THE COMMONWEALTH'S RESPONSE TO *RE WAKIM*: THE *JURISDICTION OF COURTS LEGISLATION AMENDMENT ACT 2000*

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Introduction

The *Jurisdiction of Courts (Legislation Amendment) Act 2000*, ("the JOCLA Act") came into effect on 1 July 2000. Schedule 1 of the JOCLA Act is the Commonwealth's major legislative response to the High Court's decision in *Re Wakim; Ex parte McNally*[1] ("the cross-vesting decision"). The JOCLA Act amends the *Administrative Decisions (Judicial Review) Act 1977* ("the ADJR Act") substantially, and the *Administrative Appeals Tribunal Act 1975* ("the AAT Act") to a lesser extent. This note explains the reasons for these amendments, and their practical effect.

Co-operative Schemes

Co-operative schemes have become a common feature of Australian federalism. Such schemes involve, to some extent, the conferral of both State and Commonwealth powers on some official or authority. The pattern in recent years is for States to confer functions and powers on a Commonwealth official or authority, although this is not universally the case.[2]

Providing for Merits and Judicial Review of Decisions of Commonwealth Officers/Authorities in Cooperative Schemes

Prior to turning to the amendments made by the JOCLA Act, the means by which the cooperative schemes provided for administrative and judicial review of decisions made by Commonwealth officers where the relevant power or function is conferred by a State will be examined.

Before the commencement of the JOCLA Act, s.9 of the ADJR Act prevented State courts from reviewing decisions or actions of Commonwealth officers; this restriction applied even where the powers being exercised by a Commonwealth officer were conferred by State legislation.[3] The operation of s.9 was limited to some extent by the operation of the *Jurisdiction of Courts (Cross-vesting) Act 1987* ('the Cross-vesting Act') which vests Commonwealth jurisdiction in all matters[4] in State courts. However, State courts are required in all but extraordinary circumstances to transfer such proceedings to federal courts, because proceedings involving review of decisions of Commonwealth tribunals, and

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1 (1999) 198 CLR 511.

2 This note does not discuss the validity of such schemes. However, in *R v. Hughes* (2000) 171 ALR 155, the High Court cast some doubt on the capacity of a Commonwealth authority or officer to participate in such schemes in the absence of a Commonwealth head of legislative power supporting the conferral of duties on Commonwealth officers.

3 See ADJR Act paragraph 9(1)(d)

4 Other than those specifically listed in s.4(4) of the Cross-vesting Act.

matters under the ADJR Act are 'special federal matters' for the purposes of the Cross-vesting Act.[5]

Prior to the enactment of the JOCLA Act, the ADJR Act did not apply to decisions by Commonwealth officers taken under State laws; it only applied to decisions under 'enactments', which effectively meant Commonwealth enactments, and not State laws. It is important to recall, however, that section 75(v) of the Constitution applies to decisions of Commonwealth officers even when the officer is performing functions or exercising powers conferred by the law of a State.[6]

Some of the cooperative schemes do not make any specific provision for merits or judicial review of decisions taken by Commonwealth officers; aggrieved persons in these cases would be forced to rely on section 75(v) remedies. However, in a number of schemes it was considered appropriate for States to adopt the Commonwealth administrative law system, either in part, or entirely, for Commonwealth officers and authorities exercising powers conferred by States in the scheme.[7] This was done in order to extend a more comprehensive system of administrative law to aggrieved persons than section 75(v) would offer, while also ensuring that Commonwealth officers involved would be subject to a uniform system of administrative law, regardless of whether they were acting, in a particular case, pursuant to powers conferred by State or Commonwealth law.

The usual approach in the State legislation was for the States to adopt and apply, as State law, the provisions of some or all of the 'Commonwealth administrative laws' (ie, the ADJR Act, the AAT Act, the *Ombudsman Act 1976*, the *Freedom of Information Act 1982* and the *Privacy Act 1988*).[8] Each of these laws, adopted as State law, would operate in relation to Commonwealth officers when they were performing functions under the cooperative scheme law of a particular State. For example, if an officer of the Australian Securities and Investments Commission made a decision under the Corporations Law of Victoria, that decision would be judicially reviewable under the ADJR Act as the ADJR Act applied as *State* law.

The Effect of the *Re Wakim* Decision

Several of the Commonwealth administrative law statutes confer jurisdiction on the Federal Court (and now also the Federal Magistrates Court) in their own terms.[9] If they operated as the law of a State, those laws would result in the States conferring jurisdiction on these federal courts. The decision in *Re Wakim* established that the States could not confer such jurisdiction. It was therefore necessary to consider the effect of the *Re Wakim* decision on the application of the Commonwealth administrative laws to decisions and actions taken under State law, by Commonwealth officers, in the cooperative schemes.

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5 See section 6. For a comprehensive discussion of the relationship between section 9 of the ADJR Act and the Cross-vesting Act, see Campbell, Enid 'Cross-vesting of Jurisdiction in Administrative Law Matters' (1990) 16 *Mon UL Rev* 1.

6 *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117.

7 The schemes were those where the States adopted the following Commonwealth legislation: the *Agricultural and Veterinary Chemicals Act 1994*, the *Australian Sports Drug Agency Act 1990*; the *Corporations Act 1989*; the Competition Code set out in Part 1 of the Schedule to the *Trade Practices Act 1974* and the Price Exploitation Code set out in Part 2 of the Schedule to the *Trade Practices Act*. Also relevant was the scheme where the States adopted the *Gas Pipelines Access (South Australia) Act 1997* of South Australia.

8 See for example, s.35, *Corporations ([Name of State]) Act 1989*.

9 See for example, section 8, ADJR Act.

The Ombudsman, FOI and Privacy Acts

The JOCLA Act did not amend the Ombudsman Act, the FOI Act or the Privacy Act, consequent on the *Re Wakim* decision. The FOI Act does not purport to confer jurisdiction on any federal court, and it could therefore operate as applied State law in relation to the actions of Commonwealth authorities under State law, without any *Re Wakim* issues arising.

The Ombudsman Act, in its operation as Commonwealth law, applies to the actions of Commonwealth officers taken under State law in any case, since it relates to action taken by relevant Commonwealth agencies regardless of the source of power for such action. Consequently, the Commonwealth Ombudsman Act would have operative force in all relevant circumstances, making the adoption by States of the Ombudsman Act unnecessary.

The ADJR and AAT Acts

However, the impact of *Re Wakim* upon the State adopted version of the ADJR Act and the AAT Act was more serious. As those Acts purported to confer State jurisdiction on federal courts, the application by States of the ADJR Act as State law was probably entirely invalid. The application by States of those parts of the AAT Act which confer jurisdiction on the Federal Court was also probably invalid.[10]

Finding a Solution for the ADJR and AAT Acts

The *Re Wakim* decision meant, in practical terms, that in relation to the decisions and actions of Commonwealth officers taken under State conferred powers, the only avenue of judicial review available was that provided by s.75(v) of the Constitution, and that real doubt existed as to whether there could be any appeal on questions of law, or referral of questions of law from the AAT to the Federal Court.

Either of two solutions to this problem might have been adopted. First, State courts could have been allowed to judicially review decisions by Commonwealth officers and authorities where the decisions were made under State law, and to allow State courts to hear appeals on questions of law from the AAT in the same circumstances. The most obvious way to do this would be for the States to adopt the Commonwealth administrative laws as State laws, in relation to cooperative scheme matters, but instead of conferring jurisdiction on the Federal Court in each case, have the States confer jurisdiction on State courts. However, this would have been a very different approach to the approach taken in the past - that is not to have the decisions of Commonwealth officers reviewed in State courts; this is the policy inherent in section 9 of the ADJR Act.

Moreover, this approach would create a situation where applicants would have to work out which of the State or Commonwealth cooperative scheme laws applied in the case of their particular grievance, in order to determine in which court proceedings should be commenced.

Alternatively the Commonwealth could rely upon its own powers with respect to its officers and the authorities created under Commonwealth legislation. The JOCLA Act adopts this approach.

The ADJR Act

The JOCLA Act amended the ADJR Act so that it applies not only to 'decisions under enactments' but also to decisions made by a Commonwealth authority, or officer of the Commonwealth under an Act of a State or Territory described in new Schedule 3 of the

10 *Re Wakim* did not have any negative consequences for the exercise of State-conferred functions and powers by the AAT (which is not, of course, a Chapter III court).

ADJR Act. Schedule 3 lists cooperative schemes in which State laws confer powers or functions upon Commonwealth officers or authorities. Hence, the ADJR Act will apply as Commonwealth law to decisions taken by Commonwealth officers or authorities under State laws listed in new Schedule 3, and the Federal Court will therefore have jurisdiction.

Split proceedings under the ADJR Act

One issue which the JOCLA Act highlights is the difficulties which may come into play when a judicial review proceeding is closely connected to another proceeding. For example, there may be a dispute between a person and the Commonwealth as to a decision which has been made by the ACCC under the Competition Code provisions of the *Trade Practices Act 1974* (applying as State law) which concerns a factual situation which is also in question in a dispute between two private parties, as to their respective rights under the Competition Code. The ACCC decision might give rise to judicial review proceedings (which can only be brought in the Federal Court because of the operation of s.9 of the ADJR Act and provisions of the Cross-vesting Act), while the dispute between the private parties can only be brought in a State court as it arises under a State law (ie, the State applied Competition Code provisions). Prior to the decision in *Re Wakim*, the proceedings between the parties could have been brought in a Federal Court under its cross-vested jurisdiction.

However, following *Re Wakim*, such a person would have been faced with a situation where two courts might be dealing with related proceedings, without the possibility of either proceeding being transferred to the other court. To address this, the JOCLA Act amended the Cross-Vesting Act to permit the judicial review proceedings to be transferred to a State Supreme Court where a related proceeding is either already commenced or is subsequently commenced in that State Supreme Court.[11]

AAT Act

The adoption by States of the AAT Act as State law is generally valid. However, the AAT Act does confer jurisdiction on the Federal Court (and now the Federal Magistrates Court) with respect to appeals and references on questions of law. These provisions, when applying as State law, would be contrary to the principle in *Re Wakim*, and invalid.

The JOCLA Act provides that where there is an appeal on a question of law, or a referral of a question of law from the AAT to the Federal Court, the Federal Court will deal with that appeal or referral as a matter of federal, not State, jurisdiction. The AAT Act now contains a new Part IVA, entitled: 'Appeals and references of questions of law to the Federal Court of Australia'. New section 43B provides, effectively, that Part !VA operates (as Commonwealth law) in respect of all proceedings before the AAT, including proceedings which are before the AAT by virtue of the application of the AAT Act as State law.

Conclusion

On 25 August 2000, States agreed in principle to refer powers in relation to corporations to the Commonwealth. If this comes to fruition, many of the most pressing problems which have arisen from the High Court's decision in *Re Wakim* will be resolved. However, it will not resolve the problems associated with the other cooperative schemes which have been established in reliance on the validity of cross-vesting. The JOCLA Act will ensure, at least, that the administrative law remedies which the cooperative schemes intended to make available under those schemes will be open. However, the future of cooperative schemes generally is, given the decision in *R v. Hughes*,[12] now in the hands of the High Court.

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11 See Cross-vesting Act section 6A.

12 (2000) 17 ALR 155.