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Research Note

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JURISDICTIONAL CROSS-VESTING IN THE LIGHT OF *RE WAKIM*

With the recent decision of *Re Wakim, Ex P. McNally and Anor; Re Wakim Ex P. Darvall; Re Brown and Ors Ex P. Amann and Anor and Spinks and Ors v Prentice*,¹ the High Court of Australia struck down part of the cross-vesting scheme which had operated since 1988 to provide for the cross-vesting of civil jurisdiction between the federal courts and each State and Territory Supreme Court, and between each of the State and Territory courts.²

By a 6:1 majority, the High Court held that the scheme was unconstitutional because Chapter III of the Constitution, which relates to the federal judicature, does not give the Commonwealth Parliament the power to confer State jurisdiction on federal courts. While the Constitution does provide for the Commonwealth Parliament to invest a State court with federal jurisdiction, there was no express or implied provision for the reverse process.³

This means that judgments given by the Family Court of Australia and the Federal Court of Australia exercising jurisdiction conferred by State laws have no constitutional basis and are liable to be set aside as invalid.

The decision of the High Court was not unexpected. Doubts as to the constitutional validity of the part of the scheme held to be invalid by the High Court in *Re Wakim* had existed even prior to its implementation.

The Federal Courts (State Jurisdiction) Bill 1999 (Qld),⁴ passed by the Queensland Parliament on 21 July 1999, provides in part that existing “ineffective judgments” of federal courts given in the purported exercise of State jurisdiction are taken to be judgments of the Supreme Court and enforceable as such. The Bill also provides for the transfer of pending proceedings, in which the

federal courts lack jurisdiction, to the Supreme Court. Provisions are also made for State courts to hear

matters previously dealt with under applied law schemes otherwise previously dealt with by a federal court.⁵

All States, with the exception of Victoria, have now passed or introduced similar legislation.⁶

Jurisdictional Problems between State and Federal Courts

The Australian judicial system is comprised of a parallel system of State and Federal courts. The cross-vesting scheme was developed to counter the effects of jurisdictional conflicts and uncertainties caused by this dual court system.

For the first 70 years of federation, the State court system was predominant. The State courts, exercising both State and federal jurisdiction, were the courts of original jurisdiction and first appeal in most matters.⁷

Until the mid-1970's, the Commonwealth had only made limited use of its power under Chapter III of the Constitution to create federal courts with jurisdiction in bankruptcy and industrial matters. In 1975, the Commonwealth established the Family Court of Australia and in 1976 the Federal Court of Australia. The establishment of those courts as large superior courts meant that the former simplicity of the Australian court structure no longer existed.⁸

Jurisdictional problems between State and federal courts became more frequent and serious.⁹

In its *Report to the Constitutional Commission* in 1987, the Advisory Committee on the Australian Judicial System identified three reasons why jurisdictional conflicts between State and federal courts might arise:

- A lack of substantive legislative power in the Commonwealth¹⁰

For example, property claims between defacto couples based on equitable remedies of constructive or resulting trusts are not federal matters.

- A federal court may have a statutory jurisdiction in relation to specific matters. If the issues arising between the parties in a dispute go beyond the issue which the federal court has specific jurisdiction to determine, those issues will need to be determined in a State court if the federal court is not empowered to determine them.¹¹

For example, a matrimonial dispute may encompass proceedings in the Family Court for an alteration of property interests and a related claim for an award of damages arising from a domestic assault, which is a State matter.

- Federal jurisdiction is vested exclusively in the courts of the States in respect of one part of a controversy and vested exclusively in federal courts in respect of another part.¹²

The Advisory Committee also noted three factors which reduced the effect of jurisdictional conflicts:¹³

- Matters in which federal courts are given jurisdiction are unlikely often to involve any need to go beyond Commonwealth laws.
- The Acts which create the Family Court of Australia and the Federal Court of Australia confer jurisdiction in matters of federal jurisdiction associated with a matter in which jurisdiction has been otherwise specifically conferred.¹⁴ This type of jurisdiction is known as “associated jurisdiction”.
- The doctrine of “accrued jurisdiction”¹⁵ permits a federal court to determine issues arising entirely under State law, when such issues form part of the matter in respect of which jurisdiction is specifically conferred on the federal court. The non-federal

aspects must form part of a single controversy of which the federal issues form an integral part. The federal court has a discretion whether to enter upon the non-federal aspects of the matter.

For example, the Federal Court may invoke its accrued jurisdiction to determine a federal matter, such as a large and complex claim for misleading and deceptive conduct in contravention of s 52 of

the *Trade Practices Act 1974* (Cwth) in concert with related claims in contract and tort, which are State matters, if the same set of facts gives rise to both claims.¹⁶

The Advisory Committee favoured the cross-vesting of jurisdiction between federal courts and the courts of States and Territories. The Advisory Committee was also of the view that a constitutional amendment was desirable to empower the States to effect cross-vesting.¹⁷

In 1988 the Constitutional Commission in its *Final Report*, also recommended that the Constitution be amended to empower State and Territorial legislatures with the consent of the Federal Parliament to confer State and Territorial jurisdiction, respectively, on federal courts.¹⁸ The Constitutional Commission adopted the amendment proposed by the Advisory Committee:

*77A. The Parliament of a State or the legislature of a Territory may with the consent of the Parliament of the Commonwealth, make laws conferring jurisdiction on a federal court in respect of matters arising under the law of that State or Territory, including the common law in force in that State or Territory.*¹⁹

The Cross-Vesting Scheme

In 1988, the Commonwealth, the States and the Northern Territory implemented a system of complementary legislation which cross-vested jurisdiction between federal, State and Territory courts.²⁰ The Australian Capital Territory enacted similar legislation in 1993.²¹ The general objective of the cross-vesting scheme was to ensure that no court would lack jurisdiction to determine all claims and defences which could arise in a case.²²

In the second reading speech on the introduction of the *Jurisdiction of Courts (Cross Vesting) Act 1987* (Cwth), the then Deputy Prime Minister and Attorney-General, Hon Lionel Bowen MHR explained that:

The reasons for the proposed scheme are that litigants have occasionally experienced inconvenience and have been put to unnecessary expense as a result of,

*firstly, uncertainties as to the jurisdictional limits of Federal, State and Territory courts, particularly in the areas of trade practices and family law; and secondly, the lack of power in these courts to ensure that proceedings which are instituted in different courts, but which ought to be tried together, are tried in the one court.*²³

In general terms, the cross-vesting scheme provided that:

- The Federal Parliament vested, with some exceptions, the jurisdiction of the Federal Court and the Family Court in the Supreme Courts of the States and Territories.
- The legislatures of the States and Territories vested the State and Territorial jurisdiction, respectively, of their Supreme Courts in the Federal Court, the Family Court and the other State and Territorial Supreme Courts.
- Provision was made for transfers and removals to ensure that cases were heard in the court to whose ordinary jurisdiction they belong.

A similar scheme was adopted in the Corporations Law, which is a series of State Acts passed in identical form. The Corporations Law as State law thus vested jurisdiction in each State and Territory Supreme Court and the Federal Court of Australia. Similar cross-vesting schemes are also provided for under a number of other cooperative or applied law schemes.²⁴

These cross-vesting schemes were enacted without the support of any constitutional amendment.²⁵

High Court Decision in *Re Wakim*

In *Re Wakim* the High Court considered the validity of the cross-vesting provisions of the Corporations Law and the general cross-vesting legislation. The same issue, in substance, was litigated in the High Court in an earlier decision of *Gould v Brown*.²⁶ In that case, the Court was evenly divided and the validity of the legislation was upheld. The Court in *Re Wakim* reversed the decision in *Gould v Brown*.

The Court held that Chapter III of the Constitution limited the jurisdiction that could be validly conferred on federal courts.²⁷

McHugh J noted that the negative implications arising from Chapter III of the Constitution prevented a State conferring jurisdiction on a federal Court in respect of a matter specified in sections 75 and 76:

*By granting power to the Parliament of the Commonwealth to create federal courts and by expressly stating the matters in respect of which the Parliament may confer jurisdiction on those courts, Ch III impliedly forbids the conferring of any other jurisdiction on those courts by the Commonwealth or the States.*²⁸

Thus, the State Parliaments cannot invest federal courts with State jurisdiction even with the consent of the Commonwealth Parliament.

Although the cross-vesting legislation had been commended as an example of cooperation between the Parliaments of Commonwealth, the States and the Territories, the Parliaments cannot, by cooperation, amend the Constitution.²⁹

The Court noted, however, that the Federal court is still able to deal with matters under the Corporations Law arising in a Territory as opposed to a State.³⁰ This is because the Commonwealth Parliament may confer jurisdiction on a federal court with respect to matters arising under a law made under the Commonwealth's power to make laws for the government of a Territory.

The Practical Implications of *Re Wakim*

The result of the decision in *Re Wakim* is that State matters previously litigated in the federal courts must now be dealt with in the State Courts unless the matter is one which can be heard by the federal courts under the ambit of accrued jurisdiction.³¹

For example, the Family Court of Australia cannot now ordinarily determine a State matter such as a claim for damages as part of proceedings for an alteration of property interests. It also could not determine property proceedings under de facto relationships legislation, which is a State matter, along

with proceedings between the same parties for a parenting order in relation to an ex-nuptial child.³²

One commentator has suggested that the Family Court of Australia can still determine matters arising under State law to the extent that it is necessary to apply the *Family Law Act 1975* (Cwth) or if the matter comes within the scope of the court's accrued jurisdiction.³³

The Family Court of Western Australia, which is a State court established under the *Family Law Act 1975 (WA)*,³⁴ may still exercise its cross-vested jurisdiction, as it is not a federal court created under Chapter III of the Constitution.

The decision also means that Corporations Law matters must now be litigated in the State courts at least unless they come within the accrued jurisdiction of a federal court.³⁵

It does not affect the provisions in the cross-vesting scheme which empower one State or Territory Supreme Court to transfer cases to another State or Territory Supreme Court.

The enactment of model legislation by Queensland and other jurisdictions addresses the issue of past judgments and current proceedings affected by the invalidation of the cross-vesting scheme. The model legislation does not address future arrangements which will need to be made to accommodate new cases which previously would have been brought in the federal courts under the cross-vesting schemes, but will now have to be heard mainly in State courts.

It is anticipated that the increase in the existing caseload of the Supreme Court could result in increased costs and demands in resources and a possible backlog of cases in the court system.³⁶

Some factors which might operate to reduce such problems are, firstly, changes instituted by the State and federal judiciary to improve the efficiency of the courts,³⁷ and, secondly, the use of alternative dispute resolution services.³⁸

Proposals for Reform

The full impact of the High Court's decision in *Re Wakim* is not yet known. There has been much public debate in the past about whether the Australian

judicial system should be restructured.³⁹ The concept of cross-vesting jurisdiction was developed as part of that debate, along with various proposals for unification of the Australian Court system. The decision in *Re Wakim* has now revived that debate.

Some recent proposals for reform to overcome the problems caused by the invalidation of the cross-vesting scheme include:

- Constitutional reform by referendum to enable State jurisdiction to be vested in federal courts.⁴⁰
- The referral of powers which are currently vested in the States to the Commonwealth.⁴¹
- The re-enactment of the Corporations Law, except the part that deals with the formation of companies, as a Commonwealth Law using section 51 (xx) of the Constitution.⁴² This approach has received criticism that it would create rather than solve constitutional problems.⁴³
- A national court, constituted by a number of serving judges from the State Supreme courts, with appropriate federal jurisdiction conferred by the Federal Parliament.⁴⁴

Conclusion

The decision in *re Wakim* has rekindled the public debate on the structure of the Australian judicial system. The jurisdictional problems which led to the development of the cross-vesting scheme ten years ago have re-emerged. In the short term, model legislation, enacted by all States, addresses the problem of past and present matters affected by the invalidation of part of the cross-vesting scheme. A practical solution to resolve the jurisdictional problems inherent in the Australian judicial system is still to be determined.

¹ (1999) 73 ALJR 839

² The cross-vesting scheme has no application to criminal proceedings: s 3(1) definition of "proceeding".

³ *Re Wakim* (1999) 73 ALJR 839 at 861-867 [104-127], per Gummow and Hayne JJ (Gleeson CJ at 842-846 [1-24] and Gaudron J concurring). McHugh J at 851-856 [50-71], Callinan J at 890-893 [240-265]; Kirby J dissenting.

⁴ The Bill is based on model legislation that was developed by the Standing Committee of Attorneys-General in collaboration with the Special Committee of Solicitors-General and the Parliamentary Counsel's Committee.

⁵ Federal Courts (State Jurisdiction) Bill 1999 (Qld), *Explanatory Notes*, pp 1-2.

⁶ Victoria is expected to enact complementary legislation later this year.

⁷ *Judiciary Act 1903* (Cth), s 39(2).

⁸ Australia. Constitutional Commission, Report of the Australian Judicial System Advisory Committee, May 1987, para 3.21.

⁹ Australia. Constitutional Commission. *Final Report of the Constitutional Commission*. 1988 Vol 2, para 6.7.

¹⁰ Report of the Australian Judicial System Advisory Committee, para 3.48.

¹¹ Report of the Australian Judicial System Advisory Committee, para 3.50.

¹² Report of the Australian Judicial System Advisory Committee, para 3.52. The Advisory Committee referred to examples cited in Gummow "Pendant Jurisdiction in Australia - Section 32 of the Federal Court of Australia Act 1976" (1979) 10 *Federal. Law. Review*, p.211 at p 213.

¹³ Report of the Australian Judicial System Advisory Committee, paras 3.55-3.60. The expansion of concurrent jurisdiction of State courts in matters of Federal jurisdiction has also reduced the incidence of jurisdictional conflict. See Opeskin BR, 'Allocating Jurisdiction in the Federal Judicial System', (1995) 6 *Public Law Review*, p 217.

¹⁴ *Family Court of Australia Act 1975* (Cth), s 33; *Federal Court of Australia Act 1976* (Cth), s 32

¹⁵ *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261; *Phillip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570.

¹⁶ Magoffin C, 'The Australian Court System and the Demands of Federalism: Gould v Brown and the Constitutional Issues Raised by the Cross-Vesting Scheme', *Sydney Law Review*, 20 (2) June 1998, p 329 at p 331.

¹⁷ Report of the Australian Judicial System Advisory Committee, para 3.114. The Advisory Committee published its report prior to the commencement of the cross-vesting legislation. The Advisory Committee also suggested the conferral by the States of jurisdiction on federal courts could be accomplished

by reference of powers under the s 51 (xxxvii) of the Constitution.

¹⁸ *Final Report of the Constitutional Commission*, para 6.29.

¹⁹ *Final Report of the Constitutional Commission*, para 6.38.

²⁰ *Jurisdiction of Courts (Cross Vesting) Act 1987* (Cwlth); *Jurisdiction of Courts (Cross Vesting) Act 1987* (NT); *Jurisdiction of Courts (Cross Vesting) Act 1987* (NSW); *Jurisdiction of Courts (Cross Vesting) Act 1987* (Qld); *Jurisdiction of Courts (Cross Vesting) Act 1987* (SA); *Jurisdiction of Courts (Cross Vesting) Act 1987* (Tas); *Jurisdiction of Courts (Cross Vesting) Act 1987* (Vic); *Jurisdiction of Courts (Cross Vesting) Act 1987* (WA).

²¹ *Jurisdiction of Courts (Cross Vesting) Act 1993* (ACT)

²² Hon L F Bowen, Deputy Prime Minister and Attorney-General, The Jurisdiction of Courts (Cross-vesting) Bill 1986, Second Reading Speech, House of Representatives, *Hansard*, 22 October 1986, p 2555.

²³ Hon L F Bowen, Deputy Prime Minister and Attorney-General, The Jurisdiction of Courts (Cross-vesting) Bill 1986, Second Reading Speech, House of Representatives, *Hansard*, 22 October 1986, p 2555.

²⁴ For a list of applied law schemes in Queensland see the definition of "relevant State Act" in s 3 of the Federal Courts (State Jurisdiction) Bill 1999.

²⁵ Under the terms of s 128 of the Constitution, a constitutional amendment requires a referendum.

²⁶ (1998)193 CLR 346

²⁷ *Re Wakim* (1999) 73 ALJR 839 at 857-867 [83-127], per Gummow and Hayne JJ (Gleeson CJ at 842-846 [1-24] and Gaudron J concurring), McHugh J at 851- 856 [50-71], Callinan J at 890-893 [240-265]; Kirby J dissenting.

²⁸ *Re Wakim* (1999) 73 ALJR 839 at 853 [59].

²⁹ *Re Wakim* (1999) 73 ALJR 839 at 839 [2], per Gleeson CJ at 842-843[2].

³⁰ *Re Wakim* (1999) 73 ALJR 839 at 874-875 [172-175], per Gummow and Hayne JJ (Gleeson CJ, Gaudron, McHugh and Callinan JJ concurring). The Court applied its earlier decision in *Northern Territory v GPAO* (1999) 73 ALJR 470. See also Young J, 'Recent Cases: High Court declares part of cross-vesting scheme invalid', *Australian Law Journal*, July 1999, p 487.

³¹ Dickey A, 'Family law consequences of Re Wakim: Ex Parte McNally', *CCH Australian Family Law and Practice - Family Law News*, Report No. 399, 30 June 1999, p 4.

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- ³² Dickey, p 4.
- ³³ Dickey, p 4. Dickey notes however that the question of whether the Family Court can exercise accrued jurisdiction is still unsettled.
- ³⁴ *Family Law Act 1975* (WA), s 6.
- ³⁵ Young J, p 488.
- ³⁶ Hon M J Foley MLA, Attorney-General and Minister for Justice and Minister for the Arts, Federal Courts (State Jurisdiction) Bill 1999 (Qld), Second Reading Speech, *Daily Hansard*, 21 July 1999, p 2778; Mr Springborg, Federal Courts (State Jurisdiction) Bill 1999 (Qld), Second Reading Speech, *Daily Hansard*, 21 July 1999, p 2776.
- ³⁷ Santow GFK and Austin R, 'No doubts in Wakim wake', *Australian Financial Review*, 26 July 1999.
- ³⁸ Nicholas Reece, 'Private judges in demand', *Australian Financial Review*, 2 July 1999.
- ³⁹ Report of the Australian Judicial System Advisory Committee, paras 3.61-3.85 provides a summary of various proposals made for the alteration of the Australian judicial system.
- ⁴⁰ 'High Court Finding On Cross-vesting', *ABC Radio*. 18 July 1999. Online. Available: <<http://abc.net.au/am/stories/s29829.htm>>. 20 July 1999.
- ⁴¹ 'High Court Finding On Cross-vesting'.
- ⁴² Andrew Burrell,, 'How Lawyers' prayers stayed unanswered', *Australian Financial Review*, 23 July 1999
- ⁴³ Santow GFK and Austin R, 'No doubts in Wakim wake', *Australian Financial Review*, 26 July 1999.
- ⁴⁴ David Solomon, 'State prepares action plan on court changes', *Courier Mail*, 19 June 1999.

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