Jurisdiction

CHAPTER 4

OVERVIEW

Before a court proceeding can be instituted or an appeal brought, it is necessary to consider whether the court in which it is proposed to commence the proceeding or launch the appeal has the necessary jurisdiction to determine it. In general terms this chapter will deal with two types of jurisdiction:

- subject matter jurisdiction, which refers to the nature of the disputes which may be adjudicated upon by the particular court; and
- territorial jurisdiction, which refers to the person or bodies over whom the court may exercise jurisdiction.

This chapter considers the nature of the subject matter which may be determined by each of the High Court, the Federal Court, the Federal Magistrates' Court and the state and territory Supreme Courts, and of the parties over whom that jurisdiction may be exercised. It also explains the operation of the Cross-vesting of Jurisdiction Scheme which was established in 1987 and involves the Federal Court, the Family Court and each of the state and territory Supreme Courts. The scheme has been declared by the High Court to be partially invalid, but it nevertheless alleviates some of the jurisdictional disputes and difficulties which had arisen from the strict jurisdictional limitations which otherwise applied to those courts.

SUBJECT MATTER JURISDICTION

4.1.1 It is not possible for a work of this nature to provide a comprehensive commentary covering all aspects of jurisdiction of the High Court, the Federal Court, and each of the state and territory Supreme Courts. This section will, however, provide an overview of the principal legislation which defines the jurisdiction of the various courts.

4.1.2E Commonwealth Constitution

Judicial Power and Courts

71 The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

4.1.3 Chapter III of the Commonwealth of Australia Constitution Act (ss 71–80) sets out the constitutional framework through which courts are or may be invested with the judicial power of the Commonwealth to enforce its laws. Commonwealth judicial power may only be exercised by one of the three classes of courts listed in s 71, namely the High Court, a Federal Court created by the Commonwealth Parliament, and state and territory courts which are vested with jurisdiction pursuant to Ch III. Jurisdiction which any federal or state or territory court has by virtue of a provision of Ch III is federal jurisdiction.

The High Court

Original jurisdiction

4.1.4E Commonwealth Constitution

Original jurisdiction of High Court

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.

Additional 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.

Power to define jurisdiction

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

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

(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive to that which belongs to or is invested in the courts of the States;

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

4.1.5 Parliament exercised the power in s 76(i) through the Judiciary Act 1903 (Cth) s 30(a), through which it conferred original jurisdiction on the High Court 'in all matters arising under the Constitution or involving its interpretation'. Section 40 of the Judiciary Act 1903 (Cth) allows a party to such a cause which is pending in a federal court (other than the High Court) or in a state or territory court, to apply to the High Court for an order removing the matter to the High Court. It directs that the order must be made if the application is made by the Commonwealth Attorney-General or by the Attorney-General of a state or territory.

4.1.6E Judiciary Act 1903 (Cth)

Matters in which jurisdiction of High Court exclusive

38 Subject to sections 39B and 44, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several courts of the states in the following matters:

(a) matters arising directly under any treaty;

(b) suits between states or between persons suing or being sued on behalf of different states, or between a state and a person suing or being sued on behalf of another state;

(c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a state, or any person being sued on behalf of a state;

(d) suits by a state, or any person suing on behalf of a state, against the Commonwealth or any person being sued on behalf of the Commonwealth;

(e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.

Note: Under the Jurisdiction of Courts (Cross-resting) Act 1987, State Supreme Courts are, with some exceptions and limitations, invested with the same civil jurisdiction as the Federal Court has, including jurisdiction under section 39B of this Act.

4.1.7 Section 38 of the Judiciary Act 1903 (Cth) is an exercise of the power given in s 77 of the Commonwealth Constitution. In effect, it vests within the exclusive jurisdiction of the High Court those matters which are within the original jurisdiction of the High Court and which may be regarded as having the greater national or federal significance. (Other matters are left to concurrent jurisdiction: see 4.1.26E–4.1.27.) Section 38 is expressed to be subject to ss 39B and 44. Section 39B stipulates a range of matters as falling within the original jurisdiction of the Federal Court: see 4.1.12E. In very broad terms, s 44 enables the High Court, either of its

own motion or on the application of a party, to remit a matter or any part of a matter pending in the High Court to the Federal Court, or to a court of a state or territory. Further proceedings are to be as directed by the court to which the proceedings are remitted but subject to any directions of the High Court.

Appellate jurisdiction

4.1.8E **Commonwealth Constitution**

Appellate jurisdiction of High Court

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

(i) of any Justice or Justices exercising the original jurisdiction of the High Court;

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

(iii) of the Inter-State Commission, but as to questions of law only;

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

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

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

4.1.9 The High Court's jurisdiction under s 73 to hear and determine appeals from justices exercising the original jurisdiction of the High Court is limited by s 34 of the Judiciary Act 1903 (Cth) so as to require the leave of the High Court to bring an appeal from any interlocutory judgment.

Parliament has also created a number of exceptions to, and restrictions on, the jurisdiction granted under s 73(ii). In relation to the Federal Court of Australia these include the Federal Court of Australia Act 1976 (Cth) s 33, which provides that there shall be no appeal from a decision of a single judge exercising the original jurisdiction of the court, except as otherwise provided by another Act: s 33(2). Special leave of the High Court is required for an appeal from a decision of a single judge exercising the appellate jurisdiction of the court: s 33(4). Except as otherwise provided by another Act, special leave of the High Court is also required for any appeal from a judgment of the Full Court of the Federal Court: s 33(3). There are further limitations contained in s 33(4A), which prohibits any appeal to the High Court from judgments of a Full Court of the Federal Court exercising the original jurisdiction of the Federal Court in relation to decisions of the specific types set out in the subsection. Section 33(4B) also contains prohibitions on the bringing of an appeal to the High Court

from judgments of the Federal Court (whether constituted by a Full Court or a single judge) in the exercise of its appellate jurisdiction if the judgments are of the nature of any of the decisions as described in that subsection. The restriction relating to appeals to the High Court from an interlocutory judgment does not prevent a party from founding an appeal from a final judgment in the proceeding on the interlocutory judgment, or prevent the High Court from taking account of the interlocutory judgment in determining an appeal from a final judgment in the proceeding or an application for special leave to appeal from a final judgment in the proceeding: s 33(6).

Appeals from state Supreme Courts (whether the judgments were given or pronounced in the exercise of federal jurisdiction or otherwise) are limited by the Judiciary Act 1903 (Cth) s 35, so as to also require the special leave of the High Court.

The Supreme Court of a federal territory is not a federal court or a court exercising federal jurisdiction within s 73 of the Constitution: *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591. However, under the general legislative power in s 122 of the Constitution to make laws for the government of a territory, the Commonwealth Parliament has created a statutory right of appeal from the Supreme Court of a territory (Judiciary Act 1903 (Cth) s 35AA), but it is essential to obtain the special leave of the High Court to bring the appeal.

The Federal Court

Original jurisdiction

4.1.10E Federal Court of Australia Act 1976 (Cth)

Original jurisdiction

19 (1) The court has such original jurisdiction as is invested in it by laws made by the Parliament.

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

4.1.11 The Federal Court of Australia was created by the Federal Court of Australia Act 1976 (Cth) in the exercise by the Commonwealth Parliament of the power conferred on it by s 71 of the Commonwealth Constitution.

The original jurisdiction of the court under s 77(i) of the Commonwealth Constitution and s 19 of the Federal Court of Australia Act 1976 (Cth) is limited to those matters in respect of which parliament has specifically invested the court with jurisdiction. Further, it follows from the wording of ss 75–77 of the Constitution that jurisdiction can only be conferred on the court in relation to the 'matters' mentioned in ss 75 and 76: see **4.1.4E**.

A key provision investing the court with jurisdiction in respect of a significant proportion of those matters is s 39B of the Judiciary Act 1903 (Cth).

4.1.12E **Judiciary Act 1903 (Cth)**

Original jurisdiction of Federal Court of Australia
Scope of original jurisdiction
39B(1) Subject to subsections (1B) and (1C) and (1EA), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

(a) in which the Commonwealth is seeking an injunction or a declaration; or

(b) arising under the Constitution, or involving its interpretation; or

(c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

4.1.13 The jurisdiction conferred by s 39B(1) corresponds with the jurisdiction conferred on the High Court by s 75(v) of the Constitution, while that conferred by s 39B(1A)(a) is equivalent to part of the jurisdiction conferred on the High Court by s 75(iii). The matters mentioned in s 39B(1A)(b) and (c) correspond with those contained in s 76(i) and part of that contained in s 76(ii) of the Constitution respectively.

Subsection 39B(1A) was inserted into the Judiciary Act 1903 (Cth) on 17 April 1997 by the Law and Justice Legislation Amendment Act 1997 (Cth) and it clearly effected a significant extension of the Federal Court's original jurisdiction. Before the introduction of this section, Act by Act conferral of jurisdiction had given the Federal Court jurisdiction over a broad range of matters, including admiralty, bankruptcy, intellectual property, native title, trade practices, taxation and social security, but in all cases the jurisdiction was limited to those matters where there was a specific federal statute explicitly giving the court jurisdiction. The Explanatory Memorandum to the Law and Justice Legislation Amendment Act 1997 states:

> The additional jurisdiction of the Federal Court is concurrent with the federal jurisdiction of State and Territory Courts in civil matters. The jurisdiction gives the Federal Court a greater role in the administration of federal laws, by ensuring that the Court is able to deal with all matters that are essentially of a federal nature.

Section 39B(1A) has been expansively interpreted as a general conferral of jurisdiction: *Transport Workers Union v Lee* (1998) 84 FCR 60 at 67. In respect of s 39(1A)(c) a matter may be said to arise under a federal law if a claim is made for, or in respect of, a right that owes its existence to federal law, even if the only relief claimed is relief at common law or equity rather than a right to relief under a specific provision of a federal law. It is essential, however, that the relief sought can only be granted if some right exists by force of a federal law: *Elders v Swinbank* (2000) 96 FCR 303. See also *Federal Airports Corporation v Aerolineas Argentinas* (1997) 147 ALR 649; *Fejo v Northern Territory of Australia* (1998) 152 ALR 477.

Appellate jurisdiction

4.1.14 The appellate jurisdiction of the Federal Court and its exercise are prescribed in Div 2 Pt III of the Federal Court of Australia Act 1976 (Cth). The key provision is s 24(1), which

provides that subject to that section and to any other Act, the Federal Court has jurisdiction to hear and determine:

(a) appeals from a single judge of the Federal Court;

(b) appeals from the Supreme Court of a territory (other than the Australian Capital Territory or Northern Territory);

(c) appeals from judgments of a court (but excluding Full Courts) of a state, the Australian Capital Territory or the Northern Territory, exercising federal jurisdiction;

(d) appeals from judgments of the Federal Magistrates Court exercising original jurisdiction under a Federal Law other than the Family Law Act 1975, the Child Support (Assessment Act) 1989, or the Child Support (Registration and Collection) Act 1988, or regulations under any of these Acts; and

(e) appeals from judgments of the Federal Magistrates' Court exercising jurisdiction under s 72Q of the Child Support (Registration and Collection) Act 1988.

There is, however, no jurisdiction in respect of appeals from a decision of a single judge of the court exercising the original jurisdiction of the court in respect of judgments of the nature as set out in s 24(1AA).

In the case of an interlocutory judgment, s 24(1A) requires that court or judge must give leave to appeal. This requirement is qualified by s 24(1C), which removes any requirement for leave to appeal an interlocutory judgment which affects the liberty of an individual or which is made in proceedings relating to contempt of the Federal Court or any other court. Judgments by consent, and decisions granting or refusing applications for summary judgment, are taken to be interlocutory judgments for the purpose of these provisions: s 24(1D). A party may nevertheless found an appeal from a final judgment on an interlocutory judgment in the proceeding, and the court may take account of the interlocutory judgment in determining an appeal from a final judgment: s 24(1E).

Section 25 governs the exercise of the appellant jurisdiction of the Federal Court. Although this jurisdiction is generally to be exercised by a Full Court, there are a range of circumstances set out in the section where the jurisdiction may, or in some instances must, be exercised by a single judge. The manner in which a court may deal with an appeal is set out in s 28.

Reference jurisdiction

4.1.15 Section 25(6) of the Federal Court of Australia Act 1976 (Cth) provides that a single judge of the Federal Court may state any case or reserve any question concerning a matter (whether or not an appeal would lie from a judgment of the judge to the Full Federal Court on the matter) for the consideration of the Full Federal Court, and gives the Full Federal Court jurisdiction to hear and determine the case or question.

Section 26(1) of the same Act provides that a court from which an appeal lies to the Federal Court may state any case or reserve any question for the consideration of the Federal Court, and that the Federal Court has jurisdiction to determine that case or question. Subject to any other Act, the jurisdiction is to be exercised by a Full Court, except if the referring court is one of summary jurisdiction, in which case it may be exercised by a single judge or by a Full Court: s 26(2).

Associated jurisdiction; accrued jurisdiction

4.1.16E **Federal Court of Australia Act 1976 (Cth)**

32 Jurisdiction in associated matters

Associated matters — civil proceedings

(1) 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 (the ***core matters***) in which the jurisdiction of the Court is invoked.

(2) The jurisdiction conferred by subsection (1) extends to jurisdiction to hear and determine an appeal from a judgment of a court so far as it relates to a matter that is associated with a matter (the ***core matter***) in respect of which an appeal from that judgment, or another judgment of that Court, is brought.

…

4.1.17 As previously noted, it follows from the wording of ss 75–77 of the Commonwealth Constitution (see 4.1.4E) that jurisdiction can be conferred on a Federal Court, only with respect to 'matters' mentioned in ss 75 and 76 of the Constitution, and that 'the Constitution gives no power to confer jurisdiction on a federal court with respect to a matter simply because it is associated with any of the matters mentioned in ss 75 and 76, however close that association may be': *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 493; 33 ALR 465 at 489 per Gibbs J; *Fencott v Muller* (1983) 152 CLR 570 at 581; 41 ALR 41 at 46 per Gibbs CJ. Accordingly, the associated jurisdiction conferred by the Federal Court of Australia Act 1976 (Cth) s 32 enables the Federal Court to determine only *federal* claims otherwise outside the Federal Court's jurisdiction but which are associated with the claim within the court's primary jurisdiction. Both claims must arise out of facts substantially the same or closely connected.

Although at one time an important source of additional jurisdiction for the Federal Court, the enactment of s 39B(1A) of the Judiciary Act 1903 (Cth) (see 4.1.12E) has greatly diminished the significance of the associated jurisdiction.

4.1.18 The Federal Court also has an 'accrued jurisdiction' based upon ss 76(ii) and 77(i) of the Commonwealth Constitution and ss 19 and 22 of the Federal Court of Australia Act 1976 (Cth) (rather than s 32). (Section 22 directs that the court shall grant all remedies to which any of the parties before it appear to be entitled so that, so far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.) This is a discretionary jurisdiction enabling determination of claims which arise under the common law or state legislation if they are part of the same 'matter' as the claim within the Federal Court's primary jurisdiction. Thus in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 (HC); (1980) 31 ALR 232 (FC), the High Court held that the Federal Court of Australia had jurisdiction to decide a passing off claim in an action which also involved an alleged contravention of the Trade Practices Act 1974 (Cth) (now Competition and Consumer Act 2010 (Cth)), although there were significant variations in the reasons given in the judgments. The decision in *Philip Morris* was considered by the High Court in *Fencott v Muller* (1983) 152 CLR

570; 46 ALR 41, and subsequently in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; 163 ALR 270. In general terms those cases make it clear that the federal and non-federal claims joined in a proceeding must both fall within the scope of one controversy, and hence within the ambit of the one 'matter'.

4.1.19C **Fencott v Muller**
(1983) 152 CLR 570
High Court of Australia

[In complex proceedings before the Federal Court, claims were made for damages for breach of the Trade Practices Act 1974 (Cth) s 52 (see now Australian Consumer Law s 18), along with alternative claims at common law for fraud, negligence or breach of contract. These claims related to allegedly false representations made by the respondents as to the profits and turnover of a business subsequently purchased by one of the applicants. Additional parties were also involved in related claims which included breach of fiduciary duty and a claim for an indemnity. An objection was taken in the Federal Court to the jurisdiction of the court, which was allowed in part but otherwise dismissed. The appellants, who were three of the respondents to the proceedings in the Federal Court, appealed to the Full Court of the Federal Court, contending that the proceedings were entirely outside the jurisdiction of the Federal Court, so that the objection to the jurisdiction should have been allowed in full. There was no cross-appeal against that part of the judgment which held that certain parts of the proceedings were beyond jurisdiction. The appeal was removed into the High Court. The High Court, by majority, affirmed the decision of the Federal Court. The brief extract here is from that part of the majority judgment which relates to the 'accrued' jurisdiction of the Federal Court.]

Mason, Murphy, Brennan and Deane JJ (at CLR 603–608): Though the concept of 'matter' may be narrower than that of a 'legal proceeding', it is a term of wide import. 'The word "matters"', Griffith CJ said in *South Australia v Victoria* [(1911) 12 CLR 667 at 675], 'was in 1900 in common use as the widest term to denote controversies which might come before a Court of Justice'. The concept of 'matter' as a justiciable controversy, identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of the controversy, was accepted by a majority of the Court in *Philip Morris.* Barwick CJ said [(1981) 148 CLR at 475]:

> It is settled doctrine in Australia that when a court which can exercise federal jurisdiction has its jurisdiction attracted in relation to a matter, that jurisdiction extends to the resolution of the whole matter. This accrued federal jurisdiction is not limited to matters incidental to that aspect of the matter which has, in the first place, attracted federal jurisdiction. In [sic] extends, in my opinion, to the resolution of the whole matter between the parties. This accrued jurisdiction carries with it the authority to make such remedial orders as are necessary or convenient for or in consequence of that resolution. For this [604] purpose, the court exercising federal jurisdiction may enforce rights which derive from a non-federal source. This exercise of this jurisdiction, which for want of a better term I shall call 'accrued' jurisdiction, is discretionary and not mandatory, though it will be obligatory to exercise the federal jurisdiction which has been attracted in relation to the matter.

And thus his Honour, in defining the matter in the proceedings between Philip Morris and Adam P Brown did not identify it as a cause of action but said [(1981) 148 CLR at 479–80]:

> The substantial matter between the parties was their difference as to the assertion of and attempt to protect the rights claimed to belong to the plaintiffs by reason of the trade marks or the acquired business reputation. The claim to relief under Ch V of the Act was one endeavour to protect these rights. The claim to equitable relief for passing off was another. The former attracted federal jurisdiction: the latter, not being disparate and independent of the former, was part of the whole matter between the parties and thus within the accrued federal jurisdiction. Thus, it seems to me that the federal jurisdiction attracted by the claim for misleading and deceptive conduct extends to the resolution of the entire matter between the parties, which includes the claim for passing off, not merely as an associated claim but as part of the entirety of the matter between the parties in relation to which federal jurisdiction has been attracted. …

Subject to any contrary provision made by federal law and subject to the limitation upon the capacity of non-federal laws to affect federal courts, non-federal law is part of the single, composite body of law applicable alike to cases determined in the exercise of federal jurisdiction and to cases determined in the exercise of non-federal jurisdiction (cf *Felton v Mulligan* [(1971) 124 CLR at 392, 399]).

It follows also that, though the facts upon which a non-federal claim arises do not wholly coincide with the facts upon which a federal claim arises, it is nevertheless possible that both may be aspects of a single matter arising under a federal law. Mason J in *Philip Morris* [(1981) 148 CLR at 512], following what was said in *Moorgate Tobacco* [(1980) 145 CLR 457], gave an indication of a non-federal claim which would not be severable:

> Likewise, it may appear that the attached claim and the federal claim so depend on common transactions and facts that they arise out of a common substratum of facts. In instances of this kind a court which exercises federal jurisdiction will have jurisdiction to determine the attached claim as an element in the exercise of its federal jurisdiction.

His Honour's reference to a dependence of federal and non-federal claims upon common transactions and facts approximates the test in *United Mine Workers of America v Gibbs* [(1966) 383 US at p 725 [16 Law Ed (2nd) at p 228]] that the claims 'must derive from a common nucleus of operative fact'. Barwick CJ thought [(1981) 148 CLR at p 476] that that test, if applied to Ch III of the Constitution, may be too wide because it 'would seem to warrant an accretion of non-federal jurisdiction which is not necessary or convenient for the resolution of the case or controversy which has been the source of the federal jurisdiction in the first place, but extends to what is described as "an associated matter". As I remark in relation to s 32 of the Federal Court Act, the word "associated" embraces matter which may be disparate from each other.'

Perhaps it is not possible to devise so precise a formula that its application to the facts of any controversy would determine accurately what claims are disparate and what claims are not. Whatever formula be adopted as a guide and the formula of 'common transactions and facts' is a sound guide for the purpose it must result in leaving outside the ambit of a matter a 'completely disparate claim constituting in substance a separate proceeding' (per

Barwick CJ in *Felton v Mulligan* [(1971) 124 CLR at p 373]), a non-federal matter which is 'completely separate and distinct from the matter which attracted [608] federal jurisdiction' (per Murphy J in *Philip Morris* [(1981) 148 CLR at p 521]) or 'some distinct and unrelated non-federal claim' (per Stephen, Mason, Aickin and Wilson JJ in *Moorgate Tobacco* [(1980) 145 CLR at p 482]).

Claims which are described by these or similar phrases cannot be determined by exercise of the judicial power referred to in s 71 of the Constitution, for that power can be exercised only to determine those matters in which federal jurisdiction is or can be conferred under Ch III of the Constitution. For precisely this reason, however, it is necessary to attribute to 'matter' in ss 75 and 76 of the Constitution a connotation which does not deny to federal judicial power its primary character: that is, the power of a sovereign authority 'to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property' (per Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* [(1909) 8 CLR 330 at p 357]). The unique and essential function of the judicial power is the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion. In identifying a s 76(ii) matter, it would be erroneous to exclude a substantial part of what is in truth a single justiciable controversy and thereby to preclude the exercise of judicial power to determine the whole of that controversy. What 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. 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.

4.1.20C Re Wakim; Ex parte McNally

(1999) 198 CLR 511; 163 ALR 270
High Court of Australia

[In July 1985, Mr Wakim was awarded damages in the Supreme Court of New South Wales for personal injuries sustained in an accident in the course of his employment by Tedros Nader and Nawal Nader. His action was brought against Tedros Nader only. In October 1985, Tedros Nader was declared bankrupt and the Official Trustee in Bankruptcy (the 'Trustee') was appointed trustee of his estate. In June 1987, the Trustee brought proceedings in the Supreme Court of New South Wales against Nawal Nader, seeking orders that her partnership with Tedros Nader was or had been dissolved. A firm of solicitors in which Messrs McNally were partners was retained by the Trustee, and the firm in turn retained Mr Darvall QC.

In March 1990, the parties settled. It was agreed that Mr Wakim be paid $10,000. In July 1993, Mr Wakim brought proceedings in the Federal Court against the trustee. One of his claims was made pursuant to s 176 of the Bankruptcy Act 1966 (Cth), on the basis that the trustee had been guilty of a breach of duty as trustee of the bankrupt estate. Following

the commencement of those proceedings, Mr Wakim brought two further actions against Mr Darvall and the firm of solicitors in negligence.

Mr Darvall and the solicitors contended that the Federal Court had no jurisdiction to hear the action in negligence and sought a writ of prohibition. The decision involved a successful challenge to the constitutional validity of those provisions of the scheme for cross-vesting of jurisdiction through which state jurisdiction was conferred on federal courts. The case is considered in that context at 4.3.2. However, in view of the court's finding in that regard it became necessary for the court to consider whether the Federal Court would determine the negligence claims in the exercise of its accrued jurisdiction.]

Gummow and Hayne JJ (at CLR 585–588): In *Fencott* it was said that [(1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ]: '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.' The references to 'impression' and 'practical judgment' cannot be understood, however, as stating a test that is to be applied. Considerations of impression and practical judgment are relevant because the question of jurisdiction usually arises before evidence is adduced and often before the pleadings are complete. Necessarily, then, the question will have to be decided on limited information. But the question is not at large. What is a single 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' [*Fencott* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ]. There is but a single matter if different claims arise out of 'common transactions and facts' or 'a common substratum of facts' [*Philip Morris* (1981) 148 CLR 457 at 512 Mason J], notwithstanding that the facts upon which the claims depend 'do not wholly coincide' [*Fencott* (1983) 152 CLR 570 at 607 per Mason, Murphy, Brennan and Deane JJ]. So, too, there is but one matter where different claims are so related that the determination of one is essential to the determination of the other [*Philip Morris* (1981) 148 CLR 457 at 512 Mason J], as, for example, in the case of third party proceedings or where there are alternative claims for the same [586] damage and the determination of one will either render the other otiose or necessitate its determination. Conversely, claims which are 'completely disparate' [*Felton v Mulligan* (1971) 124 CLR 367 at 373 per Barwick CJ], 'completely separate and distinct' [*Philip Morris* (1981) 148 CLR 457 at 521 Mason J], or 'distinct and unrelated' [*Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 482 per Stephen, Mason, Aickin and Wilson JJ] are not part of the same matter.

Often, the conclusion that, if proceedings were tried in different courts, there could be conflicting findings made on one or more issues common to the two proceedings will indicate that there is a single matter. By contrast, if the several proceedings could not have been joined in one proceeding, it is difficult to see that they could be said to constitute a single matter.

Here, the three proceedings could have been joined in one. The fact that those advising Mr Wakim chose to issue separate proceedings at different times does not mean that the scope of the controversy is limited to the matters raised in the first proceeding. Had the Official Trustee brought a cross-claim against both the solicitors and Mr Darvall immediately after Mr Wakim commenced his proceeding against it and if Mr Wakim had then joined the cross-respondents as respondents to his principal claim, the existence of a single controversy involving several parties would be more apparent than it may be in the present circumstances. But neither the differences in the present procedural history nor the absence of any claim

by the Official Trustee against the solicitors and Mr Darvall determines the question whether there is a single controversy.

The applicants submitted that the test should be qualified by restricting cases of accrued jurisdiction to those in which no party was added in reliance upon accrued jurisdiction. That is, the applicants contended that there must be some federal claim against every respondent in the proceedings …

[587] As we have said, the bringing of separate proceedings and the joining of different parties will often be important facts in deciding whether there is a single justiciable controversy for the purposes of Ch III of the Australian Constitution. But there is no basis in principle for concluding that there can never be accrued jurisdiction where a new party is joined. To adopt such a rule would mean that third party proceedings could never be brought in a federal court unless those third party proceedings were founded in some federal claim. And that points to the underlying difficulty in principle. If the 'matter' is to be identified from what the parties allege and how they conduct the proceeding (as *Fencott* and *Stack* hold) and if the 'justicable controversy' refers (in part, at least) to the factual dispute between them, there is no warrant for holding that federal jurisdiction ends as soon as a new party (against whom no federal claim is made) is added. Each of these proceedings brought by Mr Wakim centres upon the making of claims and bringing of action against Mrs Nader and the prosecution and settlement of those claims and that action. Mr Wakim alleges against the Official Trustee that it was negligent and guilty of breach of duty in not continuing the action against Mrs Nader; he alleges against the solicitors that they negligently failed to advise the Official Trustee of its rights against her; he alleges against Mr Darvall that he negligently failed to advise the Official Trustee of its rights against her. It may be noted that nowhere in the Official Trustee's defence to Mr Wakim's claim does it allege that it acted in reliance on the advice of the solicitors or counsel and it makes no cross-claims against them. Indeed, the pleadings in the proceeding between Mr Wakim and the Official Trustee say nothing whatever about the role of the solicitors or counsel in the matter.

The cases arise out of one set of events. Of most significance is the fact that the damage which Mr Wakim alleges he has suffered as a result of what he says are the various breaches of duty by the Official Trustee, the solicitors and Mr Darvall is, in each case, the loss of what he might have recovered in the bankruptcy had the claims against [588] Mrs Nader been prosecuted differently. There is, then, but a single claim for damages that he seeks to pursue against each of the parties he has sued. And judgment and recovery against one will diminish the amount that may be recovered from the others. There is, in these circumstances, that common substratum of facts in each proceeding of which Mason J spoke in *Philip Morris* [(1981) 148 CLR 457 at 512. See also *Fencott* (1983) 152 CLR 570 at 604–5 per Mason, Murphy, Brennan and Deane JJ].

In *Philip Morris* [(1981) 148 CLR 457 at 475], Barwick CJ said that the exercise of the 'accrued' jurisdiction 'is discretionary and not mandatory, though it will be obligatory to exercise the federal jurisdiction which has been attracted in relation to the matter'. In *Stack* [(1983) 154 CLR 261 at 294–5], Mason Brennan and Deane JJ refer to this proposition with approval [(1983) 154 CLR 261 at 294–5] but say that the idea is similar to the process of identification of a related matter mentioned in *Fencott* as being 'a matter of impression and of practical judgment' [(1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ]. There may be some difficulty in analysing the question as one of 'discretion'. It is not clear what principles or criteria would inform the exercise of a discretion of this kind. It

may be that the better view is that the references to 'discretion' are not intended to convey more than that difficult questions of fact and degree will arise in such issues — questions about which reasonable minds may well differ. It is, however, not necessary to decide what is meant by the references to discretion in this context.

[**Gleeson CJ** and **Gaudron J** agreed with the reasons of **Gummow** and **Hayne JJ. McHugh J** expressed doubt as to whether there was a single controversy in the matter but regarded the applications for prohibition as premature. **Callinan J** dissented on this issue. His Honour concluded that there was not one justiciable controversy. **Kirby P** would have upheld the validity of the relevant provisions of the cross-vesting scheme and did not therefore consider whether the Federal Court would also have accrued jurisdiction.

The applications for prohibition in these matters were dismissed.

See also: *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261; 49 ALR 193; *New South Wales Aboriginal Land Council v Aboriginal and Torres Strait Islander Commission* (1995) 131 ALR 559 at 574–5; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) ATPR 41-743; *Elders v Swinbank* (2000) 96 FCR 303.]

4.1.21 The Federal Court will not have any accrued jurisdiction if the primary claim is untenable or not genuinely pursued, or is clearly so untenable that it could not possibly succeed: *New South Wales Land Council v Aboriginal and Torres Strait Islander Commission* (1995) 131 ALR 559 at 572. But if that primary claim is genuine, the court will retain the accrued jurisdiction to determine the attached non-federal claims, even if the primary federal claim fails: *Burgundy Royale Investments Pty Ltd v Westpac Banking Corp* (1988) 76 ALR 173. See also *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2000) 104 FCR 564 at [88] and see **10.9.10**.

Incidental jurisdiction

4.1.22 The Federal Court is declared to be a superior court of record (Federal Court of Australia Act 1976 (Cth) s 5), but it is a court of statutory jurisdiction and accordingly does not have inherent jurisdiction in the same way as the Supreme Courts: see *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612; *Papazoglou v Republic of the Philippines* (1997) 144 ALR 42 at 69.

However, in the exercise of its jurisdiction and in addition to powers which are expressly or impliedly conferred upon it by statute, the Federal Court's powers extend to 'whatever is incidental and necessary to the exercise of that jurisdiction and to the exercise of any powers conferred by legislation': *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 561; 99 ALR 193. See also *Parsons v Martin* (1984) 5 FCR 235 at 241; *Harris v Caladine* (1991) 172 CLR 84 at 136; 99 ALR 193. This will include powers to control and supervise its own proceedings and to prevent abuse of its process.

The Federal Magistrates' Court

4.1.23 The Federal Magistrates' Court was established as a federal court under Ch III of the Constitution by the Federal Magistrates Act 1999 (Cth). The court was established to deal with a range of matters of a less complex nature that were being dealt with by the Federal Court and the Family Court. It was intended to give litigants a quicker, cheaper option and to

ease the workload of the Federal Court and the Family Court. The court derives its jurisdiction from the Federal Magistrates (Consequential Amendments) Act 1999 (Cth). Its jurisdiction is concurrent with the Federal Court or the Family Court, whichever has jurisdiction, and there are provisions for the transfer of matters from the Federal Magistrates' Court to the Federal Court or the Family Court, as well as provisions for the transfer of matters of a less complex nature from the Federal Court or the Family Court to the Federal Magistrates' Court. The procedures applying in the Federal Magistrates' Court will not be examined in this text.

Supreme Courts

Original and appellate jurisdiction

4.1.24E **Constitution of Queensland Act 1991 (Qld)**

Supreme Court's superior jurisdiction

58 (1) The Supreme Court has all jurisdiction that is necessary for the administration of justice in Queensland.

(2) Without limiting subsection (1), the court —

(a) is the superior court of record in Queensland and the supreme court of general jurisdiction in and for the State; and

(b) has, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise.

4.1.25 As in Queensland, legislation in the Australian Capital Territory (Australian Capital Territory (Self-Government) Act 1988 (Cth) s 48A; Supreme Court Act 1933 (ACT) s 20), New South Wales (Supreme Court Act 1970, s 23) and Victoria (Constitution Act 1975 s 85) defines the jurisdiction of their respective Supreme Courts as extending to anything which may be necessary to do justice. In the other jurisdictions, Supreme Court jurisdiction is still defined by reference to superior courts in England as they existed before the Judicature Acts 1873–1875 (UK): Supreme Court Act 1979 (NT) s 14 (defined as the jurisdiction of the Supreme Court of South Australia immediately before 1 January 1911; this in turn was defined by reference to the English courts); Supreme Court Act 1935 s 17 (SA); Australian Courts Act 1828 (Imp) ss 3, 11 (Tas); Supreme Court Act 1935 (WA) s 16.

In respect of both categories, the provisions have been widely construed with the result that the Supreme Courts have a wide general jurisdiction. However, as the Victorian Court of Appeal made clear in *City of Collingwood v Victoria (No 2)* [1994] 1 VR 652 (see, in particular, p 663 per Brooking J) the judicial power of the Supreme Courts is not sacrosanct; it may be enlarged, reduced, modified or excluded by legislation. In determining whether a Supreme Court has any particular jurisdiction, it is therefore necessary not only to refer to the general jurisdiction of the court as stated in the legislation governing in general terms jurisdiction of the court, but also to consider the limits imposed upon state courts as being part of the Australian federal structure, and to look at the impact upon the court's jurisdiction of any statutes dealing with specific heads of subject matter: see also *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577.

Federal jurisdiction

4.1.26E **Judiciary Act 1903 (Cth)**

Federal jurisdiction of State courts in other matters

39 (1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.

(2) The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter or otherwise, be invested with federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in section 38, and subject to the following conditions and restrictions —

(a) A decision of a Court of a State, whether in original or in appellate jurisdiction shall not be subject to appeal to Her Majesty in Council, whether by special leave or otherwise.

Special leave to appeal from decisions of State Courts though State law prohibits appeal.

(c) The High Court may grant special leave to appeal to the High Court from any decision of any Court or Judge of a State notwithstanding that the law of the State may prohibit any appeal from such Court or Judge.

Federal jurisdiction invested in State courts by other provisions

39A (1) The federal jurisdiction with which a Court of a State is invested by or under any Act, whether the investing occurred or occurs before or after the commencement of this section, including federal jurisdiction invested by a provision of this Act other than the last preceding section:

(a) shall be taken to be invested subject to the provisions of paragraph (a) of subsection (2) of the last preceding section; and

(b) shall be taken to be invested subject to paragraph 39(2)(c) (whether or not the jurisdiction is expressed to be invested subject to that paragraph), so far as it can apply and is not inconsistent with a provision made by or under the Act by or under which the jurisdiction is invested;

in addition to any other conditions or restrictions subject to which the jurisdiction is expressed to be invested.

…

4.1.27 Section 39(2) of the Judiciary Act is the principal provision conferring jurisdiction on state courts. It seeks to achieve its purpose through a circuitous two-step process. Section 39(1) makes the jurisdiction of the High Court exclusive of the jurisdiction of state courts. This was an exercise of the power in s 77(ii) of the Constitution to 'define the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States'. The subsection therefore divests the state courts of jurisdiction they would otherwise have in all matters referred to in s 75 of the Constitution.

Section 39(2), in exercise of the constitutional power in s 77(iii) of the Constitution, then invests state courts with federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it. Excepted are

constitutional and other matters which are exclusively the jurisdiction of the High Court pursuant to s 38 of the Judiciary Act 1903 (Cth): see 4.1.6E. Section 39(2) presumably picks up all other matters listed in ss 75 and 76 of the Constitution. There was for many years some confusion as to the scheme of s 39, as it was arguable that what was taken away by s 39(1) and what was vested by s 39(2) were not co-extensive, and that in matters listed in s 76 of the Constitution state courts possessed both federal jurisdiction (which was subject to the conditions listed in s 39(2)) and their own state jurisdiction as courts of general jurisdiction, which was not subject to conditions. The High Court ended this confusion with its decision in *Fenton v Mulligan* (1971) 124 CLR 367, in which it held that federal jurisdiction excluded the operation of concurrent state jurisdiction because of s 109 of the Constitution, which renders a state law inoperative to the extent that it is inconsistent with a Commonwealth law. The result is that there is no state jurisdiction concurrent with federal jurisdiction invested in a state court.

Despite the broad terms of s 39 of the Judiciary Act 1903 (Cth), other federal Acts may impose conditions or restrictions on the exercise of federal jurisdiction by state courts. Examples include: Competition and Consumer Act 2010 ss 138 and 138B (making exclusive the jurisdiction of the Federal Court in relation to matters arising under Div 3 of Pt 3-1, or under Pt 3-5, of the Australian Consumer Law); Patents Act 1990 (Cth) s 154(2) (making exclusive the jurisdiction of the Federal Court to hear and determine appeals against decisions of the Commissioner of Patents); Trade Marks Act 1995 (Cth) s 191 (making exclusive the jurisdiction of the Federal Court to hear and determine appeals against decisions, directions or orders of the Registrar of Trade Marks); and Designs Act 2003 s 83 (making exclusive the jurisdiction of the Federal Court to hear and determine appeals from decisions of the Registrar of Designs).

Inherent jurisdiction

4.1.28 The jurisdiction of a Supreme Court includes all those powers which are necessary to enable it to act effectively and to control its own proceedings and to prevent obstruction or abuse of its process. Examples of the exercise of inherent jurisdiction include: making practice directions (*Langley v North West Water Authority* [1991] 3 All ER 610); awarding costs and making orders for security for costs (*Rajski v Computer Manufacture and Design Pty Ltd* [1982] 2 NSWLR 443); and staying or striking out actions or pleadings which are frivolous, vexatious or an abuse of process: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125.

The inherent jurisdiction of the court extends to making its own internal arrangements in relation to the exercise of its jurisdiction, subject to any relevant statutory requirements: *Rajski v Wood* (1989) 18 NSWLR 512. See further 1.4.4–1.4.6 and 4.1.29.

4.1.29 Notes and questions

1. Artificial persons or corporations are not encompassed by s 75(iv) of the Commonwealth Constitution; the words 'residents' or 'resident' in that section being interpreted to refer only to natural persons: *Australian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290.

2. Could federal jurisdiction extend to the provision of an advisory opinion in relation to some subject matter referred to in ss 75 or 76 of the Commonwealth Constitution such as, for example, the meaning of a provision of the Constitution? In *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265–6, the High Court held that a 'matter' within ss 75 or 76 referred to the subject matter for determination and required that there be some immediate right, duty or liability to be established by the determination of the court. The mere provision of an advisory opinion or the making of a declaration at large is not sufficient.
3. The decision in *Momcilovic v The Queen* [2011] HCA 34; 280 ALR 221 provides an interesting illustration of the exercise by a state court of federal jurisdiction as a result of the interaction of s 75(iv) of the Commonwealth Constitution and s 39(2) of the Judiciary Act: see 4.1.4E, 4.1.27). In that case Ms Momcilovic was convicted after a jury trial in the Victorian County Court of trafficking in a drug of dependency, contrary to s 71AC of the Drugs, Poisons and Controlled Substances Act 1981 (Vic). The Victorian Court of Appeal dismissed her application for leave to appeal against conviction. Both the trial in the Victorian County Count and the appeal to the Court of Appeal involved the exercise of federal jurisdiction as a matter between a state (Victoria) and a resident of another state (since by the time of the trial the appellant had become a resident of Queensland) (French CJ at [6], [9] and [99]; Gummow J at [134]–[139]; and Crennan and Kiefel J at [594]). French CJ explained at [99]:

> [99] State Courts may be invested with federal jurisdiction pursuant to s 77(iii) of the Constitution in matters in which the High Court has original jurisdiction conferred on it by s 75 of the Constitution or can have original l jurisdiction conferred on it by the Parliament pursuant to s 76 of the Constitution. The classes of matter in which the High Court has original jurisdiction conferred on it by s 75(iv) include matters "between a State and a resident of another State." By operation of s 39(2) of the Judiciary Act the Supreme Court is "invested with federal jurisdiction in such matters … A 'matter' between a State and a resident of another State is a matter of federal jurisdiction notwithstanding that it arises under a State law or the common law or both.

In this case it was not until submissions made in the High Court presented by Western Australia as intervener that significance of the nature of the jurisdiction as Federal jurisdiction became apparent. For consideration of this aspect of the High Court decision, see: Australian Government Solicitor, 'Inconsistency of Commonwealth and State Laws; Validity and Operation of Victorian Charter of Human Rights', 21 *Australian Government Solicitor Litigation Notes*, 2 November 2011, at <http://www.ags.gov.au/publications/agspubs/legalpubs/litigationnotes/LN21.pdf>.

4. The introduction of s 39B(1A) into the Judicature Act 1903 (Cth) (see 4.1.12E–4.1.13) was intended to avoid consequences which had resulted from the previous position of limited Act by Act conferral of jurisdiction, such as that demonstrated in *Kodak (Australasia) Pty Ltd v Commonwealth* (1988) 22 FCR 197: *Transport Workers Union v Lee* (1998) 84 FCR 60 at 67. In *Kodak*,

the applicant had brought proceedings in the Federal Court seeking recovery of sales tax paid by it under protest, pursuant to s 12A(2) of the Sales Tax Procedure Act 1934 (Cth). That section authorised the bringing of such an action 'in any Commonwealth or State Court of competent jurisdiction'. In dismissing the proceeding, Lockhart J held that s 12A(2) did not confer express or implied jurisdiction on the Federal Court.

5. The authority in s 77(iii) of the Commonwealth Constitution to 'invest' state courts with federal jurisdiction does not enable the Commonwealth Parliament to make laws which affect or alter the structure of state courts or the organisation through which their powers and jurisdiction are exercised: see *Russell v Russell* (1976) 134 CLR 495; *Le Mesurier v Connor* (1929) 42 CLR 481.

6. A 'court of a state' which may be invested with federal jurisdiction in the exercise of the power conferred by s 77(iii) of the Constitution, extends not only to judges but also to other judicial officers such as masters and registrars who, through the structure and organisation of the particular state court, exercise limited judicial functions. The jurisdiction to be exercised by such officers may therefore encompass federal jurisdiction: *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49 (the High Court, by majority, declined to follow earlier authorities on this issue).

7. The Australian Law Reform Commission was asked to examine the application, operation and possible reform of the Judiciary Act 1903 (Cth). The review began in January 2000. One of the key matters for investigation related to the distribution of federal judicial power among federal and state courts: see Australian Law Reform Commission Discussion Paper 64: *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Canberra, December 2000. The final report of the same name (ALRC 92) sets out 125 recommendations for amendments to the Judiciary Act 1903 and related legislation such as the High Court of Australia Act 1979 (Cth), the Federal Court of Australia Act 1976 (Cth), the Family Law Act 1975 (Cth), and the Federal Magistrates Act 1999 (Cth). The report was tabled in Federal Parliament on 2 October 2001. There has been no formal response to the recommendations in ALRC 92. Some recommendations have been implemented, but there has been no significant change to the distribution of federal judicial power among federal and state courts.

8. In November 2008, the Government released the report *Future Governance Options for Federal Family Law Courts in Australia*, which found that the arrangements for the Federal Magistrates' Court were financially unsustainable, lead to confusion among litigants, conflict over resources and inefficiencies in administration, and impeded access to justice and the delivery of family law services. In line with one of the key recommendations of that report, the Commonwealth Attorney-General announced on 5 May 2009 that the Federal Courts would be restructured, by merging the Federal Magistrates' Court into the Family Court and the Federal Court. All family law matters were to be consolidated under the Family Court, and all general federal law matters were to be consolidated under the Federal Court. However, the Federal Government subsequently shifted its policy to propose a

restructure of the Federal Magistrates Court through the Access to Justice (Family Court Restructure and Other Measures) Bill 2010. Under that proposed new structure, the Federal Magistrates' Court will continue to hear general federal law matters but the court's family law component will operate as a general division of the Family Court.

4.1.30 Further reading

L Aickin, 'The Meaning of "Matter": A Matter of Meaning — Some Problems of Accrued Jurisdiction' (1988) 14 *Mon LR* 158.

The Hon Justice J Allsop, 'Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002' (2002) 23 *Aust Bar Rev* 29.

M E J Black, 'The Federal Court of Australia: The First 30 Years — A Survey on the Occasion of Two Anniversaries' (2007) 31 *Melb Univ Law Rev* 1017.

N H Bowen, 'The Federal Court of Australia' (1977) 8 *Syd Law Rev* 285.

D Burnett, 'The Commonwealth: A Multitude of Manifestations — Federal Jurisdiction under s 75(iii) of the Constitution' (2007) 81 *ALJ* 195.

C Button, 'The Federal Court's "Arising Under" Jurisdiction and the Development of a "Contingent Jurisdiction"' (2006) 27 *Aust Bar Rev* 327.

E Campbell, 'The Accrued Jurisdiction of the Federal Court in Administrative Law Matters' (1998) 17 *Aust Bar Rev* 127.

Z Cowen and L Zines, *Federal Jurisdiction in Australia*, 3rd ed, Federation Press, Annandale, NSW, 2002.

The Hon Justice P de Jersey, 'The Inherent Jurisdiction of the Supreme Court' (1985) 15 *QLSJ* 325.

P Durack, 'The Special Role of the Federal Court of Australia' (1981) 55 *ALJ* 778.

I H Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23.

G Kalimnios, 'The Federal Magistrates Court: A Snapshot of its Jurisdiction' (2007) *Qld Lawyer* 138.

P Keyzer, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth' (2008) 30 *Syd Law Rev* 101.

The Hon Justice S Kiefel, 'The Federal Court of Australia and its Contribution to the Federal Civil Justice System' (2006) 9 *FJLR* 1.

W Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution' (2003) 31 *Fed LR* 57.

A Mason, 'The Evolving Role and Function of the High Court of Australia' in B Opeskin and F Wheeler (eds), *The Australian Federal Judicial System*, Melbourne University Press, Melbourne, 2000.

K Mason, 'The Inherent Jurisdiction of the Supreme Court' (1983) 57 *ALJ* 449.

D Mossop, 'The Judicial Power of the Australian Capital Territory' (1999) 27(1) *Fed LR* 19.

R McCallum and M Crock, 'Australia's Federal Courts: Their Origins, Structure and Jurisdiction' (1995) 46 *SC L Rev* 719.

The Hon Justice R Sackville, 'The Re-emergence of Federal Jurisdiction in Australia' (2001) 21 *Aust Bar Rev* 133.

L Zines, 'Federal, Associated and Accrued Jurisdiction' in B Opeskin and F Wheeler (eds), *The Australian Federal Judicial System*, Melbourne University Press, Melbourne, 2000.

L Zines, *The High Court and the Constitution*, 4th ed, Butterworths, Sydney, 1997, Ch 10.

TERRITORIAL JURISDICTION

4.2.1 It is not necessarily sufficient to give a court jurisdiction that the subject matter of a proceeding is a matter which may ordinarily be determined by the court. It is also necessary that the court have jurisdiction over the defendant. This is generally referred to as 'territorial' or '*in personam*' jurisdiction. For instance, a resident and citizen of Uganda cannot choose to sue another Ugandan resident in the Supreme Court of Queensland for a debt arising in Uganda, because ordinarily such an action would clearly fall outside the territorial jurisdiction of the Supreme Court of Queensland. On the other hand, if the potential Ugandan defendant is in Queensland, has submitted to the Queensland court's jurisdiction, or for some other reason can validly be served with the initiating proceeding, then the Queensland court will have territorial jurisdiction.

Presence in the jurisdiction

4.2.2 The principal basis for jurisdiction over an action *in personam* is the presence of a defendant in the jurisdiction. In *Laurie v Carroll* (1958) 98 CLR 310, extracted below, the High Court considered the rationale for this jurisdiction and expounded a number of principles about it.

4.2.3C **Laurie v Carroll**
(1958) 98 CLR 310
High Court of Australia

[The plaintiff had issued a writ of summons out of the Supreme Court of Victoria the day after the defendant, Laurie, had left Victoria, having no intention of returning. The plaintiff obtained orders which included an order giving leave to serve the writ of summons within

the jurisdiction by substituted service, being by service upon a nominated firm of solicitors who had acted for Laurie. Laurie applied, without entering an appearance or a conditional appearance, to discharge the *ex parte* order for substituted service, and service pursuant to it, and also to discharge other orders which had been made. The application was dismissed at first instance and the defendant, by special leave, appealed to the High Court.]

Dixon CJ, Williams and Webb JJ (at 322–34): For a point has been reached at which it is better to turn to the question whether it was competent and proper to make the order for substituted service of the writ of summons. Primarily the question is one of jurisdiction. The action is *in personam* and it is transitory; and in such an action the jurisdiction of the Supreme Court of Victoria depends not in the least on subject matter but upon the amenability of the defendant to the writ expressing the Sovereign's command in right of the State of Victoria. The common law doctrine is that the writ does not run beyond the limits of the State. By the federal Service and Execution of Process Act 1901–1953, however, it may, if endorsed under that statute, be served elsewhere within the Commonwealth and its Territories, the conditions in which this may be done and the consequences being defined by the provisions of the Act. Further, by rules made under s 139 of the Supreme Court Act 1928 replacing, but based upon, the fifth schedule of that Act and now contained in O XI, rr 1–5 of the Rules of the Supreme Court 1957, it is provided that in cases answering any of the descriptions in r 1, service of the writ or of notice of the writ in any place outside Victoria may be allowed by the court or a judge. It may be that the cause of action which the plaintiffs seek to set up will fall neither within any of the paragraphs of r 1 of O XI nor within any of those of s 11 of the Service and Execution of Process Act 1901–1953. If so that may explain the importance apparently attached by the parties to this appeal. For except for these extensions of the principle of the common law, it remains true that a writ issued out of the Supreme Court of Victoria does not run outside that State. And in actions *in personam* this must determine the jurisdiction of the [323] court over the defendant …

The defendant must be amenable or answerable to the command of the writ. His amenability depended and still primarily depends upon nothing but presence within the jurisdiction. 'The service of the writ, or something equivalent thereto, is absolutely essential as the foundation of the court's jurisdiction. Where a writ cannot legally be served upon a defendant the court can exercise no jurisdiction over him. In an action *in personam* the converse of this statement holds good, and wherever a defendant can be legally served with a writ, there the court, on service being effected has jurisdiction to entertain an action against him. Hence, in an action *in personam*, the rules as to the legal service of a writ define the limits of the court's jurisdiction. Now, a defendant who is in England can always, on the plaintiff's taking proper steps, be legally served with a writ. The service should be personal, but if personal service cannot be effected, the court may allow [324] substituted or other service. In other words, the court has jurisdiction to entertain an action *in personam* against any defendant who is in England at the time for the service of the writ': *Dicey — Conflict of Laws*, 6th ed (1949), p 172. It will be noticed that in this passage presence within the jurisdiction at the time of service is regarded as essential. The statutory qualification or exception as to service out of the jurisdiction was of course not under the author's consideration in the foregoing passage. But what is of great importance for the purposes of the case in hand is that to insist on the presence of the defendant within the jurisdiction at the time of service is to exclude the possibility of substituted service when he is no longer within the jurisdiction …

[328] But the rival theory that the critical time is the issue of the writ means that the issue of the writ is the exercise of jurisdiction over the defendant and accordingly it is enough that he is then present within the jurisdiction. At that moment he may be regarded as falling under the command of the writ as an exercise of jurisdiction. The obligation of its command falls upon him in virtue of his presence within the jurisdiction and his consequent amenability to the writ. Service remains necessary as a condition of his incurring the consequences of default and in that way as a condition perfecting the duty of obedience to the command of the writ. If a defendant knowing of the issue of the writ goes abroad before personal service or, although he does not positively know of the fact of the issue of the writ, goes abroad to evade service, doubtless he may be treated as under notice of the obligation of its command. But without deserting the traditional principle which has governed the jurisdiction of our courts in actions *in personam* and finding a new basis of jurisdiction it is impossible to go back to a point when no writ had been issued, no exercise of jurisdiction had taken place, and to say that because there had been a time when the defendant was amenable to the jurisdiction so that it might then have been exercised over him and because he had quitted the jurisdiction in order that he might cease to be amenable to it, he none the less remained subject to the jurisdiction. For it means that, jurisdiction being based on personal presence it must have ceased when he left, yet none the less he is subject to the jurisdiction still. It must mean this if he is to be served with the writ, not as an extraterritorial exercise of jurisdiction by means of a writ for service out of the jurisdiction, but by substituted service within the jurisdiction of an eight-day writ …

[331] In the case of personal service within the jurisdiction of a writ of summons in an action *in personam* the view seems to be accepted that it is enough that the defendant is present in England at the time of service. It does not matter why, so long as he has not been enticed there fraudulently for the purpose. It does not matter whether he is a foreigner or a subject of the Crown. It does not matter how temporary may be his presence, how fleeting may be his visit. See *Dicey — Conflict of Laws*, 6th ed (1949), pp 172, 173; *Schmitthoff — The English Conflict of Laws*, 3rd ed (1954), p 428 …

If the local allegiance (the *ligeantia localis*) of Laurie to the State [332] of Victoria rendering him liable to comply with the mandate of a writ issued from the Supreme Court of Victoria began no earlier and continued no longer than his presence in Victoria, it is surely incongruous that he should be held liable to comply with the mandate of a writ issued after his departure. It is no less incongruous if the ground is that he hastened his departure lest his presence should be used to invoke the exercise over him of the jurisdiction which arose from his presence …

[333] Laurie neither by reason of past history nor by reason of present domicile, residence or course of business stood in any general relation to the State of Victoria which would make him naturally or prima facie subject to the jurisdiction of the courts of the State. He was about to leave the State within a short time and all that can be meant by the inference that he left to evade service is that he accelerated his departure because of the threat of suit. In all these circumstances the substance of the matter was that, unless [334] the case could be brought within O XI or the Service and Execution of Process Act, a contingency that must have appeared very dubious, the Supreme Court by ordering substituted service was really asserting a jurisdiction over the defendant Laurie which otherwise it could not possess, save in so far as it arose from the accidental circumstances of his brief visit to Melbourne. These are considerations which show that O IX, r 2, ought not to have been used. It was invoked by the plaintiffs only for the purpose of giving the Supreme Court of Victoria jurisdiction where

otherwise it did not exist. Accordingly the order for substituted service of the writ of summons ought not to have been made.

[The court rejected an argument raised on behalf of the plaintiff that, by seeking the other relief as claimed by Laurie in his application, he had waived his right to object or had voluntarily submitted to the jurisdiction. It ordered that the order for substituted service and the purported service of the writ in pursuance of the order be set aside.]

Submission to the jurisdiction

4.2.4 A court will also gain jurisdiction where a defendant, though not present in the jurisdiction, *voluntarily submits* to the jurisdiction.

A party will be taken to have submitted to the jurisdiction of the court if the party's conduct is inconsistent with the maintenance of an objection to the court's jurisdiction. A defendant will, for example, be held to have submitted to the jurisdiction if he or she enters an unconditional appearance (see **9.7.1**), at least where it is possible to test the jurisdiction of the court without entering such an appearance: *Perkins v Williams* (1900) 17 WN (NSW) 135. There will be no submission, however, if a defendant files a conditional appearance and applies to the court to set aside orders on the basis that the court did not have jurisdiction to make them because of significant defects in the service of the originating process: *Robinson v Kuwait Liaison Office* (1997) 145 ALR 68 at 75. See also *United Group Resources Pty Ltd v Calabro (No 4)* [2010] FCA 791.

In respect of an action on a contract, the parties may submit to the jurisdiction by an express agreement in the contract that disputes be referred to a particular court: *Vogel v Kohnstamm Ltd* [1973] QB 133 (a case dealing with enforcement of foreign judgments). A mere choice of law clause, however, does not amount to a submission: *Dunbee Ltd v Gilman & Co (Australia) Pty Ltd* (1968) 70 SR (NSW) 219 at 225.

Statutory extension of territorial jurisdiction

4.2.5 As well as having jurisdiction over a defendant present in the jurisdiction or who submits to the jurisdiction, the court may have *in personam* jurisdiction over a defendant *outside* the jurisdiction who is validly served with the proceeding. This was recognised in the joint judgment of Dixon CJ, Williams and Webb JJ in *Laurie v Carroll* (1958) 98 CLR 310 at 323.

Significant changes came into effect in 1993, in relation to the rules which extend the *in personam* jurisdiction of the Supreme Courts of the states and territories, and which provide for service of a defendant outside the territorial limits of the court. It is necessary to draw a distinction between service outside a state or territory, but within Australia on the one hand and service outside Australia on the other. For state and territory Supreme Courts, service outside the state or territory but within Australia is now governed primarily by the Service and Execution of Process Act 1992 (Cth), which in effect gives the courts of the states and territories Australia-wide *in personam* jurisdiction: *Kontis v Barlin* (1993) 115 ACTR 11 at 18–19 per Master Hogan; *McEntee v Connor* (1994) 4 Tas R 18. The rules in New South Wales also provide for service of originating process in Australia: r 10.13. Service outside Australia is governed exclusively by the Rules of Court. The Federal Court, the High Court, and all

state and territory Supreme Courts have rules which allow an initiating process to be served on a defendant outside Australia: HCR r 9.07; FCR Ch 2 Pt 10 Div 10.4; ACT Pt 6.8.9; NSW Pt 11; NT O 7; Qld Ch 4, Pt 7; SA rr 40, 41; Tas Pt 7 Div 10; Vic O 7; WA O 10; see 8.9.9–8.9.35. As will be seen, these rules require some *nexus* between the case or the defendant and the forum before the court will have jurisdiction.

The Service and Execution of Process Act 1992 (Cth) and the Rules of Court relating to service out of the jurisdiction are generally concerned with *in personam* jurisdiction, not *subject matter* jurisdiction of the courts. For individual recognition of the distinction between the two, see *Flaherty v Girgis* (1987) 162 CLR 574 at 598 in the joint judgment of Mason ACJ, Wilson and Dawson JJ. See also *David Syme & Co Pty Ltd v Grey* (1992) 38 FCR 303: 4.3.11.

4.2.6 Further reading

A Beech, 'Discretion in the Exercise of Jurisdiction: Recent Developments' (1989) 19 *UWALR* 8.

P Nygh, 'Choice of Law Rules and Forum Shopping in Australia' (1995) 6 *PLR* 237 (see, in particular, 238–41, 244–55).

CROSS-VESTING OF JURISDICTION

The purpose of the cross-vesting scheme

4.3.1 It was the desire to overcome some of the difficulties of overlapping and competing jurisdictions inherent in a federal system, and to ensure that one superior court could give complete relief, that in 1987 caused state and federal legislatures to pass a number of Acts, which collectively are referred to as the cross-vesting scheme. As it was not intended to make any general change in the distribution of business among the courts, it was necessary to also provide a mechanism to ensure that people continued to bring their actions in the most appropriate courts (and so not make any change in the distribution of business among the courts). Accordingly, the scheme has two basic components:

1. The investment or conferral, as the case requires, of the original and appellate jurisdiction of each of the participating courts in or on each of the other participating courts (although with some exclusions). The participating courts are the Federal Court, the Family Court, the Supreme Courts of each of the states and territories, and the Family Court of Western Australia. The scheme does not apply to the High Court: Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s 3(1). The scheme does not include magistrates' courts and district and county courts, although certain matters can be remitted to those courts: see 4.3.21E, 4.3.22.
2. A mechanism for the transfer of proceedings to the best suited court.

Through these two components it was intended to ensure that, within the ambit of the scheme, a proceeding could not fail because of a lack of jurisdiction, but that jurisdictional balance would be maintained between courts through the appropriate exercise by the courts of the power to transfer proceedings.

The cross-vesting scheme took effect from 1 July 1988. It comprises corresponding state and territorial legislation comprising: Jurisdiction of Courts (Cross-vesting) Act 1987 for each of the states (the State Acts): Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth); Jurisdiction of Courts (Miscellaneous Amendments) Act 1987 (Cth); Jurisdiction of Courts (Cross-vesting) Act 1987 (NT) (and now includes the Jurisdiction of Courts (Cross-vesting) Act 1993 (ACT)) (the Territory Acts). The state and territory Acts are in very similar terms, but they differ in some respects from the Commonwealth Act.

Constitutional invalidity

4.3.2 An aspect of the cross-vesting scheme has been held to be constitutionally invalid. In *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; (1999) 163 ALR 270 (and see **4.1.20C** above), the High Court held that those provisions of the cross-vesting scheme which purported to confer state jurisdiction on federal courts were invalid. In its earlier decision in *Gould v Brown* (1998) 193 CLR 346; 151 ALR 395, the High Court had been evenly divided on the issue and had therefore affirmed the decision of the Full Court of the Federal Court in *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 137 ALR 447, which had upheld the validity of the cross-vesting scheme.

The High Court's finding of invalidity in *Re Wakim* was held to flow from Ch III of the Constitution. Under s 77(i) of the Constitution, the Commonwealth Parliament may make laws defining the jurisdiction of a federal court, but only with respect to those (federal) matters which are set out in ss 75 and 76 of the Constitution: see **4.1.4E**. The High Court held that s 77(i) was an exhaustive statement of the jurisdiction which the Commonwealth Parliament could confer on a federal court, and further that no entity other than the Commonwealth Parliament had power to confer jurisdiction on a federal court. Accordingly, state parliaments could not confer any jurisdiction on a federal court. The High Court further held that there was no power in the Commonwealth Parliament to authorise a federal court to exercise jurisdiction which the Commonwealth Parliament could not itself confer.

The decision in *Re Wakim* did not invalidate the entire cross-vesting scheme, but only those provisions which purported to confer state jurisdiction on federal courts. As will be seen, the provisions of the Jurisdiction of Courts (Cross-Vesting) Act 1987 of each of the states which were affected were s 4(1) and (2). In each state these provisions have since been omitted by amending legislation. In respect of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth), the affected provision was s 9(2). Those provisions of the scheme which confer federal jurisdiction on state courts or which confer state jurisdiction on the courts of other states and territories remain operative. Similarly the provisions which facilitate the transfer of proceedings between courts are valid, but it will now only be possible to transfer proceedings between courts if both the transferring court and the court to which it is sought to transfer the proceedings have jurisdiction. Amendments have been made to the transfer provisions in each state to accurately reflect that circumstance.

The Australian Capital Territory and the Northern Territory have legislation corresponding with that of the states, and both the Commonwealth and the state and territory Acts treat them as states: s 3. The decision in *Re Wakim*, however, concerns cross-vesting of state, not territorial, jurisdiction on a federal court. As the conferring of territorial jurisdiction on a federal court was not in issue, the decision does not invalidate s 4 of the Jurisdiction of Courts (Cross-vesting) Act 1993 (ACT) or the Jurisdiction of Courts (Cross-vesting) Act (NT).

Investment and conferral of jurisdiction

4.3.3E **Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld)**
(as originally enacted)

Vesting of additional jurisdiction in certain courts
4 (1) The Federal Court has and may exercise original and appellate jurisdiction with respect to State matters.
(2) The Family Court has and may exercise original and appellate jurisdiction with respect to State matters.
(3) The Supreme Court of another State or of a Territory has and may exercise original jurisdiction with respect to State matters.
(4) The State Family Court of another State or of a Territory has and may exercise original and appellate jurisdiction with respect to State matters.
(5) Subsection (1), (2), (3) or (4) does not:
(a) invest the Federal Court, the Family Court or a Supreme Court with; or
(b) confer on any such court;
jurisdiction with respect to criminal proceedings.

4.3.4E **Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld)**
(as amended by the Federal Courts (Consequential Amendments) Act 2001)

Vesting of additional jurisdiction in certain courts
4 (1) The Supreme Court of another State or of a Territory has and may exercise original and appellate jurisdiction with respect to State matters.
(2) The State Family Court of another State has and may exercise original and appellate jurisdiction with respect to State matters.
(3) Subsection (1) or (2) does not —
(a) invest a Supreme Court or a State Family Court with; or
(b) confer on any such court;
jurisdiction with respect to criminal matters.

4.3.5 There were only immaterial variations between the various state and territory versions of this section as originally enacted. In its original form the provision purported to confer jurisdiction with respect to 'state matters' on the Federal Court, the Family Court and the Supreme Court of the other states or territories. In *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; 163 ALR 270, the High Court held, however, that state parliaments have no power to confer any jurisdiction on a Federal Court. Accordingly, in their original form s 4(1) and (2) of each of the state Acts were invalid: see 4.3.2. In Queensland, s 4 of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld) was amended by s 39 of the Federal Courts (Consequential Amendments) Act 2001, to delete the invalid provisions and appropriately reflect the position resulting from the decision in *Re Wakim*. The other states have passed similar amendments: Federal Courts (Consequential Provisions) Act 2000 (NSW) s 3; Statutes Amendment (Federal Courts — State Jurisdiction) Act 2000 (SA) s 35; Federal Courts (Consequential

Amendments) Act 2001 (Tas) s 34; Federal Courts Consequential Amendments) Act 2000 (Vic) s 24; Acts Amendment (Federal Courts and Tribunals) Act 2001 (WA). As it was the vesting of state, not territorial, jurisdiction that was in issue in *Re Wakim*, s 4 of each of the territory Acts has not been amended.

Section 3(1) of each state Act defines 'state matter' as extending to any matter in which the Supreme Court has jurisdiction other than by reason of a law of the Commonwealth or of another state, or any matter which is removed to the Supreme Court from an inferior court for the purpose of transfer under the scheme. This means that a state matter is any matter that would fall within the ordinary jurisdiction of a state court regardless of the cross-vesting scheme.

Section 3A of each state Act provides that the Act does not apply to the jurisdiction of courts to which Div 1 of Pt 9.6A of the Corporations Act 2001 (Cth) applies. That division deals with the jurisdiction of the Federal Court, and the state and territory courts with respect to civil matters arising under the corporate legislation.

The jurisdiction which is vested by s 4 is both original and appellate. Only civil jurisdiction is covered; jurisdiction with respect to criminal matters is expressly excluded.

4.3.6E Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)

Additional jurisdiction of certain Courts

4 (1) Where:

(a) the Federal Court or the Family Court has jurisdiction with respect to a civil matter, whether that jurisdiction was or is conferred before or after the commencement of this Act; and

(b) the Supreme Court of a State or Territory would not, apart from this section, have jurisdiction with respect to that matter;

then:

(c) in the case of the Supreme Court of a State (other than the Supreme Court of the Australian Capital Territory and the Supreme Court of the Northern Territory) that court is invested with federal jurisdiction with respect to that matter; or

(d) in the case of the Supreme Court of a Territory (including the Australian Capital Territory and the Northern Territory) jurisdiction is conferred on that court with respect to that matter.

(2) Where:

(a) the Supreme Court of a Territory has jurisdiction with respect to a civil matter, whether that jurisdiction was or is conferred before or after the commencement of this Act; and

(b) the Federal Court, the Family Court or the Supreme Court of a State or of another Territory would not, apart from this section, have jurisdiction with respect to that matter;

jurisdiction is conferred on the court referred to in paragraph (b) with respect to that matter.

(3) Where a proceeding is transferred to the Federal Court, the Family Court or a State Family Court of a State, that court has, by virtue of this subsection, jurisdiction with respect to so many of the matters for determination in the proceeding as that court would not have apart from this subsection.

(4) This section does not apply to a matter arising under:

(a) the Conciliation and Arbitration Act 1904; or
(aa) the Building and Construction Industry Improvement Act 2005; or
(ab) the Fair Work Act 2009; or
(ac) the Fair Work (Registered Organisations) Act 2009; or
(ad) the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009; or
(b) the Workplace Relations Act 1996; or
(ba) the Native Title Act 1993; or
(c) section 45D, 45DA, 45DB, 45E, 45EA, 46A, 155A or 155B of the Competition and Consumer Act 2010; or
(d) a provision of Part VI or XII of the Competition and Consumer Act 2010 so far as the provision relates to section 46A, 155A or 155B of that Act.

4.3.7 Section 4 of the Commonwealth Act varies from the state and territory Acts as necessitated by the different constitutional position of the Commonwealth, the fact that federal courts are not courts of general civil jurisdiction, and in order to make provision for territory courts and courts established under Ch III of the Commonwealth Constitution.

Section 3 of the Commonwealth Act defines 'state' as including the Australian Capital Territory and the Northern Territory, and it excludes both territories from the definition of 'territory'. Section 4 of the Commonwealth Act therefore vests in, or confers on, state and territory Supreme Courts, federal jurisdiction where the state or territory courts would not otherwise have jurisdiction and also confers the jurisdiction of the external territory Supreme Courts on the Federal Court, the Family Court and the state Supreme Courts and the Supreme Courts of the Australian Capital Territory and the Northern Territory (where these courts would not otherwise have jurisdiction). The constitutional validity of the conferral of territory jurisdiction on the Federal Court was upheld in *Northern Territory of Australia v GPAO* (1999) 196 CLR 553; 161 ALR 318, and *Spinks v Prentice* (1999) 198 CLR 511.

As is the position under the state and territory Acts, the jurisdiction is both original and appellate, but criminal jurisdiction is excluded: Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s 4(1), (2). Unlike the provisions of the state and territory Acts, however, the civil jurisdiction which is conferred by the Commonwealth Act is not unqualified. Section 4(4) expressly excludes matters arising under several stipulated Commonwealth statutes. The Federal Court retains exclusive jurisdiction in respect of those matters.

4.3.8E Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW)

Exercise of jurisdiction pursuant to cross-vesting laws

9 The Supreme Court —

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

4.3.9E Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)

Exercise of jurisdiction pursuant to cross-vesting laws

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

(2) The Supreme Court of a Territory may:

(a) exercise jurisdiction (whether original or appellate) conferred on that court by a provision of this Act or of a law of a State relating to cross-vesting of jurisdiction; and

(b) hear and determine a proceeding transferred to that court under such a provision.

(3) The Federal Court or the Family Court may:

(a) exercise jurisdiction (whether original or appellate) conferred on that court by a provision of this Act or of a law at the Australian Capital Territory or the Northern Territory relating to cross-vesting of jurisdiction; and

(b) hear and determine a proceeding transferred to that court under such a provision.

4.3.10 Sections 4 of the state, territory and Commonwealth legislation, while granting jurisdiction, are not sufficient in themselves to allow the court to which jurisdiction is granted to exercise that jurisdiction. Section 9 of the cross-vesting legislation applicable for the court to which the jurisdiction is conferred resolves that problem by authorising the exercise of the additional jurisdiction so conferred.

(In its original form s 9 of the Commonwealth Act purported to authorise Federal and Family Courts to exercise jurisdiction as then thought to be conferred by the state Acts. The section was amended consequent on the finding of the High Court in *Re Wakim Ex parte McNally* (1999) 198 CLR 511; 163 ALR 270 that the provision was, to that extent, invalid: Jurisdiction of Courts Legislation Amendment Act 2000, Sch 1): see 4.3.2.

Nature of jurisdiction cross-vested

4.3.11 Except to the extent of the constitutional invalidity of an aspect of the cross-vesting scheme as has been seen (see 4.3.2), there is no doubt that the cross-vesting scheme has the effect of vesting the 'subject matter jurisdiction' of a particular court in the scheme in any of the other courts (with significant exceptions to be discussed), but there is some doubt as to whether it extends, in effect, to the 'territorial' jurisdiction: see 4.2.1–4.2.6.

The issue is illustrated by *David Syme & Co Ltd v Grey* (1992) 38 FCR 303. In that case the respondent issued a writ against the appellant out of the Supreme Court of the Australian Capital Territory. The writ claimed in respect of defamatory material concerning the plaintiff 'published in the Australian Capital Territory and throughout Australia'. The writ was indorsed to be served out of the Australian Capital Territory and in Victoria. The appellant was never present, nor did it carry on any business, in the Australian Capital Territory. The appellant entered no appearance, but gave notice of motion to stay the proceedings as being inappropriate for the granting of liberty to proceed under the Service and Execution of Process Act 1901 (Cth) s 11(1). Section 11(1) of that Act authorised service out of the jurisdiction if there was sufficient nexus with the jurisdiction (as set out in the section), but it was necessary to obtain liberty to proceed if no appearance was entered. The respondent obtained an order of

the Supreme Court of the Australian Capital Territory giving it liberty to proceed, and the appellant appealed, by leave, to the Full Court. The Full Court allowed the appeal. It held that in relation to the claims for damages based upon publication outside the Australian Capital Territory, there clearly was not a sufficient nexus with the Australian Capital Territory for the granting of leave under s 11(1). It was argued, however, that the Supreme Court of the Australian Capital Territory had cross-vested jurisdiction which could be exercised without regard to nexus requirements as to service contained in the Service and Execution of Process Act 1901 (Cth), or the relevant Rules of Court relating to service out of the territory. The Full Court of the Federal Court rejected the contention. It held that the cross-vesting legislation should be construed as affecting only the subject matter jurisdiction. It did not vest the 'personal' jurisdiction of the participating courts, leaving service of process to be dealt with under the otherwise applicable rules: see at 310 per Neaves J; at 331–2 per Gummow J.

As noted in the judgments in *David Syme & Co Ltd v Grey* (1992) 38 FCR 303 (see at 332 per Gummow J), K Mason and J Crawford ('The Cross-Vesting Scheme' (1988) 62 *ALJ* 328 at 335–6) had earlier argued for the position accepted in *David Syme & Co Ltd v Grey*, namely that the scheme for cross-vesting of jurisdiction did not extend to vest the personal jurisdiction of the participating courts, leaving personal jurisdiction (including service of process) to be dealt with under the otherwise applicable rules. That view also has some academic support: P Nygh, 'Choice of Law Rules and Forum Shopping in Australia' (1995) 6 *PLR* 237 at 241–2. It should be noted, however, that a number of authors have expressed a contrary view, that there is no need to read down the legislation, and that it should in principle cover the jurisdiction which the Supreme Court of a state can exercise in actions *in personam* merely by reason of the presence of the defendant within the territorial jurisdiction of that state court: see Professor J Davies, *Annual Survey of Law*, 1987, pp 58–9; G Griffith, D Rose and S Gageler, 'Further Aspects of the Cross-Vesting Scheme' (1988) 62 *ALJ* 1016 at 1022–3; The Hon Justice C Pincus, 'Cross-vesting of Jurisdiction' (1989) 19 *QLSJ* 259 at 261; G Lindell, 'The Cross-Vesting Scheme and Federal Jurisdiction Conferred upon State Courts by the Judiciary Act 1903 (Cth) (1991), 17 *Mon LR* 64 at 73–4. This view also finds judicial support in *Seymour-Smith v Electricity Trust of South Australia* (1989) 17 NSWLR 648 at 657–60 per Rogers J (not followed in *David Syme & Co Ltd v Grey*).

The jurisdictional point discussed in *David Syme & Co Ltd v Grey*, and in the other case and articles noted, is no longer important for interstate service under the Service and Execution of Process Act 1992 (Cth) because of the effect of that Act in giving Supreme Courts of the state and territories Australia-wide *in personam* jurisdiction: see 8.9.3.

Transfer of proceedings

4.3.12 If the cross-vesting scheme merely conferred jurisdiction and contained no mechanisms to ensure that proceedings were brought in the most appropriate courts, it could have resulted in a significant change in the distribution of business among the courts and allowed parties to conduct proceedings in courts which were clearly inappropriate forums for the particular disputes. Obviously that would not be a desirable result. To ensure that the scheme does not foster forum shopping and that, so far as possible the jurisdictional balance between the various courts is maintained, the scheme contains provision for the transfer of proceedings in certain cases to a more appropriate court. The key provision for the transfer of proceedings is s 5 of each of the Jurisdiction of Court (Cross-vesting) Acts, which requires transfer of a pending proceeding (where specified conditions are met) between the various superior courts.

4.3.13E Jurisdiction of Courts (Cross-vesting) Act 1987 (WA)

Transfer of proceedings

5 (1) Where —

(a) a proceeding (in this subsection referred to as the *relevant proceeding*) is pending in the Supreme Court; and

(b) it appears to the Supreme Court that, having regard to —

(i) whether, in the opinion of the Supreme Court, apart from any law of the Commonwealth or another State relating to cross-vesting of jurisdiction and apart from any accrued jurisdiction of the Federal Court or the Family Court, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the Supreme Court and capable of being instituted in the Federal Court or the Family Court; and

(ii) the extent to which, in the opinion of the Supreme Court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the Commonwealth and not within the jurisdiction of the Supreme Court apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction; and

(iii) the interests of justice,

it is more appropriate that the relevant proceeding be determined by the Federal Court or the Family Court, as the case may be, the Supreme Court shall transfer the relevant proceeding to the Federal Court or the Family Court, as the case may be.

(2) Where —

(a) a proceeding (in this subsection referred to as the *relevant proceeding*) is pending in the Supreme Court (in this subsection referred to as the *first court*); and

(b) it appears to the first court that —

(i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Supreme Court of another State or of a Territory and it is more appropriate that the relevant proceeding be determined by that other Supreme Court

(ii) having regard to —

(A) whether, in the opinion of the first Supreme Court, apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the first Court and capable of being instituted in the Supreme Court of another State or Territory;

(B) the extent to which, in the opinion of the first court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the State or Territory referred to in sub-subparagraph (A) and not within the jurisdiction of the first court apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction; and

(C) the interests of justice, it is more appropriate that the relevant proceeding be determined by that other Supreme Court or

(iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State or of a Territory,

the first court shall transfer the relevant proceeding to that other Supreme Court.

(3) Where —

(a) a proceeding (in this subsection referred to as the *relevant proceeding*) is pending in the Supreme Court of another State or of a Territory (in this subsection referred to as the *first court*); and

(b) it appears to the first court that —

(i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Supreme Court of Western Australia and it is more appropriate that the relevant proceeding be determined by the Supreme Court of Western Australia;

(ii) having regard to —

(A) whether, in the opinion of the first court, apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the first court and capable of being instituted in the Supreme Court of Western Australia; and

(B) the extent to which, in the opinion of the first court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the State and not within the jurisdiction of the first court apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction; and

(C) the interests of justice;

it is more appropriate that the relevant proceeding be determined by the Supreme Court of Western Australia; or

(iii) it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of Western Australia,

the first court shall transfer the relevant proceeding to the Supreme Court of Western Australia.

[Section 5(4) provides for the transfer of proceedings between the Supreme Court of Western Australia and the state Family Court of Western Australia. Section 5(5) is in corresponding terms to s 5(3), except that it provides for the transfer of proceedings by the Federal Court or the Family Court, rather than by the Supreme Court of another state or territory.]

(6) [Repealed]

(7) Where —

(a) a court (in this subsection referred to as the *first court*) transfers a proceeding to another court under a law or laws relating to cross-vesting of jurisdiction; and

(b) it appears to the first court that —

(i) there is another proceeding pending in the first court that arises out of, or is related to, the first-mentioned proceeding; and

(ii) it is in the interests of justice that the other proceeding be determined by the other court;

the first court shall transfer the other proceeding to the other court.

(8) A court may transfer a proceeding under this section on the application of a party to the proceeding, of its own motion, or on the application of the Attorney-General of the Commonwealth or of a State or Territory.

...

(10) Nothing in this section confers on a court jurisdiction that the court would not otherwise have.

4.3.14 In its original form, s 5(1) of each of the state Acts included a purported jurisdiction for a state Supreme Court to transfer to the Federal Court or Family Court a proceeding arising out of, or related to, a proceeding in the Federal Court or Family Court. Following the decision of the High Court in *Re Wakim Ex parte McNally* (1999) 198 CLR 511; 163 ALR 270 (see **4.3.3**), s 5 of each of the state Acts, as originally enacted, was amended to its current form to reflect the position that proceedings can only be transferred between courts if both the transferring court and the court to which it is sought to transfer the proceedings have jurisdiction: Federal Courts (Consequential Provisions) Act 2000 (NSW) s 3; Federal Courts (Consequential Amendments) Act 2001 (Qld) s 40; Statutes Amendment (Federal Courts — State Jurisdiction) Act 2000 (SA) s 36; Federal Courts (Consequential Amendments) Act 2001 (Tas) s 35; Federal Courts (Consequential Amendments) Act 2000 (Vic) s 24; Acts Amendment (Federal Courts and Tribunals) Act 2001 (WA) s 24.

Section 5 of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) is in broadly similar terms to the state Acts. That provision was amended by the Jurisdiction of Courts (Miscellaneous Amendments) Act 2000 (Cth) to more accurately reflect the position resulting from the decision in *Re Wakim*.

It has been held on numerous occasions that despite the decision in *Re Wakim*, the venue transfer provisions in s 5(4) of the Commonwealth Act remain operable so that proceedings pending in the Federal Court falling within that court's jurisdiction may be transferred to the Supreme Court of a state: see eg, *Johnson Tiles Pty Ltd v Esso Australia Ltd* (2001) 113 FLR 42; [2001] ATPR 41-818: see **10.9.10**.

In all cases, the court in which a proceeding (referred to in the legislation as 'the relevant proceeding') is pending is required to transfer the proceeding to another court in stipulated circumstances. The legislation provides for two quite distinct circumstances.

The first is where 'related' proceedings have been commenced in different courts participating in the cross-vesting scheme. It is not essential that the 'related' proceeding be between the same parties; there need only be some degree of causality between them (*Re Hamilton-Irvine* (1990) 94 ALR 428 at 432–3 per Beaumont J), or a substantial common question arising in both proceedings: *Skaventzon v Tirimon* (1993) 61 SASR 103. Provided the other court has jurisdiction, in general terms the effect of the legislation is that the court should transfer the proceeding brought before it to the other court if it is 'more appropriate' for that other court to hear the case or if it is 'otherwise in the interests of justice' that the proceeding be transferred to that other court.

The second case specifically provided for does not require any 'related proceeding', and clearly reflects an intention of the cross-vesting legislation (as reflected in the preamble) that courts should in most situations continue to hear and determine only those proceedings which would

otherwise fall within their ordinary fields of jurisdiction: see s 5(1)(b)(ii) at 4.3.13E. It is important to note, though, that there is no requirement that the transferring court must be exercising cross-vested jurisdiction; the provisions apply to *any* proceeding pending in a relevant court. Again the proceeding must be transferred to another participating court if it is 'more appropriate' that the other court deal with the case, but here the court is specifically directed when making that determination to have regard to three criteria (to be considered cumulatively), namely:

(1) whether, apart from the cross-vesting scheme and any accrued jurisdiction, 'the relevant proceeding or a substantial part of the relevant proceeding' would have been incapable of being instituted in the court in question; and

(2) the extent to which the case involved an issue of 'the application, interpretation or validity of a law' of the receiving court, and the court would not, apart from the cross-vesting legislation, have had jurisdiction over that issue; and

(3) the interests of justice.

As is apparent, the first two of these criteria will require a consideration as to the 'traditional forum' for the subject matter of the litigation. It is necessary to inquire as to whether the court to which the application for transfer is made has jurisdiction independent of the cross-vesting scheme; whether the proposed transferee court has jurisdiction independent of the cross-vesting scheme; and whether it is clearly improper for either of such courts to exercise jurisdiction. In some circumstances (eg, if a matter which would, apart from the cross-vesting scheme, be within the exclusive jurisdiction of the Federal Court is commenced in a state Supreme Court), the first two criteria may well be decisive.

The 'interests of justice' is also a factor to which regard is to be had in considering whether it is 'more appropriate' that a matter be heard in another court. In addition, it forms a third category which may permit transfer to another court within the cross-vesting scheme with jurisdiction to hear the matter, regardless of whether there is a related proceeding pending or any issue involving cross-vested jurisdiction: see, eg, s 5(3)(b)(iii) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (WA) at 4.3.13E.

4.3.15 Questions arise as to what are the criteria for transfer in the 'interests of justice' and what is the role of the court in exercising the discretion under s 5. In particular, do the principles of private international law, such as *forum non conveniens*, have a role to play when the court is considering an application for transfer? This issue will rarely be considered by an appellate court because there is no appeal from the decision of a court upon an application for transfer. It was first considered by the New South Wales Court of Appeal in *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711. In that case Rogers AJA (with whom Street CJ agreed) said that the principles of private international law such as *forum non conveniens* have no place when judges consider the making of a transfer order, that the only lodestar is what the interests of justice dictate and that the question should not be encumbered by judge-made pronouncements of principle, although the considerations were essentially the same as those specified in *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460. (*Spiliada* is the leading English authority for the proposition that in that jurisdiction a stay of a proceeding will only be granted on the grounds of *forum non conveniens* if there is some other available forum having competent jurisdiction which is a clearly more appropriate forum for the action.)

Although this approach was not universally accepted it became over time the law applied in all jurisdictions except Western Australia. In that jurisdiction the narrower view was taken that, in determining the interests of justice under para (iii), the courts should start from the premise that the plaintiff's choice of forum should be respected and that a transfer should only be

ordered if the defendant can satisfy the court on the test established in *Voth v Manildra Flour Mills* (1990) 171 CLR 538 that the forum is clearly inappropriate: *Mullins Investments Ltd v Elliott Exploration Co Pty Ltd* [1990] WAR 531; *Whyalla Refiners Pty Ltd v Grant Thornton* (a firm) (2001) 182 ALR 274.

The High Court confirmed the approach in *Bankinvest* in *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400; 211 ALR 523. That case also provides an illustration of the factors which might be weighed by the court, in considering which is the more appropriate court having regard to the interests of justice. The decision in *Amor v Macpac Pty Ltd* (1989) 95 FLR 10 (4.3.17C) provides an earlier illustration of the factors which may be weighed on a transfer application in considering which is the more appropriate court in the interests of justice.

4.3.16C **BHP Billiton Ltd v Schultz**
(2004) 221 CLR 400; 211 ALR 523
High Court of Australia

[The first respondent suffered from asbestosis and asbestos-related pleural disease, which he claimed was the result of exposure to asbestos over various periods while he worked for the appellant in Whyalla in South Australia. He brought proceedings against the appellant in the Dust Diseases Tribunal of New South Wales (the Tribunal), alleging negligence, breach of contract and breach of statutory duty. He included four other corporations in the proceedings, also respondents to the appeal, alleging they were negligent in the manufacture and supply of materials that found their way to Whyalla. The appellant applied to have the action removed from the Tribunal to the Supreme Court of New South Wales, and then transferred to the Supreme Court of South Australia. The appellant brought this appeal, by special leave, from the decision of Sully J in the Supreme Court who had dismissed the application.

A number of significant issues arose for determination on the appeal. The extract below relates to the questions whether error had been shown in the exercise by the Supreme Court of New South Wales of the jurisdiction and power conferred on that court by the Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW).]

Gleeson CJ, McHugh and Heydon JJ (at [418–24]):
At the time of the commencement of the proceedings, the first respondent was a resident of South Australia. The appellant is incorporated in Victoria, and carries on business both in South Australia and in New South Wales. The second respondent is incorporated in the United Kingdom, and is registered as a foreign corporation in New South Wales. The third and fourth respondents are incorporated in the Australian Capital Territory. The fifth respondent is incorporated in New South Wales. According to the first respondent, products containing the asbestos were manufactured, sold and supplied to the appellant and the second respondent in New South Wales by the fifth respondent. According to the appellant, the products were supplied to the appellant in South Australia. There are cross-claims between the appellant and the respondents other than the first respondent …

… In this Court, the first respondent did not challenge the view that the law of South Australia would be the substantive law that would govern his claim against the appellant, but asserted that the law of New South Wales could govern some of the claims against the other respondents and the cross-claims.

Subject to proof of exposure and diagnosis, liability will not be in issue between the first respondent on the one hand and the appellant and the other respondents on the other hand. Subject to the qualification mentioned, the only issues affecting the first respondent will relate to damages and a claim that a limitation period has expired. The lay witnesses, and most (but not all) of the medical witnesses, reside in South Australia.

Sully J pointed out that s 11A of the Dust Diseases Tribunal Act 1989 (NSW) ('the Tribunal Act'), a provision unique to the Tribunal, empowered the Tribunal to make an award of damages in stages …

The first respondent sought from the Tribunal an order preserving his right to make a future and additional claim for damages should he develop any of the conditions of asbestosis-induced lung cancer, asbestos-induced carcinoma of any other organ, pleural mesothelioma, or peritoneal mesothelioma.

The Cross-vesting Act

The purpose of the proposed removal of the proceedings from the Tribunal to the Supreme Court of New South Wales under s 8 of the Cross-vesting Act was so that it could then be transferred to the Supreme Court of South Australia under s 5 of the same Act. The criterion for transfer established by s 5 is that it is in the interests of justice that the proceedings be determined in the Supreme Court of South Australia.

From the outset, it has been recognised by courts applying the Cross-vesting Act that, although an application for transfer under s 5 will often involve evidence and debate about matters of the same kind as arise when a court is asked to grant a stay of proceedings on the ground of forum *non conveniens*, there are differences between the two kinds of application. Because of one controversial aspect of the reasoning of Sully J, it is useful to refer to some matters of history in order to explain those differences.

The current English common law on the subject of *forum non conveniens* was established by the decision of the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

The current Australian common law is to be found in the decision of this Court in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538. To the extent to which they differ, the difference can be traced to a view about the nature of the power to stay proceedings.

[10] The earlier English view, overturned later by the House of Lords, was expressed by Scott LJ in *St Pierre v South American Stores (Gath & Chaves) Ltd* [1936] 1 KB 382 at 398: 'A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused.' That approach, which stressed the duty of a court to exercise a jurisdiction that had been regularly invoked, was abandoned in [420] England. In *Spiliada* [1987] AC 460 at 476, Lord Goff of Chieveley said that a stay would be granted on the ground of *forum non conveniens* 'where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.'

When *Spiliada* was first considered by this Court, in *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 some members of the Court expressed concern about the 'duty of an Australian court to exercise its jurisdiction' (1988) 165 CLR 197 at 238 per Brennan J. Deane J said: 'It is a basic tenet of our jurisprudence that, where jurisdiction

exists, access to the courts is a right. It is not a privilege which can be withdrawn otherwise than in clearly defined circumstances' (1988) 165 CLR 197 at 252. Later, in *Voth* (1990) 171 CLR 538 this Court settled upon the 'clearly inappropriate forum' test as the basis of granting a stay of proceedings. The reason for adopting a test somewhat stricter than the English test emerges from the joint judgment of Mason CJ, Deane, Dawson and Gaudron JJ in *Voth*, which referred back to what Deane J had said in *Oceanic*, and stated that '[t]he selected forum's conclusion that it is a clearly inappropriate forum is a persuasive justification for the court refraining from exercising its jurisdiction' (1990) 171 CLR 538 at 559. This emphasis upon the need for justification of a judicial refusal to exercise a jurisdiction that has been regularly invoked underlay the selection of the 'clearly inappropriate forum' test, in contrast to the modern English test. It has overtones of what Scott LJ said in *St Pierre* about the right of access to a court being something that is not lightly refused.

The national scheme of legislation, of which the Cross-vesting Act is a part, was intended to operate, and to be applied, in a different juridical context. This was clearly stated in the first case to come before the Court of Appeal of New South Wales under the Cross-vesting Act: *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711. It has been recognised by the Court of Appeal in later cases in which jurisdiction of one kind or the other has been invoked. (Compare, e.g., *Goliath Portland Cement v Bengtell* (1994) 33 NSWLR 414 with *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357.)

In *Bankinvest* (1988) 14 NSWLR 711 at 713–714, Street CJ said:

> The cross-vesting legislation passed by the Commonwealth, the States and the Territories both conferred on each of the ten courts Australia-wide jurisdiction and set up the mechanism regulating the [421] transferring of proceedings from one of these ten courts to another. In relation to transfer, the common policy reflected in each of the individual enactments is that there must be a judicial determination by the court in which proceedings are commenced either to transfer or not to transfer the proceedings to one of the other nine based, broadly speaking, upon consideration of the interests of justice … It calls for what I might describe as a 'nuts and bolts' management decision as to which court, in the pursuit of the interests of justice, is the more appropriate to hear and determine the substantive dispute.

In the context of the Cross-vesting Act, one is not concerned with the problem of a court, with a prima facie duty to exercise a jurisdiction that has been regularly invoked, asking whether it is justified in refusing to perform that duty. Rather, the court is required by statute to ensure that cases are heard in the forum dictated by the interests of justice. An application for transfer under s 5 of the Cross-vesting Act is brought upon the hypothesis that the jurisdiction of the court to which the application is made has been regularly invoked. If it appears to that court that it is in the interests of justice that the proceedings be determined by another designated court, then the first court 'shall transfer' the proceedings to that other court. There is a statutory requirement to exercise the power of transfer whenever it appears that it is in the interests of justice that it should be exercised. It is not necessary that it should appear that the first court is a 'clearly inappropriate' forum. It is both necessary and sufficient that, in the interests of justice, the second court is more appropriate.

The reason why a plaintiff has commenced proceedings in a particular court might, or might not, concern a matter related to the interests of justice. It might simply be that the plaintiff's lawyers have their offices in a particular locality. It is almost invariably the case

that a decision as to the court in which an action is commenced is made by the plaintiff's lawyers, and their reasons for making that choice may be various. To take an example at the other extreme, it might be because a plaintiff is near death, and has a much stronger prospect of an early hearing in one court than in another. The interests of justice are not the same as the interests of one party, and there may be interests wider than those of either party to be considered. Even so, the interests of the respective parties, which might in some respects be common (as, for example, cost and efficiency), and in other respects conflicting, will arise for consideration. The justice referred to in s 5 is not disembodied, or divorced from practical reality. If a plaintiff in the Tribunal were near to death, and, in an application such as the present, it appeared that the Supreme Court to which transfer was sought could not deal with the case expeditiously, that would be a consideration relevant to the interests of justice. Justice would ordinarily dictate that the interest of the plaintiff in having a hearing would prevail over the interest of the defendant in such benefit as it might obtain from the [422] plaintiff's early death. The capacity of the Tribunal to deal expeditiously with cases has always, and rightly, been regarded as relevant to the interests of justice, bearing in mind the condition of many sufferers from dust diseases.

On the other hand, there may be conflicting interests of such a kind that justice would not attribute greater weight to one rather than the other. The advantage which a plaintiff might obtain from proceeding in one court might be matched by a corresponding and commensurate disadvantage to a defendant. The reason why a plaintiff commenced proceedings in one court might be the same as the reason why the defendant seeks to have them transferred to another court. In such a case, justice may not dictate a preference for the interests of either party.

As was pointed out in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 517[13], referring to *Gosper v Sawyer* (1985) 160 CLR 548 at 564–565 the ordinary basis of jurisdiction of common law courts in personal actions is the presence of the defendant within the court's territory, and the defendant's resulting amenability to the court's process. In most cases, the jurisdiction of an Australian court, in the sense of authority to decide, depends upon the location of the defendant, rather than that of the plaintiff. Suing a large corporation in the place where it has its headquarters would not ordinarily be regarded as 'forum-shopping', although the location of the headquarters would not necessarily be decisive as to which was the most appropriate forum. *John Pfeiffer Pty Ltd v Rogerson* involved an action brought in the Supreme Court of the Australian Capital Territory, against a company which had its principal place of business in the Territory, for damages for personal injury arising out of a work-related accident in New South Wales. No one suggested that the Australian Capital Territory was an inappropriate forum. The decision of this Court established that the law governing the quantum of damages, which was treated as a matter of substance, was the *lex loci delicti*, the law of New South Wales.

There is nothing unusual, either in the State or the federal judicature, about actions between residents of different Australian law areas. Federal diversity jurisdiction is an obvious example. Actions in New South Wales courts are commonly brought by residents of other States, especially when the residence or principal place of business of the defendant is New South Wales. Reference is sometimes made to one forum or another being the 'natural forum'. Such a description is usually based upon a consideration of 'connecting factors', described by Lord Goff in *Spiliada* [1987] AC 460 at 478 as including matters of convenience and expense, such as availability of witnesses, the places where the parties

respectively reside or carry on business, and the law governing the relevant transaction. Lord Templeman described such factors as [423] 'legion', and said that it was difficult to find clear guidance as to how they are to be weighed in a particular case [1987] AC 460 at 465. Thus, New South Wales might well be the 'natural forum' for an action for damages brought by a passenger in a motor vehicle against the driver if they were both residents of New South Wales, even though the injury resulted from a collision that occurred on the other side of the Queensland or Victorian border.

In many cases, there will be such a preponderance of connecting factors with one forum that it can readily be identified as the most appropriate, or natural, forum. In other cases, there might be significant connecting factors with each of two different forums. Some of the factors might cancel each other out. If the action is between two individuals, and the plaintiff resides in one law area and the defendant in another, there may be no reason to treat the residence of either party as determinative, although, as already noted, it will ordinarily be the residence of the defendant that is important to establish jurisdiction. Weighing considerations of cost, expense, and convenience, even when they conflict, is a familiar aspect of the kind of case management involved in many cross-vesting applications …

There will often be overlapping, but there is no necessary coincidence, between factors which connect litigation to a forum, and factors which motivate one party to prefer, and another party to resist, litigating in that forum. In the context of the Cross-vesting Act, the treatment by the Court of Appeal of New South Wales, in *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357, of the special procedural powers of the Tribunal is illuminating. The Court of Appeal pointed out that these were not merely forensic advantages to one party that represented a corresponding disadvantage to the other party, but were factors relevant to a decision under s 5 because they have the capacity to assist both plaintiffs and defendants in the efficient and economical resolution of disputes, and therefore serve the public interest.

[Their Honours then examined the reasoning of **Sully J** at first instance and in an earlier case of *BHP Co Ltd v Zunic* (2001) 22 NSWCCR 92 which he imported by reference. They concluded that, although correctly referring to *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 as the principal authority to follow, his reasoning revealed he had proceeded on the basis that the plaintiff's choice of forum was 'not lightly to be overridden' and also that the 'unusual advantages' conferred on a plaintiff under the New South Wales legislation were to be kept open. They concluded that in the result his decision was affected by a material error. As to the appropriate course to be taken, in the light of this finding, these judges determined that the proceeding should be remitted to the Supreme Court of New South Wales for further consideration.

Kirby, Hayne, Callinan and **Heydon JJ** delivered separate judgments. All expressed similar views as to the proper approach to be taken on an application to transfer proceedings under the cross-vesting legislation. They each concluded, however, that 'the interests of justice dictated that the Supreme Court of South Australia was the more appropriate' court in the circumstances and that the proceedings should be removed into the Supreme Court of New South Wales and then be transferred to the Supreme Court of South Australia.]

4.3.17C

Amor v Macpac Pty Ltd

(1989) 95 FLR 10
Supreme Court of New South Wales

[The plaintiff was the owner–driver of a semi-trailer engaged in long distance haulage. His home was in Coffs Harbour. In the course of his business he had hauled a load from Sydney to Brisbane. He was injured while unloading in Brisbane when an employee of the defendant who was operating a forklift pushed the forklift into the load and caused some of it to roll off and crush him. He was severely injured. He was treated at the Princess Alexandra Hospital in Brisbane and subsequently at a hospital in Coffs Harbour, and was subsequently treated by specialists at various places in New South Wales. He commenced the action out of the Supreme Court of New South Wales and the defendant applied for an order under to the Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW) that the proceedings be transferred to the Supreme Court of Queensland. There was no 'related proceeding' pending in Queensland or elsewhere.]

Allen J (at 12–16): Practical guidance as to the considerations which are relevant to determining which is the most appropriate court having regard to the interests of justice is given by the adoption by Rogers AJA [in *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711] of what was said by Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd; The Spiliada* [1987] 1 AC 460. His Lordship in *Spiliada* accepted that the appropriate court is that with which the action had the most real and substantial connection. He continued (at 478):

> So it is for connecting factors in this sense that the court must first look; and these factors will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction …, and the places where the parties respectively reside or carry on business.

In the present case it is a matter of great importance that the accident occurred wholly in the State of Queensland. No negligent act or omission outside that State is relied upon to establish the cause of action. The plaintiff of his own free will chose to accept a contract to haul goods into Queensland. As Mason CJ said in *Breavington v Godleman* (1988) 62 ALJR 447 at 453:

> Australia is one country and one nation. When an Australian resident travels from one state or territory to another state or territory he does not enter a foreign jurisdiction. He is conscious that he is moving from one legal regime to another in the same country and that there may be differences between the two which will impinge in some way on his rights, duties and liabilities so that his rights, duties and liabilities will vary from place to place within Australia. It may come as no surprise to him to find that the local law governed his rights and liabilities in respect of wrong he did or any wrong he suffered in a state or territory. He might be surprised if it were otherwise.

Indeed in respect of any tort committed within a state or territory a claim for damages in respect of it would have to be determined in accordance with any legislation of that state or territory which dealt with substantive law as distinct from procedural matters, no matter in what state or territory it is that the action is brought: *Breavington* (supra). Where the wrongful acts charged are all alleged to have been committed in a particular state or territory the

'connection between the proceedings' in that state or territory is, in the words of Rogers, AJA, 'exceedingly close'.

It has not been argued, in the present case, that there is any relevant difference between the law of New South Wales and the statute law of Queensland as to any matter of the substantive law. There is, however, Queensland legislation which, if applied, well may markedly affect the quantum of any damages which the plaintiff recovers. The prescribed discount rate in Queensland is 5 per cent: Common Law Practice Act 1867 (Qld), s 5. This is procedural rather than a substantive matter. If the proceedings remain in this Court this provision of Queensland legislation will not be applied: *Guidera v Government Insurance Office of New South Wales* (unreported, Supreme Court of New South Wales, Studdert J, 16 January 1989). This Court would apply a discount of 3 per cent: *Todorovic v Waller* (1981) 150 CLR 402. The distinction between substantive law and procedural law is an important one for the purpose of private international law. But it is a distinction which owes more to convention than to reason. The classification of individual matters as being substantive or procedural frequently seems artificial. For present purposes this Court should have regard to the reality — namely that if the proceedings are tried in Queensland the discount rate will be 5 per cent whereas if they remain to be tried in New South Wales it will be 3 per cent. It is not to be expected that the plaintiff would have known that when he hauled the load of steel over the border into Queensland. But he would have expected, or should have expected, that there would be differences between the law of Queensland and the law of New South Wales and that these might affect the damages he could recover if he were injured.

The fact that the accident occurred in Queensland and that all the allegations of negligence relate to conduct in Queensland is not conclusive. It may be appropriate nevertheless that the proceedings remain in this Court. All the relevant facts must be weighed before the decision is reached, on balance, as to whether this Court or the Supreme Court of Queensland is the more appropriate court.

In weighing those other considerations it is material that if the proceedings remain in this Court the place of trial is likely to be in Coffs Harbour — not in Sydney. The plaintiff has given an undertaking to the court that if the proceedings do remain in this Court he will apply for an order that the place for trial be at Coffs Harbour and, if such an order is made, he will not seek another venue without the leave of the court.

A relevant matter is the prospective place of residence of the parties. The defendant was and still is a company incorporated in Queensland and [14] carrying on business solely in that State. The plaintiff was a resident of New South Wales at the time of the accident. He has been living in Fingal Heads for the past 14 months and it is anticipated that he will continue to do so unless suitable work for him becomes unavailable in that area. It is not unimportant that at the time of the accident the plaintiff's home was in New South Wales and that he was across the border, in Queensland, only for the purpose of delivering a load of steel. But this is far from being a case in which in fact that the accident occurred in Queensland was adventitious — for example as would be the case where a passenger in his car sued his driver both of them being New South Welshmen passing through. In such a case the connection with Queensland would carry substantially less weight than in a case such as the present where the defendant was and remains a Queensland resident and the proceedings concern an accident which occurred at its factory in Queensland.

The availability of witnesses (including the plaintiff), considerations of their convenience and considerations of the relative costs of litigation must be assessed and weighed. In those respects the question is not one of a comparison between the State of New South Wales and

the State of Queensland. It is a question of a comparison between a trial at Coffs Harbour in New South Wales and a trial at Brisbane in Queensland. Those are the likely venues in New South Wales or Queensland respectively.

The date for trial, whether it be in Coffs Harbour or in Brisbane, is so far away that it is not to be expected that any firm decision has been made by either party as to the witnesses to be called (save, of course, the calling of the plaintiff himself). The court must be guided by its experience as to the ordinary course of events in litigation of this character. Although no formal defence has as yet been filed it may be anticipated that, in the ordinary course of events, the defendant's insurer, who has the conduct of the litigation, will deny liability and allege contributory negligence. On these issues I accept that there are three persons, apart from the plaintiff, whom the solicitor for the defendant describes as 'major witnesses'. The first is the man who operated the forklift. He lives near Brisbane. The second is the receivables clerk of the defendant. He lives at Aspley, a Brisbane suburb. The third is the driver of another semi-trailer which was being unloaded at the time of the accident. He lives near Brisbane. It is not to be anticipated that if the trial were held at Coffs Harbour the distance which any of these witnesses would have to travel to court would result in them not being available to give evidence. The first two of them are still in the employment of the defendant. The third, the driver of the other semi-trailer, has indicated to the plaintiff's solicitors that he is willing to attend court in New South Wales. Nevertheless, their convenience has to be considered — as well as the cost involved in their travelling and accommodation. Consulting a standard set of road maps it appears the Coffs Harbour is some 401 kilometres by road from Brisbane. There is an air service, of sorts, between the cities. It is by a small seven-seater aircraft crewed by one pilot. The witnesses might or might not be happy to fly in it. The evidence to the frequency of flights is vague. It is: 'It may have been a daily flight'.

Although, as I have already indicated, the plaintiff's claim appears to be based primarily on the negligence of the driver of the forklift the claim is not restricted to that head of negligence. It extends to failure to provide a safe system for the unloading of the steel pipes. It is likely that this alternative [15] particular of negligence will be pressed at the hearing so that the plaintiff will not necessarily fail should he not succeed in establishing the personal negligence of the driver of the forklift. The negligence claim insofar as it is based upon failure to provide a safe system of work may well involve the calling of an expert in unloading procedures and it well may be that the expert would wish to have an inspection of the premises to assist him in forming his views. Clearly it would be more convenient and less expensive to qualify a Brisbane expert and to have the trial in Brisbane than it would be to have the trial in Coffs Harbour — whether a Brisbane expert or a Sydney expert is qualified.

On behalf of the defendant it was urged that the treating surgeon at the Princess Alexandra Hospital probably would be a witness. I doubt it. Comprehensive reports have been obtained from the hospital and its records could be subpoenaed. Medical issues are likely to turn on his progress since he has been discharged from that hospital rather than upon the treatment which he received during his hospitalisation. Nevertheless there is a significant possibility that the surgeon would be called.

It is probable that it will be more convenient and less expensive to the plaintiff personally for the hearing to be in Brisbane rather than in Coffs Harbour. Fingal Heads, where he is living, is only some 10 kilometres south of Tweed Heads. The map shows that Tweed Heads is 109 kilometres from Brisbane. This gives a road distance of 119 kilometres between Fingal Heads and Brisbane as compared with 282 kilometres between Fingal Heads and Coffs Harbour. There is the possibility that the plaintiff will return to Coffs Harbour before the trial.

But this is only a possibility. It may be anticipated that the plaintiff's wife will give evidence but there being no evidence to the contrary I shall assume that she is living with and will go with her husband.

It may be anticipated that the plaintiff's witnesses would include the orthopaedic surgeon who currently is treating him, namely Dr Oliver. Dr Oliver practises in Coffs Harbour. Clearly it would be inconvenient for him to have the trial in Brisbane. It may be anticipated, also, that evidence will be called by at least one of the psychiatrists whom he has already seen. These are Dr McCombie who practises in Coffs Harbour and Dr Cole who practises in Murwillumbah. It would be inconvenient to Dr McCombie to have the trial in Brisbane. But it probably would be more convenient for Dr Cole. The road maps show that Murwillumbah is 140 kilometres from Brisbane. It is 261 kilometres from Coffs Harbour.

Having regard to the ordinary course of the conduct of litigation of this type it may be considered quite unlikely that all the other doctors who have treated the plaintiff will be called. In large measure their evidence would be only of the history of his progress up to the time that he became fit for resumption of some work. It may be anticipated that as to some of them at least the defendant would be given consent to the tendering of his reports and that the tendering of the reports would suffice. This I would consider particularly likely to be the case in respect of the two doctors who treated the plaintiff after his discharge from the Princess Alexanrda Hospital and before he moved to Iluka. These were Dr Brand, a consultant surgeon practising at Lismore and Dr Ruthnam, a general practitioner practising at Coffs Harbour. I note that the road map shows that Lismore is 255 kilometres from Brisbane. But it is not close to Coffs Harbour. The distance by road between Lismore and Coffs Harbour is 186 kilometres. In the unlikely event that Dr Brand was called as a witness it would not be much more inconvenient for him to drive to Brisbane than it would be for him to drive to Coffs Harbour.

I consider it unlikely that the plaintiff would call as a witness the general practitioner, Dr Taylor, who treated him at Iluka. It is more likely that he would call Dr Delaney, the orthopaedic surgeon, who treated him in that township. The road map shows that Iluka is 250 kilometres from Brisbane and 151 kilometres from Coffs Harbour. The statement in the affidavit of the plaintiff's solicitor that Iluka is about 250 kilometres from Coffs Harbour is inaccurate.

If the trial is had in Brisbane it may be expected that the plaintiff's solicitor would have him examined by one or more Brisbane specialists to supplement the evidence of the specialists who have treated him so far. That would have the benefit, also, of reducing the number of the treating doctors who would need to be called. Bearing in mind that he is living in Fingal Heads it would not impose a substantial hardship upon the plaintiff to attend for examination by Brisbane specialists.

I accept that it may become necessary for the plaintiff to call his accountant in respect of economic loss. His accountant is in Newcastle. The most convenient way for him to travel to the place of trial, whether it be Coffs Harbour or Brisbane, probably would be to come to Sydney and to fly. It will make little difference to him whether the trial is in Coffs Harbour or in Brisbane.

I accept also that the plaintiff may find it necessary to call someone from the Melbourne firm which, prior to his accident, was seeking to have him enter its employment as a removalist. Again any witness from that firm would fly to the place of trial. It makes little difference whether the place of trial is in Coffs Harbour or Brisbane so far as such a witness is concerned.

In my judgment it does not appear clearly whether in respect of the convenience of witnesses and the availability of witnesses it would be more convenient to have the trial in Coffs Harbour or in Brisbane.

A further consideration is the expense of the trial. Having regard to such matters as country loadings of counsel and accommodation expenses, where required, for members of the legal profession as well as for witnesses I am satisfied that a trial in Coffs Harbour would be significantly more costly than a trial in Brisbane.

Weighing all the considerations to which I have referred I consider that the appropriate place of trial is Brisbane. Pursuant to s 5(2) of the Jurisdiction of Courts (Cross-vesting) Act I transfer these proceedings to the Supreme Court of Queensland.

As to costs I consider that the plaintiff acted quite reasonably in commencing the proceedings in this Court and in not consenting to an order for transfer to the Supreme Court of Queensland rather than putting evidence to this Court and argument on that matter. This is not a case in which it was obvious that the transfer would be ordered. The costs of the proceedings in this Court up to and including the making of the transfer order are to be costs in the cause.

4.3.18 Each of the cross-vesting Acts provides that where a proceeding is transferred the legal practitioners involved have the same right to practise in the court to which the proceeding is transferred as if that court were a federal court exercising federal jurisdiction: s 5(8) (WA s 5(9)). The court to which the proceeding is transferred may determine costs in relation to steps taken prior to transfer, unless those costs have already been dealt with by the court which transferred the proceeding: s 12. Judgments which are given by any court in the exercise of any cross-vested jurisdiction are as enforceable as if given in the exercise of that court's own jurisdiction, apart from the cross-vesting scheme: s 14.

Applicable law

4.3.19 Section 11 of the Commonwealth Act and of the state Acts provides for the appropriate law to be applied in the conduct of proceedings where the court is or is likely to be exercising cross-vested jurisdiction. The basic rule is that the law in force in the state or territory in which the court is sitting (including choice of law rules) is to be applied: s 11(1)(a). The specification in relation to choice of law rules is important, as it may well be that the effect of those rules means that the substantive law of some other place applies. In the case of any proceeding arising from an intranational tort, e.g., the applicable choice of law rule, as settled by the High Court in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 403; 172 ALR 625, will mean that the law of the place of commission of the tort (the *lex loci delicti*) should be applied as the law governing questions of substance. The High Court in that case also determined that laws that bear on the existence, extent or enforceability of remedies, rights and obligations should be characterised as substantive and not as procedural laws. This is a matter which is considered fully in standard works on conflict of laws in Australia: see generally M Davies, A Bell and P Brereton, *Nygh's Conflict of Laws in Australia*, 8th ed, LexisNexis Butterworths, Australia, 2010.

There are two qualifications to the basic rule. The first applies where the right of action arises under the written law of another state or territory. In that case the written and unwritten law of that state is to be applied: s 11(1)(b). The second qualification relates to the rules of

evidence and procedure to be applied. Section 11(1)(c) specifies the applicable rules to be those that the hearing court 'considers appropriate in the circumstances', being rules that are applied in a superior court in Australia or in an external territory.

Section 11(3) provides that if a proceeding is transferred or removed from a court, the procedural steps taken prior to transfer are to be regarded as if they had been taken in the court to which the proceeding is transferred.

Special federal matters

4.3.20 Special provisions govern the transfer of proceedings which involve 'special federal matters'. 'Special federal matters' are defined in s 3(1) of the Jurisdiction of Courts Act 1987 (Cth) to mean any of the following matters in respect of which the Supreme Court of a state or territory would not, apart from under the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth), have jurisdiction: matters arising under Pt IV of the Competition and Consumer Act 2010 (Cth) (other than under ss 45D, 45DA, 45DB, 45E or 45EA); matters arising under the Competition Code (as defined in the Competition and Consumer Act 2010 (Cth) s 150A) of the Australian Capital Territory or the Northern Territory; appeals on questions of law from Commonwealth tribunals; matters arising under the Administrative Decisions (Judicial Review) Act 1977 (Cth); matters arising under the Family Law Act 1975 (Cth) s 60G (in a court other than the Family Court of Western Australia or the Supreme Court of the Northern Territory); and matters within the original jurisdiction of the Federal Court by virtue of the Judiciary Act 1903 (Cth) s 39B; The definition is incorporated into the state Acts by reference: s 3.

Where any of these matters arise in a proceeding pending in a state or territory Supreme Court, the effect of s 6(1), (2) and (3) of each of the Commonwealth and state Acts is that the proceeding must be transferred to the Federal Court (or in the case of a matter arising under the Family Law Act 1975 (Cth) s 62AA to the Family Court, the Family Court of Western Australia or the Supreme Court of the Northern Territory, as appropriate in the circumstances), unless the state or territory Supreme Court orders that the proceeding be determined by that Supreme Court. The Supreme Court may only make such an order if it is satisfied that there are 'special reasons for doing so in the particular circumstances of the proceeding, other than reasons relevant to the convenience of the parties'.

Following amendments made in recognition of the effect of the decision of the High Court in *Re Wakim; Ex parte McNally* (see **4.3.2**), s 6(1A) of the Commonwealth Act and of each of the state Acts make it clear that it is only permissible to transfer so much of the proceeding as is, in the opinion of the transferring court, within the jurisdiction, including the accrued jurisdiction (see **4.1.18–4.1.21**) of the Federal Court (or the jurisdiction of the Family Court, Family Court of Western Australia, or Supreme Court of the Northern Territory, as the case may be). It is likely that any state matters which are properly joined in the proceeding would fall within the Federal Court's accrued jurisdiction. In the event that a special federal matter is included with a state matter not within the accrued jurisdiction, the Supreme Court may be expected to regard the joinder as providing 'special reason' for it to determine the federal matter, so that the whole controversy may be determined in one court: *Computershare Ltd v Perpetual Registrars Ltd (No 3)* [2000] 2 VR 666 at 679 per Warren J.

Section 6(4) of the Commonwealth and state Acts requires that before a Supreme Court may make an order that the matter should be determined by that court, it must be satisfied that the Commonwealth Attorney-General and the Attorney-General of the state or territory where the proceeding is pending have been notified of the nature of the special federal matter,

and allowed a reasonable time to consider whether submissions should be made to the court about the proceeding. In considering whether there are 'special reasons' for not transferring a special federal matter, s 6(6) directs that the state or territory Supreme Court must have regard to 'the general rule that special federal matters should be heard by the Federal Court' (or in the case of a matter arising under the Family Law Act 1975 (Cth) s 62AA by the Family Court, the Family Court of Western Australia or the Northern Territory Supreme Court, as the case may be) and must take into account any submission made by the Commonwealth Attorney-General or the Attorney-General of the state or territory where the proceeding is pending.

Despite the provisions of s 6, the Supreme Court is not prevented from granting urgent relief of an interlocutory nature if it is in the interests of justice to do so: s 6(7).

Inferior courts

4.3.21E **Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic)**
Orders by Supreme Court

8 (1) Where —

(a) a proceeding (in this subsection referred to as the 'relevant proceeding') is pending in —

(i) a court, other than the Supreme Court; or

(ii) a tribunal established by or under an Act; and

(b) it appears to the Supreme Court that —

(i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Federal Court, the Family Court or the Supreme Court of another State or of a Territory and, if an order is made under this subsection in relation to the relevant proceeding, there would be grounds on which that other proceeding could be transferred to the Supreme Court; or

(ii) an order should be made under this sub-section in relation to the relevant proceeding so that consideration can be given to whether the relevant proceeding should be transferred to another court —

the Supreme Court may, on the application of a party to the relevant proceeding or of its own motion, make an order removing the relevant proceeding to the Supreme Court.

(2) Where an order is made under subsection (1) in relation to a proceeding, this Act applies in relation to the proceeding as if it were a proceeding pending in the Supreme Court.

(3) Where a proceeding is removed to the Supreme Court in accordance with an order made under subsection (1), the Supreme Court may, if the Supreme Court considers it appropriate to do so, remit the proceeding to the court or tribunal from which the proceeding was removed.

4.3.22 Inferior courts do not have any cross-vested jurisdiction, but they are included in the scheme in a limited way. First, s 8 of each of the state and territory Acts provides for the Supreme Court, on the application of a party to the proceeding or of its own motion, to remove proceedings pending in a court (other than the Supreme Court of the state or territory) or a tribunal (established by or under an Act) up into the Supreme Court for the purpose of considering transferring them to another court in accordance with the cross-vesting scheme.

Section 8 of the Commonwealth Act provides for removal of proceedings from a lower court or tribunal in an external territory into the Supreme Court of the territory for the purpose of considering whether the proceeding should be transferred.

Second, s 10 of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) permits the Federal Court, the Family Court or the Supreme Court of a state or territory, on the application of a party to the proceeding or of its own motion to transfer to an *inferior* state court a proceeding otherwise within that inferior court's jurisdictional limits, if the proceeding involves a matter arising under Pts 2-2, 3-1, 3-3 or 3-4 of Sch 2 to the Competition and Consumer Act 2010 (Cth) (consumer protection matters), as that Part applies as a law of the Commonwealth and is not an appeal or a special federal matter. Section 10 of the state Acts is in similar terms, although it applies to matters pending in state or territory Supreme Courts, and extends only to matters arising under Ch 3, Pt 3-1, Divs 1, 2, 4 or 5; Ch 3, Pt 3-3; and Ch 3 Pt 3-4 of Sch 2 of the Competition and Consumer Act 2010 (Cth), applying as a law of the Commonwealth.

Limitation on appeals

4.3.23 The jurisdiction and transfer provisions of the cross-vesting legislation apply to matters within both original and appellate jurisdiction. If it was not then qualified this would mean, for example, that an appeal could be brought from a single judge of the Federal Court to a Full Court or Court of Appeal of a state. Section 7 of each of the Cross-vesting Acts therefore imposes limitations which generally require that appeals be brought within the appellate system of the court by which the primary decision was made.

Most appeals from decisions of Supreme Courts of a state (whether the court in which the proceeding was commenced, or that to which it has been transferred) are to be brought before that state Full Court. An exception is contained in the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) s 7(5), which has the effect that certain appeals (primarily those relating to bankruptcy and intellectual property matters) must be brought to the Full Court of the Federal Court, and that appeals in family law matters must go to the Full Court of the Family Court. With the special leave of the High Court, appeals in respect of these matters may also go to the High Court. Appeals cannot be taken from the Federal Court or the Family Court to the other of those courts, or to the Full Court of a state.

4.3.24 Section 13 of each of the Cross-vesting Acts provides that no appeal lies from a decision of a court in relation to the transfer or removal of a proceeding pursuant to the cross-vesting legislation, and further that there is no right of appeal in relation to the rules of evidence and procedure which are to be applied pursuant to s 11(1).

Procedure

4.3.25 Each of the courts in the cross-vesting scheme has their own rules providing for the procedural and mechanical means of implementing the scheme. These rules vary significantly.

Federal Court

4.3.26 The Federal Court Rules provide that a party may apply to the court for an order that the proceeding be transferred to another court: r 27.21. If a transfer application is made by the Attorney-General, or by the Attorney-General of a state or territory, the Attorney-General does not, because of the application, become a party to the proceeding: r 27.22.

Rule 27.23 provides some appropriate mechanisms for the transfer of proceedings under a cross-vesting law. These include a requirement that the party who applied for the order must file a copy of the order in the District Registry named in the order, or if no District Registry is so named the District Registry of the state or territory where the order was made. The Registrar will attach a notice to the order in the prescribed form. The party filing the order must serve a copy of the order, and the notice that has been attached by the Registrar, on each party to the proceeding in the court which made the transfer order. The service is to be effected at the party's address for service, but personal service is required if the party does not have an address for service. After an order is filed and the notice is attached, the Federal Court rules apply to the proceeding as if it had been started in the Federal Court. The party who files the order must, as soon as practicable after service of the order and attached notice, and before taking any further step in the proceeding, apply to the court for directions in relation to the further conduct of the proceeding.

Australian Capital Territory

4.3.27 Applications under a cross-vesting law for the transfer of a proceeding are made by an application to the court under Pt 6.2 of the rules. Applications under s 8 for an order removing a proceeding from an ACT court (other than the Supreme Court) or a tribunal to the Supreme Court must be made by originating application: r 3303. The Attorney-General (whether of the Commonwealth or of a state or territory) may make a transfer application without becoming a party to the proceeding: r 3304.

If a proceeding is removed from a lower court or tribunal under s 8, the Supreme Court may give any directions it considers appropriate: r 3305. If a party to a proceeding relies on cross-vesting legislation, the party must include particulars of the cross-vested claim in the process, pleading or affidavit by which the cross-vested law is relied on. If a matter to be decided in the proceeding is a special federal matter, the statement must also identify the special federal matter and explain why it is a special federal matter: r 3306.

Rule 3307 states that a proceeding in which cross-vested jurisdiction is invoked may be served outside the territory, but if the defendant fails to serve a defence the plaintiff cannot take any further step unless the court gives leave. The leave is only to be given if the court is satisfied that it is a convenient court in which to decide the matter. If the court gives leave, it is not prevented from later transferring the matter to another court.

The first party to rely on a cross-vesting law must apply to the court for directions: r 3308.

A party who wants the court to apply the written law of another state or territory or the rules of evidence and procedure of another court under s 11(1)(b) or s 11(1 (c) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (ACT) (see **4.3.19**) must include in their pleading a statement identifying the right of action and the written law under which it arises, or the rules they seek to have applied, as the case may be: rr 3311, 3312.

New South Wales

4.3.28 Applications for an order under any provision of the cross-vesting legislation (except s 8) are to be made by motion: r 44.3.

Applications for transfer made by the Attorney-General do not, by reason of the application, make the Attorney-General a party to the proceeding: r 44.4.

A party who intends to contend either that the court should exercise cross-vested jurisdiction, or that the court should make an order for transfer pursuant to the cross-vesting

scheme should make an application to the court as soon as practicable after the commencement of the proceeding for determination of the question whether or not the proceedings should be transferred to another court: r 44.5.

A party who wishes to contend that the court should apply the written law of another state or territory or the rules of evidence and procedure of another court under s 11(1)(b) or s 11(1)(c) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW) (see **4.3.19**) shall, as soon as practicable, file and serve on each other party notice of the contention specifying the law or rule and stating the grounds relied on in support of the contention. The court may give directions in relation to the application of such a law or rule either on the application of a party or of its own motion: r 44.6.

The Northern Territory and Victoria

4.3.29 There are common rules in the Northern Territory and Victoria. Any originating summons or motion under cross-vesting law must be headed 'In the matter of the Jurisdiction of Courts (Cross-vesting) Act 1987': NT r 89.03; Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 (Vic) r 13.03 (references for Victoria in this section are to these rules).

As in the other jurisdictions, the Commonwealth or a state or territory Attorney-General may apply for transfer of a proceeding without becoming party to the proceeding: NT 89.04; Vic r 13.04. If a proceeding is removed from a lower court or tribunal to the Supreme Court, the Supreme Court can give any direction which could have been given in the tribunal or lower court: NT r 89.05; Vic r 13.05.

A party to a proceeding who proposes to invoke a jurisdiction arising under a provision of a cross-vesting law, or otherwise to rely on a provision of a cross-vesting law, is required to file and serve a notice which identifies the provision and the claim in relation to which reliance is placed on the provision, and state the grounds upon which reliance is placed on the provision. That party must also seek directions as soon as practicable as to whether the proceeding should be transferred. If there is a special federal matter involved in the proceeding, the notice must identify the special federal matter and the grounds which make it a special federal matter: NT r 89.06; Vic r 13.06.

If a proceeding is transferred to the court, the party who commenced the proceeding is to apply for directions as soon as practicable. There are also requirements in relation to the transfer of documents filed and orders made when a proceeding is transferred by the court, and as to the numbering and titling of a proceeding transferred to the court: NT r 89.08; Vic r 13.07.

A party seeking to have the court apply the written law of another state or territory, in determining a right of action arising under that written law or the rules and procedure of another court under s 11(1)(b) or 11(1)(c) respectively of the Jurisdiction of Courts (Cross-vesting) Act 1987, is required to file and serve a notice identifying the right of action and written law or the relevant rules of evidence and procedure, as the case may be. That party must then seek directions on the subject matter of the notice before the proceeding is set down for trial: NT r 89.09; Vic r 13.08. The court has an express power to give, set aside, or vary any directions in relation to a proceeding to which a cross-vesting law applies: NT r 89.10; Vic r 13.09.

Queensland and Western Australia

4.3.30 In Queensland (r 53) and Western Australia (O 81E r 3), a party who relies on cross-vesting laws is required to indorse the process by which those laws are invoked with a statement identifying each claim or ground of defence, as the case may be, about which the cross-vesting

laws are invoked. These rules assist in ensuring that reliance upon the cross-vesting laws is identified as early as possible in the proceeding. However, a failure to include the indorsement does not invalidate the process.

If a matter for determination is a special federal matter, the indorsement is to include particulars of that special federal matter, and the court is not permitted to determine a proceeding which raises such a matter for determination, unless it is satisfied that the notice required by s 6(4)(a) of the cross-vesting laws sufficiently specifies the nature of the special federal matter: Qld r 54; WA O 81E r 4. These rules assist to ensure that the Supreme Court is in a position to adequately assess whether it should proceed to hear the matter or whether it should transfer it to the Federal Court. It is further provided that in the case of doubt or difficulty as to the manner of commencement of a proceeding, the court may give directions: Qld r 53; WA O 83E r 3. This may be necessary if the legislation or rules under which the proceeding may be commenced do not have a counterpart in the rules in Queensland or Western Australian (as the case may be). The rules specify that the first party to invoke the cross-vesting laws must make an application for directions (Qld) or take out a summons for directions (WA) and serve it on all other parties: Qld r 56; WA O 83E r 6. If it is the plaintiff who first invokes the cross-vesting laws, he or she must make and serve the application within seven days after being served with the first notice of intention to defend (Qld) or notice of appearance (WA). If a defendant is required to make the application, he or she must make and serve the application within seven days of the delivery or service of the process which invokes the cross-vesting laws.

In the situation where a proceeding is transferred to the Queensland or the Western Australian Supreme Court from another court, the party who started the proceeding is required to file and serve an application for directions (Qld) or summons for directions (WA) within 14 days of the date of the order transferring the proceeding. In default, any other party may file and serve the application or summons, or the court may call the parties before it on its own initiative. On the hearing of the application or summons, the court is to give any direction or make any decision as to the conduct of the proceeding that it thinks proper. Any order or decision made may subsequently be varied by the court at the trial or hearing of the proceeding. The rules provide some appropriate mechanisms to facilitate the transfer of proceedings pursuant to the cross-vesting scheme: Qld rr 56, 57; WA O 81E rr 6, 7.

The requirement of making the application (Qld) or taking out a summons (WA) for directions at an early stage enables the court to consider whether special directions are required. Such directions may well be needed when pleading or other procedural rules of the court where the proceeding would ordinarily be brought are different from the procedural rules which normally apply in the Queensland or Western Australian Supreme Court, for example, where a family law proceeding is commenced in the Supreme Court (proceedings in the Family Court are conducted on affidavit rather than pleadings).

It is further provided that if a proceeding is removed to the Supreme Court under s 8 of the cross-vesting laws, the court may immediately, on that removal, give any direction or make any decision or direct the parties to take any step that the court sees fit: Qld r 59; WA O 81E r 10. These powers are in addition to the powers exercisable under Qld r 56 and WA O 81E r 6, and include powers to give any directions that could have been given by the court or tribunal from which the proceeding was removed.

It is specifically provided that an application by an Attorney-General under s 5 or s 6 of the cross-vesting laws for the transfer of a proceeding may be made by application (Qld) or summons (WA) without the Attorney-General becoming a party to the proceeding: Qld r 58; WA O 81E r 9.

The Western Australian rules contain an additional provision regulating the conduct of proceedings. If the law of another state or territory must be applied under s 11(1)(b) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (WA) in determining a right of action arising under a written law of that state or territory, or if a party seeks to have the rules of evidence or procedure of another court applied under s 11(1)(c) (see **4.3.19**) the pleadings must identify the right of action and the written law under which it arises, or state the particular rules of evidence sought to be applied, as the case may be: WA O 81E r 11. In either case, the party concerned is to apply for directions on the matter before the proceeding is set down for trial. There is no equivalent rule in Queensland.

In Western Australia (O 81E r 8), any application for the transfer or removal of a proceeding under cross-vesting laws must be determined by a judge. In Queensland (r 451), any application about cross-vesting under Ch 2 Pt 7 is to be determined by a judge.

South Australia

4.3.31 Orders for the transfer of actions under the Jurisdiction of Courts (Cross-vesting) Act 1987 (SA) can only be made by a judge or the Full Court: r 313(2). An application for an order for the transfer of an action under the Act must clearly identify any special federal matter as defined in the Act, and also identify any action that the applicant has begun, or intends to begin in another court, involving the same or similar issues to those involved in the action for which the order for transfer is sought: r 313(3). If a party asserts that a matter is to be, or may be, determined by the court in accordance with the law of another place under s 11 of the Act, the party's pleadings must state which law must, or should, according to the party's assertion, be applied: r 313(4). If a party seeks an order under s 11(1)(c) of the Act for the application to an action of laws of evidence or procedure differing from those normally applied in the court, an interlocutory application may be made for such an order: r 313(5).

Tasmania

4.3.32 In Tasmania, as in the other jurisdictions, the Attorney-General of the Commonwealth, a state or a territory may apply for the transfer of a proceeding without becoming a party: r 779.

If a matter is removed into the court from a lower court or tribunal under the Jurisdiction of Courts (Cross-vesting) Act 1987 (Tas), the court may give any directions which could have been given by that court or tribunal: r 780.

Rule 781 regulates procedures whereby jurisdiction under cross-vesting laws is or may be invoked. A party who proposes to invoke a jurisdiction arising under a cross-vesting law or otherwise relies on a cross-vesting law is required to identify the provision relied on, the claim to which it relates, and the grounds upon which reliance is placed on that provision. This is to be done in the originating process or the pleadings or by notice filed and served on the other parties. The first party to invoke a cross-vesting law must also take out an application for directions within seven days of the service of the pleading which invoked the cross-vesting law. In the case of a proceeding transferred to the court, the plaintiff is to make the application for directions within 14 days of the transfer order. In default the application may be made by any party or the court may call the parties before it of its own motion. Directions given or orders made may be varied at the trial. If any special federal matter is involved, it must be identified as such in the pleading and directions must be sought by the party pleading it as to whether the proceeding should be transferred to the Federal Court. Rule 782 provides some appropriate mechanical matters which apply when proceedings are transferred pursuant to the cross-vesting scheme.

If the court may apply the law of another state or territory under s 11(1)(b) of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Tas) in determining a right of action arising under a written law of that state or territory, the pleadings must identify the right of action and the written law under which it arises. A party must also identify in his or her pleadings any rules of evidence and procedure other than those of the court which that party seeks to have applied under s 11(1)(c) of that Act. Whenever a party seeks to have such laws or rules of evidence applied, he or she must seek directions on the matter before the proceeding is set down for trial, and the court may, at any time, of its own motion, given directions and revoke any such directions in relation to the matter: r 783.

4.3.33 Notes and questions

1. In response to the decision in *Re Wakim* (1999) 198 CLR 511, legislation was enacted by each of the states in an attempt to palliate the potentially devastating blow dealt to litigants in Federal Courts: Federal Courts (State Jurisdiction) Act 1999 (NSW), (Qld), (SA), (Tas), (Vic), (WA). The legislation in each jurisdiction follows the same template, although there are some minor differences. One of the key provisions of these Acts is s 11 which, in essence, provides that existing ineffective judgments of the Federal Court in the purported exercise of state jurisdiction are taken to be judgments of the Supreme Court. It also provided a mechanism for the transfer of proceedings then pending before the Federal Court in relation to state matters to the Supreme Court. The High Court upheld the constitutional validity of that provision in *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629; 172 ALR 366.
2. A scheme that was separate from but similar to the cross-vesting scheme was enacted for corporations. Mirror state Acts applied the Corporations Act 1989 (Cth) and the Corporations Law promulgated by the Commonwealth for the Australian Capital Territory. Section 42 of the state Acts conferred jurisdiction on the Federal Court with respect to civil matters arising under the Corporations Law. The Federal Court's jurisdiction was restored following the decision in *Re Wakim* (1999) 198 CLR 511 by the commencement of the Corporations Act 2001 (Cth) on 15 July 2000.
3. It has been seen that lower courts do not have any cross-vested jurisdiction. Is there any logical justification for this? In *Cross-Vesting of Jurisdiction: A Review of the Operation of the National Scheme*, Australian Institute of Judicial Administration Incorporated, 1992, Moloney and McMaster recommended that the cross-vesting scheme should be expanded to include at least the major trial courts in each jurisdiction (for example, the Queensland District Court, the New South Wales District Court and the Victorian County Court) with suitable appellate or review procedures to ensure the proper operation of the scheme in those lower courts.
4. The decision of the Court of Appeal of the Northern Territory of Australia in *Scott v NTA* [2005] NTCA 1; (2005) 147 NTR 6; (2005) 226 FLR 1 provides an interesting illustration of circumstances (which are not common) in which the Supreme Court of a state or territory might obtain jurisdiction over a matter within the jurisdiction of a Supreme Court of another state or territory, only by virtue of the cross-vesting scheme. In that case, the Supreme Court of the Northern Territory

did not in its own right have jurisdiction to make the order sought, namely an order for the exhumation of the remains of a deceased person who had been buried in Queensland. The application was not assisted in this instance by the Service and Execution of Process Act 1992 (Cth). As Mildren J noted (at [29]), that legislation enables lawful service or process interstate, but 'it does not confer jurisdiction over a subject matter such as the power to order the exhumation of a body in another state …'. It was held the Supreme Court of the Northern Territory obtained the jurisdiction 'with respect to State matters' by virtue of the Jurisdiction of Courts (Cross-vesting) Act 1987 (Qld), and could exercise that jurisdiction under s 9 of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (NT).

5. In their review of the cross-vesting scheme, Moloney and McMaster (*Cross-Vesting of Jurisdiction: A Review of the Operation of the National Scheme*, Australian Institute of Judicial Administration Incorporated, 1992) indicated that there is scope for greater communication between judges of participating courts in relation to cross-vesting matters generally, and in relation to particular cases under the scheme. One of the suggestions mentioned as warranting detailed consideration on the question of better communication between the courts in particular cases was a suggestion that, in relation to proceedings sought to be transferred, 'teleconferencing' should be available in appropriate cases, to bring together the judges of the two courts involved in the 'presence' of the legal representatives of the parties. What are the advantages and disadvantages of this suggested procedure?

6. It has been noted that there is some uncertainty as to whether the cross-vesting scheme vests only the subject matter jurisdiction of the participating courts, or whether it also extends to territorial jurisdiction. It has also been noted that the issue is no longer relevant in respect of proceedings served interstate under the Service and Execution of Process Act 1992 (Cth), which gives state Supreme Courts Australia-wide *in personam* jurisdiction. Could the issue be relevant to service out of Australia? Could a plaintiff argue, for example, that if personal jurisdiction is cross-vested, the Supreme Court of Victoria could assume jurisdiction in respect of a proceeding to be served on a defendant in another country where there is sufficient connection with another state so that, under its Rules of Court, that other state could have *in personam* jurisdiction?

7. It is possible for there to be separate proceedings in two different courts which are part of the cross-vesting scheme involving the same parties and raising essentially the same issues, which each court refuses to transfer to the other. How should such a situation be resolved? The position arose in *Pegasus Leasing v Cadoroll Pty Ltd* (1996) 59 FCR 152, regarding parallel proceedings in the Federal Court and the Supreme Court of South Australia. Both courts had declined to transfer the proceeding before it to the other court and each had also refused an application to stay the proceeding in that court. The Full Federal Court, by majority, upheld the decision of Neaves J to restrain the parties from taking any further steps in the South Australian proceeding until the hearing and determination of the application was brought in the Federal Court. The decision includes consideration of the circumstances in which such a restraining order might be appropriately granted: Lee and Tamberlin JJ at 156–8.

Further reading

4.4.1 Articles

V Anetta and K Fraser, 'Transfer Provisions of the Cross-vesting Legislation — The Need for Clarification' (1996) 24 *ABLR* 208.

C Baker, 'Cross-Vesting of Jurisdiction between State and Federal Courts' (1987) 14 *UQLJ* 118.

E Campbell, 'Cross-vesting of Jurisdiction in Administrative Law Matters' (1990) 16 *Monash LR* 1.

G Griffith, D Rose and S Gageler, 'Choice of Law in Cross-vested Jurisdiction: A Reply to Kelly and Crawford' (1988) 62 *ALJ* 698.

G Griffith, D Rose and S Gageler, 'Further Aspects of the Cross-vesting Scheme' (1988) 62 *ALJ* 1016.

D Kelly and J Crawford, 'Choice of Law Under the Cross-vesting Legislation' (1988) 62 *ALJ* 589.

D Kovacs, 'After the Fall: Recovering Property Jurisdiction in the Family Court in the Post Cross-vesting Era' (2001) 25 *MULR* 58.

D Kovacs, 'Cross-Vesting of Jurisdiction — New Solutions or New Problems?' (1988) 16 *MULR* 669.

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