

HIGH COURT OF AUSTRALIA

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

NORTHERN TERRITORY OF AUSTRALIA

APPELLANT

AND

G P A O (Father)

FIRST RESPONDENT

J A W (Mother)

SECOND RESPONDENT

SEPARATE REPRESENTATIVE

THIRD RESPONDENT

Northern Territory of Australia v GPAO (D172-1997) [1999] HCA 8
11 March 1999

ORDER

1. *Appeal allowed.*
2. *Set aside Order 1 of the orders made by the Full Court of the Family Court on 8 August 1996 and in place thereof order that the question in the case stated be answered as follows:*

Section 97(3) of the Community Welfare Act (NT), in its operation with respect to the subpoena issued on 23 October 1995, was not rendered inoperative by the provisions of the Family Law Act 1975 (Cth) or the Evidence Act 1995 (Cth), and was binding on the Family Court by reason of the operation of s 79 of the Judiciary Act 1903 (Cth).

3. *Remit to the Full Court of the Family Court for such reconsideration as may be appropriate of the timetable with respect to submissions as to costs set out in Order 3 of its orders made on 8 August 1996.*

On appeal from the Family Court of Australia

Representation

T I Pauling QC, Solicitor-General for the Northern Territory and
T J Riley QC with R J Webb and D S Lisson for the appellant (instructed by
Solicitor for the Northern Territory)

C R McDonald QC with G J Moloney, S M Gearin and P D McNab for the
first respondent (instructed by Chapman & Associates Pty Ltd)

No appearance for the second and third respondents

Interveners:

G Griffith QC with E Willheim and D J Batt intervening on behalf of the
Attorney-General for the Commonwealth (instructed by Australian
Government Solicitor)

B M Selway QC with R F Gray intervening on behalf of the Attorney-General
for the State of South Australia (instructed by Crown Solicitor for South
Australia)

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

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

CATCHWORDS

Northern Territory of Australia v GPAO & Ors

Constitutional law – Federal jurisdiction – Law defining jurisdiction of federal court – Whether laws made under territories power are "laws made by the Parliament" for the purposes of s 76(ii) of the Constitution.

Constitutional law – Federal jurisdiction – Whether Family Court exercising federal jurisdiction – *Judiciary Act* 1903 (Cth), s 79.

Constitutional law – Inconsistency between Commonwealth and Territory laws – Whether laws incapable of concurrent operation – "Paramountcy principle".

Practice and procedure – Whether Family Court bound by Territory law – Whether Commonwealth law "otherwise provides" – Whether immunity provided for by Territory law provides a "reasonable excuse" for failure to comply with Commonwealth law – Whether obligation to produce documents excludes "public interest" privileges.

Practice and procedure – Evidence – Subpoena – Whether *Evidence Act* 1995 (Cth) applies to production of documents in response to a subpoena.

Words and phrases – "paramountcy principle", "federal jurisdiction", "otherwise provides", "reasonable excuse", "existing law of the Territory".

The Constitution, ss 75, 76, 77, 109, 122.

Judiciary Act 1903 (Cth), ss 79, 80.

Northern Territory (Self-Government) Act 1978 (Cth).

Family Law Act 1975 (Cth), Pts VII (ss 65D, 65E, 69H, 69ZG), XIII A.

Family Law Rules (Cth), O 28, r 1.

Evidence Act 1995 (Cth).

Community Welfare Act (NT), s 97(3).

1 GLEESON CJ AND GUMMOW J. This appeal presents issues which concern the interaction between two laws made by the Parliament, the *Family Law Act* 1975 (Cth) ("the Family Law Act") and the *Evidence Act* 1995 (Cth) ("the Evidence Act"), and a law made by the Legislative Assembly of the Northern Territory of Australia, the *Community Welfare Act* (NT) ("the Community Welfare Act"). The appeal comes to this Court in the following way.

2 Section 94A of the Family Law Act confers upon a Full Court of the Family Court of Australia jurisdiction to hear and determine questions of law stated for its opinion by a judge of that Court in the form of a special case. An appeal from the order answering such a question lies to this Court by special leave (s 95).

3 The first respondent in this Court is the father and the second respondent the mother of a child born in 1991. The child lives in the Northern Territory. The separate representative of the child is the third respondent. The first and second respondents have never married. On 18 March 1992, a judge of the Family Court ordered that the parents have joint guardianship of the child and the mother sole custody. Orders for supervised access were made in favour of the father. On 16 June 1995, the mother applied to the Family Court for an order granting her sole guardianship of the child and discharging the orders for access. In support of her application, the mother made allegations, denied by the father, of sexual abuse of the child by the father.

4 Order 28 r 1 of the Family Law Rules provides that, at the request of a party to any proceedings, the Registrar of the filing registry may issue a subpoena on behalf of the court commanding those named in the subpoena to attend before the court and then and there to produce any books, documents or things in their possession, custody or control. On 23 October 1995, the Registrar of the Family Court at Darwin, on application of the father, issued a subpoena addressed:

"TO: THE MANAGER

OF: Child and Family Protective Services
60 Cavenagh Street
Darwin NT 0800".

The subpoena ordered the addressee to attend the Family Court at Darwin to produce to the Court:

"[a]ll files and records in relation to [the child] born 30 April 1991".

5 It is accepted that the addressee of the subpoena was an "authorized person" within the meaning of s 97(3) of the Community Welfare Act and that the "files and records" the subject of the subpoena are "documents" of the kind referred to in s 97(3). The text of s 97(3) is set out later in these reasons. On the return of the

subpoena on 30 October 1995, before a judge of the Family Court (Murray J), the matter was adjourned to the next day. An application then was made that the subpoena be "vacated".

- 6 In these circumstances, Murray J stated a case to the Full Court presenting a question which, after amendment in the Full Court, was expressed as follows:

"Are the provisions of s 97(3) of the *Community Welfare Act* (NT) inconsistent with provisions of:

(a) the *Family Law Act* 1975 (Cth); or

(b) the *Evidence Act* 1995 (Cth);

such that the provisions of s 97(3) of the *Community Welfare Act* 1983 (NT) are inoperative to the extent of such inconsistency?"

- 7 The Full Court (Nicholson CJ, Fogarty and Frederico JJ) delivered judgment on 8 August 1996¹. Their Honours, by majority (Nicholson CJ and Frederico J; Fogarty J dissenting), answered "Yes" to the question whether the provisions of s 97(3) of the *Community Welfare Act* were "inconsistent" with the provisions of the *Family Law Act*. The majority also answered "Yes" to the question with respect to the *Evidence Act*². Fogarty J would have answered "Yes, insofar as it relates to the adduction of evidence."³ There was no question directed to the operation of s 79 of the *Judiciary Act* 1903 (Cth) ("the *Judiciary Act*"), although there was some discussion of the matter in the reasons for judgment.

- 8 On 29 August 1996, the Full Court, constituted with the same membership, granted, pursuant to s 92 of the *Family Law Act*, leave to the Northern Territory of Australia to intervene. On application of the Northern Territory, which is now the appellant, special leave was granted by this Court to appeal against the order of the Full Court made on 8 August 1996. No question arises as to the competency of the institution or carriage of the appeal by a party who entered the proceeding below as an intervener. Section 92(3) of the *Family Law Act* deemed the Northern Territory to be a party to the proceedings with all the rights, duties and liabilities of a party.

1 *Re Z* [1996] FLC ¶92-694; (1996) 134 FLR 40.

2 [1996] FLC ¶92-694 at 83,250; (1996) 134 FLR 40 at 71.

3 [1996] FLC ¶92-694 at 83,296; (1996) 134 FLR 40 at 131.

3.

The Community Welfare Act

9 The long title to the Community Welfare Act states that it is:

"[a]n Act to provide for the protection and care of children and the promotion of family welfare, and for other purposes".

Section 97(2) imposes a penalty upon a person who, while or after ceasing to be an "authorized person", performs certain acts otherwise than in the performance of duties or in the exercise of powers or the performance of functions under the Act. The phrase "authorized person" is defined in s 4(1) as meaning a person "authorized in writing by the Minister to exercise powers and perform functions under [the] Act". The proscribed activity is the making of a record, or the disclosing or the communicating to any person, of certain information acquired in the performance of duties or in the exercise of powers or in the performance of functions under the Act. The information must be "in respect of the affairs of another person".

10 The crucial provision of s 97 is sub-s (3). This states:

"A person who is, or has been, an authorized person shall not, except for the purposes of this Act, be required to -

- (a) produce in a court a document that has come into his possession or under his control; or
- (b) disclose or communicate to a court any matter or thing that has come under his notice,

in the performance of his duties or functions under this Act."

Notwithstanding the provisions of sub-ss (2) and (3), in the circumstances listed in sub-s (4), an "authorized person" may disclose information or records that have come to the notice or into the possession of that person in the performance of duties or functions under the Community Welfare Act. The circumstances are identified in sub-s (4) as follows:

- "(a) to the person to whom the information or records relate;
- (b) in connection with the administration of this Act;
- (c) if the Minister certifies that it is necessary in the public interest that information should be disclosed - to such person as the Minister directs;

4.

- (d) to a prescribed authority or person;
- (e) to a person who, in the opinion of the Minister, is expressly or impliedly authorized by the person to whom the information relates to obtain it; or
- (f) subject to the approval of the Minister - to a person engaged in a bona fide research programme where the person has given an undertaking in writing to the Minister to preserve the identity of and confidentiality relating to individual persons to whom the information and records relate".

An authority or person to whom information is disclosed under the provisions of sub-s (4) and any person or employee under the control of that authority or person is, in respect of that information, subject to the same rights, privileges, obligations and liabilities under sub-ss (2) and (3) as if an "authorized person" who had acquired information and records in the performance of duties as such a person. This is the effect of sub-s (5).

- 11 It will be observed that, whilst s 97(2) imposes an obligation upon authorised persons and those who have ceased to be authorised persons and attaches a penal sanction to that obligation, s 97(3) is differently cast. Unlike s 97(2), s 97(3) does not attract with respect to the Family Law Act the general rule of construction which was expressed in *P v P*⁴ by Mason CJ, Deane, Toohey and Gaudron JJ. It is that⁵:

"[a] law of the Parliament conferring jurisdiction upon a federal court in general terms will, in the absence of a clear legislative intent to the contrary, ordinarily be construed as not intended to confer jurisdiction to make an order authorizing or requiring the doing of an act which is specifically prohibited and rendered criminal by the ordinary criminal law of the State or Territory in which the act would be done."

Rather, in pars (a) and (b), s 97(3) provides an immunity or a sufficient answer to what otherwise would be a requirement laid upon those who are or have been authorised persons. Such a person shall not, except for the purposes of the Community Welfare Act, be required to "produce" documents "in a court" (s 97(3)(a)).

4 (1994) 181 CLR 583.

5 (1994) 181 CLR 583 at 602.

5.

12 The subpoena required the production to the Family Court by an authorised person of documents in respect of which s 97(3) of the Community Welfare Act stipulated that that person was not to be required to produce the documents "in a court" except for the purposes of the Community Welfare Act (s 97(3)). It is true that, notwithstanding s 97(3), the authorised person was at liberty to disclose the documents in question in the circumstances detailed in s 97(4). However, it is not suggested that any of pars (a)-(f) of s 97(4) applied.

13 Provisions of Pt XIII A (ss 112AA-112AP) of the Family Law Act bear upon the question of the accountability of a party who refuses to produce documents required by subpoena issued out of the Family Court where the ground for the refusal is the immunity provided by s 97(3)(a) of the Community Welfare Act from the requirement to produce documents in a court. Part XIII A is headed "Sanctions for Failure to Comply with Orders and Contempt of Court". Section 112AD provides for sanctions for contraventions of certain orders made under the Family Law Act. The phrase "order under this Act" is used in s 112AD in the sense given in the definition in s 112AA. This includes (par (ca)) "a subpoena issued under the Rules of Court".

14 However, the authority of the Family Court under s 112AD is conditioned upon its satisfaction that a person has contravened the order "without reasonable excuse". The circumstances in which a person may be taken to have had, for the purposes of Pt XIII A, a reasonable excuse include but are not limited to those specified in s 112AC (s 112AC(1)). The submission upon the operation of s 79 of the Judiciary Act included the proposition that the immunity provided by s 97(3)(a) of the Community Welfare Act provides a reasonable excuse for a failure to comply with the requirement of a subpoena issued under the Rules of Court that the documents be produced to the Family Court. We return to this matter later in these reasons.

The Evidence Act

15 The issue with respect to the Evidence Act may be disposed of at this stage. The issues concerning the Family Law Act require more detailed consideration.

16 The Evidence Act applies to proceedings in the Family Court, as a court created by the Parliament which is not the Supreme Court of a Territory. This is the effect of s 4(1) of the Evidence Act and the definition in the Dictionary of "federal court". However, the Evidence Act is concerned with the adducing of evidence (Ch 2), the admissibility of evidence (Ch 3), proof (Ch 4) and certain ancillary matters (Ch 5). It does not deal with the obligations of a party to whom an order in the nature of a subpoena is addressed to produce documents to the court in question. Nor does the Evidence Act deal with the grant of leave by the court to inspect or otherwise make use of documents which have been produced in answer to a subpoena.

17 This litigation arose from the issue of a subpoena requiring production of documents to the Family Court. It is unnecessary in this case to consider the question of the consequences of the provisions of the Evidence Act, if any, in relation to the common law principles which operate in this field. Paragraph (a) of s 97(3) of the Community Welfare Act is directed to situations which include the production of documents in response to a subpoena, yet this is a field upon which the Evidence Act does not enter. There is no question of s 97(3) in its application to the production of documents to the Family Court in response to the subpoena issued on 23 October 1995 being rendered inoperative by reason of any "inconsistency" with the Evidence Act.

18 It follows that the answer to par (b) of the question should have been in the negative.

The jurisdiction of the Family Court

19 The Family Court is created by the Family Law Act as a superior court of record (s 21) and the Court may sit at any place in Australia (s 27).

20 An appreciation of the source and content of the jurisdiction of the Family Court is a necessary starting point for an understanding of the remaining issues before this Court.

21 The question before the Full Court referred simply to "the provisions of ... the *Family Law Act* 1975 (Cth)". It is common ground that the source of the jurisdiction exercised by the Family Court is to be found in the text of the statute as amended by the *Family Law Reform Act* 1995 (Cth) ("the 1995 Act"). The 1995 Act came into operation on 11 June 1996. Section 31 thereof repealed Pt VII (ss 60-70F) which had been headed "Children" and inserted a new Pt VII (ss 60A-70Q) also headed "Children". The scheme of this new Pt VII, as emphasised by the various headings referred to below, is to provide a legislative regime which covers a field marked out by the use of available sources of constitutional power.

22 Division 12 (ss 69A-69ZK) is headed "Proceedings and jurisdiction" and comprises subdivs A-F. The heading to subdiv C (ss 69G-69N) is "Jurisdiction of courts". Section 69H(1) confers jurisdiction on the Family Court "in relation to matters arising under this Part". Section 69M provides that the jurisdiction conferred by Div 12 is in addition to any jurisdiction conferred apart from Div 12⁶.

6 Section 31(1)(c) of the Family Law Act confers jurisdiction on the Family Court with respect to matters arising under a law of a Territory other than the Northern Territory concerning the rights and status of ex-nuptial children and their parental
(Footnote continues on next page)

Proceedings may be instituted in relation to a child only if the child is present in Australia or has the other sufficient connections with Australia specified in s 69E. Subdivision F (ss 69ZE-69ZK) is headed "Extension, application and additional operation of Part". Section 69ZG states that Pt VII "applies in and in relation to the Territories". Sections 69H(1) and 69ZG are provisions of central importance for this case.

- 23 Division 6 (ss 65A-65ZD) is headed "Parenting orders other than child maintenance orders". It comprises subdivs A-E. The heading to subdiv B thereof (ss 65C-65L) is "Applying for and making parenting orders". Sections 65D and 65E are of considerable importance for the application of what is identified as the "paramountcy principle" in litigation such as that out of which this appeal has arisen. These sections state:

"65D (1) In proceedings for a parenting order, the court may, subject to this Division, make such parenting order as it thinks proper.

(2) Without limiting the generality of subsection (1) and subject to this Division, a court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order.

65E In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

A parenting order may deal with any one or more of the person or persons with whom a child is to live, contact between a child and another person or persons, maintenance, and any other aspect of parental responsibility for a child (s 64B(2)).

- 24 Division 10 (ss 68D-68M) is headed "The best interests of children and the representation of children" and subdiv B (ss 68E-68K) contains further provisions specifying what must be considered by the court in such a determination of the best interests of the child. In particular, s 68E(1) states that these considerations apply to the making of parenting orders under s 65D.

- 25 Section 65C states that a parenting order in relation to a child may be applied for by either or both of a child's parents, or the child, or any other person concerned with the care, welfare or development of the child. There is no requirement that the child be the child of a marriage within the meaning of the decisions expounding the reach of the power of the Parliament to make laws under s 51(xxi) of the

relationships. The Court was informed that, in addition to the exclusion of the Northern Territory from its application, this provision had not been proclaimed.

Constitution with respect to "Marriage". However, the effect of the provisions for extension, application and additional operation of Pt VII, made by subdiv F (ss 69ZE-69ZK) of Div 12, is to confine provisions such as s 65C in certain circumstances. This is achieved by identifying as a criterion the continuation of references of power by the Parliaments of the States under s 51(xxxvii) of the Constitution (ss 69ZE and 69ZF) and by reference to the limitations attending the marriage power (s 69ZH). Section 69ZJ should also be noted. This is an investment of jurisdiction pursuant to s 77(i) and s 75(iv) of the Constitution. The section states:

"In addition to the jurisdiction that, apart from this section, is invested in or conferred on a court under this Part, the court is invested with jurisdiction or jurisdiction is conferred on the court, as the case requires, in matters between residents of different States, being matters with respect to:

- (a) the maintenance of children and the payment of expenses in relation to children or child bearing; or
- (b) parental responsibility in relation to children."

26 In the present case, it is not suggested that the parents are residents of different States. Rather, the child and, it appears, the parents live in the Northern Territory. The child is not the child of a marriage, so as to attract an exercise of the legislative powers under ss 51(xxi), 76(ii) and 77(i) of the Constitution. The result is that a parenting order may be made by the Family Court in respect of the child as a consequence of the statement in s 69ZG that Pt VII applies in and in relation to the Northern Territory. The foundation of the jurisdiction of the Family Court thus is to be taken as having been that operation of Pt VII which it has in its character as a law made by the Parliament for the government of the Northern Territory, within the meaning of s 122 of the Constitution.

27 The Family Court, it is common ground, is a federal court created by the Parliament within the meaning of s 71 of the Constitution. It is a federal court whose jurisdiction may be defined by the Parliament, within the meaning of s 77(i) of the Constitution, with respect to any of the matters mentioned in s 75 and s 76. Section 76(ii) speaks of matters "[a]rising under any laws made by the Parliament".

28 The Northern Territory submits that ss 69H(1) and 69ZG are such laws. It further submits that this had the result that (i) in issuing the subpoena in question and in dealing with the matter on the return of the subpoena, the Family Court was exercising jurisdiction in a matter arising under a law made by the Parliament, namely the Family Law Act; (ii) this was "federal jurisdiction" within the meaning

of s 79 of the Judiciary Act; and (iii) s 79 operated to "pick up" s 97(3) of the Community Welfare Act as a surrogate law of the Commonwealth⁷.

- 29 Before deciding whether these submissions should be accepted, it is convenient first to identify the body of law applicable by the Family Court in the proceedings before it and the present constitutional status of the Northern Territory and laws made by its legislature.

The applicable body of law

- 30 The reasoning in several of the judgments in *The Commonwealth v Mewett*⁸ indicates that a convenient and perhaps the necessary starting point is the common law in Australia. In that regard, s 80 of the Judiciary Act states:

"So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State *or Territory* in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters." (emphasis added)

The words emphasised were inserted by s 15 of the *Judiciary Amendment Act (No 2) 1979* (Cth) ("the 1979 Amendment Act"). Section 80 directs all courts exercising federal jurisdiction where they "shall go for the substantive law"⁹ and is supplemented by s 79.

- 31 The Judiciary Act extends (s 3A) "to all the Territories", not merely to those internal territories (and Norfolk Island) which enjoy a measure of representative government.

- 32 Section 80 applies so far as the laws of the Commonwealth are not applicable or their provisions are insufficient to carry them into effect or to provide adequate remedies. One such law of the Commonwealth which may be applicable is s 79 of the Judiciary Act. This was amended by s 14 of the 1979 Amendment Act by

7 The expression "surrogate Commonwealth law", with respect to the operation of s 79, was used in *The Commonwealth v Mewett* (1997) 191 CLR 471 at 514, 554.

8 (1997) 191 CLR 471 at 525, 554.

9 *South Australia v The Commonwealth* (1962) 108 CLR 130 at 140.

adding "or Territory" after "State", wherever occurring. In its amended form, s 79 states:

"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."

33 It is clear that, were it not for a provision such as s 79, a law of a State with respect to such matters as the limitation of actions could not directly and of its own force operate in relation to a claim arising under a law of the Commonwealth¹⁰. In the present litigation, the Parliament, by extending the scope of s 79 of the Judiciary Act, may have rendered s 97 of the Community Welfare Act a surrogate federal law to operate beside Pt VII of the Family Law Act.

34 The term "court" is not defined in the Community Welfare Act. Ordinarily, it would be read as identifying the courts of the Northern Territory itself. However, the authorities discussed by Gibbs J in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*¹¹ show that the circumstance that s 97(3)(a) was intended by the Northern Territory legislature to apply in Northern Territory courts does not render s 79 inapplicable to courts which are exercising federal jurisdiction. The provisions of the Community Welfare Act may be "picked up" by s 79 in the Family Court if the other criteria for the operation of s 79 are satisfied.

The issues

35 At this stage, four further issues arise. The first is the meaning of the term "federal jurisdiction". This appears in s 79 and s 80 and in various other provisions of the Judiciary Act but it is not defined therein. However, it has been accepted that the exercise by this Court or any other federal court of jurisdiction with respect to any of the matters of the description in s 75 and s 76 of the Constitution is the exercise of federal jurisdiction within the meaning of s 79¹².

10 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 79, 84, 87, 93.

11 (1973) 129 CLR 65 at 87-88; cf *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 24, 37.

12 See the remarks of Mason J in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 93-94. Section 79 also applies to State courts exercising federal jurisdiction with which they have been invested by a law made by
(Footnote continues on next page)

36 The second issue is related to the first and is as follows. The Family Court was exercising jurisdiction with respect to a matter arising under a law made by the Parliament, namely Pt VII of the Family Law Act. Does the circumstance that the combination of s 69H(1) and s 69ZG is supported not by any head of power in s 51 of the Constitution, but rather by s 122 thereof, deny to the jurisdiction exercised by the Family Court in this case the character of federal jurisdiction?

37 The third issue is whether, on the footing that the Family Court was exercising federal jurisdiction, s 79 did not apply and s 97(3) of the Community Welfare Act did not bind the Family Court because a law of the Commonwealth, namely the Family Law Act, "otherwise provide[s]" within the meaning of s 79.

38 The fourth issue is, in a sense, the threshold issue and requires detailed consideration before returning to the other issues. It arises in the following way. A State law is not applied by s 79 in circumstances where it could have no direct application by reason of its invalidity for inconsistency with an existing law of the Commonwealth, within the meaning of s 109 of the Constitution¹³. Likewise, a law of the Territory which is invalid or inoperative by reason of "inconsistency" with a law of the Commonwealth is not restored to life through the medium of s 79 of the Judiciary Act. The question then is whether s 97(3) of the Community Welfare Act was rendered ineffective by reason of "inconsistency" with the provisions of Pt VII of the Family Law Act.

39 To reach an answer, it is necessary first to refer to the present constitutional status of the Northern Territory and the laws made by its legislature.

The Northern Territory

40 The status of the Northern Territory before the commencement of the *Northern Territory (Self-Government) Act 1978* (Cth) ("the Self-Government Act") was explained by Dawson J in the following passage from his judgment in *Kruger v The Commonwealth*¹⁴:

the Parliament as provided in s 77(iii) of the Constitution: *De Vos v Daly* (1947) 73 CLR 509 at 514, 517-518, 520, 522.

13 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 556; cf as to the operation of s 64 of the Judiciary Act, *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 331-332; *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 63-64.

14 (1997) 190 CLR 1 at 49-50.

"Under s 122 of the Constitution, the parliament may make laws 'for the government of any Territory surrendered by any State to and accepted by the Commonwealth, or of any Territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth'. The Northern Territory was surrendered to and accepted by the Commonwealth pursuant to an agreement with South Australia in 1907. That agreement was ratified and approved by the *Northern Territory Acceptance Act* 1910 (Cth). Pursuant to s 111 of the Constitution, the Northern Territory thereupon became, and remains, 'subject to the exclusive jurisdiction of the Commonwealth'.

Upon acquiring exclusive jurisdiction over the Northern Territory, the Commonwealth enacted the *Northern Territory (Administration) Act* 1910 (Cth). Section 13(1) of that Act empowered the Governor-General to make Ordinances having the force of law in the Northern Territory. Under s 13(2) and (3) Ordinances were required to be laid before the Houses of Parliament, either of which had the power of disallowance. Until 1947, the powers of the Governor-General remained essentially unchanged, although under the *Northern Australia Act* 1926 (Cth) the Northern Territory was divided into two territories (known as North and Central Australia) which were separately administered. In 1947 the *Northern Territory (Administration) Act* 1947 (Cth) amended the earlier Act of the same name to create a legislative council for the Northern Territory. A new section, s 4U, provided that '[s]ubject to this Act, the Council may make Ordinances for the peace, order and good government of the Territory'. Further sections were added which provided that such Ordinances had no effect until assented to by the Administrator of the Northern Territory according to his discretion (s 4V), and that the Governor-General had power to disallow any Ordinance within six months of the Administrator's assent (s 4W)."

- 41 The question arose, with respect to a comparable power to make Ordinances for the Australian Capital Territory under s 12 of the *Seat of Government (Administration) Act* 1910 (Cth) ("the Seat of Government Act"), as to whether this power might "be exercised in a manner incompatible with a law made by Parliament itself"¹⁵. Brennan J dealt with the matter when giving the leading

15 *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 588.

judgment in the Full Court of the Federal Court in *Webster v McIntosh*¹⁶. His Honour said¹⁷:

"Where one of the laws is an Act of the Parliament and the other is an Ordinance of the Australian Capital Territory made under s 12 of the [Seat of Government Act], the relevant question is not whether the Act can be so construed as to leave room for the operation of the Ordinance, but whether the Ordinance is repugnant to the Act. The power to make Ordinances conferred by s 12 does not authorize the making of an Ordinance which is repugnant to an Act of the Parliament¹⁸, and s 12 does not sustain an Ordinance if it becomes repugnant to a later Act of the Parliament. To the extent to which an Ordinance is repugnant to an Act, the Ordinance has no operation. It is not now material to discuss whether repugnancy works this result by denying power to make or sustain the Ordinance or by attributing an overriding effect to the Act. In the present case, all that needs to be ascertained is whether the Ordinance is inconsistent with and thus repugnant to the Act in the material respect."

42 The legal regime in force in the Northern Territory assumed a different dimension with the commencement of the Self-Government Act. The Northern Territory of Australia is established by s 5 of the Self-Government Act as a body politic under the Crown. The Self-Government Act is a law made by the Parliament for the government of the Northern Territory in exercise of the power conferred by s 122 of the Constitution. It is an example of the use of s 122 to provide for "the course of constitutional development"¹⁹ of a territory.

43 The Self-Government Act provides (s 6) that, subject to that statute, the Legislative Assembly of the Northern Territory of Australia has power, with the assent of the Administrator or the Governor-General, as provided by the Self-Government Act, "to make laws for the peace, order and good government of the Territory".

44 Section 57(1) of the Self-Government Act deals with continuing status of the previous legal regime in the Northern Territory. The sub-section states:

16 (1980) 49 FLR 317; 32 ALR 603.

17 (1980) 49 FLR 317 at 320-321; 32 ALR 603 at 605-606.

18 *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 588.

19 *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 270.

"Subject to this Act, on and after the commencing date, all existing laws of the Territory have the same operation as they would have had if this Act had not been enacted, subject to alteration or repeal by or under enactment."

The term "enactment" in s 57(1) is so defined in s 4(1) as to mean a law passed by the Legislative Assembly of the Northern Territory or an Ordinance continued in force by s 57(1)²⁰.

45 The phrase "existing law of the Territory" is so defined as not to include Acts of the Parliament in force in the Northern Territory among those laws which the Legislative Assembly may alter or repeal. An "existing law of the Territory" means (s 57(3)(b)) an Ordinance made under the *Northern Territory (Administration) Act* 1910 (Cth) or an instrument under such an Ordinance. The phrase also means (s 57(3)(a)) any law in force in the Territory but with two exclusions. The first is "an Act". This phrase identifies statutes of the Parliament²¹. The second is an instrument made under an Act but being neither an Ordinance nor an instrument made under an Ordinance itself made under the 1910 statute.

46 The result is that the definition of "existing law of the Territory" in s 57(3) excludes from the power of alteration or repeal given to the Legislative Assembly both (i) any Act of the Parliament in force in the Territory immediately before the commencing date; and (ii) any instrument made under such a statute, but does not exclude an Ordinance made under the 1910 Act or an instrument made under such an Ordinance. Such Ordinances and instruments made thereunder are within the concept of "existing law of the Territory" and thus may be altered or repealed by or under a law made by the Legislative Assembly.

47 The particular law made by the Parliament with which this litigation is concerned is the 1995 Act, which inserted the new Pt VII of the Family Law Act. It is true that s 15 of the Interpretation Act provides that, unless the contrary intention appears, every statute amending another Act shall "be construed with such other Act and as part thereof". However, in its present form, the Family Law Act was not a law in force in the Territory immediately before the commencing date of the Self-Government Act.

20 The structure of the Self-Government Act was more fully considered in *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 623-630 and *Attorney-General (NT) v Hand* (1989) 25 FCR 345 at 363-365.

21 *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act"), s 38(1); *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395 at 403.

48 In its form at that date, the Family Law Act was not subject to alteration or repeal by or under an enactment of the Legislative Assembly. The power of the Legislative Assembly, conferred by s 6 of the Self-Government Act, to make laws for the peace, order and good government of the Territory, is expressed to be "[s]ubject to this Act". Therefore, s 6 is subject to the limitation found in s 57 upon the power to alter or repeal laws in force in the Territory immediately before the commencing date. Plainly, it was within the competence of the Parliament in legislating under s 122 of the Constitution "for the government" of the Northern Territory to provide in this way for its constitutional development.

49 It is consistent with the imposition of this limitation upon the power of the Legislative Assembly with respect to pre-existing laws of the Commonwealth that no provision is made in the Self-Government Act with respect to the alteration or repeal by the Legislative Assembly of laws subsequently enacted by the Parliament of the Commonwealth. The phrase "to make laws for the peace, order and good government of the Territory" in s 6 of the Self-Government Act should not be construed as conferring such an extensive form of authority.

50 This appeal is concerned with a different aspect of the interrelation between Commonwealth and Territory legislation. The issue here is whether, by reason of the 1995 Act, the continued operation of the law made by the Territory in 1983 has been limited so that it has an application narrower than would otherwise be the case.

51 In *University of Wollongong v Metwally*²², Mason J said:

"Inconsistency or repugnancy is a long-standing concept in the field of statutory law. Where the provisions of two statutes are in conflict, so much so that they cannot be reconciled one with the other, there is a consequential need to resolve the problem created by the conflict. In the case of conflicting statutes enacted by one legislature the problem is resolved by regarding the later statute as impliedly repealing the earlier statute to the extent of the inconsistency. In the case of conflicting statutes, one enacted by the Imperial Parliament, the other by a colonial legislature, the problem was resolved in favour of the primacy of the Imperial statute, even if it be the first in time".

52 A related issue may arise where statute confers upon the executive branch of government the authority to make rules and regulations, generally described as "delegated legislation". The ambit of the authority so conferred is spelled out by the statute, often in terms that the delegated legislation must not be "inconsistent" with the provisions of the statute itself. An example is the expression of the

22 (1984) 158 CLR 447 at 463. See also *Attorney-General (NT) v Hand* (1989) 25 FCR 345 at 361-362.

regulation-making power conferred by s 125 of the Family Law Act itself. The regulations so made must not be "inconsistent" with the Family Law Act. In this sphere, any question of "inconsistency" does not arise as a consequence of the exercise of law-making power enjoyed by two legislative bodies. There is but one legislature involved and the failure of delegated legislation to operate fully in its terms is analysed in terms of *ultra vires* and of action in excess of the authority delegated by the legislature. Section 46 of the Interpretation Act makes provision for the "reading down" of a delegated legislation to preserve its operation to the extent to which it is not in excess of power²³.

53 This appeal concerns the impact upon a law made by the Legislative Assembly of the Northern Territory of a law of the Commonwealth, in force in that Territory, and enacted after the territorial law. This situation differs both from those described above and from the regime established by s 109 of the Constitution. Section 109 deals with laws made by the legislatures of the Commonwealth and the States, each having its place in the federal structure allotted by the text of the Constitution itself. The decided cases show "two distinct bases for the conclusion of inconsistency within the meaning of s 109", namely "a textual collision" and the manifestation of an intention that the law of the Commonwealth be the exclusive law on a topic "both for what it forbids and what it allows"²⁴. The question raised by s 109 is one "not between powers, but between laws made under powers"²⁵. The terms of s 109 are not addressed to the relationship between laws of the Commonwealth and those enacted by legislatures in the territories²⁶.

54 The Self-Government Act, which gives life to and sustains the Legislative Assembly and the laws made by it, is a law of the Commonwealth and, as such, itself is subject to express or implied repeal or amendment by subsequent Commonwealth laws²⁷. In addition, a later law of the Commonwealth may expressly override an existing law made by the Legislative Assembly of the Northern Territory. Such a later law of the Commonwealth is a law made for the

23 cf *Harrington v Lowe* (1996) 190 CLR 311 at 326-328.

24 *Miller v Miller* (1978) 141 CLR 269 at 275.

25 *O'Sullivan v Noarlunga Meat Ltd* (1956) 95 CLR 177 at 183 (PC); [1957] AC 1 at 25. See also *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 216.

26 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 464; cf *P v P* (1994) 181 CLR 583 at 602-603.

27 See *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 727-728, 740-741; 152 ALR 540 at 547, 564-565.

government of this Territory within the meaning of s 122 of the Constitution. The *Euthanasia Laws Act* 1997 (Cth) took two steps. It both removed the power of the Legislative Assembly otherwise conferred by s 6 of the Self-Government Act to make laws permitting euthanasia and provided that the enactment of the *Rights of the Terminally Ill Act* (NT) had no force or effect as a law of the Territory, except as regards the lawfulness or validity of anything done in accordance with it prior to the commencement of the Commonwealth law.

55 Part VII of the Family Law Act contains no express provision bearing upon its relationship with s 6 of the Self-Government Act or with earlier laws made by the legislature of the Northern Territory. The question then is whether, by necessary implication, the 1995 Act denies full effect to s 97(3) of the Community Welfare Act by denying thereafter the power of the Legislative Assembly to "sustain"²⁸ that provision or by the operation of the 1995 Act with an overriding effect upon the Community Welfare Act.

56 Since *Lamshed v Lake*²⁹, it has been settled that s 109 of the Constitution gives paramountcy to laws made under s 122 over inconsistent State laws. Further, as Dixon CJ pointed out in that case³⁰, many laws made by the Parliament in exercise of powers conferred by s 51 of the Constitution operate generally throughout Australia, including the territories, not merely within the areas of or by reference to acts, matters or things connected with the States.

57 There may be discerned in a law which is of general application throughout the nation and is made by the Parliament in exercise of a power conferred by s 51 of the Constitution the legislative intention to make exhaustive or exclusive provision on the subject with which it deals. Section 109 of the Constitution then will apply on the footing that, "when the Parliament appears to have intended that the Federal law shall be a complete statement of the law governing a particular relation or thing ... the operation of the Federal law would be impaired if the State law were allowed to affect the matter at all"³¹. In such a case, it is to be expected also that this field will be covered with respect to the territories. For example, one would be slow to attribute to the Parliament the intention that a law with respect to defence would occupy two fields and, in that sense, operate differentially across

28 The word used by Brennan J in *Webster v McIntosh* (1980) 49 FLR 317 at 320-321; 32 ALR 603 at 606.

29 (1958) 99 CLR 132.

30 (1958) 99 CLR 132 at 143.

31 *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 at 136.

Australia, or that a law with respect to marriage would segregate the population by a criterion of residence in a territory rather than elsewhere in Australia³².

58 The same expectation as to legislative intention arises where the power of the Parliament to enact legislation, such as Pt VII of the Family Law Act, is drawn from several sources, including s 122, but the scheme of the legislation is that it operates exclusively across the field it covers, whether in the States or the territories.

59 Different considerations may apply where the law made by the Parliament, whatever the constitutional source of authority, does not evince an intention to cover the relevant field. In such cases, one would expect greater scope for the concurrent operation of territorial laws. This would correspond with the situation respecting State laws, if narrower notions of textual collision or direct inconsistency and repugnancy be applied. Those notions apply in cases such as those where two laws may make "contradictory provision upon the same topic, making it impossible for both laws to be obeyed", as Mason J put it in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*³³, or one law, as Dixon J said in *Stock Motor Ploughs Ltd v Forsyth*³⁴, varies, detracts from or impairs the other.

60 Section 122 of the Constitution supports the stipulation by the Parliament, in the law by which a territorial legislature is established, of the criteria which determine concurrent operation of territorial laws and other laws which are made by the Parliament and are in force in the Territory concerned. Section 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ("the ACT Self-Government Act") is an example. Section 8 thereof establishes the Legislative Assembly for the Australian Capital Territory and s 22 confers upon that body the power to enact laws for the peace, order and good government of that Territory. By s 28, a provision of a law made by the Assembly has no effect to the extent that it is inconsistent with a law in force in the Australian Capital Territory, not being an enactment of the Assembly or a subordinate law. However, such a provision "shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law" (s 28(1))³⁵. It will be apparent

32 cf s 117 of the Constitution which fixes upon residence in one State rather than another State.

33 (1977) 137 CLR 545 at 563.

34 (1932) 48 CLR 128 at 136.

35 The text of s 28 of the ACT Self-Government Act states:

that s 28 operates not as a denial of power otherwise conferred by s 8, but as a denial of effect to a law so made "to the extent" of its inconsistency. To that extent the analogy with s 109 will be apparent. However, the criterion for inconsistency - incapacity of concurrent operation - is narrower than that which applies under s 109, where the federal law evinces an intention to make exhaustive or exclusive provision upon a topic within the legislative power of the Commonwealth.

61 There is no provision in the Self-Government Act which corresponds to s 28. In a case such as the present, the task is that indicated above. It is to ascertain whether it is necessarily implied by the enactment, in the 1995 Act, of Pt VII of the Family Law Act that a law such as s 97(3) of the Community Welfare Act has a narrower operation than would otherwise be the case.

62 The majority in the Full Court of the Family Court gave overriding effect to what they perceived to be the adoption in Pt VII of the "paramountcy principle". To this we now turn.

"(1) A provision of an enactment has no effect to the extent that it is inconsistent with a law defined by subsection (2), but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law.

(2) In this section:

'law' means:

- (a) a law in force in the Territory (other than an enactment or a subordinate law); or
- (b) an award, order or determination, or any other instrument of a legislative character, made under a law falling within paragraph (a)."

The term "enactment" is defined in s 3 as meaning:

- "(a) a law (however described or entitled) made by the Assembly under this Act; or
- (b) a law, or part of a law, that is an enactment because of section 34".

Section 34 provides that certain laws, other than laws of the Commonwealth, which were in force in the Territory immediately before the commencement of the ACT Self-Government Act shall be taken to be an enactment.

The paramountcy principle

- 63 In *M v M*³⁶, *Marion's Case*³⁷, *P v P*³⁸ and *ZP v PS*³⁹, this Court considered the jurisdiction conferred upon the Family Court by the previous Pt VII of the Family Law Act. In *ZP v PS*⁴⁰, Mason CJ, Toohey and McHugh JJ observed that it was established by *Marion's Case* and by *P v P* that Pt VII invested the Family Court with a welfare jurisdiction which was similar to the *parens patriae* jurisdiction exercised by the Court of Chancery but which was freed from the preliminary requirement of a wardship order. Their Honours also pointed out that in the exercise of the *parens patriae* jurisdiction the Court of Chancery had always been guided by the principle that the welfare of the minor was the first and paramount consideration.
- 64 The history of this principle is examined in the speech of Lord Guest in *J v C*⁴¹. It developed as a recognition of the welfare of an infant as a "first and paramount consideration" to which other considerations, such as the claims of a father or a mother, were subordinate. Section 1 of the *Guardianship of Infants Act* 1925 (UK) gave legislative recognition to the rule by stipulating that a court should "regard the welfare of the infant as the first and paramount consideration".
- 65 This important and salutary principle of substantive law, adopted by courts exercising *parens patriae* jurisdiction for more than a century, was not applied in an adjectival vacuum, although its identification of the principal issue to be tried had important practical consequences for the application of the rules of procedure and evidence, especially where there was a discretion to be exercised, where competing interests were to be weighed in the balance, or where there was a question of dispensing with strict compliance with the ordinary rules.

36 (1988) 166 CLR 69.

37 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

38 (1994) 181 CLR 583.

39 (1994) 181 CLR 639.

40 (1994) 181 CLR 639 at 646-647. See also *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 657-658.

41 [1970] AC 668 at 692-700.

66 In *M v M*, Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ said⁴²:

"In proceedings under Pt VII of the [Family Law] Act in relation to a child, the court is enjoined to 'regard the welfare of the child as the paramount consideration': s 60D. The paramountcy of this consideration in proceedings for custody or access is preserved by s 64(1). The consequence is that *the ultimate and paramount issue to be decided* in proceedings for custody of, or access to, a child is whether the making of the order sought is in the interests of the welfare of the child." (emphasis added)

67 The reference by their Honours to "the ultimate and paramount issue" is of present significance in the construction of Pt VII as it now stands. The text of ss 65D and 65E is set out earlier in these reasons. In particular, s 65E is directed to the final stage of the exercise by the court of its jurisdiction in proceedings for a parenting order. It states that a court, "[i]n deciding whether to make a particular parenting order in relation to a child", must have regard to the best interests of that child as the paramount consideration. The phrase quoted from s 65E further elucidates the scope of the words "in proceedings" found in the legislation as it stood when considered in *M v M*.

68 Section 65E identifies the issue in the case. In any kind of litigation, the formulation of the ultimate issue may have an important influence upon the practical operation of the adjectival rules which apply to such litigation. It has long been recognised that the paramountcy principle has such an influence in proceedings concerning the welfare of children. However, the question in the present case concerns its effect, if any, upon a specific statutory provision which is itself aimed at protecting the interests of children by securing confidentiality of information.

69 The Evidence Act applies to the adducing of evidence in the Family Court, as indicated earlier in these reasons. Further, certain particular provisions in this respect are made by Pt XI (ss 97-102B) of the Family Law Act itself. Section 102A places restrictions upon the examination of children and sub-s (4) thereof provides that, in proceedings under the Family Law Act, a court, in certain circumstances, may admit evidence which is otherwise inadmissible. Section 100A provides that evidence of a representation made by a child about a matter that is relevant to the welfare of that child or another child and which otherwise would be inadmissible as hearsay is not solely for that reason inadmissible in any proceedings under Pt VII. In addition, in subdiv D (ss 67Z-67ZB) of Div 8 of Pt VII, special provisions are made with respect to the treatment of allegations of child abuse. Finally, s 19N renders inadmissible in any court certain admissions made at mediation meetings and counselling conferences.

42 (1988) 166 CLR 69 at 75-76.

In *Centacare Central Queensland v G and K*⁴³, the Full Court of the Family Court held, in our view correctly, that s 65E does not operate upon s 19N so as to allow the admission of evidence contrary to its terms.

- 70 However, the gravamen of the reasoning of the majority in the Full Court, as expressed in several of the decisions to which they referred, is that references in Pt VII to the welfare of children as the paramount consideration⁴⁴ are to be understood as conferring upon the relevant court power to ensure that the rules of procedure and evidence which would otherwise apply are so adapted that those rules themselves serve and further that paramount consideration⁴⁵. In *Reynolds v Kilpatrick*⁴⁶, the corollary was said to be:

"[I]f a court exercising jurisdiction under [Pt VII] was to conclude that there existed evidence which, apart from the operation of a State or Territory Statute, would be available to it and which would better assist it to reach a decision that would 'best promote and protect the interests of the child', the court would be entitled to order that such evidence be made available to it."

A further corollary would be that State or Territory law would not be "picked up" by s 79 of the Judiciary Act because, upon its true construction, Pt VII of the Family Law Act "otherwise provided".

- 71 However, with respect to the application which was instituted on 16 June 1995 and which has given rise to the issues before this Court, exhaustive or exclusive provision made by Pt VII with respect to taking the best interests of the child as the paramount consideration was that spelled out in s 65E. This is the ultimate issue to be decided, namely whether to make a particular parenting order in relation to the child.

- 72 The question whether a subpoena should be set aside is anterior to any question of the admissibility of evidence. Further, upon production to the court, claims of privilege may be raised which require inspection of the documents by the judge⁴⁷; the court may also limit access to the documents and restrict the

43 [1998] FLC ¶92-821 at 85,341.

44 For example, in ss 65E, 67L, 67V, 67ZC and 68E(1).

45 [1996] FLC ¶92-694 at 83,237; (1996) 134 FLR 40 at 54.

46 [1993] FLC ¶92-351 at 79,704.

47 See discussion in *Zarro v Australian Securities Commission* (1992) 36 FCR 40 at 44-48, 60-61 of the earlier authorities in this Court.

making of copies. All these steps are designed to assist the preparation for or the conduct of trials. The conduct of the trial or other hearing may produce the situation where few or none of the documents are sought to be tendered.

73 When the provisions of Pt VII are seen in this light, it is apparent that the immunity which s 97(3) confers in respect of what otherwise would be a requirement laid upon authorised persons by a subpoena issued by the Family Court in the course of the exercise of jurisdiction under Pt VII does not vary, impair or detract from the operation of "the paramountcy principle". Nor is it impossible to give effect to "the paramountcy principle" and to s 97(3).

74 Finally, the subject with which Pt VII relevantly deals, the "paramountcy principle" implemented in s 65E, is a subject upon which Pt VII makes exclusive or exhaustive provision in its terms without manifesting a legislative intention to cover the broader field marked out by the majority in the Full Court, to the exclusion of any law otherwise applicable in that broader field.

75 It follows that there is no necessary implication in Pt VII which requires qualification to the law-making power conferred upon the Legislative Assembly of the Northern Territory by s 6 of the Self-Government Act so that it does not sustain so much of s 97(3) of the Community Welfare Act as confers an immunity upon authorised persons from the demands of a subpoena issued in proceedings under Pt VII of the Family Law Act. Nor, if this be the correct method of characterising the result, does Pt VII, as a matter of necessary implication, have such an overriding effect directly upon s 97(3), rather than through the medium of a restriction on the law-making power conferred upon the Legislative Assembly under s 6 of the Self-Government Act.

76 Accordingly, the fourth and threshold issue identified earlier in these reasons is to be resolved by determining that, when the jurisdiction of the Family Court under Pt VII was invoked, s 97(3) was in force as a law of the Northern Territory and thus was available as an object of the operation of s 79 of the Judiciary Act, if the other criteria prescribed by that section were satisfied.

77 This brings us to the third issue isolated above, namely whether s 97(3) was not rendered binding on the Family Court because the Family Law Act was, within the meaning of s 79 of the Judiciary Act, a law of the Commonwealth which "otherwise provided".

"Otherwise provided"

78 The text of s 79 is set out earlier in these reasons. It was derived from s 34 of the *Judiciary Act of 1789*⁴⁸, enacted by the First Congress of the United States and more often referred to as the *Rules of Decision Act*. Section 34 stated:

"That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

It has been said of s 34 that, if the federal courts are directed to apply federal law, it governs by "displacing" state law, even on matters of substance⁴⁹, and that this operation of s 34 is dictated by the Supremacy Clause of the United States Constitution (Art VI, cl 2)⁵⁰.

79 In applying the phrase "otherwise provided" in s 79, Latham CJ⁵¹ and Starke J⁵² asked whether the particular law of the Commonwealth was to be regarded in any way as "inconsistent" with the application of the State Act which was said to be "picked up" by s 79. Later, Menzies J asked whether the law relied upon as a law of the Commonwealth was one "displacing" the law of the State⁵³.

48 1 Stat 73, 92 (1789), now codified as amended at 28 USC §1652 (1994).

49 Freer, "Some Thoughts on the State of *Erie* After *Gasparini*", (1998) 76 *Texas Law Review* 1637 at 1637; Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction*, 2nd ed (1996), vol 19, §4501.

50 See *Sola Electric Co v Jefferson Electric Co* 317 US 173 at 176 (1942). The Supremacy Clause provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

51 *De Vos v Daly* (1947) 73 CLR 509 at 515.

52 (1947) 73 CLR 509 at 518.

53 *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 39.

In *Australian National Airlines Commission v The Commonwealth*, Mason J said⁵⁴:

"Section 26A of the *High Court Procedure Act* [1903 (Cth)], which provides that judgments of the Court shall carry interest, should be regarded as a comprehensive expression of the entitlement in this Court of a litigant to interest on damages to the exclusion of any provision in State law which would otherwise be made applicable by virtue of s 79."

80 The objective of s 79 is to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements in which may comprise the laws of the State or Territory in which the jurisdiction is being exercised, together with the laws of the Commonwealth, but subject always to the overriding effect of the Constitution itself. Seen in that light, the notion of "inconsistency" involved in the phrase "otherwise provided" in s 79 is akin to that first identified by Mason J in the passage from the judgment in *University of Wollongong v Metwally*⁵⁵ set out earlier in these reasons. This is the need to resolve the problem that arises by conflict between conflicting statutes having the same source. The law of a State or Territory which is to operate as a surrogate law of the Commonwealth is to be measured beside other laws of the Commonwealth.

81 The issue whether the Family Law Act makes relevant provision otherwise to s 97(3) of the Community Welfare Act may be approached by asking whether the operation of the former so reduces the ambit of the latter that the provisions of the Family Law Act are irreconcilable with those of the Territory law, with the result that the Family Law Act "otherwise provide[s]"⁵⁶.

82 One answer suggested in the submissions was to focus upon the phrase "except for the purposes of this Act" in s 97(3) and the broad statement in the long title to that law that it was to provide for the protection and care of children. This, it was put, was a purpose consistent with the paramountcy principle manifested in Pt VII of the Family Law Act. The result was said to be that, in the present case, to require the authorised person to produce the documents in response to the

54 (1975) 49 ALJR 338 at 340; 6 ALR 433 at 436. See also *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 368-369 where it was concluded that the relevant law of the Commonwealth left "no room" for the application of the State law.

55 (1984) 158 CLR 447 at 463.

56 cf *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 727-728, 740-741; 152 ALR 540 at 547-548, 564-565.

subpoena was to require action for the purposes of the Child Welfare Act. That would mean that the immunity otherwise given by s 97(3) did not operate.

- 83 However, the phrase "except for the purposes of this Act" in s 97(3) is to be understood in the sense given to it by the established authority to which counsel for the New South Wales Attorney-General referred. In *James v Cowan*⁵⁷, the Judicial Committee agreed with the dissenting judgment in this Court of Isaacs J. His Honour had warned against seizure upon words in a long title, separate from their context, and their erection into a "purpose" of the statute within the meaning of a specific provision thereof⁵⁸. Isaacs J had continued⁵⁹:

"The title is the label which the Legislature thinks most suitable to identify the contents of the depository of its will on the given subject. It is no part of its enactment as to the 'purposes' of the Act, except as to its authoritative selection as a label. The title is no more part of the remedy designed to cope with the evil dealt with than is the label on a druggist's bottle part of the remedy for the malady intended to be cured."

- 84 What is presently significant is that the provisions of Pt XIII A of the Family Law Act leave room for the operation of the immunity conferred by s 97(3) of the Community Welfare Act. The provisions of Pt XIII A are outlined earlier in these reasons. Section 112AC is particularly significant in its provision for "reasonable excuse". The submission that the immunity provided for by s 97(3)(a) provides a reasonable excuse for failure to comply with the requirement of a subpoena issued under the Rules of Court that a document be produced to the Family Court should be accepted. Section 112AD, in its application with respect to subpoenas, takes no large step. The apparently absolute terms of the command in subpoenas issued under other Rules of Court are treated as permitting the recipient to rely on provisions such as s 97(3) as an answer to production⁶⁰.

- 85 The result is that Pt VII does not otherwise provide within the meaning of s 79 of the Judiciary Act.

- 86 There remains the question whether, although the Family Court was exercising jurisdiction conferred by s 69H(1) and s 69ZG of the Family Law Act

57 (1932) 47 CLR 386 at 398; [1932] AC 542 at 561.

58 (1930) 43 CLR 386 at 407-408.

59 (1930) 43 CLR 386 at 408.

60 cf *Nestle Australia Ltd v Commissioner of Taxation* (1986) 11 FCR 453 at 455-456; affd (1986) 12 FCR 257.

with respect to a matter arising under a law made by the Parliament, the circumstance of the combination of those two sections as supported by s 122 of the Constitution denies to the exercise of that jurisdiction by the Family Court, a federal court within the meaning of Ch III of the Constitution, the character of federal jurisdiction.

Federal jurisdiction

87 Section 39(2) of the Judiciary Act confers "federal jurisdiction" on the several Courts of the States within the limits of their several jurisdictions. The term "jurisdiction" here signifies authority to adjudicate⁶¹. Speaking of the term "federal jurisdiction" in s 39(2), Kitto J observed that "all that is meant by saying that a court has federal jurisdiction in a particular matter is that the court's authority to adjudicate upon the matter is a part of the judicial power of the federation"⁶². In the same case, Windeyer J identified "federal jurisdiction" as depending upon the grant by Commonwealth law (or, one would add, by Ch III itself) of "a power of adjudication"⁶³.

88 In *Anderson v Eric Anderson Radio & TV Pty Ltd*⁶⁴, Taylor J expressed doubt as to whether a right given to a plaintiff by an Ordinance promulgated for the Australian Capital Territory under s 12 of the Seat of Government Act answered the description of a matter arising under a law made by the Parliament and thereby attracted federal jurisdiction. However, in *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd*⁶⁵, Dixon J had said that it was clear that a claim to a right conferred by or under Ordinances made by the Governor-General in Council under s 12 of the Seat of Government Act were matters arising under an enactment of the Parliament. His Honour assumed jurisdiction in the action which was brought in the original jurisdiction of the High Court⁶⁶. Further, in

61 *Ah Yick v Lehmert* (1905) 2 CLR 593 at 603; *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.

62 *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 30.

63 (1965) 114 CLR 20 at 44. See also *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142; *Lorenzo v Carey* (1921) 29 CLR 243 at 252.

64 (1965) 114 CLR 20 at 35-37.

65 (1929) 42 CLR 582 at 585-586. See also Dixon CJ's remarks in *Chapman v Suttie* (1963) 110 CLR 321 at 329-330.

66 (1929) 42 CLR 582 at 586.

*Capital TV and Appliances Pty Ltd v Falconer*⁶⁷, Menzies J rejected a proposition to the effect that the text of s 76(ii) of the Constitution should be read as containing an implied limitation "other than any laws made by the Parliament under s 122 of this Constitution". His Honour said⁶⁸:

"This I reject. The submission, I believe, contradicts the decision of this Court in *Lamshed v Lake*⁶⁹, a decision of far-reaching importance from which, I think, there should be no departure."

Menzies J continued⁷⁰:

"The only basis for a restricted construction of s 76(ii) would be to find in *R v Bernasconi*⁷¹, a general principle that, for the purposes of Ch III, 'laws of the Commonwealth' or 'laws made by Parliament' do not cover laws made under s 122. To reach this conclusion would, I think, be an extension - despite *Lamshed v Lake*⁷² - of the decision of the Court in *R v Bernasconi*⁷³. That decision should not, I think, be extended and it should be regarded as a decision which goes no further than to establish that, as a matter of construction, the words 'any law of the Commonwealth' in s 80 should be read as if they were followed by the words 'other than a law made under s 122'. While, therefore, I consider that the decision in *R v Bernasconi*⁷⁴ should be allowed to stand as establishing the construction to be accorded to s 80, I do not regard it as affording any reason for restricting the words 'any laws made by the Parliament' in s 76(ii) to exclude laws made by the Parliament under s 122. It would hardly be sensible to read s 76(ii) as denying Parliament power to make laws conferring original jurisdiction upon this Court in a matter arising under the law made by Parliament under s 122 and then to read s 122 as conferring upon Parliament the power to make such

67 (1971) 125 CLR 591.

68 (1971) 125 CLR 591 at 605.

69 (1958) 99 CLR 132.

70 (1971) 125 CLR 591 at 605-606.

71 (1915) 19 CLR 629.

72 (1958) 99 CLR 132.

73 (1915) 19 CLR 629.

74 (1915) 19 CLR 629.

a law. In my opinion there is no ground for inferring any limitation upon the ordinary meaning of the words used in s 76(ii)."

89 With that conclusion, we agree.

90 As we have indicated, in a judgment supervening between *Laristan Building and Investment Co* and *Capital TV and Appliances*, Taylor J had said⁷⁵ that "it may be open to question" whether an action to enforce a right given by an Ordinance made in exercise of power conferred by a statute of the Parliament involved a matter "arising under any laws made by Parliament". However, even if that were so (and, in *Laristan Building and Investment Co*, Dixon J said that the contrary might well be the case⁷⁶), it would not follow that a right directly conferred by the law of the Commonwealth itself did not give rise to a matter arising thereunder. Moreover, it has since been settled by the joint judgment of six members of this Court in *LNC Industries Ltd v BMW (Australia) Ltd*⁷⁷ that a matter arises under a federal law if the right or duty in question in the matter owes its existence to federal law or depends upon federal law for its enforcement or if the source of a defence which asserts that the defendant is immune from the alleged liability or obligation is a law of the Commonwealth.

91 We conclude that the Court should accept the submissions as to the construction of s 76(ii) of the Constitution made by the appellant with the support, in particular, of the Attorney-General for the Commonwealth and the Attorney-General for New South Wales as interveners. The submission, essential for this case, is that s 76(ii), in conjunction with s 77(i) of the Constitution, operates in accordance with its terms and permits the conferral of jurisdiction on federal courts in matters arising under laws made under s 122 of the Constitution. In such cases the constitutional source of the jurisdiction is s 76(ii) and s 77(i) and the jurisdiction is federal.

92 It is important to identify those issues which are not now before the Court. The outcome in this case is not governed or controlled by *R v Bernasconi*⁷⁸ or *Porter v The King; Ex parte Yee*⁷⁹. The Family Court is clearly a "federal court"

75 *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 37.

76 (1929) 42 CLR 582 at 585.

77 (1983) 151 CLR 575 at 581. See also *Re McJannet; Ex parte Australian Workers' Union of Employees (Q) [No 2]* (1997) 189 CLR 654 at 656.

78 (1915) 19 CLR 629.

79 (1926) 37 CLR 432.

and not a "territory court". No issue arises as to whether s 122 of the Constitution authorises laws creating "territory courts" which are not federal courts created under s 71 but upon which the Parliament may confer federal jurisdiction⁸⁰. If the Parliament may do so, a question arises with respect to the application to such "territory courts" of the reasoning in *Kable v Director of Public Prosecutions (NSW)*⁸¹. Nor is it necessary to embark upon the question whether s 122 supports the conferral upon a federal court of a jurisdiction which is not federal jurisdiction⁸². Finally, this case does not concern the appellate jurisdiction of the High Court, in particular any re-examination of the determination in *Capital TV and Appliances Pty Ltd v Falconer*⁸³ that (a) a "territory court" is not a federal court or a court exercising federal jurisdiction within the meaning of s 73 of the Constitution but (b) the Parliament may authorise an appeal to the High Court from a court created in exercise of the power in s 122.

Conclusion

93 The appeal to this Court should be allowed. Order 1 of the orders made by the Full Court of the Family Court on 8 August 1996 should be set aside. In place thereof an answer to the question in the case stated should be given which indicates that the provisions of s 97(3) of the Community Welfare Act, in their operation with respect to the subpoena issued on 23 October 1995, were not rendered inoperative by the provisions of the Family Law Act or the Evidence Act, and that s 97(3) was binding on the Family Court by reason of the operation of s 79 of the Judiciary Act.

94 As indicated earlier in these reasons, the appellant brought this appeal consequent upon its entry into the litigation in the Family Court as an intervener. There should be no order for costs in this Court⁸⁴.

95 The proceeding in this Court otherwise should be remitted to the Full Court of the Family Court for such reconsideration as may be appropriate, in the light of

80 See *Spratt v Hermes* (1965) 114 CLR 226.

81 (1996) 189 CLR 51.

82 cf *Gould v Brown* (1998) 72 ALJR 375 at 384-385, 397-398, 412, 431-432, 451; 151 ALR 395 at 406, 423-424, 443-444, 470-471, 497-498.

83 (1971) 125 CLR 591.

84 See *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 220-221.

31.

the decision of this Court and of the lapse of time, of the timetable with respect to submissions as to costs laid down in Order 3 of the orders made on 8 August 1996.

- 96 GAUDRON J. The issue to be decided in this appeal is whether the Manager, Child and Family Protective Services of the Northern Territory ("the Manager") is obliged to produce documents relating to a young child, Z, in Family Court proceedings concerned with that child's guardianship. To answer that question, however, a number of other questions must first be answered.

The proceedings in the Family Court

- 97 The proceedings in the Family Court which give rise to this appeal were commenced by the second respondent, JAW, seeking sole guardianship of her child, Z, and the discharge of access orders previously made in favour of the child's father, GPAO, the first respondent⁸⁵. The mother and father, who reside in the Northern Territory, were never married⁸⁶.

- 98 At the father's request, a subpoena was issued by the Registrar of the Family Court pursuant to O 28 r 1 of the Family Law Rules (Cth) ("the Rules") requiring the Manager to produce "[a]ll files and records in relation to [Z]"⁸⁷. On the return date, it was argued that the Manager was not obliged to produce the documents in question because of s 97(3) of the *Community Welfare Act* (NT)⁸⁸. That sub-section provides:

" A person who is, or has been, an authorized person shall not, except for the purposes of this Act, be required to –
 (a) produce in a court a document that has come into his possession or under his control; or
 (b) disclose or communicate to a court any matter or thing that has come under his notice,
 in the performance of his duties or functions under this Act."

It is not in issue that the Manager is an "authorized person" for the purposes of s 97(3).

- 99 In consequence of the issues raised by the Manager's reliance on s 97(3) of the *Community Welfare Act*, Murray J stated a case pursuant to s 94A of the *Family*

85 See the decision of the Full Court of the Family Court in this case, reported as *Re Z* [1996] FLC ¶92-694 at 83,251 per Fogarty J.

86 *Re Z* [1996] FLC ¶92-694 at 83,251.

87 *Re Z* [1996] FLC ¶92-694 at 83,252.

88 *Re Z* [1996] FLC ¶92-694 at 83,252.

*Law Act 1975 (Cth) ("the Act") for the consideration of the Full Court of the Family Court*⁸⁹.

The question asked of the Full Court

100 The case stated by Murray J was later amended by the Full Court. As amended, it asked the following question:

"Are the provisions of s 97(3) of the Community Welfare Act (NT) inconsistent with provisions of:

(a) the Family Law Act 1975 (Cth); or

(b) the Evidence Act 1995 (Cth);

such that the provisions of s 97(3) of the Community Welfare Act 1983 (NT) are inoperative to the extent of such inconsistency?"⁹⁰

101 By majority (Nicholson CJ and Frederico J), the Full Court answered the question in the case stated as follows:

"(a) Yes;

(b) Yes."⁹¹

The third member of the Full Court, Fogarty J, would have answered the question this way:

"(a) No;

(b) Yes, insofar as it relates to the adduction of evidence."⁹²

89 *Re Z* [1996] FLC ¶92-694 at 83,250.

90 *Re Z* [1996] FLC ¶92-694 at 83,250.

91 *Re Z* [1996] FLC ¶92-694 at 83,250.

92 *Re Z* [1996] FLC ¶92-694 at 83,296.

The Northern Territory intervened in the proceedings in the Full Court⁹³ and now appeals to this Court from the answers given⁹⁴.

- 102 The case stated assumes that s 97(3) of the *Community Welfare Act* is capable of applying in proceedings in the Family Court. That assumption was not challenged in the Full Court⁹⁵. It was, however, challenged in this Court. And to ascertain whether s 97(3) can apply, it is necessary to investigate the nature of the jurisdiction invoked by the mother's application for sole guardianship of her child and discharge of the father's access orders. That application was brought under Pt VII of the Act prior to its repeal and replacement with a new Pt VII on 11 June 1996. However, it is to be treated as though made under Div 6 of Pt VII as it now stands⁹⁶ and it is common ground that this appeal is to be determined by reference to those new provisions.

The Family Court's jurisdiction

- 103 The Family Court is created by s 21(1) of the Act. By s 39(1), jurisdiction is conferred on it in matrimonial causes, defined in s 4(1) of the Act to include various proceedings between or by parties to a marriage, including proceedings for the dissolution of marriage, maintenance and property settlement. Jurisdiction is also conferred on the Family Court by s 69H(1) of the Act "in relation to matters arising under [Pt VII]", which, in general terms, is concerned with matters affecting children⁹⁷. And s 69ZJ, which is in Pt VII, confers jurisdiction "in matters between residents of different States, being matters with respect to:

- (a) the maintenance of children and the payment of expenses in relation to children or child bearing; or

93 On 29 August 1996, the Full Court granted the appellant leave to intervene under s 92 of the *Family Law Act*. By s 92(3) of that Act, the appellant is "deemed to be a party to the proceedings with all the rights, duties and liabilities of a party."

94 The Court (Brennan CJ, Dawson and Toohey JJ) granted special leave to appeal on 15 August 1997.

95 *Re Z* [1996] FLC ¶92-694 at 83,267 per Fogarty J.

96 See ss 64B, 65C and 65D of the Act; cll 2 and 3 of Sched 2 to the *Family Law Reform Act* 1995 (Cth).

97 Section 60B(1) provides that the object of Pt VII is to ensure that children receive adequate parenting to "help them achieve their full potential" and to ensure "parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children."

(b) parental responsibility in relation to children."

104 Subject to exceptions in ss 69ZE and 69ZF (which are not presently relevant), Pt VII of the Act extends to children of a marriage and ex-nuptial children in New South Wales, Victoria, Queensland, South Australia and Tasmania⁹⁸, those States having referred power to legislate in that regard to the Commonwealth to the extent that it does not otherwise have that power⁹⁹. Provision is made in s 69ZE(2) for the extension of Pt VII to children in Western Australia in the event that it, too, refers that power to the Commonwealth. Until that happens, the effect of s 69ZH is that various provisions of Pt VII operate in Western Australia in relation to the children of a marriage.

105 By s 69ZG of the Act, Pt VII "applies in and in relation to the Territories." The jurisdiction invoked in this case is jurisdiction under Pt VII as applied in the Territories by s 69ZG. In its application to ex-nuptial children, s 69ZG is a law under s 122 of the Constitution¹⁰⁰ and not a law under ss 51(xxi) or (xxii) which are concerned, respectively, with "marriage" and "divorce and matrimonial causes"¹⁰¹. It is convenient to refer to the jurisdiction conferred by s 69ZG with respect to ex-nuptial children as "s 69ZG jurisdiction".

106 A question arises whether s 69ZG jurisdiction is federal jurisdiction or what, for convenience, may be called "territory jurisdiction". The question arises because, if it is federal jurisdiction, s 79 of the *Judiciary Act* 1903 (Cth), the text of which will be set out later in these reasons, provides as to the application of State and Territory laws and determines the outcome of this appeal. If it is "territory jurisdiction", s 79 of the *Judiciary Act* has no application. It is then necessary to ascertain whether some provision of the Act or the Rules provides for the application of Territory laws, either generally or in some other way that is capable of extending to s 97(3) of the *Community Welfare Act*. The question

98 See s 69ZE(1).

99 See *Commonwealth Powers (Family Law – Children) Act* 1986 (NSW); *Commonwealth Powers (Family Law – Children) Act* 1986 (Vic); *Commonwealth Powers (Family Law) Act* 1986 (SA); *Commonwealth Powers (Family Law – Children) Act* 1990 (Q); *Commonwealth Powers (Family Law) Act* 1987 (Tas).

100 Section 122 relevantly provides that "[t]he Parliament may make laws for the government of any territory". On the exercise of s 122 to enact provisions of the *Family Law Act*, see *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227 at 266 per Aickin J; *In the Marriage of Cormick* (1984) 156 CLR 170 at 182 per Murphy J.

101 Section 51(xxii) authorises the Parliament to legislate "with respect to ... [d]ivorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants".

whether, in this case, the Family Court was exercising federal or "territory" jurisdiction is anterior to any question of the kind formulated in the stated case.

Federal or "territory" jurisdiction

107 The question whether s 69ZG jurisdiction is federal or "territory" jurisdiction arises because of the decisions of this Court dealing with the relationship between s 122 and Ch III of the Constitution. Those decisions appear to have set up what Barwick CJ described in *Capital TV and Appliances Pty Ltd v Falconer* as "the doctrine of the duality of ... judicial power"¹⁰². That doctrine allows that s 122 authorises the establishment of courts to exercise jurisdiction with respect to matters arising in a territory free from Ch III, while Ch III governs federal courts and provides as to the exercise of federal jurisdiction. It is not in issue that the Family Court is a federal court for the purposes of Ch III and that, save to the extent that Pt VII jurisdiction derives from s 122, it is federal jurisdiction¹⁰³.

108 The foundation of the "doctrine of duality" lies in decisions of this Court holding that courts created by the Parliament to exercise jurisdiction in a Territory with respect to matters arising under laws made pursuant to s 122 of the Constitution are not federal courts for the purposes of s 71 and not subject to the requirements of s 72¹⁰⁴. So far as is presently relevant, s 71 provides:

" The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction."

102 (1971) 125 CLR 591 at 598.

103 So far as concerns children of a marriage, the Act is a law enacted pursuant to ss 51(xxi) (marriage) and (xxii) (parental rights, custody and guardianship of infants in relation to divorce and matrimonial causes). Because of the reference of power to the Commonwealth by New South Wales, Victoria, South Australia, Queensland and Tasmania described above, provisions of Pt VII conferring jurisdiction on the Family Court in relation to ex-nuptial children in those States are, in general, enacted pursuant to s 51(xxxvii) ("[m]atters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States").

104 See, with respect to the Supreme Court of the Northern Territory, *Porter v The King; Ex parte Yee* (1926) 37 CLR 432; with respect to the ACT Court of Petty Sessions, *Spratt v Hermes* (1965) 114 CLR 226; and with respect to the Supreme Court of the ACT, *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.

Section 72 relevantly provides as to the appointment and tenure of "[t]he Justices of the High Court and of the other courts created by the Parliament".

109 As will later appear, it is possible to form the view that courts created pursuant to s 122 are not federal courts within s 71 and not subject to the requirements of s 72 of the Constitution without adopting a doctrine of duality that treats those courts as wholly outside Ch III. However, the decided cases are not concerned solely with the relationship between s 122 and ss 71 and 72. For example, it was held in *R v Bernasconi*¹⁰⁵ that s 80 of the Constitution, which requires trial by jury for any indictable "offence against any law of the Commonwealth", does not apply to offences against laws enacted pursuant to s 122 of the Constitution. And there are statements in the decided cases to the effect that Ch III has no application to s 122¹⁰⁶ and that laws made under s 122 are not "laws made by the Parliament" for the purposes of s 76(ii) of the Constitution¹⁰⁷.

110 The significance of s 76(ii) of the Constitution is that it describes what is, perhaps, the most frequently invoked area of federal jurisdiction, namely, jurisdiction with respect to matters "arising under any laws made by the Parliament". If that expression includes laws made by the Parliament under s 122, as its language would plainly suggest, then matters arising under those laws are matters which engage the judicial power of the Commonwealth. By Ch III, that power is vested only in this Court, in federal courts created by the Parliament and

105 (1915) 19 CLR 629.

106 See, for example, *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 585 per Dixon J; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 289-290 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320; *Lamshed v Lake* (1958) 99 CLR 132 at 142 per Dixon CJ; *Spratt v Hermes* (1965) 114 CLR 226 at 256-257 per Kitto J; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 43-44 per Brennan CJ; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 537-539 per Brennan CJ; *Gould v Brown* (1998) 72 ALJR 375 at 383-385 per Brennan CJ and Toohey J; 151 ALR 395 at 404-406.

107 See, for example, *Spratt v Hermes* (1965) 114 CLR 226 at 249-250 per Kitto J. See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 169-170 where Gummow J expressed the opinion that it would be necessary to reopen the decisions in *Attorney-General of the Commonwealth of Australia v The Queen*, *Lamshed v Lake*, *Spratt v Hermes* and *Capital TV and Appliances Pty Ltd v Falconer* in order to give effect to the "simple" construction of Ch III discussed by Dixon CJ, McTiernan, Fullagar and Kitto JJ in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290, according to which laws made under s 122 would be "laws made by the Parliament" for the purposes of s 76(ii).

in "such other courts as it invests with federal jurisdiction"¹⁰⁸, which courts, it has been held, do not include the Territory courts¹⁰⁹.

- 111 It has been said that the Territory courts are not "federal courts" because they are created under s 122 which confers power to make laws, "not in virtue of [the Commonwealth's] character as the central polity of the federation and therefore in respect of the federated area, but in virtue of its responsibility for the entire (non-federal) government of a community made subject in all respects to its authority."¹¹⁰ And they have been held not to be courts which can be invested with federal jurisdiction because, in the words of Barwick CJ in *Capital TV and Appliances Pty Ltd v Falconer*:

"the courts which may be invested with federal jurisdiction are courts set up by the States. They cannot include courts created by the Commonwealth."¹¹¹

- 112 If a Territory court is neither a federal court nor a court which can be invested with federal jurisdiction, two questions present themselves: how is it that a Territory court can exercise jurisdiction with respect to matters arising under laws of the Parliament which operate throughout Australia? And how can an appeal from a Territory court lie to this Court? That last question arises because s 73(ii) of the Constitution relevantly defines this Court's appellate jurisdiction as jurisdiction to hear appeals from judgments, decrees, orders and sentences:

"of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council".

108 Constitution, s 71.

109 *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 600 per Barwick CJ, 602 per McTiernan J, 609 per Menzies J, 609 per Windeyer J, 613-614 per Owen J, 623 per Walsh J, 627 per Gibbs J.

110 *Spratt v Hermes* (1965) 114 CLR 226 at 251 per Kitto J.

111 (1971) 125 CLR 591 at 599, referring to *Porter v The King*; *Ex parte Yee* (1926) 37 CLR 432 at 440 per Isaacs J. See also *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 602 per McTiernan J, 606-607 per Menzies J, 613-614 per Owen J, 621-622 per Walsh J, 627 per Gibbs J; *Gould v Brown* (1998) 72 ALJR 375 at 412 per McHugh J; 151 ALR 395 at 444.

- 113 It was held in *Spratt v Hermes*¹¹² that a Territory court can exercise jurisdiction in respect of matters arising in a Territory under a law which operates throughout Australia because:

"the law ... operates in the territory by force of s 122 as a law for the government of the territory, whereas it operates in the Commonwealth proper by force of [ss 51 or 52] as a law for the peace, order and good government of the Commonwealth."¹¹³

That answer provides a practical solution to one of the problems that arise as a result of the doctrine of duality, albeit not an answer that is intellectually satisfying.

- 114 The difficulty with the proposition that laws of general application are, in their operation in a Territory, laws under s 122 is that the Commonwealth's power to legislate with respect to the various topics enumerated in ss 51 and 52 of the Constitution is plenary: it is not limited to making laws that operate within "the Commonwealth proper", to use an expression found in the decided cases in this area¹¹⁴. Because the Commonwealth's legislative power is not limited in that way, laws of general application enacted with respect to the subjects specified in ss 51 and 52 of the Constitution retain that character even if, in their operation in a Territory, they are also laws made under s 122¹¹⁵. And because they retain their character as laws under ss 51 or 52, matters arising under them are necessarily matters "arising under ... laws made by the Parliament" for the purposes of s 76(ii) of the Constitution.

- 115 There are also difficulties with the decisions of this Court as to the source of its appellate jurisdiction with respect to decisions and orders of the Territory courts. Once it was held that a Territory court is neither a federal court nor a court invested with federal jurisdiction, the conclusion reached in *Capital TV* that no

112 (1965) 114 CLR 226.

113 (1965) 114 CLR 226 at 259 per Kitto J. In *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 600, Barwick CJ approved that dictum; cf *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 221-222 per Gaudron J, referring to *Spratt v Hermes* (1965) 114 CLR 226 at 278 per Windeyer J. See also *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 564 per Gaudron J.

114 See *R v Bernasconi* (1915) 19 CLR 629 at 637 per Isaacs J. See also *Spratt v Hermes* (1965) 114 CLR 226 at 245 per Barwick CJ.

115 As to laws having a dual character, see generally Zines, *The High Court and the Constitution*, 4th ed (1997) at 22-26. As to laws having a dual character, one within s 51, the other within s 122, see *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 564-568 per Gaudron J and the cases discussed there.

appeal lies to this Court under s 73(ii) of the Constitution was inevitable¹¹⁶. And there could be no appeal at all if, as was said in *In re Judiciary and Navigation Acts*, the jurisdiction of this and other federal courts created by the Parliament arises wholly under Ch III of the Constitution¹¹⁷. Notwithstanding that decision, it was held in *Porter*¹¹⁸, and accepted as correct in *R v Kirby; Ex parte Boilermakers' Society of Australia*¹¹⁹, that appellate jurisdiction can be conferred on this Court by a law enacted under s 122.

- 116 The view was taken in *Boilermakers* that the decisions in *Porter* and in *In re Judiciary and Navigation Acts* are to be reconciled on the basis that "the exclusive or exhaustive character of the provisions of [Ch III] describing the judicature and its functions has reference only to the federal system of which the Territories do not form a part."¹²⁰ On that view, although Ch III speaks completely and exhaustively on the exercise of the judicial power of the Commonwealth and, also, on the original and appellate jurisdiction of this Court¹²¹, that is so only with

116 (1971) 125 CLR 591 at 600 per Barwick CJ, 602 per McTiernan J, 609 per Menzies J, 609-610 per Windeyer J, 614 per Owen J, 623 per Walsh J, 628 per Gibbs J.

117 (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ. See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290.

118 (1926) 37 CLR 432 at 440-441 per Isaacs J, 446 per Higgins J, 448 per Rich J, 449 per Starke J.

119 (1956) 94 CLR 254 at 290 per Dixon CJ, McTiernan, Fullagar and Kitto JJ, 327-328 per Webb J. The correctness of the conclusion in *Porter* that s 122 authorises a law conferring appellate jurisdiction on this Court was also accepted in *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529 at 545; [1957] AC 288 at 320; *Spratt v Hermes* (1965) 114 CLR 226 at 256-257 per Kitto J, 279 per Owen J; *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 604 per Menzies J, 612 per Windeyer J, 622-623 per Walsh J, 626 per Gibbs J; *Gould v Brown* (1998) 72 ALJR 375 at 385 per Brennan CJ and Toohey J; 151 ALR 395 at 406.

120 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

121 See *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 441 per Isaacs J, referred to in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290.

respect to the judicial power "of the Commonwealth proper, which means the area included within States."¹²²

117 It follows, from the view accepted in *Boilermakers* that Ch III is exhaustive only with respect to the judicial power of "the Commonwealth proper", that, "if there be appropriate parliamentary enactment, this Court is competent to entertain appeals from the territorial Courts."¹²³ However, if there is no enactment, there can be no appeal. Thus, Australians whose legal rights and obligations are determined in proceedings in a Territory court can be denied that access to this Court that is allowed to others by s 73 of the Constitution.

118 There are other problems associated with the view that Ch III is complete and exhaustive only as to the judicial power of "the Commonwealth proper". If that be the correct view, then presumably the judicial power of the separate polities within the federation and, even, of foreign polities can be conferred upon federal courts, whether that power involves the exercise of original or appellate jurisdiction. Presumably, also, federal courts can be given powers and functions which are not judicial in character¹²⁴. And it is difficult to see any basis in the text of the Constitution for concluding that the position of this Court is any different¹²⁵.

119 The proposition that Ch III is concerned only with the judicial power of "the Commonwealth proper" depends on the view that, at least for the purposes of that Chapter, the Territories are wholly disjoined from the Commonwealth. Recently, in *Kruger v The Commonwealth*, that view was accepted by Brennan CJ, Dawson J and McHugh J, but rejected by Toohey J and criticised by both Gummow J and myself¹²⁶. However, laws made pursuant to s 122 are not entirely unconstrained by other constitutional provisions. For example, it was held in *Capital Duplicators Pty Ltd v Australian Capital Territory*¹²⁷ that self-governing

122 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 441 per Isaacs J. See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290.

123 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 441 per Isaacs J, referred to in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290.

124 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 315 per Williams J.

125 cf *Gould v Brown* (1998) 72 ALJR 375 at 388 per Brennan CJ and Toohey J; 151 ALR 395 at 410.

126 Compare (1997) 190 CLR 1 at 43 per Brennan CJ, 56 per Dawson J, 141-142, 143 per McHugh J, with 79-83 per Toohey J, 107, 108-109 per Gaudron J, 162-176 per Gummow J.

127 (1992) 177 CLR 248 at 279 per Brennan, Deane and Toohey JJ, 290 per Gaudron J.

territories cannot legislate contrary to s 90 of the Constitution which gives exclusive power to the Commonwealth to impose duties of excise¹²⁸. And more recently, in *Newcrest Mining (WA) Ltd v The Commonwealth*, Gummow J, Kirby J and I each held that, contrary to the earlier decision of this Court in *Teori Tau v The Commonwealth*¹²⁹, s 122 does not authorise the acquisition of property contrary to the guarantee of just terms in s 51(xxxi) of the Constitution¹³⁰. And in that case Toohey J held that a law under s 122 is confined by s 51(xxxi) if it is also a law under s 51 of the Constitution¹³¹.

120 Moreover, it is simply not correct to say that laws may be passed pursuant to s 122 to operate in a territory unconfined by Ch III of the Constitution. As Barwick CJ observed in *Spratt v Hermes*:

"... it is clear, for example, that this Court could entertain an action between a resident of Western Australia against a resident of Queensland for a wrongful act done by the one to the other in a territory of the Commonwealth; it can grant mandamus to an officer of the Commonwealth to perform a duty which is to be performed in a territory; and do so, though the Commonwealth officer is located in a territory. Equally, it may prohibit an act of an officer of the Commonwealth to be done, or in the course of being done, in a territory."¹³²

His Honour added that the contrary view, apparently accepted as correct in *Waters v The Commonwealth*¹³³, "import[s] into the language of s 75 limitations which ... are unwarranted and which are in truth inconsistent with the evident purpose of giving to this Court by the Constitution itself – and thus placing beyond the assail of the Parliament – such significant powers as those of which s 75 speaks."¹³⁴

128 Section 90 of the Constitution relevantly provides that:

" On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise ... shall become exclusive."

129 (1969) 119 CLR 564 at 570.

130 (1997) 190 CLR 513 at 561, 568 per Gaudron J, 600 per Gummow J, 656-657, 661 per Kirby J.

131 (1997) 190 CLR 513 at 560-561 per Toohey J.

132 (1965) 114 CLR 226 at 241.

133 (1951) 82 CLR 188.

134 *Spratt v Hermes* (1965) 114 CLR 226 at 241.

121 The view that a law enacted under s 122 is not a law "made by the Parliament" for the purposes of s 76(ii) of the Constitution also imports unjustified limitations into the words of that sub-section. An even more creative approach to constitutional interpretation is required if the words "any laws made by the Parliament" are to be read as not including laws that have a dual character, in the sense of being laws made under ss 51 or 52 and, also, laws made under s 122 in their operation in a Territory. However, that was the approach taken in *Spratt v Hermes*¹³⁵ and confirmed in *Capital TV*¹³⁶, apparently for practical reasons.

122 In *Capital TV*, Barwick CJ explained his decision in *Spratt v Hermes* thus:

"... whatever I might myself have thought if the slate were clean, the doctrine of the duality of the judicial power [of the Commonwealth] was so deeply entrenched that it ought not now to be overturned. As well, no disadvantages of a practical kind seemed to me to stem or to be likely to stem from its continuance: indeed, there were some obvious advantages flowing from it of which the conclusion reached in *Spratt v Hermes*¹³⁷ was one."¹³⁸

Primarily, *Spratt v Hermes* decided that magistrates exercising jurisdiction in a Territory need not be appointed in accordance with s 72 of the Constitution¹³⁹.

123 Once it was held that the Territory courts were not federal courts and that they could not be invested with federal jurisdiction, very considerable practical difficulties would have arisen if it had been held that a law enacted under s 122 was a law made by the Parliament for the purposes of s 76(ii) of the Constitution. And the same is true now. At least that is so if the view is correct that a Territory court cannot be invested with federal jurisdiction.

124 Whatever their practical advantages, the decisions of this Court dealing with s 122 and its relationship with Ch III have "not resulted in a coherent body of

¹³⁵ (1965) 114 CLR 226.

¹³⁶ (1971) 125 CLR 591.

¹³⁷ (1965) 114 CLR 226.

¹³⁸ (1971) 125 CLR 591 at 598.

¹³⁹ (1965) 114 CLR 226 at 242-243 per Barwick CJ, 259-260 per Kitto J, 264 per Taylor J, 278 per Windeyer J, 280-282 per Owen J.

doctrine."¹⁴⁰ They cannot be reconciled with the terms of Ch III¹⁴¹. And in my view, they create as many problems as they purport to resolve. In particular, the decisions to the effect that Ch III is exhaustive only as to the judicial power of "the Commonwealth proper" create practical problems as to the original and appellate jurisdiction of this Court, difficulties which are exposed in detail in the judgment of McHugh J in *Gould v Brown*¹⁴².

125 In *Gould v Brown*, McHugh J observed that:

"*Bernasconi* and *Porter* are inconsistent with the view that Ch III is exhaustive of the High Court's appellate jurisdiction. For this reason, I have long believed that they were wrongly decided and that Knox CJ and Gavan Duffy J were correct in *Porter*¹⁴³ when they said in dissent:

'The status and duties of this Court are explicitly defined in Ch III of the Constitution; and an attempt to alter that status or to add to those duties is not only an attempt to do that which is not authorised by s 122, but is an attempt to do that which is implicitly forbidden by the Constitution.'¹⁴⁴

His Honour added that "[o]nce recognised, constitutional heresies are usually best laid to rest, even when they have existed for a long time."¹⁴⁵ In my view, unless practical considerations dictate to the contrary, that is a step that should now be taken with respect to the decisions of this Court concerned with the relationship between s 122 and Ch III of the Constitution.

126 Given the terms of ss 71, 72 and 76(ii) of the Constitution, I adhere to my statement in *Gould v Brown* that "the better view is that courts created pursuant to

140 *Spratt v Hermes* (1965) 114 CLR 226 at 265 per Menzies J.

141 See *Kruger v The Commonwealth* (1997) 190 CLR 1 at 108-109 per Gaudron J, 170-176 per Gummow J. See also *Gould v Brown* (1998) 72 ALJR 375 at 397 per Gaudron J, 412 per McHugh J, 451 per Kirby J; 151 ALR 395 at 423, 443-444 and 497 respectively.

142 (1998) 72 ALJR 375 at 412; 151 ALR 395 at 443.

143 (1926) 37 CLR 432 at 439.

144 (1998) 72 ALJR 375 at 412; 151 ALR 395 at 443.

145 (1998) 72 ALJR 375 at 412; 151 ALR 395 at 443.

s 122 are 'courts created by the Parliament' for the purposes of s 72"¹⁴⁶. However, there is some basis for concluding otherwise. In particular, it is possible to conclude that a court created simply to exercise jurisdiction in a Territory with respect to matters arising in that Territory is not a federal court for the purposes of s 71 because its jurisdiction is confined within the limits of s 122. And although it requires reading a limitation into the words "the other courts created by the Parliament" in s 72, it is possible to read those words as referring back to the "*federal* courts ... the Parliament creates" in s 71¹⁴⁷ with the consequence that the requirements of s 72 do not apply to the Territory courts. (emphasis added)

127 Given that there is some basis for not treating courts created by s 122 as federal courts and for not treating them as subject to the requirements of s 72 and given, also, that the decisions to that effect have been acted upon for many years, I am prepared to accept that, to that extent, the decisions of this Court on the relationship between s 122 and Ch III of the Constitution should stand. But that does not have the consequence that a Territory court cannot exercise the judicial power of the Commonwealth. Nor does it have the consequence that a Territory court stands wholly outside Ch III. Rather, it is, in my view, entirely consistent with an approach that gives effect to the integrated legal system which Ch III requires¹⁴⁸.

128 The supposed doctrine of the duality of the judicial power of the Commonwealth also rests in significant part on the premise that the Territory courts cannot be invested with federal jurisdiction. That view depends on reading s 77(iii), which allows the Parliament to make laws "investing any court of a State with federal jurisdiction", as exhaustive of the Commonwealth's power to invest federal jurisdiction¹⁴⁹. It is not in doubt that s 77(iii) is exhaustive of the Commonwealth's power to invest federal jurisdiction in State courts¹⁵⁰. However, the wider proposition is, in my view, negated by two important considerations.

146 (1998) 72 ALJR 375 at 398; 151 ALR 395 at 423-424. See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 109 per Gaudron J.

147 A view of s 72 taken in *Spratt v Hermes* (1965) 114 CLR 226 at 242-243 per Barwick CJ, 274 per Windeyer J, 281 per Owen J.

148 See with respect to the integrated legal system required by Ch III *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 101 per Gaudron J, 137-139, 143 per Gummow J.

149 McTiernan J adopted that view for that reason in *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 602.

150 See *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 at 152.

129 The first consideration that leads me to conclude that the Commonwealth's power to invest federal jurisdiction is not confined to State courts is the textual consideration that s 71 does not say so. Relevantly, it refers to "such other courts as [the Parliament] invests with federal jurisdiction." The second is the purpose served by s 77 of the Constitution. That section provides:

" With respect to any of the matters mentioned in the last two sections¹⁵¹ the Parliament may make laws:

- (i) defining the jurisdiction of any federal court other than the High Court;
- (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
- (iii) investing any court of a State with federal jurisdiction."

130 As already noted, s 71 relevantly provides that the judicial power of the Commonwealth may be exercised by "such other courts as [the Parliament] invests with federal jurisdiction." In the absence of an express legislative power to that effect, it would not lightly be implied that State courts could be required to exercise the judicial power of the Commonwealth. Thus, the need for s 77(iii) of the Constitution! However, the same is not true of a non-federal court created pursuant to s 122. There is no reason in principle why the Parliament might not require such courts to exercise the judicial power of the Commonwealth.

131 Given the terms of s 71 and the purpose of s 77(iii) of the Constitution, there is, in my view, no reason to read "such other courts as it invests with federal jurisdiction" in s 71 as if it read "such other *State* courts as it invests with federal jurisdiction". And once those words are given their natural and ordinary meaning, they are clearly capable of including non-federal courts created under s 122 of the Constitution. To read s 71 in this way is simply to put courts created under s 122 on a constitutional footing comparable with State courts.

132 If the words "such other courts as it invests with federal jurisdiction" in s 71 are given their natural and ordinary meaning, as I think they should be, there is, in my view, no reason – not even a practical consideration - why the words "any laws made by the Parliament" in s 76(ii) should not also be given their natural and ordinary meaning. And when given that meaning, they include laws made by the Parliament under s 122 of the Constitution. It follows, in my view, that matters arising under Pt VII of the Act as applied in the Territories with respect to ex-nuptial children by s 69ZG are matters arising under a law made by the Parliament

¹⁵¹ Note that ss 75 and 76 identify the matters in respect of which original jurisdiction is and may be conferred on this Court.

for the purposes of s 76(ii) of the Constitution and are, thus, matters within federal jurisdiction.

- 133 One other matter should be noted. For the purposes of s 76(ii) of the Constitution, it has been held that a matter arises under a law "if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement"¹⁵². Clearly, that statement should be understood as referring to a right or duty owing its existence to a "law ... made by the Parliament", being the words used in s 76(ii) of the Constitution. When understood in that way, it is clear that s 73(ii) allows for appeals from a Territory court created under s 122 because the right or duty in question must ultimately depend for its enforcement on the law creating that court. And on that basis, it is correct to say, as was held in *In re Judiciary and Navigation Acts*, that Ch III is exhaustive of this Court's jurisdiction, both original and appellate¹⁵³.

Application of s 97(3) of the *Community Welfare Act*

- 134 As these proceedings involve the exercise of federal jurisdiction, s 79 of the *Judiciary Act* determines whether s 97(3) of the *Community Welfare Act* applies. Section 79 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."

That provision directs attention, not to inconsistency as such, but to the question whether the Constitution or the laws of the Commonwealth "otherwise provide". For present purposes, nothing turns on that distinction.

- 135 It was contended for the first respondent that s 97(3) of the *Community Welfare Act* does not apply in this case because, for the purposes of s 79 of the *Judiciary Act*, the *Evidence Act* 1995 (Cth) ("the Evidence Act") otherwise provides. I agree with Gleeson CJ and Gummow J, for the reasons that they give,

152 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154 per Latham CJ. See also *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581.

153 (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ. See *Porter v The King; Ex parte Yee* (1926) 37 CLR 432 at 441 per Isaacs J; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 290 per Dixon CJ, McTiernan, Fullagar and Kitto JJ, which adopt the same interpretation of the decision in *In re Navigation and Judiciary Acts*.

that it does not. It was also contended that s 97(3) has no application because the Act and the Rules otherwise provide. On that issue, I also agree with Gleeson CJ and Gummow J that they do not. I shall state my reasons for that conclusion.

- 136 There are three matters upon which the first respondent relies for the argument based on the Act and the Rules. The first is the "paramountcy principle", as it is called, which is embodied in s 65E of the Act. That section provides:

" In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration."

- 137 Parenting orders include residence orders (in general terms, what were, previously, custody orders)¹⁵⁴, contact orders (previously, access orders)¹⁵⁵ and specific issues orders which deal with "any other aspect of parental responsibility", including "long-term care, welfare and development of the child" (again, in general terms, previously, guardianship orders)¹⁵⁶. The matters which must be taken into account in determining whether the making of a particular parenting order is in the child's best interests are set out in s 68F(2) of the Act and include the child's relationship with each parent¹⁵⁷, the capacity of the parents to provide for the child's needs, including emotional and intellectual needs¹⁵⁸, and the need to protect the child from physical or psychological harm¹⁵⁹.

- 138 The direction in s 65E that, in deciding whether to make a particular parenting order, the child's best interests are to be the paramount consideration serves to displace notions of parental rights as previously recognised by the common law. Secondly, and perhaps more significantly, because s 68F(2) serves

154 Sections 64B(2)(a) and 64B(3) define residence orders as dealing with "the person or persons with whom a child is to live".

155 Sections 64B(2)(b) and 64B(4) define contact orders as dealing with the "contact between a child and another person or other persons".

156 Section 64B(6). Note, however, that so far as a guardianship order under old Pt VII deals with the question of where a child is to live, it takes effect under new Pt VII as a residence order, as defined in ss 64B(2)(a) and 64B(3). The general correspondence between custody and residence orders, access and contact orders and guardianship and specific issues orders appears from cl 2 and 3 of Sched 2 to the *Family Law Reform Act* (by which Pt VII was repealed and re-enacted).

157 Section 68F(2)(b).

158 Section 68F(2)(e).

159 Section 68F(2)(g).

to signify, albeit in general terms, what matters are to be taken into account in determining the best interests of the child, the direction requires that attention be focussed on the impact on the child of the different courses of action that might be taken, rather than on the parents or their wishes.

139 It is correct to say, as was contended for the first respondent, that the "paramountcy principle" permeates the whole of Pt VII of the Act. But, so far as concerns s 65E of the Act, its significance is, in terms, confined to "deciding whether to make a particular parenting order". It does not apply to the conduct of proceedings for the making of such an order or the procedures to be observed in relation to those proceedings. The question whether a person who is not a party to proceedings is or may be made subject to the court's powers to compel the production of documents is, essentially, a question of procedure. And on that issue, s 65E of the Act has nothing to say.

140 The second matter upon which reliance was placed for the argument that the Act and the Rules "otherwise provide" and that there is, thus, no scope for the application of s 97(3) of the *Community Welfare Act* is the welfare jurisdiction of the Family Court conferred by s 67ZC of the Act. That section provides:

- "(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.
- (2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

141 In the Full Court, Nicholson CJ and Frederico J expressed the view that the jurisdiction conferred by s 67ZC is not confined to the "ancient *parens patriae* jurisdiction of the Court of Chancery"¹⁶⁰ and "can, in appropriate circumstances, encompass the area of child protection."¹⁶¹ And it was put on behalf of the first respondent that "[t]he Family Court should not be precluded from obtaining information held by child welfare authorities ... because this will operate as a significant inhibition on the discharge of the Court's statutory functions in cases involving allegations of abuse or ill treatment of children."

142 There is no doubt that the Family Court's welfare jurisdiction may be invoked if a child's welfare is threatened by the actions or decisions of his or her parents or any other person *in loco parentis*. Whether it extends beyond that need not be decided. However, even if its welfare jurisdiction is predicated on a risk or threat

160 *Re Z* [1996] FLC ¶92-694 at 83,230.

161 *Re Z* [1996] FLC ¶92-694 at 83,231.

to the welfare of a child, that does not dictate the conclusion that the Family Court's powers are entirely at large.

143 The direction in s 67ZC(2) of the Act that "[i]n deciding whether to make an order under subsection (1) ... a court must regard the best interests of the child as the paramount consideration" may well affect the decision-making process, for example, by allowing greater weight to be given to the risk of abuse than whether the child has, in fact, been abused¹⁶². However, the direction applies only in deciding whether to make an order under s 67ZC(1). As with the direction in s 65E of the Act, s 67ZC(2) has nothing to say about the Family Court's power to compel the production of documents.

144 The Family Court's powers to compel the production of documents are to be found in O 28 rr 1 and 8 of the Rules. Subject to procedural requirements which have no present relevance¹⁶³, O 28 r 1(1)(c) allows for the Registrar to issue a subpoena commanding a person to attend at court and to "produce any books, documents or things in the possession, custody or control of the person or persons named in the subpoena that are referred to in the subpoena."¹⁶⁴ And O 28 r 8 provides:

" If a person on whom a subpoena is duly served does not appear, or does not remain in attendance as required by the subpoena, a Judge, Judicial Registrar or Magistrate may, on being satisfied that the person was duly served and tendered expenses ... issue a warrant for the arrest of that person and order that person to pay any costs occasioned by such failure."

Further, s 112AD(1) of the Act relevantly provides:

" Where a court having jurisdiction under this Act is satisfied that a person has, without reasonable excuse, contravened an order under this Act ... the court may ... by order ... take such action or actions of the kind specified in subsection (2) as the court thinks is appropriate."

Sub-section (2) provides for the imposition of fines, imprisonment or other orders, including, in par (f), an order that "the person ... deliver a document to the Registrar".

162 See *M v M* (1988) 166 CLR 69 at 77.

163 See O 28 rr 1(1A) and (1B).

164 Section 123(1)(a) of the Act confers power on the judges of the Family Court, or a majority of them, to make rules "providing for and in relation to the attendance of witnesses".

145 With perhaps one presently irrelevant exception¹⁶⁵, no provision of the Act or of the Rules bears on the question whether a person can be compelled to produce specific documents, for example documents which are the subject of legal professional privilege or are privileged on public interest grounds. The Act and the Rules being relevantly silent in that regard, the issue is left to the general law. That being so, neither the Act nor the Rules provides otherwise for the purposes of s 79 of the *Judiciary Act*.

Conclusion and Orders

146 As neither the Evidence Act nor any provision of the Act and the Rules otherwise provides for the purposes of s 79 of the *Judiciary Act*, the latter provision operates to "pick up" and apply s 97(3) of the *Community Welfare Act* in the Family Court proceedings. That being so, the appeal must be allowed. Orders should be made as proposed in the joint judgment of Gleeson CJ and Gummow J.

165 Subdivision C of Div 8 of Pt VII provides for the making of a location order, requiring a person to provide the court's Registrar with information the person has or obtains about a child's location (see definition of "location order" in ss 67H, 67J(1)(a)). By s 67M(6), the "person to whom a location order applies must comply with the order in spite of anything in any other law." It is unnecessary to consider in this case the scope of those words.

- 147 McHUGH AND CALLINAN JJ. This case arises out of an alleged conflict between provisions of a Northern Territory enactment, protecting certain documents from disclosure in the course of legal proceedings, and provisions in the *Family Law Act* 1975 (Cth), the Family Law Rules (Cth) and the *Evidence Act* 1995 (Cth). The principal issue for determination is whether, and on what basis, the relevant Commonwealth provisions override the Northern Territory provision so that a subpoena issued by the Family Court can lawfully require the production of the documents.
- 148 In our opinion, the Commonwealth provisions do not override or invalidate the Northern Territory enactment or require the production of the documents. The Family Court is not exercising "federal jurisdiction". Consequently, those refusing to produce the documents cannot rely on s 79 of the *Judiciary Act* 1903 (Cth) to make the Northern Territory enactment applicable to the proceedings. However, as a matter of construction, the Commonwealth provisions do not override the protective provisions of the Northern Territory enactment.

Factual background

- 149 The first respondent and second respondent to these proceedings are the parents of an ex-nuptial child, Z. Following the breakdown of their relationship, proceedings were commenced in the Family Court of Australia to determine residency and contact arrangements with respect to Z. In response to a notification from the Family Court made under s 70BA of the *Family Law Act*, the Child and Family Protective Services unit of the Department of Community Welfare ("the Department") undertook an investigation of suspected child abuse involving Z, creating a file in the process. The first respondent sought access to that file in connection with the Family Court proceedings. Accordingly, he obtained the issue of a subpoena from the Family Court pursuant to O 28 r 1 of the Family Law Rules. The subpoena, which required the documents to be produced to the Family Court, was served upon the Manager of Child and Family Protective Services.
- 150 The subpoena was returnable before Murray J on 30 October 1995. The Department objected to the production of the file relying on the immunity from disclosure provided by s 97(3) of the *Community Welfare Act* (NT) which provides:

"A person who is, or has been, an authorised person shall not, except for the purposes of this Act, be required to –

- (a) produce in a court a document that has come into his possession or under his control; or
- (b) disclose or communicate to a court any matter or thing that has come under his notice,

53.

in the performance of his duties or functions under this Act."

It was not disputed that officers of the Department are "authorised persons" for the purposes of this provision.

- 151 Murray J stated a case to the Full Court of the Family Court, which, as amended by the Full Court, asked whether s 97(3) is inconsistent with provisions of the *Family Law Act* or the *Evidence Act* and so inoperative by operation of s 109 of the Constitution.
- 152 On 8 August 1996 a majority of the Full Family Court (Nicholson CJ and Frederico J, Fogarty J dissenting in part) answered the case stated by declaring that s 97(3) is inconsistent with provisions of both Commonwealth Acts and is inoperative to the extent of that inconsistency.
- 153 Subsequently, this Court granted special leave to the appellant to appeal to this Court against the order of the Full Court.

Statutory provisions

- 154 Section 43 of the *Family Law Act* provides:

"The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:

...

(c) the need to protect the rights of children and to promote their welfare".

- 155 At the time when the subpoena was issued, s 64 of the *Family Law Act* provided:

"(1) In proceedings in relation to the custody, guardianship or welfare of, or access to, a child:

(a) the court must regard the welfare of the child as the paramount consideration".

- 156 Section 64 was repealed by the *Family Law Reform Act* 1995 (Cth) and replaced by a scheme of provisions which, when taken together, have the same effect. Those new provisions are ss 65E, 67L, 67V and 67ZC(2), each of which

makes the best interests of the child the paramount consideration to be taken into account in the making of various orders relating to children.

157 The *Family Law Reform Act* also introduced a new s 69ZG, which provides that "[Pt VII] applies in and in relation to the Territories." Among other things, Pt VII deals with the making of parenting orders. Power to legislate with respect to children other than children of a marriage has been referred to the Commonwealth by all States except Western Australia. Accordingly, the source of the Commonwealth's power over ex-nuptial children derives from two sources: s 51(xxxvii) as regards States other than Western Australia and s 122 as regards the territories.

158 Order 28 r 1 of the Family Law Rules provides:

"(1) [I]n any proceedings, the Registrar of the filing registry shall, at the direction of the court, and may, at the request of a party to the proceedings, issue a subpoena on behalf of the court commanding a person or persons named in the subpoena, to attend before the court as indicated in the subpoena and then and there to:

...

(c) produce any books, documents or things in the possession, custody or control of the person or persons named in the subpoena that are referred to in the subpoena."

159 Important in the resolution of this case is the meaning and application of s 79 of the *Judiciary Act* which 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."

160 Section 97(3) of the *Community Welfare Act*, being a territory law dealing with the production of evidence, would therefore be binding on the Family Court, unless:

- a) the Court was not at the relevant time exercising "federal jurisdiction" within the meaning of s 79 of the *Judiciary Act*; or
- b) a provision in the Constitution or another law of the Commonwealth "otherwise provided", in such a way as to override the territory law.

55.

The meaning of "federal jurisdiction"

161 The appellant contended that the Family Court, when making parenting and contact orders in respect of an ex-nuptial child in the Northern Territory, is "exercising federal jurisdiction" within the meaning of s 79 of the *Judiciary Act*. Accordingly, s 97(3) of the *Community Welfare Act* applied to the proceedings in the Family Court and precluded the first respondent from obtaining production of the file.

162 It is well established that "jurisdiction" means "authority to adjudicate"¹⁶⁶. But the term "federal" has several meanings. In the *Annotated Constitution of the Australian Commonwealth*¹⁶⁷, Quick and Garran pointed out that as at 1900 the term was used in four senses. First, it described a union of States, linked together in one political system. Second, it described the new State formed by such a union. Third, it described a dual system of government, central and provincial. Fourth, it described the central governing organs in such a dual system of government. The learned authors pointed out¹⁶⁸ that the second and third meanings recognised "a national element in federalism itself". They pointed out that those two meanings affirmed "a duality, either of sovereign power or of government, and recognise that national organisation in matters of national concern is as much a part of federalism as provincial organisation in matters of provincial concern." They asserted¹⁶⁹ that "[t]his is the more modern scope of the word, and accords not only with later English and American usage, but with current usage in Australia." Nothing in this discussion of the term "federal" supports the view that it is intended to apply to a territory governed by the Commonwealth. In respect of a s 122 territory, the Commonwealth is sovereign. No question of duality of sovereignty or government arises. The States have no authority in respect of a s 122 territory. As Windeyer J pointed out in *Capital TV and Appliances Pty Ltd v Falconer*¹⁷⁰:

"The word 'federal' is properly used in contrast with the word 'State' used adjectivally. ... [F]ederalism postulates a division of authority between the Commonwealth and a State; whereas Commonwealth territories, those within

166 See for instance *Gould v Brown* (1998) 72 ALJR 375 at 409 per McHugh J, 419 per Gummow J; 151 ALR 395 at 439, 454.

167 (1901) at 333.

168 (1901) at 335.

169 (1901) at 335.

170 (1971) 125 CLR 591 at 610.

and those beyond Australia, are within the sole and sovereign governance of the Commonwealth."

- 163 There has been no direct judicial consideration of the meaning of the term "federal jurisdiction" in s 79 of the *Judiciary Act*. However, this Court examined its meaning in the context of s 39(2) of the *Judiciary Act* in *Ah Yick v Lehmert*¹⁷¹. In *Ah Yick*, Barton J said¹⁷²:

"The expression of sec. 39(2) which chiefly calls for examination is the term 'federal jurisdiction,' and in the absence of any context in the *Judiciary Act* or in the Constitution to explain its meaning, and, in the absence of any argument to the contrary, one may take it that it is used in that section in the same sense as in the Constitution."

His Honour held that in the Constitution "federal jurisdiction" meant those matters dealt with in or under Ch III of the Constitution and extended to appellate as well as original jurisdiction¹⁷³. His view was shared by Griffith CJ, who held that "[t]he term 'federal jurisdiction' means authority to exercise the judicial power of the Commonwealth"¹⁷⁴. But these statements merely restate the problem. They leave open the question – what are the matters that fall within Ch III or the judicial power of the Commonwealth?

- 164 Moreover, it does not follow that the construction that was placed on s 39(2) when *Ah Yick* was decided would be the same today or that it necessarily applies to s 79 of the *Judiciary Act* in the form in which it stands today. A question arises as to whether the use of the terms "State or Territory" in s 79 indicate that Parliament intended that the term "federal jurisdiction" should be given a more expanded meaning in s 79 than it has under the Constitution. To answer that question, it is necessary to examine the somewhat tortuous course of judicial decision in this Court on the relationship between s 122 and Ch III of the Constitution.

The relationship between s 122 and Ch III of the Constitution

- 165 Section 122 of the Constitution provides that the Commonwealth "may make laws for the government of any territory". The power has been interpreted broadly and allows the Commonwealth to legislate for the territories on any subject

171 (1905) 2 CLR 593.

172 (1905) 2 CLR 593 at 611.

173 (1905) 2 CLR 593 at 611-613.

174 (1905) 2 CLR 593 at 603.

57.

matter¹⁷⁵, subject only to express¹⁷⁶, and any implied¹⁷⁷, limitations contained within the Constitution. Ch III of the Constitution is headed "The Judicature" and deals with the establishment, jurisdiction and composition of courts exercising the judicial power of the Commonwealth. Of particular relevance for present purposes are ss 75, 76 and 77, which provide as follows:

"75. In all matters:

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

the High Court shall have original jurisdiction.

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

- (i) arising under this Constitution, or involving its interpretation;
- (ii) arising under any laws made by the Parliament;
- (iii) of Admiralty and maritime jurisdiction;

¹⁷⁵ *Lamshed v Lake* (1958) 99 CLR 132 at 144 per Dixon CJ; *Spratt v Hermes* (1965) 114 CLR 226 at 242 per Barwick CJ.

¹⁷⁶ *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 600 per Gummow J.

¹⁷⁷ *Kruger v The Commonwealth* (1997) 190 CLR 1 at 92 per Toohey J, 120 per Gaudron J.

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

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

- (i) defining the jurisdiction of any federal court other than the High Court;
- (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
- (iii) investing any court of a State with federal jurisdiction."

166 The relationship between Ch III and the s 122 "territories power" was first dealt with by this Court in *R v Bernasconi*¹⁷⁸ where the issue was whether the Commonwealth's power under s 122 is confined by reference to s 80 of the Constitution, which contains an express guarantee of trial by jury for certain offences. Griffith CJ, with whom Gavan Duffy and Rich JJ agreed, held that "the power conferred by sec. 122 is not restricted by the provisions of Chapter III of the Constitution"¹⁷⁹. His Honour not only thought that s 80, a provision quite distinct from the remainder of Ch III, did not fetter the plenary power conferred by s 122; he appeared to have no doubt that the entirety of Ch III, including ss 73, 75, 76 and 77 which deal with jurisdiction, had no bearing on the scope of the territories power¹⁸⁰. Isaacs J reached the same conclusion, describing the territories as "parts annexed to the Commonwealth and subordinate to it ... not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers."¹⁸¹

167 Eleven years later, in *Porter v The King; Ex parte Yee*¹⁸² the Court again considered the relationship between Ch III and s 122 of the Constitution. The issue in *Porter* was whether the Commonwealth Parliament had power to provide for a right of appeal from orders of the Supreme Court of the Northern Territory to this Court. A majority of the Court held that the purported right of appeal was

¹⁷⁸ (1915) 19 CLR 629.

¹⁷⁹ (1915) 19 CLR 629 at 635.

¹⁸⁰ (1915) 19 CLR 629 at 635.

¹⁸¹ (1915) 19 CLR 629 at 637.

¹⁸² (1926) 37 CLR 432.

constitutional. The majority held that, although Ch III exhaustively defined the *federal* jurisdiction of the High Court and other "federal" courts, those courts could exercise contemporaneously such other non-federal jurisdiction, at least of an appellate variety, as the Parliament saw fit to confer¹⁸³. The dissentients, Knox CJ and Gavan Duffy J, held that the Parliament could not confer jurisdiction on the High Court and other federal courts beyond that conferred by and under Ch III, given that they "[exist] only for the performance of the functions therein described"¹⁸⁴.

- 168 The High Court's reasoning in *Bernasconi* and *Porter* was examined by the Privy Council in *Attorney-General of the Commonwealth of Australia v The Queen*¹⁸⁵, a case concerning the circumstances in which a body not complying with s 72 of the Constitution could exercise the judicial power of the Commonwealth. Affirming this Court's decision¹⁸⁶, the Judicial Committee held that, in respect of matters entrusted to the Commonwealth in the Constitution's division of powers among the constituent polities of the federation, Ch III describes exhaustively the extent of the Commonwealth's judicial power. Their Lordships rejected the contention that this view was inconsistent with the decisions in *Bernasconi* and *Porter*. Viscount Simonds, who delivered their Lordships' advice, noted that in terms of the Constitution's federal division of powers "[t]he legislative power in respect of the Territories is a disparate and non-federal matter."¹⁸⁷ Their Lordships were of the view that the power conferred by s 122 was not one held by the Colonies prior to federation and was not a subject of the "federal" allocation of powers between Commonwealth and States on federation. Accordingly, the s 122 territories power lay outside the federal scheme of the Constitution and outside the "federal" judicature provisions with which Ch III is concerned¹⁸⁸.

- 169 *Bernasconi*, *Porter* and *Attorney-General (Cth) v The Queen* provide the strongest possible authority for holding that a court is not exercising federal

183 (1926) 37 CLR 432 at 441 per Isaacs J, 445-446 per Higgins J, 448 per Rich J and 449 per Starke J.

184 (1926) 37 CLR 432 at 438.

185 (1957) 95 CLR 529.

186 *R v Kirby; Ex parte Boilermakers' Society of Australia* (the *Boilermakers' Case*) (1956) 94 CLR 254.

187 (1957) 95 CLR 529 at 545.

188 (1957) 95 CLR 529 at 545.

jurisdiction in a territory when the rights and liabilities of the parties depend upon a law whose source of power is s 122 of the Constitution. Laws made under that power are not federal laws because they do not affect the relationship between the Commonwealth and the States.

170 Although these decisions have attracted criticism in subsequent cases, the terms of Ch III, read in the light of the Convention Debates, give much support for the view that s 122 is not affected by the operation of Ch III. Considerations supporting that view include:

- (1) Ch III makes frequent reference to "federal", "Commonwealth" and "State" but there is no mention of "territory".
- (2) The use of the term "federal" is more consistent with Ch III being concerned with the allocation of power between the Commonwealth and the States than with the exercise of judicial power in the Commonwealth, the States *and any territory*.
- (3) It is settled that territory courts are not federal courts for the purpose of Ch III¹⁸⁹. That being so, ss 75, 76 and 77 of the Constitution - which deal with the jurisdiction of Ch III courts - are concerned with this Court, federal courts and the State courts, not territory courts. There is no reason, therefore, for thinking that Ch III generally is concerned with the territories.
- (4) The carefully worked out provisions of Ch III, defining the powers and securing the independence of federal courts, were necessary to ensure the maintenance of the federal structure. As the majority in *R v Kirby; Ex parte Boilermakers' Society of Australia*¹⁹⁰ pointed out:

"The conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature."

Nothing in the relationship between the Commonwealth and the territories, however, requires that the jurisdiction of courts exercising jurisdiction under territorial law should be subject to the inhibitions

¹⁸⁹ *Spratt v Hermes* (1965) 114 CLR 226; *Capital TV and Appliances* (1971) 125 CLR 591.

¹⁹⁰ (1956) 94 CLR 254 at 267-268.

61.

imposed by Ch III including the appointment, removal and tenure of territory judges. Ch III imposes no obligations on the States in respect of their courts except to the extent that *Kable v Director of Public Prosecutions (NSW)*¹⁹¹ applies to them. There is no reason why the Commonwealth, in legislating for its territories and their courts, should be subject to constitutional burdens which do not apply to the States when they legislate for their courts.

- (5) If Ch III applies to the territories when the Commonwealth is creating courts or investing judicial power in the territories, then it must apply to territorial legislatures, which have been given self-government, when they do those things. The Commonwealth could no more escape the operation of Ch III by setting up self-governing legislatures than it could escape its operation by giving the Governor-General in Council power to create courts under a regulation. In contrast, s 121 permits the Parliament to admit new States into the federation upon "such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit." Under s 121, the Parliament could make it a term or condition that Ch III should not apply at all or in some amended form to a new entrant. It is difficult to see why the Constitution should require the Parliament legislating for a territory, or a self-governing territory, to comply with Ch III when the Parliament could admit the territory as a State with no obligation to comply with Ch III.
- (6) If "federal jurisdiction" in Ch III includes jurisdiction over "matters" arising under laws made under s 122, s 77(iii) of the Constitution would authorise the conscription of State courts to determine matters arising under territory laws, matters which have nothing to do with the federal nature of the Constitution.
- (7) At Federation, it was assumed that the Commonwealth would have a number of sparsely populated territories under its control including territories outside Australia. To require the Commonwealth to comply with such provisions of Ch III as ss 72 and 80 and to prevent it from giving non-judicial functions to a territory court would have been inconvenient to say the least.
- (8) One of the reasons that the Constitutional Convention rejected Sir Edward Braddon's suggestion that territorial representation in the

191 (1996) 189 CLR 51.

Parliament should be "in accordance with the ratio of representation provided in the Constitution" was that it would be "a great mistake" to bring the territories into line with the States¹⁹².

- 171 Indeed, the only powerful argument in support of applying Ch III to s 122 is that s 76(ii) refers to the conferral of jurisdiction "arising under any laws made by the Parliament". But given the many considerations which point in the opposite direction, this seems too weak a foundation for applying Ch III as a whole to the territories or to hold that the exercise of judicial power under a law, enacted under s 122, is an exercise of "federal jurisdiction". However, the terms of s 76(ii) and s 77(i) seem wide enough to confer original jurisdiction¹⁹³ on this Court and original and appellate jurisdiction on a federal court in respect of matters arising under a s 122 law. Nevertheless, it does not follow from that conclusion that this Court or the federal court must be exercising "federal jurisdiction" or "the judicial power of the Commonwealth" in respect of matters arising under a s 122 law.

The undermining of the original view of the relationship between s 122 and Ch III

- 172 Less than a year after the decision in *Attorney-General (Cth) v The Queen*, this Court again considered the relationship between s 122 and the Constitution's "federal" provisions. *Lamshed v Lake*, which was decided in 1958, commenced a course of decision which may eventually overthrow the confident views of the early members of this Court concerning the relationship between s 122 and Ch III of the Constitution. In *Lamshed*, the Court held invalid a South Australian legislative provision that restricted the movement of commercial cargoes between that State and the Northern Territory. A Commonwealth law, made under the territories power, purported to make trade, commerce and intercourse between the Northern Territory and the States absolutely free. The case could have been disposed of on the simple ground that a law made under s 122 was a "law of the Commonwealth" for the purpose of s 109 of the Constitution even if s 122 conferred a non-federal power, and indeed it was disposed of on this ground. But members of the Court used the occasion to cast doubt on the earlier line of decisions concerning the territories.

- 173 A majority of the Court, led by Dixon CJ, held that s 122 authorised laws that had operation beyond the limits of the territories. Dixon CJ said¹⁹⁴:

192 *Official Record of the Debates of the Australasian Federal Convention (Adelaide)*, 20 April 1897 at 1013-1014.

193 An appeal to this Court would then lie under s 73 of the Constitution.

194 (1958) 99 CLR 132 at 141.

63.

"[Section] 122 is a power given to the national Parliament of Australia as such to make laws 'for', that is to say 'with respect to', the government of the Territory. The words 'the government of any territory' of course describe the subject matter of the power. But once the law is shown to be relevant to that subject matter it operates as a binding law of the Commonwealth wherever territorially the authority of the Commonwealth runs."

This was so, in his Honour's view, in spite of the fact that the territories power had earlier been construed as "disparate and non-federal"¹⁹⁵. Dixon CJ also said that s 122 did not confer upon the Commonwealth a power wholly separate from that which it acquired under the federal compact, "as if the Commonwealth Parliament were appointed a local legislature in and for the Territory"¹⁹⁶. Though acknowledging the precedential force of cases such as *Bernasconi*, his Honour said that he had "always found it hard to see why s 122 should be disjoined from the rest of the Constitution and ... [did] not think that [earlier cases] really meant such a disjunction"¹⁹⁷. Indeed, Dixon CJ thought that the Commonwealth's power to legislate for the territories forms a natural and integral part of the federal design¹⁹⁸. He thought it absurd that legislation made under the Commonwealth's enumerated powers, such as those concerning defence, communications, immigration and industrial relations, would not apply, or be intended to apply, in and to the territories¹⁹⁹. And yet, he observed, such a restriction flows logically from an acceptance of a principle that s 122, and legislative power in respect of the territories, is somehow disjoined from the otherwise "federal" Constitution. Because he thought that the territories power cannot be treated as entirely non-federal, Dixon CJ insisted that the decision in *Bernasconi* was only authority in respect of the relationship between s 122 and s 80. In so far as the s 109 inconsistency power was concerned, his Honour found that a law made under s 122 was a "law of the Commonwealth" in the sense necessary for it to prevail over an inconsistent State law²⁰⁰.

195 (1958) 99 CLR 132 at 142.

196 (1958) 99 CLR 132 at 141.

197 (1958) 99 CLR 132 at 145.

198 (1958) 99 CLR 132 at 143-144.

199 (1958) 99 CLR 132 at 144-146.

200 (1958) 99 CLR 132 at 148.

174 The process of undermining the authority of the earlier cases continued in *Spratt v Hermes* where this Court had to determine whether a court established in a territory, under s 122, must be constituted in accordance with the requirements of Ch III in order to hear cases brought under Commonwealth legislation extending to all Australian jurisdictions. The appellant argued that a magistrate of the Court of Petty Sessions of the Australian Capital Territory was without jurisdiction to hear charges brought under the *Post and Telegraph Act* 1901 (Cth) because this amounted to an exercise of federal jurisdiction by a judicial officer not holding office on the terms specified in s 72 of the Constitution. The Court held that s 72 did not apply to territory courts.

175 In *Spratt*, Barwick CJ refused to accept the proposition that "Chap. III as a whole is inapplicable to or in respect of territories."²⁰¹ Although his Honour conceded that the territories power is "non-federal in character"²⁰², he took the view that some of the restrictions contained in the federal parts of the Constitution would nevertheless operate to constrain the s 122 legislative power. Whether any given provision had that operation was, he said, a matter of construction in each instance, "the construction being resolved upon a consideration of the text and of the purpose of the Constitution as a whole."²⁰³ Barwick CJ shared the view that Dixon CJ had expressed about *Bernasconi* in his judgment in *Lamshed*, that is, that that decision must be confined to its facts and that it is only authority in respect of the relationship between ss 80 and 122. Given that s 80 could be distinguished from other provisions within Ch III, Barwick CJ took the view that *Bernasconi* was not authority for the proposition that the whole of that Chapter has no application to s 122 and laws made under it²⁰⁴. Accordingly, in so far as the majority's reasons in *Bernasconi* were framed around the whole of Ch III, Barwick CJ thought they "went beyond the occasion" and were *obiter dicta*²⁰⁵.

176 Other members of the Court in *Spratt* agreed that the decisions in *Bernasconi* and later cases applying its *ratio* were based on reasoning which would not, in the absence of widespread reliance upon those earlier decisions, justify the perpetuation of that reasoning with respect to the relationship between s 122 and Ch III²⁰⁶. Menzies J said that, while cases such as *Bernasconi* must be accepted

201 (1965) 114 CLR 226 at 243.

202 (1965) 114 CLR 226 at 242.

203 (1965) 114 CLR 226 at 242.

204 (1965) 114 CLR 226 at 244-245.

205 (1965) 114 CLR 226 at 245.

206 (1965) 114 CLR 226 at 265-266 per Menzies J, 275 per Windeyer J.

65.

as good law in relation to their particular facts, as a general proposition, it was untenable to regard s 122 as conferring a legislative power which stands outside "the Federal System"²⁰⁷. His Honour said²⁰⁸:

"[I]t seems inescapable that territories of the Commonwealth are parts of the Commonwealth of Australia and I find myself unable to grasp how what is part of the Commonwealth is not part of 'the Federal System': see the *Commonwealth of Australia Constitution Act*, s 5, which refers not only to every State but to 'every part of the Commonwealth'. If there be room for doubt as to this in so far as territories outside Australia are concerned, I think the terms of s 122 itself preclude doubt in the case of territories within Australia. That section contemplates that an area which is part of a State and so within 'the Federal System' will be accepted by the Commonwealth and may be represented in either House of the Parliament. I do not understand how the surrender and acceptance authorised by s 111 of the Constitution can take the area affected outside 'the Federal System'. ... [T]he notion that an area which is geographically within Australia and is part of the Commonwealth of Australia is outside 'the Federal System' should be given no further countenance."

Windeyer J expressed a similar view, stating that he did not think "the conclusion that Chap. III, as a whole, can be put on one side as inapplicable to matters arising in the territories is warranted by its actual language."²⁰⁹ Rather, his Honour suggested, the provisions of that Chapter as well as other constitutional provisions may, as a matter of construction, operate to constrain the Commonwealth's legislative power in respect of the territories²¹⁰.

Was there an exercise of "federal jurisdiction"?

177 The appellant contends that, on the facts of this case, it is not necessary to examine the correctness of *Bernasconi* and *Porter* because those cases dealt with the jurisdiction of "territory courts" and this case concerns the jurisdiction of a "federal court". However, the question which must be answered is whether, for the purposes of s 79 of the *Judiciary Act*, the Family Court is exercising "federal jurisdiction" in the present proceedings. Central to that question is the issue

207 (1965) 114 CLR 226 at 269-270.

208 (1965) 114 CLR 226 at 270.

209 (1965) 114 CLR 226 at 275.

210 (1965) 114 CLR 226 at 277-278.

whether the curial determination of rights and liabilities created by s 122 of the Constitution is an exercise of federal jurisdiction for the purpose of s 79. That is a different question from whether a Commonwealth law conferring jurisdiction on this Court or a federal court in respect of matters involving the territories is a law "made by the Parliament" for the purposes of s 76(ii) of the Constitution. A finding that a s 122 law is such a law does not necessarily mean that the jurisdiction exercised in respect of such a law is federal jurisdiction. It is also a different question from whether "federal jurisdiction" in s 79 now has the same meaning as in Ch III of the Constitution.

178 In *Capital TV and Appliances*, this Court unanimously held that the Supreme Court of the Australian Capital Territory was created pursuant to s 122 of the Constitution and was not a "federal court" or a "court exercising federal jurisdiction" within the meaning of those terms in s 73 of the Constitution. Consequently, in the absence of a statutory appeal as of right, this Court had no jurisdiction to hear the appellant's appeal. Barwick CJ said²¹¹ that the established doctrine of the Court was that a territorial court determining rights as the result of an exercise of s 122 power did not exercise federal jurisdiction for the purpose of s 73 of the Constitution because federal jurisdiction arose from the exercise of the powers conferred by ss 51 and 52 of the Constitution. If "federal jurisdiction" only arises from the exercise of the powers conferred by ss 51 and 52, it means that this Court or a federal court determining a matter arising under s 122 is also not exercising federal jurisdiction. In our opinion, Barwick CJ was right so to hold. Moreover, that view of the term "federal jurisdiction" in s 73 necessarily applies to the term "federal jurisdiction" in ss 77 and 79 of the Constitution.

179 We do not think that the provisions of ss 75, 76 and 77 of the Constitution provide any ground for thinking that Barwick CJ erred when he concluded that "federal jurisdiction" was concerned with cases arising from the exercise of the powers conferred by ss 51 and 52 of the Constitution. It is true that s 77(iii) of the Constitution provides that the Parliament may invest the courts of the States with "federal jurisdiction" with respect to any of the matters mentioned in ss 75 and 76. It is equally true that those matters include "Admiralty and maritime jurisdiction", those "arising under any treaty", those "affecting consuls or other representatives of other countries" and those "relating to the same subject-matter claimed under the laws of different States". But it does not follow that the Parliament may invest State courts with jurisdiction with respect to every matter that answers the descriptions contained in ss 75 and 76 or that the term "federal jurisdiction" is synonymous with the matters referred to in ss 75 and 76.

180 In s 77(iii), the adjective "federal" qualifies "jurisdiction" and places a limitation on the matters that may be the subject of invested State jurisdiction. If

211 (1971) 125 CLR 591 at 598-600.

"federal" jurisdiction was synonymous with the matters referred to in ss 75 and 76, the adjective "federal" would be superfluous. If the makers of our Constitution had intended to empower the Parliament to invest State courts with any matter that answered one of the descriptions in ss 75 and 76, they could have achieved that object by simply declaring: "With respect to any of the matters mentioned in the last two sections the Parliament may make laws - ... Investing any court of a State with jurisdiction." That they chose to limit the ss 75 and 76 matters to matters of "federal jurisdiction" strongly supports the conclusion of Barwick CJ that matters of "federal jurisdiction" are those matters that derive from the exercise of the powers conferred by ss 51 and 52 of the Constitution. Moreover, it seems an odd use of the term "federal" to say that a court is exercising "federal jurisdiction" when, for example, it is hearing a matter affecting the consuls of other countries or a cargo claim involving two foreign ships. Similarly, it seems an odd use of the term to say that this Court is exercising "federal jurisdiction" when it hears an appeal from Nauru. Such uses of the adjective "federal" could only be justified on the basis that any jurisdiction invested in any court by the Parliament was federal jurisdiction. However, such a proposition cannot stand with *Capital TV and Appliances*²¹² which holds that territory courts are not exercising "federal jurisdiction" even though their jurisdiction is the result of a law made by the Parliament within the meaning of s 76(ii). Nor can it stand with *Spratt* which effectively holds that territory courts, even when created by the Parliament, are not federal courts created by the Parliament for the purpose of ss 71 and 72 of the Constitution.

181 In drafting ss 75 and 76 of the Constitution, the makers of our Constitution were much influenced by the plan of Art III of the United States Constitution and the judicial history of that article in the United States courts. It was for that reason that they framed ss 75 and 76 so as to give this Court jurisdiction in such matters as "Admiralty and maritime jurisdiction" and those "relating to the same subject-matter"²¹³ claimed under the laws of different States", "arising under any treaty" or "affecting consuls or other representatives of other countries", matters which need not necessarily arise under a law made by the Parliament. However, when the

212 (1971) 125 CLR 591.

213 The grant of jurisdiction under s 76(iv) is wider than that conferred by Art III, Sec 2 of the United States Constitution which conferred jurisdiction only in respect of controversies "between Citizens of the same State claiming Lands under Grants of different States". This provision was not in the first draft of the US Constitution. It was added later, there being no less than 10 States involved in boundary disputes at the time of the Philadelphia Convention: Corwin (ed), *Constitution of the United States (Revised and Annotated)* (1952) at 608-609.

makers of the Constitution decided upon the "autochthonous expedient"²¹⁴ of empowering the Parliament to invest State courts with jurisdiction, they were evidently not prepared to give to those courts the same jurisdiction that was or could be given to this Court or other federal courts. Accordingly, they limited the ss 75 and 76 matters that could be invested in State courts to those which answered the description "federal jurisdiction". Although, as Barwick CJ pointed out in *Capital TV and Appliances*²¹⁵, "[t]he word 'federal' is not always used with precision or with uniformity" in the Constitution, it seems to us, as it seemed to his Honour in that case, that in Ch III federal judicial power or jurisdiction is a reference to power or jurisdiction whose source is a law made under ss 51 or 52 of the Constitution.

Federal jurisdiction and s 79 of the *Judiciary Act* 1903 (Cth)

182 When the *Judiciary Act* was enacted in 1903, there was no reason to suppose that the term "federal jurisdiction" in s 79 had any meaning different from that which this Court later gave to that term in s 39(2) of the Act. In the absence of a legislative indication to the contrary - and there was none - the reasoning in *Ah Yick* required that the term "federal jurisdiction" in s 79 be given its constitutional meaning. Notwithstanding the fluctuations in the course of judicial decision concerning the relationship between s 122 and Ch III, the constitutional meaning of "federal jurisdiction" is still based on the notion that it is concerned with the determination of rights and liabilities that arise under ss 51 and 52 of the Constitution and not s 122. If this case had come before this Court prior to s 79 being amended in 1979, we think that the established doctrine of this Court would have required a finding that the Family Court was not exercising "federal jurisdiction". The rights which it is determining are based on s 122 of the Constitution - not s 51 or s 52. It was assumed in this case that, because of s 76(ii) of the Constitution, the Parliament can invest a federal court with jurisdiction to decide non-federal issues. But accepting that that is so, the decision of this Court in *Capital TV and Appliances* and the earlier decisions of the Court indicate that the Family Court is not exercising federal jurisdiction in the constitutional sense when it hears matters based on s 122 of the Constitution.

183 We do not think that anything said by Mason J in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*²¹⁶ was intended to assert the contrary. In the relevant passage, his Honour was doing no more than rejecting the suggestion made in earlier cases that an exercise of the original jurisdiction of this Court is

214 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268.

215 (1971) 125 CLR 591 at 599.

216 (1973) 129 CLR 65 at 93-94.

not an exercise of federal jurisdiction for the purpose of s 79 of the Constitution. His Honour's remarks were not directed to the different question whether a federal court, exercising jurisdiction in a matter arising from a s 122 law, is exercising federal jurisdiction.

184 Nor are we able to agree with Gleeson CJ and Gummow J that statements by Kitto and Windeyer JJ in *Anderson v Eric Anderson Radio & TV Pty Ltd*²¹⁷ and by Dixon J in *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd*²¹⁸ support the view that a federal court exercising jurisdiction under a law "made by the Parliament" pursuant to s 122 is exercising "federal jurisdiction".

185 We find it impossible to believe that Kitto J had in mind such a proposition when, in *Anderson*, he said that a court exercises federal jurisdiction when its authority to adjudicate is part of the judicial power of the federation. In our view, Kitto J thought that the determination of rights and duties arising under a law made pursuant to s 122 is not an exercise of the judicial power of the Commonwealth. In *Spratt*, handed down only five days after *Anderson*, his Honour held that *Bernasconi* and *Porter* were correctly decided, that s 122 is not limited by Ch III and that the territories are not part of the Commonwealth as that term is used in the Constitution. It is clear that in *Spratt* Kitto J thought that the judicial power of the federation did not include the determination of rights and liabilities arising under laws enacted under s 122. There is no reason to think that his Honour was expressing the opposite view in *Anderson*. In *Spratt*, his Honour said²¹⁹:

"[T]he limitations which Chap. I puts upon legislative power in the working of the federal system, anxiously contrived as they are with the object of keeping the Parliament to the course intended for it, are thrown aside as irrelevant when the point is reached of enabling laws to be made for the government of territories which stand outside that system; for s 122 uses terms apt to authorise the Parliament to make what provision it will for every aspect and every organ of territory government. The exercise of the judicial power which is a function of government of a territory is within the unrestricted authority thus in terms conferred."

217 (1965) 114 CLR 20 at 30 per Kitto J, 44 per Windeyer J.

218 (1929) 42 CLR 582 at 585-586.

219 (1965) 114 CLR 226 at 250-251.

186 Nor in our respectful opinion should the statement of Windeyer J in *Anderson*²²⁰, to which Gleeson CJ and Gummow J refer, be taken as indicating that federal jurisdiction always arises whenever a Commonwealth law grants a power of adjudication. Windeyer J was dealing with the jurisdiction of a State court which had been invested with federal jurisdiction by s 39 of the *Judiciary Act*. It was in that context that his Honour said, "Federal jurisdiction depends upon the grant by Commonwealth law of a power of adjudication rather than upon the law to be applied in adjudicating. Federal and State jurisdiction may overlap and be exercised concurrently."²²¹ Given the view of "federal jurisdiction" which Windeyer J expressed in *Capital TV and Appliances*, we cannot accept that his Honour intended to say in *Anderson* that federal jurisdiction exists whenever a Commonwealth law is the source of a court's authority to adjudicate.

187 Nor do the statements of Dixon J in *Federal Capital Commission*²²² lend support to the notion that a federal court exercises federal jurisdiction whenever it has authority to adjudicate on a matter arising under the territories power. His Honour's statements do no more than declare that a law made under s 52(i) of the Constitution concerning the seat of government is a law "made by the Parliament" for the purpose of s 76(ii) of the Constitution. Indeed, Dixon J said²²³ that "[s] 122 is dealing, at least primarily, with Territories which do not form part of the Federal system."

188 However, a passage in the judgment of Menzies J in *Capital TV and Appliances*²²⁴ does appear to support the view that a federal court which has been given jurisdiction under a law made pursuant to s 122 is exercising "federal jurisdiction". His Honour said "that throughout Ch III 'federal jurisdiction' means jurisdiction conferred therein upon the High Court ... or conferred by the Parliament upon some other federal court (ss 71 and 77(i)); or, invested by Parliament in a State court (ss 71 and 77(iii))." Since, in his Honour's view²²⁵, a law made under s 122 is a law "made by the Parliament", it would appear that his Honour thought that defining the jurisdiction of a federal court by reference to a law made under s 122 would be defining its federal jurisdiction.

220 (1965) 114 CLR 20 at 44.

221 (1965) 114 CLR 20 at 44-45.

222 (1929) 42 CLR 582 at 585-586.

223 (1929) 42 CLR 582 at 585.

224 (1971) 125 CLR 591 at 606.

225 (1971) 125 CLR 591 at 605.

189 We say "appear", because some parts of his Honour's reasoning in *Capital TV and Appliances*, if not inconsistent with the general proposition set out in the above passage, are at least ambiguous enough to throw doubt on whether his Honour intended to say that, whenever a federal court is invested with jurisdiction under a law "made by the Parliament", it is exercising federal jurisdiction. Thus, his Honour said²²⁶:

"No jurisdiction which is not federal jurisdiction can be given to any court by virtue of the powers given to Parliament by Ch III. *It follows that, when the High Court or any other federal court is exercising judicial power by virtue of a law not made under Ch III, it is not exercising 'federal jurisdiction' in the constitutional sense.* Support for the foregoing proposition - which seems to me to appear plainly enough from Ch III - is to be found in a consistent body of authority. See, for instance, *Ah Yick v Lehmert; New South Wales v The Commonwealth*²²⁷; *In re Judiciary and Navigation Acts*²²⁸; *Porter v The King; Ex parte Yee; Boilermakers' Case*.

It does not follow, however, that jurisdiction with respect to the matters enumerated in ss 75 and 76 must always be categorized as federal jurisdiction in the constitutional sense. Were this so, a court constituted by Parliament, otherwise than as a federal court, could not be given jurisdiction with respect to a matter arising under the Constitution or arising under a law made by the Parliament. The contrary has, however, been decided." (Emphasis added)

190 In the light of the earlier quotation of his Honour that we have set out, we find the second and third sentences in this passage puzzling. His Honour plainly assumes in the sentence that we have italicised that jurisdiction can be conferred on this Court or a federal court which is not federal jurisdiction. That seems to indicate that this Court or a federal court exercising jurisdiction under a law made pursuant to s 122²²⁹ is not exercising jurisdiction under Ch III - which is the traditional view - even though such a law is literally a law "made by the Parliament" within the meaning of s 76(ii) of the Constitution. That his Honour

²²⁶ (1971) 125 CLR 591 at 606-607.

²²⁷ (1915) 20 CLR 54.

²²⁸ (1921) 29 CLR 257.

²²⁹ The reference to *Porter* suggests that s 122 laws were among the laws that his Honour had in mind.

meant so to hold is clear from a passage towards the end of his judgment²³⁰. His Honour had concluded that the Supreme Court of the Australian Capital Territory was not exercising federal jurisdiction when it determined rights under a law enacted under s 122. He then said, "If this seems anomalous it is no more anomalous than that this Court, in hearing an appeal from the ... Territory, is not exercising federal jurisdiction because its authority to hear such an appeal stems from a source of power outside Ch III of the Constitution." His Honour's acceptance of this proposition contradicts what we have taken to be the general proposition contained in the first quotation which we have set out above, viz., that the conferral on a federal court of jurisdiction under a law "made by the Parliament" is always a conferral of federal jurisdiction.

191 We are far from confident, therefore, that in *Capital TV and Appliances* Menzies J intended to say that a federal court exercising jurisdiction under a law "made by the Parliament" is always exercising federal jurisdiction. Much of his reasoning suggests the contrary. In any event, the views expressed by other members of the Court in *Capital TV and Appliances* and earlier decisions of this Court lead to the conclusion that jurisdiction conferred under s 122 is not "federal jurisdiction". It should also be noted that in *Capital TV and Appliances* Menzies J expressly held that the Supreme Court of the Australian Capital Territory exercising a jurisdiction conferred by a law made under s 122 was not a court exercising federal jurisdiction for the purpose of s 73 of the Constitution, although his Honour also held²³¹ that such a law was a law "made by the Parliament" within the meaning of s 76(ii) of the Constitution.

192 For these reasons, we are of the opinion that, if the Family Court had been required to decide the present case before the amendments to the *Judiciary Act* in 1979, it would not have been exercising "federal jurisdiction".

193 In 1979, however, s 79 was amended to add the words "'or Territory' after 'State' (wherever occurring)."²³² Does this indicate that the Parliament intended that "federal jurisdiction" for the purpose of s 79 should now include that jurisdiction exercised by a federal court applying territory law in a territory even if the jurisdiction is not federal jurisdiction for the purposes of the Constitution? Or did the amendment do no more than require a federal court sitting in a territory to apply territory law if it was hearing a matter involving rights and liabilities arising under s 51 or s 52? Not without considerable doubt, we have concluded that the latter view is the most likely reflection of Parliament's intention. As we

²³⁰ (1971) 125 CLR 591 at 609.

²³¹ (1971) 125 CLR 591 at 605.

²³² *Judiciary Amendment Act (No. 2) 1979* (Cth), s 14.

73.

have indicated, before the 1979 amendment "federal jurisdiction" in s 79 meant jurisdiction concerning matters arising under ss 51 and 52 of the Constitution. It seems more likely that, by adding "or Territory" after "State" in s 79, Parliament intended to regulate the exercise of "federal jurisdiction" by courts sitting in territories rather than change the nature of what hitherto had been encompassed by "federal jurisdiction".

194 Accordingly, in our opinion, on the facts of this case the Family Court was not exercising "federal jurisdiction" when it commenced to hear the matter in issue. "Federal jurisdiction" does not include "matters" arising under enactments made pursuant to s 122, such as s 69ZG of the *Family Law Act*, and that is so even though the court invested with the s 122 jurisdiction is a federal court. It follows that s 79 of the *Judiciary Act* does not apply to the present proceedings.

Does s 97(3) of the *Community Welfare Act* nevertheless apply?

195 Because the Family Court is not exercising "federal jurisdiction" within the meaning of s 79 of the *Judiciary Act*, it becomes necessary to consider whether either of its own force or its intended operation s 97(3) of the *Community Welfare Act* applies in the present proceedings. For the reasons that McHugh J gave in *Gould v Brown*²³³, it is clear to us that s 97(3) could not apply of its own force. No State or territory can enact laws purporting to apply in proceedings in a federal court. It is not a question of the application of s 109 of the Constitution to the State law or of the inferior status of a territory in respect of the Commonwealth. Chapter III and s 51(xxxix) exhaust the power to make laws with respect to federal courts. Moreover, as a matter of construction, s 97(3) does not purport to apply to a federal court. In accordance with ordinary principles of statutory construction, the term "court" in s 97(3) should be confined to the courts of the Territory. Nevertheless, the existence of s 97 may affect the operation of the Family Court's power to produce documents. In the absence of a clear provision to the contrary, a law of the Parliament conferring jurisdiction or powers on a federal court does not authorise conduct "which is specifically prohibited and rendered criminal by the ordinary criminal law of the State or Territory in which the act would be done."²³⁴

196 Order 28 r 1 of the Family Law Rules, set out earlier, provides that the Court may compel production of any document by issue of a subpoena. Neither the Rules nor the Act, however, make mention of a power to compel production of

233 (1998) 72 ALJR 375 at 408-409; 151 ALR 395 at 438-439.

234 *P v P* (1994) 181 CLR 583 at 602 per Mason CJ, Deane, Toohey and Gaudron JJ.

documents which are the subject of a "public interest" privilege deriving from some other source, such as another enactment, State, federal or territorial, or the common law. Section 97(3) of the *Community Welfare Act* is clearly intended to protect the wider public interest in so far as it shields sensitive documents from the usual processes by which such documents may be made public. The general power conferred by O 28 r 1 of the Family Law Rules should not be construed as authorising the production of documents protected by a specific and narrowly directed provision such as s 97(3), which plainly intends to create an exception to long-established general principles about the procedures governing legal proceedings.

197 The Family Law Rules give no indication that they were intended to provide exhaustively with respect to the compelling of evidence. There is nothing in O 28, or anywhere else in the Rules or in the Act, that indicates that the power conferred by O 28 r 1 should be construed so that it overcomes the many qualifications and exceptions that the law has developed in relation to the production of documents in response to the issue of subpoenas. If O 28 r 1 was intended to overcome exceptions to the production of documents, such as legal professional privilege, the privilege against self-incrimination and public interest immunity, one would expect an express statement to that effect. To make express provision for such purposes would have been a simple matter. Whether, in the absence of Parliamentary authority, Rules of Court could achieve this end may be debatable²³⁵. It is enough to say, however, that O 28 r 1 contains nothing that indicates an intention to overcome public interest type protections of which s 97(3) is merely one of many examples.

198 Furthermore, the so-called "paramountcy principle", referred to earlier in these reasons, and the fact that the Family Court exercises functions in relation to child welfare provide no ground for concluding that O 28 r 1 is intended to overturn the usual exceptions to the production or admissibility of evidence. The "paramountcy principle" is a principle to be applied when the evidence is complete. Except where statute provides to the contrary, it is not an injunction to disregard the rules concerning the production or admissibility of evidence.

199 Finally, the provisions of the *Evidence Act* provide no ground for concluding that O 28 r 1 overturns the protection provided by s 97(3). As Gleeson CJ and Gummow J point out in their judgment, that Act does not deal with the obligations of a person to produce documents on subpoena or the grant of leave by a court to inspect or make use of documents produced on subpoena.

235 cf *Ex parte Grinham; Re Sneddon* [1961] SR (NSW) 862.

J
Callinan J

McHugh

Callinan J

75.

Conclusion

200 Both parts of the question in the case stated must be answered "No".

201 KIRBY J. This appeal from orders of the Full Court of the Family Court of Australia²³⁶ concerns a problem common in a federation. What is to happen where there is a suggested incompatibility or repugnancy between a law made by the federal Parliament and a law made by another legislature within the nation?

202 Where the inconsistent law is one of a State, the answer to that question is provided by s109 of the Australian Constitution. In that case the federal law prevails and the State law is, to the extent of the inconsistency, invalid. Around this constitutional provision has developed an elaborate and familiar jurisprudence. However, in this matter, the law, the operation of which is challenged, is one made by the legislature of the Northern Territory of Australia and not of a State. It was made by that legislature²³⁷ after the alteration of the constitutional arrangements for the Territory effected by the *Northern Territory (Self-Government) Act 1978* (Cth). By that Act, the Northern Territory legislature is authorised to make laws for the peace, order and good government of the Territory. It has done so here. In such circumstances, s 109 is silent on the problem of incompatibility with federal laws²³⁸. Instead, a slightly different, although analogous, jurisprudence has developed²³⁹. The result is much the same. Necessarily, it must be so in a federation such as Australia. If the federal law is clearly applicable, gives effect to rules having national application or results in legislative commands inconsistent with, or repugnant to, the territory law, the latter must give way. Federal law must be obeyed.

203 Two variations arise in this case on this theme of federal supremacy. The first derives from a provision of the *Judiciary Act 1903* (Cth), which was intended to ensure that the exercise of federal jurisdiction, relevantly in a territory, is carried out in general conformity with the laws of that territory, including as those laws affect procedure, evidence and the competence of witnesses²⁴⁰. The effect of the *Judiciary Act*, if it applies, is to give to certain territory laws the status of a "surrogate" federal law²⁴¹. The second complicating factor concerns the provenance, and intended operation, of one of the federal laws in question. The issue to be decided relates to the extent to which ambiguities in the meaning of that

236 *Re Z* [1996] FLC ¶92-694.

237 The Legislative Assembly of the Northern Territory. See *Northern Territory (Self-Government) Act 1978* (Cth), s 6.

238 A suggestion to the contrary in a passage in *P v P* (1994) 181 CLR 583 at 603 appears to have been a slip.

239 See eg *University of Wollongong v Metwally* (1984) 158 CLR 447 at 464.

240 *Judiciary Act*, s 79.

241 cf *The Commonwealth v Mewett* (1997) 191 CLR 471 at 514, 554.

federal law, concerning its ambit and operation, should be resolved in a way compatible with international law²⁴² and so as to ensure that Australian law conforms, as far as it properly can, to international law²⁴³.

Facts, case stated, issues and legislation

204 The facts giving rise to the case which Murray J stated for the opinion of the Full Court of the Family Court appear in the reasons of Gleeson CJ and Gummow J. So do the questions framed by her Honour, as amended by the Full Court²⁴⁴. Most of the legislative provisions necessary for my opinion are also contained in Gleeson CJ and Gummow J's reasons. As those reasons demonstrate, this appeal presents for resolution many complex questions. I will confine my opinion to the issues essential to dispose of the appeal, leaving inessential questions to another day.

205 Officers of the Child and Family Protective Services of the Northern Territory Department of Community Welfare ("the Department"), relying on provisions of the *Community Welfare Act* (NT) ("CWA"), have refused to produce to the Family Court files and records in the custody of the Department relating to the child Z who is the subject of these proceedings. Production of those files and records was required by a subpoena issued by the Registrar of the Family Court in Darwin in accordance with the *Family Law Act* 1975 (Cth) ("FLA").

206 The father of Z (the first respondent to this appeal) appeared before this Court to uphold the decision of the Full Court of the Family Court that production of the files and records by the Department was required by law. He supported the reasoning of the majority in that Court²⁴⁵. Although they took no part in the proceedings in this Court, the mother (the second respondent) and the separate representative appointed to represent the interests of the child²⁴⁶ (the third respondent) each supported in the Family Court the position adopted by the father.

242 Convention on the Rights of the Child, Art 9(1). The Convention was adopted and opened for signature, ratification and accession by resolution of the General Assembly of the United Nations No 44/25 of 20 November 1989. In accordance with Art 49, it entered into force on 2 September 1990. See United Nations, *Human Rights - A Compilation of International Instruments* (1994), vol 1 at 174.

243 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; Pearce, *Statutory Interpretation in Australia*, 4th ed (1996) at 64-66.

244 *Re Z* [1996] FLC ¶92-694 at 83,222.

245 Nicholson CJ and Frederico J; Fogarty J dissenting.

246 FLA, s 68L; cf *Re JJT; Ex parte Victoria Legal Aid* (1998) 72 ALJR 1141 at 1144-1146; 155 ALR 251 at 255-258.

In a display of unity rare for proceedings concerning access to a child who, it was suggested, had been sexually abused by the father, each of the parties most closely concerned supported the production to the Family Court of the files and records in question. Presumably each considered that the material in those files should at least be available to the judge of that Court who had the responsibility of deciding the application brought by the mother. It is the territory Department alone which, in reliance upon s 97(3) of CWA, objects to producing the documents named in the subpoena. In effect, it asks that the subpoena be set aside on the ground that it compels the production of documents contrary to law.

- 207 I will deal first with the issues presented by the FLA before those said to be raised by the other federal law in question, the *Evidence Act* 1995 (Cth). I will take that course because (1) it reflects the order in which the case is stated; (2) it mirrors the treatment of the issues in the Full Court; (3) it focuses debate upon questions of peculiar relevance to the Family Court (whereas the *Evidence Act* has a much broader application); and (4) as I shall demonstrate, it eventually removes the need to answer the question about the *Evidence Act*.

The *Family Law Act*: confining the issues

- 208 *Matters not in issue:* Let me start with the interface between FLA and CWA. The practical question posed is simple. By s 97(3) of CWA, it is provided that an "authorized person" shall not, except for the purposes of that Act, be required to produce in "a court" a document [arising from] the performance of his duties or functions "under this Act" (ie CWA). There is no contest that the officer of the Department who objected to production of the files and records mentioned in the subject subpoena was an "authorized person". Nor is there any contest that the Northern Territory of Australia (the appellant) was entitled to intervene in the Family Court in support of that person's interest and, now as a party in this Court, to appeal by special leave to this Court to uphold the construction which it urged. Relevantly, its construction was that nothing in FLA, or in the Family Law Rules made pursuant to FLA, authorising the issue of the subpoena in question²⁴⁷, rendered inoperative the prohibition against production of documents expressed in s 97(3) of CWA so as to relieve the addressee of the subpoena of the duty to conform to that prohibition.

- 209 "*Court*" in CWA extends to a federal court: Two textual questions immediately arise. Answered one way, they would confine the operation of s 97(3) of CWA so that it would have no application to the present case. The first concerns the meaning of the word "court". The expression is not defined in CWA. Ordinary principles of construction would suggest that the word would refer only to a "court" of the Northern Territory, being the polity whose legislature enacted CWA. Unassisted by earlier holdings of this Court, I should have been inclined to read

247 O 28 r 1 of the Family Law Rules.

the provision as one relieving an authorised person of the obligation (relevantly) to produce a document to a Northern Territory court but leaving obligations to federal courts to be determined by any federal law, applicable by its terms to the specific case. However, in previous decisions where a non-federal court was exercising federal jurisdiction, references similar to those in s 97(3) of CWA have been held applicable where s 79 of the *Judiciary Act* picks up the non-federal law and applies it to the exercise of federal jurisdiction²⁴⁸. There are obvious reasons of convenience, for the efficient operation of an integrated legal system in the Australian federation, to maintain this line of authority. There is no basis for distinguishing it because, in this case, the court referred to is a federal court. The first textual means of circumventing the operation of s 97(3) of CWA falls away.

210 *"Purposes of the Act" meaning of CWA:* The second argument is not covered by authority. It was submitted for the father, supporting a proposition of the Commonwealth (intervening), that a broad construction should be given to the exempting phrase "except for the purposes of this Act". Those "purposes" were suggested to be the "purposes" contained in the long title of CWA being to provide for the protection and care of children. However, the argument was not confined to the definition of the "purposes" stated in the long title. Had it been so, Gleeson CJ and Gummow J's *riposte*, by reference to the cautionary words of the Privy Council, when *James v Cowan*²⁴⁹ went to their Lordships, would, without more, be adequate to repel the argument. However, all members of the Full Court²⁵⁰ recognised that the argument was more sophisticated than that.

211 The argument relied on the obligation imposed on the Minister by s 9 of CWA at all times to have as his main consideration "the welfare of the child". To this extent, it was put, the Minister's obligations under CWA and the general purposes of CWA gave colour and content to the obligations of the authorised officer of the Department when in receipt of a subpoena such as that issued by the Registrar of the Family Court in this case. Whatever may have earlier, under FLA, been the purposes and functions of the Family Court, amendments of FLA, in force at the time of these proceedings, conferred on the Family Court a large child welfare jurisdiction²⁵¹. Just as the word "court" in a territory Act was broad enough

248 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 89 per Gibbs J with reference to the word "statute"; cf *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 24, 37.

249 (1932) 47 CLR 386 at 398; [1932] AC 542 at 560 (PC).

250 *Re Z* [1996] FLC ¶92-694 at 83,250 per Nicholson CJ and Frederico J; at 83,263 - 83,264 per Fogarty J.

251 As a result of amendments to FLA in 1983 and 1987. See *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 255-258.

to include a federal court operating in the Territory, so, it was submitted, the "purposes of this Act" were sufficiently broad to reflect the overlap between the child welfare purposes of CWA and similar purposes in FLA. The ultimate object of both statutory "purposes" was the same. It was the making of official decisions, including in all courts with relevant jurisdiction, in the best interests, and for the welfare, of the child concerned.

212 This submission was accepted by the Full Court²⁵², although it was rejected by one member of that Court²⁵³. It would be attractive to embrace the argument. If accepted it would afford a neat way of avoiding more complex questions whilst upholding a construction of federal and territory laws which would promote their interrelationship and a focus of each upon the "best interests" principle which, in effect, underlies each. It would have the result of diverting debate from the outcomes of constitutional and statutory analysis to an interpretation of the intersecting legislation which found common ground in the purposes of the federal and territory laws. Such common ground certainly exists in the concern of each for the best interests and welfare of children in a vulnerable situation. They remain the same children whether they are being dealt with by federal or territory officials or courts.

213 However, I cannot accept the argument. This is not a case of expanding a word (such as "court" or "statute") to take on a federal as well as a State or territory meaning in the case of the operation of a State or territory law in a federal context. The position would have been different if the exempting phrase had been "except for the purposes of the welfare of a child" or even except for such purposes "as provided by law". The difficulty lies in the specificity of the phrase "except for the purposes of *this Act*"²⁵⁴. That phrase imports a local operation for the exemption which it is impossible to expand by reference to the purposes of another Act, including an Act of a different polity (the federal Parliament) and specifically FLA.

214 The purposes of FLA are broader than, and different from, the purposes of CWA. It is impossible to assimilate them, even where they sometimes overlap, as obviously they do. On this point, therefore, I agree with the dissenting opinion below²⁵⁵. However desirable it might be to have a single legislative scheme for the welfare and best interests of children throughout Australia, which avoided the

252 *Re Z* [1996] FLC ¶92-694 at 83,250 per Nicholson CJ and Frederico J.

253 *Re Z* [1996] FLC ¶92-694 at 83,266 per Fogarty J.

254 s 97(3) of CWA. Emphasis added.

255 *Re Z* [1996] FLC ¶92-694 at 83,266 per Fogarty J.

jurisdictional conflicts of which this case is a good illustration²⁵⁶, such integration has not yet been attained. The distinction between the traditional areas of State (and territory) child welfare laws (and their respective purposes) and the jurisdiction and powers of the Family Court (and purposes of FLA) is not purely historical. There are continuities and overlaps. But the "purposes" of the respective Acts, properly characterised in this context, are distinct. In this case, the production of the files and records in answer to the subpoena of the Family Court was not "for the purposes of [CWA]". The "purposes" of the subpoena and of the operation of FLA were, relevantly, to ensure the availability for possible use as evidence of files and records of potential relevance to decisions which a judge of the Family Court would ultimately have to make. The "purposes" of CWA, on the other hand, included the promotion of confidential communications with the Department and its officers, specifically in cases of suspected child abuse, in the knowledge that such communications would, with very few exceptions (none of them presently relevant), be held in strict confidence. Specifically, they would not even be disclosed to a court except in the most rare and exceptional of circumstances²⁵⁷.

215 These conclusions make it impossible to resolve the intersection of the federal and territory laws in this case by adopting a construction which would render the territory law (CWA) inapplicable to the present situation. Accordingly, it is necessary to proceed to the principles which govern the resolution of suggested inconsistency or repugnancy between a federal and a territory law. This involves taking two distinct steps. The first or "threshold" issue is whether s 97(3) of CWA was rendered ineffective by reason of "inconsistency" or repugnancy with the provisions of FLA, notably those in Pt VII (Children) and Pt XIII A (Sanctions for Failure to Comply and Contempt). The second and additional way of looking at the problem asks whether, assuming that the Family Court was exercising federal jurisdiction in these proceedings and that the Commonwealth had not "otherwise provided", s 79 of the *Judiciary Act* "picked up" s 97(3) of CWA and applied it as a "surrogate" federal law²⁵⁸.

216 *Two ultimate issues in the appeal:* So far as the intersection of CWA and FLA is concerned, I can confine the issues for decision to two: Are the terms of FLA, on the particular subject matter covered by s 97(3) of CWA (when each law

256 The need for such integration legislation was recommended by all of the judges of the Full Court. See esp *Re Z* [1996] FLC ¶92-694 at 83,262 per Fogarty J. See also *Re Karen and Rita* [1995] FLC ¶92-632 at 83,353; cf *Re LSH; Ex parte RTF* (1987) 164 CLR 91 at 104.

257 As provided by s 97(3) of CWA.

258 *Maguire v Simpson* (1977) 139 CLR 362 at 408; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 514, 554.

is construed and properly understood), inconsistent with, or repugnant to, the latter so that s 97(3) of CWA can have no operation²⁵⁹? And has the federal Parliament in the provisions of FLA "otherwise provided"²⁶⁰ so as to deny s 97(3) of CWA the status of a "surrogate" federal law which the Family Court, exercising federal jurisdiction, is bound to apply in accordance with s 79 of the *Judiciary Act*.

217 I would answer the first, threshold question in the affirmative. There is inconsistency and repugnancy in the relevant sense. The federal law (FLA) therefore prevails. The territory law (s 97(3) of CWA) is to that extent inoperative. The departmental official was thus obliged to produce to the Family Court the files mentioned in that Court's subpoena. CWA afforded no excuse for refusing to do so.

218 On this basis, I would answer the second question in the affirmative as well. The federal Parliament having in this instance "otherwise provided", s 79 of the *Judiciary Act* is ineffectual to pick up s 97(3) of CWA and to apply it as a "surrogate" federal law. This conclusion makes it unnecessary for me to explore, as the other members of this Court have done, the extent, if at all, of federal jurisdiction in cases governed by laws made under s 122 of the Australian Constitution. That question may be postponed to another day. It will surely arise soon. Observations not strictly necessary to my decision should therefore be avoided.

259 Applying *Webster v McIntosh* (1980) 32 ALR 603 at 605-606 per Brennan J.

260 *Judiciary Act*, s 79.

The threshold question: the test of inconsistency or repugnancy

219 Addressing the "threshold" question, it is essential to clarify the criteria by which inconsistency or repugnancy between the relevant federal and territory law are to be judged²⁶¹. Because s 109 of the Constitution does not attach according to its terms, the judicial elaboration of "inconsistency" for that purpose does not, as such, apply. However, it is an established principle of the Constitution that, in the case of a conflict between a federal and a territory law, similar principles apply by analogy²⁶². If the federal law is valid under the Constitution and applicable in accordance with its terms, it prevails. It permits no law, State or territory, to operate where, were the latter to do so, it would result in the imposition of inconsistent rights or obligations.

220 At the foundation of this rule are two notions central to our legal system. The first is that there cannot, ultimately, be truly inconsistent legal obligations²⁶³. The Constitution or other rules of law must provide a means of removing the apparent inconsistency so that one law, in seeming conflict, is valid and applicable and the other is not. Secondly, in a case where the apparent inconsistency arises at the intersection of a federal and sub-federal law, if the former be constitutionally valid and applicable, it has primacy. To the extent necessary, it expels its purported competitor.

221 At the core of this second idea, as applied in the Australian federation, is the notion that some matters are appropriate, in accordance with the Constitution, to be governed by a law applicable throughout the nation without alteration, impairment or detracting²⁶⁴ by laws otherwise applicable in the same place, whether of a State or of a territory. Because, for the better part of this century, there were few federal courts and federal jurisdiction was ordinarily exercised by

261 Generally "inconsistency" and "repugnancy" are interchangeable terms in the context of the jurisprudence on s 109 of the Constitution: *Attorney-General for Queensland v Attorney-General for the Commonwealth* (1915) 20 CLR 148 at 168; *Union Steamship Co of New Zealand Ltd v The Commonwealth* (1925) 36 CLR 130 at 148, 158; *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 at 524-525. A difference was suggested by Dixon J in *Frost v Stevenson* (1937) 58 CLR 528 at 572 and reserved by Mason J in *University of Wollongong v Metwally* (1984) 158 CLR 447 at 464.

262 *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 588; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 464.

263 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 467 per Murphy J.

264 *Victoria v The Commonwealth* ("the Kakariki") (1937) 58 CLR 618 at 630 per Dixon J.

the courts of the States, invested by federal law with such jurisdiction²⁶⁵, it was necessary, and urgent, following the establishment of the Commonwealth, for the federal Parliament to provide for the way in which, in such cases, the State courts would apply not only any federal law in question but also the great body of common law and other statutory law which form the integrated legal system applicable to the parties to the litigation²⁶⁶. Complications arose later by the creation, purportedly outside Chapter III of the Constitution, of "territory courts". In the mid-1970s, further complications arose from the establishment of two federal courts²⁶⁷ having significant, and still expanding, jurisdiction and powers. Some of the assumptions developed for the intersection between federal and State (and later territory) laws, applicable in courts exercising federal jurisdiction, need reconsideration following the establishment of new federal courts upon which are conferred significant jurisdiction and large powers intended to be exercised effectively and consistently throughout Australia. In such a legal environment, the scope for, and need of, "surrogate" federal law is diminished. Increasingly, the federal law will provide its own rules. The assumption that such a federal court should adapt its procedures, practices, and applicable law to the vagaries and variations of State and territory laws will be concluded less readily today than was the case in earlier times.

- 222 A law of the federal Parliament conferring jurisdiction upon a federal court in general terms will, in the absence of clear provisions to the contrary, ordinarily be construed so that it is not taken to confer jurisdiction or to afford power to make an order authorising or requiring conduct "which is specifically prohibited and rendered criminal by the ordinary criminal law of the State or Territory in which the act would be done"²⁶⁸. The nature of the federal jurisdiction, or the matters which have historically been determined in the exercise of that or a like jurisdiction, may sufficiently demonstrate a contrary purpose in the case of the particular federal law in question²⁶⁹. But the limit of the application of those principles, in contemporary Australia, and in the context of a court such as the Family Court, has been explained by this Court in terms which are applicable to this case²⁷⁰:

265 Pursuant to the Constitution, s 77(iii).

266 *Judiciary Act*, ss 79 and 80 were enacted to this end.

267 The Federal Court of Australia and Family Court of Australia.

268 *P v P* (1994) 181 CLR 583 at 602.

269 *P v P* (1994) 181 CLR 583 at 602.

270 *P v P* (1994) 181 CLR 583 at 602-603.

"[The] ordinary approach to construction does not extend to the case where the State or Territory prohibition under criminal sanction is not imposed solely as part of the ordinary criminal law, but is imposed as an integral part of a statutory scheme conferring upon a local judicial or administrative body jurisdiction or powers which overlap or compete with the jurisdiction conferred by the Commonwealth law. Nor is it applicable to a case where the State or Territory prohibition is imposed as part of a general regulatory scheme which operates within the very area which the jurisdiction validly conferred by the Commonwealth law was intended to control. In such cases, there is no presumption that it was the intent of the Parliament that the jurisdiction conferred by the Commonwealth law should be overridden by, or subjected to, the prohibitions and requirements of the overlapping or competing State or Territory scheme. ... The practical effect of ... pro tanto invalidity of the State or Territory law is that orders made in the exercise of the Commonwealth jurisdiction will prevail over the provisions of the State or Territory law or orders made or acts done in the exercise of power or authority which the State or Territory law purportedly confers."

- 223 The present appeal illustrates the controversial character of the evaluation of federal and territory laws said to be incompatible. Differences of opinion are inherent in the application of principles which are expressed in very general terms. Upon such matters, because they are evaluative, minds can differ. In this case, I have reached the conclusion that the federal law (FLA) excludes the operation of the territory law relied on (CWA, s 97(3)). I will identify those considerations which have most influenced me in reaching this conclusion.

Deciding a parenting order and the paramountcy principle

- 224 It has been suggested that the principle binding on the Family Court, requiring it to regard the best interests of the child as the paramount consideration, only attaches, relevantly, at the stage at which that Court makes its final decision as to the particular parenting order that should be made in relation to that child. On that footing, the paramountcy principle has nothing to say to an "anterior" decision by a judge of the Family Court. Specifically, it has no application to the question presented in this case by the objection to the subpoena requiring production to the Family Court of the departmental files and records relating to the child²⁷¹.

- 225 The foundation for this argument is a textual one. It is that s 65E of FLA, which imposes on the Court the obligation to "regard the best interests of the child as the paramount consideration", is expressed to apply "[i]n deciding whether to make a particular parenting order in relation to a child". Such a decision, so the

271 The same result would follow in relation to a decision on an "anterior" application to set the subpoena aside.

argument runs, does not arise at the earlier stage of the proceedings when a subpoena is being answered. It may not even arise when evidence is being tendered. It arises only at the end stage of the hearing when all relevant evidence has been adduced and the moment of decision has arrived.

226 I cannot accept that construction of the Act. First, the provisions of s 65E of FLA appear in an Act which is addressed, relevantly, to legal proceedings in a superior federal court with important jurisdiction and powers. Such a court is bound to act on evidence. It must do so in accordance with settled procedures applicable in such cases, as modified by any relevant statutory provisions. Unless it is tendered, evidence will not be available for the decision referred to. If it is out of the possession of the parties, unless it is procured by subpoena and, where inspection is objected to, found by the judge to be available to the parties, it will not be tendered by them as evidence. Unless it is produced to the court, it will not be possible for the judge to make the requisite rulings in response to any objection about production of the documents and their availability to the parties. The consequence may be that the best interests of the child, mandated by the Act as the paramount consideration, will not govern the decision made. In such a case, that result would contradict the clear requirement of federal law. In this sense, the process of decision-making to which s 65E of FLA is directed is not one that can be confined only to the end stage when a judge actually makes and pronounces the decision.

227 Secondly, this is not merely a theoretical possibility. The effect referred to can quite readily be imagined. As the majority in the Full Court point out, cases have arisen where access to a file, relevantly, of State child welfare agencies concerning investigations of allegations of child abuse or ill-treatment, has materially affected the reasoning of the judge of the Family Court towards the decision on whether to make a particular parenting order. If the information from the files of the respective State departments concerning the child had not been available and the judge had remained unaware, for example, of the source of allegations of child sexual abuse, he or she might well have reached a different decision in relation to a parenting order "with consequent ill effects upon the children"²⁷².

228 A particularly vivid illustration²⁷³, cited by the majority, involved a case before the Family Court where a mother became aware that a child welfare authority was investigating allegations that the father had sexually abused the child of their estranged relationship. In fact, the investigation arose out of information supplied by a refuge worker who had inferred from conversations with the mother

²⁷² *Re Z* [1996] FLC ¶92-694 at 83,231 - 83,232 per Nicholson CJ and Frederico J with reference to *Re Karen and Rita* [1995] FLC ¶92-632.

²⁷³ *Minister of Community Welfare v Y* (1988) 12 Fam LR 477.

that such abuse had occurred. The mother did not suspect such abuse. She had not intended the inference to be drawn. Only when the truth emerged was it possible for the judge to decide the parenting order proper to the case. Only then could the judge do so in accordance with the paramount consideration established by the Parliament to govern decisions of this kind²⁷⁴:

"Had the information not emerged, there was an obvious risk that a significant injustice would have been done, not only to the parents, but to the child."

229 Thirdly, in the present case, there is no doubt that Murray J had embarked upon a hearing, the purpose of which was to secure a decision whether to make a particular parenting order. This is because, in advance of the return of the subpoena before her Honour, which gave rise to the objection that the appellant defends, the mother had applied for the sole guardianship of Z and for discharge of the access order in favour of the father. Furthermore, she had filed a notice of child abuse or risk of child abuse pursuant to s 70BA of FLA²⁷⁵. Thus, even as a textual matter, in terms of s 65E of FLA, the decision whether to make a particular parenting order in relation to the child was already squarely before the Family Court. The decision on the answer to the subpoena was one of a multitude of interlocutory decisions which a judge of the Family Court would commonly have to make on the way to resolving the ultimate decision. It would be artificial in the extreme, given the language and purpose of the federal Act, to treat the paramountcy principle as irrelevant to "anterior" interlocutory decisions and to confine its application to the final decision. I cannot accept that that was what the federal Parliament said, still less that such was its purpose.

230 Fourthly, my conclusion is reinforced by two further considerations. Each of them was referred to by the majority in the Full Court. The first is the way in which the paramountcy principle permeates the new Pt VII of FLA, as that Part was amended by the *Family Law Reform Act 1995* (Cth) ("FLRA"). Before FLRA, the Family Court was obliged to treat the "welfare" of the child as the paramount consideration²⁷⁶. It is now required to treat the "best interests" of the child as paramount²⁷⁷. The concept of "best interests" probably has a wider connotation

274 *Re Z* [1996] FLC ¶92-694 at 83,232.

275 Now s 67Z of FLA.

276 s 64(1)(a) of FLA (now repealed and replaced).

277 s 65E of FLA.

than "welfare". Certainly, it is not narrower²⁷⁸. The paramountcy principle is reflected in many provisions in the new Pt VII of FLA²⁷⁹. It has been correctly described, although in an unnecessarily gloomy metaphor, as a "constant shadow" cast by the legislation over child welfare cases²⁸⁰ affecting all decisions involving the interests of children within the jurisdiction of the Family Court. It is reflected in the statement of the objects of the new Pt VII²⁸¹. It is given content by the provisions of s 68F of FLA²⁸². That section sets out those matters which the Court is required to consider in order to determine what is in the best interests of the child. The very list of the considerations makes it plain that the "best interests" criterion is not artificially confined to the last minute when the final judicial decision is made. On each of the criteria, evidence may be vital. Where not in the possession of the parties or volunteered to the Court, such material must at least be susceptible of procurement so that the ultimate decision of the Court will accord with the requirement of s 65E. Of special relevance to the present case is the requirement of s 68F(2) of FLA that the Court "must consider":

"(g) the need to protect the child from physical or psychological harm caused ... by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behavior;

...

(i) any family violence involving the child ...".

How, one asks, can this obligation of federal law be fulfilled by a construction of the Act which, in a particular case, would deny the federal court with the requisite jurisdiction and powers material which, in the case in hand, was relevant or even possibly vital?

231 Fifthly, there is a final consideration, external to FLA, which reinforces the conclusion to which the foregoing matters drive me. It is that the changes to Pt VII of FLA were introduced by FLRA to give effect to Australia's obligations under

278 *Re Z* [1996] FLC ¶92-694 at 83,229 per Nicholson CJ and Frederico J; cf Alston and Gilmour-Walsh, "The Best Interests of the Child - Towards a Synthesis of Children's Rights and Cultural Values", UNICEF Symposium, Salamanca, May 1996 at 15.

279 See eg ss 65E, 67L, 67V, 67ZC and 68E(1) of FLA.

280 *In the Marriage of VJ and CJ* (1997) 22 Fam LR 166 at 183.

281 s 60B of FLA.

282 Similar to the former s 64(1)(b), (ba) and (bb) of FLA.

international law following its ratification of the United Nations Convention on the Rights of the Child ("the Convention")²⁸³. Unsurprisingly, the duties imposed on States Parties by the Convention make no artificial distinctions between a final judicial decision affecting the interests of a child and interlocutory decisions anterior to such a final decision. On the contrary, the Convention makes it clear that the States Parties are bound to ensure that the best interests of the child are taken into account throughout the process. Article 9 of the Convention says, relevantly²⁸⁴:

- "1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

232 Where, as here, an Act of federal Parliament has been amended, in part at least, to ensure conformity with Australia's obligations under international law, this Court should construe any ambiguity in the Act arising in the text of the amended law in favour of the construction which would uphold international law and ensure Australia's conformity with it²⁸⁵. In such a case, the ambiguous concept is not to be applied in a narrow sense²⁸⁶. This approach to statutory construction

283 Explanatory Memorandum to FLRA. See also Second Reading Speech in *Commonwealth Parliamentary Debates (HR)* 8 November 1994 2757 at 2759. See also Convention on the Rights of the Child, Arts 9(1) and (3), and 18(1) and (2); cf FLA, s 60B.

284 In United Nations, *Human Rights - A Compilation of International Instruments* (1994), vol 1 at 174-195 (esp 177).

285 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38.

286 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 304.

is well settled in Australia²⁸⁷. In the present case it provides an additional reason for adhering to this Court's consistent recognition and application of the paramountcy principle in the interpretation of Australian laws affecting the welfare and interests of children in positions of vulnerability²⁸⁸.

- 233 The result of this analysis is that, confining the application of the paramountcy principle to the final judicial decision on a parenting order under FLA, and treating it as irrelevant to "anterior decisions" in such proceedings, is not available as a means of avoiding the intersection of the federal law with the territory law.

The *Community Welfare Act* is not a "reasonable excuse"

- 234 It was submitted by the appellant that a textual solution, to avoid incompatibility of the federal and territory laws, lay in resort to the provisions of Pt XIII A of FLA containing "Sanctions for Failure to Comply and Contempt". In accordance with s 112AD(1) of FLA, sanctions attach to a failure to comply with orders made under the Act. By the definition provision in s 112AA, this includes failure to comply with a subpoena issued under the Rules of Court. The subpoena in the present case was such an order. By s 112AD(1) provision is made for the Family Court to take appropriate action where it is satisfied that a person has "without reasonable excuse, contravened an order". By s 112AC what is meant by "reasonable excuse for contravening an order" is elaborated²⁸⁹, although it is made plain that the elaborations are not exhaustive. The only "reasonable excuse" specified in the Act which comes close to the terms of s 97(3) of CWA is that in s 112AC(5). By that provision, a person is taken to have a "reasonable excuse" if that person "believed on reasonable grounds" that the action constituting the contravention was necessary to protect the health or safety of a person (including the respondent or the child) and the period of non-compliance was no longer than necessary for that purpose. No such "reasonable excuse" was invoked in this case. However, it was suggested that compliance by the Northern Territory departmental

²⁸⁷ Pearce, *Statutory Interpretation in Australia*, 4th ed (1996) at 65-66.

²⁸⁸ See eg *M v M* (1988) 166 CLR 69 at 77; *Marion's Case* (1992) 175 CLR 218 at 255, 257; *P v P* (1994) 181 CLR 583 at 598-599; *ZP v PS* (1994) 181 CLR 639 at 646, 648; cf *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 661-662 and 682-685 referring to *Thomson v Thomson* [1994] 3 SCR 551 at 599; (1994) 119 DLR (4th) 253 at 288; *C v C (Minor: Abduction: Rights of Custody Abroad)* [1989] 1 WLR 654; 2 All ER 465.

²⁸⁹ s 112AC(1) of FLA.

official with the terms of s 97(3) of CWA would provide a "reasonable excuse" for what would otherwise be a contravention of the order contained in the subpoena²⁹⁰.

235 In my view, it is not a "reasonable excuse". To say that it might be, tortures the language of the federal law. It is not analogous to the other "reasonable excuses" mentioned in the Act. All of these are specific and temporary. It is not one which commits to the judge exercising the jurisdiction of the Family Court the balancing of interests usual to the evaluation of a "reasonable excuse". It simply purports to provide an absolute barrier to compliance with the order and a refusal to produce the documents referred to in the subpoena, whatever their relevance to the issues before the Family Court. Although several exceptions are acknowledged in s 97 of CWA, the Family Court is, by the terms of the territory law, purportedly denied the power of inspection, evaluation of whether the documents could be relevant and judgment of any claims for exemption from production on the grounds of public interest immunity or otherwise. Although territory administrators and officials might get access to the documents, a judge of the Family Court of Australia might not. This is not the kind of "reasonable excuse" for contravening the order in a subpoena which the provisions of ss 112AB, 112AC and 112AD were concerned to provide. This final textual attempt to avoid the possibility of inconsistency or repugnancy between the federal and territory laws having been rejected, it is necessary to turn to those questions in so far as they affect the operation of FLA upon subject matters which s 97(3) of CWA would affect if its provisions bound the Family Court and limited the effectiveness of that Court's subpoenas.

Indications of inconsistency and repugnancy

236 There are at least four indications in FLA which suggest that its terms cannot coexist with s 97(3) of CWA. I refrain from using the fiction of the *intention* of the federal Parliament. It is preferable, in my view, simply to compare the *effect* of the applicable federal law with that of the territory law to see if the latter, properly interpreted, would "alter, impair or detract from" the operation of the federal law²⁹¹. In my view it would.

237 First, the federal law establishes a court to which the federal Parliament has committed a large jurisdiction and many powers affecting children. It is the clear purpose of the Parliament in so providing that the treatment of the cases committed to the Family Court should, so far as possible, be uniform and consistent throughout Australia where that Court exercises jurisdiction. The outcome of a particular case should not vary (nor the evidence available to resolve the case significantly alter) by reference to the particular State or territory in which the

290 s 112AC(1) of FLA.

291 *Victoria v The Commonwealth* ("the *Kakariki*") (1937) 58 CLR 618 at 630.

Family Court happens to be sitting. The variations in the legislative provisions governing access to the files and records of child welfare departments concerned with investigations of suspected cases of child abuse vary significantly in different parts of Australia²⁹². It also appears that the measure of cooperation between State or territory child welfare authorities and the Family Court in discharging their respective functions differs between the several Australian jurisdictions²⁹³. It is unthinkable that the performance by the Family Court of its functions, under powers conferred by federal law, should depend in important matters upon such local variations. One potentially important matter is the possibility of having available to the Family Court evidence which might assist it in discharging properly, and in accordance with the paramountcy principle, its powers where allegations of child abuse (including sexual abuse) need to be resolved. Why should the outcome of the mother's application in the present case depend upon the chance consideration that her proceedings before this federal court were brought in Darwin rather than in some other jurisdiction of the Commonwealth where the statutory limitation on disclosure to a judge of the Family Court of child welfare investigations of child abuse is not so absolute? Or where cooperation with the Family Court is more fulsome? That is a question which the father, the mother and the separate representative on behalf of the child ask of this Court in these proceedings. There can be only one reply. It is a reply which upholds federal law and assures to the Family Court the powers to perform the functions committed to it by federal law.

238 Secondly, the question is presented in an area of the operations of the Family Court where it is especially important that that Court should not be denied (where it might be relevant and otherwise admissible) the possibility of access to evidence potentially of forensic importance. In *M v M*²⁹⁴, a custody case concerned with the approach to be taken by the Family Court where allegations of sexual abuse were made, this Court said²⁹⁵:

" In resolving the wider issue the court must determine whether on the evidence there is a risk of sexual abuse occurring if custody or access be granted and assess the magnitude of that risk. After all, in deciding what is

292 *Re Z* [1996] FLC ¶92-694 at 83,254 - 83,260 per Fogarty J where some of the differences are described.

293 *Re Karen and Rita* [1995] FLC ¶92-632 at 82,353 per Nicholson CJ: "It has been of great benefit to have been able to consider [the children's] welfare with all options open. It is all too common for Departments in the States and Territories and this Court to be proceeding along parallel, but divergent tracks in relation to issues of children's welfare."

294 (1988) 166 CLR 69.

295 (1988) 166 CLR 69 at 77.

in the best interests of a child, the Family Court is frequently called upon to assess and evaluate the likelihood or possibility of events or occurrences which, if they come about, will have a detrimental impact on the child's welfare. The existence and magnitude of the risk of sexual abuse, as with other risks of harm to the welfare of a child, is a fundamental matter to be taken into account in deciding issues of custody and access."

239 How, it might be asked, is the function described in this passage to be performed where, in the Northern Territory, potentially at least, relevant and important evidence may be withheld in reliance on s 97(3) of CWA? How, in such circumstances, can the existence and magnitude of the risk of sexual or other abuse be accurately assessed by the federal court having the legal responsibility to do so?

240 It is not to the point to say that disclosure of confidential information to a child welfare authority would dry up, or confidences be broken, if the Family Court were given access to files containing such information. This argument is scarcely convincing in the present case. CWA already contains numerous express exemptions for disclosure permitted to administrators and officials, although absolutely withheld from the Family Court, a federal superior court with specialised jurisdiction over children. Moreover, as the first respondent repeatedly pointed out, the mere production of a child welfare file to the Family Court is no guarantee that the parties will gain access to the contents of that file or succeed in persuading the Family Court to permit access or inspection by the parties or to admit the contents into evidence. It is fundamental to such questions that such documents are produced to the court. They are not produced to the parties. They remain under the control of the court. The court has to be convinced that it should itself inspect the documents. In all the circumstances, it may decline to do so. It may set aside the subpoena in the particular case. It may decide to inspect some only of the documents. It may seek guidance, in this respect, from the departmental manager of the file. It may limit access to the file, under conditions, to the legal representatives of the parties and not the parties themselves. It may use pseudonyms or other "devices" to protect the persons named²⁹⁶. It will be in control over the provision (if any) of the documents or parts of documents to the parties and any admission of that evidence in the trial. Before taking any of the foregoing steps, the court may afford opportunities to the parties, the file manager, (where relevant) persons affected or their representatives and, in appropriate cases, the Law Officers to assist it to make a lawful and just decision.

241 Accordingly, there is a clear contradiction between the territory law and the operation of the Family Court in its vital jurisdiction concerning children exercised as the federal Parliament envisaged it would be. In the case of such contradiction,

296 See *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 471; *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131 at 141; cf *Sankey v Whitlam* (1978) 142 CLR 1 at 42.

the territory law must yield. It is inconsistent with, or repugnant to, the operation of FLA. The provisions of the federal law prevail. Not least is this so because of the pains which the federal Parliament has taken to ensure that the decisions in question must be made in conformity with the paramountcy principle and, in that way, in compliance with international law.

242 Thirdly, specific provisions of FLA reinforce the foregoing conclusion. These include the fact that jurisdiction in the Family Court has now been confirmed and enhanced in the case of children by provisions of FLRA according to which s 67ZC has been inserted in FLA. That section provides:

"(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.

(2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

243 Given this express provision of jurisdiction (relevantly) to the Family Court of Australia in the area of child welfare, there is now even less reason than was previously the case to assume that that federal law is designed to deal only with particular aspects of the interests of children and then solely as they relate to the dissolution of the marriage of their parents and consequent orders. By s 67ZC of FLA the federal Parliament has made it plain that, for the purposes of children coming within its powers, the Family Court is to be fully authorised to make orders relating to their "welfare". It is to do so in accordance with the

paramountcy principle. This being so, to deny to the Family Court, in every case, whatever the circumstances, material in State and territory child welfare files which might be relevant to the discharge of the welfare jurisdiction conferred on the Court by federal law, and to do so in terms which differ significantly from one Australian jurisdiction to another, is incompatible with the enhanced welfare jurisdiction of the Family Court of Australia.

244 The detailed provisions in FLA governing steps to be taken in cases of alleged child abuse (including sexual abuse)²⁹⁷ also reflect the recognition by the federal Parliament of the importance of such abuse and of the proper resolution of allegations about it for the child, its parents and all concerned. The amendments to FLA clearly recognise the important role which the Family Court is to have in deciding such matters where they affect children within its jurisdiction. To deny to that Court, in appropriate cases, even the possibility of access to documents and files relevant to the discharge of its functions under federal law is completely incompatible with the proper discharge by the Family Court of its functions.

245 The purported operation of s 97(3) of CWA to frustrate the effective performance by the Family Court of its powers, and the exercise by it of its federal jurisdiction, cannot succeed. To the extent that the CWA provision purports to have that effect, its terms have no application to the Family Court of Australia.

246 The fourth and final consideration to be mentioned concerns the importance of upholding the subpoena power of the Family Court and attaching effective sanctions to non-compliance with the order constituted by a subpoena. The subpoena is one of the greatest inventions of English law. It is an essential feature of the proper exercise of the judicial power²⁹⁸. Those in doubt should study the misfortunes of countries whose courts lack this mean of making the exercise of their jurisdiction and powers effective²⁹⁹. The Family Court has large powers

297 See eg s 67Z of FLA (previously s 70BA).

298 *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 139; *Ditfort v Calcraft*, Court of Appeal (NSW), unreported, 22 December 1989, noted in Carter, *Subpoena Law and Practice in Australia* (1996) at 10-12; cf *Danieletto v Khera* (1995) 35 NSWLR 684 at 687-688; *National Employers' Mutual General Association Ltd v Waind and Hill* [1978] 1 NSWLR 372.

299 See Kirby, Foreword to Carter, *Subpoena Law and Practice in Australia* (1996) at vi-vii referring to the position of courts in Cambodia.

under federal law³⁰⁰ and under its implied³⁰¹ (sometimes incorrectly called "inherent")³⁰² jurisdiction to issue orders in the nature of subpoenas and to make effective the exercise of its statutory powers and functions as a court. It is true that the existence of such powers does not, of itself, override all of the statutory and common law rules which impose limitations on access to documents and the use that may be made of them as evidence in a court of law. But these are questions which arise after a judge has the files and records and is asked to rule on access to, and use of, their contents as evidence.

247 In the present case, the Department (supported by the appellant) sought, in effect, a blanket exemption from the subpoena order, relying on s 97(3) of CWA. Unless clearly justified by law, I would accept no construction of FLA concerning the Family Court's power which excused from compliance those to whom its orders were addressed. In family law matters, even more than most others, passions often run high. Obedience to orders in the form of subpoenas must be upheld. Where documents are referred to they must be brought into court unless, by earlier order, a party is excused, as for example where application is made to set the subpoena aside. Here, a subpoena of the Family Court was fully effective to require the files and records of the Department to be brought to the Family Court. It was then for the Family Court judge having jurisdiction in the case, balancing the competing interests and acting in the settled way that has been developed by our law, to determine the issues of access to them and the use (if any) that might be allowed of them. The suggestion that s 97(3) of CWA excused compliance, or in some way relieved the recipient from having to comply, is rejected.

248 The terms of FLA, a federal law, and the proper operation of that law in the case of the Family Court, a federal court, make clear the purpose of the federal Parliament that that Court should not, in cases concerned with the interests of a child, be confined by a blanket prohibition of the kind that appears in s 97(3) of CWA, a territory law. The latter would "alter, impair or detract from" FLA, a federal law³⁰³. To that extent the federal law prevails. The territory law is

300 ss 21, 34(1), 34(2) and 123 of FLA; O 28 r 1 of the Family Law Rules; cf *Hughes v Western Australian Cricket Association (Inc)* (1986) 66 ALR 541; *Re Federal Commissioner of Taxation; Ex parte Swiss Aluminium Australia Ltd* (1986) 68 ALR 587.

301 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623-624 per Deane J approving a distinction made by Bowen CJ in the Full Federal Court; *Grassby v The Queen* (1989) 168 CLR 1 at 16-17; *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131 at 147; cf *Taylor v Taylor* (1979) 143 CLR 1 at 5-6.

302 eg *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7; *Taylor v Taylor* (1979) 143 CLR 1 at 6; cf *Danieletto v Khera* (1995) 35 NSWLR 684 at 686.

303 *Victoria v The Commonwealth* ("the *Kakariki*") (1937) 58 CLR 618 at 630.

ineffective. The threshold question should therefore be decided, as the Full Court did, in favour of the first respondent.

The federal law "otherwise provides"

249 This conclusion relieves me of the necessity to consider whether, differently analysed, federal law "otherwise provides" within s 79 of the *Judiciary Act*. However, it necessarily follows that it does. If, contrary to my conclusion on the threshold question, it is necessary or appropriate to consider the case in terms which asked whether s 97(3) of CWA was a "surrogate" federal law for the Family Court's exercise of federal jurisdiction, the result would be exactly the same. FLA "otherwise provides" by committing to the Family Court a large jurisdiction and powers to decide whether to make a particular parenting order in relation to a child. It does so, as well, by conferring upon the Family Court the welfare jurisdiction which it now possesses.

250 Because FLA "otherwise provides", it makes it clear that s 97(3) of CWA is not "picked up" as a "surrogate" federal law to be applied by the Family Court. Therefore, the Family Court was not bound by the territory law. Instead, it is bound by FLA and the ordinary considerations of the common law which uphold the right of a judge of the Family Court, if that judge considers it necessary and proper to do so, to inspect documents brought to the Court on subpoena, to rule on arguments of public interest or other claims to immunity and to make such decisions on the access to the documents and their reception into evidence as are lawful and appropriate³⁰⁴. This is the course which the appellant sought to prevent. In my view, legal authority requires rejection of its attempt. So does legal principle and legal policy. So does the consideration of ensuring the observance, in this aspect of Australian federal law, of the principle stated in that law, and in international law, that such decisions should be made, guided by the best interests of the child.

The *Evidence Act* question does not arise

251 In light of the foregoing conclusion, the question concerning the effect of the *Evidence Act* upon the operation of s 97(3) of CWA does not arise. That question was not included in the case as originally stated by Murray J. It was only added by later order of the Full Court. However, in the conclusion which I have reached, the answer to that question is wholly theoretical. This is because, by reason of the provisions of FLA, without more, s 97(3) of CWA has no application. It is

304 *Haj-Ismail v Madigan* (1982) 45 ALR 379; *Registrar of the Workers' Compensation Commission of New South Wales v FAI Insurances Ltd* [1983] 3 NSWLR 362 at 366-367; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 230.

unnecessary therefore to explore the question whether there is an additional basis in federal law for reaching the same conclusion³⁰⁵.

- 252 The issue presented by the question whether the *Evidence Act* applies to interlocutory judicial decisions made before the commencement of a trial is an important one. Upon it, differing opinions have been expressed in the courts of Australia. The Full Court of the Federal Court of Australia has recently delivered a decision on this point³⁰⁶. It would be preferable, if not constitutionally necessary, to decide the question involved in that decision when it is essential to a case before this Court, as here it is not.

Orders

- 253 The appeal should be allowed in part. The answer given by the Full Court to question (b) in the case stated should be amended to substitute for the answer there given the words "unnecessary to answer". Otherwise, the answer given by the Full Court to question (a) in the case stated should be confirmed. The appeal should otherwise be dismissed. The appellant should pay the first respondent's costs of the appeal. The costs of the first respondent in the Family Court should be disposed of in accordance with the orders of the Full Court of that Court.

305 The *Evidence Act*, s 8 makes it clear that it does not affect the operation of the provisions of any other federal Act other than specified provisions of the *Judiciary Act* (including s 79). Accordingly, the *Evidence Act* does not displace FLA.

306 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1998) 159 ALR 664.

254 HAYNE J. For the reasons given by Gleeson CJ and Gummow J I agree that the appeal should be allowed and consequential orders made as they propose.

255 It follows that I am unable to accept that "federal jurisdiction", when used in Ch III, is to be read as confined to authority to adjudicate on rights and duties that find their constitutional origin in laws made under ss 51 or 52 of the Constitution, or as limited to jurisdiction that in some way concerns only the States and the Commonwealth as opposed to the States, the Commonwealth and its territories.

256 The source of a federal court's authority to adjudicate is the law made by the Parliament, whatever may be the constitutional foundation for the rights and duties that are to be adjudged. The diversity jurisdiction dealt with in s 75(iv) and matters of Admiralty and maritime jurisdiction referred to in s 76(iii) (to take only two examples) are, or include, jurisdiction that is not directly concerned with the rights and duties created by laws made under ss 51 or 52 or with the federal compact (although, of course, each is dealt with in the Constitution because of that compact). And yet s 77(iii) speaks of those and the other matters mentioned in ss 75 and 76 as if Parliament, making a law investing State courts with jurisdiction with respect to them, is investing the State courts concerned with federal jurisdiction. And it speaks of them as matters of "federal jurisdiction" because it is Ch III that gives the authority to invest the court concerned with jurisdiction to determine the rights and duties concerned.

257 I accept that the decided cases in this area do not speak with a single and compelling voice, although I would add that I consider the weight of more recent authority supports the view I have reached, even if it does amount to an undermining of what was said in earlier cases. I accept also that, at the time of Federation, some, perhaps many, thought it possible that the Commonwealth would assume responsibility for many and diverse territories in various states of constitutional development and that these territories were seen as standing apart from the main stream of federal law relating to judicial power. But the immediate question that arises is whether the reference to "laws made by the Parliament" in s 76(ii) includes laws made under the power given by s 122 to make laws for the government of any territory.

258 For the reasons I have given and those given by Gleeson CJ and Gummow J it does.