

# HIGH COURT NOTES: Validity of Cross-Vesting

## Constitutional law - Powers of Parliament - Power of Parliament to bestow on Federal Court non-Commonwealth judicial power

In *re Wakim; Ex parte McNally* ([1999] HCA 27; 17 June 1999) by s.77(i) the Constitution provides that Parliament may make laws defining the jurisdiction of any Federal Court. By s.9(2)(a) the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) provided the Federal Court could exercise jurisdiction conferred on it by that Act or a State law relating to cross-vesting of jurisdiction. By ss.51 and 56 the *Corporations Act 1989* (Cth) provided the Federal Court may exercise the jurisdiction conferred on it by a State cross-vesting law. By s.42(3) each State *Corporations Act* provided the jurisdiction was conferred on the Federal Court with respect to civil matters arising under the Corporations law of that State. The High Court concluded that these provisions were not Constitutionally effective to give the Federal Court under the State Corporations law: Gleeson CJ [3]; Gaudron J [26]; McHugh JJ [33] [59]; Gummow with Hayne JJ [127]; Callinan J [265]. The High Court rejected the submission that the Commonwealth *Cross-vesting Act* represented a form of "consent" [61] or that the "incidental" power (Constitution s.51(xxxix)) could extend the ambit of the judicial power of the Commonwealth [118]. The High Court observed that this did not affect the accrued jurisdiction of the Federal Court [71], [135]. Three proceedings had been removed to the High Court. In *Wakim* the Court held a claim by W that the Official Trustee of a debtor had acted in breach of his duty under s.176 of the *Bankruptcy Act* then, in separate proceedings in the Federal Court, various solicitors had been negligent, constituted a single justiciable controversy which the Federal Court had jurisdiction to entertain [145] [147]. In *Brown* the High Court concluded that an order under s.569A of *Corporations Law* requiring

a person connected with a corporation be examined about its affairs was invalid [168]. In this matter the Court considered the extent to which *res judicata* in issue estoppel arose in constitutional litigation [160]. In *Spinks* the High Court

## Constitutional law - Family law - Guardianship and custody of children - Power of Court to order custodial parent not change residence of child

In *AMS v AIF and AIF v AMS* ([1999] HCA 26; 17 June 1999) the child of AMS (the father) and AIF (the mother) was born in the Northern Territory in March 1990. The parties then moved to WA. In April 1996 the Primary Judge of the Family Court of WA ordered the parties have joint guardianship, the mother sole custody and the mother be restrained from changing the child's principal place of residence from Perth. On appeal the Full Court ordered the mother have sole guardianship and custody but affirmed the order restraining her from changing the child's principal place of residence. The High Court allowed appeals brought by each of the father and the mother. The High Court allowed the father's appeal on the basis that s.35 of the *Family Court Act 1975* (WA) (which gave the mother of an ex-nuptial child custody and guardianship of that child) was invalid as being inconsistent with s.63F(1) of the *Family Law Act 1975* (Cth) as in force

in Darwin when the child was born (which gave both parents joint custody): Gleeson CJ, McHugh, Gummow JJ [20]; Gaudron J [65]; Kirby J [183]; Hayne J [201]. The mother's appeal was allowed on the basis that the Court had erroneously exercised its jurisdiction to make the order on the basis of requiring the mother provide compelling reasons as to why the welfare of the child would not be promoted by residence in Perth: [47], [92], [195], [220]. Callinan J dissented. Both appeals allowed.



held that orders under s.597(9) of *Corporations Law* (ACT) requiring persons connected with a corporation attend for examination and produce documents were valid by reference to the Territories Power (Constitution s.122) and because the orders were reasonably incidental [176]. In dissent Kirby J concluded the cross-vesting scheme was valid. Orders accordingly.

July 1999 High Court Notes prepared for the Law Council of Australia and its Constituents by Thomas Hurley, Barrister, Vic., NSW, ACT (Editor, Victorian Administrative Reports).