

HIGH COURT OF AUSTRALIA

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

ABEBE

PLAINTIFF

AND

THE COMMONWEALTH OF AUSTRALIA

DEFENDANT

Abebe v The Commonwealth (S53-1998)
[1999] HCA 14
14 April 1999

ORDER

1. *The question reserved for the consideration of the Full Court be answered as follows:*

"Q 1. In their application to the review by the Federal Court of Australia of decisions of the Refugee Review Tribunal, when that Tribunal is reviewing decisions of the nature referred to in section 411(1)(c) of the Migration Act 1958 (Cth), are the provisions of Part 8 of that Act (or any of them) outside the legislative powers of the Commonwealth?"

A. No.

2. *The plaintiff pay the defendant's costs.*

Representation:

D F Jackson QC with J M Gersten and J Stoljar for the plaintiff (instructed by Alex Lee)

H C Burmester QC, Acting Solicitor-General for the Commonwealth with S J Gageler and C J Horan for the defendant (instructed by Australian Government Solicitor)

Interveners:

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

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

HIGH COURT OF AUSTRALIA

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

RE THE MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS OF THE
COMMONWEALTH OF AUSTRALIA & ANOR RESPONDENTS

Ex parte ABEBE PROSECUTOR

Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe
14 April 1999
S139/1997

ORDER

Application dismissed with costs.

Representation:

D F Jackson QC with J M Gersten and J A Coombs for the prosecutor
(instructed by Alex Lee)

J Basten QC with G T Johnson for the first respondent (instructed by
Australian Government Solicitor)

No appearance for the second respondent

Interveners:

S C Churches intervening on behalf of the National Council of Women and
the Australian Federation of Business and Professional Women Inc
(instructed by H S Wise Gershov & Co)

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Commonwealth Law Reports.

CATCHWORDS

Abebe v The Commonwealth of Australia

**Re The Minister for Immigration & Multicultural
Affairs & Anor; Ex parte Abebe**

Constitutional law – Federal jurisdiction – Conferral of jurisdiction upon federal court to review decision of the Refugee Review Tribunal on limited grounds – Whether jurisdiction conferred is in respect of a matter – Meaning of "matter" in Ch III of the Constitution.

Constitutional law – Judicial power – Whether s 481(1)(a) of the *Migration Act* 1958 (Cth) requires a federal court to affirm the legality of a decision which may have been unlawfully made.

Immigration law – Refugee – Refugee Review Tribunal decision refusing to grant protection visa – Application in original jurisdiction of High Court for prerogative relief – Meaning of "well-founded fear of being persecuted".

Words and phrases – "affirm" – "matter" – "refugee" – "well-founded fear of being persecuted".

The Constitution, ss 75, 76, 77(i), Ch III.

Migration Act 1958 (Cth), ss 36, 47, 476, 481(1)(a), 485, 486.

Convention relating to the Status of Refugees of 1951.

GLEESON CJ AND McHUGH J.

ABEBE

v

THE COMMONWEALTH OF AUSTRALIA

1 The principal issue in this important case is whether the Parliament of the Commonwealth, having conferred jurisdiction on a federal court to review or hear an appeal from a decision, can constitutionally limit the grounds upon which that court can examine the correctness or, at all events, the lawfulness of the decision. The plaintiff, in proceedings by way of case stated in this Court, contends that the Parliament cannot do so. For that reason, she contends that certain provisions of the *Migration Act* 1958 (Cth) ("the Act") are invalid because they purport to limit the grounds upon which the Federal Court of Australia can examine the validity of decisions of the Refugee Review Tribunal. In our opinion, the plaintiff's contention should be rejected.

2 Also involved in the case is whether s 481(1)(a) of the Act is invalid because it is inconsistent with the doctrine of the separation of powers. That section gives the Federal Court a discretionary power to make "an order affirming, quashing or setting aside the decision, or a part of the decision" of the Tribunal. However, it gives the Court no power to dismiss an application for judicial review of a decision of the Tribunal. Members of this Court queried whether s 481(1)(a) or part of it is invalid because the lack of a power to dismiss an application combined with the limited grounds of review may require the Federal Court to affirm the legality of a decision in circumstances where the decision was in fact made unlawfully. However, the plaintiff did not wish to rely on the point. In our opinion, s 481(1)(a) is valid.

3 The issues arise under the question reserved in an amended case stated by Gummow J in proceedings commenced in the original jurisdiction of this Court. The question reserved is:

"In their application to the review by the Federal Court of Australia of decisions of the Refugee Review Tribunal, when that Tribunal is reviewing decisions of the nature referred to in section 411(1)(c) of the *Migration Act* 1958 (Cth), are the provisions of Part 8 of that Act (or any of them) outside the legislative powers of the Commonwealth?"

4 Part 8 - which contains ss 474-486 of the Act - gives the Federal Court jurisdiction to review certain decisions made under that Act. Central to the principal issue in the case stated is whether ss 476(2) and (3) and s 485 of the Act are consistent with Ch III of the Constitution in so far as they prevent the Federal

2.

Court from reviewing a decision of the Refugee Review Tribunal on the grounds specified in ss 476(2) and (3) of the Act.

The facts stated

5 The plaintiff is an Ethiopian national who arrived in Australia on 6 March 1997. On that day an officer of the Department of Immigration and Multicultural Affairs refused her immigration clearance. She was placed into immigration detention and continues to be held in detention. On 18 March 1997, the plaintiff applied to the Department of Immigration and Multicultural Affairs for the grant of a protection visa under s 36 of the Act which provides:

"(1) There is a class of visas to be known as protection visas.

(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

Section 65 of the Act provides that, if the Minister is satisfied that the prescribed criteria have been satisfied, the visa is to be granted; if not, the visa is to be refused.

6 On 21 June 1997, a delegate of the Minister, acting pursuant to s 47 of the Act, refused the plaintiff's application for the grant of a protection visa. She then applied to the Refugee Review Tribunal for a review of that decision. On 3 September 1997 the Tribunal determined that the plaintiff was not a person to whom Australia had protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967. The Tribunal also determined that the plaintiff did not satisfy the criterion set out in s 36(2) of the Act. It affirmed the decision of 21 June 1997 to refuse to grant the plaintiff a protection visa.

7 On 30 September 1997, the plaintiff commenced proceedings in the Federal Court of Australia against the Minister under s 476 of the Act. Subsequently, she filed an amended application. The plaintiff's amended application sought relief against the Tribunal on the grounds that she had been denied natural justice and that the decision of the Tribunal failed to satisfy the "reasonableness" test expressed in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*¹. Her application was heard by Davies J who declined to consider these amended grounds because of s 485 of the Act which made the provisions of s 476(2) of the Act non-reviewable grounds of judicial review in the Federal Court. Subsequently, his Honour dismissed the plaintiff's application. No appeal to the

1 [1948] 1 KB 223.

3.

Full Court of the Federal Court against his Honour's decision was lodged. Instead, on 22 December 1997, the plaintiff commenced proceedings for prerogative relief in this Court against the relevant member of the Refugee Review Tribunal and the Minister pursuant to s 75(v) of the Constitution. On 28 January 1998, Gummow J ordered that that application be made by notice of motion to a Full Court. Those proceedings are dealt with in our judgment in matter No S139 of 1997. On 29 April 1998, the plaintiff commenced the present action (S53 of 1998) seeking a declaration against the Commonwealth that ss 476(2) and (3) and s 485 of the Act are invalid.

8 On 24 August 1998, acting pursuant to s 18 of the *Judiciary Act* 1903 (Cth), Gummow J stated the following question of law reserved for the consideration of the Full Court in matter S53 of 1998:

"(1) Are sections 476(2), (3) and section 485 of the *Migration Act* 1958 beyond the legislative competence of the Commonwealth Parliament?"

9 During the course of the present hearing, questions were raised as to whether the case stated needed to be amended to raise questions concerning the validity of other provisions of Pt 8, particularly ss 475(1)(b), 481 and 486. Subsequently, the case stated was amended to raise the general question set out at the commencement of this judgment.

The Refugee Review Tribunal

10 Section 457 of the Act establishes the Refugee Review Tribunal. Section 411 gives the Tribunal power to review certain decisions ("RRT-reviewable decisions"). One of them is "a decision to refuse to grant a protection visa"².

11 Section 412 provides for applications to review RRT-reviewable decisions. Section 414(1) provides that, subject to a presently irrelevant exception, "if a valid application is made under s 412 for review of an RRT-reviewable decision, the Tribunal must review the decision."

12 Section 415 enacts:

"(1) The Tribunal may, for the purposes of the review of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision.

(2) The Tribunal may:

2 Section 411(1)(c).

4.

(a) affirm the decision; or

(b) vary the decision; or

...

(d) set the decision aside and substitute a new decision.

(3) If the Tribunal:

(a) varies the decision; or

(b) sets aside the decision and substitutes a new decision;

the decision as varied or substituted is taken (except for the purpose of appeals from decisions of the Tribunal) to be a decision of the Minister."

13 Section 420 provides:

"(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case."

The Federal Court

14 The Federal Court is a court created by the Parliament pursuant to s 71 of the Constitution. It is a statutory court. Its jurisdiction is the product of laws made pursuant to s 77(i) of the Constitution which provides:

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

(i) defining the jurisdiction of any federal court other than the High Court".

15 Among the matters referred to in the "last two sections" of the Constitution are:

5.

"75 In all matters:

...

- (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:

...

- (ii) arising under any laws made by the Parliament;

..."

- 16 Section 19 of the *Federal Court of Australia Act* 1976 (Cth) provides that the Court shall have such jurisdiction as is vested in it by laws made by the Parliament. The Act provides such jurisdiction by declaring:

"486 The Federal Court has jurisdiction with respect to judicially-reviewable decisions and that jurisdiction is exclusive of the jurisdiction of all other courts other than the jurisdiction of the High Court under s 75 of the Constitution."

- 17 Section 475(1) of the Act provides that, subject to a presently immaterial exception, decisions of the Refugee Review Tribunal "are judicially-reviewable decisions"³. Section 476(1) enacts:

"Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

- (a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;
- (b) that the person who purported to make the decision did not have jurisdiction to make the decision;

3 Section 475(1)(b).

6.

- (c) that the decision was not authorised by this Act or the regulations;
- (d) that the decision was an improper exercise of the power conferred by this Act or the regulations;
- (e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;
- (f) that the decision was induced or affected by fraud or by actual bias;
- (g) that there was no evidence or other material to justify the making of the decision."

18 Sections 476(3)(a)-(c) of the Act, however, declare that the reference in s 476(1)(d) to an improper exercise of power is a reference to an exercise of a power for a purpose other than that for which it is conferred or an exercise of a personal discretionary power at the direction or behest of another person or an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case. Furthermore, s 476(3) declares that the reference in s 476(1)(d) to an improper exercise of power is not to be taken as including a reference to:

- (1) taking an irrelevant consideration into account in the exercise of a power;
- (2) failing to take a relevant consideration into account in the exercise of a power;
- (3) an exercise of a discretionary power in bad faith; or
- (4) any other exercise of a power in such a way that it represents an abuse of the power unless the abuse falls within ss 476(3)(a)-(c).

19 Section 476(2) also limits the grounds upon which the Federal Court can review a judicially-reviewable decision of the Refugee Review Tribunal. It declares that an application for the review of a decision of the Tribunal is not examinable upon two specified grounds. The first is that there has been a breach of the rules of natural justice in connection with the making of the decision; the second is that the decision involved an exercise of power that was so unreasonable that no reasonable person could have so exercised the power.

20 Finally, s 485(1) of the Act provides that the Federal Court does not have any jurisdiction in respect of judicially-reviewable decisions under the Act other than

the jurisdiction provided by Pt 8 of the Act or by s 44 of the *Judiciary Act*. Thus, the important jurisdiction conferred on the Federal Court by ss 39B(1) and 39B(1A) of the *Judiciary Act* is withdrawn in respect of decisions made under the Act.

- 21 The combined effect of ss 476 and 485 of the Act, therefore, is that the jurisdiction of the Federal Court to review decisions under the Act is narrower in some respects than the jurisdiction conferred on this Court by s 75(v) of the Constitution, is narrower in some respects than the scope for review of administrative decisions at common law and is narrower than the scope for review of administrative decisions under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) or the *Judiciary Act*. In other respects, however, the jurisdiction is arguably wider than the jurisdiction of this Court under s 75(v) and the jurisdiction at common law⁴. Nevertheless, it is clear that in important respects the jurisdiction of the Federal Court to review decisions under the Act has been severely truncated.

"Matters"

- 22 The plaintiff claims that, when Parliament invests the Federal Court with jurisdiction to determine a "matter" that could be determined by this Court under s 75(v) of the Constitution, the Parliament cannot limit the grounds on which the Federal Court can deal with the "matter". She contends that, if the Parliament invests the Federal Court with jurisdiction in respect of a matter mentioned in s 75 or s 76 of the Constitution, it cannot "exclude a substantial part of what is in truth a single justiciable controversy and thereby ... preclude the exercise of judicial power to determine the whole of that controversy". Indeed her submissions go further. She contends that, once the Parliament confers jurisdiction on a federal court to hear and determine any part of a legal controversy between subjects or between a subject and the Crown, the Parliament cannot constitutionally prevent the Federal Court from dealing with the whole controversy between the parties. Accordingly, she contends that the Parliament, having given the Federal Court of Australia jurisdiction to review a judicially-reviewable decision of the Refugee Review Tribunal⁵, cannot constitutionally limit the grounds which the Federal Court may examine to determine whether the decision of the Tribunal was lawfully made.

- 23 According to the plaintiff's argument, a grant of jurisdiction with respect to a justiciable controversy arising under a law of the Parliament necessarily involves conferring power to quell the entire controversy. She points out that in the present case there is a justiciable controversy capable of being fully litigated in the High

4 cf sections 476(1)(a), (e) and (g).

5 Sections 475, 476(1) and 485.

Court under s 75(v) of the Constitution, as to whether the Tribunal's decision was made according to law. If the Parliament wished, it could have decided not to confer jurisdiction on the Federal Court with respect to that controversy. Alternatively, it could have enacted legislation conferring on the Federal Court complete jurisdiction to resolve all aspects of the controversy. What the Parliament could not do, according to the plaintiff's argument, was to confer upon the Federal Court limited jurisdiction to resolve some aspects of the controversy, but not others. Her argument appears to equate the power to define jurisdiction with respect to a matter under s 77(i) of the Constitution with a requirement to confer jurisdiction over the whole matter.

- 24 When s 77(i) of the Constitution empowers the Parliament to make laws "defining the jurisdiction of any federal court other than the High Court" with respect to any of the "matters" mentioned in ss 75 and 76 of the Constitution, it means that the Parliament may make laws giving federal courts authority to decide subject matters that answer any of the descriptions in pars (i)-(v) of s 75 or pars (i)-(iv) of s 76 of the Constitution. Jurisdiction is the authority to decide⁶. The jurisprudence of this Court makes it clear that federal jurisdiction is limited to deciding "matters"⁷. Central to the notion of a "matter" is the determination of rights, duties, liabilities and obligations in a legal proceeding. In *In re Judiciary and Navigation Acts*⁸, a majority of this Court pointed out that the term "matter" in s 76 did not mean "a legal proceeding, but rather the subject matter for determination in a legal proceeding." In *Stack v Coast Securities (No 9) Pty Ltd*⁹, Mason, Brennan and Deane JJ, after referring to this passage, said "that a court does not begin to exercise federal jurisdiction until a 'matter' within ss 75 or 76 is raised in the proceedings and that the federal jurisdiction then exercised by the court is co-extensive with the content of that 'matter'." Similarly, in *South Australia v Victoria*¹⁰, Griffith CJ said that "[t]he word 'matters' was in 1900 in common use as the widest term to denote controversies which might come before

6 *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087 at 1142; *The Commonwealth v New South Wales* (1923) 32 CLR 200 at 206; *Johnstone v The Commonwealth* (1979) 143 CLR 398 at 404.

7 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 290.

8 (1921) 29 CLR 257 at 265.

9 (1983) 154 CLR 261 at 290.

10 (1911) 12 CLR 667 at 675.

a Court of Justice." The Chief Justice went on to say¹¹ that the matter "must be such that it can be determined upon principles of law."

25 A "matter" is therefore ordinarily concerned with "some immediate right, duty or liability to be established by the determination of the Court."¹² This accords with the statement of Mason, Wilson, Brennan, Deane and Dawson JJ in *Attorney-General (NSW) v Commonwealth Savings Bank*¹³ "that 'matter' is wide enough to include any subject-matter for determination in legal proceedings, whether the proceedings be proceedings at first instance or proceedings by way of an appeal." Since *O'Toole v Charles David Pty Ltd*¹⁴, it is clear that proceedings may involve a "matter" even when they are not determinative of the rights of the parties, provided the proceedings concern the determination of what their rights were if the law had been properly applied. Nevertheless, the determination of rights, duties and liabilities by reference to legal rules, principles or standards in curial proceedings is at the heart of the notion of a "matter" for constitutional purposes. It follows that the Parliament is acting within the power conferred by s 77 of the Constitution whenever it authorises a federal or State court to determine, by reference to a legal rule, principle or standard, the rights, duties or liabilities of litigants which arise out of controversies that fall within any of the descriptions in pars (i)-(v) of s 75 or pars (i)-(iv) of s 76 of the Constitution. The identification of the "matter" will in part depend upon the nature of the rights, duties and liabilities that arise under a law or state of affairs described in s 75 or s 76¹⁵, but only to the extent that those rights, duties and liabilities are enforceable in the federal or State court which has jurisdiction to hear the "matter".

26 Nothing in the terms of s 77 or Ch III of the Constitution requires the Parliament to give a federal court authority to decide every legal right, duty, liability or obligation inherent in a controversy between subjects or between a subject and the Crown merely because it has jurisdiction over some aspect of the controversy. Nor does anything in s 77 or Ch III of the Constitution require a federal court dealing with a legal controversy to have authority to deal with every legal ground that a party wishes to put forward. It is true that a "matter" is concerned with the rights, duties and liabilities of particular parties in concrete

11 (1911) 12 CLR 667 at 675.

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

13 (1986) 160 CLR 315 at 323.

14 (1991) 171 CLR 232.

15 cf *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* (1988) 82 ALR 175 at 181; *West Australian Psychiatric Nurses' Association (Union of Workers) v Australian Nursing Federation* (1991) 30 FCR 120 at 123-124.

situations and that, when a "matter" exists, it cannot be identified without reference to some law¹⁶ or state of affairs described in s 75 or s 76, and which exists independently of the jurisdiction of a court or its procedures. But that does not mean that, if the Parliament wishes to confer jurisdiction on a federal court in respect of "matters" arising under a particular law or state of affairs, it can only define the jurisdiction of that court by reference to the totality of the rights, privileges, powers and duties that arise under that law or state of affairs.

27 The power of the Parliament to make laws defining the jurisdiction of a federal court "[w]ith respect to any of the matters" mentioned in ss 75 and 76 is a power to make laws with respect to a class of things which answer a certain description. A law concerning that description brings within its scope each concrete factual situation which constitutes a "matter". But s 77(i) is not concerned with any particular case. It is concerned with the general, not the particular. It is necessarily pitched at a level of generality that covers an infinite variety of factual situations, each of which itself is a "matter" which answers the relevant constitutional description. However, the outcome of a specific controversy is not the concern of s 77 which treats "matters" as a legal abstraction descriptive of such rights, duties and liabilities as will be enforceable in the federal or State court upon which is conferred or in which is invested authority to adjudicate.

28 As long as the law defining or investing jurisdiction is one "with respect to" any of the "matters", as so understood, it will be a law authorised by s 77. The conferring of a power to make laws "with respect to" a subject "is as wide a legislative power as can be created", as Latham CJ pointed out in *Bank of NSW v The Commonwealth*¹⁷. A law which changes, regulates or abolishes rights, duties, powers and privileges relating to a subject is made "with respect to" that subject. That being so, a law defines the jurisdiction of a federal court with respect to any of the "matters" mentioned in ss 75 and 76 when it defines the authority of that court to decide what are the rights of parties in a proceeding that may be brought in that court with respect to any of those "matters". Thus, a law authorised by s 77 may confer or invest jurisdiction in a federal or State court over the whole range of rights, powers, privileges and liabilities arising from the operation of a law or the existence of a state of affairs answering any of the descriptions in ss 75 and 76 of the Constitution. On the other hand, a s 77 law may validly confer or invest jurisdiction in respect of some only of those rights, powers, privileges and liabilities and may even limit the remedies which are available to a person affected by a breach of those rights. Given the ordinary and natural meaning of s 77(iii), it seems impossible, for example, to deny Parliament the power to enact a law which invests State courts with jurisdiction to hear only applications for urgent

16 Such as a law of the Parliament proclaiming rights, powers, privileges or duties.

17 (1948) 76 CLR 1 at 186.

injunctions to restrain breaches of (say) s 52 of the *Trade Practices Act* 1974 (Cth). Once that is accepted, it is impossible to find any satisfactory ground for thinking that s 77(i) requires the Parliament to define the jurisdiction of federal courts by reference to the totality of rights, powers, privileges and duties which arise under the law or state of affairs which comes within s 75 or s 76 and which is to be the basis of the federal court's jurisdiction.

29 The plaintiff contends that the words "with respect to" in s 77(i) merely identify what are the "matters" that can be the subject of a law defining jurisdiction. On this argument, the words "with respect to" do not enhance the legislative power of the Parliament. It is true that in s 77(i) those words do have an identifying function and that they operate in a context different from that in which the same words appear in ss 51 and 52 of the Constitution. But there is no substantial difference between the operation of the words in ss 51 and 52 and in s 77. In each of those sections, they identify the subject matter of the law and the nature of the connection between the law and the subject matter. In ss 51 and 52, the connection is direct and immediate - "laws ... with respect to [a subject]". In s 77(i), the connection is less immediate - "laws ... [d]efining the jurisdiction" "[w]ith respect to any of the matters mentioned". But that difference does not give the words "with respect to" any different operation in s 77 from that which they have in ss 51 and 52. As long as the law defines the jurisdiction of a federal court, its connection with any of the class of "matters" mentioned in ss 75 and 76 can be direct or indirect, close or distant, provided the law can fairly be described as one "with respect to" the relevant class of "matters".

30 As we have pointed out, the plaintiff also contends that, when Parliament gives a federal court jurisdiction under s 77, it must give it authority to quell the whole controversy between the parties. That contention was based on the claim that a "matter" "exists *dehors* the procedure or the particular court". That being so, the plaintiff contends that Parliament can legislate with respect only to that "matter". Even if the plaintiff is correct in contending that a "matter" exists independently of any court or its procedures, it does not lead to the conclusion that any part of Pt 8 of the Act is invalid. First, the power conferred by s 77 is a power to make laws "with respect to" "matters". Those words are wide enough to authorise the Parliament to give a federal court jurisdiction with respect to part of a controversy even if a "matter" exists independently of the courts and their procedures. Second, as we have pointed out, the term "matters" in s 77 of the Constitution is not dealing with individual cases as such but with a class of things. The power is one to make laws "with respect to" a class, not an individual case. But in any event the claim that a "matter" exists independently of any court or its procedure is incorrect.

31 The term "matter" has meaning only in the context of a legal proceeding, as the passages from *South Australia v Victoria*¹⁸, *In re Judiciary and Navigation Acts*¹⁹, *Stack v Coast Securities (No 9) Pty Ltd*²⁰ and *Attorney-General (NSW) v Commonwealth Savings Bank*²¹ demonstrate. A "matter" cannot exist in the abstract. If there is no legal remedy for a "wrong", there can be no "matter". A legally enforceable remedy is as essential to the existence of a "matter" as the right, duty or liability which gives rise to the remedy. Without the right to bring a curial proceeding, there can be no "matter". If a person breaches a legal duty which is unenforceable in a court of justice, there can be no "matter". Such duties are not unknown to the law. For example, in *Australian Broadcasting Corporation v Redmore Pty Ltd*²², this Court had to consider the effect on a contract of a statutory provision which prohibited the making of the contract without the approval of a Minister. The prohibition arose in a context where s 8(1) of the relevant Act imposed a duty on the Board of the appellant to ensure that it did not contravene any provision of the Act but s 8(3) provided that "[n]othing in this section shall be taken to impose on the Board a duty that is enforceable by proceedings in a court." Although the point did not arise for decision, it is plain that breach of the prohibition was incapable of giving rise to a "matter".

32 The existence of a "matter", therefore, cannot be separated from the existence of a remedy to enforce the substantive right, duty or liability. That does not mean that there can be no "matter" unless the existence of a right, duty or liability is established. It is sufficient that the moving party claims that he or she has a legal remedy in the court where the proceedings have been commenced to enforce the right, duty or liability in question. It does mean, however, that there must be a remedy enforceable in a court of justice, that it must be enforceable in the court in which the proceedings are commenced and that the person claiming the remedy must have sufficient interest in enforcing the right, duty or liability to make the controversy justiciable²³. Questions of standing cannot be divorced from the notion of a "matter".

18 (1911) 12 CLR 667 at 675.

19 (1921) 29 CLR 257 at 265.

20 (1983) 154 CLR 261 at 290.

21 (1986) 160 CLR 315 at 323.

22 (1989) 166 CLR 454.

23 *Croome v Tasmania* (1997) 191 CLR 119 at 126.

33 It is true that in *South Australia v Victoria*²⁴, Isaacs J said that the term "matters" in s 75 of the Constitution "includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject, and which therefore governs their relations, and constitutes the measure of their respective rights and duties." But his Honour's statement should not be taken as indicating that a law, made pursuant to s 77(i), which gives a federal court jurisdiction to decide only part of a particular controversy or which limits the grounds for determining the controversy is not a law defining the jurisdiction of the court with respect to one of the matters mentioned in s 75 or s 76. The issue in *South Australia v Victoria* was whether a particular suit constituted a "matter" over which this Court had jurisdiction. Nor does the statement of Isaacs J give any support to the plaintiff's contention that, for the purposes of Ch III of the Constitution, "matters" exist independently of curial proceedings. His Honour's remarks were made in a context²⁵ where he said "that expression" was "used with reference to the judicature". Plainly, his Honour saw the existence of a "matter" as dependent upon the invoking of curial procedures.

34 More helpful to the plaintiff is a passage in the judgment of Isaacs J in *Pirrie v McFarlane*²⁶ where this Court had to examine the constitutional validity of ss 38A-41 of the *Judiciary Act*. Those sections prohibited courts other than this Court from dealing with causes involving questions as to the limits *inter se* of the powers of the Commonwealth and the States and authorised the removal of causes or parts of them containing such questions into this Court. Isaacs J said:

"The word 'matter' in sec. 76 does not, of course, mean simply the particular constitutional question or other legal question which identifies the litigation with the section. In this it differs essentially from the word 'question' in sec. 74. 'Matter' means the whole controversy - the matter litigated (see *South Australia v Victoria*²⁷). For instance, looking at sec. 75, the 'matter' would not necessarily be simply that part of the controversy depending on the construction or effect of a treaty, or that part of the controversy relating to a consul or the Commonwealth. There might be other necessary parties and other essential questions, all of which would be factors constituting the 'matter'. The controversy is not intended to be decided piecemeal by different tribunals, State and Federal. If, then, the 'matter' is once identified as falling under one or other of the specified heads, it is part of the judicial power of

24 (1911) 12 CLR 667 at 715.

25 (1911) 12 CLR 667 at 715.

26 (1925) 36 CLR 170 at 198.

27 (1911) 12 CLR 667.

the Commonwealth, and may be dealt with as the Commonwealth Parliament has dealt with such matters in the sections under review."

35 Some parts of this passage appear to support the notion that a controversy is one and indivisible and has to be decided in either a State or a federal court, but not both. However, we do not think that his Honour was intending to make such an assertion. He was dealing with the constitutional issue whether legislation, which, *inter alia*, authorised the whole of a "matter" in a State court to be removed into this Court, was valid. We think that his Honour was intending to say no more than that the legislative power under s 77(ii) extended to removing into this Court the whole of a "matter", containing an *inter se* question, even though part of it was not concerned with the constitutional issue or, for that matter, with federal law. In that respect, his judgment anticipated the decisions of this Court in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*²⁸, *Fencott v Muller*²⁹ and *Stack v Coast Securities (No 9) Pty Ltd*³⁰, decisions which hold that a "matter" may include non-federal claims which are inseparable from federal claims arising out of a common substratum of fact.

36 Once it is accepted that a "matter" cannot be identified without regard to the remedies available in the court where it is litigated, it necessarily follows that the same legal controversy can give rise to separate matters because different courts may provide different remedies. Until the "fusion" of law and equity, for example, a person might obtain an injunction to restrain a continuing breach of contract in the Court of Chancery and damages for the breach in action at law. That position continued in New South Wales until the "fusion" of law and equity occurred in 1970. Similarly, an employee may be able to obtain an order from an industrial court that a term of the employment contract is void because it is harsh or unconscionable and at the same time have a right to obtain an order from a court of general jurisdiction that the term is unjust or unfair under legislation such as the *Trade Practices Act* or the *Contracts Review Act* 1980 (NSW). In both cases, the "matter" determined in one court is separate and independent from the "matter" determined in the other court even though each "matter" arises out of the same factual substratum.

37 It also follows from these premises that, when Parliament enacts a law under s 77 and gives a court authority to grant some legal remedy in aid of a right or the enforcement of a duty or liability falling within any of the classes in the numbered paragraphs in ss 75 and 76, it defines the jurisdiction of that court with respect to

28 (1981) 148 CLR 457.

29 (1983) 152 CLR 570.

30 (1983) 154 CLR 261.

15.

a "matter". The fact that Parliament has elected not to give the court all the remedies that might be available to resolve the controversy or has conferred jurisdiction to deal with only part of the subject matter of the controversy cannot alter the fact that Parliament has defined the jurisdiction of the court with respect to a "matter". It can fairly be said that the Constitution expressly recognises this fact because s 77(ii) provides:

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

...

- (ii) defining the *extent* to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is vested in the courts of the States". (emphasis added)

38 In its ordinary and literal meaning, this paragraph empowers the Parliament to invest State courts with federal jurisdiction to resolve only part of the actual controversy between the parties. In *Ex parte Walsh and Johnson; In re Yates*³¹, Higgins J said that "the Parliament has power under sec. 77(III), in investing any Court of a State with Federal jurisdiction, to define the limits or conditions of the investiture." Thus, under s 77(iii) the Parliament may invest State courts with jurisdiction to decide "matters" under a law of the Parliament and then under s 77(ii) confine the jurisdiction of the State courts to such issues as are not the exclusive province of the federal courts. Section 77(iii) is the authority³² for provisions such as s 40(1) of the *Judiciary Act* which provides for the removal into this Court of "[a]ny cause or part of a cause arising under the Constitution or involving its interpretation that is at any time pending in a federal court ... or in a court of a State or Territory ... at any stage of the proceedings before final judgment".

39 Whatever may be the situation with federal courts, it is beyond argument that the Constitution authorises the Parliament to invest State courts with jurisdiction to determine only part of an actual controversy between parties. It is hard to imagine any rational reason why the Constitution would permit the Parliament to authorise State courts to deal with some only of the issues in a controversy and at the same time deny that permission to the Parliament in respect of federal courts. Sections 77(ii) and (iii) of the Constitution seem a complete answer to the major premise of the plaintiff's case, that is to say, the premise that a "matter" exists independently of any particular court and its procedures and that the Parliament

31 (1925) 37 CLR 36 at 125.

32 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 72-74, 125, 129-130.

cannot legislate under s 77(i) in a way that would prevent a court exercising federal jurisdiction from dealing with the whole controversy between the parties.

40 Nor, contrary to the plaintiff's submissions, does a law made under s 77(i) fail to define the jurisdiction of the court with respect to "matters" because the law limits the grounds upon which the remedy may be given in a particular class of case. A grant of criminal appellate jurisdiction to a federal court in respect of federal offences defines the jurisdiction of that court with respect to one of the classes of "matters" in s 76 even though the right of appeal is limited to errors of law or excludes as a ground of appeal that the verdict of the jury was unsafe or unsatisfactory.

41 In construing provisions such as s 77(i), it is necessary to keep in mind that the Constitution is an instrument of government, not easily or readily amended, and intended to endure indefinitely. To hold that the Parliament cannot confer federal jurisdiction in respect of the matters mentioned in ss 75 and 76 unless the Parliament gives the relevant court jurisdiction to dispose of the whole controversy between the parties would create immense practical problems for the administration of federal law which the makers of the Constitution can hardly have intended. Such a holding would seem to deny the Parliament the right to have specialist federal courts³³ or courts whose jurisdiction was limited by reference to remedies, geographical areas or monetary limits. It would also seem to deny the Parliament the power to prevent federal courts from dealing with certain subject matters such as title to land or actions in contract or from granting certain remedies such as injunctions or prerogative relief. Historically, governments have found it useful to create courts of limited jurisdiction, and it was, and is, usual for the jurisdiction of magistrates' courts to be limited in such a fashion.

42 If the contention of the plaintiff is right, the Parliament breaches the terms of s 77 of the Constitution unless its law grants to federal courts, and perhaps even State courts exercising federal jurisdiction, the authority to quell the whole controversy between the parties and also arms that court with every remedy necessary to achieve that end. Acceptance of that contention would also throw in doubt the validity of s 40 of the *Judiciary Act* which provides for the removal into this Court of parts of causes pending in State and federal courts and the validity of s 44 of that Act which provides for this Court to remit parts of matters pending in this Court to State and federal courts.

33 Unless they were given an auxiliary jurisdiction to deal with every legal aspect of any controversy that incidentally came before them in their specialist jurisdiction.

43 While consequences cannot alter the meaning of the Constitution, they may throw light on its meaning³⁴. It is hardly to be supposed that the framers of the Constitution intended Ch III to operate so that the only choice available to the Parliament was to give a court no jurisdiction in respect of a "matter" or, irrespective of the court's status or geographical area, to give it jurisdiction to dispose of the whole controversy between the parties by every available legal remedy.

44 The plaintiff contends that, if the Parliament wishes to avoid this dilemma, it can refrain from creating the relevant right or duty that it does not want the courts to enforce. The plaintiff contends that, once Parliament has laid down a regime of legal rights or duties and conferred jurisdiction on a court to deal with a controversy as to whether one of those rights or duties has been breached, it can not prevent that court from dealing with the whole controversy. On these hypotheses, the Parliament has only three options. They are (i) not creating the right or duty at all; (ii) creating the right or duty and preventing all courts (other than this Court) or some courts (such as courts of inferior jurisdiction) from dealing with any part of the controversy and (iii) creating the right or duty and investing every court, irrespective of its status, with every remedy needed to settle the whole controversy. These options are so rigid and impractical that only the clearest constitutional language could compel them. In so far as the exercise of appellate jurisdiction or administrative review, in particular, is concerned, the interpretation of s 77(i) for which the plaintiff contends would seem to deny the Parliament any choice as to the form that the appeal or review would take. Nothing in the language of Ch III forces such limited and rigid choices on the Parliament.

45 Nor, in determining the validity of a conferral or investiture of jurisdiction, should any distinction be drawn between the jurisdiction of federal or State courts to deal with "matters" where this Court has a constitutionally entrenched jurisdiction under s 75(v) of the Constitution and the jurisdiction of those courts in cases where this Court has no constitutionally entrenched jurisdiction. An example of the latter is the jurisdiction that can be conferred on this Court under s 76(ii)³⁵ of the Constitution. In a case where s 75(v) gives this Court jurisdiction to enforce a right, duty or liability arising out of a particular controversy, there is a "matter" for the purpose of Ch III. But it is a "matter" in this Court only because it is to this Court which the Constitution has given the s 75(v) remedies. Plainly, without legislation enacted under s 77, the existence of this Court's jurisdiction under s 75(v) cannot give rise to a "matter" in another court. Nor do we see how a court,

34 cf Cardozo J in *In re Rouss* 116 NE 782 at 785 (1917): "Consequences cannot alter statutes, but may help to fix their meaning."

35 "The Parliament may make laws conferring original jurisdiction on the High Court in any matter: ... (ii) arising under any laws made by the Parliament".

which is given federal jurisdiction in respect of some aspect of a controversy which would attract a remedy under s 75(v) of the Constitution, in some way becomes seized of the same "matter" that would exist if proceedings were commenced in this Court. Still less are we able to see how the potential exercise of s 75(v) jurisdiction by this Court invalidates the conferral of jurisdiction on another court to give a remedy to deal with part of the controversy.

- 46 In support of her contention that ss 476(2) and (3) and ss 485 and 486 were invalid, the plaintiff relied strongly on the decisions of this Court and various statements in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*³⁶, *Fencott v Muller*³⁷ and *Stack v Coast Securities (No 9) Pty Ltd*³⁸. Thus, in *Stack*³⁹, Mason, Brennan and Deane JJ said that the decisions of this Court "establish that the content of a 'matter' in s 76 and ... the scope of federal jurisdiction in a proceeding are not restricted to the determination of the federal claim or cause of action in the proceeding, but extend beyond that to the litigious or justiciable controversy between parties of which the federal claim or cause of action forms part." In the same case, Gibbs CJ said⁴⁰ that *Fencott* and *Philip Morris* had decided that:

"when jurisdiction is conferred on the Federal Court with respect to a matter, that Court has jurisdiction to determine all the questions which form part of that matter, including questions which in themselves would not be federal in nature, and which accordingly the Federal Court would not have had jurisdiction to determine if they had arisen in separate proceedings."

- 47 However, these statements do not mean, nor in our opinion were they intended to mean, that once the Parliament enacts a law giving a federal court jurisdiction to determine a federal claim, the law will be invalid if it purports to prevent the federal court from determining every issue, federal and non-federal, which "rest[s] upon a common substratum of facts."⁴¹ Those cases establish and those statements support the proposition that, where a federal court has jurisdiction to decide a federal claim, its jurisdiction extends to deciding non-federal claims that cannot be severed from the federal claim, at all events when both sets of claims arise from a common substratum of facts. They are based on the principle that the

36 (1981) 148 CLR 457.

37 (1983) 152 CLR 570.

38 (1983) 154 CLR 261.

39 (1983) 154 CLR 261 at 290.

40 (1983) 154 CLR 261 at 278.

41 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 291.

grant of jurisdiction to deal with the federal claim carries with it all the authority necessary to enable the federal jurisdiction to be exercised effectively and practically⁴². However, those cases have nothing authoritative - or indeed anything - to say concerning the power of the Parliament to restrict the authority of a federal court to deal with claims arising out of the creation of rights, duties and liabilities by the Parliament or to deal with non-federal claims arising from a common substratum of facts. It does not follow from the fact that a "matter" in a federal court may include associated non-federal matters that the Parliament cannot prohibit a federal court from entertaining non-federal claims. Nor does it follow that the Parliament cannot prevent a federal court from determining every legal issue or question that arises from or that is associated with the creation of a federal right, duty or liability.

48 In our opinion, Gibbs CJ accurately stated the law concerning the defining of jurisdiction under s 77 in *Stack v Coast Securities (No 9) Pty Ltd*⁴³ when he said:

"Under the Constitution, the jurisdiction of a federal court can be defined only by an Act of the Parliament, and the jurisdiction so defined can be as wide as, or narrower than, (but not of course wider than) the matters mentioned in ss 75 and 76."

49 Thus, the subject matter for decision by a federal court may embrace the whole controversy between the parties or part of it. The law defining the jurisdiction of the court may provide limited remedies for the successful party or every remedy that is necessary to do justice between the parties and which is appropriate to the exercise of judicial power by a federal court. The choice is one for the Parliament.

50 In the present case, the Parliament has chosen to restrict severely the jurisdiction of the Federal Court to review the legality of decisions of the Refugee Review Tribunal. That restriction may have significant consequences for this Court because it must inevitably force or at all events invite applicants for refugee status to invoke the constitutionally entrenched s 75(v) jurisdiction of this Court. The effect on the business of this Court is certain to be serious. Nevertheless, we can see nothing in ss 75, 76 and 77 of the Constitution which prevents the Parliament from enacting ss 476, 485 and 486 of the Act.

42 cf *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 281-282 per Gibbs CJ.

43 (1983) 154 CLR 261 at 281.

51 In so far as the plaintiff's claim in this Court depends on s 77(i) of the Constitution, it must fail.

Separation of powers

52 In the course of argument in this Court, the question arose as to whether s 481(1)(a) of the Act is invalid. Section 481(1) provides:

"On an application for review of a judicially-reviewable decision, the Federal Court may, in its discretion, make all or any of the following orders:

- (a) an order affirming, quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or such earlier date as the Court specifies;
- (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit;
- (c) an order declaring the rights of the parties in respect of any matter to which the decision relates;
- (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Federal Court considers necessary to do justice between the parties."

53 Members of the Court raised with counsel for the plaintiff the question whether the effect of s 481(1)(a) was that the Federal Court could be required to affirm the legality of a decision which had been unlawfully made and, if so, whether such a direction was consistent with Ch III of the Constitution. Understandably, counsel showed no enthusiasm whatever for the question whether, independently of the validity of ss 476(2) and (3), s 481 was validly enacted. He said, "There is nothing much in it for us, your Honour, in having it invalid, I suspect." That suspicion was certainly well founded. On one view, the invalidity of s 481(1)(a) could mean that the whole apparatus of judicial review provided for in Pt 8 was invalid. Such a holding would be of no use to the plaintiff. She would be left with an unreviewable decision of the Tribunal. On another view, the use of the term "affirming" is invalid but the term is severable from the rest of Pt 8. Again that holding would be of no use to the plaintiff. At best, it would mean only that the Federal Court had no power to affirm the decision by a judicial order. But the decision of the Tribunal would stand.

54 In a context for limited review of decisions of the Tribunal, the use of the term "affirming" is certainly not the most appropriate term to use for disposing of

an application which has failed. An order of the Federal Court affirming the decision is open to the construction that that court is affirming that the decision was correctly and lawfully made. However, the term "affirm" is sometimes used in the context of appellate jurisdiction to indicate that the appeal has failed and that the decision below stands. Thus, s 28(1) of the *Federal Court of Australia Act* provides that "the Court may, in the exercise of its appellate jurisdiction: (a) affirm, reverse or vary the judgment appealed from"⁴⁴. The Court is given no express power to dismiss an appeal, although s 28(1)(b) grants it power to "give such judgment, or make such order, as, in all the circumstances, it thinks fit, or refuse to make an order". We can see no reason why, when an appeal fails, the Federal Court cannot use the power conferred by s 28(1)(a) and affirm the decision appealed from even if the statute conferring appellate jurisdiction limits the grounds of appeal.

55 The powers conferred upon the Federal Court by s 481 are to be understood and exercised in the light of the context in which they appear. In a given case, such as the present, the Federal Court may know that there are outstanding aspects of a challenge to a decision which have not been argued because they are outside the court's jurisdiction. That may be why, in the present case, Davies J did not make an order affirming the decision of the Tribunal. In such a case a discretionary power to make an order "affirming, quashing or setting aside" the decision does not require the Federal Court to make an unqualified order which may create a misleading appearance.

56 In our opinion, s 481 is valid.

Order

57 The question reserved should be answered, No.

44 cf also *Defence Force Discipline Appeals Act* 1955 (Cth), s 52(5); *Administrative Appeals Tribunal Act* 1975 (Cth), s 44(5); *Complaints (Australian Federal Police) Act* 1981 (Cth), s 79(5); *Native Title Act* 1993 (Cth), s 169(7); *Superannuation (Resolution of Complaints) Act* 1993 (Cth), s 46(4).

**RE THE MINISTER FOR IMMIGRATION & MULTICULTURAL
AFFAIRS & ANOR;**

EX PARTE ABEBE

58 This application, made in the original jurisdiction of this Court⁴⁵, for the issue of writs of certiorari and mandamus was heard together with the prosecutor's claim in S53 of 1998 that certain sections of the *Migration Act* 1958 (Cth) ("the Act") were invalid. In our judgment upon the case stated in that action we hold that the relevant sections are valid and that only limited grounds for reviewing decisions of the Refugee Review Tribunal are available in the Federal Court of Australia. However, the jurisdiction which s 75(v) of the Constitution confers on this Court to make orders concerning the decisions of Commonwealth officers - and members of the Tribunal are such officers - cannot be limited by any law of the Parliament. Laws of the Parliament, made under an appropriate head of constitutional power, may take the conduct of Commonwealth officers outside the scope of the jurisdiction of this Court under s 75(v). Such laws may do so, for example, by making lawful conduct which would otherwise be unlawful at common law or under State legislation or even under other federal legislation. But once a question arises as to whether a Commonwealth officer has acted lawfully or within or outside the jurisdiction conferred upon him or her, no law of the Parliament can curtail the jurisdiction of this Court to decide the issue⁴⁶, a jurisdiction which the Constitution has conferred on this Court to protect the people of the Commonwealth and the individual States from excesses of Commonwealth power.

59 In this application, the prosecutor contends that the second respondent, who constituted the Tribunal for relevant purposes, constructively refused to exercise his jurisdiction or, alternatively, exceeded his jurisdiction in rejecting the prosecutor's application to the Tribunal to review the decision of the Minister's delegate rejecting her claim for refugee status. The prosecutor's claim is put in various ways - failure to take a relevant matter into account, failure to properly investigate her claim and *Wednesbury*⁴⁷ unreasonableness. At the heart of her claim for prerogative relief, however, is the contention that the Tribunal failed to

45 Constitution, s 75(v).

46 *The Tramways Case [No 1]* (1914) 18 CLR 54 at 68, 83, 86; *Federated Engine Drivers' and Firemen's Association of Australasia v Colonial Sugar Refining Co Ltd* (1916) 22 CLR 103 at 108-109; *The Commonwealth v New South Wales* (1923) 32 CLR 200 at 206-207; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 276, 323, 368.

47 *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223.

examine whether she was a refugee by reason of her having a well-founded fear of persecution, if returned to her native country, because she had been raped by government officials while held in custody in that country for reasons of political affiliation and racial background. If the Tribunal should have examined, but did not examine, that issue, it is not open to argument that the Tribunal fell into jurisdictional error, error which would attract this Court's jurisdiction under s 75(v). At all events, the Minister for Immigration and Multicultural Affairs, the first respondent to the application in this Court, did not argue the contrary proposition. Instead, he contended that the Tribunal did not need to make any specific finding concerning the issue of rape because, acting within its jurisdiction, the Tribunal was not prepared to find that the prosecutor had ever been detained for political or racial purposes. In our opinion, it was open to the Tribunal to reject, or at all events to refuse to act upon, the prosecutor's claims that she had been raped while in custody for political or racial reasons. Her accounts of what had happened to her in her native country were so inconsistent that no jurisdictional or other legal error occurred by reason of the Tribunal refusing to act on her claims.

The factual background

60 The prosecutor is an Ethiopian national who arrived in Australia on 6 March 1997. On that day an officer of the Department of Immigration and Multicultural Affairs refused her immigration clearance. She was placed into immigration detention and continues to be held in detention. On 18 March 1997, she applied to the Department of Immigration and Multicultural Affairs for the grant of a protection visa under s 36 of the Act which provides:

"(1) There is a class of visas to be known as protection visas.

(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

Section 65 of the Act provides that, if the Minister is satisfied that the prescribed criteria have been satisfied, the visa is to be granted; if not, the visa is to be refused.

61 On 21 June 1997, a delegate of the Minister, acting pursuant to s 46 of the Act, refused the prosecutor's application for the grant of a protection visa. She then applied to the Refugee Review Tribunal for a review of that decision. On 3 September 1997, the Tribunal determined that the prosecutor was not a person to whom Australia had protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967. The Tribunal also determined that the prosecutor did not satisfy the criterion set out in s 36(2) of the Act. It affirmed the decision of 21 June 1997 to refuse to grant the prosecutor a protection visa.

62 On 30 September 1997, the prosecutor commenced proceedings in the Federal Court of Australia against the Minister under s 476 of the Act. Subsequently, she filed an amended application. The prosecutor's amended application sought relief against the Tribunal on the grounds that she had been denied natural justice and that the decision of the Tribunal failed to satisfy the "reasonableness" test expressed in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*⁴⁸. Her application was heard by Davies J who declined to consider these amended grounds because of s 485 of the Act which made the provisions of s 476(2) of the Act non-reviewable grounds of judicial review in the Federal Court. Subsequently, his Honour dismissed the prosecutor's application. No appeal to the Full Court of the Federal Court against his Honour's decision was lodged. Instead, on 22 December 1997, the prosecutor commenced proceedings for prerogative relief in this Court against the relevant member of the Refugee Review Tribunal and the Minister pursuant to s 75(v) of the Constitution. On 28 January 1998, Gummow J ordered that that application be made by notice of motion to a Full Court. On 29 April 1998, the prosecutor commenced an action (S53 of 1998) seeking a declaration against the Commonwealth that ss 476(2) and (3) and s 485 of the Act are invalid. In our judgment in that matter, we hold that those sections are valid.

The Refugee Review Tribunal

63 Section 457 of the Act establishes the Refugee Review Tribunal. Section 411 gives the Tribunal power to review certain decisions ("RRT-reviewable decisions"). One of them is "a decision to refuse to grant a protection visa"⁴⁹.

64 Section 412 provides for applications to review RRT-reviewable decisions. Section 414(1) provides that, subject to a presently irrelevant exception, "if a valid application is made under s 412 for review of an RRT-reviewable decision, the Tribunal must review the decision."

48 [1948] 1 KB 223.

49 Section 411(1)(c).

65 Section 415 enacts:

"(1) The Tribunal may, for the purposes of the review of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision.

(2) The Tribunal may:

(a) affirm the decision; or

(b) vary the decision; or

...

(d) set the decision aside and substitute a new decision.

(3) If the Tribunal:

(a) varies the decision; or

(b) sets aside the decision and substitutes a new decision;

the decision as varied or substituted is taken (except for the purpose of appeals from decisions of the Tribunal) to be a decision of the Minister."

66 Section 420 provides:

"(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case."

The decisions of the delegate and the Tribunal

67 In considering the prosecutor's application for a protection visa, the Minister's delegate examined the question whether the prosecutor was a non-citizen to whom Australia has protection obligations under the Convention relating to the Status of Refugees of 1951 as amended by the Protocol relating to the Status

of Refugees of 1967. The Convention and Protocol define "refugee" as a person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of [her] nationality and is unable or, owing to such fear, is unwilling to avail [herself] of the protection of that country".

68 It is common ground that, after leaving Ethiopia, and before arriving in Australia, the prosecutor spent some time in Kenya and South Africa. While she was in South Africa, she made an application to the government of that country to be accorded refugee status. In support of the application, she gave the South African authorities information which was untrue. She claimed that she and her husband had been members of a political group known as the All Amhara People's Organisation ("AAPO"), that her husband had mobilised people in the southern region of Ethiopia against the government in 1993, that her husband had been killed in 1994, and that she had been sought by the authorities. She said that she had never been arrested or detained. It is not disputed that she was a member of the Amhara ethnic group. But much of the substance of the account which she gave to the South African authorities was inconsistent with other accounts of what happened to her and her husband in Ethiopia.

69 When the prosecutor arrived at Sydney airport she told the Australian authorities that she was an Ethiopian housewife, that her husband, who was living at home with his family, had been a soldier under the previous Ethiopian regime, that he had fought against the current regime, that he had lost his leg in the fighting, that she had fled from Ethiopia without telling anyone she was going, and that she could not return for fear of persecution.

70 In her protection visa application in this country, and in two subsequent interviews, the prosecutor gave a third account of her history. She said that she and her husband had been minor members of AAPO in a branch of about 200 members. She said that in April 1994 her husband disappeared and that about five days later she herself was arrested. She was held in jail for two months, raped and abused, but eventually escaped disguised as a nurse. She left Ethiopia in July 1994. She said that no one but her husband and herself had been arrested at that time and that her husband had not been released.

71 The Minister's delegate examined the prosecutor about substantial inconsistencies in the information she had given at different times. The delegate made plain to the prosecutor that her credibility was a matter of serious concern to the delegate and that her credibility was adversely affected by the various inconsistencies in her accounts. The prosecutor conceded to the delegate that she had told some lies. The delegate found that "(the prosecutor) is not a credible

witness and I am unable to accept her claims as being credible. Therefore I do not accept her fear of harm or mistreatment on return to Ethiopia is well founded."

72 When the matter came before the Tribunal for review of the delegate's decision, there were two hearings. At the second hearing the prosecutor was legally represented. She relied upon a statutory declaration, evidently prepared with legal assistance, which attempted to address the issues of credibility raised by the delegate. She said that she had told lies because she was distressed and fearful of being deported. She insisted, however, that she feared that, if she went back to Ethiopia, she would be imprisoned.

73 The prosecutor was questioned by the Tribunal about a number of discrepancies in the chronology she had given and about her contention that she had belonged to a political organisation opposed to the current regime. She was asked to give details about the organisation and her association with it. She was questioned closely about the organisation and about her claims that the ethnic group to which she belonged was being persecuted. The Tribunal informed the prosecutor of information which had been obtained from various sources. They included the United States State Department and the Australian Department of Foreign Affairs and Trade. The Tribunal put the information to her and suggested that it was, in significant respects, inconsistent with her evidence. She was invited to comment. The Tribunal also questioned her closely about her husband, her political activities, and her knowledge of his current situation. The Tribunal made it clear that it was sceptical of her claim that being a member of the political organisation to which she said she belonged carried with it a risk of imprisonment. The member who constituted the Tribunal told her, giving reasons, that he found her account of her knowledge, or lack of knowledge, of what had happened to her husband "hard to believe". She was given an opportunity to comment upon the problems raised by the Tribunal. Her solicitor was given time to make written submissions to the Tribunal.

74 The solicitor made submissions which were accompanied by a report of a clinical psychologist who had made an assessment of the prosecutor. These submissions took the question of the prosecutor's credibility as the central issue, advanced arguments as to why the fact that she had made some false statements should not be treated as destructive of her central claims, and referred to the significance of the psychological assessment.

75 The Tribunal's reasons for decision reiterated at considerable length the information that had been obtained from a number of sources as to the position of the Amhara and the AAPO in Ethiopia. Reference was made to an Amnesty International report about the arrest and detention of an AAPO leader in 1994, to a publication of the US Department of State in 1996 and to information provided by the Department of Foreign Affairs and Trade. The allegations made by the

prosecutor about the activities of the prosecutor and her husband were tested by reference to that information, and the inconsistencies in her story were examined.

76 The findings of the Tribunal were expressed as follows:

"Whilst the Applicant's file shows the number of claims made by her that she subsequently changed, the Tribunal has not reiterated all of them here. The primary decision-maker found against the Applicant on the question of credibility and the Tribunal tried to look at the whole matter afresh. In particular, in the second RRT hearing, it attempted to examine the Applicant's evidence without pressing her too often to remember dates, which she claims is her weak point under the claimed stress of interrogation. The Tribunal focussed mainly on claimed causes and effects, and on claimed action and reaction. It found her evidence still to be seriously inconsistent and unreliable.

The Tribunal has considered the claims made by the Applicant at the second hearing and does not, in the context of the number of distorted claims made by the Applicant, accept her account of her husband's arrest. It follows that the Tribunal is not, in the circumstances, prepared to rely on the evidence before it as to her own.

The Tribunal considers it possible that the Applicant might have suffered some form of abuse in the past: her difficulty with the truth might be argued to be consistent with a disturbed past; however, it is not able to accept on [sic] the Applicant's evidence to the effect that she and her husband were the sole victims of a 1994 police swoop on their *small* suburban branch of the AAPO in isolation of anyone else in the branch, such as its leader and office holders, and in isolation of the kind of events that attracted such action during that year. The Tribunal concludes that the Applicant's claims about her husband still being detained are no more than a poorly-argued ambit. She did not convince the Tribunal that, for the reasons she gave, she had tried unsuccessfully to find out about him. The Applicant now has a long history, much of it admitted by her, of having told untruths. Her claims as to fear and confusion wear thin after six or seven occasions of 'clearing the slate' as it were.

It appears to the Tribunal that the Applicant's corrections of her evidence can virtually all be attributed to adjustment subsequent to discovery. This does not help her case. At no point did she draw attention to corrections of untruths ahead of their possible discovery. This is evidence of something other than good faith on her part.

The Tribunal finds the Applicant an unreliable witness in this matter. Her claims in relation to 'political opinion' are unsuccessful.

However, the Tribunal is prepared to accept that the Applicant is an Amhara and notes her claims to the effect that the Amhara are disliked by the current government and suffer discrimination. Nevertheless, the Tribunal considers the above-cited (DFAT and other) information as to the circumstances of the Amhara in Ethiopia to negate her claims as to the existence of a real chance of persecution for reasons of her membership of this particular social ethnic group.

On the evidence, the Tribunal is not satisfied that the Applicant faces a real chance of Convention-related persecution in Ethiopia.

The Applicant is therefore not a refugee."

The judgment of Davies J

77 Davies J concluded that none of the grounds set out in ss 476(1)(a), (d) or (e) of the Act had been made out. In an earlier case, *Eshetu v Minister for Immigration and Multicultural Affairs*⁵⁰, to which his Honour referred and which he distinguished, Davies J had taken an expansive view of the jurisdiction conferred by s 476(1). Nevertheless, he held that the Tribunal had acted fairly, had observed the necessary procedural requirements and had addressed the correct issue.

78 In relation to the prosecutor's principal submission in this Court, Davies J said:

"The substance of the case as put by the counsel for the [prosecutor] was based upon the allegation that the [prosecutor] had been detained and held in prison for two months by soldiers and had been repeatedly raped and abused during that period. Counsel submitted that the Tribunal erred by reaching a conclusion adverse to the [prosecutor] as there was no finding that that did not occur. It seems to me, however, that the Tribunal did not accept that evidence and that the Tribunal made that clear. The Tribunal certainly considered it possible that the [prosecutor] might have suffered some form of abuse in the past and that her difficulty with the truth may be consistent with a disturbed past. However, the Tribunal did not accept that such abuse had occurred as a result of her arrest by government soldiers, that she had been arrested because she had been a member of AAPO or that the mistreatment of which she complained was attributable either to her membership of AAPO or to her ethnicity."

50 (1997) 71 FCR 300.

79 Davies J concluded that he was not satisfied that there was any error in the Tribunal's decision and, in particular, he was not satisfied that there was an error which the Federal Court would have jurisdiction to correct.

80 As we have pointed out, this Court's jurisdiction to examine the decision of the Tribunal is not subject to the limitations which now apply to the Federal Court. However, essentially for the reasons given by Davies J, we are of the opinion that the Tribunal made no error which is capable of attracting the jurisdiction of this Court under s 75(v) of the Constitution.

81 In determining whether the prosecutor had a well-founded fear of persecution, the Tribunal had to form an opinion as to what was likely to occur if the prosecutor was returned to Ethiopia⁵¹. In *Minister for Immigration and Ethnic Affairs v Guo*⁵², Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ said:

"Past events are not a certain guide to the future, but in many areas of life proof that events have occurred often provides a reliable basis for determining the probability – high or low – of their recurrence. The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity. In many cases, when the past has been evaluated, the probability that an event will occur may border on certainty. In other cases, the probability that an event will occur may be so low that, for practical purposes, it can be safely disregarded. In between these extremes, there are varying degrees of probability as to whether an event will or will not occur. But unless a person or tribunal attempts to determine what is likely to occur in the future in relation to a relevant field of inquiry, that person or tribunal has no rational basis for determining the chance of an event in that field occurring in the future."

82 Given the nature of the prosecutor's claim for refugee status, the logical starting point for the Tribunal to determine whether the prosecutor had a well-founded fear of persecution because of her husband's or her political opinions was whether the prosecutor or her husband had been detained as she claimed. This was the approach adopted by the Tribunal. If satisfied that the prosecutor had been detained as she claimed, the next question for the Tribunal would have been whether she had been detained by reason of the political opinions she or her

51 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 574.

52 (1997) 191 CLR 559 at 574-575.

husband held or were suspected of holding. If satisfied that she had been detained for holding or being suspected of holding such opinions, the Tribunal would then have been obliged to determine whether the fact or cause of her detention constituted persecution for reasons of political opinion. Evidence that the prosecutor had been persecuted in the past would have given powerful support to the conclusion that the fear that she claimed that she held was well founded.

83 The prosecutor carried no onus of proof in relation to these matters, and the fact that she might fail to make out an affirmative case in respect of one or more of the above steps did not necessarily mean that her claim for refugee status must fail. As *Guo*⁵³ makes clear, even if the Tribunal is not affirmatively satisfied that the events deposed to by an applicant have occurred, the degree of probability of their occurrence or non-occurrence is a relevant matter in determining whether an applicant has a well-founded fear of persecution. The Tribunal "must take into account the chance that the applicant was so [persecuted] when determining whether there is a well-founded fear of future persecution."⁵⁴ However, given the nature of the prosecutor's claim, the Tribunal was entitled - indeed bound - to start its inquiry by considering her claim that she had been *arrested* by government officials for political reasons.

84 The Tribunal was unable to accept the prosecutor's account of her or her husband's arrest. Her answers to questions in relation to the husband and his present whereabouts were such that the Tribunal could not accept her account of his arrest. Given the inconsistencies and admitted lies in her various accounts, it is hardly surprising that the Tribunal was also unable to act on her evidence concerning her arrest. What was particularly telling against her was the statement to the South African authorities when she was applying for refugee status that she had never been arrested or detained. The Tribunal was not bound to accept the prosecutor's account of the alleged incidents. It was open to the Tribunal to find, as it did, that it could not rely on her evidence about her arrest and detention.

85 Once the Tribunal was unable to find that she had been arrested as claimed, her further claims of detention and rape became logically irrelevant. The Tribunal, having found that it could not rely on her evidence of arrest, was not then required to act on her allegations of detention and rape, allegations which were dependent on her claim of being arrested and taken into custody for reasons of political opinion. The Tribunal was not bound therefore to make any express finding as to whether she had been raped. Nor given the nature of her claim and the Tribunal's finding that she was not a credible witness was it required, as it might have been

53 (1997) 191 CLR 559 at 575-576.

54 (1997) 191 CLR 559 at 576.

in other circumstances, to determine whether there was a real chance that she had been arrested as she claimed.

86 Once the Tribunal made the findings which it did in relation to the prosecutor's claim of being arrested for her or her husband's political opinions, her claim of having a well-founded fear of persecution for reasons of political opinions inevitably failed.

87 The only other aspect of the prosecutor's claim that required investigation by the Tribunal was whether she might be persecuted by reason of her being an Amhara. The Tribunal, having considered the evidence, concluded that there was no "real chance of persecution for reasons of her membership of this particular social ethnic group." That was a conclusion open to the Tribunal.

88 No error attracting the jurisdiction of this Court under s 75(v) appears in the Tribunal's reasons.

89 The application must be refused.

- 90 GAUDRON J. The facts and the issues raised for decision in each of these matters are set out in the joint judgment of Gummow and Hayne JJ. I agree with their Honours, for the reasons that they give, that, in the first matter, the application for prerogative relief should be dismissed. As that application is, in large measure, the consequence of the statutory scheme, the validity of which is in issue in the second matter, I would make no order as to costs in the first matter. In the second matter, I agree with their Honours' proposed answer to the question reserved for the consideration of the Full Court pursuant to s 18 of the *Judiciary Act* 1903 (Cth). I shall state my reasons for that conclusion.

The question reserved

- 91 As amended, the reserved question asks:

"In their application to the review by the Federal Court of Australia of decisions of the Refugee Review Tribunal, when that Tribunal is reviewing decisions of the nature referred to in section 411(1)(c) of the *Migration Act* 1958 (Cth), are the provisions of Part 8 of that Act (or any of them) outside the legislative powers of the Commonwealth?"

The practical issue

- 92 The practical issue raised by the reserved question is of considerable importance. It is whether the Parliament can confer jurisdiction in such a way that it is or may be necessary for a litigant to commence and prosecute proceedings in two different courts if he or she wishes to secure a judicial determination as to his or her rights or obligations in relation to some specific happening or event. That issue arises because, by Pt 8 of the *Migration Act* 1958 (Cth) ("the Act"), the Parliament has purported to confer jurisdiction on the Federal Court to review decisions of the Refugee Review Tribunal ("the Tribunal") on some, but not all, grounds upon which administrative decisions are ordinarily susceptible of judicial review. And as will later appear at least some of the grounds excluded from the Federal Court's consideration may ground review by this Court in exercise of the jurisdiction conferred by s 75(v) of the Constitution.

- 93 The practical problems presented by this case do not arise out of s 75(v) of the Constitution which confers original jurisdiction on this Court "[i]n all matters ... in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". Nor are they necessarily limited to administrative decisions. If the Parliament can confer federal jurisdiction in the manner in issue in this case, it can do so in relation to other matters within federal jurisdiction. For example, it could confer jurisdiction in matters "arising under [a law] made by the Parliament"⁵⁵ in such a way that, to obtain a final determination

⁵⁵ See s 76(ii) of the Constitution.

as to the rights and obligations which arise out of a particular set of facts, a plaintiff must commence proceedings in a federal court and, also, in a State or territory court. And in that event, there would be a real likelihood of disputes as to the precise limits of the respective jurisdictions of the different courts. Worse still, there would be the possibility that the courts might make inconsistent findings of fact resulting in inconsistent outcomes or, at least, outcomes that are not easily reconciled.

The constitutional issues

94 Three separate but related constitutional issues are presented by the reserved question. The first is whether, if Parliament enacts legislation to confer jurisdiction on a federal court as to part only of a justiciable controversy, it confers jurisdiction in a "matter" for the purposes of ss 75⁵⁶ and 76⁵⁷ of the Constitution. And if by the legislation Parliament does not confer jurisdiction in a matter but only part of a matter, the further question arises whether, pursuant to s 77 of the Constitution, the Parliament may define the jurisdiction of a federal court or invest jurisdiction in a State court so that that court can deal only with that part.

95 The third issue which arises, although, in a sense, it informs the first of the constitutional questions posed by the reserved question, is whether the power purportedly conferred on the Federal Court under Pt 8 of the Act is properly

56 Section 75 of the Constitution provides:

" In all matters:

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

the High Court shall have original jurisdiction."

57 Section 76 of the Constitution provides:

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

- (i) arising under this Constitution, or involving its interpretation;
- (ii) arising under any laws made by the Parliament;
- (iii) of Admiralty and maritime jurisdiction;
- (iv) relating to the same subject-matter claimed under the laws of different States."

described as judicial power. That question arises because it is well settled that the Parliament can confer no power on a federal court other than the judicial power of the Commonwealth or a power ancillary or incidental thereto⁵⁸. As that issue informs the first of the constitutional questions, it will not be considered separately.

Relevant legislative provisions

- 96 The Act relevantly provides for the review by the Tribunal of, amongst other decisions, "a decision to refuse to grant a protection visa"⁵⁹. The Act refers to a decision that may be reviewed by the Tribunal as "an RRT-reviewable decision"⁶⁰ and provides, in s 413(3), that:

" No action is to be taken to review the RRT-reviewable decision otherwise than under [Pt 7 of the Act]."

Other provisions in Pt 7 of the Act specify that the Tribunal must review an RRT-reviewable decision if a valid application is made for review⁶¹ and set out the powers of the Tribunal⁶² and the procedures it is to observe⁶³.

- 97 By Pt 8 of the Act, certain decisions, including decisions of the Tribunal, may be judicially reviewed by the Federal Court. The provisions of Pt 8 refer to a decision of that kind as "a judicially-reviewable decision"⁶⁴ and specify precisely the grounds upon which it may be reviewed under that Part. Thus, s 476, which is central to this case, provides:

58 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 271-272 per Dixon CJ, McTiernan, Fullagar and Kitto JJ where it was held:

"the Constitution does not allow the use of courts established by or under Chap III for the discharge of functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto."

59 Section 411(1)(c).

60 See, for example, ss 411 and 412(1).

61 Section 414(1).

62 Sections 415 and 427.

63 Sections 423, 424, 425, 426, 427, 428 and 429.

64 See, for example, ss 475 and 476.

" (1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

- (a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;
- (b) that the person who purported to make the decision did not have jurisdiction to make the decision;
- (c) that the decision was not authorised by this Act or the regulations;
- (d) that the decision was an improper exercise of the power conferred by this Act or the regulations;
- (e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;
- (f) that the decision was induced or affected by fraud or by actual bias;
- (g) that there was no evidence or other material to justify the making of the decision.

(2) The following are not grounds upon which an application may be made under subsection (1):

- (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
- (b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

(3) The reference in paragraph (1) (d) to an improper exercise of a power is to be construed as being a reference to:

- (a) an exercise of a power for a purpose other than a purpose for which the power is conferred; and
- (b) an exercise of a personal discretionary power at the direction or behest of another person; and
- (c) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

but not as including a reference to:

- (d) taking an irrelevant consideration into account in the exercise of a power; or
- (e) failing to take a relevant consideration into account in the exercise of a power; or
- (f) an exercise of a discretionary power in bad faith; or
- (g) any other exercise of the power in such a way that represents an abuse of the power that is not covered by paragraphs (a) to (c).

(4) The ground specified in paragraph (1) (g) is not to be taken to have been made out unless:

- (a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or
- (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

98 It should be noted that, subject to the limits of its legislative power, the Parliament may confer a decision-making power on a person or tribunal in such a way that, in the case of a tribunal, the lawfulness of any decision it makes is beyond question provided that "its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body."⁶⁵ However, that is not what s 476 does.

99 Section 476 does not enlarge the circumstances in which the Tribunal's decisions are to be treated as lawful, whether by this Court in proceedings under s 75(v) of the Constitution or by any other court. It simply specifies the grounds upon which those decisions may and may not be reviewed by the Federal Court. And it is entirely silent as to the exercise by this Court of its jurisdiction under s 75(v) of the Constitution, the existence of which is expressly recognised by s 486 of the Act. That section provides:

" The Federal Court has jurisdiction with respect to judicially-reviewable decisions and that jurisdiction is exclusive of the jurisdiction of all other courts other than the jurisdiction of the High Court under section 75 of the Constitution."

100 But for s 485, which, too, is in Pt 8 of the Act, the practical difficulties which arise in a case of the present kind could be eliminated by this Court exercising its power under s 44 of the *Judiciary Act* to remit matters arising under s 75(v) of the Constitution to the Federal Court, that Court having jurisdiction conferred on it in relation to matters arising under s 75(v) by s 39B of that Act. However, so far as decisions of the Tribunal are concerned, s 485 of the Act effectively renders the

65 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 615 per Dixon J. See also *R v The Members of the Central Sugar Cane Prices Board; Ex parte The Maryborough Sugar Factory Ltd* (1959) 101 CLR 246 at 254-255 per Dixon CJ, Kitto and Windeyer JJ; *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418 per Mason ACJ and Brennan J; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 248-251 per Mason CJ, 274 per Brennan J, 286 per Deane, Gaudron and McHugh JJ, 304 per Dawson J (Toohey J agreeing).

power of remitter useless. Subject to a qualification in sub-s (2) which has no bearing on this case, s 485 relevantly provides:

" (1) In spite of any other law, including section 39B of the *Judiciary Act* 1903, the Federal Court does not have any jurisdiction in respect of judicially-reviewable decisions or decisions covered by sub-section 475(2), other than the jurisdiction provided by this Part or by section 44 of the *Judiciary Act* 1903.

...

(3) If a matter relating to a judicially-reviewable decision is remitted to the Federal Court under section 44 of the *Judiciary Act* 1903, the Federal Court does not have any powers in relation to that matter other than the powers it would have had if the matter had been as a result of an application made under this Part."

101 It is necessary to note the terms of s 481(1)(a) which is also in Pt 8 of the Act. That paragraph relevantly allows that "[o]n an application for review of a judicially-reviewable decision, the Federal Court may ... make ... an order affirming, quashing or setting aside the decision, or a part of the decision". That provision highlights the central difficulty raised by the provisions of Pt 8 of the Act. How can the Federal Court affirm a decision if its lawfulness can be challenged on additional grounds in collateral proceedings in this Court?

The excluded grounds of review and jurisdiction under s 75(v) of the Constitution

102 The co-existence of this Court's jurisdiction under s 75(v) of the Constitution with another court's jurisdiction to review an administrative decision presents neither an insoluble practical problem nor constitutional difficulty if the grounds upon which that other court may review the decision in question are either co-extensive with or include those which will or might also ground relief in this Court under s 75(v) of the Constitution. In that situation, practical questions as to the court in which the matter should proceed can be determined by resort to the doctrine of election⁶⁶ or, if necessary, by one court staying its proceedings in favour of the other⁶⁷. And no constitutional question would arise because in that situation the other court would have jurisdiction with respect to the entire matter

66 For example, a litigant who invoked the jurisdiction of one court would be taken to have elected not to invoke the jurisdiction of the other; a litigant who commenced proceedings in both courts could be forced to elect as to the court in which he or she would proceed.

67 Ordinarily, the court with the more limited jurisdiction would stay its proceedings in favour of the other.

or controversy, namely, the question whether the decision in question was made in accordance with the law's requirements. Thus, in this case, the question of invalidity arises only if a decision of the Tribunal may be challenged in this Court on grounds which may not be raised in proceedings under Pt 8 of the Act in the Federal Court. I turn now to that question.

103 This Court's jurisdiction under s 75(v) of the Constitution is usually exercised in matters in which relief is sought by way of mandamus or prohibition. In general terms, that relief is available only to correct jurisdictional errors, as distinct from errors within jurisdiction⁶⁸. However, jurisdiction under s 75(v) extends to matters in which an injunction is sought against an officer of the Commonwealth and it may be that the grounds upon which injunctive relief can be granted are not as circumscribed as those which determine the availability of prerogative relief.

104 As appears from *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*⁶⁹, equitable remedies have a continuing role in public and administrative law. And in those areas, "equity has proceeded on the footing of the inadequacy (in particular the technicalities hedging the prerogative remedies) of the legal remedies otherwise available to vindicate the public interest in the maintenance of due administration."⁷⁰ (footnotes omitted)

105 Given the potential for administrative decisions to impact on existing rights and interests, and, also, on important and valuable statutory rights to which the individual might otherwise be entitled, it may well be that an injunction will lie to prevent an officer of the Commonwealth from giving effect to an administrative decision based on error, even if that error is not jurisdictional error. It is, however, unnecessary to explore that issue for, in the view I take, at least some grounds which are excluded from consideration by the Federal Court in proceedings under Pt 8 of the Act are capable of constituting error of the kind that will ground prerogative relief under s 75(v) of the Constitution.

106 It is convenient to begin with the grounds excluded from consideration as an aspect of the improper exercise of power by ss 476(3)(d) and (e) of the Act, namely, "taking an irrelevant consideration into account" and "failing to take a

68 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 633 per Gaudron and Gummow JJ (Brennan CJ, Dawson and Toohey JJ agreeing). See also *Director of Public Prosecutions (Cth) v Kainhofer* (1995) 185 CLR 528 at 542 per Toohey J.

69 (1998) 72 ALJR 1270; 155 ALR 684. See also *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

70 (1998) 72 ALJR 1270 at 1275 per Gaudron, Gummow and Kirby JJ; 155 ALR 684 at 690.

relevant consideration into account". As already mentioned, prerogative relief is available to remedy jurisdictional error. However, error of that kind is not readily susceptible of definition in terms used in the Act to specify the grounds upon which decisions may and may not be reviewed by the Federal Court.

107 Jurisdictional error is not confined to situations in which a tribunal either lacks jurisdiction or exceeds its jurisdiction, situations which fall within ss 476(1)(b) and (c) of the Act and, thus, ground review by the Federal Court. Rather, a tribunal falls into jurisdictional error if "it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers"⁷¹. Section 476 does not include a ground of review specifically concerned with failure to exercise jurisdiction.

108 Not every failure to have regard to relevant matters or to disregard irrelevant matters constitutes jurisdictional error. Even so, a failure of that kind may, in the particular circumstances of a case, lead a tribunal to wrongly deny the existence of its jurisdiction or to mistakenly place limits on its functions or powers. If so, relief is available under s 75(v) of the Constitution, although the decision is not reviewable by the Federal Court in proceedings under Pt 8 of the Act.

109 The ground of review excluded from the Federal Court's consideration by s 476(2)(a) is "breach of the rules of natural justice". Although it is not entirely clear, it would seem from the specific inclusion of actual bias as a ground of review⁷² that s 476(2)(a) is concerned only to exclude review for apprehended bias and what, in recent years, has become known as "denial of procedural fairness"⁷³.

110 There are numerous cases in which prerogative relief has issued for breach of the rules of natural justice by those charged with the exercise of arbitral powers conferred pursuant to s 51(xxxv) of the Constitution⁷⁴. However, those cases may be explained on the basis that a decision reached in breach of those rules is not an exercise of arbitral power and, thus, not a power that may be conferred pursuant to

71 *Craig v South Australia* (1995) 184 CLR 163 at 177 per Brennan, Deane, Toohey, Gaudron and McHugh JJ, albeit speaking with reference to inferior courts.

72 See s 476(1)(f).

73 See, for example, *Kioa v West* (1985) 159 CLR 550 at 584-585 per Mason J, 600-601 per Wilson J, 632 per Deane J; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 571-572 per Mason CJ, Dawson, Toohey and Gaudron JJ; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

74 See, for example, *Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513; *Re Australian Railways Union; Ex parte Public Transport Corporation* (1993) 67 ALJR 904; 117 ALR 17; *Re Media, Entertainment and Arts Alliance; Ex parte Arnel* (1994) 179 CLR 84.

s 51(xxxv) of the Constitution⁷⁵. This notwithstanding, it has long been accepted that denial of natural justice will ground prerogative relief.

111 Originally, only courts were bound by the rules of natural justice, the rules being extended to what were described as "quasi-judicial tribunals"⁷⁶ and later, following the decision in *Ridge v Baldwin*⁷⁷, to bodies charged with the performance of functions in a judicial manner. As the doctrine of natural justice developed, the requirement that the decision-maker should act judicially or in a judicial manner was seen as an essential condition of the exercise of jurisdiction and, thus, failure to observe the rules of natural justice would ground prerogative relief.

112 More recent developments in the field of administrative law have seen the emergence of a rule of procedural fairness which requires "fair [but] flexible procedures ... which do not necessarily take curial procedures as their model"⁷⁸. In *Kioa v West*, Mason J explained that rule as "a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention."⁷⁹ In the same case, Brennan J described the rule as an implication to be drawn from legislation conferring decision-making authority, the implication being that "observance of the principles of natural justice conditions the exercise of [a statutory power to affect rights and interests]"⁸⁰.

75 See *R v Moore; Ex parte Victoria* (1977) 140 CLR 92 at 102 per Gibbs J where it was said:

"it is inherent in the very notion of arbitration that there [should] be a hearing of the disputants, and a procedure that produce[s] an award without a proper hearing [is] outside the Constitutional power [in s 51(xxxv) of the Constitution]".

See also *Re Australian Railways Union; Ex parte Public Transport Corporation* (1993) 67 ALJR 904 at 910 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ; 117 ALR 17 at 25.

76 See Sykes et al, *General Principles of Administrative Law*, 4th ed (1997) par 1501.

77 [1964] AC 40.

78 *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J.

79 (1985) 159 CLR 550 at 584.

80 (1985) 159 CLR 550 at 615.

113 Whether procedural fairness is to be seen as a common law duty or an implication from statute, it is an adaptation of the rules of natural justice to ensure fairness and flexibility in administrative decision-making. Consistency with those rules requires that it be accepted that, where a decision-maker is required to accord procedural fairness, that requirement is an essential condition of the exercise of the decision-making power. Thus, subject to the operation of discretionary factors, breach of those rules is a jurisdictional error which will ground prerogative relief. Discretionary factors which will militate against the grant of prerogative relief include situations where the relief will serve no useful purpose⁸¹ or where the breach had no effect on the decision in question⁸².

114 As I am of the view that s 476(2)(a) operates and that, in certain circumstances, s 476(3) may operate to exclude from the consideration of the Federal Court grounds which may be relied upon in this Court in proceedings under s 75(v) of the Constitution, it is strictly unnecessary to consider the ground excluded by s 476(2)(b), namely, "that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power" – "*Wednesbury* unreasonableness", as it is usually called⁸³. Although "*Wednesbury* unreasonableness" owes its legal significance in this country to statutory provisions concerned with judicial review of administrative actions⁸⁴, that does not mean that it is wholly irrelevant to the grant of relief under s 75(v) of the Constitution.

115 A decision that is so unreasonable that no reasonable person could have arrived at it will often also be a decision involving a denial of procedural fairness. And there may be situations in which a decision of that kind cannot be related either to the matter to be decided or to the relevant head of legislative power. Moreover, reasonableness may have a further significance.

116 As with the rules of procedural fairness, it is difficult to see why, if a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should not be construed so that it is an essential condition of the exercise of that power that it be exercised reasonably, at least in the sense that it

81 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 580 per Mason CJ, Dawson, Toohey and Gaudron JJ.

82 See, as to this aspect of the rules of natural justice in their application to judicial proceedings, *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145 per Mason, Wilson, Brennan, Deane and Dawson JJ.

83 So called because the principle was first stated in the case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 at 230 per Lord Greene MR (Somervell LJ and Singleton J agreeing).

84 Notably, s 5(2)(g) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

not be exercised in a way that no reasonable person could exercise it. However, as already indicated, that is not a matter that need now be decided.

The constitutional meaning of "matter"

117 It has been accepted since *In re Judiciary and Navigation Acts*⁸⁵ that, in ss 75, 76 and 77 of the Constitution, the word "matter" means "the subject matter for determination in ... legal proceeding[s]" rather than the proceedings themselves. Thus, the consideration that Pt 8 of the Act is concerned with proceedings in the Federal Court does not lead to the conclusion that Pt 8 is a law with respect to a "matter" for the purposes of Ch III of the Constitution. Nor does the consideration that the subject-matter of those proceedings can be identified as being whether the decision in question is liable to be set aside on specified statutory grounds direct the conclusion that there is a matter in the constitutional sense.

118 The matters referred to in ss 75, 76 and 77 of the Constitution are matters which are to be determined by the exercise of judicial power. Judicial power is the power to make final and binding determinations as to some immediate right, duty or obligation put in issue by the parties⁸⁶. The right put in issue when an administrative decision is challenged is not a right to have that decision set aside. That is the relief granted in the event that the challenge is successful. The right put in issue is the right of an officer of the Commonwealth to act upon or give effect to that decision.

119 As has been seen, the right of the Minister to act upon or give effect to a decision of the Tribunal under s 411(1)(c) of the Act can be challenged in collateral proceedings in this Court on grounds which are excluded from the Federal Court's consideration in proceedings under Pt 8 of the Act. That being so, there can be no final determination by the Federal Court as to that right. It follows that a determination of the issues raised in proceedings under Pt 8 of the Act is not a determination of the kind that involves the exercise of judicial power. And power to make a determination of that kind cannot be conferred on the Federal Court. It

85 (1921) 29 CLR 257 at 265. See also *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 541 per Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ; *Fencott v Muller* (1983) 152 CLR 570 at 591 per Gibbs CJ, 603 per Mason, Murphy, Brennan and Deane JJ.

86 See *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 especially at 211-212 per Starke J. See also *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 267 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 per Kitto J; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 256-259 per Mason CJ, Brennan and Toohey JJ, 267-269 per Deane, Dawson, Gaudron and McHugh JJ.

also follows that Pt 8 of the Act does not constitute a law with respect to a "matter" for the purposes of ss 75, 76 or 77 of the Constitution.

Jurisdiction with respect to part of a matter?

120 My conclusion that the power purportedly conferred on the Federal Court under Pt 8 of the Act is not judicial power makes it unnecessary to consider the contention that the Parliament may, pursuant to s 77 of the Constitution, define the jurisdiction of a federal court in such a way that it has jurisdiction with respect to part only of a matter. However, that contention carries with it the potential for fragmentation of the judicial process and for that reason it should not be left out of consideration.

121 Section 77 of the Constitution provides:

" With respect to any of the matters mentioned in [ss 75 and 76 of the Constitution] 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."

If that provision is to be construed as permitting the Parliament to confer jurisdiction in part of a matter, that construction must, in my opinion, flow from the words "with respect to".

122 Neither in context nor as a matter of ordinary language are the words "defining ... jurisdiction" and "investing ... with federal jurisdiction" apt to indicate that the word "matter" includes part of a matter. And notwithstanding the breadth of the expression "with respect to"⁸⁷, the words "with respect to any of the matters" do not, as a matter of ordinary language, convey the meaning "with respect to any of the matters or any part of the matters".

123 The words "with respect to" in s 77 of the Constitution, in combination with the words "defining ... jurisdiction" and "investing ... jurisdiction", allow the Parliament to confer jurisdiction subject to limits or conditions, as was said in *Ex parte Walsh and Johnson; In re Yates*⁸⁸. Clearly, the Parliament can define or

⁸⁷ As to that expression see, for example, *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77 per Dixon CJ, McTiernan, Webb and Kitto JJ; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 351 per Dawson J; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 353 per Toohey J.

⁸⁸ (1925) 37 CLR 36 at 125 per Higgins J.

invest jurisdiction by reference to locality or a specified amount, as well as by reference to particular legislation. But that does not mean that it can define or invest jurisdiction with respect to part only of a matter. And *Walsh and Johnson* does not suggest otherwise.

124 In *Walsh and Johnson* it was held that s 40 of the *Judiciary Act* was validly enacted. As it then stood, s 40(1) provided for the removal of "[a]ny cause or part of a cause arising under the Constitution or involving its interpretation". No question arose as to the removal of part of a matter, the whole cause having been removed. There is, thus, nothing in *Walsh and Johnson* to warrant the conclusion that Parliament may confer jurisdiction on this or any other court with respect to part only of a matter. Indeed, s 40(3) of the *Judiciary Act* as it now stands seems to be premised on a precise understanding of what was decided in *Walsh and Johnson* for, by that sub-section, the conferral of jurisdiction that is not otherwise conferred on this Court with respect to "a cause or part of a cause removed" is expressly made "[s]ubject to the Constitution".

125 Apart from the language of s 77, there are other considerations which tell against the view that that provision enables the Parliament to confer only partial authority on a court to determine rights put in issue in legal proceedings. First, there are statements in *Collins v Charles Marshall Pty Ltd*⁸⁹ and in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*⁹⁰ suggesting that it cannot. Second, the notion that Parliament can confer partial authority is contrary to or, at least, difficult to reconcile with the nature of federal jurisdiction as exposed in *Felton v Mulligan*⁹¹.

126 It was held in *Felton v Mulligan* that, once federal jurisdiction is attracted, that jurisdiction attaches to the whole matter, not simply its federal element. In the view of Walsh J, a view subsequently adopted in *Moorgate Tobacco Co Ltd v Philip Morris Ltd*⁹², there is no room for double jurisdiction⁹³ because of the

89 (1955) 92 CLR 529 at 541 per Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ.

90 (1981) 148 CLR 457 at 506 per Mason J.

91 (1971) 124 CLR 367.

92 (1980) 145 CLR 457 at 479.

93 (1971) 124 CLR 367 at 411-412. See also at 373 per Barwick CJ (agreeing with Walsh J).

confusion and difficulty that would then be generated⁹⁴. In his Honour's view, the potential for confusion and difficulty required that a law investing a State court with federal jurisdiction be treated "as paramount and as excluding, in relation to the matters to which that law applies, the operation of the laws under which the State jurisdiction of the court would be exercised."⁹⁵ Were it possible to confer jurisdiction in respect of part only of a matter, confusions and difficulties of the kind apparently laid to rest by *Felton v Mulligan* could re-emerge.

127 It was the potential for confusion and the fragmentation of the legal process that led this Court, in *Fencott v Muller*⁹⁶, to give a broad rather than a narrow meaning to the word "matter" in Ch III of the Constitution. It was said in the joint judgment of Mason, Murphy, Brennan and Deane JJ that to treat "matter" as something less than the whole of a dispute would be "to ensure that the obstacles of arid jurisdictional dispute [would] beset the path of a party who must invoke federal jurisdiction"⁹⁷. Their Honours continued:

"The judicial ascertainment of facts in a particular controversy would be bedevilled by the possibility of divergent findings or by unseemly attempts to secure a first finding from one court rather than another. The judicial award of effective remedies in resolution of a controversy would be impaired, especially in cases where remedies are discretionary or reciprocal. The judicial power of the Commonwealth would at once prove insufficient to accomplish its purpose and productive of inefficiency in the exercise of the judicial power of the States. These consequences cannot be accepted unless they follow from the language of the Constitution, and they do not."⁹⁸

The same considerations require that s 77 of the Constitution be construed so that the Parliament can confer jurisdiction only in respect of a matter, not part of a matter. Moreover, to construe s 77 as permitting Parliament to confer jurisdiction in respect of part of a dispute – partial authority to adjudicate – would be to enable

94 At the time of that decision that was especially so in relation to the different avenues of appeal which then existed, appeals to the Privy Council from State Supreme Courts not then having been abolished.

95 (1971) 124 CLR 367 at 412.

96 (1983) 152 CLR 570.

97 (1983) 152 CLR 570 at 609.

98 (1983) 152 CLR 570 at 609.

Parliament to subvert the efficacy of the integrated legal system established by Ch III⁹⁹.

128 It cannot be doubted that the framers of the Constitution fashioned Ch III with a close eye to the judicial provisions of the United States Constitution, the influence of which is readily apparent. There are, however, two distinct differences between Ch III and the judicial provisions of the United States Constitution. The first is the "autochthonous expedient"¹⁰⁰, as it is sometimes called, whereby State courts are integrated into the federal judicial system. The second, as is pointed out by Mason J in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*, is that "the word 'matters', a word of great breadth, was selected in preference to 'cases' and 'controversies'"¹⁰¹, words which in the United States Constitution had been construed to mean "the claims of litigants brought before the courts for determination"¹⁰².

129 The evident purpose of the modifications of the United States model in Ch III of the Constitution was to ensure an integrated legal system and to provide for the efficient determination of controversies involving a federal element. To allow that s 77 permits the Parliament to confer partial authority is to allow for the subversion of that purpose.

Answer to the reserved question

130 The reserved question should be answered:

131 "Yes, the whole of Part 8".

99 As to the integrated system established by Ch III of the Constitution, see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 101 per Gaudron J, 111-115 per McHugh J, 139-143 per Gummow J. See also *Leeth v The Commonwealth* (1992) 174 CLR 455 at 498-499 per Gaudron J.

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

101 (1981) 148 CLR 457 at 507.

102 *In re Pacific Railway Commission* 32 F 241 at 255 (1887) per Field J, referred to by Mason J in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 507-508.

132 GUMMOW AND HAYNE JJ. Seniet Abebe, an Ethiopian national, claims that she is a refugee to whom Australia owes protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967). She has commenced two proceedings in this Court. The first is an application for prerogative relief pursuant to s 75(v) of the Constitution against the Minister for Immigration and Multicultural Affairs and against a member of the Refugee Review Tribunal. The Tribunal reviewed a decision of the delegate of the Minister to refuse Ms Abebe a protection visa under s 36 of the *Migration Act* 1958 (Cth) ("the Act"). On review, the Tribunal affirmed the decision of the Minister's delegate. It was directed¹⁰³ that the application for prerogative relief be made by notice of motion to a Full Court. The central issue in this proceeding is whether the Tribunal's exercise of executive or administrative power was not in accordance with law on two grounds - first, that in making its decision, the Tribunal took into account irrelevant considerations or failed to take account of relevant considerations and, second, that the decision was so unreasonable that no reasonable person could have made it.

133 The second proceeding is an action against the Commonwealth claiming a declaration that certain provisions of Pt 8 of the Act are invalid. In that action, a question was reserved pursuant to s 18 of the *Judiciary Act* 1903 (Cth) for the consideration of a Full Court. As amended, that question is:

"In their application to the review by the Federal Court of Australia of decisions of the Refugee Review Tribunal, when that Tribunal is reviewing decisions of the nature referred to in section 411(1)(c) of the *Migration Act* 1958 (Cth), are the provisions of Part 8 of that Act (or any of them) outside the legislative powers of the Commonwealth?"

The central issue in this proceeding is whether Pt 8 of the Act validly confers jurisdiction on the Federal Court of Australia to review decisions of the Tribunal.

134 The two proceedings have been heard together. It is convenient to refer to Ms Abebe as "the applicant".

135 More will be said later about the description that the applicant has given of events and circumstances that have led to her claim to be a refugee, but for the moment it is enough to say that she arrived in Australia on 6 March 1997 and was

103 Pursuant to O 55 r 2.

refused immigration clearance. On 18 March 1997 she applied for what the Act calls a "protection visa"¹⁰⁴. Section 36(2) of the Act provides that:

"A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."¹⁰⁵

The Minister's delegate refused that application on 21 June 1997 and on 25 June 1997 the applicant sought a review of the refusal by the Tribunal.

136 On 3 September 1997, the Tribunal found that the applicant is not a refugee and affirmed the decision of the Minister's delegate. The applicant then sought judicial review of the Tribunal's decision by the Federal Court. On 11 December 1997, that Court (Davies J) dismissed the application. No appeal was brought from that dismissal.

The significance of the litigation

137 The issues at stake in this litigation involve more than what might be seen as technical questions respecting federal jurisdiction. We turn to explain why this is so. The Constitution, as Dixon J put it in *Australian Communist Party v The Commonwealth*¹⁰⁶, is an instrument framed on the assumption of the rule of law. In the conduct of government under the Constitution, this means at least that, while there is no error of law simply in making a wrong finding of fact¹⁰⁷, (a) "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is", the terms used by Marshall CJ in *Marbury v Madison*¹⁰⁸, and (b) to adopt remarks of Isaacs J in *R v Macfarlane; Ex parte O'Flanagan and O'Kelly*¹⁰⁹, every

104 s 36(1).

105 The "Refugees Convention" and "Refugees Protocol" are defined by s 5 of the Act as the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

106 (1951) 83 CLR 1 at 193.

107 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77 per Brennan J; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J.

108 5 US 87 at 111 (1803).

109 (1923) 32 CLR 518 at 541-542.

person "is entitled to his personal liberty except so far as that is abridged by a due administration of the law".

138 Without the protection the applicant seeks from the issue of a protection visa, she is, as an "unlawful non-citizen"¹¹⁰, liable to removal from Australia¹¹¹ and, before that step is taken, to be kept in "immigration detention"¹¹². The applicant contends that, on its true construction, the legislation whose validity she challenges purports to engage the judicial department, not to say what the law is, but to affirm that there has been a due administration of that law where this may not have been so and to limit a judicial examination of the grounds which would show there to have been maladministration of that law.

139 The Tribunal was obliged to reach its decision by due administration of the law and the controversy between the applicant, the Tribunal and the Minister turns upon the question whether the Tribunal did so act or whether it committed one or more errors of law. What thereby is put in issue is the right in law of the Minister (or any other officer of the Commonwealth) to act upon or give effect to the decision of the Tribunal. The relief granted by a court exercising the judicial power of the Commonwealth with respect to the controversy may be an order which has the effect of setting aside the decision. But the application for the order is not the right put in issue.

140 The concept of "matter" in Ch III of the Constitution identifies a justiciable controversy. This is identifiable independently of the proceedings which are brought for its determination and encompasses all claims made within the scope of that controversy¹¹³. The justiciable controversy which we have identified in the present case could, depending upon the nature of the claims to relief, answer the description of a matter in which this Court has original jurisdiction conferred directly by s 75(v) of the Constitution. A justiciable controversy with respect to any one of the nine descriptions of "matter" contained in the five paragraphs of s 75 of the Constitution and the four paragraphs of s 76 may contain with it, or involve at its threshold, a matter within another one or more of those heads of jurisdiction¹¹⁴. So, with respect to the justiciable controversy presently under

110 s 14.

111 s 198.

112 ss 189, 196.

113 *Fencott v Muller* (1983) 152 CLR 570 at 603 per Mason, Murphy, Brennan and Deane JJ.

114 *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 539 per Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ; *Re East; Ex parte Nguyen* (1998) (Footnote continues on next page)

consideration, it also answers the description of a matter arising under a law made by the Parliament within the meaning of s 76(ii) of the Constitution. This is because the determination of the controversy involves the interpretation of the Act and the rights or duties in question in the matter owe their existence to that statute¹¹⁵.

141 The question then arises whether, with respect to that matter, the Parliament has made a law within the meaning of s 77(i) of the Constitution which defines the jurisdiction of the Federal Court. It is here that the difficulty arises with the provisions of Pt 8 of the Act (ss 474-486). Section 486 states that the Federal Court has jurisdiction with respect to judicially-reviewable decisions, a term defined in s 475(1) to include decisions of the Tribunal. Further, s 481 appears to provide for the quelling of a controversy as to whether the Tribunal, in the decision in question, acted within the law. But it does not do so. In dealing with the controversy, the Federal Court is confined by s 476 to the consideration of grounds which are confined so as to be narrower than those applicable, for example, in a proceeding under s 75(v) of the Constitution. The result is that Pt 8 defines the jurisdiction of the Federal Court, with respect to matters arising under the Act, in such a fashion as to lead not to any conclusive determination of the matter, but to a judicial determination that, contrary to what may be the true situation, administrative decisions have been made according to law.

142 If Pt 8 is upheld as a law defining the jurisdiction of the Federal Court with respect to matters arising under the Act, the result would have a broader significance. Many laws of the Commonwealth create new rights and impose new liabilities which affect the personal position of citizens and their commercial interests and those of corporations. These laws may achieve their end by operating upon what otherwise would be common law rights and liabilities, whether between citizens or between citizens and the state.

143 The distinction between right and remedy is deeply embedded in the corpus of the law. This is apparent in the law with respect to Crown liability¹¹⁶, time limitations upon actions and failure to comply with statutory requirements as to formalities. However, to define the jurisdiction of a federal court to determine

73 ALJR 140 at 143 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; 159 ALR 108 at 112.

115 *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ.

116 *Werrin v The Commonwealth* (1938) 59 CLR 150 at 167-168 per Dixon J; *The Commonwealth v Mewett* (1997) 191 CLR 471 at 549-550 per Gummow and Kirby JJ.

controversies with respect to those rights and liabilities by excluding grounds for relief which otherwise would be available has the effect of restricting or denying the right or liability itself. This stultifies the exercise of the judicial power of the Commonwealth.

The Application to the Refugee Review Tribunal

144 The Tribunal had available to it a number of statements that the applicant had made about what had happened in Ethiopia to her and to her husband and about what had happened in the time between her leaving Ethiopia and arriving in Australia. Those statements gave differing accounts of events.

145 The applicant submitted a statutory declaration of the kind contemplated by s 423(1) in support of her application for review by the Tribunal. In it she stated that she had made a number of untrue statements to immigration officers when she first arrived in Australia and sought to explain certain other statements that she had made to officials in Australia and to officials in South Africa (where she had earlier sought asylum). The Tribunal conducted a hearing on 6 August 1997 but adjourned after only a short time. The then solicitor for the applicant was later to say in a letter to the Tribunal that the decision to adjourn the hearing "was made in light of the Tribunal's difficulty in adducing information from the applicant regarding certain very straightforward matters relating to the applicant's background". The solicitor arranged for the applicant to be examined by a clinical psychologist. After the hearing had resumed and been completed on 28 August 1997, a copy of a report by the psychologist was provided to the Tribunal. That report suggested that the applicant's inability to answer questions at the first hearing was the result of "debilitating anxiety" and that "it would thus be unfair to draw any negative inferences from her non-response".

146 Nevertheless, the Tribunal found that the applicant was an unreliable witness. It concluded that "[o]n the evidence [it was] not satisfied that the Applicant faces a real chance of Convention-related persecution in Ethiopia".

The Application for Review by the Federal Court

147 The applicant gave a number of grounds in her application for review by the Federal Court. As amended, those grounds were:

"(1)

- (a) that procedures that were required by [the] Act or the regulations to be observed in connection with the making of the decision were not observed.

53.

- (d) that the decision was an improper exercise of the power conferred by [the] Act or [the] regulations:
 - (e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the face of the record.
- (3) ... the improper exercise of a power ... [being] construed as being a reference to:
- (a) an exercise of a power for a purpose other than a purpose for which the power is conferred
 - (c) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case".

148 In his reasons for judgment dismissing the application, Davies J said:

"It is important to keep in mind that, in fulfilling the function conferred upon it by s 476 of the Act, the Court must look to the matters specified in the grounds of review. It is not the function of the Court itself to review the merits of the case or to decide the facts of the case. The facts are for the administrative decision-maker, the Refugee Review Tribunal. The function of the Court is to see whether there was something having the nature of an error of law in the decision of the Tribunal including an error in the approach of the Tribunal to the questions before it. The present case falls very much into the category of a fact case, for the Tribunal did not accept the substance of the claims made by the applicant."

149 The relevant statutory framework is complicated but it is as well to refer to it in some detail.

Provisions for review by the Refugee Review Tribunal

150 Part 7 of the Act¹¹⁷ provides for Review of Protection Visa Decisions by the Refugee Review Tribunal, a body established by s 457 of the Act. In particular, the Tribunal may be asked to review a decision to refuse to grant a protection visa¹¹⁸. For the purposes of the review, the Tribunal may "exercise all the powers

¹¹⁷ ss 410-473.

¹¹⁸ s 411(1)(c).

and discretions that are conferred by [the] Act on the person who made the decision"¹¹⁹ and may affirm the decision, vary it, set it aside and substitute a new decision or, in some circumstances, remit the matter for reconsideration¹²⁰. The Minister, if he or she thinks it is in the public interest to do so, may substitute for a decision of the Tribunal a decision more favourable to the applicant¹²¹.

151 Section 420 of the Act provides:

"(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case."

The manner of conducting the review is further regulated by Div 4 of Pt 7¹²². An applicant for review may submit a statutory declaration "in relation to any matter of fact that the applicant wishes the Tribunal to consider"¹²³ and may submit written arguments relating to the issues arising in relation to the decision under review¹²⁴. The Tribunal will have available first, this material, secondly, a statement provided by the Secretary to the Department that sets out findings of fact, evidence and reasons for the decision under review¹²⁵ and thirdly, any other document in the possession or control of the Secretary that is considered by the Secretary to be relevant to the review of the decision¹²⁶. If, having considered the material, the Tribunal is not prepared to make the decision or recommendation that is most favourable to the applicant, the Tribunal must notify the applicant of his or

119 s 415(1).

120 s 415(2).

121 s 417(1).

122 ss 423-429.

123 s 423(1)(a).

124 s 423(1)(b).

125 s 418(2).

126 s 418(3).

her rights¹²⁷. The Tribunal must notify the applicant that he or she may appear before the Tribunal to give evidence and that, if he or she wants the Tribunal to obtain oral evidence from one or more named persons, the applicant may give notice to that effect¹²⁸. Section 427 of the Act gives the Tribunal various powers, including power to take evidence on oath or affirmation¹²⁹ and to summon persons to give evidence¹³⁰ or produce documents¹³¹.

Provisions for Judicial Review by the Federal Court

152 Part 8 of the Act¹³² provides that certain decisions (including decisions of the Refugee Review Tribunal¹³³) are judicially-reviewable decisions. Section 476(1) of the Act provides that, subject to sub-s (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any of seven stated grounds:

- "(a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;
- (b) that the person who purported to make the decision did not have jurisdiction to make the decision;
- (c) that the decision was not authorised by this Act or the regulations;
- (d) that the decision was an improper exercise of the power conferred by this Act or the regulations;

127 ss 424-426.

128 s 426(1) and (2). Sub-section (3) provides that if notice is given that the applicant wants the Tribunal to obtain oral evidence from others "the Tribunal must have regard to the applicant's wishes but is not required to obtain evidence (orally or otherwise) from a person named in the applicant's notice". It is not necessary to consider what is the effect of this provision.

129 s 427(1)(a).

130 s 427(3)(a).

131 s 427(3)(b).

132 ss 474-486.

133 s 475(1)(b).

- (e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;
- (f) that the decision was induced or affected by fraud or by actual bias;
- (g) that there was no evidence or other material to justify the making of the decision."

Sub-section (2) of s 476 provides:

"The following are not grounds upon which an application may be made under subsection (1):

- (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;
- (b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power."

Sub-section (3) seeks to elucidate what is meant by an improper exercise of a power. It provides:

"The reference in paragraph (1)(d) to an improper exercise of a power is to be construed as being a reference to:

- (a) an exercise of a power for a purpose other than a purpose for which the power is conferred; and
- (b) an exercise of a personal discretionary power at the direction or behest of another person; and
- (c) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

but not as including a reference to:

- (d) taking an irrelevant consideration into account in the exercise of a power; or
- (e) failing to take a relevant consideration into account in the exercise of a power; or
- (f) an exercise of a discretionary power in bad faith; or

57.

- (g) any other exercise of the power in such a way that represents an abuse of the power that is not covered by paragraphs (a) to (c)."

Sub-section (4) provides that the ground specified in s 476(1)(g) (the ground that there was no evidence or other material to justify the making of the decision) is not to be taken to have been made out unless:

- "(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or
- (b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

Section 481(1) specifies the powers of the Federal Court on an application for review of a judicially-reviewable decision. It provides:

"On an application for review of a judicially-reviewable decision, the Federal Court may, in its discretion, make all or any of the following orders:

- (a) an order affirming, quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or such earlier date as the Court specifies;
- (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit;
- (c) an order declaring the rights of the parties in respect of any matter to which the decision relates;
- (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Federal Court considers necessary to do justice between the parties."

153

Section 485 provides:

"(1) In spite of any other law, including section 39B of the *Judiciary Act 1903*, the Federal Court does not have any jurisdiction in respect of judicially-reviewable decisions or decisions covered by subsection 475(2), other than the jurisdiction provided by this Part or by section 44 of the *Judiciary Act 1903*."

(2) Subsection (1) does not affect the jurisdiction of the Federal Court in relation to appeals under section 44 of the *Administrative Appeals Tribunal Act 1975*.

(3) If a matter relating to a judicially-reviewable decision is remitted to the Federal Court under section 44 of the *Judiciary Act 1903*, the Federal Court does not have any powers in relation to that matter other than the powers it would have had if the matter had been as a result of an application made under this Part."

The Question Reserved

154 We deal first with the issue of validity raised by the question reserved in the action. It is necessary, therefore, to consider the proper construction of the provisions of Pt 8. The validity of the provisions can be examined only in the light of what it is that they provide.

155 Section 486 gives the Federal Court jurisdiction with respect to judicially-reviewable decisions that is exclusive of the jurisdiction of all other courts other than the jurisdiction of this Court under s 75 of the Constitution. Section 485(1), however, limits the jurisdiction conferred on the Federal Court in respect of judicially-reviewable decisions to the "jurisdiction provided by this Part or by section 44 of the *Judiciary Act 1903*". As the sub-section says, "In spite of *any* other law, including section 39B of the *Judiciary Act 1903*, the Federal Court does not have *any* jurisdiction in respect of judicially-reviewable decisions" other than the jurisdiction provided by Pt 8 of the Act or s 44 of the *Judiciary Act* (emphasis added).

156 Although s 485(1) seeks to limit the jurisdiction conferred on the Federal Court, it is not a privative clause of the kind considered in cases such as *R v Hickman; Ex parte Fox and Clinton*¹³⁴. Section 486 expressly recognises this Court's jurisdiction under s 75 of the Constitution. It therefore recognises that the decisions and actions of the Tribunal are amenable to judicial review in this Court and, unlike the cases concerning privative clauses, no question arises of resolving an apparent tension between provisions of the Act that appear to limit the powers of the Tribunal and a provision of the Act that appears to contemplate that the Tribunal's conduct or decision is not open to review in any court. It is, however, necessary to notice some of the other provisions of the Act in a little more detail.

¹³⁴ (1945) 70 CLR 598. See also *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232; *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.

157 It will be recalled that Pt 7 makes provision for the way in which the Tribunal is to go about its task. In particular, Div 4 of Pt 7 provides for the way in which the Tribunal is to conduct its review. To the extent to which the Act prescribes the steps that are to be taken (and prescribes what steps need not be taken¹³⁵) it may determine the content of that aspect of the requirements of procedural fairness often referred to as the "hearing rule". If that were so, it may be doubted that a decision may be challenged for want of a sufficient hearing so long as the statutory procedures have been followed. There being power to challenge a decision on the ground that procedures required by the Act to be observed in connection with the making of the decision were not observed¹³⁶, the exclusion by s 476(2)(a) from the grounds for judicial review by the Federal Court of a ground that a breach of the rules of natural justice occurred in connection with the making of the decision may, therefore, have less practical effect than may be thought at first sight. Again, because the Act permits judicial review by the Federal Court on the ground that the decision was "induced or affected by fraud or by actual bias"¹³⁷, at least some aspects of the "bias rule" are dealt with, and the practical consequences of the exclusion of the ground of breach of the rules of natural justice may be reduced still further.

158 It is not necessary, however, to say whether the grounds for judicial review that are permitted by s 476(1) cover the whole field that would otherwise be covered by an allegation that there was a breach of the rules of natural justice in connection with the making of the decision. That is not necessary because it is clear that there are grounds on which prohibition would lie to the Tribunal under s 75(v) of the Constitution that are excluded by s 476 from consideration by the Federal Court. In particular, prohibition would lie to the Tribunal in at least some cases where it is shown to have fallen into error of law which causes it to ignore relevant material or rely on irrelevant material¹³⁸. And yet such questions are expressly excluded from consideration by the Federal Court¹³⁹ in exercising its jurisdiction under s 486.

135 For example, s 425(2) provides that, subject to giving the applicant an opportunity to appear before it to give evidence, the Tribunal "is not required to allow any person to address it orally about the issues arising in relation to the decision under review".

136 s 476(1)(a).

137 s 476(1)(f).

138 *Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

139 s 476(3)(d) and (e).

159 Conversely, it may be that the Act extends the ground that it describes as "an improper exercise of a power" conferred by the Act or the regulations¹⁴⁰ beyond matters that would found the grant of prerogative relief. But we do not stay to consider whether that is so.

160 For present purposes two points are important. First, the limits imposed by s 476 on the grounds for judicial review are different from, and in important respects narrower than, the grounds on which prerogative relief would lie under s 75(v). Secondly, on its true construction, the Act is not to be read as identifying the only limits on the Tribunal's exercise of its powers as being those encompassed by the grounds specified in s 476.

Part 8 of the Act and Ch III of the Constitution

161 On their face the provisions of Pt 8 purport to define the jurisdiction of a federal court other than the High Court¹⁴¹ with respect to a matter arising under a law made by the Parliament¹⁴². Since the judgment of Griffith CJ in *Ah Yick v Lehmert*¹⁴³ the term "defining" in s 77(i) has been understood as being used in the sense of the giving or conferring of jurisdiction or, as Harrison Moore put it, a "power to commit" to the federal court in question "jurisdiction in the matters referred to [it]"¹⁴⁴. Section 77(ii) has a different operation. It directs attention to the jurisdiction which "belongs to" the courts of the States independently of s 77(iii) or which was invested in them under the authority conferred by s 77(iii), and permits their deprivation of jurisdiction¹⁴⁵. Here the phrase "defining the extent" is used, as Isaacs J put it, "to mark out the boundaries"¹⁴⁶ of the

140 s 476(1)(d) and s 476(3)(a) to (c).

141 Constitution, s 77(i).

142 Constitution, s 76(ii).

143 (1905) 2 CLR 593 at 603-604. See also *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 539-540 per Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ; *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 622-623 per McHugh J.

144 *The Constitution of the Commonwealth of Australia*, 2nd ed (1910), 1997 reprint at 210.

145 *Pirrie v McFarlane* (1925) 36 CLR 170 at 176-178 per Knox CJ; *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 470-471 per Gibbs J, 479-480 per Stephen, Mason, Aickin and Wilson JJ.

146 *The Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393 at 407; Cowen and Zines, *Federal Jurisdiction in Australia*, 2nd ed (1978) at 199-203.

exclusiveness of the jurisdiction of any federal court, including this Court, with respect to that which otherwise belongs to or is invested in State courts. This is so, although it "is a strain upon language to speak of an 'extent' of exclusiveness - a matter is either exclusive or not"¹⁴⁷.

162 The validity of the impugned provisions depends upon the related questions whether there is a "matter" and whether, under those provisions, the Federal Court exercises judicial power.

163 The Commonwealth contended that the provisions are valid because, although there can be no "matter" and no exercise of judicial power without there being an adjudication of rights or duties, here the rights the subject of adjudication are those conferred by Pt 8 - the right to have the decision set aside on any of the stated grounds. The fact that other rights might be adjudicated in an application under s 75 of the Constitution was, so it was contended, irrelevant. The applicant contended, on the other hand, that there is no "matter" and there is no exercise of judicial power because the controversy between the parties is whether the Tribunal acted in accordance with law. That controversy is wider than a controversy about the grounds specified in Pt 8 and is not quelled by the decision of the Federal Court.

164 Since the decision in *In re Judiciary and Navigation Acts*¹⁴⁸ it has been accepted that there can be no matter "unless there is some immediate right, duty or liability to be established by the determination of the Court"¹⁴⁹. And it has long been recognised that an important aspect of federal judicial power is that, by its exercise, a controversy between the parties about some immediate right, duty or liability is quelled. In *Huddart, Parker & Co Pty Ltd v Moorehead*, Griffith CJ said¹⁵⁰ that:

"the words 'judicial power' as used in sec 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property."

¹⁴⁷ Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th ed (1976) at 436.

¹⁴⁸ (1921) 29 CLR 257.

¹⁴⁹ (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

¹⁵⁰ (1909) 8 CLR 330 at 357.

And as the majority in *Fencott v Muller* said¹⁵¹:

"The unique and essential function of the judicial power is the quelling of such controversies [ie controversies of the kind described by Griffith CJ in *Huddart Parker*] by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion."

165 The contention that Pt 8 of the Act confers jurisdiction on the Federal Court with respect to a "matter" requires, in this case, consideration of three questions: first, what is the subject matter for determination in a proceeding¹⁵²; secondly, what right, duty or liability is to be established¹⁵³; thirdly, what is the controversy between the parties¹⁵⁴? But although each may be considered separately, all are related aspects of the single question: is there a "matter"?

166 The fact that Pt 8 entitles a person dissatisfied with a decision of the Refugee Review Tribunal to commence a proceeding in the Federal Court does not mean that the proceeding relates to a matter. Much of the argument advanced in favour of the validity of Pt 8 proceeded from the unstated premise that the existence of a matter can be demonstrated by showing that a litigant may commence a proceeding.

167 But the majority of the Court in *In re Judiciary and Navigation Acts*¹⁵⁵ rejected the contention that "matter" means no more than legal proceeding. It was held there that "matter" in s 76 means the subject matter for determination in a legal proceeding rather than the proceeding itself¹⁵⁶. Thus, to say that a party may bring a proceeding under Pt 8 does not mean that the subject of the proceeding is a "matter". The answer put forward on behalf of the Commonwealth was, in effect, that the "matter" was not the right to bring a proceeding but the right to have the Tribunal's decision set aside if one or more of the grounds specified in Pt 8 was

151 (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ.

152 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

153 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

154 *Fencott v Muller* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ.

155 (1921) 29 CLR 257.

156 (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

established. That invites attention to what are the rights or duties that are to be judicially established.

168 No doubt a lay observer may say that the grievance of a person like the present applicant is that she was not granted refugee status. But no person who claims to be a refugee has any right recognised in law to have the merits of the executive's decision about refugee status reconsidered and decided in the exercise of the judicial power of the Commonwealth. By contrast, however, and as indicated earlier in these reasons, an applicant for refugee status does have a right to have the executive make its decision about an application for a protection visa in accordance with law. And that right may be vindicated by seeking the exercise of the judicial power of the Commonwealth. Thus, to cast the issue in terms of rights and duties, what is significant for immediate purposes is that the Tribunal has a duty to reach its decision according to law and an applicant to that Tribunal has a right enforceable in the exercise of federal judicial power to have it do so. That right does not find its origin in Pt 8 of the Act.

169 It is not necessary to embark upon any further consideration of whether, under the system of government established under the Constitution, judicial review of administrative action is founded in the common law or finds some or all of its origins in the proper construction of laws of the Commonwealth that empower administrative decision making¹⁵⁷. It is enough for present purposes to recall that the premise from which the cases about privative clauses (such as *Hickman*) proceed is that:

"[i]t is ... impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition."¹⁵⁸

For present purposes, it does not matter whether the limits on the executive's powers are to be found in the proper construction of the statutory provisions conferring the power or are to be found in the common law, or whether s 75(v) of the Constitution is concerned only with remedies or creates rights. Section 75(v) gives this Court power to grant relief against an unlawful exercise of or refusal to exercise Commonwealth executive authority¹⁵⁹. The right to have the executive

157 See Aronson and Dyer, *Judicial Review of Administrative Action*, (1996) at 103-115.

158 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616 per Dixon J.

159 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 204-205 per Deane and Gaudron JJ.

make its decision according to law is, then, not a right that is created by Pt 8 of the Act. Likewise, the duty of the executive to act according to law does not find its origin in Pt 8 of the Act.

170 What Pt 8 of the Act seeks to do is to say that some, but not all, allegations of breach of that duty may be raised in and decided by the Federal Court. The inevitable consequence of limiting the kinds of allegation that may be made is that the Federal Court can never conclude that the decision challenged was made according to law. It may decide only that the particular grounds of challenge that were raised in the proceeding were not made out. The statute forbids it from embarking on some aspects of the more general inquiry whether the decision was made according to law.

171 Nevertheless, the provisions of s 481 of the Act indicate that proceedings before the Federal Court under Pt 8 will lead to a conclusive determination about the lawfulness of the decision of the Tribunal that is impugned. Among the orders that the Court is empowered to make are "an order affirming ... the decision, or a part of the decision"¹⁶⁰ and "an order declaring the rights of the parties in respect of any matter to which the decision relates"¹⁶¹. These are orders that would be rightly made if *all* questions affecting the legality of the decision were resolved by the outcome of the proceedings. But that is not and cannot be so.

172 There was some debate in the course of argument about what was meant by "affirming" when it appears in s 481(1)(a). The word "affirm" is commonly used in forms of order disposing of appellate or review proceedings. Older precedent books give the form of order for disposing of an appeal that has failed as an order that affirms the judgment below and dismisses the appeal¹⁶². It is commonplace for orders disposing of unsuccessful appeals to a Court of Criminal Appeal to affirm the sentence passed on the offender. And so examples could be multiplied. There is no reason to think that "affirming" was intended to be used in some different sense in s 481. Thus, were such an order to be made pursuant to s 481 it would amount to the Court ordering that the decision is one to which the parties to the proceeding may give effect. It would be appropriate to make an order affirming the decision if (and only if) the Court could hold that the decision had been made according to law. But the Federal Court cannot do that.

¹⁶⁰ s 481(1)(a).

¹⁶¹ s 481(1)(c).

¹⁶² See, for example, *Chitty's Queen's Bench Forms*, 18th ed (1956), Pt XVII, Ch 1, s 1, Form 11 at 1187-1188; *Seton's Judgments and Orders*, 7th ed (1912), vol 1 at 811-812.

173 Similar difficulties emerge when consideration is given to what declarations might be made pursuant to the power given by s 481(1)(c). What "rights of the parties" might be declared "in respect of any matter" to which the decision (ie, the decision of the Tribunal) relates? At most it would seem that a declaration might be made about the entitlement of an applicant to the relief sought. (No other possible forms of declaration were suggested in argument.) But it may be doubted that there would ever be occasion to make a declaration that an applicant was, or was not, entitled to the relief sought. If the applicant was entitled to substantive relief quashing or setting the decision aside then there seems no reason to think that a declaration should be made in addition to, or instead of, granting the substantive relief. If, however, the applicant is not entitled to substantive relief, it follows, for the reasons given earlier, that it would not be right to declare that the decision was validly made and there would seem no point to declaring that the applicant has not established any of the grounds referred to in s 476.

174 It was submitted that if no order could be made affirming the decision, the word "affirming" should be severed from s 481(1)(a) and that, if this was done, the remaining provisions in Pt 8 would be valid. Severance of the kind proposed is not possible.

175 Section 481(1) says that "the Federal Court may, in its discretion, make all or any of" the orders listed in the sub-section. At first sight, the reference to discretion might suggest that the excision of one item from the list of available remedies would be of little moment. Ordinarily, however, if a statute gives a court a power to make any of a range of orders, the statute will be construed as obliging the court to make one of those orders if the occasion for its making is proved to exist¹⁶³. And there is no reason to construe s 481(1) in any different way, at least in so far as it refers to affirming, quashing or setting aside the decision of the Tribunal. Whatever may be the position with other kinds of orders mentioned in s 481 (such as orders in the nature of injunction¹⁶⁴), if a case were made for affirming, quashing or setting aside the decision there seems no basis for concluding that such an order could properly be refused as a matter of discretion. But whether or not this is so, when Pt 8 is read as a whole, it can be seen that it

163 *Ward v Williams* (1955) 92 CLR 496 at 506-507 per Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ.

164 s 481(1)(d).

"was intended to operate fully and completely according to its terms, or not at all"¹⁶⁵. There can, therefore, be no severance of the kind suggested.

176 Consideration of what orders the Federal Court may make is important because it reveals a more fundamental difficulty than a narrow point about the remedies that may be granted or a point about severance. What the difficulties about the possible forms of order that may be made under Pt 8 illustrate is that the rights and duties of the parties are not adjudicated in a proceeding under that Part. Only *some* of the considerations affecting their rights and duties may be agitated and decided and the controversy between them is not quelled by any decision in the proceeding. There is, therefore, no conferring on the Federal Court of jurisdiction over a "matter" arising under a law made by the Parliament, within the meaning of s 77(i) and s 76(ii) of the Constitution.

177 As is apparent from what we have said about severing the word "affirming" from s 481(1)(a), we do not consider that it is possible to sever or read down Pt 8 in such a way as to preserve part of its operation. In large part that conclusion follows inexorably from the conclusion that the Parliament has attempted to confer jurisdiction over something less than the justiciable controversy. It is not surprising that severance or reading down is not available in such a case.

178 It is necessary, however, to deal separately with s 485 which, it will be recalled, seeks to limit the jurisdiction of the Federal Court in relation to judicially-reviewable decisions covered by s 475(2) and to limit that jurisdiction to that conferred by Pt 8 of the Act or by s 44 of the *Judiciary Act*. Section 485(3) provides that, if a matter relating to a judicially-reviewable decision is remitted to the Federal Court by this Court pursuant to s 44 of the *Judiciary Act*, "the Federal Court does not have any powers in relation to that matter other than the powers it would have had if the matter had been as a result of an application made under [Pt 8]". Standing alone, this and the other provisions of s 485 might possibly be said to suggest an intention that the jurisdiction of the Federal Court should be limited to whatever is validly given by Pt 8 and that, if Pt 8 otherwise falls, the excluding effect of s 485 should still be given work to do. But this is to rewrite the statute altogether. Part 8 was intended to be a comprehensive set of provisions regulating judicial review of certain decisions. If part of that comprehensive scheme falls, the whole scheme falls. The invalidity of the provisions permitting review means that the provisions limiting review must also fall.

¹⁶⁵ *Pidoto v Victoria* (1943) 68 CLR 87 at 108 per Latham CJ; *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

179 The amended question reserved should be answered "Yes, the whole of Part 8." The Commonwealth should pay the applicant's costs of this proceeding.

The Application for Prerogative Relief

180 We turn, then, to the application for prerogative relief in this Court. It is necessary to say something more about the events that relate to the applicant's claim to be a refugee and that bear upon her claim to prerogative relief.

181 After the applicant arrived in Australia, she was interviewed by officers of the Department of Immigration and Multicultural Affairs, first at Sydney airport and later, on more than one occasion, in the Villawood Immigration Detention Centre. In the Detention Centre she told the interviewing officers that she was wanted by the Ethiopian Government because she held political views opposing the government and because she had escaped from gaol. (She had, she said, been arrested and questioned in Ethiopia and detained for more than two months.) According to the applicant, she had joined the All Amhara Peoples Organisation or "AAPO" in January 1994 and did so because she saw that organisation and its aims as defending her interests as an Amhara. She said that she had attended meetings of the organisation and that two or three months after she joined it, she began to type letters of invitation to its meetings and letters asking for financial aid. She was, she said, just an "ordinary" member although exactly what was meant by that expression (which may have been used first by the interviewers rather than the applicant) was not explored in the interviews. In the interviews at the Detention Centre she spoke of her husband and said that he too had been an "ordinary" member of AAPO who had attended meetings, organised some demonstrations and fee collections.

182 For the first time, in one of the interviews held at the Detention Centre, the applicant spoke of an incident during her imprisonment when two policemen raped her in her cell. She had not mentioned this fact on arrival at Sydney airport or in accounts she had previously given of her history when she had sought (unsuccessfully) refugee status in South Africa.

183 The information she gave in the various interviews with Australian officials was not always consistent and it differed in a number of ways from information she had given to the South African authorities in 1994. She had said in South Africa that her husband had been killed by the government in 1994 and that it was for that reason she left her country. She made no mention of having been raped. Although she answered the question "Have you ever been arrested or detained?" by checking the box marked "No", a handwritten statement she later made to the South African authorities (after her South African application had been refused) spoke of her being "thrown to jail for 5 days".

184 There were several other inconsistencies between her accounts to officers at Sydney airport, to officers who interviewed her at the Detention Centre and to the South African authorities. Her accounts of how she had travelled from Ethiopia to Australia, via South Africa, varied; her accounts of the fate of her husband varied. We need not notice the detail of these inconsistencies.

185 In the course of the proceedings before the Tribunal she made a statutory declaration in which she sought to record these inconsistencies, to acknowledge that some of the statements she had made were untrue, and to assert the truth of some other of those statements. As has been mentioned earlier, a report from a clinical psychologist was submitted to the Tribunal concerning what appeared to be the difficulty in obtaining information from the applicant about her background. Nevertheless, the Tribunal found that the applicant was an unreliable witness.

186 The applicant submitted in this Court that the essence of her claim was that because she was a member of a political party (the AAPPO) which was in opposition to the government and because she is a member of the Amhara ethnic group, she had been arrested (following her husband's arrest), raped, and detained in custody for more than two months until she escaped. Much emphasis was placed in the applicant's submissions on her claim to having been detained and raped. It was described as being the central part of her claim and it was submitted that the Tribunal did not deal with it properly. The attack was put in several ways: as a breach of procedural fairness, as a failure to take relevant considerations into account, and as evidencing a manifestly unreasonable exercise of the Tribunal's power.

187 The want of procedural fairness was said to lie in the Tribunal not putting to the applicant any suggestion that her story of detention and rape was untrue. Framed in this way, the submission may, perhaps, assume that proceedings before the Tribunal are adversarial rather than inquisitorial or that in some way the Tribunal is in the position of a contradictor of a case being made by the applicant. Such assumptions, if made, would be wrong. The proceedings before the Tribunal are inquisitorial and the Tribunal is not in the position of a contradictor. It is for the applicant to advance whatever evidence or argument she wishes to advance in support of her contention that she has a well-founded fear of persecution for a Convention reason. The Tribunal must then decide whether that claim is made out.

188 In this case the applicant knew that her claims about her detention and rape might not be accepted. The primary decision maker, the delegate of the Minister, said in the reasons for her decision that "... I do not find the applicant to be a reliable witness, and have grave doubts about her credibility, as in South Africa and at the Airport, the applicant did not mention that she had been raped or imprisoned in Ethiopia". After that, there could be no doubt that her story of detention and rape while in detention might not be accepted. And indeed her

provision to the Tribunal of the statutory declaration dealing with inconsistencies in her accounts can be explained only on the basis that she and her advisers were alive to the difficulties in having what she said was the true account of events accepted by the Tribunal.

189 The remaining two bases of attack on the Tribunal's decision were not always kept separate in the course of argument. It was said that the Tribunal failed to take into account a relevant consideration, namely, whether the applicant had been raped by State officials while in detention because of her political affiliations and racial background, and it was said that the Tribunal's failure to investigate those matters meant that the Tribunal's decision was so unreasonable that no reasonable person could have exercised the Tribunal's powers as it did. At once, then, it can be seen that the attacks focus upon the factual basis for the Tribunal's decision. Should it have concluded that the applicant was raped in detention? Should it have made further inquiries to discover whether she had been raped?

190 Inquiring whether a person has a well-founded fear of persecution is attended by very great difficulties. It is as well to begin such inquiries from two premises that, while obvious, may possibly be overlooked. First, the fact that a person in the applicant's position does not complain of rape to the first immigration officer who speaks to her on arrival in this country, a country in which she seeks asylum, is anything but compelling evidence that no such assault occurred. Even if the "primitive rule of hue-and-cry" spoken of by Wigmore¹⁶⁶ in connection with doctrines of recent complaint in cases of rape¹⁶⁷ may once have had some basis in the society in which it grew up, there is no warrant for some unthinking application of such a rule to a person from a wholly different society coming to a new country in which she seeks asylum, leave aside the fact that the rape may have occurred months if not years ago as one more horror in a history of horror.

191 Secondly, the fact that an applicant for refugee status may yield to temptation to embroider an account of his or her history is hardly surprising. It is necessary always to bear in mind that an applicant for refugee status is, on one view of events, engaged in an often desperate battle for freedom, if not life itself. But those difficulties are to be confronted by the Tribunal in the execution of its tasks, not by a court that is asked to review the way in which the Tribunal reached its decision.

192 The question that the Tribunal was called on to decide in this case was whether the applicant showed that she then had a well-founded fear of persecution

166 *Wigmore on Evidence*, 3rd ed (1940), vol 4 at 219 par 1134.

167 cf *Kilby v The Queen* (1973) 129 CLR 460; *Jones v The Queen* (1997) 191 CLR 439; *Suresh v The Queen* (1998) 72 ALJR 769; 153 ALR 145.

on a Convention ground. What is meant by "well-founded" has been considered by this Court in several cases¹⁶⁸ and it is not suggested that the Tribunal failed to apply the correct principles in this regard. No doubt, a Tribunal will often find assistance in deciding whether a person has a well-founded fear of persecution by looking at that person's prior experiences. If a person has been persecuted in the past for a Convention reason, this history may ground an inference that the person subjectively fears repetition of persecution and an inference that this fear is well founded. But proving persecution in the past is not an essential step in an applicant demonstrating that he or she has a well-founded fear of persecution. Regrettably, cases can readily be imagined where an applicant's fear is entirely well founded but the particular applicant has never suffered any form of persecution in the past.

193 In this case the applicant maintained that she had been persecuted in the past. If that contention were disbelieved then, for the reasons just discussed, it did not mean that her claim to protection must inevitably fail. There would remain for consideration any other basis on which it was said that her fear of persecution was well founded. The contentions that were advanced in support of her application for prerogative relief must be examined in light of those considerations.

194 The submission that the Tribunal should have made further inquiries about the possibility that the applicant had been raped in detention can be dealt with shortly. No plausible and possible line of inquiry was suggested, whether in this Court or in the course of the Tribunal's inquiries, that the Tribunal might have undertaken and that might have shed any light on the issue. That being so, it is not necessary to consider the validity of the premise from which this limb of the argument proceeded, namely, that the Tribunal was under some obligation to make some further inquiries. But it follows that the asserted ground of unreasonableness fails. And it is, therefore, not necessary to examine, in this case, what are the limits of what has become known as the *Wednesbury* ground¹⁶⁹. In particular, we need not consider whether the ground of unreasonableness is confined to cases of the same kind as *Wednesbury*, in which a decision maker is called on to exercise a discretion and the decision taken lies outside the range of decisions at which a

168 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389 per Mason CJ, 396-398 per Dawson J, 406-407 per Toohey J, 428-429 per McHugh J; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274-275 per Brennan CJ, Toohey, McHugh and Gummow JJ; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 571-573 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ.

169 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

reasonable person could arrive¹⁷⁰. Nor is it necessary to consider the kinds of question referred to by Mason CJ in *Australian Broadcasting Tribunal v Bond*¹⁷¹ concerning the review of findings and inferences of fact on the ground that they could not be reasonably made on the evidence or reasonably drawn from the primary facts.

195 The submission that the Tribunal had failed to take into account a relevant consideration - described as being *whether* the applicant had been raped in detention - appeared, in the course of argument, to slide sometimes to a contention that the Tribunal should have concluded that the applicant *had been* raped. We need not, and do not, express any concluded view on whether the first form of the contention, if made out, would reveal a failure to take into account a relevant consideration. There appears much to be said, however, for the view that the identification of relevant and irrelevant considerations is to be drawn from the statute empowering the decision maker to act¹⁷² rather than from the particular facts of the case that the decision maker is called on to consider. But leaving this issue to one side, it must be noted that the latter form of contention (that the Tribunal should have concluded that the applicant had been raped) is self-evidently a contention that depends upon the Court reviewing the merits of the Tribunal's decision rather than the process by which it arrived at its conclusion. Such a contention could not be advanced as a ground for the grant of prerogative relief¹⁷³. As Brennan J said in *Attorney-General (NSW) v Quin*¹⁷⁴:

"The duty and the jurisdiction of the courts are expressed in the memorable words of Marshall CJ in *Marbury v Madison*¹⁷⁵:

'It is, emphatically, the province and duty of the judicial department to say what the law is.'

170 cf *R v Chief Constable of Sussex; Ex parte International Trader's Ferry Ltd* [1998] QB 477.

171 (1990) 170 CLR 321 at 355-357.

172 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40 per Mason J.

173 See, for example, *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ.

174 (1990) 170 CLR 1 at 35-36.

175 (1803) 1 Cranch 137 at 177 [5 US 87 at 111].

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone."

196 If, however, the applicant's contention is that the Tribunal failed to inquire into whether the applicant had been raped in detention, that contention must fail. The Tribunal did consider that question. In its reasons for decision the Tribunal recorded that the applicant claimed "that five days after her husband was arrested, she was also arrested and then detained for two months, during which she was interrogated by authorities and raped" and concluded that it "considers it possible that the Applicant might have suffered some form of abuse in the past". Plainly, then, the Tribunal examined the question.

197 It may be accepted that, as the applicant submitted, much of the Tribunal's statement of reasons focuses upon what the applicant said about her husband's arrest and whether what she had said on that subject was to be believed. But it did this in the context of assessing whether her claims that she had been persecuted in the past should be accepted. The Tribunal's reasoning does not reveal any failure to take account of relevant matters or any taking into account of irrelevant matters. In the end, the criticisms made by the applicant of the Tribunal's reasoning are criticisms of the factual findings it made and are criticisms that fasten upon the weight that the Tribunal attributed to various pieces of information that it had available for consideration. But what weight the Tribunal gave to those various pieces of information was for it to say.

198 The Tribunal did consider whether the conditions in Ethiopia were such that Amharas (as a group) were liable to discrimination. It rejected that contention. It concluded:

"However, the Tribunal is prepared to accept that the Applicant is an Amhara and notes her claims to the effect that the Amhara are disliked by the current government and suffer discrimination. Nevertheless, the Tribunal considers the above-cited (DFAT and other) information as to the circumstances of the Amhara in Ethiopia to negate her claims as to the existence of a real chance of persecution for reasons of her membership of this particular social ethnic group."

There was evidence before it (being the cables from the Department of Foreign Affairs and Trade to which it referred in its reasons) that suggested that only politically active Amharas were at risk of being persecuted. And it was open to

the Tribunal to conclude that the applicant was not politically active to the degree necessary to attract adverse attention from the authorities in Ethiopia.

199 The material about her past experiences (if accepted) may have been a sufficient basis for concluding that her stated fears of persecution were well founded. But that material was not a necessary step along that path. The rejection of her version of events therefore did not conclude the question. It was necessary to deal with the more general question: whether the applicant had a well-founded fear of persecution for a Convention reason. This the Tribunal did.

200 No ground is made out for the grant of prerogative relief and the application should be dismissed with costs.

201 One other aspect of the matter should be mentioned. Counsel for the Minister submitted that the Court should not consider the questions that the applicant sought to agitate in the application for prerogative relief because she had made application under Pt 8 of the Act and she had not sought to appeal against the judgment of Davies J that was given in that proceeding. Counsel for the Minister put the point as a discretionary bar and expressly disclaimed any contention that there was an estoppel. Because no ground for prerogative relief is established, we need not consider what, if any, effect follows from the bringing of proceedings under Pt 8 or the absence of challenge to the judgment given in those proceedings.

202 KIRBY J. The Court is divided over a constitutional question. The resolution of the differences may be found by resort to a facultative principle of constitutional interpretation.

203 The Australian Constitution is expressed in statutory form. The elucidation of its meaning must therefore observe the basic principles followed in the construction of any statute¹⁷⁶. But a constitution is a special kind of statute. This fact requires that it should always be construed with its constitutional character in mind¹⁷⁷. Our Constitution is notoriously difficult to amend by formal process¹⁷⁸. It is intended to operate indefinitely and in a fast-changing world. In elucidating ambiguities, the constitutional text should therefore be approached as a "facility of rational and efficient government"¹⁷⁹ for the people of Australia. It is not correct to construe it by a search for what its framers "intended", helpful as their remarks about those purposes may be from time to time¹⁸⁰. We are not bound to the imaginings of the men who, in the last decade of a past century, wrote the Constitution. It is the governmental charter of today's Australians. It belongs to the present and the future. It is not chained to the past¹⁸¹. It should be construed, so far as its text and structure permit, to avoid irrational rigidities or seriously inconvenient outcomes. Ordinarily, such rigidities and serious inconvenience will

176 *Tasmania v The Commonwealth* (1904) 1 CLR 329 at 338; cf *Graves v New York; Ex rel O'Keefe* 306 US 466 at 491 (1939) per Frankfurter J.

177 *McCulloch v Maryland* 17 US 159 at 200 (1819); *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367-368; *R v Brislan; Ex parte Williams* (1935) 54 CLR 262; cf *Street v Queensland Bar Association* (1989) 168 CLR 461 at 537.

178 Constitution, s 128. In 98 years, only eight of 42 proposals to amend the Constitution have been approved by the requisite majorities of the electors of the Commonwealth.

179 *Gould v Brown* (1998) 72 ALJR 375 at 441 par [274]; 151 ALR 395 at 483; cf *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 140.

180 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17; *Cole v Whitfield* (1988) 165 CLR 360 at 385; *New South Wales v The Commonwealth (The Incorporation Case)* (1990) 169 CLR 482 at 501-503; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 485; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 197; cf *The Municipal Council of Sydney v The Commonwealth* (1904) 1 CLR 208 at 240.

181 *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396 per Windeyer J; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 171-173 per Deane J.

be inconsistent with the enduring character of the Constitution as the charter of government of a modern nation.

The facts, proceedings and issues

204 The facts are stated in the reasons of the other members of the Court. So are the relevant constitutional provisions and the sections of the *Migration Act* 1958 (Cth) ("the Act") the validity of which is challenged. I will not repeat these.

205 Two proceedings are before us. For convenience they have been dealt with together. Ms Seniet Abebe is the prosecutor in a summons claiming the issue out of the Court of one of the constitutional writs¹⁸². She has sought that relief against the Minister for Immigration and Multicultural Affairs and the officer of the Commonwealth constituting the Refugee Review Tribunal ("the Tribunal") concerned in her case. Ms Abebe is also the plaintiff in an action which she has brought against the Commonwealth. In that action she claims a declaration that the provisions of Pt 8 of the Act are invalid. It is in the latter proceeding that the constitutional question, which is set out in other reasons, has been reserved for the opinion of the Full Court¹⁸³.

206 The application for a constitutional writ has required a detailed examination of the facts contained in the record of the Tribunal. In defence of the efficient discharge of its primary responsibilities, the Court would normally remit a matter, or that part of the matter, involving factual or non-constitutional questions, to another court¹⁸⁴. Quite apart from the identity of the parties to the proceedings and the federal character of this matter, because of the provisions of the Act¹⁸⁵, the court to which the matter (or part of the matter) would be remitted in this case would be the Federal Court of Australia.

207 For reasons explained by the other members of the Court, as the Parliament has limited the grounds upon which the Federal Court may review a decision of the Tribunal¹⁸⁶ (and has applied those limitations to any matter or part of a matter remitted to that Court by this Court¹⁸⁷), the jurisdiction of the Federal Court,

182 Provided by the Constitution, s 75(v).

183 Pursuant to the *Judiciary Act* 1903 (Cth), s 18.

184 Pursuant to the *Judiciary Act* 1903 (Cth), s 44.

185 The Act, s 486. The text is set out in the reasons of Gleeson CJ and McHugh J.

186 The Act, s 476(2). The text is set out in the reasons of Gummow and Hayne JJ.

187 The Act, ss 485(1) and (3). The text is set out in the reasons of Gummow and Hayne JJ.

however engaged, would be narrower than that of this Court as provided by the Constitution. To avoid the risk of injustice to Ms Abebe, were she to be able to make out an entitlement to a constitutional writ, it was therefore necessary for this Court to hear and determine her application. This is a consequence of the legislation. It must have been understood by the Parliament and appreciated by the Executive Government. It has certainly been called to notice¹⁸⁸. The prospect of this Court's having to hear and determine, in its original jurisdiction, applications of this kind, in default of the availability of equivalent redress in the Federal Court (or of effective remitter to the Federal Court), is extremely inconvenient. It is also expensive and time-consuming. These considerations suggest the need for further attention to legislation which has such an outcome.

The application for a constitutional writ fails

208 All other members of the Court are of the opinion that Ms Abebe has failed to make out an entitlement to the issue of a constitutional writ on any of the three grounds stipulated by her before this Court. The grounds which Ms Abebe pressed were:

- (1) The alleged failure of the Tribunal to observe the requirements of natural justice in relation to the hearing of her case;
- (2) The alleged failure of the Tribunal to take into account a relevant consideration, namely that she had been raped by State officials when in custody in Ethiopia; and
- (3) The Tribunal's arrival at a conclusion criticised by Ms Abebe as manifestly unreasonable, in the sense that it was so unreasonable that no donee of the relevant statutory power, exercising such power in accordance with law, could properly have come to such a conclusion¹⁸⁹.

209 By the Act, these three heads of challenge to the decision of the Tribunal are excluded from the jurisdiction of the Federal Court¹⁹⁰. However, if included within

188 cf *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe [No 1]* (1997) 72 ALJR 574 at 575; 151 ALR 711 at 713; *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe [No 2]* (1998) 72 ALJR 630 at 633; 152 ALR 177 at 180.

189 cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 applying *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230.

190 The Act, ss 476(2) and 476(3)(e).

the constitutional jurisdiction of this Court, they cannot be removed by legislation and no attempt has been made to do so.

210 Given the purposes of the constitutional writs, I accept that their availability is not today to be confined to the narrower categories which were doubtless within the "intentions" of the framers when the Constitution was originally written. In this, as in other respects, the meaning of the constitutional text marches in step with developing understandings of the law of judicial review, stimulated by important decisions of the courts and (in a general way at least) by statutory developments affecting the legal culture within which the Constitution operates.

211 I agree with the remarks of Gummow and Hayne JJ concerning the two considerations which can easily be overlooked in fact-finding, both by the Minister's delegate and by the Tribunal. Such oversight can readily arise when it is shown that an applicant for refugee status (or the visa appropriate to that status) has made untrue statements to officials or given false evidence to the Tribunal. I agree with the comment by their Honours that, even if an applicant is disbelieved, the primary decision-maker and the Tribunal must still consider whether, on any other basis asserted, a fear of persecution exists which is well founded so as to ground the protection claimed.

212 Nevertheless, for the reasons which Gummow and Hayne JJ give, no basis is established in any of the grounds propounded by Ms Abebe upon which she is entitled to the issue of a constitutional writ. I therefore agree with the orders favoured in that regard by all members of the Court. Those proceedings should be dismissed with costs.

The meaning of "matter"

213 No decision of this Court determines the controversy presented by the question reserved in Ms Abebe's other proceedings. The past authority of this Court addresses attention, relevantly, to two considerations. Each must be examined to respond to the arguments raised concerning the validity of the provisions of Pt 8 of the Act. The first involves the meaning of the word "matter" or "matters" where appearing in ss 75, 76, 77 and 78 of the Constitution. The second concerns the implications to be derived from the creation, by Ch III of the Constitution, of "the Judicature" as a separate and independent branch of government, and the further implications to be drawn from the language, structure and purposes of that Chapter and the provisions within it.

214 Ms Abebe's first challenge to the validity of the provisions of Pt 8 of the Act depends upon the suggested incompatibility between the requirement of the Constitution¹⁹¹ that the jurisdiction of any federal court (such as the Federal Court

191 Constitution, s 77.

of Australia) may only be defined in a law made by the federal Parliament "[w]ith respect to any of the *matters* mentioned" in ss 75 and 76, and the limitations which the concept of "matter" imports.¹⁹²

215 The meaning of the word "matter" is elusive. Established doctrine, not challenged in these proceedings, holds that the word has the same meaning in each of the sections in Ch III in which it is used¹⁹³. It does not connote "a legal proceeding" as the parties may have chosen to frame it¹⁹⁴. Rather it refers to "the subject matter for determination in a legal proceeding."¹⁹⁵ It is not *any* subject matter upon which the parties may disagree or about which they have a dispute susceptible to independent determination. It must be a subject matter which is apt for determination by a court of law by reference to some "immediate right, duty or liability" susceptible of determination by such a court¹⁹⁶. Upon this notion of "matter" rest the restrictions which this Court has applied to legislative attempts to confer upon a Ch III court, including this Court, a jurisdiction to provide advisory opinions¹⁹⁷ or to decide abstract questions divorced from the actual administration of the law¹⁹⁸.

216 In these proceedings, the latter aspects of authority on the meaning of the word "matter" were not directly engaged. There was nothing advisory about the jurisdiction which Pt 8 of the Act confers on the Federal Court. That jurisdiction is far from "abstract", particularly for Ms Abebe. If the challenged provisions are valid they effectively determine Ms Abebe's claim to refugee status unless relief were afforded to her in the form of a constitutional writ issued by this Court, which I have held to be unavailing in her case.

217 The question is thus whether the word "matter", as it has been elucidated, carries within it the irreducible notion of the entire legal controversy between the

192 Emphasis added.

193 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266.

194 (1921) 29 CLR 257 at 265.

195 (1921) 29 CLR 257 at 265.

196 (1921) 29 CLR 257 at 265.

197 As the *Judiciary Act* 1903 (Cth), Pt XII did in 1910. See ss 88, 89 and 93 of that Act as then enacted; cf *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612, 642, 665-668.

198 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303; *Croome v Tasmania* (1997) 191 CLR 119 at 125, 135.

parties. It is whether nothing less than the jurisdiction over the entire matter may be conferred on a federal court if jurisdiction is given to that court at all.

218 Ms Abebe asserts that the notion of the indivisibility of a "matter" is inherent in the meaning of the word, understood in its context. In support of her submission, she deploys several arguments. They are by no means insubstantial. First, she relies on the cases concerned with the jurisdiction of federal courts with respect to non-federal claims arising out of transactions and facts common with a federal claim¹⁹⁹. A law purporting to confer on a federal court jurisdiction over connected non-federal claims will be valid, being a law "with respect to" the "matters" supporting the federal legislation. Ms Abebe argued that the opposite was equally true. An attempt to provide jurisdiction over part only of a matter was constitutionally invalid.

219 Secondly, Ms Abebe submitted that only if federal courts were engaged to state the entire law with respect to a justiciable controversy would there be a proper exercise of the judicial power of the Commonwealth. On this footing, a "matter" could not be split by a law made by the Parliament, whether as between different federal courts upon which federal jurisdiction is conferred or as between those courts and the courts of the States which are invested with federal jurisdiction relevant to the matter. In support of this argument Ms Abebe pointed to the suggested inconvenience of the division of a single matter as between this Court and the Federal Court, as illustrated by the present case. She argued that such a division of jurisdiction carried inherent risks of inconsistent or incomplete findings, of barren jurisdictional contests and of attendant costs and delays to litigants. These considerations combined to support the conclusion that this was not the kind of provision for the jurisdiction of a federal court which the Constitution envisaged when empowering the Parliament to make laws with respect to "matters" within its constitutional authority. So went Ms Abebe's main arguments on this point.

"Matter" does not import indivisibility of proceedings

220 The argument that the meaning of the word "matter" and of the other relevant provisions in Ch III of the Constitution is to be ascertained by reference to the intention of the original framers is rejected. Such "intention" is a fiction²⁰⁰. It has

199 cf *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457; *Fencott v Muller* (1983) 152 CLR 570; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261.

200 Brest, "The Misconceived Quest for the Original Understanding", (1980) 60 *Boston University Law Review* 204 at 215-216; Patapan, "The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia", (1997) 25 *Federal Law Review* 211; Dawson, "Intention and the (Footnote continues on next page)

no place in constitutional elucidation. It is apt to divert the reader to the historical origins of a word rather than the word's contemporary meaning and operation. The latter are to be found from the way the provisions in question operate in their current constitutional context. Relevantly, that involves the chapter of the Constitution providing for a separate and independent judicature functionally charged with upholding the rule of law²⁰¹. In deriving the meaning of a particular provision of the Constitution, this Court should adopt the approach stated at the outset of these reasons.

221 Provisions in statutes for the conferral of jurisdiction on courts are ordinarily read to accord the broadest ambit and flexibility to the jurisdiction so provided. This is done out of recognition of the multitude of situations with which courts must typically deal²⁰². How much broader must be the construction of a constitutional grant of lawmaking power affording to the Parliament the authority to "make laws" in terms of that ample phrase "with respect to" any "matter"²⁰³? In such a context, none of the words of the grant of power should be narrowly construed.

222 Viewed from this perspective it is hardly surprising that the decisions of this Court uphold the validity of laws made by the Parliament extending the jurisdiction of federal courts over non-federal claims which can be regarded as part of a single legal controversy. The same logic which demands a recognition of the ample power afforded to the Parliament to make such laws forbids a restrictive approach when the issue is the Parliament's power to make a law effectively confining such jurisdiction to some aspects only of the parties' legal controversy.

223 Take the present case. It must be assumed that the Parliament enacted the restrictions on the jurisdiction of the Federal Court of Australia for a reason. Ostensibly, that reason was because of a conclusion that all of the grounds of judicial review, provided by the common law or by other federal laws²⁰⁴, were not appropriate to review of decisions concerning the status of a person claiming to be a refugee. The delays, uncertainties and costs attending litigation of such cases

Constitution - Whose Intent?", (1990) 6 *Australian Bar Review* 93; cf *Mills v Meeking* (1990) 169 CLR 214 at 234.

201 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J.

202 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 per Gaudron J.

203 cf *Re East; Ex parte Nguyen* (1998) 73 ALJR 140 at 156 [par 71.2]; 159 ALR 108 at 130; cf *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 577.

204 For example *Administrative Decisions (Judicial Review) Act 1977* (Cth).

have been noticed, including by this Court²⁰⁵. Those who framed and those who supported such legislation may have concluded that some applications for judicial review in this context were thinly disguised attempts to procure judicial redeterminations of the facts or the merits²⁰⁶. If that were the conclusion of the Parliament, it would be open to it to decide that such proceedings were diverting courts and the immigration process into peripheral issues of limited ultimate relevance to the true merits of the claim to refugee status in the particular case.

224 Such a conclusion might be disputed. The presence of the unremovable facility to seek constitutional review in this Court would doubtless fuel such a dispute. Yet for the bulk of cases of this kind, working their way through the various levels of first instance, tribunal and judicial review determinations, it is by no means obvious that the conclusion is constitutionally forbidden. The Parliament may, in making laws conferring rights and privileges or imposing duties and obligations, take a broad or a narrow view. That is what the exercise of legislative power involves. Subject to the Constitution, it is a privilege that is inherent in the representative character of our democracy. Neither in expounding a grant of legislative power, nor in defining its restraints, should this Court adopt a construction restrictive of the constitutional grant. The only possible warrant for such a restriction would be the existence of a word, or phrase, or an implication necessarily arising from the structure of the Constitution itself. Is that so here?

225 It is true, as Gaudron J has pointed out, that the use in the Australian Constitution of the word "matter" rather than "cases" and "controversies", as appearing in the United States Constitution²⁰⁷, suggests, on textual grounds, that "matter" has a broader meaning than a particular legal proceeding. However, that conclusion has not been in doubt since the decision of this Court in *In re Judiciary and Navigation Acts*²⁰⁸. Acceptance of that truth casts no light, in my respectful opinion, upon the suggested restriction on the grant of legislative power which would prevent the Parliament from conferring jurisdiction with respect to some criteria and withholding jurisdiction with respect to others.

205 See eg *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 579-580.

206 cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 37; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 341; Aronson and Dyer, *Judicial Review of Administrative Action* (1996) at 186-202.

207 United States Constitution, Art III, s 2(1); *Cohens v Virginia* 19 US 120 at 170 (1821); cf *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 507; *Croome v Tasmania* (1997) 191 CLR 119 at 133.

208 (1921) 29 CLR 257 at 265.

226 When one goes to the other relevant textual considerations, they speak with a single voice. They contradict the supposed limitation on the legislative power which Ms Abebe would have us read into the word "matter". The amplitude of the opening words of s 77 argues against such a limitation. The particular provisions of pars (i) and (ii) of s 77 are also incompatible with the theory of an indivisible and irreducible matter. In s 77(i) the word "defining" connotes the fixing of the bounds or limits of the jurisdiction conferred on a federal court. The word "defining" should be given its full meaning. It connotes the imposition of restrictions on the jurisdiction of the federal court in question. It does so in the context of laws made "with respect to" "matters". It contradicts the rigid indivisibility and irreducibility of the notion of a "matter" urged by Ms Abebe.

227 An even more telling indication of what the Constitution permits is found in the text of s 77(ii). The reference in that paragraph to "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"²⁰⁹ makes the constitutional purpose still clearer. The Parliament's power to make laws which confer jurisdiction extends to delineating precisely those aspects of the "matter" which are to be the subject of the conferral of jurisdiction and, by so doing, identifying those which are not. Here is an express recognition of the Parliament's power to divide a "matter" according to the "extent" which it considers to be appropriate. The express provisions of s 77(ii) throw additional light on the kind of "defining" of the jurisdiction of a federal court for which s 77(i) provides.

228 Of their nature, legal controversies commonly display several layers. Because of the delays and expense of litigation, parties frequently endeavour to confine their legal dispute in manageable ways. They may move to strike out a pleading. They may select particular issues to be fought. They may separate a question of law to be decided in advance of the trial. They may take one of the myriad interlocutory steps which are features of litigation, particularly modern complex litigation. Because legal controversies present so many potential faces, it must be accepted that drawing a line around the boundaries of the legal controversy, and defining it for constitutional purposes, presents a challenge upon which minds will easily differ. Particular aspects of the controversy may be appropriate to different treatment, before different courts according to their different jurisdictions. Different rights of appeal may be provided with respect to different decisions in relation to the matter and in respect of different parts of the conflict. To describe every part of such a legal controversy as indivisible and irreducible within the one constitutional "matter" and to insist that each and every such proceeding must, for that reason, be heard in a federal court if jurisdiction is conferred on it, is to impute a most serious inflexibility to the Constitution.

209 Emphasis added.

229 Only the clearest necessity of the text or of the structure of Ch III would justify imposing such a straitjacket on the Parliament when deciding how to "define" the jurisdiction of a federal court so as to assign to it some aspect of the legal controversy and to withhold other aspects. When the text and structure of the Constitution are examined, they do not require such a result. When the history of the Australian court system is studied, with its generally sensible interrelationship between State, territory and federal courts, it would be extraordinary to compel such an outcome. When statutory provisions for the rational assignment of legal proceedings within the Australian court system are remembered²¹⁰, the need to impose such a doctrine of indivisibility (and thereby to limit the choices open to the Parliament) is revealed as unnecessary. It is disharmonious with the interpretation of the Constitution as a facility of rational and efficient government²¹¹.

Differentiated remedies do not suggest indivisibility

230 These conclusions leave only the question of whether something beyond the word "matter" imposes a restriction on the Parliament, either because of the implications to be derived from the irremovable facility of constitutional review in this Court (provided by s 75(v) of the Constitution) or because of implications to be drawn from the character and functions of the Judicature as established by Ch III.

231 There is no incompatibility between the facility given to this Court to provide the constitutional writs against an officer of the Commonwealth²¹² and the power given to the Parliament, elsewhere in Ch III, to make laws defining the jurisdiction of a federal court, other than the High Court, in a way which falls short of the constitutional grant of jurisdiction to this Court. In the hierarchy of courts, common to the legal system which preceded the Constitution and for which it now provides, it was not at all unusual for jurisdiction and powers to be enjoyed by higher courts which other courts, lower in the hierarchy, did not enjoy. Such distinctions are a product of legal history. Indeed, they are an inescapable feature of hierarchy. Fragmentation of proceedings, concerned with what may otherwise

210 As to the *Judiciary Act* 1903 (Cth), s 40, see *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 602. As to the jurisdiction of the Federal Court under the *Trade Practices Act* 1974 (Cth), s 86, see *Fencott v Muller* (1983) 152 CLR 570. As to the pendant or "associated" jurisdiction of the Federal Court under the *Federal Court of Australia Act* 1976 (Cth), s 32(1), see *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261. As to cross-vesting legislation, see *Gould v Brown* (1998) 72 ALJR 375; 151 ALR 395.

211 cf *Flaherty v Girgis* (1985) 4 NSWLR 248 at 254.

212 s 75(v).

be notionally classified as a single legal controversy, is relatively common in our legal tradition. It may indeed be inconvenient, including to this Court, that the legal controversy between Ms Abebe, the Commonwealth and various officers of the Commonwealth is potentially divided between different courts. In addition to the two proceedings now before this Court there was even a third possible proceeding, by way of appeal to the Full Federal Court and (if special leave were granted) a further appeal to this Court. But such proceedings arise out of the different legal rights which Ms Abebe enjoyed, although all were concerned with substantially the same facts and circumstances.

232 The facility of appeal, where it exists, has never been taken as a reason to restrict or confine the availability of constitutional review provided by s 75(v) of the Constitution²¹³. Courts exercising constitutional and judicial review usually develop practical ways of avoiding the worst problems associated with fragmentation of the proceedings²¹⁴. However, the existence of such fragmentation is common. Its potential is actually increased by the advent of federation. The coincidence of the avenues of redress available to a person under s 75 of the Constitution, and under laws made pursuant to s 77, should therefore scarcely cause surprise. Still less should it occasion a suggestion of the implied constitutional incompatibility of the differentiated remedies. As is usually the case, the fragmentation may be explained simply by reference to the different laws affording different rights and privileges, imposing different duties and obligations and affording different forms of redress, sometimes in different courts.

233 The Federal Court provides the relief appropriate to the rights, privileges, duties and obligations afforded in the relevant statutory definitions of its jurisdiction. This Court, having a larger jurisdiction founded in the Constitution itself²¹⁵, is empowered to provide the constitutional remedies which belong to it. Because a "matter" presupposes a pre-existing foundation in law for the right or privilege claimed (or the duty and obligation imposed), far from being incompatible with past authority, the fragmentation complained of is an inherent

213 It should be noted that appeals lie from "judgments, decrees, orders, and sentences" and not in respect of "matters". See Constitution, s 73.

214 cf *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 214; *Ballam v Higgins* (1986) 17 IR 131 at 133 per McHugh JA; *Boral Gas (NSW) Pty Ltd v Magill* (1993) 32 NSWLR 501 at 508-512, 519, 523; *In re Preston* [1985] AC 835 at 862; *R v Paddington Valuation Officer; Ex parte Peachey Property Corporation Ltd* [1966] 1 QB 380 at 400; *R v Hillingdon London Borough Council; Ex parte Royco Homes Ltd* [1974] QB 720 at 728; *Ex parte Waldron* [1986] QB 824 at 852.

215 Constitution, s 75(v).

consequence of the dependence of every matter, and every part of a matter, upon the pre-existing law which defines its content.

Separation of powers does not require indivisibility

234 Ms Abebe next argued that the division of the "matter", and the way it was effected in this case by the Act, conflicted with the implications to be derived from the Constitution and, specifically, those arising from the creation of a Judicature in which is vested the judicial power of the Commonwealth²¹⁶. This argument had two parts. The first suggested that the fragmentation of the judicial process, inherent in the exclusion of the Federal Court from specified grounds of judicial review which would otherwise be within its jurisdiction, led to a result that was so incompatible with the character of a "federal court" (as Ch III envisaged it) as to render unconstitutional the attempt of the Parliament to confine the court's jurisdiction as it has. On this view s 77(i), when it provides for "defining the jurisdiction of any federal court", would be read so as to exclude this form of "definition" because it would be incompatible with the nature and functions of the kind of court which Ch III contemplates.

235 There can be no doubt that the power conferred on the Parliament by s 77(i) of the Constitution to define by law the jurisdiction of a federal court should be understood as one permitting the "definition" of jurisdiction in terms proper to a body which truly answers the description of a "federal court". To this extent, the limitations of the legislative power in s 77(i) derive as much from the imputed character of "federal courts", as envisaged by the Constitution, as from implications inherent in the word "matter". An attempt by the Parliament to make a law "defining" the jurisdiction of a federal court so as to include the provision of a purely advisory opinion, or the making of decisions on abstract questions divorced from any attempt to administer the law²¹⁷, would be beyond legislative power. The judicial power of the Commonwealth can thus only be exercised in "accordance with the essential attributes of the curial process"²¹⁸. This fact, and the characteristics which inhere in every "federal court", as such, undoubtedly place restrictions on the laws which the Parliament may make, including those which purport to "define" the jurisdiction of a federal court.

216 Constitution, s 71.

217 *Croome v Tasmania* (1997) 191 CLR 119 at 125, 135 citing *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 303.

218 *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607 per Deane J, 703 per Gaudron J; cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 115-116.

236 However, such restrictions are concerned (relevantly) with an attempt by the Parliament to require a federal court to do something which it may not do because of its constitutional character or an attempt to oblige it to do something which is incompatible with its constitutional independence. This point was explained in *Chu Kheng Lim v Minister for Immigration*²¹⁹. The provisions of the Act considered in that case²²⁰ purported to prohibit a court, otherwise having jurisdiction, from ordering the release from custody of "a designated person" who might be held unlawfully²²¹. This Court found that provision to be constitutionally invalid. The majority drew an important distinction in the course of explaining their reasons²²²:

"In terms, s 54R is a direction by the Parliament to the courts as to the *manner* in which they are to exercise their jurisdiction. It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, *to grant or withhold jurisdiction*. It is a quite different thing for the Parliament to purport to direct the courts as to the *manner and outcome* of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates."

237 Here, then, is the point which is critical to the provisions of Pt 8 of the Act, challenged in these proceedings. Those provisions grant certain jurisdiction to the Federal Court. They also withhold jurisdiction from the Federal Court. Specifically, they withhold jurisdiction although, by the Constitution, jurisdiction of a similar kind is granted to this Court and cannot be withdrawn from it by any law made by the Parliament. Yet within the jurisdiction so granted to the Federal Court, the Parliament has made no attempt whatever to dictate to it "the manner and outcome" of the exercise of that court's jurisdiction. It remains wholly independent. It performs functions proper to a federal court. The objection that the Parliament ought not to have granted and withheld jurisdiction in the precise manner that it has is an objection of a political or practical character. The practical implications for the work of this Court are potentially significant. But such political and practical arguments must be addressed to the Parliament not the

219 (1992) 176 CLR 1.

220 See eg the Act, s 54R (see now s 183).

221 The Act, s 54L (see now s 178).

222 (1992) 176 CLR 1 at 36-37 per Brennan, Deane and Dawson JJ. Emphasis added. Gaudron J agreed with this passage: see at 53.

Court²²³. So long as the law which it enacts offends no requirement or limitation of the Constitution and "defines" the jurisdiction of a federal court "with respect" to a "matter" within the Parliament's authority, such a law is constitutionally valid.

The suggested objection to "affirming" fails

238 Finally, during argument, a question was raised whether the limited powers conferred on the Federal Court could require it to "affirm" the legality of a decision which might not, in truth, have been lawful and which this Court, exercising its constitutional jurisdiction, might later hold to have been unlawful. Did this possibility offend the implications derived from Ch III as to the independence of federal courts? The argument was that no law made by the Parliament could impose such an embarrassing obligation on a federal court in the guise of conferring jurisdiction upon it.

239 The practical reasons for Ms Abebe's apparent lack of enthusiasm for this point are explained by Gleeson CJ and McHugh J. Nevertheless, the question having been raised, it is the duty of the Court to answer it, for it goes to the validity of the contested legislation. It is relevant to the proper disposition of the question reserved for this Court's opinion.

240 I agree that, although the phrase in question is common to other federal legislation, the use by the Act of the word "affirming"²²⁴ is unfortunate. Yet in its context, the word means no more than that the Federal Court has the power to confirm the decision of the Tribunal in so far as it possesses jurisdiction to review that decision. The word "affirming" would not be construed to effect some higher judicial approbation of the decision. This is because the Federal Court, a statutory court bound to conform to any valid law conferring jurisdiction upon it, is limited in the orders which it may lawfully make in a case of this kind. It reads too much into the word "affirming" to suggest that an order of the Federal Court, expressed in such terms, stamps the decision under review with the *imprimatur* of complete legality on every conceivable basis, whether litigated or not, whether within the jurisdiction of the Federal Court or not. Like any court order, that of the Federal Court here in question must be understood in the context, and for the purposes, of

223 cf *McCulloch v Maryland* 17 US 159 at 206 (1819); *Burton v Honan* (1952) 86 CLR 169 at 179 per Dixon CJ; *Herald and Weekly Times Ltd v The Commonwealth* (1966) 115 CLR 418 at 437; *Re Dingjan*; *Ex parte Wagner* (1995) 183 CLR 323 at 368; *Leask v The Commonwealth* (1996) 187 CLR 579 at 599.

224 See eg s 481(1).

the jurisdiction being exercised²²⁵. As that jurisdiction is confined to particular grounds of review, as envisaged by the Act, the order "affirming" would be so understood. Nothing more would be read into it.

241 The fact that, in this case, the actual order made by the Federal Court was, in terms, expressed as a "dismissal" of the appeal is not determinative of the constitutional validity of the statutory provision upon which the order rested. That provision remains to be measured against the requirements of the Australian Constitution. It is possible that the order, as made in this case, reflected a distaste felt by some judges at having to "affirm" a decision which they have reviewed, but only on specified grounds and not on others. However that may be, an order "affirming" the decision of the Tribunal amounts, in law, to nothing more than a dismissal of the application for review before the Federal Court. Orders of dismissal and affirmation are not uncommonly linked interchangeably in this context. The argument that the Act, by providing for an order "affirming" the decision of the Tribunal, imposed on the Federal Court a duty incompatible with its constitutional independence fails.

242 On this footing it is unnecessary, in disposing of the referred question, to decide any argument about the severance of the provision for "an order affirming" the decision as contained in s 481(1)(a) of the Act. The section is valid. To the extent that there was ultimately before the Court any separate question as to the validity of par (a), I would reject the challenge.

243 In light of these conclusions, it is also unnecessary to consider the Commonwealth's arguments, whether based on discretion or on the law of estoppel, to resist the consideration by the Court of the application for constitutional relief. As that application fails, no separate question arises concerning the impediments (if any) to the provision of relief.

Orders

244 The application for relief under s 75(v) of the Constitution should be dismissed. As a matter of practicality, Ms Abebe was obliged to bring those separate proceedings in this Court only because of the procedural divisions imposed upon the court system by Pt 8 of the Act. I do not believe that two costs orders should be made in favour of the Commonwealth's interests. I would therefore make no order as to the costs of the s 75(v) proceedings. In the question reserved on the amended case stated, the answer given should be: No. The plaintiff should pay the costs of the hearing in the Full Court. The proceedings should be

²²⁵ cf *Rajah Tasadduq Rasul Khan v Manik Chand* (1902) LR 30 Ind App 35 at 39 (PC); *The Commonwealth v Bank of NSW* (1949) 79 CLR 497 at 625 (PC); [1950] AC 235 at 294.

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remitted to a single Justice to be disposed of in accordance with the answer given by the Full Court.

CALLINAN J.

Facts and earlier proceedings

245 Mrs Abebe, to whom I will refer as the plaintiff, is an Ethiopian national who arrived in Australia at Sydney Airport on a flight from Johannesburg, South Africa, on 6 March 1997. As she could not produce a valid passport she was interviewed and subsequently detained by an official of the Department of Immigration and Multicultural Affairs upon arrival. The plaintiff claimed that she had travelled from South Africa on a false passport provided to her by a friend which she had destroyed during the journey. She was held, and remains in immigrant detention in Sydney.

246 On 18 March 1997, the plaintiff applied to the Department for a protection visa pursuant to s 36(2) of the *Migration Act* 1958 (Cth) ("the Act"). That application was made on the basis that the plaintiff is a non-citizen in Australia to whom this country has protection obligations pursuant to the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967.

247 Article 1A(2) of the Convention defines a refugee to be any person who:

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".

248 In her application for a protection visa, upon arrival at Sydney Airport and in an application for asylum in South Africa, the plaintiff stated the circumstances which had led her to flee from her country of origin and upon which she relied in support of her application for refugee status.

249 In doing so she made various, and some contradictory claims: that she was an ordinary member of the political party the All Amhara People's Organisation ("the AAPO"); that her husband also was a member of the AAPO and had been killed by the Ethiopian Government in 1994; that he had had his leg injured (and later amputated) in fighting the current regime; that he had been arrested and has not yet been released; that she had never been arrested or detained; and contrarily, that she was the victim of persecution and had been arrested, detained, raped and abused by guards of the current regime during that detention.

250 The plaintiff claimed a fear of persecution in Ethiopia on two grounds: for reasons of "political opinion", owing to her membership of the AAPO, and "race"; and, "membership of a particular social group": that as a social group to which she belonged, the Amhara ethnic group were subject to systematic persecution by the

Ethiopian People's Revolutionary Democratic Front, an organisation in effective control of the Ethiopian Government.

251 On 21 June 1997, a delegate of the Minister refused the plaintiff's application. The delegate referred, in so doing, to the unreliable nature of the plaintiff's inconsistent statements to immigration officials both here and in South Africa, and found that she had not been truthful in her accounts. The delegate therefore refused to accept the plaintiff's claim of a well-founded fear of harm or mistreatment if she were to return to Ethiopia. The delegate had a "positive state of disbelief"²²⁶ of the plaintiff's claims, based, in part at least, on the plaintiff's failure to mention to officials in South Africa and at Sydney Airport, that she had been imprisoned and then raped by Ethiopian police during her detention.

252 On 25 June, the plaintiff applied to the Refugee Review Tribunal for review of that decision. The application for review was heard by Mr Hardy, a member of the Tribunal, on 6 and 28 August 1997. On 3 September 1997, the Tribunal held that the plaintiff was not a refugee and affirmed the decision not to grant a protection visa. The Tribunal rejected the plaintiff's claims and accordingly held that she did not have a well-founded fear of persecution in Ethiopia within the meaning of the Convention.

253 In a statutory declaration sworn on 5 August 1997 in evidence at the Tribunal hearings, the plaintiff admitted that aspects of her evidence were not truthful and offered the explanation that she was "simply telling the officer anything that came into my head to try and get him to let me through the airport" and that "I was telling lies because I thought it would help me get through the airport and I was scared that if I didn't keep talking I would be sent straight back to South Africa". In an earlier interview with an official of the Department, the plaintiff had alleged that interpreters in South Africa did not correctly represent her claims to them. The plaintiff herself later conceded that in part, the statutory declaration was not accurate and required correction. The plaintiff by the time of the second hearing by the Tribunal had retained the services of a clinical psychologist who made a report which sought to explain and justify some of the inconsistencies in the plaintiff's various accounts of events in her home country. The Tribunal did give consideration to this report although it might not have been admissible in evidence in conventional legal proceedings²²⁷.

254 The Tribunal's conclusions are contained in the following passage:

226 *Guo Wei Rong v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 421 at 458.

227 See *Farrell v The Queen* (1998) 72 ALJR 1292 at 1299 per Kirby J, 1311-1312 per Callinan J; 155 ALR 652 at 661-662, 677-679.

"The Tribunal has considered the claims made by the Applicant at the second hearing and does not, in the context of the number of distorted claims made by the Applicant, accept her account of her husband's arrest. It follows that the Tribunal is not, in the circumstances, prepared to rely on the evidence before it as to her own.

The Tribunal considers it possible that the Applicant might have suffered some form of abuse in the past: her difficulty with the truth might be argued to be consistent with a disturbed past; however, it is not able to accept on [sic] the Applicant's evidence to the effect that she and her husband were the sole victims of a 1994 police swoop on their *small* suburban branch of the AAPO in isolation of anyone else in the branch, such as its leader and office holders, and in isolation of the kind of events that attracted such action during that year. The Tribunal concludes that the Applicant's claims about her husband still being detained are no more than a poorly-argued ambit. She did not convince the Tribunal that, for the reasons she gave, she had tried unsuccessfully to find out about him. The Applicant now has a long history, much of it admitted by her, of having told untruths. Her claims as to fear and confusion wear thin after six or seven occasions of 'clearing the slate' as it were.

It appears to the Tribunal that the Applicant's corrections of her evidence can virtually all be attributed to adjustment subsequent to discovery. This does not help her case. At no point did she draw attention to corrections of untruths ahead of their possible discovery. This is evidence of something other than good faith on her part.

The Tribunal finds the Applicant an unreliable witness in this matter. Her claims in relation to 'political opinion' are unsuccessful.

However, the Tribunal is prepared to accept that the Applicant is an Amhara and notes her claims to the effect that the Amhara are disliked by the current government and suffer discrimination. Nevertheless, the Tribunal considers the above-cited ([Department of Foreign Affairs and Trade] and other) information as to the circumstances of the Amhara in Ethiopia to negate her claims as to the existence of a real chance of persecution for reasons of her membership of this particular social ethnic group.

On the evidence, the Tribunal is not satisfied that the Applicant faces a real chance of Convention-related persecution in Ethiopia." (emphasis in original)

255 The plaintiff filed in the Federal Court of Australia an application to review the decision of the Tribunal. That application was made pursuant to s 476 of the Act and was heard by Davies J on 11 December 1997. His Honour held that there was no reviewable error pursuant to s 476(1)(a), (d) or (e) of the Act in the

Tribunal's decision. His Honour declined to entertain that part of the plaintiff's application raising matters which were, by s 475(2)(a) and (b) of the Act, declared to be unavailable as grounds upon which the Federal Court might review a decision of the Refugee Review Tribunal.

256 It is convenient to set out at this point, the provisions of s 476 of the Act which state the grounds upon which an application for review may be made:

"(1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

- (a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;
- (b) that the person who purported to make the decision did not have jurisdiction to make the decision;
- (c) that the decision was not authorised by this Act or the regulations;
- (d) that the decision was an improper exercise of the power conferred by this Act or the regulations;
- (e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;
- (f) that the decision was induced or affected by fraud or by actual bias;
- (g) that there was no evidence or other material to justify the making of the decision."

257 Sub-sections (2) and (3) of s 476 then expressly exclude grounds upon which reliance might otherwise be sought to be placed:

"(2) The following are not grounds upon which an application may be made under subsection (1):

- (a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

- (b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

(3) The reference in paragraph (1)(d) to an improper exercise of a power is to be construed as being a reference to:

- (a) an exercise of a power for a purpose other than a purpose for which the power is conferred; and
- (b) an exercise of a personal discretionary power at the direction or behest of another person; and
- (c) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

but not as including a reference to:

- (d) taking an irrelevant consideration into account in the exercise of a power; or
- (e) failing to take a relevant consideration into account in the exercise of a power; or
- (f) an exercise of a discretionary power in bad faith; or
- (g) any other exercise of the power in such a way that represents an abuse of the power that is not covered by paragraphs (a) to (c)."

258 Davies J examined the Tribunal's decision on the basis that the Court's task, pursuant to s 476 of the Act, was to ascertain whether there was an error of law in the Tribunal's decision, as opposed to the making of a review of the merits, or any entry upon a reconsideration of factual matters. His Honour said of the decision made by the Tribunal:

"The substance of the case as put by the counsel for the applicant was based upon the allegation that the applicant had been detained and held in prison for two months by soldiers and had been repeatedly raped and abused during that period. Counsel submitted that the Tribunal erred by reaching a conclusion adverse to the applicant as there was no finding that that did not occur. It seems to me, however, that the Tribunal did not accept that evidence and that the Tribunal made that clear. The Tribunal certainly considered it possible that the applicant might have suffered some form of abuse in the past and that her difficulty with the truth may be consistent with a disturbed past. However, the Tribunal did not accept that such abuse had occurred as a result of her arrest by government soldiers, that she had been arrested

because she had been a member of AAPO or that the mistreatment of which she complained was attributable either to her membership of AAPO or to her ethnicity."

The proceedings in the High Court

259 On 22 December 1997 the plaintiff commenced proceedings for prerogative relief in this Court against the Tribunal and the Minister, pursuant to s 75(v) of the Constitution.

260 On 28 January 1998, Gummow J ordered that the application for prerogative relief be, pursuant to O 55 r 2 of the High Court Rules, made by notice of motion to a Full Court of this Court. That notice of motion was filed and served on 27 February 1998. Gummow J further ordered, on 24 August 1998, that the following question be reserved for the determination of the Full Court:

"Are sections 476(2), (3) and section 485 of the *Migration Act* 1958 beyond the legislative competence of the Commonwealth Parliament?"

261 Subsequently a larger question for consideration by the Court was substituted:

"In their application to the review by the Federal Court of Australia of decisions of the Refugee Review Tribunal, when that Tribunal is reviewing decisions of the nature referred to in section 411(1)(c) of the *Migration Act* 1958 (Cth), are the provisions of Part 8 of that Act (or any of them) outside the legislative powers of the Commonwealth?"

262 The sections to be considered need to be placed in context. Section 65 specifies the matters of which the Minister must be satisfied for the issue of a visa. In their absence, the Minister is to refuse to grant a visa. The Minister may delegate the making of the relevant decision²²⁸. Section 411(1)(c) provides that a decision to refuse to grant a protection visa is a decision that may be reviewed by the Refugee Review Tribunal.

263 Section 412 sets out the procedures and periods for the making of an application for review. By s 414, the Tribunal is obliged to review a decision to refuse a visa, save for a decision in respect of which the Minister has issued a conclusive certificate pursuant to s 411(3). Section 415 confers upon the Tribunal

228 Section 496(1) provides:

"The Minister may, by writing signed by him or her, delegate to a person any of the Minister's powers under this Act."

a power to reverse or affirm the decision, to make a new decision or to remit the matter for reconsideration.

264 Because counsel for the plaintiff places reliance on it, I set out s 420 in full:

"(1) The Tribunal, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) must act according to substantial justice and the merits of the case."

265 An oral hearing will only be necessary if, on a consideration of the papers filed by the parties, the Refugee Review Tribunal is not prepared to make the decision or recommendation most favourable to the applicant (ss 424 and 425).

266 The Principal Member of the Refugee Review Tribunal may refer a decision raising an important principle or issue, or a matter of general application, to the President of the Administrative Appeals Tribunal, who may accept such a referral (ss 443 and 444).

267 Section 475 provides that a decision of the Refugee Review Tribunal is a judicially reviewable decision, and s 476, which I have already quoted, prescribes the available grounds of review. Those grounds mirror some of the grounds of review for which the *Administrative Decisions (Judicial Review) Act 1977* (Cth) provides but fall well short of the latter in their breadth and totality. The Federal Court is given, by s 481, extensive powers of dealing with the decision if any of the available grounds are made out:

"(1) On an application for review of a judicially-reviewable decision, the Federal Court may, in its discretion, make all or any of the following orders:

(a) an order affirming, quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or such earlier date as the Court specifies;

(b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit;

(c) an order declaring the rights of the parties in respect of any matter to which the decision relates;

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- (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Federal Court considers necessary to do justice between the parties.

(2) On an application for a review in respect of a failure to make a judicially-reviewable decision, or in respect of a failure to make a decision within the period within which the decision was required to be made, the Federal Court may make any or all of the following orders:

- (a) an order directing the making of the decision;
- (b) an order declaring the rights of the parties in respect of any matter to which the decision relates;
- (c) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Federal Court considers necessary to do justice between the parties.

(3) The Federal Court may, at any time, of its own motion or on the application of any party, revoke, vary, or suspend the operation of, any order made by it under this section."

268 Section 485 confines the jurisdiction of the Federal Court to the jurisdiction expressly conferred by Pt 8 of the Act and s 486 is in these terms:

"The Federal Court has jurisdiction with respect to judicially-reviewable decisions and that jurisdiction is exclusive of the jurisdiction of all other courts other than the jurisdiction of the High Court under section 75 of the Constitution."

269 The plaintiff's principal submission was that apart from the instances referred to by Kirby J in *Gould v Brown*²²⁹, conferral of original jurisdiction upon any federal court under s 77(i) of the Constitution may only be with respect to

229 (1998) 72 ALJR 375 at 451; 151 ALR 395 at 496-497.

"matters" as referred to in ss 75 and 76²³⁰ of the Constitution. In argument, the plaintiff developed this submission by arguing that although the legislature might define the "matter" for consideration by a member or officer of the executive, or a delegate, or any other original decision maker, narrowly or broadly, the matter for decision once so defined must remain intact and complete, in the sense that all issues that might have been relevant at the first level of decision making must remain as issues for decision at any subsequent level of review or appeal, especially the Federal Court, as a court created pursuant to Ch III of the Constitution. (This limb of the plaintiff's argument was confined to the jurisdiction of a federal tribunal or court other than the High Court.)

230 Sections 75, 76 and 77(i) provide:

"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:
- (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".

270 Counsel for the plaintiff relied upon a passage in the judgment of Mason, Brennan and Deane JJ in *Stack v Coast Securities (No 9) Pty Ltd*²³¹:

"[T]he content of a 'matter' in s 76 and ... the scope of federal jurisdiction in a proceeding are not restricted to the determination of the federal claim or cause of action in the proceeding, but extend beyond that to the litigious or justiciable controversy between parties of which the federal claim or cause of action forms part."

271 Reliance was also placed on a statement to a similar effect of Gibbs CJ²³² in which his Honour said that it had been held in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*²³³ and *Fencott v Muller*²³⁴ that "when jurisdiction is conferred on the Federal Court with respect to a matter, that Court has jurisdiction to determine all the questions which form part of that matter".

272 The plaintiff contended that in identifying a matter within the meaning of s 76(ii), it is erroneous to exclude a substantial part of what is a single justiciable controversy and effectively to preclude thereby the exercise of judicial power to determine the whole of that controversy²³⁵. This submission, if correct, could have very far reaching ramifications for many federal statutory and specialist tribunals whose decisions may be subject to review, or to appeal upon grounds more limited than those in issue at first instance²³⁶.

273 The Federal Court is a court created by the Parliament pursuant to s 71 of the Constitution. Section 71 itself does not by its language suggest that a court created pursuant to it must have unlimited federal jurisdiction, or any particular quantum of federal jurisdiction. It is the jurisdiction of the High Court only that Ch III of the Constitution expressly defines and which cannot be legislatively truncated.

231 (1983) 154 CLR 261 at 290.

232 (1983) 154 CLR 261 at 278.

233 (1981) 148 CLR 457.

234 (1983) 152 CLR 570.

235 *Fencott v Muller* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 282 per Gibbs CJ.

236 The grounds available for review generally of a decision by a member of the executive progressively shrink at each ascending level pursuant to ss 5 and 6 of the *Administrative Decisions (Judicial Review) Act*. The latter confine the issues for determination by the Federal Court to issues of law only: see for example s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth).

The Commonwealth legislature can confer upon other federal courts jurisdiction in various forms and quantities: in short, as s 77(i) states, it may define that jurisdiction.

274 Gibbs CJ in *Stack* said²³⁷:

"Under the Constitution, the jurisdiction of a federal court can be defined only by an Act of the Parliament, and the jurisdiction so defined can be as wide as, or narrower than, (but not of course wider than) the matters mentioned in ss 75 and 76."

275 Some reliance was placed by the plaintiff upon the reasoning of this Court in *O'Toole v Charles David Pty Ltd*²³⁸ in which it was unanimously held that in proceedings for the enforcement of an award, the presence of the privative clause could not operate to prevent the Federal Court from considering the constitutional validity of the award. Attention was focussed upon s 5 of the *Commonwealth of Australia Constitution Act* 1900 (UK) by the Court in that case. But that case decides what is self-evidently correct: that that section operates to ensure that no body, that is to say, no person, corporation, tribunal or court may apply or act upon a law which lacks constitutional validity²³⁹. Here, Pt 8 of the Act does not purport to direct or require the Federal Court or anyone else to defy the Constitution or act otherwise than in accordance with it.

276 For the purposes of ss 75-77 of the Constitution, the term "matter" means the subject matter for determination in a legal proceeding²⁴⁰, and not necessarily the legal proceeding itself in exactly the form in which it was first presented. And, as Griffith CJ said in *South Australia v Victoria*²⁴¹, a matter must be such that it can be determined on principles of law.

277 The cases which held or affirmed that the Federal Court possessed accrued jurisdiction in respect of cases brought under the *Trade Practices Act* 1974 (Cth)²⁴²

237 (1983) 154 CLR 261 at 281.

238 (1991) 171 CLR 232.

239 (1991) 171 CLR 232 at 250-252 per Mason CJ, 272-273 per Brennan J, 307-308 per Dawson J (with whom Toohey J agreed).

240 See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-266; see also *Croome v Tasmania* (1997) 191 CLR 119.

241 (1911) 12 CLR 667 at 675.

242 See *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570; *Stack v Coast Securities (No 9) Pty Ltd* (1983) (Footnote continues on next page)

in order to enable that Court to determine completely a "matter" within ss 75 and 76 do not establish that jurisdiction may only be conferred on a federal court in relation to all matters in controversy at the inception of the process in respect of which either a review or an appeal is made available by statute. Those cases effectively hold no more than that the Federal Court has a jurisdiction no wider or greater than a jurisdiction to decide such non-federal claims as are inseparable from federal claims based upon the same factual situations. There is no reason why Parliament, within power, may not reduce or take away rights earlier conferred. As Brennan CJ and McHugh J said in *Kartinyeri v The Commonwealth*²⁴³, the power to make laws includes the power to unmake them. Here, the Parliament gave entrants to Australia (by the adoption of the Convention and the passage of Pt 8 of the Act) certain rights in respect of what would otherwise be matters for the executive exclusively, rights which extended to recourse to the Federal Court. It follows, as the plaintiff was bound to concede, that had no provision been made for the creation of these rights then the decision of the Minister would have been conclusive.

278 Legislation made under the Constitution cannot determine its interpretation, but an examination of the legal consequences of the invalidation or validation of that legislation may assist in the search for the intended operation of a constitutional provision. Section 44 of the *Judiciary Act* 1903 (Cth) expressly contemplates that the High Court may remit "any part" of a matter before it to a lower court. Section 2 of that Act contains a statutory definition of "matter" for the purposes of that Act. *Newcrest Mining (WA) Ltd v The Commonwealth*²⁴⁴ is an example of such a remittal. The legislature assumed that pursuant to s 44 it is possible for a court (including a federal court) to exercise jurisdiction in relation to a part of a "matter" falling within ss 75 or 76 of the Constitution. In my opinion that assumption is correct. Were s 44 to be invalidated such a remitter would not be possible.

279 If a matter arises under a law (within power) made by the Parliament, the scope of the matter is to be ascertained by reference to the statute which creates the right or duty and confers jurisdiction on the Court to enforce it. The content of the matter will depend on the terms of the relevant law under which the matter arises. Any issue which is declared not justiciable by that law will not form part

154 CLR 261; cf in relation to State courts exercising federal jurisdiction *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457.

243 (1998) 72 ALJR 722 at 729; 152 ALR 540 at 549.

244 (1997) 190 CLR 513 at 590.

of the matter as defined by s 76(ii). As Gummow J observed in *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation*²⁴⁵:

"It may be that with respect to matters which arise under a law made by the Parliament, it is for the Parliament to create the rights or obligations in question and in so doing to determine the content of matters arising under that law. In other words, the rights and obligations, which supply the foundation for the controversy which is the 'matter', would be provided by the statute. The statute itself thus would govern the content of that matter".

280 Thus "[a] matter arising under a law made by the Parliament referred to in s 76(ii) of the Constitution is that which is specified, or indicated, as a justiciable subject matter by the law defining the jurisdiction of the court"²⁴⁶. The same provision can both create a right in respect of which a matter may arise, and invest a court with jurisdiction in that matter; "[a] right is created by the provision that a court may make an order, and such a provision also gives jurisdiction to the court to make the order."²⁴⁷

281 The submissions of the plaintiff that the Federal Court was wrongly deprived of a jurisdiction to decide a "matter" within the meaning of that term as used in Ch III of the Constitution because a matter must remain unfragmented as to all issues when it comes to be reviewed by a federal court must be rejected.

282 I would also reject the plaintiff's proposition that s 476 in its current form requires the Federal Court to exercise its powers in a manner inconsistent with the essential character of a court. It was put that a statutory provision which seeks to preclude the determination by a federal court of matters in controversy constitutes an impermissible intrusion into the exercise of judicial power. In support of that contention, counsel for the plaintiff referred to a passage from the judgment of Mason CJ in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*²⁴⁸:

245 (1988) 82 ALR 175 at 181. See also *O'Toole v Charles David Pty Ltd* (1989) 90 ALR 112 at 136 per Northrop J, 158-159 per Gummow J (with whom Bowen CJ and Morling J agreed).

246 *West Australian Psychiatric Nurses' Association v Australian Nursing Federation* (1991) 30 FCR 120 at 123 per Lee J.

247 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 155 per Latham CJ; see also at 168 per Dixon J.

248 (1995) 183 CLR 168 at 185.

"[A] statutory provision which attempts to preclude the determination by a federal court of facts in controversy constitutes an impermissible intrusion into the exercise of judicial power."

283 By the time the "matter" comes to the Federal Court, the facts are no longer in controversy. The facts are those that have been found by the Refugee Review Tribunal. The controversy, as a "matter", by the time that it comes before the Federal Court, is as defined by such grounds as the plaintiff is able to invoke, and as s 476 of the Act makes available, and falls to be resolved on the factual findings made below.

284 As to the argument that s 476 should be read as subject to s 420 of the Act, I would hold that the very general provisions of s 420(1) cannot operate to alter the clear meaning of the very specific provisions of s 476 which are intended to state, and do clearly state and limit with precision, the grounds upon which those proceedings may be reviewed. In short the imposition of an obligation upon the Tribunal pursuant to s 420(1) to conduct its proceedings in a certain way cannot enlarge the grounds prescribed by s 476 for review in another place, the Federal Court, of the decision of the Tribunal.

285 In arguing that s 481(1) of the Act was beyond the legislative power of the Parliament, the plaintiff fixed upon the word "affirming" in s 481(1) of the Act.

286 The argument proceeded upon the basis that if a decision of the Refugee Review Tribunal was flawed, for reasons which s 476 excluded from consideration by the Federal Court but which would otherwise ground relief which could be granted by the High Court in the exercise of its prerogative jurisdiction, were the Federal Court to "affirm" that decision, that Court might be seen to be legitimising judicially activities of the executive branch of the government that were unlawful. The short answer to this argument is that Davies J in the Federal Court did not, in terms, "affirm" the decision of the Refugee Review Tribunal. His Honour's conclusion was expressed in this way:

"In these circumstances, I am not satisfied that there was any error in the Tribunal's decision and, in particular, I am not satisfied that there was any error which this Court would have jurisdiction to correct. For those reasons the application must be dismissed with costs."

287 Words should not be read into his Honour's explicit conclusion. He did not "affirm" the decision of the Tribunal. He dismissed the application.

288 A further answer is that, simply because a court may dismiss an application which perhaps it might not dismiss if its powers to deal with the application were unlimited, or even were of the very broad kind customarily exercised by an appellate court conducting a rehearing, does not mean that the court in dismissing

the application is affirming the objective correctness in all respects of the decision under review.

289 The meaning of the word "affirming" in s 481(1) of the Act should in any event be taken to be no more than the abstaining from interference with the decision of the Refugee Review Tribunal. Accordingly the use of the word "affirming" does not, as argued by the plaintiff, involve any breach of the doctrine of the separation of powers.

The application for prerogative relief

290 I now turn to the application for prerogative relief pursuant to s 75(v) of the Constitution.

291 This application is based upon grounds of the kind which the Federal Court, in reviewing a decision of the Refugee Review Tribunal, is not entitled to entertain, by reason of ss 476(2) and 476(3)(d) and (e). Davies J in the Federal Court declined to entertain the application for review insofar as it relied on those grounds and, as I have held, correctly so. The High Court's jurisdiction however is relevantly governed only by the Constitution so that if the plaintiff can make out a case for prerogative relief, (subject only to discretionary considerations) she must have that relief.

292 The plaintiff submitted that the statements which she made in Australia as to the events which caused her to flee Ethiopia and seek refugee status were consistently to the same effect: that essentially she held well-founded fears of the kind to which the Convention referred, of persecution because of her membership of the AAPO, and membership of the Amhara ethnic group, in consequence of either, or both of which, she had been arrested, raped and held in custody for more than two months.

293 The submissions were made as if the proceedings before the delegate and the Tribunal were almost exclusively of an adversarial and not of an investigative kind and that her allegations of rape were either not, or not sufficiently challenged in those proceedings.

294 The plaintiff submitted that the failure by the Tribunal to challenge these matters involved a failure to comply with s 420(1) of the Act: that for the Tribunal to disbelieve her without expressly putting these matters to her, and to make no assertion to her that her statement that she had been raped was false, was to fail to accord her natural justice.

295 There are two answers to this submission. One is that the Tribunal in undertaking its essentially investigative function is not obliged to put, as an adversary in adversarial proceedings might be bound to do, in respect of each and every key matter, an assertion of apparent falsity or unreliability. Secondly,

examination of the proceedings before the Tribunal shows that the member who constituted it made plain in a number of ways, and at numerous times, that the plaintiff's reliability on all matters was of great importance to the final matter which he had to decide.

296 Undoubtedly rape would be an act of oppression or persecution of the kind contemplated by the Convention if it occurred in relation to a victim's political or ethnic affiliations or membership. But an examination of the Tribunal's approach to this matter and decision generally do not suggest that the Tribunal was of any different opinion. What the Tribunal was concerned to do, and did not improperly or inadequately do, was to try to establish whether what the plaintiff stated, both as to matters of detail and generally, was accurate. In the end the Tribunal formed the view that the plaintiff was unreliable and that the plaintiff did not genuinely hold a well-founded fear (whether by reason of rape or otherwise) of persecution within the meaning of the Convention.

297 The plaintiff also submitted that the Tribunal failed to take into account a relevant consideration. The relevant consideration was said to be that the plaintiff had been raped by State officials while in detention because of her political affiliations and racial background. If however there was no rape, as the Tribunal effectively found, that matter did not arise.

298 A related submission was that the decision was manifestly unreasonable in the sense in which that concept is developed in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*²⁴⁹, because the Tribunal in reaching it failed to investigate an essential aspect of the plaintiff's claim, that is, the genuineness of the claim of rape and the circumstances surrounding it. That submission is met with the same answer as the previous one. The Tribunal did, but largely at the plaintiff's invitation, characterize the central element of the plaintiff's contentions as abuse whilst in detention. If there had been no detention, then abuse during it could not have occurred, or, alternatively, absent detention, possible abuse would be unrelated to any Convention ground and would therefore be irrelevant²⁵⁰.

249 [1948] 1 KB 223.

250 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 570-571; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 240-241 per Dawson J, 257-258 per McHugh J.

299 Finally, on this limb of the plaintiff's argument, even if it were possible to
find differences between the evidence and the complexion put upon it by the
Tribunal, no reviewable error of law was established²⁵¹.

300 Only one other matter need be mentioned. The plaintiff did not appeal as she
might have done from the decision of the Federal Court to the Full Court of the
Federal Court²⁵². Although the point was not fully articulated by the respondent,
it was at least suggested that there was an issue estoppel, or what is sometimes
described as an *Anshun* type estoppel²⁵³ precluding the plaintiff from pursuing any
separate remedies in this Court. Although it is open to doubt whether such an
estoppel can arise in relation to the exercise of the judicial power of this Court
pursuant to s 75(v) of the Constitution, to the extent that discretionary
considerations may be relevant to the grant of any prerogative or injunctive relief
sought pursuant to that sub-section of the Constitution, that consideration would
certainly be relevant.

301 However it is unnecessary to pursue that matter as the plaintiff has not made
out a case for prerogative or other relief.

302 I would dismiss the notice of motion with costs and order that the substituted
reserved question be answered "no". The plaintiff should also pay the respondent's
costs of and incidental to the reserved question.

251 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356 per Mason CJ.

252 *Federal Court of Australia Act* 1976 (Cth), s 24.

253 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.