

HIGH COURT OF AUSTRALIA

BRENNAN CJ,
TOOHEY, GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

VANDA RUSSELL GOULD & ORS

APPELLANTS

AND

MARTIN RUSSELL BROWN in his capacity as
liquidator of Amann Aviation Pty Limited
(in liquidation)

RESPONDENT

Gould v Brown (S204/1996) [1998] HCA 6
2 February 1998

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation:

F M Douglas QC with P J Dowdy and K M Connor for the appellants
(instructed by Henry Davis York)

S D Robb QC with A Robertson SC and M A Jones for the respondent
(instructed by Nash O'Neill Tomko)

Interveners:

D R Williams QC (Attorney-General) with G Griffiths QC, H C Burmester and S J Gageler intervening on behalf of the Commonwealth (instructed by the Australian Government Solicitor)

P A Keane QC with R W Campbell intervening on behalf of the Attorney-General for the State of Queensland (instructed by the Crown Solicitor for the State of Queensland)

D Graham QC with C M Caleo intervening on behalf of the Attorney-General for the State of Victoria (instructed by the Victorian Government Solicitor)

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

B M Selway QC with J P Gill intervening on behalf of the Attorney-General for the State of South Australia (instructed by the Crown Solicitor for South Australia) and also intervening on behalf of the Attorney-General for the State of Tasmania (instructed by the Crown Solicitor for Tasmania)

J J Spigelman QC with L S Katz SC intervening on behalf of the Attorney-General for the State of New South Wales (instructed by the Crown Solicitor for New South Wales)

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

CATCHWORDS

Gould v Brown

Constitutional law - Cross-vesting of federal, State and Territory jurisdiction - State law vesting jurisdiction in Federal Court to order winding-up of company - Whether State has power to confer State jurisdiction on federal courts - Federal law enabling Federal Court to accept vesting of State jurisdiction under State law - Validity of laws - Whether Ch III of the Constitution excludes the vesting of State jurisdiction in federal courts - Conditions under which State jurisdiction may be vested in federal courts.

Constitutional law - Issue of examination orders and examinations summons pursuant to Corporations Law - Validity - Whether exercises of judicial power.

The Constitution, s 51(xxxviii), Ch III, ss 107, 109, 122

Australia Act 1986 (Cth)

Colonial Laws Validity Act 1865 (Imp)

Companies Act 1961 (NSW)

Corporations Act 1989 (Cth), s 56(2)

Corporations Law, ss 596A, 596B

Corporations (New South Wales) Act 1990 (NSW), s 42(3)

Corporations (Victoria) Act 1990 (Vic), s 42(3)

Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)

1 BRENNAN CJ AND TOOHEY J. This is an appeal against a judgment of the Full Court of the Federal Court (Black CJ, Lockhart and Lindgren JJ) delivered in one of three matters involving the same or substantially the same issues¹. The three matters were heard together by consent and their Honours' judgments dealt with them together. The present matter arises from an order made by the Federal Court on 30 November 1992. On that day, on the application of BP Australia Limited made in Victoria, the Federal Court ordered that Amann Aviation Pty Limited ("Amann") - a company incorporated in New South Wales under the *Companies Act* 1961 (NSW) - "be wound up by this Court under the provisions of the *Corporations Law*" and that "Mr Martin Brown ... be appointed the liquidator of the affairs of the ... company" ("the winding-up orders"). Subsequently, the liquidator applied for orders for the issue of summonses directed to named persons to attend for examination on oath or affirmation about the examinable affairs of Amann. The Court, sitting in New South Wales, made the orders sought on 7 July 1995 and 21 August 1995 ("the examination orders"). Pursuant to those orders, summonses were issued to the examinees (including the present appellants). The appellants then moved the Federal Court for declarations that the Federal Court had no jurisdiction to make the winding-up orders and no jurisdiction to order and conduct the proposed examinations and for an order setting aside the summonses issued pursuant to the examination orders.

2 Black CJ referred the following questions to the Full Court for determination:

- "1. (a) Did s42 (3) of the Corporations (NSW) Act, 1990, or s42 (3) of the Corporations (Vic) Act, 1990 and s56 (2) of the Corporations Act, 1989 (Cth) operate validly to confer upon the Court jurisdiction to make the Orders [that is, the winding-up orders]?
 - (b) If no to question 1 (a), did s42 (3) of the Corporations (NSW) Act, 1990 or s42 (3) of the Corporations (Vic) Act, 1990 and s9 (2) of the Jurisdiction of the Courts (Cross-Vesting) Act 1987 (Cth) operate validly to confer upon the Court jurisdiction to make the Orders?
 - (c) If no to questions 1 (a) and 1 (b), did the Court otherwise have jurisdiction to make the Orders?
2. If no to each part of question 1 are the Orders liable to be set aside and, if so, from what date?

1 *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451; 137 ALR 447.

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3. (a) Did, or does (as the case may be), s42 (3) of the Corporations (NSW) Act, 1990 or s42 (3) of the Corporations (Vic) Act, 1990 and s56 (2) of the Corporations Act, 1989 (Cth) operate validly to confer upon the Court jurisdiction to:
 - (i) make the Examination Orders;
 - (ii) issue the Summonses; or
 - (iii) to conduct and hear examinations under ss596A or 596B or any, and which, provision of Part 5.9 Division 1 of the Corporations Law?
 - (b) If no to question 3 (a) did, or does (as the case may be), s42 (3) of the Corporations (NSW) Act, 1990 or s42 (3) of the Corporations (Vic) Act, 1990 and s9 (2) of the Jurisdiction of Courts (Cross-Vesting) Act, 1987 (Cth) operate validly to confer upon the Court jurisdiction to:
 - (i) make the Examination Orders;
 - (ii) issue the Summonses; or
 - (iii) to conduct and hear examinations under ss596A or 596B or any, and which, provision of Part 5.9 Division 1 of the Corporations Law?
 - (c) If no to question 3 (a) and 3 (b), did, or does (as the case may be), the Court otherwise have jurisdiction to:
 - (i) make the Examination Orders;
 - (ii) issue the Summonses; or
 - (iii) to conduct and hear examinations under ss596A or 596B and or any, and which, provision of Part 5.9 Division 1 of the Corporations Law?
4. If no to each part of question 3 should an order be made on the application of the Examinees setting aside:
- (a) the Examination Orders; and
 - (b) the Summonses?

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5. Are the Applicant Examinees by their Notice of Motion ... entitled to any, and if so what, orders or declarations?"

On 24 June 1996 the Full Court gave the following answers to the questions in the Amann proceedings:

"1(a): Yes.

1(b) and (c) and 2: These questions do not arise.

3(a): Yes.

3(b), (c) and 4: These questions do not arise.

5: No."

The legislation

- 3 The jurisdiction to make the winding-up orders was purportedly conferred on the Federal Court by s 42 of the *Corporations (New South Wales) Act* 1990 or by the corresponding provision of the *Corporations (Victoria) Act* 1990. Both provisions were, at the time of the making of the winding-up orders, in the same terms mutatis mutandis:

"42. (1) Subject to section 9 of the Administrative Decisions (Judicial Review) Act 1977 of the Commonwealth, as it applies as a law of New South Wales, jurisdiction is conferred on the Supreme Court of New South Wales and of each other State and the Capital Territory with respect to civil matters arising under the Corporations Law of New South Wales.

(2) The jurisdiction conferred on a Supreme Court by subsection (1) is not limited by any limits to which any other jurisdiction of that Supreme Court may be subject.

(3) Jurisdiction is conferred on the Federal Court with respect to civil matters arising under the Corporations Law of New South Wales."

Section 56 of the *Corporations Act* 1989 (Cth) purports to permit the Federal Court to exercise the jurisdiction purportedly conferred by the New South Wales and Victorian provisions. Section 56 provides:

" Exercise of jurisdiction pursuant to cross-vesting provisions

56. (1) Nothing in this or any other Act is intended to override or limit the operation of a provision of a law of a State or Territory relating to cross-

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vesting of jurisdiction with respect to matters arising under the Corporations Law of the State or Territory.

(2) The Federal Court, the Family Court or the Supreme Court of the Capital Territory may:

- (a) exercise jurisdiction (whether original or appellate) conferred on that Court by a law of a State corresponding to this Division with respect to matters arising under the Corporations Law of a State; and
- (b) hear and determine a proceeding transferred to that Court under such a provision."

A provision similar to s 42(3) is contained in s 4 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW):

" (1) The Federal Court has and may exercise original and appellate jurisdiction with respect to State matters.

(2) ...

(3) ...

(4) ...

(5) Subsection (1), (2), (3) or (4) does not:

- (a) invest the Federal Court ... with; or
- (b) confer on [that] court,

jurisdiction with respect to criminal proceedings."

And consent, corresponding to the consent given by s 56 of the *Corporations Act* 1989 (Cth) is given by the Parliament of the Commonwealth to the Federal Court's exercise of the jurisdiction conferred by the *Cross-vesting Act* of New South Wales. That consent is contained in s 9 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth):

" (1) Nothing in this or any other Act is intended to override or limit the operation of a provision of a law of a State relating to cross-vesting of jurisdiction.

(2) The Federal Court ... may:

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- (a) exercise jurisdiction (whether original or appellate) conferred on that court by a provision ... of a law of a State relating to cross-vesting of jurisdiction; and
- (b) hear and determine a proceeding transferred to that court under such a provision."

4 The questions that arise for determination do not relate to jurisdiction vested in the Federal Court by the Parliament of the Commonwealth under Ch III of the Constitution. The questions relate to State jurisdiction which can be conferred only by the Parliament of the State. Thus the questions relate to -

- (i) the power of the New South Wales Parliament to confer State jurisdiction on a Court that is not a Court created by that Parliament;
- (ii) the capacity of the Federal Court to receive and to exercise jurisdiction other than jurisdiction vested in it by or pursuant to Ch III of the Constitution;
- (iii) the restrictions or limitations that govern the jurisdiction that the Federal Court can receive and exercise and, in particular, the ability of the Federal Court to receive and exercise jurisdiction to order and conduct the proposed examinations.

1. Power of the New South Wales Parliament

5 The first and basic challenge to the jurisdiction of the Federal Court is that the New South Wales Parliament does not have power to confer on the Federal Court jurisdiction to hear and determine matters arising under the *Corporations Law* of New South Wales or, for that matter, under any other law of the State. Such a power, it is submitted, could not have been exercised by the Colonial Parliament as at the establishment of the Commonwealth and consequently was not continued as a power of the Parliament of the State by s 107 of the Constitution. That section reads:

"Every power of the Parliament of a Colony which has become ... a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth ..."

At the establishment of the Commonwealth, a State Parliament did not possess universal legislative power. Apart from those powers "exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State", some legislative powers were exercisable only by the Parliament of the United Kingdom or by the Federal Council of Australasia. Upon the establishment of the

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Constitution, the last-mentioned powers could be exercised within Australia only by the Parliament of the Commonwealth and then only if the Parliaments of the States directly concerned requested or concurred in their exercise. That follows from s 51(xxxviii) of the Constitution which confers on the Parliament of the Commonwealth power to make laws with respect to:

"The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia".

Moreover, at the establishment of the Commonwealth, there were some limitations on the exercise of legislative powers by the Colonial Parliament of New South Wales, chiefly those imposed by the *Colonial Laws Validity Act* 1865 (Imp). However, if the powers denied to the Parliaments of the States were not acquired by those Parliaments before the *Australia Act* 1986 (Cth) came into force, that Act conferred those powers on those Parliaments.

- 6 The *Australia Act* frees the legislative powers of the States from the restrictions imposed by the *Colonial Laws Validity Act*² and declares the legislative powers of the States to include "all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act"³. Repugnancy of a State law to the law of England no longer renders a State law void or inoperative⁴. These provisions are qualified by s 5 of the *Australia Act* which provides that ss 2 and 3(2) are "subject to the Commonwealth of Australia Constitution Act and to the Constitution of the Commonwealth"⁵. In so far as the *Australia Act* was required to enlarge the legislative powers of the States⁶, that Act ensures that, save in those particular instances where the Constitution excludes the exercise of legislative power by both the Commonwealth and the States - for example, s 92 of the Constitution - an aggregation of the legislative powers of Commonwealth and States covers every subject that is susceptible of legislative regulation or control.

2 s 3(1).

3 s 2(2).

4 s 3(2).

5 s 5.

6 See *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 416.

7.

- 7 The significance of the possession by Australian legislatures of legislative powers which, complementing one another, are universal powers subject only to exceptions prescribed by the *Constitution Act* and the Constitution, was pointed to by Deane J in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*⁷:

"in the absence of any express or implied constitutional prohibition or of any relevant limitations upon State powers persisting from colonial times, it is to be presumed that any legislative power which naturally appertains to self-government and which is not conferred upon the Commonwealth Parliament remains in the States. The existence of a constitutional objective of Commonwealth/State co-operation may, on occasion, be obscured by the fact that cases in this Court in relation to the constitutional scope of legislative powers are commonly concerned with the resolution of competing legislative claims of the Commonwealth and of one or more of the States. It is, however, unnecessary to do more than refer to the provisions of s 51(xxxiii), (xxxiv), (xxxvii) and (xxxviii) and of Ch V of the Constitution to demonstrate the existence of such a constitutional objective. It would be inconsistent with that objective for there to be any general constitutional barrier to concurrent legislation by Commonwealth and State Parliaments."

- 8 If a combination of the legislative powers of the Commonwealth and the States is ineffective to vest State jurisdiction in the Federal Court, the reason must be found, if anywhere, in some restriction or limitation contained in the Constitution. The argument that a combination of the legislative powers of the Commonwealth and a State cannot effect what cannot be effected by the legislative power of either polity exercised independently is patently fallacious: one power may supply a deficiency in the other. *R v Duncan* shows the argument to be constitutionally untenable. But to determine the effect of interlocking Commonwealth and State statutes, it is necessary to identify with some precision the effect of each.

- 9 In the present case, four elements must coexist in order to achieve the vesting of State jurisdiction in a federal court: the creation of the court, the vesting of State jurisdiction by a State statute, an effective consent by the Commonwealth to the vesting of the State jurisdiction and the absence of any constitutional restriction on the vesting, acceptance and exercise of the jurisdiction.

- 10 The starting point is to distinguish between the power to create a federal court and the power to vest jurisdiction in it. When the *Colonial Laws Validity Act* was in force, s 5 of that Act conferred on each colonial legislature -

7 (1983) 158 CLR 535 at 589.

"full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof".

Although prerogative power had been relied on to establish courts of civil jurisdiction in the Colonies⁸, it became constitutional practice when a local legislature was established, to create courts by or under the authority of statute⁹. In New South Wales the Supreme Court was established by the Charter of Justice granted pursuant to statute in 1823¹⁰. In *McCawley v The King*¹¹, the Privy Council said of s 5 of the *Colonial Laws Validity Act*:

" It would indeed be difficult to conceive how the Legislature could more plainly have indicated an intention to assert on behalf of colonial Legislatures the right for the future to establish Courts of Judicature, and to abolish and reconstitute them, than in the language under consideration".

Their Lordships emphasised the creation and abolition of curial institutions, not the vesting of jurisdiction in them. Earlier, in *Taylor v Attorney-General of Queensland*¹², Gavan Duffy and Rich JJ said that the words of this section were -

"properly chosen to express the powers sought to be conferred. It was intended that a colonial legislature should have power to constitute new Courts and to put an end to existing Courts, to determine whether specific Courts should continue to exist or should cease to exist, as well as to mould their form, prescribe their duties, and regulate their procedure".

Their Honours should not be understood to have said that s 5 was the source of power to vest jurisdiction in a court. Thus jurisdiction under colonial laws was exercised by courts established under an Imperial statute. The Supreme Court of New South Wales, established by the Charter of Justice, exercised jurisdiction

8 Sir Victor Windeyer, "A Birthright and Inheritance", (1962) 1 *University of Tasmania Law Review* 635 at 649.

9 Some courts could be established only by or with the authority of statute: see *In re Lord Bishop of Natal* (1864) 3 Moo PC (NS) 115 at 151 [16 ER 43 at 57].

10 4 Geo IV c 96. Subsequent statutory authority was provided by *The Australian Courts Act* 1828 (Imp) (9 Geo IV c 83) and by the *New South Wales Constitution Act* 1855 (18 & 19 Vict c 54 s 42).

11 (1920) 28 CLR 106 at 121; [1920] AC 691 at 710-711.

12 (1917) 23 CLR 457 at 478.

under laws enacted by the colonial legislature¹³. Conversely, it was held that the High Court of Australia had been vested with jurisdiction under the Imperial *Colonial Courts of Admiralty Act* 1890¹⁴. The power of the Parliament of the United Kingdom to vest jurisdiction in this or any other Ch III court has now ceased. The jurisdiction once conferred by the Imperial *Colonial Courts of Admiralty Act* is now a federal jurisdiction¹⁵.

11 The appellants placed some reliance on the opinion of Sir Owen Dixon, expressed extra-judicially¹⁶, that the power conferred by s 5 of the *Colonial Laws Validity Act* "perhaps, should be considered as an exhaustive statement of the legislature's authority over the [subject] with which it deals ... constituting Courts of justice". Be it so. That observation simply emphasises, in the present context, that the power to create a court under Ch III is conferred on the Parliament of the Commonwealth. The Parliament of New South Wales has not purported to create a court and Sir Owen's statement says nothing about the power of a State legislature to vest jurisdiction in matters arising under State law in an existing federal court.

12 Section 5 of the *Colonial Laws Validity Act* did not place a territorial limitation on the courts in which jurisdiction could be vested by State law. In *The Commonwealth v Queensland*¹⁷ this Court rejected a submission that s 5 imposed such a limitation. When the *Colonial Laws Validity Act* was in force, a State law was valid if its substantive provisions had a sufficient territorial connection with the State¹⁸. That gave the law the character of a law for the peace, order and good government of the State¹⁹. In *The Commonwealth v Queensland*²⁰, an attempt by the Queensland Parliament to vest jurisdiction in constitutional matters in the Privy Council failed, but not because that Parliament lacked power to vest jurisdiction in justiciable matters in the Privy Council. Although the Privy

13 See Castles, *An Australian Legal History*, (1982) Ch 9.

14 *John Sharp & Sons Ltd v The Katherine Mackall* (1924) 34 CLR 420; *McIlwraith McEacharn Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175.

15 See the *Admiralty Act* 1988 (Cth), ss 9, 10 and 44.

16 "The Law and the Constitution" published in *Jesting Pilate*, (1965) at 47.

17 (1975) 134 CLR 298 at 310-311.

18 See, for example, *Macleod v Attorney-General for New South Wales* [1891] AC 455 at 457.

19 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10-14.

20 (1975) 134 CLR 298.

Council exercised jurisdiction conferred by the *Judicial Committee Act* 1833 (Imp) and the *Judicial Committee Act* 1844 (Imp) and although the Privy Council was regarded as an Imperial court²¹ having no particular national character or location²², it was held that the vesting by the Queensland Parliament of jurisdiction in the Privy Council²³ "should not be regarded as repugnant to the existing statutes of the United Kingdom". The attempt to vest jurisdiction in the Privy Council failed because the jurisdiction which the impugned State statute purported to vest in the Privy Council included jurisdiction made exclusive to the High Court by s 74 of the Constitution. There was a specific constitutional restriction which aborted the State Parliament's attempt to vest the particular jurisdiction in the court of another polity. If the Queensland Parliament had power to vest jurisdiction in the Privy Council when the *Colonial Laws Validity Act* was in force, now that the *Australia Act* is in force the only limitations on the power of the Parliament of New South Wales to vest State jurisdiction in federal courts must be found in the Constitution itself.

- 13 The Constitution contains particular provisions for creating courts and prescribing their constitution and other provisions for vesting federal jurisdiction. Chapter III of the Constitution provides first for the creation of courts to exercise the judicial power of the Commonwealth (s 71); next, it prescribes their constitution (ss 72 and 79) and then defines the jurisdiction of the High Court and provides for the Parliament's conferral of federal jurisdiction on the High Court and on other Ch III courts: ss 73-77). Section 80 relates to the requirement of a jury in a criminal trial on indictment for an offence against a law of the Commonwealth. Section 80 apart, the provisions of Ch III of the Constitution distinguish between, on the one hand, the power to create and prescribe the constitution of federal courts and, on the other, the power to confer jurisdiction to hear and determine matters in exercise of the judicial power of the Commonwealth. In *R v Kirby; Ex parte Boilermakers' Society of Australia* ("Boilermakers")²⁴, Dixon CJ, McTiernan, Fullagar and Kitto JJ said:

" Had there been no Chap III in the Constitution it may be supposed that some at least of the legislative powers would have been construed as extending to the creation of courts with jurisdictions appropriate to the subject matter of the power ... The legislature would then have been under no limitations as to the tribunals to be set up or the tenure of the judicial

21 *British Coal Corporation v The King* [1935] AC 500 at 510-511.

22 *Hull v M'Kenna* [1926] Ir R 402 at 403-404 (PC); *Ibralebbe v The Queen* [1964] AC 900 at 919-920.

23 *The Commonwealth v Queensland* (1975) 134 CLR 298 at 312.

24 (1956) 94 CLR 254 at 269.

11.

officers by whom they might be constituted. But the existence in the Constitution of Chap III and the nature of the provisions it contains make it clear that no resort can be made to judicial power except under or in conformity with ss 71-80. An exercise of a legislative power may be such that 'matters' fit for the judicial process may arise under the law that is made. In virtue of that character, that is to say because they are matters arising under a law of the Commonwealth, they belong to federal judicial power. But they can be dealt with in federal jurisdiction only as the result of a law made in the exercise of the power conferred on the Parliament by s 76(ii) or that provision considered with s 71 and s 77."

Boilermakers is authority for the proposition that Ch III is the only source of power to create a federal court and the only source of power to vest federal jurisdiction and federal judicial power. The Federal Court was created in exercise of the power conferred by Ch III but the jurisdiction presently under consideration is not federal jurisdiction. It is State jurisdiction under the legislative power of the State Parliament.

- 14 The Parliament of the Commonwealth had power to create the Federal Court and the Parliament of New South Wales had power to vest jurisdiction under State law in a non-State court even if that power had not existed at the establishment of the Constitution. The next question is whether there was any restriction on the exercise of the State's power to vest jurisdiction under State law in the Federal Court.

2. Jurisdiction of the Federal Court vested otherwise than under Ch III of the Constitution

- 15 It is settled and fundamental constitutional law that the judicial power of the Commonwealth cannot be invested otherwise than in accordance with Ch III of the Constitution. In *In re Judiciary and Navigation Acts*²⁵, this Court said in reference to the matters which are specified in ss 73 to 77 of the Constitution:

"This express statement of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is, we think, clearly intended as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction. The question then is narrowed to this: Is authority to be found under sec 76 of the Constitution for the enactment of Part XII of the *Judiciary Act*?"

25 (1921) 29 CLR 257 at 265.

In their joint judgment in *Boilermakers*²⁶ Dixon CJ, McTiernan, Fullagar and Kitto JJ said:

"[W]hen an exercise of legislative powers is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chap III. For that reason it is beyond the competence of the Parliament to invest with any part of the judicial power any body or person except a court created pursuant to s 71 and constituted in accordance with s 72 or a court brought into existence by a State. ... Indeed to study Chap III is to see at once that it is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested. It is true that it is expressed in the affirmative but its very nature puts out of question the possibility that the legislature may be at liberty to turn away from Chap III to any other source of power when it makes a law giving judicial power exercisable within the Federal Commonwealth of Australia. No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap III. The fact that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise was noted very early in the development of the principles of interpretation:²⁷ In Chap III we have a notable but very evident example."

This doctrine is both the consequence of and, in our opinion, the necessary condition of preserving, the separation of federal judicial power from federal legislative and executive powers²⁸. Federal judicial power is exercised by a court when it exercises jurisdiction vested in it pursuant to ss 73, 75, 76 or 77. Courts are the only repositories in which federal jurisdiction can be vested pursuant to those sections and no federal executive or legislative power can be conferred upon them save a power that is incidental to the judicial power. Federal judicial power has two characteristics that are presently relevant. First, it is distinct from legislative and executive power. That characteristic is descriptive of its nature. Secondly, it is the power which is vested in order to exercise federal jurisdiction, a term which Griffith CJ held to mean "authority to exercise the judicial power of the Commonwealth"²⁹. That characteristic is descriptive of its source. In

26 (1956) 94 CLR 254 at 270.

27 *Townsend's Case* (1553) 1 Plowden 111 at 113 [75 ER 173 at 176].

28 See per Deane J in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 579-580 and in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 606-607 and per Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26-27.

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

Boilermakers, the joint judgment speaks of the judicial power of the Commonwealth as the power which is conferred when federal jurisdiction is vested in a court pursuant to Ch III. It is unnecessary now to express an opinion whether the judicial power of the Commonwealth is coterminous with federal judicial power; for present purposes, it is sufficient to accept that, s 122 apart, no legislative power to confer the judicial power of the Commonwealth can be found outside Ch III.

- 16 The exclusivity of the legislative power conferred by Ch III to vest federal jurisdiction in Ch III courts including courts created by a State has been repeatedly affirmed³⁰. However, the exclusivity of the Ch III power to vest federal jurisdiction says nothing about the power to vest jurisdiction that is non-federal. Later cases show that the passage cited from the judgment in *In re Judiciary and Navigation Acts* refers only to federal jurisdiction. In *Spratt v Hermes*³¹, Barwick CJ said that the opinion expressed in *In re Judiciary and Navigation Acts*:

"must be taken, in my opinion, in the context of that case to be limited to original jurisdiction given by laws made under legislative power derived from s 51 of the Constitution. It has not so far been taken by the Court as a decision that Chap III negates the possibility of original jurisdiction being given to this Court by a law made under some other legislative power of the Parliament".

- 17 Jurisdiction conferred under the Territories power has been held to be non-federal³². It may be vested by the Parliament in exercise of the power conferred by s 122, not in exercise of the powers conferred by Ch III. Chapter III and, in particular, s 73 does not prevent the vesting in this Court of appellate jurisdiction under s 122³³. Opinion has been divided on the question whether

30 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 539-540; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 530-531; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 275, 281, 289-290.

31 (1965) 114 CLR 226 at 240; see also at 255-257 per Kitto J; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 600, 612, 623.

32 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 441, 446-447, 448, 449; *Spratt v Hermes* (1965) 114 CLR 226 at 239-240, 259; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 600, 602, 612, 623.

33 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 440, 446-447, 448, 449; but cf 439; *Boilermakers* (1956) 94 CLR 254 at 289-290; *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 540, 545 (PC); [1957] AC 288 at 315, 320.

original jurisdiction under s 122 can be vested in this Court³⁴, but it is settled law that Ch III deals only with federal jurisdiction, whether original or appellate. This Court has had no occasion to deal with the vesting of jurisdiction in a federal court to hear and determine matters arising solely under a State law³⁵.

18 Hitherto the legislative powers of the States have been exercised to vest State jurisdiction and State judicial power in State Courts or tribunals or in the Privy Council. In the present case, we are not concerned with federal jurisdiction; the question is whether the Federal Court can be vested by State law with State jurisdiction. Once it is accepted that the Parliament of New South Wales has power to vest jurisdiction to hear and determine matters arising under its laws in courts other than the courts of its own creation, a State law which purports to vest State jurisdiction and State judicial power in a federal court must be given effect according to its tenor unless the law is invalidated by some constitutional restriction. Three sources of possible constitutional restriction can be distinguished.

19 First, the attempt to vest State jurisdiction and State judicial power in a federal court may fail by reason of inconsistency between the State law and the law of the Commonwealth. Section 109 of the Constitution would invalidate the State law to the extent of the inconsistency. Without an express legislative agreement by the Commonwealth to the vesting of State jurisdiction in a court created by a law of the Commonwealth, the vesting of federal jurisdiction in the court by the Parliament would imply a legislative intention that that court's jurisdiction should not be enlarged beyond the federal grant. The Parliament of the Commonwealth would be presumed to intend that the court it created was to have the jurisdiction which that court was created to exercise or the jurisdiction subsequently vested in it by the Parliament. An attempt by State statute to vest State jurisdiction would then be inconsistent with the law of the Commonwealth. If a federal court could be vested with State jurisdiction without the legislative approval of the Parliament of the Commonwealth, State jurisdiction additional to the federal jurisdiction vested by the Parliament in that federal court would divert the court from the exercise of its federal jurisdiction. It was precisely to overcome the possibility of such an objection to the investing of federal jurisdiction in State

34 See *Porter v The King; Ex parte Yee* (1926) 37 CLR 432; *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 584-585; *Spratt v Hermes* (1965) 114 CLR 226 at 240-241, 267, 277.

35 The vesting of federal jurisdiction to hear and determine matters which include issues arising under State laws has been considered in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 530-531; *Fencott v Muller* (1983) 152 CLR 570 and *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 275, 281, 289-290.

courts³⁶ that the Constitution adopted the autochthonous expedient of conferring legislative power on the Parliament to vest federal jurisdiction and federal judicial power in State courts irrespective of the agreement of the Parliaments of the States. In the present case, there is no question of a State legislature "drafting" or "conscripting" the Federal Court to exercise State jurisdiction. The consent of the Commonwealth is a condition precedent to the exercise of such jurisdiction.

20 In *R v Duncan* the question was the efficacy of a vesting by a State Parliament of State arbitral power in a Tribunal created pursuant to laws of both the Commonwealth and the State and vested by the Commonwealth with Commonwealth arbitral power. The Commonwealth and State laws were complementary and were designed to create a Tribunal exercising State and Commonwealth powers concurrently. Brennan J said³⁷:

"If the Commonwealth Act were construed as not permitting the tribunal to be a repository of State power, it would prevail over the State Act by reason of the inconsistency between them. But the Commonwealth Act permits the State Act to repose State powers in the Tribunal. The Commonwealth Parliament, having power to create the Tribunal and vest federal powers of conciliation and arbitration in it, is not bound to refuse permission for the reposing of similar State powers in the Tribunal. Indeed, the object of preventing and settling interstate industrial disputes in the coal industry may be better achieved by permitting the Tribunal to have and to exercise similar powers conferred upon it by a State Act ... It is within the competence of the Commonwealth Parliament to permit such a tribunal to have and to exercise State powers where the vesting and exercise of State is conducive to or consistent with the achievement of the object which the vesting and exercise of federal powers is intended to achieve. It is no argument against the validity or efficacy of co-operative legislation that its object could not be achieved or could not be achieved so fully by the Commonwealth alone. In *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd*³⁸, Starke J said:

'Co-operation on the part of the Commonwealth and the States may well achieve objects that neither alone could achieve; that is often the end and the advantage of co-operation. The court can and ought to do no

36 Quick & Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 803 and see *Felton v Mulligan* (1971) 124 CLR 367 at 393.

37 (1983) 158 CLR 535 at 579-580.

38 (1939) 61 CLR 735 at 774.

more than inquire whether any thing has been done that is beyond power or is forbidden by the Constitution."

21 In the present case, the Parliament of the Commonwealth legislatively consents to the vesting of State jurisdiction in the Federal Court³⁹. Without that consent there could be no effective vesting of jurisdiction. In so far as the vesting of State arbitral power in *R v Duncan* and the vesting of State judicial power in the present case depend upon the exercise of legislative power by the State with the consent or concurrence of the Parliament of the Commonwealth, there is an analogy between *R v Duncan* and the present case. The analogy is imperfect because of the difference between the provision which authorises the vesting of federal arbitral power (s 51(xxxv)) and the provisions which govern the vesting of federal judicial power (ss 73 to 77). Leaving that factor aside for the moment, there is no general constitutional principle which operates to restrict the vesting by State law of a State power in a tribunal created by the Parliament of the Commonwealth provided the Commonwealth agrees.

22 It is submitted that the Parliament of the Commonwealth has no legislative power so to agree. But agreement by the Commonwealth does not purport to vest State jurisdiction in a federal court nor does it purport to prescribe a new constitution or procedure for that court; it merely negatives a legislative intention that State jurisdiction should not be invested in that court. The negating of that intention denies an occasion for the operation of s 109 of the Constitution. An expression of legislative agreement to the vesting of jurisdiction by the Parliament of another polity is not itself a vesting of jurisdiction. In *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*⁴⁰ Mason J, referring to earlier authority, said:

" The judgments to which I have referred make the point that although a provision in a Commonwealth statute which attempts to deny operational validity to a State law cannot of its own force achieve that object, it may nevertheless validly evince an intention on the part of the statute to make exhaustive or exclusive provision on the subject with which it deals, thereby bringing s 109 into play. Equally a Commonwealth law may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals, thereby enabling State laws, not inconsistent with Commonwealth law, to have an operation. Here again the Commonwealth

39 That consent is not given by s 15C of the *Acts Interpretation Act* 1901 (Cth), a provision which is clearly intended to vest federal jurisdiction, but by s 56(2) of the *Corporations Act* 1989 (Cth). The same position obtains under s 9 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth).

40 (1977) 137 CLR 545 at 563.

law does not of its own force give State law a valid operation. All that it does is to make it clear that the Commonwealth law is not intended to cover the field, thereby leaving room for the operation of such State laws as do not conflict with Commonwealth law."

Section 56(2) of the *Corporations Act* 1989 (Cth) makes it clear that the Parliament of the Commonwealth does not intend to preclude the operation of s 42(3) of the *Corporations (New South Wales) Act* 1990 and thus leaves that provision room to operate. Section 56(2) itself vests no jurisdiction under s 77 of the Constitution⁴¹. It merely denies any implication of exclusivity that might otherwise be drawn from the vesting of federal jurisdiction in the Federal Court.

23 The second source of restriction relates to the High Court of Australia. Its appellate and original jurisdiction is vested in large measure by the Constitution itself. As the creature of the Constitution, it has the jurisdiction vested by the Constitution, subject to regulations affecting its appellate jurisdiction under s 73 and subject to addition to its constitutionally-vested original jurisdiction by laws made under s 76. The constitutional prescription of its original jurisdiction by s 75 subject only to addition under s 76 and the "special position and function of this Court under the Constitution" - to use the phrase of Windeyer J in *Spratt v Hermes*⁴² - lead us to join his Honour in thinking that the list of this Court's possible heads of jurisdiction is exhausted by ss 75 and 76. In contrast with the position of other federal courts, this Court's original jurisdiction cannot be altered by State law. Although this implication can be drawn from the spare textual foundation of ss 75 and 76, it seems to have been the accepted view⁴³. And that view is confirmed by a consideration of this Court's appellate jurisdiction under s 73.

24 This Court's appellate jurisdiction cannot be extended by the Parliament except under the territories power⁴⁴ but it is conferred in terms which ensures that all matters decided by an Australian court in the exercise of original federal or State jurisdiction are or can be ultimately subject to this Court's appellate jurisdiction, including the judgments "[o]f any Justice or Justices exercising the original jurisdiction of the High Court": s 73(i). The term "original jurisdiction of the High Court" in s 73(i) clearly refers to the original jurisdiction which is vested in the Court by s 75 or may be vested in the Court under s 76. The Constitution

41 Nor does s 9 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth).

42 (1965) 114 CLR 226 at 277; but cf at 240 per Barwick CJ.

43 See *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168 at 169; *Gurnett v The Macquarie Stevedoring Co Pty Ltd [No 2]* (1956) 95 CLR 106 at 110.

44 See above, fn 33.

does not contemplate the exercise by "any Justice or Justices" of jurisdiction other than that original jurisdiction. If original State jurisdiction could be vested in the High Court, a judgment given in exercise of that jurisdiction would not fall within s 73(i) and would thus fall outside the Court's appellate jurisdiction. That would be inconsistent with the Constitution's clear intention to spread this Court's appellate net to cover all judgments given by federal courts, State Supreme Courts and other courts exercising federal judicial power. By contrast, a judgment given by the Federal Court in exercise of State original jurisdiction falls within s 73(ii) as a judgment "[o]f any other federal court" and is thus susceptible of appeal to this Court.

25 Thirdly - and this is the restriction on which the appellants place greatest reliance - the investing of State jurisdiction in federal courts might be thought to be inconsistent with ss 76 and 77 by which the Parliament is authorised to vest jurisdiction in federal courts. But, as we have seen, those sections are exhaustive only of federal jurisdiction that can be invested by the Parliament of the Commonwealth. The cases which have turned upon the application of Ch III of the Constitution have so often focused on the limitations of federal judicial power without reference to State judicial power that there is a tendency to enlarge the doctrine so that the jurisdictions described in ss 75 and 76 are exhaustive of the jurisdiction which may be exercised by a federal court under State as well as federal judicial power⁴⁵. But there is nothing in Ch III which warrants the proposition that the exhaustive enumeration of the heads of original federal jurisdiction that may be invested in a federal court other than the High Court is an exhaustive enumeration of the heads of all original jurisdiction that can be invested in the Federal Court, whether by the Parliament of the Commonwealth⁴⁶ or by the Parliament of a State. To the contrary, the constitutional possibility of the Commonwealth vesting part of its original jurisdiction in the courts of a State⁴⁷ indicates that there is no necessary constitutional barrier to the courts of one polity exercising jurisdiction conferred by the Parliament of the other.

26 The autochthonous expedient vests State courts with federal jurisdiction to hear and determine justiciable controversies arising otherwise than under the laws of the State. Whether the duty to exercise that jurisdiction be regarded as a duty imposed by the investing statute or as a duty imposed by the common law on the

45 See, for example, *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 275 per Gibbs CJ: "It is hardly necessary to repeat that no jurisdiction can be conferred on a federal court except with respect to matters of the kinds mentioned in ss 75 and 76 of the Constitution: see s 77(i) of the Constitution."

46 Under s 122.

47 s 77(iii).

repository of jurisdiction⁴⁸ is immaterial. It is also immaterial that the judgments, decrees and orders of a State court given or made in the exercise of federal jurisdiction are executed by officers of the State. The significant fact is that the courts of one polity - the States - can be conscripted by the other polity - the Commonwealth - to exercise that other polity's judicial power. The States cannot conscript federal courts to exercise their judicial power but, given agreement by the Commonwealth, there is no prohibition against their investing State judicial power in courts created by the Parliament of the Commonwealth.

27 However, the nature of the power that can be so invested must be compatible with the character and constitution of the courts in which it is to be invested.

3. The jurisdiction that federal courts can receive and exercise

28 The powers which the Parliament of the Commonwealth can repose in the courts it creates under Ch III are restricted to the exercise of jurisdiction which can be conferred under that Chapter and under s 122 and powers incidental thereto under s 51(xxxix)⁴⁹. As those courts are created to exercise functions that are exclusively judicial and incidental to judicial functions, it would be contrary to their constitutional character to permit them to be vested with non-judicial functions. In *Boilermakers*⁵⁰, Dixon CJ, McTiernan, Fullagar and Kitto JJ held that "Chap III does not allow powers which are foreign to the judicial power to be attached to the courts created by or under that chapter for the exercise of the judicial power of the Commonwealth". The addition of State or "Territory" jurisdiction to the jurisdiction of a federal court vested by or under Ch III does not alter the purpose of that court's creation or its judicial character. The restriction on the nature of the powers that can be vested in a federal court expressed by their Honours in *Boilermakers* is of general application. Of course, as their Honours said in that case⁵¹:

"What belongs to the judicial power or is incidental or ancillary to it cannot be determined except by ascertaining if it has a sufficient relation to the

48 *Ashby v White* (1703) 2 Ld Raym 938 at 956 [92 ER 126 at 138]; *Browne v Commissioner for Railways* (1935) 36 SR (NSW) 21 at 28-29.

49 *Boilermakers* (1956) 94 CLR 254 at 271-275; *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 543; [1957] AC 288 at 318.

50 (1956) 94 CLR 254 at 289.

51 (1956) 94 CLR 254 at 278.

principal or judicial function or purpose to which it may be thought to be accessory."

29 At the heart of judicial power is the power to decide justiciable controversies between subject and subject or between subject and the State⁵². That is the central concept of a "matter" as that term is used in Ch III⁵³. The source of the law to be applied in deciding a controversy is not relevant to the question whether the power to decide it is judicial in nature or not, although either party's reliance on the Constitution or on a law of the Commonwealth is sufficient to stamp a federal character on the jurisdiction to determine the controversy⁵⁴. Federal jurisdiction to determine a controversy may be attracted even though, at the end of the day, the controversy is determined solely by reference to State law. If federal jurisdiction to determine a controversy by reference solely to State law can be exercised by the Federal Court, there is no reason why State jurisdiction to determine controversies by reference solely to State laws cannot be received and exercised by that Court.

30 It follows that, provided the State law which purports to invest State jurisdiction in a federal court invests only judicial power as that term is understood in the context of Ch III, and provided the Commonwealth agrees to the investing, there is no constitutional inhibition against its reception and exercise by the federal court. It remains to apply these principles in the present case.

Jurisdiction to make the winding-up orders and the examination orders and to conduct and hear examinations

31 Jurisdiction to make the winding-up orders is relevantly indistinguishable from a jurisdiction to make a sequestration order under the law of bankruptcy. In *R v Davison*⁵⁵ Dixon CJ and McTiernan J said:

" In the now long history of the English law of bankruptcy the process by which a compulsory sequestration has been brought about has always been

52 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357; *R v Davison* (1954) 90 CLR 353 at 367-368; *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 at 149.

53 *Fencott v Muller* (1983) 152 CLR 570 at 608.

54 *Fencott v Muller* (1983) 152 CLR 570 at 607; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 291.

55 (1954) 90 CLR 353 at 365. See also *Re The Socket Screw & Fastener Distributors (NSW) Pty Ltd* (1994) 51 FCR 599 at 603; 123 ALR 315 at 319.

of a description which may properly be called judicial⁵⁶. It is unnecessary to trace the history of voluntary sequestration but for a very long time it has been the subject of judicial order."

Winding up is equally a judicial process and jurisdiction to make a winding-up order may be vested in the Federal Court. The jurisdiction exercised in making the Amann winding-up orders was conferred by s 42(3) of the New South Wales *Corporations Act*, Amann being a company incorporated under New South Wales law. Question 1(a) was correctly answered "yes".

32 The power to order the examination of witnesses in the course and for the purposes of a winding up and to conduct and hear such an examination has long been a power conferred on and exercised by courts exercising jurisdiction in the winding up of corporations. So much is accepted by the appellants in the present case. However, they submit that the examinations power as purportedly conferred on the Federal Court by ss 596A and 596B of the *Corporations Law* falls outside the conception of judicial power in Ch III of the Constitution and outside the denotation of the term "matter" as used in that Chapter.

33 The appellants point to the diverse purposes of examinations in a winding up, stated by Mason CJ in *Hamilton v Oades*⁵⁷, and submit that those purposes reveal the non-judicial character in the examination function. His Honour said:

"There are the two important public purposes that the examination is designed to serve. One is to enable the liquidator to gather information which will assist him in the winding up; that involves protecting the interests of creditors. The other is to enable evidence and information to be obtained to support the bringing of criminal charges in connexion with the company's affairs: *Mortimer v Brown*⁵⁸."

Although those are the purposes of an examination in a winding up, it is the part which an examination plays in a winding up and the court's function in conducting the examination that determines whether the court is exercising judicial power. We respectfully adopt the description of the examination process given by Lockhart J in the Full Court of the Federal Court⁵⁹:

56 See Holdsworth, viii *History of English Law*, (1937) at 238 et seqq.

57 (1989) 166 CLR 486 at 496.

58 (1970) 122 CLR 493 at 496, 499.

59 *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451 at 475; 137 ALR 447 at 469.

" The examination orders, summonses and proposed examination which are the subject of this challenge are in truth but part of the processes that follow from the making of the winding-up order, and which ultimately protect and adjust the rights of companies, their creditors and in some cases contributories. The Court's supervisory role in the course of a winding up is to ensure that the winding-up laws are properly interpreted and applied to correct mistakes, and to supervise the exercise of compulsory processes in relation to the examination of persons and the obtaining of documents for the purposes of the conduct of those examinations."⁶⁰

True it is that the function of the court in conducting an examination is not the determination of the rights and liabilities of adversaries, but the function is incidental to the winding up. The incidental character of the function and the traditional supervision exercised by the court in performing it are sufficient to stamp it with a judicial character. In *R v Davison*, Dixon CJ and McTiernan J said⁶¹:

" It will be seen that the element which Sir *Samuel Griffith* emphasized⁶² is that a controversy should exist between subjects or between the Crown and a subject, that which *Palles* CB emphasized is the determination of existing rights as distinguished from the creation of new ones, and those elements emphasized by *Miller* J are adjudication, the submission by parties of the case for adjudication and enforcement of the judgment. It may be said of each of these various elements that it is entirely lacking from many proceedings falling within the jurisdiction of various courts of justice in English law. [Their Honours then gave some examples]. *To wind up companies may involve many orders that have none of the elements upon which these definitions insist. Yet all these things have long fallen to the courts of justice.*" (Emphasis added.)

Their Honours pointed out that, although a function might be characterised as administrative if conferred upon an administrative agency, a corresponding function might be characterised as judicial if conferred upon a court. They said⁶³:

⁶⁰ Lockhart J referred to *Rees v Kratzmann* (1965) 114 CLR 63 at this point.

⁶¹ (1954) 90 CLR 353 at 367-368.

⁶² Their Honours were referring to *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

⁶³ (1954) 90 CLR 353 at 368; see also *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188-189.

"The legislature may commit some functions to courts falling within Chapter III although much the same function might be performed administratively. In the judgment of this Court in *Queen Victoria Memorial Hospital v Thornton*⁶⁴, the observation occurs:- 'Many functions perhaps may be committed to a court which are not themselves exclusively judicial, that is to say which considered independently might belong to an administrator. But that is because they are not independent functions but form incidents in the exercise of strictly judicial powers'⁶⁵."

34 In *Boilermakers*⁶⁶ Dixon CJ, McTiernan, Fullagar and Kitto JJ said:

"On more than one occasion of late attempts have been made in judgments in this Court to make it clear that a function which, considered independently, might seem of its own nature to belong to another division of power, yet, in the place it takes in connection with the judicature, falls within the judicial power or what is incidental to it: see *Queen Victoria Memorial Hospital v Thornton*⁶⁷; *R v Davison*⁶⁸. There are not a few subjects which may be dealt with administratively or submitted to the judicial power without offending against any constitutional precept arising from Chap III. It may be too that the manner in which they have been traditionally treated or in which the legislature deals with them in the particular case will be decisive: see *Davison's Case*.⁶⁹

The point might be elaborated and many illustrations, *particularly from the bankruptcy jurisdiction*, might be given." (Emphasis added.)

64 (1953) 87 CLR 144.

65 (1953) 87 CLR 144 at 151.

66 (1956) 94 CLR 254 at 278. See also *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374.

67 (1953) 87 CLR 144 at 151.

68 (1954) 90 CLR 353 at 366-370.

69 (1954) 90 CLR 353 at 369, 370, 376-378, 382-384, 388, 389.

35 To the extent that the power to order and conduct examinations is available for exercise in the course and for the purposes of a winding up, it is an incident of the judicial power of winding up⁷⁰ and has a judicial character.

36 However, the powers available under ss 596A and 596B of the *Corporations Law* may be exercised to order and conduct examinations otherwise than in the course and for the purposes of a winding up. That is the consequence of combining some of the several categories of persons listed in the definition of "eligible applicant" in s 9 of the *Corporations Law* with some of the several categories of matters listed in the definition of "examinable affairs" in the same section, both terms being found in ss 596A and 596B. Section 596A reads:

70 See *Re The Socket Screw and Fastener Distributors (NSW) Pty Ltd* (1994) 51 FCR 599 at 603; 123 ALR 315 at 319.

" Mandatory examination

The Court is to summon a person for examination about a corporation's examinable affairs if:

- (a) an eligible applicant applies for the summons; and
- (b) the Court is satisfied that the person is an examinable officer of the corporation or was such an officer during or after the 2 years ending:
 - (i) if the corporation is under administration - on the section 513C day in relation to the administration; or
 - (ii) if the corporation has executed a deed of company arrangement that has not yet terminated - on the section 513C day in relation to the administration that ended when the deed was executed; or
 - (iii) if the corporation is being, or has been, wound up - when the winding up began; or
 - (iv) otherwise - when the application is made."

Section 596B reads:

" Discretionary examination

- (1) The Court may summon a person for examination about a corporation's examinable affairs if:
 - (a) an eligible applicant applies for the summons; and
 - (b) the Court is satisfied that the person:
 - (i) has taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation; or
 - (ii) may be able to give information about examinable affairs of the corporation.
- (2) This section has effect subject to section 596A."

For example, if the Australian Securities Commission (par (a) of the definition of "eligible applicant") were to apply for a summons for the examination of a chief

executive officer (an "examinable officer") of a corporation about a takeover being made by the corporation (one of the "affairs of the corporation" under par (b) of the definition), the issuing of the summons to the Chief Executive Officer and the conduct of his or her examination about the takeover offer would not be an exercise of judicial power. Does the attempt by s 42(3) of the *Corporations (New South Wales) Act* to vest jurisdiction in the Federal Court to order and conduct examinations fail because the powers which are purportedly vested include powers that, being capable of exercise outside a winding up, are not incidental to the winding-up power and thus lack a judicial character?

37 Section 42(3) of the *Corporations Law* takes effect as a law of New South Wales by force of s 7 of the *Corporations (New South Wales) Act* which reads:

" The Corporations Law set out in section 82 of the Corporations Act as in force for the time being:

(a) applies as a law of New South Wales; and

(b) as so applying, may be referred to as the Corporations Law of New South Wales."

The "Corporations Act" is defined as the *Corporations Act* 1989 of the Commonwealth, s 82 of which sets out the *Corporations Law*. Section 10 of the *Corporations (New South Wales) Act* then provides:

" (1) Subject to Part 1.2 of the Corporations Law of New South Wales, the Acts Interpretation Act 1901 of the Commonwealth as in force at the commencement of section 8 of the Corporations Act, applies as a law of New South Wales in relation to the Corporations Law, and the Corporations Regulations, of New South Wales and any instrument made, granted or issued under that Law or those Regulations (other than application orders under section 111A of that Law) and so applies as if that Law were an Act of the Commonwealth and those Regulations or instruments were regulations or instruments made under such an Act.

(2) The Interpretation Act 1987 does not apply in relation to the Corporations Law, or the Corporations Regulations, of New South Wales or an application order or any other instrument made, granted or issued under that Law or those Regulations."

It follows that what s 7 of the *Corporations (New South Wales) Act* picks up and applies as a law of New South Wales is the *Corporations Law* set out in s 82 of the *Corporations Act* of the Commonwealth, construed according to the *Acts Interpretation Act* 1901 of the Commonwealth. Section 15A of the last-mentioned Act provides:

" Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

- 38 The provisions of s 15A cannot be engaged to qualify the terms in which a State purports to confer State powers on a federal court. The qualification, if any, which might affect the attempt to invest non-judicial State powers in the Federal Court must operate on s 7 of the *Corporations (New South Wales) Act* so as to limit what that section picks up, not on the *Corporations Law* after it has been picked up by s 7. In other words, if s 7 were construed as picking up and applying the whole of the *Corporations Law* set out in s 82 of the *Corporations Act* of the Commonwealth, some of which is and some of which is not within the legislative competence of New South Wales, s 7 itself would be invalid. Section 7, as an enactment of the Parliament of New South Wales, must be construed in accordance with the *Interpretation Act* 1987 (NSW) not in accordance with the Commonwealth *Acts Interpretation Act*. Therefore the relevant qualification, if any, is that prescribed by s 31 of the *Interpretation Act* 1987 (NSW). It provides:

"Acts and instruments to be construed so as not to exceed the legislative power of Parliament

- (1) An Act or instrument shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of Parliament.
- (2) If any provision of an Act or instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, be construed as being in excess of the legislative power of Parliament:
 - (a) it shall be a valid provision to the extent to which it is not in excess of that power, and
 - (b) the remainder of the Act or instrument, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected.
- (3) This section applies to an Act or instrument in addition to, and without limiting the effect of, any provision of the Act or instrument."

This provision is similar in text and operation to s 15A of the Commonwealth *Acts Interpretation Act*. Of the latter provision, Brennan J said in *Re Dingjan; Ex parte Wagner*⁷¹:

"[Section] 15A can save a provision that is literally in excess of legislative power only if two conditions are satisfied⁷²: first, that 'the law itself indicates a standard or test which may be applied for the purpose of limiting, and thereby preserving the validity of, the law'⁷³ and, second, that the operation of the law upon the subjects within power is not changed by placing a limited construction upon the law⁷⁴."

The text of the *Corporations Law* may be inspected to ascertain whether discrete provisions having the operation intended for them in the entirety of the *Corporations Law* can be severed from other provisions which cannot validly be picked up by s 7. If, on inspection, the text of the *Corporations Law* allows the provisions which can validly be picked up to be distinguished from the provisions that cannot validly be picked up, s 7 can be construed as picking up only the former provisions. Making that inspection, there is no difficulty in selecting provisions of ss 596A and 596B of the *Corporations Law* which are validly picked up by s 7 of the *Corporations (New South Wales) Act*. The provisions which can be upheld in this way include those on which the examination orders are based. Paragraph (b) of the definition of "eligible applicant" in s 9 - "a liquidator or provisional liquidator of the corporation" - can be combined with par (a) of the definition of "examinable affairs" in s 9 - "the promotion, formation, management, administration or winding up of the corporation" - so as to ensure that the powers conferred by ss 596A and 596B are exercised in the course and for the purpose of a winding up. That is sufficient to support the examination orders made in the present case.

- 39 Understanding the source of the Federal Court's jurisdiction to be s 42(3) of the *Corporations (New South Wales) Act* 1990 and s 56(2) of the *Corporations Act* 1989 (Cth), we would affirm the answers given by the Full Court of the Federal Court to the questions reserved. The appeal should be dismissed with costs.

71 (1995) 183 CLR 323 at 339.

72 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 485-486 per Brennan and Toohey JJ.

73 *Pidoto v Victoria* (1943) 68 CLR 87 at 109 per Latham CJ; see also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 61, 80.

74 *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468 at 493 per Barwick CJ.

40 GAUDRON J. The respondent is the liquidator of Amann Aviation Pty Ltd ("Amann"), a company wound up by order of the Federal Court of Australia on 30 November 1992. Later, on 7 July 1995, that Court ordered that the appellants or, in the case of the corporate appellants, certain of their officers be examined in relation to the examinable affairs of Amann. Summonses were subsequently issued in accordance with that order.

41 Following the issue of summonses, the appellants instituted these proceedings in the Federal Court seeking a declaration that that court had no jurisdiction to order Amann's winding up and seeking, also, the setting aside of the summonses and the order pursuant to which they were issued. The orders which the appellants seek to have set aside were purportedly made pursuant to the Corporations Law, the history and status of which will be discussed later in these reasons.

42 The proceedings instituted by the appellants in the Federal Court came before Black CJ who reserved five questions of law for the consideration of the Full Federal Court. Those questions will be set out later in these reasons. For the moment, it is sufficient to note that the Full Court answered them in a manner adverse to the appellants. They now appeal to this Court, contending that the legislative provisions pursuant to which the Federal Court made the orders which they seek to have set aside are invalid.

History and status of the Corporations Law

43 In 1989, the *Corporations Act* 1989 (Cth) ("the Corporations Act (Cth)") was enacted for the regulation of companies throughout Australia. In *New South Wales v The Commonwealth (The Incorporation Case)*⁷⁵, this Court held that certain provisions of that Act were invalid. In 1990, the Corporations Act (Cth) was amended in significant respects and was then expressed to be a law for the government of the Australian Capital Territory and the Jervis Bay Territory (together referred to in the Corporations Act (Cth) and in these reasons as the "Capital Territory"). Section 82 of the Corporations Act (Cth) contains the Corporations Law which is given effect by s 5 of that Act. Section 5 provides:

" The Corporations Law set out in section 82 as in force for the time being:

- (a) applies as a law for the government of the Capital Territory; and
- (b) as so applying, may be referred to as the Corporations Law of the Capital Territory."

75 (1990) 169 CLR 482.

- 44 Following amendment of the Corporations Act (Cth), each of the States and the Northern Territory enacted legislation making the Corporations Law applicable as a law of and for that State or Territory ("the counterpart legislation")⁷⁶. In consequence, the Corporations Law now operates throughout Australia.

Jurisdiction with respect to civil matters arising under the Corporations Law

- 45 By s 51 of the Corporations Act (Cth), jurisdiction is conferred on the Federal Court and on the Supreme Courts of the States and Territories⁷⁷ "with respect to civil matters arising under the Corporations Law of the Capital Territory." "Civil matter" is defined in s 50(1) to mean "a matter other than a criminal matter". Jurisdiction with respect to civil matters is also conferred on the Family Court of Australia and State Family Courts by s 51A and, except for superior court matters⁷⁸, on lower State and Territory courts by s 51B. And the courts which have jurisdiction under ss 51, 51A and 51B are authorised to transfer proceedings to other courts having jurisdiction under those provisions⁷⁹.
- 46 The counterpart legislation confers jurisdiction with respect to civil matters arising under the Corporations Law of the States and the Northern Territory in much the same way as jurisdiction is conferred by the Corporations Act (Cth). Thus, for example, s 42(1) of the *Corporations (New South Wales) Act 1990* (NSW) ("the Corporations (NSW) Act") provides:

"... jurisdiction is conferred on the Supreme Court of New South Wales and of each other State⁸⁰ and the Capital Territory with respect to civil matters arising under the Corporations Law of New South Wales."

And s 42(3) provides:

76 Section 7 of the Corporations Act of each State and the Northern Territory respectively applies the Corporations Law as set out in s 82 of the Corporations Act (Cth) as a law of that State or the Northern Territory.

77 Note that, by s 51(2), jurisdiction is conferred on the Supreme Courts of the States and Territories "[s]ubject to section 9 of the *Administrative Decisions (Judicial Review) Act 1977*".

78 The expression "superior court matter" is defined in s 50(1) of the Corporations Act (Cth) to mean "a civil matter that the *Corporations Law* clearly intends (for example, by use of the expression 'the Court') to be dealt with only by a superior court."

79 See ss 53, 53A, 53AA, 53B and 53C.

80 "State" is defined in s 3 of that Act to include the Northern Territory.

31.

" Jurisdiction is conferred on the Federal Court with respect to civil matters arising under the Corporations Law of New South Wales."

There are also provisions conferring jurisdiction on the Family Court and State Family Courts and, except for superior court matters, on the lower courts of the States and Territories⁸¹. Additionally, provision is made for the transfer of proceedings from one court to another⁸². Again, identical provision is made in the legislation of the other States and the Northern Territory.

47 Section 56(2), which is in Div 1 of Pt 9 of the Corporations Act (Cth), authorises the Federal Court, the Family Court and the Supreme Court of the Australian Capital Territory to exercise jurisdiction conferred by the counterpart legislation. That section is as follows:

" The Federal Court, the Family Court or the Supreme Court of the Capital Territory may:

- (a) exercise jurisdiction (whether original or appellate) conferred on that Court by a law of a State⁸³ corresponding to this Division with respect to matters arising under the Corporations Law of a State; and
- (b) hear and determine a proceeding transferred to that Court under such a provision."

Similar provision is made in the counterpart legislation. Thus, for example, s 47 of the Corporations (NSW) Act provides:

81 Sections 42A and 42B respectively.

82 Sections 44, 44A, 44AA, 44B and 44C.

83 Note that State is defined in s 4(1) to include the Northern Territory.

" A court of New South Wales may:

- (a) exercise jurisdiction (whether original or appellate) conferred on it by a law of another State or the Capital Territory corresponding to this Division with respect to matters arising under the Corporations Law of that State or Territory; and
- (b) hear and determine a proceeding transferred to it under such a provision."

48 It is not in issue that, in terms of s 56(2)(a) of the Corporations Act (Cth), the provisions of the counterpart legislation conferring jurisdiction and providing for the transfer of proceedings between courts constitute, in the case of each State and the Northern Territory, "a law ... corresponding to [Div 1 of Pt 9] with respect to matters arising under the Corporations Law of [that] State". Nor is it in issue that the combined effect of the Corporations Act (Cth) and of the counterpart legislation, so far as their provisions confer and authorise the exercise of jurisdiction, is that, if those provisions are valid, the Federal Court, the Family Court, the Supreme Courts of the States and the Territories and State Family Courts each have jurisdiction with respect to all civil matters arising under the Corporations Law of the States and Territories, no matter the State or Territory in which the corporation in question was incorporated or in which it carries on business.

Cross-vesting legislation

49 The legislative technique adopted by the Commonwealth, the States and the Northern Territory to confer and vest jurisdiction with respect to civil matters arising under the Corporations Law is, in some respects, similar to that adopted in cross-vesting legislation enacted by them in 1987⁸⁴. The nature of that legislation can be sufficiently ascertained from the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) and the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth).

50 So far as is presently relevant, the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) provides, in ss 4(1) and (2), that the Federal Court and the Family Court each "has and may exercise original and appellate jurisdiction with respect to State matters."⁸⁵ And provision is made, in s 5, for certain proceedings to be

84 Note that the Australian Capital Territory enacted the *Jurisdiction of Courts (Cross-vesting) Act* in 1993.

85 "State matter" is defined in s 3 of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) to mean:

transferred by the Supreme Court of New South Wales to the Federal Court, the Family Court or the Supreme Court of another State or Territory and for proceedings to be transferred by those courts to the Supreme Court. By s 9(2) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) it is provided:

" The Federal Court, the Family Court or the Supreme Court of a Territory⁸⁶ may:

- (a) exercise jurisdiction (whether original or appellate) conferred on that court by a provision of ... a law of a State relating to cross-vesting of jurisdiction; and
- (b) hear and determine a proceeding transferred to that court under such a provision."

The questions

- 51 The proceedings have at all stages been conducted on the basis that the orders in question in this appeal were made by the Federal Court in exercise or purported exercise of jurisdiction conferred by the Corporations (NSW) Act or its Victorian counterpart, the *Corporations (Victoria) Act* 1990 (Vic) ("the Corporations (Vic) Act"). Seemingly, that is because Amann was incorporated in New South Wales and carried on business in that State and in Victoria. In any event, the questions formulated by Black CJ for consideration by the Full Court refer to the New South Wales and Victorian legislation. Those questions are as follows:

- "1(a) Did s 42(3) of the Corporations (NSW) Act, 1990, or s 42(3) of the Corporations (Vic) Act, 1990 and s 56(2) of the Corporations Act, 1989 (Cth) operate validly to confer upon the Court jurisdiction to make the Orders?

"a matter:

- (a) in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State; or
- (b) removed to the Supreme Court under section 8".

By s 8, the Supreme Court may order the removal into that court of proceedings pending in other State courts and statutory tribunals.

- 86 By s 3 of this Act "State" is defined to include the Northern Territory while "Territory" is defined to exclude the Northern Territory.

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- (b) If no to question 1(a), did s 42(3) of the Corporations (NSW) Act, 1990 or s 42(3) of the Corporations (Vic) Act, 1990 and s 9(2) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) operate validly to confer upon the Court jurisdiction to make the Orders?
 - (c) If no to questions 1(a) and 1(b), did the Court otherwise have jurisdiction to make the Orders?
- 2 If no to each part of question 1 are the Orders liable to be set aside and, if so, from what date?
- 3 (a) Did, or does (as the case may be), s 42(3) of the Corporations (NSW) Act, 1990 or s 42(3) of the Corporations (Vic) Act, 1990 and s 56(2) of the Corporations Act, 1989 (Cth) operate validly to confer upon the Court jurisdiction to:
 - (i) make the Examination Orders;
 - (ii) issue the Summonses; or
 - (iii) to conduct and hear examinations under ss 596A or 596B or any, and which, provision of Part 5.9 Division 1 of the Corporations Law?
- (b) If no to question 3(a) did, or does (as the case may be), s 42(3) of the Corporations (NSW) Act, 1990 or s 42(3) of the Corporations (Vic) Act, 1990 and s 9(2) of the Jurisdiction of Courts (Cross-vesting) Act, 1987 (Cth) operate validly to confer upon the Court jurisdiction to:
 - (i) make the Examination Orders;
 - (ii) issue the Summonses; or
 - (iii) to conduct and hear examinations under ss 596A or 596B or any, and which, provision of Part 5.9 Division 1 of the Corporations Law?
- (c) If no to questions 3(a) and 3(b), did, or does (as the case may be), the Court otherwise have jurisdiction to:
 - (i) make the Examination Orders;
 - (ii) issue the Summonses; or

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(iii) to conduct and hear examinations under ss 596A or 596B and or any, and which, provision of Part 5.9 Division 1 of the Corporations Law?

4 If no to each part of question 3 should an order be made on the application of the [appellants] setting aside:

(a) the Examination Orders; and

(b) the Summonses?

5 Are the [appellants] ... entitled to any, and if so what, orders or declarations?"

52 The Full Court answered "Yes" to question 1(a) and "No" to question 5, and, on that basis, the other questions and sub-questions did not arise. In arriving at those answers, the Full Court rejected the appellants' submissions that the States have no power to confer jurisdiction on federal courts with respect to matters arising under State laws and that the Commonwealth has no power to authorise those courts to exercise jurisdiction of that kind.

Winding up jurisdiction

53 Power to order the winding up of corporations is conferred on "the Court" by ss 459A, 459B and 461 of the Corporations Law as it applies in each of the States and Territories. "Court" is defined in s 58AA in terms which will be set out later in these reasons. For the moment, it is sufficient to note that that definition encompasses the Federal Court, the Supreme Courts of the States and Territories, the Family Court and State Family Courts. And for the moment, it is convenient to proceed on the assumption that winding up jurisdiction is validly conferred on each of those courts and, on that basis, to consider the validity of the provisions of the Corporations Law concerned with the "examinable affairs" of a corporation.

Examinations with respect to the "examinable affairs" of a corporation

54 The provisions concerned with the examination of witnesses with respect to the examinable affairs of a corporation are contained in Ch 5 Pt 5.9 of the Corporations Law. By s 596A, "[t]he Court" - in the light of the definition in s 58AA, that means each of the Supreme Courts of the States and Territories, the Federal Court, the Family Court and each State Family Court - is to summon a person for examination as to a corporation's "examinable affairs" if:

"(a) an eligible applicant applies for the summons; and

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- (b) the Court [concerned] is satisfied that the person is an examinable officer of the corporation or was such an officer during or after the 2 years ending:
 - (i) if the corporation is under administration - on the section 513C day in relation to the administration; or
 - (ii) if the corporation has executed a deed of company arrangement that has not yet terminated - on the section 513C day in relation to the administration that ended when the deed was executed; or
 - (iii) if the corporation is being, or has been, wound up - when the winding up began; or
 - (iv) otherwise - when the application is made."

Similarly, by s 597A, "the Court" is to require a "person" to file an affidavit about a corporation's "examinable affairs" if an eligible applicant so applies and the "person" was an officer of the corporation who satisfies the same conditions as those outlined in s 596A(b).

55 Section 596B of the Corporations Law confers a discretion on "the Court" to summon a person for examination as to the "examinable affairs" of a corporation if:

- "(a) an eligible applicant applies for the summons; and
- (b) the Court [concerned] is satisfied that the person:
 - (i) has taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation; or
 - (ii) may be able to give information about examinable affairs of the corporation."

"[E]ligible applicant" is defined in s 9 of the Corporations Law to mean in relation to a corporation:

- "(a) the [Australian Securities] Commission; or
- (b) a liquidator or provisional liquidator of the corporation; or
- (c) an administrator of the corporation; or

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- (d) an administrator of a deed of company arrangement executed by the corporation; or
- (e) a person authorised in writing by the Commission to make:
 - (i) applications under the Division of Part 5.9 in which the expression occurs; or
 - (ii) such an application in relation to the corporation".

And "examinable affairs" is defined to mean in relation to a corporation:

- "(a) the promotion, formation, management, administration or winding up of the corporation; or
- (b) any other affairs of the corporation (including anything that is included in the corporations affairs because of section 53); or
- (c) the business affairs of a connected entity of the corporation, in so far as they are, or appear to be, relevant to the corporation or to anything that is included in the corporation's examinable affairs because of paragraph (a) or (b)".

It is not necessary for present purposes to refer to s 53 of the Corporations Law.

56 Three matters clearly emerge from the provisions set out above. The first is that the power to summon witnesses for examination as to the examinable affairs of a corporation may, and, on some occasions, must be exercised notwithstanding that an order has neither been made nor sought for its winding up. Thus, for example, by s 596A(b)(iv) of the Corporations Law, the Australian Securities Commission may apply at any time for the mandatory examination of a director or secretary of a corporation, they being examinable officers⁸⁷, with respect to the management of that corporation or the business affairs of a connected entity in so far as those affairs appear to be relevant to the corporation, both matters being within the definition of "examinable affairs" in s 9 of the Corporations Law.

57 The second matter which emerges from the provisions concerned with the examinable affairs of a corporation is that even if a winding up order has been made, the examination of witnesses is not necessarily confined to matters that are relevant or incidental to its winding up. And finally, even if a court has made a winding up order or proceedings have been instituted in a court for the winding up of a corporation, the Corporations Law allows that another court, or, perhaps, other

87 See definition of "examinable officer" in s 9.

courts, may make orders for and conduct examinations with respect to the examinable affairs of that corporation.

- 58 It is convenient, at this stage, to say something of the nature of the examination contemplated by Ch 5 Pt 5.9 of the Corporations Law. The examination is a judicial examination, at least in the sense that it is to be conducted by a court. It is a compulsory examination in that, save with reasonable excuse, the witness must not refuse or fail to attend, refuse or fail to take an oath or make an affirmation, refuse or fail to answer a question, make a false or misleading statement, or refuse or fail to produce books if the summons so requires or the Court so directs⁸⁸. And the witness may be required to sign a written record of the examination which can later be used "in evidence in any legal proceedings against [that] person"⁸⁹, subject, however, to the qualification that if, before answering a question, the witness has claimed that the answer may incriminate, that answer is not admissible in subsequent criminal proceedings or in proceedings for the imposition of a penalty⁹⁰.

Chapter III of the Constitution: Federal, State and Territory Courts

- 59 The first part of s 71 of the Constitution provides:

" The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called 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."

It is settled constitutional doctrine that the provisions of Ch III of the Constitution, particularly s 71, prevent the Commonwealth from conferring any power other than judicial power and powers incidental or ancillary to the exercise of judicial power on federal courts established by or under Ch III of the Constitution⁹¹.

88 See ss 597(6), (7), (9) and (10A).

89 Section 597(14).

90 Section 597(12A). Note, however, that by s 597(14) even if the witness does claim this privilege under s 597(12A), the answer will still be admissible against the witness in any proceeding under s 597 or proceeding regarding the falsity of the answer.

91 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264-265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *Victorian Stevedoring and General Contracting Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 97-98 per Dixon J; (Footnote continues on next page)

60 If it be the case that the States may confer jurisdiction on federal courts created under Ch III, they must be subject to the same limitations in that regard as the Commonwealth. It is simply unthinkable that, in relation to the federal judicature, the Constitution allows the States to do that which is forbidden to the Commonwealth. Thus, if the power to examine witnesses with respect to the examinable affairs of a corporation is neither judicial in character nor ancillary or incidental to the exercise of judicial power, neither the Commonwealth nor the States can confer that power on federal courts.

61 And just as it has been held that Ch III confines the power which may be conferred on federal courts, it has been held that neither s 77(iii) of the Constitution, which allows the Parliament to make laws investing State courts with federal jurisdiction, nor any other provision of the Constitution authorises the Commonwealth to make laws "requir[ing] State courts to exercise any form of non-judicial power"⁹². However, none of the cases concerned with the Commonwealth's purported conferral of non-judicial power on State courts were cases in which the power was conferred by a law for the government of a territory enacted pursuant to s 122 of the Constitution.

62 So far as concerns s 122, the decided cases have, in important respects, isolated the courts created pursuant to that provision and the jurisdiction which they exercise from the provisions of Ch III of the Constitution. Thus, it was held in *Capital TV and Appliances Pty Ltd v Falconer*⁹³ that the Supreme Court of the Australian Capital Territory is not a federal court and is not exercising federal jurisdiction when determining matters arising under laws enacted pursuant to s 122 of the Constitution. Accordingly, if the Corporations Law, in its operation in the Australian Capital Territory is a law under s 122 and not a law under s 51 of the

R v Federal Court of Bankruptcy; Ex parte Lowenstein (1938) 59 CLR 556 at 586-587 per Dixon and Evatt JJ; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 538; [1957] AC 288 at 312-313; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 606-607 per Deane J, 703 per Gaudron J; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469 per Mason CJ, Dawson and McHugh JJ, 487 per Deane and Toohey JJ. See also *Harris v Caladine* (1991) 172 CLR 84.

92 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 236 per Latham CJ, approved in *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152. See also *R v Murphy* (1985) 158 CLR 596 at 613-614; *Kable v DPP (NSW)* (1996) 70 ALJR 814 at 830 per Dawson J, 846 per McHugh J, 858 per Gummow J; 138 ALR 577 at 599, 622, 638.

93 (1971) 125 CLR 591.

Constitution, the jurisdiction purportedly conferred on State Courts by ss 51(2), 51A(2) and 51B(1) of the Corporations Act (Cth) is not federal jurisdiction.

63 It is an interesting question whether, with or without the consent of the State concerned, the Commonwealth may vest "territory jurisdiction" in a State Court in such a way that non-judicial powers are conferred on that court. That is not a question that need be answered in this case. It is, however, necessary to say something of Territory courts and the powers which they may exercise. The view was expressed by Taylor J in *Spratt v Hermes*⁹⁴ that the provisions of Ch III have no application to those courts. And much the same view was taken by Dawson and McHugh JJ in *Kruger v The Commonwealth*⁹⁵. However, that view was questioned in a number of judgments in *Spratt v Hermes*⁹⁶. And in *Kruger*⁹⁷, Gummow J and I both noted that it is difficult, if not impossible, to reconcile the decisions with respect to Territory courts with the terms of Ch III.

64 As the constitutional position of Territory courts is of some relevance to my decision in this matter, it is necessary that I indicate my views in that regard. I think the better view is that courts created pursuant to s 122 are "courts created by the Parliament" for the purposes of s 72 of the Constitution. I also incline to the view that Territory courts may be invested with federal jurisdiction. There is, I think, no very compelling reason for treating the expression "such other courts as it invests with federal jurisdiction" in s 71 as confined to State courts, notwithstanding what was said in *Capital TV and Appliances Pty Ltd v Falconer*⁹⁸. Similarly, I think there is no very compelling view for reading the words "[a]rising under any laws made by the Parliament" in s 76(ii) as not applying to laws in their

94 (1965) 114 CLR 226 at 260-261, his Honour citing as authority for that proposition: *R v Bernasconi* (1915) 19 CLR 629; *Porter v The King*; *Ex parte Yee* (1926) 37 CLR 432; *R v Kirby*; *Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290; *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320.

95 (1997) 71 ALJR 991 at 1012 per Dawson J (with whom McHugh J agreed on this point); 146 ALR 126 at 154-155.

96 (1965) 114 CLR 226 at 240, 243-248 per Barwick CJ, 275-277 per Windeyer J, 280 per Owen J.

97 (1997) 71 ALJR 991 at 1038 per Gaudron J, 1072-1077 per Gummow J; 146 ALR 126 at 190-191, 237-245.

98 (1971) 125 CLR 591 at 602 per McTiernan J, 606 per Menzies J, 613 per Owen J, 623 per Walsh J, 627 per Gibbs J.

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operation in a territory⁹⁹, especially if, as in *Spratt v Hermes*¹⁰⁰, they are laws which operate generally throughout the country.

- 65 If Ch III does apply to Territory courts in the manner I have indicated, it must, in my view, also operate in relation to those courts to prevent the contemporaneous vesting of federal jurisdiction and the conferral of powers inconsistent with the exercise of that jurisdiction. Subject to that qualification, there is, however, nothing in the language or structure of Ch III to preclude the conferral of non-judicial powers on Territory courts. And there is nothing in the decided cases to suggest that that cannot be done. Rather, the contrary proposition is implicit in the statement of the Privy Council in *Attorney-General of the Commonwealth of Australia v The Queen* that Ch III "exhaustively describ[es] the federal judicature and its functions in reference only to the federal system of which the territories do not form part."¹⁰¹

Nature of the power to examine witnesses as to the examinable affairs of a corporation

- 66 It is notoriously difficult to provide a "definition of judicial power that is at once exclusive and exhaustive"¹⁰². The difficulty is compounded by the

99 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290 where Dixon CJ, McTiernan, Fullagar and Kitto JJ said:

"It would have been simple enough to follow the words of s 122 and of ss 71, 73 and 76(ii) and to hold that the courts and laws of a Territory were federal courts and laws made by the Parliament. ... But an entirely different interpretation has been adopted, one which brings its own difficulties."

See also *Kruger v The Commonwealth* (1997) 71 ALJR 991 at 1073-1074 per Gummow J; 146 ALR 126 at 239-240. But cf *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320; *Spratt v Hermes* (1965) 114 CLR 226 at 239-240 per Barwick CJ, 257 per Kitto J, 268 per Menzies J.

100 (1965) 114 CLR 226.

101 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320.

102 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188. See also *R v Davison* (1954) 90 CLR 353 at 366 per Dixon CJ and McTiernan J; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 per Windeyer J; *Brandy v Human Rights and Equal Opportunity Commission* (Footnote continues on next page)

consideration that some powers have a "double aspect"¹⁰³ so that they are properly characterised as judicial if conferred on a court and non-judicial if conferred on another body¹⁰⁴. The examination of witnesses is a feature of the conduct of judicial proceedings. It is also a feature of the conduct of non-judicial proceedings. But the power in question in this case is not properly characterised as one with a "double aspect". Rather, it is an investigative power that courts have to carry out their judicial duties and which other bodies may also have to carry out their functions.

- 67 The power to examine witnesses conferred by Ch 5 Pt 5.9 of the Corporations Law is not a power to be exercised in the discharge of judicial duties. It is a power divorced from the determination of any justiciable controversy¹⁰⁵. It is not directed to the determination of existing rights or liabilities¹⁰⁶. Nor is it directed to the determination of guilt or innocence or the imposition of punishment for breach of the law¹⁰⁷. It is unrelated to the making of any binding decision as to existing powers, duties or status¹⁰⁸. And it is not associated with the conferral or adjustment

(1995) 183 CLR 245 at 257 per Mason CJ, Brennan and Toohey JJ, 267 per Deane, Dawson, Gaudron and McHugh JJ.

103 *R v Davison* (1954) 90 CLR 353 at 369 per Dixon CJ and McTiernan J.

104 *Federal Commissioner of Taxation v Munro*; *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* (1926) 38 CLR 153 at 177 per Isaacs J; *R v Spicer*; *Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305 per Kitto J; *R v Hegarty*; *Ex parte City of Salisbury* (1981) 147 CLR 617 at 628 per Mason J; *Re Ranger Uranium Mines Pty Ltd*; *Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 665; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189.

105 See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ.

106 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 463 per Isaacs and Rich JJ; *R v Davison* (1954) 90 CLR 353 at 369 per Dixon CJ and McTiernan J; *R v Trade Practices Tribunal*; *Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 per Kitto J; *Re Ranger Uranium Mines Pty Ltd*; *Ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656 at 666; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189.

107 See *Re Tracey*; *Ex parte Ryan* (1989) 166 CLR 518 at 580 per Deane J; *Harris v Caladine* (1991) 172 CLR 84 at 147 per Gaudron J.

108 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ; *Harris v Caladine* (1991) 172 CLR 84 at 147 per Gaudron J; *Re Nolan*;
(Footnote continues on next page)

of rights or interests in accordance with legal standards¹⁰⁹. It is simply a power to obtain information. As such, it is not judicial power. However, that is not to say that the power to examine witnesses in relation to the affairs of a corporation can never be conferred on a federal court.

68 Courts have long exercised jurisdiction with respect to the bankruptcy of individuals and the insolvency of companies, their procedures in that regard being essentially judicial in the sense that they usually involve parties - the petitioner and creditor - and invariably require proof of factual matters by application of the rules of evidence in proceedings conducted in accordance with judicial procedures. Moreover, the power to order the winding up of a company or the sequestration of a bankrupt's estate is exercised by "the application of legal principles to proved states of fact and not upon considerations of policy or expediency."¹¹⁰ It may be that those powers need not be conferred on courts, but, being so conferred, they are readily characterised as judicial in character.

69 The curial examination of witnesses in relation to the affairs of persons who have been declared bankrupt and companies that have been wound up is a familiar feature of bankruptcy and insolvency law. And a power to examine witnesses with respect to matters relevant to the proper administration of the bankrupt's estate or the winding up of the company is readily seen as a power "attendant upon or incidental to the fulfilment of [the powers to make sequestration and winding up orders]"¹¹¹. Accordingly, if jurisdiction is conferred upon a federal court with respect to bankruptcy matters or matters involving the winding up of corporations, a power of examination may also be conferred as incidental or ancillary to the exercise of judicial power in that regard. As has already been noted, however, the power conferred on a court by Ch 5 Pt 5.9 of the Corporations Law is not confined to examinations with respect to the affairs of a corporation wound up by that court or, even, a corporation in respect of which a winding up application has been made to that court. And, as earlier indicated, it is by no means obvious that all matters

Ex parte Young (1991) 172 CLR 460 at 497 per Gaudron J; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258 per Mason CJ, Brennan and Toohey JJ, 268 per Deane, Dawson, Gaudron and McHugh JJ.

109 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151; *R v Spicer*; *Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 290 per Dixon CJ. See also *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134 at 149.

110 *R v Davison* (1954) 90 CLR 353 at 383 per Kitto J.

111 *R v Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1938) 59 CLR 556 at 587 per Dixon and Evatt JJ.

falling within the definition of "examinable affairs" are necessarily relevant to the winding up of a corporation.

- 70 It is convenient to proceed on the assumption that the power to examine witnesses in relation to the examinable affairs of a corporation may validly be conferred on a federal court if it has ordered that that corporation be wound up or if proceedings have been instituted in that court for its winding up. Even on that assumption, however, it must be concluded that, to the extent that the power conferred by Ch 5 Pt 5.9 is not confined to examination by a court which has exercised or is exercising jurisdiction to make an order for the winding up of the corporation, it is not properly characterised as judicial power. And to that extent, Ch III precludes the conferral of that power on the Federal Court, whether by the States or by the Commonwealth. However, there is nothing in Ch III to prevent the Commonwealth from conferring power of that kind on the Supreme Court of the Australian Capital Territory.

Reading down

- 71 Provision is made in s 15A of the *Acts Interpretation Act* 1901 (Cth) for the reading down of legislation which exceeds the limits of Commonwealth legislative power. Similar provision is to be found in s 31 of the *Interpretation Act* 1987 (NSW) and in s 6 of the *Interpretation of Legislation Act* 1984 (Vic) with respect to the legislation of those States. For the moment, however, the State Acts can be put to one side. That is because ss 8(2) and (3) of the Corporations Act (Cth)¹¹², s 10 of the Corporations (NSW) Act, the Corporations (Vic) Act and of the other counterpart legislation¹¹³ and Pt 1.2 of the Corporations Law¹¹⁴ together operate so that s 15A of the *Acts Interpretation Act* 1901 (Cth) applies to the reading down

112 By s 8(2) of the Corporations Act (Cth), Pt 1.2 of the Corporations Law, which deals with the interpretation of that law, applies to the exclusion of the *Acts Interpretation Act* 1901 (Cth) where the latter Act and Pt 1.2 overlap. Section 8(3) of the Corporations Act (Cth) provides that, subject to Pt 1.2 of the Corporations Law, the *Acts Interpretation Act* 1901 (Cth) applies to the Corporations Law as it stood at the commencement of s 8 but not as thereafter amended.

113 By s 10 of the Corporations (NSW) Act and the Corporations (Vic) Act respectively, the *Acts Interpretation Act* 1901 (Cth) applies to the Corporations Law, subject to Pt 1.2 of that Law. Identical provision is made in the counterpart legislation of the other States and the Northern Territory.

114 Part 1.2 of the Corporations Law is silent as to the reading down of that Law. Thus, it follows that s 15A of the *Acts Interpretation Act* 1901 (Cth) applies in that regard.

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of the Corporations Law as it applies in the Capital Territory and in the States and the Northern Territory.

72 Section 15A of the *Acts Interpretation Act* 1901 (Cth) is as follows:

" Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power."

73 As already indicated, there is nothing in Ch III of the Constitution to prevent the Commonwealth from conferring power on the Supreme Court of the Australian Capital Territory to examine witnesses in accordance with Ch 5 Pt 5.9 of the Corporations Law. And to the extent that the Corporations Act (Cth) and the Corporations Law are laws for the government of a Territory (questions which I need not determine), s 122 of the Constitution clearly authorises the conferral of those powers on that Court. Moreover, it is clearly within the legislative competence of the States to confer those powers on their own State courts. And it may be assumed that the same is true of the Northern Territory. Thus, it is not the substance of the provisions specifying the circumstance in which an examination may or must be ordered and conducted that must be read down, but the word "Court" as used in those provisions. More accurately, it is the definition of "Court" in s 58AA(1) of the Corporations Law.

74 "Court" is defined in s 58AA(1) of the Corporations Law in these terms:

"'Court' means any of the following courts when exercising the jurisdiction of this jurisdiction:

- (a) the Federal Court;
- (b) the Supreme Court of this or any other jurisdiction;
- (c) the Family Court of Australia;
- (d) a court to which section 41 of the *Family Law Act* 1975 applies because of a Proclamation made under subsection 41(2) of that Act."

75 It is possible to read a limitation into pars (a) and (c) of the definition of "Court" in s 58AA(1) so that, in those paragraphs, "Court" means the Federal Court or the Family Court except in relation to matters arising under Ch 5 Pt 5.9 if that court has not exercised or is not exercising jurisdiction to wind up the company concerned. In my view, however, that would give rise to an operation of the Corporations Law and of the scheme constituted by the Corporations Act (Cth)

and the counterpart legislation that is very different from that intended. And it is well settled that a provision such as s 15A of the *Acts Interpretation Act* 1901 (Cth) cannot apply to effect the partial validation of a law if that would result in the law's changed operation or if it appears that "the law was intended to operate fully and completely according to its terms, or not at all"¹¹⁵.

76 In the course of arguing that jurisdiction is validly conferred on the Federal Court by the States and the Northern Territory pursuant to their counterpart legislation and that its exercise is validly authorised by the Corporations Act (Cth), the Solicitor-General for the Commonwealth described the legislation involved as a "reciprocal scheme to ensure a seamless operation of corporations laws for the benefit of the [Capital] Territory". There are real questions as to the extent to which the Corporations Law and the Corporations Act (Cth) can be described as laws for the government of that Territory. But that aside, the word "seamless" is apt to describe the situation clearly intended to be effected by the Corporations Act (Cth) and the counterpart legislation, namely, a situation in which jurisdiction was conferred on all superior courts in Australia with respect to all civil matters arising under the Corporations Law in its operation throughout Australia so that, in practice, no question would ever arise as to any court's jurisdiction to deal with any such matter. One of the provisions from which that intention is to be discerned is the definition of "Court" in s 58AA(1) of the Corporations Law.

77 In the context of a legislative intention to ensure a "seamless operation" of the Corporations Law as it applies in each State and Territory, it is by no means a simple question to determine whether the definition of "Court" in s 58AA(1) of the Corporations Law was or was not intended to operate fully according to its terms. However, it is clear, in my view, that the only reading down which is consistent with its intended operation is one that, itself, involves a "seamless operation". And if pars (a) and (c) of the definition of "Court" in s 58AA(1) of the Corporations Law were read as subject to the limited exceptions earlier indicated, that would not occur.

78 If the definition of "Court" were read down in the limited manner which I earlier indicated, the Supreme Courts of the States and Territories and State Family Courts would each have jurisdiction in all civil matters arising under the Corporations Law but the Federal Court and the Family Court would have jurisdiction in respect of some only of those matters. And instead of there being a situation in which, as a practical matter, it would be unnecessary for any court to determine jurisdictional issues, those issues would arise in the Federal Court and in the Family Court. And they could also arise in other courts in any case involving

¹¹⁵ See *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ (quoting *Pidoto v Victoria* (1943) 68 CLR 87 at 108 per Latham CJ) and the cases there cited.

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the question whether proceedings should be transferred to the Federal or Family Court.

79 Quite apart from unravelling the "seamless operation" of the Corporations Law, one other matter presents as an obstacle in the path of reading pars (a) and (c) of the definition of "Court" as subject to the limited exceptions earlier indicated. The Corporations Law confers very extensive powers on courts with respect to the affairs of a corporation. For example, in addition to the power to make winding up orders and to conduct examinations in relation to the examinable affairs of a corporation, it confers power on "the Court" to require reports with respect to proposed compromises and arrangements¹¹⁶, to inquire into the conduct of controllers of property and, after that inquiry, to "take such action as it thinks fit"¹¹⁷, to fix the remuneration of receivers¹¹⁸, to remove controllers of property for misconduct¹¹⁹, to direct an administrator to lodge a report, including to give a direction of that kind of its own motion¹²⁰, to limit the powers of a receiver¹²¹, to limit the rights of a secured creditor¹²², to cancel a variation of a deed of company arrangement¹²³ and, even, to "make such order as it thinks appropriate about how [Pt 5.3A] is to operate in relation to a particular company"¹²⁴. Part 5.3A is concerned with the administration of a company's affairs with a view to the execution of a deed of company arrangement.

80 It may be that some of the powers to which reference has been made and which the Corporations Law confers on "the Court" are not properly characterised as judicial powers. Whatever be the character of any particular power, however, the Corporations Law clearly envisages that "the Court" will play a significant role in the external administration of companies. And, in my view, the comprehensive nature of that role tells against a legislative intention that any court having

116 Section 415.

117 Section 423.

118 Section 425.

119 Section 434A.

120 Section 438D(3).

121 Section 441H.

122 Section 444F(3).

123 Section 445B.

124 Section 447A(1).

jurisdiction with respect to civil matters arising under the Corporations Law should have jurisdiction with respect to some only of those matters, and not others.

81 Having regard to the nature of the scheme effected by the Corporations Act (Cth) and the counterpart legislation and, having regard, also, to the intended involvement of courts in the external administration of companies, I am of the opinion that the only manner in which the definition of "Court" in s 58AA(1) can be read down consistent with the intended operation of that scheme and, also, with the intended operation of the Corporations Law is for it to be read as if pars (a) and (c), which refer, respectively, to the Federal Court and the Family Court, were deleted from it. Subject to a qualification which will be dealt with later, I would read it down in that manner, leaving in place a "seamless operation" of the Corporations Law in the sense that the Supreme Courts of the States and Territories and State Family Courts will each have jurisdiction with respect to all civil matters arising under the Corporations Law, no matter in which State or Territory the relevant corporation is incorporated or carries on business.

82 Again subject to the qualification to which I shall come shortly, the considerations which direct the reading down of the definition of "Court" in s 58AA(1) of the Corporations Law require that the provisions of the Corporations Act (Cth) conferring jurisdiction with respect to civil matters arising under the Corporations Law and authorising the transfer of proceedings from one court to another should be read as if they contained no reference to the Federal Court or the Family Court. In particular, ss 51 and 51A, which confer jurisdiction, should be read as if sub-s (1) were deleted from each of those sections. And ss 53 and 53A, which are concerned with the transfer of proceedings, should be read as if they did not refer to the Federal Court or the Family Court.

83 The qualification to the reading down which, in my view, must be undertaken is that it is arguable that the legislature must be taken not to have intended State Family Courts to have powers over and above those conferred on the Family Court and that the provisions which must be read down should be read down to exclude State Family Courts as well as the Federal Court and the Family Court. That, however, is not a matter that need be decided in this case.

84 So far as the jurisdiction conferring provisions of the counterpart legislation are concerned, they must be read down, if that is permitted, in accordance with the legislation of the State in question or, in the case of the Northern Territory, in accordance with the legislation of that Territory. For present purposes, it is necessary to refer only to s 31 of the *Interpretation Act* 1987 (NSW) and s 6 of the *Interpretation of Legislation Act* 1984 (Vic). It is unnecessary to set out the terms of those provisions. It is sufficient to say that they are to similar effect as s 15A of the *Acts Interpretation Act* 1901 (Cth) and that they cannot be applied to bring about a changed operation of the law in question or to effect a situation inconsistent with legislative intent.

85 Given that s 31 of the *Interpretation Act* 1987 (NSW) and s 6 of the *Interpretation of Legislation Act* 1984 (Vic) are, for present purposes, to be applied in the same way as s 15A of the *Acts Interpretation Act* 1901 (Cth), the considerations which direct the reading down of the definition of "Court" in s 58AA(1) of the Corporations Law also require that the jurisdiction conferring provisions of the Corporations (NSW) Act and of the Corporations (Vic) Act be read as if they contained no reference to the Federal Court or the Family Court. In particular, s 42 of those Acts should be read as if sub-s (3) were deleted and s 42A should be read as if sub-s (1) were deleted. So, too, s 44 of those Acts, which is concerned with the transfer of proceedings from one court to another, should be read as not applying to the Federal Court or the Family Court.

86 When the provisions of the Corporations Law, the Corporations Act (Cth), the Corporations (NSW) Act and the Corporations (Vic) Act are read down in the manner indicated, there is nothing upon which s 56 of the Corporations Act (Cth), to the extent that it authorises the Federal Court and the Family Court to exercise State jurisdiction, can operate. At least that is so with respect to civil matters arising under the Corporations Law of New South Wales and Victoria. Thus, it is unnecessary in this case to consider the power of the Commonwealth to legislate in terms of s 56. So too, the reading down of the Corporations (NSW) Act and the Corporations (Vic) Act make it unnecessary to consider whether the States may validly confer jurisdiction on federal courts. This notwithstanding, I agree with Gummow J, for the reasons his Honour gives, that the States cannot confer jurisdiction on federal courts and the Commonwealth cannot authorise those courts to exercise jurisdiction of that kind.

The cross-vesting legislation of 1987 and other possible sources of jurisdiction

87 The questions formulated by Black CJ for the consideration of the Full Court ask, in effect, whether the Federal Court has jurisdiction with respect to matters arising under the Corporations Law of New South Wales or Victoria by reason of the cross-vesting legislation of 1987 or in consequence of some other grant of jurisdiction. Those issues can be dealt with shortly.

88 The provisions of the Corporations Act (Cth) which confer jurisdiction with respect to civil matters arising under the Corporations Law and which authorise the transfer of proceedings from one court to another are found in Pt 9 Div 1 of that Act. Section 49(1) states that Pt 9 Div 1:

"... provides in relation to:

- (a) the jurisdiction of courts in respect of civil matters arising under the Corporations Law of the Capital Territory; and

- (b) the jurisdiction of the courts of the Capital Territory in respect of civil matters arising under any Corporations Law of a State;

and so provides to the exclusion of:

- (c) the Jurisdiction of Courts (Cross-vesting) Act 1987; and
- (d) section 39B of the *Judiciary Act* 1903."

Like provision is made in s 40(1) of the counterpart legislation.

- 89 It follows from the legislative provisions to which reference has been made, that the Federal Court does not have jurisdiction with respect to matters arising under the Corporations Law in consequence of the cross-vesting legislation of 1987. Finally, it was not suggested that there is any other legislation conferring jurisdiction with respect to matters of that kind or that any accrued or pendant jurisdiction was attracted at any stage of the proceedings in question.

Answers to questions

- 90 I agree with Gummow J, for the reasons that his Honour gives, that the order for Amann's winding up must be taken to be valid until discharged on appeal by a competent party. That being so, it is inappropriate to answer any but question 3 of the questions formulated by Black CJ. As to each of (a), (b) and (c), question 3 should be answered "No".

Orders

- 91 The appeal should be allowed, the answers of the Full Court to the questions formulated by Black CJ should be set aside and, in lieu, those questions should be answered in the manner proposed by Gummow J. The respondent should pay the appellants' costs of this appeal and of the proceedings in the Federal Court. There should be no other order as to costs.

92 McHUGH J. The principal question in this appeal is whether a State, with or without the consent of the Parliament of the Commonwealth, can constitutionally invest State jurisdiction in a federal court.

93 The appeal is brought by a number of individuals and companies ("the appellants") against an order of the Full Court of the Federal Court which unanimously held that a State has the power under s 107 of the Constitution¹²⁵ to enact legislation that invests a federal court with jurisdiction to exercise State judicial power and that, if the Parliament of the Commonwealth consents to that course, nothing in the Constitution - in particular nothing in Ch III of the Constitution - prevents a State from doing so. The Full Court also upheld the validity of a number of summonses issued to the individual appellants and the representatives of the corporate appellants which required them to attend before the Federal Court to be examined about the examinable affairs of Amann Aviation Pty Limited ("Amann"), a company incorporated under the *Companies Act* 1961 (NSW).

94 In my opinion, these holdings of the Federal Court were wrong. The Constitution permits federal courts to exercise original jurisdiction only where that jurisdiction involves the exercise of *federal judicial* power with respect to the matters mentioned in ss 75 and 76 of the Constitution. On some occasions, when a party raises a claim in the Federal Court of Australia invoking the exercise of federal jurisdiction, that court may ultimately determine the controversy solely by reference to State law including the Australian common law. This is because the federal claim and the "attached" State claim "arise out of a common substratum of facts" and the Federal Court determines "the attached claim as an element in the exercise of its federal jurisdiction."¹²⁶ But nothing in the Constitution authorises the Parliament of the Commonwealth, or that parliament in conjunction with the legislature of a State, to invest a federal court with jurisdiction to determine "some distinct and unrelated non-federal claim"¹²⁷. The question does not turn on whether the Parliament of the Commonwealth gives or does not give its consent to

125 Section 107 provides:

"Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

126 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 512; *Fencott v Muller* (1983) 152 CLR 570 at 607-608.

127 *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 482; *Fencott* (1983) 152 CLR 570 at 607-608.

the investing of State jurisdiction. The Parliament of the Commonwealth simply has no power to consent to the federal courts of Australia exercising State jurisdiction or State judicial power. It has no more power to consent to the investing of that jurisdiction or power in the federal courts of this country than it has to consent to those courts exercising the judicial power of, say, the United States of America. Federal courts are created under the power conferred by s 71 of the Constitution to exercise the judicial power of the Commonwealth - not State judicial power - and ss 51(xxxix) and 77 of the Constitution are the source of the Parliament's power to define the jurisdiction of the federal courts. Nothing in any of those provisions supports the notion that the Parliament of the Commonwealth can consent to federal courts exercising State jurisdiction conferred on them by the legislature of a State.

95 It follows in my opinion that this appeal must be allowed.

The factual background

96 On 30 November 1992, the Federal Court of Australia ordered that Amann be wound up by that Court "under the provisions of the Corporations Law"¹²⁸ and that the respondent be appointed liquidator of the affairs of Amann. The applicant was BP Australia Ltd. Neither Amann nor any of its directors or officers appealed against the making of these orders. No suggestion that the orders were invalid arose until 1995 when the respondent applied to the Federal Court for an order that the individual appellants and representatives of the corporate appellants be summonsed to attend before that Court to be examined about the examinable affairs of Amann.

97 Under the power purportedly conferred on it by ss 596A and 596B of the Corporations Law of New South Wales, the Federal Court made the order sought. The appellants then moved to set aside the summonses upon the ground that the Federal Court had no jurisdiction to issue them because the winding up of Amann and the appointment of the respondent as liquidator were invalid. On 3 November 1995, Black CJ ordered that the issues raised by the appellants be referred for consideration by a Full Court of the Federal Court in the form of five questions to be answered on the basis of agreed facts¹²⁹. The Full Court (Black CJ, Lockhart

¹²⁸ The Court appears to have been referring to the Corporations Law of New South Wales (the State in which Amann was incorporated) as defined in s 7 of the *Corporations (New South Wales) Act 1990* (NSW).

¹²⁹ *Federal Court of Australia Act 1976* (Cth), s 20(1A). The five questions are set out in the judgments of Brennan CJ and Toohey J, Gaudron J and Gummow J.

and Lindgren JJ) answered the questions adversely to the appellants¹³⁰. Their Honours unanimously held that the Federal Court did have jurisdiction to wind up Amann and to appoint the respondent liquidator. The learned judges also held that the Federal Court had jurisdiction to issue summonses and to conduct and hear examinations under ss 596A and 596B of the Corporations Law of New South Wales in respect of the affairs of Amann.

The 1990 legislation

98 After this Court held¹³¹ that certain provisions of Ch 2 of the *Corporations Act* 1989 (Cth) ("the Commonwealth Act") were invalid, the Parliaments of the States, the Northern Territory and the Commonwealth enacted legislation within their respective jurisdictions for the purpose of creating effectively a single company law throughout Australia that could be administered by State, Territory and federal courts. The Commonwealth Act was substantially amended by the *Corporations Legislation Amendment Act* 1990 (Cth) ("the Commonwealth Amendment Act").

99 Part 2 (ss 3-7) of the Commonwealth Amendment Act converts the Commonwealth Act into a law for the government of the Australian Capital Territory ("the ACT"). Section 4 of the Commonwealth Amendment Act declares:

"(1) This Part changes the [Commonwealth] Act from an Act relying on the corporations and other powers, and intended to apply of its own force throughout Australia, into a law for the government of the Australian Capital Territory in relation to corporations, securities, the futures industry and some other matters.

(2) Section 6 of this Act inserts in the [Commonwealth] Act new Parts providing for the Corporations Law set out in new section 82 of the Act to apply as a law for the government of the Territory.

(3) Section 7 of this Act then creates that Corporations Law out of the existing interpretation and substantive provisions of the [Commonwealth] Act.

(4) The States (including the Northern Territory) can also apply that Corporations Law as their own law, because the amendments made by this

130 *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451; 137 ALR 447.

131 *New South Wales v The Commonwealth (The Incorporation Case)* (1990) 169 CLR 482.

Part are designed to render that Law suitable for application as a uniform law in all States and internal Territories."

100 Section 6 of the Commonwealth Amendment Act inserts a new s 5 into the Commonwealth Act so as to provide:

"The Corporations Law set out in section 82 as in force for the time being:

- (a) applies as a law for the government of the Capital Territory; and
- (b) as so applying, may be referred to as the Corporations Law of the Capital Territory."

101 Section 7 of the Commonwealth Amendment Act makes the provisions of the Commonwealth Act, as amended, provisions of the Corporations Law.

102 Section 56 of the Commonwealth Act is entitled "Exercise of jurisdiction pursuant to cross-vesting provisions". At the relevant time, sub-s (2) provided:

"The Federal Court, the Family Court or the Supreme Court of the Capital Territory may:

- (a) exercise jurisdiction (whether original or appellate) conferred on that Court by a law of a State corresponding to this Division with respect to matters arising under the Corporations Law of a State; and
- (b) hear and determine a proceeding transferred to that Court under such a provision."

103 As part of the co-operative scheme, the Parliament of New South Wales enacted the *Corporations (New South Wales) Act* 1990 ("the NSW Act")¹³² in order to apply certain provisions of the Commonwealth Act "as laws of New South Wales"¹³³. Section 7 of the NSW Act declares:

132 Corresponding provisions were made in legislation of the other States and of the Northern Territory by the *Corporations (Victoria) Act* 1990 (Vic); *Corporations (South Australia) Act* 1990 (SA); *Corporations (Queensland) Act* 1990 (Q); *Corporations (Western Australia) Act* 1990 (WA); *Corporations (Tasmania) Act* 1990 (Tas); *Corporations (Northern Territory) Act* 1990 (NT).

133 s 1(2).

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"The Corporations Law set out in section 82 of the [Commonwealth] Act as in force for the time being:

- (a) applies as a law of New South Wales; and
- (b) as so applying, may be referred to as the Corporations Law of New South Wales."

Section 42(3) declares:

"Jurisdiction is conferred on the Federal Court with respect to civil matters arising under the Corporations Law of New South Wales."

The NSW Act defines "Federal Court" to mean "the Federal Court of Australia"¹³⁴. Correspondingly, s 9 of the Corporations Law defines the term "Court" to mean "the Federal Court, or the Supreme Court of this or any other jurisdiction, when exercising the jurisdiction of this jurisdiction".

104 The respondent contends that s 42(3) of the NSW Act alone or in combination with s 56(2) of the Commonwealth Act is the source of the jurisdiction exercised by the Federal Court in ordering the winding up of Amann and in appointing the respondent as liquidator of the affairs of Amann. The respondent also relies on s 19 of the *Federal Court of Australia Act* (1976) (Cth) ("the Federal Court Act") which provides that that Court "has such original jurisdiction as is vested in it by laws made by the Parliament" and s 15C of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act") which provides that, where an Act of the Parliament authorises, expressly or by implication, the institution of a civil or criminal proceeding in a particular court in relation to a matter, that provision is deemed to vest that court with jurisdiction in that matter. But neither s 19 of the Federal Court Act nor s 15C of the Interpretation Act increase the jurisdiction of the Federal Court for present purposes.

105 Section 56(2) of the Commonwealth Act does not confer jurisdiction on the Federal Court. It operates on the hypothesis that a law of a State has conferred jurisdiction on the Federal Court. There is therefore no law made by the Parliament of the Commonwealth, within the meaning of s 19 of the Federal Court Act, which vests jurisdiction in the Federal Court and no work in this case for s 15C of the Interpretation Act to do. Section 15C operates in respect of laws of the Parliament of the Commonwealth which authorise the institution of proceedings. If such a law exists, s 15C has the effect that the law of the Parliament of the Commonwealth deems the relevant court to have jurisdiction. However, s 56(2) of the Commonwealth Act does not authorise the institution of proceedings.

134 s 3(1).

Section 15C therefore does not pick up the provisions of s 56(2) and does not deem the Federal Court to have jurisdiction in respect of State matters instituted in that Court.

Defining the jurisdiction of the Federal Court

106 Federal courts are created by the Parliament of the Commonwealth under the power conferred by s 71 of the Constitution. Prima facie, in accordance with s 77 of the Constitution only a law of the Parliament of the Commonwealth can define the jurisdiction of a federal court. Sections 71, 75, 76 and 77 of the Constitution are presently relevant. Section 71 is entitled "Judicial power and Courts" and provides:

"The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called 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 shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes."

Section 75 is entitled "Original jurisdiction of High Court" and provides:

"In all matters -

- (i) Arising under any treaty:
- (ii) Affecting consuls or other representatives of other countries:
- (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
- (iv) Between States, or between residents of different States, or between a State and a resident of another State:
- (v) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction."

Section 76 is entitled "Additional original jurisdiction" and provides:

"The Parliament may make laws conferring original jurisdiction on the High Court in any matter -

- (i) Arising under this Constitution, or involving its interpretation:

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- (ii) Arising under any laws made by the Parliament:
- (iii) Of Admiralty and maritime jurisdiction:
- (iv) Relating to the same subject-matter claimed under the laws of different States."

Section 77 is entitled "Power to define jurisdiction" and provides:

"With respect to any of the matters mentioned in the last two sections the Parliament may make laws -

- (i) Defining the jurisdiction of any federal court other than the High Court:
- (ii) 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:
- (iii) Investing any court of a State with federal jurisdiction."

107 Subject to the Constitution, s 51(xxxix) also gives the Parliament of Commonwealth power to make laws with respect to:

"Matters incidental to the execution of any power vested by this Constitution in the ... Federal Judicature".

108 Sections 71 and 77(i) therefore authorise the Parliament of the Commonwealth to create federal courts and to define their jurisdiction. Moreover, s 77(iii) authorises the Parliament to invest the courts of the States with federal jurisdiction whether or not the States wish their courts to exercise federal jurisdiction. That paragraph does not require a State to consent to the investing of its courts with federal jurisdiction. On the other hand, nothing in the Constitution expressly empowers the States to invest State jurisdiction in this Court or in any federal court created by the Parliament of the Commonwealth under s 71 of the Constitution. Nor does anything in the Constitution expressly empower the Commonwealth to consent to the States investing federal courts with jurisdiction of any kind.

109 To all outward appearances, therefore, the text and structure of the Constitution indicate that, for the orders made by the Federal Court in this case to be valid, it would be necessary for the Parliament of the Commonwealth to have enacted some law which defines the jurisdiction of that Court in accordance with s 77(i) of the Constitution. That is to say, having regard to the subject matter of

the present case¹³⁵, the Parliament of the Commonwealth would have had to enact a law that gives the Federal Court jurisdiction to wind up Amann under a federal law and make consequential orders under that law. Yet, as the appellants point out, nowhere in the Commonwealth Act or elsewhere is there any law made by the Parliament of the Commonwealth which answers that description¹³⁶.

110 How then could the Federal Court have had jurisdiction to make the orders that it did? Where could the States get power, with or without the consent of the Parliament of the Commonwealth, to invest federal courts with State jurisdiction? Where could the Parliament of the Commonwealth get power to consent to a State investing the Federal Court with State jurisdiction?

111 The respondent and the supporting interveners submit that there are straightforward answers to these questions. They advance four related propositions. First, the Constitution contemplates joint legislative action by the States and the Commonwealth to deal with matters that are beyond the individual capacities of the federal and State governments. Second, the powers conferred on the State of New South Wales by its Constitution are sufficiently wide to authorise that State to invest a federal court with State jurisdiction. Third, that, when the Parliament of the Commonwealth creates an authority, it can validly consent to that authority, be it a court or tribunal, receiving powers from sources other than the Commonwealth. Fourth, nothing in Ch III, either expressly or by necessary implication, prevents federal courts from being invested with State judicial power.

112 To a great extent, the validity of these propositions, and their relevance to the question at issue in the present proceedings, can be tested only by reference to the accepted jurisprudence underpinning Ch III of the Constitution.

135 Of the matters referred to in ss 75 and 76 of the Constitution, only that contained in s 76(ii) - "matter ... [a]rising under any laws made by the Parliament" could empower the Parliament of the Commonwealth to give the Federal Court jurisdiction to make the orders of the kind that the Federal Court made in this case.

136 The difficulty in constitutionally erecting a cross-vesting scheme, such as that attempted in the 1990 legislation that forms the backdrop to the present case, was perceived by the Constitutional Commission Advisory Committee on the Australian Judicial System: Australia, Constitutional Commission, Australian Judicial System Advisory Committee, *Report*, (1987). The Committee said (at par 3.114):

"[The Committee] thinks that the terms of ss 75 and 76 of the Constitution may well be interpreted as stating the outer limits of the jurisdiction which may be exercised by federal courts and that it is likely to be held that the Commonwealth cannot itself confer, nor agree to the conferral by a State of, jurisdiction upon a federal court where the jurisdiction in question is not within s 75 or s 76".

Chapter III of the Constitution

- 113 Although Ch III of the Constitution expressly prohibits the doing of some matters¹³⁷, it is well settled that it also contains negative implications. In *R v Kirby; Ex parte Boilermakers' Society of Australia* ("the *Boilermakers Case*")¹³⁸ Dixon CJ, McTiernan, Fullagar and Kitto JJ said:

"to study Chap III is to see at once that it is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested. It is true that it is expressed in the affirmative but its very nature puts out of question the possibility that the legislature may be at liberty to turn away from Chap III to any other source of power when it makes a law giving judicial power exercisable within the Federal Commonwealth of Australia. No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap III. The fact that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise was noted very early in the development of the principles of interpretation. In Chap III we have a notable but very evident example." (footnote omitted)

- 114 More than 150 years earlier, the Supreme Court of the United States of America took the same view of Art III of the US Constitution. In *Marbury v Madison*¹³⁹ the Supreme Court held that Congress had no power to give original jurisdiction to the Supreme Court in cases other than those described in Art III. In delivering the judgment of the Court, Chief Justice Marshall said¹⁴⁰:

"Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all."

137 For example, s 72(ii) (Justices of the High Court and other federal courts cannot be removed except for proved misbehaviour or incapacity); s 72(iii) (the remuneration of such Justices cannot be diminished during their continuance in office); s 73 (the Parliament of the Commonwealth cannot prescribe any exception or regulation that prevents the High Court from hearing appeals from the Supreme Court of a State); s 74 (no appeal to the Privy Council on an inter se question without the certificate of the High Court).

138 (1956) 94 CLR 254 at 270; affd *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529; [1957] AC 288 (PC).

139 5 US 137 (1803).

140 5 US 137 at 174 (1803).

The Chief Justice said that, unless this approach was taken to Art III, "the distribution of jurisdiction, made in the constitution, is form without substance"¹⁴¹.

115 The *Boilermakers Case* itself established a fundamental negative implication concerning Ch III¹⁴² - the Parliament cannot confer upon a federal court any function that is non-judicial and not ancillary or incidental to the exercise of the judicial power of the Commonwealth. Decisions of this Court have also established four other negative implications concerning Ch III.

116 First, the judicial power of the Commonwealth cannot be vested in a court that is not specified in s 71 of the Constitution¹⁴³. Second, Ch III contains an exhaustive statement of the heads of federal jurisdiction, and no court exercising the judicial power of the Commonwealth can be vested with original¹⁴⁴ or appellate¹⁴⁵ jurisdiction that is not contained in Ch III. Third, because Ch III exhaustively defines the powers of Parliament of the Commonwealth to invest jurisdiction in State and federal courts, the Parliament cannot enact legislation under s 51 of the Constitution giving State courts jurisdiction that is not federal jurisdiction within the meaning of Ch III¹⁴⁶. Fourth, Ch III prevents the Parliament of the Commonwealth from investing a Ch III court with jurisdiction to exercise "a judicial function ... unless its exercise is an exercise of part of the judicial power

141 5 US 137 at 174 (1803).

142 (1956) 94 CLR 254 at 271-272.

143 *The State of New South Wales v The Commonwealth* ("the Wheat Case") (1915) 20 CLR 54 at 62, 89-90, 106, 109; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 442, 457, 465, 489; *The Boilermakers Case* (1956) 94 CLR 254 at 270; *Harris v Caladine* (1991) 172 CLR 84 at 147, 159.

144 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

145 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 299-300; and see *North Galanjanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612.

146 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152.

of the Commonwealth."¹⁴⁷ In *In re Judiciary and Navigation Acts*¹⁴⁸ Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ said¹⁴⁹:

"Sec 75 confers original jurisdiction on the High Court in certain matters, and sec 76 enables Parliament to confer original jurisdiction on it in other matters. Sec 77 enables Parliament to define the jurisdiction of any other Federal Court with respect to any of the matters mentioned in secs 75 and 76, to invest any Court of the States with Federal jurisdiction in respect of any such matters, and to define 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. This express statement of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is, we think, clearly intended as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, *and as a necessary exclusion of any other exercise of original jurisdiction.*" (emphasis added)

117 It is a necessary corollary of the decision in *In re Judiciary and Navigation Acts* that under s 77 of the Constitution¹⁵⁰ the Parliament of the Commonwealth can define the original jurisdiction (and any consequential appellate jurisdiction¹⁵¹) of a federal court other than the High Court by reference only to those matters specified in ss 75 and 76. The Parliament of the Commonwealth therefore has no power to invest such a court with jurisdiction to determine matters that go beyond the subject-matter of legislative power conferred by the Constitution¹⁵².

118 The respondent and the supporting interveners accept that, consistent with Ch III, the States cannot confer non-judicial power on a federal court. Yet they insist that, consistent with Ch III, the States, with the consent of the Parliament of the Commonwealth, can invest non-federal judicial power in a federal court. But, quite apart from the implications that necessarily arise from the language of Ch III, *In re Judiciary and Navigation Acts* provides a complete answer to their argument, for that case holds that the content of the judicial power of the Commonwealth is

147 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264.

148 (1921) 29 CLR 257.

149 (1921) 29 CLR 257 at 264-265.

150 *Adam P Brown* (1981) 148 CLR 457 at 478-479, 494, 516, 535, 547.

151 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603-604.

152 *DMW v CGW* (1982) 151 CLR 491 at 501.

narrower than the content of judicial power¹⁵³. In *In re Judiciary and Navigation Acts* this Court did not reject the conferring of non-judicial power on federal courts. That was not the issue that arose for decision. Rather, the Court rejected the conferring of judicial power that was not the judicial power of the Commonwealth. All members of the Court accepted¹⁵⁴ that Pt XII of the *Judiciary Act* 1903-1920 (Cth) purported to invest this Court with a "judicial function". What the majority denied was that this Court could be invested with a judicial function that did not involve the determination of a "matter" within the meaning of ss 75 and 76 of the Constitution. It must follow, therefore, that Ch III also prohibits both the High Court and any other federal court from being invested with State judicial power. It is impossible to accept the proposition that, although the Parliament of the Commonwealth cannot confer judicial power on the High Court or a federal court when it does not involve the determination of a "matter" specified in s 75 or s 76 of the Constitution, the legislature of a State, with the consent of the Parliament of the Commonwealth, can nevertheless invest judicial power in the High Court or a federal court although it does not involve the determination of such a matter.

- 119 In addition to contravening established doctrine, the notion that the States, with the consent of the Commonwealth, can invest the High Court or any other federal court with State jurisdiction is inconsistent with the fundamental and carefully defined role in the federation that Ch III gives to the federal judicature. In the *Boilermakers Case*¹⁵⁵ Dixon CJ, McTiernan, Fullagar and Kitto JJ stressed that the Constitution carefully defines the powers of the Commonwealth and the States and that there are practical difficulties in maintaining that definition "unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature." Their Honours then said¹⁵⁶:

"The demarcation of the powers of the judicature, the constitution of the courts of which it consists and the maintenance of its distinct functions become therefore a consideration of equal importance to the States and the Commonwealth. While the constitutional sphere of the judicature of the States must be secured from encroachment, it cannot be left to the judicial power of the States to determine either the ambit of federal power or the extent of the residuary power of the States. The powers of the federal judicature must therefore be at once paramount and limited. The organs to which federal judicial power may be entrusted must be defined, the manner

153 *The Commonwealth v Queensland* (1975) 134 CLR 298 at 325.

154 (1921) 29 CLR 257 at 264, 270.

155 (1956) 94 CLR 254 at 268.

156 (1956) 94 CLR 254 at 268.

in which they may be constituted must be prescribed and the content of their jurisdiction ascertained."

120 Jurisdiction is the authority to adjudicate. The framers of the Constitution intended that the High Court and other federal courts be courts of limited jurisdiction. The jurisdictions of these courts was not to be left to the general discretion of the Parliament of the Commonwealth, still less the legislatures of the States. Rather, the framers carefully defined the jurisdiction of the federal courts, original and appellate, in an exhaustive exposition in Ch III of the Constitution.

121 Just as ss 75 and 76 were intended to be a complete statement of the heads of original jurisdiction, s 73¹⁵⁷ was intended to be an exhaustive statement of the appellate jurisdiction of the High Court. In the first case reported in the Commonwealth Law Reports, this Court said that the Parliament of the Commonwealth cannot create appellate jurisdiction for the High Court in addition to that provided by s 73 itself¹⁵⁸. Section 73 was also intended as an exhaustive statement of the appellate jurisdiction of federal courts in respect of State jurisdiction. For this reason, this Court has held that the terms of s 73(ii) preclude the Parliament of the Commonwealth from authorising an appeal to a federal court from the exercise of State jurisdiction by an inferior court of a State. In *Collins v*

157 Section 73 of the Constitution is entitled "Appellate jurisdiction of High Court" and provides:

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences -

- (i) Of any Justice or Justices exercising the original jurisdiction of the High Court:
- (ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:
- (iii) Of the Inter-State Commission, but as to questions of law only:

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court."

158 *Hannah v Dalgarno* (1903) 1 CLR 1 at 10.

*Charles Marshall Pty Ltd*¹⁵⁹, this Court held s 31 of the *Conciliation and Arbitration Act* 1904 (Cth) invalid on the ground that it attempted to invest the Court of Conciliation and Arbitration with appellate jurisdiction from State courts exercising State jurisdiction. These limitations upon the Parliament of the Commonwealth to grant original and appellate jurisdiction to the High Court and the other federal courts powerfully support the negative implication that no other legislature in the federation, with or without the consent of the Parliament of the Commonwealth, can invest the High Court or the other federal courts with jurisdiction.

122 The affirmative but limited grants of constitutional power to the Parliament of the Commonwealth negate its competency to invest the federal courts and the High Court with original and appellate jurisdiction except in accordance with ss 73, 75 and 76. In my view, logically these affirmative grants must also negative the power of other legislatures in the federation to invest the High Court and the federal courts with jurisdiction. The fact that the other legislatures in the federation play no part in the creation of the High Court or the federal courts, and that the Constitution gives them no powers at all in respect of these courts, further supports this conclusion. Moreover, if Ch III is not interpreted as preventing a State from investing State jurisdiction in the federal courts, State jurisdiction invested in a federal court could then be exercised throughout Australia while the same jurisdiction vested in a State court could be exercised only within the State. This would be, to say the least, a curious result. Indeed, even if Ch III did not carefully delimit the jurisdiction of the federal courts in the way that it does, I would think that it was strongly arguable that the States have no power to invest federal courts with additional jurisdiction or control the way that that additional jurisdiction was to be exercised¹⁶⁰.

123 In striking contrast to the absence of any express power in the Constitution giving the States power to conscript the federal courts to exercise State judicial power, s 77(iii) gives the Parliament of the Commonwealth power to conscript the courts of the States to exercise the judicial power (original and appellate¹⁶¹) of the

159 (1955) 92 CLR 529.

160 *The Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372; *Re Residential Tenancies Tribunal of New South Wales; Ex parte Defence Housing Authority* (1997) 71 ALJR 1254; 146 ALR 495. It is hardly to be supposed, for example, that a State, with or without the consent of the Parliament of the Commonwealth, could invest State jurisdiction in a federal court and punish a federal judge who refused to exercise the jurisdiction or could lay down rules of procedure or evidence for the exercise of the State jurisdiction in federal courts.

161 *Ah Yick* (1905) 2 CLR 593 at 604.

Commonwealth. Moreover, the Parliament of the Commonwealth may require¹⁶² that this federal jurisdiction be exercised by a particular number of judges. In criminal trials on indictment in a State court invested with jurisdiction to try an offence against any law of the Commonwealth, the Constitution itself requires¹⁶³ that the trial must be by jury even if the State has abolished juries in criminal trials either generally or for State offences of a similar kind. The Constitution does, and the Parliament of the Commonwealth may, also affect the proceedings of State courts in other ways. Thus, s 118 of the Constitution requires that full faith and credit be given, throughout the Commonwealth, to the judicial proceedings of every State. Section 51(xxiv) gives the Parliament of the Commonwealth power to make laws with respect to the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States. Section 51(xxv) gives the Parliament of the Commonwealth power to make laws for the recognition throughout the Commonwealth of the judicial proceedings of the States. If the framers of the Constitution had intended that the States would be able to conscript the High Court or the other federal courts to exercise State judicial power, one would expect to find in the Constitution similar provisions under which the Parliaments of the States could affect the proceedings of these federal courts. No such provisions exist.

- 124 Moreover, it must be borne in mind that this Court has already held that Ch III contains negative implications that affect the legislatures of the States. Thus in *The Commonwealth v Queensland*¹⁶⁴, the Court held that, even before the abolition of appeals to the Judicial Committee, State legislatures could not provide for the reference of issues to the Privy Council for determination or advice if to do so would conflict with the scheme of Ch III. In *Kable v DPP (NSW)*¹⁶⁵, the Court held that while State legislatures can confer upon State courts non-judicial functions, they cannot confer upon them functions that are incompatible with the exercise by those courts of the judicial power of the Commonwealth. As early as 1904, the Court also held that a State law cannot control the exercise by this Court of its appellate jurisdiction when hearing appeals from State Supreme Courts under s 73(ii) of the Constitution¹⁶⁶. Thus, a State law, by purporting to make a Supreme

162 Constitution, s 79.

163 Constitution, s 80.

164 (1975) 134 CLR 298.

165 (1996) 70 ALJR 814; 138 ALR 577.

166 *Peterswald v Bartley* (1904) 1 CLR 497 at 498-499. See also *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168 at 169.

Court judgment final and conclusive and not subject to appeal, cannot prevent this Court from hearing an appeal against the judgment¹⁶⁷.

125 If the States have the power, with or without the consent of the Parliament of the Commonwealth, to invest federal courts with original jurisdiction, the conclusion is inescapable that they have the power to invest this Court with appellate jurisdiction in respect of matters not mentioned in s 73. If the careful delimitation of *original* jurisdiction in Ch III does not preclude the States from investing original jurisdiction in the High Court or the federal courts, it seems logically impossible to hold that the delimitation of *appellate* jurisdiction in Ch III could preclude the States from investing State appellate jurisdiction in the High Court or other federal Courts. Yet such a conclusion would distort the fundamental role that Ch III gives to this Court as the ultimate appellate court of the nation.

126 Section 73(ii) provides for the High Court to hear appeals from all judgments, decrees, orders and sentences of the Supreme Court of any State, "or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council"¹⁶⁸. At federation, the Judicial Committee of the Privy Council was at the apex of Australian judicial system¹⁶⁹. It formed part of the colonial and, after federation, the State judicial systems¹⁷⁰. Sections 73 and 74 of the Constitution significantly changed the nature of the State judicial systems. Subject to an appeal to the Privy Council by grant of special leave by that body¹⁷¹, the High Court became the court of appeal for the Supreme Courts of the States. In addition, s 73(ii) provided for a right of appeal to the High Court from any State court invested with federal jurisdiction under s 77(iii). Furthermore, although s 73 gives the Parliament of the Commonwealth power to prescribe exceptions and regulations in respect of appeals to the High Court, that power does not authorise a law that purports to prevent this Court from hearing and determining any such appeal¹⁷².

167 *Peterswald* (1904) 1 CLR 497 at 498-499.

168 The Local Court of Appeal of South Australia was the only such court: Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 742-743.

169 *Kable* (1996) 70 ALJR 814 at 844-845; 138 ALR 577 at 619.

170 *Ibralebbe v The Queen* [1964] AC 900 at 921-922.

171 The Parliament of the Commonwealth was empowered to enact laws limiting the matters in which the Privy Council could grant special leave to appeal.

172 *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 194 at 209-210.

127 Moreover, as I pointed out in *Kable*¹⁷³, because s 73(ii) of the Constitution entrenches a right of appeal to the High Court from the Supreme Courts of the States, Ch III requires the State legislatures to maintain court systems, including a court which answers the description in s 73(ii) of a Supreme Court.

128 Against this background, I find it impossible to conclude that the Constitution authorises State legislatures, with or without the consent of the Parliament of the Commonwealth, to invest the High Court or the federal courts with appellate jurisdiction. It would distort the scheme of Ch III and its carefully worked out provisions if the States could invest the High Court with appellate jurisdiction additional to that specified in s 73. Unless the affirmative words of s 73 also have a negative operation, applying to the States as well as the Commonwealth, "they have no operation at all."¹⁷⁴ And the implications that prevent the States from investing appellate jurisdiction in the High Court and the federal courts arise just as logically in respect of original jurisdiction.

129 Furthermore, if contrary to my view, a State could invest a federal court with State jurisdiction, there would be nothing that the Parliament of the Commonwealth could do to reject or control it. No question of inconsistency under s 109 of the Constitution could arise. This is because the Parliament of the Commonwealth has power to invest only federal jurisdiction in federal courts. If the States could invest State jurisdiction in federal courts, no conflict would arise with any federal law because the State law would not detract from the full operation of the federal law, and the federal law conferring federal jurisdiction could not occupy any part of the field covered by State law¹⁷⁵. The fact that the Parliament of the Commonwealth could not exclude State law vesting State jurisdiction in a federal court is itself a compelling reason for concluding that Ch III forbids the States investing jurisdiction in federal courts.

130 The constitutional provisions contained in Ch III, together with the incidental power conferred by s 51(xxxix), therefore exhaustively state the power to legislate with respect to federal courts. They preclude resort to any other general provisions of the Constitution to confer jurisdiction on the High Court or the federal courts created by the Parliament of the Commonwealth. In particular, they preclude the States from resorting to ss 106 and 107 of the Constitution, and the Parliament of the Commonwealth from resorting to the general powers in s 51, to invest additional jurisdiction in the federal courts.

173 (1996) 70 ALJR 814 at 844; 138 ALR 577 at 618-619.

174 *Marbury v Madison* 5 US 137 at 174 (1803).

175 *Victoria v The Commonwealth* (1937) 58 CLR 618.

The Territory cases

- 131 The respondent contends that four decisions of this Court, dealing with the interrelation between Ch III and s 122 of the Constitution, illustrate that Ch III is not an exhaustive statement of the power to confer jurisdiction on the High Court or the federal courts. Those decisions are *R v Bernasconi*¹⁷⁶, *Porter v The King; Ex parte Yee*¹⁷⁷, *Spratt v Hermes*¹⁷⁸ and *Capital TV and Appliances Pty Ltd v Falconer*¹⁷⁹. I accept that *Bernasconi* and *Porter* are inconsistent with the view that Ch III is exhaustive of the High Court's appellate jurisdiction. For this reason, I have long believed that they were wrongly decided and that Knox CJ and Gavan Duffy J were correct in *Porter*¹⁸⁰ when they said in dissent:

"The status and duties of this Court are explicitly defined in Chapter III of the Constitution; and an attempt to alter that status or to add to those duties is not only an attempt to do that which is not authorized by sec 122, but is an attempt to do that which is implicitly forbidden by the Constitution."

- 132 *Bernasconi*, the first of the four cases, was decided at a time when this Court was only just beginning to examine the full implications to be derived from Ch III. Once recognised, constitutional heresies are usually best laid to rest, even when they have existed for a long time. But it is unnecessary to consider whether these two decisions should still be regarded as authoritative. They cannot govern or control the outcome of this case. They deal with the appellate jurisdiction of the High Court and only with laws made by the Parliament of the Commonwealth for the government of a Territory. They do not deal with a law made by a State Parliament that purports to confer jurisdiction upon Ch III courts. Moreover, they give no support to the validity of s 56(2) of the Commonwealth Act. Indeed, properly construed, these decisions support the appellants' argument that s 56(2) is invalid. Thus, in *Bernasconi*¹⁸¹ Griffith CJ, with whose judgment Gavan Duffy and Rich JJ relevantly agreed, said that "Chapter III is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those

176 (1915) 19 CLR 629.

177 (1926) 37 CLR 432.

178 (1965) 114 CLR 226.

179 (1971) 125 CLR 591.

180 (1926) 37 CLR 432 at 439.

181 (1915) 19 CLR 629 at 635.

functions of government as to which it stands in the place of the States, and has no application to territories." In *Porter*¹⁸², Isaacs J said:

"I accordingly accept [*Bernasconi*] as authoritatively determining that 'the judicial power of the Commonwealth,' within the meaning of Chapter III, and both original and appellate, cannot be increased by Parliament. But the judicial power of the Commonwealth is, as defined by *R v Bernasconi*, that of the Commonwealth proper, which means the area included within the States." (footnote omitted)

- 133 *Bernasconi* and *Porter* therefore stand for two propositions. First, although Ch III exhaustively describes the federal judicature, it does so by reference the federal system, a system which they hold consists of the States and the Commonwealth. Second, the Territories are not part of the federal system, and the "legislative power in respect of the Territories is a disparate and non-federal matter."¹⁸³ The two later cases of *Spratt* and *Falconer* simply decide that ss 72 and 73 of the Constitution do not apply to courts created under s 122. In addition, in *Falconer* all members of the Court appeared to accept that Ch III is concerned with the federal system. In the present proceedings, however, the legislation at issue purports to deny that Ch III exhaustively defines the jurisdiction of the federal courts in respect of the federal system, a proposition that *Bernasconi*, *Porter*, *Spratt*, and *Falconer* do not support and which *Bernasconi* and *Porter* in fact reject.

Commonwealth and State co-operation

- 134 It is now necessary to examine the proposition on which the respondent and the supporting interveners most strongly relied during argument before this Court. That proposition centres on the legal advantages to be obtained by Commonwealth and State co-operation. The proposition dominated the reasoning of the learned judges in the Full Court of the Federal Court. The respondent points out that the Constitution in terms, and this Court by its decisions, accept that State action otherwise prohibited by the Constitution may be taken with the consent of the Parliament of the Commonwealth. Thus, s 91 of the Constitution provides that, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, a State may grant any aid to or bounty on the production or export of goods, notwithstanding the provisions of s 90. Similarly, s 114 provides that, with the consent of the Parliament of the Commonwealth, a State may raise or

¹⁸² (1926) 37 CLR 432 at 441.

¹⁸³ *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320 (PC).

maintain a naval or military force and may impose a tax on property belonging to the Commonwealth.

135 This Court has also held that a law of the Commonwealth which is otherwise within power and not expressly or impliedly prohibited by the Constitution is not invalid merely because it establishes an administrative body that derives its powers from State as well as from Commonwealth legislation¹⁸⁴. If the Commonwealth law indicates that the body in question is to be free to exercise powers derived from State law as well as a law of the Parliament¹⁸⁵, the federal law does not seek to cover the field so far as that body is concerned¹⁸⁶. Consequently, no inconsistency between laws for the purpose of s 109 arises. The Commonwealth law does not invalidate the State law, and s 109 does not impair the combined operation of the State and federal legislation. But the cases which so decide have nothing to say about whether the High Court or federal courts created under Ch III of the Constitution can exercise jurisdiction invested by a State legislature.

136 As long as the Parliament of the Commonwealth stays within the general powers conferred by s 51 of the Constitution, it may set up administrative bodies and define their jurisdiction, powers and privileges in whatever way the Parliament thinks fit. If authorising the body to receive and exercise powers, capacities or privileges referred by the States is incidental to the creation of that body, the receipt and exercise of those powers, capacities or privileges are valid unless otherwise prohibited by the Constitution. Furthermore, subject to the operation of s 109, it may be that a State law of its own force can apply to a federal administrative body. In any event, if it is incidental to the working of the body that it should exercise State law functions, there is no constitutional reason preventing the Parliament of the Commonwealth from authorising an administrative body that it has created from exercising those State functions.

137 However, the power to create a federal court arises by implication from s 71, not s 51, of the Constitution. Section 71 of the Constitution declares that "[t]he judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called 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." By necessary implication, s 71 authorises the creation of federal

184 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 552-553, 589.

185 *Duncan* (1983) 158 CLR 535 at 563, 582.

186 *Aberdare Collieries Pty Ltd v The Commonwealth of Australia* (1952) 86 CLR 12 at 30.

courts¹⁸⁷. But the implication, "arising as it does from necessity, must be limited by the extent of the need."¹⁸⁸ Surely then, those courts, created under s 71, can be created only for the purpose of exercising the judicial power of the Commonwealth. After all they are called "federal courts", and the combination of ss 75, 76 and 77 of the Constitution exhaustively defines the jurisdiction that the Parliament of the Commonwealth can confer on them¹⁸⁹. In *Falconer*¹⁹⁰, Windeyer J pointed out that in these sections the "word 'federal' is properly used in contrast with the word 'State' used adjectivally". Earlier he had said¹⁹¹ that the adjective "federal" in the expression "federal court" was an example of the usage of the word "in relation to the Commonwealth and its institutions". In allowing for the creation of federal courts, s 71 provides for the creation of a Commonwealth institution, an institution for exercising the judicial power of the Commonwealth. There is no warrant for reading into s 71 a power to create a court that can exercise jurisdiction other than federal (that is, Commonwealth) jurisdiction.

138 I cannot accept therefore the proposition that simply by creating a federal court the Parliament of the Commonwealth obtains the incidental power to authorise that court to receive jurisdiction from a source other than the Parliament of the Commonwealth. If it can authorise the receipt of additional jurisdiction, it must be able to control it when it is received. It would be extraordinary if it could consent to the vesting of jurisdiction but had no further power to control its exercise. If the Parliament of the Commonwealth can make laws controlling the operation of received jurisdiction, then *In re Judiciary and Navigation Acts* cannot stand because that case decided that ss 75, 76 and 77 were exhaustive of the Parliament's power to regulate the jurisdiction of federal courts.

139 Having regard to *In re Judiciary and Navigation Acts*, the Parliament of the Commonwealth cannot invest federal courts, created under s 71, with State jurisdiction. If that is so, it seems an extraordinary conclusion that the act of creating a federal court can empower the Parliament of the Commonwealth to consent to a State legislature investing that court with jurisdiction that the Parliament creating the court cannot confer on it.

¹⁸⁷ *Ah Yick* (1905) 2 CLR 593 at 603.

¹⁸⁸ *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 118. See also *Harris* (1991) 172 CLR 84 at 160.

¹⁸⁹ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

¹⁹⁰ (1971) 125 CLR 591 at 610.

¹⁹¹ (1971) 125 CLR 591 at 610.

140 The Parliament of the Commonwealth, therefore, has no general authority to define the jurisdiction, powers or privileges of the High Court or the federal courts created under Ch III. It cannot confer judicial power on those courts unless the exercise of that power involves the determination of a matter within the meaning of ss 75 and 76 of the Constitution¹⁹². It cannot authorise an appeal to a federal court from the exercise of State jurisdiction by an inferior court of a State¹⁹³. It cannot even utilise its general powers under s 51 to invest a State court with jurisdiction¹⁹⁴. Because the Parliament of the Commonwealth can confer jurisdiction only in accordance with ss 75 and 76 of the Constitution, it must logically follow that the Parliament cannot enlarge the jurisdiction of a federal court by consenting to any other legislature investing a federal court with jurisdiction. Unlike the case of administrative bodies - where the Parliament has wide powers to define jurisdiction - the Parliament's powers to define the jurisdiction of a federal court is circumscribed by the Constitution. Plainly, the framers of the Constitution, while recognising the necessity for federal courts, intended that the jurisdiction of those courts should be limited in the manner laid down in Ch III.

141 With great respect to the learned judges in the Full Court, no assistance is gained from those cases¹⁹⁵ that hold that a law of the Commonwealth which is otherwise within power and not expressly or impliedly prohibited by the Constitution may establish an administrative body that derives its powers from State as well as from Commonwealth legislation. Those cases operate in a very different constitutional context from that of Ch III. The creation of federal courts under s 71 has no analogy with the creation of an administrative body under ss 51 or 122 of the Constitution. The Parliament of the Commonwealth can define the jurisdiction of such a body in such manner as it thinks fit. But it has no such power with respect to federal courts. It has no power therefore to consent to a State or another country investing a federal court with jurisdiction.

142 In addition, an officer of a federal body exercising powers derived from State law is not required to exercise those powers in isolation from those derived from federal law. Indeed, such a person is an "officer of the Commonwealth" within the meaning of s 75(v) of the Constitution, notwithstanding that he or she may have

192 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

193 *Collins* (1955) 92 CLR 529.

194 *Queen Victoria Memorial Hospital* (1953) 87 CLR 144 at 151-152.

195 *Duncan* (1983) 158 CLR 535 at 552-553, 589; *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117.

exercised a power referable solely to the State legislation¹⁹⁶. On the other hand, the judge of a State court exercising federal jurisdiction is not an officer of the Commonwealth¹⁹⁷. That being so, it is difficult to see how a judge of the Federal Court exercising State jurisdiction, divorced from federal jurisdiction, would be an officer of the Commonwealth for the purposes of s 75(v). That conclusion would have the consequence that, unless the term "federal court" in s 73 was construed to mean a federal court even when exercising non-federal jurisdiction, there would be no appeal to the High Court against any decision of the "federal" court and no means of controlling it under s 75.

143 In my opinion, Ch III, in conjunction with s 51(xxxix), exhaustively states the jurisdiction of the Australian legislatures with respect to the High Court and the federal courts. Consequently, neither the States nor the Commonwealth can legislate individually or co-operatively to vest State jurisdiction in the High Court or the federal courts created under Ch III.

144 The respondent and the supporting interveners also seek to uphold the legislation by contending that, consistent with Ch III, a State could validly confer on a federal court so much of State original jurisdiction which, if had it been federal jurisdiction, the Parliament of the Commonwealth could validly have conferred on a State court. That is, they contend that nothing in Ch III prohibits the conferral of jurisdiction with respect to a "matter" arising under a State law in those cases where, if the law had been a law of the Commonwealth, s 76(ii) of the Constitution would have applied. But how this could constitutionally be done is not easy to grasp. As Brennan CJ, Dawson and Toohey JJ pointed out in *Croome v Tasmania*¹⁹⁸, the term "matter" in ss 75 and 76 identifies "not the proceeding but the subject of the controversy which is amenable to judicial determination in the proceeding." The subject matter of the controversy must arise under ss 75 or 76 of the Constitution. To speak of a State "matter" in the context of Ch III is meaningless. To avoid the unattractive conclusion that the States can confer non-judicial power on the federal courts, it was argued that the State jurisdiction that could be conferred on federal courts was restricted to the exercise of judicial power. But Ch III goes further than preventing non-judicial power being vested in the federal courts. In *In re Judiciary and Navigation Acts*¹⁹⁹ held that Ch III also prohibits the vesting of judicial power in the federal courts unless it is the judicial

¹⁹⁶ *Re Cram* (1987) 163 CLR 117 at 128-129.

¹⁹⁷ *R v Murray and Cormie; Ex parte the Commonwealth* (1916) 22 CLR 437.

¹⁹⁸ (1997) 71 ALJR 430 at 432; 142 ALR 397 at 400.

¹⁹⁹ (1921) 29 CLR 257. See *The Commonwealth v Queensland* (1975) 134 CLR 298 at 325; *Croome* (1997) 71 ALJR 430 at 438; 142 ALR 397 at 408-409.

power of the Commonwealth. Consequently, Ch III prohibits the investing of State judicial power of any kind.

145 In my opinion, in so far as the NSW Act sought to invest jurisdiction in the Federal Court, it was invalid. It necessarily follows that the order made by the Federal Court in this case was made without jurisdiction. The appeal must be allowed.

Order

146 I agree with the order proposed by Gummow J.

147 GUMMOW J. Amann Aviation Pty Limited ("Amann") was incorporated on 25 June 1982 under the *Companies Act* 1961 (NSW). On 30 November 1992, the Federal Court of Australia ordered that Amann "be wound up by this Court under the provisions of the Corporations Law". The Federal Court also ordered that the respondent to the present appeal, an official liquidator, be appointed liquidator of the affairs of Amann. It will become apparent that the reference was to the Corporations Law of New South Wales, within the meaning of s 7 of the *Corporations (New South Wales) Act* 1990 ("the NSW Act"). These orders ("the Orders") were made on the footing that Amann was unable to pay its debts within the meaning of s 460(1) of that Law²⁰⁰. The Orders were entered on 3 December 1992 and no appeal was brought from them.

148 On 7 July 1995 and upon application by the respondent, a judge of the Federal Court ordered that those who are the individual appellants to this Court, together with representatives of the other appellants and certain other persons, be summonsed to attend before the Federal Court to be examined about the examinable affairs of Amann. The order was implemented by summonses to attend examination under s 596A or s 596B of what appears to have been the Corporations Law of New South Wales. These sections empower "the Court", upon application by "an eligible applicant", to summon a person for examination about the "examinable affairs" of a corporation, if the Court, in each case, is satisfied as to certain matters. The expression "eligible applicant" is defined so as to include a liquidator. Section 596A obliges the Court to order an examination if the criteria in the section are made out, whereas s 596B uses the expression "[t]he Court may summon ...".

149 By a Notice of Motion filed on 30 August 1995, the appellants moved for orders setting aside the summonses. They also sought declarations that the Federal Court had no jurisdiction to order the winding up of Amann under the Corporations Law, that the Orders (being the winding-up order made on 30 November 1992 and that appointing the respondent as liquidator) were invalid, and that the Federal Court had no jurisdiction to conduct the examinations referred to in the summonses. By this means, the appellants raised issues involving the interpretation of the Constitution and the validity of the laws upon which the relevant jurisdiction of the Federal Court was based. The parties agreed upon certain facts and propounded questions for the determination of these issues. Black CJ, acting pursuant to s 20(1A) of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"), directed that the jurisdiction of the Court be

200 Section 460 ceased to operate as part of the Corporations Law of New South Wales upon the commencement on 23 June 1993 of s 58 of the *Corporate Law Reform Act* 1992 (Cth), but nothing turns upon this for the present appeal. Section 116 of the same statute, also with effect from 23 June 1993, introduced ss 596A and 596B, to which further reference will be made.

exercised by a Full Court. The Full Court thus exercised original not appellate jurisdiction.

- 150 The Full Court (Black CJ, Lockhart and Lindgren JJ) answered the questions adversely to the appellants²⁰¹. The text of the questions is set out later in these reasons under the heading "Conclusion". The Full Court determined (Question 1(a)) that the Federal Court had had jurisdiction to make the Orders whereby Amann was to be wound up and the respondent was appointed liquidator. It also determined (Question 3(a)) that the Federal Court had jurisdiction to make the examination order of 7 July 1995, to issue the summonses, and to conduct and hear examinations under ss 596A and 596B of the Corporations Law.

Legislative history

- 151 Before identifying the particular legislative provisions relied upon to found the relevant jurisdiction of the Federal Court, it is necessary to refer briefly to some of the legislative history. The preamble to the *Corporations Act* 1989 (Cth) ("the Commonwealth Act") stated that it was "[a]n Act to enact a national law about corporations, securities and the futures industry, and for other purposes". The term "company" was defined in s 9 to include "a body corporate that [was] a company for the purposes of the company law of [a] State". Chapter 2 (ss 112-216) was headed "CONSTITUTION OF COMPANIES" and Ch 5 (ss 410-601) was headed "EXTERNAL ADMINISTRATION".

- 152 Division 2 of Pt 2.2 of Ch 2 (s 126) of the Commonwealth Act required "a company of a State" which was a trading corporation or a financial corporation within the meaning of s 51(xx) of the Constitution not to carry on business unless it was registered or awaiting registration under that Division. Section 460(1) provided for the "Court" to order the winding up of a company that was unable to pay its debts. The term "Court" was defined in s 9 as meaning "the Federal Court of Australia or the Supreme Court of a State or Territory".

- 153 The Federal Court is created by the Federal Court Act as a superior court of record and as a court of law and equity (s 5). The process of the Federal Court runs, and its judgments have effect and may be executed, throughout Australia and the Territories (s 18).

- 154 Section 19 of the Federal Court Act provides that that Court "has such original jurisdiction as is vested in it by laws made by the Parliament"²⁰².

201 *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451 at 455-457, 473-474, 502; 137 ALR 447 at 451-452, 468, 494-495.

202 The text of s 19 is:

(Footnote continues on next page)

Section 15C of the *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act") provides that, where an Act of the Parliament authorises, expressly or by implication, the institution of a civil or criminal proceeding in a particular court in relation to a matter, that provision is deemed to vest that court with jurisdiction in that matter.

155 Had the Commonwealth Act remained in its original form, and been valid, the result would have been that, in ordering the winding up of Amann, the Federal Court was exercising federal jurisdiction pursuant to laws made under ss 76(ii) and 77(i) of the Constitution.

156 However, on 8 February 1990, this Court had answered questions reserved by Mason CJ to the Full Court by determining that certain provisions of Ch 2 of the Commonwealth Act were invalid. This followed from the holding that s 51(xx) of the Constitution does not empower the Parliament to legislate for the incorporation of trading and financial corporations²⁰³. Legislative action then followed at Commonwealth and State levels and in the Northern Territory. Substantial amendments were made to the Commonwealth Act, including the provisions of Ch 5.

157 A fundamental issue in the present case is whether, with respect to the jurisdiction of the Federal Court, the same result is achieved by pursuit of the new path laid out by this further legislation as would have been reached if Ch 5 of the Commonwealth Act, in particular s 460 thereof, had remained in its original form and been effective in its terms.

158 This case concerns federal and New South Wales legislation. The respondent and his supporters appeared to submit that the validity of that legislation was enhanced in some fashion because the legislatures of the other States and the Northern Territory had passed laws to corresponding effect to that of New South Wales. The phrase "co-operative scheme" was used in these submissions. However, the submissions did not disclose any grounds upon which, if the relevant provisions of the federal and New South Wales laws were otherwise invalid, they were saved by reason of the passage of corresponding laws by other Parliaments.

"(1) The Court has such original jurisdiction as is vested in it by laws made by the Parliament.

(2) The original jurisdiction of the Court includes any jurisdiction vested in it to hear and determine appeals from decisions of persons, authorities or tribunals other than courts."

203 *New South Wales v The Commonwealth (The Incorporation Case)* (1990) 169 CLR 482.

The result of acceptance of the respondent's submissions has to be that any one State may legislate to confer State jurisdiction upon this or any other federal court.

159 It is convenient at this stage to note another apparent consequence of acceptance of the respondent's submissions. The laws of two or more States, by their terms or in their operation, may affect the same persons, transactions or relationships and do so by laws which are in conflict²⁰⁴. The Constitution contains no express paramountcy provision by reference to which such conflicts are to be resolved²⁰⁵. As yet, no decision of this Court has remedied the deficiency. The respondent's submissions expose the federal courts to the receipt of conflicting requirements from two or more State legislatures, with respect to the exercise of jurisdiction throughout the nation upon the same subject-matter²⁰⁶.

The 1990 legislation

160 The new scheme was laid out in the following manner.

161 Only Ch 1 (ss 1-111) of the Commonwealth Act, headed "INTRODUCTORY", had been proclaimed at the time of the decision in *The Incorporation Case* on 8 February 1990. The Commonwealth Act was extensively amended by the *Corporations Legislation Amendment Act 1990* (Cth) ("the 1990 Act"). The Commonwealth Act, as amended by Pt 2 of the 1990 Act, came into operation on 18 December 1990. Remaining provisions of the Commonwealth Act and the 1990 Act, together with certain State and Territory legislation including the NSW Act, commenced on 1 January 1991.

162 Part 2 (ss 3-7) of the 1990 Act contained provisions designed to convert the Commonwealth Act into a law for the government of the Australian Capital Territory ("the ACT"). The steps by which this was achieved were stated as follows in s 4 of the 1990 Act:

"(1) This Part changes the [Commonwealth] Act from an Act relying on the corporations and other powers, and intended to apply of its own force throughout Australia, into a law for the government of the Australian Capital

204 *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 374; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 71 ALJR 56 at 69-70; 140 ALR 129 at 147-148.

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

206 cf *David Syme & Co Ltd v Grey* (1992) 38 FCR 303 at 315-317, 327-333; 115 ALR 247 at 259-261, 271-276.

Territory in relation to corporations, securities, the futures industry and some other matters.

(2) Section 6 of this Act inserts in the [Commonwealth] Act new Parts providing for the Corporations Law set out in new section 82 of the Act to apply as a law for the government of the Territory.

(3) Section 7 of this Act then creates that Corporations Law out of the existing interpretation and substantive provisions of the [Commonwealth] Act.

(4) The States (including the Northern Territory) can also apply that Corporations Law as their own law, because the amendments made by this Part are designed to render that Law suitable for application as a uniform law in all States and internal Territories."

163 Section 6 of the 1990 Act inserted a new s 5 into the Commonwealth Act. It provided:

"The Corporations Law set out in section 82 as in force for the time being:

- (a) applies as a law for the government of the Capital Territory; and
- (b) as so applying, may be referred to as the Corporations Law of the Capital Territory."

164 Section 7 of the 1990 Act produced the result that the provisions of the Commonwealth Act, as amended, became provisions of the Corporations Law. Substantial changes were made by Sched 1 of the 1990 Act to the definitions in what had been s 9 of the Commonwealth Act. The definitions, such as those of "foreign corporation" and "trading corporation" which had reflected the terms of s 51(xx) of the Constitution, were omitted. The definition in s 9 of "company" became part of the Corporations Law but in an amended form which provided that "'company' means a company incorporated, or taken to be incorporated, under the Corporations Law of this jurisdiction". When reference is had to the newly inserted s 5 of the Commonwealth Act it is clear that "this jurisdiction" in the Commonwealth Act refers to the ACT. Accordingly, s 460 of the Commonwealth Act no longer applied to companies such as Amann which were incorporated elsewhere and, in particular, in New South Wales.

165 It is convenient now to turn to consider the NSW Act²⁰⁷. One of the purposes of that statute, identified as such in s 1(2), was to apply certain provisions of the

207 Corresponding provisions were made in legislation of the other States and of the Northern Territory by the *Corporations (Victoria) Act* 1990 (Vic); *Corporations* (Footnote continues on next page)

Commonwealth Act "as laws of New South Wales". Section 7 is a crucial provision in the attaining of that objective. It states:

"The Corporations Law set out in section 82 of the [Commonwealth] Act as in force for the time being:

- (a) applies as a law of New South Wales; and
- (b) as so applying, may be referred to as the Corporations Law of New South Wales."

The adoption was of s 82 "as in force for the time being". The result is that s 7 of the NSW Act carries into the Corporations Law of New South Wales the Corporations Law set out in s 82 of the Commonwealth Act as modified from time to time by the Parliament of the Commonwealth in its operation as a law for the government of the ACT. The appellants challenge the competence of a State Parliament to legislate for the ambulatory adoption in this way of the laws made by another legislature²⁰⁸. Because the outcome of the appeal will turn upon other issues it will be unnecessary to determine whether the appellants are correct in their challenge to s 7 of the NSW Act.

166 The changed definition of "company" in the Commonwealth Act (and correspondingly in the Corporations Law as a consequence of the 1990 Act) in its application to New South Wales pursuant to s 7 of the NSW Act had a significant consequence for the status of Amann. The "jurisdiction" referred to in the definition of "company" was New South Wales when the Corporations Law was applied as a law of New South Wales by s 7 of the NSW Act. Amann was now a company for the purposes of s 460 of the Corporations Law of New South Wales. It was liable to be wound up thereunder and orders might be made under ss 596A and 596B with respect to its examinable affairs. The term "Court" was now defined in s 9 of the Commonwealth Act as meaning "the Federal Court, or the Supreme Court of this or any other jurisdiction, when exercising the jurisdiction of this jurisdiction". It followed that, in its operation as part of the Corporations Law of New South Wales, s 460(1) was to be understood as if it read "the Federal Court, or the Supreme Court of New South Wales or any other jurisdiction, when exercising the jurisdiction of the State of New South Wales, may order the winding

(*South Australia*) Act 1990 (SA); *Corporations (Queensland) Act* 1990 (Q); *Corporations (Western Australia) Act* 1990 (WA); *Corporations (Tasmania) Act* 1990 (Tas); *Corporations (Northern Territory) Act* 1990 (NT).

208 cf *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 265; *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 488.

up of a company that is unable to pay its debts". The term "[t]he Court" in ss 596A and 596B was to be read in the same sense.

The legislation under challenge

167 The respondent relies upon s 42(3) of the NSW Act, or s 42(3) in combination with s 56(2) of the Commonwealth Act, as providing the source of the jurisdiction exercised by the Federal Court in making the orders of 30 November 1992 for the winding up of Amann and for the respondent's appointment as liquidator.

168 The appellants contend for the invalidity of s 42(3) of the NSW Act. They also submit that s 56(2) of the Commonwealth Act (inserted by the 1990 Act) is invalid, at least in its application to the Federal Court. Section 6 of the 1990 Act stipulates s 56 of the Commonwealth Act as one of a number of provisions to apply as a law for the government of the ACT (s 4(2)).

169 The new Pt 9, Div 1 (ss 49-61) of the Commonwealth Act is headed "Vesting and cross-vesting of civil jurisdiction". Section 49(1) states that the Division makes provision "to the exclusion of ... the *Jurisdiction of Courts (Cross-vesting) Act* 1987 [(Cth)]" ("the Commonwealth Cross-vesting Act"). Section 56(2) provides:

"The Federal Court, the Family Court or the Supreme Court of the Capital Territory may:

- (a) exercise jurisdiction (whether original or appellate) conferred on that Court by a law of a State corresponding to this Division with respect to matters arising under the Corporations Law of a State; and
- (b) hear and determine a proceeding transferred to that Court under such a provision."

170 Part 9 (ss 40-56) of the NSW Act is headed "JURISDICTION AND PROCEDURE OF COURTS" and Div 1 (ss 40-52A) is headed "Vesting and cross-vesting of civil jurisdiction". Section 40(1) states that it makes provision "to the exclusion of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 [(NSW)]". Section 42(3) provides:

"Jurisdiction is conferred on the Federal Court with respect to civil matters arising under the Corporations Law of New South Wales."

"Federal Court" is defined to mean "the Federal Court of Australia" (s 3(1)). The Federal Court held that s 42(3) of the NSW Act, in conjunction with s 56(2) of the Commonwealth Act, founded its jurisdiction in respect of

Amann. That was how the issue was presented in Questions 1(a) and 3(a), which were answered by the Full Court²⁰⁹.

171 The Full Court found that Questions 1(b) and 3(b) did not arise. They were presented on the basis that the answers to Questions 1(a) and 3(a) would be answered adversely to the existence of jurisdiction, whereas the Full Court, by its answers to these questions, had supported jurisdiction. The alternative questions posited jurisdiction upon a combination of s 42(3) of the NSW Act and a provision of the Commonwealth Cross-vesting Act, namely s 9(2) which states:

"The Federal Court ... may:

- (a) exercise jurisdiction (whether original or appellate) conferred on that court by a provision of this Act or of a law of a State relating to cross-vesting of jurisdiction; and
- (b) hear and determine a proceeding transferred to that court under such a provision."

172 These questions apparently were framed on the footing that s 42(3) was "a law of a State relating to cross-vesting of jurisdiction", so as to attract s 9(2). The counterpart to the Commonwealth Cross-vesting Act is the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW). The NSW Act and the Commonwealth Act are later statutes which deal with the particular field of the law relating to corporations. Section 49 of the Commonwealth Act and s 40 of the NSW Act, to which I have referred above, specify that this later legislative scheme operates to the exclusion of the 1987 legislation. The phrase in s 9(2) of the Commonwealth Cross-vesting Act, "a law of a State relating to cross-vesting of jurisdiction", must be read so as to accommodate the exclusionary provision of the later legislation.

173 It follows that, as a matter of construction, Questions 1(b) and 3(b) were misconceived in yoking s 42(3) of the NSW Act to s 9(2) of the Commonwealth Cross-vesting Act. The consequence is that, even if Questions 1(a) and 3(a) are now to be answered "no", so that the alternative questions arise, they also may be answered "no" without the need to embark upon the question of the validity of s 9(2) of the Commonwealth Cross-vesting Act. In the event, for reasons which appear in the final section of this judgment, it is inappropriate to answer any part of Question 1. However, the whole of Question 3 will be answered.

209 The Federal Court order for the winding up of Amann was made in Victoria and the questions before the Full Court treated the corresponding law of Victoria as a possible basis of jurisdiction. This construction was, correctly, not pressed on appeal to this Court.

174 I turn to the appellants' submissions upon those questions of validity which necessarily arise.

The appellants' submissions

175 The appellants submit that s 42(3) of the NSW Act and s 56(2) of the Commonwealth Act are invalid. They emphasise the absence of any law made by the Parliament of the Commonwealth which answers the description in ss 76(ii) and 77(i) of the Constitution of a law made by the Parliament which defines the jurisdiction of the Federal Court in a matter arising under a law made by the Parliament. In its terms, s 56(2) of the Commonwealth Act accepts that jurisdiction has been conferred on the Federal Court by the law of the State. It does not itself purport to confer jurisdiction or to identify any matter of federal jurisdiction as detailed in Ch III of the Constitution.

176 The operation of s 56(2) is not supplemented by s 15C of the Interpretation Act. Section 15C is concerned with laws of the Parliament which authorise the institution of proceedings and provides that such a law shall be deemed to vest jurisdiction. Section 56(2) of the Commonwealth Act is not a law of that description and s 15C does not operate upon it.

177 The appellants submit that the Parliament of a State lacks the power to legislate so as to confer jurisdiction on a federal court. I turn to consider the answer to that question first. If the appellants' submissions are accepted, I will then consider whether any different result flows from the existence, as a law made by the Parliament of the Commonwealth, of s 56(2).

Judicial power and federal jurisdiction

178 It is convenient first to restate several basic propositions which are derived from decisions of this Court construing Ch III. Many represent negative implications. In the formulation which follows, there may be some overlap between the propositions. First, in this context, "jurisdiction" signifies authority to adjudicate; federal jurisdiction is that authority derived from Ch III of the Constitution to exercise the judicial power of the Commonwealth²¹⁰ and State jurisdiction "is the authority which State Courts possess to adjudicate under the State Constitution and laws"²¹¹. Secondly, although the respondent submitted that "the integrity of Chapter III" would be impaired only if a federal court were obliged by State law to exercise power which was non-judicial in nature, judicial power is not co-extensive with the limits of the judicial power of the Commonwealth identified in s 71; it was established by *In re Judiciary and*

²¹⁰ *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603.

²¹¹ *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.

*Navigation Acts*²¹² that the content of the former is greater than that of the latter²¹³. Thirdly, the judicial power of the Commonwealth can be vested in the courts mentioned in s 71 of the Constitution and not otherwise²¹⁴. Fourthly, Ch III contains an exhaustive statement of the heads of federal jurisdiction (both original²¹⁵ and appellate²¹⁶) which may be exercised by courts in which the judicial power of the Commonwealth is vested by s 71. Fifthly, as was established by *R v Kirby; Ex parte Boilermakers' Society of Australia* ("*Boilermakers*")²¹⁷, the Parliament may not confer upon a federal court functions which are non-judicial and which are not ancillary or incidental to the exercise of the judicial power of the Commonwealth. Finally, the jurisdiction (original and appellate²¹⁸) of a federal court other than the High Court can be defined by the Parliament (acting under s 77 of the Constitution²¹⁹) only with reference to the matters mentioned in ss 75 and 76 of the Constitution²²⁰ and the Parliament cannot give power to such a body

212 (1921) 29 CLR 257.

213 See *The Commonwealth v Queensland* (1975) 134 CLR 298 at 325; *Croome v Tasmania* (1997) 71 ALJR 430 at 438; 142 ALR 397 at 408-409.

214 *The State of New South Wales v The Commonwealth* (1915) 20 CLR 54 at 61-62, 89-90, 106, 108-109; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 442, 457, 465, 489; *Harris v Caladine* (1991) 172 CLR 84 at 146-148, 159.

215 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

216 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289; and see *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612.

217 (1956) 94 CLR 254; affd *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 (PC).

218 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603-604.

219 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 478-479, 494, 516, 535, 547.

220 Sections 75, 76 and 77 provide:

"75 In all matters -

- (i) Arising under any treaty:
- (ii) Affecting consuls or other representatives of other countries:

(Footnote continues on next page)

which goes beyond the subject-matter of legislative power conferred by the Constitution²²¹.

179 The respondent referred to decisions such as *R v Bernasconi*²²², *Porter v The King; Ex parte Yee*²²³, *Spratt v Hermes*²²⁴, and *Capital TV and Appliances Pty Ltd v Falconer*²²⁵ which deal with the interrelation between Ch III and s 122 of the

(iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

(iv) Between States, or between residents of different States, or between a State and a resident of another State:

(v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction.

76 The Parliament may make laws conferring original jurisdiction on the High Court in any matter -

(i) Arising under this Constitution, or involving its interpretation:

(ii) Arising under any laws made by the Parliament:

(iii) Of Admiralty and maritime jurisdiction:

(iv) Relating to the same subject-matter claimed under the laws of different States.

77 With respect to any of the matters mentioned in the last two sections the Parliament may make laws -

(i) Defining the jurisdiction of any federal court other than the High Court:

(ii) 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:

(iii) Investing any court of a State with federal jurisdiction."

221 *DMW v CGW* (1982) 151 CLR 491 at 501.

222 (1915) 19 CLR 629.

223 (1926) 37 CLR 432.

224 (1965) 114 CLR 226.

225 (1971) 125 CLR 591.

Constitution. These decisions are not in point, for several reasons. First, they deal only with laws made by the Parliament of the Commonwealth, albeit for the government of a Territory, not with laws made by the State Parliaments which purport to confer jurisdiction upon Ch III courts. Secondly, and with respect to reliance upon these cases to support s 56(2) of the Commonwealth Act, these decisions rest upon the negative implication arising from the references in Ch III to federal courts and courts exercising federal jurisdiction; the negative implication supports the conclusion that Ch III exhaustively describes the federal judicature and its functions in reference only to the federal system. This system consists of States and the Commonwealth - upon this hypothesis the Territories do not form part of the federal system - and the "legislative power in respect of the Territories is a disparate and non-federal matter"²²⁶. Thirdly, it is with that very exclusiveness of Ch III that this case is concerned, namely the place of Ch III in the federal structure composed of the Commonwealth and States and the reach of State legislatures with respect to a federal court.

Commonwealth and State interaction

180 On the other hand, certain State action otherwise prohibited by the Constitution may be taken with the consent of the Parliament of the Commonwealth. With that consent, a State may raise or maintain a naval or military force and may impose a tax on property belonging to the Commonwealth (s 114). With the consent of both Houses of the Parliament of the Commonwealth, expressed by resolution, nothing in the Constitution, in particular s 90, prohibits a State from granting any aid to or bounty on the production or export of goods (s 91).

181 Consideration of the question whether a State legislature may validly confer jurisdiction on a federal court should commence with recognition that the Constitution has a significant impact upon the judicial structures and proceedings of the States. Section 118 requires that full faith and credit be given, throughout the Commonwealth, to the judicial proceedings of every State. The Parliament has power to make laws with respect to the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States (s 51(xxiv)), and the recognition throughout the Commonwealth of the judicial proceedings of the States (s 51(xxv)).

182 The Constitution also envisages co-operation between federal and State legislatures and executive governments²²⁷. A law of the Commonwealth which is

²²⁶ *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 545 (PC); [1957] AC 288 at 320.

²²⁷ The history of federal and State activity of this description in the first half-century of federation is given in Nicholas, *The Australian Constitution*, 2nd ed (1952),
(Footnote continues on next page)

otherwise within power and which does not offend any express or implied constitutional prohibition is not invalid because it establishes, jointly with a State, an administrative body which derives its powers from State as well as from Commonwealth legislation²²⁸. There is no inconsistency between the relevant State and Commonwealth laws upon which s 109 operates so as to destroy or limit the combined operation of the legislation where the federal law indicates that the authority or body in question is to be at liberty to exercise powers derived from both sources²²⁹. That is because the Commonwealth law is interpreted as not intended to occupy the field to the exclusion of the State law²³⁰. The persons who constitute that body or authority are not required to exercise powers derived from the State law in isolation from those derived from the federal law. However, they remain officers of the Commonwealth within the meaning of s 75(v) of the Constitution notwithstanding that a particular power exercised by them is identifiable as having been conferred by the State legislation²³¹.

- 183 The legislative system created by the Constitution engages the federal and State Parliaments not merely by the provision in s 109 for the resolution of inconsistency between laws. Section 105A²³² provides for Commonwealth-State agreements with respect to the public debts of the States and for their legislative implementation. Further, some powers of the federal Parliament are defined so as to include as an essential element therein the consent of the State or States affected thereby. Examples are the powers in s 51 with respect to the acquisition of State railways (par (xxxiii)), and railway construction and extension in a State (par (xxxiv)). Section 123 provides for alteration by the Commonwealth Parliament of the geographical limits of States and involves State parliamentary

Ch IV. Examples commencing with the earliest days of federation are given in Ch XVIII of the *Report of the Royal Commission on the Constitution*, (1929).

228 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 552, 589.

229 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 563, 582.

230 *Aberdare Collieries Pty Ltd v The Commonwealth of Australia* (1952) 86 CLR 12 at 30.

231 *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117.

232 Inserted in 1929 by *Constitution Alteration (State Debts)* 1928 (Cth): see *New South Wales v The Commonwealth [No 1]* (1932) 46 CLR 155 at 182-184. The Loan Council had been formed in 1924, without statutory authority, to control borrowing by the States and the Commonwealth and for some time New South Wales had not been a member: *Report of the Royal Commission on the Constitution*, (1929) at 178.

consent²³³. Finally, pars (xxxvii) and (xxxviii) of s 51 respectively provide for legislation with respect to matters referred by the Parliament of any State, and for the exercise within the Commonwealth of certain powers, at the request or with the concurrence of the Parliaments of all the States directly concerned.

- 184 It may be noted that, if the respondent's submission be correct, the legislatures concerned have achieved results that may have followed by pursuit of the forms of "co-operative federalism" contemplated by pars (xxxvii) and (xxxviii) of s 51. However, the appellants contend that this legislative activity has failed to produce a result that otherwise would have been achieved if par (xxxvii) had been utilised. They submit that the Parliaments have constructed a legislative leviathan which collides with Ch III of the Constitution.

Chapter III

- 185 The appellants correctly submit that, in the light of the scheme of the Constitution with respect to the judicature, and the decisions of this Court which have construed Ch III, it would be highly anomalous if, consistently with Ch III, the Parliament of a State nevertheless might validly legislate to draft this Court or another federal court to exercise State jurisdiction, whether original or appellate.

- 186 When viewed against the Constitution in its entirety, Ch III presents a distinct appearance. Upon what had been the judicial structures of the Australian colonies and, upon federation, became the judicial structures of the States, the Constitution by its own force imposed significant changes. Section 77(iii) authorises the federal Parliament to conscript the courts of the States for the exercise of federal jurisdiction without imposing any requirement of State consent thereto. The terms of the Constitution do not provide for the States to conscript the High Court, or any other federal court created by the Parliament pursuant to s 71 of the Constitution, for the exercise of State jurisdiction. The respondent's submission must be that Ch III does so implicitly.

- 187 Textual analysis indicates the contrary. Section 77(i) speaks of the Parliament "[d]efining the jurisdiction" of a federal court which has been created by the Parliament in exercise of the power specified in s 71. That section envisages the taking of two legislative steps by the Parliament. The first is the creation of the federal court pursuant to s 71 of the Constitution, and the second is the defining

233 Section 123 states:

"The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected."

of that court's jurisdiction. A law defines that jurisdiction if it gives or confers²³⁴ and determines or marks the boundary or extent of jurisdiction. The power to mark the boundary or extent of the jurisdiction of the federal court is conferred on the Parliament and is limited to definition with respect to any of the matters in ss 75 and 76.

188 This second legislative step (the marking out of the jurisdiction of the federal court) is sequential to the first (the creation of that court). It is hardly to be supposed that the effect of these provisions is that the Parliament may take the first step, but leave it to a State legislature to define the jurisdiction of the federal court in question. Nor is it to be supposed that, where the Parliament itself has taken this second step, a State legislature may redefine the jurisdiction by adding to it subject-matter outside that in ss 75 and 76 and thus beyond the competence of the Parliament.

189 There is a distinction in s 77 between the terms "[d]efining" (s 77(i) and (ii)) and "[i]nvesting" (s 77(iii))²³⁵. Section 77(iii) uses the term "[i]nvesting" to identify the situation where a legislature augments the jurisdiction of a court which it has not created. The term "[d]efining" is used with respect to the legislature which both creates the court in question and supplies it with jurisdiction. It may be appropriate to describe what has been attempted by the New South Wales Parliament in this case as the "investing" of the Federal Court with State jurisdiction. But the constitutional question is whether the State legislature has usurped the power of the federal legislature under s 77(i) to "define" the jurisdiction of the Federal Court. That question is to be answered in the affirmative. The Constitution places that power only in the Parliament and then limits it by reference to ss 75 and 76.

190 Moreover, the effect of the "presumptive force" (to use the phrase in the majority judgment of this Court in *Boilermakers*²³⁶), which is derived from a further consideration of Ch III, is also contrary to the respondent's submission.

191 In *Boilermakers*²³⁷, Dixon CJ, McTiernan, Fullagar and Kitto JJ, after emphasising the importance to the States and to the Commonwealth of the maintenance of the distinct functions of the federal judicature, continued:

"While the constitutional sphere of the judicature of the States must be secured from encroachment, it cannot be left to the judicial power of the

234 These terms were used by Griffith CJ in *Ah Yick v Lehmert* (1905) 2 CLR 593 at 604.

235 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 586.

236 (1956) 94 CLR 254 at 296.

237 (1956) 94 CLR 254 at 268.

States to determine either the ambit of federal power or the extent of the residuary power of the States. The powers of the federal judicature must therefore be at once paramount and limited. The organs to which federal judicial power may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained."

192 Chapter III erects a structure which draws within it elements of the State judicial systems and significantly affects their operations. This is apparent from consideration first of appellate and then of original jurisdiction.

193 First, at the appellate level, s 73(ii)²³⁸ provides for appeals to this Court, as the "Federal Supreme Court" (to use the phrase in s 71), from all judgments, decrees, orders and sentences of the Supreme Court of any State, "or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council"²³⁹. The Privy Council was a component of the Australian colonial and then of the State judicial structures²⁴⁰. The interposition

238 Section 73 of the Constitution states:

"The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences -

- (i) Of any Justice or Justices exercising the original jurisdiction of the High Court:
- (ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:
- (iii) Of the Inter-State Commission, but as to questions of law only:

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court."

239 The only other such court, in addition to the Supreme Courts, was the Local Court of Appeal in South Australia: Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at §306.

240 *Ibralebbe v The Queen* [1964] AC 900 at 921-922.

of this Court (subject to further appeal to the Privy Council by special leave) as a court of final appeal significantly changed those structures. The principle or policy which s 73(ii) embodies was to place under the appellate jurisdiction of the High Court the court that is supreme in the State judicial hierarchy; other State courts were so placed by s 73(ii) only to the extent that they were courts exercising federal jurisdiction by reason of their investment by the Parliament with federal jurisdiction pursuant to s 77(iii)²⁴¹.

194 The State legislatures are required by the Constitution to maintain court systems, including a court which answers the description in s 73(ii) of a Supreme Court, from the decisions of which s 73(ii) entrenches a right of appeal²⁴². The power to prescribe exceptions and regulations, conferred upon the Parliament in the opening words of s 73, does not extend to support a law which prevents the High Court from hearing and determining any such appeal²⁴³. Nor may the Parliament create appellate jurisdiction of the High Court in addition to that provided by s 73 itself²⁴⁴.

195 The exercise by the High Court of its appellate jurisdiction vested by s 73(ii) cannot be controlled or qualified by State law²⁴⁵. Nor was it competent for State legislatures, even before the *Australia Acts* finally placed this Court in superintendence of an integrated national court system²⁴⁶, to provide for the reference of issues to the Privy Council or some other body for determination or advice in a manner which conflicted with the scheme of Ch III²⁴⁷.

241 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 544. An appeal from a State court exercising federal jurisdiction may be determined by the High Court upon a ground which is derived solely from State law: *R v Wilkinson; Ex parte Brazell, Garlick and Coy* (1952) 85 CLR 467 at 478; *Kerr v Pelly* (1957) 97 CLR 310 at 319.

242 *Kable v DPP (NSW)* (1996) 70 ALJR 814 at 839, 844, 862; 138 ALR 577 at 611-612, 618-619, 643.

243 *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 194 at 209-210.

244 *Hannah v Dalgarno* (1903) 1 CLR 1 at 10.

245 *Peterswald v Bartley* (1904) 1 CLR 497 at 498-499; *Commissioner of Stamp Duties (NSW) v Owens [No 2]* (1953) 88 CLR 168 at 169; *Gurnett v The Macquarie Stevedoring Co Pty Ltd [No 2]* (1956) 95 CLR 106 at 110, 116.

246 *Kable v DPP (NSW)* (1996) 70 ALJR 814 at 838-839, 844-846, 859-860; 138 ALR 577 at 610-611, 619-622, 639-641.

247 *The Commonwealth v Queensland* (1975) 134 CLR 298.

196 Finally, s 73 is addressed to the High Court and there is no power in the Parliament of the Commonwealth to confer upon any other federal court any appellate power over any State court exercising State jurisdiction. This was decided in *Collins v Charles Marshall Pty Ltd*²⁴⁸. Section 31 of the *Conciliation and Arbitration Act* 1904 (Cth) was held to be invalid on the ground that it conferred upon the Court of Conciliation and Arbitration an appellate jurisdiction from State courts exercising State jurisdiction. The particular State court in question in the case was the Metropolitan Industrial Court at Melbourne.

197 In this context, it would be incongruous if, consistently with Ch III, there nevertheless were constitutional power in a State legislature to confer upon this Court or any other federal court appellate jurisdiction in respect of decisions of any State court exercising State jurisdiction. Federal appellate jurisdiction in respect of the exercise of State jurisdiction is that vested in the High Court by the Constitution itself. However, acceptance of the submissions by the respondent would appear to have the consequence that a State legislature might confer upon the High Court or another federal court appellate jurisdiction with respect to the exercise of State jurisdiction, both by its Supreme Court and its inferior courts. Such a State law would conflict with the constitutional scheme implemented by s 73(ii) and expounded in the decisions of this Court, in particular *Collins v Charles Marshall Pty Ltd*.

198 The second matter to which I referred above was the impact of Ch III upon the operation of State judicial structures with respect to the exercise of State original jurisdiction. By force of s 75(iv) of the Constitution, the High Court has original jurisdiction in matters between residents of different States. This is a national jurisdiction in respect of actions which, before federation, could have been tried only in the Supreme Courts or other courts of the Australian colonies. Where such actions were *in personam* and transitory, the jurisdiction, at least of the Supreme Courts, did not depend upon subject-matter but upon the amenability of the defendant to the writ expressing the command of the Sovereign. At common law that writ did not run beyond the limits of the colony, so that extraterritorial service of a writ of summons in a personal action was a nullity²⁴⁹. The power which s 77(ii) of the Constitution confers upon the Parliament includes a power to

248 (1955) 92 CLR 529.

249 *McGlew v New South Wales Malting Co Ltd* (1918) 25 CLR 416 at 420; *Laurie v Carroll* (1958) 98 CLR 310 at 322; *Flaherty v Girgis* (1987) 162 CLR 574 at 598, 599. However, the legislatures of the colonies and then of the States had power to enact laws authorising the service of writs outside their territory and, moreover, the *Australasian Civil Process Act* 1886 (Imp) had been passed by the Federal Council of Australasia pursuant to s 15(d) of the *Federal Council of Australasia Act* 1885 (Imp): *Flaherty v Girgis* (1987) 162 CLR 574 at 582, 600; *David Syme & Co Ltd v Grey* (1992) 38 FCR 303 at 318; 115 ALR 247 at 261-262.

make laws defining the extent to which the jurisdiction of this Court under s 75(iv) is to be exclusive of that which otherwise "belongs to" the courts of the States²⁵⁰. The phrase "belongs to" in s 77(ii) identifies "State jurisdiction", as distinguished from federal jurisdiction²⁵¹.

199 Further, those controversies which answer the description of "matter" in ss 75 and 76 of the Constitution may include claims which do not arise under federal law²⁵². The result is that the exercise of federal jurisdiction in relation to that matter, whether by this Court, by another federal court or by a State court invested with federal jurisdiction pursuant to s 77(iii), may involve determination of a claim which, if it stood alone, would be dealt with by a State court exercising its own jurisdiction.

200 Conversely, a matter does not arise under a law made by the Parliament, within the meaning of s 76(ii), merely because the interpretation of the law is involved; State jurisdiction, not federal jurisdiction, is engaged where a matter involves the interpretation of a federal law but does not arise under that law²⁵³.

201 Finally, and as I have indicated, any court of a State may be invested with federal jurisdiction (original and appellate²⁵⁴) by a law made by the Parliament under s 77(iii), and this is without any requirement of consent by the State concerned. Moreover, the federal Parliament may prescribe that this federal jurisdiction be exercised by a particular number of judges (s 79) and the trial on indictment in a State court of an offence against the law of the Commonwealth must be by jury (s 80). In this way the Constitution empowers the Parliament of the Commonwealth to conscript the courts of the States for the exercise of federal jurisdiction. Moreover, whilst the legislatures of the States may confer upon State courts non-judicial functions, they may not confer upon them functions which are incompatible with the exercise by those courts of the judicial power of the Commonwealth²⁵⁵.

250 See *The Commonwealth v Limerick Steamship Co Ltd and Kidman* (1924) 35 CLR 69 at 87, 114; *Pirrie v McFarlane* (1925) 36 CLR 170 at 177.

251 *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.

252 *Fencott v Muller* (1983) 152 CLR 570.

253 *Felton v Mulligan* (1971) 124 CLR 367 at 416; *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581.

254 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 604.

255 *Kable v DPP (NSW)* (1996) 70 ALJR 814; 138 ALR 577.

- 202 Whilst the provisions of the Constitution to which I have referred explicitly give legislative power to the Commonwealth in respect of State courts, they, together with the incidental power conferred by s 51(xxxix), exhaustively state that power. In particular, the general powers of the Parliament to legislate with respect to the subjects in s 51 are not to be interpreted as authorising legislation giving to State courts jurisdiction which is not federal jurisdiction within the meaning of Ch III²⁵⁶.

Validity of s 42(3) of the NSW Act

- 203 The respondent did not squarely face the issue that, if his submissions are good with respect to the investing of original State jurisdiction in the Federal Court, they must also be good with respect to the investing of such original jurisdiction in this Court. The matters set out in ss 75 and 76 are determinative of the original jurisdiction of this Court created by s 71 and of the other federal courts created by the Parliament. A distinction is that, whereas the original jurisdiction of this Court is partly (by s 75) vested by the Constitution, that of the other federal courts is wholly dependent upon the exercise of the legislative power conferred by s 77(i). However, "the original jurisdiction of the High Court" identified in s 73(i) is, as a matter of textual analysis, that "original jurisdiction" detailed in ss 75 and 76²⁵⁷. Likewise, the phrase in s 73(ii), "any other federal court, or court exercising federal jurisdiction" is a reference to s 77(i) and (iii) respectively²⁵⁸. The position was accurately expressed as follows by Quick and Garrahan²⁵⁹:

"Appeals from any Justice or Justices of the High Court itself in its original jurisdiction, and from other federal courts or courts of federal jurisdiction, can, of necessity, only arise in the specific cases where original jurisdiction is granted by the Constitution, or may be conferred by the Parliament; but appeals from the Supreme Courts of the States extend to all cases, without regard to the subject matter or the character of the parties."

- 204 Nor is the respondent's case sustained by attempting, as the respondent and his supporters would have it, a dissection of the jurisdiction which belongs to the courts of the States. The attempted dissection would permit, consistently with Ch III, conferral on a federal court by State law of so much of State original jurisdiction which, had it been federal jurisdiction, could have been conferred by

256 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151-152.

257 See *Ah Yick v Lehmert* (1905) 2 CLR 593 at 612.

258 *Cockle v Isaksen* (1957) 99 CLR 155 at 165-166.

259 *The Annotated Constitution of the Australian Commonwealth*, (1901) at §305.

the Parliament of the Commonwealth on a court of a State²⁶⁰. Thus, jurisdiction with respect to a "matter" arising under a State law might be conferred on a federal court because, had the law been a law of the Commonwealth, s 76(ii) of the Constitution would have applied. Such a dissection could not conveniently be made nor would it be conceptually possible. The term "matter" identifies "not the proceeding but the subject of the controversy which is amenable to judicial determination in the proceeding"²⁶¹. Further, I have indicated that the concept of "judicial power" is broader than that of the "judicial power of the Commonwealth" and that this is what was determined by *In re Judiciary and Navigation Acts*²⁶². Moreover, the content of federal jurisdiction is delineated in ss 75 and 76 of the Constitution by categories of matters, many of which largely are not of direct concern to the States.

205 Nor are the species of matters in ss 75 and 76 readily rewritten to accommodate the submissions for the respondent. Section 75(v) provides an example. The phrase "an officer of the Commonwealth" includes a judge of a federal court other than this Court, not a judge of an inferior court of a State invested with federal jurisdiction²⁶³. Nor does it include the Governor of a State in respect of powers conferred by s 12 of the Constitution with respect to the issue of writs for Senate elections²⁶⁴. It is not readily to be supposed that, consistently with Ch III and the scheme of the Constitution as a whole, a State legislature might confer jurisdiction upon this Court or any other federal court, with respect to disputes arising purely within State jurisdiction, to issue mandamus or prohibition or an injunction against a judge or other officer of a State court of limited jurisdiction or against the Governor of a State.

206 The following passage in the joint judgment of this Court in *Boilermakers* is applicable to and indicates the result in the present case. The passage is directly concerned with the Parliament of the Commonwealth but the reasoning in it

260 The appellants respond that, in any event, the jurisdiction or power which is created by ss 596A and 596B with respect to the examinable affairs of Amann is inquisitorial rather than judicial in nature. The respondent accepts that this is so as regards some of the operation of these provisions but submits that their valid operation may be severed by the operation of s 15A of the Interpretation Act, which is made applicable by s 10 of the NSW Act. It will be unnecessary for the determination of this appeal to rule upon these submissions.

261 *Croome v Tasmania* (1997) 71 ALJR 430 at 432; 142 ALR 397 at 400.

262 (1921) 29 CLR 257. See *The Commonwealth v Queensland* (1975) 134 CLR 298 at 325; *Croome v Tasmania* (1997) 71 ALJR 430 at 438; 142 ALR 397 at 408-409.

263 *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437.

264 *R v The Governor of the State of South Australia* (1907) 4 CLR 1497.

extends *a fortiori* to the State legislatures and spells the invalidity of s 42(3) of the NSW Act. Their Honours said²⁶⁵:

"Indeed to study Chap III is to see at once that it is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested. It is true that it is expressed in the affirmative but its very nature puts out of question the possibility that the legislature may be at liberty to turn away from Chap III to any other source of power when it makes a law giving judicial power exercisable within the Federal Commonwealth of Australia. No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap III. The fact that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise was noted very early in the development of the principles of interpretation²⁶⁶. In Chap III we have a notable but very evident example."

207 Chapter III contains a number of instances of a "negative force" derived from "affirmative words appointing or limiting an order or form of things". *Boilermakers* itself established what is perhaps the best known, namely the denial of the authority of the Parliament to confer non-judicial functions on a federal court. Others, which have been identified earlier in these reasons, include the classification of ss 75 and 76 as a complete statement of the heads of federal jurisdiction, and the treatment of s 73 as an exhaustive statement of the appellate jurisdiction of the High Court, and of s 73(ii) as denying the competency of the Parliament to authorise any appeal to a federal court from the exercise of State jurisdiction by an inferior court of a State.

208 In particular, s 77(iii) is the only express provision whereby the legislature of one component in the federation may conscript the courts of another for the exercise of its judicial power. The Parliament may do so only with respect to the matters in ss 75 and 76. This textual limitation upon the affirmative grant to the Parliament strengthens the negative implication which denies to all other legislatures competency to bestow jurisdiction upon the Federal Court.

209 In *Marbury v Madison*²⁶⁷, the Supreme Court of the United States decided that Congress has no power to give original jurisdiction to the Supreme Court in cases other than those described in Art III of the United States Constitution. In delivering the opinion of the Court, Marshall CJ emphasised that in construing

265 (1956) 94 CLR 254 at 270.

266 *Townsend's Case* (1554) 1 Plowden 111 at 113 [75 ER 173 at 176].

267 5 US 137 (1803).

Art III care was needed lest "the distribution of jurisdiction, made in the constitution, is form without substance"²⁶⁸. His Honour continued²⁶⁹:

"Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all."

This reasoning animates the passage from the joint judgment of this Court in *Boilermakers* which I have set out above. It indicates the path to be followed in the present appeal.

210 I have assumed that the jurisdiction purportedly conferred by s 42(3) is original jurisdiction. Section 56(2)(a) of the Commonwealth Act speaks of the exercise by the Federal Court of original or appellate jurisdiction conferred by State law. However, appeal is not a common law remedy and must be the subject of provision by statute²⁷⁰ or by the Constitution, as exemplified by s 73. Section 43(2) of the NSW Act bars the institution of an appeal from the Federal Court to a State court, an ACT court or to the Family Court of Australia. The NSW Act appears to have been drawn on the footing, supported by some of the interveners in the present appeal, that, subject to the negative provisions of ss 43(2) and 49²⁷¹, which were inserted for more abundant caution, the NSW Act "takes the

²⁶⁸ 5 US 137 at 174 (1803).

²⁶⁹ 5 US 137 at 174 (1803).

²⁷⁰ *Grierson v The King* (1938) 60 CLR 431 at 436; *Davern v Messel* (1984) 155 CLR 21 at 47.

²⁷¹ Section 49 states:

"An appeal does not lie from a decision of a court:

(a) in relation to the transfer of a proceeding under this Division; or

(b) as to which rules of evidence and procedure are to be applied pursuant to section 45(1)."

I will refer later in these reasons to the transfer provision in s 44. Section 45 purports to empower the Federal Court (and certain other courts) when exercising jurisdiction conferred by s 42(3) to apply those rules of evidence and procedure which the Court "considers appropriate". Section 45, at least in its operation upon federal courts, may be invalid for inconsistency with s 4 of the *Evidence Act* 1995 (Cth). Section 49 as a whole may conflict with the conferral on this Court of appellate jurisdiction by s 73 of the Constitution. It is unnecessary for the present appeal to determine these questions.

Federal Court as it finds it"²⁷². That might be thought to bring with it the appellate jurisdiction conferred by Div 2 (ss 24-30A) of Pt 3 of the Federal Court Act. However, s 122 of the Constitution aside, the only legislative power of the Parliament which supports Div 2 is s 77 of the Constitution, aided by s 51(xxxix). This authorises the conferral of appellate jurisdiction upon the Federal Court only by reference to one or more of the matters mentioned in ss 75 and 76 of the Constitution²⁷³. The federal Parliament is not competent to legislate so as to define the jurisdiction of the Federal Court with respect to appeals to it from a State court²⁷⁴.

211 A State law which conferred original jurisdiction upon a federal court would leave a void with respect to appeals within that federal court. Any appeal from the exercise of original jurisdiction by that court would lie only to this Court directly, on the footing that it was brought under s 73(ii) of the Constitution from "any other federal court". Any such appeal would be subject to such exceptions and regulations as are prescribed not by a State legislature but by the federal Parliament. In any event, as indicated earlier in these reasons, the correct reading of s 73 is that the only reference to appeals from judgments, decrees, orders, and sentences wholly in respect of State jurisdiction is to the decisions of State Supreme Courts²⁷⁵.

212 The federal courts are either created by the Constitution (in the case of this Court) or created by the Parliament. The judges thereof are appointed by the Governor-General in Council and their remuneration is fixed by the Parliament (s 72 of the Constitution). As a significant component of the federal system, the federal courts exercise not an amalgam of judicial power from all Australian sources, nor an amalgam of the judicial power of the Commonwealth and judicial and non-judicial power of the States. They exercise the judicial power of the Commonwealth and their federal jurisdiction is carefully marked out in ss 75 and 76 of the Constitution. Section 42(3) is invalid as violating "the principles that underlie Ch III" and as being contrary to the inhibitions which are "clearly implicit in Ch III"²⁷⁶.

213 To resolve in this way the issues on the appeal is not to deny the efficacy of arrangements between the Commonwealth and the States whereby there is referred to the Parliament of the Commonwealth the matter of so much of the law with

²⁷² cf *Le Mesurier v Connor* (1929) 42 CLR 481 at 496, 498.

²⁷³ *Cockle v Isaksen* (1957) 99 CLR 155 at 164.

²⁷⁴ *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529.

²⁷⁵ *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 543-544.

²⁷⁶ *The Commonwealth v Queensland* (1975) 134 CLR 298 at 315.

respect to corporations as complements the power conferred by s 51(xx). Nor is it to deny the efficacy of referral of the matter of so much of the "cross-vesting" of State jurisdiction as when acted upon by the Parliament would yield matters arising under a law made by the Parliament within the meaning of s 76(ii) of the Constitution.

- 214 These points may be illustrated by reference to the *Mutual Recognition Act* 1992 (Cth). This rests upon s 51(xxxvii) of the Constitution²⁷⁷. Section 34 of the statute provides for review by the Administrative Appeals Tribunal ("the AAT") of decisions of local registration authorities, which include State bodies, and from decisions of the AAT an "appeal" on a question of law may be brought to the Federal Court²⁷⁸.

Article III of the United States Constitution

- 215 The respondent, with particular support from the intervention by New South Wales, submits that a comparison between the construction of Art III as understood a century ago and the structure of Ch III lends support to his submission that s 42(3) of the NSW Act validly confers original jurisdiction upon the Federal Court with respect to civil matters arising under the Corporations Law of New South Wales. This is not so. Such a comparison provides no such support.

- 216 In *Bank of NSW v The Commonwealth*²⁷⁹, Dixon J said:

"Anyone who takes Article III of the American Constitution and acquaints himself with the difficulties that arose under it and the manner in which they were dealt with by the Supreme Court and Congress and then compares it with Chapter III of our Constitution will at once see that the text of the latter is the outcome of much knowledge of the judicial exegesis by which judicial power of the United States has been defined."

277 See ss 3 and 43 of the Act. Other examples are Pt XV (ss 488-536) of the *Workplace Relations Act* 1996 (Cth) (Matters referred by Victoria: *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic)); Pt VII of the *Family Law Act* 1975 (Cth) (Children), as amended by ss 23-35 of the *Family Law Amendment Act* 1987 (Cth) and repealed and replaced by s 31 of the *Family Law Reform Act* 1995 (Cth).

278 *Administrative Appeals Tribunal Act* 1975 (Cth), s 44.

279 (1948) 76 CLR 1 at 366; see also *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 89; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 544-546.

In *Boilermakers*²⁸⁰, Dixon CJ, McTiernan, Fullagar and Kitto JJ described the framers of the Australian Constitution as having had a "discriminating appreciation" of the American experience with Art III. Their Honours also said²⁸¹:

"It would be indeed difficult to believe that the framework of Chap III was not adopted because the effect of the framework of Art III was known and it was intended that the same broad principles affecting the judicial power should govern the situation of the judicature in the Commonwealth Constitution."

Sections 1 and 2 of Art III state:

"Section 1 The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2 The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

²⁸⁰ (1956) 94 CLR 254 at 268.

²⁸¹ (1956) 94 CLR 254 at 297.

217 In *Collins v Charles Marshall Pty Ltd*, this Court held that s 31 of the *Conciliation and Arbitration Act* 1904 (Cth) was invalid on the ground that it conferred an appellate jurisdiction on a federal court, the Court of Conciliation and Arbitration, from State courts exercising State jurisdiction²⁸². After referring to s 25 of the *Judiciary Act* (US) passed by Congress in 1789, to certain decisions of the Supreme Court of the United States, and to s 73(ii) of the Australian Constitution, Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ observed²⁸³:

"A consideration of the history of the matter in the United States and the different framework of the judicature chapter of our Constitution tends to confirm the view that appellate power over State courts exercising State jurisdiction cannot be conferred upon a Federal court by the Parliament. It is perhaps not unworthy of remark that Congress has not attempted to arm any court but the Supreme Court with authority to entertain appeals from State courts."

218 The starting point is that Congress had no authority to confer federal jurisdiction upon the State courts; it could not vest any portion of the judicial power of the United States except in courts ordained as established by itself²⁸⁴. Section 77(iii) of the Australian Constitution stands in marked contrast to that situation²⁸⁵.

219 However, the Supremacy Clause (Art VI, cl 2) rendered the State courts competent to exercise what was identified as "concurrent" jurisdiction with the federal courts in cases arising under the Constitution, laws and treaties of the United States, where this was not excluded by provision of federal law or "by incompatibility in its exercise arising from the nature of the particular case"²⁸⁶. In certain instances the State courts had declined to exercise their concurrent jurisdiction²⁸⁷. It was not until after federation in Australia that the United States Supreme Court determined that rights arising under the laws of the United States are enforceable as of right in a State court "when its ordinary jurisdiction as

282 See *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 194 at 215.

283 (1955) 92 CLR 529 at 546.

284 *Martin v Hunter's Lessee* 14 US 304 at 335 (1816); see also *Houston v Moore* 18 US 1 at 27-28 (1820).

285 cf *Felton v Mulligan* (1971) 124 CLR 367 at 393; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 513.

286 *Clafin v Houseman, Assignee* 93 US 130 at 136 (1876).

287 *Clafin v Houseman, Assignee* 93 US 130 at 140 (1876).

prescribed by local laws is appropriate to the occasion"²⁸⁸, and that State courts are "presumptively competent, to adjudicate claims arising under the laws of the United States"²⁸⁹. Hence the further significance of s 77(iii) in the scheme of Ch III as involving the conscription of the courts of the States for investment with federal jurisdiction.

220 I have referred to the power in s 77(ii) of the Constitution whereby the Parliament may make laws 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". In the United States, Art III on its face does not empower the Congress to render exclusive to any federal court the cases or controversies identified by Art III. Nevertheless, the authority to do so was regarded by the Supreme Court as implicit and was exercised by Congress effectively to remove into federal courts what otherwise would have remained as "concurrent" jurisdiction of the State courts. Federal laws providing for such removal were upheld as providing an "indirect mode" by which a federal court acquired jurisdiction in respect of an Art III case or controversy²⁹⁰.

221 The courts of the territories of the United States were not federal courts to which Art III applied. They exercised such general jurisdiction as Congress provided, without distinction between subjects of State and federal jurisdiction²⁹¹. As part of the institutional rearrangements upon the admission of a territory as a State of the Union, it appears to have been permissible for the new State legislature, with the assent of the Congress, to continue the previous territorial court as an interim State court pending both the establishment of a State court system and the provision of a new United States federal District Court²⁹².

222 However, certainly before the commencement of the Australian Constitution, it appears in the United States never to have been attempted by a State to impose upon a federal court established under Art III any obligation to exercise State jurisdiction, original or appellate. In the second edition of Cooley's *The General Principles of Constitutional Law in the United States of America*, which was published in 1891, it was said²⁹³:

288 *Second Employers' Liability Cases* 223 US 1 at 56-57 (1912).

289 *Tafflin v Levitt* 493 US 455 at 458 (1990).

290 *Railway Company v Whitton* 80 US 270 at 287-289 (1872).

291 *Benner v Porter* 50 US 235 at 242 (1850).

292 *Metlakatla Indians v Egan* 363 US 555 at 558-559 (1960).

293 at 140.

"The States cannot enlarge the federal jurisdiction, and confer authority over new cases upon the federal courts."

Section 56(2) of the Commonwealth Act

223 It remains to consider the validity of s 56(2) of the Commonwealth Act. If it is valid, the question then is whether the effect of the concurrent operation of s 56(2) with s 42(3) of the NSW Act is that jurisdiction is validly conferred on the Federal Court with respect to civil matters arising under the Corporations Law of New South Wales, even though, in the absence of s 56(2), that would not be the result.

224 As I have indicated, s 56 is placed in Div 1 (ss 49-61) of Pt 9 of the Commonwealth Act. Division 1 deals with what is described as the vesting and cross-vesting of civil jurisdiction. Section 51 states:

"(1) Jurisdiction is conferred on the Federal Court of Australia with respect to civil matters arising under the Corporations Law of the Capital Territory.

(2) Subject to section 9 of the *Administrative Decisions (Judicial Review) Act 1977*^[294], jurisdiction is conferred on the Supreme Court of each State and the Capital Territory with respect to civil matters arising under the Corporations Law of the Capital Territory.

(3) The jurisdiction conferred on a Supreme Court by subsection (2) is not limited by any limits to which any other jurisdiction of that Supreme Court may be subject."

Section 53 provides for a court exercising jurisdiction under s 51 with respect to a civil matter arising under the Corporations Law of the ACT to transfer the proceeding or application in question to another court having jurisdiction in the matters for determination in that proceeding or application. Section 56 deals not with civil matters arising under the Corporations Law of the ACT but with jurisdiction with respect to matters arising under the Corporations Law of a State. Section 56(2) is addressed both to the Federal Court and to the Supreme Court of the ACT. Paragraph (a) thereof provides for the exercise of jurisdiction conferred

294 Section 9(1)(d) denies to State courts federal jurisdiction they might otherwise have had under any other federal law to review certain decisions.

by State law and par (b) for proceedings transferred under a State law corresponding to s 53. Section 44 of the NSW Act is such a provision²⁹⁵.

225 The appellants primarily attack the validity of s 56(2)(a) of the Commonwealth Act in its operation with respect to the Federal Court. However, the conclusions I have reached also apply to that operation of s 56(2)(b).

226 It may be conceded that there is concurrent federal and State legislative power to make laws with respect to:

"[f]oreign corporations, and trading or financial corporations formed within the limits of the Commonwealth"²⁹⁶.

However, s 56(2) cannot be supported as such a law. It operates with respect to matters arising under the Corporations Law of a State. By way of example, and as indicated earlier in these reasons, the NSW Act deals with companies incorporated or taken to be incorporated under that statute. There is no use of the term "corporation" in the restricted sense given in s 51(xx) of the Constitution. I have referred earlier in these reasons to the changes in definitions made by the 1990 Act.

295 Section 44 states:

"(1) This section applies to a proceeding with respect to a civil matter arising under the Corporations Law of New South Wales in a court having jurisdiction under section 42.

(2) Where it appears to the court that, having regard to the interests of justice, it is more appropriate for the proceeding, or an application in the proceeding, to be determined by another court having jurisdiction in the matters for determination in the proceeding or application, the first-mentioned court may transfer the proceeding or application to that other court."

The text of s 42(3) is set out earlier in these reasons. Sub-sections (1) and (2) of s 42 provide:

"(1) Subject to section 9 of the *Administrative Decisions (Judicial Review) Act* 1977 of the Commonwealth, as it applies as a law of New South Wales, jurisdiction is conferred on the Supreme Court of New South Wales and of each other State and the Capital Territory with respect to civil matters arising under the Corporations Law of New South Wales.

(2) The jurisdiction conferred on a Supreme Court by subsection (1) is not limited by any limits to which any other jurisdiction of that Supreme Court may be subject."

296 Constitution, s 51(xx).

227 Nor would it be proper to read s 56(2) down to achieve such a result. The legislative intention plainly was that s 56(2) operate upon the laws of the States as they stood as a whole, not in respect only of matters affecting companies which answered the description in s 51(xx) of the Constitution. There is no scope to read down s 56(2) to produce a result so at variance with that intention²⁹⁷.

228 Section 56(2) uses the phrase "may ... exercise jurisdiction". Ordinary canons of construction would indicate that in such a context "may" is used imperatively²⁹⁸. So understood, s 56(2), with respect to the Federal Court, may be a law defining the jurisdiction of a federal court. However, it is not supported by the power given the Parliament by s 77(i) of the Constitution to define the jurisdiction of any federal court other than the High Court. This is because s 56(2) is not a law with respect to any matters mentioned in s 75 or s 76. In particular, it does not define the jurisdiction of the Federal Court with respect to matters arising under any law made by the federal Parliament (s 76(ii)). Rather, s 56(2) speaks of matters arising under the Corporations Law of a State.

229 Section 56(2) cannot be supported under s 51(xxxix) of the Constitution. This provides for laws with respect to:

"[m]atters incidental to the execution of any power vested by this Constitution in the Parliament or ... in the Federal Judicature".

One power vested in the Parliament is the making of laws defining the jurisdiction of courts such as the Federal Court (s 77(i)). The power in the first limb of s 51(xxxix) authorises legislation in respect of some matters which are incidental to the exercise of federal jurisdiction²⁹⁹. However, as indicated earlier in these reasons, s 51(xxxix) does not authorise the Parliament to make laws "conferring jurisdiction on a Court forming part of the Federal Judicature"³⁰⁰. Likewise with respect to the execution of powers vested in the federal judicature. In *Boilermakers*, Dixon CJ, McTiernan, Fullagar and Kitto JJ said³⁰¹:

297 *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 501-503.

298 *Ward v Williams* (1955) 92 CLR 496 at 505-506; *Mitchell v The Queen* (1996) 184 CLR 333 at 345-346.

299 *Bayne v Blake* (1908) 5 CLR 497 at 503; *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151; *R v Murphy* (1985) 158 CLR 596 at 613-614.

300 *Willocks v Anderson* (1971) 124 CLR 293 at 299.

301 (1956) 94 CLR 254 at 269-270.

"Section 51(xxxix) extends to furnishing courts with authorities incidental to the performance of the functions derived under or from Chap III and no doubt to dealing in other ways with matters incidental to the execution of the powers given by the Constitution to the federal judicature. But, except for this, when an exercise of legislative powers is directed to the judicial power of the Commonwealth it must operate through or in conformity with Chap III."

230 Section 56(2) is not a law with respect to matters incidental to the execution of any power vested by the Constitution in the Parliament, such as the powers in ss 71 and 77 to create the Federal Court and define its jurisdiction, or to the execution of any power vested by Ch III in the federal judicature. Neither the State jurisdiction purportedly conferred on the Federal Court by s 42(3) of the NSW Act, nor the Territory jurisdiction conferred on the Federal Court by s 51(1) of the Commonwealth Act, is federal jurisdiction. Moreover, s 51(xxxix) is concerned with matters incidental to the execution of powers vested not in any State legislature but in the Parliament of the Commonwealth or in the federal judicature established by Ch III.

231 The Solicitor-General for Queensland emphasised, as is indicated earlier in these reasons, that a "matter" within the scope of s 75 or s 76 of the Constitution may include non-federal claims which are attached to the federal claims, and together constitute the one controversy, attracting federal jurisdiction in respect of the whole of that controversy. Counsel then pointed to the treatment of distinct matters related to but not within that accrued jurisdiction as beyond the scope of ss 75 and 76³⁰². The submission was that it would be incidental to the exercise of jurisdiction conferred by the Parliament upon a federal court for the Parliament to authorise the exercise of jurisdiction conferred by State law in respect of non-federal claims. Thus, s 56(2) would be supported by s 51(xxxix).

232 However, consistently with the scheme of Ch III, the State legislatures cannot confer jurisdiction upon a federal court. There is no "power", in the sense of s 51(xxxix), vested by the Constitution in the federal judicature to exercise non-federal jurisdiction. Therefore, there is relevantly no judicial power to the execution of which s 56(2) is an incidental matter within the meaning of s 51(xxxix). Nor, given the course of authority which construes s 51(xxxix), can a law such as s 56(2) be supported as incidental to the exercise by the Parliament of its power under s 77(i) of the Constitution to confer jurisdiction upon a federal court with respect to the matters listed in ss 75 and 76.

233 It was submitted that s 56(2) is a law for the government of the ACT and thus supported by s 122 of the Constitution. There is established by ss 51 and 56 of the

302 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 478-479, 494, 516, 535, 547-548.

Commonwealth Act and by s 42 of the NSW Act a reciprocity whereby the Supreme Court of the ACT exercises jurisdiction under the NSW law and the Supreme Court of New South Wales exercises jurisdiction under the Corporations Law of the ACT. It may be assumed, without deciding, (i) that a law of the Commonwealth may validly confer upon a State court jurisdiction arising under a law made for the government of a Territory; (ii) that a law of a State may validly confer jurisdiction upon a Territory court; and (iii) that a law of the Commonwealth which expresses consent by the Parliament to the exercise by the Territory court of jurisdiction so conferred by State law also is supported by s 122. Those questions may remain for decision in litigation in which they directly arise.

234 As I have indicated, the present case is concerned with the operation of s 56(2)(a) of the Commonwealth Act in respect of the Federal Court, not the Supreme Court of the ACT. Section 51(1) of the Commonwealth Act confers jurisdiction on the Federal Court with respect to civil matters arising under the Corporations Law of the ACT. It proceeds on the footing that a law which does not confer appellate jurisdiction on the High Court³⁰³, but confers original jurisdiction on the High Court or another federal court with respect to matters arising under a law made for the government of a Territory, is itself such a law and does not conflict with Ch III. Support for that view as to the conferral of original jurisdiction is provided by dicta of Barwick CJ, Kitto J and Menzies J in *Spratt v Hermes*³⁰⁴ (Taylor J, Windeyer J and Owen J contra³⁰⁵) and of Menzies J in *Capital TV and Appliances Pty Ltd v Falconer*³⁰⁶. The correctness of that view again may be assumed, without deciding the question.

235 However that may be, it does not readily appear that a law such as s 56(2) of the Commonwealth Act, which states that the Federal Court may exercise jurisdiction with respect to matters arising under the Corporations Law of a State, is a law for the government of a Territory. The relationships between federal and State judiciatures and judicial systems is essentially a federal matter. As indicated earlier in these reasons, the use of s 122 to support laws investing federal courts with jurisdiction with respect to disputes arising under Territory laws is supported by regarding the legislative power of the Parliament of the Commonwealth with respect to Territories as involving a disparate non-federal matter.

236 My conclusion is that s 56(2) in its operation with respect to the Federal Court is not a law for the government of any Territory and so not supported by s 122 of

303 Consistently with the reasoning in *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.

304 (1965) 114 CLR 226 at 239-240, 256-257, 266.

305 (1965) 114 CLR 226 at 264-265, 277, 280.

306 (1971) 125 CLR 591 at 604; see also at 626 per Gibbs J.

the Constitution. It is no more a law for the government of a Territory than was a law forbidding the use of certain expressions in connection with a business or trade or the supply or use of goods without the consent of a corporation incorporated under the Companies Ordinance 1962 (ACT)³⁰⁷.

- 237 It follows that, at least in its operation with respect to the Federal Court, s 56(2) of the Commonwealth Act is invalid, as is s 42(3) of the NSW Act. I have referred to the legislative purpose manifested by s 4 of the 1990 Act and s 1(2) of the NSW Act. It is unnecessary for the purposes of this case to determine whether ss 56(2) and 42(3) nevertheless may be treated as valid enactments to any extent to which they are not in excess of legislative power. However, s 15A of the Interpretation Act and s 31 of the *Interpretation Act* 1987 (NSW) can save a provision only if the operation of the remaining parts of the law remains unchanged and they cannot be applied if it appears that the law was intended to operate fully and completely according to its terms or not at all³⁰⁸.

Concurrent operation of ss 56(2) and 42(3)

- 238 Even if s 56(2) were fully valid it would not render effective, in concurrent operation with s 42(3) of the NSW Act, the conferral upon the Federal Court of State jurisdiction which is attempted by s 42(3).
- 239 Section 56(2) may have been designed as a legislative waiver of what was perceived to be an immunity of a federal court to imposition by a State law of an obligation to exercise State jurisdiction. In *West Australian Psychiatric Nurses' Association v Australian Nursing Federation*³⁰⁹, Lee J considered an argument for the Attorney-General of the Commonwealth that it was unnecessary for a waiver of immunity by the Parliament to be grounded upon any specific legislative power of the Parliament and that the legislature might remove an immunity by signifying its assent to the action of a State. His Honour, in my view correctly, rejected the argument. Lee J saw it as based upon a qualification to the discarded doctrine of implied immunity of Commonwealth and State instrumentalities. The qualification had been to the effect that a privilege of government might be waived by appropriately worded legislation³¹⁰. The true situation is that, if the State law

307 *Davis v The Commonwealth* (1988) 166 CLR 79 at 97, 117.

308 *Industrial Relations Act Case* (1996) 187 CLR 416 at 502.

309 (1991) 30 FCR 120 at 133-134; 102 ALR 265 at 277-278.

310 *Chaplin v Commissioner of Taxes for South Australia* (1911) 12 CLR 375 at 380-381; see the analysis by Evatt J in *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 695-696, 700-701.

is incompatible with Ch III of the Constitution, then it is invalid by force of the Constitution itself³¹¹.

240 Alternatively, in the course of submissions dealing with the significance for this case of *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*³¹², it appeared to be suggested that s 56(2) was an expression of intention to restrict any "covering the field" operation of s 109 of the Constitution. The proposition would be that the statement in s 19 of the Federal Court Act that the Federal Court has such original jurisdiction "as is vested in it by laws made by the Parliament" is not an exhaustive statement of the jurisdiction which might be conferred upon that Court³¹³. It would follow that it was open to State law to confer jurisdiction in so far as it was within constitutional power to do so.

241 Subject to what follows, it may be that s 56(2) of the Commonwealth Act could operate to save s 42(3) of the NSW Act from what otherwise would be the operation of s 109 of the Constitution. But, s 109 could operate only upon the assumption that the State law otherwise was validly made in exercise of a legislative power concurrent with that of the Parliament of the Commonwealth. In general, where there is no "direct" inconsistency or collision, an expression of federal legislative intention should save a State law from the invalidity which otherwise would flow from s 109 of the Constitution³¹⁴. However, it cannot save that State law from invalidity which otherwise flows from the operation of the Constitution. Section 109 applies only in cases where, apart from the operation of that section, both the federal and State laws in question would be valid³¹⁵. Here, as indicated, invalidity of s 42(3) arises by reason of its incompatibility with Ch III of the Constitution. There can be no work for s 109.

Conclusion

242 It follows that the appeal should be allowed and the order of the Full Court should be set aside. It remains then to determine the answers which should now

311 *Kable v DPP (NSW)* (1996) 70 ALJR 814 at 837, 839-840, 851, 863; 138 ALR 577 at 609, 612, 628-629, 644.

312 (1983) 158 CLR 535.

313 cf *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-564; *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 552.

314 cf *University of Wollongong v Metwally* (1984) 158 CLR 447 at 456.

315 *Carter v Egg and Egg Pulp Marketing Board (Vict)* (1942) 66 CLR 557 at 573.

be given to the questions which were before the Full Court. The questions seek relief which is essentially declaratory in nature.

243 Question 3(a) asks whether the Federal Court had jurisdiction to make the examination order of 7 July 1995, to issue the summonses and to conduct and hear the examinations. It should be answered "No". Question 3(b) and Question 3(c) each should be answered "No". The basis for the negative answer to Question 3(b), namely matters of construction, was identified earlier in these reasons when dealing with the 1987 cross-vesting legislation.

244 Questions 1 and 2 deal with a distinct matter, the validity of the winding-up order and the order appointing the respondent as liquidator. It has been said that a winding-up order is not an order *in rem* and the jurisdiction of the court which made the order may be challenged in proceedings outside the winding-up action, for example by a purchaser in a contractual action to which the liquidator is a party³¹⁶. Section 471(1) of the Corporations Law states:

"An order for winding up a company operates in favour of all the creditors and contributories of the company as if it had been made on the joint application of all the creditors and contributories."

In the administration of the winding up, the order must be taken as valid until discharged on appeal by a competent party³¹⁷. Moreover, no order for discharge, as distinct from relief which is declaratory in nature, has been sought in these proceedings. In all the circumstances, the interests of the appellants are sufficiently vindicated in this Court by a favourable answer to Question 3. Even if, which it is unnecessary to decide, the appellants had standing to seek declaratory relief in respect of the winding-up order and the appointment of the respondent, I would, as a matter of discretion, not grant such relief. Questions 1 and 2 should be classified as inappropriate to answer.

245 Questions 4 and 5 also should not be answered by this Court. It is inappropriate to do so. The issues they raise should be resolved by the Federal Court when dealing with the balance of the proceedings before it, and so far as it bears upon that resolution, in accordance with the decision of this Court.

246 The questions referred to the Full Court should be answered as follows:

316 *In re Bowling and Welby's Contract* [1895] 1 Ch 663 at 668, 671-672, 673.

317 *In re Padstow Total Loss and Collision Assurance Association* (1882) 20 Ch D 137 at 145-148, 150; see also *Cameron v Cole* (1944) 68 CLR 571 at 599; *Commissioner of Pay-Roll Tax v Group Four Industries Pty Ltd* [1984] 1 NSWLR 680 at 684-686.

Question 1:

- (a) Did s 42(3) of the *Corporations (New South Wales) Act* 1990 or s 42(3) of the *Corporations (Victoria) Act* 1990 and s 56(2) of the *Corporations Act* 1989 (Cth) operate validly to confer upon the Federal Court jurisdiction to make the Orders?
- (b) If no to question 1(a), did s 42(3) of the *Corporations (New South Wales) Act* 1990 or s 42(3) of the *Corporations (Victoria) Act* 1990 and s 9(2) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) operate validly to confer upon the Federal Court jurisdiction to make the Orders?
- (c) If no to questions 1(a) and 1(b), did the Federal Court otherwise have jurisdiction to make the Orders?

Answer: As to each of (a), (b) and (c), inappropriate to answer.

Question 2: If no to each part of question 1, are the Orders liable to be set aside and, if so, from what date?

Answer: Inappropriate to answer.

Question 3:

- (a) Did, or does (as the case may be), s 42(3) of the *Corporations (New South Wales) Act* 1990 or s 42(3) of the *Corporations (Victoria) Act* 1990 and s 56(2) of the *Corporations Act* 1989 (Cth) operate validly to confer upon the Federal Court jurisdiction to:
 - (i) make the Examination Orders;
 - (ii) issue the Summonses; or
 - (iii) conduct and hear examinations under ss 596A or 596B or any, and which, provision of Pt 5.9, Div 1 of the Corporations Law?
- (b) If no to question 3(a), did, or does (as the case may be), s 42(3) of the *Corporations (New South Wales) Act* 1990 or s 42(3) of the *Corporations (Victoria) Act* 1990 and s 9(2) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) operate validly to confer upon the Federal Court jurisdiction to:
 - (i) make the Examination Orders;
 - (ii) issue the Summonses; or

- (iii) conduct and hear examinations under ss 596A or 596B or any, and which, provision of Pt 5.9, Div 1 of the Corporations Law?
- (c) If no to questions 3(a) and 3(b), did, or does (as the case may be), the Federal Court otherwise have jurisdiction to:
 - (i) make the Examination Orders;
 - (ii) issue the Summonses; or
 - (iii) conduct and hear examinations under ss 596A or 596B or any, and which, provision of Pt 5.9, Div 1 of the Corporations Law?

Answer: As to each of (a), (b) and (c), "No".

Question 4: If no to each part of question 3, should an order be made on the application of the Examinees setting aside:

- (a) the Examination Orders; and
- (b) the Summonses?

Answer: Inappropriate to answer.

Question 5: Are the Applicant Examinees by their Notice of Motion filed 30 August 1995 entitled to any, and if so what, orders or declarations?

Answer: Inappropriate to answer.

247 The appellants and respondent sought orders under s 78A(2) of the *Judiciary Act* 1903 (Cth) which would shift part of their costs to the shoulders of the interveners. The hearing of the appeal went into the third day. However, the submissions of the interveners were well co-ordinated and there was a minimum of repetition. The importance and complexity of the issues raised by the appellants called for the closest consideration and the submissions by the interveners have been of much assistance. The only costs order of the appeal should be that the respondent pay the costs of the appellants.

248 KIRBY J. This appeal challenges the constitutional validity of cross-vesting legislation. There is a subsidiary challenge to the validity of statutory provisions³¹⁸ providing for the making by the Federal Court of Australia of examination orders and the provision of ancillary relief in a company winding up.

249 It is contended that the cross-vesting legislation is invalid because it is constitutionally impermissible for a State Parliament to confer jurisdiction upon federal courts³¹⁹ and for the Federal Parliament to permit the exercise of such jurisdiction (whether original or appellate)³²⁰. The challenge to the purported conferral of jurisdiction to make examination orders and to provide ancillary relief in winding up proceedings rests upon the contention that such activities, as envisaged by the legislation, are non-judicial in character. They are therefore not such as might be exercised by a federal court, even assuming that it otherwise had jurisdiction.

250 Although the cross-vesting legislation attacked in the appeal is the special scheme enacted by complementary federal³²¹, State³²² and Northern Territory³²³ legislation, the constitutional criticisms, if valid, would apply equally to the general cross-vesting legislation enacted by the Federal Parliament³²⁴ three years prior to the corporate cross-vesting scheme. The general cross-vesting Act of the Federal Parliament is complemented by like legislation enacted in every State and in the Northern Territory³²⁵. As this legislation has operated throughout Australia

318 Corporations Law, ss 596A and 596B as purportedly applied by the Federal Court pursuant to the *Corporations (New South Wales) Act* 1990 (NSW), s 42(3).

319 *Corporations (New South Wales) Act* 1990 (NSW), s 42(3).

320 *Corporations Act* 1989 (Cth), s 56(2).

321 *Corporations Legislation Amendment Act* 1990 (Cth) amending the *Corporations Act* 1989 (Cth) contains the Corporations Law of the Australian Capital Territory. See *Acton Engineering Pty Ltd v Campbell* (1991) 31 FCR 1 at 8-11; *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451 at 479.

322 *Corporations Act* 1990 of each State.

323 *Corporations (Northern Territory) Act* 1990 (NT).

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

325 Sub nom *Jurisdiction of Courts (Cross-vesting) Act* 1987 (of each State and the Northern Territory).

efficiently and beneficially for a decade, the importance of the challenge to the legislation could scarcely be over-stated.

251 The challenge having been raised in a number of cases before the Federal Court, the Chief Justice of that Court³²⁶ directed that the cases be heard by a Full Court of that Court in its original jurisdiction³²⁷. The Full Court unanimously³²⁸ dismissed the challenges. Two of the cases fell away. But the parties to the third proceeding sought, and obtained, special leave to appeal to this Court.

252 Notice of constitutional matters having been given³²⁹, the Attorneys-General for the Commonwealth and all of the States intervened to uphold the validity of the cross-vesting legislation and to support the submissions of the respondent. The only major point of difference in the States' submissions was that none of them agreed with the contention that the federal legislation under challenge could be upheld as an exercise of the power to make laws "at the request or with the concurrence of the Parliaments of all the States directly concerned"³³⁰. Limited submissions only were advanced by the Commonwealth and the States to repel the challenge to the suggested conferral of non-judicial power on a federal court. The big issue which the Commonwealth and the States came to argue, with singularly rare unanimity, was the validity of the cross-vesting legislation which all (together with the Northern Territory) had enacted and which all wished to see upheld as an instance of constitutionally valid "cooperative federalism"³³¹.

326 Under s 20(1A) of the *Federal Court of Australia Act* 1976 (Cth).

327 *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451 at 454-455 per Lockhart J. The questions referred by Black CJ to the Full Court are set out in the reasons of other members of this Court.

328 Black CJ, Lockhart and Lindgren JJ.

329 Pursuant to the *Judiciary Act* 1903 (Cth), s 78B. During the hearing an additional ground was added, without objection, relating to the contention that the legislative scheme was invalid on the basis that it amounted to an unconstitutional abandonment or surrender of the legislative power of the State.

330 Constitution, s 51(xxxviii).

331 This was the description given by the Attorney-General for the Commonwealth in his submissions to the Court; cf *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 71 ALJR 1254 at 1306-1307; 146 ALR 495 at 564-565.

Winding up orders and examination summonses

- 253 The facts which bring these issues to the Court could not be more pedestrian. In 1982, a company, Amann Aviation Pty Limited ("Amann"), was incorporated under the *Companies Act* 1961 (NSW). In November 1992, BP Australia Limited invoked the jurisdiction of the Federal Court of Australia, by process filed in its Victorian District Registry, seeking an order that Amann (the respondent to the application) "be wound up ... under the provisions of the Corporations Law". It sought a further order that Mr Martin Brown ("the respondent") be appointed liquidator of the affairs of Amann.
- 254 The winding up orders were made by the Federal Court³³². They were entered on 3 December 1992. No appeal was brought from those orders. The Federal Court did not specify which of the relevant State Acts it was purportedly applying. However, nothing turned on this as the legislation of all jurisdictions was relevantly identical³³³.
- 255 In July and August 1996, a judge of the Federal Court, sitting in New South Wales³³⁴ ordered that a number of persons ("the appellants") be summoned to attend before that Court for examination about the examinable affairs of Amann. Subsequently summonses were issued to the appellants to attend before the Court to be examined under ss 596A or 596B of the Corporations Law. These examination orders and summonses caused the appellants to file a notice of motion in the Federal Court. By their process, they sought declarations and orders to the effect that the Federal Court did not have jurisdiction to make the winding up orders or the examination orders, to issue the summonses served upon them or to conduct and hear the examinations.

332 Pursuant to the Corporations Law, s 460. This section was repealed with effect from 23 June 1993. See *Corporate Law Reform Act* 1992 (Cth).

333 The appellants, in their written submissions, contended that the applicable law was the Corporations Law of New South Wales by virtue of the fact that Amann was originally incorporated in the State of New South Wales. In its notice under s 78B of the *Judiciary Act* 1903 (Cth), the appellants contended that the Corporations Law referred to in the orders of the Federal Court was the *Corporations (Victoria) Act* 1990 (Vic) and that the summonses were issued under the Victorian Act or the New South Wales Act but that in either event there was no power to do so. It is unnecessary to determine which Act was applicable as they are relevantly identical. It will be assumed that it was the New South Wales Act.

334 Tamberlin J.

256 It was this motion which gave rise to questions which the Chief Justice of the Federal Court ordered to be heard by a Full Court. That Court, as stated, dismissed all of the challenges to the validity of the orders and summonses in question.

The appellants' contentions

257 The appellants submitted that the answers to the questions referred to the Full Court were incorrect; that that Court had no jurisdiction in the matter and that, in any event, it had no power to make the winding up orders, the examination orders or to issue the summonses. Specifically, the appellants contended that:

- (1) The New South Wales Parliament did not have the legislative power to enact s 42(3) of the *Corporations (New South Wales) Act* 1990 (NSW) as the Parliament of the colony of New South Wales before Federation did not have such a power and the Parliament of the State was similarly restricted.
- (2) To the extent that the Federal Parliament may have had legislative power to authorise the conferral of State jurisdiction upon a federal court under s 51(xxxviii) of the Constitution, s 56(2) of the *Corporations Act* 1989 (Cth) ("the federal Act") was not an exercise of power under, and in accordance with, that paragraph.
- (3) If, contrary to (1) the Parliament of the colony of New South Wales did have the legislative power to enact a provision such as the sub-section in question, that power was not continued upon Federation with respect to federal courts by reason of the provisions of Ch III of the Constitution.
- (4) The *Corporations (New South Wales) Act* 1990 (NSW), s 7, in applying s 82 of the federal Act as the Corporations Law of New South Wales, was a delegation of the legislative power of the Parliament of New South Wales amounting to an abandonment by that Parliament of its legislative function and duty and the said Act was therefore wholly invalid.
- (5) Irrespective of the foregoing, the purported conferral on the Federal Court of a power to make examination orders, to issue examination summonses and to conduct examinations under ss 596A and 596B of the Corporations Law was invalid, being inconsistent with the exercise of the judicial power of the Commonwealth.

258 Success in any of the foregoing contentions, except (2), would require that the appeal be allowed. Success in contentions (1), (3) or (4) would involve the invalidity of both of the cross-vesting schemes as presently constituted. Success

in contention (3) might, upon one view, forbid any legislation affording power to a State Parliament to confer jurisdiction on a federal court or authorising a State court to transfer a matter to a federal court and also forbid the Federal Parliament purporting to permit a federal court to exercise such jurisdiction.

- 259 It was the crucial importance of the language and structure of Ch III of the Constitution, and the authority of this Court upon it, which attracted most of the argument in the appeal. If the appellants' attack on this basis could be made good, the legislative scheme would collapse as fatally flawed. Although other parts of the scheme might theoretically be sustained³³⁵, the integrated reciprocity of the legislation, and the inter-governmental agreement out of which it arose, made it likely that if one part of the mosaic were lost, the entire scheme would be destroyed, the parts being inseverable. Pending another legislative attempt³³⁶, the introduction of a more modest scheme omitting cross-vesting to federal courts³³⁷ or the passage of a constitutional amendment to allow that course³³⁸, Australia would be returned to the disadvantageous position which obtained before the cross-vesting legislation was enacted. The issue of severance of parts of the cross-vesting scheme was not argued at length. The appellants' complaint was of the constitutional invalidity of the legislation as a whole which, in this case, purported to confer jurisdiction on the Federal Court³³⁹ and purported to permit that Court to exercise such jurisdiction³⁴⁰.

335 For example vesting of Federal jurisdiction in State courts, conferral of Territory jurisdiction and transfer of matters from Territory courts to State courts and conferral of jurisdiction upon, and transfer of matters to, one State court from a court of another State.

336 For example under s 51(xxxvii) or (xxxviii) but subject to arguments that any such legislation could not alter the provisions of Ch III of the Constitution.

337 The main beneficiary of both present schemes has been the Federal Court of Australia and not State Supreme Courts. See O'Brien, "The Constitutional Validity of the Cross-Vesting Legislation", (1989) 17 *Melbourne University Law Review* 307 at 313-314.

338 See Australian Constitutional Commission ("ACC"), Australian Judicial System Advisory Committee, *Report* (1987) at par 3.115. See also ACC, *Final Report* (1988) vol 1 at pars 6.29-6.38 proposing the insertion of a new s 77A in the Constitution; cf *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451 at 477 per Lindgren J.

339 *Corporations (New South Wales) Act* 1990 (NSW), s 42(3).

340 Federal Act, s 56(2); cf *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth), s 9.

Cross-vesting: Origins and constitutional doubts

260 For most of the history of the Australian Federation, there was no need for cross-vesting legislation. Whereas the Founders of the United States Constitution considered, and rejected, the exercise of federal jurisdiction by State courts³⁴¹, the Australian Founders embraced the "autochthonous expedient"³⁴². Pursuant to this, the Federal Parliament could make laws investing any court of a State with federal jurisdiction³⁴³. The High Court would have jurisdiction to hear appeals from courts exercising federal jurisdiction or from Supreme Courts of the States³⁴⁴. In this way the State courts were enlisted to try matters within federal jurisdiction. Appeals lay to this Court from their judgments. In a country with established State court systems, initially limited federal jurisdiction, a small population and limited resources, the arrangement was efficient. It worked well. It had the merit of avoiding many of the jurisdictional conflicts which had arisen in the dual court system of the United States, the Constitution of which otherwise provided the model for Ch III of the Australian Constitution.

261 When the Family Court of Australia, in 1976, and the Federal Court of Australia, in 1977, began to exercise their substantial respective national jurisdictions, the predicted difficulty of jurisdictional conflict and competition soon emerged³⁴⁵. In 1983, the Australian Constitutional Convention began to

341 Johnson, "Historical and Constitutional Perspectives on Cross-Vesting of Court Jurisdiction", (1993) 19 *Melbourne University Law Review* 45 at 51 fn 32 referring to Elliot, *Debates on the Adoption of the Federal Constitution at the Convention held in Philadelphia* (1907) at 158-159.

342 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268; cf Cowen and Zines, *Federal Jurisdiction in Australia*, 2nd ed (1978) Ch 5.

343 Constitution, s 77(iii).

344 Constitution, s 73(ii).

345 Bowen, "Some Aspects of the Commonwealth Superior Court Proposal", (1967) 41 *Australian Law Journal* 336 at 337-338; Lane, "The Commonwealth Superior Court", (1969) 43 *Australian Law Journal* 148 at 150; Else-Mitchell, "The Judicial System - The Myth of Perfection and The Need for Unity", (1970) 44 *Australian Law Journal* 516 at 523-524; Street, "The Consequences of a Dual System of State and Federal Courts", (1978) 52 *Australian Law Journal* 434; Rogers, "Federal/State Courts - The need to restructure to avoid jurisdictional conflicts", (1980) 54 *Australian Law Journal* 285; Rogers, "State/Federal Court Relations", (1981) 55 *Australian Law Journal* 630; Gibbs, "The State of the Australian Judicature", (1981) 55 *Australian Law Journal* 677 at 677-679; Burt, "An Australian Judicature", (1982) 56 *Australian Law Journal* 509; Street, "Towards an Australian Judicial System", (Footnote continues on next page)

explore the solutions which would obviate or remove jurisdictional conflicts between federal and State courts. One such solution, so-called "cross-vesting", was examined in a paper prepared by the Solicitor-General for Western Australia³⁴⁶. The idea, and others, continued to be debated in the Judicature Sub-Committee of the Australian Constitutional Convention. In October 1984, that Sub-Committee produced a report³⁴⁷ which contained a proposal for a scheme to remove jurisdictional problems by a system of "cross-vesting" of jurisdictions. Annexed to that report was a legal opinion of Professor Leslie Zines³⁴⁸. Whilst acknowledging difficulties and uncertainties, the opinion concluded that "the principle in favour of co-operation, as expounded in [*R v*] *Duncan*³⁴⁹, will, in my view, prevail". However, this view was based "on general principles, and there are no decisions, or even dicta, that are directly in point".

262 The Sub-Committee's report recommended legislation. The proposal was taken up by the Advisory Committee on the Australian Judicial System of the Australian Constitutional Commission. That Committee concluded that "to put cross-vesting legislation beyond doubt as to validity" there should either be a

(1982) 56 *Australian Law Journal* 515; Neasey, "Comment Upon Proposals for an Australian Judicial System", (1983) 57 *Australian Law Journal* 335 at 335-336.

346 Parker, "An Integrated Court System in Australia - Need and Practicality", Australian Institute for Judicial Administration, seminar on an integrated court system for Australia, 3 August 1983.

347 ACC, Judicature Sub-Committee, *Report to Standing Committee on an Integrated System of Courts* (1984) vol 2 at 1-36.

348 The opinion of Professor Zines "Integrated Court Scheme" appears as an appendix to the Judicature Sub-Committee Report.

349 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.

reference of powers³⁵⁰ or a constitutional amendment³⁵¹. In its *Final Report*, the Constitutional Commission recommended formal amendment of the Constitution³⁵². However, in the meantime, the general cross-vesting legislation was enacted by the Federal, State and Northern Territory legislatures to commence on 1 July 1988³⁵³. The legislation so enacted had an experimental element³⁵⁴. In the federal cross-vesting legislation, provision was made to empower the Governor-General to terminate the legislation if satisfied that the State cross-vesting legislation was not effective³⁵⁵. This provision was an apparent reflection of lingering federal doubts about constitutional validity. In academic writing, uncertainty continued to be expressed, either generally³⁵⁶ or with particular reference to special aspects of the legislation³⁵⁷.

263 Surprisingly, perhaps, given the cautious foundation of Professor Zines' published opinion and the widespread doubts expressed about the constitutionality of the legislation, challenges to it have been comparatively few.

350 Under s 51(xxxvii) of the Constitution.

351 ACC, Australian Judicial System Advisory Committee, *Report* (1987) at 3.114-3.115. Two members of the Committee (Gummow J and Professor J Crawford) expressed doubts about "hybrid" courts which, they considered, would contravene "basic principle". See at par 3.106.

352 ACC, *Final Report of the Constitutional Commission* (1988) vol 1 at par 6.38.

353 *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) and the counterpart legislation of the States and Northern Territory. For a brief history of the legislation see Mason and Crawford, "The Cross-vesting Scheme", (1988) 62 *Australian Law Journal* 328.

354 Fryberg, "Cross-Vesting of Jurisdiction", (1987) 17 *Queensland Law Society Journal* 113 at 1116.

355 *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth), s 16(4).

356 See for example Lee, "An Overview of the Legislation", Paper presented at a seminar on "Cross-vesting of Jurisdiction between State and Federal Courts: Is it Working?", held in Perth on 29 November 1989 at 42; O'Brien, "The Constitutional Validity of the Cross-Vesting Legislation", (1989) 17 *Melbourne University Law Review* 307 at 313-314.

357 Stevens and Gageler, "Review of Cross-vesting Legislation", (1994) 12 *Australian Bar Review* 14 at 21; Fryberg, "Cross-Vesting of Jurisdiction", (1987) 17 *Queensland Law Society Journal* 113 at 115.

264 In October 1988, in the Supreme Court of Queensland, Ryan J determined the first of these against the challenger³⁵⁸. He upheld the validity of the *Jurisdiction of Courts (Cross-vesting) Act 1987 (Q)*, s 5(2) under which custody proceedings in the Supreme Court of Queensland were then transferred to the Family Court of Western Australia. The correctness of this decision was doubted and the constitutionality of the cross-vesting schemes questioned, in a series of decisions of Gummow J, then in the Federal Court³⁵⁹. However, in none of these decisions was the cross-vesting legislation actually found to be invalid.

265 Perhaps encouraged by the fact that the general scheme had survived constitutional attack, the Ministerial Council for Companies and Securities, in June 1990, in the aftermath of the decision of this Court on the corporations power in *New South Wales v The Commonwealth (The Incorporation Case)*³⁶⁰, agreed to the complementary federal, State and Northern Territory legislative scheme which became the Corporations Law³⁶¹. An essential component of that legislation, as agreed between the governments of the Commonwealth, the States and the Northern Territory, was the enactment of a facility of cross-vesting civil actions brought under the Corporations Law, so that they might be heard and determined by the Federal Court or a Supreme Court and, if the interests of justice so required, transferred from one court to the other. The reason why an additional, special regime for cross-vesting was enacted in the Corporations Law is not entirely clear. Apparently, the Special Committee of Solicitors-General recommended in favour of using the general legislative scheme³⁶². However, the participating governments opted for the special legislative regime. Presumably they saw it as a vital component of the integrated legislation thought necessary to achieve a

358 *Re T (an infant)* [1990] 1 Qd R 196.

359 *Grace Bros Pty Ltd v Magistrates, Local Courts of New South Wales* (1988) 84 ALR 492 at 498; *Australian Trade Commission v Film Funding & Management Pty Ltd* (1989) 24 FCR 595 at 599; *Re Truman; Ex parte Natwest Investments Australia Pty Ltd*, unreported, Federal Court of Australia, 14 February 1990. See also *West Australian Psychiatric Nurses' Association (Union of Workers) v Australian Nursing Federation* (1991) 30 FCR 120 at 134-136 per Lee J.

360 (1990) 169 CLR 482.

361 There is no substantial difference between the general cross-vesting scheme and the corporate scheme. See *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451 at 482. The history of the corporate scheme is told and the scheme explained by Lindgren J at 477-479.

362 Statement by Solicitor-General of the Commonwealth. Transcript of proceedings at 107.

national Corporations Law quickly following the ruling of this Court in *The Incorporation Case*³⁶³.

- 266 Introducing the Corporations Legislation Amendment Bill 1990 (Cth) into the Federal Parliament, the Attorney-General described the cross-vesting provisions within it as intended to uphold the "national character of the jurisdictional arrangements"³⁶⁴. The Explanatory Memorandum explained that "[t]he cross-vesting of jurisdiction in this way is central to the conferment of a national character on the [legislation]"³⁶⁵ so as to "bring together the eight State and Territory Supreme Courts and the Federal Court into a common jurisdictional framework"³⁶⁶.

The key legislative provisions

- 267 The detailed legislative provisions both of the general cross-vesting legislation and the special scheme introduced as part of the Corporations Law are set out in the reasons of the other members of this Court and by the judges in the Full Court³⁶⁷. I will confine myself to the citation of the two critical provisions whereby the *Corporations (New South Wales) Act* 1990 (NSW) and its equivalent in each State ("the State Act") purported to confer jurisdiction on the Federal Court and the federal Act purported to permit the exercise of the jurisdiction so conferred.

- 268 The provisions of the State Act appear in Div 1 of Pt 9 providing for vesting and cross-vesting of civil jurisdiction. Civil matters are defined to mean non-criminal matters³⁶⁸. Nothing turns upon that classification. Section 42 of the State Act then provides (relevantly):

363 (1990) 169 CLR 482.

364 House of Representatives, *Parliamentary Debates* (Hansard), 8 November 1990 at 3666. See also *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451 at 478.

365 Corporations Legislation Amendment Bill 1990 (Cth) *Explanatory Memorandum* at par 57.

366 Corporations Legislation Amendment Bill 1990 (Cth) *Explanatory Memorandum* at par 163.

367 See *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451 esp at 457-463, 479-484.

368 State Act, s 40(1)(a).

"(1) ... [J]urisdiction is conferred on the Supreme Court of [the State] and of each other State and the Capital Territory with respect to civil matters arising under the Corporations Law of [the State].

(2) The jurisdiction conferred on a Supreme Court by subsection (1) is not limited by any limits to which any other jurisdiction of that Supreme Court may be subject.

(3) Jurisdiction is conferred on the Federal Court with respect to civil matters arising under the Corporations Law of [the State]."

The key provision of the federal Act is s 56. It is expressed in identical terms in s 9 of the general cross-vesting legislation. It provides:

"(1) Nothing in this or any other Act is intended to override or limit the operation of a provision of a law of a State or Territory relating to cross-vesting of jurisdiction with respect to matters arising under the Corporations Law of the State or Territory.

(2) The Federal Court, the Family Court or the Supreme Court of the Capital Territory may:

- (a) exercise jurisdiction (whether original or appellate) conferred on that Court by a law of a State corresponding to this Division with respect to matters arising under the Corporations Law of a State; and
- (b) hear and determine a proceeding transferred to that Court under such a provision."

The purpose of s 56(1)³⁶⁹ is to make it clear that it is not the intention of the Federal Parliament that the federal Act should prevail over the cross-vesting provisions of the State Act by force of s 109 of the Constitution. The provision of such indicia of the Parliament's intention in that regard has become a common feature of federal legislation in recent years³⁷⁰. A risk in any "integrated" federal and State legislative scheme is that, unless the intention of the Federal Parliament is made

369 As of s 9(1) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth).

370 cf *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 at 417 per Mason J; *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 71 ALJR 1254 at 1300; 146 ALR 495 at 557-558.

clear, the provisions in the federal legislation, if valid, may be held to expel the operation of a State law.

269 It is s 42(3) of the State Act and s 56(2) of the federal Act which presents the central controversy in this appeal. The appellants primarily argued that the State Parliament had no power to confer State jurisdiction on the Federal Court and the Federal Parliament had no power to permit the exercise of such jurisdiction by a federal court.

270 Before leaving the legislation, it should be noted that the federal Act does not purport, as such, to confer jurisdiction on the Federal Court. Any jurisdiction conferred is State jurisdiction. The federal Act merely permits the exercise of that jurisdiction. The jurisdiction in question is antecedent and acknowledged to exist outside federal legislative power. If it be valid, it derives from State judicial power conferred on the Federal Court by State legislation but with the permission of the Federal Parliament.

Rationale of cross-vesting legislation

271 Although the creation of a special cross-vesting regime within the Corporations Law has been criticised, the advantages for good government of the facility of cross-vesting cannot be denied, including in the field of corporations law. Although the decisions of this Court on the "accrued jurisdiction" of the Federal Court removed a number of the difficulties and irritants which had accompanied the growth of the jurisdiction of federal courts³⁷¹, the need for a simple regime to integrate the superior courts of Australia has not been seriously questioned. However fascinating they may be to lawyers, most litigants find jurisdictional arguments sterile, productive only of unwanted delay and cost³⁷². Such impediments are particularly undesirable in cases involving corporations where the needs of national and international markets for the efficient resolution of disputes put a premium on the avoidance of barren jurisdictional contentions.

371 See *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 494-495, 506, 520, 538-539, 547; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 292-294; *Fencott v Muller* (1983) 152 CLR 570 at 608. See also Griffith, Rose and Gageler, "Choice of Law in Cross-vested Jurisdiction: A Reply to Kelly and Crawford", (1988) 62 *Australian Law Journal* 698 at 706; ACC, Australian Judicial System Advisory Committee, *Report* (1987) at 29.

372 ACC, Judicature Sub-Committee, *Report to Standing Committee on an Integrated System of Courts* (1985) at par 2.1; cf *National Parks and Wildlife Service v Stables Perisher* (1990) 20 NSWLR 573 at 584-585.

272 Some of the reasons of good government which propelled the governments of Australia into the rare unanimity that produced both the general and corporate cross-vesting legislation are stated in the preamble to the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth)³⁷³. Those considerations are equally applicable to the corporations scheme. The legislative unanimity was based upon a highly practical foundation recognised by the governments and Parliaments of all Australian jurisdictions. It remained so a decade later, despite significant shifts in the political alignment of those governments and the composition of those Parliaments. This was not, and is not, a matter upon which the governments and legislatures of Australia have been in any way divided. Governmental unanimity and convenience cannot override the requirements of the Constitution, at least when given effect in the way chosen here. However, they provided reason for caution on the part of this Court before striking down the integrated legislative product which is of such a rare order.

273 The extensive use of the cross-vesting legislation after it came into operation recognises the beneficial facility thereby afforded for the efficient use of hard-pressed resources and the reduction of inconvenience, delay and cost to litigants³⁷⁴. The scheme operates within a legal system in which rationality in the initial choice of jurisdiction and good sense in the transfer of matters to another jurisdiction can usually be relied upon³⁷⁵. The "organisational relationship" into which the scheme sought to bring all of the superior courts exercising jurisdiction within Australia has resulted in many obvious advantages. One writer has drawn an analogy to the effective "organisational relationship" which operated for the first 75 years after Federation because of the "autochthonous expedient"³⁷⁶. In that

373 cf Fryberg, "Cross-Vesting of Jurisdiction", (1987) 17 *Queensland Law Society Journal* 113 at 113; Baker, "Cross-Vesting of jurisdiction between state and federal courts", (1987) 14 *University of Queensland Law Journal* 118 at 126.

374 See *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711; cf Griffith, Rose and Gageler, "Further Aspects of the Cross-vesting Scheme", (1988) 62 *Australian Law Journal* 1016 at 1020. The number of Corporations Law matters completed in the Federal Court of Australia has been 1990-91 - 79; 1991-92 - 510; 1992-93 - 709; 1993-94 - 1178; 1994-95 - 1589; 1995-96 - 1836. See Federal Court of Australia, *Annual Report* 1995-96 at 105.

375 See Kovacs, "Cross-Vesting of Jurisdiction. New Solutions or New Problems?", (1988) 16 *Melbourne University Law Review* 669; Johnson, "Historical and Constitutional Perspectives on Cross-Vesting of Court Jurisdiction", (1993) 19 *Melbourne University Law Review* 45 at 46.

376 Lindell, "The Cross-Vesting Scheme and Federal Jurisdiction Conferred upon State Courts by The Judiciary Act 1903 (Cth)", (1991) 17 *Monash University Law Review* 64 at 65-66. See also *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 713.

time, Australian judges, lawyers and citizens became accustomed to the effective unity of the Australian court system. When that unity was threatened, by the advent of federal courts of limited jurisdiction, they moved promptly, through their governments and legislatures, to return to effective unity, under the ultimate supervision of this Court³⁷⁷.

274 The speed with which cross-vesting legislation was agreed is remarkable. It should cause this Court to hesitate before holding that the legislation is outside the law-making permissible to all the legislatures of Australia in terms of the Australian Constitution. That Constitution serves the people of Australia. Whilst the text must be upheld by this Court and occasionally produces unexpected and inconvenient results³⁷⁸, the Constitution should be approached as a facility of rational and efficient government. Unless constrained by authority or clear constitutional principle, the Court should hold its mind open to new constitutional responses apt for the solution of new problems. The suggestion that the desirable objective of restoring institutional unity to the Australian court system might have been obtained by other means³⁷⁹ (assuming that to be valid) or by formal amendment of the Constitution³⁸⁰ (recognising that to be difficult) affords no reason for striking down the means adopted, if they be valid.

275 Nobody denies the utility and desirability of cross-vesting of State and federal jurisdictions. But is the legislation providing for it in this case conformable with the Constitution?

Matters of approach

276 I have already foreshadowed the approach which I favour to the problems of constitutional validity which are presented in this appeal. However, it is useful for me to collect some of the guiding principles which I accept in responding to the problems which the appeal presents:

377 Baker, "Cross-Vesting of jurisdiction between state and federal courts", (1987) 14 *The University of Queensland Law Journal* 118 at 120-124.

378 As in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529.

379 For example by use of ss 51 (xxxvii) or (xxxviii) of the Constitution.

380 Constitution, s 128.

1. The Constitution, a document which has proved resistant to formal amendment, must not be narrowly or pedantically construed³⁸¹. It should be afforded a construction which recognises the need to adapt the sparse language inherited from the nineteenth century to meet the governmental needs and problems of contemporary Australia³⁸². A rigid approach to constitutional interpretation is inappropriate to the function entrusted to this Court. Inescapably, each new generation sees in the text of the Constitution a reflection of the solutions that may be offered to contemporary problems, including those which derive from the shifting patterns of federalism which the Constitution has witnessed³⁸³. This is a reason for special care in the use of dicta offered by Justices of the Court in earlier times, dealing with different controversies considered in the context of distinguishable social circumstances and institutional needs. Conformably with the constitutional text and authoritative holdings as to its meaning, this Court has approached new problems with fresh constitutional insights which have ensured the adaptation of the Constitution to the needs of each succeeding generation of the Australian people. It has never shackled itself to an "originalist" construction of the text; and it should not start to do so now.
2. The Federation which the Constitution establishes is obviously one intended to operate with a high measure of cooperation between its component parts. By this I mean between the Commonwealth, the States and the Territories to which self-government has been granted. Any Federation involves occasional conflict and differences for which a judicial arbiter is typically provided. But no federal system of government could work without cooperation between the politics constituting the Federation. So much is inherent in the federal idea. It is implied in the structure and language of the Constitution. Its existence has been recognised on many occasions. In *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd*³⁸⁴, Starke J observed:

381 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 85; *Lamshed v Lake* (1958) 99 CLR 132 at 144.

382 *Spratt v Hermes* (1965) 114 CLR 226 at 272.

383 cf Mathews, "The Development of Australian Federalism" in Mathews (ed), *Federalism in Australia and the Federal Republic of Germany: A Comparative Study* (1980). See also Blackshield, Williams and Fitzgerald, *Australian Constitutional Law and Theory* (1996) at 233-237; Gillespie, "New Federalisms" in Brett, Gillespie and Goot (eds) *Developments in Australian Politics* (1997) at 60.

384 (1939) 61 CLR 735 at 774.

"Co-operation on the part of the Commonwealth and the States may well achieve objects that neither alone could achieve; that is often the end and the advantage of co-operation. The court can and ought to do no more than inquire whether anything has been done that is beyond power or is forbidden by the Constitution."

Many provisions of the Constitution expressly contemplate cooperative activities necessary to fulfil the federal compact³⁸⁵. Numerous inter-governmental arrangements have been established to give effect to cooperative schemes³⁸⁶. Many statutes have been enacted providing for federal office-holders to receive additional powers and functions as conferred by the laws of another legislature within the Federation³⁸⁷. Such legislation is permissible. It has been upheld by decisions of this Court³⁸⁸. It is a reflection of the kind of constitutional cooperation which is inherent in the system of governance established by the Constitution. In *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*³⁸⁹, Deane J expressed this consideration in these words:

"The existence of a constitutional objective of Commonwealth/State co-operation may, on occasion, be obscured by the fact that cases in this Court in relation to the constitutional scope of legislative powers are commonly concerned with the resolution of competing legislative claims of the Commonwealth and of one or more of the States. It is,

385 For example in ss 51(xxxiii), (xxxiv), (xxxvii), (xxxviii), 73(ii), 77(iii), 84, 105 and 105A, 111, 119 and 120.

386 See for example *Hide and Leather Industries Act* 1948 (Cth) considered in *Wilcox Mofflin Ltd v State of NSW* (1952) 85 CLR 488 at 508-511, 526-528; *Air Navigation Act* 1920 (Cth) considered in *Airlines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1 at 40, 42, 48; *Wheat Industry Stabilization Act* 1974 (Cth) considered in *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120 at 179.

387 For example *Albury-Wodonga Development Act* 1973 (Cth), ss 8(3), 8(4); *Australian Federal Police Act* 1979 (Cth), ss 8(1)(ba), 8(2), 8(2A); *Australian Sports Drug Agency Act* 1990 (Cth), s 9(5); *National Crime Authority Act* 1984 (Cth), s 55A; *Public Service Act* 1922 (Cth), s 80; *Trade Practices Act* 1974 (Cth), s 44ZZM, 150F; *Wheat Marketing Act* (1989) (Cth), s 6(4); *Workplace Relations Act* 1996 (Cth), ss 5.

388 For example *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 552-553, 566; *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 127-131.

389 (1983) 158 CLR 535 at 589.

however, unnecessary to do more than refer to the provisions of s 51(xxxiii), (xxxiv), (xxxvii) and (xxxviii) and of Ch V of the Constitution to demonstrate the existence of such a constitutional objective. It would be inconsistent with that objective for there to be any general constitutional barrier to concurrent legislation by Commonwealth and State Parliaments."

The same idea is reflected in other decisions³⁹⁰. A high measure of cooperation between the polities created by the Constitution is both necessary and desirable for the proper operation of the Constitution. This Court, within the requirements of the constitutional text and authority, should uphold and facilitate such cooperation as one of the objectives for which the Constitution was made.

3. In *Kable v Director of Public Prosecutions (NSW)*³⁹¹, the Court emphasised the integrated system of State and federal courts within Australia³⁹². In part, this characteristic of the system derived from the "autochthonous expedient"³⁹³. But in part it is also an implication that may be drawn from Ch III of the Constitution with its express recognition of the Supreme Courts³⁹⁴ and of the other courts of the States³⁹⁵ as potential recipients of federal jurisdiction and as participants in the integrated appellate structure of the Australian court system. Justice Gaudron³⁹⁶ explained the constitutional inter-relationship of federal and State courts in these terms:

"Neither the recognition in Ch III that State courts are the creatures of the States nor its consequence that, in the respects indicated, the Commonwealth must take State courts as it finds them detracts from what is, to my mind, one of the clearest features of our Constitution,

390 See for example *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 130.

391 (1996) 70 ALJR 814; 138 ALR 577. See also *Beecham (Australia) Pty Ltd v Roque Pty Ltd* (1987) 11 NSWLR 1 at 3.

392 (1996) 70 ALJR 814 at 844-846; 138 ALR 577 at 619-622.

393 (1996) 70 ALJR 814 at 839; 138 ALR 577 at 611.

394 Constitution, s 73(ii).

395 Constitution, s 77(iii).

396 (1996) 70 ALJR 814 at 839; 138 ALR 577 at 611.

namely, that it provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth."

Being integrated for that purpose inevitably affects what may be done to and with State courts, at least State Supreme Courts. But the obverse side of that coin is that the integration of courts, being such a feature of Australia's constitutional arrangements, may have implications for the exercise of State judicial power in ways compatible with the integration.

4. One objective of the Founders of the Australian Constitution was to ensure that the entirety of the legislative power relevant to the governance of the Australian people should thereafter exist within Australia for disposition, in accordance with the Constitution, by the representative of the Australian people in the several legislatures. Exceptionally, where the Constitution presented an unwanted impediment, the people themselves could be consulted anew to determine whether to grant or withhold the additional powers proposed³⁹⁷. Prior to Federation, the establishment of inter-colonial courts had historically been the prerogative of imperial legislation³⁹⁸ and imperial orders in council³⁹⁹. Even after the grant of responsible government to the Australian colonies, the establishment of an inter-colonial court would only have been achievable by imperial enactment⁴⁰⁰. But upon the creation, by the Australian Constitution, of the Commonwealth of Australia and the Australian States, together with the provision by that instrument for federal territories, an entirely new legal situation was created. The State constitutions continued as at the establishment of the Commonwealth. But they were thenceforth to operate within the context of the new federal

³⁹⁷ Constitution, s 128.

³⁹⁸ See for example *West Indian Court of Appeal Act 1919* (Imp).

³⁹⁹ See for example *East African Protectorates (Court of Appeal) Order in Council 1909* SRO 1909 No 198 at 321 (establishing a Court of Appeal for Kenya, Uganda and Nyasaland with jurisdiction later extended to other colonies); *West African Court of Appeal Order in Council 1928* SRO 1928 No 889 at 616 (establishing a Court of Appeal for Nigeria, the Gold Coast, Sierra Leone and the Gambia); *Leeward Islands and Windward Islands (Courts) Order in Council 1939* SRO 1939 No 1898 SRO & SI REV XII at 391 (providing for a Supreme Court and a Court of Appeal for Caribbean Colonies); *Sarawak, North Borneo and Brunei (Courts) Order in Council 1951* SI 1951 II No 1948 at 620 (establishing a Supreme Court and a Court of Appeal for Sarawak, North Borneo and Brunei).

⁴⁰⁰ *The British Settlements Act 1887* (Imp), ss 2, 5.

polity⁴⁰¹. Unless vested in the Federal Parliament, or withdrawn from the Parliament of a State, legislative power was thereafter to reside in the Parliament of a State⁴⁰². Within the limits stated, that power is plenary⁴⁰³. It is controlled only by express or implied limitations and restrictions arising from the Constitution and the *Australia Act* 1986 (Cth) made under that Constitution. Just as the grant of legislative power to the Federal Parliament must not be given a narrow or pedantic construction, for similar reasons the residuum of legislative power enjoyed by the State Parliaments (or granted to self-governing Territories) must not be approached narrowly. For good governance in all of the Australian polities, and to permit them to discharge their constitutional functions, the grant of power will be viewed as broad and ample. It will be construed to achieve the objectives that have recommended themselves to the respective legislatures, unless the Constitution, expressly or by necessary implication, imposes a limitation or restriction which this Court must uphold⁴⁰⁴ until the Australian people approve an alteration of the constitutional text to remove the limitation or to lift the restriction.

5. A useful tool in the construction of any instrument, including a statute and not excluding a Constitution, is the rule stated in the maxim *expressio unius est exclusio alterius*. This, as I see it, is the linchpin of the appellants' attack on the cross-vesting legislation. In s 73(ii) of the Constitution, express provision is made for an appeal to this Court from the Supreme Court of a State exercising State jurisdiction. Express provision exists in s 77(iii) for the making of laws investing any court of a State with federal jurisdiction. No provision is made to invest a federal court with State jurisdiction (whether at first instance or on appeal). The appellants therefore argued that no such provision was intended. Indeed, it was forbidden. Dicta in the Court, strongly relied upon by the appellants, support this argument. In *In re*

401 Constitution, s 106.

402 Constitution, s 107.

403 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 155; *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 408-409; *The Commonwealth v Queensland* (1975) 134 CLR 298 at 310-312; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9-10; cf *Australia Act* 1986 (Cth), s 2(2).

404 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 579-580.

*Judiciary and Navigation Acts*⁴⁰⁵, Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ said:

"Sec 77 enables Parliament to define the jurisdiction of any other Federal Court with respect to any of the matters mentioned in secs 75 and 76, to invest any Court of the States with Federal jurisdiction in respect of any such matters, and to define 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. This express statement of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is, we think, clearly intended as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction."

The same idea was repeated in *R v Kirby; Ex parte Boilermakers' Society of Australia* ("*The Boilermakers' Case*")⁴⁰⁶ by Dixon CJ, McTiernan, Fullagar and Kitto JJ:

"But the existence in the Constitution of Chap III and the nature of the provisions it contains make it clear that no resort can be made to judicial power except under or in conformity with ss 71-80. ... Indeed to study Chap III is to see at once that it is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested."

In the context of ordinary legislation, this Court has warned against a mechanical application of the *expressio unius* rule⁴⁰⁷. The same caution applies, with even greater force, in the context of constitutional interpretation. This is because the language of the document must address a multitude of problems and needs appearing over decades and potentially

⁴⁰⁵ (1921) 29 CLR 257 at 265.

⁴⁰⁶ (1956) 94 CLR 254 at 269-270. See also *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 537-539; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 275; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 486-487; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26-27; *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 70 ALJR 743 at 753; 138 ALR 220 at 233.

⁴⁰⁷ *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94 citing *Colquhoun v Brooks* (1888) 21 QBD 52 at 65 in which the rule was described as "a valuable servant, but a dangerous master".

centuries. In neither *In re Judiciary and Navigation Acts* nor *The Boilermakers' Case* did the Court have to consider a problem similar to the present. The holding in the first decision relates to the impermissibility of advisory opinions. The holding in the second relates to the impermissibility of mixing judicial and non-judicial functions in a federal court. Both relate to the exercise of the judicial power of the Commonwealth. Neither is concerned with the judicial power of the States. There are many historical reasons to explain the need for an express provision such as s 77(iii) of the Constitution to conscript State courts as the trial courts of most federal matters following the establishment of the Commonwealth. Those State courts, particularly the State Supreme Courts, were well established and already functioning as colonial courts, some of them for the better part of the previous century. Federal courts were then non-existent. To derive from the necessities of history a prohibition on the conferral of State jurisdiction on federal courts, once established, is illogical. Unless prohibited by something stronger than the *expressio unius* rule, the possibility of conferring part of the judicial power of one component of the Australian Federation upon the courts of another component is far from offensive to the already integrated operation of those courts. On the contrary, it is conducive to the good governance of the Commonwealth and its component polities. Only the clearest prohibition in the Constitution should forbid it. There is no express prohibition. Implications alone are invoked. But are they strong enough?

The State Parliament has legislative power

277 If Ch III of the Constitution withdrew from State Parliaments the legislative power to confer part of the judicial power of the State upon a federal court, the consideration of what would otherwise have been within their legislative power would be entirely theoretical. In that sense, logic would seem to require immediate consideration of the prohibitions in Ch III and the suggested lack of legislative authority in the Federal Parliament to permit the exercise by a federal court of the judicial power conferred on that court by a State Parliament.

278 However, in deference to the appellants' arguments, I will put this issue to one side and immediately address their first and fourth contentions. These were that the State Parliaments had no power to enact the conferral of jurisdiction and that doing so amounted to an abandonment or surrender of the State's governmental powers.

279 The appellants' first contention went thus. The legislative power of the State of New South Wales, invoked to sustain the provisions of the State Act conferring jurisdiction on the Federal Court⁴⁰⁸, derived from s 107 of the Constitution. But

408 State Act, s 42(3).

that section recognised that the content of the power of the Parliament of a State was that which was enjoyed by the Parliament of a colony prior to Federation from which were subtracted the powers exclusively vested in, or lawfully exercised by, the Federal Parliament. By s 51(xxxviii), the Constitution had expressly recognised that, at Federation, there were some legislative powers which could then only be exercised by the Imperial Parliament. *The Colonial Laws Validity Act* 1865 (Imp) had reflected and expressed the particular limitations imposed upon a colonial Parliament with respect to the exercise of its judicial power⁴⁰⁹. The continued operation of that Imperial Act, notwithstanding the adoption of the Australian Constitution, had been recognised by this Court in a series of decisions⁴¹⁰. Upon the subjects with which it deals, it was held, *The Colonial Laws Validity Act* was meant to be definitive⁴¹¹. Accordingly, so the appellants submitted, because the State Parliaments, like their colonial predecessors, were limited with respect to extra-territorial operation of their laws and controlled in the exercise of judicial power, the purported enactment of a provision conferring part of the judicial power of one State upon a court of another jurisdiction (here the Federal Court of Australia) was unconstitutional. There was no authority to do it in colonial times. Any such authority existed only in the Imperial Parliament and Government. After Federation, it could only be exercised as s 51(xxxviii) of the Constitution allowed or by formal amendment with the approval of the people as s 128 of the Constitution required.

280 There are a number of answers to these arguments. The control on the exercise of the judicial power by colonial Parliaments was, in terms of s 5 of *The Colonial Laws Validity Act*, limited to the establishment, reconstitution and alteration of courts of judicature and providing "for the administration of justice therein". The legislation in question here accepts courts already established by law. It therefore has no operation prohibited by the Imperial Act. In any case, with the arrival of Federation, a new relationship was established between the States and the Commonwealth. Section 107 of the Constitution is a confirmation of legislative power within the new Federal polity. It is not a limitation upon that power.

281 The provisions of *The Colonial Laws Validity Act* ceased to have relevance at the latest in 1986 by reason of the passage of the *Australia Acts* of that year⁴¹².

409 *The Colonial Laws Validity Act* 1865 (Imp) (28 & 29 Vict c 63), s 5.

410 *Taylor v Attorney-General of Queensland* (1917) 23 CLR 457 at 477-478, 479-480; *McCawley v The King* (1918) 26 CLR 9 at 64 approved (1920) 28 CLR 106 at 117, 119, 120-121; *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

411 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 443.

412 s 3. See also s 2(2).

The suggestion that the legislation here challenged, conferring jurisdiction on the Federal Court amounted to an impermissible attempt to enact a State law with extra-territorial operation is misconceived. The Federal Court is not, relevantly, outside New South Wales any more than the Commonwealth is. Local legislation conferring jurisdiction upon the Judicial Committee of the Privy Council or seeking to regulate its jurisdiction, was upheld at a time when the Privy Council was part of the judicial system of the jurisdiction concerned⁴¹³. Just as the Privy Council was referred to in the Australian Constitution, so federal courts established by the Federal Parliament were envisaged as part of the integrated judicial system of the Commonwealth. There may be a limitation to be observed in State conferral of jurisdiction. There may be a restriction in Ch III, to be explored later, which prohibits such conferral of power. But, at least so far as the legislative power of a State is concerned, no inhibition inherited from colonial times prevented the passage of State legislation conferring on an established federal court part of the judicial power of the State in question.

282 That this is so, leaving aside any restrictions or limitations derived from Ch III, is demonstrated by this Court's decision in *Duncan*⁴¹⁴. The argument of lack of State power deployed by the appellants in this case, or some of them, would have rendered impermissible the legislative scheme which was upheld by this Court in that decision. A tribunal had been constituted by a federal Act⁴¹⁵ and a State Act⁴¹⁶, the two legislatures "setting up joint or combined authorities by the concurrent exercise of their respective constitutional powers⁴¹⁷". The State Act contained provisions reciprocal to those in the federal Act for the constitution of the tribunal, and the appointment of a person to hold office. The constitution of the tribunal by the mixture of State and federal powers, was challenged⁴¹⁸. The challenge was unanimously rejected. Chief Justice Gibbs observed⁴¹⁹:

413 See *The Commonwealth v Queensland* (1975) 134 CLR 298 at 310-313; *British Coal Corporation v The King* [1935] AC 500 at 511; *Ibralebbe v The Queen* [1964] AC 900 at 915-917.

414 (1983) 158 CLR 535.

415 *Coal Industry Act* 1946 (Cth).

416 *Coal Industry Act* 1946 (NSW).

417 *Australian Iron & Steel Ltd v Dobb* (1958) 98 CLR 586 at 596.

418 cf State Act, ss 36, 37.

419 (1983) 158 CLR 535 at 552-553.

"The Constitution effects a division of powers between the Commonwealth and the States but it nowhere forbids the Commonwealth and the States to exercise their respective powers in such a way that each is complementary to the other. There is no express provision in the Constitution, and no principle of constitutional law, that would prevent the Commonwealth and the States from acting in co-operation, so that each, acting in its own field, supplies the deficiencies in the power of the other, and so that together they may achieve, subject to such limitations as those provided by s 92 of the Constitution, a uniform and complete legislative scheme. ... Further, no reason is provided by constitutional enactment or constitutional principle why the Commonwealth and a State or States should not simultaneously confer powers on one person and empower that person to exercise any or all of those powers alone or in conjunction. In one instance the Constitution has expressly recognised the possibility of co-operation of that kind when it enables the Parliament to invest a court of a State with federal jurisdiction: Constitution, ss 71, 77(iii). It would be an absurd result, for example, if the Commonwealth and a State were unable, by complementary legislation, to empower an officer of police to enforce both the laws of the Commonwealth and the laws of the State, or to give power to a fisheries inspector to act in Australian waters both within and beyond territorial limits, or to authorise a public servant to collect State taxes as well as Commonwealth taxes."

- 283 It is true that these observations were made in relation to an administrative tribunal and not a federal court. It is also true that this Court stressed that such cooperative legislation would have to conform to the restrictions and limitations elsewhere provided in the Constitution⁴²⁰. However, leaving aside for the moment such restrictions and limitations, so far as they derive from Ch III, it is plain from *Duncan* that a State Parliament may validly confer power upon a body established by the Federal Parliament. This is not such a surprising conclusion once it is appreciated that, in their relationships with each other, the federal, State and self-governing territory polities are not foreign entities. They are all inherent parts of the government of one nation⁴²¹. It was fully within the legislative power of a State Parliament to make laws for the efficient discharge of the States' judicial power by a superior court of the Commonwealth or of another State or Territory within the Federation. Such a law has a rational, appropriate connection with the State concerned. It is properly characterised as being for the peace, order and good government of the State. Any law which overcomes arid jurisdictional disputes⁴²²

420 See for example (1983) 158 CLR 535 at 580.

421 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 174.

422 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 582.

is incontestably within the State Parliament's legislative power unless some other provision of the Constitution, such as Ch III, imposes a limitation or a restriction which would forbid or defeat such a cooperative scheme.

The State Parliament did not abandon its legislative powers

284 It is appropriate next to consider the fourth contention of the appellants. This was that s 7 of the State Act was a delegation of the legislative power of the Parliament of New South Wales which amounted to an unconstitutional abandonment by that Parliament of its legislative function and duty.

285 Section 7 provides:

"The Corporations Law set out in section 82 of the Corporations Act as in force for the time being:

(a) applies as a law of New South Wales; and

(b) as so applying, may be referred to as the Corporations Law of New South Wales."

286 By s 3(1) "Corporations Act" means the "Corporations Act 1989 of the Commonwealth". The appellants' argument was that such a delegation of legislative power was invalid. It amounted, in effect, to a disturbance of the constitutional distribution of powers between the Commonwealth and the States but without compliance with the constitutional requirements for such disturbance⁴²³.

287 The theoretical foundation for the foregoing argument is the rule that a legislature may not "create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence"⁴²⁴. The provision of legislative powers to the several Australian legislatures implies that they will not assign, transfer or abrogate such powers nor renounce or abdicate their responsibilities⁴²⁵. Care must be observed in the application of these rules to cooperative legislative schemes within Australia whereby the several legislatures of the nation, in pursuit of the desirable objective of uniform laws, agree to adopt a common standard and to cooperate in its modification and improvement from time to time. This is not a relinquishment of legislative responsibilities. It is the

423 Namely the Constitution, ss 51(xxxvii), (xxxviii) or s 128.

424 *In re The Initiative and Referendum Act* [1919] AC 935 at 945.

425 *Cobb & Co Ltd v Kropp* [1967] 1 AC 141 at 157.

exercise of them. It is not the creation by one legislature of a new and different legislative authority (which would be forbidden). It is the decision of that legislature to exercise its own powers in a particular way⁴²⁶. A legislature, such as a State Parliament, may delegate legislative power so long as it does not abdicate it⁴²⁷. In *Capital Duplicators Pty Ltd v Australian Capital Territory*⁴²⁸, which concerned the much more general delegation of law-making powers by the Federal Parliament to the legislature of the Australian Capital Territory, this Court dismissed a challenge analogous to the present one:

"There are very considerable difficulties in the concept of an unconstitutional abdication of power by Parliament. So long as Parliament retains the power to repeal or amend the authority which it confers upon another body to make laws with respect to a head or heads of legislative power entrusted to the Parliament, it is not easy to see how the conferral of that authority amounts to an abdication of power."

There is no suggestion in the State Act that the State Parliament abandoned or renounced its power, at any time, to amend or repeal that Act. Detailed provisions are contained in the Act to integrate the uniform law into the law of the State. This Court has made it clear several times that no objection arises to the Commonwealth's making a law "by adopting as a law of the Commonwealth a text which emanates from a source other than the Parliament"⁴²⁹. The same is true of a Parliament of a State. It could scarcely be otherwise within the one Federation where the polities constituting the Federation must necessarily cooperate in many ways to achieve peace, welfare and good government for the people within their respective jurisdictions. It follows that the argument of abandonment of legislative power should be rejected.

The federal Act is not supported by s 51(xxxviii)

288 Once it is established that the conferral of State jurisdiction by the State Act is, subject to the Constitution, a valid exercise of State legislative power, the next

426 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 95-96, 121; cf Malcolm, "The Limitations, if Any, on the Powers of Parliament to Delegate the Power to Legislate", (1992) 66 *Australian Law Journal* 247.

427 *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365 at 373.

428 (1992) 177 CLR 248 at 265 per Mason CJ, Dawson and McHugh JJ.

429 *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 484; *Hooper v Hooper* (1955) 91 CLR 529 at 536-537.

question is the source of the Federal Parliament's legislative power to enact s 56(2) of the federal Act.

289 The need for such a provision was considered in *Duncan*⁴³⁰. As here, it was contended that it was beyond the powers of the Federal Parliament to authorise the constitution of a tribunal exercising both federal and State powers. Of this argument Brennan J remarked⁴³¹:

"It is of course beyond the power of the Commonwealth Parliament to vest the Tribunal with State power, but that is not what the Commonwealth Act does. The Act approves the Tribunal's having and exercising State powers but it does not purport to vest them. It vests only federal powers ... If the Act had merely constituted or authorised the constitution of a tribunal and had vested federal powers of conciliation and arbitration in it without reference to State powers, an attempt by a State Act to vest similar State powers in the same tribunal would fail - not because of a constitutional incapacity in a Commonwealth tribunal to have and to exercise State power, but because the Commonwealth Act would be construed as requiring the tribunal to have and to exercise only such powers as the Commonwealth Parliament had chosen to vest in it."

It was to overcome a like presumption, with the constitutional consequences for which s 109 of the Constitution provides, that the Federal Parliament here enacted s 56(2) of the federal Act permitting the Federal Court, which had been created by it, to exercise the State jurisdiction conferred on it by a law of a State.

290 This provision in the federal Act, like any other, requires a constitutional foundation. What is that foundation? Amongst the sources to which the Commonwealth appealed was s 51(xxxviii). That paragraph enables the exercise by the Federal Parliament "at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which [could] at the establishment of [the] Constitution [have been] exercised only by the Parliament of the United Kingdom". Upon the assumption that, in colonial times, it would have been necessary to invoke the legislative power of the Parliament of the United Kingdom to empower the conferral and reception of part of the judicial power of one of the Australian colonies by another polity under the Crown, one of the preconditions for the exercise of the power in s 51(xxxviii) was said to be established. For the moment I shall assume that this is so. But what of the other

430 *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.

431 (1983) 158 CLR 535 at 579; cf *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 129-131.

precondition requiring "the request or ... concurrence of the Parliaments of all the States directly concerned"?

291 The Commonwealth submitted that it was not necessary to have, or to demonstrate, a formal "request" or "concurrence". The existence of those preconditions could be inferred from the face of the legislation, its uniform and integrated language, the temporal coincidence of the enactments and the admissible background materials demonstrating that the legislation was the product of a cooperative scheme arising out of a meeting of the governments concerned in June 1990. The concurrence of the Parliaments of the States was to be derived from the terms of their several enactments.

292 The exercise of the power provided to the Federal Parliament by s 51(xxxviii) has been extremely infrequent. It was considered in relation to the *Coastal Waters (State Powers) Act* 1980 (Cth) in *Port MacDonnell Professional Fishermen's Assn Inc v South Australia*⁴³². That Act had been enacted by the Federal Parliament at the request of the Parliaments of each of the six States. It followed negotiations between the Commonwealth and the States after this Court's decision in *New South Wales v The Commonwealth* ("*Seas and Submerged Lands Case*")⁴³³. This Court explained the reasons why s 51(xxxviii) should be given "the broad interpretation which befits it as a constitutional provision with a national purpose of a fundamental kind"⁴³⁴. It was to be viewed as both an actual and potential enhancement of State legislative powers⁴³⁵. However, because it involves a change of constitutional arrangements without the participation of the people of Australia (as required for formal amendments)⁴³⁶, it is necessary that the procedural preconditions should be scrupulously observed. They were observed in *Port MacDonnell* by the enactment by each State of a *Constitutional Powers (Coastal Waters) Act*⁴³⁷. A similar course was carefully followed in the passage of the *Australia Act* 1986 (Cth) enacted by the Federal Parliament with the concurrence of all of the States. Such concurrence was signified by the *Australia Acts (Request) Act* 1985 of each State. The observance of such formalities is not an obligation of needless technicality about evidentiary matters which could be proved otherwise. It is no more than compliance with the constitutional provision

⁴³² (1989) 168 CLR 340.

⁴³³ *New South Wales v The Commonwealth* (1975) 135 CLR 337.

⁴³⁴ (1989) 168 CLR 340 at 378.

⁴³⁵ (1989) 168 CLR 340 at 379.

⁴³⁶ Constitution, s 128.

⁴³⁷ (1989) 168 CLR 340 at 375.

which has no operation without the request or concurrence of the governments of the States directly concerned. What is constitutionally mandated is a formal act of request or concurrence by the State Parliaments, constituted by the elected representatives of the people in those States. Such a formal act provides assurance that the Parliaments concerned have respectively directed their collective attention to the constitutional requirements of the paragraph.

- 293 In the light of this conclusion it is unnecessary to consider other objections raised by the appellants to the Commonwealth's reliance on s 51(xxxviii) of the Constitution. They arose out of the sequence for the assent and coming into effect of the Federal and State Acts⁴³⁸. The reliance by the Commonwealth on s 51(xxxviii) to support s 56(2) of the federal Act must be rejected.

Federal legislative power exists

- 294 The arguments challenging the remainder of the contentions advanced to support the validity of s 56(2) of the federal Act necessarily overlapped with the arguments that Ch III of the Constitution forbade the enactment of such a provision.

- 295 Assuming, contrary to the dicta in *In re Judiciary and Navigation Acts* and *The Boilermakers' Case*, that other heads of federal legislative power may be invoked to confer jurisdiction on a federal court, what provisions of the Constitution would sustain s 56(2) of the federal Act? The Commonwealth relied upon the implication said to be derived from the "nature of the body politic"⁴³⁹ established by the Constitution⁴⁴⁰:

"Subject to constitutional prohibitions, express or implied, the implied powers include a power for the regulation and supervision of the polity's own

438 Part 1 of the federal Act, as amended by Pts 1 and 2 of the *Corporations Legislation Amendment Act* 1990 (Cth) received the Royal Assent on 18 December 1990 and came into force on that day. The Acts of several of the States received assent after 18 December 1990 (viz South Australia, 20 December 1990; Tasmania, 20 December 1990; and Western Australia, 2 January 1991). All of the State Acts (together with the remaining provisions of the federal Act) came into force on 1 January 1991 giving rise to the submission that it was impossible to "request" that which had already been done.

439 *State Chamber of Commerce and Industry v The Commonwealth (The Second Fringe Benefits Tax Case)* (1987) 163 CLR 329 at 357.

440 *State Chamber of Commerce and Industry v The Commonwealth (The Second Fringe Benefits Tax Case)* (1987) 163 CLR 329 at 357.

activities, the exercise of its powers and the assertion or waiver of its immunities."

296 Whatever the scope of the implied powers inherent in the creation of the Commonwealth of Australia as a body politic, I could not agree that they would extend to regulation of the detailed and specific kind which the federal Act provides, affecting as it does the rights and obligations of individuals such as the appellants.

297 The Commonwealth then relied upon a more refined argument concerning its implied powers. It was said that the power to establish a federal court under s 71 of the Constitution carried with it the legislative power necessary for, or conducive to, the exercise of the grant⁴⁴¹. As well, the Commonwealth relied upon the express incidental power in s 51(xxxix) of the Constitution. This enables the Parliament to enact laws with respect to "[m]atters incidental to the execution of any power vested by [the] Constitution ... in the Federal Judicature, or in any department or officer of the Commonwealth".

298 In *Duncan*⁴⁴² this Court held that the conferral on a federal industrial tribunal of the capacity to receive powers and functions under State legislation was incidental to the power of the Federal Parliament to establish such a tribunal. Subject to the suggested prohibition derived from the language or structure of Ch III of the Constitution, the same might be said of the creation by the Parliament of a federal court to operate as a superior court within the integrated Australian courts system. Such a court, exercising both its primary jurisdiction and the "accrued" jurisdiction sanctioned by this Court⁴⁴³, hears and determines matters in the several States, affecting residents of those States. The enactment of s 56(2) of the federal Act is sufficiently connected to the power to establish federal courts in s 71 of the Constitution. This is so because it assists in the exercise of the federal judicial power by such courts by eliminating or reducing jurisdictional disputes which would otherwise add needlessly to the costs and delays involved in the exercise of that power. Alternatively, the facility of transfer to and by a federal court facilitates the efficient discharge of its functions as such.

441 *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

442 (1983) 158 CLR 535 at 552-553, 563, 572, 579-580, 589. But cf O'Brien, "The Constitutional Validity of the Cross-vesting Legislation", (1989) 17 *Melbourne University Law Review* 307 at 311.

443 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 474-475; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 278-279, 294.

299 In *Duncan*⁴⁴⁴, s 51(xxxix) of the Constitution was cited as the source of the federal legislative power exercised in that case. That paragraph does not empower the Federal Parliament to confer jurisdiction on a federal court⁴⁴⁵. But it does enable that Parliament to enact laws "with respect to" all matters which may properly be characterised as "incidental" to the execution of the judicial power vested in federal courts by Ch III. It is sufficient that there be a practical connection between the law and the incidental matter⁴⁴⁶. There could be nothing with a more practical connection with the just and efficient operation of federal courts within an integrated judiciary than the receipt and transfer of matters which, in the interests of justice, may more suitably be determined in such courts.

300 Other heads of legislative power were relied upon by the respondent and the interveners. These included the corporations power⁴⁴⁷ and the territories power⁴⁴⁸. Each of these paragraphs presents difficulties, as the Commonwealth acknowledged. It is unnecessary to explore them. By analogy with *Duncan*, the enactment of a federal law as part of a cooperative scheme, enabling a federal body to exercise State jurisdiction and to hear and determine a proceeding transferred to it, is within the implied power attaching to the practical operation of that body within the Australian Federation. However, the remaining question is whether the fact that here that body is a federal court, operating within the constraints of Ch III of the Constitution, renders the analogy with *Duncan* inapplicable and forbids what was done by the federal and State legislation in this case.

Chapter III of the Constitution does not forbid the scheme

301 The appellants urged that the language, structure and purpose of Ch III of the Constitution prohibited the purported conferral of jurisdiction on a federal court by the State Parliament and the purported permission by the Federal Parliament for a federal court to exercise the jurisdiction so conferred.

302 It was submitted that s 77(i) of the Constitution represents an exhaustive statement of the power of any Australian Parliament to make laws defining the original jurisdiction of a federal court. Only the Federal Parliament has such

444 (1983) 158 CLR 535 at 591.

445 *Willocks v Anderson* (1971) 124 CLR 293 at 299; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 535.

446 See *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368-369; *Leask v The Commonwealth* (1996) 70 ALJR 995 at 999; 140 ALR 1 at 7.

447 Constitution, s 51(xx).

448 Constitution, s 122.

legislative power. Similarly, only the Federal Parliament has the legislative power to define the jurisdiction of any federal court with respect to the matters in ss 75 and 76 of the Constitution⁴⁴⁹. In support of their arguments, the appellants relied on the passages in *In re Judiciary and Navigation Acts*⁴⁵⁰ and *The Boilermakers' Case*⁴⁵¹ previously quoted.

303 The appellants urged that, in the face of an express statement as to the extent of the legislative power to define and confer the original jurisdiction set out in ss 75-77, the stated subject matters should be viewed as an exhaustive statement of that power. That conclusion should be reached because of the authority of this Court, because of the care taken in the Constitution to express what was permissible and the clear inference that such precise definition was adopted to protect the judicial branch of the Commonwealth from the danger of contamination by, or dilution with, extraneous personnel, jurisdiction or functions. Where, as was conceded, the Federal Parliament could not itself confer jurisdiction with respect to any matter arising under a law made by a Parliament of a State, it was unthinkable that a State Parliament, not expressly authorised to do so, could confer part of its judicial power upon a court of another polity. Had such authority been intended by the Constitution, it would have been a simple thing for reciprocal provision to be made vesting federal courts with State jurisdiction in s 77(ii). Yet this was not done.

304 There is, of course, force in the appellants' arguments. An application of the dicta in *In re Judiciary and Navigation Acts* and *The Boilermakers' Case*, read out of their context, together with a failure to heed "the silent operation of constitutional principles"⁴⁵² and to grasp "the context of complete independence and international sovereignty"⁴⁵³ of the Australian Commonwealth might sustain the appellants' contentions. However, in my view they should not prevail.

305 First, it is important to recognise that Ch III of the Constitution is dealing, as it states, with "[t]he judicial power of the Commonwealth". It is not dealing with the judicial power of the States. That power remains to be governed, outside those

449 Constitution, s 77.

450 (1921) 29 CLR 257 at 265.

451 (1956) 94 CLR 254 at 269-270.

452 *Cooper v Stuart* (1889) 14 App Cas 286 at 293.

453 *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 378. See also *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 412-414 per Isaacs J.

matters expressly provided in Ch III, by or under the State constitutions provided for in Ch V.

306 Secondly, the express provision for the investing of the courts of the States with federal jurisdiction, as stated in s 77(iii), is readily explained by the historical circumstances which the Constitution was required to address in 1901. At that time there were no federal courts but established colonial courts which became State courts and which could be required to accept the federal jurisdiction, whether the State consented or not. The problem which the legislation under scrutiny in this appeal addresses is of a different order. It concerns the conferral of State jurisdiction upon the recently created Federal Court with the concurrence of the Commonwealth and on the initiative of the States as part of a cooperative legislative scheme. The Constitution does not forbid such provisions. It simply fails to afford an express power whereby a State could invest its jurisdiction compulsorily in a federal court, ie whether the Commonwealth agreed or not. But the absence of express power does not mean that the power does not exist if a proper source may be found to sustain it.

307 Thirdly, it is not the case that a federal court may only exercise jurisdiction as enumerated in Ch III of the Constitution. In at least three areas additional jurisdiction has been conferred upon federal courts, including this Court. Such jurisdiction has been upheld and actually exercised, including by this Court. I refer to the exercise of jurisdiction as a Colonial Court of Admiralty under the *Colonial Courts of Admiralty Act* 1890 (Imp), since repealed in its application to Australia⁴⁵⁴; the exercise of the jurisdiction to hear appeals from decisions of the Supreme Court of an independent country, Nauru, under the *Nauru (High Court Appeals) Act* 1976 (Cth)⁴⁵⁵; and, most importantly, the exercise by this Court and by other federal courts of original and appellate jurisdiction under the territories power⁴⁵⁶.

308 The authority of this Court concerning the integration of territory courts within the Australian judicial system has been described as involving

454 See for example *John Sharp & Sons Ltd v The Katherine Mackall* (1924) 34 CLR 420. This jurisdiction was repealed in relation to Australia by the *Admiralty Act* 1988 (Cth), s 44.

455 See *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627; *Amoe v Director of Public Prosecutions (Nauru)* (1991) 66 ALJR 29; 103 ALR 595.

456 See *R v Bernasconi* (1915) 19 CLR 629; *Porter v The King*; *Ex parte Yee* (1926) 37 CLR 432; *Spratt v Hermes* (1965) 114 CLR 226; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 604, 626. See also *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 544-545.

"baroque complexities and many uncertainties"⁴⁵⁷. It is true that the decisions are not all easy to reconcile. But the notion that territory courts (which are not mentioned in Ch III) are outside the Australian judicial system there provided for is consistent neither with what this Court has said nor with what it has done. If a source of power to confer jurisdiction, original or appellate, upon federal courts may be found outside Ch III, for example in s 122 of the Constitution, the strict prohibition contended by the appellants is unsustainable. Once it goes, logic suggests that a source of such power may also be found outside that Chapter in s 107 whereby the legislative powers of the State Parliaments are preserved and recognised. Although the States are not in the same relationship to the Commonwealth as the territories are, they are part of the Federation and, as sources of legislative power, just as "non-federal" as is law-making for the territories under s 122 of the Constitution.

309 Fourthly, this approach does not involve the Court in over-ruling its holdings in *In re Judiciary and Navigation Acts*⁴⁵⁸ or *The Boilermakers' Case*. Those decisions stand for the matters essential to their respective determinations. It merely requires a reading of the passages referred to confining what was said to the "judicial power of the Commonwealth" and recognising that different rules will govern the endeavour to confer jurisdiction on federal courts in relation to territory courts or matters within a State's legislative and judicial power⁴⁵⁹.

310 Fifthly, the approach not only fortifies and sustains the integrated judicial system of Australia which is such an important feature of our Constitution. As a practical charter of government it is unsurprising that the Constitution should provide a power to confer territory and State jurisdiction equally upon federal courts for which equally Ch III does not expressly provide. The suggestion that pars (xxxvii) and (xxxviii) of s 51 would suffice to permit such a conferral of jurisdiction would be doubtful if the appellants' arguments about the closed parameters of Ch III are taken to their logical conclusion. If Ch III does provide the entire exposition of the legislative power of the Federal Parliament with respect to the federal judiciary then, unless explicitly provided for (as in s 51(xxxix)), the legislative heads of power in s 51 (including pars (xxxvii) and (xxxviii)) would be incapable of adding to the jurisdiction contained in Ch III⁴⁶⁰. To impose such a rigidity on the Constitution would inflict a needless wound which this Court has

⁴⁵⁷ Cowen and Zines, "Federal Jurisdiction in Australia", 2nd ed (1978) at 172. See also ACC, Australian Judicial Advisory Committee, *Report* (1987) at 51.

⁴⁵⁸ But see discussion in *North Galanjanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612, 642.

⁴⁵⁹ ACC, Australian Judicial System Advisory Committee, *Report* (1987) at par 3.42.

⁴⁶⁰ cf *Northern Pipeline Co v Marathon Pipe Line Co* 458 US 50 (1982).

avoided in the past with respect to territory jurisdiction. It should avoid it now with respect to State jurisdiction.

311 Contrary to the opinion of the Privy Council⁴⁶¹, territory jurisdiction is not "non-federal"⁴⁶². State jurisdiction is clearly federal, apt for conferral by a State Parliament, with the permission of the Federal Parliament, upon a federal court. I would be second to none in defending the integrity of the courts established by or under Ch III of the Constitution⁴⁶³. But the institutional separation of the federal courts and the independence of the judiciary where protected⁴⁶⁴ are in no way threatened either by the conferral of jurisdiction to hear territory appeals nor by the conferral of original and appellate jurisdiction upon a federal court by a State Parliament with the agreement of the Federal Parliament. On the contrary, such enactments strengthen the integrated Australian judicature as contemplated by the Constitution. They do so by appropriately relating its component parts to one another. The territory appeals cases were not challenged in this appeal. Yet at their heart lies a fundamental inconsistency with the appellants' argument that the jurisdiction of federal courts must be found in Ch III and in Ch III alone⁴⁶⁵.

312 As Professor Zines stated in his opinion, which eventually gave birth to the proposal for the legislation in question in this appeal, the constitutional question before this Court has not previously been considered in this country. However, in the United States, a question in some ways analogous arose when Alaska was admitted to the Union as a State. Before it attained statehood, a federally created District Court exercised judicial power in Alaska. After statehood, and before the creation of a system of State courts, the new State legislature purported to vest the judicial power of the State in the federal District Court for Alaska. Its constitutional power to do so was challenged in the Supreme Court of the United

461 *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 545.

462 *Spratt v Hermes* (1965) 114 CLR 226 at 242; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 71 ALJR 1346 at 1368, 1390, 1422-1423; 147 ALR 42 at 71, 101, 145-146.

463 See *Nicholas v The Queen* unreported, High Court of Australia, 2 February 1998.

464 cf *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 684-685 per Toohey J.

465 *Spratt v Hermes* (1965) 114 CLR 226 at 240 per Barwick CJ; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 626 per Gibbs J.

States⁴⁶⁶. That Court dismissed the challenge. It acknowledged and accepted that the District Court, after statehood was⁴⁶⁷:

"to a significant degree the creature of two sovereigns acting cooperatively to accomplish the joint purpose of avoiding an interregnum in judicial administration in the transitional period."

The Supreme Court held⁴⁶⁸:

"It is apparent that the legislature of Alaska vested the judicial power of the State in the interim District Court for the time being, that the district judge in this case explicitly deemed himself to be exercising such power, and that, in light of the express consent of the United States, he properly did so."

It would be extremely surprising if the vesting of State power in a federal court could lawfully be undertaken in the United States, against the history of that country which rejected the constitutional interrelationship of State and federal courts, yet was forbidden in Australia where, from the start, close integration of the judiciary has been maintained and strengthened first by the constitutional text and then by later federal legislation⁴⁶⁹.

- 313 It follows that no barrier exists in Ch III of the Constitution to forbid the conferral by a State Parliament upon a federal court of State juridical power. Nor is there any prohibition in Ch III to prevent the Federal Parliament from allowing that course.

Residual jurisdictional arguments

- 314 There remain a number of residual arguments on the jurisdictional challenge still to be disposed of. First, it was submitted for the appellants that the provisions of the federal and State Acts impermissibly interfered with the appellate jurisdiction provided by the Constitution⁴⁷⁰. It was argued that they did so by re-

⁴⁶⁶ *Metlakatla Indians v Egan* 363 US 555 (1960).

⁴⁶⁷ 363 US 555 at 558 (1960).

⁴⁶⁸ 363 US 555 at 559 (1960).

⁴⁶⁹ *Kable v Director of Public Prosecutions (NSW)* (1996) 70 ALJR 814 at 839, 844-846; 138 ALR 577 at 611, 619-622.

⁴⁷⁰ Constitution, s 73.

directing an appeal in a matter otherwise within State judicial power so that it became an appeal from the Federal Court such as had been made in this case.

315 There may indeed be a problem in those provisions of the State Act⁴⁷¹ and of the federal Act⁴⁷² which purport to exclude a right of appeal in relation to a transfer of a proceeding or as to which rules of evidence and procedure are to be applied. But as the present case did not involve a transfer and as no question as to evidence or procedure has arisen, it is unnecessary to explore such provisions. They would, in any case, clearly be severable. The appellate jurisdiction of this Court, as provided in the Constitution⁴⁷³, is not otherwise disturbed in the slightest. If original jurisdiction may lawfully be conferred on a federal court, that court's appellate provisions will, by statute, govern any appeal that may be brought from the court's orders. Such appeal would lie to this Court, although from the Federal and not the State or Territory Supreme Court. Appellate supervision would not be circumvented or circumscribed.

316 Secondly, the spectre of State additions to the original jurisdiction of this Court was raised. In the unlikely event that that were attempted with the concurrence of the Federal Parliament, it would be time enough to consider the validity of such legislation. It would raise questions quite different from those presented by the State and federal Acts given this Court's constitutional functions and the express provisions in the Constitution itself for the definition of much of the jurisdiction of this Court. I will not extend these reasons with reflections upon such unlikely and remote possibilities.

317 Thirdly, it was urged that, if the Commonwealth could not enact a law conferring State jurisdiction on a federal court, it could not have been within the contemplation of the Constitution that the Commonwealth could achieve indirectly what could not be done directly. The answer to this complaint is found in the remarks of Brennan J in *Duncan*⁴⁷⁴ with which I agree:

"It is no argument against the validity or efficacy of co-operative legislation that its object could not be achieved or could not be achieved so fully by the Commonwealth alone."

471 State Act, s 49.

472 Federal Act, s 58.

473 Constitution, s 73.

474 (1983) 158 CLR 535 at 580 citing *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 774 per Starke J.

Nor is it an answer, if the means chosen be valid, that other means (eg by the use of pars (xxxvii) and (xxxviii) of s 51) might have been enlisted to secure the same ends.

318 Fourthly, it was complained that, because State courts are not constrained by all the constitutional principles which have been expressed to govern federal courts, a serious risk existed in permitting the conferral of State jurisdiction upon federal courts that functions alien to the constitutional character of federal courts and the exercise of matters proper to the federal judicial power might thereby ensue, destructive of the scheme for the federal judiciary which Ch III, as explained by this Court, establishes.

319 Although this argument presents a theoretical risk, it has no application in this case. It was accepted unreservedly by the Commonwealth and the States that the latter, in conferring their jurisdiction upon a federal court would be obliged to accept that court as it is constituted⁴⁷⁵. A State could not legislate so as to violate Ch III or to alter the essential character of a federal court created in accordance with that Chapter⁴⁷⁶. Any attempt to impose duties or functions upon a federal court contrary to those permitted by decisions of this Court concerning the federal judicial power would be, for that reason and to that extent, ineffective.

320 Unsurprisingly, this problem of potential incompatibility was addressed by those who drafted both the Federal and State Acts. Each enactment is expressed in terms of jurisdiction with respect to "matters"⁴⁷⁷. It seems hardly likely that this word, of the greatest constitutional significance in Australia, was chosen without the intention that it be understood in the constitutional sense. The suggestion that non-"matters" might be conferred within State judicial power is completely unpersuasive. Such an attempt might unacceptably distort a settled feature of the federal judiciary as it has been explained by this Court. Against the risk that it might, for that reason, undermine the clear institutional "protections for ... independence"⁴⁷⁸ essential to the federal judiciary, it could not be allowed. So much is recognised by the terms of the legislation permitting the conferral of State jurisdiction. Accordingly, at least in the case of the legislation under scrutiny in this appeal, the suggested problem disappears.

⁴⁷⁵ *Le Mesurier v Connor* (1929) 42 CLR 481 at 496-497; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469.

⁴⁷⁶ See *Kable v Director of Public Prosecutions (NSW)* (1996) 70 ALJR 814; 138 ALR 577.

⁴⁷⁷ See federal Act, ss 56(1) and (2); State Act, ss 42(1) and (3).

⁴⁷⁸ See *Northern Pipeline Co v Marathon Pipe Line Co* 458 US 50 at 60 (1982).

321 Fifthly, it was objected that if a State Parliament could confer jurisdiction on a federal court this would potentially erode the guarantee of jury trial under s 80 of the Constitution, which appears in Ch III. There are several answers to this objection. Section 80 is confined, in its terms, to "[t]he trial on indictment of any offence against any law of the Commonwealth". Accordingly, the section does not apply, and was never intended to apply, to an offence against a law of a State. A proposal to introduce into the Constitution, by referendum, a guarantee of trial by jury in terms larger than s 80, and to extend the protection to the States failed to pass in 1988⁴⁷⁹. In any case, to the extent that s 80 might be said to suggest a broader principle, it is notable that the State Act confines the conferral of State jurisdiction on the Federal Court to "civil matters", a phrase defined to exclude criminal proceedings of the kind to which s 80 would apply.

322 Sixthly, it was objected that the State legislation impermissibly conscripted federal courts and imposed upon them functions and duties contrary to the implications of the Constitution as expressed in *The Commonwealth v Cigamatic Pty Ltd (In Liquidation)*⁴⁸⁰. Alternatively, this argument was advanced in terms of the constitutional prohibition stated in *Melbourne Corporation v The Commonwealth*⁴⁸¹. There is no merit in either of these arguments. Whatever the scope of the implications restricting State legislation affecting the Commonwealth and its officers, they can have no application, in a case such as the present, where the affectation is the consequence of inter-governmental agreement approved by the Commonwealth and given effect by legislation enacted by the Federal Parliament. What the States might not have done unilaterally, they could do, as here, where the Commonwealth has legislated to bind itself⁴⁸².

323 For all of the foregoing reasons the appellants' objections to the conferral of State jurisdiction on the Federal Court under the cross-vesting legislation fails. The Full Court was correct in so deciding.

479 See Constitution Alteration (Rights and Freedoms) 1988, s 2.

480 (1962) 108 CLR 372; cf *Re Residential Tenancies Tribunal of NSW; Ex parte Defence Housing Authority* (1997) 71 ALJR 1254 at 1259, 1265, 1270, 1272-1277, 1279-1283, 1301-1306; 146 ALR 495 at 500, 508, 515, 518-525, 527-533, 558-565.

481 (1947) 74 CLR 31.

482 See *Chaplin v Commissioner of Taxes for South Australia* (1911) 12 CLR 375; *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330 at 356, 357. See also Griffith, Rose and Gageler, "Further Aspects of the Cross-vesting Scheme", (1988) 62 *Australian Law Journal* 1016 at 1024.

A permissible exercise of judicial power

324 I reach the fifth and final contention of the appellants. This complained about the conferral of State jurisdiction upon the Federal Court, and the acceptance of that conferral by the Federal Parliament, insofar as this would permit the making of examination orders, the issue of examination summonses and the conduct of examinations under ss 596A and 596B of the State Act. It was submitted that this was inconsistent with the exercise of the judicial power of the Commonwealth and thus forbidden to a federal court, even where exercising State jurisdiction.

325 By reference to the explanation of the purposes and character of such legislative provisions expounded in *Hamilton v Oades*⁴⁸³, the appellants submitted that the activities envisaged, even where incidental to the performance by a liquidator of the functions necessary to the winding up or administration of a company, went beyond functions proper to a federal court. They involved what essentially amounted to the gathering of evidence upon which might be based civil or criminal proceedings against those subject to the examination. They were thus foreign to the exercise of the judicial power. To the extent that the State Act attempted to confer such functions, and to the extent that the federal Act purported to permit their exercise, each statute offended against the constitutional rule obliging the separation of the judicial power and those who exercise it from other government power⁴⁸⁴.

326 The appellants went on to argue that, even if their examination on the application of a liquidator could be sustained as a traditional and incidental exercise of judicial power, other provisions of the impugned sections would nonetheless fail because of the way in which they envisaged the possibility of a wider course of examination by other "eligible applicants" (such as the Australian Securities Commission) having functions and purposes completely unconnected with any exercise of judicial power. Because the powers of examination provided by the sections were interconnected and part of a comprehensive legislative scheme⁴⁸⁵, it would be impossible to sever permissible judicial examinations from those which were impermissible. The sections in their entirety would fall, being a

483 (1989) 166 CLR 486 at 496. The Court there considered s 541(3) of the *Companies (New South Wales) Code* which was the predecessor to ss 596A and 596B; cf *Re Hugh J Roberts Pty Ltd* (1970) 91 WN (NSW) 537 at 541.

484 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 271-272.

485 See for example Corporations Law, ss 596A(a) and 596B(1)(a) read with the definition of "eligible applicant" in s 9 pars (a) ("the Commission") and (e) ("a person authorised in writing by the Commission").

vivid illustration of the difficulties of attempted conferral of State jurisdiction on a federal court.

327 There is no merit in the complaint about the conferral of jurisdiction on a federal court to conduct an examination of the kind provided on the application of a liquidator relevant to the winding up of a company. In determining whether particular activity is within, or incidental to, the exercise of judicial power, it is permissible and often helpful to examine the judicial activity as it existed before and at the time the Constitution was adopted⁴⁸⁶. In the analogous and antecedent field of bankruptcy law, judges have been performing similar functions of examinations for more than four centuries⁴⁸⁷. Judges have done so, as Barwick CJ explained in *Rees v Kratzmann*⁴⁸⁸, to ensure that such examinations are "not made an instrument of oppression, injustice, or of needless injury to the individual".

328 The use of judges in this way has often been noted by this Court⁴⁸⁹ as a necessary and usual step in the process of the judicial winding up of a company⁴⁹⁰. Such functions therefore fall quite readily within the test of activity incidental to the exercise of judicial power stated in *Lowenstein's Case*⁴⁹¹. Against the background of such a long established performance of judicial functions in the same or analogous fields, it is impossible to suggest that the examination of officers, on the application of a liquidator, falls outside the scope of the judicial power properly exercisable by a federal court⁴⁹². Although of their own nature such functions might seem at first blush to be non judicial in character, in their

486 *Cominos v Cominos* (1972) 127 CLR 588 at 600, 605, 608; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 627.

487 See *Bankruptcy Act* 1542 (Eng). See now *Bankruptcy Act* 1966 (Cth), s 81.

488 (1965) 114 CLR 63 at 66; cf *Cominos v Cominos* (1972) 127 CLR 588 at 606.

489 See for example *Cheney v Spooner* (1929) 41 CLR 532 at 537.

490 *R v Davison* (1954) 90 CLR 353 at 367-368.

491 *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 586-587.

492 *Re the Socket Screw & Fastener Distributors (NSW) Pty Ltd* (1994) 51 FCR 599 at 603; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 469.

context and discharged in connection with the performance of judicial functions, they fall within the judicial power or what is incidental to it⁴⁹³.

329 A more difficult question is whether the inclusion of a power in other "eligible applicants", such as the Australian Securities Commission and other inquisitorial powers, contaminates the legislative provisions as they were invoked in this case in a way that could not be severed to uphold the permissible provisions and to excise the impermissible.

330 The arguments on this issue are very finely balanced indeed. Strong reasons can be marshalled for each point of view. However, I agree, for the reasons given by Brennan CJ and Toohey J, that it is possible to select those provisions of ss 596A and 596B of the Corporations Law which are validly picked up by the carefully chosen language of s 7 of the State Act, construed in accordance with the *Interpretation Act* 1987 (NSW) s 31. I therefore agree that, so severed, the provisions sustaining the examination orders made in the present case, were compatible with a jurisdiction conferred on the Federal Court which involved the exercise by that Court of judicial power and nothing else⁴⁹⁴.

Conclusion and order

331 Because I reach the conclusion that the decision of the Full Court of the Federal Court was correct, it is unnecessary for me to consider an additional submission, advanced on behalf of the State of New South Wales. This was that, in the event that the cross-vesting legislation were held unconstitutional, this Court should, as a matter of practice, adopt measures to delay the making of its orders so as to give an opportunity to the Governments and Parliaments involved to consider remedial legislation to cure the disruption which such a decision would cause in very many cases⁴⁹⁵. In the conclusion which I reach, the cross-vesting legislation considered in this appeal is valid. So are the orders for the examination of the appellants. The answers given by the Full Court were correct. The appeal from the Full Court's orders should therefore be dismissed with costs.

493 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 151; *R v Davison* (1954) 90 CLR 353 at 366-370; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278.

494 See *Re F; Ex parte F* (1986) 161 CLR 376 at 384-385 where the relevant authorities are discussed.

495 See *Northern Pipeline Co v Marathon Pipe Line Co* 458 US 50 at 88-89 (1982); *Re Language Rights under Manitoba Act, 1870* (1985) 19 DLR (4th) 1 at 46; *Bilodeau v Attorney-General of Manitoba* (1986) 27 DLR (4th) 39 at 46.

