

## FEDERAL JURISDICTION AND THE JURISDICTION OF THE FEDERAL COURT OF AUSTRALIA

### Introduction

**1A. This is a revised version of a paper delivered in September 2002 to the NSW Bar Association and published in the December 2002 part of the *Australian Bar Review*. I have not sought to refer to all cases decided in the last year dealing with the subject.**

1. The aim of this paper is to provide as simple a framework as possible to enable a practitioner to make an informed assessment whether the matter before the practitioner can be brought in the Federal Court, and whether the matter (in whichever court it is brought) involves an exercise of federal jurisdiction.
2. After the introduction in 1987 of the cross-vesting scheme there was a tendency to see an understanding of the notion of federal jurisdiction as unimportant. After all, the Federal Court was (it seemed) vested with all State and Territory jurisdiction and the States and Territory Supreme Courts were vested with (nearly) all federal jurisdiction.
3. Despite this tendency, for reasons which include some dealt with later, during the currency of the cross-vesting scheme, it was in fact still necessary to understand the notion of federal jurisdiction. Indeed, it remains a necessary task in *every* piece of litigation to understand whether the jurisdiction being exercised is federal or State, and to have that question in mind throughout a piece of litigation, *in whatever court the litigation is being conducted*.
4. Since the decision in *Re Wakim; Ex parte McNally*<sup>1</sup> the need to understand principles attending the exercise of federal jurisdiction has become more obvious. In *Re Wakim* the High Court held invalid the attempt to confer State

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<sup>1</sup> (1999) 198 CLR 511

jurisdiction on federal courts. Of course, State courts have been invested with federal jurisdiction from the very early years of the Federation by subs 39(2) of the *Judiciary Act 1903* (Cth), to which provision I will return.

5. Federal jurisdiction is not the same thing as the jurisdiction of the Federal Court. The difference in their meaning should be borne in mind.
6. At the end of the paper in appendix 1 there is a list (not exhaustive) of readily accessible and digestible reading materials that may assist in a more comprehensive understanding of the topic.

### **Constitutional Background**

7. The word “jurisdiction” is generic. At least in a curial context, it means “authority to adjudicate”, which might depend on presence within territorial bounds or on specific subject matter<sup>2</sup>.
8. The expression “federal jurisdiction” (and its distinction from “State jurisdiction”) is derived from the Constitution. Federal jurisdiction is the authority to adjudicate derived from the *Commonwealth* Constitution and *Commonwealth* laws; State jurisdiction is the authority to adjudicate derived from the *State* constitutions and *State* laws<sup>3</sup>.
9. Federal jurisdiction can arise by subject matter, identity of parties or the nature of relief. To understand how, one must start with the Constitution. Essentially, federal jurisdiction is co-extensive with the matters specified in ss 75 and 76 of the Constitution.

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<sup>2</sup> *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at [2]

<sup>3</sup> *Edensor* at [3]

10. The jurisdiction of the Federal Court is always federal jurisdiction; it must come from ss 75 and 76 of the Constitution in terms of content; and it is that which is defined by a law authorised by s 77(i) of the Constitution<sup>4</sup>.
11. The basic Constitutional elements that need to be understood to achieve a satisfactory working knowledge of federal jurisdiction and the jurisdiction of the Federal Court are few in number and tolerably straightforward. One first goes to ss 71, 75, 76 and 77 in Chapter III of the Constitution. These provisions are set out below, with the parts of them particularly relevant to the jurisdiction of the Federal Court emphasised.

*s 71 Judicial power and Courts*

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

12. One court and two groups of courts are referred to in s 71:
  - (a) the High Court;
  - (b) such other federal courts as the Commonwealth Parliament creates; and
  - (c) such other courts (not created by the Commonwealth Parliament) as the Commonwealth Parliament invests with federal jurisdiction.
13. To avoid complication, in this paper I will ignore the courts of the Territories. Strictly speaking, they are not “federal courts” governed by Chapter III. Questions of some complexity attend the position of Territory courts<sup>5</sup>. With the Territories put to one side, one can see the three categories of court in s 71 of the Constitution as:
  - (a) the High Court;
  - (b) federal courts; and
  - (c) State courts.

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<sup>4</sup> *Re Wakim*

<sup>5</sup> See, recently, *Re the Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322; and *Northern Territory v GPAO* (1999) 196 CLR 553

14. One of the federal courts (the Family Court and the Federal Magistrates Court are others) *created* (s 71) by the Commonwealth Parliament is the Federal Court. It was created by the *Federal Court of Australia Act 1976* (Cth) (FCAA). Once the Federal Court was created, s 71 of the Constitution vested the judicial power of the Commonwealth in the Federal Court. Judicial power is one thing, authority to exercise it over a given subject matter (federal jurisdiction) is another. For that, one turns to s 77, and, through it, to ss 75 and 76 of the Constitution.

*s 77 Power to define jurisdiction*

***With respect to any of the matters mentioned in [ss 75 and 76] the Parliament may make laws:***

- (i) ***defining the jurisdiction of any federal court other than the High Court;***
  - (ii) ***defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;***
  - (iii) *investing any court of a State with federal jurisdiction.*
15. The Constitution thereby gave the Commonwealth Parliament legislative power:
- (a) to define the jurisdiction of the Federal Court, once it was created, by reference to the subject matters dealt with by ss 75 and 76: s 77(i);
  - (b) to make that jurisdiction exclusive if it so desired: s 77(ii); and
  - (c) to invest any State court with federal jurisdiction: s77(iii).
16. One needs therefore to go to ss 75 and 76 to see what the universe of the subject matter of possible jurisdiction for a federal court or a State court is.

*s 75 Original jurisdiction of High Court*

***In all matters:***

- (i) *arising under any treaty;*
- (ii) *affecting consuls or other representatives of other countries;*
- (iii) ***in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;***
- (iv) *between States, or between residents of different States, or between a State and a resident of another State;*

(v) *in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;*  
*the High Court shall have original jurisdiction.*

*s 76 Additional original jurisdiction*

***The Parliament may make laws conferring original jurisdiction on the High Court in any matter:***

- (i) *arising under this Constitution, or involving its interpretation;*
- (ii) ***arising under any laws made by the Parliament;***
- (iii) ***of Admiralty and maritime jurisdiction;***
- (iv) *relating to the same subject-matter claimed under the laws of different States.*

16. I will first deal with the Federal Court.

### **The Evolving Jurisdiction of the Federal Court 1976 to 1997**

17. A natural and appropriate starting point for explaining what Commonwealth legislation has been passed under the authority of s 77(i) to define the jurisdiction of the Federal Court might be thought to be the FCAA itself – not so. With few exceptions (s 32, being the principally relevant exception, with which I deal later), the FCAA is *not* the source of jurisdiction of the Federal Court. Subsection 19(1) of the FCAA provides that:

*The Court has such original jurisdiction as is vested in it by laws made by the Parliament.*

Thus, subs 19(1) requires one to find another Commonwealth statute if one wishes to find a subject matter over which the Federal Court is to wield the judicial power of the Commonwealth vested by s 71.

18. Section 22 of the FCAA is in the following terms:

*The Court shall, in every matter before the Court, grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.*

19. Section 22 confers power on the Federal Court, not jurisdiction.<sup>6</sup>
20. The approach taken by the Parliament for the first 21 years of the life of the Federal Court, until 1997, was to define the jurisdiction of the Federal Court, Act by Act, by reference to individual named subject matters. From its earliest days, the Federal Court's jurisdiction was defined by such well known provisions as s 82 and subs 86(1) of the *Trade Practices Act 1974* (Cth) (TPA) which are now in the following terms:

**s 82**

- (1) *A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV, IVA, IVB or V or section 51AC may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.*
- (2) *An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.*

**s 86(1)**

*Jurisdiction is conferred on the Federal Court in any matter arising under this Act in respect of which a civil proceeding has, whether before or after the commencement of this section, been instituted under this Part.*

21. The Court's jurisdiction during these years was based on specific provisions vesting jurisdiction: the TPA; administrative law – the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act), and the *Administrative Appeals Tribunal Act 1975* (Cth); intellectual property legislation; industrial legislation; bankruptcy legislation; and taxation legislation.
22. In 1977, shortly after its creation, the Federal Court's jurisdiction was defined by 13 Commonwealth statutes; in 1992, by about 100. The annual report of the Court, in any given year, lists the legislation which gives the Court jurisdiction.

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<sup>6</sup> *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457

23. Over time, the Parliament began to use other foundations of power within ss 75 and 76 of the Constitution to define the jurisdiction of the Federal Court. In 1983, an important change was made to the *Judiciary Act 1903* (Cth) which affected the practice of administrative law. Subsection 39B(1) of the *Judiciary Act* was passed which provided as follows:

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

24. This employed ss 75(v) and 77(i) of the Constitution. Subsection 39B(1) mirrors the Constitutional relief available in the High Court under s 75(v) of the Constitution. The width of the notion of the administrative law concept of “jurisdiction” enunciated by the High Court in cases such as *Attorney-General (NSW) v Quin*<sup>7</sup>, *Craig v State of South Australia*<sup>8</sup> and *Minister for Immigration and Multicultural Affairs v Yusuf*<sup>9</sup> governing the granting of such relief, to a significant degree, overarches and encompasses much of the approach of the AD(JR) Act. But that is a paper in itself. **Indeed, Alan Robertson SC has illuminated that topic in an article entitled “The administrative law jurisdictions of the Federal Court – Is the AD(JR) Act still important?” (2003) 24 Aust Bar Rev 89. The article repays careful reading.**

25. In 1988, acting on the recommendation of the Australian Law Reform Commission, the Parliament enacted the *Admiralty Act 1988* (Cth) which conferred on the Federal Court comprehensive admiralty jurisdiction using ss 76(iii) and 77(i) of the Constitution. See generally in this regard the *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc.*<sup>10</sup> and at first instance<sup>11</sup> where Gummow J explained s 76(iii) in its historical context.

### ***1997 subs 39B(1A)***

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<sup>7</sup> (1990) 170 CLR 1

<sup>8</sup> (1995) 184 CLR 163

<sup>9</sup> (2001) 180 ALR 1

<sup>10</sup> (1994) 181 CLR 404

<sup>11</sup> 32 FCR 78

26. Most importantly, in 1997, the Commonwealth Parliament took a significant step towards transforming the Court from being a court of specific federal jurisdiction into a court of more general federal jurisdiction. Initially, this was general federal civil and criminal jurisdiction, though this latter aspect was probably an error and was quickly corrected. The step in question was the passing of subs 39B(1A), especially par 39B(1A)(c), of the *Judiciary Act*. Using ss 75(iii) (in part), 76(i) and (ii) and 77(i) of the Constitution, the Parliament (after amendment removing criminal jurisdiction) provided as follows in subs 39B(1A):

*The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:*

- (a) in which the Commonwealth is seeking an injunction or a declaration; or*
- (b) arising under the Constitution, or involving its interpretation; or*
- (c) **arising under any laws made by the Parliament**, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.*

27. Paragraph 39B(1A)(a) draws on s 75(iii) only to the extent that the Commonwealth *seeks* relief. “Commonwealth” includes Commonwealth instrumentalities such as ASIC and the Civil Aviation Authority<sup>12</sup>. The test of what is the Commonwealth for par 39B(1A)(a) and s 75 (iii) is not the same enquiry as involved in the determination of the question as to whether an authority is entitled to Crown immunity<sup>13</sup>. Also, the term “injunction” should be viewed as not limited to traditional equitable relief; it incorporates the developing remedy of injunctive relief in public law<sup>14</sup>.
28. Paragraph 39B(1A)(b) makes clear by specific conferral what has always been taken to be the case – that the Federal Court was conferred with jurisdiction to

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<sup>12</sup> *Edensor* at [39]; *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136 at [10] and [48]

<sup>13</sup> See generally Zines in Opeskin and Wheeler *The Australian Federal Judicial System* at 272-275; *State Bank of New South Wales v Commonwealth Savings Bank* (1986) 161 CLR 639; *Edensor*; and *Austral Pacific*

<sup>14</sup> *Edensor* at [45]

determine the constitutional validity of an Act conferring jurisdiction upon it<sup>15</sup>. Section 32 of the FCAA could also be called in play<sup>16</sup>. In any event, par 39B(1A)(b) now deals with the matter.

**28A. This jurisdiction would extend to a claim that a State Act is invalid or indeed whether an amendment to a State Constitution was made in accordance with that Constitution as required by s 106 of the Commonwealth Constitution. As to a wider possible view that all matters arising under State Constitutions or involving their interpretation are within federal jurisdiction on the basis that State Constitutions are in a sense incorporated by reference into s 106, see also Zines *The High Court and the Constitution* (4<sup>th</sup> Ed) pp 341, 382-91, and cf *Boath v Wyvill* (1989) 85 ALR 621, 634.**

29. The effect of par 39B(1A)(c) is difficult to overstate. Leaving aside criminal matters, the Federal Court is vested with jurisdiction:

- in any **matter**;
- **arising under** any laws of the Commonwealth Parliament.

30. Paragraph 39B(1A)(c) operates according to its terms as a general conferral of jurisdiction<sup>17</sup>. The effect of par 39B(1A)(c) on pre-existing provisions conferring jurisdiction will be worked out on a case by case basis, but one starts from the proposition that par 39B(1A)(c) is a general conferral of jurisdiction. In *Hooper v Kirella Pty Ltd*<sup>18</sup> the Full Court considered the relationship between par 39B(1A)(c) and s 86 of the TPA. Section 86 was a positive conferral not a proscription and thus par 39B(1A)(c) extended to matters beyond “proceedings” dealt with by s 86. Section 86 thus became otiose. Questions of statutory construction may arise between an earlier (or

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<sup>15</sup> See *Re Tooth & Co Ltd (No 2)* (1978) 34 FLR 112, 119-120, 130, 139-140; and *Grace Bros Pty Ltd v Magistrates, Local Courts of New South Wales* (1988) 84 ALR 492, 496

<sup>16</sup> In this regard see [83] below

<sup>17</sup> *Transport Workers' Union of Australia v Lee* (1998) 84 FCR 60 at 67; *National Union of Workers v Davids Distribution Pty Ltd* (1999) 165 ALR 595 at 601

<sup>18</sup> (1999) 167 ALR 358

later) Act and par 39B(1A)(c). There may be difficult questions where there is already some conferral, but it can be seen as deliberately circumscribed or there may be a proscription<sup>19</sup>.

**“matter”**

31. First, it is essential to appreciate the meaning of the word “matter”. This is a word used in both ss 75 and 76: s 75 “[i]n all matters”, s 76 “...in any matter”. Parliament repeated the use of the word in the *Judiciary Act*: ss 30, 32, 38, subss 38(a) and 38(e), subs 39(2), subss 39B(1), (1A), (1B), (1C), (1D) and (1E). It is a word basal to an understanding of federal jurisdiction. The word has a wide meaning and is of particular relevance to understanding the width of federal jurisdiction as exercised by any relevant court and to understanding what is referred to as the accrued jurisdiction of any federal court, including the Federal Court.
32. The “matter” is the justiciable controversy between the actors to it comprised of the substratum of facts and claims representing or amounting to the dispute or controversy between or amongst them. It is not the cause of action or the causes of action brought by the plaintiff. A justiciable controversy is identifiable independently of proceedings brought for its determination<sup>20</sup>. It is not characterised by the form of the proceedings<sup>21</sup>. It is the whole controversy in respect of which it is the function of the court (State or federal) exercising the judicial power of the Commonwealth to quell. It is the “subject matter for determination in a legal proceeding”<sup>22</sup>. The best known limitation is that it does not include advisory opinions<sup>23</sup>. This limitation arises from the Constitutional purpose of courts exercising of the judicial power of the Commonwealth in Ch III: to quell controversies, not to answer hypothetical

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<sup>19</sup> For example see *TWU v Lee* and *Rohner v Scanlan* (1997) 77 FCR 433. See also *ACTEW Corporation v Pangallo* [2002] FCAFC 325 (special leave refused).

<sup>20</sup> *Fencott v Muller* (1983) 152 CLR 570, 603-608; *Crouch v Commissioner for Railways (Q'd)* (1985) 159 CLR 22, 37; *Edensor* at [54]; *Hooper v Kirella* at [41]-[55]

<sup>21</sup> *Re Wakim* at 583-88

<sup>22</sup> *In re Judiciary and Navigation Acts* (1923) 32 CLR 455 at 265-66; *Croome v Tasmania* (1997) 191 CLR 119, 124-25

<sup>23</sup> *In re Judiciary and Navigation Acts*

questions or questions for advice put to them whether by private parties, the Parliament or the Executive. Accepting this limitation, it is essential to appreciate the width of the notion<sup>24</sup>.

33. *Re Wakim* is best remembered for its decision forbidding conferral of State judicial authority on federal courts. But Gummow and Hayne JJ discussed the notion of matter in very broad terms:

*[139] The central task is to identify the justiciable controversy. In civil proceedings that will ordinarily require close attention to the pleadings (if any) and to the factual basis of each claim.*

*[140] In Fencott [(1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ] it was said that “in the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter.” The references to “impression” and “practical judgment” cannot be understood, however, as stating a test that is to be applied. Considerations of impression and practical judgment are relevant because the question of jurisdiction usually arises before evidence is adduced and often before the pleadings are complete. Necessarily, then, the question will have to be decided on limited information. But the question is not at large. What is a single controversy “depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationships” [Fencott (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ]. There is but a single matter if different claims arise out of “common transactions and facts” or “a common substratum of facts” [Philip Morris (1981) 148 CLR 457 at 512 per Mason J], notwithstanding that the facts upon which the claims depend “do not wholly coincide” [Fencott (1983) 152 CLR 570 at 607 per Mason J, Murphy, Brennan and Deane JJ]. So, too, there is but one matter where different claims are so related that the determination of one is essential to the determination of the other [Philip Morris (1981) 148 CLR 457 at 512 per Mason J], as, for example, in the case of third party proceedings or where there are alternative claims for the same damage and the determination of one will either render the other otiose or necessitate its determination. Conversely, claims which*

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<sup>24</sup> See generally *Re Wakim* at [135], [139] to [142]; *Edensor* at [54] and [55]; *Fencott v Muller* at 591-92 and 603-608; *Stack v Coast Securities (No 9) Pty Ltd; Bargal Pty Ltd v Force* (1983) 154 CLR 261, 290-91, 294; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212, 219; *Moorgate Tobacco Co Ltd v Phillip Morris Ltd* (1980) 145 CLR 457

*are “completely disparate” [Felton v Mulligan (1971) 124 CLR 367 at 373 per Barwick CJ], “completely separate and distinct” [Philip Morris (1981) 148 CLR 457 at 521 per Murphy J] or “distinct and unrelated” [Moorgate Tobacco Co Ltd v Philip Morris Ltd (1980) 145 CLR 457 at 482 per Stephen, Mason, Aickin and Wilson JJ] are not part of the same matter.*

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

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

34. The history of the development of the notion through the phrase “accrued jurisdiction” is discussed by Zines in *Opeskin and Wheeler* at 290-95. As a general guide, the substantial commonality and interconnection of facts and legal issues is the basis for the identification of a matter. In any given case identifying the outer limit of the controversy may be a matter for judgment.

**34A. There are some what might be termed “non-controversial matters” accepted to be within the notion of federal jurisdiction appropriate for the exercise of the judicial power of the Commonwealth. For example in *Hedge, as Administrator of Goldfields Medical Fund Inc* [2002] FCA 1498 orders were sought giving effect to a proposed course of action by an administrator . There was no contradictor (as there often is not in uncontested company matters). French J discussed (see [41] to [46]) the**

relationship of “matter” with the notion of judicial power. The character of statutory function was closely analogous with matters historically accepted as judicial in character.

34B. Also, for a discussion of whether non-judiciability denies the existence of a matter, see *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth of Australia* [2003] FCAFC 3 and [2003] FCAFC 83.

34C. As to “matter” generally see Zines (3<sup>rd</sup> Ed) pp 15-21 esp.

*“arising under”*

35. A matter indubitably “arises under” a law of the Parliament if a provision such as s 82 of the TPA creates a cause of action under a federal law. However, it must be understood that this is only the paradigm of “arising under”.

36. It is *not* necessary for the form of relief or the cause of action to owe its nature or existence to a federal law. Even if the cause of action or form of relief is not created or provided for by federal law, if a federal statute is relied upon as giving a right sought to be vindicated or as the source of a defence asserted then the matter (that is the controversy) in which that right or defence arises is a matter *arising under* federal law<sup>25</sup>.

37. If a question under federal law is to be determined as a step along the way in one way of vindicating the position of someone involved in the controversy, that will create a matter arising under federal law<sup>26</sup>. In *Moorgate Tobacco v Philip Morris* at 476, Stephen, Mason, Aickin and Wilson JJ said:

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<sup>25</sup> *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 154; *Felton v Mulligan* (1971) 124 CLR 367, 374, 375, 388, 403, 408; *Fejo v Northern Territory* (1998) 195 CLR 96, 120; *Re McJannett; Ex parte Australian Workers’ Union of Employees, Queensland* (1997) 189 CLR 654, 656-57; *Australian Solar Mesh Sales Pty Ltd v Anderson* (2000) 101 FCR 1, 7-8

<sup>26</sup> *Felton v Mulligan* at 374, 375; *Moorgate Tobacco v Philip Morris* at 476; *Australian Solar Mesh Sales* at 6-7 [11]

*...The cases establish that federal jurisdiction is attracted if the right or duty based in a federal statute is directly asserted by the plaintiff or defendant, but not if the federal question arises only in some incidental fashion. So too federal jurisdiction is attracted if the court finds it necessary to decide whether or not a right or duty based in federal law exists, even if that matter has not been pleaded by the parties. But the converse is not true. If a federal matter is raised on the pleadings federal jurisdiction is exercised, notwithstanding that the court finds it unnecessary to decide the federal question because the case can be disposed of on other grounds.*

38. It is important to appreciate the relationship between a controversy (which the court's job is to quell) and the question of arising under a Commonwealth law. A controversy may be evident between parties well before either party decides to go to court. An assessment may well be able to be made at that point about whether there is a federal matter. For example, an insured might make a claim upon its insurer, seeking vindication of its contractual rights. The insurer may deny liability and say nothing, or it may explain its position. It may say that there was a non-disclosure or misrepresentation, thereby raising in the controversy ss 21 and 28 of the *Insurance Contracts Act 1984* (Cth) (the ICA). It may say that the claim is fraudulent, making s 56 of the ICA relevant. It may say that a breach of condition occurred so as to make s 54 of the ICA relevant. In these circumstances the matter (the controversy) arises under a law of the Parliament because of the existence of the federal issue embedded within the matter. The federal nature of the controversy does not depend upon whether the federal issue is in the first or second pleading. It does not depend upon whether the insurer strikes first by seeking a declaration of right based on the ICA or the applicant strikes first with a claim under the policy. Difficult questions might arise if a defendant, before action, asserts a federal right, but before any assertion in court or before suit the defendant genuinely abandons the previously asserted federal right or immunity. However, it is plain that a "matter" or controversy may exist prior to the institution of proceedings and that it may, at that point, bear a federal character<sup>27</sup>. This was the foundation for the conclusion in *Hooper v Kirella* that the procedure for preliminary

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<sup>27</sup> *Hooper v Kirella* at [41] to [55]

discovery in the Federal Court was valid and could be supported by an existing matter under par 39B(1A)(c) before the suit was commenced. As Griffiths CJ said in *South Australia v Victoria*<sup>28</sup>:

*The word “matters” was in 1900 in common use as the widest term to denote controversies **which might come before a court of Justice.***  
[emphasis added]

39. There need not even be a disputed federal issue in this way. The phrase “arising under” is wide enough to encompass a claim for common law or equitable relief in respect of, or over, a right which right owes its existence to federal law. This is a matter arising under federal law<sup>29</sup>. In *LNC Industries v BMW*<sup>30</sup> the property over which the parties were fighting comprised import quotas. The fight was about contractual and equitable rights and obligations. The subject matter was a bundle of rights owing their existence to federal law.

40. The joint reasons of the High Court in *LNC Industries v BMW* also approved of what Dixon J had said in *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd*<sup>31</sup>. Dixon J was dealing with Territory jurisdiction, but part of what he said related directly to the notion of “arising under” a law of the Parliament. Dixon J said:

*...It may well be that all claims of right arising under the law in force in the Territory come within this description, because they arise indirectly as the result of the Seat of Government Acceptance Act 1909 (see sec 6), and the Seat of Government (Administration) Act 1910 (see secs 4 to 7 and 12). **But it is at least clear that a claim to a right conferred by or under ordinances made by the Governor-General in Council under sec 12 of the Seat of Government (Administration) Act is a matter arising under an enactment of the Parliament.***  
[emphasis added]

41. So, there, Territory ordinances and claims to rights under Territory ordinances arose under the Commonwealth Act providing for those ordinances. Thus,

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<sup>28</sup> (1911) 12 CLR 667 at 675

<sup>29</sup> *LNC Industries Ltd v BMW (Aust) Ltd* (1983) 151 CLR 575

<sup>30</sup> (1983) 151 CLR 575

<sup>31</sup> (1929) 42 CLR 582, 585-6

where a liquidator was appointed by the Federal Court under the *Corporations Act 2001* (Cth) at the suit of ASIC, the claim instituted by the liquidator seeking to get in the assets of the trust to which he was appointed by the Court was within federal jurisdiction, notwithstanding that the third party raised only common law rights to justify its possession: *ASIC v Landy DFK Securities Ltd*<sup>32</sup>; cf *Avamure Pty Ltd (in liq) v Fletcher Jones & Staff Pty Ltd*<sup>33</sup> which dealt with an action by a voluntary liquidator.

42. For examples of claims for debts whose existence was owed to Commonwealth legislation, see *Federal Airports Corporation v Aerolineas Argentinas*<sup>34</sup> and *Coffey v Department of Social Security*<sup>35</sup>.
43. So, “arising under” does not merely signify a federal cause of action or a disputed federal issue (by way of claim or defence), it also encompasses these wider notions where the subject matter is federal or the matter has its origins under a federal Act.
44. An example of the changes wrought by par 39B(1A)(c) can be seen in sale of goods cases. Paragraph 39B(1A)(c) means that sale of goods cases, insofar as a term imported into the contract by the TPA is relied on, will involve, or be, matters arising under a federal law. This is an important widening of the Federal Court’s jurisdiction in respect of the TPA. It has long been accepted since Brennan J in *Arturi v Zupps Motors Pty Ltd*<sup>36</sup> followed the decision of Rogers J in *Zalai v Col Crawford (Retail) Pty Ltd*<sup>37</sup>, that ss 82 and 86 of the TPA confer no jurisdiction on the Federal Court merely because damages are claimed for breach of terms implied by the TPA. This proposition is undoubtedly correct. Section 82 refers to damage by conduct done in contravention of a provision of Part IV or V of the TPA. The damages in this

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<sup>32</sup> [2002] FCA 1056

<sup>33</sup> (1996) 22 ACSR 256

<sup>34</sup> (1997) 147 ALR 649

<sup>35</sup> (1999) 86 FCR 434

<sup>36</sup> (1980) 33 ALR 243

<sup>37</sup> (1980) 32 ALR 187

kind of case are contractual for breach of a contractual term implied by the TPA. However, now, the right claimed (the implied term) owes its existence to a federal statute and so such a matter arises under a law of the Commonwealth.

45. Another example of the operation of par 39B(1A)(c) can be found in *von Arnim v Group 4 Correctional Services Pty Ltd*<sup>38</sup>. There Kenny J discussed the effect of s 53 of the *Extradition Act 1988* (Cth) which was in the following terms:

*The laws of a State or Territory with respect to:*

- a. *the conditions of imprisonment of persons imprisoned in that State or Territory to await trial for offences against the law of that State or Territory;*
  - b. *the treatment of such persons during imprisonment; and*
  - c. *the transfer of such persons prison to prison;*
- apply, so far as they are capable of application, in relation to persons who have been committed to prison in that State or Territory under this Act.*

46. This made a State law, s 47 of the *Corrections Act 1986* (Vict), applicable to persons committed to prison under the *Extradition Act*. Thus, though the right sought to be vindicated arose from the *Corrections Act* it was picked up by s 53 of the *Extradition Act* and so the right was one arising under the federal law. The operation was similar to that of s 79 (see [85] below) in transforming the State law into a surrogate federal law.

47. There is a distinction drawn between merely interpreting a federal law, which is insufficient alone to attract federal jurisdiction, and arising under a federal law. The difference is not reliably placed into a universally valid test. In *Felton v Mulligan* the following was said:

- (a) Barwick CJ at 374:

*...Further the matter arising under a law of the Parliament will have arisen if the suit could have been disposed of by deciding the matter, whether or not the suit was so disposed of: cf Nelungaloo Pty Ltd v The Commonwealth [(1952) 85 CLR 545]; The Commonwealth v Bank of New South Wales [(1949) 79 CLR 497]. It is of course not*

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<sup>38</sup> [2002] FCA 310

*enough that a law made by the Parliament must be construed in the course of the decision of the case. There must be a matter arising under a law of the Parliament. The contrast between the language of s 76(i) and 76(ii) is relevant in this connexion. The point at which interpretation of the federal statute, prima facie an apparently incidental consideration, may give rise to a matter arising under the statute is not readily expressed in universally valid terms. But the distinction between the two situations must be maintained.*

(b) Walsh J at 408-9:

*A comparison between the terms of s 76(i) and those of s 76(ii) of the Constitution indicates that a distinction is to be drawn between a matter “arising under” a law of the Parliament and a matter which involves the interpretation of such a law. The fact that the interpretation of a law is involved does not necessarily mean that there is a matter arising under the law. But, in my opinion, there is a matter arising under the law if the source of the right claimed by the plaintiff or applicant or the source of a defence which asserts that the defendant or respondent is immune from the liability or obligation alleged against him is a law of the Parliament. I think that that view of what constitutes a matter arising under a law of the Parliament is in conformity with the statements made in R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett [(1945) 70 CLR 141] by Latham CJ and McTiernan J [(1945) 70 CLR at p 173]. There Latham CJ said: “If a right claimed is conferred by or under a federal statute, the claim arises under the statute” [(1945) 70 CLR at p 154]. Likewise, in my opinion, if the answer made to a claim is that the defendant is free from the obligation asserted against him and that this freedom is conferred by an Act of the Parliament, the defence arises under that Act and the result is that there is before the Court a “matter” which arises under that Act.*

(c) Gibbs J at 416:

*...I regard it as now settled that a matter cannot be said to arise under a law made by the Parliament within s 76(ii) simply because to decide the matter it is necessary to consider or construe the law. To adapt some of the language used in James v South Australia [(1927) 40 CLR 1 at p 40] in relation to s 30 of the Judiciary Act, it may be said that a matter arises under a law made by the Parliament when a right, title, privilege or immunity is claimed under that law. A right, title privilege or immunity may be claimed under a law, either because the law is the source of the right, title, privilege or immunity or because the right, title, privilege or immunity can only be enforced by virtue of the law.*

48. The occasional elusiveness of the distinction between “arising under” and “involving the interpretation of” can be seen in *Felton v Mulligan* itself. The

plaintiff sought a declaration as to her rights under a covenant in a maintenance agreement against her former husband's executor. The defendant argued that the covenant was void as an attempt to oust the jurisdiction of the Court under the *Matrimonial Causes Act 1959* (Cth) to make a maintenance order. All seven justices agreed that in determining the matter and dealing with the defence the federal Act was relevant. The majority (Barwick CJ, McTiernan, Windeyer and Walsh JJ) were of the view that it arose under the Act. Menzies, Owen and Gibbs JJ disagreed.

49. Often the distinction will be clear. For example a State statute under which the rights of the parties are to be judged may have words similar to, or the same as, those appearing in a federal statute in respect of which there is a body of case law. The disposition of the case may turn on the interpretation of the relevant words (and so, in one sense, on the interpretation of the federal statute), but the case clearly would not arise under a law of the Commonwealth.

50. However, it should be noted that Gummow and Hayne JJ in *Abebe v Commonwealth*<sup>39</sup> cited *LNC v BMW* as authority for the proposition that a controversy will be a matter arising under a federal law:

*...because the determination of the controversy involves the interpretation of the Act and the rights or duties in question in the matter owe their existence to that statute.*

51. The width of the views of the Courts in construing the phrase "arising under of laws of the Parliament" was probably originally informed, in part, by the desire to limit appeals to the Privy Council (cf par 39(2)(a) of the *Judiciary Act* - [91] below). That is now history. However, subs 39B(1A) is a grant of jurisdiction. The High Court has consistently said that grants of jurisdiction

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<sup>39</sup> (1999) 197 CLR 510 at 561 [140]

and discretion to courts should be read liberally and without constriction from words and concepts not otherwise present<sup>40</sup>.

52. It can be seen from the above that not all available jurisdiction under ss 75 and 76 have been conferred on the Federal Court under s 77(i). Nevertheless the conferral is wide.

**once federal, only and ever federal**

53. Once a party involved in a controversy asserts its position and that amounts to the assertion of a matter arising under a federal law in the sense discussed above, the whole matter or controversy is federal<sup>41</sup>.
54. Once federal jurisdiction is attracted to a court, the jurisdiction which is exercised by that court throughout the case will be federal, save as to a completely disparate claim constituting in substance a separate matter<sup>42</sup>.
55. Once federal jurisdiction is attracted, the court is not exercising State jurisdiction. There is no notion of concurrent exercise of federal and State jurisdiction over the matter. It is federal. The notion that there could be two concurrent streams of federal and state jurisdiction (cf *Lorenzo v Carey*<sup>43</sup>) was

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<sup>40</sup> *CDJ v VAJ* (1998) 197 CLR 172 at 201; *The Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421; *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Services* (1995) 184 CLR 301 at 313 and 316; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205; *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 290; *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 275-76; *Emanuele v ASC* (1997) 188 CLR 114 at 136-37; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 56-7; *Abebe v Commonwealth* (1999) 197 CLR 510 at 586-87; *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184 at 201; *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 301; *Eastman v R* (2000) 203 CLR 1 at [81]; *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at [17]; and *Gerlach v Clifton Bricks Pty Ltd* (2002) 188 ALR 353 at [14]

<sup>41</sup> *Edensor* at [7]

<sup>42</sup> *NEC Information Systems Australia Pty Ltd v Iveson* (1992) 36 FCR 258 at 264; *Fencott v Muller* at 606-8; *Re Wakim* at [135]; *Felton v Mulligan* at 393; and *Moorgate Tobacco v Philip Morris* at 477

<sup>43</sup> (1921) 29 CLR 243 at 251

doubted in *Frost v Stevenson*<sup>44</sup> and rejected in *Felton v Mulligan*<sup>45</sup> and *Moorgate Tobacco*<sup>46</sup>.

56. When a right, as part of a claim or defence, which is said to arise under a law of the Parliament, is put forward by the party, the *assertion* of the federal issue, not its disposition, and not its merit, attracts the jurisdiction of the court to the relevant matter of which the federal issue forms part<sup>47</sup>, unless the claim or defence is made colourably, that is not genuinely or as a ‘mere subterfuge’ in order to fabricate jurisdiction<sup>48</sup>. Note that (especially in the context of the cross-vesting legislation) it is not colourable to bring proceedings in the Federal Court as a step in having the case moved to the Supreme Court so that all issues may be dealt with<sup>49</sup>.
57. Hence, even if the federal issue is decided against the party raising it, or, it was, or became, unnecessary to deal with it, the matter of which it forms part does not cease to be federal jurisdiction<sup>50</sup>. This is so even if the federal claim is struck out<sup>51</sup>. There is a proposition in the ALRC DP 64 at [2.162] that the Federal Court’s jurisdiction does not extend to the non-federal claim if the federal claim is colourable (which is correct) but also it if is “trivial, insubstantial or unarguable”. This is too broad a statement in the light of the authorities. In *Unilan Holdings* the TPA claims were struck out as not disclosing a cause of action. A Minister had given a speech at a public conference. It was held that it was not arguable that it was *in trade* or

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<sup>44</sup> (1937) 58 CLR 528

<sup>45</sup> (1971) 124 CLR 367 at 412-3

<sup>46</sup> (1980) 145 CLR 457 at 471 and 479

<sup>47</sup> *Miller v Haweis* (1907) 5 CLR 89, 93; *Troy v Wrigglesworth* (1919) 26 CLR 305, 311; *National Union of Workers v Davids Distribution* at [22]; *Felton v Mulligan* at 374; *Australian Solar Mesh* at 8-9; *Westpac Banking Corporation v Paterson* (1999) 167 ALR 377; and *Hooper v Kirella* at [55]

<sup>48</sup> *Burgundy Royale v Westpac* at 219

<sup>49</sup> *Palm Springs Ltd v Darling* [2002] FCAFC 239

<sup>50</sup> See *Moorgate Tobacco v Philip Morris* at 472, 476; *Hooper v Kirella* at [55]; *Burgundy Royale v Westpac* at 219; *McIntosh v National Australia Bank Ltd* (1988) 17 FCR 482, 484; *Hopper v Egg and Egg Pulp Marketing Board (Vict)* (1939) 61 CLR 665, 673-74, 680-81; *Carter v Egg and Egg Pulp Marketing Board* (1942) 66 CLR 557, 580, 585-87, 602; *Parton v Milk Board (Vict)* (1949) 80 CLR 229, 249, 257-58

<sup>51</sup> *Unilan Holdings Pty Ltd v Kerin* (1993) 44 FCR 481, 481-82; *Hooper v Kirella* at [55]

commerce<sup>52</sup>. Nevertheless, the Full Court made it clear that the Court had jurisdiction to hear the negligent misrepresentation claims left on the pleadings<sup>53</sup>. In *Moorgate Tobacco v Philip Morris* a trade mark count was pleaded but, though lying on the pleading, was not pressed. To all intents and purposes it was abandoned. All other matters were non-federal. The matter was federal jurisdiction.

58. There is reference by Professor Zines in *Opeksin and Wheeler* at 294-95 and by the ALRC in DP 64 at [2·164] to the question of the failure of the federal claim possibly leading to the absence of accrued jurisdiction. An example given is a finding that an act complained of was not administrative (but was legislative) for the AD(JR) Act, and so an AD(JR) Act claim failing and bringing down with it the accrued jurisdiction. However, the failure of the federal issue does not deny the consequences of its assertion. If non-colourable, the assertion clothes the court with jurisdiction to hear the federal and non-federal parts of the matter – the whole matter. It is the request to the court by a litigant to deal with a matter in which the litigant seeks the aid of the court to decide whether it has a valid right or defence arising under Commonwealth law in the sense described above which is crucial. Jurisdiction is attracted by non-colourable claim or assertion within the matter by one of the parties to it. The Full Court in *Westpac v Paterson* at 381 put the matter squarely:

*As a matter of principle, there is no reason why the court cannot acquire jurisdiction in a matter arising under a law of the Commonwealth by the filing of a cross-claim which asserts a claim founded on the Commonwealth legislation. The filing of the cross-claim asserts the right and makes the claim to enforce the right part of the justiciable controversy between the parties. Provided the cross-claim is not “colourable”, it attracts federal jurisdiction. This was the view of French J in Cambridge Gulf Investments Pty Ltd (in liq) v Dandoe Pty Ltd (1999) 32 ACSR 422 at [16], although his Honour considered that the cross-claim actually filed in that case did not properly raise such an issue. [emphasis added]*

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<sup>52</sup> See 35 FCR 272

<sup>53</sup> See 44 FCR 481

- 58A.** Since September 2002, I have had the advantage of discussion of this issue with Professor Zines. As originally drafted, [58] perhaps glossed over an issue which is better exposed more crisply. There was a dispute in the authorities as to whether the absence of an “administrative” act under the *AD(JR) Act* led to the conclusion of an absence of jurisdiction (and thus denying the possibility of accrued or associated jurisdiction), or to the conclusion that the action failed, but within jurisdiction. (See generally *Vietnam Veterans’ Affairs Association of Australia New South Wales Branch Inc v Cohen* (1996) 70 FCR 419 (the former view) and *Post Office Agents Assoc. Ltd v Australian Postal Commission* (1958) 84 ALR 563, 565 (the latter view); and see also *Johnson Tiles v Esso Aust* (2000) 104 FCR 564, 598 [87]. The High Court has stated that unless there is federal jurisdiction properly invoked there can be no accrued jurisdiction: *Carlton & United Breweries Ltd v Castlemaine Tooheys Ltd* (1986) 161 CLR 543, 553. But that proposition does not answer the question, which is one of statutory construction whether the limitations on the exercise of power (relevantly here whether the act in question was “administrative”) will be regarded as going to the existence of jurisdiction or its exercise.
- 58B.** In *Parisiennes Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 391 Dixon J made clear that ordinarily limitations relevant to the jurisdiction of a superior court will be regarded as going to the exercise of jurisdiction, rather than its existence, unless a contrary intention is clearly expressed. Thus, generally, the non-colourable assertion of the elements of a cause of action, in respect of the resolution of which a Court has been given authority to hear, is sufficient for the existence of jurisdiction. For instance, if it is alleged that the respondent has engaged in misleading or deceptive conduct under s 52 of the *Trade Practices Act 1974* (Cth) and the case fails because the court finds there was no such conduct, that does not mean the court lacked jurisdiction to hear the case, rather, the issue of misleading or deceptive conduct went to the exercise of jurisdiction, not

its existence. See also Sir Anthony Mason in the Hong Kong Final Court of Appeal in *The Tian Sheng No 8* [2002] 2 Lloyd's Rep 430, 443.

**58C** An example of the legislature intending the limitation to be jurisdictional can be found in the factual preconditions in ss 17, 18 and 19 of the *Admiralty Act (1988)* (Cth): *The Shin Kobe Maru* (1984) 181 CLR 404, 426.

**58D** The matter can perhaps best be left by referring to what French J said in *Johnson Tiles v Esso* at [87]

87. *If there be no federal jurisdiction properly invoked then there can be no accrued jurisdiction – Carlton & United Breweries Ltd v Castlemaine Tooheys Ltd* (1986) 161 CLR 543 at 553 and see the discussion by Professor Zines, “Federal Associated and Accrued Jurisdiction”, in B Opeskin and F Wheeler (eds) – *The Australian Federal Judicial System* (2000), pp 294-295 and the apparent tension between *Vietnam Veterans’ Affairs Association of Australia New South Wales Branch Inc v Cohen* (1996) 70 FCR 419 on the one hand and *Post Office Agents Association Ltd v Australian Postal Commission* (1988) 84 ALR 563 at 565 (Davies J) and *Buck v Comcare* (1996) 66 FCR 359 at 370 (Finn J). *The Court in such a case of course does have a limited jurisdiction to determine whether its jurisdiction is properly invoked – Mercator Property Consultants Pty Ltd v Christmas Island Resort Pty Ltd* (1999) 94 FCR 384; *Khatri v Price* (1999) 95 FCR 287.

**58E** To the extent that there is or may be debate about the AD(JR) Act (see [58A] above) that is one of statutory construction, and not principle. Further, as Alan Robertson has shown in his article referred to at [24] above this particular point concerning the AD(JR) Act is now largely moot in the light of par 39B(1A)(c).

59. The legitimacy of the court disposing of the non-federal issues even after the failure of the federal issue arises from the clothing of the court with an authority essential for the complete adjudication of the matter. The jurisdiction, the authority to decide, arises once the claim is made, once it is

asserted. As Latham CJ said in *Hopper v Egg and Egg Pulp Marketing Board* at 673:

*The fact that the constitutional objection has failed does not deprive the court of jurisdiction if “the facts relied on were bona fide raised, and were such as to raise” the question (Troy v Wrigglesworth... at 311).*

60. For the accrued jurisdiction to fail or lapse by reason of the unsuccessful invocation of a federal right, the non-federal part of the matter would have to have remained State jurisdiction or would have to have been transmogrified back into State jurisdiction. The former is a species of *Lorenzo v Carey* heresy<sup>54</sup>. The latter has no foundation.

61. In *Unilan Holdings Pty Ltd v Kerin* the Full Court said<sup>55</sup>:

*This is an appeal from the judgment of a judge of this Court (Lockhart J) dismissing an application in which the present appellants sought damages for negligent misstatement.*

*Earlier, another judge of the Court had struck out those portions of the statement of claim which propounded a cause of action seeking damages under s 82 of the Trade Practices Act 1974 (Cth) (the TP Act) in respect of alleged contravention of s 52 of that statute. The judgment is reported: Unilan Holdings v Kerin (1992) 35 FCR 272. An application for leave to appeal was heard and refused by us on 27 May 1993, immediately before we proceeded with the hearing of the appeal from the decision of Lockhart J.*

*Accordingly, these reasons are confined to the disposition of that appeal. The jurisdiction of the Court initially was attracted by that element of the matter comprising the claim of contravention of the TP Act. That claim could not be described as colourable. The striking out of the relevant portions of the appellant’s pleading did not thereby deprive the Court of the jurisdiction in respect of the balance of the matter: Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation (1987) 18 FCR 212. It is unnecessary, therefore, to determine whether there was any other basis of jurisdiction.*

62. In *Burgundy Royale Investments Pty Ltd v Westpac* the Full Court dealt with a claim under the TPA. Two respondents successfully argued, in an early separate hearing, that the TPA had no application to them (they being

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<sup>54</sup> See [55] above.

<sup>55</sup> At 481-82

governmental in character). However, they were unsuccessful in their contention that this meant that there was no accrued jurisdiction over them. The Full Court said the following<sup>56</sup>:

*The Court's jurisdiction is to determine each of the claims which together constitute a federal "matter". That jurisdiction cannot be limited, as the argument of the second and third respondents would suggest, to the determination of only those claims, federal or attached, which are successfully maintained. On the contrary, the jurisdiction is to entertain, and determine, all claims constituting a "matter", whatever their ultimate fate. Any other approach would involve the extremely inconvenient result that the existence or absence of jurisdiction to deal with a particular claim would depend upon the substantive result of that claim: cf Parisienne Basket Shoes Pty Ltd v Whyte (1938) 59 CLR 369 per Dixon J at 391.*

...

*It is true that in answering questions 1 and 2 in the negative, we have determined preliminary points of law in the claims under the Act brought against the second and third respondents; and that, in consequence, there will be no further trial of those issues. But it does not follow that the Court ever lacked jurisdiction to deal with such claims. Nor does it follow that the Court now loses its jurisdiction to deal with the attached common law claims: see Moorgate Tobacco Co Ltd v Philip Morris Ltd (1980) 145 CLR 457 at 469, 472, 477; Elna Australia Pty Ltd v International Computers (Australia) Pty Ltd (1987) ATPR 40-795; 75 ALR 271, and Dorotea Pty Ltd v Vancleve Pty Ltd (1987) ATPR 40-807; 75 ALR 629. In principle, the position is no different than it would have been if the claims under the Act had proceeded to trial and had been dismissed on the merits. In that situation, it could not seriously be suggested that the dismissal of the claims under the Act had the effect of depriving the Court of jurisdiction to deal with any attached non-federal claim.*

*The position may have been different if the claims under the Act had been "colourable" in the sense that they were made for the improper purpose of "fabricating" jurisdiction: see P H Lane, Lane's Commentary on the Australian Constitution (1986), pp 367-368 and the cases there cited. There is no room for such a suggestion here. The applicants' case that the second and third respondents were bound by the Act cannot be said to be unarguable; and we think it was pursued bona fide: cf R v Cook; Ex parte Twigg (1980) 147 CLR 15 per Gibbs J at 26.*

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<sup>56</sup> At 219

63. Once a non-colourable assertion is made, that clothes the court with federal jurisdiction, which, once gained, is never lost. Owen Dixon KC's testimony to the Royal Commission on the Constitution in 1927 put the matter in pungent practical terms:

*So, if a tramp about to cross the bridge at Swan Hill is arrested for vagrancy and is intelligent enough to object that he is engaged in interstate commerce and cannot be obstructed, a matter arises under the Constitution. His objection may be constitutional nonsense, but his case is at once one of Federal jurisdiction.*

64. "Colourable" imports improper purpose<sup>57</sup>, or a lack of *bona fides*<sup>58</sup>. It is not judged by reference to the strength and weakness of the case alone. Improper purpose or lack of *bona fides* carries with it the notion of an abuse of process.
65. The Full Court decision of *Elders Ltd v Swinbank*<sup>59</sup> that, there being no federal matter in an original pleading, the Full Court on appeal had no power to amend the application to include a federal matter (a claim for interest under the ICA), was reversed on appeal to the High Court, without argument at the hearing of the appeal. The Chief Justice made it plain that the Full Court had jurisdiction to hear the application to amend and if it granted the application it would then have jurisdiction to hear the whole matter. The Chief Justice said<sup>60</sup>:

*The Court is of the opinion that the Federal Court of Australia had jurisdiction to hear and determine the application for leave to amend made by notice of motion dated 17 November 1999 and that if the amendment was granted, the Federal Court would have jurisdiction to hear and determine the whole matter, including the application for leave to appeal against the decision of Justice Mansfield. Because the respondent insurers do not now oppose the making of the amendment sought and will consent to its making, it is unnecessary to consider*

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<sup>57</sup> *Burgundy Royale* at 219

<sup>58</sup> *Hopper* at 673

<sup>59</sup> (2000) 96 FCR 303

<sup>60</sup> See High Court transcript 13 August 2001

*whether, as is contended in this Court, the Federal Court otherwise had jurisdiction.*

66. As to the final fate of *Swinbank v Elders Ltd*, see the Full Court judgment on the application for leave to discontinue<sup>61</sup>.
67. Federal jurisdiction is often invoked by the pleading in the statement of claim of a matter arising under a law of the Commonwealth Parliament. It may be invoked by the pleading of such a matter in a defence<sup>62</sup>. It may also be invoked by the pleading of such a matter in a cross-claim, where, for the first time in the pleadings a federal issue is raised<sup>63</sup>. If the issues raised by those pleadings have already been ventilated by the parties in their discussion of the controversy the matter will already be federal<sup>64</sup>.
68. At first sight, it may seem odd that the characterisation of the “matter” as federal can arise from the defence or cross-claim. If the initiating process has no reference to any provision of a Commonwealth statute how can the matter be federal? At least at that point? It may not be. But it may be. What is essential is to think in terms of a “matter”, a “controversy”, which is there to be “quelled”. Parties sometimes engage in debate about their rights before going to court. A letter is sent. A response is received. Further delineation of the issues takes place. If within that exchange a party asserts in the sense described above (see Owen Dixon KC’s evidence at [63]) a right or claim under a federal law, (whether by way of claim to be asserted or defence to be vindicated) there is a controversy in which one party is asserting a question arising under a federal law. If thereafter one party wishes to seek the aid of the Court to quell the controversy, it will be bringing a matter forward which has within it a question under a federal statute, even if the enunciation of the

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<sup>61</sup> [2002] FCAFC 270

<sup>62</sup> *Felton v Mulligan* at 382-83; *Moorgate Tobacco v Philip Morris* at 476; *NEC Information v Iveson* at 264; *Westpac v Paterson* at [12]

<sup>63</sup> *Westpac v Paterson* at [9]–[13]; *Cambridge Gulf Investments Pty Ltd (in liq) v Dandoe Pty Ltd* (1999) 32 ACSR 422 at [16]; and *Bell Group Ltd v Westpac Banking Corporation* (2000) 104 FCR 305

<sup>64</sup> *Hooper v Kirella* at [41] to [55]

claim in the originating process contains no explicit foundation upon a federal statute. The justiciable controversy will be federal.

69. A few examples of reasonably commonplace circumstances illustrate the above. *Westpac v Paterson* is a good example. Westpac sought possession of the mortgaged premises. The debt was owed and in default. Mrs Paterson sought to set aside the mortgage, by a cross-claim, relying on *Commercial Bank of Australia Ltd v Amadio*<sup>65</sup>, the *Contracts Review Act 1980* (NSW) and a claim under s 52 of the TPA. The s 52 claim was to set aside or vary the mortgage. The controversy was federal because of her claims under a federal law. An insurance claim may contain a claim for interest under s 57 of the ICA in the originating process; or in the pre-existing correspondence a controversy may be seen to exist as to defences or claims under the ICA, cf ss 21, 28, 54, 56. In a cheque claim alleging the wrongful debit of a bank account, say in respect of a fraudulently altered cheque, the bank's defence may involve reliance on a provision of *Cheques and Payment Orders Act 1986* (Cth) (CPOA). Any case raising banker's protections will be a matter arising under the CPOA. The *Corporations Act* is now Commonwealth legislation pursuant to the referral of power by the States. Claims by Commonwealth authorities such as ASIC or APRA for injunctions or declarations are claims contemplated by par 39B(1A)(a).
70. A list of specific conferrals of jurisdiction on the Federal Court in respect of banking, finance and insurance is set out in appendix 2 hereto.

### **basic approach required**

71. To assess with some reliability whether the Federal Court has jurisdiction, the following steps should be taken:
- (a) First, the controversy and its limits should be identified.
  - (b) Secondly, the federal element or connection should be identified.

(c) Thirdly, having identified the federal element or connection, assess whether there is a question arising under a federal law in the sense discussed earlier or whether for some other reason the Court has jurisdiction.

According to Gummow and Hayne JJ (with whom Gleeson CJ agreed) in *Re Wakim* at [139], the “central task” is the identification of the controversy.

72. Of course, the task in (a) is not necessarily able to be confidently concluded prior to suit. If, prior to filing originating process, no federal element can be seen as part of the controversy, federal jurisdiction may not be present, in which case the Federal Court may not have jurisdiction.
73. If, later, the defendant asserts a claim in the defence or cross-claim raising a question under federal law, the matter arises under federal law. See for example *Bell Group Ltd v Westpac* where the issue arose in a pre-*Wakim* context with a statement of claim and defence not disclosing a federal issue, but the cross-claim sought relief under s 52 of the TPA.

#### **accrued and associated jurisdiction**

74. These terms denote different concepts, which it is important not to confuse. “Accrued jurisdiction” is that part of the matter which is not specifically federal. It is probably a term best avoided. The whole matter is federal if it arises under a federal law. It is apt to mislead if one thinks of State or common law jurisdiction clamping on to federal jurisdiction. It is all federal jurisdiction, if it is one controversy. The old notion of there perhaps being some “discretion” as to whether the Court will accept this “accrued” jurisdiction may well be wrong (or at the very least, unreliable) in the light of recent statements in the High Court in *Re Wakim*, *Edensor* and *Austral Pacific*.
75. The separateness of the notion of accrued jurisdiction arose because of the context of some of the early debates. In its early form, s 86 of the TPA

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<sup>65</sup> (1983) 151 CLR 447

conferred *exclusive* jurisdiction on the Federal Court to hear and determine “actions, prosecutions and other proceedings” under Part VI of the TPA. If common law questions were part of the matter, the problem arose that these common law questions may also have been conferred exclusively on the Federal Court. This led to the two elements being viewed separately and also to the notion (latterly the subject of adverse comment in the High Court) that the assumption of this accrued jurisdiction was discretionary.

76. “Associated” jurisdiction is dealt with in s 32 of the FCAA. Section 32 is in the following terms:
- (1) *To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked.*
  - (2) *The jurisdiction conferred by subsection (1) extends to jurisdiction to hear and determine an appeal from a judgment of a court so far as it relates to a matter that is associated with a matter in respect of which an appeal from that judgment, or another judgment of that court, is brought.*
77. Though related, in a sense, to the question of the extent of the controversy or “accrued” jurisdiction, s 32 provides for a conferral of jurisdiction in other federal matters not otherwise conferred, but available to be conferred, if there is conferral of some jurisdiction. Thus, if there is conferral by Commonwealth statute X of some federal jurisdiction, and jurisdiction under topic Y could be conferred on the Federal Court (by reference to ss 75 and 76 of the Constitution) but has not been so conferred *and* it is associated with the matter conferred by statute X, s 32 confers jurisdiction on the Court in respect of topic Y for the disposition this controversy.
78. Thus, if there is a federal element in a controversy arising under a law of the Parliament (par 39B(1A)(c), from s 76(ii) of the Constitution) and the Commonwealth is being sued, s 32 would confer jurisdiction on the Court, by, and in respect of, the fact that the Commonwealth is being sued, since it is a ground in s 75(iii) which could be, but otherwise has not been, conferred on

the Federal Court (par 39B(1A)(a) only deals with the Commonwealth *seeking* certain relief). With the growth of jurisdiction by par 39B(1A)(c) the scope for the operation of s 32 has lessened, but it could be useful in clarifying the existence of express federal jurisdiction, for example if the dispute involves the diversity jurisdiction under s 75(iv) or the Commonwealth is sued making s 75(iii) relevant.

79. The word “associated” is not a synonym for “accrued”. Section 32 is not referring merely to the operation of accrued jurisdiction. There is a lack of authoritative exposition of the extent of “associated”. In *Philip Morris Inc v Adam P Brown Male Fashions*<sup>66</sup>, Barwick CJ at 476 indicated that “associated” embraced matters which may be disparate from each other, that is not within the “accrued” jurisdiction within the conferred federal matter. Gaudron J in *PCS Operations Pty Ltd v Maritime Union of Australia*<sup>67</sup> was of the view that Barwick CJ’s views were implicit in the other judgments in that case<sup>68</sup>. The High Court, apart from Gaudron J sitting at first instance in *PCS v MUA*, has not recently discussed “associated” and s 32. *Philip Morris v Adam P Brown Male Fashions* remains the main High Court source of discussion on s 32. See also the article by Gummow J in 1979 in 10 Fed LR 211 which outlines the history behind s 32 and which remains a fertile source of ideas as to the scope and extent of s 32.
80. An example of the impact of associated jurisdiction is provided by *Allied Mills Industries Pty Ltd v Trade Practices Commission (No 1)*<sup>69</sup>. There a cross-claim was brought by a company to the litigation against the Trade Practices Commission. Leaving aside the question of whether this fell within the whole controversy anyway, s 32 gave the Federal Court jurisdiction which it otherwise may not have had (the cross-claim being founded on common law

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<sup>66</sup> (1981) 148 CLR 457

<sup>67</sup> (1998) 153 ALR 520, 521

<sup>68</sup> See *Philip Morris* at 494-95, 518, 521-22

<sup>69</sup> (1981) 34 ALR 105

and equitable causes of action) because the Trade Practices Commission was the Commonwealth for the purposes of s 75(iii).

81. Another example of the use of s 32 can be seen in the Patrick's dispute in *PCS v MUA*. There the applicants claimed breach of an award and an enterprise agreement, contravention of the *Workplace Relations Act 1996* (Cth) and of the *Corporations Law* against certain companies in the Patrick Group. The applicants also alleged two common law causes of action for conspiracy against the "Patrick parties", the National Farmers Federation and the Commonwealth. The claim against the Commonwealth fell within s 75(iii) and jurisdiction to hear it was not otherwise conferred on the Federal Court. Section 32 brought it within the Federal Court's jurisdiction. Gaudron J rejected the proposition that s 32 was limited to "matters which arise under other laws made by Parliament". This was how Gibbs J put it in *Philip Morris v Adam P Brown Male Fashions*. Her Honour said that it was at odds with the words of s 32 and the views expressed by Aickin J and Wilson J in *Philip Morris v Adam P Brown Male Fashions*<sup>70</sup> that s 32 extends jurisdiction to associated matters falling within ss 75 and 76 and was contrary to *Turner v Owen*<sup>71</sup> and *Businessworld Computers Pty Ltd v Australian Telecommunications Commission*<sup>72</sup>.
82. There is room for some further exposition of the scope of s 32, and, in particular, the meaning of "associated".
83. The possible role of s 32 was alluded to at [28] above. The availability of conferral under s 76(i) would mean if the jurisdiction conferred by an Act was otherwise apparently attracted, any attendant constitutional question (such as the validity of the conferring Act) could be dealt with.

### **State Courts Exercising Federal Jurisdiction**

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<sup>70</sup> At 535 and 547

<sup>71</sup> (1990) 26 FCR 366

84. So far attention has been given to the exercise by the Federal Court of federal jurisdiction. State courts, of course, exercise federal jurisdiction also, unless a federal statute confers jurisdiction exclusively in the Federal Court. The reason why attention is required to be addressed to the jurisdiction of the Federal Court is that, as a statutory Court, its jurisdiction is defined and bounded by federal statutes. But no court in Australia has unlimited jurisdiction. It is always necessary to understand what jurisdiction any court is exercising.
85. Sections 79 and 80 of the *Judiciary Act* deal with the application of laws, not just when a federal court or the Federal Court is exercising jurisdiction, but when *any* court is exercising federal jurisdiction. They are in the following terms:

***s 79 State or Territory laws to govern where applicable***

*The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, **except as otherwise provided by the Constitution or the laws of the Commonwealth**, be binding on all Courts exercising federal jurisdiction in that State or Territory **in all cases to which they are applicable.***  
[emphasis added]

***s 80 Common law to govern***

*So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and **not inconsistent** with the Constitution and **the laws of the Commonwealth**, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.*  
[emphasis added]

86. These are important provisions, especially the words “except as otherwise provided by... the laws of the Commonwealth” in s 79, and “not inconsistent with... the laws of the Commonwealth” in s 80. If the court in question is

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<sup>72</sup> (1988) 82 ALR 499, 500-1 (Gummow J)

exercising federal jurisdiction and if it is a State court, it is necessary to ascertain whether any law (State statute or common law) is inapplicable to the resolution of the controversy because there is an otherwise applicable law of the Commonwealth. This task is *always* present when the court is exercising federal jurisdiction, whether the court is the Supreme Court or the Federal Court or any other court. A recent decision explaining the operation of s 79 is *Northern Territory v GPAO*<sup>73</sup>.

87. It is beyond this paper to examine s 79 and s 80 exhaustively. There are a number of issues attending their application. Of some importance is the question of the degree to which the wording of the State Act (through the choice of words by the State Parliament) can make the State Act inapplicable. To read the State statute too literally might permit control over the constitutional conception of a “matter” to be exercised by State Parliaments. In *John Robertson & Co Ltd (in liq) v Ferguson Transformers Pty Ltd*<sup>74</sup> Mason J (as he then was) said:

*To ensure that State laws dealing with the particular topics mentioned in the section are applied in the exercise of federal jurisdiction by courts other than State courts, it is necessary that State laws be applied according to the hypothesis that federal courts do not necessarily lie outside their field of application. Section 79 requires the assumption to be made that federal courts lie within the field of application of State laws on the topics to which it refers, at least in those cases in which the State laws are expressed to apply to courts generally.*

88. When a State statute is expressed to apply to courts generally, it will pick up the Federal Court. Also, even when the State statute refers to State courts by name it may be read as encompassing the Federal Court<sup>75</sup>.
89. So, when do State courts exercise federal jurisdiction? It is first necessary to recall the terms of s 77(iii) of the Constitution:

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<sup>73</sup> especially [79] and [81] (per Gleeson CJ and Gummow J, with whom Gaudron J at [135] and Hayne J at [254] agreed); and see also *Mcleod v ASIC* [2002] HCA 37 at [10]

<sup>74</sup> (1973) 129 CLR 65, 95

<sup>75</sup> See *Edensor* at 588-89, 593-4 [59]-[60], [72]-[75]; *Macleod v ASIC* at [10]

*With respect to any of the matters in [ss 75 and 76] the [Commonwealth] Parliament may make laws:*

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

90. Section 77(iii) gave the Commonwealth Parliament the opportunity to use the existing State judicial structures without the need to set up separate federal courts. It was termed the “autochthonous [ie native] expedient”. The Americans had set up an entirely separate federal judicial (civil and criminal) court structure because of a lack of faith in the State courts, generally populated by locally elected judges. In Australia, there was not this level of distrust. However, as time passed the Commonwealth set up federal courts in areas of perceived specialty, for example bankruptcy and industrial law. But, by and large, until the creation of the Family Court and the Federal Court in the mid-1970s, the Commonwealth relied upon State courts to exercise federal jurisdiction. It still predominantly relies on State courts to deal with breaches of Commonwealth criminal law.

91. As stated above, early on in the life of the Federation, the Commonwealth Parliament passed the *Judiciary Act* which, in ss 38 and 39, provided for the vesting of federal jurisdiction in State courts. In their current form these sections are, relevantly, as follows:

***s 38 Matters in which jurisdiction of High Court exclusive***

*Subject to sections 39B and 44, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:*

- (a) matters arising directly under any treaty;*
- (b) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;*
- (c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;*
- (d) suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth;*
- (e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.*

**s 39 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 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.*

...

92. For present purposes, the immediately relevant provision is subs 39(2) which invests State courts with all jurisdiction provided for under ss 75 and 76 of the Constitution, except insofar as s 38 makes that the exclusive jurisdiction of the High Court (which itself is subject to the Federal Court's concurrent jurisdiction in s 39B and the power of remitter in s 44 to any federal or State court). Other provisions of Commonwealth Acts may expressly and individually vest jurisdiction in State courts as is recognised by s 39A of the *Judiciary Act*.
93. Thus, for instance, if proceedings in a State Supreme Court raise a question arising under federal law within the meaning of s 76(ii) of the Constitution, as explained earlier, the "matter" is federal jurisdiction. It no longer is (if it ever was) State jurisdiction. There are not two concurrent streams of jurisdiction. The matter is federal. It always remains federal jurisdiction; and thereupon and thereafter must be dealt with as such. In particular it is subject to ss 79 and 80 of the *Judiciary Act*.
94. The potential importance of ss 79 and 80 is seen in *Austral Pacific*. The plaintiff, an employee of the Civil Aviation Authority, sued Austral in respect of personal injuries. Austral issued a claim for contribution against the

authority under a State Act. The difficulty was that there was a regime as between the plaintiff and the Authority dealing with compensation rights and damages. Thus, the State Act, providing for contribution, had to be read (as a surrogate Commonwealth law picked up by s 79) subject to the Commonwealth legislation which limited the rights against the Authority through the words “otherwise provided”.

95. The test of inconsistency in ss 79 and 80 is a narrower test than s 109 inconsistency. It is based on “irreconcilability” or repugnancy<sup>76</sup>.

### **Conclusion**

96. No litigator in Australia can practise in ignorance of the above issues. However, the essentials are not overly difficult to grasp. Whether suing in the Federal Court or any other court, it is necessary to understand whether the jurisdiction being granted is federal or State.

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<sup>76</sup> *Austral Pacific* at 625; *Northern Territory v GPAO* at 588

## Appendix 1

1. Australian Law Reform Commission Rep 92 – *The judicial power of the Commonwealth*, especially chs 2, 3 and 4.
2. Australian Law Reform Commission Discussion Paper 64 – *The judicial power of the Commonwealth*, especially chs 2 and 6.
3. Sackville “The Re-Emergence of Federal Jurisdiction in Australia” (2001) 21 *Aust Bar Rev* 133.
4. French “Federal Courts Created by Parliament” in Opeskin **and** Wheeler *The Australian Federal Judicial System* (Melb. Uni Press 2000).
5. Zines “Federal, Associated and Accrued Jurisdiction” in Opeskin & Wheeler *op. cit.*
6. Cowen and Zines *Federal Jurisdiction in Australia* (3<sup>rd</sup> Ed OUP 2002)

## **Appendix 2**

### **Banking, Finance and Insurance Statutes**

#### **1. List of Federal Statutes**

##### **Banking and Insurance Federal Statutes**

*Australian Prudential Regulation Authority Act 1998*

*Banking Act 1959*

*Bills of Exchange Act 1909*

*Cheques and Payment Orders Act 1986*

*Debits Tax Administration Act 1982*

*Financial Corporations Act 1974*

*Financial Institutions Supervisory Levies Collection Act 1998*

*Financial Sector (Collection of Data) Act 2001*

*Financial Sector (Shareholdings) Act 1998*

*Financial Transaction Reports Act 1988*

*Payments Systems (Regulation) Act 1998*

*Reserve Bank Act 1959*

*Superannuation (Resolution of Complaints) Act 1993*

*Superannuation Industry (Supervision) Act 1993*

##### **Insurance Statutes**

*Insurance Act 1973*

*Insurance (Agents and Brokers) Act 1984*

*Insurance Contracts Act 1984*

*Insurance Acquisitions and Takeovers Act 1991*

*Life Insurance Act 1995*

*Marine Insurance Act 1909*

#### **2. Statutes that specifically confer jurisdiction on the Federal Court**

- I. *Banking Act 1959*
- 11CD [Party to a contract can apply to the Federal Court for orders in relation to contractual obligations if subjected to a direction by APRA]
- 14B & 14F [APRA can apply to Federal Court to wind up an ADI]
- 65 [Full Court of the Federal Court may direct an ADI to comply with the Act and Federal Court may authorise APRA to assume control of ADI/NOHC's business]
- 65A [Power of Federal Court to grant injunctions and types of injunctions]
- 69E [Federal Court action for compensation for acquisition of property under the Constitution]
- II. *Financial Corporations Act 1974*
- 23 [Federal Court has jurisdiction to direct a corporation to comply with Act where convicted of an offence under Act]
- III. *Financial Sector (Shareholdings) Act 1998*
- 10-12 [Federal Court has powers to remedy an "unacceptable shareholding situation"]
- 24 [Requirement of stakeholder to relinquish practical control, etc]
- 25 [Federal Court has powers to reduce stake of certain persons]
- 30 [Federal Court not to make an order that contravenes 51(xxxi) of the Constitution]
- 32 [Federal Court may grant specified injunctions]
- 33 [Power of Federal Court to grant interim injunctions]
- 34 [Federal Court has power to vary or discharge injunctions]
- 35 [Certain limits to grant injunctions do not apply]
- 36 [General power of the Federal Court]
- IV. *Financial Transaction Reports Act 1988*
- 19 [Federal Court's powers in relation to the unblocking or forfeiture of an account]
- 32 [Federal Court has power to grant injunctions]
- V. *Insurance Acquisitions and Takeovers Act 1991*
- 63 [Federal Court has power to enforce Ministerial orders]
- VI. *Insurance Act 1973*
- 88 [Federal Court can order that a designated security trust fund be placed under judicial trusteeship]
- 89 [Grounds for an order of judicial trusteeship]
- 92E [Federal Court may direct a judicial trustee not to deal with certain assets]
- 92F [Federal Court may make an order for the judicial trustee to make provision for liabilities in the accounts of the designated security trust funds]

- 92G [APRA may apply to the Federal Court for orders in relation to the judicial trustee]
- 92J [Duration of Federal Court's order for judicial trustee]
- 92K [Cancellation of judicial trusteeship, procedures and application to the Federal Court]
- 92L [Judicial trustee is to file with the Federal Court a report]
- 92M [Federal Court has power to review the determination of a judicial trustee to wind up or dissolve a designated security trust fund]
- 92N [Resignation of judicial trustee filed with Federal Court which appoints a new judicial trustee]
- 94A [Federal Court has power to grant injunctions]
- 124 [Evidence and judicial notice: Court under this section includes State and Territory Courts as well as the Federal Court]
- 129C [Jurisdiction of the Superannuation Complaints Tribunal]
- 129D [Federal Court may grant an injunction to in relation to s 129C]

VII. *Debits Tax Administration Act 1982*

- 25A [Application to Federal Court or AAT for review of decision]
- 25B [Federal Court or AAT may hear objections]
- 25D [Procedure and limits on review by AAT or appeal to the Federal Court]
- 26 [Federal Court may make orders on appeal]
- 29A [Timeframe for the implementation of the decisions of Federal Court or AAT]

VIII. *Life Insurance Act 1995*

- 41 [Federal Court has general powers in relation to non-compliance with s 38]
- 41A [Federal Court has power to deal with certain classes of transactions under s 38]
- 157 [Federal Court has powers to order that a life company be placed under judicial management]
- 158 [Federal Court's powers for order of judicial management]
- 159-160 [Other grounds for the Federal Court to make judicial management orders]
- 161 [Power of the Federal Court to stay proceedings against a company under judicial management]
- 162-166, 168, 170-171, 173-174,  
178-179 [General powers and role of the Federal Court in relation to judicial management and manager]
- 167 [Federal Court has power over the judicial manager]
- 169 [APRA may apply to the Federal Court to give instructions to the judicial manager]

172	[Federal Court has powers to cancel judicial management]
175-176	[Federal Court's powers in relation to the report of the judicial manager]
177	[Federal Court can order the transfer of business to another company]
180-187	[Federal Court's powers to order the winding up of life company]
188	[Liability of directors for loss to statutory fund and Federal Court's powers thereto]
233	[Operation of State and Territory laws]
235	[Federal Court's powers to grant injunctions]

IX. *Payment Systems (Regulation) Act 1998*

17	[Rights of person denied access to a designated payment system to apply to the Federal Court and Court's powers thereto]
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X. *Superannuation Industry (Supervision) Act 1993*

193	[Civil penalty provisions]
196	[Federal Court may make civil penalty orders]
197-201	[General provisions in relation to civil penalty orders]
221	[Relief from liability for contravention of civil penalty]
222	[Punitive damages not excluded]
262A	[Federal Court can enforce an undertaking]
289	[Powers of the Federal Court in relation to non-compliance with Act]
310	[Power of the Federal Court to grant relief against a superannuation official]
311-312	[Powers of the Federal Court in respect of meetings ordered by the Court]
313	[Power of the Federal Court to prohibit payment or transfer of money or property]
314	[Federal Court may order disclosure of information]
315	[Injunctions]
317	[Power of the Federal Court to punish contempt of court]
318	[Federal Court has power to resolve transitional difficulties]
319-325	[Sets out the rules about Court proceedings]
349A	[Bankruptcy provisions]

XI. *Superannuation (Resolution of Complaints) Act 1993*

46	[Federal Court can hear appeals from the Tribunal]
47	[Operation and implementation of determination subject to appeal to the Federal Court]
48	[Tribunal's provision of documents to the Federal Court]

### 3. Reviewable Administrative Decisions

- I. *Debits Tax Administration Act 1982*
  - 20-33 [Sets out the procedures for AAT review of decisions and applications to the Federal Court]
- II. *Financial Institutions Supervisory Levies Collection Act 1998*
  - 27-28 [Review of decisions made under the Act by the AAT]
- III. *Financial Transaction Reports Act 1988*
  - 17B & 19 [Director's decision subject to review by a court]
  - 42 [Administrative Decisions (Judicial Review) Act does not apply to decisions made under Act other than the above]
- IV. *Insurance Acquisitions and Takeovers Act 1991*
  - 43-62 [Decisions that can be made by the Minister or APRA under s 69 and powers thereto]
  - 66-68 [Sets out review of decisions by the Minister and the jurisdiction and procedures of the AAT]
  - 69 [Delegation by the Minister of powers to APRA]
- V. *Insurance (Agents and Brokers) Act 1984*
  - 41-41A, 43 [ASIC's decision making powers]
  - 42 [Application for review to the AAT]
- VI. *Insurance Act 1973*
  - 63-64 [Review of certain decisions of the Treasurer or APRA by the AAT]
- VII. *Life Insurance Act 1995*
  - 236 [Review by APRA and the AAT of certain decisions]
  - 237 [Constitution and procedure of AAT review]
- VIII. *Superannuation (Resolution of Complaints) Act 1993*
  - 6 [Establishes the Superannuation Complaints Tribunal]
  - 14AA-15C [Complaints may be made against trustees of funds and insurers concerning sale of annuity policies]
  - 15CA [Complaints may be made in respect of statements given to Commissioner of Taxation by superannuation provider]

- 15D [The complaints that the Superannuation Complaints Tribunal cannot deal with]
- 15E-15G [Complaints may be made about RSA providers]
- 15H-15K [Complaints may be made about insurers and sale of insurance benefits]
- 16-26 [General provisions in relation to Tribunal hearing]
- 27-31 [Conciliation of complaints by the Tribunal]
- 32-36, 38
- 40-43 [Procedures of the Tribunal]
- 37A-37G [Tribunal's powers in respect of specific complaints]
- 39 [Tribunal may refer questions of law to the Federal Court]
- 44-45 [Notification of determination and appeal rights]

IX. *Superannuation Industry (Supervision) Act 1993*

- 64A [Where Superannuation Complaints Tribunal joins person under *Superannuation (Resolution of Complaints) Act 1993*]

**4. Australian Prudential Regulation Authority**

General information on APRA and a list of statutes that confer powers on APRA

I. *Australian Prudential Regulation Authority Act 1998*

- 7-8 [Establishment and purpose of APRA]
- 9A [Conferral by State or Territory Laws of APRA functions]
- 11 [APRA's powers]
- 16-19 [Board's functions and powers in relation to APRA activities]
- 20 [Delegation of functions and powers of board to APRA staff members]
- 21-26 [Board meetings]

II. *Banking Act 1959*

- 9-9B [APRA's power to grant and revoke authority to carry on banking business]
- 9C [APRA may from time-to-time publish a list of ADIs]
- 11 [APRA may determine that provisions of the Act other than s 63 do not apply to a person]
- 11AA [APRA has power to grant and revoke authority to be a NOHC of an ADI]
- 11AB
- 11AD [APRA has power to publish list of NOHCs]
- 11AF [APRA may make prudential standards for ADIs and NOHCs]
- 11B [APRA's functions include monitoring of prudential matters]

- 11CA [APRA may give directions in certain circumstances]
- 11CB [APRA may certify an industry support contract]
- 11CC [APRA may direct parties to an industry support contract to comply with contract]
- 11CE [Requirements and powers of APRA to supply and disclose certain information]
- 12 [APRA has a duty to exercise its powers in relation to depositors for the protection of depositors]
- 13 [APRA's powers and rights in relation to supply of information from an ADI]
- 13A [APRA's powers in relation to ADIs that cannot meet obligations]
- 13B [Powers of investigators in relation to ADIs]
- 13C [APRA's powers in relation to the assuming of control of a business or appointment of an administrator to an ADI]
- 14B-14E [APRA's role and powers in relation to statutory manager of ADI]
- 14F [APRA's powers to apply to Federal Court for ADI to be wound up]
- 16A [APRA's obligations to report to Treasurer and publish information about statutory management]
- 16B-16C [APRA's powers in relation to auditors of ADIs and authorised NOHCs]
- 61 [APRA's powers to conduct investigations]
- 62 [APRA can require persons to supply information]

III. *Financial Sector (Collection of Data) Act 2001*

- 3 [Object of Act to assist APRA in prudential regulation]
- 13-17 [APRA's powers to determine reporting standards and require information]
- 18-25 [APRA has power to issue administrative penalties in lieu of prosecution for certain offences]

IV. *Insurance Act 1973*

- 8 [APRA has general administration of Act subject to Treasurer's directions]
- 12-17D [APRA's powers in relation to authorisation for a body corporate to carry on insurance business]
- 18-22 [APRA's powers in relation to authorisation of NOHCs]
- 23 [APRA may publish list of authorised NOHCs]
- 25A-26 [APRA's powers to disqualify a person]
- 27 [APRA's powers to remove a director or senior manager]
- 32-35 [APRA's powers to determine prudential standards and powers thereto]

- 36-37 [APRA's powers to issue direction to insurer, NOHC or subsidiary]
- 38 [APRA to monitor prudential matters]
- 40-48 [APRA to approve appointment of auditor or actuary and powers thereto]
- 49-49B [APRA to receive information from auditor]
- 49E [APRA may require actuarial investigation of liabilities]
- 49M-49N [APRA may direct a general insurer to provide its accounts for liabilities subject to Treasurer's agreement]
- 51 [APRA's powers to make directions in relation to certain assets]
- 52-62 [APRA's powers to investigate NOHCs and general insurers]
- 68-70 [APRA may require Lloyd's to have security trust fund arrangements in place]
- 74 [APRA may direct Lloyd's underwriters not to issue or renew policies]
- 75-76 [APRA can carry out investigations of Lloyd's and require provision for liabilities]
- 77-86 [APRA's powers in relation to inquiries and investigations of Lloyd's or specified designated security trust fund]
- 115-115A [APRA's powers to require production of certain information]

V. *Life Insurance Act 1995*

- 12A-12B [APRA's powers to declare that certain businesses are life insurance business]
- 16C [APRA's powers over friendly societies]
- 16L-16Y [APRA's powers to approve benefit fund rules and powers thereto]
- 20-28 [APRA's powers over registration of companies under this Act]
- 49 [APRA may give notice to company in contravention of Act]
- 50-51 [APRA may sue in the name of a life company]
- 52-53 [Powers in relation to statutory funds]
- 54 [Prudential rules may deal with transitional matters]

VI. *Superannuation Industry (Supervision) Act 1993*

- 6 [Sets out comprehensively the sections within the Act that APRA has general administration of]
- 23-28 [APRA to deal with applications for trusteeship under Act]
- 29 [APRA must be notified of change in circumstances or breach of conditions]
- 35-36A [APRA to receive annual return from trustee of superannuation fund]
- 63 [APRA has powers to direct trustees of certain superannuation funds not to accept employer contributions]

- 71 [APRA's powers to determine an in-house asset]
- 92 [APRA's powers to approve certain arrangement of funds]
- 94-95 [APRA's powers in relation to borrowing by trustees of approved deposit funds]
- 120A [APRA may disqualify individuals]
- 126A-126F [APRA's regulatory powers over custodians of superannuation entities]
- 131 [APRA may disqualify auditor]
- 131A [APRA may refer auditor or actuary to a professional association]
- 132-133 [APRA may remove or suspend trustee of a superannuation entity]
- 134 [APRA may appoint acting trustee in cases of suspension or removal]
- 142 [APRA may formulate a scheme for the winding up and/or dissolution of a superannuation entity]