

HIGH COURT OF AUSTRALIA

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

MICHAEL REGINALD BASS and
EVELYN MAUDE BASS

APPELLANTS

AND

PERMANENT TRUSTEE COMPANY
LIMITED

FIRST RESPONDENT

FANMAC LIMITED

SECOND RESPONDENT

STATE OF NEW SOUTH WALES

THIRD RESPONDENT

PERMANENT CUSTODIANS LIMITED

FOURTH RESPONDENT

LIVERPOOL-INGLEBURN CO-OPERATIVE
HOUSING SOCIETY

FIFTH RESPONDENT

MARKHAM, GEIKIE & RUMORE

SIXTH RESPONDENT

CO-OPERATIVE HOUSING SOCIETIES
ASSOCIATION OF NEW SOUTH WALES
LIMITED

SEVENTH RESPONDENT

THE ESTATE OF ANTHONY MARKHAM

EIGHTH RESPONDENT

*Bass v Permanent Trustee Co Ltd (S45-1997) [1999] HCA 9
24 March 1999*

ORDER

- 1. Appeal allowed in part.*
- 2. Set aside Order 1 of the orders of the Full Court of the Federal Court of Australia to the extent necessary to set aside the Full Court's answers to questions 1, 2, 3 and 5 referred to that Court by Wilcox J. In lieu thereof order that those questions be answered as follows:*

2.

Q 1 Whether, having regard to the matters pleaded in the amended Statement of Claim and the material contained in the agreed bundle of documents, the State is bound by the Trade Practices Act 1974 (Cth) and whether any claim made under that Act in these proceedings against the State is maintainable?

A 1 The claim made under the Trade Practices Act 1974 (Cth) against the State of New South Wales in these proceedings cannot be maintained. Otherwise, inappropriate to answer.

Q 2 Whether, having regard to the matters pleaded in the amended Statement of Claim and the material contained in the agreed bundle of documents, the respondents other than the State, or any of them, are immune from the claims contained in the amended Application and the amended Statement of Claim herein, in light of the principles referred to in Bradken?

A 2 Inappropriate to answer.

Q 3 Whether, on the assumption that the claim against the State under the Fair Trading Act 1987 (NSW) is not maintainable, on the basis of the matters pleaded in the amended Statement of Claim and the material contained in the agreed bundle of documents, the respondents other than the State, or any of them, are immune from the claims under the Fair Trading Act, in light of the principles referred to in Bradken?

A 3 Inappropriate to answer.

Q 5 Are the applicants protected by section 47 of the Legal Aid Commission Act 1979 (NSW) against liability for the payment of the whole or any part of the costs that might be ordered by the Court against them if unsuccessful in these proceedings?

A 5 Inappropriate to answer.

3. *Set aside Orders 3, 4 and 6 of the orders of the Full Court of the Federal Court.*

4. *The appellants pay the costs of the State of New South Wales in this Court and in the Full Court of the Federal Court, subject to a maximum for the costs of the proceedings in the Full Court of the Federal Court of \$10.00.*

3.

5. *The appellants and the respondents, other than the State of New South Wales and the sixth and eighth respondents, bear their own costs of the proceedings in this Court and in the Full Court of the Federal Court.*

On appeal from the Federal Court of Australia

Representation:

J Basten QC with S Winters and S C Churches for the appellants (instructed by Public Interest Advocacy Centre)

B A J Coles QC with C J Birch for the first and fourth respondents (instructed by Church & Grace)

T F Bathurst QC with I M Jackman for the second respondent (instructed by Mallesons Stephen Jaques)

L S Katz SC, Solicitor-General for the State of New South Wales with A J L Bannon SC and R P L Lancaster for the third respondent (instructed by Crown Solicitor for New South Wales)

G M McGrath for the fifth and seventh respondents (instructed by Church & Grace)

No appearance for the sixth and eighth respondents

Interveners:

D M J Bennett QC, Solicitor-General for the Commonwealth with H C Burmester QC and R Sofroniou intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

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

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

4.

A J Myers QC with M R Pearce intervening on behalf of the Australian Competition and Consumer Commission (instructed by Dunhill Madden Butler)

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

HIGH COURT OF AUSTRALIA

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

PAULA CONCA and
MARCELO ALBERTO CONCA

APPELLANTS

AND

PERMANENT TRUSTEE COMPANY
LIMITED

FIRST RESPONDENT

FANMAC LIMITED

SECOND RESPONDENT

STATE OF NEW SOUTH WALES

THIRD RESPONDENT

PERMANENT CUSTODIANS LIMITED

FOURTH RESPONDENT

MERRYLANDS CO-OPERATIVE HOUSING
SOCIETY

FIFTH RESPONDENT

LIVERPOOL-INGLEBURN CO-OPERATIVE
HOUSING SOCIETY

SIXTH RESPONDENT

CO-OPERATIVE HOUSING SOCIETIES
ASSOCIATION OF NEW SOUTH WALES
LIMITED

SEVENTH RESPONDENT

KEN LONG (trading as LONG & COMPANY) EIGHTH RESPONDENT

Conca v Permanent Trustee Co Ltd
24 March 1999
S46/1997

ORDER

1. *Appeal allowed in part.*
2. *Set aside Order 1 of the orders of the Full Court of the Federal Court of Australia to the extent necessary to set aside the Full Court's answers to questions 1, 2, 3 and 5 referred to that Court by Wilcox J. In lieu thereof order that those questions be answered as follows:*

2.

Q 1 Whether, having regard to the matters pleaded in the amended Statement of Claim and the material contained in the agreed bundle of documents, the State is bound by the Trade Practices Act 1974 (Cth) and whether any claim made under that Act in these proceedings against the State is maintainable?

A 1 The claim made under the Trade Practices Act 1974 (Cth) against the State of New South Wales in these proceedings cannot be maintained. Otherwise, inappropriate to answer.

Q 2 Whether, having regard to the matters pleaded in the amended Statement of Claim and the material contained in the agreed bundle of documents, the respondents other than the State, or any of them, are immune from the claims contained in the amended Application and the amended Statement of Claim herein, in light of the principles referred to in Bradken?

A 2 Inappropriate to answer.

Q 3 Whether, on the assumption that the claim against the State under the Fair Trading Act 1987 (NSW) is not maintainable, on the basis of the matters pleaded in the amended Statement of Claim and the material contained in the agreed bundle of documents, the respondents other than the State, or any of them, are immune from the claims under the Fair Trading Act, in light of the principles referred to in Bradken?

A 3 Inappropriate to answer.

Q 5 Are the applicants protected by section 47 of the Legal Aid Commission Act 1979 (NSW) against liability for the payment of the whole or any part of the costs that might be ordered by the Court against them if unsuccessful in these proceedings?

A 5 Inappropriate to answer.

3. *Set aside Orders 3, 4 and 6 of the orders of the Full Court of the Federal Court.*

4. *The appellants pay the costs of the State of New South Wales in this Court and in the Full Court of the Federal Court, subject to a maximum for the costs of the proceedings in the Full Court of the Federal Court of \$10.00.*

3.

5. *The appellants and the respondents, other than the State of New South Wales and the eighth respondent, bear their own costs of the proceedings in this Court and in the Full Court of the Federal Court.*

On appeal from the Federal Court of Australia

Representation:

J Basten QC with S Winters and S C Churches for the appellants (instructed by Public Interest Advocacy Centre)

B A J Coles QC with C J Birch for the first and fourth respondents (instructed by Church & Grace)

T F Bathurst QC with I M Jackman for the second respondent (instructed by Mallesons Stephen Jaques)

L S Katz SC, Solicitor-General for the State of New South Wales with A J L Bannon SC and R P L Lancaster for the third respondent (instructed by Crown Solicitor for New South Wales)

G M McGrath for the fifth, sixth and seventh respondents (instructed by Church & Grace)

No appearance for the eighth respondent

Interveners:

D M J Bennett QC, Solicitor-General for the Commonwealth with H C Burmester QC and R Sofroniou intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

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

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

4.

A J Myers QC with M R Pearce intervening on behalf of the Australian Competition and Consumer Commission (instructed by Dunhill Madden Butler)

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

HIGH COURT OF AUSTRALIA

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

BESSIE MAVIS WOODLANDS (on her
own behalf) and BESSIE MAVIS
WOODLANDS (as Administratrix ad litem
of the ESTATE OF LILIAN MAY
BALLARD)

APPELLANTS

AND

PERMANENT TRUSTEE COMPANY
LIMITED

FIRST RESPONDENT

FANMAC LIMITED

SECOND RESPONDENT

STATE OF NEW SOUTH WALES

THIRD RESPONDENT

PERMANENT CUSTODIANS LIMITED

FOURTH RESPONDENT

FAIRDALE CO-OPERATIVE HOUSING
SOCIETY

FIFTH RESPONDENT

CO-OPERATIVE HOUSING SOCIETIES
ASSOCIATION OF NEW SOUTH WALES
LIMITED

SIXTH RESPONDENT

Woodlands v Permanent Trustee Co Ltd
24 March 1999
S47/1997

ORDER

1. *Appeal allowed in part.*
2. *Set aside Order 1 of the orders of the Full Court of the Federal Court of Australia to the extent necessary to set aside the Full Court's answers to questions 1, 2, 3 and 5 referred to that Court by Wilcox J. In lieu thereof order that those questions be answered as follows:*

Q 1 Whether, having regard to the matters pleaded in the amended Statement of Claim and the material contained in

2.

the agreed bundle of documents, the State is bound by the Trade Practices Act 1974 (Cth) and whether any claim made under that Act in these proceedings against the State is maintainable?

A 1 The claim made under the Trade Practices Act 1974 (Cth) against the State of New South Wales in these proceedings cannot be maintained. Otherwise, inappropriate to answer.

Q 2 Whether, having regard to the matters pleaded in the amended Statement of Claim and the material contained in the agreed bundle of documents, the respondents other than the State, or any of them, are immune from the claims contained in the amended Application and the amended Statement of Claim herein, in light of the principles referred to in Bradken?

A 2 Inappropriate to answer.

Q 3 Whether, on the assumption that the claim against the State under the Fair Trading Act 1987 (NSW) is not maintainable, on the basis of the matters pleaded in the amended Statement of Claim and the material contained in the agreed bundle of documents, the respondents other than the State, or any of them, are immune from the claims under the Fair Trading Act, in light of the principles referred to in Bradken?

A 3 Inappropriate to answer.

Q 5 Are the applicants protected by section 47 of the Legal Aid Commission Act 1979 (NSW) against liability for the payment of the whole or any part of the costs that might be ordered by the Court against them if unsuccessful in these proceedings?

A 5 Inappropriate to answer.

3. *Set aside Orders 3, 4, 6 and 7 of the orders of the Full Court of the Federal Court.*
4. *The appellants pay the costs of the State of New South Wales in this Court and in the Full Court of the Federal Court, subject to a maximum for the costs of the proceedings in the Full Court of the Federal Court of \$12,500.*
5. *The appellants and the respondents, other than the State of New South Wales, bear their own costs of the proceedings in this Court and in the Full Court of the Federal Court.*

On appeal from the Federal Court of Australia

Representation:

J Basten QC with S Winters and S C Churches for the appellants (instructed by Public Interest Advocacy Centre)

B A J Coles QC with C J Birch for the first and fourth respondents (instructed by Church & Grace)

T F Bathurst QC with I M Jackman for the second respondent (instructed by Mallesons Stephen Jaques)

L S Katz SC, Solicitor-General for the State of New South Wales with A J L Bannon SC and R P L Lancaster for the third respondent (instructed by Crown Solicitor for New South Wales)

G M McGrath for the fifth and sixth respondents (instructed by Church & Grace)

Interveners:

D M J Bennett QC, Solicitor-General for the Commonwealth with H C Burmester QC and R Sofroniou intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

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

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

A J Myers QC with M R Pearce intervening on behalf of the Australian Competition and Consumer Commission (instructed by Dunhill Madden Butler)

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CATCHWORDS

Bass & Anor v Permanent Trustee Co Ltd & Ors
Conca & Anor v Permanent Trustee Co Ltd & Ors
Woodlands & Anor v Permanent Trustee Co Ltd & Ors

Statutes – Construction – Whether ss 51AB, 52 and 74 of the *Trade Practices Act* 1974 (Cth) apply to the State of New South Wales – Whether State of New South Wales a "person" within the meaning of ss 6(3) and 75B(1) of the *Trade Practices Act* 1974 (Cth) – Rule of construction embodied in maxim *expressio unius est exclusio alterius* – Whether s 64 of *Judiciary Act* 1903 (Cth) operates to apply ss 6(3) and 75B(1) of the *Trade Practices Act* 1974 (Cth) to the State of New South Wales – Whether s 5(2) of the *Crown Proceedings Act* 1988 (NSW) operates to apply ss 6(3) and 75B(1) of the *Trade Practices Act* 1974 (Cth) to the State of New South Wales.

Practice and procedure – Preliminary questions of mixed fact and law – Judicial power – Purpose of judicial determinations – Refusal of courts to give advisory opinions or answer hypothetical questions – Distinction between declaratory judgments and advisory opinions – Distinction between demurrers and advisory opinions – Need to identify all essential facts.

Practice and procedure – Costs – Whether applicants in Federal Court proceedings entitled to rely on protection against liability for costs contained in s 47 of *Legal Aid Commission Act* 1979 (NSW).

Words and phrases – "corporation" – "person".

Acts Interpretation Act 1901 (Cth), s 22(1).

Judiciary Act 1903 (Cth), ss 64, 79.

Trade Practices Act 1974 (Cth), ss 2A, 2B, 2C, 6(3), 51AB, 52, 74, 75B(1).

Legal Aid Commission Act 1979 (NSW), s 47.

Fair Trading Act 1987 (NSW).

Crown Proceedings Act 1988 (NSW), s 5(2).

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. These three appeals were heard together. They arise out of a scheme, known as "HomeFund", devised by the State of New South Wales, the third respondent in each of the appeals. The purpose of HomeFund was to enable persons, who might not otherwise be able to do so, to purchase their own homes. The appellants all purchased homes through the scheme.

2 The HomeFund scheme was, apparently, implemented by loans made to home buyers by co-operative housing societies, including Liverpool-Ingleburn Co-operative Housing Society, Merrylands Co-operative Housing Society and Fairdale Co-operative Housing Society, they being, respectively, the fifth respondent in each of the first, second and third appeals¹. The loans were made from funds raised by bonds issued in various trusts created by the first and second respondents, Permanent Trustee Company Limited and FANMAC Limited. It seems that, in the event there was a shortfall in the income of these trusts, it was to be supplemented by income from another trust of which the trustee is Permanent Custodians Limited, the fourth respondent in each of the appeals, and a wholly owned subsidiary of the first respondent.

3 The appellants claim that the HomeFund scheme was promoted by the State of New South Wales, through the Department of Housing, and, also, by the Co-operative Housing Societies Association of New South Wales Limited, the seventh respondent in the first two appeals and the sixth respondent in the third appeal. The other respondents to these appeals are solicitors who acted in the loan transactions. They took no part in the proceedings in this Court and it is unnecessary to make any further reference to them.

4 The appellants assert, amongst other things, that various of the respondents, including the State of New South Wales, engaged in misleading and deceptive conduct and other contraventions of the *Trade Practices Act* 1974 (Cth) ("the Act") as well as contraventions of the *Fair Trading Act* 1987 (NSW) and that, in consequence, they each entered into loan transactions through the HomeFund scheme. Moreover, they claim that the terms of those loans were and are such that the principal sum increased to an extent that their equity was reduced or eliminated and they were and remain unable to refinance at the lower interest rates now available. They brought proceedings in the Federal Court of Australia on their

1 Liverpool-Ingleburn Co-operative Housing Society is also the sixth respondent in the second appeal.

Gleeson CJ
Gaudron J
McHugh J
Gummow J
Hayne J
Callinan J

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own behalf and, also, in the case of the appellants in the second and third appeals, in a representative capacity². They seek damages and other relief.

- 5 The respondents made no application to strike out the appellants' pleadings or terminate the action summarily. The respondents had not pleaded in answer to the appellants' claims. However, there were interlocutory proceedings before Wilcox J during which the question emerged whether, given the involvement of the State of New South Wales in the HomeFund scheme, the proceedings could properly be maintained. In the result, Wilcox J formulated six questions in each matter to be "heard separately from and before any other question in the proceedings". The questions, which were the same in each case, were referred to the Full Court of the Federal Court for its consideration. The parties raised no objection to the questions which his Honour formulated or to their reference to a Full Court. The appellants now appeal from the answers given in four of those questions³ and the consequential orders made by the Full Court.

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- 2 The persons represented in these proceedings are all those who executed mortgages as mortgagor with, or guaranteed a loan from, the first respondent as part of the HomeFund scheme. The persons who are also members of the United Borrowers Association Inc are represented by the appellants in the third appeal. Those who are not members of that association are represented by the appellants in the second appeal. Those whose causes of action accrued after 4 March 1992, the day on which Pt IVA of the *Federal Court of Australia Act 1976* (Cth) commenced, are represented pursuant to that Part. Those whose causes of action accrued on or before that date are represented pursuant to O 6 r 13 of the Federal Court Rules.
- 3 At the parties' request, the Full Court deferred consideration of question 6 which asked whether any claim for breach of fiduciary duty could be maintained against the State. There is no appeal with respect to question 4 which asked whether the proceedings could be maintained in the Federal Court. That question was answered "Yes".

3.

The first question

6 The first question was asked in these terms:

"Whether, having regard to the matters pleaded in the amended Statement of Claim and the material contained in the agreed bundle of documents, the State is bound by the *Trade Practices Act* 1974 (Cth) and whether any claim made under that Act in these proceedings against the State is maintainable?"

As it happens, the issue raised by that question does not require any consideration of material other than the Amended Statement of Claim. It is, then, unnecessary to identify or refer to what the question describes as "the agreed bundle of documents".

7 The Amended Statements of Claim⁴ specifically allege contraventions by the State of New South Wales of s 51AB (unconscionable conduct), which was formerly s 52A, and of s 52 of the Act (misleading or deceptive conduct). In argument, counsel for the appellants contended that the appellants pleaded breaches of the warranties implied by s 74 of the Act and, also, relied upon s 75B(1), although neither is readily apparent from the pleadings.

8 The Full Court held, by reference to *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*⁵, that, at the relevant time, the Act did not bind the State of New South Wales⁶. Additionally, it held that neither s 64 of the *Judiciary Act* 1903 (Cth) nor s 5(2) of the *Crown Proceedings Act* 1988 (NSW) operates to apply the Act to the State⁷. In the result, the first question was answered "No" and it was ordered that "[t]he claims made in the proceedings under Parts IVA and V of the *Trade Practices Act* against the State of New South Wales be struck out."

The *Trade Practices Act*: the position of the State of New South Wales

9 Before turning to the appellants' argument that the Full Court erred in holding that the Act does not apply to the State of New South Wales, it is necessary to note

4 In the third appeal, there is also a Further Amended Statement of Claim.

5 (1979) 145 CLR 107.

6 *Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213 at 223.

7 (1996) 68 FCR 213 at 225.

Gleeson CJ
Gaudron J
McHugh J
Gummow J
Hayne J
Callinan J

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that s 51AB (s 52A before it was renumbered) and s 52 of the Act, in terms, apply only to corporations⁸. It is sufficient to refer to s 52(1) which provides:

" A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

So, too, s 74 only operates to imply warranties in contracts for the supply of services by corporations.

10 The appellants concede that the State of New South Wales is not a corporation for the purposes of the Act and, thus, not directly affected by the prohibitions in ss 51AB and 52. They also concede that s 74 does not, of itself, subject the State's contracts to the warranties implied by that section. However, they contend that ss 6(3) and 75B(1) extend the Act's operation so as to give it a relevant application to the State in these matters.

11 It is provided by s 6(3) of the Act that:

"... the provisions of Part IVA and of Divisions 1 and 1A of Part V have, by force of this subsection, the effect they would have if:

- (a) those provisions (other than section 55) were, by express provision, confined in their operation to engaging in conduct to the extent to which the conduct involves the use of postal, telegraphic or telephonic services or takes place in a radio or television broadcast; and

8 By s 4(1) of the Act, "corporation" is defined, unless a contrary intention appears, to mean

"a body corporate that:

- (a) is a foreign corporation;
- (b) is a trading corporation formed within the limits of Australia or is a financial corporation so formed;
- (c) is incorporated in a Territory; or
- (d) is the holding company of a body corporate of a kind referred to in paragraph (a), (b) or (c)".

5.

- (b) a reference in those provisions to a corporation included a reference to a person not being a corporation."⁹

Section 51AB¹⁰ is in Pt IVA and s 52 is in Div 1 of Pt V of the Act. The appellants contend that the State engaged in unconscionable conduct and in misleading or deceptive conduct by forwarding promotional material through the mail and, also, by promoting HomeFund on radio and television. To that extent, they rely on s 6(3) of the Act. It may be noted that s 74 is in Div 2 of Pt V and, thus, its operation is not extended by s 6(3).

- 12 Additionally, the appellants contend that they are entitled to relief against the State under Pt VI of the Act because of its involvement in the contraventions of other respondents. Their argument can be illustrated by reference to s 82 which is in Pt VI. That section confers on a person a right to recover damages for loss or damage suffered in consequence of the "conduct of another person that was done in contravention of a provision of Part IV or V ... by action against that other person or against any person involved in the contravention." And for the purposes of Pt VI, s 75B(1), upon which the appellants claim to rely, defines the expression "a person involved in a contravention of a provision of Part IV, IVA or V" to mean:

"... a person who:

- (a) has aided, abetted, counselled or procured the contravention;
- (b) has induced, whether by threats or promises or otherwise, the contravention;
- (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention."¹¹

- 13 The answers to the questions whether the prohibitions in ss 51AB and 52 extend to conduct by the State involving the use of the postal services, radio or

9 Section 6(3) has been amended twice with effect from 21 January 1993 and 6 November 1995. As nothing turns on these amendments, it is convenient to refer to s 6(3) in its present form.

10 Prior to being renumbered as s 51AB, effective from 21 January 1993, s 52A was located in Div 1 of Pt V of the Act.

11 Section 75B(1) was amended with effect from 21 January 1993. Again, it is convenient to refer to s 75B(1) in its present form as nothing turns on the amendment.

Gleeson CJ
Gaudron J
McHugh J
Gummow J
Hayne J
Callinan J

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television and whether damages may be recovered from the State by reason that it aided and abetted or was otherwise involved in a contravention of the Act for the purposes of s 75B(1) depend on the meaning of the word "person" in ss 6(3) and 75B(1) of the Act. More precisely they depend on whether, in those sections, the word "person" extends to a State. That is different from the question considered in *Bradken*.

14 In *Bradken*, the issue was whether the Commissioner for Railways for the State of Queensland, a corporation by statute, was a corporation for the purposes of the Act. In the view of the majority, that issue was to be approached by first asking whether the Commission was "entitled to the immunities of the Crown"¹², was "to be equated to the Crown in right of the State of Queensland"¹³ or was "an instrumentality or agent or authority of the Crown in right of the State of Queensland"¹⁴. Since there was no real dispute that the Commission was "representing the Crown" and had "all the powers, privileges, rights, and remedies of the Crown"¹⁵, the central issue was then identified as whether the Act was intended to "bind the Crown in right of the State of Queensland"¹⁶. It was held that it was not¹⁷.

15 The issue in *Bradken* was formulated in terms of a legislative intention to bind the Crown because of the common law rule or presumption that "the Crown is only bound by statute where there [is] express mention or necessary implication"¹⁸. That rule was developed in the context of a unitary system of

12 (1979) 145 CLR 107 at 113 per Gibbs ACJ.

13 (1979) 145 CLR 107 at 126 per Stephen J.

14 (1979) 145 CLR 107 at 132 per Mason and Jacobs JJ.

15 Section 8(1) of the *Railways Act* 1914 (Q).

16 (1979) 145 CLR 107 at 134 per Mason and Jacobs JJ. See also at 115 per Gibbs ACJ, 127 per Stephen J.

17 (1979) 145 CLR 107 at 123 per Gibbs ACJ, 129 per Stephen J, 136 per Mason and Jacobs JJ.

18 (1979) 145 CLR 107 at 127 per Stephen J, referring to *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58 at 61. See also at 116 per Gibbs ACJ, 135 per Mason and Jacobs JJ, 140 per Murphy J.

7.

government and it was necessary in *Bradken* to consider its application "in a federal setting"¹⁹. In particular, it was necessary to consider whether the presumption applied only "to the Crown in right of the *enacting* legislature" or "to the Crown in right of every government which represents it"²⁰. The latter view prevailed²¹.

16 It was subsequently held in *Bropho v Western Australia*²² that the presumption discussed in *Bradken* was no longer to be treated as an inflexible rule involving a stringent test of necessary implication and that, if a legislative intention to bind the Crown "appears when the relevant legislative provision is construed in a context which includes the presumption against the Crown and its instrumentalities or agents being so bound, that legislative intent must, as a matter of principle, prevail."²³ It is by reference to that decision that the appellants argue that the word "person" in ss 6(3) and 75B(1) of the Act includes a State.

17 Before turning to the appellants' argument, it is pertinent to note one other matter with respect to the decision in *Bropho*. It was said in that case that:

"the historical considerations which gave rise to a presumption that the legislature would not have intended that a statute bind the Crown are largely inapplicable to conditions in this country where the activities of the executive government reach into almost all aspects of commercial, industrial and developmental endeavour and where it is a commonplace for governmental commercial, industrial and developmental instrumentalities and their

19 (1979) 145 CLR 107 at 127 per Stephen J. See also at 116 per Gibbs ACJ, 140 per Murphy J.

20 (1979) 145 CLR 107 at 128 per Stephen J.

21 (1979) 145 CLR 107 at 122-123 per Gibbs ACJ, 129 per Stephen J, 136 per Mason and Jacobs JJ.

22 (1990) 171 CLR 1.

23 (1990) 171 CLR 1 at 22 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

Gleeson CJ
Gaudron J
McHugh J
Gummow J
Hayne J
Callinan J

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servants and agents ... to compete and have commercial dealings on the same basis as private enterprise."²⁴

The same considerations and the nature of our federal structure make expressions such as "shield of the Crown", "binding the Crown" and, more particularly, "binding the Crown in right of the Commonwealth" and "binding the Crown in right of the States" inappropriate and potentially misleading when the issue is whether the legislation of one polity in the federation applies to another.

18 Where the legislative provisions in question are concerned with the regulation of the conduct of persons or individuals, it will often be more appropriate to ask whether it was intended that they should regulate the conduct of the members, servants and agents of the executive government of the polity concerned, rather than whether they bind the Crown in one or other of its capacities. In other legislative contexts, slightly different questions may emerge. Thus, for example, where legislation regulates the use of land or other property, it will usually be more pertinent to ask whether the legislation was intended to apply to land or property owned by or on behalf of the polity in question. These matters can, however, be put to one side.

19 It is the State of New South Wales that is sued in these proceedings and the issue is whether "person" in ss 6(3) and 75B(1) of the Act extends to that State. That is different from the question whether the Act "binds the Crown in right of a State". And as will appear, its answer depends on textual considerations rather than the presumption considered in *Bradken* and *Bropho*.

20 Section 22(1) of the *Acts Interpretation Act* 1901 (Cth) relevantly provides that:

" In any Act, unless the contrary intention appears:

- (a) expressions used to denote persons generally (such as 'person', 'party', 'someone', 'anyone', 'no-one', 'one', 'another' and 'whoever'), include a body politic or corporate as well as an individual".

24 (1990) 171 CLR 1 at 19 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

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In that context, the question to be determined is whether, at the relevant time, the Act evinced an intention that the word "person" in ss 6(3) and 75B(1) should not extend to the States.

- 21 Until 1995, the Act was silent as to its application or non-application to the States but made specific provision, in s 2A, as to its application to the Commonwealth. That section relevantly provides²⁵:

- "(1) Subject to this section and section 44E, this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth carries on a business, either directly or by an authority of the Commonwealth.
- (2) Subject to the succeeding provisions of this section, this Act applies as if:
- (a) the Commonwealth, in so far as it carries on a business otherwise than by an authority of the Commonwealth; and
- (b) each authority of the Commonwealth (whether or not acting as an agent of the Crown in right of the Commonwealth) in so far as it carries on a business;
- were a corporation."

25 Section 2A was amended in 1995 to reflect the insertion of Pt IIIA into the Act, which, by s 44E, binds "the Crown in right of the Commonwealth, of each of the States, of the Australian Capital Territory and of the Northern Territory". Other amendments effected in 1995 were an addition to sub-s (3) to exempt the Commonwealth from pecuniary penalty and the insertion of sub-s (3A) to provide that the exemptions from prosecution and pecuniary penalty do not apply to an authority of the Commonwealth. Sub-section (1) was also amended in 1989 to delete a reference to Pt X not binding the Crown in right of the Commonwealth. Those amendments have no bearing on the question whether "person" in ss 6(3) and 75B(1) of the Act at any stage extended or now extends to the States and it is, thus, convenient to refer to s 2A in its present form.

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In 1995, ss 2B²⁶ and 2C²⁷ were inserted into the Act with the consequence that Pts IV and XIB now bind the States in so far as they carry on business either directly or by State authorities. The actions of which the appellants complain occurred prior to the insertion of those sections and the question is whether, at that stage, "person" in ss 6(3) and 75B(1) extended to a State. And that is a question that can be answered without reference to ss 2B and 2C.

22 Although the rule of construction embodied in the Latin maxim *expressio unius est exclusio alterius* is not a rule of universal application²⁸, it is to be inferred

26 Section 2B provides:

"(1) The following provisions of this Act bind the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory, so far as the Crown carries on a business, either directly or by an authority of the State or Territory:

(a) Part IV;

(b) Part XIB;

(c) the other provisions of this Act so far as they relate to the above provisions.

(2) Nothing in this Act renders the Crown in right of a State or Territory liable to a pecuniary penalty or to be prosecuted for an offence.

(3) The protection in subsection (2) does not apply to an authority of a State or Territory."

Prior to being amended in 1997, s 2B only applied Pt IV of the Act to the States and Territories.

27 Section 2C sets out activities that do not amount to carrying on a business for the purposes of ss 2A and 2B.

28 *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575 per Mason CJ, Dawson, Toohey and Gaudron JJ; *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 250 per Deane, Dawson, Toohey and Gaudron JJ; *PMT Partners Pty Ltd (In Liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 311 per Brennan CJ, Gaudron and McHugh JJ, 320 (Footnote continues on next page)

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from the precise specification in s 2A of the manner in which the Act "binds the Crown in right of the Commonwealth" that that section was intended to be a complete and exhaustive statement of the Act's application to the Commonwealth. That being so, the specification in s 2A(2) that the Act is to apply to the Commonwealth "as if [it] were a corporation" leaves no room for it to apply on the further basis that, in ss 6(3) and 75B(1), the word "person" extends to the Commonwealth. Thus, the terms of s 2A indicate a contrary intention for the purposes of s 22(1)(a) of the *Acts Interpretation Act* so that the word "person" in ss 6(3) and 75B(1) does not extend to the Commonwealth body politic.

23 The conclusion that the word "person" in ss 6(3) and 75B(1) does not extend to the Commonwealth body politic, of itself, tells strongly against its extending to the bodies politic constituted by the States. Of greater significance, however, is the consideration that if the word "person" did extend to a State, the Act's application would not be confined, as it is in the case of the Commonwealth, to its business activities. At least that is so in the case of s 75B(1). As a matter of construction, there is no reason why s 75B(1), assuming it extends to the States, would not operate to make them liable for conduct which constitutes involvement in another person's contravention of a provision of Pts IV, IVA or V even though that conduct was not in the course of any business activity but was engaged in solely for traditional governmental purposes.

24 It is extremely unlikely that the Commonwealth Parliament intended that s 75B(1) should apply to activities of the State engaged in solely for traditional governmental purposes, particularly when it limited the Act's application to the Commonwealth to its business activities. And there is no basis for thinking that the word "person" bears different meanings in ss 6(3) and 75B(1). Given these considerations and given, also, that the word "person" in ss 6(3) and 75B(1) does not extend to the Commonwealth, it is to be concluded that the Act evinces an intention that, contrary to s 22(1)(a) of the *Acts Interpretation Act*, a State is not a "person" for the purpose of those sections.

Section 64 of the *Judiciary Act*

25 Section 64 of the *Judiciary Act* provides:

per Toohey and Gummow JJ; *Federal Commissioner of Taxation v Rowe* (1997) 187 CLR 266 at 277 per Brennan CJ, Dawson, Toohey and McHugh JJ.

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" In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject."

The appellants contend in this Court, as they did in the Federal Court, that, if ss 6(3) and 75B(1) of the Act do not apply to the State of New South Wales of their own force, s 64 of the *Judiciary Act* operates so as to apply them to the State in these proceedings.

26 Before turning to the appellants' argument with respect to s 64, it is convenient to note two matters. The first is that s 64 applies only in suits in federal jurisdiction²⁹. Even within that field of operation, there are statements in the decided cases questioning the extent to which s 64 validly applies to the States³⁰. As it happens, it is not necessary to consider that question in this case.

27 The second matter that should be noted is that this case has been conducted on the assumption that, even if ss 6(3) and 75B(1) of the Act do not apply to the States, there is but one matter or controversy, to which the State is a party, which is a matter "arising under [a law] made by the Parliament"³¹ and, accordingly, that it is a matter within federal jurisdiction. It also happens that it is unnecessary to examine that assumption.

28 It was held in *Maguire v Simpson* that s 64 of the *Judiciary Act* has an ambulatory operation so that it may extend rights in proceedings in which the

29 *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 223 per Stephen J, 234 per Murphy J; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 474 per Gummow J; *Commonwealth of Australia v State of Western Australia* [1999] HCA 5 at [49] per Gleeson CJ and Gaudron J, [136] per Gummow J.

30 See, for example, *Maguire v Simpson* (1977) 139 CLR 362 at 401 per Mason J, 404-405 per Jacobs J; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 203 per Gibbs J; *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 263 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ.

31 Section 76(ii) of the Constitution.

Commonwealth or a State is a party by reference to subsequent legislation³². It was also held in that case³³, and reaffirmed in *The Commonwealth v Evans Deakin Industries Ltd*³⁴, that s 64 operates to apply substantive as well as procedural laws, although that distinction is, perhaps, not one that sheds any great light on this or any other area of the law³⁵. And, it follows from *Evans Deakin* that s 64 may operate to confer a cause of action against the Commonwealth which would not have existed "if s 64 had not equated the substantive rights of the parties to those in a suit between subject and subject."³⁶ The appellants rely on these decisions, particularly *Evans Deakin*, to support their argument that s 64 enables them to proceed against the State of New South Wales by reason of ss 6(3) and 75B(1) of the Act, even though those provisions do not of their own force apply to the State.

29 The fallacy in the appellants' argument is that s 64 does not operate to confer rights by reference to all subsequent legislation. For example, it does not operate to confer rights by reference to a subsequent State law that is inconsistent with a law of the Commonwealth and invalidated by s 109 of the Constitution. Thus, it was held in *Dao v Australian Postal Commission*³⁷ that s 64 did not subject the

32 (1977) 139 CLR 362 at 388 per Gibbs J, 395 per Stephen J, 397 per Mason J, 407 per Murphy J. See also *Moore v The Commonwealth* (1958) 99 CLR 177 at 182 per Dixon CJ; *Suehle v The Commonwealth* (1967) 116 CLR 353 at 356-357; *Downs v Williams* (1971) 126 CLR 61 at 100 per Gibbs J; *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 263 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ.

33 (1977) 139 CLR 362 at 373 per Barwick CJ, 377-378, 388 per Gibbs J, 400 per Mason J, 405 per Jacobs J, 407 per Murphy J.

34 (1986) 161 CLR 254 at 262 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ. See also *Commonwealth of Australia v State of Western Australia* [1999] HCA 5 at [247] per Hayne J.

35 See, for example, in relation to choice of law questions *McKain v RW Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 57-58, 62 per Gaudron J. See also *The Commonwealth v Mewett* (1997) 191 CLR 471 at 549-550 per Gummow and Kirby JJ.

36 (1986) 161 CLR 254 at 267, referring to *Pitcher v Federal Capital Commission* (1928) 41 CLR 385.

37 (1987) 162 CLR 317.

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Commonwealth, in the form of the Australian Postal Commission, to the *Anti-Discrimination Act 1977* (NSW), that Act being inconsistent with the conferral on the Commission of a power to "appoint as officers such number of persons as it thinks necessary"³⁸. So, too, it was held in *Deputy Commissioner of Taxation v Moorebank Pty Ltd* that "where a Commonwealth legislative scheme is complete upon its face, s 64 will not operate to insert into it some provision of State law for whose operation the Commonwealth provisions can, when properly understood, be seen to have left no room."³⁹

30 It was said in *Dao* that s 64 was to be "construed as intended to extend a litigant's rights in a suit in particular circumstances only if, and to the extent that, there be no directly applicable and inconsistent (in the relevant sense) Commonwealth law already regulating those circumstances"⁴⁰. The Court was there speaking of inconsistency of the kind upon which s 109 of the Constitution operates, namely, inconsistency between Commonwealth and State laws. But there can be inconsistency in another sense. There can be inconsistency between the statutes of a single legislature.

31 It was acknowledged in *Moorebank* that the "application or operation [of s 64] to or with respect to cases falling within the provisions of a subsequent Act will be excluded to the extent that such application or operation would be inconsistent with those subsequent statutory provisions"⁴¹. That is because s 64 is "neither a constitutional provision nor an entrenched law ... [and] can be expressly or impliedly amended or repealed ... by a subsequent Act"⁴².

32 Once there is discerned an intention that ss 6(3) and 75B(1) of the Act not apply to the States, it follows that, to that extent, those provisions, being provisions

38 Section 42(1) of the *Postal Services Act 1975* (Cth).

39 (1988) 165 CLR 55 at 64.

40 (1987) 162 CLR 317 at 331-332.

41 (1988) 165 CLR 55 at 63, referring to *Goodwin v Phillips* (1908) 7 CLR 1 at 7 per Griffith CJ.

42 (1988) 165 CLR 55 at 63. See also *Downs v Williams* (1971) 126 CLR 61 with respect to the application of *Claims against the Government and Crown Suits Act 1912* (NSW) in circumstances involving a subsequent inconsistent New South Wales Act.

of a later Commonwealth Act, impliedly repeal s 64 of the *Judiciary Act*. Accordingly, s 64 does not operate to apply those provisions to the State of New South Wales in these proceedings.

Section 5(2) of the *Crown Proceedings Act* 1988 (NSW)

33 Section 5(2) of the *Crown Proceedings Act* provides:

" Civil proceedings against the Crown shall be commenced in the same way, and the proceedings and rights of the parties in the case shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side, and shall bear interest, as in an ordinary case between subject and subject."

34 The appellants contend that, if s 64 of the *Judiciary Act* does not apply ss 6(3) and 75B(1) of the Act to the State of New South Wales in these proceedings, that result is achieved by s 5(2) of the *Crown Proceedings Act*. It is common ground that the question whether s 5(2) has that effect is to be decided on the assumption that there is but one matter or controversy to which the State is a party and that it "aris[es] under [a law] made by the Parliament"⁴³ and is, thus, within federal jurisdiction. And on that assumption, the appellants' argument must fail.

35 Section 5(2) of the *Crown Proceedings Act* cannot apply of its own force in proceedings which invoke the judicial power of the Commonwealth⁴⁴. It can only apply if "picked up" by s 79 of the *Judiciary Act*. That section provides:

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

43 Section 76(ii) of the Constitution.

44 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 79 per Menzies J, 84 per Walsh J, 87 per Gibbs J, 93 per Mason J. See also *Pedersen v Young* (1964) 110 CLR 162 at 165 per Kitto J, 167 per Menzies J; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 135 per Gaudron J; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 552-553 per Gummow and Kirby JJ.

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- 36 Section 79 of the *Judiciary Act* cannot "pick up" s 5(2) of the *Crown Proceedings Act* because a law of the Commonwealth, namely, s 64 of the *Judiciary Act*, otherwise provides. There is simply no room for the concurrent operation of s 64 of the *Judiciary Act* and s 5(2) of the *Crown Proceedings Act* in matters within federal jurisdiction.

The answer to the first question

- 37 It follows that the claims made under the Act against the State of New South Wales cannot be maintained. The Full Court was correct in ordering that they be struck out. However, there are two difficulties with the form of question 1 and it is necessary to advert to those difficulties before that question can be answered.

- 38 The first difficulty is that, on analysis, the precise question which had to be decided was not whether, at the relevant time, the Act bound the State of New South Wales, but whether the State was a "person" for the purposes of ss 6(3) and 75B(1). The second is that the answer to the question does not depend on the material contained in documents other than the Amended Statement of Claim and it would have been preferable if no reference had been made to other material. Because of these matters, the Full Court's answer to question 1 should be set aside and, instead, it should be answered:

"The claim made under the *Trade Practices Act* 1974 (Cth) against the State of New South Wales in these proceedings cannot be maintained. Otherwise, inappropriate to answer."

Questions 2 and 3: the position of the respondents, other than the State of New South Wales

- 39 Question 2 asked:

"Whether, having regard to the matters pleaded in the amended Statement of Claim and the material contained in the agreed bundle of documents, the respondents other than the State, or any of them, are immune from the claims contained in the amended Application and amended Statement of Claim herein, in light of the principles referred to in *Bradken*?"

Question 3 was designed to raise a similar issue, namely, whether, on the "assumption that the claim against the State under the *Fair Trading Act* 1987 (NSW) [was] not maintainable", the other respondents were immune from suit under the *Fair Trading Act*. The Full Court answered both questions as follows:

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"Yes, to the extent that the acts or omissions giving rise to those claims were not outside the scope of the HomeFund scheme as devised by the State of New South Wales, or that those acts or omissions were carried out pursuant to the direction or request of the State of New South Wales."

And a declaration was made to that effect.

40 To understand questions 2 and 3, the Full Court's answers to them and the declaration that was made, it is necessary to say something of the facts in *Bradken*. In that case, the Commissioner for Railways had entered into a contract by which it agreed to acquire from the respondent companies freight cast steel bogies and other equipment necessary for the construction of railway rolling stock. This was not to be done by way of competitive tender as it had been in the past and it was alleged that two of the respondent companies had agreed to provide financial assistance to the Commissioner on condition that none of the equipment be acquired from their competitors. No orders were sought against the Commissioner but orders were sought to restrain the companies from supplying equipment pursuant to the contract and, also, to prevent the provision of financial assistance⁴⁵.

41 It was held in *Bradken* that the relief sought against the respondent companies should be refused because not only did the Act not apply to the Commissioner directly but it did "not apply so as to prejudice its interests when in contractual relationship with parties to whom the Act clearly applie[d] or when otherwise interested in transactions affecting those parties"⁴⁶. That view was expressed by reference to the decision in *In re Telephone Apparatus Manufacturers' Application*⁴⁷, a decision to which the Full Court also referred in this case⁴⁸.

42 It seems that the rule of construction applied in *Telephone Apparatus* and, also, in *Bradken* was the common law rule that a statute is not to be construed as divesting the Crown of its property, rights, interests or prerogatives in the absence

45 (1979) 145 CLR 107 at 111-113 per Gibbs ACJ.

46 (1979) 145 CLR 107 at 129 per Stephen J. See also at 124 per Gibbs ACJ, 137-138 per Mason and Jacobs JJ.

47 [1963] 1 WLR 463; [1963] 2 All ER 302.

48 (1996) 68 FCR 213 at 229, 231.

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of express words or necessary implication to that effect⁴⁹. The Full Court's view that the respondents, other than the State of New South Wales, are immune from claims under the Act to the extent that their acts and omissions "were not outside the scope of the HomeFund scheme" and "were carried out pursuant to the direction or request of the State of New South Wales" extends beyond that principle of construction. Moreover, it extends beyond what was decided in *Bradken*. However, that is not an issue that need now be pursued. There is a more fundamental difficulty with questions 2 and 3.

- 43 As with question 1, questions 2 and 3 were asked by reference to "the matters pleaded in the amended Statement[s] of Claim and the material contained in the agreed bundle of documents". The Full Court noted that there was some doubt as to the status of those documents but said they "provide some general background information concerning the nature of the HomeFund scheme and the roles of the parties."⁵⁰ It added:

"However, there is no agreed statement of facts before the [C]ourt and no findings of fact have been made. Nor is it possible for the Court in the present proceedings to make any such findings."

- 44 Notwithstanding its inability to make factual findings, the Full Court expressed the view, in relation to questions 2 and 3, that "the New South Wales government was intimately involved in both the conception and marketing of the [HomeFund] scheme" and that, to the extent that the other respondents were involved, "they seem to have been acting as mere agents of the government"⁵¹. The answers given to questions 2 and 3 and the declaration were premised on that factual basis.

- 45 The purpose of a judicial determination has been described in varying ways. But central to those descriptions is the notion that such a determination includes a conclusive or final decision based on a concrete and established or agreed situation

49 See *Attorney-General v Hancock* [1940] 1 KB 427 at 439 per Wrottesley J, referred to in *Telephone Apparatus* [1963] 1 WLR 463 at 479 per Upjohn LJ; [1963] 2 All ER 302 at 311.

50 (1996) 68 FCR 213 at 217.

51 (1996) 68 FCR 213 at 237.

which aims to quell a controversy. In *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd*⁵², Kitto J said:

"[J]udicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons... [T]he process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which ... entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist."

46 Similarly, Professor Borchard in his pioneering work, *Declaratory Judgments* stated⁵³:

"A judgment of a court is an affirmation, by the authorized societal agent of the state ... of the legal consequences attending a proved or admitted state of facts. It is a conclusive adjudication that a legal relation does or does not exist. The power to render judgments, the so-called 'judicial power,' is the power to adjudicate upon contested or adverse legal rights or claims, to interpret the law, and to declare what the law is or has been. It is the final determination of the rights of the parties in an action which distinguishes the judgment from all other public procedural devices to give effect to legal rights." (footnotes omitted)

47 Because the object of the judicial process is the final determination of the rights of the parties to an action, courts have traditionally refused to provide answers to hypothetical questions⁵⁴ or to give advisory opinions. The jurisdiction with respect to declaratory relief has developed with an awareness of that

52 (1970) 123 CLR 361 at 374.

53 (1934) at 6-7.

54 *Luna Park Ltd v The Commonwealth* (1923) 32 CLR 596 at 600 per Knox CJ; *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia* (1925) 36 CLR 442 at 451 per Isaacs J; *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 10 per Gibbs J.

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traditional attitude. In *In re F (Mental Patient: Sterilisation)*⁵⁵, Lord Goff of Chieveley said that:

"a declaration will not be granted where the question under consideration is not a real question, nor where the person seeking the declaration has no real interest in it, nor where the declaration is sought without proper argument, eg in default of defence or on admissions or by consent."

By "not a real question", his Lordship was identifying what he called the "hypothetical or academic"⁵⁶. The jurisdiction includes the power to declare that conduct which has not yet taken place will not be in breach of a contract or a law and such a declaration will not be hypothetical in the relevant sense. Barwick CJ pointed this out in *The Commonwealth v Sterling Nicholas Duty Free Pty Ltd*⁵⁷. However, that is not the present case.

48 It is true that some have seen the use of the declaratory judgment as little more than the giving of an advisory opinion⁵⁸. However, one crucial difference between an advisory opinion and a declaratory judgment is the fact that an advisory opinion is not based on a concrete situation and does not amount to a binding decision raising a *res judicata* between parties. Thus, the authors of one recent text on declaratory judgments⁵⁹ emphasise that, where the dispute is divorced from the facts, it is considered hypothetical and not suitable for judicial resolution by way of declaration or otherwise. They say⁶⁰:

55 [1990] 2 AC 1 at 82.

56 [1990] 2 AC 1 at 82. The New South Wales Court of Appeal (Mason P, Sheller and Powell JJA) in *Sanderson Computers Pty Ltd v Urica Library Systems BV* (1998) 44 NSWLR 73 set aside a declaration on the ground that it dealt with a hypothetical question.

57 (1972) 126 CLR 297 at 305.

58 Foster, "The Declaratory Judgment in Australia and the United States", (1958) 1 *Melbourne University Law Review* 347 at 373.

59 Zamir & Woolf, *The Declaratory Judgment*, 2nd ed (1993).

60 Zamir & Woolf, *The Declaratory Judgment*, 2nd ed (1993) at 132.

"If ... the dispute is not attached to specific facts, and the question is only whether the plaintiff is *generally* entitled to act in a certain way, the issue will still be considered theoretical. The main reason for this is that there may be no certainty that such a general declaration will settle the dispute finally. Subsequent to that declaration a person (the defendant himself or someone else) may be adversely affected by a particular act of the plaintiff. It may then be doubtful whether this act is covered by the declaration. In such a case the affected person will probably be entitled to raise the issue again on its special facts. Indeed, such a declaration will in effect be a mere advisory opinion."

49 As the answers given by the Full Court and the declaration it made were not based on facts, found or agreed, they were purely hypothetical. At best, the answers do no more than declare that the law dictates a particular result when certain facts in the material or pleadings are established. What those facts are is not stated, nor can they be identified with any precision. They may be all or some only of the facts. What facts are determinative of the legal issue involved in the question asked is left open. Such a result cannot assist the efficient administration of justice. It does not finally resolve the dispute or quell the controversy. Nor does it constitute a step that will in the course of the proceedings necessarily dictate the result of those proceedings. Since the relevant facts are not identified and the existence of some of them is apparently in dispute, the answers given by the Full Court may be of no use at all to the parties and may even mislead them as to their rights. Courts have traditionally declined to state - let alone answer - preliminary questions when the answers will neither determine the rights of the parties nor necessarily lead to the final determination of their rights. The efficient administration of the business of courts is incompatible with answering hypothetical questions which frequently require considerable time and cause considerable expense to the parties, expense which may eventually be seen to be unnecessarily incurred.

50 The procedure adopted in the present case is far removed from that concerned with demurrers, a form of procedure which assumes the truth of a particular set of facts. If the "facts" which are the basis of an answer to a legal question are identified, that answer will have utility for the parties provided that no other evidence could add to or qualify those "facts". In such a case, the parties' rights will be determined when the evidence finally determines the existence or non-existence of those "facts". Because that is so, demurrers have been much used in determining the rights of parties to litigation. The demurrer proceeds upon identified facts and enables a court to declare whether or not they provide a cause of action or a defence or reply to another party's pleading. Unlike the present case,

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however, a demurrer assumes that the pleadings exhaust the universe of relevant factual material. The utility of demurrers is, however, heavily dependent on the pleadings containing all the relevant facts. When the parties are uncertain whether further investigation will reveal further factual material, the utility of the demurrer is diminished.

51 It cannot be doubted that in many cases the formulation of specific questions to be tried separately from and in advance of other issues will assist in the more efficient resolution of the matters in issue. However, that will be so only if the questions are capable of final answer and are capable of being answered in accordance with the judicial process.

52 Preliminary questions may be questions of law, questions of mixed law and fact or questions of fact. Some questions of law can be decided without any reference to the facts. Others may proceed by reference to assumed facts, as on demurrer or some other challenge to the pleadings. In those cases, the judicial process is brought to bear to give a final answer on the question of law involved. Findings of fact are made later, if that is necessary. Where a preliminary question is a pure question of fact that, too, can be answered finally in accordance with the judicial process if the parties are given an opportunity to present their evidence and, also, to challenge the evidence led against them.

53 Special problems can arise where the preliminary question is one of mixed fact and law. As Brooking J pointed out in *Jacobson v Ross*⁶¹, it is necessary in that situation that there be precision both in formulating the question and in specifying the facts upon which it is to be decided. His Honour added:

" Care must be taken to ensure that, in one way or another, all the facts that are on any fairly arguable view relevant to the determination of the question are ascertainable ... as facts assumed to be correct for the purposes of the preliminary determination, or as facts which both sides accept as correct, or as facts which are to be judicially determined. Failure to do this, and in particular failure to perceive that the facts alleged in a pleading are some only of the facts relevant to the determination of the preliminary question, may make the order for preliminary determination unfruitful."

61 [1995] 1 VR 337 at 341, referring to *Nissan v Attorney-General* [1970] AC 179 at 242-243 per Lord Pearson.

Quite apart from rendering the "order for preliminary determination unfruitful", the failure to identify the relevant facts or the means by which they are to be ascertained may result in procedures which do not conform to the judicial process. That is a matter to which it will be necessary to return.

54 It is clear that questions 2 and 3 were formulated as questions of mixed law and fact. But the relevant facts were neither agreed nor found. Presumably, it was for this reason that the respondents to this appeal declined to argue that questions 2 and 3 were answered correctly. Rather, they argued that, so far as concerns the answers to those questions and the declaration made to give effect to them, special leave to appeal should be revoked.

55 The argument that special leave should be revoked was made by reference to the appellants' acquiescence in the formulation of questions 2 and 3 and their failure to appeal from the order that those questions be determined as preliminary issues. Moreover, according to the argument, they later requested the Full Court to give declaratory relief in terms of the answers given. This last matter may be disposed of shortly. It is clear that the appellants requested the grant of declaratory relief so that there would be no doubt as to the competence of any appeal to this Court⁶². Had the appellants not been able to appeal to this Court, their claims against the respondents, other than the State of New South Wales, would have been remitted to a single judge of the Federal Court to be determined in accordance with the answers given without the facts ever being found. And that will be the result if special leave is revoked.

56 Judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process⁶³. And that requires that the parties be given an opportunity to present their evidence and to

62 As to the need for answers to a special or stated case to finally determine the parties' rights before an appeal lies to this Court, see *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 299-304 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.

63 See *Harris v Caladine* (1991) 172 CLR 84 at 150 per Gaudron J, referring to *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 per Kitto J. See also *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496 per Gaudron J; *Polyukhovich v The Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 532 per Mason CJ, 703-704 per Gaudron J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 67 per McHugh J; *Nicholas v The Queen* (1998) 72 ALJR 456 at 473-474 per Gaudron J; 151 ALR 312 at 335-336.

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challenge the evidence led against them⁶⁴. It is contrary to the judicial process and no part of judicial power to effect a determination of rights by applying the law to facts which are neither agreed nor determined by reference to the evidence in the case. However, that is what happened in this case. To revoke special leave to appeal would be to sanction departure from the judicial process – a course that should not be taken even if the appellants acquiesced in the formulation of questions 2 and 3 and in the procedures which led to the answers given and the consequential orders made by the Full Court.

57 Furthermore, the answers given by the Full Court to questions 2 and 3 are more likely to impede than to facilitate the future course of the litigation. While the Full Court said that it could not make any findings of fact, its answers to questions 2 and 3 are predicated on a relationship of agency which the Full Court has implicitly found as the result of "the amended Statement of Claim and the material in the agreed bundle of documents". The result of the Full Court's answer is that the action can proceed only to the extent that there was conduct outside that relationship of agency. Thus, in effect the plaintiff is burdened with disproving an agency relationship. And what is the trial judge to make of the statement that "[t]o the extent that others were involved, they seem to have been acting as mere agents of the government"? Once an issue is determined at the interlocutory stage, and the trial continues, the primary judge's hand is tied in respect of all matters of fact and law involved in that determination. In *Fidelitas Shipping Co Ltd v V/O Exportchleb*⁶⁵, Diplock LJ pointed out :

"Where the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance argument or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is by way of appeal from the interlocutory judgment and, where appropriate, an application to the appellate court to adduce further evidence".

58 Even if the answers to questions 2 and 3 or the above statement of the Full Court do no more than "provide guidance to the parties" so that all matters can be

64 See *Harris v Caladine* (1991) 172 CLR 84 at 150 per Gaudron J; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 496 per Gaudron J.

65 [1966] 1 QB 630 at 642.

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re-argued, the answers to those questions and that statement were given by the highest tribunal in the Federal Court structure. A trial judge would naturally be loath to depart from them. The answers to questions 2 and 3, the difficulty of knowing what "facts" were determinative of the answer and the above statement must hamper the future course of the litigation and seriously disadvantage a party who sought to disregard the answers and the above statement concerning agents in a hearing at first instance before a single judge.

- 59 The course which has been adopted in other cases in which questions have been answered without a proper factual basis has been to set aside the answers given and, instead, to answer the questions "Inappropriate to answer"⁶⁶. That is the course that should have been taken in this case by the Full Court in relation to questions 2 and 3.

The final question: s 47 of the *Legal Aid Commission Act* 1979 (NSW)

- 60 The final question involved in this appeal is question 5 of the questions referred to the Full Court. That question was:

"Are the applicants protected by section 47 of the *Legal Aid Commission Act* 1979 (NSW) against liability for the payment of the whole or any part of the costs that might be ordered by the Court against them if unsuccessful in these proceedings?"

The question was answered "No".

- 61 Section 47 of the *Legal Aid Commission Act* provides, in sub-s (1):

" Where a court or tribunal makes an order as to costs against a legally assisted person:

- (a) except as provided by subsections (2), (3), (3A), (4) and (4A), the Commission shall pay the whole of those costs; and
- (b) except as provided by subsections (3), (3A), (4) and (4A), the legally assisted person shall not be liable for the payment of the whole or any part of those costs."

⁶⁶ See, for example, *Jacobson v Ross* [1995] 1 VR 337; *Re Alcoota Land Claim No 146* (1998) 82 FCR 391; *Richards v Naum* [1967] 1 QB 620; *Attia v British Gas Plc* [1988] QB 304.

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The Commission is the Legal Aid Commission of New South Wales⁶⁷.

62 It is unnecessary to refer further to sub-ss (3), (3A), (4) and (4A) which, as is implicit in s 47(1), specify the circumstances in which the Commission may decline to pay the whole or any part of the costs ordered, in which event the legally assisted person is liable for them. It is, however, necessary to refer to sub-s (2) which provides:

" The Commission shall not pay an amount in excess of \$5,000 (or such other amount as the Commission may from time to time determine):

- (a) except as provided by paragraph (b), in respect of any one proceeding; or
- (b) in respect of each party in any one proceeding, being a party who has, in the opinion of the Commission, a separate interest in the proceeding."

The appellants contend that s 79 of the *Judiciary Act* "picks up" s 47 of the *Legal Aid Commission Act* and that, as legally assisted persons, they are, thus, entitled to the protection of that section.

63 Except as otherwise provided by the Constitution or the laws of the Commonwealth, s 79 of the *Judiciary Act* makes State laws "binding on all Courts exercising federal jurisdiction in that State ... in all cases to which they are applicable." Section 47 of the *Legal Aid Commission Act* only begins to operate when an order for costs has been made. Until that occurs, s 47 has no application at all and, thus, cannot be "picked up" by s 79 of the *Judiciary Act*.

64 Orders were made by Wilcox J in interlocutory proceedings as to the maximum costs orders that might be made in these matters with respect to the proceedings in relation to the preliminary questions⁶⁸. And, a costs order was made by the Full Court in the third appeal within the limits earlier set by the order of Wilcox J. If the costs order made by the Full Court exposes the appellants in the third appeal to costs in greater sum than that payable by the Legal Aid Commission under s 47(2) of the *Legal Aid Commission Act* or if costs orders are made in the other matters, a question may arise in subsequent enforcement proceedings as to whether s 79 of the *Judiciary Act* then operates to "pick up" s 47 of the *Legal Aid Commission Act*. The question would not be one of inconsistency

67 See s 4(1) of the *Legal Aid Commission Act*.

68 *Woodlands v Permanent Trustee Company Ltd* (1995) 58 FCR 139.

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because s 47 is predicated on "a court or tribunal" making an order for costs which, in context, means a State court or tribunal⁶⁹.

65 It seems clear enough that were the question whether s 79 of the *Judiciary Act* "picks up" s 47 of the *Legal Aid Commission Act* to arise in proceedings to enforce a costs order of the Federal Court, it would be answered "No". That is because s 43 of the *Federal Court of Australia Act* provides as to the costs of proceedings in that Court and, thus, otherwise provides for the purpose of s 79 of the *Judiciary Act*. It is clear that that was the issue intended to be raised by the question referred to the Full Court. However, that question has not yet arisen. Accordingly, question 5 should also have been answered "Inappropriate to answer".

Conclusion

66 The appeal should be allowed to the extent necessary to set aside the Full Court's answers to questions 1, 2, 3 and 5 and to substitute instead the following answers:

Question 1: The claim made under the *Trade Practices Act* 1974 (Cth) against the State of New South Wales in these proceedings cannot be maintained. Otherwise, inappropriate to answer.

Question 2: Inappropriate to answer.

Question 3: Inappropriate to answer.

Question 5: Inappropriate to answer.

69 See s 12(1) of the *Interpretation Act* 1987 (NSW) which provides:

" In any Act or instrument:

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

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And Orders 3, 4 and 6 of the Full Court's Orders, which are consequential on that Court's answers to questions 2, 3 and 5, should also be set aside.

67 In substance, the appellants have failed in their claims against the State of New South Wales. Accordingly, they should pay the State's costs in this Court and in the Full Court. As earlier indicated, however, orders were made by Wilcox J limiting their liability for the costs of the proceedings in relation to the determination of the preliminary questions. By those orders the maximum liability in respect of the costs of the State was \$10.00 in the first two appeals and \$12,500 in the third appeal⁷⁰. Apparently, those orders were not the subject of appeal and it was not contended in this Court that the appellants should not have the benefit of them. Accordingly, the order in favour of the State for the costs of the proceedings in the Full Court of the Federal Court should be subject to a maximum of \$10.00 in the first and second appeals and \$12,500 in the third appeal.

68 So far as concerns the respondents, other than the State of New South Wales, neither they nor the appellants can claim to have been successful in this Court on the issues intended to have been raised by questions 2 and 3. The respondents have, perhaps, had a limited measure of success with respect to the final question, although that question should not have been asked. The appropriate course, in the circumstances, is for the appellants and respondents, other than the State of New South Wales, the sixth and eighth respondents in the first appeal and the eighth respondent in the second appeal⁷¹, to bear their own costs of the proceedings in this Court and in the Full Court of the Federal Court.

⁷⁰ (1995) 58 FCR 139 at 149.

⁷¹ As earlier mentioned, there were solicitors who were respondents to the appeals but took no part in proceedings in this Court.

- 69 KIRBY J. These appeals from the Full Court of the Federal Court of Australia⁷² raise multiple issues of constitutional law and federal statutory law. However, on the way to resolving them, a question, procedural in character, arose during argument in this Court. It was suggested that most, if not all, of the questions ordered for separate and preliminary trial⁷³, were hypothetical so that they should not be answered and that the Full Court of the Federal Court had erred by failing to so hold.

Responding effectively to complex litigation

- 70 The history of this litigation in the Federal Court is one of considerable complexity. This was probably inescapable given the many differentiated questions raised by the three actions out of which the appeals arose; the representative character of the applicants in two of the three proceedings; the separate groups on whose behalf they brought the proceedings⁷⁴; the different times at which it was alleged the causes of action of the applicants accrued; the different respondents in the respective proceedings; and the large number of respondents. Some of the respondents were common to all proceedings. These included the State of New South Wales ("the State"), Permanent Trustee Company Limited, FANMAC Ltd and Permanent Custodians Limited. Additional corporate respondents, being cooperative societies, were also named as parties in particular proceedings. The latter were variously described as "agents" for, or "co-venturers" with, the State in the promotion and execution of the HomeFund scheme which lies at the centre of this litigation.

- 71 The course which the proceedings followed in the Federal Court can only be understood against the background of the unavoidable complexity, costs and delays which would attend the judicial resolution of the appellants' individual claims by separate and individual proceedings. Only then will the desire of the parties (and of the Federal Court itself) to find an efficient way to proffer for judicial decision any justiciable issues common to the many claims before that Court be appreciated. The Constitution does not require this Court to adopt a view of the judicial power which would unduly restrict innovative procedures and flexible remedies made available in the courts to resolve new and complex problems in modern litigation. Within applicable constitutional restraints the

72 *Sub nom Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213.

73 Orders of Wilcox J, 1 June 1995. See *Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213 at 216-217.

74 In the *Woodlands* and *Ballard* proceedings, they did so pursuant to the *Federal Court of Australia Act* 1976 (Cth), Pt IVA. In the *Conca* proceedings, they did so on behalf of two separate groups falling into different categories. See *Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213 at 215-216.

procedures of the courts should be allowed to adapt to the necessities of the time. Otherwise the inevitable consequence will be that courts become irrelevant to, or effectively unavailable for, the determination of the disputes of parties such as those now before this Court. That cannot be the purpose and meaning of the Australian Constitution in providing for the Judicature as a branch of the government of the nation.

- 72 It was not alleged at any stage of this lengthy litigation, until it reached argument before this Court, that the Constitution stood as a barrier to the procedures adopted in the Federal Court. Neither in its substance, nor in the way the question arose, am I convinced that there is any constitutional objection to, or constraint upon, the course followed by the Federal Court. The approach taken can in no way be characterised as seeking an advisory opinion, unconstitutional by virtue of its hypothetical and abstract nature⁷⁵. This was a matter involving real litigants in a bona fide dispute before a federal court. It was therefore proper, and in this matter virtually essential, that attention should be given to the issue whether any common questions could be separated and decided prior to the main trial.

The course of the HomeFund litigation in the Federal Court

- 73 What happened in the Federal Court is described in the decision now under appeal⁷⁶, in the submissions of counsel before this Court (which were broadly agreed) and in contemporary correspondence passing between the solicitors at the time when the procedural arrangements were settled. The facts are that on 1 June 1995, a single judge of the Federal Court (Wilcox J) directed that six preliminary questions be heard separately from, and in advance of, any other questions in the proceedings. Following discussion with the parties' representatives, and consultation with the Chief Justice of the Federal Court, Wilcox J referred the preliminary questions to a Full Court for answer⁷⁷. Later, at the request of the parties, that Court deferred consideration of the sixth question (which concerned whether any claim for breach of fiduciary duty was maintainable against the State)⁷⁸. The affirmative answer to another question (relating to whether the proceedings were maintainable in the Federal Court⁷⁹) was not challenged in this Court. In this way, the issues before us were narrowed to four questions. I will

75 See, for example, *In re Judiciary and Navigation Acts* (1921) 29 CLR 257.

76 *Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213 at 216-217.

77 *Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213 at 216-217.

78 *Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213 at 217.

79 Question 4.

not repeat their terms. They are set out in the majority reasons. Essentially, they were designed to present for decision by the Full Court three issues concerning:

1. The legal admissibility of the purported proceedings against the State pursuant to the *Trade Practices Act* 1974 (Cth). (Question 1).
2. The legal admissibility of the proceedings against the respondents other than the State. (Questions 2 and 3).
3. The availability to the appellants in the Federal Court of the protections given to legally aided persons by the *Legal Aid Commission Act* 1979 (NSW) ("the State Act"), s 47. (Question 5).

74 On the face of things, each of these issues was of great practical moment for the parties locked into these complex proceedings. Depending upon the way in which the first and second group of questions were answered, the answers given might clarify the rights of the parties affected; remove certain parties (such as the State) from the proceedings so far as the specified claims were concerned; narrow the issues to be tried; facilitate negotiation towards settlement; contribute to the efficient and orderly disposal of the litigation; and avoid individual trials which would otherwise extend until the Greek Calends the final disposal of the proceedings: involving the outlay of huge costs, private and public⁸⁰.

75 There was some debate before Wilcox J about whether the appropriate procedure which the Federal Court should follow was one of demurrer or the statement of separate questions. His Honour favoured the latter course. Certainly, it was within his powers under the Federal Court Rules to act as he did. None of the parties to the proceedings in the Federal Court objected to the course which he took. Still less did any of them suggest that factual questions needed first to be determined formally; or that the resolution of any mixed questions of fact and law was impossible in default of such determination at trial.

76 Similarly, when the matter was before the Full Court, each party had an opportunity to tender, and to refer to, any documents which they considered might throw light on the legal arguments which they were then severally presenting. A still further facility of objection was afforded to the parties, after judgment was announced and before final orders were made, "to consider their positions in the light of the Court's answers to the preliminary questions"⁸¹. Neither when those reasons were published, nor before the orders were finalised, was any application whatsoever made by any party to vacate *ab initio* the procedure adopted; to withdraw the preliminary questions and proceed by way of strict demurrer; to

80 cf *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 153-154, 168-169.

81 *Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213 at 245.

reframe any of the questions; or to refrain from answering them, or any of them, on the ground that they were premature, hypothetical or unnecessary to be answered. In these circumstances, to suggest that the course taken was the invention of a judge or judges of the Federal Court, imposed on the hapless parties, is quite misleading and unfair. It must be bluntly stated that all of the parties fully acquiesced and cooperated in the course which the Federal Court took.

77 Furthermore, the difficulty now suggested was not even raised by any of the parties on the special leave application before this Court. It is true, that one of them⁸² submitted, in relation to the issue arising under the *Legal Aid Commission Act*, that, by reason of a costs order earlier made by Wilcox J⁸³, the maximum liability of the appellants had been fixed, in effect, at that for which they would have been liable if the State Act applied to the Federal Court proceedings. On that footing, it submitted that special leave should be refused because the question was "moot and premature"⁸⁴. No other party advanced such an argument either in relation to that point or any other point. Nor was there a single suggestion that the Full Court had erred in receiving, embarking upon and answering the preliminary questions separated by Wilcox J. There has been no request to this Court by the appellants, or any other party, that this Court should grant special leave to appeal from the interlocutory order made by his Honour more than three years ago. One can imagine the short shrift that such a belated application would receive. Instead, the appellants' notice of appeal raised substantive issues of law challenging, in each case, the rulings which the parties had sought from the Federal Court and which, in the event, turned out to be uniformly adverse to the interests of the appellants. In other words, the appellants were willing to receive the benefit of the Federal Court's decisions and when they proved adverse to them they wished to challenge each of the rulings on its legal merits.

78 The written submissions of the appellants, the respondents and the interveners likewise raised no suggestion whatever to the effect that the course adopted was procedurally impermissible. Still less did any of them submit that the proceedings involved an impermissible exercise of the judicial power of the Commonwealth. The first suggestion that such might be so came in questions addressed to counsel during oral argument before this Court. Counsel for the appellants, apparently perceiving the grave dangers presented to his clients by the adverse determination of the separate questions, embraced the notion that the questions should never have been asked or answers given. He did this with the enthusiasm of a shipwreck finding an unexpected life-raft on a stormy sea. He suggested that to answer the questions was impermissible in law as either going

82 FANMAC Ltd. See transcript of special leave application, 11 April 1997 at 15-16.

83 Under O 62A of the Federal Court Rules.

84 Special leave transcript, 11 April 1997 at 17.

beyond the proper exercise of the judicial power of the Commonwealth (forbidden to the Federal Court) or premature for want of conclusive determination of factual controversies not yet decided.

- 79 Argument of the appeal, over two days, had virtually completed when the appellants finally sought leave to add the additional ground to their notice of appeal complaining that the Full Court had erred in answering the questions and making the orders and declarations it did "in circumstances where, no facts being found or agreed and the matter not proceeding by way of demurrer, there was no proper exercise of judicial power"⁸⁵. This Court reserved the question whether the appellants should have leave to so amend.

Appropriateness of the procedures adopted

- 80 I have traced the history of these proceedings to explain why I agree with the respondents' submissions in this respect. Flexibility of procedural rules extends to the rules governing amendment of process⁸⁶, including before this Court. However, there are many reasons why I would not stretch that flexibility to the circumstances of this case. I hope my reasons are clear enough from the history of the proceedings which I have now recounted. But in addition to that history two further considerations must be mentioned.

- 81 The procedure adopted by the Full Court, with the knowing participation of all the parties was, it is true, something of a hybrid. It was not strictly a demurrer, which, traditionally, must be argued within the four walls of the facts alleged in the pleadings⁸⁷. Nor was it a pleading summons being dealt with on the footing of facts formally agreed between the parties or judicially determined as a preliminary matter. But, subject to the Constitution and to practical utility in the particular case, there is no reason why novel procedures should not be adopted, including in federal courts and courts exercising federal jurisdiction, where the parties request it, and where the judges so decide, if the preliminary determination of legal questions may cut through what would otherwise be costly and time consuming litigation. To those brought up in the common law system of pleading, the procedure adopted in this case seems a trifle untidy and potentially risky if the resolution of factual controversies is necessary for the court to be in a position to give answers to the legal questions which are formulated. But this Court has commented before that modern demurrer practice is not as rigid as it was before

85 Proposed additional ground of appeal 2.5.

86 cf *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 153-154, 168-170.

87 *Levy v Victoria* (1997) 189 CLR 579 at 649.

the *Judicature Acts*, and their Australian counterparts⁸⁸. Those statutes introduced the more discursive system of pleading which is followed today throughout Australia and the more flexible procedures which are its consequence in federal, State and territory courts⁸⁹.

- 82 I therefore take what happened in the present matter to be somewhat similar to the course now commonly followed in appeals by way of stated case. In former times, the slightest reference in such appeals to evidence or documents would have been absolutely forbidden⁹⁰. But now, courts, to understand the stated case, will sometimes take into account associated documents (such as court transcripts or files) in order to respond to the questions posed in a lawful way and also in a constructive way that avoids misunderstandings or uncertainties which could otherwise arise out of ambiguity⁹¹. The references to "the material contained in the agreed bundle of documents", in the questions framed for the Full Court, involve no more than this limited use of defined evidentiary material. It was to help that Court to understand the legal claims of the appellants, as stated in this complex litigation, in necessarily brief terms in the statements of claim⁹². The Full Court made it clear that it was not determining any disputed matters of fact⁹³. It was merely viewing the bundle of documents which the parties had agreed upon as "some general background information concerning the nature of the HomeFund scheme and the roles of the parties [in it]"⁹⁴. Otherwise, the Full Court proceeded to consider the basis upon which the appellants had pleaded their cases against those respondents. It acknowledged that the answers which could be given to the

88 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 142 per Dixon CJ, 152 per Windeyer J; *Levy v Victoria* (1997) 189 CLR 579 at 648-649; cf Bullen and Leake, *Precedents of Pleadings in Personal Actions in the Superior Courts of Common Law*, 3rd ed (1868).

89 See, for example, *The Commonwealth v Western Australia* [1999] HCA 5, where demurrers were filed together with various documents referred to in the pleadings, without any objection from this Court.

90 cf *Thomas v The King* (1937) 59 CLR 279 at 286.

91 See eg *DPP v B* (1998) 72 ALJR 1175 at 1185; 155 ALR 539 at 553; cf *Taikato v The Queen* (1996) 186 CLR 454 at 479.

92 It is only in relation to the claims against the non-State respondents that the issue now raised has any practical consequence. So far as the liability of the State itself is concerned, the question referred to the Full Court can be decided as a pure matter of law.

93 *Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213 at 217.

94 *Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213 at 217.

questions concerning the liability of the non-State respondents would necessarily be imprecise⁹⁵, depending, as they ultimately had to do, upon the extent to which it was proved that the implementation of the HomeFund scheme could "properly be described as an implementation of a Crown project by agents of the Crown in accordance with Crown instructions, express or implied"⁹⁶. Furthermore, the Full Court ordered that the claims against the State⁹⁷ and the corporate respondents alleged to have been its agents or co-venturers⁹⁸ be "struck out". It did not order that they be "dismissed". These considerations strengthen the impression that the Full Court was dealing, as a preliminary matter, with the admissibility of the appellants' pleadings as they stood and as if the respondents had demurred to them.

- 83 In stating its conclusions in the way that it did, the Full Court was entitled to have regard to those paragraphs of the appellants' statements of claim which asserted, either in terms⁹⁹ or as an arguable consequence of law¹⁰⁰, that the relationship of the corporate respondents with the State was one of agency. That, as I understand it, is also the way in which the appellants' claims were supported in oral argument before the Full Court. The reference made to the facts in the bundle was purely for the limited object of ensuring an understanding of what might otherwise be ambiguous in the abbreviated terms of the statements of claim, given the very complex circumstances out of which the claims were alleged to have arisen.

Absence of constitutional or legal merit to objections

- 84 No court can adopt procedures, however well intentioned and whatever the wishes of the parties, if those procedures are incompatible with the Constitution. Nor is it for the parties to litigation or a federal court (or a court exercising federal jurisdiction) to agree on a course of action which contradicts the requirements of Ch III of the Constitution governing the exercise of the judicial power of the Commonwealth. Although raised belatedly, in the manner which I have described, the ultimate suggestion embraced by the appellants was that the procedures

95 *Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213 at 237-238.

96 *Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213 at 238.

97 Order 2.

98 Order 3, referring to the first, second, fourth, fifth, sixth, seventh and eighth respondents.

99 As to the fifth respondent. See amended statement of claim as at 26 May 1995 par 43.

100 As to the third respondent. See amended statement of claim as at 26 May 1995 pars 12 and 13.

adopted by the Full Court were fundamentally flawed as going outside the proper exercise of the judicial power or as amounting to a premature determination of a question which has not yet arisen in the litigation between these parties.

85 Where any such question is thought to arise, it is the duty of this Court not to proceed in the cause until notice is given to the law officers in accordance with the *Judiciary Act* 1903 (Cth), s 78B(1). Although, in this matter, constitutional notices were earlier given by several of the parties, thereby provoking the participation of a number of interveners, no such notices were given on this point. All of the Attorneys-General concerned were not before the Court. There has been neither compliance with, nor permissible waiver of, the mandatory requirements of the legislation in that regard. Because of this, the constitutional question does not strictly arise for my decision. However, if it did, I would not uphold it.

86 It is unlikely that the Australian Constitution would have the effect of imposing such rigid constraints on court procedures and orders. The constitutional text has proved relatively impervious to formal change. Necessarily, as a charter of government, it must respond and adapt to the needs of successive generations who live under its protection. It has done so. Who can doubt that the contemporary needs of litigants in federal courts (and courts exercising federal jurisdiction) extend to active case management, the separate determination of questions of practical relevance to their litigation and the adoption of procedures adapted for large scale litigation such as the present? The fundamental purpose of the Judicature, established by Ch III of the Constitution, would be frustrated by intolerable burdens of cost and delay if constraints, not there stated, were needlessly imported as effectively unchangeable constitutional requirements by the decisions of this Court.

87 Complaint is made about the fact that the Federal Court in these proceedings was setting out to give "guidance" to the parties¹⁰¹. It would be a sorry day if a constructive approach on the part of the Judicature to the resolution of justiciable issues, in proceedings such as these, were to be a badge of unconstitutionality. Many obiter dicta and not a few declaratory orders over the years are explained by the attempts of courts to be constructive. In the present case, the Federal Court was not providing an advisory opinion¹⁰². Rather, it was issuing a declaration of legal right¹⁰³. Such a declaration differs from the advisory opinion in that there is

101 *Woodlands v Permanent Trustee Company Ltd* (1996) 68 FCR 213 at 237.

102 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; *Pirrie v McFarlane* (1925) 36 CLR 170 at 198; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 508; *Fencott v Muller* (1983) 152 CLR 570 at 607-608.

103 *Attorney-General for New South Wales v Brewery Employees Union of New South Wales* (the "Union Label Case") (1908) 6 CLR 469; *Attorney-General (Vict) v The* (Footnote continues on next page)

nothing hypothetical or abstract about its subject¹⁰⁴: Nor is it removed from an actual attempt to apply or administer the law in a particular case¹⁰⁵. Instead, it involves rival litigants presenting a bona fide controversy to the court for adjudication. As Lord Dunedin stated in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd*¹⁰⁶:

"The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought."

88 The three issues of law presented to the Full Court in this matter were neither hypothetical nor abstract. They were inextricably raised by the issues thrown up in particular cases between particular litigants. They were of intensely practical importance to the litigation. Also, because of the appellants' representative capacity, the decisions potentially affected thousands of other persons otherwise effectively denied access to the judicial determination of their legal rights.

89 The development of the declaration of legal right is one of the most important and beneficial advances in the administration of justice during this century¹⁰⁷. It is now commonly stated that there are virtually no limits to the subject matter of a declaration, provided it meets the requirements stated by Lord Dunedin¹⁰⁸. Given this, declaratory relief should not be unnecessarily circumscribed by a narrow view of the requirements of the Constitution. I am unconvinced that the orders and declarations made in this case (or any of them) involved the Federal Court in going outside the constitutional limits of the judicial power. I would not allow the appellants, who would have been quite happy to take the benefit of favourable declarations and orders, to resist them at this very late stage on such an

Commonwealth (the "Pharmaceutical Benefits Case") (1945) 71 CLR 237; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

104 In *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582.

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

106 [1921] 2 AC 438 at 448.

107 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 665-668.

108 *West v Gwynne* [1911] 2 Ch 1; *Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490 at 507 per Lord Sterndale MR; *Barnard v National Dock Labour Board* [1953] 2 QB 18 at 41 per Denning LJ; *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421 at 435 per Gibbs J; cf Katyal, "Judges As Advicegivers" (1998) 50 *Stanford Law Review* 1709.

unconvincing footing. Their objection is too late. They have not complied with the law in making it. And on examination, the objection has no legal substance.

Disposal of the appeals as originally framed

90 *The answer to question 1:* These conclusions require me to dispose of the appeals as they were originally framed, before this Court was diverted into the mesmeric byways of procedural rigidity and suggested constitutional constraints. I can do so quite briefly.

91 On the substance of the argument relating to the first point (concerning the liability of the State to the claims by the appellants under the *Trade Practices Act*), I am in agreement with the other members of this Court for concluding that such claims against the State cannot be maintained. For my own part, I would not express my reasons in terms of the "intention" of the *Trade Practices Act* or of the *Judiciary Act* or of the Parliament in enacting either of those laws. Such an "intention" is a fiction. It is preferable for courts to shoulder the responsibility of stating the effect and meaning of the legislation rather than referring to an inferred "intention" which is, or may be, misleading¹⁰⁹. Save for that, I agree with what their Honours have written.

92 Given the view that I take of the limited but permissible use which the Full Court made of the bundle of documents which the parties agreed should be before it, it is sufficient for my purposes to dismiss the appeal from the answer to the first question given by the Full Court. I have no real objection to the formulation proposed by the other members of this Court in substitution for the answer given by the Full Court, save for the last words which reflect their Honours' view of the impermissibility of the use of the bundle of documents. Because I do not share that view, and because I do not believe that this Court should condescend to the re-drafting of answers given to separated questions except for compelling cause, I will content myself with confirming the answer given by the Full Court to the first question.

93 *The answer to questions 2 and 3:* The appellants' belated complaints about the answering of questions 2 and 3 are in a different class. The contingent way in which the questions were asked and answered and the possible implications of the evidence of the facts governing the relationship between the State and those "agents" or "co-venturers" amongst the respondents who asserted immunity from the claims of the appellants, make it preferable that this Court should refrain at this stage from a detailed analysis of the Full Court's answers and the declarations made to give them effect.

109 cf *Mills v Meeking* (1990) 169 CLR 214 at 234 per Dawson J.

94 In the manner in which the appeal proceeded, the only just way of dealing with the complaint of the appellants about these questions is to revoke the special leave which was granted in respect of them. Such leave was not at large. It was granted upon terms that the appeal should be subject to directions and that the parties should be aware that "the Court will require those questions to be answered as questions of law without being required to determine, as a matter of controversy, factual issues"¹¹⁰. Directions were duly given to encourage agreement on the facts¹¹¹. However, the parties were unable to agree on a statement of the facts representing the substance of the material contained in the agreed bundle. In the absence of such agreement, so far as the corporate respondents other than the State were concerned, the pre-condition for the grant of special leave in relation to those questions is, in effect, unfulfilled.

95 In resistance to the revocation of special leave in relation to the answers given to questions 2 and 3, and the declaration dependent thereon, the appellants submitted that this Court should not leave standing answers and declarations which would control the conduct of the litigation by the judge to whom the trial is ultimately assigned. If I considered that the answers and declaration in question would unlawfully or unjustly prevent the determination of the appellants' claims against the respondents, other than the State, I would concede the force of that submission. However, as the Full Court itself recognised, the extent of its answers to questions 2 and 3 was necessarily circumscribed by the factual contest which remained to be decided at trial. The precise association which each of the respondents, other than the State, had with the State and the latter's HomeFund scheme, remains for elucidation. Expressed at the level of generality and legal principle in which they appear, the Full Court's answers and declaration present no real obstacle to the lawful and just trial of the appellants' claims against those respondents. This Court would be in a much better position after that trial (and any further appeal which followed it) to deal with the legal issues arising from the suggested application of *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd*¹¹², to consider whether the holding in that case should be reopened and whether it should be extended¹¹³ to cover the relationship of the parties here.

96 *The answer to the final question:* As to the final question concerning the application of the *Legal Aid Commission Act*, s 47, I agree, for the reasons given by the other members of this Court that, neither in its terms, nor by force of the *Judiciary Act*, s 79, does the State Act affect the power and duty of the Federal Court to conform to its own statute in the provision of the costs of proceedings

110 Special leave transcript at 23-24, 11 April 1997 per Dawson J.

111 See orders of Gummow J, 12 June 1998 par 3.

112 (1979) 145 CLR 107.

113 See per joint reasons at [42].

before it¹¹⁴. If that is the conclusion which this Court reaches, it can be simply demonstrated. If it answers a live issue between the parties to this litigation, there is no obstacle, constitutional or otherwise, to the Court's affirming the answer "no" which was given by the Full Court to the separated question concerned with this issue.

97 It is not as if the issue was hypothetical or moot, as was claimed. I leave aside the importance of the determination for proceedings in the Federal Court generally and for the guidance of litigants and the legal profession awaiting this decision. I do so in case these very practical functions of the Full Court's determination in the context of this case should be regarded as disjoined from a real controversy. Concentrating solely on the situation of the present parties, it is to be noted that the question is framed in terms of whether the appellants are "protected" by the provision of the State Act. Whilst it is true that they have had the benefit of an order of Wilcox J which, in the immediate proceedings, fixed as the maximum costs orders that might be made an amount equivalent to those for which they would be liable under the State Act¹¹⁵, such order would not operate indefinitely *in futuro*. If their arguments of law concerning the operation of the State Act were rejected, the appellants would immediately be exposed to a risk of much heavier costs orders, either upon a fresh exercise by Wilcox J of his discretion or by a different exercise of discretion by another judge or judges of the Federal Court.

98 In the circumstances, given the size, complexity, duration and hence the costs of this litigation, there could scarcely be a more pressing and practical issue for both sides to have resolved by authoritative determination. With every respect, it is unrealistic to require that the parties should conclude their litigation and then be left to the chances of a judicial determination of the point in resistance to an attempt to enforce, at that stage, a different cost order. In recognition of the unreasonableness of this consequence, it is unsurprising that an effective answer should have been given to the substantive question. In my view, it was right for the Federal Court to give that answer and to reflect it in the form in which it did so. The answer which the Full Court gave was the correct one. This Court should say so directly and give its answer legal effect. There is no constitutional or other impediment in the way of doing so. The Constitution does not oblige such artificialities. The Judicature for which the Australian Constitution provides in Ch III is a judicature of the common law tradition. It responds to practical problems in practical ways. The appeal against the Full Court's answer to the last question should therefore be dismissed.

114 *Federal Court of Australia Act 1976* (Cth), s 43.

115 *Woodlands v Permanent Trustee Company Ltd* (1995) 58 FCR 139.

Conclusions and orders

99 My conclusions leave to the future the consideration of a number of important questions raised by these appeals. They included whether the holdings of this Court in *Bradken*¹¹⁶ and in *The Commonwealth v Evans Deakin Industries Ltd*¹¹⁷ should be re-opened; whether, at this stage in the understanding of the nature of a State of the Commonwealth, as provided for in the Constitution, it is appropriate to continue to treat it as an emanation of the Crown¹¹⁸; and whether, in the Australian Commonwealth¹¹⁹ a State enjoys (as has until now been assumed) the immunity from suit historically attributed to the Crown as the personification of the sovereign. In the conclusion which I have reached, none of these questions needs to be decided now.

100 I favour the following orders:

1. In relation to the appellants' appeals against the answers given by the Full Court of the Federal Court of Australia to questions 2 and 3 in the preliminary questions answered by that Court and declaration number 3 made in the orders of that Court, revoke special leave to appeal.
2. In relation to the remainder of the appeals order that the appeals be dismissed.
3. Order that the appellants pay the respondents' costs of the appeals to this Court.

116 (1979) 145 CLR 107.

117 (1986) 161 CLR 254; cf *Australian Postal Commission v Dao* (1985) 3 NSWLR 565 at 583, 604.

118 In Ireland it was held that the former prerogative of Crown immunity from suit which existed before the *Constitution of the Irish Free State 1922* (Ir) did not apply to the State thereby created (which was a constitutional monarchy) and was accordingly not vested or confirmed by the *Constitution of Ireland 1937* (Ir) Arts 49 and 50. See *Byrne v Ireland* [1972] IR 241 at 272-273 per Walsh J.

119 cf *The Commonwealth v Mewett* (1997) 191 CLR 471 at 542-545 per Gummow and Kirby JJ; *The Commonwealth v Western Australia* [1999] HCA 5.