

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

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HBSY PTY LTD

PLAINTIFF

AND

GEOFFREY LEWIS & ANOR

DEFENDANTS

*HBSY Pty Ltd v Lewis*  
[2024] HCA 35  
*Date of Hearing: 9 May 2024*  
*Date of Judgment: 9 October 2024*  
S106/2023

## ORDER

1. *A writ of certiorari issue directed to the second defendants, the Federal Court of Australia and the Judges thereof, to quash the decision of the Full Court of the Federal Court of Australia made on 14 July 2023 in proceeding NSD 726 of 2022 (HBSY Pty Ltd v Lewis [2023] FCAFC 109).*
2. *A writ of mandamus issue directed to the second defendants commanding them to hear and determine the plaintiff's appeal from the whole of the judgment of the Supreme Court of New South Wales given on 24 June 2022 in proceeding 2019/263639.*
3. *The first defendant pay the plaintiff's costs in the Full Court of the Federal Court of Australia and in this Court.*

## Representation

M K Condon SC with D K Smith for the plaintiff (instructed by Roberts & Partners Lawyers)

P J Menadue for the first defendant (instructed by Shields Lawyers)



S P Donaghue KC, Solicitor-General of the Commonwealth, with C Ernst for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

Submitting appearance for the second defendants

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **HBSY Pty Ltd v Lewis**

Federal Court of Australia – Jurisdiction – Statutory construction – Where plaintiff brought proceedings in New South Wales Supreme Court – Where plaintiff relied on s 153 of *Bankruptcy Act 1966* (Cth) – Whether Full Court of Federal Court of Australia had jurisdiction to hear and determine appeal involving matter arising under *Bankruptcy Act* – Whether s 7(5) of *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) engaged – Whether s 24(1)(c) of *Federal Court of Australia Act 1976* (Cth) engaged.

Words and phrases – "appellate jurisdiction", "cross-vesting", "Federal Court of Australia", "federal jurisdiction", "jurisdiction", "matter arising under", "right of appeal", "right to appeal", "Scheduled Act", "writ of certiorari", "writ of mandamus".

*Acts Interpretation Act 1901* (Cth), ss 15AA, 15C.

*Bankruptcy Act 1966* (Cth), s 153.

*Federal Court of Australia Act 1976* (Cth), ss 19, 24.

*Judiciary Act 1903* (Cth), ss 39, 39B.

*Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), ss 4, 7.



GAGELER CJ.

## Introduction

1           This is an application in the original jurisdiction of the High Court under s 75(v) of the Constitution for writs of certiorari and mandamus directed to the Federal Court of Australia.

2           In circumstances more fully described in the reasons of the plurality, the application arises from a decision of the Full Court of the Federal Court<sup>1</sup> holding that the Full Court did not have jurisdiction to entertain an appeal from a decision of a single judge of the Equity Division of the Supreme Court of New South Wales<sup>2</sup> which turned on an issue as to the operation of s 153 of the *Bankruptcy Act 1966* (Cth) ("the Bankruptcy Act"). That section relevantly provides that discharge from bankruptcy operates to release the bankrupt from debts provable in the bankruptcy other than those incurred by means of fraud or fraudulent breach of trust to which the bankrupt was a party.

3           The plaintiff, which was the appellant in the putative appeal to the Full Court of the Federal Court, argues that the Full Court had jurisdiction to entertain the appeal by operation of s 7(5)(a) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) ("the Cross-vesting Act") in combination with s 15C of the *Acts Interpretation Act 1901* (Cth) ("the Acts Interpretation Act") and s 24(1)(c) of the *Federal Court of Australia Act 1976* (Cth) ("the Federal Court Act"). Its argument is supported by the Attorney-General of the Commonwealth, who intervenes under s 78A of the *Judiciary Act 1903* (Cth) ("the Judiciary Act").

4           Differing from the majority, I reject the argument and in consequence would dismiss the application.

5           My view is that s 7(5)(a) of the Cross-vesting Act does not confer jurisdiction on the Full Court of the Federal Court to entertain an appeal from a decision of a single judge of a State Supreme Court. It operates only to regulate the exercise of such jurisdiction to entertain an appeal from a decision of a single judge of a State Supreme Court as is conferred on the Full Court of the Federal Court apart from the Cross-vesting Act. Its limited operation is not expanded by s 15C of the Acts Interpretation Act or by s 24(1)(c) of the Federal Court Act.

6           To explain that view of s 7(5)(a) of the Cross-vesting Act, I will explain my understanding of the operation of s 7(5)(a) within the structure of the national scheme for the cross-vesting of jurisdiction, constituted by the Cross-vesting Act

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1     *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303.

2     *HBSY Pty Ltd v Lewis* (2022) 108 NSWLR 558.

and complementary State cross-vesting Acts,<sup>3</sup> as originally enacted, together with my reasons for considering that its operation has not been altered by subsequent amendments to the Schedule to the Cross-vesting Act or by the subsequent repeal, amendment or enactment of Acts referred to in that Schedule as now amended.

7 The historical explanation will, I hope, be clearer for being set against the background of a description of the scope of the federal jurisdiction that the Federal Court and State Supreme Courts each have, and in the relevant past have had, apart from the Cross-vesting Act with respect to different categories of civil matters arising under the Bankruptcy Act.

### **The jurisdictional background**

#### *Federal jurisdiction generally*

8 Federal jurisdiction is authority to exercise the judicial power of the Commonwealth in order to determine a justiciable controversy; correspondingly, State jurisdiction is authority to exercise the judicial power of a State in order to determine a justiciable controversy.<sup>4</sup>

9 The settled effect of Ch III of the Constitution is that, other than the federal jurisdiction conferred on the High Court directly by s 75 of the Constitution, federal jurisdiction: can only be conferred or invested by a law enacted by the Commonwealth Parliament; can only be conferred on or invested in a court; and can only be conferred or invested with respect to one or more of the categories of "matter" in respect of which federal jurisdiction is conferred on the High Court by s 75 of the Constitution or can be conferred on the High Court by a law enacted by the Commonwealth Parliament under s 76 of the Constitution. Within those categories of matter, by operation of s 76(ii) of the Constitution, is any matter "arising under" a law made by the Commonwealth Parliament.

10 With respect to all or any such matters, the Commonwealth Parliament is empowered by s 77(i) of the Constitution to confer federal jurisdiction on all or any federal courts it might choose to create under s 71 of the Constitution and is empowered by s 77(ii) of the Constitution to make the federal jurisdiction it confers on a federal court exclusive of State jurisdiction. Further, the Commonwealth

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3 *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic); *Jurisdiction of Courts (Cross-vesting) Act 1987* (SA); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld); *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Tas).

4 *Rizeq v Western Australia* (2017) 262 CLR 1 at 22 [50], quoting *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.



## 3.

Parliament is empowered by s 77(iii) of the Constitution to invest federal jurisdiction in any court of a State, and such federal jurisdiction as it invests in a State court displaces any overlapping State jurisdiction of the State court through the operation of s 109 of the Constitution.<sup>5</sup>

11 Such federal jurisdiction as the Commonwealth Parliament might choose to confer on a federal court under s 77(i) of the Constitution or to invest in a State court under s 77(iii) of the Constitution can be original or appellate jurisdiction,<sup>6</sup> and can extend to determining the whole of a matter or can be confined to determining some defined part of a matter.<sup>7</sup> Moreover, federal jurisdiction with respect to the same matter can be conferred on one federal court or State court alone or on several federal courts or State courts concurrently.

12 Whatever the nature and extent of the federal jurisdiction that the Commonwealth Parliament might choose to confer on a federal court or to invest in a State court with respect to a matter, the High Court has jurisdiction directly conferred on it by s 73(ii) of the Constitution to determine an appeal from any decision made by any court in its exercise. The ultimate appellate jurisdiction so conferred on the High Court is with such exceptions and subject to such regulations as the Commonwealth Parliament might prescribe.

13 Through s 39(2) of the Judiciary Act, subject to exceptions from time to time expressed or implied in other Commonwealth legislation, the Commonwealth Parliament has under s 77(iii) of the Constitution vested federal jurisdiction in all State courts with respect to all matters arising under all laws made by the Commonwealth Parliament. The federal jurisdiction invested in State courts by s 39(2) of the Judiciary Act is expressed to be invested "within the limits of their several jurisdictions". The federal jurisdiction invested is thereby mapped to the contours of the State jurisdiction, whether it be original or appellate jurisdiction, that is from time to time invested in those same courts by State legislation.<sup>8</sup> Where triggered by the raising of a claim or defence under a Commonwealth law at any stage of any process directed to the determination of any justiciable controversy in any State court, the federal jurisdiction invested by s 39(2) of the Judiciary Act is indelible and pervasive: extending to the whole of the justiciable controversy; imparting to the whole of that justiciable controversy the character of a matter within federal jurisdiction; and doing so from the inception of the justiciable

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5 *Burns v Corbett* (2018) 265 CLR 304 at 350-351 [80]-[81].

6 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603.

7 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 531 [39], 534 [49].

8 See *Ah Yick v Lehmert* (1905) 2 CLR 593 at 604-605; *The Commonwealth v The District Court of the Metropolitan District* (1954) 90 CLR 13 at 22.

controversy until the ultimate resolution of that controversy by a court within the appellate hierarchy of the State or on appeal to the High Court.<sup>9</sup>

14 Accordingly, in the circumstances giving rise to the present application, the raising of an issue as to the operation of s 153 of the Bankruptcy Act was enough to make the whole of the justiciable controversy determined by the decision of the judge of the Equity Division of the Supreme Court of New South Wales a matter within the federal jurisdiction invested in the Supreme Court by s 39(2) of the Judiciary Act. The raising of that issue in the Equity Division was also enough to make any appeal from the decision of the judge to the Court of Appeal of the Supreme Court of New South Wales under s 75A of the *Supreme Court Act 1970* (NSW) a continuation of that same matter within the federal jurisdiction invested in the Supreme Court by s 39(2) of the Judiciary Act.

15 The Commonwealth Parliament's investiture of original and appellate federal jurisdiction in State courts under s 77(iii) of the Constitution has not been only through the general and ambulatory operation of s 39(2) of the Judiciary Act. The Commonwealth Parliament from time to time has also invested original or appellate federal jurisdiction in State courts with respect to matters or specified categories of matters arising under particular Commonwealth statutes. The Bankruptcy Act is an example.

16 In contrast with the approach taken to vesting original and appellate federal jurisdiction in State courts under s 77(iii) of the Constitution through the general and ambulatory operation of s 39(2) of the Judiciary Act, in conferring federal jurisdiction on the Federal Court under s 77(i) of the Constitution the Commonwealth Parliament has drawn a clear distinction between original jurisdiction and appellate jurisdiction. The Commonwealth Parliament has also eschewed any general conferral of appellate jurisdiction, as distinct from original jurisdiction, in matters arising under laws made by it.

17 Within Div 1 of Pt III of the Federal Court Act, s 19 is headed "Original jurisdiction". Section 19 provides that the Federal Court "has such original jurisdiction as is vested in it by laws made by the Parliament". Plainly, the section does not itself confer original federal jurisdiction on the Federal Court: it merely indicates that the original jurisdiction of the Federal Court is that which is from time to time conferred by other laws of the Commonwealth Parliament.<sup>10</sup> Since

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9 *Felton v Mulligan* (1971) 124 CLR 367 at 408; *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581; *NEC Information Systems Australia Pty Ltd v Iveson* (1992) 36 FCR 258 at 264.

10 See *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161; *Thomas Borthwick & Sons (Pacific Holdings) Ltd v Trade Practices Commission* (1988) 18 FCR 424 at 428.

1997,<sup>11</sup> one of those other laws has been s 39B(1A)(c) of the Judiciary Act, which has relevantly provided that the original jurisdiction of the Federal Court includes "jurisdiction in any matter ... arising under any laws made by the Parliament".

18        Within Div 2 of Pt III of the Federal Court Act, s 24 is headed "Appellate jurisdiction". Section 24(1)(a) provides that the Federal Court "has jurisdiction to hear and determine ... appeals from judgments of the Court constituted by a single Judge exercising the original jurisdiction of the Court". Section 24(1)(c) provides that the Federal Court "has jurisdiction to hear and determine ... in such cases as are provided by any other Act, appeals from judgments of a court (other than a Full Court of the Supreme Court) of a State ... exercising federal jurisdiction".

19        An important difference between s 24(1)(a) and s 24(1)(c) of the Federal Court Act, sometimes elided in general descriptions of the operation of s 24,<sup>12</sup> is that s 24(1)(a) operates as a conferral of federal appellate jurisdiction whereas s 24(1)(c) operates not as a conferral of federal appellate jurisdiction but rather in a manner akin to s 19 to indicate that the appellate jurisdiction of the Federal Court includes such federal appellate jurisdiction as is from time to time conferred by other laws of the Commonwealth Parliament. The difference between s 24(1)(a) and s 24(1)(c) was explained by Deane J in *Thompson v Mastertouch TV Service Pty Ltd*,<sup>13</sup> who appropriately referred to s 24(1)(c) as serving to "indicate that, in so far as appeals from State courts exercising federal jurisdiction are concerned, one will need to look to the content of the other legislation to determine the appellate jurisdiction of [the Federal Court]". By operation of s 25 of the Federal Court Act, the federal appellate jurisdiction of the Federal Court is ordinarily to be exercised by the Full Court of the Federal Court.

20        The question whether some other law of the Commonwealth Parliament confers original or appellate jurisdiction on the Federal Court under s 77(i) of the Constitution, so as to fall within the ambit of s 19 or s 24(1)(c) of the Federal Court Act, is a question as to the construction of that other law. Whether, and if so to what extent, a law of the Commonwealth Parliament might invest original or appellate jurisdiction in a State court under s 77(iii) of the Constitution in addition to the original and appellate jurisdiction invested by s 39(2) of the Judiciary Act is likewise a question of the construction of that other law.

21        Depending on the statutory context, resolution of such a question of construction can be assisted by reference to s 15C of the Acts Interpretation Act.

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11    See item 1 of Sch 11 to the *Law and Justice Legislation Amendment Act 1997* (Cth).

12    eg *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 18 [64].

13    (1978) 19 ALR 547 at 557.

That section has applied since its insertion in 1984<sup>14</sup> "[w]here a provision of an Act, whether expressly or by implication, authorises a civil or criminal proceeding to be instituted in a particular court in relation to a matter". The section deems a provision to which it applies to vest the particular court with federal jurisdiction with respect to the matter and puts beyond doubt that the federal jurisdiction so vested is not limited by any limits to which any other jurisdiction of the court may be subject.

22 The precondition to the application of s 15C that the provision in question operate expressly or impliedly to "authorise" a proceeding to be instituted in a particular court in relation to a matter is critical. The threshold question of whether the provision has that prerequisite operation is itself a question of statutory construction which the section asks but does not answer.

23 What is clear is that a provision does not satisfy the precondition of authorising a proceeding to be instituted in a particular court in relation to a matter so as to attract the application of s 15C merely by restricting the institution of a proceeding to a designated court within a range of courts having federal jurisdiction with respect to the matter. That point is illustrated by s 56 of the Judiciary Act, which limits the courts in which "[a] person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth". The making of such a claim arising within Australia is restricted by the section to the High Court or to the Supreme Court or other court of competent jurisdiction of the State or Territory in which the claim arose. Although the section has been held to operate as a conferral of a "right[] to proceed" under s 78 of the Constitution, it has been held not to operate as a conferral or investiture of federal jurisdiction.<sup>15</sup> The jurisdiction of the High Court in the class of matters to which the section refers is conferred directly by s 75(iii) of the Constitution and the jurisdiction of State courts in the same class of matters is that invested under s 77(iii) of the Constitution by s 39(2) of the Judiciary Act. Neither alone nor in combination with s 15C of the Acts Interpretation Act does s 56 of the Judiciary Act operate as an additional investiture of federal jurisdiction in a State court under s 77(iii) of the Constitution so as to override the jurisdictional limitations imposed by s 39(2) of the Judiciary Act.

*Federal jurisdiction in civil matters arising under the Bankruptcy Act*

24 From its inception, the Bankruptcy Act has adopted the undefined expression "jurisdiction in bankruptcy", has defined "bankruptcy" in relation to

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14 See s 8 of the *Acts Interpretation Amendment Act 1984* (Cth).

15 *Breavington v Godleman* (1988) 169 CLR 41 at 68-69, 105-106, 118, 140, 152-153, 169.

jurisdiction to mean "jurisdiction ... under or by virtue of" that Act,<sup>16</sup> and has made ubiquitous use of the undefined expression "the Court", evidently to refer to a court exercising jurisdiction in bankruptcy. For example, it has done so in providing for sequestration orders<sup>17</sup> and for discharge from bankruptcy<sup>18</sup> as well as in provisions headed "General powers of Courts in bankruptcy"<sup>19</sup> and "Exercise of jurisdiction".<sup>20</sup> Whether, and if so how far, the expression "jurisdiction in bankruptcy" extends beyond the jurisdiction elaborated by those other provisions of the Bankruptcy Act referring to "the Court" is a vexed question<sup>21</sup> which need not now be resolved.

25 For present purposes, it suffices to note that the category of matters encompassed by "jurisdiction in bankruptcy" is narrower than the category of all matters "arising under" the Bankruptcy Act within the meaning of s 76(ii) of the Constitution encompassed within the federal jurisdiction invested in State courts by s 39(2) of the Judiciary Act. No one has suggested that the matter determined by the decision of the single judge of the Equity Division of the Supreme Court was within "jurisdiction in bankruptcy" merely by reason of it being a matter "arising under" s 153 of the Bankruptcy Act and it is common ground that the matter was instead within the federal jurisdiction invested in the Supreme Court by s 39(2) of the Judiciary Act.

26 As a result of amendments made to the Bankruptcy Act after the establishment of the Federal Court in 1976,<sup>22</sup> and as the Bankruptcy Act existed at the time of the enactment and commencement of the Cross-vesting Act, s 27(1)(a) of the Bankruptcy Act conferred "jurisdiction in bankruptcy" on the Federal Court and s 27(1)(b)-(g) invested "jurisdiction in bankruptcy" in each State Supreme Court. Section 38 of the Bankruptcy Act provided that "[a]n appeal from a judgment, order or sentence given or pronounced ... by a State Court exercising jurisdiction in bankruptcy ... may be brought to the Federal Court ... and not

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16 Section 5(1) of the Bankruptcy Act.

17 Section 43 of the Bankruptcy Act.

18 Section 153 of the Bankruptcy Act.

19 Section 30 of the Bankruptcy Act.

20 Section 31 of the Bankruptcy Act.

21 See *Scott v Bagshaw* (2000) 99 FCR 573 at 577 [17]-[22]; *Meriton Apartments Pty Ltd v Industrial Court of New South Wales* (2008) 171 FCR 380 at 399-408 [80]-[116], 420-428 [170]-[197]; *Truthful Endeavour Pty Ltd v Condon* (2015) 233 FCR 174 at 184 [35].

22 Sections 3 and 6 of the *Bankruptcy Amendment Act 1976* (Cth).

otherwise". Read with s 15C of the Acts Interpretation Act, s 38 of the Bankruptcy Act thereby conferred exclusive federal appellate jurisdiction on the Federal Court with respect to matters arising under the Bankruptcy Act which answered the description of "jurisdiction in bankruptcy".

27 Those jurisdictional provisions of the Bankruptcy Act remained until the Bankruptcy Act was further amended in 1996<sup>23</sup> to repeal s 38 and to substitute a new s 27(1) which provided that "[t]he Federal Court has jurisdiction in bankruptcy, and that jurisdiction is exclusive of the jurisdiction of all courts other than the jurisdiction of the High Court under section 75 of the Constitution". Section 27(1) as then amended remains relevantly unchanged save that, as the culmination of a series of amendments,<sup>24</sup> the opening words "[t]he Federal Court has jurisdiction in bankruptcy" have been replaced by "[t]he Federal Court and the Federal Circuit and Family Court of Australia (Division 2) have concurrent jurisdiction in bankruptcy".

28 The Commonwealth Parliament's present allocation of jurisdiction with respect to matters arising under the Bankruptcy Act apart from the Cross-vesting Act can therefore be summarised as follows. With respect to the limited category of matters encompassed by "jurisdiction in bankruptcy", the Federal Court and the Federal Circuit and Family Court of Australia (Division 2) have concurrent original jurisdiction under s 27(1) of the Bankruptcy Act to the exclusion of any other federal or State jurisdiction vested in State courts. With respect to matters arising under the Bankruptcy Act outside the limited category of matters encompassed by "jurisdiction in bankruptcy", State courts have original and appellate federal jurisdiction commensurate with their corresponding State jurisdiction by operation of s 39(2) of the Judiciary Act. And with respect to civil matters arising under the Bankruptcy Act outside the limited category of matters encompassed by "jurisdiction in bankruptcy", the Federal Court has concurrent original federal jurisdiction under s 39B(1A)(c) of the Judiciary Act and has the federal appellate jurisdiction conferred by s 24(1)(a) of the Federal Court Act to entertain appeals from decisions of single judges of the Federal Court made in the exercise of original jurisdiction under s 39B(1A)(c) of the Judiciary Act.

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23 Items 89 and 101 of Sch 1 to the *Bankruptcy Legislation Amendment Act 1996* (Cth).

24 See item 4 of Sch 7 to the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth); item 1 of Sch 2 to the *Federal Circuit Court of Australia (Consequential Amendments) Act 2013* (Cth); item 124 of Sch 2 to the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth).

### The cross-vesting scheme

29       The national scheme for the cross-vesting of jurisdiction was succinctly described by Kirby P in *Bankinvest AG v Seabrook*<sup>25</sup> as "a regime for the assignment of litigation to the most appropriate jurisdiction in Australia".

30       The Cross-vesting Act commenced with a Preamble which was replicated in the preambles to each of the State cross-vesting Acts. The Preamble furnished a concise identification of the mischief to which the national scheme was directed together with a concise explanation of the strategy adopted by the national scheme to address that mischief.

31       The Preamble identified the mischief to which the national scheme was directed as having been relevantly that "inconvenience and expense have occasionally been caused to litigants by jurisdictional limitations in federal [and] State ... courts". It explained the strategy adopted to address that mischief to have had three principal elements. The first was "to establish a system of cross-vesting of jurisdiction between those courts, without detracting from the existing jurisdiction of any court". The second was "to structure the system in such a way as to ensure as far as practicable that proceedings concerning matters which, apart from this Act and any law of a State relating to cross-vesting of jurisdiction, would be entirely or substantially within the jurisdiction (other than any accrued jurisdiction) of the Federal Court or the Family Court or the jurisdiction of a Supreme Court of a State ... are instituted and determined in that court, whilst providing for the determination by one court of federal and State matters in appropriate cases". The third was, "if a proceeding is instituted in a court that is not the appropriate court, to provide a system under which the proceeding will be transferred to the appropriate court".

32       The ambition articulated by the Preamble was reinforced by the Attorney-General of the Commonwealth in the second reading speech for the Cross-vesting Act in the House of Representatives. The Attorney-General said of the national scheme that it was "an attempt to resolve difficulties that presently exist in determining the jurisdictional limits of [f]ederal [and] State ... courts" and emphasised that it would "not detract from the existing jurisdictions of those courts".<sup>26</sup> The Attorney-General predicted that the national scheme would need to be applied only in "exceptional cases" and opined that its successful operation

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25   (1988) 14 NSWLR 711 at 716.

26   Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 October 1986 at 2555.

would "depend very much upon courts approaching the legislation in accordance with its general purpose and intention as indicated in the [P]reamble".<sup>27</sup>

33 The principal element of the national scheme, being the establishment of a system of cross-vesting of jurisdiction between courts, was to be achieved through the operation of s 4 of the Cross-vesting Act (headed "Additional jurisdiction of certain Courts") and through the complementary operation of s 4 of each State cross-vesting Act. The essential design was for s 4 of the Cross-vesting Act to vest additional federal jurisdiction in State Supreme Courts and for s 4 of each State cross-vesting Act to vest State jurisdiction in the Federal Court and the Family Court. The effect of the holding in *Re Wakim; Ex parte McNally*<sup>28</sup> was that the investiture of State jurisdiction in federal courts was invalid. But that is of no present concern. The present concern is with understanding the extent of the conferral of federal jurisdiction under s 4 of the Cross-vesting Act.

34 Section 4(1) of the Cross-vesting Act was expressed to vest federal jurisdiction with respect to a civil matter in a State Supreme Court whenever two specified conditions were satisfied. The first, specified in s 4(1)(a), was that federal jurisdiction was conferred on the Federal Court or the Family Court with respect to the matter. The second, specified in s 4(1)(b), was that the State Supreme Court would not have federal jurisdiction with respect to the matter apart from s 4 of the Cross-vesting Act. Section 4(1) was subject to exclusions in s 4(4) the detail of which is of no present concern.

35 The effect of s 4(1) was thereby to invest the Supreme Court of each State under s 77(iii) of the Constitution with original and appellate federal jurisdiction in civil matters arising under Commonwealth laws in addition to the original and appellate federal jurisdiction from time to time vested in them by operation of s 39(2) of the Judiciary Act and other laws made under s 77(iii) of the Constitution. To the extent not excluded by s 4(4), the additional original and appellate federal jurisdiction invested by s 4(1) encompassed the totality of the matters in which original or appellate federal jurisdiction was from time to time conferred on the Federal Court or the Family Court under s 77(i) of the Constitution.

36 Section 4(3) had the complementary effect of conferring additional original or appellate federal jurisdiction on the Federal Court or the Family Court under s 77(i) of the Constitution, but only with respect to a matter arising for determination in a civil proceeding transferred to the Federal Court or the Family Court and only where the transferee court would not have federal jurisdiction with respect to the matter arising for determination in the transferred proceeding apart

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27 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 October 1986 at 2556.

28 (1999) 198 CLR 511.



from s 4(3). The additional federal jurisdiction conferred on the Federal Court or the Family Court by s 4(3) of the Cross-vesting Act was therefore not freestanding but would arise only where a State Supreme Court first transferred a proceeding to the Federal Court or the Family Court by making an order under the general transfer provision in s 5(1) of the Cross-vesting Act (which was replicated in s 5(1) of each State cross-vesting Act) or under the particular transfer provision applicable to "special federal matters" in s 6(1) of the Cross-vesting Act (which was replicated in s 6(1) of each State cross-vesting Act).

37 Importantly, save for the limited conferral of additional federal jurisdiction by s 4(3) in the event of a State Supreme Court transferring a proceeding to the Federal Court or the Family Court by order made under s 5(1) or s 6(1) of the Cross-vesting Act (or a State cross-vesting Act equivalent), no part of the design of the Cross-vesting Act was to confer on the Federal Court or the Family Court under s 77(i) of the Constitution any part of the original or appellate federal jurisdiction from time to time invested in a State Supreme Court by operation of s 39(2) of the Judiciary Act or any other law made under s 77(iii) of the Constitution.<sup>29</sup> As the Full Court of the Federal Court observed in *NEC Information Systems Australia Pty Ltd v Iveson*,<sup>30</sup> the Cross-vesting Act did "not operate so as to confer upon [the Federal Court] any fresh federal jurisdiction, in addition to that conferred upon it by other laws of the Parliament".

38 Unlike s 4 of the Cross-vesting Act, s 7 was not directed to the investiture or conferral of additional federal jurisdiction. Rather, s 7 (headed "Institution and hearing of appeals") was directed to implementing an aspect of the element of the national scheme which was explained in the Preamble in terms of ensuring as far as practicable "that proceedings concerning matters which, apart from [the national scheme], would be entirely or substantially within the jurisdiction ... of the Federal Court or the Family Court or the jurisdiction of a Supreme Court ... are instituted and determined in that court, whilst providing for the determination by one court of federal and State matters in appropriate cases". In light of the Federal Court and the Family Court each retaining such appellate federal jurisdiction with respect to matters arising under Commonwealth laws as was from time to time to be conferred on them by s 24(1)(a) of the Federal Court Act and other Commonwealth laws made under s 77(i) of the Constitution and in light of s 4(1) of the Cross-vesting Act operating concurrently to vest appellate federal jurisdiction in State Supreme Courts with respect to those same matters under s 77(iii) of the Constitution, s 7 of the Cross-vesting Act was concerned to regulate the exercise

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29 Griffith, Rose and Gageler, "Choice of Law in Cross-vested Jurisdiction: A Reply to Kelly and Crawford" (1988) 62 *Australian Law Journal* 698 at 701.

30 (1992) 36 FCR 258 at 264.

of those potentially competing conferrals and investitures of appellate federal jurisdiction.

39 Section 7 was designed to regulate the exercise of appellate federal jurisdiction so as to ensure that an appeal that would be within the jurisdiction of the Federal Court or the Family Court apart from the national scheme would still be instituted and determined in the Federal Court or the Family Court as the case may be other than in exceptional cases. The section was designed to do so by proscribing the institution and determination of an appeal in a State Supreme Court in a matter in which (apart from the appellate jurisdiction of the High Court under s 73(ii) of the Constitution) the Federal Court or the Family Court alone would have appellate federal jurisdiction apart from the national scheme.

40 To that end, s 7(1) was framed to proscribe the institution of an appeal from a decision of a single judge of the Federal Court or the Family Court to the Full Court of a State Supreme Court. Section 7(1) was thereby to ensure that such an appeal would be determined by the Full Court of the Federal Court in the exercise of the appellate jurisdiction conferred by s 24(1)(a) of the Federal Court Act or by the Full Court of the Family Court in the exercise of the appellate jurisdiction conferred at the time of the enactment and commencement of the Cross-vesting Act by the equivalent provision of the *Family Law Act 1975* (Cth) ("the Family Law Act").<sup>31</sup>

41 To the same end, subject to qualifications in s 7(7) and (8), s 7(5) was framed to proscribe the institution and determination of an appeal from a decision of a single judge of a State Supreme Court other than in the Federal Court or the Family Court in a matter arising under an Act listed in the Schedule. Section 7(5) was thereby to ensure that, subject to the qualifications in s 7(7) and (8), such an appeal would be determined by the Full Court of the Federal Court or by the Full Court of the Family Court in the exercise of such appellate jurisdiction as was conferred on the Federal Court or the Family Court by an Act listed in the Schedule.

42 The Attorney-General of the Commonwealth explained that limited purpose and intended operation of s 7(5) in its application to the Federal Court when he said in the second reading speech for the Cross-vesting Act:<sup>32</sup>

"The special role of the Federal Court is also recognised in relation to appeal matters which presently lie within the exclusive appellate

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31 Section 94(1)(a) of the Family Law Act. See s 50 of the *Family Law Amendment Act 1983* (Cth).

32 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 October 1986 at 2556.

jurisdiction of the Federal Court. The Schedule to the Bill lists certain Acts such as the Bankruptcy Act ... and the Commonwealth Electoral Act ... Appeals in matters under the listed Acts will remain within the exclusive appellate jurisdiction of the full Federal Court."

43 The explanatory memorandum for the Cross-vesting Act elaborated:<sup>33</sup>

"But for [s] 7, the full cross-vesting of federal and State jurisdiction between the relevant courts at the appellate levels as well as at first instance could, for example, result in an appeal being taken from a single judge of a State Supreme Court to the Full Federal Court ... [Section] 7 is designed to prevent the cross-vesting from giving rise to any such appeals except where a matter in an appeal from a single judge of a State Supreme Court is a matter arising under a Commonwealth Act specified in the Schedule to the Bill. In such a case, the whole appeal will lie only to the Full Federal Court. The scheduled Acts are Acts, such as the Bankruptcy Act ... and the Commonwealth Electoral Act ..., under which the Full Federal Court now has exclusive appellate jurisdiction."

44 When the Cross-vesting Act was originally enacted, the Schedule to the Cross-vesting Act listed the Bankruptcy Act along with twelve other Commonwealth Acts. The common feature of eleven of those other Acts was that each (like s 27(1)(b)-(g) of the Bankruptcy Act) invested original federal jurisdiction in State Supreme Courts with respect to civil matters or a specified category of civil matters arising under it and that each (like s 38 of the Bankruptcy Act) also contained a provision which operated to confer federal appellate jurisdiction to determine an appeal from a judgment of a State Supreme Court given in the exercise of that original jurisdiction on the Federal Court exclusive of any federal appellate jurisdiction of the State Supreme Court in which that federal appellate jurisdiction was then exercisable by the Full Court in accordance with s 25 of the Federal Court Act. The twelfth of the other listed Commonwealth Acts, the Family Law Act, followed a similar pattern. It invested original federal jurisdiction in State Supreme Courts with respect to specified categories of civil matters arising under it<sup>34</sup> and contained a provision which operated to confer federal appellate jurisdiction to determine an appeal from a judgment of a State Supreme Court given in the exercise of that original jurisdiction only on the Full

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33 Australia, House of Representatives, *Jurisdiction of Courts (Cross-vesting) Bill 1986*, Explanatory Memorandum at 11.

34 Section 39(5) of the Family Law Act. See s 18 of the *Family Law Amendment Act 1983* (Cth).

Court of the Family Court exclusive of any federal appellate jurisdiction of the State Supreme Court.<sup>35</sup>

45 The text of s 7(5) of the Cross-vesting Act as originally enacted was as follows:

"Subject to sub-sections (7) and (8), where it appears that a matter for determination in a proceeding by way of an appeal from a decision of a single judge of the Supreme Court of a State ... is a matter arising under an Act specified in the Schedule, that proceeding shall be instituted only in, and shall be determined only by—

(a) the Full Court of the Federal Court or of the Family Court, as the case requires; or

(b) with special leave of the High Court, the High Court."

46 Section 7(7) provided:

"Where—

(a) the Full Court of the Supreme Court of a State ... commences to hear a proceeding by way of an appeal; and

(b) before the Court determines the proceeding, it appears to the Court that the proceeding is a proceeding to which sub-section (5) applies,

the Court shall, unless the interests of justice require that the Court proceed to determine the proceeding, transfer the proceeding to the Full Court of the Federal Court or of the Family Court, as the case requires."

47 And s 7(8) provided:

"Where the Full Court of the Supreme Court of a State ... —

(a) determines a proceeding to which sub-section (5) applies as mentioned in sub-section (7); or

(b) through inadvertence, determines a proceeding to which sub-section (5) applies,

nothing in this section invalidates the decision of that court."

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35 Section 94(1)(b)(ii) of the Family Law Act. See s 50 of the *Family Law Amendment Act 1983* (Cth).

48 Especially when read in juxtaposition to s 4(1) and in context with s 7(1) and s 7(7) and (8), several features of the text and structure of s 7(5) of the Cross-vesting Act confirm the limited purpose and intended operation identified.

49 The first is that the concern of s 7(5) of the Cross-vesting Act was solely with a matter arising under one of the thirteen Commonwealth Acts listed in the Schedule, twelve of which each operated independently of the Cross-vesting Act to confer federal appellate jurisdiction to hear and determine an appeal from a single judge of a State Supreme Court in a matter arising under it solely on the Full Court of the Federal Court, and the other of which operated independently of the Cross-vesting Act to confer federal appellate jurisdiction to hear and determine an appeal from a single judge of a State Supreme Court in a matter arising under it solely on the Full Court of the Family Court. The second is that the legal operation of s 7(5) was expressed solely in terms of a negative "command",<sup>36</sup> or "prohibition",<sup>37</sup> against instituting or determining a proceeding by way of appeal raising such a matter for determination other than in accordance with one or other of the options presented in s 7(5)(a) and s 7(5)(b). The third is that the framing of the option presented in s 7(5)(a) as a choice between the Full Court of the Federal Court and the Full Court of the Family Court "as the case requires" indicated that the question whether either of those Courts, and if so which, was required to hear and determine the appeal raising the matter needed to be answered and was to be answered on a case by case basis independently of s 7(5)(a) itself. The fourth, reinforcing the third, is that the further option presented by s 7(5)(b) necessarily assumed the jurisdiction of the High Court to entertain an appeal under s 73(ii) of the Constitution subject to the requirement for special leave to appeal imposed by s 35 of the Judiciary Act.

50 The construction of s 7(5)(a) of the Cross-vesting Act as originally enacted which emerges from the accumulation of these purposive, contextual and textual considerations is that it did no more than to restrict a proceeding by way of appeal from a single judge of a State Supreme Court raising a matter under a Commonwealth Act listed in the Schedule to being instituted in and determined by the Full Court of the Federal Court or the Full Court of the Family Court if that Court had jurisdiction to entertain and determine the appeal apart from the operation of the Cross-vesting Act.

51 Merely by restricting the institution and determination of a proceeding by way of appeal to the Full Court of the Federal Court or the Full Court of the Family Court in a case where either Court otherwise had federal appellate jurisdiction to hear and determine an appeal from a single judge of a State Supreme Court with

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36 Compare *NEC Information Systems Australia Pty Ltd v Iveson* (1992) 36 FCR 258 at 265.

37 *Eberstaller v Poulos* (2014) 87 NSWLR 394 at 399 [21].

respect to a matter, in light of the State Supreme Court also having federal jurisdiction to hear and determine an appeal from a single judge of a State Supreme Court with respect to the matter by operation of s 4(1) of the Cross-vesting Act, s 7(5)(a) of the Cross-vesting Act did not operate to "authorise" a proceeding in relation to the matter to be instituted in the Federal Court or the Family Court so as to attract the application of s 15C of the Acts Interpretation Act. Irrespective of s 7(5)(a), authority to institute such a proceeding by way of appeal existed as an incident of the conferral of federal appellate jurisdiction on the Federal Court or the Family Court by the Commonwealth Act listed in the Schedule under which the matter arose.

- 52           Within the overall design of the Cross-vesting Act as enacted, s 7(5)(a) accordingly served to maintain the integrity of the exercise of independent conferrals of exclusive federal appellate jurisdiction on the Federal Court and the Family Court. No part of its purpose or operation was to add to the federal appellate jurisdiction of either the Federal Court or the Family Court. Conversely, no part of its purpose or operation was to restrict or otherwise detract from the exercise of the federal appellate jurisdiction independently invested in State Supreme Courts by s 39(2) of the Judiciary Act.

### **The inconsequentiality of subsequent legislative developments**

- 53           Of course, s 7(5)(a) of the Cross-vesting Act is "always speaking in the present" and must therefore be construed within the context of the Cross-vesting Act as amended and currently in force<sup>38</sup> on the working hypothesis that the Commonwealth Parliament intends its legislation that speaks in the present to speak harmoniously.<sup>39</sup> But what of substance might be said to have changed which might properly be said to result in s 7(5)(a) now bearing a different construction from the construction it properly bore at the time of the original enactment of the Cross-vesting Act?

- 54           The structure of the Cross-vesting Act remains the same. Save for present references to "the Federal Circuit and Family Court of Australia (Division 1)" appearing in place of prior references to "the Family Court" in the wake of the enactment of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) ("the FCFCOA Act"), so does the Preamble and so does the text of s 7.

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38   *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565 at 594 [86].

39   *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at 33 [98].

55 All that has changed over the 37 years since the original enactment of the Cross-vesting Act is that the Schedule has been amended and some of the Acts that were and are still referred to in the Schedule have also been amended.

56 The result of the amendments to the Schedule is that the Schedule still lists thirteen Commonwealth Acts. Ten of the currently listed Acts (including the Bankruptcy Act and the Family Law Act) were amongst those listed in the Schedule as originally enacted. Two currently listed Acts are successors to Acts listed in the Schedule as originally enacted.<sup>40</sup> One of the originally listed Acts has been deleted from the Schedule, because the Act itself has been repealed.<sup>41</sup> And one currently listed Act, the *Dental Benefits Act 2008* (Cth) ("the Dental Benefits Act"), has been added.

57 The two currently listed Acts that are successors to Acts listed in the Schedule as originally enacted<sup>42</sup> and five of the ten<sup>43</sup> currently listed Acts that were listed in the Schedule as originally enacted each continue to invest original federal jurisdiction in State Supreme Courts with respect to civil matters or a specified category of civil matters arising under it and confer federal appellate jurisdiction on the Federal Court to determine an appeal from a judgment of a State Supreme Court given in the exercise of that original jurisdiction.<sup>44</sup> And another of the listed Acts that were listed in the Schedule as originally enacted, the Family Law Act, continues to invest original federal jurisdiction in State Supreme Courts with respect to specified categories of civil matters arising under it<sup>45</sup> and the FCFCOA Act now confers federal appellate jurisdiction on the Federal Circuit and Family

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40 See: *Patents Act 1990* (Cth), which replaced the *Patents Act 1952* (Cth); *Designs Act 2003* (Cth), which replaced the *Designs Act 1906* (Cth).

41 *Petroleum Retail Marketing Franchise Act 1980* (Cth).

42 See: *Patents Act 1990* (Cth) (ss 155 and 158); *Designs Act 2003* (Cth) (ss 84 and 87).

43 The reference in the Schedule to the *Trade Marks Act 1955* (Cth) is to be read as a reference to its successor Act, the *Trade Marks Act 1995* (Cth). See s 10(b) of the Acts Interpretation Act.

44 See: *Advance Australia Logo Protection Act 1984* (Cth) (s 13(1) and (4)); *Copyright Act 1968* (Cth) (ss 131A and 131B); *Liquid Fuel Emergency Act 1984* (Cth) (s 48); *Shipping Registration Act 1981* (Cth) (ss 47B, 47C, 59, 70 and 82); *Trade Marks Act 1995* (Cth) (ss 190-192, 195).

45 Section 39(1)(b) of the Family Law Act.

Court of Australia (Division 1) to determine an appeal from a judgment of a State Supreme Court given in the exercise of that original jurisdiction.<sup>46</sup>

58 Of the other four currently listed Acts that were listed in the Schedule as originally enacted, three have been amended with the result that they no longer invest in State Supreme Courts original federal jurisdiction with respect to civil matters or specified categories of civil matters arising under them and now instead confer such original federal jurisdiction exclusively in federal courts: the Bankruptcy Act,<sup>47</sup> the *Commonwealth Electoral Act 1918* (Cth) ("the Commonwealth Electoral Act")<sup>48</sup> and the *Referendum (Machinery Provisions) Act 1984* (Cth) ("the Referendum Act").<sup>49</sup>

59 The last of the other four currently listed Acts that were listed in the Schedule as originally enacted is the *Health Insurance Act 1973* (Cth) ("the Health Insurance Act"). As a result of amendments in 1999,<sup>50</sup> the Health Insurance Act no longer contains any provision conferring federal appellate jurisdiction on the Federal Court.

60 Like the Health Insurance Act in the form in which it has existed since 1999, the Dental Benefits Act does not now contain, and has never since its enactment in 2008 contained, any provision conferring federal appellate jurisdiction on the Federal Court.

61 The current position with respect to s 7(5)(a) of the Cross-vesting Act is therefore that, adopting the construction I have ascribed to s 7(5)(a) of the Cross-vesting Act at the time of its enactment, s 7(5)(a) continues to apply in relation to a proceeding by way of appeal that raises for determination a matter arising under any of eight of the thirteen Commonwealth Acts listed in the Schedule in the same way as it applied at the time of enactment of the Cross-vesting Act.

62 On the same construction, s 7(5)(a) of the Cross-vesting Act has no current application to a proceeding by way of appeal that raises for determination a matter arising under one of the other five Commonwealth Acts now listed in the Schedule, being the Bankruptcy Act, the Commonwealth Electoral Act, the Health Insurance Act, the Dental Benefits Act, and the Referendum Act. That is because neither the

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46 Section 26(1)(d)(ii) of the FCFCOA Act.

47 See s 27(1) of the Bankruptcy Act.

48 See ss 354 and 383 of the Commonwealth Electoral Act.

49 See s 139 of the Referendum Act.

50 See item 63 of Sch 1 to the *Health Insurance Amendment (Professional Services Review) Act 1999* (Cth).



Federal Court nor the Federal Circuit and Family Court of Australia (Division 1) has any federal appellate jurisdiction to determine an appeal from a decision of a single judge of a State Supreme Court in any matter arising under any of those other five Acts in their current forms independently of the Cross-vesting Act.

63 That non-application of s 7(5)(a) of the Cross-vesting Act to a proceeding by way of appeal that raises for determination a matter arising under any of the other five Commonwealth Acts listed in the Schedule does no violence to the construction I have ascribed to s 7(5)(a) of the Cross-vesting Act at the time of its enactment. Indeed, with the exception of the non-application of s 7(5)(a) to a proceeding by way of appeal that raises for determination a matter arising under the Dental Benefits Act, the non-application of s 7(5)(a) to a proceeding by way of appeal that raises for determination a matter arising under each of those other five Commonwealth Acts can be seen to result from s 7(5)(a) having a consistent operation through time in changing circumstances. The current situation is simply that, lacking any federal appellate jurisdiction to determine an appeal from a decision of a single judge of a State Supreme Court in a matter arising under any of those other five Acts in their current forms independently of the Cross-vesting Act, neither the Federal Court nor the Federal Circuit and Family Court of Australia (Division 1) is currently "require[d]" to entertain any such appeal.

64 Nor does non-application of s 7(5)(a) of the Cross-vesting Act to a proceeding by way of appeal that raises for determination a matter arising under any of the other five Commonwealth Acts mean that the Federal Court could never hear and determine an appeal from a decision of a single judge of a State Supreme Court in a matter arising under any of those other five Commonwealth Acts. Section 5(1) of the Cross-vesting Act would still authorise and require a State Supreme Court to transfer any such proceeding by way of appeal to the Federal Court if the Supreme Court were to be persuaded that having the proceeding be determined by the Federal Court would be more appropriate or would be otherwise in the interests of justice. In the event of a State Supreme Court transferring the proceeding by way of appeal to the Federal Court, s 4(3) of the Cross-vesting Act would operate to confer federal appellate jurisdiction on the Federal Court sufficient to determine the appeal.

65 The only potential difficulty with maintaining the construction I have ascribed to s 7(5)(a) of the Cross-vesting Act at the time of its enactment is that argued by the Attorney-General of the Commonwealth to arise from the inclusion of the Dental Benefits Act in the Schedule to the Cross-vesting Act. The Attorney-General properly points out that, on that construction of s 7(5)(a), the reference to the Dental Benefits Act would have been redundant from the moment of its inclusion in the Schedule.

66 The explanatory memorandum for the *Dental Benefits (Consequential Amendments) Act 2008* (Cth), which inserted the reference to the Dental Benefits

Act into the Schedule to the Cross-vesting Act, explained the thinking behind its insertion as follows:<sup>51</sup>

"The effect of the amendment would be to allow subsection 7(5) of the Cross-vesting Act to apply, which would require a matter arising under the proposed *Dental Benefits Act 2008* to be heard on appeal by the Full Federal Court, or, with special leave, by the High Court, rather than by the Full Court of a State or Territory Supreme Court.

As the *Health Insurance Act 1973* (relating to the payment of Medicare benefits) also appears in the Schedule of the Cross-vesting Act, the insertion will align the proposed *Dental Benefits Act 2008* with the *Health Insurance Act 1973*."

67 The thinking disclosed by the explanatory memorandum was to my mind confused. By 2008, as a result of amendments made to it in 1999, the Health Insurance Act no longer required a proceeding by way of appeal raising any matter under the Health Insurance Act to be heard on appeal by the Full Court of the Federal Court rather than by the Full Court of a State Supreme Court and therefore no longer engaged s 7(5)(a) of the Cross-vesting Act. Mere inclusion of the Dental Benefits Act in the Schedule to the Cross-vesting Act was not enough to cause s 7(5)(a) of the Cross-vesting Act to apply to a proceeding by way of appeal raising a matter under the Dental Benefits Act so as to require it to be heard on appeal by the Federal Court rather than by a State Supreme Court.

68 Though the Commonwealth Parliament can always amend an Act by implication, the Commonwealth Parliament "does not change the law simply by betraying a mistaken view of it".<sup>52</sup> That is what I infer has happened here. The circumstance that the Commonwealth Parliament assumed that s 7(5)(a) of the Cross-vesting Act had a different operation is not a reason to depart from the objective construction of s 7(5)(a) that I consider has always been correct.

## Conclusion

69 Purposively construed within the context of the Cross-vesting Act, s 7(5)(a) neither itself confers federal appellate jurisdiction nor authorises the institution of a proceeding by way of appeal so as to attract the operation of s 15C of the Acts Interpretation Act to confer federal appellate jurisdiction. The provision is not

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51 Australia, House of Representatives, *Dental Benefits Bill 2008* and *Dental Benefits (Consequential Amendments) Bill 2008*, Explanatory Memorandum at 30.

52 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 506 (quotation marks omitted). See also *McNamara v The King* (2023) 98 ALJR 1 at 11 [34]; 415 ALR 223 at 232.

directed to the conferral or investiture of federal appellate jurisdiction at all but rather to the exercise of federal appellate jurisdiction otherwise conferred.

70           On its proper construction, s 7(5)(a) of the Cross-vesting Act does no more than restrict a proceeding by way of appeal from a decision of a single judge of a State Supreme Court raising for determination a matter arising under a Commonwealth Act listed in the Schedule to being instituted in and determined by the Full Court of the Federal Court or of the Federal Circuit and Family Court of Australia (Division 1). The provision does so if but only if, apart from the Cross-vesting Act, one or other of those Courts has federal appellate jurisdiction to entertain an appeal from a decision of a single judge of a State Supreme Court with respect to the matter in question.

71           The appeal in the present case from a decision of a single judge of the Equity Division of the Supreme Court of New South Wales determining a matter arising under s 153 of the Bankruptcy Act is not one which the Full Court of the Federal Court has federal appellate jurisdiction to determine apart from the Cross-vesting Act. Neither alone nor in combination with s 15C of the Acts Interpretation Act does s 7(5)(a) of the Cross-vesting Act confer such federal appellate jurisdiction upon it.

72           The application should be dismissed. The plaintiff should pay the costs of the first defendant.

Gordon J  
Edelman J  
Steward J  
Gleeson J  
Beech-Jones J

22.

GORDON, EDELMAN, STEWARD, GLEESON AND BEECH-JONES JJ.

## Introduction

73 This case concerns the scope of the appellate jurisdiction of the Full Court of the Federal Court of Australia ("the Full Court") to hear and determine an appeal involving a matter arising under the *Bankruptcy Act 1966* (Cth) from a single judge of the Supreme Court of New South Wales ("the Supreme Court"), dismissing the plaintiff's claim for relief.<sup>53</sup>

74 The Full Court dismissed the plaintiff's application for an extension of time to appeal as incompetent. The Court held that s 7(5) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) ("the *Cross-vesting Act*") did not apply to engage the Court's appellate jurisdiction under s 24(1)(c) of the *Federal Court of Australia Act 1976* (Cth) ("the *Federal Court Act*") to hear and determine an appeal from a State Supreme Court exercising federal jurisdiction because the decision under appeal was not made in the exercise of jurisdiction invested by s 4(1) of the *Cross-vesting Act*.<sup>54</sup>

75 In terms, s 7(5) of the *Cross-vesting Act* provides that, if it appears that a matter for determination in an appeal from a "decision of a single judge of the Supreme Court of a State or Territory" is a "matter arising under" one of the 13 Commonwealth Acts specified in the Schedule to the *Cross-vesting Act* ("Scheduled Acts"), that appeal is required<sup>55</sup> to be instituted in, and determined by, one of the three courts identified in s 7(5), including the Full Court. The *Bankruptcy Act* is one of the Scheduled Acts. The Full Court reasoned that s 7(5) should not be "read literally", but should be "read down" so that a "decision of a single judge of the Supreme Court of a State" means only decisions in federal jurisdiction that have come before the relevant Supreme Court as a result of the operation of s 4(1) of the *Cross-vesting Act*.<sup>56</sup>

76 For the following reasons, the Full Court erred in its construction of s 7(5) of the *Cross-vesting Act*. The Court has appellate jurisdiction to hear and determine

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53 *HBSY Pty Ltd v Lewis* (2022) 108 NSWLR 558.

54 *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 317 [53].

55 Except in particular circumstances specified in ss 7(7) and 7(8) of the *Cross-vesting Act*.

56 *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 313 [38].

the appeal brought by the plaintiff in the Federal Court. That jurisdiction, granted by s 24(1)(c) of the *Federal Court Act* "in such cases as are provided by any other Act", is enlivened by an appeal that falls within the scope of s 7(5) of the *Cross-vesting Act*. Section 7(5) relevantly directs appeals from a Supreme Court decision to the Full Court, irrespective of the source of the Supreme Court's original jurisdiction, where a matter arising for determination in the appeal is a matter arising under one of the Scheduled Acts. Accordingly, writs should issue, quashing the decision of the Full Court that it lacked jurisdiction to hear the plaintiff's appeal and commanding it to hear and determine that appeal.

### Legislative framework

77 The legislative provisions of principal relevance to the resolution of this case are s 24(1) of the *Federal Court Act* and ss 4(1) and 7 of the *Cross-vesting Act*. Section 24(1) of the *Federal Court Act* confers upon the Federal Court "jurisdiction to hear and determine" appeals from judgments of the kinds specified in s 24(1)(a)-(e). Section 24(1) provides:

"Subject to this section and to any other Act, whether passed before or after the commencement of this Act (including an Act by virtue of which any judgments referred to in this section are made final and conclusive or not subject to appeal), the Court has jurisdiction to hear and determine:

- (a) appeals from judgments of the Court constituted by a single Judge exercising the original jurisdiction of the Court;
- (b) appeals from judgments of the Supreme Court of a Territory (other than the Australian Capital Territory or the Northern Territory); and
- (c) in such cases as are provided by any other Act, appeals from judgments of a court (other than a Full Court of the Supreme Court) of a State, the Australian Capital Territory or the Northern Territory, exercising federal jurisdiction; and
- (d) appeals from judgments of the Federal Circuit and Family Court of Australia (Division 2) exercising original jurisdiction under a law of the Commonwealth other than:
  - (i) the *Family Law Act 1975*; or
  - (ii) the *Child Support (Assessment) Act 1989*; or
  - (iii) the *Child Support (Registration and Collection) Act 1988*; or

Gordon J  
Edelman J  
Steward J  
Gleeson J  
Beech-Jones J

24.

- (iv) regulations under an Act referred to in subparagraph (i), (ii) or (iii); and
- (e) appeals from judgments of the Federal Circuit and Family Court of Australia (Division 2) exercising jurisdiction under section 72Q of the *Child Support (Registration and Collection) Act 1988*."

78 Section 4(1) of the *Cross-vesting Act*, entitled "Additional jurisdiction of certain courts", states:

"Where:

- (a) the Federal Court or the Federal Circuit and Family Court of Australia (Division 1) has jurisdiction with respect to a civil matter, whether that jurisdiction was or is conferred before or after the commencement of this Act; and
- (b) the Supreme Court of a State or Territory would not, apart from this section, have jurisdiction with respect to that matter;

then:

- (c) in the case of the Supreme Court of a State (other than the Supreme Court of the Australian Capital Territory and the Supreme Court of the Northern Territory)—that court is invested with federal jurisdiction with respect to that matter; or
- (d) in the case of the Supreme Court of a Territory (including the Australian Capital Territory and the Northern Territory)—jurisdiction is conferred on that court with respect to that matter."

79 Section 7 of the *Cross-vesting Act*, entitled "Institution and hearing of appeals", states:

- "(1) An appeal shall not be instituted from a decision of a single judge of the Federal Court or the Federal Circuit and Family Court of Australia (Division 1) to the Full Court of the Supreme Court of a State or Territory.
- (2) An appeal shall not be instituted from the Federal Court or the Federal Circuit and Family Court of Australia (Division 1) to the other of those courts.

*Gordon J*  
*Edelman J*  
*Steward J*  
*Gleeson J*  
*Beech-Jones J*

25.

- (3) Where it appears that the only matters for determination in a proceeding by way of an appeal from a decision of a single judge of the Supreme Court of a State or Territory are matters other than matters arising under an Act specified in the Schedule, that proceeding shall be instituted only in, and shall be determined only by, the Full Court of the Supreme Court of that State or Territory.
- (4) An appeal shall not be instituted from a decision of a court of summary jurisdiction of a State to the Supreme Court of the State if an appeal lies from that decision to the State Family Court of the State.
- (5) Subject to subsections (7) and (8), where it appears that a matter for determination in a proceeding by way of an appeal from a decision of a single judge of the Supreme Court of a State or Territory (not being a proceeding to which subsection (6) applies) is a matter arising under an Act specified in the Schedule, that proceeding shall be instituted only in, and shall be determined only by:
  - (a) the Full Court of the Federal Court or of the Federal Circuit and Family Court of Australia (Division 1), as the case requires; or
  - (b) with special leave of the High Court, the High Court.
- (6) A proceeding by way of an appeal from a decision of a judge of a State Family Court, being a proceeding involving the determination of:
  - (a) a matter arising under an Act specified in the Schedule; and
  - (b) another matter;may be dealt with as if no matter for determination in the proceeding were a matter arising under an Act specified in the Schedule.
- (7) Where:
  - (a) the Full Court of the Supreme Court of a State or Territory commences to hear a proceeding by way of an appeal; and

*Gordon J*  
*Edelman J*  
*Steward J*  
*Gleeson J*  
*Beech-Jones J*

26.

- (b) before the Court determines the proceeding, it appears to the Court that the proceeding is a proceeding to which subsection (5) applies;

the Court shall, unless the interests of justice require that the Court proceed to determine the proceeding, transfer the proceeding to the Full Court of the Federal Court or of the Federal Circuit and Family Court of Australia (Division 1), as the case requires.

- (8) Where the Full Court of the Supreme Court of a State or Territory:
  - (a) determines a proceeding to which subsection (5) applies as mentioned in subsection (7); or
  - (b) through inadvertence, determines a proceeding to which subsection (5) applies;

nothing in this section invalidates the decision of that court."

### **Background to the case**

80 The plaintiff is the assignee of the entitlement of Anthony Lewis under the will of the late Marjorie Lewis, who died in August 2008. Anthony Lewis and Geoffrey Lewis ("the first defendant") are among several residuary beneficiaries under the will. The will named the deceased's brother and Anthony Lewis as executors of the deceased's estate.

81 At all relevant times, Anthony Lewis was a director and the majority shareholder of Lewis Securities Ltd ("Lewis Securities"), a broking and investments business. The deceased had invested with Lewis Securities and, at the date of her death, her portfolio was valued at around \$305,000.

82 The deceased estate's largest asset was \$551,084.93, being a debt owing to it by the Sir Moses Montefiore Jewish Home. Shortly after the deceased's death, Anthony Lewis contacted the Home and was sent a cheque for the amount of the Montefiore debt ("the Montefiore sum"). On 9 September 2008, Anthony Lewis transferred the Montefiore sum to Lewis Securities. At around this time, Anthony Lewis also transferred a further \$20,000 of the deceased estate's money to Lewis Securities.

83 In transferring the two sums to Lewis Securities, Anthony Lewis acted in breach of his fiduciary duty to the deceased estate and, accordingly, was liable to the estate. On 14 December 2008, the deceased's brother renounced his



executorship of the estate. Anthony Lewis renounced his executorship on 17 December 2008 before obtaining probate, and letters of administration were granted to the first defendant on 13 January 2009. After a period in voluntary administration, Lewis Securities went into liquidation in February 2009 and Anthony Lewis was declared bankrupt in April 2009. In April 2012, he was discharged from bankruptcy.

84 Pursuant to an agreement with Anthony Lewis's trustee in bankruptcy, made in July 2011, the plaintiff purchased certain assets from the trustee for \$275,000, including Anthony Lewis's interest in the residue of the deceased estate. This assignment was effective, but was "subject to the equities", including any liability of Anthony Lewis to the deceased estate.

85 In total, the deceased estate has received dividends of \$103,423.49 in respect of the funds transferred by Anthony Lewis to Lewis Securities. No other sums have been recovered. The estate remains in administration, with no distributions to the residuary beneficiaries having been made.

#### *Supreme Court proceedings*

86 In August 2019, the plaintiff commenced proceedings in the Supreme Court seeking orders to revoke the letters of administration granted to the first defendant. The first defendant cross-claimed, seeking, among other relief, declarations that the plaintiff was not entitled to be paid Anthony Lewis's share of the deceased estate on the basis that Anthony Lewis: (a) was deemed to have received a distribution to the extent of the loss he caused to the estate and interest on the amount of that loss; and/or (b) could not participate in or receive a distribution from the estate without having made good the loss that he caused to the estate.

87 In its defence to the cross-claim, the plaintiff pleaded that Anthony Lewis's liability to the estate was extinguished upon his discharge from bankruptcy pursuant to s 153(1) of the *Bankruptcy Act*. The first defendant disputed this contention by arguing, among other things, that Anthony Lewis's liability was not extinguished as s 153(2)(b) of the *Bankruptcy Act* applied. That provision relevantly provides that liabilities incurred "by means of fraud or a fraudulent breach of trust" are not extinguished under s 153(1).

88 At first instance, the proceeding attracted federal jurisdiction because of the plaintiff's disputed reliance on s 153(1) of the *Bankruptcy Act* to defeat the first

Gordon J  
Edelman J  
Steward J  
Gleeson J  
Beech-Jones J

28.

defendant's cross-claim.<sup>57</sup> The justiciable controversy thus involved a "matter arising under" the *Bankruptcy Act*.<sup>58</sup> Federal jurisdiction was granted to the Supreme Court by s 39(2) of the *Judiciary Act 1903* (Cth), which relevantly invests a State court with federal jurisdiction within the limits of that court's jurisdiction.

89 The primary judge delivered judgment on 24 June 2022 and, among other things, upheld the first defendant's case based on s 153(2)(b). Consequently, the primary judge dismissed the plaintiff's statement of claim and made a declaration that the plaintiff cannot participate in or receive a distribution from the deceased estate without having first paid to the estate an amount equivalent to the residue of the estate's claim against Anthony Lewis.

*Steps taken by the plaintiff to appeal from the Supreme Court judgment*

90 The plaintiff filed and served a notice of intention to appeal from the Supreme Court judgment to the New South Wales Court of Appeal. While preparing the relevant papers, the plaintiff's legal advisers came to the view that the appeal would concern a matter arising under the *Bankruptcy Act* and that, pursuant to s 7(5) of the *Cross-vesting Act*, such an appeal lay only to the Full Court. By that time, the deadline for filing a notice of appeal to the Full Court had expired.<sup>59</sup>

91 On 2 September 2022, the plaintiff filed an application for an extension of time to appeal to the Full Court. One of the issues raised by the proposed appeal is a challenge to the primary judge's conclusion in relation to s 153 of the *Bankruptcy Act*, including his Honour's interpretation of the meaning of "fraudulent breach of trust" in s 153(2)(b).

92 The first defendant opposed the extension of time application on the ground that the Full Court lacked jurisdiction to hear the appeal.

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57 *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 476; *NEC Information Systems Australia Pty Ltd v Iveson* (1992) 36 FCR 258 at 264.

58 See *R v Commonwealth Court of Conciliation and Arbitration*; *Ex parte Barrett* (1945) 70 CLR 141 at 154; *Re Wakim*; *Ex parte McNally* (1999) 198 CLR 511 at 585 [139].

59 *Federal Court Rules 2011* (Cth), r 36.03.

### The Full Court's dismissal of the application for extension of time to appeal

93 The Full Court reasoned that, as the proposed appeal was from a decision made in the exercise of jurisdiction granted by s 39(2) of the *Judiciary Act*, on the Full Court's construction of s 7(5) of the *Cross-vesting Act* s 4(1) was not engaged, with the result that s 7(5) did not apply.<sup>60</sup> If s 4(1) had been engaged, the Full Court would have granted an extension of time to appeal.<sup>61</sup>

94 The Full Court made repeated references to the effect of ss 7(3) and 7(5), if "read literally". This apparently described an approach to interpreting the text of the provisions, without regard to context or purpose.<sup>62</sup> Using this technique, the Full Court identified several matters of context in support of this confined interpretation of s 7(5). These were: (1) the purpose of the *Cross-vesting Act* did not include "far-reaching reform[s]" such as conferring additional "exclusive appellate jurisdiction" upon the Federal Court;<sup>63</sup> (2) s 7(5) should be read congruently with s 7(3), which, if "read literally", would "dictate the flow of appeals through State courts in non-federal matters";<sup>64</sup> and (3) s 39(2) of the *Judiciary Act* provides for a case in which a State court exercises federal jurisdiction to proceed on appeal through that State's court system in accordance with the legislation of the State.<sup>65</sup> The Full Court reasoned that, read literally, s 7(3) does the work that is already done by s 39(2) of the *Judiciary Act* and is otherwise otiose.<sup>66</sup> Further, if s 7(5) were to be read literally, it would effect an "implied partial repeal" of s 39(2) of the *Judiciary Act* and create "a fundamental change" in the allocation of appellate jurisdiction in respect of matters arising under any of

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60 *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 308 [21], 311 [33]-[34], 313-314 [38], [40]-[41], 317 [53].

61 *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 306 [15].

62 cf *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 368 [14].

63 *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 310 [30], 313-314 [40]-[41].

64 *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 310 [31].

65 *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 310-311 [32].

66 *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 311 [33].

Gordon J  
Edelman J  
Steward J  
Gleeson J  
Beech-Jones J

30.

the Scheduled Acts.<sup>67</sup> Such a result was said not to be supported by the objects of the *Cross-vesting Act*.<sup>68</sup>

### **Federal Court's appellate jurisdiction**

95 "Jurisdiction" is the "authority which a court has to decide matters that are litigated before it".<sup>69</sup> Federal jurisdiction arising from the subject matters in ss 75 and 76 of the *Constitution* is limited to deciding "matters".<sup>70</sup> In this case, there was no dispute that there was a relevant matter, both in the proceeding before the primary judge and in the plaintiff's application in the Federal Court.

96 An appeal is a statutory right to obtain relief from a superior court, usually<sup>71</sup> to redress error in the court below.<sup>72</sup> Accordingly, statutory authority is required to found a proceeding by way of appeal.<sup>73</sup> The appellate jurisdiction of the Federal Court is statutory and is created by legislation passed under s 77(i) of the

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67 *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 311 [34].

68 *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 312-313 [37].

69 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 561, quoting *Halsbury's Laws of England*, 4th ed, vol 10 at [715]. See also *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 at 349 [24].

70 *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 674 at 685 [30]; 411 ALR 615 at 624.

71 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203 [12]-[13].

72 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 109, quoting *Attorney-General v Sillem* (1864) 10 HLC 704 at 724 [11 ER 1200 at 1209].

73 *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523 at 553, citing *Attorney-General v Sillem* (1864) 10 HLC 704 at 720 [11 ER 1200 at 1207-1208].

*Constitution*.<sup>74</sup> Consequently, an appeal depends upon the existence of both a right to bring the appeal and the appellate court's jurisdiction to decide the appeal.

97 In some cases, a statutory provision by which a right of appeal is conferred may impliedly grant jurisdiction to hear the appeal.<sup>75</sup> In other cases, a statutory provision by which jurisdiction is granted to hear an appeal impliedly confers a right to appeal.<sup>76</sup> Section 15C of the *Acts Interpretation Act 1901* (Cth) also supplements the jurisdiction of certain courts, including the appellate jurisdiction of the Federal Court, by providing relevantly that where a provision of an Act, whether expressly or by implication, "authorises" a civil proceeding to be "instituted" in the Federal Court (that is, confers a right to commence a proceeding) in relation to a matter, that provision shall be deemed to vest that Court with jurisdiction in that matter.

98 Appellate jurisdiction is granted to the Federal Court by the opening words of s 24(1) of the *Federal Court Act*, while the additional words in each of ss 24(1)(a), 24(1)(b), 24(1)(c), 24(1)(d), and 24(1)(e) identify the particular instances in which that jurisdiction is expressly granted and in which a right of appeal is impliedly conferred. As a provision that grants jurisdiction to a court, s 24(1) is to be construed "with all the amplitude that the ordinary meaning of its words admits".<sup>77</sup> Section 24(1) may be contrasted with the language of s 19(1) of the *Federal Court Act*, which limits the Court's original jurisdiction to such jurisdiction "as is vested in it by laws made by the Parliament", and does not, of itself, operate as a grant of jurisdiction.

99 While s 24(1) (like s 73 of the *Constitution*) does not contain an express conferral of a right to bring an appeal, the conferral of that right has been implied

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74 *AZC20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 674 at 685 [30]; 411 ALR 615 at 624.

75 See, eg, *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 165-166; *Peel v The Queen* (1971) 125 CLR 447 at 456, 459-460, 462, 467.

76 See, eg, *Federal Court of Australia Act 1976* (Cth), s 24(1)(a)-(b). See also *Thompson v Mastertouch TV Service Pty Ltd* (1978) 19 ALR 547 at 557.

77 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72 at 78 [11].

Gordon J  
Edelman J  
Steward J  
Gleeson J  
Beech-Jones J

32.

in relation to s 24(1)(a)-(b).<sup>78</sup> Unlike s 24(1)(a) and s 24(1)(b), which expressly grant appellate jurisdiction, and impliedly confer a right of appeal, without reference to the content of other legislation, the jurisdiction expressly granted and the right of appeal impliedly conferred by s 24(1)(c) may be invoked only in "cases as are provided by any other Act". Section 24(1)(c) also extends to grant jurisdiction in circumstances in which other legislation has conferred a right of appeal but has not impliedly granted jurisdiction. Section 24(1)(c) is not merely an empty confirmation of jurisdiction, or a right of appeal, expressly conferred by other legislation. An example is s 565(1) of the *Fair Work Act 2009* (Cth), which provides that "[a]n appeal lies to the Federal Court from a decision of an eligible State or Territory court exercising jurisdiction" under that Act. If that provision were interpreted to confer a right of appeal, but not also impliedly to confer jurisdiction, then s 24(1)(c) would confer appellate jurisdiction upon the Federal Court.

100       The *Cross-vesting Act* is an "other Act" that provides, in s 7(5), for appeals from "a decision of a single judge of the Supreme Court of a State or Territory" in which it appears that a matter for determination is a matter arising under a Scheduled Act. There is no dispute that, in this case, the decision of the primary judge was "a decision of a single judge of the Supreme Court of a State", and that such a decision is a judgment of a court of a State exercising federal jurisdiction within the scope of s 24(1)(c). According to its terms, therefore, s 7(5) has the effect that an appeal from the primary judge's decision, appearing to raise for determination a matter arising under a Scheduled Act, "shall be instituted only in, and shall be determined only by", in this case, the Full Court of the Federal Court.

101       Accordingly, the issue in this case is whether, on the proper construction of s 7(5) of the *Cross-vesting Act*, provision is made for appeals "in such cases as are provided by any other Act" within the meaning of s 24(1)(c) so that the Federal Court has federal appellate jurisdiction in all appeals from a Supreme Court decision in which it appears that a matter for determination is a matter arising under a Scheduled Act.

### **Construction of s 7(5)**

102       The plaintiff and the Attorney-General of the Commonwealth contended that s 7(5) should be construed according to its "literal meaning", by which they meant that s 7(5) should not be "read down", as held by the Full Court, so that it applies only to an appeal from a decision of a single judge of a Supreme Court of

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<sup>78</sup> *Thompson v Mastertouch TV Service Pty Ltd* (1978) 19 ALR 547 at 556-557.

a State or Territory made in the exercise of cross-vested jurisdiction. The plaintiff and the Attorney-General of the Commonwealth argued that the so-called "literal" construction of the provision gives effect to the settled meaning of the words "matter arising under" and achieves the manifest purpose of s 7(5). That purpose was to ensure that, notwithstanding the conferral of federal appellate jurisdiction upon State and Territory Supreme Courts by s 4(1) of the *Cross-vesting Act*, appeals in matters that were previously within the so-called exclusive appellate jurisdiction of the federal courts specified in s 7(5) would (subject to limited exceptions in ss 7(7) and 7(8)) continue to be instituted in and determined by those courts.

103 The first defendant contended that the Full Court's construction of s 7(5) was correct. Alternatively, it was submitted, s 7(5) (and s 7(3)) should be construed so as not to deprive State appeal courts of their jurisdiction granted by s 39(2) of the *Judiciary Act* to decide appeals on a matter arising under any of the Scheduled Acts. The first defendant argued that a "literal" construction of s 7(5) would operate as an implied repeal of the State courts' appellate jurisdiction granted by s 39(2), which is inconsistent with the stated legislative intention that the *Cross-vesting Act* would not detract from the existing jurisdiction of any court.<sup>79</sup> Further, it was submitted that a "literal" construction would be inconsistent with the sole intention of s 7(5), which was to protect the exclusive appellate jurisdiction of the Federal Court only in so far as that exclusive appellate jurisdiction was conferred by the Scheduled Act itself. The first defendant also argued that s 7(5) does not engage s 24(1)(c) of the *Federal Court Act* because s 7(5) does not create any rights of appeal to the Federal Court and does not confer any appellate jurisdiction on that Court.

104 For the following reasons, the Full Court's construction of s 7(5) cannot be accepted as the proper construction of the text in light of the context and purposes of the provision.<sup>80</sup> The commands in s 7(5), that proceedings by way of appeal falling within the scope of the sub-section "shall be instituted only in, and shall be determined only by" the Full Court of the Federal Court or of the Federal Circuit and Family Court of Australia (Division 1) (as the case requires), impliedly confer the necessary authority to bring such a proceeding so as to enliven the jurisdiction granted by s 24(1)(c) of the *Federal Court Act*. Section 7(5) should not be "read

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79 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), preamble.

80 *Acts Interpretation Act 1901* (Cth), s 15AA.

Gordon J  
Edelman J  
Steward J  
Gleeson J  
Beech-Jones J

34.

down", as the Full Court held, to restrict its operation to appeals from decisions made in the exercise of cross-vested jurisdiction.

*Textual and contextual considerations*

105 The terms of s 7(5) operate to require any appeal from a single judge of a Supreme Court that arises under one of the 13 Scheduled Acts to be instituted in and determined by the specified courts, irrespective of the source of the federal jurisdiction exercised by the Supreme Court. There are several aspects arising from both the terms of the provision and its context which reinforce this construction and preclude the approach of the Full Court.

106 First, a matter for determination in a proceeding by way of appeal, posited by s 7(5), must be a "matter arising under an Act specified in the Schedule". The language of "matter arising under" an Act adopts the language of s 76(ii) of the *Constitution*, which was adopted in s 39B(1A)(c) of the *Judiciary Act*. A "matter arises under" a law if the right or duty in question in the matter owes its existence to that law or depends upon that law for its enforcement.<sup>81</sup> The phrase directs attention to the connection between the subject matter of the appeal and one or more of the Scheduled Acts. In context, the apparent subject matter of the appeal is the criterion for the operation of s 7(5). By contrast, as the first defendant accepted, the approach of the Full Court requires the phrase "matter arising under an Act specified in the Schedule" to be "read down" by adding a requirement that the matter must also involve the exercise of cross-vested jurisdiction under s 4(1) of the *Cross-vesting Act*. There is nothing in the text which supports an interpretation of the text as if there were added words to the effect that the matter must also involve the exercise of cross-vested jurisdiction under s 4(1) of the *Cross-vesting Act*.

107 Secondly, the commands contained in s 7(5) (and in s 7(3)) for the institution of a proceeding only in, and its determination only by, the specified courts reinforce the conclusion that s 7(5) assumes the federal appellate jurisdiction of those courts in matters arising under the Scheduled Acts. Understood in this way, s 7(5) operates to regulate the exercise of power within existing federal appellate jurisdiction, by channelling the exercise of power in particular types of appeals from a Supreme Court decision to particular courts. The

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81 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154; *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 476; *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581. cf *Northern Territory v GPAO* (1999) 196 CLR 553 at 591 [90], 605 [133].



focus of s 7(5) is upon the exclusive exercise of power rather than the existence of jurisdiction.<sup>82</sup> In this respect, s 7(5) may be contrasted with s 4(1) of the *Cross-vesting Act*, which refers to jurisdiction that is "invested" or "conferred".

108 Thirdly, s 7(5) is qualified by ss 7(7) and 7(8). Section 7(7) provides, unless the interests of justice require otherwise, for the transfer of proceedings to the Full Court of the Federal Court or of the Federal Circuit and Family Court of Australia (Division 1), as the case requires, if the proceedings were erroneously commenced in the Full Court of the Supreme Court of a State or Territory ("State or Territory Full Court") contrary to s 7(5). Section 7(8) provides that nothing in s 7 invalidates the decision of a State or Territory Full Court that determines a proceeding to which s 7(5) applies. Sections 7(7) and 7(8) make it clear that, contrary to the Full Court's reasoning, s 7(5) does not operate as an implied repeal of jurisdiction otherwise vested in a State or Territory Full Court. Rather, s 7(5) assumes the jurisdiction of the relevant State or Territory Full Court to hear and determine the proceeding, consistently with the federal appellate jurisdiction conferred by provisions such as s 39(2) of the *Judiciary Act* or s 4(1) of the *Cross-vesting Act*. The continued existence of that State or Territory Full Court jurisdiction is confirmed by ss 7(7) and 7(8), which rely upon that jurisdiction in cases where the interests of justice require its continued exercise (rather than transfer) or where the proceeding has been determined by inadvertence.

109 Fourthly, the Schedule applies only to s 7 of the *Cross-vesting Act*. The Schedule is referred to in ss 7(3), 7(5) and 7(6). When read in accordance with the limits of Commonwealth legislative power, s 7(3) operates to prevent a federal court from exercising appellate power on an appeal from a State or Territory Supreme Court concerning a matter that arises entirely outside the Scheduled Acts. Thus, subject to limited exceptions in ss 7(7) and 7(8), ss 7(3) and 7(5) bifurcate appeals from single judges of State or Territory Supreme Courts exercising federal jurisdiction according to whether the appeal involves a matter for determination arising under any of the Scheduled Acts. The bifurcation is not made according to the source of the original jurisdiction exercised by the primary judge. Nor is it made according to the source of authority to bring an appeal from the primary judge's decision. It is made according to a selection of legislation that, at the time of enactment of the *Cross-vesting Act*, gave effect to the Commonwealth Parliament's earlier determinations that the Federal Court should have exclusive appellate jurisdiction.

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82 *Harris v Caladine* (1991) 172 CLR 84 at 136; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 590 [64].

Gordon J  
Edelman J  
Steward J  
Gleeson J  
Beech-Jones J

36.

110 Fifthly, at the time of enactment of the *Cross-vesting Act*, each of the Scheduled Acts granted original federal jurisdiction to one or more State or Territory Supreme Courts. Since s 4(1) of the *Cross-vesting Act* applies only where a State or Territory Supreme Court "would not, apart from [s 4], have jurisdiction", it follows that s 4(1) of the *Cross-vesting Act* invested no jurisdiction upon any State court in any matter arising under any of the Scheduled Acts. Any such jurisdiction was granted by s 39(2) of the *Judiciary Act*. Once this is recognised, a further reason that the Full Court's construction must be rejected is that the Full Court's construction would mean that s 7(5) had no operation on enactment.

111 Sixthly, the phrase "as the case requires" in s 7(5)(a) indicates that the satisfaction of the other requirements of s 7(5) will lead to a decision about which of the two alternatives in s 7(5)(a) applies – that is, whether the Full Court, or the Full Court of the Federal Circuit and Family Court of Australia (Division 1), should hear the appeal.

*The objective of the Commonwealth cross-vesting legislation*

112 A construction which seeks to confine s 7(5) to cases in which an Act, apart from the *Federal Court Act* or the *Cross-vesting Act*, confers a right to appeal, if accepted, would also be inconsistent with the *Cross-vesting Act*'s object of structuring a system to ensure that, as far as practicable, proceedings concerning matters which, apart from the national cross-vesting scheme, "would be entirely or substantially within the jurisdiction ... of the Federal Court ... are instituted and determined in that court".<sup>83</sup>

113 Addressing the House of Representatives, the then Commonwealth Attorney-General, Mr Lionel Bowen, described the national cross-vesting scheme, which comprised federal and State legislation – including the Bill that became the *Cross-vesting Act* – as "simple in concept" but amounting to "a radical change in the Australian judicial system".<sup>84</sup> The "primary objective"<sup>85</sup> of the cross-vesting scheme was to vest federal courts with State jurisdiction and to vest State courts with federal jurisdiction "so that no action will fail in a court through lack of

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83 *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), preamble.

84 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 October 1986 at 2556.

85 Australia, House of Representatives, *Jurisdiction of Courts (Cross-vesting) Bill 1986*, Explanatory Memorandum at 3 [5].

jurisdiction, and will ensure that no court will have to determine the boundaries between Federal, State and Territory jurisdictions".<sup>86</sup>

114 Section 7 of the *Cross-vesting Act* was the subject of detailed debate in the House of Representatives. The debate included a proposed amendment that was designed to achieve full integration of federal and State courts. When opposing the argument for full integration, Mr Bowen reminded the House that the Bill was the product of negotiation with the State Attorneys-General, who were concerned that they were losing jurisdiction as a result of the High Court's interpretative approach that "where there is a Federal element in a matter, it becomes an issue for the Federal Court of Australia".<sup>87</sup> Mr Bowen explained that the legislation was intended to be "jurisdictionally neutral. It was not intended to alter the balance – and that is the position – but was simply to solve the problems related to uncertainties."<sup>88</sup> Mr Bowen said that the States considered that the proposed legislation "will give them a clear-cut jurisdictional area and will clearly define what [the States] regard as the Commonwealth area".<sup>89</sup> Mr Bowen then addressed the proposed cl 7 of the Bill, which was enacted as s 7, in the following terms:<sup>90</sup>

"Really the issue relates to the question of appeals from supreme courts in proceedings involving certain Federal matters. These matters are listed in the Schedule. I can tell the honourable gentlemen that I have had a lot of discussions with judges, particularly the Chief Judge of the Federal Court of Australia, and they are very anxious to have some certainty about the areas. That is why a list of the relevant Acts is in the Schedule. If we did not do that ... it would do away with the specialist Federal appellate jurisdiction. That concerns that court no end. It has developed a very good

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86 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 October 1986 at 2556.

87 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 March 1987 at 915.

88 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 March 1987 at 915.

89 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 March 1987 at 915.

90 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 March 1987 at 918.

Gordon J  
Edelman J  
Steward J  
Gleeson J  
Beech-Jones J

38.

appellate jurisdiction, and it is anxious to retain it. Everybody has agreed with it. My eloquence, if any, has been to the point of clearly indicating to the State Attorneys-General that this is perfectly all right, and they have accepted that. I think I should say no more, seeing that they are in agreement. ... On this occasion, as we have agreement and it is particularly of interest to the Federal Court, it is important that we proceed as drafted."

115 It is plain from this parliamentary debate that s 7 was the product of negotiation between the Commonwealth and State Attorneys-General and was formulated to achieve certainty about the way in which courts would decide appeals from State and Territory Supreme Court decisions involving certain federal matters.

*Purpose of s 7(5)*

116 The Explanatory Memorandum for the Bill for the *Cross-vesting Act* and the Second Reading Speech noted that provision was made in the Bill, including by cl 7, "to recognise the special role of the Federal Court ... in relation to appeal matters which presently lie within the exclusive appellate jurisdiction of the Federal Court".<sup>91</sup> The Explanatory Memorandum stated that "where a matter in an appeal from a single judge of a State Supreme Court is a matter arising under a Commonwealth Act specified in the Schedule to the Bill ... the whole appeal will lie only to the Full Federal Court".<sup>92</sup>

117 The concept of "exclusive appellate jurisdiction" requires explanation. As already mentioned, an appeal requires both a right to bring the appeal and jurisdiction to decide the appeal. None of the Scheduled Acts expressly vests appellate jurisdiction in the Federal Court and there are different provisions concerning appeals in each of the Acts. For example, at the time of enactment of the *Cross-vesting Act*, the *Advance Australia Logo Protection Act 1984* (Cth) provided only that "an appeal lies" to the Federal Court from a judgment or order of a court of a State or Territory exercising jurisdiction under that Act.<sup>93</sup> If this

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91 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 October 1986 at 2556. See also Australia, House of Representatives, *Jurisdiction of Courts (Cross-vesting) Bill 1986*, Explanatory Memorandum at 4 [8].

92 Australia, House of Representatives, *Jurisdiction of Courts (Cross-vesting) Bill 1986*, Explanatory Memorandum at 11.

93 *Advance Australia Logo Protection Act 1984* (Cth), s 13(4).

conferral of a right of appeal does not carry with it an implied grant of jurisdiction, then that jurisdiction would be supplied by the grant of jurisdiction in s 24(1)(c) of the *Federal Court Act*. An appeal from such a judgment or order falls within the appellate jurisdiction of the Federal Court pursuant to s 24(1)(c).

118 The Explanatory Memorandum referred to the *Bankruptcy Act* as one of the Scheduled Acts "under which the Full Federal Court now has exclusive appellate jurisdiction".<sup>94</sup> The Second Reading Speech referred to the *Bankruptcy Act* and the *Commonwealth Electoral Act 1918* (Cth) as Scheduled Acts and said that "[a]ppeals in matters under the listed Acts will remain within the exclusive appellate jurisdiction of the full Federal Court".<sup>95</sup> Yet, the Full Court's exclusive appellate jurisdiction in matters arising under the *Bankruptcy Act* was confined to appeals from courts exercising jurisdiction in bankruptcy and, in matters arising under the *Commonwealth Electoral Act*, was confined to appeals from the exercise of the jurisdiction to grant injunctions under s 383 of that Act. It is clear that the Full Court's exclusive appellate jurisdiction in relation to the *Bankruptcy Act* did not encompass all matters "arising under" that Act and doubtful that the Full Court's exclusive appellate jurisdiction in relation to the *Commonwealth Electoral Act* encompassed all matters "arising under" that Act.<sup>96</sup> Thus, there was a degree of imprecision in the Explanatory Memorandum about the identification of the previous exclusive appellate jurisdiction of the Federal Court.

119 The Explanatory Memorandum and Second Reading Speech otherwise amply support the submission of the Attorney-General of the Commonwealth that the selection of the Scheduled Acts reflects a legislative judgment to create a scheme with similar effect to the previous exclusive appellate jurisdiction of the Federal Court (and, by special leave, the High Court), whereby, in the context of the investing of that previously exclusive jurisdiction in State courts by s 4(1) of the *Cross-vesting Act*, the power to exercise that previously exclusive appellate jurisdiction would generally be confined to federal courts.

120 As the Attorney-General of the Commonwealth acknowledged, the text of s 7(5) does not align perfectly with the effect of the provisions in the Scheduled

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94 Australia, House of Representatives, *Jurisdiction of Courts (Cross-vesting) Bill 1986*, Explanatory Memorandum at 11.

95 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 October 1986 at 2556.

96 cf *Camenzuli v Morrison* (2022) 107 NSWLR 439.

Gordon J  
Edelman J  
Steward J  
Gleeson J  
Beech-Jones J

40.

Acts that provided for the Federal Court's exclusive appellate jurisdiction at the time when the *Cross-vesting Act* was enacted. Rather, the "arising under" formulation slightly expands the category of appeals that are required to be instituted and determined in the Federal Court. However, the over-inclusivity of s 7(5) does not detract from the State courts' jurisdiction. Rather, it reflects a legislative choice to adopt a formulation that provides the desired certainty by the straightforward expedient of directing appeals from State or Territory Supreme Court decisions to the Full Court of the Supreme Court of a State or Territory or to the federal courts in s 7(5) depending upon whether it appears that a matter for determination in the appeal is a matter arising under a Scheduled Act. That certainty is reinforced by s 7(3), which directs to State courts appeal proceedings that relate to matters that do not arise under a Scheduled Act.

121 The construction adopted by the Full Court, and advanced by the plaintiff in this Court, is inconsistent with the purpose of creating a scheme with similar effect to the previous exclusive appellate jurisdiction of the Federal Court (and, by special leave, the High Court), whereby, in the context of the investing of that previously exclusive jurisdiction in State courts by s 4(1) of the *Cross-vesting Act*, the power to exercise that previously exclusive appellate jurisdiction would generally be confined to federal courts. By itself, s 4(1) of the *Cross-vesting Act* would have undermined the previously exclusive appellate jurisdiction, because it confers jurisdiction on State Supreme Courts in cases where they would not otherwise have had jurisdiction, including where their appellate jurisdiction under s 39(2) had been deliberately excluded to give exclusive appellate jurisdiction to a federal court.

## Conclusion

122 The plaintiff's proposed appeal to the Federal Court is capable of enlivening that Court's appellate jurisdiction under s 24(1)(c) of the *Federal Court Act* by reason of the provision made in s 7(5) of the *Cross-vesting Act*, commanding that proceedings by way of an appeal from a single judge of the Supreme Court raising a matter for determination arising under the *Bankruptcy Act* be instituted and determined in the Federal Court.

123 The following orders should be made:

- (1) A writ of certiorari issue directed to the second defendants, the Federal Court of Australia and the Judges thereof, to quash the decision of the Full Court of the Federal Court of Australia made on 14 July 2023 in proceeding NSD 726 of 2022 (*HBSY Pty Ltd v Lewis* [2023] FCAFC 109).

*Gordon J*  
*Edelman J*  
*Steward J*  
*Gleeson J*  
*Beech-Jones J*

41.

- (2) A writ of mandamus issue directed to the second defendants commanding them to hear and determine the plaintiff's appeal from the whole of the judgment of the Supreme Court of New South Wales given on 24 June 2022 in proceeding 2019/263639.
- (3) The first defendant pay the plaintiff's costs in the Full Court of the Federal Court of Australia and in this Court.

JAGOT J.

**Background**

124 In this matter, the plaintiff contends that the Full Court of the Federal Court of Australia was wrong to conclude that it did not have jurisdiction in respect of an appeal from a decision of a single judge of the Supreme Court of New South Wales.<sup>97</sup> The decision appealed from determined, relevantly, the operation of s 153(2)(b) of the *Bankruptcy Act 1966* (Cth)<sup>98</sup> ("the 1966 Bankruptcy Act") in respect of the conduct of the executor of a deceased estate who became bankrupt.

125 The Full Court held that it did not have jurisdiction in respect of the appeal on the basis that s 7(5) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) ("the Cross-Vesting Act") must be construed to apply only to "decision[s] of a single judge of the Supreme Court of a State or Territory" in which that Supreme Court obtained jurisdiction by reason of the operation of the Cross-Vesting Act itself.<sup>99</sup> As, in the present matter, the single judge of the Supreme Court of New South Wales did not obtain jurisdiction from the operation of the Cross-Vesting Act, but from the operation of s 39(2) of the *Judiciary Act 1903* (Cth), the Full Court dismissed the plaintiff's application for an extension of time to appeal as incompetent.<sup>100</sup>

126 According to the plaintiff, by operation of s 7(5) of the Cross-Vesting Act, the Full Court of the Federal Court of Australia has exclusive jurisdiction to determine the appeal. According to the first defendant, s 7(5) of the Cross-Vesting Act does not deprive State appeal courts of their jurisdiction to determine appeals arising under the Acts specified in the Schedule to which s 7(5) refers ("the Schedule") where the source of that appellate jurisdiction is s 39(2) of the *Judiciary Act*. The Commonwealth Attorney-General intervened to contend that the plaintiff's construction of s 7(5) of the Cross-Vesting Act is correct.

127 For the following reasons, the contentions of the plaintiff and the Commonwealth Attorney-General best give effect to the objective purpose,

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<sup>97</sup> *HBSY Pty Ltd v Lewis* (2022) 108 NSWLR 558; *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303.

<sup>98</sup> Section 153(2)(b) provides that the discharge of a bankrupt from a bankruptcy does not "release the bankrupt from a debt incurred by means of fraud or a fraudulent breach of trust to which he or she was a party or a debt of which he or she has obtained forbearance by fraud".

<sup>99</sup> *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 313-314 [38]-[41].

<sup>100</sup> *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 317 [53]. See, to a similar effect, *Singh v Khan* (2021) 363 FLR 88.



context, and text of the relevant statutory provisions whilst maintaining the overall unity of the statutory scheme of which those provisions form part.<sup>101</sup> To understand this conclusion, it is necessary to trace aspects of the history of the statutory provisions.

### **Constitution, Ch III**

128 The judicial power of the Commonwealth is regulated by Ch III of the *Constitution*, s 71 of which provides for that power to be vested in "the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction". The High Court's appellate jurisdiction is provided for in s 73, and its original jurisdiction in ss 75 and 76. Section 77 provides that, with respect to any of the matters mentioned in ss 75 and 76, the Parliament may make laws: "defining the jurisdiction of any federal court other than the High Court"; "defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States"; and "investing any court of a State with federal jurisdiction".

### **Judiciary Act, s 39(2)**

129 Section 39(2) of the *Judiciary Act* relevantly provides (and has always provided) that "[t]he 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, except as provided in section 38 ...". Section 38 specifies (and has always specified) the matters in which "the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States".

### **Bankruptcy Act (1924, 1930, 1966, 1976) and Federal Court of Australia Act (1976)**

130 Section 18(1) of the *Bankruptcy Act 1924* (Cth) ("the 1924 Bankruptcy Act") provided that "[t]he Courts having jurisdiction in bankruptcy shall be— (a) such Federal Courts (if any) as the Parliament creates to be Courts of Bankruptcy; and (b) such State Courts or Courts of a Territory as are specially authorized by the Governor-General by proclamation to exercise that jurisdiction".<sup>102</sup> "[J]urisdiction in bankruptcy" was not defined in the 1924

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101 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[70].

102 "State Court" was defined by s 4 of the 1924 Bankruptcy Act as "a State Court having jurisdiction in bankruptcy under [the] Act".

Bankruptcy Act, but s 4 provided<sup>103</sup> that bankruptcy, "in relation to jurisdiction or proceedings, includes any jurisdiction or proceedings under or by virtue of this Act".

131 The *Bankruptcy Act 1930* (Cth) amended the 1924 Bankruptcy Act by inserting s 18A, which provided that "[t]here shall be a Federal Court of Bankruptcy, which shall be a Court of Record ...".

132 The 1966 Bankruptcy Act repealed the 1924 Bankruptcy Act.<sup>104</sup> Section 21(1) of the 1966 Bankruptcy Act, as enacted, continued the existence of the Federal Court of Bankruptcy. Section 27 of the 1966 Bankruptcy Act, as enacted, included these terms:

- "(1) The Courts having jurisdiction in bankruptcy are—
- (a) the Federal Court of Bankruptcy;
  - (b) the Supreme Court of the State of New South Wales;
  - (c) the Court of Insolvency in and for the State of Victoria;
  - (d) the Supreme Court of the State of Queensland;
  - (e) the Court of Insolvency of the State of South Australia;
  - (f) the Supreme Court of the State of Western Australia;
  - (g) the Supreme Court of the State of Tasmania; and
  - (h) the Supreme Court of the Northern Territory of Australia.
- (2) The State Courts specified in the last preceding sub-section are invested with federal jurisdiction in bankruptcy and jurisdiction in bankruptcy is conferred on the Supreme Court of the Northern Territory of Australia.
- (3) The jurisdiction with which State Courts are invested by this section is subject to the conditions and restrictions specified in sub-section (2) of section 39 of the *Judiciary Act 1903-1965* so far as they are applicable and the jurisdiction conferred on the Supreme

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**103** "[I]ncludes" has been replaced with "means", but this definition otherwise continues in this form in s 5(1) of the 1966 Bankruptcy Act.

**104** See s 4(1) and the First Schedule of the 1966 Bankruptcy Act.

Court of the Northern Territory of Australia is subject to the restrictions specified in the next succeeding section."

133 Section 35(1) of the 1966 Bankruptcy Act, as enacted, provided that:

"Proceedings under this Act in a court having jurisdiction under this Act or any motion or application in any such proceedings may, upon the application of an official receiver or of any other person interested, be transferred by that court to another court having jurisdiction under this Act."

134 Section 38(1) of the 1966 Bankruptcy Act, as enacted, provided for the referral of a question of law "in any proceeding before the Court"<sup>105</sup> to the High Court. Section 39(1) provided that, notwithstanding anything contained in any other Act and subject to s 39(2) of the 1966 Bankruptcy Act, an appeal did "not lie to the High Court from a judgment, order or sentence of the Court given, made or pronounced under [the] Act except by leave of the Court or of the High Court". Section 39(2) of the 1966 Bankruptcy Act referred to certain orders from which an appeal lay to the High Court, including sequestration orders.

135 The *Bankruptcy Amendment Act 1976* (Cth) ("the 1976 Bankruptcy Amendment Act") abolished the Federal Court of Bankruptcy and transferred its jurisdiction to the newly constituted Federal Court of Australia.<sup>106</sup> It also amended s 27 of the 1966 Bankruptcy Act but, in effect, only to substitute the Federal Court of Australia for the Federal Court of Bankruptcy (such that State and Territory courts referred to in the provision continued to have jurisdiction in bankruptcy). The 1976 Bankruptcy Amendment Act also repealed ss 38 and 39 of the 1966 Bankruptcy Act (which, as set out above, provided for the referral of questions of law and appeals to the High Court) and replaced them with a new s 38 as follows:

"An appeal from a judgment, order or sentence given or pronounced after the commencement of this section by a State Court exercising jurisdiction in bankruptcy or by the Federal Court of Bankruptcy may be brought to the Federal Court of Australia and not otherwise."

136 By this means, the right to refer questions of law and to appeal to the High Court (with and without leave), as previously specified in ss 38 and 39, was repealed. Instead, the right to appeal from a State Court<sup>107</sup> exercising jurisdiction

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**105** "[T]he Court" was defined by s 5(1) of the 1966 Bankruptcy Act (as enacted) as "a Court having jurisdiction in bankruptcy under [the] Act".

**106** See ss 3(a), 4, 7(1), 8; see also s 5 of the *Federal Court of Australia Act 1976* (Cth).

**107** Defined by s 5(1) of the 1966 Bankruptcy Act as "a State Court having jurisdiction under [the] Act".

in bankruptcy was a right to appeal exclusively to the Federal Court of Australia. The newly inserted s 38 also engaged s 24(1)(c) of the *Federal Court of Australia Act 1976* (Cth), which provided<sup>108</sup> that the Federal Court of Australia had jurisdiction to hear and determine "in such cases as are provided by any other Act, appeals from judgments of a court of a State, other than a Full Court of the Supreme Court of a State, exercising federal jurisdiction".

137 In the Second Reading Speech in respect of bills related to the *Federal Court of Australia Bill 1976*, including the *Bankruptcy Amendment Bill 1976*, the Commonwealth Attorney-General said that:<sup>109</sup>

"In introducing the Federal Court of Australia Bill, I said that it was the intention that the full court of that court should have appellate jurisdiction from State courts, other than the full courts of State supreme courts, in special areas of Federal jurisdiction. In fulfilment of that intention, provision is made in the Bills now being introduced for appeals to lie to the Full Court of the Federal Court of Australia from State courts exercising bankruptcy jurisdiction, from State courts exercising jurisdiction under the Patents and Trade Marks Acts and from decisions of single judges of State supreme courts on appeals from a Taxation Board of Review and the Commissioner of Taxation under the Income Tax Assessment Act. These appeals will be exclusive of any right of appeal that might otherwise exist to the full court of the State supreme courts."

138 It is to be noted that the Commonwealth Attorney-General: (a) referred to "State courts exercising bankruptcy jurisdiction" (rather than exercising "jurisdiction in bankruptcy");<sup>110</sup> and (b) did not differentiate between the bankruptcy jurisdiction and the jurisdiction under the "Patents and Trade Marks Acts" (nor between the bankruptcy jurisdiction and appeals from decisions of single judges of State Supreme Courts on appeals from certain decisions under the "Income Tax Assessment Act"). Section 148 of the *Patents Act 1952* (Cth), by reason of legislative amendments consequential on the enactment of the *Federal Court of Australia Act*, provided for an appeal to lie only to the Federal Court of Australia (or, with special leave, to the High Court) from a "prescribed court

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108 This provision continues in an amended form to include judgments of a court of the Australian Capital Territory and the Northern Territory.

109 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 November 1976 at 2283.

110 See, eg, *Meriton Apartments Pty Ltd v Industrial Court of New South Wales* (2008) 171 FCR 380 at 384 [5], 421 [172], 425-427 [185]-[193], explaining the distinction between "jurisdiction in bankruptcy" and a matter arising under the 1966 Bankruptcy Act.

exercising jurisdiction under this Act" (with "prescribed court" defined by s 6 to include the Supreme Court of a State, of the Australian Capital Territory and of the Northern Territory). The *Trade Marks Act 1955* (Cth), by reason of legislative amendments consequential on the enactment of the *Federal Court of Australia Act*, contained similar provisions.<sup>111</sup> So too did the *Income Tax Assessment Act 1936* (Cth).<sup>112</sup>

139 This reflects that the Commonwealth Attorney-General, in the Second Reading Speech in respect of the *Federal Court of Australia Bill 1976*, said that "[s]eparate legislation will be introduced to provide for appeals from State courts to the Federal Court of Australia in taxation, industrial property, bankruptcy and trade practices matters".<sup>113</sup> The Commonwealth Attorney-General also said that "[i]n those special matters of federal jurisdiction in which an appeal will lie from the State courts to the Federal Court of Australia, federal jurisdiction will not be vested in the full courts of the State Supreme Courts to hear appeals". This was seen as appropriate to enhance uniformity of interpretation of the law in these matters.<sup>114</sup>

### Acts Interpretation Act, s 15C

140 Section 15C of the *Acts Interpretation Act 1901* (Cth) was inserted by the *Acts Interpretation Amendment Act 1984* (Cth). As enacted, s 15C provided<sup>115</sup> that where "a provision of an Act, whether expressly or by implication, authorizes a civil or criminal proceeding to be instituted in a particular court in relation to a matter— (a) that provision shall be deemed to vest that court with jurisdiction in that matter".<sup>116</sup>

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111 Sections 6 and 114 of the *Trade Marks Act*.

112 Sections 196(5) and 200 of the *Income Tax Assessment Act*.

113 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 21 October 1976 at 2111.

114 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 21 October 1976 at 2112-2113.

115 This provision continues in an amended form, although s 15C(a) continues in the form set out.

116 cf *Breavington v Godleman* (1988) 169 CLR 41 at 68-69, see also at 105-106, 118, 139-140, 152-153, 169.

141 While no extrinsic material specifically explains the reason for the insertion of s 15C,<sup>117</sup> it was described in the relevant Explanatory Memorandum as appearing "to be declaratory of the present law".<sup>118</sup>

### Cross-Vesting Act

142 The Cross-Vesting Act (and legislation to the same effect in each State and the Northern Territory)<sup>119</sup> commenced on 1 July 1988. The Preamble to and provisions of that Act are to be construed in the context of the statutory provisions existing at the time, including: (a) s 38 of the 1966 Bankruptcy Act, which provided for exclusive appellate jurisdiction to be vested in the Federal Court of Australia in respect of a judgment, order or sentence of a State Court<sup>120</sup> exercising jurisdiction in bankruptcy or the Supreme Court of the Northern Territory exercising jurisdiction in bankruptcy; (b) the other provisions of the 1966 Bankruptcy Act, which did not define "jurisdiction in bankruptcy" but provided in s 5(1) that bankruptcy, "in relation to jurisdiction or proceedings, means any jurisdiction or proceedings under or by virtue of this Act";<sup>121</sup> and (c) s 15C of the *Acts Interpretation Act*.

143 The Preamble to the Cross-Vesting Act recorded<sup>122</sup> that it is desirable "to establish a system of cross-vesting of jurisdiction between [federal, State and Territory] courts, without detracting from the existing jurisdiction of any court" and "to structure the system in such a way as to ensure as far as practicable that proceedings concerning matters which, apart from [cross-vesting legislation], would be entirely or substantially within the jurisdiction ... of the Federal Court or

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117 See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 3 May 1984 at 1746-1749, 1790-1796, in which the purpose of the bill is discussed more generally.

118 Australia, Senate, *Acts Interpretation Amendment Bill 1984*, Explanatory Memorandum at 3.

119 The Australian Capital Territory participated in the cross-vesting scheme through the operation of the Cross-Vesting Act (that is, the Commonwealth legislation) until 17 April 1997, when the *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT) commenced.

120 Which, at this time, remained defined by s 5(1) of the 1966 Bankruptcy Act as "a State Court having jurisdiction under [the] Act".

121 This definition remains in force.

122 The Preamble continues in an amended form to account for the constitution of the Federal Circuit and Family Court of Australia (Division 1) and to include "so far as is constitutionally possible" in the chapeau.

the Family Court or the jurisdiction of a Supreme Court of a State or Territory are instituted and determined in that court, whilst providing for the determination by one court of federal and State matters in appropriate cases". It will be apparent from the discussion below that this statement of the objects of the legislation is incomplete and ambiguous. It is not to be assumed that the Preamble identifies the effect of every provision of the legislation.

144           Section 3(1) of the Cross-Vesting Act contained<sup>123</sup> a definition of "special federal matter". Those matters did not include a matter arising under the 1966 Bankruptcy Act.

145           Section 4(1) of the Cross-Vesting Act relevantly provided<sup>124</sup> that where "the Federal Court or the Family Court has jurisdiction with respect to a civil matter" and "the Supreme Court of a State or Territory would not, apart from [s 4], have jurisdiction with respect to that matter", then the Supreme Court of a State is "invested with federal jurisdiction with respect to that matter". Section 5 provided<sup>125</sup> for the transfer of matters between courts. Section 6(1) provided<sup>126</sup> that "[w]here a matter for determination in a proceeding that is pending in the Supreme Court of a State or Territory is a special federal matter, that Supreme Court shall transfer the proceeding to the Federal Court unless that Supreme Court makes an order that the proceeding be determined by that Supreme Court".

146           Section 7(1) provided<sup>127</sup> that "[a]n appeal shall not be instituted from a decision of a single judge of the Federal Court or the Family Court to the Full Court of the Supreme Court of a State or Territory". Section 7(2) provided<sup>128</sup> that

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123 This definition continues in an amended form.

124 This provision continues in an amended form to account for the constitution of the Federal Circuit and Family Court of Australia (Division 1) and the application of the Cross-Vesting Act to the Australian Capital Territory.

125 This provision continues in an amended form.

126 This provision continues in an amended form.

127 This provision continues in an amended form to account for the constitution of the Federal Circuit and Family Court of Australia (Division 1).

128 This provision continues in an amended form to account for the constitution of the Federal Circuit and Family Court of Australia (Division 1).

"[a]n appeal shall not be instituted from the Federal Court or the Family Court to the other of those courts". Sections 7(3) and 7(5) provided<sup>129</sup> that:

"(3) Where it appears that the only matters for determination in a proceeding by way of an appeal from a decision of a single judge of the Supreme Court of a State or Territory are matters other than matters arising under an Act specified in the Schedule, that proceeding shall be instituted only in, and shall be determined only by, the Full Court of the Supreme Court of that State or Territory.

...

(5) Subject to sub-sections (7) and (8), where it appears that a matter for determination in a proceeding by way of an appeal from a decision of a single judge of the Supreme Court of a State or Territory (not being a proceeding to which sub-section (6) applies) is a matter arising under an Act specified in the Schedule, that proceeding shall be instituted only in, and shall be determined only by—

(a) the Full Court of the Federal Court or of the Family Court, as the case requires; or

(b) with special leave of the High Court, the High Court."

147 Section 7(7) provided<sup>130</sup> for the transfer of such proceedings and s 7(8) provided<sup>131</sup> that nothing in s 7 invalidates the decision of the Full Court of the Supreme Court of a State or Territory if such proceedings are not transferred.

148 The Schedule specified<sup>132</sup> various Acts, including the 1966 Bankruptcy Act, the *Patents Act*, and the *Trade Marks Act*.

149 It is apparent that, if the words "by way of an appeal from a decision of a single judge of the Supreme Court of a State or Territory" in s 7(3) are given their literal meaning, s 7(3) would purport to regulate the non-federal jurisdiction of the

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129 These provisions continue, but s 7(5) has been amended to account for the constitution of the Federal Circuit and Family Court of Australia (Division 1).

130 This provision continues in an amended form.

131 This provision continues in the same form.

132 The Schedule continues in an amended form, with the *Petroleum Retail Marketing Franchise Act 1980* (Cth) removed and the *Dental Benefits Act 2008* (Cth) added. The *Designs Act 1906* (Cth) has also been replaced with the *Designs Act 2003* (Cth), and the *Patents Act 1952* (Cth) has been replaced with the *Patents Act 1990* (Cth).



Supreme Court of a State. However, as submitted for the Commonwealth Attorney-General, s 7(3) assumes: the existence of s 39(2) of the *Judiciary Act*; and the valid operation of s 4 of the Cross-Vesting Act (and the equivalent provisions in legislation of each State).<sup>133</sup> Accordingly, the words "by way of an appeal from a decision of a single judge of the Supreme Court of a State or Territory" are to be construed within the limits of Commonwealth power under s 77(iii) of the *Constitution* as relating only to such decisions in the exercise of federal jurisdiction.<sup>134</sup> The Full Court considered that, so understood, s 7(3) would be otiose as its function was already performed by s 39(2) of the *Judiciary Act* – thereby indicating that s 7(3) must have a narrower operation (that is, an operation confined to cross-vested jurisdiction).<sup>135</sup>

150 Even if, however, mere redundancy is a sure guide to interpretation (which is not always the case, particularly not where the redundancy results from the operation of a separate statutory provision),<sup>136</sup> s 7(3) is to be read with ss 4 and 7(5). Together, these provisions embody a scheme in which: (a) appeals from a decision of a single judge of the Supreme Court of a State or Territory in a matter not arising under an Act specified in the Schedule are to be determined only by the Full Court of the Supreme Court of the State or Territory (s 7(3)); and (b) appeals from a decision of a single judge of the Supreme Court of a State or Territory in a matter arising under an Act specified in the Schedule are to be determined only by the Full Court of the Federal Court or of the Federal Circuit and Family Court of Australia (Division 1) as the case requires (or, with special leave of the High Court, the High Court), albeit subject to ss 7(7) and 7(8) (s 7(5)). Sections 7(7) and 7(8) recognise the continued existence of the jurisdiction the Supreme Courts of States or Territories otherwise would have been able to exercise by reason of, amongst other provisions, s 39(2) of the *Judiciary Act* and s 4 of the Cross-Vesting Act. By this means, there is no detracting (in the sense of removal) from the jurisdiction of the Supreme Court of a State, but the exercise of appellate jurisdiction of those courts in certain federal matters (as specified in the Schedule) is regulated.

151 Further, when given its ordinary grammatical meaning, s 7(5) does not partially repeal s 39(2) of the *Judiciary Act*, impliedly or otherwise.<sup>137</sup> As submitted for the Commonwealth Attorney-General, s 7(5) presupposes the

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133 cf *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, invalidating the vesting of State jurisdiction in federal courts.

134 See s 15A of the *Acts Interpretation Act*.

135 *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 311 [33].

136 eg, *Brisbane City Council v Attorney-General (Qld)* (1908) 5 CLR 695 at 720.

137 cf *HBSY Pty Ltd v Lewis* (2023) 298 FCR 303 at 311 [34].

vesting of federal jurisdiction in the Supreme Courts of the States (whether by s 39(2) or otherwise), and regulates the exercise of that jurisdiction by channelling an appeal in a matter arising under an Act specified in the Schedule to, relevantly, the Full Court of the Federal Court of Australia. The language used to achieve this channelling of appeals, moreover, is a positive command ("shall be determined only by"), which carries with it the authority to decide and thereby the jurisdiction in the Full Court of the Federal Court of Australia to do so (given the terms of s 15C of the *Acts Interpretation Act*). If s 7(5) did detract from (in the sense of remove) appellate jurisdiction of the Supreme Court of a State, ss 7(7) and 7(8) could not operate as intended. Those provisions reinforce that s 7(5) merely regulates an aspect of that jurisdiction (namely, appeals in matters arising under the Acts specified in the Schedule), howsoever it be vested in the Supreme Court of a State.

152 The language of s 7(5) (that, where it appears that the matter "is a matter arising under an Act specified in the Schedule, that proceeding shall be instituted only in, and shall be determined only by ...") and the language of s 7(3) is sufficient to engage s 15C of the *Acts Interpretation Act*. That it did not need to do so to the extent that s 38 of the 1966 Bankruptcy Act already provided that appeals from "a State Court exercising jurisdiction in bankruptcy ... may be brought to the Federal Court of Australia and not otherwise" and s 5(1) provided that bankruptcy, "in relation to jurisdiction or proceedings, means any jurisdiction or proceedings under or by virtue of this Act" may be accepted. Similarly, other Acts specified in the Schedule contained their own vesting of jurisdiction provisions in respect of appeals. But, again, mere redundancy by reason of provisions in another statute is not a sure guide to meaning (and still less so where the scope of the redundancy depends on distinctions such as between "jurisdiction in bankruptcy" as used in s 38, and jurisdiction "under or by virtue of [the Bankruptcy] Act" as provided by s 5(1)).

153 The Preamble to the Cross-Vesting Act, the Second Reading Speech in respect of the *Jurisdiction of Courts (Cross-vesting) Bill 1986* ("the Cross-Vesting Bill"),<sup>138</sup> relevant subsequent parliamentary debate,<sup>139</sup> and the Explanatory Memorandum in respect of the Cross-Vesting Bill,<sup>140</sup> understood against this background and in the context of the text of its other provisions, support this conclusion. As noted, the Preamble to the Cross-Vesting Act recorded that it is

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138 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 October 1986.

139 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 March 1987.

140 Australia, Senate, *Jurisdiction of Courts (Cross-vesting) Bill 1987*, Explanatory Memorandum.

desirable "to establish a system of cross-vesting of jurisdiction between [federal, State and Territory] courts, without detracting from the existing jurisdiction of any court". The Commonwealth Attorney-General in the Second Reading Speech in respect of the Cross-Vesting Bill also said that the "[Cross-Vesting] Bill will not detract from the existing jurisdictions of" federal, State and Territory courts.<sup>141</sup> With the understanding that "detract" refers to the removal, rather than the regulation, of jurisdiction, that is accurate. The Commonwealth Attorney-General then said that, apart from "special federal matter[s]", the "special role of the Federal Court is also recognised in relation to appeal matters which presently lie within the exclusive appellate jurisdiction of the Federal Court. The Schedule to the Bill lists certain Acts such as the Bankruptcy Act 1966 and the Commonwealth Electoral Act [1918]. Appeals in matters under the listed Acts will remain within the exclusive appellate jurisdiction of the full Federal Court."<sup>142</sup> In the subsequent parliamentary debate following amendments to the Cross-Vesting Bill, the Opposition proposed amending cl 7 to provide that "[a]n appeal from a decision of a court shall only be instituted and heard in accordance with the appeal provisions which normally apply to that court".<sup>143</sup> The Commonwealth Attorney-General explained in response that the proposed amendment would remove "the specialist Federal appellate jurisdiction" in respect of the Acts listed in the Schedule, and that the State Attorneys-General had agreed to that provision. The proposed amendment was rejected.<sup>144</sup>

154 The Explanatory Memorandum in respect of the Cross-Vesting Bill recorded that the bill recognised "the special role of the Federal Court in matters in which it now has, apart from the jurisdiction of the High Court, exclusive original or appellate jurisdiction".<sup>145</sup> The Explanatory Memorandum subsequently stated, in respect of cl 7:<sup>146</sup>

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141 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 October 1986 at 2555.

142 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 22 October 1986 at 2556.

143 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 March 1987 at 917.

144 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 March 1987 at 918.

145 Australia, Senate, *Jurisdiction of Courts (Cross-vesting) Bill 1987*, Explanatory Memorandum at 4 [8].

146 Australia, Senate, *Jurisdiction of Courts (Cross-vesting) Bill 1987*, Explanatory Memorandum at 11.

"Clause 7 is designed to prevent the cross-vesting from giving rise to any such appeals [ie, in matters that, but for 'the cross-vesting legislation, would have been entirely outside the jurisdiction of the Federal Court'] except where a matter in an appeal from a single judge of a State Supreme Court is a matter arising under a Commonwealth Act specified in the Schedule to the Bill. In such a case, the whole appeal will lie only to the Full Federal Court. The scheduled Acts are Acts, such as the Bankruptcy Act 1966 and the Commonwealth Electoral Act 1918, under which the Full Federal Court now has exclusive appellate jurisdiction."

155 Again, this statement does not distinguish jurisdiction "under" the 1966 Bankruptcy Act from the Federal Court of Australia's exclusive appellate jurisdiction under s 38 of that Act ("jurisdiction in bankruptcy").

156 In summary, while, at this time, the 1966 Bankruptcy Act included s 38, by which an appeal from, relevantly, a "State Court exercising jurisdiction in bankruptcy" (which State Supreme Courts had under s 27 at this time<sup>147</sup>) was to be brought only to the Federal Court of Australia: (a) none of the extrinsic material leading up to (and since) the constitution of the Federal Court of Australia had or has adverted to the possibility, or apparently recognised, that the expression "jurisdiction in bankruptcy" in s 38 of the 1966 Bankruptcy Act may involve a narrower field of operation than contemplated by s 5(1) of that Act (which said bankruptcy, "in relation to jurisdiction or proceedings, means any jurisdiction or proceedings under or by virtue of this Act"); (b) to the contrary, the extrinsic material all treated s 38 of the 1966 Bankruptcy Act as if it gave the Federal Court of Australia appellate jurisdiction equivalent to that under, in particular, the patents and trademarks legislation (in which the exclusive right of appeal<sup>148</sup> from a decision of a single judge of the Supreme Court of a State or Territory was to the Federal Court of Australia); and (c) on that assumed state of affairs, s 7(5) of the Cross-Vesting Act did not detract from (in the sense of remove) the existing jurisdiction of the Supreme Courts of the States.

157 Irrespective of these matters, the potential reasons to avoid giving effect to the ordinary grammatical meaning of s 7(5) of the Cross-Vesting Act would be: first, if "detract" includes regulating the exercise of appellate jurisdiction, to give effect to the stated object in the Preamble and in the Second Reading Speech not to detract from any court's existing jurisdiction; and, secondly, to avoid

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147 Noting that, by the *Statute Law (Miscellaneous Amendments) Act 1981* (Cth), "the Court of Insolvency in and for the State of Victoria" in s 27(1)(c) had been replaced with "the Supreme Court of the State of Victoria" and "the Court of Insolvency of the State of South Australia" in s 27(1)(e) had been replaced with "the Supreme Court of the State of South Australia".

148 Apart from appeals to the High Court, with special leave of the High Court.

redundancy of statutory language by reason of the existing provisions vesting jurisdiction in respect of appeals in the other Acts listed in the Schedule. However, these reasons would be insufficient to adopt any meaning of s 7(5) other than its ordinary grammatical meaning, given: (a) the enactment of s 15C of the *Acts Interpretation Act*, ensuring that provisions authorising an exercise of jurisdiction by a court also necessarily vested such jurisdiction in the court; (b) the clarity of the text of ss 7(3) and 7(5) of the Cross-Vesting Act; (c) that ss 7(3) and 7(5) constitute a comprehensive and coherent scheme authorising the exercise of exclusive appellate jurisdiction by either, relevantly, the Supreme Court of a State or the Full Court of the Federal Court of Australia, depending on whether the matter is one arising under an Act specified in the Schedule or not;<sup>149</sup> (d) that, as the language of ss 7(5), 7(7) and 7(8) makes clear, s 7(5) does not detract from (in the sense of remove) jurisdiction of (relevantly) Supreme Courts of the States, but regulates the exercise of an aspect of that jurisdiction by channelling appeals in matters arising under an Act specified in the Schedule to the Full Court of the Federal Court of Australia; (e) the mandatory objective approach to statutory interpretation in terms of text, context, and purpose, in which the required focus is the meaning of the words of the statute, not any divination of the actual intentions of the legislature or drafter of the legislation;<sup>150</sup> and (f) Parliament's choice to use the language of an appeal in a "matter arising under an Act specified in the Schedule" in s 7(5), being the language of s 76(ii) of the *Constitution*, having a well-known legal meaning.<sup>151</sup>

158 On this basis, moreover, there is no incongruity in the enactment of the *Dental Benefits (Consequential Amendments) Act 2008* (Cth)<sup>152</sup> (or the related

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**149** See, to the same effect, *Bramco Electronics Pty Ltd v ATF Mining Electrics Pty Ltd* (2013) 86 NSWLR 115 at 125 [50]; *Eberstaller v Poulos* (2014) 87 NSWLR 394 at 400 [25]; *Boensch (as trustee of the Boensch Trust) v Pascoe* (2016) 349 ALR 193 at 197 [11], [14]-[15]; *Morris Finance Ltd v Brown* (2016) 93 NSWLR 551 at 556 [22]-[25]; *Karlsson v Griffith University* (2020) 103 NSWLR 131 at 133-135 [10]-[14]; *Guan v Li* (2022) 405 ALR 701 at 709 [41].

**150** See, eg, Herzfeld and Prince, *Interpretation*, 3rd ed (2024) at 8-10 [1.50].

**151** Namely, that a matter can only be said to "aris[e] under any laws made by the Parliament" if the right or duty in question owes its existence to a law made by the Parliament or depends upon that law for its enforcement: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154; *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581; *Ruhani v Director of Police* (2005) 222 CLR 489 at 500 [10], 515 [64], 530 [116], 556 [218].

**152** This Act amended the Cross-Vesting Act, to add the *Dental Benefits Act* to the Schedule.

Explanatory Memorandum<sup>153</sup>), which depended on s 7(5) of the Cross-Vesting Act both: (a) authorising the Full Court of the Federal Court of Australia to determine all appeals under that Act and, thereby, vesting jurisdiction in that Court to do so; and (b) regulating the exercise of federal jurisdiction under that Act by the Supreme Courts of the States to exclude the exercise by them of appellate jurisdiction in that regard.

### **Bankruptcy Legislation Amendment Act (1996)**

159 The *Bankruptcy Legislation Amendment Act 1996* (Cth), amongst other things, repealed s 27(1) of the 1966 Bankruptcy Act and substituted the following:<sup>154</sup>

"The Federal Court has jurisdiction in bankruptcy, and that jurisdiction is exclusive of the jurisdiction of all courts other than the jurisdiction of the High Court under section 75 of the Constitution."

160 The *Bankruptcy Legislation Amendment Act* also repealed s 38 of the 1966 Bankruptcy Act and the definition of "State Court" in s 5(1).<sup>155</sup>

161 The Explanatory Memorandum in respect of the *Bankruptcy Legislation Amendment Bill 1996* recorded one category of amendments as "conferring jurisdiction in bankruptcy on the Federal Court of Australia to the exclusion of courts other than the High Court under the Constitution, and the defunct Federal Court of Bankruptcy, subject to the cross vesting of jurisdiction scheme provided for in the *Jurisdiction of Courts (Cross Vesting) Act 1987* and complementary State and Territory legislation".<sup>156</sup> The Explanatory Memorandum also stated that: (a) "[t]o preserve the situation that creditor's petitions are dealt with in the Federal Court, the Bill proposes amendments to the Act to give that Court jurisdiction in bankruptcy exclusive of the jurisdiction of courts other than the High Court under the Constitution";<sup>157</sup> (b) "[b]ankruptcy matters will still be able to be dealt with by Supreme Courts of the States and the Northern Territory under the *Jurisdiction of*

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153 Australia, House of Representatives, *Dental Benefits Bill 2008* and *Dental Benefits (Consequential Amendments) Bill 2008*, Explanatory Memorandum at 30.

154 This provision has since been amended.

155 As noted above, "State Court" was defined to mean "a State Court having jurisdiction under [the 1966 Bankruptcy] Act".

156 Australia, House of Representatives, *Bankruptcy Legislation Amendment Bill 1996*, Explanatory Memorandum at 2 [3(i)].

157 Australia, House of Representatives, *Bankruptcy Legislation Amendment Bill 1996*, Explanatory Memorandum at 26 [81]. See also at 32 [4.1] and 55 [29.2].

*Courts (Cross-Vesting) Act 1987* in appropriate cases";<sup>158</sup> (c) "[t]he term 'State Court' refers to a State Court having jurisdiction under the Act. The Bill proposes to confer exclusive jurisdiction in bankruptcy on the Federal Court of Australia, subject to the residual jurisdiction of the Federal Court of Bankruptcy and the High Court, under the Constitution. The definition will become unnecessary, and it is proposed to be repealed";<sup>159</sup> and (d) "[t]he Supreme Courts will be able to deal with bankruptcy matters under the *Jurisdiction of Courts (Cross Vesting) Act 1987*, but in general, as at present, bankruptcy proceedings will only be capable of being initiated in the Federal Court. This change will not have any significant impact in practice, as very few bankruptcy cases are initiated in State or Territory courts, with only one known matter in 1994."<sup>160</sup>

162 The Explanatory Memorandum in respect of the *Bankruptcy Legislation Amendment Bill 1996* also stated that:<sup>161</sup>

"Section 38 provides that appeals from judgments, orders and sentences given by a State Court, the Supreme Court of the Northern Territory and the Federal Court of Bankruptcy after 1 February 1977 may only be instituted in the Federal Court of Australia. Item 102) proposes amendments to section 38 to omit the references to State Courts and the Supreme Court of the Northern Territory, consequential to the abolition of the jurisdiction of those Courts, other than for the purposes of the *Jurisdiction of Courts (Cross Vesting) Act 1987*."

163 As disclosed in the Second Reading Speech in relation to the *Bankruptcy Legislation Amendment Bill 1996*, the proposed amendment to s 38 was omitted and s 38 was simply repealed.<sup>162</sup>

164 To the extent that there was any confusion or mistake about the scope of "jurisdiction in bankruptcy", it was ultimately moot after the enactment of s 7(5) of the Cross-Vesting Act, construed in the context of s 15C of the *Acts*

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158 Australia, House of Representatives, *Bankruptcy Legislation Amendment Bill 1996*, Explanatory Memorandum at 26 [82].

159 Australia, House of Representatives, *Bankruptcy Legislation Amendment Bill 1996*, Explanatory Memorandum at 35 [6.2].

160 Australia, House of Representatives, *Bankruptcy Legislation Amendment Bill 1996*, Explanatory Memorandum at 54 [29.1].

161 Australia, House of Representatives, *Bankruptcy Legislation Amendment Bill 1996*, Explanatory Memorandum at 59 [39.1].

162 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 11 September 1996 at 4096.

*Interpretation Act*. Section 7(5), by providing that an appeal from a decision of a single judge of the Supreme Court of a State or Territory in a matter arising under (relevantly) the 1966 Bankruptcy Act "shall be instituted only in, and shall be determined only by" the Full Court of the Federal Court of Australia: (a) for the purpose of s 15C of the *Acts Interpretation Act*, "authorizes a civil ... proceeding to be instituted in" the Full Court of the Federal Court of Australia, and thereby engages the provision so that the Full Court of the Federal Court of Australia is deemed to be vested with that jurisdiction; and (b) regulates the Supreme Court of a State or Territory exercising federal jurisdiction (under s 39(2) of the *Judiciary Act* or otherwise) in respect of that proceeding.

### Conclusion

165 For these reasons, the Federal Court of Australia had jurisdiction by operation of s 7(5) of the Cross-Vesting Act and s 15C of the *Acts Interpretation Act*. Accordingly, the orders proposed by Gordon, Edelman, Steward, Gleeson and Beech-Jones JJ should be made.



