CROSS-VESTING: WHY NOT AND WHAT NEXT?

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On 17 June, the High Court, by a 6:1 majority, found invalid provisions in the *Corporations Act 1989* and the *Jurisdiction of Courts (Cross-Vesting) Act 1987* that provide for the cross-vesting of State jurisdiction in Federal Courts. The successful cross-vesting of State jurisdiction in federal courts which had existed for over a decade came to an end. In this talk today, I would like to briefly discuss the decision of the High Court and then consider some of the ramifications that arise as a result of the decision.

The validity of the cross-vesting schemes was first directly attacked in November 1995. At that time, the Full Federal Court considered the issue and in June of 1996 upheld the co-operative schemes. At that time, argument focussed on whether or not there was a *prohibition* in Chapter III of the *Constitution*. The Full Federal Court said there was not. Attention also focussed on the *source of the Commonwealth power* to allow its courts to be used for the exercise of State jurisdiction. The Federal Court found that source in the High Court decision in *re Duncan*, and the notion of co-operative federalism under which similar and complementary state powers and functions could properly be invested in federal bodies.

This sensible approach to what was universally regarded as a successful theme was to be short lived. In February 1998, the High Court in *Gould v Brown* split 3:3 on the validity of the cross-vesting scheme. That even balance in June this year became a flood with Kirby J as the sole dissenter upholding validity.

What led to this overwhelming outcome? What constitutional principle required the result? What unstated premise was behind the decision of the majority? It is necessary to examine the reasoning of the majority in order to understand the answer to some of these questions.

The leading judgment was given by Gummow and Hayne JJ which Gaudron J and Gleeson CJ endorsed. They rejected an argument that the incidental power in some way supported legislation. This was because they did not see that the conferral of state jurisdiction in any way was necessary to the effective exercise of federal judicial power. Rather, what was being sought to be done was to supplement the power the Commonwealth is given with respect to the federal judicial power not to complement it (para 152).

Those judges also agreed that Chapter III was exhaustive of the definition of the jurisdiction of federal courts. They took the view that ultimately it was the legislature of the polity in question that needed to authorise the exercise of jurisdiction by its courts. There was no relevant Commonwealth power and this could not be avoided whereby, with consent, the jurisdiction was in fact conferred by some other polity.

What the cross-vesting schemes attempted was to confer by state law jurisdiction outside the Chapter III system. This was to misconceive the true source of a court's jurisdiction which must derive from the polity which set it up.

Gleeson CJ also rejected the view that Chapter III allowed conferral of state jurisdiction. To him, Chapter III contained an exhaustive definition of the original jurisdiction that may be conferred on the federal courts which cannot be supplemented through some co-operative legislation. This had been determined in *Re Judiciary and Navigation Acts* in 1921. That

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case was not simply about whether advisory opinions were judicial, but about Chapter III being an exhaustive statement of the matters that a federal court could determine.

Similarly, he rejected the argument based on the incidental power as had Gummow and Hayne JJ. He said what was being done was not an execution of the federal judicial power but a substantial addition to the power and an attempt to circumvent limitations imposed on the power by the Constitution. So the Duncan principle cannot overcome a prohibition which was found to exist in Chapter III.

McHugh J repeated his views as expressed in the earlier decision of *Gould v Brown* and Callinan J agreed with him. The decision provided McHugh J with an excuse to engage in a bit of an excursus on constitutional interpretation in which he made it quite clear that for him the aim is to search for the intention of the makers of the Constitution deduced from the words used in a historical context.

> No current conceptions of the Constitution and no propositions, inferences or implications that can be drawn from the Constitution support the cross-vesting legislation. Not only does the Constitution contain no express powers supporting the legislation, it contains negative implications prohibiting such legislation. (para 48)

Parliament can only invest jurisdiction in federal courts to decide the matters specified in ss 75 and 76. The negative implications in Chapter III are a complete answer to reliance on the incidental power.

> It would be an extraordinary constitutional result if the power to create a federal court … extended to creating a court that other polities could invest with non-federal jurisdiction … they would be curial vessels into which could be poured unlimited jurisdiction by any polity except their creator. (para 60)

McHugh J also argues that if a state can confer jurisdiction on federal courts, it must be able to confer non-judicial power not incompatible with the exercise of federal judicial power. Both McHugh J, Gleeson CJ and other judges had images of the federal court providing advisory opinions under state law. This seems to have been an image that caused them considerable disquiet. They saw no basis for confining the state jurisdiction that could be conferred to matters that fall within federal judicial power; for them the only logical limit they could conceive was an inability to confer non compatible functions through a reverse *Kable* approach. This confirmed for them the danger of the cross-vesting schemes.

The approach of the majority looks for some positive or affirmative provision in the Constitution in order to support the particular legislative scheme. There is no such provision, so the scheme must fail.

Accrued Jurisdiction

By contrast to the rejection of any Commonwealth power to confer state jurisdiction as such, the Court affirmed a broad view of accrued jurisdiction - so as to allow state matters to be disposed of as part of the exercise of federal jurisdiction. Not only will accrued jurisdiction exist where there is one proceeding involving a single justiciable controversy - it may also exist where there are separate proceedings arising out of one set of facts. Thus, in *Wakim* three separate claims were brought against the Official Trustee, solicitors and a barrister alleging negligence. The High Court considered there was sufficient connection between the claims for them to be regarded as within the accrued federal jurisdiction as a result of the claim against the Official Trustee arising in federal jurisdiction.

Territory Jurisdiction

In *Spinks v Prentice* heard at the same time as *Re Wakim*, the High Court held that it was possible to vest jurisdiction arising under the Corporations Law of the ACT in the Federal Court. There is no prohibition on a federal court being given jurisdiction under a law made by the Commonwealth parliament, including a law made under section 122 of the Constitution: *Northern Territory of Australia v GPAO* was applied. What is left undecided is whether a territory legislature can itself confer jurisdiction on a federal court.

Let me contrast the approach of the majority with the approach of Kirby J. He rejected the drawing of negative implications and saw no prohibition in Chapter III to federal courts exercising state jurisdiction. As to power, while there was not power for the Commonwealth itself to confer state jurisdiction, the incidental power allowed it to consent to the conferral by the states of jurisdiction on federal courts. He also invoked the implied nationhood power to uphold the scheme.

If I can read a couple of short passages from his judgment, you will see the outspoken way in which he criticises the approach of the majority. In particular he attacks the resort to accrued jurisdiction to overcome the problem. He says:

> If there is a danger to the continued existence of the state judiciary, it lies in the persistent expansion of the accrued jurisdiction. This expansion may depend, as the proceedings involving Mr Wakim illustrate, upon considerations much more disputable, contentious and uncertain than the provisions of the cross vesting legislation (para 226).

He goes on further:

> In my view, the cross vesting legislation is more in keeping with the operation of Chapter III properly understood than the rigid construction of the Constitution which would strike down the legislation as impermissible and turn to judicial invention and sophistry to overcome the problems which are thereby created.

That is a very brief analysis of the judgement, but I think what emerges quite clearly is that the approach of the majority requires positive conferral of a power, finds that power in the form of an exhaustive definition of what federal jurisdiction consists of and what matters can be determined by the federal court, and then once they have reached the conclusion that it is an exhaustive list, that is the end of the matter.

They can overcome that in terms of accrued jurisdiction by relying on the incidental power by saying that ultimately what the courts there are principally adjudicating is a federal matter, and as part of that they can pick up state jurisdiction or matters arising under state law, but which still form a part of the same controversy. So they do not see a conflict between their relaxed approach to accrued jurisdiction and their narrow approach to cross-vested jurisdiction. Clearly it illustrates that the approach of the majority is much more a black-letter law approach, much less willing to allow pragmatic considerations or doctrines like cooperative federalism to overcome what they see as words in a constitution.

Immediate Implications

Let me turn then to the implications of the decision.

As a result of the decision, there is a need to validate the various past decisions made by the Federal Court where there was no basis for the jurisdiction, and to deal with cases commenced but not yet finalised in the Federal Court where there is no longer a basis for jurisdiction.

Clearly, there will be some work to be done by legal advisers perhaps in identifying which cases are ones where there would no longer be a basis for jurisdiction, where there is no alternative basis of jurisdiction or accrued jurisdiction. But no doubt, in some instances it will be fairly clear.

The solution to these immediate problems is state legislation. And model state legislation was prepared by the Solicitors-General. To date, it has been passed by NSW and WA, and it has been introduced in all the other states except Victoria. And what this state legislation is intended to do is the following:

(1) validate all past orders, decisions, judgments of federal courts made in the exercise of state jurisdiction by giving them substantive effect as if they were decisions of State Supreme Courts; and

(2) with respect to matters filed in the Federal Court, the state legislation will provide that once a federal court makes an order (either before or after the state legislation is enacted) to the effect that the federal court has no jurisdiction, a party can apply to the state supreme court to have the matter treated as a proceeding in the state court. Any interlocutory orders made in the Federal Court will have effect by virtue of point (1) above. The matter will be treated as if it had been filed in the state court at the time it was filed in the federal court, to avoid limitation problems. It will be treated, for all purposes, as if it had proceeded in the state court. The state court will be able to make any necessary ancillary orders to deal with any anomalies (of which there are bound to be some).

So if the states get their act together and pass this legislation, there should be mechanisms that ensure that there is no basis for parties to rush off to court to try and have judgments set aside and there will be no basis on which to take unmeritorious jurisdictional points in terms of existing cases.

Other Issues

There is a whole host of other issues thrown up by the cross-vesting decision. Let me just mention some of them.

Apart from the corporations scheme and the general cross-vesting scheme, there is a host of cooperative federal-state arrangements which have provided for the conferral of jurisdiction on the Federal Court under state law. These include the Competition Code, which gave the Federal Court exclusive jurisdiction so all the state competition codes will need to be amended to restore the jurisdiction of their own courts.

There are other cooperative schemes such as the Agriculture and Veterinary Chemicals Scheme, the Gas Pipelines Access Code, and a number of others. The major cooperative scheme, of course, and the one that, perhaps, attracts the most public comment is the Corporations Law Scheme.

Now, in these schemes, not only are there provisions for conferring jurisdiction on the Federal Court, but there are also mechanisms whereby the states have picked up various Commonwealth administrative laws and applied them as state law. For instance, under the Corporations Law there are mechanisms whereby, review of decisions can be made under the Administrative Decisions (Judicial Review) Act (ADJR Act), jurisdiction conferred on the Administrative Appeals Tribunal (AAT) to review decisions of the various corporate regulators, and these Commonwealth administrative laws essentially apply as a result of

provisions in the state corporations laws. As I said, there is a number of provisions like this in other schemes.

When the Federal Court no longer has jurisdiction, it seems very difficult to see how the ADJR Act, for instance, can continue to operate in any meaningful way. For the AAT and some of the other administrative laws there may be less difficult issues.

The Commonwealth has indicated that it is considering legislation to ensure the Federal Court can continue to exercise judicial review jurisdiction in respect of decisions made by relevant Commonwealth officers or authorities when exercising functions and powers in relation to state matters. So, there may be Commonwealth legislation that will restore the ability, for instance, to seek judicial review of decisions of the Australian Securities and Investment Commission.

But, clearly, there is a whole complex area there of associated matters that may completely or in part be affected by the cross-vesting decision. What, in fact, strikes me is how many cooperative schemes have crept up with little public scrutiny, adopting the cross-vesting mechanism, relying on a broad view of the *Duncan* decision to confer all sorts of powers on Commonwealth officers under state law, and to provide for those Commonwealth officers to be reviewed and so on.

It is interesting that there has been very little study of all these schemes, but I suspect there is a whole host of undiscovered legal difficulties out there. And one issue, in particular, that I think the cross-vesting decision leaves very much unanswered is precisely what does the *Duncan* principle stand for if it doesn't enable the conferral of state jurisdiction on federal courts? Does it still enable the conferral of a whole host of state powers and functions on other Commonwealth bodies, or are there some other limitations?

Long-term Implications

In terms of long-term implications, let me briefly mention what might be required. You will have seen from the public debate there are those who think the previous situation needs to be restored as a matter of some urgency. There are others, like the Attorney-General of WA, who think the solution is to abolish the Federal Court. There are others like Santow and Austin JJ in today's *Financial Review* who think the NSW Supreme Court can adequately cope with the new corporations jurisdiction and that there is no particular problem.

But there are many out there who think the old cross-vesting scheme was important and did work very satisfactorily and ought to be restored. The problem is finding a way in which to do that.

References of power have been thought about, but if Chapter III is a barrier by being an exhaustive statement of federal jurisdiction, then references of power in terms of simply referring some form of state jurisdiction and no substantive subject matter to the Commonwealth, do not seem likely to provide any solution, whether it be under section 51(37) or 51(38). Unless the states wish to refer their corporations power or some of their other substantive powers, references of powers seem unlikely to provide a solution.

A referendum has been canvassed. I think it unlikely that if there is to be a referendum that it will come about this year, but it is certainly a long term option. It may be seen as non-controversial and in that sense it may have prospects of getting up. On the other hand the interchange of powers proposal a few years ago, you might recall, was seen as non-controversial and then failed dismally. But certainly a referendum may be one mechanism.

Then the third main option is for the Commonwealth to actually assert and rely on some of the powers it already has which it has chosen not to use. This, in particular, is the suggestion in the corporations area where the Commonwealth simply relies on section 122 of the Territories power and otherwise relies on the states to enact the corporations law. While the Commonwealth may not have power over all aspects of corporations, it clearly could draw on its section 51(20) corporations power to enact much more corporations law as substantive Commonwealth law, and with that would go federal jurisdiction. Whether that is desirable or not may be something you could talk about. Certainly, from where I sit, there seems to be little inclination at present within the Commonwealth to fundamentally redraw the constitutional basis of the corporations law, and I must say, I have not yet seen too much pressure from the business community for that to be done. But who knows?

I have briefly touched, in this presentation, on the decision and the short and long term implications. It seems to me that it is too early to assess fully the impact of the High Court decision. It is also too early to assess the impact on the work of the Federal Court, whether there will be lots of Federal Court judges with far fewer cases to deal with than they have at present, and I think it is far too early to expect any restoration of a fully fledged cross-vesting scheme.