STATE COURTS AND FEDERAL ADMINISTRATIVE LAW: PROBLEMS OF FEDERAL JURISDICTION

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1 RATIONALE FOR JURISDICTION OF THE FEDERAL COURT

From the time a Federal Court was first proposed, questions about its jurisdiction, and its relationship with state courts have dominated discussion.[1] While it is not proposed to review this extensive literature in detail, it is apposite to draw on some insights from an article by Sir Garfield Barwick published in 1964 at an early stage of this debate.[2] First, it was suggested that the matters in which a Federal Court should have jurisdiction be in some way special. This special element could, it was said, consist of either a distinctive and separate body of law, a desire for uniformity in the interpretation of Commonwealth law, or the character of a party involved in a matter (*eg* the Commonwealth or a State).[3] Secondly, and of major importance to the present consideration of the exclusive jurisdiction of Federal Courts, Barwick stated:

> My own preference for a new federal court rests on a view that most of these matters present characteristics sufficiently 'special' to make a Federal Court the most appropriate forum. Whenever it can, therefore, I think the Parliament should make the jurisdiction it gives any such new federal court, exclusive.[4]

Later in the article, the prospect of the Commonwealth enacting general legislation relating to administrative law was referred to, together with the recently conceived but then unborn Commonwealth restrictive trade practices legislation. It was suggested that these areas of legislation, if and when enacted, would be appropriate jurisdictions to invest in a Federal Court.[5]

A Federal Court with a general jurisdiction was established by legislation in 1976, after three previous legislative attempts had been unsuccessful.[6] The element of distinctive Federal quality, (or special nature as Barwick put it) was described by the Attorney-General, Mr Ellicott in his Second Reading Speech on the Federal Court of Australia Bill:

> The government believes that only where there are special policy or perhaps historical reasons for doing so should original Federal jurisdiction be vested in a Federal Court.

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[1] The initial contributions to this discussion were M H Byers and P B Toose, "The Necessity for a New Federal Court" (1963) 36 ALJ 308 and Sir Garfield Barwick, "The Australian Judicial System: The Proposed New Federal Superior Court" (1964) 1 F L Rev 1. A recent discussion is also by M H Byers, "Federal and State Judicatures" (1984) 58 ALJ 590.

[2] Barwick, *supra* n 1. It should be noted that the article was prepared while Sir Garfield Barwick was Attorney-General, but was published after his appointment as Chief Justice.

[3] *Ibid* 3.

[4] *Ibid* 9.

[5] *Ibid* 18, 19.

[6] J Crawford, *Australian Courts of Law* (1982) 127.

> This has been so in relation to industrial matters, bankruptcy and trade practices. It is also appropriate that judicial review of administrative decisions by Commonwealth officers be vested in a Federal Court.[7]

While history could be invoked as a justification for jurisdiction being conferred in industrial matters and bankruptcy (the Commonwealth Industrial Court and the Federal Court of Bankruptcy being absorbed into the Federal Court of Australia), the trade practices jurisdiction had only been in existence since 1974, and special policy reasons were not advanced to justify its inclusion in the exclusive jurisdiction of the Federal Court. Nor, at that stage, was the proposal to vest the judicial review legislation exclusively in the Federal Court elaborated.[8] This article will concentrate on the latter jurisdiction. Developments in this field were surveyed in 1984 by LJW Aitken and Professor Enid Campbell.[9] This article examines the policy considerations behind vesting judicial review of administrative action in a Federal Court. It also updates case law and legislative developments in this area.

2 JUDICIAL REVIEW OF FEDERAL ADMINISTRATIVE DECISIONS

The enactment of the Administrative Decisions (Judicial Review) Act 1977 (Cth) resulted from a number of reviews of federal administrative law. It is apparent from previous references to Sir Garfield Barwick's article that reform of judicial review of federal administrative decisions was under consideration as long ago as 1963. And it is also important that consideration was being given at that time to where jurisdiction in matters of judicial review should be reposed.[10]

The first major review of this area was in the Kerr Committee Report.[11] It considered the possibility of such jurisdiction being conferred on either the High Court, State Supreme Courts, or the (then) proposed Commonwealth Superior Court.[12] The High Court was rejected on grounds of the importance of proceedings, the workload of the High Court, costs, the specialist role of administrative review, and the function of the High Court as an ultimate appellate court.[13] In relation to State Supreme Courts, it was pointed out that the jurisdiction of the High Court had been made exclusive of the State Supreme Courts in prerogative writ matters by s 38(e) of the Judiciary Act 1903 (Cth), presumably on the ground that judicial review of decisions by Commonwealth officers should be by a Federal and not a State Court. It was suggested that good

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[7] House of Representatives, *Hansard*, 21st October 1976, cited in C Saunders, "A Single System of Courts for Australia", Working Paper annexed to the Report of the Judicature Committee of Standing Committee D, Australian Constitutional Convention 1977, 62.

[8] *Infra* n 20.

[9] LJW Aitken, "State Courts and the Administrative Decisions (Judicial Review) Act" (1984) 7 UNSWLJ 254; E Campbell, "State and Federal Judicial Review of Administrative Action" in Monash University, *Advanced Civil Litigation Series, Book One — 1984*, at 58 (See, on the present topic, 68–71).

[10] *Supra* n 5.

[11] Commonwealth Administrative Review Committee (Kerr Committee) Report (1971): Parliamentary Paper 144 (1971).

[12] *Ibid* paras 240–247.

[13] *Ibid* para 241.

reasons would be needed for abandoning that policy.[14] It was also considered that, even if the Supreme Courts established administrative divisions, they would not be able to develop an expertise in this area, and that lack of uniformity of approach may present difficulties.[15]

In the absence of an alternative forum, such as the Superior Court, the Kerr Committee considered giving jurisdiction in judicial review of administrative decisions to State Supreme Courts in preference to vesting it in the High Court.[16] However, the preferred position was for such jurisdiction to be vested in either the proposed Commonwealth Superior Court (*ie* the Federal Court) or, if that court was not established, an Administrative Court, as these bodies could develop an appropriate expertise and "be in a position to work creatively in the administrative area".[17] This proposal as to the vesting of jurisdiction was also recommended in a further report on Prerogative Writ Procedures (Ellicott Committee) where it was stated that it was desirable that supervisory review be channelled away from the High Court, and that that court ought to have an appellate and stated case jurisdiction, by way of supervision of applications for review.[18]

The legislation which was drafted to implement the recommendations of the Kerr Committee and the Ellicott Committee was considered by the Administrative Review Council prior to its enactment in 1977, by which time the Federal Court had been established. The Administrative Review Council considered the question of where the judicial review jurisdiction should be vested, and reported:

> . . . jurisdiction under the proposed Act should be vested exclusively in the Federal Court. In the Council's view it would be anomalous to vest jurisdiction under this Act in State Courts. The Federal Court, which already exercises appellate jurisdiction in some cases decided by State Courts and various Commonwealth tribunals, is the appropriate court to provide judicial review of Commonwealth administrative actions. The Council considered that the vesting of jurisdiction in the Federal Court should aid the development of uniformity and precision in the law and practice of judicial review. The proposal does not affect in any way the jurisdiction vested in the High Court by the Constitution.[19]

This recommendation was adopted when the Administrative Decisions (Judicial Review) Act 1977 (Cth) was introduced into Parliament. The Attorney-General, Mr Ellicott, stated:

> The Bill is intended to provide a comprehensive procedure for judicial review of Commonwealth administrative action taken under statutory powers. Clause 9 of the Bill is intended to ensure that this jurisdiction is exclusive of the jurisdiction of State Courts. The Judiciary Act has long embodied the policy that actions of Commonwealth officers should not be subjected to review by way of mandamus or writ of prohibition in State Courts — s38 of the Judiciary Act.[20]

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[14] *Ibid* para 242.
[15] *Ibid* para 243.
[16] *Ibid* para 244.
[17] *Ibid* para 246.
[18] Prerogative Writ Procedures: Committee of Review (Ellicott Committee) Report (1973): Parliamentary Paper 56 (1973), para 47.
[19] Administrative Review Council: First Annual Report (1977), para 62.
[20] House of Representatives, *Hansard*, 28th April 1977, 1396, quoted in G A Flick, *Federal Administrative Law*, 2nd ed. 1511.

Reference has already been made to the Second Reading Speech on the Federal Court Act, where it was pointed out that jurisdiction would only be vested in the Federal Court for either special policy reasons or historical reasons.[21] In the Second Reading Speech, it can be noted that conferral of this jurisdiction was justified by reference to considerations of policy and history.

Section 9(1) of the Administrative Decisions (Judicial Review) Act1977 (Cth) provides:

> 9(1) Notwithstanding anything contained in any Act other than this Act, a court of a State does not have jurisdiction to review —
> (a) a decision to which this section applies that is made after the commencement of this Act;
> (b) conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision to which this section applies;
> (c) a failure to make a decision to which this section applies; or
> (d) any other decision given, or any order made, by an officer of the Commonwealth or any other conduct that has been, is being, or is proposed to be, engaged in by an officer of the Commonwealth, including a decision, order or conduct given, made or engaged in, as the case may be, in the exercise of judicial power.

Section 9(2) defines certain terms in s9(1). It provides that a decision to which this section applies is one to which the Act applies, or which is excluded from the Act. "Officer of the Commonwealth" has the same meaning as in paragraph 75(v) of the Constitution. "Review" means the grant of an injunction, the grant of a prerogative or statutory writ, or order of like effect (other than a writ of habeas corpus) or a declaratory order. Section 9(3) excludes decisions of the National Companies and Securities Commission, while s 9(4) provides that the section does not affect the jurisdiction of State Courts under the Bankruptcy Act 1966 (Cth), the Federal Court Act 1976 (Cth), or in relation to proceedings pending before the commencement of the Act.

It will be noted that this provision is a clear use of s 77(ii) of the Constitution in making the jurisdiction of the Federal Court exclusive of that of State Courts. However, while s 9 achieves the policy objective of securing for the Federal Court exclusive jurisdiction over the subject matter of the Administrative Decisions (Judicial Review) Act, it goes beyond this in excluding the jurisdiction of State Courts from the wider field of judicial review of Commonwealth administrative action generally.

This led to a degree of uncertainty as to the meaning, scope and effect of s 9. It was suggested that there may have been decisions reviewable only by the High Court as a result of the wide exclusion affected by s 9.[22] This situation was rectified by the enactment in 1983 of s 39B of the Judiciary Act 1903 (Cth). Section 9 will be discussed in the light of the historical and policy considerations mentioned previously,[23] which is intended to clarify the scope and effect of that provision.

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[21] *Supra* n 7.

[22] *Appliance Holdings Pty Ltd* v *Lawson* [1983] 1 NSWLR 246, 250; *Hayes and Mercury Marine Pty Ltd; ex parte Outboard Marine Pty Ltd* (High Court of Australia, 10 June 1983, unreported decision of Deane J, cited in Administrative Review Council: Seventh Annual Report, (1982-83) para 178.)

[23] *Supra* n 7.

In *Clyne* v *Deputy Commissioner of Taxation*,[24] the plaintiff applied to the Supreme Court of New South Wales for orders that certain notices issued by the defendant Commissioner be declared void, and that the defendant Clerk of Petty Sessions be enjoined from acting upon such notices. It was submitted for the Commissioner of Taxation that s 9 operated so as to deprive the Supreme Court of jurisdiction. Rogers J expressed this submission in somewhat melodramatic terms:

> Indeed if the submission be upheld all that I have said so far has been writ in sand. On this view whether I am right or wrong my labours have been in vain. The scarce judicial resources of the State have been wasted and time and money expended in useless argument. This is said to be so because the plaintiff knocked on the wrong door. Instead of being on level 12 of the Law Courts Building he should have gone to level 21 or 22 of the same building where a similarly wigged and gowned figure would have had jurisdiction to give effect to the view on the merits I have expressed.[25]

After referring to the terms of s 9, Rogers J made an impassioned plea for reform of the problems created by parallel jurisdictions, to which he had previously drawn attention in an article.[26] However, Rogers J found what he considered to be a solution in the instant case. He ruled that the relief sought against the defendant Commissioner did not constitute a review of a decision, but was merely a declaration as to the proper construction of an Act of Parliament (s 218 of the Income Tax Assessment Act 1936 (Cth)).

A number of comments should be made about this decision. First, the relevant proceedings could have been taken under the Administrative Decisions (Judicial Review) Act 1977 (Cth), under the ground of error of law (s.5(1)(f)) on the part of the Commissioner. The decision to issue the notice was not excluded from review under Schedule 1, paragraph (e) as the decision did not relate to the making of an assessment.[27] It could not be said that in this case the plaintiff had no readily available tribunal from which to seek relief. The relevant prohibition against the State Court proceeding in the matter would thus appear to be s 9(1)(a), and not the more controversial s 9(1)(d). Secondly, the conclusion of Rogers J as to the nature of the proceedings involving the interpretation of legislation rather than the review of conduct requires further examination. It was held that the present notice under s 218 of the Income Tax Assessment Act 1936 (Cth), was not authorised under that provision.

Rogers J expressly declined to make the orders sought by the plaintiff, and directed that the Commissioner of Taxation be the only defendant. If the orders sought by the plaintiff were granted, it would have been clear that the s 9 exclusion of jurisdiction operated.[28] Aitken points out that "It is artificial to separate the meaning of the statute from the factual background giving rise to the dispute."[29] If anything, the case is stronger than that, as the statute could only be

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[24] [1983] 1 NSWLR 110.

[25] *Ibid* 118.

[26] AJ Rogers, "State/Federal Court Relations" (1981) 55 ALJ 630, *supra* n 24, 119.

[27] See C C H Australia Ltd., *Australian Federal Tax Reporter*, para 934–200 as to review of taxation decisions.

[28] Campbell, *supra* n 9, 69, takes this view.

[29] LJW Aitken, *supra* n 9, 262.

construed by reference to the terms of the notice which requires, at least in an indirect sense, the review of the decision to issue the notice.

In a further taxation case, *Nomad Industries of Australia Pty Ltd* v *Commissioner of Taxation*,[30] Rogers J adhered to his views as to the scope of s 9, again expressing in forceful terms his views on the exclusion of State courts from this field. The plaintiff sought declarations as to the applicability of an exemption for certain goods under the Sales Tax (Exemptions and Classifications) Act 1935 (Cth). It was held that all the defendant Commissioner had done was to express a view as to the operation of the legislation, as any liability or exclusion from liability resulted from that legislation, and thus has not, within the meaning of s 9 made or taken any action in relation to a decision. In this respect *Clyne* v *Deputy Commissioner of Taxation*[31] was followed. In *Nomad Industries of Australia Pty Ltd* v *Commissioner of Taxation*[32] the plaintiff had initially sought to proceed in the Federal Court. However, as the decision was one of the class excluded under Schedule 1, paragraph (e) of the Administrative Decisions (Judicial Review) Act 1977 (Cth), and at this stage the Federal Court had no general administrative law jurisdiction, (a situation which was rectified by the enactment in 1983 of s 39B of the Judiciary Act, 1903 (Cth)) the action in the Federal Court was withdrawn. As the Federal Court could not review this decision under the Administrative Decisions (Judicial Review) Act (Cth), it was apparent that the exclusionary provision was s 9(1)(d). It was proposed that proceedings be taken in the High Court but the problem of costs meant that this course was not taken.[33]

In *Appliance Holdings Pty Ltd* v *Lawson*,[34] Waddell J of the New South Wales Supreme Court heard an application for an injunction against Commonwealth police officers who had seized goods pursuant to a search warrant. Certiorari was also sought against the justice of the peace who issued the search warrant. It was held that under s 9(1)(d) of the Administrative Decisions (Judicial Review) Act (Cth), the Court was precluded from granting an injunction against the Commonwealth police officers. This conclusion was again reached with reluctance, particularly as the plaintiff had already failed on jurisdictional grounds to obtain relief in the Federal Court, and the probability of the High Court being the only forum where a remedy could be obtained was raised again.[35] However, Waddell J held that he could review the question of the validity of the search warrant issued by the justice of the peace. It was held that the decision to issue the search warrant was of a judicial, rather than an administrative character and therefore fell outside the scope of s 9. Again, this result appears to have overlooked the express provision in s 9(1)(d) that the exclusion of State Courts extends to the review of an exercise of judicial power.

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[30] [1983] 1 NSWLR 56.

[31] [1983] 1 NSWLR 110.

[32] *Supra* n 30.

[33] [1983] 2 NSWLR 56, 58-59. *Supra* n 22, where Deane J remarked on the burden imposed on the High Court.

[34] [1983] 1 NSWLR 246.

[35] [1983] 1 NSWLR 246, 250. *Supra* nn22, 29.

Apart from this consideration, it would appear to be somewhat anomalous for the Court to be able to review the decision to issue the search warrant, while it could not review any decision to act upon that search warrant.[36]

In *Powell* v *Manufacturers Mutual Insurance Co Ltd*[37], the plaintiff sought to challenge a notice under s 115 of the Social Security Act 1947, requiring the defendant insurer to pay compensation monies due to the plaintiff to the Director-General of Social Security. In that case, Needham J of the New South Wales Supreme Court held that s 9 applied to exclude the jurisdiction of the Court. Needham J considered the issue of whether granting an injunction to restrain compliance with the s 115 notice constituted a review of a decision. He stated that, "To say, of a decision that a person is immediately liable to pay a sum of money to another, that that payment shall not be made until further order of the court is, in my opinion, to review the decision. The fact that it is not a complete review on the facts and the law does not seem to me to be conclusive of the question."[38] This decision gave a broad scope to the concept of review of a decision, with the corollary that the jurisdiction of the State Court was excluded.

Although the scope of s 9 was not directly in consideration, problems associated with that provision were adverted to in *Coward* v *Allen*[39] where Northrop J in the Federal Court, in recounting the proceedings to date, stated that the actions had initially been commenced in the High Court of Australia and had subsequently been remitted to the Supreme Court of Victoria. However, doubts had then arisen as to the jurisdiction of the latter court to entertain those proceedings because of s 9 of the Administrative Decisions (Judicial Review) Act (Cth), although the relief sought was prerogative and not statutory review. To obviate this difficulty, the previous orders for remitter were rescinded by the High Court and, consequent upon the coming into force of s 39B of the Judiciary Act 1903, the proceedings were remitted to the Federal Court.

In *Woss* v *Jacobsen*[40] Sheppard J dealt with an application for judicial review of an extradition order under the Service and Execution of Process Act 1901 (Cth). Section 19 of that Act conferred jurisdiction upon a Supreme Court to review the extradition order. It was held that s 9 did not deprive the State Court of its express power to review the decision, notwithstanding that the decision was also reviewable under the Administrative Decisions (Judicial Review) Act (Cth). In fact Sheppard J exercised his discretion under s 10 of that Act upon the basis that the Service and Execution of Process Act 1901 (Cth) by s 19 made adequate provision for review of the decision or conduct in question. Sheppard J observed in relation to s 9.[41]

> The courts of a State are not deprived of jurisdiction by the operation of s 9 unless the review in which they would otherwise have been empowered to undertake is a review of the kind defined in s 9(2). It seems to me that s 9(2) was intended to encompass, by and large, the review which this Court is empowered to undertake under ss 5, 6 and 7

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[36] LJW Aitken, *supra* n9, 261.
[37] [1983] 3 NSWLR 183.
[38] *Ibid* 188.
[39] (1984) 52 ALR 320.
[40] (1984) 4 FCR 356.
[41] *Ibid* 362.

> of the Judicial Review Act. So much appears in my opinion, from a consideration of s.16 which specifies the relief this Court may give. Its language is not the same as that used in the definition of 'review' in s 9 but essentially the same things are involved.

A similar approach was adopted on appeal in *Woss* v *Jacobsen*.[42] The Full Federal Court dismissed the appeal. This approach, which looks at the intention of the provision in order to interpret it, would appear to be more constructive than the approach in, for example, *Nomad Industries of Australia Pty Ltd* v *Deputy Commissioner of Taxation*[43] where somewhat fanciful and extreme examples of conduct which may be unreviewable by State Courts were given.

The scope of s 9 of the Administrative Decisions (Judicial Review) Act (Cth) came to be considered by the Supreme Court of Victoria in *Rosenthal* v *Phillips*.[44] The plaintiff brought actions for damages and sought declarations entitling him to the return of goods seized pursuant to a search warrant.[45] A declaration was also sought as to the validity of the search warrant. The defendants applied to strike out all claims for relief in relation to the goods and the declaration, upon the grounds that s 9 excluded the jurisdiction of the Supreme Court. In relation to the issue of the search warrant, reliance was placed on *Appliance Holdings Pty Ltd* v *Lawson*,[46] that such a decision was of a judicial nature, and thus not within the scope of the Administrative Decisions (Judicial Review) Act. Marks J considered the question of whether the relief sought constituted a review of the conduct of the Commonwealth officers.

It was pointed out that the term "review" appeared to have been given an extended meaning by both Waddell J in *Appliance Holdings Pty Ltd* v *Lawson*[47] and Rogers J in *Nomad Industries of Australia Pty Ltd* v *Commissioner of Taxation*.[48] However, as has been pointed out above, the definition in s 9(2) was not expressly considered in those cases. Marks J pointed to the fact that "review" is used in different senses through ss 9 10 and 16 and that, as s 10 clearly contemplates the prospect of alternative forms of review, "review" should be limited to the relief specified in s 9(2).

On this basis, it was held that the declaration sought as to the validity of the search warrant was clearly not available having regard to s 9. It was conceded that the Supreme Court had jurisdiction to entertain the trespass claim, and it was held that the relief as to entitlement to possession and consequential relief, rested on the same footing. Marks J stated that ". . . to uphold the submissions for the defendant [on such relief], it would be necessary to interpret s 9 as applying to decisions and conduct which found or lead to, although not the subject of, relief granted."[49]

It was also submitted that s 9 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) may be invalid. Counsel submitted that s 77(ii) and

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[42] (1985) 60 ALR 313, 329-330 *per* Davies J.
[43] [1983] 2 NSWLR 56, at 63.
[44] [1985] VR 409.
[45] It is of interest that *Appliance Holdings Pty Ltd* v *Lawson* [1983] 1 NSWLR 246, *Coward* v *Allen* (1984) 52 ALR 320 and the present case all concerned the validity of warrants under s10 of the Crimes Act 1914 (Cth).
[46] *Supra* n 41.
[47] *Supra* n 41.
[48] *Supra* n 39.
[49] [1985] VR 409, 416.

s 51(xxxix) of the Constitution do not permit abrogation of existing State jurisdiction unless at the same time it invests the abrogated jurisdiction in a Federal Court or unless the law that has that effect answers the description of a head of power in s 51.[50] While this submission was not ruled upon, it clearly influenced the defendants in their submissions as to the scope of s 9.[51]

This is the most fully reasoned Supreme Court decision and would appear to recognize the policy behind s 9 and interpret it as part of the Act as a whole, rather than an isolated provision that, taken out of context, may be construed as having somewhat drastic effects. It would appear that while reference was not made to *Woss* v *Jacobsen*,[52] the approach taken here by Marks J is similar to that taken by Sheppard J and Davies J in the Full Federal Court in that case.

There are two further decisions of the Supreme Court of New South Wales. In *Delmore Pty Ltd* v *Commonwealth of Australia*,[53] the plaintiff, a proprietor of a private hospital, sought declarations as to its entitlement to Medicare benefits. The litigation arose after correspondence had taken place, in which officers of the Commonwealth expressed the view that the plaintiff (and its patients) were ineligible for such benefits. It was contended for the Commonwealth that to grant the declarations sought would constitute review of those decisions. McLelland J rejected these submissions, stating that:

> There is a clear distinction between a review of decision on one hand, and a determination of the correctness or otherwise of a question which has been the subject of a decision on the other. In the first class of case, what is under examination is the act of the decision maker. The examination may be directed to the correctness of the matter decided, or it may be directed to the validity of the process by which the decision was made, regardless of the correctness of the matter decided. However, in the second class of case is a question (whether of fact, of law or of combined fact and law) which may be independent of any act of a decision maker notwithstanding that the act of a decision maker may have given rise to the occasion for such consideration or that the same question may have been involved in the act of the decision maker . . . if the validity or impropriety of the act of the decision maker, as such, is not a necessary element in the claim for relief, s 9 does not operate to exclude the jurisdiction of a State court.[54]

A number of doubtful propositions may be identified in this passage. It can be noted first, that McLelland J is relying on a distinction of doubtful significance when he distinguishes review of a decision from determination of the correctness of a question; second, that although determination of the correctness of a question may be independent of a decision, on the present facts this was not the case; and thirdly, as an error of law was alleged, it would appear that there was an invalidity in the determination (to use a natural term) which was essential to the relief sought by the plaintiff and thus the operation of s 9 of the Administrative Decisions (Judicial Review) Act was attracted. It is submitted that, like *Clyne* v *Deputy Commissioner of Taxation*, this decision cannot be sustained.[55]

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[50] In relation to the argument that abrogated State jurisdiction has to be vested in a Federal Court, this proposition had been advanced by Dixon as counsel but then rejected in *Lorenzo* v *Carey* (1921) 29 CLR 243.

[51] [1985] VR 409, 415.

[52] (1984) 4 FCR 356, (1985) 60 ALR 313.

[53] (1985) 2 NSWLR 179.

[54] *Ibid* 185-186.

[55] [1983] 1 NSWLR 110.

The final decision is *Clamback & Hennessy Pty Ltd* v *Commonwealth of Australia*.[56] The plaintiffs sought an injunction to restrain the defendant from erecting a fence at Bankstown Airport which, it was alleged, would deny access to the plaintiff's premises. Proceedings for judicial review were also taken in the Federal Court. It was claimed that the proceedings would involve review of either a decision to build the fence, or of conduct engaged in by an officer of the Commonwealth. Needham J pointed out that although there was a decision made, that s 9(1)(d) required a decision to be "given", and held that "One would have to torture language to describe the decision made as a decision "given" by an officer of the Commonwealth",[57] there being an implied restriction of the scope of "decision" to the determination of a claim. He then proceeded to consider the question of "conduct", and held that conduct had to be interpreted as meaning conduct related to a decision in s 9(1)(d). It was held that there was jurisdiction.

This decision again involved a restrained view of the scope of s 9, reading it in its context and constraining it, having regard to the scope of and purpose of vesting judicial review of administrative action in the Federal Court as a specialist court, applying Federal law in relation to the Commonwealth and its officers — a position which, in the case of prerogative relief, has prevailed as a matter of policy since 1903.[58]

The present position with the decisional law on s 9 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) is neither clear nor satisfactory. Some of the responsibility for this situation must be attributed to the drafting of the legislation itself, in particular with s 9(1)(d), which appears to go beyond the scope of protecting legitimate Commonwealth interests. However, some State Supreme Court judges have taken what can only be regarded as a hostile view to s 9 generally, and this has led to the adoption of various artificial constructions of the provision, and devices of interpretation to avoid their jurisdiction being removed by s 9. It might be remarked that in a number of cases, persons claiming a remedy were left in considerable doubt as to where they should seek relief.[59] However, the enactment in 1983 of s 39B of the Judiciary Act 1903 (Cth), enabling the Federal Court to deal with applications for mandamus, prohibition and injunction has prevented the emergence of the feared jurisdictional vacuum. This problem of the appropriate forum had been adverted to in academic writings and in the earlier cases referred to, in response to which s 39B of the Judiciary Act 1903 was enacted.[60] The postulated judicial vacuum was considered by the Administrative Review Council as a result of the earlier cases on s 9 and the increasing jurisdiction imposed on the High Court.[61] The

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[56] (1985) 3 NSWLR 91.

[57] *Ibid* 97.

[58] *Supra* nn 7, 21.

[59] *Appliance Holdings Pty Ltd* v *Lawson* [1983] 1 NSWLR 246; *Nomad Industries of Australia Pty Ltd* v *Commissioner of Taxation* [1983] 2 NSWLR 56, *Coward* v *Allen* (1984) 54 ALR 320.

[60] See article by J Griffiths, "Legislative Reform of Judicial Review of Commonwealth Administrative Action " (1978) 9 FL Rev 42, and *Clamback & Hennessy Pty. Ltd.* v *Commonwealth of Australia* (1985) 3 NSWLR 91, 96 *per* Needham J.

[61] Administrative Review Council, *Annual Report*, 1983-1984, 56, 59 paras 226-227, 242.

Administrative Review Council is considering the scope of s 9 in its review of the Administrative Decisions (Judicial Review) Act 1977 (Cth).[62]

In examining the earlier decisions relating to s 9, a number of defects were found in the reasoning in these cases, where it appeared that the requirements of that provision were not considered properly. In his useful review of these cases, Aitken recognizes these problems but then states in his conclusion "The reasoning of Rogers J in *Clyne* and *Nomad Industries* would be effective to cover most situations", with no apparent disapproval of this position.[63] In the light of previous criticism of this reasoning, this implicit approval would appear to be based on considerations of convenience. Aitken has returned to this theme with further express approval of State courts' ingenuity in exercising jurisdiction notwithstanding s 9.[64] His analysis of the later cases fails to emphasise the constructive attempts, particularly in the Federal Court, to place appropriate limits on s 9. But the argument of inconvenience fails to recognize the origins of this provision in the Judiciary Act 1903 (Cth), and the discussion in the Kerr Committee, Ellicott Committee and the Administrative Review Council which preceded the enactment of s 9 of the Administrative Decisions (Judicial Review) Act 1977 (Cth).

In fairness to the members of the judiciary who decided these early cases, it should be pointed out that they were faced with urgent interlocutory proceedings and may not have been provided with full argument.[65] The absence of any appellate authority may also be attributed to the fact that in general, appeals only lie to the Court of Appeal or Full Court in interlocutory matters by leave.[66]

In *Lamb* v *Moss* the Full Federal Court (Bowen CJ, Sheppard and Fitzgerald JJ) recognized that their ruling on the meaning of the word "decision" for the purposes of the Administrative Decisions (Judicial Review) Act (Cth) would, because of s 9 of that Act, affect the jurisdiction of State Courts. The Full Federal Court said:

> The jurisdiction of State Courts to review matters under federal enactments (for example by declaration) expands or contracts according as a narrow or wide meaning is accorded the word 'decision' in the Act. . . . Any vagueness or uncertainty in the scope of the word 'decision' in the Act could only lead to the growth of a grey area between the jurisdictions of the Federal and State Courts in this field, which would be most undersirable. A broad practical approach to the language of the Act, on the other hand, will not only accord with the evident legislative policy but will also more likely result in a consistent and logical relationship between this Court and State Courts and reduce the grey area of jurisdictional uncertainty.[67]

The criticism which Aitken makes of this pronouncement, in its overlooking of some of the difficulties in s 9 itself, has less force when regard is had to the

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[62] Administrative Review Council, *Annual Report*, 1984-1985, 64, 65 para 257.

[63] LJW Aitken, *supra* n 9, 265. See nn27, 31.

[64] LJW Aitken, "The Exclusion of the Operation of Section 9 of the Administrative Decisions (Judicial Review) Act" (1986), *Australian Current Law*, 36063, 36071.

[65] The argument in *Delmore* v *Commonwealth of Australia* (1985) 2 NSWLR 179 also appears not to have been developed in great depth. *Rosenthal* v *Phillips* [1985] VR 409 was not cited and a number of cases referred to in argument appear to be of peripheral relevance.

[66] Supreme Court Act 1970 (NSW) s 101(2), Supreme Court Act 1958 (Vic) s 40.

[67] (1983) 76 FLR 296, 319.

observations of Sheppard J in *Woss* v *Jacobsen,*[68] that "review" in s 9 means broadly the scope of review that the Federal Court could itself undertake.[69] Although not directly concerned with the interpretation of s 9 of the Administrative Decisions (Judicial Review) Act (Cth), the cases where the Federal Court has paid regard to that provision have provided a reasoned approach seeking to maintain a workable and pragmatic balance between the jurisdiction of State and Federal Courts.[70]

Again, this observation could be made of the decisions of Needham J of the New South Wales Supreme Court and the decision of Marks J in *Rosenthal* v *Phillips*.[71] These decisions would appear to provide the path for the future interpretation of s 9, without resorting to artificial approaches to construction coloured by apparent prejudice against the Federal Court. While Aitken concluded that problems remain in s 9, and the Administrative Review Council is reviewing the provision, it is submitted that these problems could be minimized by the application of judicial comity and restraint. In any event, these problems should be resolved to a substantial degree with the entry into operation of the cross-vesting legislation discussed below.

3 THE CROSS-VESTING LEGISLATION AND ADMINISTRATIVE LAW

The Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) was assented to on 26 May, 1987. It provides for the cross-vesting of jurisdiction between State and Federal Courts.[72] The Explanatory Memorandum accompanying the Bill described the general effect of the legislation as follows:

> The essence of the cross-vesting scheme, as provided for in the Jurisdiction of Courts (Cross-Vesting) Bill 1986 and proposed complementary State legislation, is that State and Territory Supreme Courts will be vested with the civil jurisdiction (except certain industrial and trade practices jurisdiction) of the federal courts . . . and the federal courts will be vested with the full jurisdiction of the State and Territory Supreme Courts.[73]

In dealing with the question of existing heads of exclusive jurisdiction of the Federal Court, the Explanatory Memorandum stated that:

> Provision is made in the Bill (Clauses 3, 6 and 7) to recognise the special role of the Federal Court in matters in which it now has . . . exclusive original or appellate jurisdiction.[74]

Recognition is given to the special role of the Federal Court in administrative law matters by defining proceedings under the Administrative Decisions (Judicial Review) Act 1977 (Cth) and s 39B of the Judiciary Act 1903 (Cth) as falling

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[68] (1984) 4 FCR 356.

[69] LJW Aitken, *supra* n 9, 260; E Campbell, *supra* n 9, 71; *Woss* v *Jacobsen* (1984) 4 FCR 356, 362. See n 54.

[70] *Lamb* v *Moss* (1983) 76 FLR 196, *Woss* v *Jacobsen* (1984) 4 FCR 356, (1985) 60 ALR 313 (Full Federal Court).

[71] *Powell* v *Manufacturers Mutual Insurance Ltd.* [1983] 3 NSWLR 183, *Clamback & Hennessey Pty Ltd* v *Commonwealth of Australia 1985* 3 NSWLR 91, [1985] VR 409.

[72] Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth), Jurisdiction of Courts (Miscellaneous Amendments) Act 1987 (Cth). See S Newman, "Administrative Law", (note) (1986) 60 LIJ 1380.

[73] Explanatory Memorandum, 2, para 3.

[74] *Ibid* para 8, p3.

within the class of special federal matters, a term which is defined in s 3 of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth). Section 6 of that Act provides for a special procedure to be followed where a proceeding in a Supreme Court is a special federal matter. The Supreme Court is required, under s 6(1), to transfer such a matter to the Federal Court, unless the Supreme Court makes an order that the proceedings continue and be determined in the Supreme Court. A Supreme Court shall not make an order that proceedings continue unless it is not appropriate that the proceedings be transferred, and it is appropriate that the Supreme Court decide the proceedings (s 6(2)). If an order is made under s 6(2), it is the duty of the court not to proceed until notice of the order has been given to the Attorney-General, so that he may decide to exercise his power of requesting a transfer to the Federal Court under s 6(7), and a reasonable time has elapsed since the giving of that notice (s 6(3)). The Supreme Court may give directions as to notice, and adjourn the proceedings (s 6(4)), and the Attorney-General may authorise the payment of costs occasioned by such an adjournment (s 6(5)). There are savings provisions in s 6(6) of the power of Supreme Courts in respect of urgent relief of an interlocutory nature, and in s 6(8) where a Supreme Court exercises jurisdiction in a special federal matter through inadvertence. Section 6(7), relating to the power of the Attorney-General to require transfer to the Federal Court, has already been mentioned. Section 6(9) excludes the operation of this section in relation to appeals.

Section 7 of the Act relates to appeals, and introduces a category of scheduled Commonwealth laws, under which appeals from State courts lie to the full Federal Court. It may be noted that neither the Administrative Decisions (Judicial Review) Act 1977 (Cth), nor the Judiciary Act 1903 (Cth) are scheduled laws, and it may be assumed that the Commonwealth will, by ensuring that first instance proceedings in administrative matters are transferred to the Federal Court, bring about the result that appeals will lie to the Full Federal Court in any event (s 7(1)).

Although the general cross-vesting provision, s 5, contains a number of specific criteria for "appropriateness" for transfer of proceedings, such specific matters are absent from s 6 in relation to special Federal matters. The matters to which a court is to have regard under s 5 of are (1) the relationship of proceedings to a proceeding pending in another court, (2) the extent to which the proceeding under consideration could have been instituted, (3) the relevant law to be applied or interpreted, and (4) the interests of justice. It is apparent that the concept of "appropriateness" allows for the exercise of a broad discretion, and that the courts will have to develop guidelines in relation to such a discretion. However, as pointed out above, under s 6, when an application is made by the Attorney-General for transfer in a special Federal matter, then the Supreme Court is required to effect that transfer whether or not it may be considered "appropriate", with the consequent elimination of any element of judicial discretion.

Consideration of the cross-vesting scheme in relation to administrative law matters would tend to indicate that, in proceedings where s 9 of the Administrative Decisions (Judicial Review) Act (Cth) is involved, the formula contained in s 6(1) of the Jurisdiction of Courts (Cross-Vesting) Act (Cth) would require transfer to the Federal Court by a Supreme Court, and if a Supreme Court did

make an order under s 6 to continue to determine such proceedings, the Attorney-General could require transfer under s 6(7). This would have the effect of preserving the exclusive jurisdiction of the Federal Court, taking into account the considerations of policy and history adverted to above.

4 CONCLUSION

At the level of the High Court, the Judiciary Act 1903 (Cth) made provision in s 38(e) for the jurisdiction of the High Court to be exclusive of that of State Courts in matters involving prerogative relief against an officer of the Commonwealth. It should also be noted that s 44(2) of the Judiciary Act (Cth) does not provide for remitter of actions coming within s 38(e), although a remitter is the norm in matters falling within s 38(a)-(d) of that Act. The legislative policy behind s 9 of the Administrative Decisions (Judicial Review) Act (Cth) has been subjected to scrutiny by a number of specialist *ad hoc* committees and standing bodies such as the Administrative Review Council. The principle, however, consistently acted on in legislation since 1903, that judicial review of Commonwealth administrative action should be carried out only by courts established by the Commonwealth, with judges appointed by that Government, has been maintained and not seriously questioned by such reviews. When that background is taken into account, the justification for exclusive jurisdiction can be understood. The cross-vesting legislation, by its recognition of judicial review proceedings as special federal matters, does not substantially depart from this principle.

In their commentary on s 77 of the Constitution, Quick and Garran point out ". . . the judicial department of the Commonwealth is more national, and less distinctively federal, in character, than either the legislative or executive departments".[75] It was this lack of a federal element in the judicial arrangements for the Commonwealth which led Sir Owen Dixon to criticize the notion of federal jurisdiction in his evidence to the Royal Commission on the Constitution in 1927: ". . . as a result of the provisions of the Constitution and those of the Judiciary Act, 'Federal jurisdiction' forms a grave impediment to the practical administration of justice. We think this confusion and all the difficulties which attend it ought to receive the serious attention of those interested in maintaining a Federal System of Government".[76] Sir Owen Dixon returned to this theme in his address "The Law and the Constitution" and upon the occasion of his swearing in as Chief Justice.[77] On the latter occasion, prior to reiterating his much debated view that the only safe guide to judicial decisions was strict and complete legalism, Sir Owen Dixon said:

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[75] J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901, repr. 1976) para 337, p804.

[76] Royal Commission on the Constitution, *Report*, 1929, p110 (extract from the evidence of Dixon KC).

[77] O Dixon, "The Law and the Constitution", (1935) 51 LQR 590, 607-608, O Dixon *Jesting Pilate* (1965) 245.

> . . . I do not overlook the distinction which we unfortunately maintain between State and Federal jurisdiction. That is an eighteenth-century conception which we derived from the United States of America in the faithful copy which was made of their judicial institutions. It is to be hoped that at some future time it will be recognised that under the English system of law, the British system of law which we inherited, the whole body of law is antecedent to the work of any legislature and that the courts as a whole must interpret and apply the whole body of law, so that there should be one judicial system in Australia which is neither State nor Commonwealth but a system of Australian Courts administering the total body of the Law.[78]

This proposal reflects the general approach of covering cl 5 of the Constitution which makes the Constitution and Commonwealth laws binding on the Courts, judges and people of every State. In the light of these considerations, it will be observed that Sir Owen Dixon's views represent an ideal of a federal judicial system in a common law jurisdiction. As such, it may be remarked with unfeigned respect, that the development of judicial institutions within the constitutional framework has tended to depart from that ideal rather than approach it. The cross-vesting legislation, rather than resolving difficulties in the definition of federal jurisdiction, requires for its successful operation the blurring of the continuing distinction between federal jurisdiction and state jurisdiction, rather than the elimination of that distinction.

[78] O Dixon, *Jesting Pilate supra* n 77, 247.