court has applied elsewhere[93]. Where, as here, reference is made in legislation to an arrangement that is necessarily governed by, or under, legislation ("assignment" as between Divisions of a Supreme Court), and where it is inherent in that item of reference that the "assignment" will be altered from time to time, and where federal legislation expressly contemplates varying "limits" of jurisdiction that will fluctuate from time to time, the imposition of an historical "fixed time" meaning as the criterion for the limit on jurisdiction offends the language, purpose and federal context of the provisions in question. This Court should say so.

103 There are no competing principles that warrant adopting a different course. It is true that a presumption is sometimes recognised in the law that, where a court is invested with jurisdiction to determine certain matters, it may be supposed that Parliament intended to take the court as it found it with procedures and powers apt for the discharge of all of its functions[94]. However, this well-known principle, and other rules favourable to the maintenance of an established jurisdiction of a court[95], cannot override an enactment with the clear language of s 44(1)(a)(i) of the District Court Act by which the jurisdiction of the District Court of New South Wales is "limited" in a way enlivening the alteration from time to time of the boundaries of federal jurisdiction.

104 *Conclusion: jurisdiction is "limited"*: From these reasons, it follows that a correct interpretation of s 44(1)(a)(i) of the District Court Act sustains the conclusion that the provision is an ambulatory one, addressing the subject of its commands in terms that confine the jurisdiction of the District Court by reference to the jurisdiction of the Common Law Division of the Supreme Court of the State, as from time to time assigned. This is both what the words say and what they mean by reference both to the State and federal contexts in which they operate. It is the meaning that is confirmed by a textual analysis of the language; by a consideration of its basic purpose; by an application to it of the provisions of

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93 See for example *R v Gee* (2003) 212 CLR 230 at 241 [7].

94 cf *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560.

95 See for example *Shergold v Tanner* (2002) 209 CLR 126 at 136 [33].

the Interpretation Act, s 68; and by following the general approach to the construction of contemporary Australian legislation, so that it is accepted as "always speaking".

105 Whilst the consequence that follows is a burden on the respondent, he, of all litigants, is very well provided with legal advice and cannot really complain about the inconvenience or injustice of the mistake that occurred in commencing his proceedings in the District Court without apparently checking (or checking carefully) whether an action of such a kind, if brought in the Supreme Court, would have been assigned to the Common Law Division of that Court or not.

106 Every observer of the relationship in recent years between the Supreme Court and the District Court in New South Wales would be aware of the shift to the District Court of a substantial part of the trial litigation formerly conducted in the Supreme Court of the State. However, that shift has been confined to criminal and other matters, as ordinarily assigned to the Common Law Division of the Supreme Court. There are, no doubt, reasons for confining the movement of business in such a way. Doubtless they include the powers and remedies available to the District Court[96]; the capacity of the District Court to absorb the increase in cases; the ordinary expertise of the judges of the District Court; and the available number of judicial personnel[97].

107 Once these contextual considerations are added to the ingredients taken into account in resolving the present appeal, the harmony of the interpretation propounded by the appellant is plain and the disharmony of that advanced for the respondent becomes even clearer[98].

108 The jurisdiction and powers of the District Court were intended to constitute the *alter ego* of the Common Law Division of the Supreme Court of the State. This makes it a natural, and relatively simple, inquiry to ascertain, from time to time, the jurisdiction of the latter so as to identify the jurisdiction of the former. The limits of jurisdiction so enacted become the limits of federal jurisdiction, as provided by the Judiciary Act, s 39(2). At the relevant time, the District Court was not a "court of competent jurisdiction" for the respondent's

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96 *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 449 [43]-[44], 460 [78], cf at 482-483 [142].

97 *Forge v Australian Securities and Investments Commission* (2006) 80 ALJR 1606 at 1640 [140], 1650 [181(4)]; 229 ALR 223 at 262, 275.

98 *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719 at 722; *Catto v Ampol Ltd* (1989) 16 NSWLR 342 at 345-346; *Hore v Albury Radio Taxis Co-operative Society Ltd* (2002) 56 NSWLR 210 at 222 [39].

action, within the meaning of s 220AAZA(4) of the 1936 Act. The respondent could not, therefore, invoke the jurisdiction of that Court to sue the appellant in an action claiming the "recoverable amount" alleged to be due under the 1936 Act. Save for the point raised by the respondent's notice of contention, to which I now turn, these conclusions entitle the appellant to succeed in the appeal.

The recoverable amount was a tax, fee etc

109 *The contention issue*: By his amended notice of contention, the respondent sought to support the additional ground, propounded by Gzell J in the Court of Appeal, for holding that the proceedings remained "assigned" to the Common Law Division and were not "assigned" to the Equity Division under the amendment to the Supreme Court Rules 1970 (NSW), Pt 12 r 5(b)(vi), as described in the joint reasons[99].

110 Gzell J concluded[100] that the "penalty" for which the respondent had commenced his proceedings in the District Court was not included in the collocation "a tax, fee, duty or other impost", proceedings for the recovery of which were, at the time of the commencement of the respondent's proceedings, assigned to the Equity Division of the Supreme Court. Neither Spigelman CJ nor Giles JA endorsed this suggested reason for upholding the jurisdiction of the District Court. In my view, the majority of the Court of Appeal were correct in holding back from support of this additional argument.

111 The matter for decision is whether the provisions of the taxation legislation under which the respondent, by his action in the District Court, sought to recover the amount alleged to be recoverable as a debt due to the Commonwealth from the appellant[101], were within the relevant Rule of Court. A proper understanding of the legislation confirms that the provisions of the amended Rules of Court were satisfied. Proceedings such as the action brought by the respondent would have been assigned to the Equity Division of the Supreme Court in the place of the Common Law Division, until those provisions were later altered[102].

112 *A provision for collection of a tax*: Section 221C(1A) of the 1936 Act imposed a duty on employers to make deductions from payments of salary and

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99 Joint reasons at [24]-[32], [46].

100 *Forsyth* (2004) 62 NSWLR 132 at 146-147 [70]-[75].

101 Pursuant to the 1936 Act, s 220AAZA(4).

102 See above at [69].

wages to employees at the identified times. Section 220AAM[103] of the 1936 Act imposed an obligation on employers to remit amounts so deducted. Section 221H(3) of the 1936 Act provided that the employee was entitled to credit against an assessment (if tax were payable) for amounts so deducted. Section 4-10 of the *Income Tax Assessment Act* 1997 (Cth) provided for the method of calculating the amount of liability to income tax. The *Income Tax Rates Act* 1986 (Cth) provided in s 12(1) and Sched 7 for the applicable rates of tax.

113 It is tolerably clear from this scheme of legislation that the fundamental purpose and object of the creation of the "penalty", payable by a person such as the appellant, was to provide a means "by which" a tax, levied on the employer, could be "collected" in circumstances where, contrary to the 1936 Act, the employer had failed to remit to the Commissioner the amounts deducted from the salary or wages of employees[104].

114 The legislation operates in that way both by direct and indirect prescription. It discourages companies from failing to comply with their obligations to remit the amount collected from employees to the Commissioner by making it clear that any such failure will be visited not only with consequences for the companies concerned but also with individual consequences for the directors upon whom there is imposed a continuing obligation to cause the company to comply with its obligations[105]. Moreover, in the case of default, the "penalty" that falls upon a director of a company that has not complied with its remittance obligation is measured exactly by reference to "an amount equal to the unpaid amount" of the company's liability[106].

115 In such circumstances, looking at the provisions of the applicable taxation legislation in its entirety, it is clear that the "penalty" the respondent sought to recover by bringing his "action" in the District Court was brought in reliance upon legislation "by which" a "tax" was "collected". It therefore fell within the amended Rule of Court that rendered the action of a kind which, if brought in the Supreme Court, would be assigned to the Equity Division of that Court.

116 It is important to note the generality of the words in the amended Rule of Court assigning proceedings to the Equity Division. To be so assigned to the Equity Division, it was sufficient that the proceedings be "*in relation to any*

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103 In respect of the deductions made prior to 1 July 1998, s 221F(5) of the 1936 Act applies. See joint reasons at [9]-[11], [14]-[16].

104 Joint reasons at [6].

105 Joint reasons at [10], citing s 222AOB of the 1936 Act.

106 Joint reasons at [10]-[13], citing ss 222AOC, 222AOD of the 1936 Act.

provision"[107]. The overall objective of the reassignment was clearly to shift collection proceedings concerned with State and federal taxation legislation from the Common Law Division of the Supreme Court to the Equity Division. That purpose should be given effect for the period in which the amended Rule of Court operated[108].

117 *Conclusion: contention rejected*: It follows that, upon the construction that I would give to s 44(1)(a)(i) of the District Court Act and Pt 12 r 5(b)(vi) of the Supreme Court Rules, the action was not one which the District Court had jurisdiction to hear and dispose of at the time the respondent purported to invoke that Court's jurisdiction. The point advanced in the respondent's amended notice of contention should be rejected.

Orders

118 Both issues having been resolved against the respondent, the appellant is entitled to succeed. At the applicable time, the District Court did not have jurisdiction to hear and dispose of the respondent's action against the appellant. The judgment of the District Court against the appellant cannot stand.

119 The appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside. In place of those orders, this Court should order that the appeal to the Court of Appeal be allowed; the judgment of the District Court of New South Wales, dated 26 September 2003, should be set aside; and in place thereof it should be ordered that the action be dismissed for want of jurisdiction. I would reserve the disposition of the costs in the Court of Appeal and in the District Court to be determined by the Court of Appeal.

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107 Supreme Court Rules 1970 (NSW), Pt 12 r 5(b)(vi) (emphasis added).

108 See joint reasons at [31]-[32].