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IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Sydney

No S74 of 1998

RE THE JUDGES OF THE FEDERAL
COURT OF AUSTRALIA

First Respondents

GEORGE WAKIM

Second Respondent

Ex parte –

PETER J. McNALLY and TERENCE
McNALLY

Prosecutors

Office of the Registry
Sydney

No S107 of 1998

RE THE JUDGES OF THE FEDERAL
COURT OF AUSTRALIA

First Respondents

GEORGE WAKIM

Second Respondent

Ex parte –

CHOLMONDELEY DARVALL QC

Prosecutor

Office of the Registry
Sydney

No S118 of 1998

In the matter of –

Applications for Writs of Prohibition
and Certiorari against SUSAN
AGNEW, formerly a Registrar of the
Federal Court of Australia

First Respondent

THE HONOURABLE BRIAN JOHN
MICHAEL TAMBERLIN, A Judge of
the Federal Court of Australia

Second Respondent

THE JUDGES AND REGISTRARS
OF THE FEDERAL COURT OF
AUSTRALIA

Third Respondents

MARTIN RUSSELL BROWN,
Liquidator of Amann Aviation Pty
Limited and AMANN AVIATION
PTY LIMITED (IN LIQUIDATION)
and BP AUSTRALIA LTD

Fourth Respondents

ROBERT OTTO AMANN &
VANDA RUSSELL GOULD

Prosecutors/Applicants

B e t w e e n -

JOHN SPINKS, TRAVERS DUNCAN,
ALLAN WELLS, GEOFFREY WHITE,
WHITE CONSTRUCTIONS PTY
LIMITED, WHITE INDUSTRIES
AUSTRALIA LIMITED, WHITE
INDUSTRIES PTY LIMITED, WHITE
CONSTRUCTIONS PTY LIMITED, PDC
CONSTRUCTIONS PTY LIMITED, PDC
PLANT HIRE PTY LIMITED, WIL
CIVIL AND MINING ENGINEERING
PTY LIMITED, WHITE
CONSTRUCTIONS PTY LIMITED,
EXXON COAL AUSTRALIA LIMITED

Applicant

MAXWELL WILLIAM PRENTICE

Respondent

GLEESON CJ
GAUDRON J
McHUGH J
GUMMOW J
KIRBY J
HAYNE J
CALLINAN J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON WEDNESDAY, 2 DECEMBER 1998, AT 10.02 AM

(Continued from 1/12/98)

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GLEESON CJ: Mr Solicitor, before you proceed, could I mention that I have a certificate from the Senior Registrar saying that she has been informed by Corrs Chambers Westgarth, the solicitors for BP Australia Limited, the third-named fourth respondent in the above matter, that is the matter of *Re Brown & Ors ex Parte Amann & Anor*, that BP Australia Limited does not wish to be heard in this application and submits to any order of the Court save as to costs. Yes, Mr Solicitor.

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MR BENNETT: If the Court pleases. Yesterday, your Honour the Chief Justice asked me a question at page 102 of the transcript, about section 9(2)(a) of the Commonwealth Cross-vesting Act. May I just complete a rather more precise answer to your Honour than I gave yesterday? The section provides that:

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The Federal Court.....may:

(a) exercise jurisdiction.....conferred on that court by a provision of this Act or of a law of a State –

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The reference to the provisions of this Act are to sections 4(2) and 4(3). Section 4(2) is a conferral of jurisdiction under section 122. Section 4(3) is intended to be a conferral of jurisdiction under such of the heads of sections 75 and 76 as are not picked up by section 39 of the *Judiciary Act*. In other words, if one has a matter pending in a State court which falls within one of those heads, and the State court considers it appropriate to transfer it under section 5, then subsection (3), by virtue of section 77(i), confers the necessary jurisdiction on the Federal Court.

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Going back to section 9(2)(a), the conferrals are thus under those sections. The conferral by the law of the State is of course a conferral under State law. What section 9(2)(a) is doing is defining within the meaning of section 77(i) of the Constitution the jurisdiction of the Federal Court. It is doing that in relation to two separate things. It is defining the jurisdiction in relation to the matters as to which jurisdiction is being conferred by the Cross-vesting Act. They are the matters under 75 and 76 in 4(3) and 122 in 4(2).

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Secondly, it is defining what the States can do in conferring jurisdiction and it is defining what it is accepting that the States may do, if one likes, and it is doing that under a number of powers which we have listed in paragraphs 6.5 to 6.9 of our submissions, but the primary one is the incidental power associated with the power to define jurisdiction and the incidental power which arises out of that, we say, to accept a conferral of State jurisdiction.

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GUMMOW J: I am not sure I understand all this. Are you saying 9(2) is supported by section 77(i)?

MR BENNETT: Yes, your Honour.

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GUMMOW J: Wholly? It certainly cannot operate as to 122, can it, unless you give a particular meaning as to 76(ii).

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MR BENNETT: Your Honour, we do give that meaning, of course, to 76(ii) in our primary submission, but what we say is that the role of defining can deal both with jurisdiction conferred by the Commonwealth to the extent that it can confer jurisdiction and with jurisdiction conferred by anyone else to the extent that it can confer jurisdiction.

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GUMMOW J: But the opening words of section 77 refer back to 75 and 76.

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MR BENNETT: Yes, but the incidental power in relation to that must be to define the jurisdiction that can be conferred in any other way so as - - -

HAYNE J: With respect to a matter that is not a 75 or 76 matter.

MR BENNETT: Yes, your Honour, yes.

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GLEESON CJ: Mr Solicitor, section 22 of the *Family Court of Australia Act* provides that :

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(2B) If a person who holds office as a Judge of the Family Court of Australia is appointed or serves as a Judge of a Family Court of a State, the appointment or service shall not affect his or her tenure of that office of Judge of the Family Court of Australia - - -

MR BENNETT: Yes, your Honour.

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GLEESON CJ: What is the legislative power pursuant to which that provision was enacted?

MR BENNETT: I am sorry, your Honour said section - - -?

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GLEESON CJ: Section 22(2B)

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MR BENNETT: Yes. Your Honour, that would be a combination of the power in section 51(xxii) and the incidental power in relation to sections 71 and 72 concerning the appointment of federal judges.

GLEESON CJ: Is it the fact that there are judges of the Family Court of Australia who serve as judges of the Family Court of a State?

4710 **MR BENNETT:** I think only in Western Australia, your Honour, but I am not certain of that answer.

GLEESON CJ: It is the case, is it not, that a number of judges of the Federal Court hold multiple commissions?

4715 **MR BENNETT:** Yes, as judges of territorial courts. Certainly as judges of territorial courts.

GLEESON CJ: Some as judges of foreign courts?

4720 **MR BENNETT:** I am not sure if that extends to serving judges or has been historically limited to retired judges but I think some may have.

4725 **KIRBY J:** I think some judges of the Federal Court serve on Courts of Appeal in the Pacific.

MR BENNETT: Yes, I think that is right, your Honour, but I am not certain. I am told that is right.

4730 **GLEESON CJ:** Is there some statutory provision relating to that that overcomes the principle concerning inconsistent commissions?

4735 **MR BENNETT:** Your Honour, when your Honour refers to the “principle of inconsistent commissions”, does your Honour mean inconsistent in the *Wilson* sense or inconsistent in some higher constitutional sense?

GLEESON CJ: Inconsistent, perhaps, in the sense of owing obligations to two different courts in respect of their time.

4740 **MR BENNETT:** Your Honour, the practical solution to that, of course, is dealt with by provisions relating to leave and matters of that sort.

GLEESON CJ: I notice that in the *Defence Force Discipline Act* 1982, section 181 provides that:

4745 The appointment of the holder of a judicial office as the Judge Advocate General.....does not affect his tenure of that judicial office-

and I had assumed that provision was included in that legislation to overcome problems about inconsistent commissions.

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4755 **MR BENNETT:** Your Honour, there would only be an inconsistency if the second appointment was either – I suppose there were three ways it could arise: if it was inconsistent in the *Kable* sense applied to the federal judiciary by analogy; if it is inconsistent in the *Wilson* sense of simply being something which it is inappropriate for a person who holds the office and there is inconsistency in the time sense in that if the duties of the second office were so onerous as to interfere with one exercising the present duties.

4760 **GUMMOW J:** Well there is a common law doctrine though, which is referred to in *Wilson* at page 15 in the joint judgment:

4765 The common law doctrine operates to vacate an office to which a person has been appointed when that person accepts another office and the duties of the two offices cannot be faithfully and impartially discharged by the same person.

That is the common law doctrine.

4770 **McHUGH J:** It is upon that theory that it is alleged that the commission as Queen's Counsel is terminated by appointment of judges. Now, I know some people take the view they revive. That is a question.

4775 **MR BENNETT:** Yes, there was also the question of the doctrine of merger – of the merger of the lesser commission and the higher commission which was a different common law doctrine which was thought to apply in that situation or is said by some to apply in that situation.

4780 **GLEESON CJ:** What I was wondering was whether the legislative power behind statutory provisions intended to overcome problems about inconsistent commissions might be the same kind of power as that on which you are relying in the present case?

4785 **MR BENNETT:** Yes, well, in one sense it certainly is because, in relation to section 109 – we have put that in our submissions, that the incidental power that we are exercising to one extent is simply the power to negate the operation of section 109 by demonstrating the absence of inconsistency in the federal intention.

4790 **GLEESON CJ:** Another thing that I was wondering was that if it is the case that judges of the Federal Court can, and commonly do, hold multiple commissions on Territory courts, or even State courts, or foreign courts, what the negative implications in Chapter III are saving them for?

4795 **MR BENNETT:** Yes, we respectfully adopt that, your Honour. I can add to the sections - - -

4800 **McHUGH J:** It may be that some of this legislation is invalid, for example, the legislation which was passed to allow Sir John Latham to be Minister or Ambassador to Japan in 1940, or the legislation that allowed Sir Owen Dixon to become a Minister in Washington in 1942, unless it can be supported under the external affairs power.

4805 **MR BENNETT:** Well, we would submit that it could, but the alternative view - - -

McHUGH J: But there is a real problem about Chapter III as far as I am concerned.

4810 **MR BENNETT:** There might be a problem in relation analogous to *Wilson* in relation to that, but that is a different aspect. But there is also section 6(5) of the *Federal Court* - - -

4815 **GUMMOW J:** You start off with the common law doctrine. Forget about the Constitution for the moment.

MR BENNETT: Yes, but the common law doctrine can be overridden by legislation and the section - - -

4820 **GUMMOW J:** Yes, but there is not legislation in respect of a lot of these multiple commissions.

MR BENNETT: Your Honour, I was just about to say that section 6(5) of the *Federal Court of Australia Act* says:

4825 Notwithstanding anything contained in any other Act, a person may hold office at the one time as a Judge, other than the Chief Justice, of the Court and as a Judge of a prescribed court or of 2 or more prescribed courts.

4830 And then those courts are prescribed under that section. So, there is a – a prescribed court is defined as meaning:

(a) a court.....created by the Parliament; or

4835 (b) the Supreme Court of the Northern Territory; or

(c) the Supreme Court of the Australian Capital Territory.

4840 Somewhat surprisingly, it does not include the courts of the other external territories but there may be a reason for that.

GUMMOW J: Nor foreign countries.

- 4845 **MR BENNETT:** Or foreign countries.
- GLEESON CJ:** Section 37 of the *Supreme Court Act* 1970 of New South Wales enables, or purports to enable, the Governor to appoint a judge of the Federal Court an acting judge of the Supreme Court.
- 4850 **MR BENNETT:** Yes. That is another example of a provision which is designed to avoid the common law principle. Of course, the fact that it is a common law principle is a reason why there is no need for any further implication in Chapter III because the common law principle being there, there is no need for anything additional.
- 4855 **GLEESON CJ:** Is there any reason why a judge of the Federal Court of Australia should not also be appointed a judge of the Supreme Court of New South Wales?
- 4860 **MR BENNETT:** No, your Honour.
- GUMMOW J:** But it is not a prescribed court, is it, within the meaning of that section?
- 4865 **MR BENNETT:** Subject to there being appropriate legislation, there is no reason.
- GUMMOW J:** There is not, is there?
- 4870 **MR BENNETT:** Not that I am aware of, your Honour.
- GLEESON CJ:** And the appropriate legislation would be legislation of the Commonwealth Parliament?
- 4875 **MR BENNETT:** I suppose it would have to be the Commonwealth and the States to avoid the common law rule.
- GLEESON CJ:** And pursuant to what power would the Commonwealth legislation be enacted?
- 4880 **MR BENNETT:** The incidental power in relation to the appointment of judges. The same power which enables it to deal with other matters incidental to - - -
- 4885 **GAUDRON J:** Implied or 51(xxxix)?
- MR BENNETT:** Either, your Honour.

4890 **GAUDRON J:** Because 51(xxxix) is limited to:
the execution of any power vested.....in the Federal Judicature –
relevantly. It deals with “the execution of any power”. It does not seem to
me - unless the power which is vested in the Federal Judicature is a judicial
4895 power of the Commonwealth, it is not readily apparent to me that 51(xxxix)
extends to the execution of the judicial power of somebody else.

MR BENNETT: It can be dealt with either under the general *Burton v*
Honan-type of implied incidental power, or as - - -

4900 **GAUDRON J:** That is what is necessary for the power. That may be - - -

GUMMOW J: It may be narrower.

4905 **GAUDRON J:** Narrower, yes.

MR BENNETT: In *State Chamber of Commerce v The Commonwealth*
163 CLR 329, which is referred to in our submissions in 6.11, at 357 the
Full Court specifically dealt with that and said this:

4910 The Constitution established a new body politic, the
Commonwealth of Australia. The body politic was armed with
specific legislative, executive and judicial powers. However, the
establishment and the nature of the body politic gave rise also to
4915 certain implied powers.....Subject to constitutional prohibitions,
express or implied, the implied powers include a power for the
regulation and supervision of the polity’s own activities, the exercise
of its powers and the assertion or waiver of its immunities.

4920 **GAUDRON J:** But that does not take you further. Once you start talking
about powers of another polity in the Federation you are in a different
realm, are you not?

MR BENNETT: No, your Honour, because all one is doing is waiving an
4925 immunity in relation to the exercise of those powers.

GAUDRON J: I do not know that it is an immunity.

McHUGH J: No, this is the submission you keep repeating. It borders, I
4930 must say, on the ridiculous, as far as I am concerned, talking about an
immunity. This is a naked conferral of jurisdiction by the Federal
Parliament on the Federal Courts and you have got to face up to that.

4935 **MR BENNETT:** Well, your Honour, with respect, the submission is that it is not. We do not have to justify it on that basis. It is sought to be justified as a conferral of power by the States to which the Commonwealth consents.

4940 **McHUGH J:** But where do they get the power to control the States?

MR BENNETT: They do not control the States, your Honour. The States make their own decisions.

4945 **McHUGH J:** Yes, but where do they get the power to control this exercise of State power relevantly in respect of the courts? Where does it come from? It certainly does not come from 51(xxxix)?

4950 **MR BENNETT:** The States, because of the *Electric Light* doctrine, pick up the court with all its powers and all its machinery and rights of appeal and matters of that sort. Those are Commonwealth matters.

GUMMOW J: This pick-up doctrine, where does that come from?

4955 **MR BENNETT:** That is the *Electric Light and Power Case*, your Honour.

GUMMOW J: Well, you had better take us to it.

4960 **MR BENNETT:** If your Honours please. That is the case which says that where a new power is conferred on an existing court, by legislation, one takes that court with all its existing powers and statuses.

GUMMOW J: By legislation of what legislature?

4965 **MR BENNETT:** It is talking about the same polity, your Honour.

McHUGH J: Well, of course it is.

MR BENNETT: Yes, but the - - -

4970 **McHUGH J:** Well,.....another world.

MR BENNETT: But, your Honour, there is no reason why that cannot apply to a different polity.

4975 **McHUGH J:** Well, of course there is, there is every reason.

MR BENNETT: The *Nauru Case* is an example of it being done.

McHUGH J: Well, query whether that legislation is valid.

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MR BENNETT: The power is conferred by Nauru legislation, not by Australian legislation, but the Australian legislation consents to it and defines, if one likes, the extent of it but it is - - -

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KIRBY J: Was the same formula used in that case as in the cross-vesting legislation, that is to say, that this is Nauru jurisdiction conferred on this Court which the Commonwealth consents to?

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MR BENNETT: I have not got it in front of me, your Honour. That is certainly my understanding but I would need to check that.

GAUDRON J: And in that formula - can I ask which piece of legislation, State or Commonwealth, Nauruan or Commonwealth, requires the exercise of jurisdiction?

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MR BENNETT: Only the Nauruan legislation, your Honour, so - - -

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HAYNE J: But, Mr Solicitor, identifying a second occasion for considering a problem is offering no solution to the problem. The Nauru example is trotted out repeatedly. It is a second occasion for considering the problem. What solution does it offer?

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MR BENNETT: Only, your Honour, that on two occasions the Court has exercised the jurisdiction without demur. That is all I can get from it and the fact that it is an example of another type of case where it is convenient and are useful for this sort of power to be exercised.

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KIRBY J: Yes, but with, in a sense, much less authority than the Constitution provides in a case of a State of the Commonwealth. It seems to me that it is not ridiculous to suggest that in the case of a State of the Commonwealth the relationship of the State to the Commonwealth, to the courts of the Commonwealth is quite different and quite much stronger than in the case of Nauru.

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MR BENNETT: Yes, your Honour.

KIRBY J: I mean, whether the Nauruan legislation might fall, but that is absolutely no reason for criticising the cross-vesting legislation.

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MR BENNETT: No, that is so, your Honour. The - - -

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KIRBY J: We are talking about the States as if they are foreign powers, foreign countries. They are not, they are part of the Commonwealth of Australia, and it is important to consider this in the way we approach the matter.

5030 **MR BENNETT:** And that is part of the basis for the implied incidental power. Your Honours, *Electric Light and Power Supply Case* 94 CLR 554 and the relevant passage is at page 560, and it is a unanimous judgment of the Full Court, and what is said is, in the long paragraph, almost exactly half way down the page against the words “It is no artificial presumption” in the left hand margin, and their Honours say:

5035 When the legislature finds that a specific question of a judicial nature arises but that there is at hand an established court to the determination of which the question may be appropriately submitted, it may be supposed that if the legislature does not mean to take the court as it finds it with all its incidents including the liability to appeal, it will say so. In the absence of express words to the contrary or of reasonably plain intendment the inference may safely be made that it takes it as it finds it with all its incidents and the inference will accord with reality.

5045 Then they go on to discuss contrary intention. Now, that, of course, is within a polity but the principle, we would submit, is equally applicable. The States do not need to define the detail. They confer a jurisdiction on an existing court, and take that court as they find it, as the Republic of Nauru does, or as is done in numerous matters within a single polity.

5050 **GAUDRON J:** Can I ask you this, Mr Solicitor, with respect to your answer to me that it is the State law that compels the exercise of jurisdiction. Can you do that unaided, in view of the theory that has usually been accepted that you need section 79 of the *Judiciary Act*, for example, to pick up and apply State laws in the Federal Court because they could not apply of their own force?

MR BENNETT: Your Honour, the only reason why it needs the Commonwealth consent is section 109, and I dealt with that yesterday.

5060 **GAUDRON J:** So the vesting of jurisdiction applies of its own force?

MR BENNETT: Yes, your Honour.

5065 **GAUDRON J:** Notwithstanding what was said in *Robinson v Ferguson Transformers*, for example?

GUMMOW J: Or in *Owens v The Commissioner of Stamp Duties* 88 CLR.

5070 **GAUDRON J:** And I think later again in - - -

McHUGH J: The *Suiters Fund Act* of New South Wales applies of its own force.

5075 **MR BENNETT:** Yes.

McHUGH J: And by a parity of reasoning, I suppose. Is this consent ambulatory if the law in the vesting State changes, or if they change the procedure of the laws of evidence, for example, does that change with it?

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MR BENNETT: Your Honour, the rules of evidence would be the Commonwealth rules of evidence.

McHUGH J: Why? It is not a federal matter.

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MR BENNETT: The rules of evidence would be governed by separate legislation. That is dealt with substantively by the – one would have to look at the construction of the Commonwealth *Evidence Act* and see whether it applied or whether it left the field to the States, but that would be a matter simply of construction of the particular legislation and there would be no constitutional mandate.

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McHUGH J: But you do not shirk from the view that the State could control the laws of evidence in the Federal Court?

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MR BENNETT: Subject to the overriding power of the Commonwealth, yes, your Honour.

GAUDRON J: Well, where does that come from if it is not a federal matter?

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MR BENNETT: The jurisdiction being exercised is State jurisdiction and no doubt the State substantive law would apply. As to procedural law - that would be the Commonwealth procedural law – whether evidence fell on one side or the other would depend on the legislation. There would be no constitutional impediment to the State evidence law applying subject to the section 109 in the Commonwealth consent.

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HAYNE J: And that in fact applies under the *Corporations Law*, does it not? The *Corporations Law* of the States provides various evidentiary rules, rules which are then applied in the Federal Court in proceedings that are cross-vested there.

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MR BENNETT: Yes, your Honour.

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HAYNE J: What evidence law is it that is then applied? Is it the evidence law of the State?

5120 **MR BENNETT:** Your Honour, if that is the effect of the true construction of the legislation - - -

HAYNE J: The *Corporations Law* of the State provides that, for example, books are to have certain status and there are, I think, certain certificate provisions and the like. There are quite elaborate evidence provisions. Are
5125 the State evidence provisions those that apply?

MR BENNETT: If they are what the State *Corporations Law* says apply and if the consent provisions, if I may so describe it, accepting the controversial nature of that, accepts that, yes.
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McHUGH J: Including abolition of legal professional privilege and matters of that nature?

MR BENNETT: That is a matter of substantive law, your Honour, yes.
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McHUGH J: Self-incrimination?

MR BENNETT: Yes, all those things, your Honour.

5140 **HAYNE J:** All of which are real and lively examples from the *Corporations Law* as it now stands.

MR BENNETT: One would have to look at the question of construction in each case, but subject to that, yes.
5145

KIRBY J: And presumably you would get to a point where the change in the law was altering the nature of the Court as a court; you might get to that point.

5150 **MR BENNETT:** If one got to that point, there would be a different answer. Yesterday, your Honour Justice Hayne asked me a question at page 100 about the separation of the two polities in the Constitution. Your Honour's question was that once there was a division of jurisdiction, how did one paper over that division? And, your Honours, may I add this
5155 to my answer, that there are numerous other ways in which there is an intermingling and the two are bridged. In the Constitution itself one has section 77(iii) and one has section 73(ii); one has this Court hearing appeals on purely State matters from State Supreme Courts; one has the vesting of federal jurisdiction in State courts. That is two examples of the bridge
5160 being crossed in the Constitution itself.

GUMMOW J: But not quite as simply as that; it is not from any decision of a Supreme Court - - -

5165 **MR BENNETT:** I accept that, your Honour.

GUMMOW J: - - -the point of section 72. More the point of investment; is it investment of jurisdiction from the Commonwealth, which could have come from a State? In other words, the judicial power concept that flows
5170 through section 77(iii) - - -

MR BENNETT: Yes.

GUMMOW J: In each case it comes through a filter.

5175 **MR BENNETT:** Yes.

HAYNE J: And does not the very fact of specification of the particular links or bridges tell against your argument?

5180 **MR BENNETT:** No, your Honour, because the reason why it was necessary to spell out section 77(iii) is that that is a compulsory vesting of jurisdiction; the States have no say in whether or not their courts will accept the vesting of federal jurisdiction in State courts. That was the reason why
5185 it had to be spelt out in the Constitution. There was no need for Part III to deal with the question of vesting of jurisdiction by agreement between the two polities in an appropriate way, because that - - -

GUMMOW J: When you say agreement between the two polities, you mean by agreement between the two legislatures?

5190 **MR BENNETT:** Yes, in effect, by the State legislature conferring and the Commonwealth legislature consenting.

5195 **GUMMOW J:** Well it cannot be meaning by the two executives surely?

MR BENNETT: No, no, I do not suggest that. We also give the other examples we have referred to in our submissions, of which there are many.

5200 **GUMMOW J:** I think you misstate the history about section 77(iii). Section 77(iii) was there because in the United States at that time it was not clear whether the State courts could be compelled to act in this way, in the United States – it was not quite clear, so it was specified here. It was never suggested that it operated in this fashion here; it simply was not
5205 contemplated.

MR BENNETT: No, your Honour, nor was the exclusion contemplated, we would submit. What section 77(iii) was - - -

5210 **GUMMOW J:** I cannot see how you can get some sub silentio support for this.

5215 **KIRBY J:** Is not the position that they had to deal with an immediate problem? There were no Federal Courts. They had to deal with the problem of receiving federal jurisdiction in an established State court system where there were, say, for the contemplation of this Court no Federal Courts and unlikely to be Federal Courts for some time. I mean, that is the historical context.

5220 **MR BENNETT:** Yes, it is, your Honour, but what I am putting in answer to Justice Hayne is that there is no expressio unius arising from 77(iii) because the area of discourse in 77(iii) is requiring one polity to accept something. That is a very different area of discourse from the one polity conferring a jurisdiction on the courts of another and the other polity
5225 accepting it.

GUMMOW J: I know, but if what you are saying is right, you would expect to find some express power for the Commonwealth to consent through legislation, and that is not there.

5230 **MR BENNETT:** Your Honour, everything is not - - -

GUMMOW J: I know you try and stretch and strain 51(xxxix) – you may be right – but that is what you have to do. One would have thought in such
5235 an important matter the reception would have been dealt with.

MR BENNETT: Your Honour, no one pretends that the idea of cross-vesting occurred to the founding fathers. The issue is whether the implied exclusions which appear in Chapter III are such as to exclude it, but
5240 one does not - - -

GUMMOW J: In the end you have to find some legislative power at the Commonwealth end.

5245 **MR BENNETT:** Your Honour, I have put my submissions a number of times on that. We find that power primarily in the implied incidental power and it is analogous, if one likes, to the power to waive an immunity, it is analogous to a number of other incidental powers. I will come to the reasons for it in a moment.

5250 The final matter that I was asked about yesterday was your Honour Justice Gummow asked me at pages 96 to 97 about the absence of a common field in relation to my submission that but for the Commonwealth consent there would be inconsistency under section 109. There are two
5255 cases I wanted to refer your Honours to in relation to that. One was some

passages in *Duncan* 158 CLR 535 which appear to suggest that section 109 would operate in the way that I submitted in answering your Honour's question.

5260 **GUMMOW J:** But *Duncan* assumes, fairly enough, that the State law would have been valid because it was within power to pass such a law until such time as the Commonwealth decided itself to exercise its concurrent power which would prevail subject to it being held back to produce some co-operative mechanism.

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MR BENNETT: Three of the Justices suggest it is the action of the Commonwealth which takes away the section 109 problem. If I can just show your Honour the passages briefly, the first is the Chief Justice - - -

5270 **GUMMOW J:** What I was putting to you is that there is no 109 problem because the State law is simply not valid; it is not within power. It is just as if the State had passed a law with respect to excise. You do not go and say what has the Commonwealth provided? It is a sales tax, and then say that covers the field and therefore there is no State law as to excise. It is simply
5275 not within State power. What is put against you by Mr Jackson is that this is such a case.

MR BENNETT: Your Honour, clearly if it is within an implied exclusion, this argument does not help me. But the reason for my reference
5280 to section 109 is simply to make good the submission that, assuming that the reason for the Commonwealth consent and the reason for its necessity is that but for it the State could not confer power without running foul of section 109. What was suggested to me yesterday was that that was not the case because the field was a field which was solely State power.

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My answer to that is that when the Commonwealth defines the jurisdiction of the Federal Court in the *Federal Court Act*, it would be inconsistent with that defining for the State to confer additional power on that court unless the Commonwealth in some way legislatively indicated its
5290 consent. I will not read your Honours the passages, but I will give your Honours the three references. It is the Chief Justice at page 554 point 2; Justice Mason, as he then was, at page 563, and his Honour puts it particularly clearly because at 563 point 5 he says:

5295 One potential problem.....is that of an inconsistency between Commonwealth and State laws bringing into operation s 109.....This problem can be alleviated, if not eliminated, by a manifestation of intention in the Commonwealth law that it is not intended to occupy the field to the exclusion of State law.

5300

He goes on to say that is what has been done. The third passage is that of Justice Brennan, as he then was, at page 582 point 5.

5305 **McHUGH J:** Yes, but that is because in these cases the Commonwealth has the power to legislate not only in respect of the field in which it has operated, but also in respect of matters on which the State could legislate, but *In re Navigation* says the Commonwealth has not got that power to go outside the field. The field is very narrow.

5310 **MR BENNETT:** I will come to *In re Judiciary and Navigation* in a moment if I may, your Honour. If I can just complete the answer to Justice Gummow's question of yesterday, the other reference is to *Cram's Case* 163 CLR 117 at pages 127 to 128.

5315 The final loose end from yesterday is that Justice Kirby asked about statistics. We have obtained copies of statistics from the annual report of the Federal Court, and I will hand those up at the end of the case. I will not interrupt myself to do it now.

5320 **KIRBY J:** That would not cover the Family Court, of course.

MR BENNETT: I have not obtained those, your Honour.

5325 **KIRBY J:** Would it cover all of the State referrals?

MR BENNETT: May I just say this, your Honour: the statistics are not of any real value because they deal only with transferred cases. The statistics do not list the number of cases commenced, like the cases in the present case, in the Federal Court under the cross-vesting legislation.

5330 The nearest I can get to assisting your Honour in relation to that is that these statistics do contain numbers in relation to *Corporations Law* matters and they, of course, would virtually all be matters brought under the cross-vesting provisions of the corporations legislation. So, to that extent,
5335 the statistics may be helpful but there are no statistics of which I am aware which would deal with cases such as *Wakim Ex parte McNally* or *Wakim Ex parte Darvall* where you have proceedings commenced in the Federal Court under the cross-vesting legislation and I will hand those up - - -

5340 **KIRBY J:** It would give us some clue of the large number of orders that will be affected by this decision – may be affected by it.

GUMMOW J: If the orders have been made and they have not been
5345 appealed, they are not affected.

KIRBY J: If they have been made outside jurisdiction the question must arise.

5350 **MR BENNETT:** Well, there are a very large number of pending cases, of course, which is the other problem which would need to be dealt with by legislation in every State and Territory and the litigants would have then – what would have to happen, presumably, is that the litigants would have to recommence in State courts and the States would, presumably, all pass legislation declaring that the *Limitation Act* was told by the commencement of invalid proceedings in the Federal Court. So, one would have to have - - -

5360 **GUMMOW J:** The States could pass an Act deeming to have been taken in the State court, steps taken so far in the Federal Court.

MR BENNETT: Yes, the transitional problem can be solved.

5365 **McHUGH J:** It was solved in the *Boilermakers*. After the decision in the *Boilermakers Case*, the industrial field was thrown into chaos. Statutes that had been on the books basically for a century, or three-quarters of a century, was thrown into doubt. Certainly, it had been in that form since the late twenties.

5370 **KIRBY J:** Chaos may sometimes be necessary but it ought not to cause pleasure.

5375 **MR BENNETT:** May I now proceed to *Judiciary and Navigation Acts* 29 CLR 257? There are a few things I wish to say about that case. It really involves – I referred yesterday to a sorites – it has five steps and I need to say a little bit about each one and, in particular, the second. The first step is that the making of a declaration of the type which the Court was considering in that case is a judicial function. That may not have been a necessary step for the decision and it was criticised in *Boilermakers*, particularly at page 541 of the Privy Council decision, and there is some criticism of it in the decision in this Court as well which I will not take your Honours to.

5385 It is probably not correct because although, of course, the making of a declaration in a suit inter partes is a normal judicial function, part of the means of determining a dispute, the same does not necessarily apply to a declaration of the type contemplated in that case but - - -

5390 **McHUGH J:** What about advice to trustees, courts of equity, chancery? I mean, giving advice to trustees, surely that is a judicial function.

5395 **MR BENNETT:** Yes, that is closer to the borderline, your Honour. But here one is talking about a function which involves the making of a quasi legislative direction intended to bind litigants in other cases who would not have the opportunity in those cases to have the decision reversed or changed.

5400 It is not a matter of merely creating a precedent, it is creating a binding declaration as to constitutional validity, but I will not tarry on that because that proposition does not substantially affect the argument. I simply make the comment that it is part of the case which has been doubted.

5405 **GUMMOW J:** Well, I do not know. There is a reference in footnote 6 on page 260 to a Canadian appeal which was in 1912 which established their advisory jurisdiction and only this year the Supreme Court of Canada has affirmed that as a proper exercise of judicial power, as generally understood, in dealing with the question as to the proposed secession by Quebec.

5410 **MR BENNETT:** Yes. There is no doubt a different view has been taken in Canada in relation to that question. Could I pass to the second and most important proposition which is that this Court cannot exercise judicial functions unless they are part of the judicial power of the Commonwealth and that is a proposition to which I will return because it is that one which we submit is expressed too widely. Certainly, it was expressed more widely than was necessary for the purposes of that case and we submit there is a limit on it. The third, fourth and fifth I will deal with very quickly. The third is that sections 75 and 76 are a delimitation of the whole of the original jurisdiction which can be exercised under the judicial power of the Commonwealth. That is self-evident from the wording of the sections themselves.

5425 My learned friend, Mr Jackson, referred to that proposition and we do not dispute it. The fourth is that those sections require there to be a matter in relation to each of the nine heads of power and the fifth is that the relevant declaratory power does not arise in a matter because there was no lease inter partes. Those are uncontroversial propositions. Now, returning to the second one we submit, very simply, that it was sufficient for the purposes of that case for the court to decide that the Commonwealth Government could not confer judicial power on a Chapter III Court unless it was done as part of the judicial power of the Commonwealth. That would have been sufficient for the purpose.

5435 There was no need to go any further and certainly one should not, in our respectful submission, take propositions which are, as a matter of grammar, expressed in the passive voice or expressed in general terms as being wider than were necessary for that case and one should regard *Re*

5440 *Judiciary and Navigation Acts*, we would submit, as silent on the issue of whether or not powers could be conferred on Federal Courts, on Chapter III Courts by politics other than the Commonwealth Government. It is important to note that - - -

GAUDRON J: And if so, I take it – if judicial power can be conferred, can non-judicial power also be conferred?

5445 **MR BENNETT:** No, your Honour, because of the *Wilson* doctrine.

5450 **GAUDRON J:** Well, I do not know. The *Wilson* doctrine deals with a particular sort of thing but why could not the States confer jurisdiction to do in relation to State issues, for example, that which was said was not possible in *Re Judiciary and Navigation Acts*. Why could not the States, for example, confer power or jurisdiction on this Court to determine questions of privilege arising in the Houses of Parliament, on a reference, by the Speaker?

5455 **MR BENNETT:** Your Honour, we would accept an implied limitation which would limit the ability of a Chapter III Court to be required to accept an outside conferral of jurisdiction as being limited to judicial power. The reason is the nature of the court, the nature of its functions and obligations - - -

5460 **GAUDRON J:** The Federal Court too?

MR BENNETT: Yes, your Honour.

5465 **HAYNE J:** To judicial power as distinct from judicial power of the Commonwealth?

MR BENNETT: Yes, your Honour, yes. The - - -

5470 **GAUDRON J:** And would it require a matter, would it require a controversy, in your view?

5475 **MR BENNETT:** Your Honour, one could answer that question in either way, and one could give the answer that whichever way the court decided, that issue does not arise in this case. Probably the better view - - -

GAUDRON J: It is not far away from this case, though. Perhaps maybe not far away from *Spinks* at all.

5480 **MR BENNETT:** Well, yes, that is a different issue, the question of examinations and so on. But the point is not taken against us in *Spinks* in that form.

5485 **GAUDRON J:** No, but it is a live question, is it not?

MR BENNETT: Your Honour, if I were forced to answer the question, the answer would be that it - - -

5490 **GUMMOW J:** No one is forcing you to answer anything, but it may help you case if you do.

5495 **MR BENNETT:** Yes. The answer would be that it would probably have to be a matter, not because of the use of the word “matter” in Part III, rather because of the nature of the power being conferred and the extent to which it might otherwise be inconsistent with the nature of judicial power being conferred on the court in its more general matters.

5500 Now, one of the principal matters which is put against us in the judgment of the three Justices who were not in the statutory majority in *Gould v Brown* is if the Commonwealth cannot confer the power, how is it that the States can? And that proposition is put in a number of different ways. What we say is when one looks to the reasons why the Commonwealth cannot confer the power, those reasons simply do not apply to a conferral by the States. The first principle, the separation of powers principle, does not operate to prevent the States vesting judicial power in a Federal Court. The second principle, the principle which says that one cannot exercise jurisdiction outside a matter where there is no lease inter partes to make a binding declaration for future cases, because that is inconsistent with the availability of judicial power in other cases, that principle does not require it. No extension of the *Kable* principle requires it and no extension of the *Wilson* principle requires it.

5510 **GAUDRON J:** Does section 106, perhaps, require it? Was it ever part of the Constitution of a State to allow its judicial power to be exercised by a body other than State courts?

MR BENNETT: Prior to the Constitution there was never any restriction on that. There was nothing - - -

5520 **KIRBY J:** I think we were given in *Gould v Brown* some examples of colonial endeavours to confer jurisdiction on other colonial courts. I think it did happen. There were historical examples, and I think they are footnoted in *Gould v Brown*.

5525 **MR BENNETT:** Yes. I respectfully adopt that, but, even independently of that, there would be no reason why it could not. The State, certainly prior to Federation, could confer its judicial power anywhere it wished. If it chose to do it on a court of another place it was free to do so.

5530 There is no question of a swamping of it being inconsistent with the setting up of the Federal Court because of the risk of preventing it carrying out its other functions, first because of the Commonwealth's consent and, secondly, because of the power to remit.

5535 **GUMMOW J:** Why should one assume the Commonwealth's consent is always benign?

HAYNE J: Because the Solicitor is paid to tell us it is.

5540 **GUMMOW J:** The fact is, under legislation challenged in the last sittings, this Court has an onerous burden of original jurisdiction in migration matters thanks to legislation of the body you represent, which may well impede the Court in the discharge of its primary functions as a constitutional Court and the Court of ultimate appeal. It really does not get
5545 you very far to come here asserting that yours is bathed in some bright light of rectitude.

MR BENNETT: No, but perhaps the stronger point is the power to remit.

5550 **GUMMOW J:** It is denied in that case, in the legislation you are referring to.

MR BENNETT: In that case, your Honour, yes.

5555 **GUMMOW J:** By a law of the Commonwealth Parliament.

MR BENNETT: Your Honour, I am not going to reargue *Abebe* in the short time - - -

5560 **GUMMOW J:** I am not seeking you do. I am just saying it is no good brandishing this notion of Commonwealth consent as some reason why the Court could never be swamped.

5565 **GAUDRON J:** In fact, in theory, as the law presently stands the Supreme Court of New South Wales could, for example, be left simply with a criminal jurisdiction; everything else going to the Federal Court, could it not, as the law presently stands?

5570 **MR BENNETT:** Under this legislation there is a power of remitter which may well be a necessary feature of validity on one view of it, because that power enables the Federal Court to say, "We consider this case to be inappropriate. We remit it". That may be more important in relation to the aspects of the cross-vesting case involving the States and Territories cross-vesting on each other, because when one puts the extreme example of

5575 two Tasmanians commencing proceedings in the Northern Territory in relation to a solely Tasmanian matter, the power of remitter is clearly available to be exercised.

5580 So as the legislation stands, it is not legislation which suffers from the vice that it is going to, or has the risk of, impeding the Federal Court from exercising its Chapter III functions.

GAUDRON J: I wonder though has it the vice of risking the State courts as part of an integrated court system for the exercise of federal jurisdiction.

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MR BENNETT: I am sorry, your Honour?

GAUDRON J: I said, I wonder if it has the vice that it risks the State Supreme Courts being there as part of an integrated system for the exercise of federal jurisdiction?

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MR BENNETT: Well, your Honour, holding the legislation to be invalid would have a more dramatic effect, because it would mean that where one has a case involving both federal and State jurisdiction, where the State jurisdiction is not within the accrued jurisdiction, one would be forced to litigate in the State court.

5595

GAUDRON J: But if you have got two matters, may be that is right; you would only be forced to litigate if there are two separate matters.

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McHUGH J: And particularly when it involves third parties. You see, the benefits of this legislation, in a practical sense, are when the matters are between two parties, but, as we know from experience, third parties are dragged into other Federal courts to litigate issues. Take the Family Court: you have a dispute; husband and wife; property settlement; divorce. Husband or wife alleges, "We were in partnership with the father-in-law in a farm. There were promises about land". Then the father-in-law is dragged into the Family Court and he has got a partnership case on, or an equity case on, which he would much prefer to have heard in the Supreme Court of the State. Now, that is the down side of this - - -

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MR BENNETT: It an upside, your Honour, because it may be an advantage - - -

McHUGH J: It is not. What if you are an insurance company; it has got a negligence claim, that you would rather have heard by a jury in New South Wales or some other State; you are dragged off to the Federal Court and it is heard by a judge.

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5620 **MR BENNETT:** If, as matter of discretion, it is more appropriate for the Supreme Court of New South Wales to deal with it, it will be transferred under section 5.

5625 **McHUGH J:** How many are retransferred back to the Supreme Court?

MR BENNETT: Your Honour, I do not have the statistics in front of me in relation to that, but one assumes that courts will exercise powers of transfer responsibly. The type of case where it was particularly necessary - - -

5630 **McHUGH J:** The lesson is, courts are avid for jurisdiction.

MR BENNETT: Your Honour, in my respectful submission, that is not an assumption one should make in relation to this. The sort of case which
5635 really was a major factor in relation to the cross-vesting legislation was the problems that were arising in the family law area; some of these problems have been solved in other ways, some of them have not.

GAUDRON J: Well they have now been entirely solved, have they not,
5640 except to the extent that there may be some problem in Western Australia, because there has been a reference of power, and once there is a reference of power under section 51(xxxvii) and a law then made by the Commonwealth, no trouble with Chapter III, because you immediately come up to section 76(ii).

5645 **KIRBY J:** That is a question because of the fact that section 51 in which exists the power of reference is itself subject to the Constitution which imports the suggested limitations of Chapter III. I do not think we should delude ourselves that the reference of power provides the solution to this
5650 problem.

MR BENNETT: There are serious problems with the reference of power as a solution.

5655 **GUMMOW J:** What are they?

McHUGH J: Yes. Let us have some particulars.

GUMMOW J: What are they?

5660 **MR BENNETT:** Well, your Honours, the first is that there is a question of what power is being referred. Does one refer the whole of the State judicial power as such? Does one do it by – it would be very difficult to delimit exactly the power being referred.

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5670 **GAUDRON J:** There was no great difficulty in relation to the *Family Law Act* in saying with respect to Part VII, I think it was, that to the extent that the Commonwealth does not otherwise have power to legislate with respect to children, that power is hereby transferred.

5675 **KIRBY J:** But is not the suggested problem that if there is a negative implication in Chapter III, that you can do all the references you want but the negative implication in Chapter III will still exist and that will be the inhibition upon an effective reference? If the negative implication exists, it simply cannot be done within Chapter III.

MR BENNETT: It depends on the scope that the court attributes to the negative implication when it finds it.

5680 **GUMMOW J:** What negative implication?

McHUGH J: What negative implication are you talking about, Mr Bennett?

5685 **MR BENNETT:** Whatever negative implication is relied on against me here, the negative implication that a Federal Court cannot have vested in it State jurisdiction.

5690 **GAUDRON J:** But why would that not apply equally – if there is a negative implication about Chapter III that affects 51(xxxvii) schemes, why would it not equally affect cross-vesting schemes if, as you conceded to me earlier, the States cannot vest any sort of power that the Commonwealth could not?

5695 **MR BENNETT:** I am sorry, because I was answering the question why the problem that would be created by this Court striking down the cross-vesting legislation could not be solved by a scheme under 51(xxxvii). That was what I was addressing.

5700 **GAUDRON J:** That may well be right in the corporations area.

MR BENNETT: That is all I was addressing, your Honour; I was not taking it further than that.

5705 **McHUGH J:** But it seems to me a remarkable proposition that the Commonwealth runs into trouble legislating under 51(xxxvii) but it does not run into these troubles by legislating under some implied power which you say is to be found in the Constitution as an incident.

5710 **MR BENNETT:** No, your Honour, I did not say that. What I am suggesting is that if this Court holds that the cross-vesting scheme is invalid

5715 because of an implied negative implication, then it is unlikely that that could be solved by use of 51(xxxvii). That is all I was putting; nothing more than that. The other problem is that section 51(xxxvii) requires a transfer of substantive law and there are more difficult questions when one is transferring procedural matters or judicial matters in general. There is a real question whether the section could apply to that.

5720 **McHUGH J:** Of course, one solution is that you can invest the State courts with large amounts of jurisdiction and do not vest the same jurisdiction in the Federal Courts.

5725 **MR BENNETT:** That is one way in which it could be done. But the example I was going to give your Honours of the sort of problem that arose under the family law in the seventies, is a dispute over custody between a man and a woman where there is a dispute of fact or law as to whether they are married. If they are married, as the law stood in the seventies, only the Family Court had jurisdiction, if they were not, only the State court had jurisdiction and one, therefore, had the difficulty where there was a dispute about that fact, in - - -

5735 **GAUDRON J:** How often did that occur? There is a lot of that in the reported cases, is there not? I can remember one case in which a question of paternity was in issue and there was a question whether that was to be decided in the Family Court or the Equity Division of New South Wales, and I remember that being one case that arose, but I do not remember any at all on the question whether the parties had married and so far as concerned the paternity question, the decision of this Court, and I think it was *W v W*, was unambiguously that that was a matter within the jurisdiction of the Family Court, there having been a marriage. I do not think this is a big problem that you are addressing, Mr Solicitor.

5745 **HAYNE J:** The moment you have definitions and divisions of jurisdiction, you will have difficulties at the edges. Unless you contend that there is a unitary judicial system in this country, there will inevitably be jurisdiction disputes. Pointing to them, seems to me, to advance the argument nowhere.

5750 **MR BENNETT:** Your Honour, if there is a way of reducing that by legislative action, as here by nine legislatures, and if that is seen as being in the public - - -

5755 **GAUDRON J:** It could reduce it by the action of one legislature, namely, the Commonwealth's. You can do it simply by not making particular legislation exclusive. If the Commonwealth wants to, they can vest all the jurisdiction they want in the Federal Court and the State courts and that will reduce it very significantly. At the same time you give what I would have

5760 thought was the normal meaning of “matter”, that is, whatever is in
controversy between the parties, and you have, I would have thought, very
little problem at all.

5765 **MR BENNETT:** And there will still be cases, your Honour, where one
party wishes to go to the Federal Court and the other party claims the matter
is outside the jurisdiction, and there will be arid jurisdictional disputes, if I
can use the cliché. As was said yesterday and as was said this morning by
Justice Hayne, if you have rules and limits to jurisdiction, you will have
jurisdictional disputes and if there are ways of avoiding it, if there are ways
of reducing that happening, that is something which ought to be regarded as
desirable rather than undesirable.

5770 **McHUGH J:** Mr Bennett, it really does not matter, does it, whether or not
the scheme has benefits or not. I do not need any convincing that on
balance the cross-vesting legislation is a very good thing for the
community. The question is, does the Constitution permit it? So far as I
5775 was concerned in *Gould v Brown*, it did not. I want to hear argument from
you on the Constitution to persuade me that I was wrong in *Gould v Brown*.

MR BENNETT: That is ultimately the question which the Court has to
decide, of course.

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Might I now take your Honours to our written submissions? I do not
propose to say any more about sections 1 to 3. I have dealt substantially
with the proposition put in section 4, which is that when one looks at the
mischief in *Boilermakers*, and when one looks at the mischief in
5785 *In re Judiciary and Navigation Acts*, those mischiefs have nothing to do –
have nothing to say either way about the problem that faces your Honours
in this case.

5790 One can, of course, go to passages, and both sides can play the game,
if one likes, of looking for passages in those cases which do or do not use
the words “the Commonwealth may not vest”, rather than the words “there
may not be vested”. In a sense, that does not answer the problem. What is
important is that those cases were concerned only with vesting by the
Commonwealth. I will give your Honours one example to show the
5795 difficulty with this. If one goes to *Boilermakers* in the Privy Council, there
is a passage that was cited by my learned friend, Mr Jackson, at
95 CLR 538 point 1. My learned friend read the sentence, being the second
full sentence on that page, which said:

5800 In the same way section 71 and the succeeding sections while
affirmatively prescribing in what courts the judicial power of the
Commonwealth may be vested and the limits of their jurisdiction

negatives the possibility of vesting such power in other courts or extending their jurisdiction beyond these limits.

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If one stops there, the proposition supports my learned friend. One then goes to the next sentence which says:

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It is to Chap III alone that the Parliament must have recourse if it wishes to legislate in regard to the judicial power.

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I have described it uncharitably as a game but, in a sense, that is all it is to take sentences like that out of context. The ultimate point is that these cases were not concerned with the question whether jurisdiction could be vested from another source. The answer to that question must be found elsewhere than the principles in *Boilermakers* and *In re Judiciary and Navigation Acts*, and I have given your Honours the ultimate basis that stands behind the principles in those cases, which does not necessitate the current prohibition.

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Paragraph 4.14 deals with one question which arose yesterday as to whether the jurisdiction of this Court could be altered by State law. We simply point out that that is a different question, the answer to which is not pre-empted by the answer to this question.

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, The High Court, of course, has a special position and function created by the Constitution. The Federal Court and other Federal Courts involve an intermediate step, namely, the creation by Act of the legislature and it does not follow that the same implications that might affect a State imposing or conferring - - -

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GUMMOW J: Well, are there any implications? Is there some special doctrine as to the States in this Court that you espouse? It seemed to be in the joint judgment in *Gould v Brown*. This Court was treated as somehow a different receptacle.

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MR BENNETT: Yes. That is the point I am making, your Honour. If there are any negative implications they may extend to this Court but that does not have to be decided in this case. All I do submit is one does not answer this case by saying, "If this is permitted then there could be a conferral by States of jurisdiction on this Court and - - -

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GUMMOW J: Well, are you denying that there could be a conferral by States of this Court?

MR BENNETT: I do not make a submission either way on it, your Honour, but what I - - -

5850 **GUMMOW J:** Well, you are not helping your argument, Mr Bennett.

McHUGH J: You are not helping us. We have got to look at this as an overall situation. It cannot be looked at it on some narrow ad hoc basis, it has got to be looked as a matter of principle. Can the States, with the consent of the Commonwealth, confer additional appellate jurisdiction on this Court? Can the States grant a right of appeal direct here from the New South Wales Industrial Commission?

5860 **MR BENNETT:** Your Honour, there are other issues that might arise in relation to appeals and there are other implications that might arise but those implications are not ones which affect the present situation. That is as far as we put that submission. One cannot argue against us that if you can do one, you can necessarily do the other, because of the different nature. *Collins v Charles Marshall* involved specifically a statement of the narrow question whether the Commonwealth could vest such jurisdiction and it was 5865 that narrow question only which was both asked and answered. The case is reported in 92 CLR 529 and if I could just show your Honours the question and the answer? The question posed appears at page 543, point 3, just below the names of the Justices and it was:

5870 But does the Constitution contemplate the imposition by the Federal Parliament of such a limitation or condition on the jurisdiction or the finality of the jurisdiction of State courts exercising State jurisdiction?

5875 And it is that question which is answered at page 546, at point 7, adjacent to the word “legislature” in the left-hand margin, by saying:

5880 A consideration of the history of the matter in the United States and the different framework of the judicature chapter of our Constitution tends to confirm the view that appellate power over State courts exercising State jurisdiction cannot be conferred upon a Federal court by the Parliament.

5885 So, *Collins v Charles Marshall* - - -

GAUDRON J: But you would have to say it can be by a State Parliament, so long as the Commonwealth consents.

5890 **MR BENNETT:** In relation to this Court, I do not need to go so far, your Honour.

GAUDRON J: In relation to the Federal Court you would have to say it can.

5895 **MR BENNETT:** Yes.

GAUDRON J: So - - -

5900 **McHUGH J:** It does do it, does it not? Does not this legislation purport to do it?

MR BENNETT: Well, your Honour, it has that effect because the *Electric Light Case* means that the Federal Court internal appellate structure is picked up.

5905 **GAUDRON J:** Which really comes to the question: why would one assume, simply because there is not an express prohibition, that a State can do in relation to an organ of the Commonwealth Government what the Commonwealth cannot do?

5910 **MR BENNETT:** Because one has to ask the reasons why the Commonwealth cannot do it.

5915 **GAUDRON J:** One would have thought that the reason in *Collins v Charles Marshall* was really because of the federal system, that is a federal system of different polities each with its own organs of government exercising its own governmental functions which include the power to determine justiciable controversies.

5920 **MR BENNETT:** Yes, and a Constitution which also set up the two systems with numerous links between them.

GAUDRON J: Specified links; certainly it has specified links. Why would not one treat them as exhaustive?

5925 **MR BENNETT:** One has to look at each specified link to see what it could be exhaustive of. The 77(iii) link, in my submission, is dealing with the area of discourse of compulsory referral of jurisdiction.

5930 **GAUDRON J:** But you tell me that so long as the Commonwealth consents, the compulsive exercise of jurisdiction comes from the State law in this case.

5935 **MR BENNETT:** I was using “compulsive” in a different sense, your Honour. I was using “compulsive” in the sense that the State legislatures do not have any power to resist the imposition of federal judicial power on State courts.

5940 **GLEESON CJ:** That is really the critical question as you put your case, is it not, Mr Solicitor? As I understand your argument, you say the reason the

Commonwealth Parliament cannot confer State judicial power on an organ is that the Commonwealth Parliament does not have State judicial power. You then say section 77(iii) of the Constitution demonstrates that there is nothing repugnant to the Constitution about the same court exercising
5945 federal jurisdiction and State jurisdiction. It is expressly contemplated that that will happen. That tends to focus attention upon the question as the critical question. Accepting that you are correct when you say that State Parliaments can confer State jurisdiction on anybody they choose and that
5950 there is nothing constitutionally repugnant about the same court exercising both State and federal jurisdiction, what is it that makes the States' conferral of State jurisdiction on the Federal Court effective?

MR BENNETT: What makes it effective is the Act of the State, combined with the consent of the Commonwealth to remove whatever
5955 immunity might arise from section 109.

McHUGH J: That assumes that the Commonwealth has the power to remove any such immunity and that is what I keep asking, where does he get this power from? You say it is incidental, it is up there.
5960

MR BENNETT: Well, it is, your Honour. I have put the argument and it is well within the scope of the type of incidental power that has been held to exist, in cases like *Burton v Honan*. I can repeat the submission, but that is what we put. Ultimately, we say the question the Court has to answer is,
5965 where is the exclusion, where is the negative implication and what is the scope of that negative implication which prevents what is being done in this case?

GLEESON CJ: As I put the proposition to you, I had assumed in your favour that there is no relevant negative implication, but that the problem is of finding what it is that gives legal effect to the conferral by the State of jurisdiction on the Federal Court; it has got to be an Act in the law of the Commonwealth Parliament.
5970

MR BENNETT: Well, we submit it is an Act of the State that confers the State judicial power. One then says - - -
5975

GLEESON CJ: But just a moment, you do not suggest, do you, that if the Commonwealth remains silent in the face of State legislation, the legislation would be effective?
5980

MR BENNETT: No, I do not really.

GLEESON CJ: Well then, that seems to suggest that it is something that the Commonwealth does that gives it effect.
5985

MR BENNETT: Yes, and that is because of section 109, and only because of section 109.

5990 **McHUGH J:** But you have still have to get something to overcome section 109; where do you get it?

MR BENNETT: That is where I have the consent and that is where - - -

5995 **McHUGH J:** No, but where do you get the power to enact this consent? I do not see anything in section 51 that says you may make laws with respect to giving consent, the States' vesting power in the Federal Courts.

6000 **GAUDRON J:** And there is a decision, I think it is in *GMH*, in the 1970s to the effect that a law, the purpose of which is to overcome section 109, is not a law within section 51.

6005 **MR BENNETT:** No, but the power to do it arises from the structure of the – if the States can only legislate in a field the Commonwealth has covered, with the Commonwealth having indicated in some way the absence of inconsistency, then there must be power as incidental to the passing of the Commonwealth law, to give that consent.

6010 **McHUGH J:** But that is what I was putting to you yesterday; the Commonwealth's power to make anything exclusive, is only in respect of federal judicial power. Outside that it has got no power to operate. What you are trying to do is not to invest federal judicial power through the State, but you are trying to invest State judicial power to be exercised, in effect, concurrently with federal judicial power. Now, the Commonwealth has no
6015 power to legislate in respect of concurrent State judicial power, so how can it give its consent?

MR BENNETT: Because, your Honour, under the *Federal Court Act*, the activities and the time of the Federal Court are defined pursuant to
6020 section 77(i). It is that Act with which there would be an inconsistency if the States were without federal consent to confer jurisdiction on the Federal Court.

6025 **McHUGH J:** Yes, but surely the simple answer to that is that there is to be read into the very creation of the Federal Court the fact that it can only exercise the judicial power of the Commonwealth. That is its limitation. The Commonwealth cannot set up a Federal Court to exercise jurisdiction all over the world, or to exercise any jurisdiction. And I think you concede that. It sets up to exercise the judicial power of the Commonwealth, that is
6030 what section 71 says.

MR BENNETT: Yes, your Honour.

6035 **KIRBY J:** There are provisions in the *Federal Court Act*, are there not, to exercise certain jurisdiction with respect of New Zealand?

MR BENNETT: I think that is right, your Honour, there are now. But the - - -

6040 **KIRBY J:** And that is done by consent of the New Zealand Government, as I dimly recall it.

MR BENNETT: Yes. But the specific answer - - -

6045 **McHUGH J:** Now, if your argument is right, there is no reason at all why the United States Congress cannot vest some of the judicial power in the United States in the Federal Court, and you can consent to it, or that the French legislature or the Russian Parliament. There is no limit to what can be done, if your argument is right.

6050 **MR BENNETT:** Well, there may be some limits for this reasons, your Honour, that the starting point is that the Commonwealth and State and Territory legislatures formed the view that there is a practical problem arising out of the multiplicity of jurisdictional disputes which it is desirable to solve. In order to solve that problem, they enact – and it could easily have been done if the legislation had been anticipated in the *Federal Court Act* itself when the Act was first passed – a provision saying, “This court may exercise the following aspects of the judicial power of the Commonwealth, and it may exercise State jurisdiction cross-vested in it, and with a power to remit, this provision being inserted in order to avoid arid jurisdictional disputes”.

6065 **McHUGH J:** I think you have to go so far as to say that and as I understand it, that is what the majority - what Justice Brennan and Justice Toohey, in effect, said in the majority.

MR BENNETT: I have made it very clear that is what we say, your Honour.

6070 **GLEESON CJ:** Why does the purpose of solving jurisdictional disputes affect the argument one way or another? Would it be different if the purpose was financial? Would it be different if the reason the States co-operated in this scheme was that they did not have enough money to operate effective court systems themselves?

6075 **MR BENNETT:** We would submit it would still be valid, but it might not be as strong an argument as the argument I am putting.

6080 **HAYNE J:** Why does the strength of the argument vary according to the convenience asserted in support of it? What is the principle that underlies it, other than a bare assertion of convenience of result?

6085 **MR BENNETT:** The convenience of result, your Honour, goes to the use of the implied incidental power. One can take it in two stages, if one likes, or three stages. One starts by saying everyone has agreed that it is within the incidental power to have accrued jurisdiction in the Federal Court, so that where one has a case with State and federal elements, the Federal Court can deal with it. Everyone accepts that.

6090 The next step is, one might say, let us give the Federal Court jurisdiction to deal with cases where there is a real doubt as to whether or not it would otherwise have jurisdiction, and the same to State courts. Then, I suppose one would have moved the goal posts, so instead of
6095 litigating over whether there was jurisdiction, one would litigate over whether there was doubt about jurisdiction. Then one could do what has been done, which is to go one step further and say, we will simply confer everyone's jurisdiction reciprocally with the safety valve of the ability to remit where the case is inappropriate, so that there will be no jurisdictional
6100 disputes and that will solve the problem and enable the Federal Court to administer justice more effectively.

McHUGH J: What jurisdictional disputes – I mean, this term “jurisdictional disputes” is bandied around, what jurisdictional disputes are we talking about?

6105 **MR BENNETT:** Any jurisdictional disputes between State and Federal Courts.

6110 **McHUGH J:** But they are not jurisdictional disputes that affect the federal judicial power – it has its limits and it can be defined. If you exhaust it, it is exhausted. You are then in another area. It is not a dispute. It must mean, as Justice Hayne has been putting to you, that in a Federation you have limits on the jurisdiction of courts, and it may be that it is just inconvenient that you have to go to two, but there is no dispute and you keep using the
6115 word “dispute”.

MR BENNETT: Well, there is, your Honour. There is a dispute as long as there were two views on the issue and, no doubt, in many of these cases, if not all of them, there are two views on the issue until the court resolves it.
6120 That is what is being avoided under the implied incidental power.

HAYNE J: Is that any more than an argument of convenience? What is the principle?

6125 **MR BENNETT:** The question one has to ask is, is it reasonably incidental to the efficient administration of justice in the Federal Court to have legislation of this nature, and we submit, yes. That is the ultimate question.

6130 **HAYNE J:** Would that permit the creation of a unitary judicial system in this country? Some may say – they may be right, they may be wrong – that that would be a more efficient system, a more convenient system.

6135 **MR BENNETT:** Well, when your Honour says unitary system, it depends how far one goes. Certainly, there were certain special rules which govern the position of this Court, although this Court is the apex of - is unitary in the sense that it is the apex of the whole system. There may well be some limitations but the step that has been taken, as we would submit, is well within the implied power to which I am referring.

6140 **HAYNE J:** You say, for example, it would be possible to create a national trial court?

MR BENNETT: Your Honour, it is - - -

6145 **McHUGH J:** I do not see how you can shrink from that proposition. If your proposition is good, that must be your argument. You have to be able to say under section 71, it is reasonably incidental to create national trial courts – exercise of total jurisdiction.

6150 **MR BENNETT:** Yes, it is the precise meaning of the question that I am having some problem with, the meaning of the phrase - - -

6155 **HAYNE J:** I was taught that in Oxford, Mr Solicitor: if you do not like the question, challenge the question. The national trial court is, I think, an identifiable concept, is it not?

6160 **MR BENNETT:** If your Honour means by that a court which is able to exercise at the trial level State and federal jurisdiction, to which all States refer jurisdiction, the first problem is that the Constitution has an implication about the maintenance of State Supreme Courts. So, one might have a problem with that unless its jurisdiction was concurrent. It may well be that the creation of such a court would depend upon its jurisdiction being concurrent with the existing State Supreme Courts. Subject to that, there may be no other problem with it. But, that might well be an insuperable answer to it.

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6170 The reason I put these matters was that it was suggested to me by Justice McHugh that my argument necessitates the consequence that one could have a conferral of jurisdiction by large numbers of foreign countries on the Federal Court. There may well be a number of questions which

would arise in relation to that. It has happened, as we know, in relation to Nauru, but I will not repeat the arguments there. One would have to ask the question, does the acceptance of such a great quantity of jurisdiction get to the point that it inhibits the ability of the Court to deal with Chapter III questions, and there might be all sorts of issues of that nature. But, subject to that, we would submit there would be no objection to such legislation.

There may be difficulties in relation to that legislation if the conferral was done by the Commonwealth because of *In re Judiciary and Navigation Acts* and *Boilermakers*. As long as the conferral is done by the other body, and as long as one can find a basis for the existence of the power, there, no doubt in the foreign affairs power, it could be done.

GLEESON CJ: With the development of electronic commerce it may be that the sort of jurisdictional problems that we have been talking about in recent minutes will be seen as trivial compared to the jurisdictional problems that will arise between nations in the next few years.

MR BENNETT: That may well be so, your Honour. It may well be convenient in the future to have legislation of that sort. I am not seeking to pre-empt it, but the point I am making is this legislation is closer to the incidental power which I have been referring to – the consent here – and therefore, a negative answer to your Honour’s question about foreign jurisdiction would not be decisive in this case.

KIRBY J: I am not sure that the New Zealand provisions do confer jurisdiction on the court. I think they merely remove the barriers to actually sitting and receiving evidence, administering oaths, and so on. I have looked closely at section 32C of the *Federal Court of Australia Act* and the following sections.

MR BENNETT: I do not think they go so far as to permit the court to - - -

KIRBY J: It was all done under the Closer Economic Relations Treaty and of course I suppose we should not entirely put out of our mind that with regionalisation and globalisation it may have some implications for our court system.

MR BENNETT: It may well, your Honour. We have given the examples in 5.9 of the other areas. I will not go back over that. I will not take your Honours through the reasoning in relation to the *Defence Force Discipline Act*, this Court as the Court of Disputed Returns, the appeals from Nauru and the appellate jurisdiction under the Territories power, all of which are areas which would be in question depending upon the extent of the negative implication found.

6220 We have dealt in part 6 with the *Duncan* principle - I will not say more about that – and with the sources of Commonwealth power. There is a reference which I might add to paragraph 6.9, the decision in this Court in *Reg v Murphy* (1985) 158 CLR 596 at page 614 point 3, where it was suggested it might be within the incidental power to confer a committal power on State magistrates in relation to federal prosecutions, but I will not deal further with that.

6225 **McHUGH J:** Do you deal with *Commonwealth v Queensland* which held that before the abolition of appeals to the Judicial Committee, State legislatures could not provide for references to the Privy Council if to do so would conflict with the scheme of Chapter III?

6230 **MR BENNETT:** Yes, it is referred to, I think, your Honour. That is a case of an exclusion for a large number of different reasons and the reasons really are adumbrated in that case. I think we have referred to it somewhere in the submissions. I will give your Honour the reference to that in a moment. At 6.13 to 6.20 we deal with cross-vested jurisdiction not being
6235 federal jurisdiction. May I just remind your Honours also that this Court has sat as a trial court in the Territories. Under section 30B of the *Judiciary Amendment Act* of 1927 this Court was a trial court for the Australian Capital Territory. There is a report in the Commonwealth Law Reports - - -

6240 **McHUGH J:** That was *Porter's Case*.

MR BENNETT: Yes, *R v Porter* (1936) 55 CLR 182, where there was a murder trial before Justice Dixon in this Court.

6245 **GAUDRON J:** Your submissions in 6.13 to 6.20, what law is applied? Let us forget the *Corporations Law*. Let us assume that there were no – does the Cross-vesting Act specify the law to be applied?

6250 **MR BENNETT:** No, your Honour.

GUMMOW J: Section 11 does, does it not, which has a whole lot of problems of its own?

6255 **MR BENNETT:** Yes, the court applies:

the law in force in the State or Territory in which the court is sitting
(including choice of law rules) –

6260 but there is a range of discretions set out in section 11 in relation to choice of law.

GUMMOW J: It includes 11(1)(c) which has some dubious validity to it.

6265 **GAUDRON J:** Where does the Commonwealth get the power to legislate to that effect?

MR BENNETT: That is part of its power to set up the Federal Court.

6270 **GUMMOW J:** It empowers the court to pick and choose.

MR BENNETT: And the provisions are no doubt reflected in the State Acts as well, so one has a *Duncan* referral, if one likes, of both bodies saying in identical terms what rules of evidence will be applied.

6275 That is an example of a situation where one does not need to answer the question, "Which has the power?" because to the extent that it either has it, the two powers work in the *Duncan* way together to achieve the result.

6280 **GUMMOW J:** But one always needs to know what the source of the power is. This is a myth that is around and about, "Don't you worry about that" transcended into constitutional law, and I do not subscribe to that and I do not see why a citizen should have to, either.

6285 **MR BENNETT:** No, your Honour, but what is done here is for both relevant polities to provide for the relevant rule. The ultimate view probably is that either can deal with it and the section 109 would make the Commonwealth dealing with it paramount and the power, to the extent that the power is found in the power to create the court, it is the Federal power which is operative. To the extent that it said the power, which is the judicial power over the dispute, it is the State power that is operative. In section 7 we deal with the argument based on execution which I will not spend time on. I have really gone over what I intended to put but what we submit about – the argument put against us is that because enforcement - and this the *Brandy Case* – is the ability to enforce decisions is one of the principal indicia of judicial power therefore it is said that when the Federal Court enforces an order in exercising State jurisdiction it is exercising the judicial power of the Commonwealth.

6300 What we say about that is it is a complete non sequitur. It does not follow from the fact that one looks to see whether something is administrative or judicial, whether or not there is a power of enforcement. It does not flow from that the exercise of the enforcement power by the Federal Court is necessarily part of the judicial power of the Commonwealth where it is a jurisdiction conferred from outside and we would submit that one simply cannot make that assumption.

6305 **McHUGH J:** But that hardly answers what is put against you, does it, because the State has not conferred these powers on it. I know you are

6310 relying on the *Electric Light Case* but the fact is that these are powers conferred by the Federal Parliament and so it indicates – this is the argument against you – that when the Federal Court exercises this non-Federal power or exercises State judicial power, when it comes to enforcement, it is exercising Federal judicial power and there is this conflict.

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MR BENNETT: We would submit it is – one is using the words “Federal judicial power” in two senses. What it is exercising is a power to enforce a decree which is incidental to the power to make the decision.

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McHUGH J: But you have to say, in effect, that section 71 not only enables it to exercise this incidental jurisdiction but it enables the Commonwealth to legislate for it to enforce State jurisdiction.

6325

MR BENNETT: If one takes the first step, the second step is necessarily incidental to it. If one takes the first step of saying that it is permissible for the Court to exercise the jurisdiction, it is light matter to take the second step and say it is incidental to that for it to enforce it.

6330

GUMMOW J: Is one dealing here with a judicial proceeding in the State within the meaning of section 51(xxv)? How does the *Service and Execution of Process Act* attach to the Federal Court in this particular activity Justice McHugh has been putting to you?

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MR BENNETT: It is enforcement by the Federal Court.

GUMMOW J: But does the *Service and Execution of Process Act* apply to it?

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MR BENNETT: Well, one has to look at the individual – your Honours concerned with power or with the - - -?

GUMMOW J: Yes, is it supported by section 51(xxiv) in that operation, if you want to enforce the order somewhere else?

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MR BENNETT: No, it is not a judgment of the court of the States.

GUMMOW J: No.

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McHUGH J: But this is one of the remarkable benefits that you get out of this cross-vesting scheme, that Federal Court’s judgments can be enforced even though a State court, exercising its own jurisdiction, could not enforce in a particular area.

6355 **MR BENNETT:** Well, one could always enforce a State judgment under the *Service and Execution of* - - -

McHUGH J: Well, that is right, but you have to make use of the federal statute.

6360 **MR BENNETT:** Yes. Well one might not have to; one might be able to have done it without the statute under the common law rules about enforcement of foreign judgments, one might have been able to use those. But, there is nothing surprising, we would submit, in those powers being federal.

6365 In relation to *Commonwealth v Queensland*, what we adopt, with respect, is the passage in the judgment of the Chief Justice and Justice Toohey in *Gould v Brown* in paragraph 12, where their Honours say in that case:

6370 an attempt by the Queensland Parliament to vest jurisdiction in constitutional matters in the Privy Council failed, but not because that parliament lacked power to vest jurisdiction in justiciable matters in the Privy Council. Although the Privy Council exercised jurisdiction.....and although the Privy Council was regarded as an Imperial court having no particular national character or location, it was held that the vesting by the Queensland Parliament.....“should not be regarded as repugnant to the existing statutes of the United Kingdom”. The attempt to vest jurisdiction in the Privy Council failed because the jurisdiction which the impugned State statute purported to vest in the Privy Council included jurisdiction made exclusive to the High Court by section 74 of the Constitution.

6385 So that was the way it was dealt with by the majority, and we would respectfully adopt that.

6390 In relation to *Spinks & Ors v Prentice*, I am going to have to leave that largely to counsel appearing for the Attorney-General of the Northern Territory. Our primary submission is that the Full Court was correct and that, for the reasons given in section 8 of our submissions, first of all, a law under section 122 is a law within the meaning of section 76(ii) and cases such as *R v Bernasconi* - that case should be regarded as confined to section 80 and not as going any further. Even though one may say that, as a general matter, Territory courts are outside the federal system, it does not follow that a law made under section 122 is not a law within the meaning of section 76(ii) of the Constitution.

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GAUDRON J: Does that depend on whether or not the jurisdiction is vested in a Federal Court or a Territory court?

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MR BENNETT: Yes, your Honour.

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GAUDRON J: Well, you have to answer that question. Is it different for the purposes of 76(ii) if it is vested in a Federal Court from the situation when it is vested in a Territory court?

MR BENNETT: Yes, your Honour.

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GAUDRON J: Yes, and why is that?

MR BENNETT: Because one is the judicial power of the Commonwealth under section 76(ii) - - -

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GAUDRON J: Why?

MR BENNETT: Because section 76(ii) says, "Arising under laws made by the Parliament".

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GAUDRON J: Let us assume a Commonwealth law of general application throughout Australia, jurisdiction vested in a Territory court in respect of matters arising under that law in a Territory, what is the nature of that law? What is the nature of the matter? Is it vested in a Territory court?

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MR BENNETT: That is section 122 alone, your Honour.

GAUDRON J: Even though it is of general application.

MR BENNETT: Yes.

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GAUDRON J: So, it is not a law made by the Parliament for the purposes of 76(ii)?

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MR BENNETT: I am sorry. Your Honour, 76(ii) confers a power in the Parliament to confer original jurisdiction on the High Court - or under 77 in any Federal court - "Arising under laws made by the Parliament". If it passes a law conferring jurisdiction on a Territory court which is not a Federal Court, then it is simply not operating under that section. It is operating under the general power in section 122.

6440

GAUDRON J: And a law under 122 is not a law made by the Parliament.

MR BENNETT: It is a law made by the Parliament, your Honour.

6445 **GAUDRON J:** What I am trying to elucidate from you is this: do you say that a Territory court can have invested in it federal jurisdiction, or do you say that that is not necessary if the jurisdiction is given to a Territory court?

MR BENNETT: I am sorry, your Honour, I do not - - -

6450 **GAUDRON J:** All right. *Spratt v Hermes* says that a Territory court exercising jurisdiction under a law of general application is not exercising jurisdiction in a matter arising under a law for the purposes of section 76(ii). Do you accept that?

6455 **MR BENNETT:** Yes, your Honour, but that would be so because section 76(ii) is simply not invoked when one is talking of a Territory court.

GAUDRON J: But why is that? That is what I want to know. Why is that?

6460 **MR BENNETT:** Because it is not a Federal Court under 77(i).

GAUDRON J: A law made by the Parliament means one thing when you are talking about jurisdiction in a Federal Court and another thing when you are talking about jurisdiction.

MR BENNETT: No, I do not need to say that, your Honour. Sections 76 and 77 are dealing with the vesting of jurisdiction in Federal Courts. They say nothing either way about the vesting of jurisdiction in Territory courts.

6470 **GAUDRON J:** Well, 77(ii) is talking about that.

MR BENNETT: But, that again deals with a Federal Court, and a court of the States.

6475 **GAUDRON J:** But ordinarily one takes the view that what is in sections 75 and 76 is the judicial power of the Commonwealth.

MR BENNETT: Yes.

6480 **GAUDRON J:** But you say, even though it is arising under a law made by the Parliament, it is no part of the judicial power of the Commonwealth if it is vested in a Territory court.

6485 **MR BENNETT:** That is the effect of reading sections 75, 76 and 77 with section 122.

GAUDRON J: As disjoined from 106? As totally disjoined.

6490 **MR BENNETT:** For that purpose, yes.

GAUDRON J: Yes, but in truth, you cannot, of course read section 75 as disjoined from section 122, can you?

6495 **MR BENNETT:** Section 76(ii) is invoked where under a law made by a Parliament original jurisdiction in a Territory matter is conferred on a Federal Court. It does not follow from that that where the jurisdiction is vested in a Territory court, that the nature of the jurisdiction is - - -

6500 **GAUDRON J:** I know why you say that, because there would be problems about how the Territory court operates, and how persons are appointed to the Territory court. But, you must come to say laws made by the Parliament means one thing if jurisdiction is vested in the Territory court, and another thing if it is vested in a Federal Court.

6505 **MR BENNETT:** Ultimately, yes.

GAUDRON J: That is an approach to constitutional interpretation that is at least original, is it not?

6510 **MR BENNETT:** It has been applied in - - -

GAUDRON J: Creative, even.

6515 **MR BENNETT:** It has been applied in this Court in many cases, your Honour, effectively.

GAUDRON J: Yes, perhaps.

6520 **MR BENNETT:** We have set out the submissions in section 8 of our submissions and we justify the provision in the alternative under section 76(ii) with section 122 and under section 122 alone, and under one or the other, one achieves the desired result.

6525 I should tell your Honours, in relation to footnote 209 on page 48, that there is a special leave application pending to this Court in the *Australian Memory Case* which we have cited there. That was not known when the submissions were prepared.

6530 We make the submissions, without adumbrating on them, referred to in page 3 in paragraph 1.2c about *St Helens Farm*. We do submit that the views of four of the Justices in that case, as to the precedential nature of a decision ought not to be followed, and that this Court ought to regard *Gould v Brown* as a decision having precedential weight.

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6540 Ultimately, we submit, it is only a question of weight. It is a decision of an equally divided Court, but it is an equally divided Court which affirmed three judges of the Federal Court. The rationale which says one does not know what views would have been formed by a Court of seven, would apply equally to a Bench of five, because if a Bench of five Justices decides a case by three votes to two, the other two might have voted with the minority.

6545 **GUMMOW J:** They produce an order.

MR BENNETT: Yes, they do. The result in St Helens Farm was that this Court made a decision not to reverse the decision of the Federal Court. There was an appeal to this Court, and the appeal was dismissed.

6550 **GUMMOW J:** It did not make any decision.

MR BENNETT: Your Honour, in my respectful submission - - -

6555 **GUMMOW J:** It only produced an order by virtue of this statutory sleight of hand.

MR BENNETT: Well, your Honour, the report I have ends with the words "appeal dismissed with costs".

6560 **GUMMOW J:** Quite. Anyhow, we are cavilling over matters, Mr Solicitor.

6565 **MR BENNETT:** Well, your Honour, that seems to have been the order of the Court, and I have not - - -

GUMMOW J: By virtue of this statutory provision.

MR BENNETT: Yes, but - - -

6570 **GUMMOW J:** To resolve that matter.

MR BENNETT: Yes, and it resolved it. And the - - -

6575 **GUMMOW J:** Between those parties for that piece of litigation, that is all.

6580 **MR BENNETT:** Your Honour, it certainly has binding effect outside this Court, no one disputes that. It is a decision so far as other courts are concerned. Other courts would not be entitled to say, "We prefer the views of the statutory minority". And if it has precedential effect for that purpose, why should one not say it is merely a question of degree; and when it

6585 becomes a question of degree, one sees a decision of three Justices one way and three the other, and three justice of the Federal Court in the same case. And in my respectful submission, that is something which can be given weight, in the same way that a majority judgment is a 3:2 decision can be given weight.

6590 I simply stress what was said in the *Second Territorial Senator's Case* about the importance of matters not being relitigated merely because there has been a change in the composition of the Court. And we submit the effect of what is being sought to be done here is to relitigate the issue because there has been a change in the composition of the Court and, in my respectful submission, this Court ought not - - -

6595 **GUMMOW J:** In the long view – which is the sort of view those instructing you should take – that would be a very dangerous submission for your interests.

6600 **MR BENNETT:** Well, your Honour, we nevertheless submit, taking that risk into account, that this Court ought not to apply with full force the language of the four members of the Court in *St Helens Farm* who took that view. It should apply the views of Justices Gibbs and Mason, and should take the view that the decision in *Gould v Brown* ought not to be reopened, even if, as in the *Second Territorial Senator's Case*, different views are held
6605 by different members of the Court.

6610 I have not addressed in detail the submissions of Mr White in relation to severance because of the time constraints, but we have dealt with that in section 8 of our submissions, and ultimately, we would submit that what should be severed, if anything does have to be severed, is the conferral of particular powers, rather than the general conferral of - - -

6615 **GAUDRON J:** So that the Federal Court should have powers that are of not the same extent. What is the principle of severance that justifies that approach? One has to look for the parliamentary intent.

MR BENNETT: Yes, your Honour.

6620 **GAUDRON J:** And what, in the parliamentary intent, suggests that approach?

6625 **MR BENNETT:** Well, your Honour, the contrary approach is only suggested by giving paramountcy to a parliamentary intention that the jurisdiction of the two sets of courts should be identical.

GAUDRON J: That one should be avoiding jurisdictional conflict. Well, I do not know what the real intent to be found in the *Corporations Law* is

6630 because there was no history of jurisdictional conflict there, rather, the Commonwealth intent seems to be that the Federal Court should be able to do that which the State courts can do under the State *Corporations Law*.

MR BENNETT: Yes, it was, your Honour, and - - -

6635 **GAUDRON J:** But not that it should be able to do some of it only.

MR BENNETT: But, your Honour, certainly one of the desirable consequences sought to be achieved was that consequence but that, we submit, is not the only desirable consequence sought and it could readily be discerned that the bulk of what is sought to be achieved is achieved, 6640 notwithstanding that there are some minor powers which may be exercised by one and not by the other, but we would submit that is the preferable view in relation – if one comes to that. We also submit for the reasons given in the submissions that there is no invalidity, in any event, in the various provisions. In paragraph 8.27 we refer to the intention as being for such 6645 jurisdictional disputes as might arise to be eliminated to the extent to which it is constitutionally impossible. If one regards the intention as being that - - -

GAUDRON J: Where does that come from?
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MR BENNETT: Section 15A, your Honour, but the - - -

GAUDRON J: Of what?

6655 **MR BENNETT:** Of the *Acts Interpretation Act*.

GAUDRON J: Yes, but what is the intention in the law which vests jurisdiction in the Federal Court to deal with matters under the *Corporations Law*?
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MR BENNETT: To eliminate jurisdictional - - -

6665 **GAUDRON J:** No, what appears from – is it section 8? Where do we find the vesting of jurisdiction in the Federal Court?

MR BENNETT: Section 51A, I think, your Honour. I will just check that. I am just having it turned up. 51(1):

6670 Jurisdiction is conferred on the Federal Court of Australia with respect to civil matters arising under the *Corporations Law* of the Capital Territory.

6675 **GUMMOW J:** Well, it will be with respect to bits and pieces of civil matters arising under the *Corporations Law*.

MR BENNETT: Well, your Honour, it is more than that, it is almost all of it and one or two sections may have a little problem.

6680 **GUMMOW J:** Well, so far.

MR BENNETT: Yes.

6685 **GAUDRON J:** And where is the vesting under State laws, the *Corporations Law* of a State?

MR BENNETT: I think it is dealt with differently there. In the State Acts, your Honour, it is section 42.

6690 **GAUDRON J:** No, which is the law of the Commonwealth that authorises the Federal Court to exercise jurisdiction under a *Corporations Law* of the State?

6695 **MR BENNETT:** It will take me a moment to answer that question, your Honour. I am told it is section 56(2) of the *Corporations Act*. Yes:

The Federal Court.....may:

6700 (a) exercise jurisdiction (whether original or appellate)
conferred on it by a law of a State corresponding to this Division –

So, it uses the same language as section 9 of the cross-vesting legislation.

6705 **GAUDRON J:** So, it is the *Corporations Act* 1989 to which we must look, primarily, to see if reading down would give the Act an operation different from that which the Parliament intended?

MR BENNETT: Yes, your Honour. Yes, and then - - -

6710 **GAUDRON J:** And so we then go back to section 8, do we, or is that - - -

MR BENNETT: Section 5 is perhaps the more important point to go back to.

6715 **GAUDRON J:** Yes. Well, we have to find in there something to dispel a notion that they might want it to operate piecemeal in the Federal Court.

6720 **MR BENNETT:** Well, your Honour, one finds that by saying that the discernible intention is to eliminate jurisdictional disputes to the greatest extent possible and one cannot achieve it totally - - -

GAUDRON J: I do not think it does that if it can only operate piecemeal.

6725 **MR BENNETT:** Well, your Honour, it depends how - - -

GAUDRON J: In fact it creates them.

6730 **MR BENNETT:** If there are one or two provisions - and section 447A is the one that is relied on - - -

GAUDRON J: No, it is the whole part about examinations.

6735 **MR BENNETT:** Your Honour, I did not understand that point to be pressed. As I understood - - -

6740 **GAUDRON J:** Well, I thought it was 447A that was not pressed, the point being that the examination - to the extent that a company is not wound up, and presumably also to the extent that a company is not wound up by the Federal Court, the examinations power has no connection with any exercise of judicial power.

6745 **MR BENNETT:** That is a matter in dispute, your Honour. We would submit that it is incidental to a dispute between parties in much the same way as discovery before suit provisions in various rules of court are incidental to disputes between parties. Historically of course, bankruptcy examinations go back to the 16th century.

GAUDRON J: Once a bankruptcy order has been made.

6750 **MR BENNETT:** Yes, your Honour.

6755 **GAUDRON J:** Yes, well, we are talking about a situation in which there is no winding-up order on one view, and on another view no winding-up order by the Federal Court.

6760 **MR BENNETT:** But an examination for the purpose of ascertaining whether or not a person has a cause of action is, we would submit, incidental to the judicial power to determine the dispute that would then be brought to court in the same way as the discovery before suit provisions are incidental to the judicial power to determine suits. Those are the submissions for the Commonwealth, if your Honours please.

GLEESON CJ: Thank you, Mr Solicitor. Mr Solicitor for the Northern Territory.

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MR PAULING: May it please the Court. It is not proposed to make any submissions on the validity of the cross-vesting scheme generally and our written submissions adopt those of South Australia and Tasmania. Can I clarify a few matters in the short amount of time that is available to me –
6770 the time I had has already expired. Yesterday your Honour Justice Gummow raised the matter of *GPAO*, a decision which is pending in this Court. I can say that our written submissions in that matter and those of the Commonwealth are consistent with the arguments that have been put here regarding the fact that the law then being enforced was a law made by
6775 the Parliament under 76(ii) and that the jurisdiction being exercised by the Family Court was federal jurisdiction.

Your Honour Justice Kirby raised a question concerning appeals from the Supreme Court of the Northern Territory to this Court. That is
6780 provided for, your Honour, in section 35AA of the *Judiciary Act*. If I could take your Honours to that Act, there are some additional points I wish to make with respect to it.

KIRBY J: When was it changed from the appeals to the Full Federal Court? That was the system, was it not, at one stage?
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MR PAULING: Yes, and the appeal to this Court from the Federal Court was as a result of it being the Federal Court and the *Federal Court Act*. I think it was in 1982 that the change was brought about.
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McHUGH J: There was still appeal to Federal Court at the time of the *Chamberlain Case* which was 1983.

MR PAULING: It was amended by Act No 65 of 1985. In respect of matters occurring and being heard, and judgments given in the Supreme Court of the Northern Territory, a statutory right - and it is accepted it is not a constitutionally guaranteed right - a statutory right of appeal is granted.
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Can I then take your Honours to the question of the jurisdiction exercised in the Northern Territory? Your Honour Justice Gaudron put forward a proposition that if a Queensland resident was in the Northern Territory and committed an offence against the *Customs Act* in respect of drugs, that that person, when tried in the Northern Territory, would not have procedural rights to come to this Court, leaving aside
6800 35AA.
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If I can take your Honours to Part X of the *Judiciary Act*, under the heading "Criminal Jurisdiction", section 68, what is provided for there is for

6810 an exercise of jurisdiction in the Northern Territory of the matters therein set out. But, more particularly, if you go back - - -

GAUDRON J: But, it being in a Territory court, the hypothesis which comes from *Spratt v Hermes*, or the decision in *Spratt v Hermes* is, it is not then a matter of federal jurisdiction. So, the rights of appeal depend on legislative intervention – it can be taken away by legislative intervention.

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MR PAULING: That is correct. The point we make about that is this - - -

GAUDRON J: And section 80 does not apply, of course, whereas it would anywhere else; and, whereas in any other part of the Commonwealth it would be a matter arising under a law of the Parliament, but in the Northern Territory it is not. It is vested in a Territory court.

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MR PAULING: In the sense that the consequence is that the court when exercising its jurisdiction is a Territory court, it is true to say that the fact that it was also a law made by the Parliament – for it plainly is in its terms, the *Customs Act*, for example – it does not have the effect of engaging some provisions of Chapter III. We say that that is a reason for finding that Chapter III is not exhaustive of judicial power.

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GAUDRON J: I think that is the tail wagging the dog.

MR PAULING: Well, let me just take it from another angle, if I may, your Honour? What we put, consistently in *GPAO* and here, is that all Territories start off in a state of tutelage, and as Justice Mason put it in *Berwick v Gray*, and, indeed, his words in *Berwick v Gray* are the preamble to the *Northern Territory Self-Government Act* – those very words, the passage that deals with the fact that Territories can be advanced through various stages and various levels towards self government until one reaches a situation where a Territory is ready for Statehood; ready to be admitted with its own Constitution as a new State, and that is what we say the process will eventually be with the Northern Territory.

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But along the way, it is not to be supposed that the framers of the Constitution could have worked out which bits would apply at what stage. Rather, it was left to the Commonwealth, in its discretion, to determine what rights, what obligations would be conferred on people in Territories. And to say that section 73 does not provide a constitutionally guaranteed right of appeal might, on its own, seem odd, but up to and including the admission of the Territory as a State, there are not any rights – no constitutionally guaranteed rights to participate in the democracy. It is a matter for the Commonwealth Parliament to decide and it will decide, no doubt, as a term of admitting the Northern Territory as a State what its representation will be.

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Whereas the Constitution has already laid down what happens to the original States, so it is that the Constitution expressly confides in the Parliament that discretion. It is also not surprising when one looks at other provisions of the Constitution, section 92 for example, or section 99, or section 117, that are all limited to States. The Constitution sets out to say, and it is recognised, we say, in the way in which Justice Mason put it in *Berwick v Gray*, that these areas put under the control of the Commonwealth and under their tutelage, as they grow, as they become capable or accepting rights and responsibilities, so they will be conferred upon them.

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So that, the essential point that seemed to be made that, absent a constitutionally guaranteed right of appeal under section 73, that is an indication that, perhaps, Territory courts are Federal Courts - - -

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GUMMOW J: They may not be Federal Courts but may they not be exercising federal jurisdiction?

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MR PAULING: That is a possibility, your Honour, and it has been adverted to - - -

GUMMOW J: And if one looks at section – go to the *Judiciary Act* if you would for a second - section 67C(b) of the *Judiciary Act*:

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matters in which a writ of mandamus or prohibition or an injunction is sought against the Commonwealth or an officer of the Commonwealth, being matters arising in, or under the laws in force in –

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which would include Commonwealth laws of general application, I suppose –

the Territory.

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Does not 67C(b) look like federal jurisdiction?

MR PAULING: It does.

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GUMMOW J: Section 75 jurisdiction, and (iii) and (v), and 76(ii) jurisdiction.

MR PAULING: Can I say this, your Honour, that also if you go to 76C(c), the effect of that legislation – I do not have it in front of me – is to pick up the federal jurisdiction exercised by the Supreme Court of South

6900 Australia before 1911. Those provisions can be followed through but that is the effect of it.

6905 **GUMMOW J:** Well, why, therefore, does not section 73(ii) apply in such a case? Namely, it was not a Federal Court, but it was a court exercising federal jurisdiction?

6910 **GAUDRON J:** The answer Chief Justice Barwick gave in *Capital TV & Appliances Pty Ltd v Falconer*, in explaining what he had held in *Spratt v Hermes*, was that the only course that could be invested with federal jurisdiction were the State courts. He treated section 77(iii) as exhaustive of the investment of federal jurisdiction.

6915 **MR PAULING:** What we say arises out of *Spratt v Hermes* and *Falconer*, in respect of this aspect of Chapter III is that section 75 and 76 must not be exhaustive if you can contemplate that Territory courts can exercise jurisdiction, but outside the federal system.

6920 **GUMMOW J:** Well, this phrase “federal system” is a conclusory expression really; it may be more complicated than that, as the illustration I just put to you as section 67 of *Judiciary Act* perhaps just indicates.

6925 **MR PAULING:** I accept that, your Honour; I mean, this is an extraordinarily vexing problem in the Constitution. It has been put to me more than once that there is no greater problem than the inter-relationship of section 122 and Chapter III.

GUMMOW J: All right, I am holding you up, I am sorry.

6930 **MR PAULING:** We also need, your Honours, in some of the expressions - and these must be brief - it is suggested that Territory courts are applying Territory laws because they apply in the Northern Territory, but *Lamshed v Lake* in covering clause 5 make it quite clear that laws made under section 122 are capable of being section 76(ii) laws, because they apply nationally and they are made by the National Parliament and they have the power, when inconsistent with a State law, to override that law, pursuant to section 109. So that by narrowly focusing and, indeed, in terms of Chapter III, focusing only on some aspects of it, for example, rights of appeal, it does not elucidate the whole problem and that is, of course, as is so often said and is trite, that one needs to read all those provisions in the context of the whole Constitution.

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6945 Can I then take your Honours to a possible consequence – we advert to it in our submissions – but if Territory courts were Federal Courts and if Chapter III were exhaustive, that is to say, that the only jurisdiction that could be conferred on a court in a Territory would be jurisdiction pursuant

to section 75 and 76, and that seems, with respect, to be two points of view that are coming closer together: one that they might possibly be Federal Courts, but then if they are Federal Courts and Chapter III is exhaustive, then the jurisdiction is limited.

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GUMMOW J: When you say “Federal Court”, that raises another question. They may be courts created by the Parliament of the Commonwealth under 122, I suppose, or they may be courts created by the legislature of the Northern Territory under powers given it under 122. That would mean though not courts necessarily for the purposes of section 72.

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MR PAULING: That is correct.

GUMMOW J: But they might still be exercising federal jurisdiction.

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GAUDRON J: If you read 71, 71 does not say that the only courts that can be invested with federal jurisdiction are State courts. Theoretically you could read section 71 as permitting the investment of federal jurisdiction in a court created by section 122 or a court created by a Territory without doing any great violence to Chapter III or to the system that has developed.

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MR PAULING: That is the middle part that we come back to, that self-governing Territories, enabled to create their own courts, stand in a different position from a non-self-governing Territory. The outcome of that would be that 72 simply would not apply because it was not a court that was - - -

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GUMMOW J: But 73 would.

MR PAULING: But 73 would in those circumstances. Section 74 we can leave aside. As far as 75 and 76 are concerned, we already see from the *Judiciary Act* that some of the enumerated heads of power there, the jurisdiction in respect of them has been conferred upon the Northern Territory Supreme Court and that in those circumstances in addition and by force of section 122, general laws can be made. The court would have jurisdiction as a court of general jurisdiction as well as being capable of exercising federal jurisdiction. That middle path can work.

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The force of our submissions is to say, however, that if it was decided that the only courts that could be created in the Territory would be Federal Courts and that the only jurisdiction they could exercise comes under 75 and 76, the disastrous consequences we have adverted to in our written submissions would occur – that is, neither the Commonwealth nor any legislature that if created would be able to validly create laws and have a court exercising general jurisdiction. So that, we say, ought mean that the conclusion either that the court is a Federal Court for all purposes or that

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Chapter III is exhaustive in the sense we have discussed in writing ought not to be reached. Your Honours, in view of the time I am afraid I - - -

6995 **GLEESON CJ:** Thank you, Mr Solicitor. Mr Solicitor for Queensland.

MR KEANE: May it please the Court. Your Honour the Chief Justice and your Honour Justice Hayne raised, in the course of discussion with my learned friend the Solicitor-General for the Commonwealth, the point that
7000 there are jurisdictional boundaries observed by the Constitution in relation to State and Commonwealth judicatures.

Your Honour Justice Hayne observed to my learned friend this morning that where there are jurisdictional boundaries there may be
7005 disputes at the boundary. In our respectful submission, that is perfectly correct. With respect, the possibility of those jurisdictional disputes at the boundary give rise to the need for rules of engagement and disengagement to guide those charged with policing those boundaries. In *Gould v Brown* we submitted that section 51(xxxix) of the Constitution affords the relevant
7010 power to support section 9(2), although in that case it was its analogue in the *Corporations Act*, section 56(2). In *Gould v Brown* at page 470 in the Australian Law Reports at paragraph 232, Justice Gummow explicitly rejected that submission on the footing that:

7015 there is relevantly no judicial power to the execution of which s 56(2) –

of the *Corporations Act* or its analogue, section 9(2) of the Cross-vesting Act –

7020 is an incidental matter within the meaning of s 51(xxxix).

GLEESON CJ: What page again, Mr Solicitor?

7025 **MR KEANE:** Your Honour, it is at page 470 of the Australian Law Reports, paragraph 232. We submit with respect that that is an unnecessarily narrow view. The relevant judicial power to which section 9(2) is incidental is that of the Federal Court executing the jurisdiction vested in it, albeit mediately, by section 71 of the Constitution.

7030 **GAUDRON J:** You do not see that in *Wakim* matters, do you? Once you have a law which says any civil matter that would ordinarily go to a Supreme Court can go to the Federal Court, you have moved well beyond the engagement of some necessary law at the boundaries.

7035 **MR KEANE:** Your Honour, that is so if one focuses attention solely on section 9(2) and ignores the provisions of section 5(4), particularly

7040 section 5(4)(b) which our learned friend for the Commonwealth referred to as a power of remitter. It seems to us with the greatest respect it is an obligation to remit and it is an obligation to remit in circumstances where the court given jurisdiction to come to this view comes to the view that, putting it compendiously, the centre of gravity, the real basis of the case, is under State law rather than federal law.

7045 **GAUDRON J:** I mean, should that be the test: real basis is State law rather than – if it is the Federal Court, should it not be looking to see what the controversy is?

7050 **MR KEANE:** Indeed, your Honour.

GAUDRON J: And to see whether it is one that falls within the terms of sections 75 and 76.

7055 **MR KEANE:** Yes.

GAUDRON J: If it does that, why does not section 109 then operate itself as the rule of engagement or disengagement?

7060 **MR KEANE:** What your Honour is putting to us is that the position which really arose after cases like *Philip Morris Inc v Adam P. Brown Male Fashions* and *Stack v Coast Securities*.

7065 **GAUDRON J:** Well, I am suggesting that *Stack v Coast Securities* is wrong to the extent that it says “accrued jurisdiction is discretionary” and to the extent that it is said that the State courts retain jurisdiction over matters falling within the accrued jurisdiction of the Federal Court.

7070 **MR KEANE:** Well, your Honour, of course the cross-vesting scheme proceeds on the footing that *Stack v Coast Securities* is right in that respect and that where in *Stack v Coast Securities* it is said that it is necessary to develop common law rules as to how that discretion - as to whether to proceed with the - - -

7075 **GAUDRON J:** Well, I do not understand that a court ever has a discretion whether or not to exercise jurisdiction except where it would be an abuse of process.

MR KEANE: Well, except, your Honour, that once one accepts - - -

7080 **GUMMOW J:** That is why you say 5(4) is more than a power.

MR KEANE: Yes, it is, your Honour.

7085 **GUMMOW J:** It is consistent with that theory.

MR KEANE: Quite. To return your Honour Justice Gaudron's point, the difficult is at the boundary that litigants being the kind of people they are assert claims which may colourably engage both federal and State laws. So, there is both a federal claim and a State claim.

7090 **GAUDRON J:** That is not the test of Chapter III that it engages federal and State laws; never been a relevant test in determining jurisdiction for the purposes of Chapter III.

7095 **MR KEANE:** Well, your Honour, can we simply content ourselves in response to your Honour by giving your Honour reference to Chief Justice Barwick's observations in *Philip Morris v Adam P. Brown* 148 CLR 457, which are to the contrary of what your Honour is putting to us. At 474, in the first full paragraph on that page, and at 475 in the second

7100 paragraph and in the joint judgment in *Stack v Coastal Securities* which is in - - -

GAUDRON J: I do not see anything inconsistent with what I have put to you in Chief Justice Barwick's remarks.

7105 **MR KEANE:** Your Honour, at about point three:

Thus, there may be circumstances in which the matter does not in substance itself attract federal jurisdiction, though that which attracts

7110 federal jurisdiction must in some way relate to the matter. Once federal jurisdiction is attracted, it is not lost because the claim or assertion which attracted it has not been substantiated or has been displaced by some countervailing fact.

7115 **GAUDRON J:** Exactly, which is why I think, if you accept that that is right, the notion that the exercise of accrued jurisdiction is discretionary loses some of its validity.

MR KEANE: But, your Honour, what one has is a case where one has

7120 accrued jurisdiction and the possibility of - - -

GAUDRON J: Perhaps the error in this area is in talking about it as accrued jurisdiction. The point I am really trying to put is that once there is a "matter" that is the beginning and end of it. You do not talk about it as

7125 accrued jurisdiction, or jurisdiction. There is jurisdiction in respect of the "matter". That is the beginning and end of it. "Accrued jurisdiction" was, itself, a term that was likely to mislead.

7130 **MR KEANE:** And it is the term that his Honour used at 475 in the second paragraph on the page, and which has been used consistently since; I think, with respect, in all the judgments of the Court which have dealt with the issue.

7135 **GAUDRON J:** I know it is a term that has been used. I think Justice Gummow invented it, as counsel.

MR KEANE: Yes, his Honour was appearing for the Commonwealth in *Stack v Coast Securities*, and no doubt urged that view.

7140 **GUMMOW J:** I am not signalling any admissions.

MR KEANE: In *Stack v Coast Securities* 154 CLR 293, if we could take your Honours to that. We have to ask your Honours to begin reading at 293 at about point 5 within the first full paragraph, the sentence that begins:

7145 A central element in this design for the exercise of the judicial power of the Commonwealth is the power given to Parliament –

and so forth. If we can ask your Honours to read that. Coming to the point at about point 7:

7150 It would be contrary to the advice of the Judicial Committee in *Nelungaloo* –

7155 and, we would submit, evidently contrary to the view of the joint judgment -

7160 cited by Walsh J in *Felton v Mulligan*, to approach the provisions in Ch III on the footing that they require courts exercising federal jurisdiction “to dissect out of an entire legal question one of the component issues it involves and to submit it for decision in artificial isolation”.

7165 That approach would, contrary to settled authority, preclude this Court in its original jurisdiction from deciding non-severable claims having their origin in State law. It would, again contrary to settled authority, restrict Parliament to the creation of federal courts lacking jurisdiction to determine such claims, thereby inhibiting their capacity as effective elements in the court system for which Ch III makes provision. The preferable approach from the viewpoint of principle is that established by authority, namely, to regard Ch III as empowering the Parliament to make sensible and practical dispositions for determination of justiciable controversies by either

7170 of the two means –

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GAUDRON J: Let us assume that instead of that sentence reading “Ch III as empowering the Parliament”, what if one were to read it that “Chapter III requires the Parliament to give jurisdiction in respect of the whole matter”? Would there be any error in that approach, particularly when the word used in Chapter III is “matter”?

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MR KEANE: Your Honour, Chapter III, in particular section 77(ii) and (iii), both contemplates the exercise of federal jurisdiction by State courts. Section 77(ii) contemplates the Parliament making laws for the exclusive exercise by Federal Courts of jurisdiction exclusive of that which belongs to the States. So that it does seem, in our respectful submission, to at least contemplate that there will be occasions for the Parliament to draw the line and we adopt what my learned friend Mr Solicitor for the Commonwealth said in relation to the *expressio unius* argument in respect of that. But, your Honours, to come back to your Honour Justice Gaudron’s original question to us, can we invite the Court to read on at 294 in the second full paragraph of text on the page which begins at about point 5 where their Honours say:

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In this, as in other cases, the recurrent problem is to identify what it is that falls within the Federal Court’s accrued jurisdiction. The majority judgment in *Fencott v Muller* provides this assistance in reaching an answer:

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“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.”

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Barwick C.J. in *Philip Morris* had expressed a similar idea, stating that the exercise of the accrued jurisdiction “is discretionary and not mandatory”. In expressing this opinion, Barwick C.J. expressly acknowledged that the Federal Court had a discretion to allow the non-federal claims to be determined in a State court.

And then they go on to say:

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It is for the Federal Court to determine how the discretion should be exercised.

7225 **HAYNE J:** Are the two ideas in truth similar? That is, is the idea first mentioned on 294 similar to the exercise of a discretion? The former seems to be an idea encompassing the notion that reasonable people may differ about the outcome and also circumstances of cases may affect the outcome. The second idea, discretion, seems to be an idea that presupposes a decision of the first, namely, this is within the one matter but I choose to sever or not sever. I wonder whether the clue to the passage may lie in the expression of similarity, that their Honours may, perhaps, be indicating discretion not in the sense of, "I choose to or not to", but circumstances affect the decision of the first question.

7235 **MR KEANE:** Your Honour, that may be so, but what is clear, in our submission, is that what is required of a Federal Court judge executing his function as such, is to resolve issues of impression and judgment and to resolve them in some way in respect of the thing that comes before him on the basis of assertions, more or less colourable, and then to exercise a discretion for which, as Justice Murphy said, at page 299 at the second and third paragraphs, in relation to which it is necessary to have "common law rules of federal judicial power". Now, if your Honours would read the two paragraphs, that is at the beginning of the second-last paragraph on the page.

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7255 The point we make about that, with respect, is that the Court there, both the joint judgment and the judgment of Justice Murphy, is recognising that there is, because of the scope of federal jurisdiction, encompassing it as it does, matters, which involve claims in controversies between disputants, which may be more or less colourable in their reliance upon federal law, does afford the occasion for rules and, in our respectful submission, if, in the execution of the judicial power vested in the Federal Court, it is appropriate to create common law rules, than it is open to the Parliament to create, under section 51(xxxix), rules to assist.

HAYNE J: To assist by resolving the dispute or to assist by removing the occasion for the dispute. The cross-vesting system is one which seeks to remove the occasion for dispute, is it not?

7260 **MR KEANE:** Yes, that is quite right, your Honour, but in a way which, because the scheme includes section 5(4), is not excessive. Your Honour put to our learned friend for the Commonwealth, "Well, could 51(xxxix) justify a national trial court?" We would submit it could not because to do that would not be incidental to making effective, it would not be a convenient and practical way of avoiding this problem which belittles the

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exercise of federal jurisdiction – bedevils the exercise of federal jurisdiction.

7270 **McHUGH J:** Well, “convenient” and “practical” are such value laden words that for me they have no content unless and until you specify the criteria.

7275 **MR KEANE:** I understand your Honour’s point. May we say in relation to that that the test and the availability of section 51(xxxix), as a support for the measure, is one of practical effectiveness and indeed convenience. We have seen - - -

7280 **McHUGH J:** But I was going to put to you, your argument does not grapple with the situation where there is no proceeding pending in the Supreme Court or a State or a Territory, where there is just a naked transfer of State jurisdiction, proceedings are started in the Federal Court.

7285 **MR KEANE:** Your Honour, section 5(4)(b) does deal with the situation where there is not yet a State proceeding on foot but where the Federal Court is able to make a judgment that the claim has its – the phrase we are using is “centre of gravity in the State”. To return to what we were saying to your Honour Justice Hayne, in *Re Judiciary and Navigation Act* (1921) 29 CLR 265 in the passage which follows the passage which our learned friend Mr Jackson read to your Honours, there is reference to
7290 section 51(xxxix) as being concerned with rendering effective the execution of the jurisdiction.

7295 In the passage we gave your Honours from *Stack v Coastal Securities*, there is a reference to “convenience, practical and common sense”, and in *Philip Morris* at 477 point five, Chief Justice Barwick speaks in terms of “convenience”, and he gives the example that certiorari though not conferred on the Court, because it is more convenient than prohibition, could be made available on the footing of section 51(xxxix).
7300 Your Honours, 51(xxxix) being concerned with matters incidental to the execution of the jurisdiction is something where convenience and practical effectiveness are relevant considerations. It may be different when one is talking about what - - -

7305 **HAYNE J:** You put them forward as the sole relevant consideration, do you not? Sole justification is practicality and convenience.

MR KEANE: Subject, of course, to arguments about excess, using the sledge hammer to crack the nut and so forth.

7310 **GUMMOW J:** But 51(xxxix) talks about execution of power vested usually in the federal judicature, and the power that is vested is identified in section 71. It is a judicial power of the Commonwealth.

MR KEANE: Yes, your Honour.

7315 **McHUGH J:** Mr Solicitor, I must have missed something in 5(4). I read 5(4) as only applying to proceedings which are already pending in the Supreme Court of a State or a Territory.

7320 **MR KEANE:** Your Honour, section 5(4)(b), where it appears to the first court, and relevantly that would be the Federal Court - - -

HAYNE J: Or (i), (ii) and (iii) are alternatives, are they?

7325 **MR KEANE:** Yes, they are. And (i) concerns pending procedures, your Honour, to answer your Honour Justice McHugh, (ii) is an alternative stand alone ground for a mandatory transfer to the Supreme Court. And if one looks at A, B and C, that does not seem to require - - -

7330 **McHUGH J:** I will read it during the lunch-hour. I had read them as conjunctive because of the last “and”, I suppose.

MR KEANE: That is in A, B and C. But your Honour will see the “or” before (iii).

7335 **GLEESON CJ:** Is that a convenient time, Mr Solicitor?

MR KEANE: It is, your Honour.

7340 **GLEESON CJ:** We will adjourn till 2.15.

AT 12.48 PM LUNCHEON ADJOURNMENT

7345

UPON RESUMING AT 2.18 PM:

7350

GLEESON CJ: Yes, Mr Solicitor.

7355 **MR KEANE:** Your Honours, I have been asked by our learned friend for the Commonwealth to inform that Court that the statistics in relation to the operation of the scheme have been provided to your Honours' associates.

GLEESON CJ: Thank you.

7360 **MR KEANE:** Your Honours, the last thing that we wish to say is to draw the Court's attention to the preamble to the *Jurisdiction of Courts (Cross-vesting) Act* and in particular to paragraphs (b) and (c) of the preamble and, your Honours, it is our submission that section 5(4) is
7365 important to the achievement of that objective. It is apt to effect the objective stated particularly in paragraph (b) of the preamble, that intent being to preserve, not to abolish, the jurisdiction of the Supreme Courts.

McHUGH J: But it is only when the Court is positively satisfied that it is in the interestS of justice and so on, that you make a transfer.

7370 **MR KEANE:** Not a bad reason for doing it, your Honour.

McHUGH J: No, no, but you have to be satisfied that it is in the interest of justice to transfer it.

7375 **MR KEANE:** But, your Honour - - -

McHUGH J: You can keep it there as long as it is not in the interest of justice; that it is more appropriate that it be determined by the Supreme
7380 Court, for example.

MR KEANE: Well, your Honour, one has to have some rules and, in our respectful submission, these rules are at least as good as the rules that the Court was adumbrating in broad terms in *Stack v Coast Securities Pty Ltd*.

7385 **McHUGH J:** Can I ask you one other question? Do you part company with the Solicitor for the Commonwealth on the source of the vesting of the jurisdiction? Do I gather from your reliance on 51(xxxix) that it is your case that it is the Commonwealth that vests this jurisdiction?

7390 **MR KEANE:** No, your Honour, it is the States that proffer it and vest it, and it is the Commonwealth legislation which is necessary to avoid the argument that there has been a conscription. That is the way we put it.

7395 **GUMMOW J:** Not the operation of 109?

MR KEANE: No, it is not, but, by the same token, we do not think it is necessary to say that we reject that argument. The joint judgment in *Gould v Brown* in so far as it addresses what would be a 109 problem because of

7400 the specific provisions of the *Federal Court of Australia Act*, we do not submit that we part company from that. Those are our submissions, if it please the Court.

7405 **GLEESON CJ:** Thank you, Mr Solicitor. Mr Solicitor for Victoria.

MR GRAHAM: May it please the Court. May I ask the Court to go to our written submissions? I just wish to develop, during the course of our oral submissions, one aspect of the written submissions.

7410 On page 2, part B, under the heading “The legislative power of the Commonwealth” we have endeavoured to offer an answer to the question which arose right at the beginning of the argument of *Gould v Brown*, and has been asked several times since by members of the Court, “What is the source of the Commonwealth’s power to enact the provisions contained in section 9 of the general Cross-vesting Act, section 56 of the *Corporations Act*?”.

7420 There is no doubt that, of course, the Commonwealth under section 71 can create courts. Although section 71 does not so state, it has been held again and again that there is an implied power conferred upon the Parliament to create other federal courts. The next step in what we say is that the Commonwealth Parliament in the exercise of that power has created the Federal Court of Australia and granted it extensive jurisdiction, both under the *Federal Court of Australia Act* and under many other Acts. If the State Parliaments sought to invest jurisdiction on the Federal Court there would at least be encountered a problem under section 109, and we give the Court the reference to the *Credit Tribunal Case* that your Honour Justice Gaudron, I think, referred to in the course of argument this morning. The Commonwealth Parliament can displace or express an intention contrary to an intention to cover the field.

7435 We then go on to give the Court a reference to *Burton v Honan* which deals with the incidental powers both implied and under section 51(xxxix). Then we go on to indicate that the incidental power may attach both to sections 71 and 77, and we say there is the source of the power, if power there be, and really we cannot take it further than that.

7440 **GLEESON CJ:** Mr Solicitor, if the Parliament of New South Wales attempted to confer State jurisdiction on the High Court of New Zealand and the New Zealand Government and the New Zealand High Court simply ignored that, no question of section 109 would arise. Would a litigant be entitled to go to the High Court of New Zealand and invoke that jurisdiction?

7445 **MR GRAHAM:** No, your Honour.

GLEESON CJ: Why not?

7450 **MR GRAHAM:** Because there would be no domestic law which could be invoked in New Zealand to which the litigant could point to request the courts of New Zealand to provide relief. So there would need to be a domestic law operating concurrently with the New South Wales law in order for the litigant to be able to insist upon jurisdiction being exercise.

7455 **GLEESON CJ:** But that suggests, does it not, that there is something more than section 109 that would be the problem if the States unilaterally tried to confer jurisdiction on the Federal Court?

7460 **MR GRAHAM:** We would respectfully agree, your Honour. There needs to be more than a displacement of section 109 but, of course, there must be legislative power to do that but what we say is that the power contained in section 71 and the power contained in section 77, coupled with the implied incidental power, furnishes the ability of the Federal Parliament, as it were, to open the doors of the Federal Court to the reception of State jurisdiction and at the same time to declare that section 109 would not operate, so as to indicate an intention to cover the field in earlier Commonwealth legislation.

7470 **GLEESON CJ:** You say there is nothing repugnant to anything in the Constitution, if the States knock on the door and the power to open the door is found where you say you find it?

MR GRAHAM: Yes.

7475 **KIRBY J:** I think something similar to this arose in West Africa or East Africa in the conferring of jurisdiction by the colonial parliaments on the common court of appeal of those two former areas of British rule and I think that there was a challenge and I dimly recall that there is a footnote somewhere there that refers to these cases, that - - -

7480 **MR GRAHAM:** I think it is a footnote in your Honour's judgment, and I think it came from Western Australia's submissions.

KIRBY J: It was argued in *Gould v Brown*.

7485 **MR GRAHAM:** Yes. The final - - -

7490 **KIRBY J:** In terms of principle, if you have a polity with full power subject to its extraterritorial limits and it confers jurisdiction which will be accepted by another body, there would not seem to be any difficulty unless it is found in the implications of Chapter III.

MR GRAHAM: We respectfully agree with that, your Honour.

7495 **KIRBY J:** If the two polities agree, then when you get into Chapter III you have to remember that these are not ordinary polities in relation to each other, if they can be so described, but they are integral parts of the Australian Federation.

7500 **MR GRAHAM:** Perhaps I should just add for completeness a reference to what appears in paragraph 12 of our outline. The point was made by your Honour Justice Gummow in *Gould v Brown* the significance of the words “belongs to” in section 77(ii) of the Constitution, indicating that State courts as contemplated - as referred to in that paragraph have jurisdiction both which belongs to them otherwise than being invested, and which is
7505 invested. And it is a matter perhaps of passing importance, but not enormous importance, that the jurisdiction of the Federal Court can be rendered exclusive of both the non-federal and the federal jurisdiction of a State court. It just lends a little weight to the notion that there is nothing totally surprising about the idea of a Federal Court possessing jurisdiction
7510 which is non-federal. It does not - - -

McHUGH J: But you have two problems to get over. First of all you have to get over the proposition that one only has to look at Chapter III to see that it repels the notion that the States have any constitutional power at
7515 all to legislate with respect to Federal Courts. In other words, it cuts your argument off at the knees. And if you get over that, then you have the other problem of saying, “Well, nevertheless, the Commonwealth can consent to it in some way”, and you rely on 71 and do not - - -

7520 **MR GRAHAM:** Your Honour, I think the answer as best it can be given to the first problem, the cutting off at the knees problem, comes from what the Court said in *Commonwealth v Queensland*, that the State Parliaments can invest State jurisdiction in bodies other than the courts created by the State.

7525 **McHUGH J:** They certainly can; there is no problem about that.

MR GRAHAM: So the impediment must arise - - -

7530 **McHUGH J:** Its effect is another question. When one asks under this Constitution whether a State can, one has to look at Chapter III itself.

KIRBY J: But Chapter III exists in the Constitution.

7535 **McHUGH J:** Of course it does.

7540 **KIRBY J:** And therefore you cannot ignore the fact that elsewhere in the Constitution there is the conception that the States with their polities include their judiciary. It is whether you are looking in Chapter III for the express which nobody suggests is there.

7545 **MR GRAHAM:** Your Honour, perhaps the question really can be put in two different ways. Whether there is anything in Chapter III which enables it to be done, the answer expressly “No”, but if one puts the question, “Is there anything in Chapter III which inhibits that step being taken?”, then we say subject to the exercise by the Parliament of a legislative power which enables the door to be opened, then the answer is yes.

7550 **McHUGH J:** Except that you have Parliaments saying – I appreciate – what about sections 76 and 77, those “matters”? Has the State got any power to invest those matters in a Federal Court? Supposing, for example, Parliament passed a law but did not give any jurisdiction to a Federal Court in respect of it, could the State Parliament then pass legislation investing jurisdiction in the Federal Court in respect of a matter arising under that particular law of Parliament?

7560 **MR GRAHAM:** Unaided by Commonwealth legislation, your Honour, we would have to say no. We would have to say, no, and we do not shrink from that. Your Honour, I think I would be repeating what has been said by others, time and time again, if I pressed our submissions any further, and that is what we wish to put to the Court.

7565 **GLEESON CJ:** Thank you, Mr Solicitor. Mr Solicitor for South Australia.

7570 **MR SELWAY:** Your Honours, we have a time problem of a sort. The time for the interveners was to expire at 2.30 pm. The respondents were to start at 2.30 pm; the reply at 3.30pm. The remaining interveners would only seek to put about five minutes each, but we would not wish to transgress on the respondents’ time.

7575 If it please the Court, similar arrangements to the cross-vesting scheme are well known in respect of executive power. An example can be seen in sections 31 and 37 of the *Corporations (NSW) Act*, which confers State functions on Commonwealth officers and sections 46 and 47 of the *Commonwealth Corporations Act 1989* authorises Commonwealth ministers and officers to carry out those functions.

7580 Those executive cooperative schemes are, we submit, undoubtedly valid on the authority of *Duncan’s Case* and *Cram’s Case*. Neither of those cases are all that clear on what the Commonwealth power is and how it operates, but those cases hold that the schemes are valid, notwithstanding

7585 that the Commonwealth acting alone could not have conferred the relevant
function on the Commonwealth officer. We submit that the Commonwealth
power to authorise those Commonwealth officers to carry out the State
function is an incidental power. The Commonwealth's capacity to create
and maintain an executive office or an executive position carries with it, as
an incident, a capacity of the Commonwealth to consent to the
7590 Commonwealth officer performing a State function under a co-operative
scheme.

7595 Now, your Honours, if that is true, the issue in this case is whether
there is anything in Chapter III that prevents the same analysis applying
and, with respect, that is the submission to which our written submissions
are directed. If given the time, I will merely adopt them. I think
your Honours may recall that some parts of it we have made in previous
cases.

7600 There are two matters I should draw attention. We are generally, to
the same effect as the Commonwealth's submission, excepting that the
Commonwealth's submission says that a non-judicial function cannot be
conferred. We do not say that that is the limitation. We say the limitation
is, if you like, the incompatibility principle which is certainly different, it
may be narrower in some contexts and broader in others. The other place
7605 we differ is we say that the - - -

KIRBY J: I do not quite follow that. Why would it not be incompatible
with the conferral of jurisdiction on a Federal Court with the permission of
the Commonwealth Parliament to do something which is non-judicial?
7610 That would be incompatible, would it not, with the nature of Federal
Courts?

MR SELWAY: It may be, your Honour, but the incompatibility principle,
as we understand it, coming out of *Lim's Case*, is not restricted to judicial
7615 functions or not. It is the nature of the power given and how it operates. It
is possible, at least in principle, that a function could be given which is
non-judicial, but which would not be incompatible with a judicial function.
The matter has not been explored in the cases, and simply as a matter of
principle we say that the distinction between judicial and non-judicial
7620 power does not apply. If it does not apply that cannot be the limitation.
The limitation has to be another one, and we say it is the incompatibility
principle. Those matters are explained more fully in our written
submission. The only other matter is that we say that the - - -

7625 **GAUDRON J:** Can I interrupt you there, Mr Solicitor? Would the arbitral
power be incompatible?

MR SELWAY: It may not be.

7630 **GAUDRON J:** No, so, although the Commonwealth could not confer the power of conciliation and arbitration on a court, the States could.

MR SELWAY: Yes, your Honour.

7635 **GAUDRON J:** It sounds remarkable, does it not?

MR SELWAY: That is the effect of our submission. It may be that one would say that the arbitral function is, in fact, an incompatible function, and solve the matter that way. But, all we say is that - - -

7640 **GUMMOW J:** That is unlikely.

GAUDRON J: Yes, that is unlikely.

7645 **MR SELWAY:** I take your Honour's point.

KIRBY J: That may run into other negative implications in Chapter III which, after all, is the fundamental rationale of the *Boilermakers* decision.

7650 **MR SELWAY:** Yes, your Honour.

KIRBY J: If you happen to use Federal Courts then I am afraid, on my view, and I think that of Chief Justice Brennan and Justice Toohey, you have to receive them as they are and can only use them to do that which Federal Courts can do within the Constitution.

7655 **MR SELWAY:** Yes, your Honour. I understand the argument, your Honour, and all we say is that that argument cannot apply because the premise of our argument is *Boilermakers* does not apply to this conferral of State jurisdiction. The only other matter, your Honours, is that we say that beyond section 109, the reason why the States cannot confer the function is a federal issue similar to *Cigamatic* but would also apply between the States. If it please the Court.

7665 **GLEESON CJ:** Thank you, Mr Solicitor. Mr Solicitor for New South Wales?

7670 **MR SEXTON:** If the Court pleases. Your Honours, we do not propose to add by way of oral argument to our written submission subject to two minor points, or brief points, that I will come to in a moment. In those written submissions we have noted at two points where we adopt the written submissions of my learned friends from Queensland and from South Australia. The two points that we would add to those, which may not be fully spelt out in those submissions, are a matter that was just touched on by

7675 my learned friend from South Australia and has been raised a number of
times in the course of questions from the Bench to the Commonwealth
Solicitor-General, concerning what would happen if there was an absence of
consent by the Federal Parliament to the conferral of State jurisdiction on,
for example, the Federal Court.

7680 We are, of course, in a large measure of agreement with the
Commonwealth Solicitor-General in these proceedings but on this particular
question we would not see section 109, as it were, as the solution to that
particular situation. In keeping with what my learned friend from South
7685 Australia just said, we would see that as really resolved by *Cigamatic* or the
Melbourne Corporation doctrine in the sense that the State legislation
would encounter that doctrine in that situation.

GUMMOW J: Mr Solicitor, is it the position of New South Wales that
7690 with respect to matters arising under a State law, the Parliament of New
South Wales could confer jurisdiction on a Federal Court and do so
exclusively to the exhaustion or denial of what would otherwise be any
jurisdiction in the matter of the Supreme Court of New South Wales? You
seem to have done that in some of your legislation.

7695 **MR SEXTON:** Yes, your Honour.

GUMMOW J: Well, that would be one way of achieving a unified court
system.

7700 **MR SEXTON:** Well, subject to this, your Honour: subject to that
problem of *Cigamatic* and the *Melbourne Corporation* doctrine.

KIRBY J: But it would also, surely, be subject to the fact that the
7705 Constitution contemplates the continuance of a State Supreme Court. So,
you could not denude all jurisdiction from a State Supreme Court so as to
render it a non-State Supreme Court because the Constitution does not
contemplate that.

7710 **MR SEXTON:** Well, because, in effect, your Honour, that would amount
to the abolition, in a sense, of the State Supreme Court.

KIRBY J: Could not do that.

7715 **MR SEXTON:** No, I am not suggesting - - -

GLEESON CJ: For a couple of reasons: the New South Wales
Constitution entrenches the New South Wales Supreme Court and, perhaps,
the three-tier court system.

7720

MR SEXTON: I took your Honour Justice Gummow to be speaking, for example, about a particular area.

7725 **GUMMOW J:** Many Federal Courts have existed from time to time but they have had no jurisdiction conferred on them.

MR SEXTON: They have, your Honour, but I took your Honour to be referring to a particular area of jurisdiction.

7730 **GUMMOW J:** Yes. Well, I was referring to section 22, in particular, of the *Competition Policy Reform (NSW) Act 1995* which implements the Hilmer Report, as I understand it, not only in your State but I think the States, generally, and it seems to confer jurisdiction on matter arising under that State Act exclusively on the Federal Court, not merely concurrently but
7735 exclusively.

MR SEXTON: Well, we would say in that area that that can be done, your Honour.

7740 **GUMMOW J:** But are there any restrictions at all on it? What are they?

MR SEXTON: Well, there is certainly the restriction that Justice Kirby has raised, your Honour, but in a general sense it would depend upon the effect on the Supreme Court of New South Wales. There may be, as
7745 your Honour the Chief Justice points out, limitations in the New South Wales Constitution.

KIRBY J: And it would require the supporting legislation of the Federal Parliament.
7750

MR SEXTON: All of those submissions are premised on that, your Honour.

KIRBY J: And it would have to be a jurisdiction of a kind which may be rescinded by a Federal Court as a Federal Court within Chapter III of the Constitution.
7755

MR SEXTON: Yes.

7760 **KIRBY J:** That is why I have difficulty with the submission for South Australia that you could give conciliation and arbitration for any other alien jurisdiction to a Federal Court. If you use a Federal Court you must use it as it exists in Chapter III.

7765 **MR SEXTON:** Your Honour, that was the second point to which I wish to advert very briefly and it has been raised a number of times in the argument.

7770 **McHUGH J:** Well, the only thing you can use Chapter III courts is for the exercise of federal judicial power.

KIRBY J: That is the question.

7775 **GUMMOW J:** All you have to do is transmute State judicial power into something else, into A plus B, and A can go to the Federal Court because it is analogous in some to the judicial power of the Commonwealth, but B cannot.

7780 **MR SEXTON:** Well, as your Honour appreciates we, on our part, concede that it would have to be judicial power that is - - -

7785 **GUMMOW J:** No, not just judicial power. There are many things that the New South Wales Supreme Court does and other State Supreme Courts do which, on any generally accepted view of it, have judicial activities, judicial powers, but they do not happen to fall within the sub-class that answers the description of judicial power of the Commonwealth. The question is, what is the rationale?

7790 **McHUGH J:** I must say if the statutory majority view prevails in this particular case, I myself see great difficulty in seeing any reason for preventing the States from giving non-judicial powers to the Federal Court unless it offended the sort of federal *Kable* principle.

7795 **MR SEXTON:** Your Honour understands the difference in a sense that we have on that first question.

McHUGH J: Yes.

7800 **MR SEXTON:** On the second question, we would say that the character of the Federal Court would preclude that occurring, and therefore we accept that non-judicial functions could not be conferred on the Federal Court.

GUMMOW J: You keep using this phrase, “non-judicial functions”. That is not right, Mr Solicitor. It just obscures the point.

7805 **MR SEXTON:** Your Honour, they are non-judicial in the sense in which that is used in - - -

7810 **GUMMOW J:** They are non-judicial in a hypothetical sense, if they could be made the subject of a grant of federal jurisdiction by a law of the Parliament. By definition they cannot be, because they are outside federal power.

7815 **MR SEXTON:** It is the point of difference in a sense, your Honour.
Your Honour understands our submissions on that question. We understand
what your Honour has said, of course, in the previous judgment.

GUMMOW J: I am not sure I do.

7820 **MR SEXTON:** Subject to those two points, your Honours, we rely on the
written submissions.

GLEESON CJ: Thank you, Mr Solicitor. Mr Cock.

7825 **MR COCK:** Your Honours, we would like to make just two points. The
first observation we would like to make is a central point of the challenge to
the cross-vesting scheme is focused on the operation of section 9(2) of the
Jurisdiction of Courts (Cross-Vesting) Act. We maintain that, read in its
proper context, subsection (2) does not constitute a conferral; it merely
sanctions a conferral by the States of their judicial power.

7830 **GUMMOW J:** Does that mean that the Federal Court may or may not
choose to exercise this jurisdiction?

7835 **MR COCK:** To the extent that it is amenable to State law, it is obliged to
comply with the requirements of the State law, we say.

GAUDRON J: And what makes it amenable to State law?

7840 **MR COCK:** We say it is amenable to State law unless we infringe
Cigamatic or unless there is an overriding federal law that otherwise
prohibit it.

7845 **GAUDRON J:** Why do we have section 79 in the *Judiciary Act*, and why
does not the *Cigamatic* principle itself mean that the judicial organs of the
Commonwealth are not amenable to State laws? Let us assume, for
example, the States set up a law for the inquisition of people who
subscribed to a particular point of view. Why would the Federal Court have
to - why would that apply in the Federal Court?

7850 **MR COCK:** In our submission, your Honour, it would apply if on the
terms of the State law it would have application to Federal Court, and if on
the proper construction of the federal law applying in the area, no
implications exhibiting an intention not to enable the State law to apply in
that area can be found. That is our submission.

7855 **GLEESON CJ:** Could the Judicial Commission of New South Wales
exercise jurisdiction over judges of the Federal Court if its legislation so
provided?

7860 **MR COCK:** It probably would not be hard to find an implication under the *Federal Court Act* to the contrary.

7865 **KIRBY J:** Section 79 is expressed to be subject to exceptions as otherwise provided by the constitutional laws of the Commonwealth, and presumably one would be saying here that that is the general regime but in these particular matters, there is a special regime and if it is constitutionally permissible, then the special rating will apply to special cases.

7870 **MR COCK:** With respect, we adopt that. So, our submission is that section 9(2) does not become - - -

GUMMOW J: You have to get down to distributive meaning, do you not? As the Chief Justice pointed out yesterday, it had several operations.

7875 **MR COCK:** It does.

GUMMOW J: And in its non-State operations, is it not mandatory?

7880 **MR COCK:** It is, it would seem.

GUMMOW J: It “may” mean two things, depending upon which operation, is that right?

7885 **MR COCK:** Yes, but our submission is the alternative submission that if section 9(2) is found by the Court to, in fact, be an attempt by the Commonwealth to confer State judicial power on the Federal Court, and its impermissible exercise of that power, it is unnecessary for the operation of the scheme. In our respectful submission, the scheme would still operate if section 9(1) remained, as long as it was perceived to be not inconsistent
7890 with the operation of the federal law, that is, if section 9(2) is seen to be really conferring the power, and your Honours find that that is an impermissible exercise of the power of the Commonwealth then we do not see it as essential to the scheme. That is an alternative submission that we advance.

7895
7900 We adopt, with respect, the submission of the Solicitor-General for Victoria in this respect, that the incidental power operates not under section 77 specifically, but on section 71, that is the Constitution of the Federal Court itself rather than the conferring of its particular jurisdiction. What we say is that it is incidental to provide the Federal Court as conferred or not conferred particular other jurisdiction. If it is within the incidental power for the Federal Parliament to say that no additional jurisdiction may be conferred upon the Federal Court – and we submit that is a matter of principle – that must be within the power of the Commonwealth Parliament,

7905 and it must also be within the power of the Parliament to say that we do not prohibit the conferring of additional jurisdiction on our Federal Court.

7910 **GAUDRON J:** Unless that is an exercise in futility, unless there is no necessity at all to say that no other part can be concerned with the Federal Court, or no other jurisdiction.

7915 **MR COCK:** Well, we say that there is no reason in principle why the State cannot confer the power and, as I say, we rely upon *Cram* and the other cases referred to in support of the proposition that, where there is a limit to the constitutional capacity of the Commonwealth under, say, the corporations power, and that another State, in a cooperative way, gives to that Commonwealth body its authority, the Commonwealth Parliament has the capacity to say that we will allow that additional jurisdiction to be conferred upon our body, and that has happened in two cases that have been referred to your Honours.

7920

7925 An additional observation which we think has not yet been made is that, in addition to conferring judicial power or that element that has presently been the subject of debate, we say the *Jurisdiction of Courts (Cross-vesting) Act* also confers the power to enforce judgment. This, I think, is inconsistent with the submission of the Solicitor for the Commonwealth, and we refer your Honours to section 14(1) of the New South Wales Cross-vesting Act. In our respectful submission, that provision evinces the clear intention by the New South Wales Parliament that the execution of judgments, itself be the State's judicial power be conferred upon the Federal Court, inconsistent, I think, with the submission that was put by the Solicitor for the Commonwealth, where he conceded, I think, that it was federal - - -

7930

7935 **GUMMOW J:** Which subsection of section 14?

MR COCK: Subsection (1), your Honour.

7940 **GUMMOW J:** Well, that is in the Territory.

MR COCK: I am sorry, the New South Wales legislation - - -

KIRBY J: Are these in common form throughout all the jurisdictions?

7945 **MR COCK:** Save for the Commonwealth provision; the State provisions are in common form. Your Honour Justice Gummow is correct, the Commonwealth provision confers it upon the Territory, but the State provision, subsection (1) provides that:

7950 A judgment of the Federal Court or the Family Court that is given, in whole or in part, in the exercise of jurisdiction conferred by a law or laws relating to cross-vesting of jurisdiction is enforceable in the State as if the judgment had been given entirely in the exercise of the jurisdiction of that court apart from any such law.

7955 And we say not only does that show that this is an intention by the State Parliament to confer the enforcement power of the State judicial power, but also it provides the mechanism by which enforcement may arise and does not rely upon the *Service and Execution of Process Act* as I think others had suggested may have been the position.

7960 **GUMMOW J:** But is there not a section 109 problem with that? Powers of enforcement of Federal Court orders come out of the *Federal Court Act* and Rules and they operate across the country. You do not need some State Act to enforce a Federal Court judgment.

7970 **MR COCK:** The State purports to confer it and we say achieves this by conferring upon the Federal Court the exercise of the enforcement authority of the judicial power of the State. We say that is what purports to be done.

7975 **GUMMOW J:** Anyhow, you say it does not take the Federal Court as it finds it?

7980 **MR COCK:** No, I accept that is a proposition inconsistent with that advance by others. We wish to bring the provision to your Honours' attention. It is also relevant to remind your Honours that an identical provision appears in section 50 of the *Corporations (NSW) Act* in respect of enforcement of judges under that Act also.

7985 So, in other words there is an attempt there to confer upon the Federal Court the power the State would have in relation to enforcement of judgments in relation to the jurisdiction conferred under that provision.

7990 **KIRBY J:** Just explain that to me. You say that your submission is inconsistent with taking the Federal Court as it finds it, but what I take section 14(1) to be saying is: we have a Federal Court. It has its own Act. Its own Act gives its judgments force, and we are saying that for the purposes of State law, that will be taken in accordance with section 14(1). So, it is accepting the Federal Court as it finds it, but it is merely making it plain that that is the effect of it for purpose of - - -

7995 **MR COCK:** With respect, we adopt that, too. It is a question of whether that is taking the court as it finds it, or deliberately taking the court as it finds it. In other words, deliberately conferring upon the court the jurisdiction that it finds in that court. I think the point is whether it needed

8000 to have done that, or whether it could have simply relied upon that. If it
relied upon it without the provision it suggests that it was, in fact, simply
the exercise of Commonwealth judicial power in relation to the enforcing of
judgments. Our submission is that the scheme entails the States conferring
upon the Federal Court their judicial power in respect of enforcements,
excepting that the mechanisms be that as presently are available under the
Federal Court Act. I think it is more than semantics, but that is our
submission.

8005 Our final observation we would like to make to your Honours
concerns section 77(iii) of the Constitution. It is a point that we seek to
advance at paragraph 9 of our written submissions in further explanation of
the proposition we make. What we contend is that there is no relevant
legislative imperative arising from section 77(iii), and that is because the
8010 rationale for the inclusion of that specific provision, I think as your Honour
Justice McHugh referred us to right at the beginning of the proceedings
yesterday, at page 268 of the decision of the majority in *Boilermakers* of
this Court, that the rationale for section 77(iii) was because of the
paramountcy of the function, and the importance of the federal judicature
8015 that it was felt imperative that the agencies in whom, or the courts in whom
such authority may be conferred, be defined, prescribed, and very clear.

In our respectful submission that, and your Honours will read that
passage in the joint judgment at page 268, that is the explanation for the
8020 inclusion of section 77(iii), and it is not such that one would expect to have
found a converse power authorising the federal Parliament to enable State
jurisdiction to be conferred upon Federal Courts because it was the
paramountcy of the federal judicature which was the relevant consideration,
nothing else. We say the distinction, really, is mandated, not between State
8025 and Federal Courts, but between State and federal judicial power, and there
is no reason, in our submission, that has been advanced why the courts
cannot both exercise State and federal judicial power simultaneously if it
has been conferred correctly. They are our additional submissions,
your Honours.

8030 **GLEESON CJ:** Thank you, Mr Cock. Yes, Mr Palmer?

MR PALMER: If the Court please. Mr Wakim relies, of course, on the
validity of the Cross-vesting legislation but I intend to say nothing further
8035 about that. Even if the Cross-vesting legislation is invalid, the Court would
have to consider the other two grounds upon which Mr Wakim says that the
writ of prohibition should not go in both the cases of the prosecutors. There
are, essentially, two grounds upon which Mr Wakim relies. The first is that
the Federal Court has, in both the cases against the prosecutors, original
8040 jurisdiction, because a right depending upon the *Bankruptcy Act* for its
existence is put in question in the proceedings. Therefore, a matter arises

under a federal law. The answer given to that by the prosecutors is that only the interpretation of the *Bankruptcy Act* is involved in the proceedings against the solicitors and Mr Darvall.

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GAUDRON J: Is the right put in issue or the value of that right?

8050

MR PALMER: Both are put in issue, both actions against the prosecutors. The prosecutors deny the fact or the allegation that the Bankruptcy Trustee had vested in him a right to proceed against Mrs Nader for a contribution or indemnity. They deny that such a chose of action existed. They deny that, if it existed, it vested under the *Bankruptcy Act*, section 58, invested in the official trustee. They also deny the value in this way: they say that even if the action vested, even if the prosecutors were negligent, and so on, by reason of contributory negligence, there was nothing lost by Mr Wakim.

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8060

GAUDRON J: But, is not Mr Wakim's case this, "I had a right to participate in the administration of the bankrupt estate of Mr", whoever it was, "That right is less valuable because". Now, is not that the controversy, whether it was less valuable and - well, whether there was a duty owed to him to prevent damage by having a less valuable right than he would otherwise have?

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8070

MR PALMER: That is not quite the issues, your Honour. It is admitted by all concerned, as I understand it, particularly by the Official Trustee, that Mr Wakim had a right to participate in the estate. His proof of debt was admitted. There are two bases upon which Mr Wakim says he has been damaged by the conduct of the Official Trustee and of the prosecutors. The first is that he should have been able to recover from the estate, by participation, an amount which the Official Trustee should have recovered from Mrs Nader. That claim is based upon an allegation of that \$100,000 was paid by the insurers of Mr Nader – that is the defendant who was sued – directly to Mr Wakim.

8075

8080

That payment was on account of the partnership; therefore, there has been an actual payment on behalf of the bankrupt. I should say that payment, it is alleged, was made on behalf of Mr Nader, not the partnership. Therefore, Mr Nader on his bankruptcy had in him a right of indemnity in respect of that payment from Mrs Nader, his co-partner. That right vested in the Official Trustee. The amount having been paid, indemnity can be recovered or reimbursement can be recovered into the estate by the Official Trustee. So a payment out of the estate and a diminution of Mr Wakim's right to participate in the estate is one claim.

8085

The second claim is that Mr Nader had a right in equity to require contribution from his co-partner before he himself had paid the whole of the

8090 amount due under the judgment, that right, the chose in action against his
Trustee then was entitled to commence proceedings, as in fact he did,
8095 against Mrs Nader seeking a declaration that she was obliged to contribute
one half of the damages awarded against Mr Nader and she was, in
accordance with that indemnity obligation, required to pay directly half of
that sum awarded in damages to Mr Wakim, thereby relieving the
bankrupt's estate of one half of that obligation.

8100 Those are the two ways in which Mr Wakim says the trustee caused
him damage, did not recover into the estate at least half of the \$100,000 and
did not prosecute the proceedings which would have resulted in a payment
directly to him from Mrs Nader. The claim against the Official Trustee is
put under the *Bankruptcy Act*, sections 176, 178 and 179.

8105 **GUMMOW J:** What is the source of power for appointment of the
Official Trustee?

MR PALMER The *Bankruptcy Act*.

GUMMOW J: Which section?

8110 **MR PALMER** Section 160. The Official Trustee was, of course,
appointed by order of the court on the sequestration order being - - -

8115 **GUMMOW J:** I know, but what is the source of the creation of the office
of Official Trustee?

MR PALMER What is the source of power of the office?

8120 **GUMMOW J:** Yes. It is not section 160. That assumes there is this
creature called the Official Trustee. Where does he or she come from?

MR PALMER Well, his obligation - - -

8125 **GUMMOW J:** There is a statute – there is a provision somewhere that
creates the office of Official Trustee.

MR PALMER The obligation? Is your Honour asking me whether he
was - - -?

8130 **GUMMOW J:** I am trying to find out whether he is an officer of the
Commonwealth.

MR PALMER Well, he is an officer of the court. I cannot tell
your Honour, off hand.

8135 **GUMMOW J:** Well, section 18 says that there is to be a “corporation sole”.

MR PALMER Well, I cannot tell your Honour that off hand. I will have to look at the Act in that respect, but there is - - -

8140 **GUMMOW J:** I do not think he is an officer of the court.

MR PALMER Section 18, as your Honour says, continues, in existence the Official Trustee is a corporation sole. Section 18AA provides that the
8145 official trustee is not a Commonwealth authority.

GUMMOW J: 18?

MR PALMER 18AA. Section 18AA provides that:
8150

The Official Trustee is subject to the same personal liability –
as would be:

8155 the trustee of the estate of a bankrupt; or.....the trustee of a composition –

and so on. And, subsection (2) of that section provides that:

8160 That the Commonwealth is by force of this subsection liable to indemnify the Official Trustee against any personal liability –

So, it may be that there is no section which specifically says that he is an officer or to be regarded as an officer. He is a corporation sole, certainly,
8165 but the Commonwealth obviously stands behind him in every respect.

GUMMOW J: Anyhow, he is not a party to this action?

MR PALMER He is not a party to the application for prohibition, no. He
8170 is a party to one of the three proceedings that are together said to constitute one controversy or matter and because the claim is made against him and obviously is a claim made under the *Bankruptcy Act* - - -

GUMMOW J: It should be it, actually.
8175

MR PALMER: Yes. Now, your Honours, we, as I say, make as our first submission, the claim that original jurisdiction arises in respect of the claim against the solicitors and the barrister, because the claim of Mr Wakim against both of them depends upon there being vested in the Official

8180 Trustee, a right of action against Mrs Nader, and that allegation or that right
is put in question in that it is denied in both of the proceedings against the
solicitors and the barrister. Therefore, we say that we do not need to have
8185 recourse to the accrued jurisdiction, as it is called; we simply have recourse
to the original jurisdiction of the Court. The answer given to that, as I have
said earlier, is that only the interpretation of the *Bankruptcy Act* - - -

GUMMOW J: Now, the right or duty in question that is asserted against
the Official Trustee in the proceeding at page 34 of the application book
must owe its existence to Commonwealth law, because that is what creates
8190 him.

MR PALMER: Yes, it is what creates him or it or - - -

GUMMOW J: Or it.
8195

MR PALMER: Yes.

GUMMOW J: Well, why is that not an action in federal jurisdiction? It
is.

8200 **MR PALMER:** It is. I am going a little - - -

GUMMOW J: Were these other actions in some way pendant to it?

8205 **MR PALMER:** Yes, because the claim of Mr Wakim is that he suffered
loss by the negligence of a barrister and a solicitor, because they advised the
trustee, who had a right to proceed, that in fact he had no right to proceed.
He acted on their advice. They put in issue whether he had a right to
proceed. That right to proceed, if it exists, vested in him only by virtue of
8210 section 116 and section 58 of the *Bankruptcy Act*. They put in issue that it
vested in him, under those sections. So, if the right existed, in the trustee,
and not being pursued, Mr Wakim thereby suffered damage, it existed by
virtue of the *Bankruptcy Act*, it could not exist in him otherwise. So, unless
the *Bankruptcy Act* operated to vest that chose in action in the trustee,
8215 which is denied by the prosecutors, Mr Wakim suffered no damage. They
put that in issue in the proceedings. In the application book we have drawn
attention to the pleadings in which the issue is directly raised and denied.

8220 Now, your Honours, the second ground upon which we put the case
is that there is accrued jurisdiction by reason of the fact that both matters
involve issues of fact and law which are inextricably intertwined with the
issues in the proceedings against the official trustee, under which, of course,
there is no question, in our submission, that federal jurisdiction is attracted;
indeed, it is expressly admitted by the prosecutors that in the action against
8225 the Official Trustee there is federal jurisdiction attracted.

8230 It will be necessary for me to draw your Honours' attention briefly to the facts and circumstances which we say are common to all three proceedings and therefore together constitute the three proceedings, one controversy or, to follow a suggestion made by Justice Gaudron, perhaps the better way of putting it is one matter for the purposes of the jurisdiction of the court arising under Chapter III.

8235 Your Honours should have a chronology which formed part of the written submissions. I do not want to spend too much time on it because the matters are referred to in our written submissions, but I should point out the significance of certain of the events which are set out in that chronology and they are not in dispute for the purposes of these proceedings. Common to all proceedings is the circumstance that Mr Wakim suffered injury in
8240 March 1980 in the course of his employment by Mr and Mrs Nader who were then in partnership. Those injuries were very severe, as can be seen by the extent of the damages award which was finally made against Mr Nader alone in 1985, some five years after the accident.

8245 Mr Nader presented a bankruptcy petition shortly afterwards. I may say in passing that he had managed to dispose of practically all of his assets between the time of the accident and the time of the judgment against him. Although Mr Wakim's debt was approximately 84 per cent of the unsecured claims in the bankrupt estate, it was quite clear he was going to get virtually
8250 nothing. The estate was sequestrated. Mr Wakim then in 1986, realising that he would get little from the estate if matters stood as they were then, commenced proceedings against Mrs Nader in the common law division seeking damages for his personal injury. For some unexplained reason she was not a co-defendant in the first action. That non-joinder of Mrs Nader in
8255 itself was a cause of complaint against the solicitors who acted for Mr Wakim in the first proceedings.

8260 In 1987 there was a deed of indemnity entered into with the Official Trustee whereby Mr Wakim agreed to provide an unlimited indemnity to the Official Trustee for the Official Trustee to commence proceedings against Mrs Nader for contribution and indemnity in equity and under the *Partnership Act*. The result of that deed of indemnity would have been – and this is another basis upon which loss of claimed by reason of the wrongful acts of the three defendants – that if the Official Trustee had
8265 succeeded in recovering that contribution and indemnity in one form or another, and if the estate had thereby received at least the sum of \$50,000 which was being claimed, application was to be made by the Official Trustee under section 109(10) of the *Bankruptcy Act* for an order of the court entitling him to pay the whole of the proceeds to Mr Wakim in view
8270 of the fact that he had funded those proceedings and he was the only one interested.

8275 The Official Trustee commenced proceedings in the Equity Division of the Supreme Court against Mrs Nader seeking the various orders that had been contemplated. He then sought through the solicitors the advice of the barrister as to whether the Trustee would have any rights to seek contribution. The advice was given answering the question in the negative. If the Court is interested, the reasons for that advice and why it is wrong are set out in the written submissions.

8280 The Official Trustee then consented to a summons dismissing the proceedings against Mrs Nader – the chronology there is in error, it should be Mrs Nader – on the advice of the solicitors and the barrister. Thereafter, of course, the proceedings against Mrs Nader by the Official Trustee were stopped by judgment. From 1988 onwards, Mr Wakim sought then to recover his award of damages, or damages for its loss, from the legal advisers who had been responsible for the fact that by that time he had recovered nothing from his damages award against Mr Nader back in 1985. He reactivated the common law proceedings against Mr Nader, he sued the solicitors who had acted for him in the first proceedings, and eventually settled those two proceedings.

8295 Those matters are all relevant to all three claims, that is, both against the Official Trustee, and against the two prosecutors, because in each of the cases against those people Mr Wakim claims, amongst other losses, the expenses he incurred in trying to recover his award of damages either from Mrs Nader or from the solicitors who were responsible for the fact that he found himself in that unfortunate position. And in each of the three proceedings, liability for those losses – the same losses – is denied as a matter of causation based on an allegation that in settling the various proceedings against the solicitors and settling the proceedings against Mrs Nader, and so on, Mr Wakim was negligent in accepting less than he should have. So, the same issues as to liability, causation and quantum arise in all three proceedings. I will give your Honours a reference to the appeal book pages where your Honours will see that shortly.

8300 Now, your Honours, the proceedings against the Official Trustee were commenced in the Federal Court in July 1993 and shortly thereafter Mr Wakim commenced proceedings against the barrister and the solicitors. It was quite obvious to the court, no doubt, that the same questions or very similar questions, both of fact and law, arose in all three proceedings because all three proceedings were consistently listed together for directions. We have given your Honours the references to the occasions upon which that occurred.

8315 On some occasions only the proceedings against the official trustee and the barrister were listed together because of particular issues relating to

8320 those two proceedings, but, eventually, all three proceedings were listed for
hearing together on 6 October 1998. On 28 August 1998 all three
proceedings were listed together for directions to deal with, amongst other
things, an application by the barrister that evidence in one matter be
evidence in all.

8325 It is ironic that my learned friend, Mr Jackson, for the barrister,
contends before this Court that the proceedings against the barrister are
totally disparate from the proceedings against the Official Trustee, and the
proceedings against the solicitors, when it was the barrister's own
application - not only not opposing that the three matters be listed together,
but applying for an order that the evidence in one be evidence in all.

8330 That application was not dealt with by the court, simply because by
that stage the writs of prohibition had been applied for, so that the Federal
Court judge simply adjourned the matters – all three of them – pending the
outcome of the applications for prohibition.

8335 **KIRBY J:** If there were no cross-vesting legislation, how would this all be
untangled?

8340 **MR PALMER:** Mr Wakim would now be statute barred, as against both
the solicitors and the barrister.

8345 **KIRBY J:** But I am talking a step back from that. Leave aside his
particular problems. How would these claims, which fall otherwise in
different courts, be advanced in a way that would bring to conclusion the
various claims and counter-claims of the parties?

8350 **MR PALMER:** If it were possible to recommence proceedings in the
Supreme Court, the Supreme Court would probably have jurisdiction, were
it not for the fact that the actions against the prosecutors are statute barred.
What could be done is that proceedings could be commenced against all
three defendants in the Supreme Court; the Supreme Court having
jurisdiction under the *Bankruptcy Act* by virtue of section 27 of the
Bankruptcy Act, concurrent jurisdiction with the Federal Court. So, it
would mean that 18 years after his accident Mr Wakim has to start all over
again.

GAUDRON J: But that assumes that there is not a single matter.

8360 **MR PALMER:** Yes.

GAUDRON J: Or that there are not three matters within federal
jurisdiction, which is your argument. Your argument that you are now

addressing is that you do not need the cross-vesting legislation because it is all within federal jurisdiction anyway.

8365

MR PALMER: That is right. If we had to untangle it because we lost on all that, that is the way we do it, but we do not have to untangle the matters because, as Justice Gaudron says, in our submission at least, it is all one matter, one matter in controversy.

8370

Your Honours, I am very conscious of the limitations of time. The way in which the issue arising on the existence of the right which we seek to enforce, or at least the existence of the right in - - -

8375

GUMMOW J: Is this not a common substratum of operative fact or whatever that phrase is?

MR PALMER: Yes, there is this - - -

8380

GUMMOW J: You have not got that in your list in paragraph 5 on page 3 of the written submissions.

8385

MR PALMER: We would put it in two ways, but as Justice Gaudron says, it can be put one way, namely, that it is all one matter in which the Court has jurisdiction. We have made that point at the end of our submissions, in effect, under the heading "Accrued Jurisdiction". I will just indicate that that point is really made in paragraph 40 of our written submissions on page 15.

8390

KIRBY J: But if that is a good point you do not get to the constitutional validity of the cross-vesting legislation.

MR PALMER: Yes, but we do not have anything to do with the cross-vesting validity.

8395

KIRBY J: *Gould v Brown* - - -

8400

MR PALMER: Yes, it is a problem for others. The purity of our case means that *Gould v Brown* is a problem for others. Can I add simply a reference in further support of the point that we made in paragraph 40 of our submissions, to the *Philip Morris Case*, that is *Philip Morris Inc v Adam P. Brown Male Fashions* 148 CLR 457 at pages 491 to 492, and at 509. I do not need to take your Honours to the passage. It supports the proposition how a controversy can be regarded as one controversy, how a controversy is presented to the Court is really a matter of form, it is of no consequence. What the Court has to do is to determine whether there is one matter which involves - - -

8405

8410 **GUMMOW J:** Look at page 512. We are going round and round Mr Palmer, and wasting time. Look at page 512 in *Adam P. Brown*, the judgment of Justice Mason, the paragraph in the middle of the page, second-last sentence:

8415 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 –

et cetera. Well, is that not your submission?

8420 **MR PALMER:** Yes.

HAYNE J: It is either good or bad; you would have taken us to the facts.

8425 **MR PALMER:** Yes. Your Honours, I will be repeating myself if I continue. Can I just give your Honours references to the parts of the pleadings in all three proceedings in which the same loss is claimed and the same issues arise. Unfortunately, they do not appear in our written submissions, so if I can read them onto the record for convenience.

8430 The same loss is claimed against each of the prosecutors and against the Official Trustee and denied on the same grounds. The claim against the solicitors at application book, pages 10 to 11, paragraphs 31 to 33. In the solicitors defence that is put in issue at application book, page 16 to 18, paragraph 36, and particulars subparagraphs c), d) and e); statement of
8435 claim against the barrister, application book 28 to 30, paragraphs 28 to 30; the defence puts it in issue at application book page 33, paragraphs 30, 31, in particular paragraphs b) and d). In the claim against the Official Trustee, application book 47 to 49, paragraph 18, and particulars at page 49; and in the Official Trustee's defence at pages 57 to 59, paragraph 12 d) to n).
8440 Unless there is anything further, they are our submissions. If the Court please.

GLEESON CJ: Thank you, Mr Palmer. Mr Robertson?

8445 **MR ROBERTSON:** If your Honours please. I will need to take the Court to some 10 pages of the evidence in the *Amann and Gould* matter and also give your Honours references to three or four authorities. My submissions, for present purposes, for oral submissions, are limited to the question of relief if there is to be any relief as sought by the prosecutor applicants.
8450 Your Honours should have three affidavits which I will come to one or two paragraphs of in a moment. One affidavit of Michael O'Neill sworn on 13 November 1998 – that is the longer of the two affidavits and it has a large number of exhibits. Secondly, there is an affidavit of the Liquidator,

8455 Martin Russell Brown, affirmed on 25 November 1998, and thirdly, there is another affidavit of Michael O'Neill of 28 November 1998.

8460 Can I start by taking your Honours, and dealing first with Mr Gould's position? Can I take your Honours to volume 3 of the exhibits to Mr O'Neill's first affidavit – to volume 3, tab 63, to show your Honours what it was, and who it was, that was the subject matter of the earlier litigation. Your Honours have seen the questions that were asked by the Full Federal Court and answered by them and the fact that the appeal was dismissed in this Court.

8465 But the process that started the matter in the Full Federal Court on the last occasion, which ended up in this Court as *Gould v Brown*, is at page 320, looking at the numbering on the bottom right-hand corner, your Honours, 320, a notice of motion for a number of declarations, that is that the winding-up order:

8470 that the Federal Court of Australia ("the Court") had no jurisdiction to –

8475 make the winding-up order or to appoint

Martin Russell Brown as liquidator there of was invalid and has no force or effect.....no jurisdiction to conduct and hear examinations in connection with Amann Aviation.....

8480 4. An order setting aside all summonses issued by the Court in connection with the proposed examination –

8485 And, then, costs. and, if your Honours turn over two pages to 322 your Honours will see that Mr Gould is not, as my learned friend, Mr Rares, said, alone, if it makes any difference, but there were a number of other people who were also appellants in the Full Federal Court, or they were the moving parties of the notice of motion and also appellants in this Court.

8490 That is at page 320 and we submit that in relation to Mr Gould's position, whether it is described as abuse of process or res judicata or issue estoppel - your Honours will see this in our written submissions – the result is the same because what he seeks to do in the present proceedings is collaterally to attack the judgment of this Court and the fact that the addition of a party as an application, in our respectful submission, makes no difference follows from, amongst other places, your Honour
8495 Justice Gummow's judgment, when a Judge of the Federal Court in *Trawl Industries v Effem Foods* (1992) 36 FCR 406 and an appeal from that judgment was dismissed, (1993) 43 FCR 510 and at 510 of that report your Honours will see that an application for special leave to appeal to this

8500 Court was refused on 10 December 1993. Also in relation to Mr Gould's position, and this was something that I think your Honour Justice Gummow adverted to this morning in the course of argument, if I could take your Honours to the report of this Court's decision in *Gould v Brown* and to the judgment of your Honour Justice Gummow at 151 ALR 395 at 473.

8505 **HAYNE J:** What paragraph, please?

MR ROBERTSON: 244, your Honour. Where your Honour, on the view that your Honour was taking, was looking at the question of relief, and of course in all of this I am assuming that relief of some sort – assuming
8510 against ourselves, that relief of some sort is to be given - your Honours deal with questions 1 and 2, which is the winding-up order and the order appointing the respondent as a Liquidator and then, after setting out section 471(1) of the *Corporations Law* and referring to some authorities in
8515 footnotes 316 and 317, your Honour said:

In the administration of the winding up, the order must be taken as valid until discharged on appeal by a competent party. Moreover, no order for discharge, as distinct from relief which is declaratory in
8520 nature, has been sought in these proceedings. In all the circumstances, the interests of the appellants are sufficiently vindicated in this court by a favourable answer to question 3.

CALLINAN J: Mr Robertson, if there is non-compliance with the order by Mr Gould, what are the consequences? Will he be charged with
8525 contempt or is it an offence under the Act?

MR ROBERTSON: In relation to the examination order, your Honour?

8530 **CALLINAN J:** Yes.

MR ROBERTSON: Can I answer your Honour's question this way, as I will take your Honour to the evidence. The examinations of each of the applicants are finished.
8535

CALLINAN J: Complete. But he has not signed the transcript of his examination.

MR ROBERTSON: He is not required to.
8540

CALLINAN J: He is not required to.

MR ROBERTSON: He is not required to. I will take your Honours to the evidence, but - - -
8545

CALLINAN J: Just let me know these matters first, please. What further effect, if any, does the order have? Is there anything further at all to be done under the order?

8550 **MR ROBERTSON:** Under the order for examination?

CALLINAN J: Yes, and any associated order.

8555 **MR ROBERTSON:** No, nothing at all.

CALLINAN J: So, the question is as to what use, if any, the transcript could be put - whether it could be used against him in any proceedings, civil or quasi-criminal. Is that right?

8560 **MR ROBERTSON:** That is the highest that Mr Gould could put the question; yes, your Honour.

8565 **CALLINAN J:** In any subsequent proceedings, he might be able to take an objection that the material tendered against him, his transcript, was obtained illegally. Would that be possible?

MR ROBERTSON: Illegally in a broad sense.

8570 **CALLINAN J:** In the sense that it was under duress, under a form of duress, which - under a statutory provision which has since been held to be invalid, assuming that the case goes against him.

MR ROBERTSON: That would be as high as he could put it.

8575 **CALLINAN J:** Why would that not be a good ground for rejection of the material?

8580 **MR ROBERTSON:** If there were transcripts obtained in, broadly speaking, unlawful circumstances, then, as we have put in our written submissions, either section 138 of the *Evidence Act* or the common law equivalent, might provide some basis for submission.

8585 **CALLINAN J:** It would be discretionary whether it would be received or not?

8590 **MR ROBERTSON:** Yes. Our point about Mr Gould is, in a sense, a different point to the point about Mr Amann. I am not sure whether this is clear from our written submissions, but in relation to Mr Amann we say there is no threat to his rights, whatever. Your Honours will have seen that in relation to Mr Gould he is a defendant in some proceedings brought by the liquidator in the Supreme Court, so the possibility that your Honour

8595 Justice Callinan adverts to may be something that comes to pass, but our submission in relation to Mr Gould is that, however one describes it, he has exhausted his remedies in relation to the winding-up order and the appointment of the liquidator, and that therefore, what amounts to a collateral attack on the - - -

CALLINAN J: But there still may be proceedings against him.

8600 **MR ROBERTSON:** There may be, yes.

CALLINAN J: And if there are proceedings against him, then this point could arise in the same way as it may arise in *Amann's Case*.

8605 **MR ROBERTSON:** There are no proceedings against Mr Amann.

CALLINAN J: I thought you said there were. Did I mishear that?

8610 **MR ROBERTSON:** No, there are proceedings against Mr Gould.

CALLINAN J: I am sorry.

8615 **MR ROBERTSON:** What we submit in relation to Mr Gould is that by virtue of the steps that he has previously taken, he is not able to attack now, again, which is the self-same subject matter as he previously litigated in the Full Federal Court and in this Court, he is not now entitled to attack collaterally the judgment of this Court, or of the Full Federal Court for that matter.

8620 **CALLINAN J:** On the basis that there is some form of issue estoppel against him?

MR ROBERTSON: Yes, however one describes it.

8625 **CALLINAN J:** It is not of universal application, is it? There are exceptions. It is not a doctrine that has to be applied founded on justice, avoidance of oppression. Would it not be equally oppressive for somebody to suffer under legislation which had been held to be invalid as it would be oppressive to a defendant, as it were, to have to face further proceedings?

8630 **MR ROBERTSON:** We would submit not, your Honour, and in relation to the question, "Is it of universal application or not?", we would submit that if it is described as *res judicata*, as between Mr Gould and Mr Brown we would submit it is, then applying the decision of this Court in *Chamberlain v Deputy Commissioner of Taxation*, that principle does not admit of exceptions.

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8640 **CALLINAN J:** I think if you look at *Arnold v National Westminster* (1991) AC 93, there is a suggestion that there may always be the possibility of some exceptions.

MR ROBERTSON: My recollection is, your Honour, that that was a different sort of case.

8645 **CALLINAN J:** But so is this, is it not? This is a constitutional case with all sorts of special considerations. The very fact that this Court sat an even number of Judges previously makes the case fairly exceptional, does it not?

8650 **MR ROBERTSON:** We would submit not, your Honour, because one thing that is beyond doubt, in our respectful submission, is that there was an order of the Court, and the order of the Court was that the appeal be dismissed.

8655 **HAYNE J:** That was an order dismissing an appeal from answers to questions. Was an order ever made in the Federal Court disposing of the principal motion that gave rise to those questions?

8660 **MR ROBERTSON:** The answer to your Honour is no, except to this extent, that the order of the Federal Court is set out at tab 84 of the blue volumes. Your Honours will see at page 511 the order of the Federal Court and the answers to the questions are as your Honours have seen previously. They are at the foot of page 513.

8665 **HAYNE J:** That is the order disposing of the trial at separate question. Has there ever been an order disposing of the substantive motion or is that substantive motion, at least theoretically, still alive?

8670 **MR ROBERTSON:** The substantive motion, your Honour, in our submission, is disposed of in this way. If your Honour looks at page 513, question 5:

Are the Applicant Examinees –

8675 and I have shown your Honour the list of applicant examinees –

by their Notice of Motion –

which I have shown your Honours as well –

8680 a copy of which is Annexure “I”, entitled to any, and if so what, order or declarations?

Then the answer is at the top of the next page:

8685 Question 5: No.

So what your Honour puts to me is accurate but that was how the notice of motion was disposed of. That is: are they entitled to any relief on the notice of motion? Answer, no.

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HAYNE J: At least, as at present informed, it does not seem to me that that is a disposal of anything more than the separate questions. It might have entitled the parties as of course to orders disposing of the notice of motion but, at least, as at present advised, it does not seem to me to be a disposal of that notice of motion.

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MR ROBERTSON: Your Honours, if I can deal with that question this way: in terms of one thing that may be implicit in that, what were the answers to the questions, (a) a judgment, for the purposes of section 73 of the Constitution, the answer is clearly, yes, because *Swiss Aluminium* 63 CLR 421 was overruled. As to whether a refusal to make declarations, which is what that answer amounts to in substance, in our respectful submission, can found a res judicata or an issue estoppel, may we give to the Court - - -

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GUMMOW J: Just before you do that, Mr Robertson, where do we find the notice of motion?

MR ROBERTSON: The notice of motion I took your Honour to before – it is at volume 3 of the blue volumes, 320 at tab 63 - - -

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GUMMOW J: Yes, you took us to that.

MR ROBERTSON: Your Honour will recall that is the notice of motion with the Schedule A – what I might call appellant examinees.

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GUMMOW J: Yes. They look like - even though it is in a notice of motion, they look like prayers for final relief, do they not?

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MR ROBERTSON: Well, we would submit they are.

GUMMOW J: That, yet, has not been given. These are interlocutories.

MR ROBERTSON: In substance they are.

8725

GUMMOW J: What happened in the Full Court was some interlocutory procedure. It did not produce a final order. It could not. The final order would be on the motion.

8730 **HAYNE J:** And would be made by the single judge.

GUMMOW J: Exactly. Never happened.

8735 **MR ROBERTSON:** Well, it may not have happened, your Honour - - -

GUMMOW J: Once you start playing with these technical doctrines like estoppel, you tend to go in to a briars bush.

8740 **MR ROBERTSON:** Yes, your Honour. That is why we put it with various labels.

GUMMOW J: This doctrine you rely on relates to final orders, does it not?

8745 **MR ROBERTSON:** Yes, it does.

CALLINAN J: But, in any event, Mr Robertson, there is a passage at page 107 of *Arnold*, letter C, which says:

8750 It thus appears that, although *Henderson v Henderson* was a case of cause of action estoppel, the statement there by Wigram V.-C. has been held to be applicable also to issue estoppel.....there may be special circumstances where estoppel does not operate.

8755 Then, at page 109, his Lordship, Lord Keith of Kinkel, refers to the “possibility of a change in the law” or the making of a mistake by a judge in earlier proceedings and, perhaps, some analogy might be drawn between a decision which is, in a real sense, left important matters unsettled, and a subsequent decision which settles those matters. There is no need to read it
8760 but if you look at page 109 from about letter E to G.

MR ROBERTSON: Well, your Honour, we would submit two things about that decision. First of all, we would submit that the earlier passage is not consistent with the decision of this Court in *Chamberlain v The Deputy Commissioner of Taxation*. As to the second passage, *Arnold* was a case
8765 where the question really was, “Does a decision about the contract in the rent review clause, as to the past - - -

8770 **CALLINAN J:** I know that, but I think his Lordship was speaking generally in the passages to which I am referring.

MR ROBERTSON: Well, he may have been, your Honour, but in relation to the particular facts of the case, it was really whether the past decision and the assumption of the House of Lords was an erroneous past
8775 decision. Where that should continue to apply to the rent reviews into the

8780 distant future, as opposed to the past, and why we submit what Lord Keith of Kinkel says is distinguishable in the present case is, of course, what Mr Gould seeks to do is to reopen the past, in relation to the winding-up orders, the appointment of the liquidator, and matters of that sort as opposed to the facts of *Arnold* which were looking to the future.

8785 **CALLINAN J:** There is another case also, a matrimonial case *Thoday v Thoday* (1964) P 181, which again seems to be an exception to the principle, on the basis – a curious basis perhaps – that there is an investigative element involved in matrimonial proceedings.

MR ROBERTSON: Well, as I recall, that was the case in which Lord Diplock in fact approved or adopted the earlier learning in this Court.

8790 **CALLINAN J:** Yes, and discussed the various categories of estoppel.

MR ROBERTSON: But we do not put it any higher than that, your Honour. The crucial point here is trying to reopen the past, the past including the order of this Court in the *Gould v Brown* litigation.

8795 **CALLINAN J:** Thank you.

8800 **MR ROBERTSON:** So far as the facts are concerned in relation to Mr Amann, if I can deal with them as quickly as I may. In volume 1 of the blue book, your Honours –and I will do this as quickly as I can – at tab 18 to 19 – and this really goes to the question of Mr Amann’s delay in seeking certiorari, the delay being from the time of those original orders in 1992 really up to 1988 – but originally it was thought by the Liquidator - and this is page 75 of volume 1 - that Mr Amann was a likely source of
8805 informational material about the company. A letter was written to him, which is part of tab 18, page 75. Mr Amann says:

8810 we do not hold any records nor are we directors or hold any interest in the company since 1990 when the company was solvent.

And then at tab 19, page 88, there is a fuller explanation by Mr Amann as to the position. He resigned as a director on 15 December 1989. At paragraph 3:

8815 new Directors were appointed by the major shareholder Continental Venture Capital Pty Limited.

8820 He does not have any “company property; company records; company seal”. He has not:

conducted any business in the name of the company; held any or operated any bank accounts.

He has no records.

8825

we are unaware we are shown as Directors on the Australian Securities Commission records –

and then, lastly:

8830

Should you require any additional information or require the above to be given under oath we would be in a position to oblige.

8835 And then, if one goes to the body of the three affidavits that I gave your Honours brief references to, with Mr O'Neill's longer affidavit, paragraph 107, that sets out that "the Liquidator's examination" of Mr Amann were on "12 and 13 October 1998". And, in passing, that Mr Gould's examinations were on other dates.

8840 One then goes from there to the Liquidator's affidavit of 25 November 1988 and in paragraph 3, he has, "no present intention to conduct any further examinations". In paragraph 4 he says he has:

8845 no present intention to either seek to commence proceedings against Robert Otto Amann or to seek to join Robert Otto Amann as an additional defendant –

8850 Then in paragraph 6 he says he has "no present intention of requiring" Mr Amann or Mr Gould to sign any transcript. And then Mr O'Neill has sworn a further affidavit, if I can take your Honours to paragraph 8 on page 4 where the registrar, at the foot of page 4, paragraph 8, clears up a misconception that those on this side, the Liquidator, had that was an order for transcript. The registrar says:

8855 The only order I made was the usual order for adjournment.

At paragraph 12, therefore Mr O'Neill corrects his earlier affidavit and deposes to the fact that:

8860 The Registrar did not made "the usual order for transcript"-

8865 The usual order is at tab 93 – and I mention this because it was referred to in the written submissions on behalf of the prosecutors – page 578 of volume 4. The effect, therefore, of Mr O'Neill's second affidavit is that the only orders that had been made but which have now been vacated by the registrar are the order numbered 1, 2 and 3, second occurring. So what

happened was that the registrar handed to the witnesses the document at 578 but with the first two thirds of it crossed out.

8870 So, your Honours, in relation to the application for relief, which is at
page 2 of the application book, we would submit that for the reasons that
your Honour Justice Gummow gave in *Gould v Brown* in paragraph 244,
and if I might add this: that your Honour Justice Gaudron, at paragraph 90,
8875 agreed with Justice Gummow for the reasons that his Honour gave that the
order for Amann's winding up must be taken to be valid until discharged on
appeal by a competent party, and therefore it was inappropriate to answer
those questions. And your Honour Justice McHugh, although less
explicitly, in paragraph 146, which is on page 447 of 151 ALR, agreed with
the order proposed by Justice Gummow and we have assumed that that
8880 means your Honour was adopting what his Honour had said in
paragraph 244.

 So, for that reason and the other reasons that we have advanced, we
would submit that the writs of certiorari which are sought in (a) and (b) on
8885 page 2 of the application book would not go in any event. We also submit
that in each case there is nothing that any of the officers of the
Commonwealth propose to do, or to put it another way, there is nothing that
remains for them to do, the subject of the claimed writ of prohibition in
paragraph (c).

8890 One of the other matters that were put by Mr Rares in oral
submissions yesterday was a reference to section 600 of the *Corporations
Law* and, in particular, he took your Honours to what he described as the
interest in Mr Amann of the Liquidator, as demonstrated, so he put it, by
8895 page 354 of volume 3 of the blue book. I will not take your Honours
through the details of it, but if I may give your Honours these page
references which show, not only is that a three-year-old letter by the
Liquidator asking what was then the ASC, what they might do about it, but
the other references I am about to give your Honours show that that request
8900 by the Liquidator did not bear fruit. There is no intention, so far as one can
see, by the ASC to do anything and, of course, the ASC is not a party to the
present proceedings anyway. But, if I can give your Honours the references
as follows to the same exhibits: 359 was the beginning of the
correspondence - 355, especially 359 - that was the original request to the
8905 ASC to look at the question; 362 - the ASC says no; 353 and 354 is where,
in October 1995, the request was repeated; and then 395, 430, 440 and 444
makes it clear that that subject matter was dropped and the correspondence
went to other matters.

8910 We submit that on any view certiorari is discretionary. That
Mr Amann has delayed, in circumstances where the Liquidator's duties
have been performed. We have raised in the written submissions a question

8915 of whether section 473(9) of the *Corporations Law* would apply, in any
event, to validate the Liquidator's actions. The authority on that question to
which we wish to give the Court a reference is to a decision of the Western
Australia Supreme Court called *Re Kyra Nominees* (1980) 5 ACR 60 at
page 64. I do not want to take your Honours to it. In relation to certiorari
only as well, we put in the written submission, we draw attention to
8920 Order 55 rule 17 of the High Court Rules which prescribes a prima facie
period, at least of six months.

8925 In relation to prohibition, we submit that the current authority in this
Court – and I will only give your Honours perhaps page references to it – is
that the grant of prohibition is relevantly discretionary. The references we
wish to give your Honours are to some pages further to the pages we have
put in the written submissions of *Reg v Ross-Jones; Ex parte Green* (1984)
156 CLR 185; at page 194, Chief Justice Gibbs, 203 which is
Justice Mason, 214 to 215 in the joint judgment of Justices Wilson and
Dawson, 217 to 219 which is the judgment of Justice Brennan, and 225
8930 which is the judgment of Justice Deane. Justice Brennan at 218 says - - -

GLEESON CJ: We will read these references for ourselves.

8935 **MR ROBERTSON:** Thank you, your Honour. His Honour says that the
jurisdiction in relation to the sphere of Federal Courts is discretionary.
Then in *Reg v Gray; Ex parte Marsh* (1985) 157 CLR 351 at pages 375,
381 to 382 and 383 to 384. Thirdly and penultimately, a decision of
Justice Brennan sitting as a single Judge in *Re Griffin* 167 CLR 37 at
page 41 where his Honour said:

8940 The jurisdiction of this Court under - - -

GLEESON CJ: We will read these references for ourselves.

8945 **MR ROBERTSON:** As your Honours please. If I could also draw the
Court's attention to a decision on this point of the nature of the discretion of
the New South Wales Court of Appeal in *Hill v King* 31 NSWLR 654. That
is where the report begins. So, in our respectful submission, in relation to
Mr Gould, we do not want to repeat anything that we have said but the
8950 discretionary remedy should be refused. In relation to Mr Amann in
summary, we submit he is too late for certiorari. There was no appeal by
him from the winding-up order or the appointment of the Liquidator. The
examination orders are spent.

8955 **GAUDRON J:** But he had no right of appeal, did he? He was not a
director, was he, or a shareholder?

MR ROBERTSON: There was some question about whether he was a director.

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GAUDRON J: He might not even have known about the winding up.

MR ROBERTSON: It would have been advertised in - - -

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GLEESON CJ: He might be a subscriber to the Government Gazette.

MR ROBERTSON: Well, your Honour, there are prescribed ways for advertising winding-up orders, but the point is that at some stage he knew about it but there has never been any application by him or the other applicant or applicants to set aside that winding-up order at all.

8970

And we submit that as things stand, no legal rights of his are affected and on that basis the claimed relief should be refused, not only for those reasons but also that if certiorari is refused and those founding orders subsist then, in our respectful submission, it would put the Liquidator in a very unusual, not to say impossible position, to be restrained from taking any further steps in the winding up in a winding up that remains on foot.

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HAYNE J: As to the finality of those orders reference might usefully be made to Order 29 rule 4 of the Federal Court Rules.

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MR ROBERTSON: If your Honour pleases. I am not sure whether I ended up – I think I was answering a question at the time – but did I give your Honours a reference to the decision of the Privy Council in *Dunlop v Woollahra Municipal Council* (1982) AC 158 as to the status of declarations or the refusal of declarations as final orders. If the Court pleases.

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GLEESON CJ: Thank you. Yes, Mr Grieve.

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MR GRIEVE: Your Honours, we adopt the submissions advanced by the Solicitors-General for the Commonwealth and the Northern Territory on the validity point and have little to add. The starting point, we submit, is the preamble to the *Corporations Act* 1989 which describes it as:

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An Act to make a law for the Government of the Australian Capital Territory in relation to corporation, securities and futures industry, and for other purposes.

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It was an Act of the Commonwealth Parliament, not of the ACT Parliament. We submit that preamble makes plain that the Parliament had resort to section 122 for the purposes of making the law. When one comes to

section 51 one finds, initially, of course, in subsection (1) the conferral in terms of jurisdiction:

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on the Federal Court with respect to civil matters arising under the *Corporations Law* of the Capital Territory.

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Under subsection (2) the conferral of jurisdiction with respect to the same matters:

on the Supreme Court of each State and the Capital Territory –

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In our submission, the conferral of jurisdiction under subsection (1) is an exercise of the power conferred by section 77(i). Read in conjunction with section 76(ii) we submit that the conferral under subsection (2) is an exercise of the power conferred by section 77(iii). The first submission that we put with respect to subsection (1), of course, puts us in collision with the applicants on the proposition that cases such as *Spratt v Hermes* and *Falconer* have established as a matter of principle that section 76(ii) is exclusive of section 122. In our submission, for the reasons advanced by the Solicitor-General for the Northern Territory in particular, that intention by the applicants is unsound and I will not take up time to go back over the passages in question in those two cases. They are all aptly set out in the Solicitor-General for the Northern Territory's written submissions.

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We submit the question in the application for special leave is whether or not section 51(1) is valid and in turn, whether or not it was competent of the Federal Court to summons officers and former officers of the company for examination under section 596A of the *Corporations Law*, and order the production of documents under section 597(9) of that law. If the contention that we have made with reference to section 122 in conjunction with section 77(i), 76(ii) is right, the answer must be plainly, yes.

9035

The applicants concede that the powers to summons witnesses, et cetera, are powers of a judicial nature. There therefore appears to be no question as to whether or not the validity of section 51(1) is in question for want of observance with Chapter III in that respect.

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The applicants rely, of course, on the fact that certain provisions of the Division 1 of Part 5.9 of the *Corporations Law* appear on their face to empower the Federal Court to conduct examinations otherwise than in aid of a winding up. The applicants maintain that ex hypothesi that involves the exercise of non-judicial power. With respect, we join issue with that. In our submission, the example offered by the Solicitor-General for the Commonwealth that such an examination could be in the nature of preliminary discovery illustrates that it is not axiomatic; that such inquiries

9050 or examinations at the instigation of the ASIC would necessarily involve a non-judicial power.

9055 It is to be borne in mind, we submit, that in this particular context, the Court's role in relation to companies generally is perhaps a little different than that which it ordinarily exerts in relation to litigants. During the course of argument, the question was posed by Justice McHugh as to whether or not the courts giving advice to a trustee would be in relation to a matter. We submit that it would. Similarly, the court's approval, or confirmation of a capital reduction of a company, would be in relation to a matter, albeit that there was not a pending....between two antagonistic
9060 litigants.

9065 For those reasons, we submit that it is inappropriate to assume that, for example, section 596A would, of necessity, where invoked on the application of the ASIC de hors a liquidation, involve something other than the exercise of a judicial power. In some, we submit that that, in part, at least, would involve a consideration of the circumstances giving rise to the ASIC's application.

9070 If that is right, if it is right to say that to some degree at least the circumstances of the application bear upon the question of judicial power or no, then we submit that question ought to be dealt with on a case-by-case basis and not determined in these proceedings. On the other hand, if we are wrong in that submission and the Court takes the view that such an examination would as a matter of law and regardless of circumstances
9075 involve an administrative or non-judicial activity, the question then becomes one of application of section 15A of the *Acts Interpretation Act*. In our submission, the choice that the Court is confronted with under section 15A is a fairly straightforward one, should it, as the applicants contend, excise section 51(1) altogether and the references to the Federal and Family Courts in section 58AA of the *Corporations Law* or should it
9080 simply read down provisions such as section 596A so as to restrict the Federal Court's powers under those sections as to be exercised judicially and not otherwise?

9085 Now, the question in the ultimate is: which of these approaches would best preserve the legislation in accordance with the Parliament's evident intention? That intention was clearly enough that the Federal Court should have jurisdiction to make orders in relation at least to companies incorporated in the Australian Capital Territory. The objectives, as the
9090 Solicitor-General for the Commonwealth pointed out, sought to be achieved doubtless also included the elimination, or at least substantial reduction of, jurisdictional disputes. In our submission, those objectives may also have included the notion of a uniform approach by the courts to substantive issues arising under the legislation.

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In that regard there has already been developed a substantial body of case law to which the Federal Court has made a significant contribution. It may well have been the Parliament's apprehension that the doctrines of comity between State Supreme Courts were perhaps insufficient to bring about the uniformity of approach which this legislation calls for. However, in the ultimate, we submit that the presumption that section 15A allows is such that one need not speculate about what was the precise objective sought to be achieved, or objectives sought to be achieved, by the Parliament. The presumption operates, in our submission, in such a way that it is incumbent upon the applicants to demonstrate proof positively that the statute, unless construed or written down in the way for which they contend, would operate discordantly with the Parliament's intention. That they have not done. Those are our submissions, your Honours.

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GLEESON CJ: Thank you, Mr Grieve. Yes, Mr Jackson?

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MR JACKSON: Your Honours, may I deal first and very briefly with the question of reopening. We would submit that the approach to be taken is that referred to by the Court in *Commissioner of Taxation v St Helen's Farm* (1981) 146 CLR 336. Your Honours, we are glad to say, without going to the case in detail, that there are actually five, not four Justices, who appear to have adopted the view for which we contend in our written submissions. They are Chief Justice Barwick at page 348 about point 8, Justice Gibbs at 354 point 8, Justice Stephen at 364 point 6, Justice Aickin at page 437 point 7 and Justice Wilson agreed with Justice Aickin. Even Justice Mason at page 370 about point 4 had a reservation in relation to constitutional cases.

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Could I then go to the question of enforcement. Your Honours have been taken to section 14 of the New South Wales cross-vesting law. Section 14(1) of that makes it absolutely clear, in our submission, that the intention, if I could put it that way, is that the judgment is to be enforceable as if it had been given entirely in the exercise of federal jurisdiction. That that is so is apparent from the terms in which section 14(1) is expressed. The next matter to which I would refer - - -

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GUMMOW J: That was 14(1) of which Act?

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MR JACKSON: That is the New South Wales Act, your Honour. It:

is enforceable in the State as if the judgment had been given entirely in the exercise of the jurisdiction of that court apart from any such law -

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being a cross-vesting law.

9145 Your Honours, turning to the question of evidence, your Honours will see that section 11(1)(c) deals with that topic. Could we invite your Honours to – maybe questions of validity perhaps may arise in relation to 11(1)(c) as a quite separate matter, but could we invite your Honours to note in relation to it that section 13 of the Cross-vesting Acts limits the ability to appeal on decisions as to which rules of procedure and evidence are to apply and also that an appeal does not lie in relation to transfer or removal under the Act.

9150

Could I come then, your Honours, to the two parts of section 9(2)(a). The first part – that is -

9155 exercise jurisdiction.....conferred on that court by a provision of this Act –

9160 appears to apply to two provisions, we would say. Our learned friends for the Commonwealth say section 4(3) as well, but it may well be that 4(3) is intended to be dealt with by section 9(2)(b) rather than 9(2)(a). It seems to apply to two provisions: section 4(2) on the one hand, to which your Honours have been taken, and on the other hand section 7(5) in relation to some appeals.

9165 Your Honours, I will not go to the detail of them but your Honours will see that the Federal Court is intended to be given some jurisdiction pursuant to section 7(5). It seems really apparent, in our submission, that the first part of section 9(2)(a) is directed to authorising the exercise of jurisdiction. We would submit why would not the second part be construed similarly?

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9175 Your Honours, could I just mention – and I will endeavour to do so very briefly indeed – something further about Nauru. There is an agreement between Australia and the Republic of Nauru in relation to the exercise of jurisdiction. Your Honours can see it in the schedule to the Nauru High Court Appeals Act 1976. The legislation is legislation of a typical – at least for that time – form being legislation which, in relation to an external affair, would approve an agreement entered into with another nation and then enact something pursuant to it. The legislation approves the agreement – that is section 4. It implements it by conferring jurisdiction on the Court – that is section 5(2). It does so directly. Now, your Honours, it is quite apparent, prima facie at least, that the law appears to be an endeavour to exercise a legislative power conferred by one or both of section 51(xxix) or section 51(xxx).

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9185 **KIRBY J:** Presumably there was an Act in the legislature of Nauru?

MR JACKSON: Yes, your Honour, I think that is so because there is a reference to provisions of the law of Nauru.

9190 **KIRBY J:** And it is only the jurisdiction of the courts of Nauru that is conferred on this Court?

MR JACKSON: No, your Honour, with respect. Jurisdiction is conferred on the Court by section 5(2) of the Act. The jurisdiction - - -

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KIRBY J: That is true, but Nauru is a foreign country. It has nothing to do with us. We would not be exercising that jurisdiction unless it were conferred by the law of Nauru.

9200 **MR JACKSON:** Well, with respect, your Honour, there is power in section 51(xxix), for example, and 51(xxx) to make laws with respect to external affairs. If the external affair be one that there is an agreement arrived at between Australia and Nauru, two countries, that Australia is to have certain functions in relation to Nauru, then legislation implementing
9205 that takes effect as something which is a law of the Commonwealth and derives its validity from the Commonwealth law.

KIRBY J: In any case, you are supporting the validity of the law?

9210 **MR JACKSON:** Your Honour, I had not quite got to that. What I was going to say, your Honours, was this, that the provisions however of section 51(xxix) and 51(xxx) are expressed as the opening words of section 51 say, "subject to the Constitution". And your Honours, if the jurisdiction that is sought to be conferred on this Court by section 5(2) of
9215 the Appeals Act is treated as true, in a sense appellate jurisdiction, it may have difficulties with section 73. On the other hand, if it is to be treated as being original in substance, though expressed to be appellate in form, section 76(ii) would be applicable. It would not matter that it related to matters external to Australia because section 51(xxix) and (xxx) are
9220 concerned with topics of that nature.

Your Honours, could I come then to the question of a reference of power. Your Honours, once again one hears of the supposed difficulties in a reference of powers under section 51(xxxvii). Three difficulties,
9225 your Honours, appear to be suggested. The first is the assumption that one would have to give and put in a broad form the whole of the topic. But your Honours, it is purely a question, with respect, of drafting – I do not mean to diminish it by putting it that way. The ambit of the matter referred pursuant to that provision can be wide or narrow. It just depends on the
9230 ambit of the subject matter that it is decided to refer.

9235 The second matter, your Honours, is this. It is suggested that to do so would conflict with the negative implication of Chapter III. But, your Honours, the negative implication arises because of the statement of some powers and the fact that others are not stated. If specific legislative power is referred, the basis for the relevant negative implication would disappear.

9240 Your Honours, the third feature that is referred to is that it is said by our learned friends for the Commonwealth that the matters referred have to be, and the word used was “substantive” matters, whatever that may mean. But your Honours, if I could deal with it on two bases, that seems to be belied somewhat by, for example, section 51(xxiv) and, to a lesser extent, section 51(xxv).

9245 What I mean by that is that if one looks at section 51(xxiv), it is dealing with matters which are fundamentally procedural, if one is drawing a distinction between procedure and substance. Section 51(xxv), not quite to the same degree. The other feature of it is this: the terms of section 77, itself, make it apparent that jurisdiction, and the conferring of jurisdiction, is a proper subject of legislative power. Our submission is that the suggested difficulties are created in relation to the reference of power, in truth, do not exist.

9255 Something was said about co-operative schemes, and the aggregation of powers. Of course, one has to have powers to aggregate them. It is not just governments which have an interest in power. So too, do the people in being able to require that their rights, and their powers under section 128, be observed. Governments, cannot, by agreement, cross out prohibitions in the Constitution, whether they be express or implied.

9260 The next matter to which I wish to refer is this: it is said that a decision in our favour on this issue would affect various cases. Decisions in major constitutional cases frequently do so. *Boilermakers Case* has been referred to.

9270 **GUMMOW J:** Yes, the section which dealt with that, the consequences, is section 49 of the *Conciliation and Arbitration Act* 1956, and it deemed orders previously made to have certain character, and so on and so forth.

9275 **MR JACKSON:** Your Honour, *Cole v Whitfield* resulted in various new arrangements having been made. So, too, the excise cases last year, *Ha v New South Wales* and *Walter Hammond v New South Wales*, where previous sources of large sums of revenue which had been supported, as it were, by decisions of the Court over a number of years, were then put in jeopardy. Sometimes, as in part of *Ha* and *Walter Hammond*, it is governments which seek the overturning.

9280 Could I come then, your Honours, to the essence of the case on this
issue, and that is, in our submission, where is the relevant Commonwealth
legislative power? Your Honours, one sees in that regard, in our
submission, a mildly amusing paradox: no, says the Commonwealth, on the
one hand, there is no relevant negative implication to be drawn from
Chapter III but, when it comes to identifying the source of power to confer
9285 the jurisdiction, what is it? And, your Honours, the answer is to be found in
an implied incidental power. So that, your Honours, one sees it as being a
case where a new implication is relied upon. If one asks, "Incidental to
what?", it is not, in our submission, incidental to any legislative power, it is
not incidental to any executive power, and to what aspect of the federal
9290 judiciary, your Honours, our submission is that it is incidental to no more in
reality than the fact that it is there.

KIRBY J: Well, it is suggested that it is incidental to the efficient
economic and expeditious disposal of matters within the federal judiciary.

9295
MR JACKSON: Well, your Honour, the federal judiciary is a judiciary
which, in our submission, exists to exercise such jurisdiction as is conferred
upon it by the Parliament of the Commonwealth pursuant to the powers
under section 77(i) and in relation to that, that is something that it does and
9300 it does not require anything more to do that; that is its function under the
Constitution, in our submission.

 Your Honours, the next thing to which we would wish to refer is this,
that it appears to be accepted that a State law cannot by itself operate to
9305 confer jurisdiction. That makes a provision like section 9(2) necessary and
it is that provision, the law of the Commonwealth, which creates the
relevant authority of the Federal Court and the duty to exercise it.

 Your Honours, without that, the legislation of the States is not
9310 merely officious, in a sense, but also inefficacious. Your Honours, once
one gets to the point that it is the federal law which requires that the
jurisdiction be exercised or permits its exercise, that really takes one into
federal jurisdiction. Your Honours, we would submit that means that one is
in the area of Chapter III. Your Honours, our learned friends' arguments
9315 rather tend to apply a kind of new assigning to the earlier cases, *Re*
Judiciary and Navigation Acts and the *Boilermakers' Case*, and to what
they mean. Could we just invite your Honours to note that that course was
not adopted by Justice Jacobs, with whom Justice McTiernan agreed, in
Commonwealth v Queensland 134 CLR 325 at the bottom of the page and
9320 at the top of the next page, your Honours. I will not read your Honours the
passage.

9325 Could I just invite your Honours to note one other matter and that
 concerns a part of the Commonwealth's written submissions, and also oral,
 the written part being in paragraph 4.13(a). We would invite your Honours
9330 to note that the Commonwealth's submissions in paragraph 4.11 which are
 at page 15, after what we have described as the new assignment, as it were,
 of the *Boilermakers' Case*, suggest that Chapter III is not an exhaustive
 statement of the judicial power. But the very next page of the submissions,
9335 paragraph 4.13(a), rather tolls as a virtue of the cross-vesting scheme, that it
 confers jurisdiction only with respect to "matters". But, your Honours, any
 need to do that could come only, in our submission, from Chapter III
 because that is where the concept of "matters" comes from. Could we also
 give your Honours a reference to an obiter dictum of Chief Justice Barwick,
 with whom Justice McTiernan agreed in an earlier case, *Commonwealth v*
 Rhind (1966) 119 CLR 584 at 599. I said an obiter dictum.

9340 The question which the court ultimately found it unnecessary to
 answer was whether, if section 2(a) of the *Landlord and Tenant Act of New*
 South Wales operated to prevent the Commonwealth having access to that
 court, it was a valid law, the court exercising, relevantly, federal
 jurisdiction. I am sorry, your Honours, I do not think this is on our list. At
 page 599, about point 3 on the page, his Honour said:

9345 If it had sought to do so in relation to the Commonwealth, it –

 and by that, I mean, your Honours, seeking to deny the Crown access to the
 Supreme Court by way of an action of ejectment.

9350 would, in my opinion, have been plainly attempting to do something
 beyond the power of the State legislature, namely, to determine who
 should have access to a court invested with federal jurisdiction and,
 in particular, to determine that the Commonwealth should not have
 such access –

9355 but the reference, your Honours, to the determining of who should have
 access to a court exercising federal jurisdiction would apply equally, of
 course, to the Federal Court.

9360 Your Honours, I could also say one further thing on this issue and
 that concerns the question of consent. Your Honours, one sees the terms of
 section 9(2) being referred to, in a sense, as a consent. I have argued about
 the question of construction earlier and I will not repeat that but may I just
9365 say in relation to it that it is interesting to note that the Constitution where it
 speaks of things that may be done with consent in terms of the exercise of
 legislative power does tend to say so specifically.

9370 Could we give your Honours three references: section 51(xxxii),
51(xxxiii) and, of course, section 91 which is the provision referred in the
Seamen's Union of Australia v Utah Development Company in which there
is a possibility that the States may be liberated from the prohibition against
excise and bounties.

9375 **McHUGH J:** Well, it is not only in 91, there is 114 and there are also
provisions which enable the States to interfere in Commonwealth affairs,
namely, Commonwealth elections have sections 9, 10, 25, 29, 30, those
sections - - -

9380 **MR JACKSON:** Yes, your Honour, I was simply seeking to identify a
sum in relation to legislative power.

KIRBY J: This is expressio unius?

9385 **MR JACKSON:** Indeed, your Honour, yes. The implications one draws
from a Constitution in relation to a government of limited power.

9390 Your Honours, in relation to the question of jurisdiction, that is an
issue on which we will be happy to put our submissions in relation to the
matter on paper tomorrow, for example, if the Court is happy to - - -

GLEESON CJ: Within five working days from today?

9395 **MR JACKSON:** I was going to suggest tomorrow, your Honour, but five
working days. Your Honour, those are our submissions.

9400 **GLEESON CJ:** Thank you, Mr Jackson. Now, Mr Rares and
Mr Douglas, we were so impressed with the quality of your written
submissions that we thought that it might be a good idea – if this was not
unsatisfactory to you – that you should put those in writing within five
working days from today. Is that satisfactory?

9405 Very well. We are obliged to counsel for their arguments, and we
will reserve our decision in this matter.

AT 4.33 PM THE MATTER WAS ADJOURNED