THE CONSTITUTIONAL VALIDITY OF THE CROSS-VESTING LEGISLATION

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[*In this comment the author examines the constitutional validity of the cross-vesting legislation. He concludes that in so far as the legislation confers federal jurisdiction on State courts, and State jurisdiction on the courts of other States, the legislation is valid. However, in so far as the legislation purports to confer State jurisdiction on Federal courts, which does not come within the scope of the accrued jurisdiction of Federal courts, the legislation is invalid. This invalidity rests upon the principle that State Parliaments cannot conscript Federal courts to exercise State jurisdiction. However, in so far as the Commonwealth can confer accrued jurisdiction on Federal courts, which when exercised by State courts is State jurisdiction, then to that extent Federal courts can exercise State jurisdiction.*]

Introduction

In this comment, I will address questions concerning the constitutional validity of the cross-vesting legislation. That legislation consists of complementary enactments passed by the Commonwealth and the States which enable a superior court in one jurisdiction to transfer an action, pending in that jurisdiction, to another superior court, exercising a different jurisdiction, in which a related action is proceeding. A Federal court[1] can transfer an action to a State or Territory Supreme Court. Likewise, a State or Territory Supreme Court can transfer an action brought within its jurisdiction to a Federal court. Finally, a State or Territory Supreme Court can transfer an action brought within its jurisdiction to another State or Territory Supreme Court.

Three questions arise as to the constitutional validity of this arrangement. First, is it valid to transfer a federal action from a Federal court to a State or Territory Supreme Court? Second, is it valid to transfer a State or territory action from a State or Territory Supreme court to a Federal court? Third, is it valid to transfer a State or territory action from one State or territory to another?

The answer to the first question is obviously yes, since that involves nothing more than investing a State or Territory Supreme Court with federal jurisdiction. The Commonwealth has power to invest State courts with federal jurisdiction under s. 77(iii) of the Constitution, and it has plenary legislative power with respect to the territories under s. 122 of the Constitution. That plenary legislative

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[1] A Federal court is either the Federal Court of Australia or the Family Court of Australia.

power would enable it to confer on Territory courts a jurisdiction sufficiently wide to include matters identical to those set out in ss 75 and 76 of the Constitution.

The provisions authorising the transfer of State jurisdiction to Federal courts are, I will argue, only partially valid. In so far as those provisions authorise a State Supreme Court to transfer an action, pending therein, which comes within State jurisdiction and which falls outside of the accrued jurisdiction, to a Federal court, the State legislation is valid. However, in so far as those provisions authorise a Federal court to accept the transfer of such an action and exercise jurisdiction over it, neither the Commonwealth nor the State provisions are valid. The provisions for transfer from one State or Territory to another are, in my opinion, sufficiently valid for the arrangement to be effective.

In this comment I will look first at the transfer of State jurisdiction to Federal courts, and then at transfers from one State or Territory to another.

The Constitutional Validity of Investing State Jurisdiction in Federal Courts

Under s. 4 of the State legislation,[2] the Federal Court and the Family Court are invested with jurisdiction over 'State matters'. 'State matters' refers to any matter over which State Supreme Courts have jurisdiction, and matters which have been removed into the jurisdiction of those courts under s. 8 of the State legislation other than matters coming within the federal jurisdiction exercised by State Supreme Courts. Under s. 5(1) of the State legislation, the State Supreme Courts have power, indeed they have a duty, to transfer proceedings in such matters under certain conditions to either the Federal Court or the Family Court, as the case may be. Once the proceeding has been transferred, the Federal Court or the Family Court is seized with jurisdiction over that matter and, under s. 11(3) of the State legislation, they 'shall deal with the proceeding' as if it had been commenced in the transferee court.

The legislation not only confers State jurisdiction on Federal courts but also requires them to exercise that jurisdiction in the same manner as if it had been conferred under Commonwealth legislation. There is not only a power but also a duty to exercise State jurisdiction. Subject to some minor and immaterial exceptions, ss 5(1) and 11(3) of the Commonwealth Act are identical to ss 5(1) and 11(3) of the State legislation. Thus, that power and duty to exercise State jurisdiction in Federal courts is done with the concurrence of the Commonwealth. Are these provisions valid?

In an opinion provided to the Judicature Sub-Committee of the Australian Constitutional Convention in 1984, Professor Zines argued that the States and the Commonwealth combined could validly undertake such an exercise.[3] He relies on *Re Duncan; Ex parte Australian Iron and Steel Pty Ltd*[4] in support of this

[2] See for instance the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Vic).

[3] The opinion appears as an appendix to the report of the Sub-Committee to the Standing Committee on an Integrated System of Courts (1984) 27-36.

[4] (1983) 49 A.L.R. 19, 29-30 (*per* Gibbs C.J.), 36-7 (*per* Mason J.), 40 (*per* Murphy J.), 42 (*per* Wilson and Dawson JJ.), 55 (*per* Brennan J.).

proposition. That case dealt with the constitutional validity of a combined legislative exercise of the Commonwealth and the State of New South Wales to create an industrial tribunal which exercises State and federal power concurrently. The High Court unanimously expressed the view that there was no general constitutional prohibition on either the Commonwealth or the States jointly empowering an administrative tribunal to exercise powers which neither Parliament could alone constitutionally confer, but which came within their combined constitutional competence.

Needless to say, that decision does not support the proposition that if neither the Commonwealth nor the States have the constitutional power to confer State jurisdiction on a Federal court that they can achieve that end by acting co-operatively. In fact the reverse proposition must be true. If neither have that power, then they cannot cure the defect by acting jointly. As Professor Zines correctly points out in that opinion, the Commonwealth's legislative powers to create a Federal court and define its jurisdiction are confined, under s. 77(i) of the Constitution, to matters which come within federal jurisdiction as set out in ss 75 and 76 of the Constitution.[5] The Commonwealth, therefore, cannot confer State jurisdiction on Federal courts. Can the Parliaments of the States do so?

In my opinion the answer is no. Take the following illustration. Could the Parliament of New Zealand confer New Zealand jurisdiction on the Federal Court? If the answer were yes then the legislatures of any country could confer their own jurisdiction on the Federal Court. This proposition is manifestly absurd. The New Zealand Parliament cannot confer its own jurisdiction on the Federal Court because the Federal Court does not owe allegiance to an expression of that legislature's will. It is a basic axiom of constitutional law that courts are only bound by the formal expression of the will of their own legislature. They cannot be conscripted to exercise the judicial power of a foreign jurisdiction. Australian State Parliaments are not foreign legislatures in relation to Federal courts, but neither are they the dominant legislature so far as Federal courts are concerned. Does the Commonwealth Constitution place them in a position superior to that of the New Zealand Parliament?

If State Parliaments have the power to conscript Federal courts to exercise State judicial power under the Commonwealth Constitution, then the Commonwealth Parliament would presumably possess a reciprocal power. The Commonwealth Parliament does possess the power to confer federal jurisdiction on State courts, but that is due to the express grant of such a power under s. 77(iii) of the Constitution. There is no provision in the Constitution which confers an equivalent power on State Parliaments to grant State jurisdiction on Federal courts. If the Constitution did not provide expressly for investing State courts with federal jurisdiction, could that power, nevertheless, be derived from the

[5] *Supra* n. 3. Putting to one side the conferral of territorial jurisdiction on Federal courts by the Commonwealth, Chapter III of the Constitution has been regarded as the exclusive source of legislative power of the Commonwealth to confer judicial power; *Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257; *The Attorney-General of the Commonwealth v. R.(The Boilermakers' case)* (1957) 95 C.L.R. 529. Under Chapter III, the Commonwealth can only confer judicial power in the nine categories of matters set out in ss 75 and 76 of the Constitution.

general legislative powers of the Commonwealth under s. 51 of the Constitution? The answer to that question would appear to be no.

In *Queen Victoria Memorial Hospital v. Thorton*[6] the High Court unanimously adopted a passage from the joint judgment of Knox C.J., Rich and Dixon JJ. in *Le Mesurier v. Connor*[7] in which their Honours said:

> Sec. 77 of the Commonwealth Constitution expressly confers upon the Parliament power to make laws investing the Courts of the States with Federal jurisdiction. But the provisions of sec. 77 and sec. 79, which explicitly give legislative power to the Commonwealth in respect of State Courts, make it plain that the general powers of the Parliament to legislate with respect to the subjects confided to it, like the similar powers of Congress, must not be interpreted as authorizing legislation giving jurisdiction to State Courts.[8]

In *Thorton*'s case it was held that the Commonwealth lacked the authority to confer non-judicial power on State courts. That decision was recently affirmed, although distinguished, in *R. v. Murphy*.[9]

In the passage quoted above, what the Court is saying is that the express inclusion of a power to invest State courts with federal jurisdiction was necessary, otherwise in its absence, the Commonwealth Parliament, like the United States Congress, would have no power to conscript State courts to exercise federal judicial power. The general legislative powers of the Commonwealth confer no authority to legislate with respect to State courts.

If that is so then it is difficult to understand how it could be argued that the State Parliaments, in the exercise of their general legislative powers, can conscript Federal courts to exercise State judicial power. Surely, in this respect, the Commonwealth Constitution must operate symmetrically: what is true of one level of government must be true of both. Thus in the absence of an express grant of power to the States, under the Constitution, they lack the power to confer State jurisdiction on Federal courts. The only provision which could supply this grant of power is s. 118 of the Constitution, requiring full faith and credit. There is no authority either in Australia or in the United States which has ascribed such an operation to that obscure provision. Furthermore its counterpart with respect to the Commonwealth, covering clause 5, states:

> This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every state . . .

In light of the decision in *Thorton*'s case, that provision was not sufficient to remedy the deficiency in the general powers of the Commonwealth. It is, then, hard to see how the more obscurely worded provision of s. 118 can effect a remedy with respect to the general legislative powers of the States.

What is more to the point in relation to both s. 118 and covering clause 5 is that neither provision is worded such that it could be construed as a grant of legislative power to either the Commonwealth or the State Parliaments. Thus whatever the function of those provisions may be, one thing is clear: they do not confer legislative power and therefore cannot remedy any deficiency in either the

[6] (1953) 87 C.L.R. 144, 152.
[7] (1929) 42 C.L.R. 481.
[8] *Ibid.* 496.
[9] (1985) 61 A.L.R. 139, 147.

legislative powers of the Commonwealth or of the States to confer State or federal judicial power.[10]

Professor Zines confines his argument to the proposition that the States can confer State jurisdiction on Federal courts if acting with the agreement of the Commonwealth.[11] He does not address the question of whether the States acting alone could confer such jurisdiction on Federal courts. Professor Zines' argument overlooks the issue of how the Commonwealth agrees to the conferral of State jurisdiction on Federal courts, when it has no legislative or executive power with respect to that topic. Surely any purported exercise of legislative power by the Commonwealth to concur in the grant of such jurisdiction is both *ultra vires* and void. Thus there is only the illusion of a concurrence by the Commonwealth. In reality there is no valid agreement, since the Commonwealth can only act within the confines of the powers granted to it by the Constitution.

On this analysis neither the Commonwealth nor the States have the power to confer State jurisdiction on Federal courts. That situation contrasts strongly with that in *Re Duncan* where the two levels of government together possessed the power to support the jurisdiction of the industrial tribunal in question. Here neither possess any power to accomplish the desired result of investing State jurisdiction in a Federal court. The fallacy in the argument advanced by Professor Zines can be simply, if somewhat brutally put. If the addition of two fractions equals one, it does not follow that zero plus zero equals one. I therefore conclude, subject to certain qualifications which I shall raise shortly, that the cross-vesting provisions which confer State judicial power on the Federal Court and the Family Court are invalid.

The constitutional validity of the Queensland cross-vesting provisions which purport to confer State jurisdiction on the Family Court were considered by Ryan J. in *Re Tink*.[12] In that case it was argued that the Family Court could not have jurisdiction conferred on it by a State Parliament because, within the federal system, the jurisdictional limits of any Federal court are determined by reference to ss 75 and 76 of the Constitution. His Honour rejected that argument and held that those provisions of the Constitution only exhaustively define the extent of the Commonwealth's power to confer federal jurisdiction on a Federal court. They do not imply a prohibition as to the limits of the jurisdiction which Federal courts can exercise. Thus, for example, the Commonwealth, in the exercise of its legislative power over Territories, can confer additional non-federal jurisdiction on a Federal court.[13] Consequently those provisions cannot be regarded as a bar to the State Parliaments conferring State jurisdiction on a Federal court.[14]

[10] It may be thought that this problem can be solved by reference to s. 51(xxv) of the Constitution. Traditionally this provision has been regarded as simply confined to granting power to the Commonwealth to enact choice of law rules; Commonwealth Law Reform Commission, Issues paper No. 8 (June 1989), 'Federal and Territory Choice of Law Rules', para. 9. Furthermore, given the analysis which underlies the separation of powers doctrine, it would be highly anomalous to find in s. 51(xxv) a legislative power vested in the Commonwealth to confer state jurisdiction on Federal courts.

[11] *Supra* n. 3, 31.

[12] (1989) F.L.C. 92-020

[13] *E.g. Capital T.V. and Appliances Pty Ltd v. Falconer* (1971) 125 C.L.R. 591, 604.

[14] *Supra* n. 13, 77-350.

That case did not consider the argument which I have raised above, namely that Federal courts cannot be conscripted to exercise State jurisdiction. It may be the case that the Supreme Court of Queensland is bound by the cross-vesting provisions of the Queensland legislation which authorise it to transfer a State matter into a Federal court; however, those same provisions cannot authorise a Federal court to accept jurisdiction over that matter when it is transferred.

More recently, in *Re Grace Bros Pty Ltd*,[15] Gummow J. in the Federal Court, as a matter of *dicta*, expressed doubts as to the correctness of the decision in *Re Tink* and intimated that the Federal Court's potential jurisdiction was limited to those matters set out in ss 75, 76 and 122 of the Constitution. By inference the Federal Court was constitutionally incapable of exercising State jurisdiction unless it came within the accrued jurisdiction of the Federal Court. However, it should be emphasised that his Honour did little more than allude to these considerations. He certainly did not express any definitive view on that question.

Other issues have been raised as to the constitutional validity of those provisions of the cross-vesting legislation.[16] It has been suggested that the principle laid down in *Commonwealth v. Cigamatic Pty Ltd*[17] may also operate to render those provisions invalid. The analytical basis of the doctrine formulated in *Cigamatic* remains obscure. I have examined that doctrine in another context.[18] In light of the argument which I have developed above as to why State Parliaments cannot invest Federal courts with State jurisdiction, I think that an analysis based on *Cigamatic* would be superfluous if it lead to the same conclusion.

Before leaving this issue one point is worth noting. There can be no question that if the State or Territory Supreme Court transfers an action to a Federal court and that action comes within federal jurisdiction, then the cross-vesting legislation can validly authorise such a transfer. Section 5(1) of the Commonwealth Act which *inter alia* authorises such transfers, would answer the description of a law which defines the jurisdiction of a Federal court, within the meaning of s. 77(i) of the Constitution. According to the majority judgment in *Fencott v. Muller*,[19] federal jurisdiction encompasses not only those causes of action which come within any one of those nine categories of matters set out in ss 75 and 76 of the Constitution, but also any other causes of action which form part of the same controversy.[20] To use the language of the majority in *Fencott v. Muller*, 'a single justiciable controversy' is an entire controversy as determined by 'impression and practical judgment'.[21] This additional jurisdiction, namely the accrued jurisdiction of Federal courts, whilst forming part of federal jurisdiction, is not exclusive to Federal courts.[22] Thus a cause of action or proceeding which comes

15 (1988) unreported.

16 Mason, K. and Crawford, J., 'The Cross-Vesting Scheme' (1988) 62 *Australian Law Journal* 328, 333-4; Griffith, G., Rose, D. and Gageler, S., 'Further Aspects of the Cross-Vesting Scheme' (1988) 62 *Australian Law Journal* 1016, 1023-5.

17 (1962) 108 C.L.R. 372.

18 'The Law Applicable in Federal Jurisdiction — Part 2: The Application of Common Law to Federal Jurisdiction' (1977) 2 *University of N.S.W. Law Journal* 46, 64-8.

19 (1983) 46 A.L.R. 41 (*per* Mason, Murphy, Brennan and Deane JJ.).

20 *Ibid.* 67-8.

21 *Ibid.*

22 *Stack v. Coast Securities (No. 9) Pty Ltd* (1983) 49 A.L.R. 193, 216 (*per* Mason, Brennan and Deane JJ.).

within federal jurisdiction can also come within State jurisdiction as well, if it comes within the accrued jurisdiction.

The Commonwealth Parliament would also have power to authorise the transfer by a State or Territory Supreme Court to a Federal court of an action which comes within the accrued jurisdiction, even though it also comes within State jurisdiction. This analysis, therefore, would not render invalid any of the provisions of the Commonwealth and State cross-vesting legislation. The validity of the provisions of s. 5(1) would be preserved by reading them down, if necessary, to include only actions which come within federal jurisdiction.[23]

The Constitutional Validity of Investing the Jurisdiction of One State in the Courts of Another State

The transfer of proceedings from the Supreme Court of one State or Territory to the Supreme Court of another State or Territory is quite novel. Such transfers are authorised under s. 5(2) of the cross-vesting legislation. The constitutional validity of that exercise rests on much stronger grounds. The following example illustrates this point. The Supreme Court of Victoria transfers proceedings to the Supreme Court of South Australia. This involves two steps: the power to transfer and the power to accept the transfer. Only the Victorian Parliament has the power to authorise the transfer, and only the South Australian Parliament has the power to authorise the acceptance. The two Parliaments combined have the power to authorise both the transfer and the acceptance, and they have exercised that power. This situation is obviously analogous to the position in *Re Duncan*. Where two Parliaments possess cumulatively the power to accomplish a certain end, the exercise of those powers in concert to achieve that end can be regarded as constitutionally valid.

Conclusion

The cross-vesting legislation involves both horizontal and vertical transfers of jurisdiction. In the case of horizontal transfers, their constitutional validity can be thought of as symmetrical: if it is valid to transfer from State A to State B, then it must be valid to transfer from State B to State A. In the case of vertical transfers, an asymmetry results from the express powers given to the Commonwealth to invest State courts with federal jurisdiction. The Commonwealth can transfer federal jurisdiction to the States while the opposite is not true. However, given the potential width of the accrued jurisdiction this limitation may well be more of a theoretical problem than a practical problem. The legislation contemplates a situation where jurisdiction, as between superior courts, can move in all directions. The asymmetry in vertical transfers undermines an important, if not fundamental, aspect of the philosophy behind the cross-vesting legislation by imposing a restriction in one direction as to where jurisdiction can be transferred. As can be seen from s. 16(4) of the legislation, this possibility was anticipated and power was given to the State Governors and the Governor-General to

[23] S. 15 of the cross-vesting legislation.

terminate the continued operation of the legislation by way of proclamation, if that possibility eventuated.

If it is true that under our existing constitutional arrangements Federal courts cannot be vested with State jurisdiction, and if the accrued jurisdiction is interpreted narrowly, then the continued operation of the cross-vesting legislation may become somewhat lopsided. This may have the undesirable result of bringing the scheme to an end.

The virtues of the cross-vesting scheme have been described in the judgments of the New South Wales Court of Appeal in *Bankinvest AG v. Seabrook and Others*.[24] In that case the Court of Appeal set out the tests which were applicable for each of the three alternative bases, laid down in the legislation, for when an action should be transferred. The first basis is when an action is pending in the more appropriate forum. The Court of Appeal followed the House of Lords in *Spiliada Maritime Corporation v. Cansulex Ltd.*[25] The more appropriate forum was the natural forum, namely the forum with which the action had its closest and most real connection.[26]

The second basis is where, except through the cross-vesting legislation, 'a substantial part of the relevant proceeding' cannot be brought in the forum where the action is pending, but can be brought in the alternative forum. The Court of Appeal dealt with this only briefly, but the relevant provisions seem analogous to the reasoning of Mason, Brennan and Deane JJ. in *Bargal Pty Ltd v. Force*.[27] In that case their Honours set out the principles governing a stay of proceedings in a Supreme Court action when concurrent proceedings are being pursued in the Federal Court.[28] Under that analysis, subject to certain exceptions, the forum to be preferred is the one which 'can resolve the entire controversy'.[29]

The third basis is where 'it is otherwise in the interests of justice'. The Court of Appeal took the view that this basis applied where there were no proceedings pending in the alternative forum. Once again the test in *Spiliada* was favoured, namely that when the alternative forum is the natural forum, the action should be transferred.[30]

The principles laid down in *Bankinvest* may avert, at the federal and interstate level, the confusion created by the High Court in *Oceanic Sun Line Special Shipping Co Inc v. Fay*[31] as to the operation at the international level of the *forum non conveniens* doctrine. This further emphasises the value of the cross-vesting legislation. Whilst it may not be constitutionally possible to confer state jurisdiction on Federal courts, that ought not to be a serious problem with respect to the practical operation of the cross-vesting legislation, given the potential width of the accrued jurisdiction. It should not justify the termination of that legislation's operation.

[24] (1988) 14 N.S.W.L.R. 711.
[25] [1987] A.C. 460.
[26] (1988) 14 N.S.W.L.R. 711, 728.
[27] (1983) 49 A.L.R. 193, 217.
[28] *Ibid.* 218.
[29] *Ibid.*
[30] (1988) 14 N.S.W.L.R. 711, 730.
[31] (1988) 79 A.L.R. 9.