The Cross-Vesting Scheme and Federal Jurisdiction Conferred upon State Courts by The Judiciary Act 1903 (Cth)

G J LINDELL[1]

'The cross-vesting legislation in effect brings together the eight State and Territory Supreme Courts,[2] the Federal Court and the Family Court into an organisational relationship. Very broadly speaking, the legislation now operative throughout Australia achieves two objectives: first it enables any one of these courts to exercise the jurisdiction of, and to apply the law that would be applied by, any one of the other nine; secondly it enables any one of those courts in which proceedings are commenced to transfer them to any one of the other nine.

The introduction of this scheme is a significant move towards providing throughout our nation the services of an integrated court system transcending the boundaries, both geographic and jurisdictional, that have in the past obstructed the courts in meeting the requirements of the Australian public.'

Bankinvest AG v *Seabrook* (1988) 14 NSWLR 711 at p 713 *per* Street CJ.

Section 39 of the *Judiciary Act* is 'a standing provision constantly speaking in the present.'

Le Mesurier v *Connor* (1929) 42 CLR 481 at p 503 *per* Isaacs J.

INTRODUCTION

The aim of this article is to discuss the effect of the national cross-vesting scheme on the federal jurisdiction that is conferred on the State Supreme Courts by virtue of the *Judiciary Act* 1903 (Cth)s 39(2) as amended. Although it is not intended to provide a survey of the cross-vesting scheme or its success since it began to operate, it is hoped, nevertheless, that the discussion of the issue analysed in the article will help to focus on one of the two main features of the scheme, namely, the cross-vesting of jurisdiction of courts in Australia.

It should be stated at the outset that this article will assume the constitutional validity of the cross-vesting scheme and that no attempt will be made

[1] LLB (Hons)(Adel); LLM (Adel); Reader, Faculty of Law, *The Australian National University*. The article is based on a paper delivered by the author at the National Practitioner Forum on Constitutional Law conducted by the Commonwealth Attorney-General's Department and held in Canberra on 20 June 1991. The author wishes to acknowledge the valuable assistance received from Mr D J Rose, Chief General Counsel in the same Department. He also wishes to thank Mrs H Roberts, the Law Librarian at The Australian National University, who assisted in searching the existence of cases which involved the interpretation of the relevant aspects of the *Judiciary Act* 1903 (Cth) s 39(2). Responsibility for any errors or omissions remains, of course, with the author.

[2] In addition to the Supreme Courts of the external Territories of the Commonwealth.

to canvass the soundness of the arguments which have been raised to substantiate doubts about its validity.[3]

The scheme consists of complementary Commonwealth and State legislation[4] which was borne out of the rivalry between State and Federal Courts, especially as regards the exclusive jurisdiction vested in the Federal and Family Courts of Australia during the 1970s and also the failure of the Australian political system to accept the establishment of a unified system of Australian courts.[5] Cross-vesting, it is suggested is a more modest alternative and yet, as the passage quoted from the judgment of Sir L Street in the *Bankinvest* case suggests, it is quite radical in itself. This is so, not only as regards the organizational relationship created between Federal Courts and State and Territory Supreme Courts, but also as between State and Territory Supreme Courts as amongst themselves — a feature of the scheme which is the main focus of attention in their article. The achievement bears some analogy with the fusion of the courts of law and equity which occurred during the nineteenth century as a result of which no case should fail if it was brought in the wrong court (or the wrong division of the same court).[6]

Stated broadly, the two main features of the cross-vesting scheme are:

(a) *firstly*, that as a result of s 4 of the Cross-vesting Acts, each of the State and Territory Supreme Courts, the Federal Court and the Family Court of Australia, may (with certain significant exceptions) exercise the jurisdiction of any of the other same superior courts; and

(b) *secondly*, that because of s 5 of the same Acts, any of those courts in which proceedings are commenced are required in certain circumstances to transfer the proceedings to any of the other superior courts.[7]

The federal jurisdiction that is conferred on State courts by virtue of s 39(2) of the *Judiciary Act* 1903 (Cth) needs little introduction. The 'autochthonous

[3] Although the writer does not wish to be seen as supporting those doubts, they are adverted to by Gummow J in *Grace Bros Pty Ltd* v *Magistrates, Local Courts of New South Wales* (1988) 84 ALR 492 at pp 498–9. In *Re T (An Infant)* [1990] 1 Qd R 196 Ryan J upheld the relevant legislation whereas in *West Australian Psychiatric Nurses' Association v The Australian Nursing Federation* (1991) 102 ALR 265 Lee J indicated that he would have been inclined to reach a different conclusion if it had been necessary to determine the question of validity (at p 280). As at the date of writing there was no definitive judicial ruling against the validity of the scheme. The references to articles which discuss the constitutional issues can be found in E Campbell, 'Cross-vesting of Jurisdiction in Administrative Law Matters' 1990 16 *Mon LR* 1 at p 9, n 41.

[4] The scheme is contained in the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) and the complementary State and Northern Territory Acts which each have the same short title as the federal Act. All the Acts were proclaimed to come into force on 1 July 1988.

[5] Notwithstanding the famous remarks of Sir Owen Dixon that it should not have been 'beyond the wit of man' to devise such a system in 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590 at p 607. See generally for the present writer's account of the developments which led to the adoption of the scheme in Ch 7, B Galligan (ed), *Australian Federalism* (Melbourne, Longman Cheshire, 1989) at pp 165–75.

[6] See eg W J V Windeyer, *Lectures on Legal History* (2nd ed., Sydney, Law Book Company, 1957) at pp 286–9.

[7] See the passage from the judgment of Street CJ in the *Bankinvest* case quoted at the beginning of this article at p 64.

expedient', as it has sometimes been described, has proved to be a resilient and long standing solution to the question regarding which court should exercise federal jurisdiction. It dates back to the enactment of the *Judiciary Act* in 1903 and it involves the exercise of a power in the Constitution (s 77(iii)) which has been described as 'obviously a very convenient means of avoiding the multiplicity and expense of legal tribunals'.[8] It is a matter of some regret that those advantages were set aside, to some extent, when exclusive jurisdiction was conferred upon the Federal Court and the Family Court of Australia during the 1970s although the writer understands, of course, the importance of using specialized courts for some purposes.

The nature and scope of the jurisdiction referred to in s 39(2) of the *Judiciary Act* will be elaborated below[9] but for the moment it is sufficient to emphasise both its comprehensive and its ambulatory character. The latter aspect was stressed in the remarks made by Isaacs J which are quoted at the beginning of this article when he described s 39 of the *Judiciary Act* 'a standing provision constantly speaking in the present.'[10] Thus the limits of the jurisdiction conferred upon State courts are not determined as at the time of the enactment of s 39 or its amendment, but as they exist from time to time. This has the obvious utility of avoiding the need for the constant amendment of the *Judiciary Act* by reference to changes which occur in a State court's jurisdiction in State type matters since, as will be explained later, the limits of that jurisdiction are used to determine the limits of the invested federal jurisdiction.

It is the purpose of this article to discuss in greater detail the two matters referred to so far, namely, the cross-vesting scheme and the ambulatory nature of the federal jurisdiction conferred on State courts, with a view to showing that each State Supreme Court may exercise the federal jurisdiction conferred on the other State Supreme Courts, despite the absence of express statutory provisions in the Cross-vesting Acts to that effect.

'THE AUTOCHTHONOUS EXPEDIENT': THE JUDICIARY ACT 1903 (Cth)s 39(2)

Section 77(iii) of the Constitution enables the Federal Parliament to invest State courts with federal jurisdiction *ie* the nine matters referred to in ss 75 and 76 of the Constitution which define the actual and potential jurisdiction of the High Court. In the exercise of that power the Parliament has enacted the following provisions in s 39 of the *Judiciary Act*:

> '*Federal jurisdiction of State Courts in other matters*
> (1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive

[8] *The Commonwealth* v *Limerick Steamship Co Ltd and Kidman* (1924) 35 CLR 69 at p 90 *per* Isaacs and Rich JJ.
[9] *Infra* text pp 64, 66.
[10] *Supra* text p 64.

of the jurisdiction of the several Courts of the States, except as provided in this section.

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

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

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

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

Exercise of federal jurisdiction by State Courts or summary jurisdiction

(d) The federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction, or an arbitrator on whom the jurisdiction, or part of the jurisdiction, of that Court is conferred by a prescribed law of the State, within the limits of the jurisdiction so conferred.'

The comprehensive character of the federal jurisdiction conferred upon State courts by virtue of the provisions quoted above is qualified in certain respects. For present purposes the most important of those qualifications results from the investment of the State courts with federal jurisdiction 'within the limits of their several jurisdictions whether such limits are as to locality, subject matter, or otherwise.'[11] In *The Commonwealth* v *Dalton* Isaacs and Rich JJ stated:

> 'The totality of these provisions (which define the jurisdiction of a State court) mark out the area of curial jurisdiction, and therefore define the limits of the jurisdiction as adopted by the Federal Parliament for the purposes of Federal jurisdiction. The Federal jurisdiction conferred by s 39(2) automatically covers the area occupied by State jurisdiction so adopted, and does not exceed those limits'.[12]

In effect, the scope of the conferred federal jurisdiction is defined by reference to the scope of the State court's jurisdiction in relation to similar State type matters *ie* the limits prescribed for the State courts when exercising their State jurisdiction in matters analogous to the matters which are the subject of the

[11] The other important qualification relates to the matters in respect of which the jurisdiction of the High Court is made exclusive by virtue of ss 38 and 39(1) of the *Judiciary Act*. Section 44 of the same Act purports to empower the High Court to remit proceedings involving some of those matters to the Federal Court or the court of a State or Territory.

[12] (1924) 33 CLR 452 at p 456.

invested federal jurisdiction.[13] It should be emphasised that State jurisdiction is referred to only by way of analogy.

Two examples may be cited to illustrate the qualification in question. The *first* involves the general rule at common law which requires that in actions *in personam* a defendant must be served with originating process within the territorial jurisdiction of the court from which the process is issued in order to render him or her amenable to the jurisdiction of that court. This rule has of course been overcome in certain cases where authority is given to serve the defendant out of the jurisdiction pursuant to the Rules of the Supreme Courts of the State and Territories which authorise such service interstate and overseas and the *Service and Execution of Process Act* 1901 (Cth) which authorises such service interstate and anywhere in Australia.[14] It is accepted that the rule in question operates in relation to the exercise by a State court of diversity jurisdiction *ie* actions between residents of different States within the meaning of s 75(iv) of the Constitution.[15] In principle the same considerations should apply to actions involving the exercise by a State court of other forms of federal jurisdiction such as, for example, an action that deals with a matter arising under the *Trade Practices Act* 1974 (Cth) — this being a law 'made by the Parliament' within the meaning of s 76(ii) of the Constitution.

The *second* example to illustrate the limit on the jurisdiction conferred on a State court under s 39(2) of the *Judiciary Act* could involve the limit on *subject-matter* jurisdiction created by the rule in *British South Africa Co* v *Companhia de Mozambique*[16] which precludes the court of the forum from entertaining certain actions in respect of land situated out of the forum *eg* an action commenced in the Western Australian Supreme Court involving land in New South Wales where the plaintiff and the defendant are residents of different States (diversity jurisdiction).

THE SCOPE OF CROSS-VESTING PROVISIONS IN RELATION TO FEDERAL JURISDICTION

It is necessary at this stage to focus on the provisions of s 4 of the Cross-vesting Acts which provide for the cross-vesting of the jurisdiction of the Australian superior courts. One basic feature of the scheme is to ensure that subject to some exceptions, each State Supreme Court is vested with the jur-

[13] *R v Bull* (1974) 131 CLR 203 at p 258 *per* Gibbs J; *McManus* v *Clouter* (1980) 29 ALR 101 at p 110 *per* McLelland J.

[14] See generally E I Sykes and M C Pryles, *Australian Private International Law* (2nd ed., Sydney, Law Book Company, 1987) at pp 21–57.

[15] *John Sanderson & Co* v *Crawford* [1915] VLR 568; *Weber* v *Aidone* (1981) 36 ALR 345 at p 347; P Hanks and M Pryles *Federal Conflict of Laws* (Sydney, Butterworths, 1974) at pp 114–15.

[16] [1893] AC 602. For an illustration of its application to interstate land see *Inglis* v *The Commonwealth Trading Bank of Australia* (1972) 29 FLR 30. The rule is subject to a number of wide ranging exceptions. For a discussion of the rule and its exceptions see E I Sykes and M C Pryles, *supra* n 14, at pp 59–62.

isdiction possessed by each of the other State Supreme Courts — a concept which significantly increases the jurisdiction possessed by each of those courts.

Despite the breadth of the concept there have been a number of cases which have confirmed that the cross-vesting legislation has not cross-vested the federal jurisdiction conferred on the State Supreme Courts by virtue of the *Judiciary Act* s 39(2).[17]

The Commonwealth Parliament has not exercised its power to cross-vest (or perhaps, more accurately, confer) that jurisdiction in favour of:

(a) the Federal Court and the Family Court of Australia (under s 77(i) of the Constitution); and

(b) as between the State Supreme Courts in relation to the federal jurisdiction vested in each of those courts (under s 77(iii) of the Constitution).

Subject to one qualification about to be mentioned, the provisions of s 4 of the Commonwealth Cross-vesting Act purport to only cross-vest *the federal jurisdiction vested in the Federal Court and the Family Court in favour of the State and Territory Supreme Courts.*[18] That qualification relates to the power of a State Supreme Court to *transfer* proceedings involving the exercise of federal jurisdiction conferred on the Court by s 39(2) of the *Judiciary Act*, in favour of another State Supreme Court, the Federal Court and the Family Court of Australia.[19]

The State Parliaments would appear to lack the constitutional power to cross-vest the federal jurisdiction conferred upon the State Supreme Court under s 39(2) of the *Judiciary Act*. Any such attempt would fail because of inconsistency with a federal statute under s 109 of the Constitution and also possibly because of inconsistency with Chapter III of the Constitution.[20] The State Cross-vesting Acts do not, in any event, purport to cross-vest the jurisdiction in question because s 4 of those Acts only cross-vests jurisdiction with respect to 'State matters'. That term is defined in s 3(1) to mean matters

[17] *Kodak (Australasia) Pty Ltd* v *The Commonwealth* (1988) 98 ALR 424; *Grace Bros Pty Ltd v Magistrates, Local Courts of New South Wales* (1988) 84 ALR 492 at p 498 (concession); *Bond* v *Sulan* (1990) 98 ALR 121 at p 125; *West Australian Psychiatric Nurses' Association* v *The Australian Nursing Federation* supra n 3 especially at p 274 and see also *Courtice* v *Australian Electoral Commission* (1990) 95 ALR 297 especially at pp. 300–1 (other federal jurisdiction); and E Campbell, *supra* n 3, at pp 7–8.

[18] Neither the Federal Court nor the Family Court of Australia have been vested with general federal jurisdiction ie in respect of all of the matters referred to in ss 75 and 76 of the Constitution.

[19] The Commonwealth Cross-vesting Act s 5 and also s 4(3) as regards the cross-vesting of the jurisdiction which results from the *transfer* of the proceedings to the Federal Court and the Family Court of Australia, as to which see E Campbell, *supra* n 3 at pp 8–9. If the argument put forward in this article is correct it was unnecessary for the Commonwealth Cross-vesting Act to explicitly provide for the cross-vesting of the jurisdiction which results from the *transfer* of the proceedings between the State Supreme Courts as amongst themselves in cases involving the exercise of federal jurisdiction conferred by s 39(2) of the *Judiciary Act*: cf E Campbell *ibid* n 40.

[20] *Felton* v *Mulligan* (1971) 124 CLR 367 in relation to s 109 although the issue in that case was not the same as the issue here and also *The Commonwealth* v *Queensland* (1975) 134 CLR 298 in relation to the inability of a State Parliament to legislate inconsistently with Chapter III of the Constitution.

in which the Supreme Court of the State of the enacting legislature 'has jurisdiction otherwise than by reason of a law of the Commonwealth'.

THE ACTUAL AND POSSIBLE CONSEQUENCES OF A FAILURE TO CROSS-VEST FEDERAL JURISDICTION

(1) The Federal Court and the Family Court of Australia

It will be clear from the foregoing discussion that the Federal Court and the Family Court of Australia are not given the ambulatory federal jurisdiction vested in State courts by virtue of the *Judiciary Act* s 39(2). A leading illustration of that consequence can be found in *Kodak (Australasia) Pty Ltd* v *The Commonwealth*[21] which involved an action to recover Commonwealth sales tax paid under protest. The relevant federal statutory provisions provided that the action could be heard in 'a court of competent jurisdiction' — an accepted formula in federal legislation for referring to courts vested with federal jurisdiction by reason of s 39(2) of the *Judiciary Act*.[22] It was held that although the Supreme Courts of the States could have heard the action, the action could not be commenced in the Federal Court. Lockhart J said:

> 'Section 12A(2) of the Sales Tax Procedure Act assumes the existence of courts of competent jurisdiction, the Supreme Court being such a court of competent jurisdiction given the combined effect of s 75(iii) of the Constitution and s 39(2) of the Judiciary Act. The Federal Court does not have this jurisdiction since s 39(2) does not invest it with federal jurisdiction in all matters in which the High Court has original jurisdiction.
>
> The Supreme Court therefore exercises jurisdiction by reason of a law of the Commonwealth, namely, s 39(2) of the Judiciary Act. Hence, an action under s 12A(2) of the Sales Tax Procedure Act is a matter in which the Supreme Court has jurisdiction by reason of a law of the Commonwealth and therefore is not a "State matter" within the meaning of that expression in s 4(1) of the (Jurisdiction of Courts (Cross-vesting) Act 1987 (NSW)). (That) Act is therefore not a possible source of jurisdiction of the Federal Court to hear the present proceeding'.[23]

This result is certainly consistent with the original policy which attended the creation of the Federal Court, which was that the court should not be given unlimited federal jurisdiction *ie* jurisdiction in respect of all the matters listed in ss 75 and 76 of the Constitution. That policy is reflected in s 19 of the *Federal Court of Australia Act* 1976 (Cth) which provides that the court should have 'such original jurisdiction as is vested in it by law made by the Parliament being jurisdiction in respect of matters arising under laws made by the Parliament.'[24]

[21] *Supra* n 17. Special leave to appeal from this decision to the High Court was granted on 4 October 1991 : 14 Leg. Rep. p. SL 1.

[22] *Stack* v *Gold Coast Securities* (1983) 154 CLR 261 at pp 276–7 *per* Gibbs CJ who cites the relevant authorities.

[23] *Supra* n 17, *Kodak Case* at p 430.

[24] The history surrounding the debate as to whether there should have been created a federal superior court with general federal jurisdiction is discussed in Z Cowen and

The issue today, however, is whether this is consistent with the basic philosophy which seems to underlie the cross-vesting scheme and under which, with some exceptions, no case should fail for being commenced in the wrong court. It is clear that in one very significant respect the Federal and Family Courts of Australia are not vested with the jurisdiction possessed by the State Supreme Courts.

Recently Lee J described this result as bringing about 'a gap in the mutual jurisdiction of the Federal Court and Supreme Courts of the States sought to be established by the cross-vesting scheme'. He also observed that attention had been directed 'to this deficiency on previous occasions'.[25] On one of those occasions Pincus J described the same result as one which some would think was 'incongruous'.[26]

The reason for the gap, if it is indeed correct to describe it as such, is not explained in the extrinsic statutory material surrounding the enactment of the Cross-vesting legislation. However, it has been suggested to the writer that it was not thought feasible to confer upon the Federal Court the totality of the jurisdiction referred to in ss 75 and 76 of the Constitution without changing the character of the Court and because of workload and resource implications. An example cited of the jurisdiction which would have been conferred was that of actions in negligence against the Commonwealth. It was also suggested that it would be difficult to devise a transfer regime which would have ensured that such cases would normally have been heard by the State and Territory Supreme Courts, as occurs at present, without disturbing the equal status enjoyed by those courts with that enjoyed by the Federal Court in the present transfer arrangements provided for in s 5 of the Cross-vesting Acts.[27]

(2) State Supreme Courts

As has already been indicated, s 4 in the Commonwealth Cross-vesting Act does not, and s 4 in each State Cross-vesting Act cannot, cross-vest the s 39(2) *Judiciary Act* jurisdiction vested in a State Supreme Court in favour of *each of the other State Supreme Courts.* It needs to be recalled, in that regard, that despite the wide nature of that jurisdiction, it is nevertheless limited by reference to limits which exist in relation to analogous State matters.

Again, this result can be illustrated by reference to the earlier examples given in this article. The *first* example might be where a defendant is sued for a breach of the terms implied by the *Trade Practices Act* 1974 (Cth) under Part V Division 2 in respect of the fitness and quality of goods or services supplied to a consumer; or, alternatively, a breach of the manufacturers' warranties

L Zines, *Federal Jurisdiction in Australia* (2nd ed., Melbourne, Oxford University Press, 1978) at pp 109–14.

[25] *West Australian Psychiatric Nurses' Association* v *The Australian Nursing Federation supra* n 3 at p 274.

[26] *Courtice* v *Australian Electoral Commission supra* n 17 at pp 300–1. The case involved the inability of the Federal Court to exercise the jurisdiction vested in the State and Territory Supreme Courts in relation to the resolution of Commonwealth electoral disputes.

[27] The suggestions were made by Mr D J Rose and also Mr E Willheim, Special Counsel in the Commonwealth Attorney-General's Department.

prescribed in Part V Division 2A of the same Act. The example assumes that:

(a) both actions fall within s 39(2) of the *Judiciary Act*[28] and
(b) that the actions are commenced in a Supreme Court of a State even though the defendant is not present in that State (and cannot be served outside that State either under the Supreme Court Rules or the *Service and Execution of Process Act*).

Even if the defendant is present in another State, and thus capable of being sued in the Supreme Court of the other State, this would not *appear* to be of any avail since s 4 of the Cross-vesting Act has not cross-vested the federal jurisdiction of the latter court in favour of the former court.

A like result would *appear* to occur in the *second example* involving the exercise of diversity jurisdiction in respect of a dispute over land situated in another State eg the action mentioned earlier commenced in the Western Australian Supreme Court involving land in New South Wales where the parties to the action are residents of different States.

So far the writer has been careful to frame the results in terms which only *appear* to suggest that the State Supreme Courts would be unable to exercise the federal jurisdiction conferred upon the other State Supreme Courts under the *Judiciary Act* s 39(2). The results may be only *apparent* because of the argument which follows.

THE LIKELY ABSENCE OF THE NECESSITY TO CROSS-VEST THE FEDERAL JURISDICTION AS BETWEEN THE STATE SUPREME COURTS

The argument put forward in this article is that each State Supreme Court already enjoys the federal jurisdiction vested in each of the other State Supreme Courts without the need for the cross-vesting of that jurisdiction, even though, ironically, this will be because of the cross-vesting that has occurred in relation to State matters. The cogency of the argument depends upon the acceptance of four essential points.

[28] The actions involve matters arising under a law made by the Parliament within the meaning of s 75(iv) of the Constitution. Because of s 39(2) of the *Judiciary Act* the State Supreme Courts had, even before the Cross-vesting scheme, and now continue to have, the jurisdiction to:

(a) deal with breaches of statutory terms implied in Part V Div 2 of the Act mentioned in the text: *Zalai* v *Col Crawford (Retail) Pty Ltd* (1980) 32 ALR 187; *Arturi* v *Zupps Motors* (1980) 33 ALR 243; and
(b) hear actions for breaches of the statutory manufacturers' warranties contained in Part V Div 2A of the same Act since the State Supreme Courts are 'courts of competent jurisdiction' within the meaning of ss 74B–74H of that Act: *Stack* v *Gold Coast Securities* (1983) 154 CLR 261 at pp 276–7 *per* Gibbs CJ.

(i) Effect of cross-vesting in State matters

First, the effect of each State Cross-vesting Act is to cross-vest the Supreme Courts of each of the other States in relation to State matters with the same jurisdiction as is vested in the Supreme Court of the enacting State.

This may be illustrated by the effect of the NSW Cross-vesting Act. Section 4(3) of that Act states that the Supreme Court of another State 'has and may exercise original and appellate jurisdiction with respect to State matters.' It will be recalled that 'State matters' is defined in s 3 to mean a matter 'in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth.' Presumably 'Supreme Court' here means the NSW Supreme Court and the cross-vesting can operate in favour of the Supreme Courts of the other States eg the Western Australian Supreme Court. The same applies of course in relation to the effect of the Cross-vesting Acts of the other States.

As was indicated at the outset no attempt is made in this article to canvass the soundness of the doubts which have been raised regarding the constitutional validity of the cross-vesting scheme.[29] It is sufficient for present purposes to assume that a State parliament (*eg* that of NSW) has the constitutional power to vest the Supreme Courts of the other States (including *eg* the Supreme Court of Western Australia) with the jurisdiction possessed by the Supreme Court of that State (NSW) in relation to State matters — at least where a State consents to its Supreme Court being vested with such jurisdiction which has in fact occurred in the case of all State Parliaments.[30]

(ii) Jurisdiction over a defendant present in Australia

Secondly, the cross-vested jurisdiction in relation to State matters should in principle cover the jurisdiction which a Supreme Court of a State can exercise in actions *in personam* merely by reason of the presence of the defendant within the territorial jurisdiction of that State court. Such a view, if correct, would dispense with the need for a plaintiff to invoke the *Service and Execution of Process Act* or the Supreme Court Rules of a State in order to authorise the service of a defendant who is present in another State.

That view has already attracted significant judicial and other support.[31] It is true that it was not accepted by everyone, at least initially, since the NSW Solicitor-General, Mr K Mason QC, and Professor J Crawford argued that:

(a) the Cross-vesting legislation should not be read as rendering redundant the *Service and Execution of Process Act* and the Rules of Court which authorise the service of process interstate; and, that,

(b) otherwise the same legislation may be invalid on the basis of the 'apparently continuing doctrine that requires an objective nexus to be

[29] *Supra* pp 64–65.

[30] Cross-vesting Acts for all the States, s 9.

[31] *Seymour-Smith* v *Electricity Trust of South Australia* (1989) 17 NSWLR 648 at pp 657–60 *per* Rogers J; Professor J Davis, *Annual Survey of Law* 1987 at pp 58–9; G Griffith, D Rose and S Gageler, 'Further Aspects of the Cross-vesting Scheme' (1988) 62 ALJ 1016 at pp 1022–3.

> demonstrated before a State Act of Parliament may have valid extra-territorial effect'.[32]

The writer does not share the perceived need to read down the legislation in this way for the same reasons as those already advanced by those who support the contrary view.[33]

It needs to be appreciated, however that even if that contrary view is correct it is still subject to the possible need to comply with the Rules made by each of the Supreme Courts in the exercise of an *implied* power to regulate the exercise of cross-vested jurisdiction. If appears that in some jurisdictions the leave of the Court may be required to serve a defendant in another State or Territory of the Commonwealth.[34]

(iii) Ambulatory nature of Judiciary Act s 39(2)

Thirdly, it will be recalled that the grant of federal jurisdiction under 39(2) of the *Judiciary Act* is ambulatory and so should be read as encompassing any changes which occur from time to time in the limits of the jurisdiction of the State Supreme Courts in relation to 'State matters'.

The leading authority on this aspect of the provisions in question is *The Commonwealth* v *The District Court of the Metropolitan District*[35] in which the Commonwealth commenced an action in a NSW District Court to recover board and lodgings provided to the defendant and his family at migrant centres operated by the Commonwealth. The amount sought to be recovered was approximately £570 and clearly exceeded the amount recoverable in the District Court according to the limits in force under NSW law *in 1903* when s 39(2) of the *Judiciary Act* was enacted (£200). The amount did not exceed the same limits in force when the action was commenced *in 1953* (£1000). It was in that context that the High Court decided that s 39(2) of the *Judiciary Act* 1903–1950 should be construed as an ambulatory provision operating in relation to State jurisdiction at it exists from time to time and within the limits imposed from time to time by State law upon such jurisdiction.

It should therefore follow that any changes made to the limits of the jurisdiction of a State Supreme Court in relation to State matters should work a corresponding increase in the grant of federal jurisdiction in respect of analogous matters.

(iv) The source of the expanded 'limits' should be irrelevant

Fourthly, it is submitted that the limits of the jurisdiction of a State Supreme Court in s 39(2) of the *Judiciary Act* have been expanded to encompass the

[32] K Mason and J Crawford, 'The Cross-vesting Scheme' (1988) 62 ALJ 328 at pp 335–6. It appears that the Solicitor-General for NSW subsequently resiled from this position: *Seymour-Smith* v *Electricity Trust of South Australia supra* n 31 at p 659.

[33] *Supra* n 31.

[34] G Griffith, D Rose and S Gageler *supra* n 31; and also *Seymour-Smith* v *Electricity Trust of South Australia supra* n 31 at p 660 per Rogers J.

[35] (1954) 90 CLR 13. See also *Minister for the Army* v *Parbury Henty and Co* (1945) 70 CLR 459 at p 505 *per* Dixon J; Z Cowen and L Zines *supra* n 24 at pp 201–2.

jurisdiction vested in the Supreme Courts of the States in relation to 'State matters' as a result of the Cross-vesting scheme.

It will be recalled that the effect of that scheme, generally speaking, is to enable the Supreme Court of a State to exercise the jurisdiction vested in each of the other State Supreme Courts in relation to State matters. Furthermore federal jurisdiction should expand with a corresponding increase in State jurisdiction since the scope of federal jurisdiction depends upon those limits in analogous matters.

If this is correct the action involving a breach of the *Trade Practices Act* mentioned earlier could be commenced in a Supreme Court of a State (*eg* Western Australia) even if the defendant is not present in that State but is, instead, present in another State (*eg* NSW).[36] Likewise in the case of the action between residents of a different State commenced in the Western Australian Supreme Court where the action concerns a dispute over land in NSW.[37] In both of these examples the Western Australian Supreme Court can exercise the federal jurisdiction vested in the NSW Supreme Court.

One obstacle, however, remains in the way of accepting the argument put forward above. That obstacle relates to judicial remarks which suggest that the *ambulatory* effect of the *Judiciary Act* s 39(2) is *confined to changes made by the legislature of the State in which the Supreme Court is situated.* Thus in *The Commonwealth* v *The District Court of the Metropolitan District* it was stated:

> 'In restricting the grant of federal jurisdiction within the limits of the jurisdiction under State law of the several courts, s 39(2) is again taking up the limits of the jurisdiction which State law may prescribe from time to time for the State jurisdiction of those courts'.[38]

In *Power* v *Walters* Jordan CJ stated:

> 'The Federal jurisdiction conferred on State Courts by s 39 is subject to the limits of their several jurisdictions, whether as to locality, subject matter, or otherwise. The jurisdiction of the Western Australian Magistrate was limited to that conferred by the Western Australian Statute. . .'.[39]

The critical changes made to the limits of a State Supreme Court's jurisdiction were made by a different legislature. Thus in the examples discussed above[40] the expansion of the limits of the jurisdiction of the Western Australian Supreme Court results from the conferral of jurisdiction effected by the NSW Cross-vesting Act and not, at least for the most part, Western Australian legislation.

In the view of the writer the remaining obstacle is more apparent than real. In the *first* place, although not a complete reply to the obstacle raised, the cross-vesting of the jurisdiction to a court in another State only takes place

[36] *Supra* text p 68.
[37] *Supra* text p 68.
[38] *Supra* n 35 at p 22 and see also at pp 21 and 23.
[39] (1947) 47 SR NSW 370 at p 373 and see also *Minister for the Army* v *Parbury Henty and Co supra* n 35.
[40] *Supra* text p 75.

with the consent of the legislature of the other State. To some extent, then, the changes in the limits of the Western Australian Supreme Court's jurisdiction which arise as a result of the NSW Cross-vesting Act are also, partly at least, the result of legislative action taken by the Western Australian legislature, particularly if the consent is essential to the constitutional validity of the cross-vesting of the jurisdiction.[41] *Secondly*, the remarks were not, in any event, necessary for the decisions in those cases *ie* the remarks were *obiter* in the classic sense. *Finally*, but not least, the view that *the source of the expanded jurisdictional limits* should be irrelevant seems more consistent with the utility and the reason for the ambulatory character of the *Judiciary Act* s 39(2) — the reason being that it obviates the need to change s 39(2) every time changes are made to the limits of the jurisdiction of the State courts.

THE TRANSFER OF PROCEEDINGS INVOLVING THE EXERCISE OF FEDERAL JURISDICTION

The focus of attention in this article has been the cross-vesting aspect of the cross-vesting scheme effected by s 4 of the Cross-vesting Acts. As indicated at the outset the scheme has a second important feature, namely, the duty to transfer proceedings to the most appropriate court by reason of s 5.[42] There is nothing to suggest that the extensive provisions of s 5 of the Commonwealth Act should be read as excluding the transfer of proceedings which involve the exercise of federal jurisdiction. Herein lies the answer to any suggested potential abuse in the exercise of the expanded federal jurisdiction argued for in this article. For example in the action commenced in the Western Australian Supreme Court in respect of land situated in NSW the action could, and indeed should, be transferred to the NSW Supreme Court if it was thought inappropriate for the case to be heard in the former court.

[41] The *Western Australian Cross-vesting Act* s 9. The writer is indebted to Mr P McDonald, Deputy Government Solicitor, Commonwealth Attorney-General's Department, for the point made immediately above in the text.

[42] *Supra* text p 65.