THE MEANING OF "MATTER": A MATTER OF MEANING – SOME PROBLEMS OF ACCRUED JURISDICTION

LEE AITKEN*

"Critical to ... the outcome of this case is the meaning of 'matter' ": per Mason J. in Philip Morris Inc. v. *Adam P. Brown Male Fashions (1980) 33 A.L.R. 465, 500.*

INTRODUCTION

What is "accrued" jurisdiction as that term is applied to the federal courts? "Accrued" jurisdiction is that jurisdiction exercisable by a federal court, in its discretion, when a "matter" within its jurisdiction is so inextricably interwoven with other facts which raise non-federal issues that the latter may be properly treated as part of the "matter" upon which the court's jurisdiction initially depended[1]. The existence of such a jurisdiction depends entirely upon the extended meaning bestowed on the concept of a justiciable "matter" as that term has been defined by the High Court.

In recent times, the High Court, beginning with *Moorgate Tobacco Ltd* v. *Philip Morris*[2], and ending with *Fencott* v. *Muller*[3] and *Stack* v. *Coast Securities (No. 9) Pty Ltd*[4] has endeavoured to define the ambit of the

* Solicitor of the Supreme Court of New South Wales.

[1] Report of the Advisory Committee to the Constitutional Commission (1987) Australian Judicial System, para. 3.59. *Stack* v. *Coast Securities (No.9) Pty Ltd* (1983) 154 C.L.R. 261, 294. As Fitzgerald noted in *Stack* at first instance (1983) 46 A.L.R. 451, 460: "The reality, in our federal judicial system, is that there is no court of unlimited original jurisdiction." The ultimate enactment of the Jurisdiction of Courts (Cross-Vesting) Bill (Cth) introduced into Federal Parliament on 22 October 1986 will alleviate the problem of divided jurisdiction to some extent. "Under the proposed legislation the Federal Court will be 'vested' with state jurisdiction and state courts with Federal jurisdiction": R. Baxt, (1987) *Australian Business Law Review* 3. On the cross-vesting legislation see K. Mason and J, Crawford, "The Cross-Vesting Scheme" (1988) 62 *A.L.J.* 328; G. Griffith, D. Rose and S. Gageler, "Choice of Law in Cross-Vested Jurisdiction: A. Reply to Kelly and Crawford" (1988) 62 *A.L.J.* 698. Despite the Act, substantial problems of accrued jurisdiction remain; see Lane, *Supplement on Commentary on the Constitution* (1988) note to p. 368: "The High Court is not within the Scheme, say its accrued jurisdiction in regard to the width of a case stated under s. 18 of the Judiciary Act or in regard to the width of a matter in ss. 75 (iii), (v) or 76 (i) of the Constitution."

[2] The "modern" decisions may be said to date from *Moorgate* (1980) 31 A.L.R. 161 although the masterful decision of Northrop J. at first instance in *Adamson* v. *West Perth Football Club (Inc.)* (1979) 27 A.L.R. 475 contains the definitive discussion of the problem.

[3] ((1983) 152 C.L.R. 570.

[4] Supra fn.1.

accrued jurisdiction.[5]. The forebears of the modern interpretation may be faintly traced in previous decisions[6] of the High Court which dealt with cognate issues but the lineage is unclear, its patrimony uncertain.

The High Court's original jurisdiction is defined in terms of various "matters". It is derived from sections 75 and 76 of the Constitution. The latter section[7] relevantly allows the Commonwealth Parliament to confer "original jurisdiction on the High Court in any matter" which "arises under this Constitution" or involves "its interpretation",[8] or arises "under any laws made by the Parliament"[9]. With respect to an enumerated "matter", section 77 of the Constitution empowers the Parliament to make laws which define the jurisdiction of any federal court other than the High Court[10], to define the extent to which the jurisdiction of a federal court is exclusive of that of a State court[11], and to invest a State court with federal jurisdiction.[12]

The jurisdiction of the Federal Court of Australia provides a paradigm of the interrelation of these sections of the Constitution. Section 19 of the *Federal Court Act* 1976 (Cth) confers upon the Federal Court "such original jurisdiction as is vested in it by laws made by the Parliament". The original jurisdiction of the Federal Court, then, derives from (sections 76(ii)) and 77(i) of the Constitution[13]. The jurisdiction is over matters arising under other Commonwealth Acts (section 76(ii)) and is vested in it by a Commonwealth Act passed under section 77(i). Parliament has also exercised the power conferred by section 77(ii), by virtue of section 86 of the *Federal Court Act* 1976 (Cth) giving jurisdiction over certain enumerated areas which were formerly within the exclusive jurisdiction of the Courts of the States.[14]

[5] Arguably, the continued recognition of accrued jurisdiction rests on *stare decisis* alone (although this is not necessarily an insubstantial basis; see, Murphy and Rueter, *Stare Decisis in Commonwealth Appellate Courts* (Toronto, Butterworths; 1981) 59-64, the judgment of Aickin J. in *Queensland* v. *The Commonwealth* (1977) 139 C.L.R. 585, 625, and Vince Robinson, Note (1978) 9 *Fed. L.R.* 375). The supporters of the broad interpretation of accrued jurisdiction still on the Court are Mason C.J., Deane and Brennan JJ. Wilson and Dawson JJ., however, have consistently supported the narrower view of section 76 of the Constitution first propounded by Aickin J. The recent appointment of Gaudron J., and the promotion of Toohey J., means that majority view is unclear.

[6] E.g. *Troy* v. *Wrigglesworth* (1919) 26 C.L.R. 305; *Pirrie* v. *McFarlane* (1925) 36 C.L.R. 170; *Hume* v. *Palmer* (1926) 38 C.L.R. 441; *Hopper* v. *Egg and Egg Pulp Marketing Board (Vic.)* (1939) 61 C.L.R. 665; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 C.L.R. 36.

[7] Constitution, sections 76(iii) and (iv) need not concern us.

[8] Id., section 76(i) discussed in *James* v. *South Australia* (1927) 40 C.L.R. 1 and *Felton* v. *Mulligan* (1971) 124 C.L.R. 367.

[9] Id., section 76(ii).

[10] Id., section 77(i).

[11] Id., section 77(ii).

[12] Id., section 77(iii).

[13] It also derives in part from section 71 of the Constitution which implicitly recognises the existence of federal courts other than the High Court. Section 122 of the Constitution may also operate in certain circumstances to confer jurisdiction on the Federal Court: *Evans* v. *Friemann* (1981) 35 A.L.R. 428, 432-433 per Fox A.C.J.; *Philip Morris* v. *Brown* (1981) 33 A.L.R. 465, 490 per Gibbs J.

[14] This jurisdictional hiatus has now been removed by the insertion of section 86 into the *Trade Practices Act*. Subject to section 38 of the *Judiciary Act* and the conditions imposed by paragraphs 39(2)(a), (b), (c) and (d), "the several courts of the States shall ... 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 ..." e.g. the State Supreme Courts

It has long been a question as "to what extent, if at all, ... the Commonwealth Parliament [can][15] confer jurisdiction on a federal court to hear and determine a claim for relief based in non-federal law when that claim for relief is joined with a claim ... based in federal law?"[16] It is an axiom of Australian constitutional law that the denotation of "matter",[17] where it appears in Chapter III of the Constitution, is narrower than that of "proceeding" or "action"[18] or the analogous United States clause which requires a "case" or "controversy" to excite the jurisdiction of the Supreme Court.[19] The potential narrowness of a "matter" is the root of the jurisdictional problems in the federal courts.[20]

A proceeding brought in the High Court or a federal court may be composed of several disparate factual strands, some of which are within jurisdiction in the sense that they obviously arise in the context of a federal enactment, while the remainder are not. It is difficult to avoid the language of metaphor in discussing the difference between two such types of action. It is, perhaps, easier to take a commonplace concrete example to illustrate the point.

Suppose a plaintiff brings a case under the *Trade Practices Act* 1974 (Cth) and seeks to avoid a contract by invoking the remedies available pursuant to sections 52, 53(aa) or 53A. His or her cause of action will arise because some misleading or deceptive statement, say, has been made to him or her in the course of the contractual dealing. He or she will also have available remedies for breach of contract, regardless of any fiduciary obligation owed to him or her, or some other legal or equitable right. This latter category of relief owes nothing to the federal statute. If, however, the jurisdiction

have jurisdiction to grant relief pursuant to the "consumer warranties" sections of the *Trade Practices Act: Arturi* v. *Zupps Motors Pty Ltd* (1980) 33 A.L.R. 243, 247 per Brennan J.; *Zalai* v. *Col. Crawford (Retail) Pty Ltd* (1980) 32 A.L.R. 187 overruling *Fletcher* v. *Seddon Atkinson (Aust.) Pty Ltd* (1979) 1 N.S.W.L.R. 169; *Carlton and United Breweries* v. *Tooth & Co.* (1986) 65 A.L.R. 159, 164 per Hodgson J. As Gibbs C.J. noted in *Stack* at p. 275-6: "Four sections only of the *Trade Practices Act* expressly vest jurisdiction in the Federal Court, viz ss.86, 114(2), 163(2) and 163A(1) ... Jurisdiction in matters which arise under the *Trade Practices Act*, but which do not fall within ss.86, 114(2), 163(2) or 163A(1), is not conferred on the Federal Court, but is invested in the State Courts by s.39(2) of the Judiciary Act."

[15] The original reads "to what extent, if at all, can the Commonwealth Parliament ..." per Mason J. (1980-81) 33 A.L.R. 465, 496.

[16] *Philip Morris v. Brown* (1981) 33 A.L.R. 465, 496 per Mason J.

[17] *In re Navigation and Judiciary Acts* (1921) 29 C.L.R. 257, 266; Wynes, *Legislative, Executive and Judicial Power* (1975) 446-451.

[18] Section 86 of the *Trade Practices Act* would seem to ignore this, as did the section 31 of the *Family Law Act* 1975 until it was amended in 1983. The draftsman did not heed the warning of the Court in *Collins* v. *Charles Marshall Pty Ltd* (1955) 92 C.L.R. 529 where the Full Court noted the dangers of making the jurisdiction depend on anything other than a "matter". See, too, Mason J. in *Philip Morris* at 500.

[19] Article III, section 2(1) of the Constitution of the United States. See, C.A. Wright, *The Law of Federal Courts* (4th ed., St Paul Minn., 1983) Ch.2, section 12; Hart and Wechsler, *The Federal Courts and the Federal System* (2nd ed. 1973) 64-214; *Shepard's Manual of Federal Practice* (2nd ed. McGraw-Hill 1979) section 1.4.

[20] As Mason J. in *Philip Morris* notes (pp.500-501), this result may not have been intended by the draftsman of the Constitution: Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* p. 765; *South Australia* v. *Victoria* (1911) 12 C.L.R. 667, 675 per Griffith C.J.

of the Federal Court was exclusive in relation to a *Trade Practices Act* claim (as it was in relation to section 52 by operation of section 86)[21] it was difficult to know how such a "mixed" claim should be treated. Logically, it might be said that the Court can and should only deal with those parts of the claim which fell within section 19 of the *Federal Court Act*, that is, those aspects which arose directly from the federal Act.[22]

To resolve the question in this way, however, had a number of damaging consequences. For one thing, it forced a litigant who was prosecuting a claim which possessed both State and federal aspects to seek part of his relief in a State court, with a diminution in court efficiency. It also threatened to cause jurisdictional disputes between the State and federal courts as each sought to exercise a co-ordinate and potentially overlapping jurisdiction. Yet the corollary of allowing both federal and non-federal aspects of a broadly defined "matter" to be litigated simultaneously in the Federal Court raised the "lurking" policy considerations adverted to by Mason J. in *Philip Morris*. If the Federal Court was able to adjudicate both aspects of the "matter",

> "State courts will lose to the Federal Court a proportion of the important work which they have hitherto discharged, work which the Federal Court has no jurisdiction to determine if it be not attached to a federal claim."[23]

Equally, it was not easy in every case to determine whether or not a relevant federal "matter" existed when a proceeding was commenced. A litigant incurred the danger and possible additional expense of choosing the wrong forum in which to seek relief for his or her alleged injury. The problem was compounded in those "matters" in which the jurisdiction of the Federal Court was exclusive. In such a case, it was possible that a plaintiff who had commenced an action in a State Court might find that tribunal had been peremptorily divested of jurisdiction when the federal aspect appeared in the course of proceeding.

[21] See, now, section 86(2) investing the Courts of the States with concurrent jurisdiction over Pt. V matters.

[22] In Canada, the problem of "federal" issues has been resolved in this draconian way. Section 101 of the *British North America Act* 1867 provides: "The Parliament of Canada may ... from Time to Time provide ... for the Establishment of ... Courts for the better Administration of the Laws of Canada". Pursuant to this power, the Federal Court Act R.S.C. 1970, (2nd Supp.) c. 10 established the Federal Court. The Supreme Court of Canada in a recent series of cases has permitted only claims which are founded exclusively on a federal law to be brought in the Federal Court. This has resulted in situations in which a single judicial tribunal is unable to deal with the whole of a civil suit in which both a federal statute and some provincial rights are asserted. E.g. *McNamara Construction (Western) Ltd* v. *The Queen* [1977] 2 S.C.R. 254; *Quebec North Shore Paper Co.* v. *Canandian Pacific Ltd* [1977] 2 S.C.R. 1054; *R* v. *Thomas Fuller Construction Co. Ltd* 1979) 1 F.C. 877; (1980) 106 D.L.R. (3d) 193. P.W. Hogg, "Federalism and the Jurisdiction of Canadian Courts" (1981) 30 U.N.B.L.J. 9; J.M. Evans, Note, (1981) 59 *Can. B.R.* 124. P.W. Hogg, *Constitutional Law of Canada* (2nd edn., Toronto, Canada, Carswell Co. Ltd 1985) has argued that this result was not inevitable, although conceding that earlier cases did not, in the main, support the doctrine of "ancillary jurisdiction". He has said: "I would argue that the Supreme Court of Canada should develop a doctrine of ancillary jurisdiction to mitigate the difficulties which it has created in those two decisions", i.e. *McNamara* and *Fuller*.

[23] (1980-1981) 33 A.L.R. 465, 505.

THE EARLY HISTORY OF THE PROBLEM

Although the introduction of the *Federal Court Act* 1976 (Cth) sharpened the problem, the difficulties which arose from accrued jurisdiction had a long history. For example, the High Court has for many years exercised a jurisdiction conferred upon it by section 30(a) of the *Judiciary Act* 1903 (Cth). This provides that the High Court "shall have original jurisdiction in all matters arising under the Constitution or involving its interpretation". This jurisdiction depends upon section 76(i) of the Constitution. In exercising such jurisdiction[24] the Court has found it necessary from time to time to determine questions which did not fall within the federal issue but necessarily arose in the context of the "matter" which gave rise to the jurisdiction. For example, in *R* v. *Bevan: Ex parte Elias and Gordon*, the High Court exercised jurisdiction over the entire issue involved in a court martial although the federal aspect was so latent that the Court itself had to discover it. As Renfree observed, the High Court has construed its jurisdiction under section 76(i) "rather generously" and has on occasion found a "basis for the Court's jurisdiction where counsel was apparently unable to detect a problem of constitutional interpretation" sufficient to attract section 30(a) of the *Judiciary Act*.[25]

Similarly, when appeals lay to the Privy Council pursuant to section 39 of the *Judiciary Act*, it was necessary to decide whether the entire decision on all aspects of the case of the State court which exercised conferred federal jurisdiction was open to appeal or only that part dealing with non-federal questions.[26]

SOME "TESTS" TO DETERMINE JURISDICTION

It is important to note that, unlike the practice in the United States, facts which give rise to federal jurisdiction may be found not only in the plaintiff's statement of claim but also in a defence.[27] It is thus quite possible for

[24] See Cowen and Zines, *Federal Jurisdiction in Australia* (2nd ed., Melbourne, Oxford University Press, 1978) 57-63. The authorities are set out in *Stack* v. *Coast Securities* (1983) 49 A.L.R. 193, 212 per Mason, Brennan and Deane JJ. They include *Carter* v. *Egg and Egg Pulp Marketing Board (Vic.)* (1942) 66 C.L.R. 557; *R.* v. *Carter; Ex parte Kisch* (1934) 52 C.L.R. 221; *Hopper* v. *Egg and Egg Pulp Marketing Board (Vic.)* (1939) 61 C.L.R. 665, 673, 680-681; *R.* v. *Bevan; Ex parte Elias and Gordon* (1942) 66 C.L.R. 452, 464-466, 480-482; *Parton* v. *Milk Board (Vic.)* (1949) 80 C.L.R. 229, 257-258.

[25] H.E. Renfree, *The Federal Judicial System of Australia* (Sydney, Legal Books, 1984) 221-222 quoting Cowen and Zines op. cit. 62. Since *Elias* was a capital case, the High Court's zeal in finding some head of jurisdiction entitling it to review the decision of the Court Martial is perhaps excusable.

[26] Cowen and Zines loc. cit.

[27] Per Mason, Brennan and Deane JJ. in *Stack* at p. 212 citing *Carter* v. *Egg and Egg Pulp Marketing Board (Vic.)* 1939 C.L.R. 665, 673, 680-681; *R* v. *Bevan* at 464-466; *Parton* v. *Milk Board (Vic.)* (1949) 80 C.L.R. 229, 257-258; *Felton* v. *Mulligan* (1972) 124 C.L.R. 367.

a "matter" to assume a federal hue after the statement of claim has been lodged, or indeed, at any stage of a proceeding.[28]

Two "tests" have been developed in the cases since the High Court first confronted the problem of accrued jurisdiction. Although the High Court has now laid down more "detailed" criteria for determining when the Federal Court may exercise the jurisdiction, these older "tests" are still important, and recognised in recent judgments.[29] It will be suggested that the High Court's failure to address the issues raised by the older "tests" illustrates the poverty of the more recent analysis. In the absence of any agreed terminology in the field, the tests will be called the "substantiality" and the "bona fides" requirements. It may be said, as an ill-defined rule, that for a non-federal aspect of a "matter" to be properly joined to, and adjudicated under, the federal jurisdiction, it must be both raised in a "substantial" way and be "bona fide".

Isolated, early dicta on the topic of accrued jurisdiction bear out such an assertion. In *Hume* v. *Palmer*, for example, Knox C.J. observed that "the question as to inconsistency was substantial and was raised bona fide is shown by the course of argument in this Court."[30] In *Hopper* v. *Egg and Egg Pulp Marketing Board*, Latham C.J. in accepting the accrued jurisdiction noted that, "although the claim based on the Constitution has failed, I cannot discern a reason for saying that it was not a bona fide claim so raised.[31] Earlier, in *Ex parte Walsh and Johnson; In re Yates*, Sir Isaac Isaacs observed that although a claim may apparently possess the character of a properly accrued "matter", "this Court may find during its progress, particularly if between private parties, that for some reason it does not 'really and substantially' arise under the Constitution or involve its interpretation".[32] More recently, in *Hilton* v. *Wells*, Wilcox J. observed that "the claim which lies

[28] *Miller* v. *Haweis* (1907) 5 C.L.R. 89, 93 per Griffith C.J. The United States courts apply the "well-pleaded complaint" rule: "issues of federal law raised by an answer, a counterclaim or by any other means than the complaint, cannot be considered for purposes of jurisdiction": Shepard op. cit. pp.71-72. In our jurisprudence, if the pleadings attract federal jurisdiction by raising a federal matter under, say, section 76(ii) of the Constitution, that the pleading is disclaimed at some later stage or is not the subject of decision by the judge is irrelevant to the proper attraction of the jurisdiction. *Moorgate Tobacco supra* at 170 per Stephen, Mason, Aickin and Wilson JJ; Barwick C.J. in *Philip Morris* at 473: "Once federal jurisdiction is attracted, it is not lost because the claim or assertion which attracted it has not been substantiated or has been displaced by some countervailing fact."

[29] Perhaps the most explicit judgment which adopts the older "tests" is that of Northrop J. in *Adamson* v. *West Perth Football Club* (1979) 39 F.L.R. 199, 221 where his Honour said: "The claim made must be in respect of matters arising under laws made by the Parliament and must be bona fide and substantial, but the validity or strength of the claim in respect of the matters arising under the laws made by the Parliament is quite immaterial so long as they are genuinely raised." See also *Burgundy Royale* v. *Westpac Bank* (1987) 76 A.L.R. 173, 183 when the Full Federal Court said '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 . . . There is no room for such a suggestion here. The Applicant's case that "the 1st and 2nd Respondents were bound by the Act" cannot be said to be unarguable and me thinks it was pursued bona fide . . .'.

[30] (1926) 38 C.L.R. 441, 446.

[31] (1939) 61 C.L.R. 665, 673.

[32] (1925) 37 C.L.R. 36, 74.

within the court's jurisdiction must be made bona fide and not merely colourably to attract jurisdiction . . .".[33]

At the Royal Commission on the Constitution in 1927, Owen Dixon K.C. (as he then was) exemplified the potentially unusual and wide operation of federal jurisdiction.[34] A boy who infringes a municipal by-law riding his bicycle on a footpath may plead in his defence that he did so while engaged in work as a postal messenger pursuant to Commonwealth authority. A tramp arrested while he crosses the bridge at Swan Hill may wisely invoke his right to do so under section 92 of the Constitution.[35]

These examples may seem far-fetched, yet authority may be found to support them as cases involving federal questions.[36] It is also important to note that:

> "Once the Court has become seized of a matter involving the interpretation of the Constitution, it is clothed with full authority for the complete adjudication of the matter and its jurisdiction is not lost by reason of the rejection of the constitutional point. In other words, the original jurisdiction attracted by reason of the constitutional question is not limited by the determination of that question".[37]

THE USE OF THE CONCEPTS OF "SUBSTANTIALITY" AND BONA FIDES

The use of the concepts of "substantiality" and bona fides to test the validity of a federal accrued claim may be traced to *Troy* v. *Wrigglesworth*. A defendant was prosecuted for a motoring offence in Victoria and raised as a defence the claim that he was performing duties as an officer of the Commonwealth Defence Department when it occurred. Thus, it was argued, the Court of Petty Sessions which had heard the charge was exercising federal jurisdiction because it was involved in interpreting the Constitution when it ruled on the validity of the defence. If the matter did involve a federal claim then an appeal lay to the High Court pursuant to the *Judiciary Act* 1903 (Cth).

In deciding that the claim did properly raise federal jurisdiction and accordingly the jurisdiction of the High Court, the majority posed the simple rhetorical question: "was there a question calling for the exercise of federal jurisdiction properly raised?" The Court concluded that "the facts relied on were *bona fide* raised, and were such as to raise it [the federal question] before

[33] (1985) 59 A.L.R. 281, 294. See, too, *Adamson* v. *West Perth Football Club (Inc.)* (1979) 27 A.L.R. 475, 499 per Northrop J.; *Denpro* v. *Centrepoint Freeholds Pty Ltd* (1983) 48 A.L.R. 39; *Bill Acceptance Corp Ltd* v. *G.W.A. Ltd* (1983) 50 A.L.R. 242. The modern cases are discussed in detail infra.

[34] Dixon: Royal Commission on the Constitution: Minutes of Evidence (1927) p. 788, quoted in Cowen and Zines op. cit. 63, fn. 248.

[35] Ibid. "His objection may be constitutional nonsense, but his case is at once one of Federal jurisdiction".

[36] *Troy* v. *Wrigglesworth* (1919) 26 C.L.R. 305; *Pirrie* v. *McFarlane* (1925) 36 C.L.R. 170; *O. Gilpin Ltd* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (1934-35) 52 C.L.R. 189.

[37] Wynes op. cit. 481.

the decision was given, in a very pronounced way".[38] This ratio was advanced without any reference to authority or any reasoning to support it.

It raises a number of interesting and important questions to which the High Court has never given a clear answer. What does "bona fide" mean in the context? Is it to be treated by considering the state of mind of the party or his legal advisers, or is the "genuiness" to be measured against some objective scale? Secondly, what consequences follow from a failure to raise the federal question before the decision is given? Thirdly, what does "pronounced" mean? How "substantial" must the federal question be? More importantly, why does it need to be "substantial" at all?[39]

BONA FIDES: AN OBJECTIVE OR SUBJECTIVE TEST?

In *Troy's* case, it would have not been possible to examine the motives of the ambulance driver. Even if an inquiry were made, it would have revealed little. The individual litigant would have no thoughts on concocting a "federal" question.[40] The plea in defence owed more to the legal subtlety of R.G. Menzies for the defendant than any mala fides on the part of the latter. Is the question to be judged objectively? Can one say that a "federal" question is not bona fide if it appears to be farcical, or to spring from some supposititious motive, to the objective observer? While such a conclusion is appealing, all authority is against it.

In the examples given by Sir Owen Dixon, virtually no allegation of federal jurisdiction. For example, the High Court has used it to justify the grant of reject it. If his Honour's examples are correct, it is hard to disagree with Sir Zelman Cowen's conclusion that "it would seem that a constitutional issue would have to be extremely far-fetched or remote before the court would treat it as having been raised mala fide with the object of attracting jurisdiction".[41] Unfortunately, Sir Zelman does not discuss what he understands mala fides to mean in relation to such a claim. To put it in terms of "the object of attracting jurisdiction", as he does, rather suggests that he conceives of the question in subjective terms. That is, the defendant or plaintiff consciously sets out to invoke federal jurisdiction while all the time perceiving that such jurisdiction does not exist.

Since *Troy* v. *Wrigglesworth* it has become customary to utilise the term "bona fides" when assessing whether a federal court should assume jurisdiction over non-federal matters joined with a claim which is potentially within jurisdiction. For example, the High Court has used it to justify the grant of

[38] (1919) 26 C.L.R. 305, 311 per Barton, Isaacs, and Rich JJ.

[39] Compare the United States rule where "a remote reference to federal law is not a sufficient basis for federal question jurisdiction". Shepard op. cit. p. 73.

[40] See, *Hopper supra* per Latham C.J. at 673; cf. Sir Hayden Starke in *Hopper* at 677: "... an allegation of some contravention of the Constitution which on its face is not such a contravention does not attract or found the original jurisdiction conferred upon this court .... The allegations in the present case are merely colourable: they do not raise any real question involving the interpretation of the Constitution and are in truth fictitious".

[41] Cowen and Zines op. cit. 62.

the writ of certiorari pursuant to section 75(v) of the Constitution even though certiorari is not mentioned in that section at all.[42] The Court has held that if prohibition, say, is sought "bona fide" then certiorari may issue in the accrued jurisdiction. Because certiorari is frequently sought to quash the decision of an officer of the Commonwealth, the problems of justifying the grant of the writ on the ground of "bona fides" has caused the Court increasing embarrassment.

"SUBSTANTIALITY"

The problem of bona fides is compounded by the difficulty concerning "substantiality". In *Troy*, the matter arose in a "pronounced" way. But such a standard need not necessarily be met in order to attract the jurisdiction, as the risible examples of Sir Owen Dixon indicated.

Professor Lane has suggested that to surprise the use of fabricated or feigned jurisdiction the High Court may use a "general tool".[43] It is that consent cannot give jurisdiction, and that the Court must determine jurisdiction before it hears a matter.

> "And the Court may use a more precise tool: the party put on the record must be 'really' concerned with the relief sought by the plaintiff; or the plaintiff must positively prove diversity of residence both of himself and of defendant; or the federal ground raised, the jurisdictional ground, must be 'bona fide' ".[44]

It is, with respect, something of an overstatement to characterise this last requirement as a "precise tool" when no one has ventured to state explicitly what bona fides means in this context.

With regard to substantiality, Evatt J. in *Hopper* v. *Egg and Egg Pulp Marketing Board* pointed out that "the original jurisdiction [of the High Court] is attracted by reason of the constitutional question, but it is not limited to the determination of such question. The legal validity or strength of the plaintiff's constitutional point is quite immaterial as long as it is genuinely raised".[45] This dictum supports the broad Dixonian view.

Professor Lane prefers to conflate the requirements of bona fides and substantiality. He reasons that the Court in assessing bona fides takes into account the arguable nature of the plaintiff's submission, or presumably, the defendant's defence.[46] In arguing this way, he relied on *Hopper's* case, and it is necessary to examine that decision in a little detail to see whether the argument is persuasive.

In *Hopper*, a number of claims were made on behalf of the applicant against the Victorian Egg Board. Some of them involved the allegation that

[42] *Pitfield* v. *Franki* (1970) 123 C.L.R. 448; *R* v. *Marshall; ex parte Federated Clerks Union of Australia* (1974-1975) 132 C.L.R. 595; *R* v. *Cook; ex parte Twigg* (1980) 31 A.L.R. 353.
[43] P.H. Lane, *The Australian Federal System* (2nd ed., Sydney, Law Book Co., 1979) 594.
[44] Ibid.
[45] (1938-1939) 61 C.L.R. 665, 681.
[46] Lane op. cit. 596.

certain Victorian Egg Board deductions were unlawful as constituting an excise within section 90 of the Constitution, while other allegations required the construction of a State Act. The first sort of claim is clearly within the jurisdiction of the High Court since it requires the interpretation of the Constitution. The latter type of claim, however, could be resolved without invoking federal jurisdiction at all since it would only require the construction and interpretation of Victorian legislation.

Although a majority of the Court held that the former matter involving the Constitution was not really arguable, the Court might nevertheless rule upon the State claims since they were "really and substantially" involved with them.[47]

Professor Lane explains the decision on the ground that the federal claim was open because of a possible conflict in previous High Court cases. He concludes that "the Court does decide the 'bona fides' of such a claim to jurisdiction by mentally considering whether the federal ground is arguable, whether it is a plausible submission".[48] Professor Lane suggests that: "a litigant will exhibit 'bona fides' in asking High Court jurisdiction, authorised by Constitution s.76(1), if the state of existing law leaves room for argument. On the other hand, his 'bona fides' would be suspect if there existed an authority four-square against him".[49]

But bona fides, which suggest some mental element of intent, surely could not be found against a party if that party or its legal advisers, are mistaken in their view of the law. How is the position to be determined before the High Court considers the matter? The Court, after all, has the power to overrule its previous decisions. Moreover, while the reasoning may perhaps provide a guide in relation to a legally ambivalent claim, it is of no use where the claim which generates the federal issue is factually unlikely or improbable. As Sir Owen Dixon noted, "(an) objection may be constitutional nonsense, but (the) case is at once one of federal jurisdiction". From a practical point of view, it is difficult to determine *a priori* that a claim does not raise a federal issue. In many cases it will be necessary to enter into evidence before any determination can be made.

Although Professor Lane is the only constitutional expert to have given this fundamental question any attention at all, it is submitted that upon analysis his own reconciliation of the dicta is unhelpful. Unhelpful because it fails to explain both the legal and factual claim which lacks bona fides, and because it is contrary to received wisdom on the strength such a claim must possess before the High Court may properly entertain it.

Despite the admonitions of Griffith C.J. in *Ridley* v. *Whipp*[50] on the need to establish jurisdiction before proceeding, the Court has never been overly scrupulous in determining whether it actually has jurisdiction before proceed-

[47] (1938-1939) 61 C.L.R. 665, 674, per Rich J. citing *Ex parte Walsh and Johnson; in re Yates* (1925) 37 C.L.R. 36, 74.
[48] Lane op. cit. 596.
[49] Ibid.
[50] (1916) 22 C.L.R. 381, 386. And see Lane, op. cit. 593-596 under the title "Fabricated Jurisdiction".

ing to hear a matter. The Court has never declined jurisdiction because the claim before it was characterised by it as "colourable" or brought "mala fide". Until recently, it did not matter that the Court was paying lip-service to the idea of deciding its jurisdiction before hearing a matter. Nothing turned on it. Previously, there was little incentive to seek to sue in a federal as opposed to a State court. This is no longer the case.[51]

Since the establishment of the Federal Court as a court exercising a broad and accessible jurisdiction over a range of matters, an expansion of its jurisdiction by a wide interpretation of its accrued jurisdiction threatens the very existence of the State courts. Perhaps for reasons of preventing such a general expansion, or perhaps for unexpressed fears in the competence of its judges, the High Court has deliberately restricted the expansion of the Family Court's jurisdiction.[51a] Without a "test" of some sort to prevent the factitious attraction of the Federal Court's jurisdiction, most of the jurisdiction exercised by the State courts could be swept into the federal forum since it could be easily connected in some tendentious way with a federal issue.

This problem has arisen since 1976. It has caught the High Court unprepared in terms of precedent to formulate criteria for determining when State matters should be the subject of adjudication in a federal forum. More importantly, the absence of attention to the theoretical problems outlined above has resulted in an overly pragmatic approach by the Court which has deliberately eschewed providing a principle to determine the cases and thrown the entire burden of doing so on to courts of first instance. The most recent cases demonstrate the difficulties into which a lack of a "test", or even a perception of the problem, has led the Court.

THE RECENT CASES

The recent cases commence with *Moorgate Tobacco Co. Ltd.* v. *Philip Morris Ltd.* The claim did not, strictly speaking, involve accrued jurisdiction in the sense in which it has been discussed above. In it the High Court heard an appeal from the Supreme Court of New South Wales in which the applicant sought conditonal leave to appeal to the Privy Council. The appellant had sued for breaches of a trade mark, for breach of trust, and for breach of a contractual licence. The "matter" potentially involved federal jurisdiction because the appellant's claims could have been based in part on the *Trade Marks Act* 1955 (Cth).[52] If "federal jurisdiction" had been attracted, no appeal would lie to the Privy Council because of the exclusionary provisions of the *Judiciary Act* 1903 (Cth). It was necessary to decide whether the right of appeal was removed with respect only to the trade mark

[51] For example, all cases involving a contract and a corporation would be susceptible to a colourable plea that section 52 of the *Trade Practices Act* had been breached in the formation of the contract.

[51a] *In the Marriage of Smith* (1986) 66 A.L.R. 1.

[52] (1980) 31 A.L.R. 161, 169-170 per Stephen, Mason, Aickin and Wilson JJ.

claim, or whether the exclusion extended as well to the two related common law claims which had arisen on the same facts.

Barwick C.J. acknowledged that "an independent and disparate cause of action of a non-federal kind" could exist side by side with a "federal" matter. In that case, the non-federal issue was appellable separately. His Honour, however, concluded that that situation had not arisen in *Moorgate*, where it was "not possible . . . to isolate a non-federal question independent of the federal question".[53]

According to Gibbs J. (as he then was), it was enough if the matter could have been disposed of on a "federal" basis. "The jurisdiction does not cease to be federal because the matter that attracted jurisdiction is either not dealt with, or is decided adversely to the plaintiff."[54]

The majority held that 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."[55]

The Court did not discuss how an issue which involves a federal question is properly "raised". The ease with which such a federal issue may occur on the traditional tests has been noted already. Implicit in the majority reasoning is a confidence that no colourable pleading, designed merely to attract jurisdiction of the federal forum, will ever be drawn. Without some litmus test of genuiness, however, it is conceivable on the authorities that a pleading could "raise" a federal issue merely to attract jurisdiction, an issue which is never afterwards addressed in the case.

The majority in *Moorgate* concluded that, unless the non-federal matter demonstrably arose from facts which were not part of the same transaction, "decision" in section 39(2)(a) of the *Judiciary Act* was sufficiently broad to encompass both the federal and non-federal aspects of the case so as to preclude an appeal on either aspect to the Privy Council.[56]

Moorgate represented a continuation of the trend evinced by the Court's earlier decisions to do nothing which might trench in any way upon a broadening of federal judicial power.[57]

The next important case, *Philip Morris* v. *Brown*,[58] raised the federal/State dichotomy squarely and is really the first of the modern cases in the

[53] Id. 163.
[54] (1980) 31 A.L.R. 161, 167.
[55] Id. 170 per Stephen, Mason, Aickin and Wilson JJ.
[56] Section 39(2)(d) of the *Judiciary Act* 1903 invests the Courts of the States with federal jurisdiction subject to the condition that "a decision" made "shall not be subject to appeal to Her Majesty in Council . . .".
[57] Compare the United States approach expressed in *Pointdexter* v. *Board of Supervisors* (1960) 177 F. Supp. 852, "Federal Courts should be zealous to avoid expansion of federal jurisdiction and should scrutinise carefully the pleadings and facts before assuming jurisdiction where jurisdiction is claimed on ground of an alleged federal question being involved."
[58] (1981) 33 A.L.R. 465.

area in which the High Court has felt the lack of any theoretical underpinning of its accrued jurisdiction.

In *Philip Morris* the Court heard two matters together. The applicants sued the defendant to restrain it from acting in alleged breach of sections 52 and 53 of the *Trade Practices Act* 1974 (Cth). The plaintiffs owned the rights to the "Marlboro" advertising design and slogan and claimed that their use of that mark was exclusively identified by the public with their products. The defendant, it was claimed, had used a deceptively similar mark in the sale of its clothing. The applicants sought relief under the Act and also at common law for alleged "passing off" of their products. The defendant denied that the Federal Court had jurisdiction to entertain the common law as well as the action which was based on the Commonwealth Act.

In *United States Surgical Corporation*[59] a similar situation had occurred. The applicants sought relief under the *Trade Practices Act* against a former employee and another company which were engaged in the sale of products which were alleged to be deceptively similar to the applicant's own. It was further alleged that the respondents had engaged in conduct, variously stigmatised, to mislead the public about the identity of the products.

Both actions thus required the High Court to consider to what extent the Federal Court could hear claims not based on federal law, but which arose from the same set facts which grounded the federal claims.

Barwick C.J. held that, while it was incumbent on the Federal Court to exercise the "federal" jurisdiction, the Court has a discretion whether to exercise the "accrued" jurisdiction, the jurisdiction over questions which arose in the same context but depended on a non-federal right.[60]

"There would", he added, "need to be very good reasons why a court which could resolve the whole matter should refuse or fail to do so."[60a] It might have been thought that a State court which is exercising federal jurisdiction does not exercise State jurisdiction over those "related" matters of State jurisdiction which, metaphorically, "run in the bed of the same stream." This view, derived from *Lorenzo* v. *Carey*[61] has been discarded.[62] Covering Clause 5 and section 109 of the Constitution combine to require the ascendancy of the Federal law. On the Barwick view, it is not inconsistent with authority or illogical in principle that a minor federal issue should colour the entire proceeding. His Honour did not address the question of bona fides or substantiality at all; presumably he did not consider it a problem.

Gibbs J. was more attuned to the difficulties of combined jurisdiction. The doctrine, which he called one of "full authority",[63]

[59] Reported at the same time as *Philip Morris*.

[60] (1981) 33 A.L.R. 465, 474. "The federal jurisdiction will not extend to enable the court to resolve the further matter, being ... in substance a disparate and independent matter. But this does not involve any close confinement of the federal jurisdiction by too narrow a view of what is relevantly the matter."

[60a] Id. 475.

[61] (1921) 29 C.L.R. 243.

[62] Cowen and Zines op. cit. 204-205, 226-228 discussing *Ffrost* v. *Stevenson* (1937) 58 C.L.R. 528; *Felton* v. *Mulligan* (1971) 124 C.L.R. 367.

[63] (1981) 33 A.L.R. 465, 492. The phrase is that of Starke J. in *R* v. *Bevan; Ex parte Elias* (1942) 66 C.L.R. 452, 465.

> "does not mean that a federal court has jurisdiction to make a complete adjudication of any legal proceeding which involves a matter of the requisite kind and other matters as well. If the jurisdiction extended so wide, it would mean that a party could, by joining a number of matters in one proceeding, enlarge at will the jurisdiction of the federal court beyond the limits explicitly defined by the Constitution."[63a]

His Honour did not suggest any test to distinguish such a case. In his view, the correct characterisation of the "matter" involved suffices to control the difficulty to which he referred. His reasoning is, with respect, circular. The only limit explicitly defined by the Constitution turns on the width to be attributed to "matter". Depending on how that is defined, a party will be able to join federal claims improperly at will in order to attract jurisdiction. His Honour did recognise that bona fides played a part in the process; in discussing *Hopper's* case in relation to section 76(i) jurisdiction he noted that jurisdiction may be attracted over the entire claim "provided that the allegation that there has been a contravention of the Constitution was genuinely made and is not merely colourable."[63b]

Aickin and Wilson JJ. dissented. Sir Keith Aickin's central argument concerned the essential differences between sections 76(i) and 76(ii) of the Constitution. He concluded that "matters" arising at common law or under Acts of a State Parliament could not properly be joined with a federal "matter" which arose under section 76(ii).

It will be observed that the majority view in the cases which have been mentioned above, which allowed the federal courts to exercise an accrued jurisdiction, treats the earlier cases on the various sections of the Constitution as being generally applicable to the extended meaning of "matter".

It could be plausibly contended that the course of authority requires that the jurisdiction formerly exercised by the High Court under section 76(i) of the Constitution and section 30(a) of the *Judiciary Act*, and those cases dealing with appeals from State courts exercising federal jurisdiction, are not otherwise applicable to the jurisdiction which is exercised by the Court under section 76(ii) of the Constitution and the relevant federal enactment. Indeed, depending upon the way in which the judges' views are interpreted, it could be said that there is a majority in favour of attributing a narrow and restricted view to the latter section.

Sir Hayden Starke pointed out long ago that, although it would be possible for Parliament to enact such a law, no law which confers general jurisdiction upon the High Court in every matter arising under an Act of the Commonwealth Parliament has been enacted.

> "There has never been any general investment of original jurisdiction in any matter arising under any laws made by the Parliament for the obvious reason that this would impose an intolerable burden on the Court. Specific statues have from time to time conferred original jurisdiction on the Court in respect of matters arising under particular laws made by Parliament such as those relating to patents, trade marks and income tax."[64]

[63a] Ibid.
[63b] Ibid.
[64] Cowen and Zines op. cit. citing Starke J. in *R* v. *Bevan; ex parte Elias and Gordon* (1942) 66 C.L.R. 452.

In *Philip Morris*,[65] Aickin J. relied upon this distinction to deny power to confer accrued jurisdiction upon the Court. His Honour argued that a matter which involves the interpretation of the Constitution (that is, on a section 76(i) basis) does not depend upon the nature of the parties or the subject matter of the litigation "but on the nature of one legal question involved in a matter".[66] One may contrast the original jurisdiction which is conferred by the relevant heads of jurisdiction in section 75. By contrast, Aikin J. argued, section 76(ii) jurisdiction operates on a much narrower basis.

> "There is a clear difference between the wording of paras (i) and (ii) of s.76, the former being wider in relation to its subject matter than the latter. It is this vital distinction which requires the conclusion that matters arising under the common law, or Acts of State Parliaments cannot be the subject of a grant of jurisdiction to federal courts under s.76(ii) whatever the degree of overlap there may be in the facts relevant to the two kinds of matter ...".[67]

Wilson J. agreed with this restrictive approach. His Honour argued that "a grant of jurisdiction which is referable to s.76(ii) of the Constitution is necessarily dependent on subject matter, and exclusively so."[68] It followed, in his Honour's view, that the denotation of matter in section 76(ii) should be less generous than that accorded to it in section 76(i).

Furthermore, if this were felt to occasion difficulty, it was necessary to "maintain a viable federation"[69] to restrict the ambit of the accrued jurisdiction and the Commonwealth Parliament could resolve any problems which might be felt to arise through the restriction in jurisdiction through using section 77(iii) of the Constitution, which allows the Parliament to confer federal jurisdiction upon the courts of the States. Thus, Wilson J. would increase the jurisdiction of the State Courts directly by express enactment rather than increase that of the federal courts by implication of additional jurisdiction which at the same time encroaches upon that exercised by the courts of the States.

His Honour pointed out that the "matter" to which section 76(ii) looked was much narrower than section 76(i) because of the nature of the inquiry which each empowered the Court to make. As Wilson J. noted, " 'matter' involving the interpretation of the Constitution received a generous denotation".[70] Such a denotation cannot, however, be ascribed to a "matter" which arises under a law made by the Parliament.

Much may be said for this narrower view. Practical considerations frequently mean that the facts which give rise to the application of section

[65] (1981) 33 A.L.R. 465, 521-522.
[66] Id. 520.
[67] Id. 522.
[68] Id. 531.
[69] Id. 534. This is a strong point. Why is there any need for section 77(iii) of the Constitution at all if surreptitious accretions to jurisdiction can otherwise expand the meaning of matter and, accordingly, the jurisdiction of the federal courts.
[70] Id. 531 citing *R* v. *Carter; Ex parte Kisch* (1934) 52 C.L.R. 221, 223-224; *Hopper* v. *Egg and Egg Pulp Marketing Board* (Vic.) (1939) 61 C.L.R. 665; *Parton* v. *Milk Board (Vic.)* (1949) 80 C.L.R. 229, 249, 257-258.

76(i) may also involve the determination of some common law claim or the interpretation of a State Act. This is not so under section 76(ii). Mason J. suggested that to limit "matter" in the latter section would cause jurisdictional difficulties.[71] It is hard to disagree with the view of Wilson J. that "the Constitution itself in s.77(iii) provides the Parliament with a solution to the problem".[72]

Had the minority view prevailed in subsequent cases, the question of mala fides and substantiality would be of little importance. The range of non-federal matters which might potentially be joined with a federal question arising under an Act of Parliament would be so small as to cause little difficulty. The two leading cases following *Philip Morris* confirmed the expansionist view propounded in it.

In *Fencott* v. *Muller*[73] the Court explored the boundaries of *Philip Morris*. The applicant had purchased a wine bar and restaurant. He brought an action under section 82 of the *Trade Practices Act* against parties which he alleged had been involved in the contraventions of section 52 by the vendor, Scrid. Scrid was a corporation which was the trustee of a unit trust which ran the business. The parties allegedly involved with Scrid and liable under the Act were the directors and shareholders of Scrid, a company which was conducting business as a real estate agent, and an employee of that real estate company. Under the contract of sale, the purchaser was to be indemnified by the former owners for liabilities incurred by the business prior to sale. A shelf company, Oakland, was later substituted for Scrid as trustee of the unit trust.

A series of actions was commenced in the Federal Court arising from this variegated transaction. The purchaser of Scrid sued the former owners, the real estate company and the agent of the company for breaches of the *Trade Practices Act*, and for deceit and negligence. Scrid sued the same parties for breach of fiduciary duty. Scrid also sought an indemnity from Oakland in respect of its liabilities to the applicant. Scrid and the applicant sued the company and the company's agent for breaches of the *Trade Practices Act*.

The High Court had to decide whether, on the tests laid down in *Philip Morris*, these actions were so closely related that all of them could be tried by a Federal Court which was admittedly seized of jurisdiction with regard to the claims under the Commonwealth Act.

The majority held that they were. The Chief Justice concurred with respect to the claim for damages for deceit and negligence but not the actions for indemnity or against the nominee company.

Wilson and Dawson JJ. held that none of the claims other than the Trade Practices matter could be heard in the Federal Court.

The majority recognised the difference of opinion expressed in *Philip Morris*. It said:

"... a 'matter' is a justiciable controversy which must either be consti-

[71] Id. 502-503.
[72] Id 534.
[73] (1983) 46 A.L.R. 41; 57 A.L.J.R. 317.

tuted by or must include a claim arising under a federal law but which may also include another cause of action arising under another law, provided it is attached to and is not severable from the former claim. The proposition that a matter may include a cause of action arising under a non-federal law, though denied in the dissenting judgments, is the ratio decidendi of *Philip Morris*. It follows that the ambit of a matter arising under a federal law may extend beyond claims which arise under that law which are to be determined by reference to that law alone".[74]

Nevertheless, the court found it impossible "to devise so precise a formula that its application to the facts of any controversy would determine accurately what claims are disparate and what claims are not".[75] The court held that the scope of the controversy could be determined by examining the conduct of the proceedings, and "especially by the pleadings in which the issues in controversy are defined and the claims for relief are set out."[75a] At the end of the day, however, the question is to be resolved as a "matter of impression and of practical judgment".[76]

This approach causes certain difficulties. To begin, the court of first instance, the Federal Court, is not a court which may determine its own jurisdiction. Although the *Federal Court Act* 1976 (Cth) states that it is a superior court of record, it is amenable to the statutory jurisdiction of the High Court pursuant to section 75(v) of the Constitution so soon as it strays beyond the metes and bounds of its jurisdiction.[77]

Furthermore, to say that the issue is to be resolved as a matter of practical judgment is to avoid the issue entirely. The majority view expressed the pious hope that the question whether a federal issue was involved could be "amenable to summary disposition".[77a] The majority judgment revealed both its inability to clarify the questions and its desire to deny all responsibility for its failure to do so. The ratio of the case was laid down in a passage which provokes more questions than it solves.

"Federal judicial power is attracted to the whole of a controversy only if the federal claim is a substantial aspect of that controversy. A federal claim which is a trivial or insubstantial aspect of the controversy must, of course, itself be resolved in federal jurisdiction, but it would be neither appropriate nor convenient in such a case to translate to federal jurisdiction the determination of the substantial aspects of the controversy from the

[74] Id. 331-332. *In the Marriage of Smith (No. 2)* (1985) 64 A.L.R. 227, 239 Evatt C.J., rather ironically, set out "tests which have been formulated ... include the following" and listed six possible descriptions of a "matter" concluding with Gibbs C.J. in *Fencott* at 325: "it is not possible to select any of these expressions of opinion as stating the ratio decidendi of the case (*Philip Morris*)".

[75] Ibid.

[75a] Ibid.

[76] Ibid.

[77] "While [the Family Court] can determine the extent of its own jurisdiction its conclusion in that regard is not conclusive, but may be challenged in the High Court. In addition, prohibition will lie to prevent the court from entering upon a preliminary inquiry as to jurisdiction. In this respect, there appears to be no factor to distinguish the Family Court from the Federal Court": citation omitted per Evatt C.J. in *Smith (No. 2)* at 234.

[77a] (1983) 46 A.L.R. 41, 69.

jurisdiction to which they are subject in order to determine the trivial or insubstantial federal aspect.

Regardless of whether the form of objection to the jurisdiction of a court relates to the jurisdiction conferred upon it or the jurisdiction from which it is excluded by a law enacted pursuant to s.77(ii), the question – hopefully amenable to summary disposition – is whether the claim under the relevant federal law is a substantial part of a controversy the whole of which would be appropriately and conveniently determined by the court vested with jurisdiction in matters arising under that law. That is not to say that a judicial decision as to whether a particular question or issue falls for determination by the exercise of federal jurisdiction is not capable of review. But the occasions for such review should be few indeed and restricted to cases where there has been an obvious error in holding either that the federal aspect of the matter is substantial or that it is trivial or that the overall dispute is susceptible of clear division into component controversies or that it is not."[78]

The majority thus rejuvenate, without explaining, the line of authority which requires the federal matter to be "substantial". Although they make no specific reference to it, it may be implied that the claim must be bona fide as well. Why, however, is it not appropriate or convenient to have the whole matter tried in the Federal Court even if the federal aspect is only "trivial"? As a matter of judicial economy this is not self-evident. Nor, if the older authorities are applied in all their width, is it at all clear that such a restriction may be justified. The dubious claims (e.g. the tramp at Swan Hill, the sophisticated postal messenger) outlined by Sir Owen Dixon as giving rise to a federal issue with respect to section 76(i) jurisdiction are surely trivial if any are.

As a practical matter, it does not appear likely that a Federal Court judge will be able, summarily, to dispose of recondite distinctions which have bewildered the High Court itself over the past three years. Presumably, a challenge to jurisdiction will be made at the outset of the case. This will require a preliminary hearing, the determination of which, without the benefit of evidence from the parties, will depend upon the way in which the pleader has more or less satisfactorily advanced his or her case.[79]

At a fundamental level, the majority approach appears flawed. Implicit in it is some notion of *de minimis* jurisdictional failure. The High Court, consistent with authority, could not say that the Federal Court's decision at first instance that it has jurisdiction, is not reviewable. As noted above, such a view is wrong. It is therefore superfluous to deny that the jurisdiction is not capable of review. But the notion of "obvious" error is an attempt, in practice, to achieve the same end. Only if the want of jurisdiction is "obvious" will the matter be reviewable under the ratio in *Fencott*. That, too, is wrong, or at least unheard of until this case.

[78] Ibid.

[79] Compare the most recent cases discussed infra where the issue is decided sometimes upon the basis of affidavit, sometimes upon the pleadings, and sometimes not addressed at all.

The idea that a superior court which derives its jurisdiction from statute is empowered to go beyond that jurisdiction so long as the excess or jurisdiction is minor, trivial, insubstantial or not "obvious" is incorrect. Any excess of jurisdiction, however venial, by the Federal Court may be restrained by prohibition.[80] It has never been suggested that the High Court itself may exercise jurisdiction not conferred upon it so long as the error is not "obvious".

If that is the case, it is difficult to suggest that a party objecting to the exercise of the accrued jurisdiction may be satisfactorily resolved on a "summary" hearing, although no doubt as a practical matter parties will be discouraged from appealing or seeking any prerogative relief in respect of such a determination. By making the decision at first instance unreviewable, the High Court has avoided the tedious chore of going through the Federal Court's jurisdictional laundry.

The judgment, unfortunately, does not clarify what is required for the matter to be substantial. If the jurisdiction is to be deduced simply from the statement of claim, it is not immediately clear how the triviality or bona fides of the claim can be detected without the primary judge undertaking a hearing of the evidence. The substantiality test provides no security against the colourable pleading designed merely to excite the court's jurisdiction.

Furthermore, as Sir Harry Gibbs pointed out, in those situations where the jurisdiction of the Federal Court was exclusive there was an automatic reciprocal contraction of State jurisdiction so soon as the Federal Court began to exercise its jurisdiction over the federal and accrued matters.[81]

In dissent, Dawson J. presciently noted that, even if it was desirable, practically, to widen the denotation of "matter" to avoid any hiatus in jurisdiction, the desire to do so provided no justification for doing so in legal or constitutional terms.

> "Moreover, it may be thought that solving the jurisdictional problems in the Federal Court in such a way is to create problems at the other end. The immediate source of the jurisdiction of the Federal Court under the *Trade Practices Act* is s.86 of that Act and the jurisdiction which that section invests is exclusive of the jurisdiction of other courts. If then the Federal Court has under that section jurisdiction to determine the whole matter between litigating parties, whether arising under a federal law or

[80] It is appropriate to note here the similar difficulty of deciding jurisdiction of inferior federal courts in relation to the grant of prohibition under section 75(v) of the Constitution. As Starke J. noted in *R* v. *Bevan; Ex parte Elias and Gordon* (1942) 66 C.L.R. 452, 464: "It (the High Court) is not a common law court but a statutory court. To the Constitution and the laws made under the Constitution it owes its existence and all its powers, and whatever jurisdiction is not found there either expressly or by necessary implication does not exist." The Federal Court is expressed to be a superior court of law and equity (s. 5 *Federal Court Act* 1976) but the judges of the court are officers of the Commonwealth for the purposes of the prohibition jurisidiction conferred by section 75(v): *R* v. *Judges of the Federal Court of Australia and Adamson; Ex parte Western Australian National Football League (Inc.) and the West Perth Football Club* (1979) 23 A.L.R. 439. This tension has resulted in it being impossible to provide any clear rule on when an error of law in the interpretation of a statute is sufficient to deprive the court of jurisdiction: *In re Gray; Ex parte Marsh* (1985) 59 A.L.J.R. 804 where the High Court, by a statutory majority, decided that the Federal Court deprived itself of jurisdiction by incorrectly interpreting its enabling statute.

[81] *Stack* v. *Coast Securities (No. 9) Pty Ltd* (1983) 57 A.L.J.R. 731, 736.

> the common law or a State law, it would seem that the jurisdiction ... of the Federal Court is actually invoked. Determining what comprises the matter in these circumstances may in many cases prove to be no easy task."[82]

The difficulty of excluded, but unexercised, federal jurisdiction arose in *Bargal* v. *Force*.[83] Actions had been commenced in the Supreme Court of Queensland by the vendor specifically to enforce contracts for the sale of home units. The bottom fell out of the real estate market. The purchasers sought to avoid the contracts, praying in aid of the Federal Court and alleging breaches of the *Trade Practices Act*. The difficulty foreseen by Dawson J. "at the other end" had occurred. For if the "matter" was properly one within the Federal jurisdiction as it seemed to be, the State Supreme Court lacked any jurisdiction in the matter by the operation of section 86 of the *Trade Practices Act*.[84] The federal "matter" although dormant, always existed to deprive the State tribunal of jurisdiction.[85] The consequences of the well-pleaded, or even nonsensical, defence doctrine began to bite.

The Chief Justice was plainly embarrassed by this predicament which permitted the potential peremptory divestment of State jurisdiction at any stage of the proceedings when the defendant decided to invoke his federal rights.[86] The dangers of a defendant "lying-by" were great.

> "Counsel went so far as to submit that the Supreme Court would be deprived of jurisdiction, even though no proceedings had been commenced in the Federal Court, once there had arisen a controversy of which a federal matter of the requisite kind was an inseverable part, or, to state the position in a more specific way, once one party had made to the other a genuine assertion of a claim to a right or relief under the *Trade Practices Act* of a kind that would fall within s.86. On this view, the Supreme Court, if informed of the existence of the controversy, would be bound to decline jurisdiction, although no other court could exercise it, and, if kept in ignorance of the controversy, might proceed to judgment, only to find it had never had jurisdiction."[87]

Gibbs C.J. expressed his surprise at this. Yet, as Professor Lane has said, "in fact under the *Judiciary Act* s.39(2) State courts, often unwittingly, exercise federal jurisdiction in a multitude of matters . . .".[87a] It is only the harsh consequences of section 86 which formerly made the jurisdiction exclusive that takes this case out of the general rule.

The majority in *Bargal* adhered to their earlier view expressed in *Fencott* v. *Muller*. They reasoned, on the basis of *Nelungaloo Pty Ltd* v. *Commonwealth*, that Chapter III of the Constitution did not impose any obligation

[82] (1983) 57 A.L.J.R. 317, 341.
[83] (1983) 49 A.L.R. 193.
[84] The difficulty has now been removed by the insertion of section 86(2) in the *Trade Practices Act* which allows for the exercise of federal jurisdiction under the Act by the Supreme Court of the States in appropriate cases.
[85] Per Gibbs C.J. at 49 A.L.R. 193, 204.
[86] Id. 203-204 where his Honour referred to the "astonishing consequences of the argument".
[87] Ibid.
[87a] P.H. Lane, *The Australian Federal System* (2nd ed.), p. 521.

to prefer State to federal courts by investing the former with federal jurisdiction "as it would be if the Constitution were to deny power to give authority to federal courts to decide the whole of a single justiciable controversy of which a federal issue forms an integral part."[88] The reasoning here is circular. Only if "matter" is predicated as involving non-federal proceedings as well can it justify the jurisdiction. In the result, the majority remitted the matter to the Federal Court for it to decide whether to exercise the jurisdiction in its discretion or not. Since certain aspects of the non-federal issues had already been determined by the State Court there was no reason for the Federal Court to hear them.

Wilson and Dawson JJ. vigorously criticised the earlier cases, pointing out that the "genesis" of the whole problem was the earlier decisions of the Court. Applying as best they could, "the imprecise and unsatisfactory test of 'impression and practical judgment' "[89], they concluded that the Federal Court had jurisdiction over both claims and ordered the remission of the whole matter to the Federal Court.

THE "TESTS" IN ACTION

The Federal Court has applied the criteria of "impression and practical judgment" on a number of occasions since that test was propounded. The test has been given lip-service by almost all judges who have attempted to apply it. Mr Justice Northrop, however, stands out as both perceiving the difficulties in relation to factitious jurisdiction and doing something to provide a sanction against it.

In *Francis C. Mason* v. *Citicorp*[90] the applicants claimed that they had been induced to enter a loan contract with the respondent bank by conduct which contravened section 52 of the *Trade Practices Act* 1974 (Cth). They sought an interlocutory injunction to restrain the respondent from proceeding to judgment in the Supreme Court of Victoria on a claim for payment of monies allegedly due under the loan agreement.

As noted above, the vesting of accrued jurisdiction in the Federal Court in respect of the matter would have prevented the State court from determining any aspect of it at all because the jurisdiction with respect to relief pursuant to section 52 was vested exclusively in the Federal Court pursuant to section 86 of the *Trade Practices Act*.

Northrop J. reiterated an approach that he had earlier expressed in *Denpro Pty Ltd* v. *Centrepoint Freeholds Pty Ltd*[91] in relation to the way in which the accrued jurisdiction was to be exercised.

> "Before the Federal Court makes an order of the type sought by the applicants, the material before the court must satisfy it that the Federal claims and the State claims constitute one controversy between the parties,

[88] Id. 214.
[89] Id. 222.
[90] (1984) 57 A.L.R. 130.
[91] (1983) 48 A.L.R. 39.

that the Federal claims are genuine and that they form a substantial aspect of that controversy."[92]

Affidavit evidence had been filed by both parties and his Honour considered whether, in the light of this evidence, the federal claim advanced by the applicants was "genuine". He concluded that it was not; accordingly, he rejected the application on the basis that no jurisdiction to hear it existed in the Federal Court. He reached that conclusion chiefly because the evidence of one of the applicants was inconsistent with contemporaneous documents upon which they also sought to rely. He concluded:

"In this motion it is neither necessary nor desirable that the court express any opinion on the likelihood of the applicants' success in their Federal claims or to other claims made in the Federal Court in the exercise of the accrued jurisdiction".[93]

His Honour decided that the alleged federal "claims" were made merely for the purpose of delaying the Supreme Court proceedings and "without any real basis to support the federal claims".[93a]

The decision in *Citicorp* demonstrates that rejection of an alleged federal claim is possible if "bona fides" is lacking. Precisely how his Honour's views tie in with the theoretical arguments outlined above is not clear. Northrop J. seems to prefer a subjective approach in assessing the question of bona fides, and to be prepared to resolve the question on an interlocutory basis. But it may be unwise to drive an applicant from the Federal Court simply because he or she does not satisfy the trial judge when examined at an interlocutory stage on affidavits filed in court. According to the "test" propounded by a majority in the High Court, the appropriateness of exercising federal jurisdiction over the whole matter is to be resolved chiefly by an examination of the way in which the pleader has sought to make out his or her claim in the originating process. The decision in *Citicorp* rather suggests that the jurisdictional issue is to be treated as a question of law which is to be determined before the hearing of the main action and to be resolved by any evidence then available. On a conventional view, the applicant should, perhaps, be allowed to take any point, no matter how tendentious.

Indeed, if one were to take the dictum of Knox C.J. in *Hume* v. *Palmer*[94] as revealing the correct approach (where bona fides was shown "by the course of argument in [the] Court") it would be impossible to apply the more ruthless control of Northrop J. because, of necessity, there would need to be full argument before the mala fides aspect of the application became apparent.

On the other hand, Latham C.J. in *Hopper*[95] seems to suggest that the onus lies upon the respondent to show that jurisdiction does not exist. This general bias towards exercising jurisdiction also does not lie easily with the decision of Northrop J. to reject the applicant's claim.

[92] (1984) 57 A.L.R. 130, 131.
[93] Id. 134.
[93a] (1984-85) 57 A.L.R. 130, 134.
[94] (1926) 38 C.L.R. 441, 446.
[95] (1939) 61 C.L.R. 665, 673.

The need to determine the jurisdiction of the Federal Court with regard to accrued claims points up an incongruity with which the High Court has failed to deal. Since the Federal Court derives its jurisdiction from Statute, it ought to be amenable to the prohibition jurisdiction of the High Court, pursuant to section 75(v), as soon as it attempts to exercise jurisdiction beyond the ambit of its empowering statute. Yet, it seems, the accrued jurisdiction is properly exercised even if the allegation which gave rise to the constitutional point is ultimately rejected.

The interplay of these two positions was considered by Toohey J. (then sitting in the Federal Court) in *Hughes* v. *Western Australian Cricket Association*. The applicant sought relief under the *Trade Practices Act* for alleged restraint of trade in contravention of section 45 of the Act, and in the accrued jurisdiction for conspiracy, bad faith, ultra vires, and breach of a Western Australian statute. His Honour commented:

> "When the court has before it a claim arising under a law made by the Parliament in respect of which jurisdiction has been conferred upon the court, the determination of the claim or matter is itself sufficient to attract the federal jurisdiction essential for the complete adjudication of the matter. Once jurisdiction is acquired, it is not lost by reason of the rejection of the claim or the matter attracting federal jurisdiction. . . . Nevertheless the claim or matter attracting federal jurisdiction must be raised bona fide."[96]

Notwithstanding this, his Honour concluded that the mere fact that there was "an arguable case that one of the respondents [was] a trading corporation"[96a] was not, of itself, sufficient to found jurisdiction. Rather, the "existence of a trading corporation is essential"[96b] because without it there is no constitutional basis for the *Trade Practices Act* to operate.

It appears that, while the accrued jurisdiction may depend upon some allegation of fact (in a constitutional sense) which may ultimately be disposed of against the person seeking relief, the basic claim upon which the Federal Court's jurisdiction initially depends must always be properly brought before any question of accrued matters arises.

This view is confirmed by *Pallas* v. *Finlay*,[97] where a Federal Court action was settled and the applicant then sought to enforce the settlement in the Federal Court. The settlement, of course, had no federal element at all; it was a matter of mere contract.

The Full Federal Court upheld an objection to jurisdiction on the basis that "this court's jurisdiction, being statutory only and for present purposes, limited to jurisdiction under the *Trade Practices Act*, does not entitle it, even in its accrued or associated jurisdiction, to entertain the claim" under the settlement agreement.

[96] (1986) 69 A.L.R. 660, 681.
[96a] Ibid.
[96b] Ibid.
[97] (1985) 61 A.L.R. 220, 222. But compare *Darling Downs Investments Limited* v. *Ellwood* (1988) 80 A.L.R. 203 where a compromise between parties was enforced and *Pallas* was distinguished on the ground that the promise was made by a stranger in that case.

In *Hilton* v. *Wells*[98], Wilcox J. considered whether relief might be granted against parties who were not officers of the Commonwealth for the purposes of section 75(v) of the Constitution on the basis that jurisdiction to do so accrued because parties within that section were properly impleaded. The applicants for relief claimed that the relevant federal claim which involved the interpretation of a search warrant issued pursuant to section 14 of the *Crimes Act* 1914 (Cth) "was made bona fide and not colourably to attract the jurisdiction of the court."

His Honour concluded that the relief could be granted because the High Court's view on the issuing of federal warrants was not known at that time. This view harkens back to some of the earlier cases discussed above in relation to certiorari where jurisdiction is assumed on the ground that the mere appearance of an arguable case for intervention suffices to justify the grant of certiorari if prohibition could have been obtained in the action.

Similarly, in *Duff* v. *McCulloch*,[99] Wilcox J. considered joinder of non-federal parties and decided the matter on the ground that no "subterfuge" was involved in their joinder without, regrettably, discussing how such subterfuge might be detected.

The difficulties of detecting an improper plea of jurisdiction have been most recently considered by the Full Federal Court in *Westpac Banking Corporation* v. *Eltran Pty Ltd.*[100] The Bank had commenced proceedings in the Supreme Court of Queensland to recover loan moneys. The borrower then began separate proceedings in the Federal Court claiming damages for breach of section 52 of the *Trade Practices Act*. The borrower alleged that its claim was in the nature of an equitable set-off which acted to reduce the Bank's claim. The Federal Court ordered the Bank to take no further action in its Supreme Court proceedings. The Bank subsequently obtained leave to bring fresh proceedings to recover the difference between its claim and the amount allegedly available as a set-off. The Bank also appealed to the Full Federal Court against the initial decision to stay its action in the Supreme Court while the borrower appealed against the order allowing the Bank to bring its second set of proceedings.

The Court's ultimate decision turned on questions of interlocutory relief but part of it involved the accrued issue. The majority, Fox and Burchett JJ., held that the trial judge's initial discretion to hear all the claims, both federal and non-federal together, had been correctly exercised. "He found that there was a single controversy which included a federal claim genuinely put forward, and accepted that determination of the controversy in the Federal Court had the important advantage conferred by the court's ability to 'resolve the entire controversy' "[100a] relying upon dicta in *Stack's* case.

Northrop J., as might have been predicted, took an altogether different view of the borrower's behaviour. He pointed out that, for the Federal Court to grant a stay, "it is necessary for the party seeking a stay of such proceed-

[98] (1985) 59 A.L.R. 281, 294.
[99] (1986) 65 A.L.R. 677, 679.
[100] (1987) 74 A.L.R. 45.
[100a] Id. 55.

ings to show that the Federal Court claims were genuine. I considered this type of question in *Francis C. Mason Pty Ltd* v. *Citicorp Australia Ltd* (1984) 57 A.L.R.30 and held that, on the facts of that case, the claim in the Federal Court was not genuine. In the present case, what is important is whether the respondents' claims under the *Trade Practices Act* are genuine and give rise to a substantial issue. I am not satisfied that they are. I have formed the opinion that the Federal Court proceedings have all the outward appearance of being brought in order to delay the Supreme Court proceedings."[101]

In reaching this conclusion his Honour relied upon three facts. First, the claim in the Federal Court was brought belatedly and the Federal Court aspect of the claim was "shadowy". Secondly, the undertaking which the respondents gave in respect of the damages which might be suffered by the Bank were worthless. Finally, the Bank's claim in the Supreme Court exceeded the alleged set-off by over $6 million.

It is not immediately clear why the "shadowy" nature of the claim prevents it being one involving Federal jurisdiction. It is in just such a case that the vast gap between the constitutional theory espoused in the early cases and the actual practice in the modern context of the modern enforcement of an outstanding bank loan becomes most apparent. On the older cases, the merest shadow of a federal claim, albeit "constitutional nonsense", sufficed to make the matter one of federal jurisdiction. For example, the claim that the contract of loan was illegal because the lending policy in some way breached section 92 of the Constitution ought, under the old doctrine to render the matter a federal claim.

The approach of Northrop J. seems to meld both objective and subjective criteria to assess "genuiness". The actual bona fides of the borrower seems to be impugned in the first element which his Honour considered, that is, there was a subjective lack of good faith in the borrower because he made a late and weak claim for relief under the *Trade Practices Act*. The objective element is highlighted by the second and third elements; the worthlessness of the undertaking and the difference in amounts involved demonstrated objectively that there was no "genuine" element in the borrower's objections.

Unfortunatelly, the joint judgment of the majority judges did not address the issue at all.[102]

The decision of Burchett J. in *McMahon* v. *Smith*[103] illustrates the difficulties which may arise in relation to substantiality. The applicant had sued the first respondents for breach of section 52 of the *Trade Practices Act* and the second respondents, his solicitors, for negligence and breach of contract. He alleged "no separate federal claim ... against the solicitors who [were] sued upon their contract of retainer and in negligence".[104] The solicitors asserted that the Court had no jurisdiction against them.[105] It was

[101] Id. 65.
[102] Fox and Burchett JJ.
[103] (1986) 69 A.L.R. 527.
[104] Id. 529.
[105] The matter came on as an application for summary judgment against the applicant on the basis of *General Steel Industries Inc.* v. *Commissioner for Railways (N.S.W.)* (1964) 112 C.L.R. 125. Accordingly, to succeed on summary judgment it must be clear that the applicant would fail were the matter to continue.

argued on their behalf that "the federal claim must be *the* substantial aspect of the controversy"[106] before the Court could exercise jurisdiction. Burchett J. considered that such a requirement would be inconsistent with the views expressed in *Fencott* v. *Muller*. Regrettably, his Honour's dicta on the question serve merely to emphasise the terminological uncertainty in the field.

He said: "where the federal claim is a 'trivial or insubstantial' aspect of the controversy . . . it would be insufficient to attract to itself accrued jurisdiction to determine the substantial aspects of the controversy. . . . the federal issue may be one of several issues and may be relatively insubstantial."[106a] It does not, with respect, enlighten the argument to introduce degrees of "insubstantiality" nor to do so without indicating how the presence or absence of it is to be determined. Significantly, he did note that "difficult questions of mixed law and fact can arise in a case near the border between federal and non-federal jurisdiction, which is not a sharp line, but rather a broad demarcation zone in which impression and practical judgment must be looked to as guides."[106b]

THE DISCRETIONARY NATURE OF THE JURISDICTION

As noted above, "where accrued jurisdiction exists, its exercise is discretionary and would depend upon the circumstances of each particular case". It was suggested in *Fencott* v. *Muller* that, in order to determine the exercise of the discretion, the Court should have regard to:

(a) what the parties had done;
(b) the relationship between them and the law which attaches rights or liabilities to their conduct or relationship;
(c) the exclusive jurisdiction which the Federal Court has to determine all the issues in a matter;
(d) whether a proceeding is pending in two courts; and
(e) what is in the best interest of the litigants.

No case to date, however, has addressed the more fundamental issue: How may a jurisdiction conferred by the Constitution (since the accrued aspect is necessarily part of the "matter" conferred by sections 75 or 76 of the Constitution) be exercised or not exercised in the discretion of the Court?

It is hard to see in logic how the accrued jurisdiction can be discretionary and yet still accord with other constitutional axioms. The facts[107] in the sense of being determined by the Federal Court anterior to its determining whether jurisdiction exists, are fixed and unalterable. If the facts, as found, are such that a "matter" relevantly arises, how is it possible for the federal jurisdiction attracted to be discretionary? The accrued jurisdiction arises because the common law or other claims are so closely related to the federal "matter" that they are part of it; this "matter" can only be some head of the

[106] Id. 531.
[106a] a Ibid.
[106b] Id. 532.
[107] The question of Constitutional facts is discussed in detail in Zines, *The High Court and the Constitution.*

original jurisdiction of the High Court pursuant to the relevant sections of the Constitution.

The duty of the High Court to exercise judicial review has been the subject of detailed discussion in Australian jurisprudence.[108] As Cowen and Zines point out, "it is clear that Parliament cannot shut out the original jurisdiction of the High Court so far as it has been conferred by section 75 of the Constitution. It is not altogether clear, however, whether the High Court may decline to exercise jurisdiction conferred directly by section 75, or by Parliament under section 76".[109]

It is clearly arguable, on the basis of those cases which suggest that the grant of jurisdiction carries with it a correlative duty to exercise that jurisdiction, that the Court is under a duty to exercise the accrued jurisdiction. So soon as the related matter is characterised as being properly part of the matter it "arises" under the relevant section of the Constitution which confers the original jurisdiction which the Court is initially exercising.

It must be conceded that the High Court has, in a number of cases, declined to exercise jurisdiction because of the smallness of the sum in issue or because another tribunal seemed more appropriate.[110] Cowen and Zines have noted that the jurisdicitonal amounts specified in respect of the United States Federal Court are absent in Australia. Section 44 of the *Judiciary Act* 1907 (Cth) for example, is a provision which allows the High Court to remit a matter to a more appropriate court for hearing, if necessary. Such remitter depends upon the explicit statutory basis imposed in the *Judiciary Act*. The position is much more tenuous when the jurisdiction exercised by the Federal Court in accrued matters is considered, since there is no specific statutory entitlement which purports to authorise the exercise of federal jurisdiction by another tribunal if a federal court has declined to do so.

CONCLUSION

This article has attempted to examine the jurisprudence concerning substantiality and bona fides as tests to establish whether the accrued jurisdiction of the federal courts has been properly attracted in relation to a "matter". If it does no more than throw the problem into relief and attract attention to the issue it will have achieved its purpose. The High Court has never specifically directed its attention to the question, which is an important (some might have thought fundamental) one. It has been considered

[108] The general principle is stated categorically in *Re Ross-Jones and Marinovich; Ex parte Green* (1983) 56 A.L.R. 609, 631 per Brennan J. "... when this court's jurisdiction is properly invoked, this court cannot decline to exercise it on the ground that there is another more convenient forum for the exercise of the same jurisdiction." See, Barwick, "The Australian Judicial System: The Proposed New Federal Superior Court" (1964-1965) 1 *Fed. L.R.* 1, 10-14; Lindell, "Duty to Exercise Judicial Review" in *Commentaries on the Australian Constitution* (Zines ed. 1977) 150, 156-157; Cowen and Zines, *Federal Jurisdiction in Australia* (2nd ed. Melbourne, Oxford University Press, 1978) 81.

[109] Cowen and Zines op. cit. 75.

[110] E.g. *Faussett* v. *Carroll* (1917) 15 W.N. (N.S.W.) No. 12 cited in Cowen and Zines op. cit. 76 pp. 296-298.

vestigially and intermittently. Only the recent experience has shown the entire absence of theory supporting the older views espoused mainly in dicta. The only judges to have considered the issue have wavered between a subjective and an objective test for bona fides; the formal adoption of either would compound the difficulties. It may not be uncharitable to suggest that the question has not been directly attacked because to do so would require the overruling or explaining of most of the earlier decisions on the federal question. As has been shown, the use of "substantiality" is at odds with all earlier authority on the nature and strength of the federal question required before jurisdiction may be exercised. The discretionary nature of the jurisdiction, which lacks statutory support, also sits uneasily with received doctrine.

Inevitably, the High Court will have to consider these issues and grapple with the consequences of its own previous irresolution and the conundrums concealed in the meaning of "matter". Since, at base, the whole question intimately involves the constitutionally ordained antinomy between the State and federal courts, one may confidently expect that the needs of a "viable federation" will determine the outcome. The absence of a satisfactory theory and lexicon, explored and delineated briefly above, will be the central obstacle for the Court to surmount.