

# HIGH COURT OF AUSTRALIA

GAUDRON J

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PCS OPERATIONS PTY LTD & ORS

APPLICANTS

AND

MARITIME UNION OF AUSTRALIA & ORS

RESPONDENTS

*PCS Operations Pty Ltd v Maritime Union of Australia;  
Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd; Ex parte  
Attorney-General for the Commonwealth;  
Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia  
(M24-1998) [1998] HCA 29  
Date of Order: 17 April 1998  
Date of Publication of Reasons: 21 April 1998*

## ORDER

*Application dismissed with costs.*

### **Representation:**

N J Young QC with P M Tate for the applicants (instructed by  
Minter Ellison)

K H Bell QC for the first and second respondents (instructed by  
Maurice Blackburn & Co)

R W Gotterson QC for the seventh to nineteenth respondents (instructed by  
Freehill Hollingdale and Page)

J E Murdoch for the twentieth and twenty-second respondents (instructed by  
Blake Dawson Waldron)



2.

A M Pomeranke for the twenty-first respondent (instructed by Arthur Robinson and Hedderwicks)

W A Harris for the twenty-third and twenty-fourth respondents (instructed by Dunhill Madden Butler)

(No appearance for the third to sixth respondents)

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

GAUDRON J

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MARITIME UNION OF AUSTRALIA & ORS

APPLICANTS

AND

PATRICK STEVEDORES NO 1 PTY LTD & ORS

RESPONDENTS

EX PARTE THE HONOURABLE DARYL WILLIAMS,  
ATTORNEY-GENERAL FOR THE COMMONWEALTH

*Date of Order: 17 April 1998*

*Date of Publication of Reasons: 21 April 1998*  
M25/1998

## ORDER

1. *The whole of Federal Court of Australia Matter No VG 152 of 1998 be removed into this Court pursuant to section 40(1) of the Judiciary Act 1903 (Cth).*
2. *Federal Court of Australia Matter No VG 152 of 1998 be remitted to that Court save for the following question:*

*Are s 4(1) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic) and s 9 of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) invalid in their application to the cause of action for inducing breach of contract pleaded in paragraphs 136 to 139 inclusive of the Applicants' Statement of Claim in the Federal Court?*

3. *Costs of this application to abide the outcome of the proceedings in this Court.*



**Representation:**

K H Bell QC for the first and second applicants (instructed by Maurice Blackburn & Co)

R W Gotterson QC for the fifth to seventeenth respondents (instructed by Freehill Hollingdale and Page)

J E Murdoch for the eighteenth and twentieth respondents (instructed by Blake Dawson Waldron)

A M Pomerence for the nineteenth respondent (instructed by Arthur Robinson and Hedderwicks)

N J Young QC with P M Tate for the twenty-second to twenty-seventh respondents (instructed by Minter Ellison)

W A Harris for the twenty-eighth and twenty-ninth respondents (instructed by Dunhill Madden Butler)

G Griffith QC with W A Harris for the Attorney-General for the Commonwealth (instructed by Dunhill Madden Butler)

(No appearance for the first to fourth and the twenty-first respondents)

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# HIGH COURT OF AUSTRALIA

GAUDRON J

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PATRICK STEVEDORES OPERATIONS NO 2  
PTY LTD & ORS

APPLICANTS

AND

MARITIME UNION OF AUSTRALIA & ORS

RESPONDENTS

*Date of Order: 17 April 1998*  
*Date of Publication of Reasons: 21 April 1998*  
B7/1998

## ORDER

*Application dismissed with costs.*

### **Representation:**

R W Gotterson QC for the applicants (instructed by Freehill Hollingdale and Page)

K H Bell QC for the first and second respondents (instructed by Maurice Blackburn & Co)

J E Murdoch for the seventh and ninth respondents (instructed by Blake Dawson Waldron)

A M Pomerence for the eighth respondent (instructed by Arthur Robinson and Hedderwicks)

N J Young QC with P M Tate for the eleventh to sixteenth respondents (instructed by Minter Ellison)



2.

W A Harris for the seventeenth and eighteenth respondents (instructed by Dunhill Madden Butler)

(No appearance for the third to sixth and the tenth respondents)

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## **CATCHWORDS**

PCS Operations Pty Ltd & Ors v Maritime Union of Australia & Ors

Maritime Union of Australia & Ors v Patrick Stevedores No 1 Pty Ltd & Ors;  
Ex parte the Honourable Daryl Williams, Attorney-General for the  
Commonwealth

Patrick Stevedores Operations No 2 Pty Ltd & Ors v Maritime Union of Australia  
& Ors

High Court – Removal – Whether matter arising under the Constitution or involving its interpretation.

Constitutional Law – Federal Court – Jurisdiction.

The Constitution, ss 75, 76, 77.

*Federal Court of Australia Act 1976 (Cth), s 32.*

*Judiciary Act 1903 (Cth), s 40(1).*

*Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth), s 9.*

*Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic), s 4.*



1 GAUDRON J. These applications under s 40(1) of the *Judiciary Act* 1903 (Cth) were heard in Brisbane on 17 April 1998. They concern proceedings in the Federal Court of Australia between, on the one hand, the Maritime Union of Australia ("MUA") and three of its members who sue in a representative capacity (collectively, "the MUA parties"), and, on the other hand, Patrick Stevedores No 1 Pty Ltd and other companies and individuals associated with that company (collectively, "the Patrick parties"), the National Farmers Federation ("NFF") and companies and individuals associated with the NFF (collectively, "the NFF parties") and the Commonwealth of Australia and the Honourable Peter Keaston Reith, the Minister for Workplace Relations and Small Business (collectively, "the Commonwealth parties"). The proceedings arise out of a dispute in the stevedoring industry.

2 In the Federal Court proceedings, the MUA parties allege, and seek various remedies for, breaches of the Stevedoring Industry Award 1991, breach of the Patrick-Melbourne Enterprise Agreement 1996, breach of certain contracts of employment, contravention of the *Workplace Relations Act* 1996 (Cth) and contraventions of the Corporations Law. Those allegations are made against some of the Patrick parties, but not others. They are not made against any of the NFF or Commonwealth parties. It is not in issue that, to the extent that the proceedings involve the breaches and contraventions thus alleged, they are within the jurisdiction of the Federal Court.

3 As well as alleging the various breaches and contraventions set out above, the proceedings in the Federal Court involve two common law causes of action for conspiracy, it being alleged, respectively, that the Patrick parties, the NFF parties and the Commonwealth parties conspired together to injure the MUA and various of its members and, also, that they conspired to injure them by unlawful means. So far as concerns those two causes of action, the MUA pleads the various breaches and contraventions to which reference has already been made as overt acts in the first conspiracy and as the unlawful means involved in the second. The MUA parties have also pleaded that the Patrick parties and the NFF parties induced certain of the Patrick parties to breach contracts of employment with the MUA members on whose behalf the proceedings were brought. That cause of action is not pleaded against either of the Commonwealth parties.

4 It is contended by the applicants that a question arises as to the jurisdiction of the Federal Court to entertain the causes of action for conspiracy and for inducing breach of contract. It is further said that that is a question arising under the Constitution or involving its interpretation and, thus, the proceedings should be removed into this Court pursuant to s 40(1) of the *Judiciary Act*. That sub-section confers a right on parties to apply for the removal of proceedings and a right on an Attorney-General to have proceedings removed into this Court in these terms:

" Any cause or part of a cause arising under the Constitution or involving its interpretation that is at any time pending in a federal court other than the High Court or in a court of a State or Territory may, at any stage of the proceedings before final judgment, be removed into the High Court under an order of the High Court, which may, upon application of a party for sufficient cause shown, be made on such terms as the Court thinks fit, and shall be made as of course upon application by or on behalf of the Attorney-General of the Commonwealth, the Attorney-General of a State, the Attorney-General of the Australian Capital Territory or the Attorney-General of the Northern Territory."

5 To understand the contentions of the applicants, it is necessary to say something of the sources of the Federal Court's jurisdiction. In general terms, there are three distinct sources of jurisdiction. The first is specific statutory provision, such as that which confers jurisdiction with respect to the claimed breaches of Award and contravention of the *Workplace Relations Act*<sup>1</sup>. It is well settled that that jurisdiction may extend to the determination of the entire matter or controversy and, thus, include non-federal claims which involve the same transactions and facts<sup>2</sup>. However, it does not extend to "a 'completely disparate claim constituting in substance a separate proceeding' ..., a non-federal matter which is 'completely separate and distinct from the matter which attracted federal jurisdiction' ... or 'some distinct and unrelated non-federal claim'"<sup>3</sup>.

6 The second source of jurisdiction is s 32(1) of the *Federal Court of Australia Act* 1976 (Cth) ("the Federal Court Act"). That sub-section confers additional jurisdiction in these terms:

" To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked."

In *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*, Barwick CJ expressed the view that "the word 'associated' [in s 32] embraces matters which

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1 See, for example, s 412(1) of the *Workplace Relations Act*.

2 See *Fencott v Muller* (1983) 152 CLR 570 at 607 per Mason, Murphy, Brennan and Deane JJ.

3 *Fencott v Muller* (1983) 152 CLR 570 at 607-608 referring to *Felton v Mulligan* (1971) 124 CLR 367 at 373 per Barwick CJ, *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 521 per Murphy J, *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 482 per Stephen, Mason, Aickin and Wilson JJ.

3.

may be disparate from each other"<sup>4</sup>, a view which is implicit in other judgments in that case<sup>5</sup>.

7 The third source of jurisdiction is to be found in cross-vesting legislation. For present purposes, it is sufficient to refer to the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Vic) and the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) (collectively, "the Cross-vesting Acts"). Subject to an exception which is not presently relevant, s 4(1) of the former Act, which has counterparts in each of the other States, provides:

" The Federal Court has and may exercise original and appellate jurisdiction with respect to State matters."<sup>6</sup>

And s 9(2) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) relevantly provides:

" The Federal Court ... may:  
(a) exercise jurisdiction (whether original or appellate) conferred on that court by a provision ... of a law of a State relating to cross-vesting of jurisdiction; ..."

8 The three sources of the Federal Court's jurisdiction so mesh together that its jurisdiction to hear and determine the causes of action for conspiracy and for inducing breach of contract can be challenged only by challenging all three. That challenge is made by the NFF parties, but not, apparently, by any of the Patrick or Commonwealth parties<sup>7</sup>. The precise details of that challenge emerged only in this Court, no attempt having been made to obtain any ruling by the Federal Court on any of the issues thus raised. That is significant because of the nature of the exercise involved in determining whether the various claims are part of the one

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4 (1981) 148 CLR 457 at 476.

5 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 494-495 per Gibbs J, 518 per Mason J, 521-522 per Murphy J.

6 "State matter" is defined in s 3 of that Act to mean, inter alia, a matter "in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State".

7 Counsel for the Patrick parties who are the applicants in Matter No B7 of 1998 informed the Court that he had no instructions on this matter, as did counsel for the Commonwealth. Counsel for the Attorney-General for the Commonwealth was not able to indicate what position would be taken by the Attorney-General if the matter were removed into this Court or, even, whether the Attorney-General would intervene in the proceedings pursuant to s 78A of the *Judiciary Act*.

matter and, thus, within jurisdiction in accordance with the principles in *Fencott v Muller*<sup>8</sup> and, if not, whether they are "associated" matters for the purposes of s 32(1) of the Federal Court Act.

- 9 It was said by Mason, Murphy, Brennan and Deane JJ in *Fencott v Muller* that "[w]hat is and what is not part of the one controversy depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships"<sup>9</sup>. Their Honours added:

"The scope of a controversy which constitutes a matter is not ascertained merely by reference to the proceedings which a party may institute, but may be illuminated by the conduct of those proceedings and especially by the pleadings in which the issues in controversy are defined and the claims for relief are set out. But in the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter."<sup>10</sup>

- 10 The question whether different claims constitute a single matter is clearly a question arising under ss 75, 76 and 77 of the Constitution or involving the interpretation of those provisions. Since *Fencott v Muller*<sup>11</sup>, however, that is not a question that involves any contentious question of principle. Rather, it is simply a question of "practical judgment" and one which should be determined, at least in the first instance, by the Federal Court. So, too, is the question whether a federal matter is associated with another federal matter for the purposes of s 32(1) of the Federal Court Act.

- 11 The causes of action for conspiracy are pleaded against the Patrick interests, the NFF parties and the Commonwealth parties and, if they constitute disparate claims, they are matters "[i]n which the Commonwealth, or a person ... being sued on behalf of the Commonwealth, is a party" and are, thus, federal matters within s 75(iii) of the Constitution. It was contended on behalf of the NFF interests that, so far as jurisdiction is concerned, it is not merely a question of practical judgment whether the conspiracy claims are associated with the alleged breaches and contraventions earlier referred to. Rather, it was put, by reference to a statement

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8 (1983) 152 CLR 570.

9 (1983) 152 CLR 570 at 608.

10 (1983) 152 CLR 570 at 608.

11 (1983) 152 CLR 570.

by Gibbs J in *Philip Morris*, that s 32(1) has no application because it applies only to "matters which arise under other laws made by the Parliament"<sup>12</sup>.

12 The question whether s 32(1) of the Federal Court Act is confined to matters arising under other federal laws is simply a question of construction, not a constitutional question. It is one which might appropriately be determined, at least in the first instance, by the Federal Court. However, as the issue bears on the outcome of these applications, it is appropriate to observe that the view that s 32(1) is confined to matters arising under federal laws is at odds with the wording of s 32(1), with statements in the judgments of Aickin J and Wilson J in *Philip Morris* to the effect that s 32(1) extends jurisdiction to associated matters falling within ss 75 and 76 of the Constitution<sup>13</sup>, and with the decision of the Federal Court in *Turner v Owen*<sup>14</sup>. Thus, in my view, s 32(1) cannot be confined in the manner for which the NFF interests contend. Accordingly, the question whether, if the conspiracy claims are not part of the one controversy, they fall within s 32(1) of the Federal Court Act involves no more than a question of practical judgment as to whether they are associated with the claims alleging the breaches and contraventions earlier referred to.

13 There is nothing in this case to suggest that the jurisdictional questions which arise pursuant to the principles in *Fencott v Muller*<sup>15</sup> or pursuant to s 32(1) of the Federal Court Act should not be determined, in the first instance, by the Federal Court. On the contrary, there is much to suggest that it would be inappropriate for them to be determined without the benefit of relevant factual findings by that Court. The same is not, however, true of the challenge to the validity of the Cross-vesting Acts. That question can be decided without regard to the factual issues involved in this case. However, it is a question which, in practical terms, will only fall for decision in this matter if it is held that the Federal Court otherwise lacks jurisdiction with respect to one or more of the causes of action which are not the subject of a specific grant of jurisdiction. Moreover, it is a question which will only arise if this Court grants leave to re-open the decision in *Gould v Brown*<sup>16</sup>, a decision delivered as recently as February of this year.

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12 (1981) 148 CLR 457 at 494.

13 (1981) 148 CLR 457 at 535 per Aickin J and 547 per Wilson J.

14 (1990) 26 FCR 366. See also *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499 at 500-501 per Gummow J.

15 (1983) 152 CLR 570.

16 (1998) 72 ALJR 375; 151 ALR 395.

- 14 For the reasons given, there is little, if anything, to commend any of the applications for removal, applications which, if granted, have the potential to delay or disrupt the proceedings presently before the Federal Court. Accordingly, the applications by the NFF parties and by those Patrick parties who have sought removal under s 40(1) of the *Judiciary Act* should be dismissed with costs.
- 15 The application by the Attorney-General stands in a somewhat different position in that s 40(1) provides for removal "as of course" in the case of his application. That notwithstanding, the only jurisdictional issue which is appropriately dealt with by this Court is that relating to the validity of the Cross-vesting Acts. That is a constitutional question and it is a question that has arisen in the sense that, so far as concerns the three causes of action in issue, the NFF interests have advanced a challenge to all possible sources of jurisdiction. As already explained, however, it is not a question that will necessarily fall for decision. For the reasons given with respect to s 32(1) of the Federal Court Act, it is a question more likely to arise with respect to the action for inducing breach of contract, than in relation to the conspiracy claims.
- 16 The appropriate course with respect to the Attorney-General's application is to remove the whole of the cause pending in the Federal Court but to remit the proceedings back to that Court save for the question whether s 4(1) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Vic) and s 9(2) of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) are invalid in their application to the claim by the MUA interests that the Patrick interests and the NFF interests induced a breach of contracts relating to the employment of certain MUA members. The determination of that question should await a determination by the Federal Court of the question whether it otherwise has jurisdiction with respect to that cause of action. The costs of the Attorney-General's application should abide the outcome of the proceedings in this Court.

