

# Cross-vesting of Jurisdiction in Administrative Law Matters

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## INTRODUCTION

The purpose of this article is to examine the effect of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) and the complementary State and Northern Territory Acts<sup>1</sup> on the supervisory or superintending jurisdictions of federal, State and Territory courts, on the administrative appeals jurisdictions of those courts and on their jurisdiction to entertain civil actions in which the validity or legality of administrative acts is in issue. By a supervisory or superintending jurisdiction I primarily mean a jurisdiction to review on applications for the prerogative writs of *certiorari*, *mandamus* and prohibition and like statutory orders. I include also a jurisdiction to entertain suits for declarations and injunctions in respect of the validity of administrative acts.

The cross-vesting legislation, it should be stated at the outset, in no way affects the original jurisdiction of the High Court of Australia. It does, however enlarge the supervisory jurisdictions of the Federal Court of Australia and of the Supreme Courts of the States and Territories. Whereas previously the Federal Court's supervisory jurisdiction was limited to that conferred on it by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) — hereafter referred to as the *ADJR Act* — and s 39B of the *Judiciary Act 1903* (Cth), under the cross-vesting legislation its supervisory jurisdiction now extends to State and Territory matters. More important State Supreme Courts have reacquired most of the federal supervisory jurisdiction denied to them by s 9 of the *ADJR Act*, subject, however, to provisions governing what are termed 'special federal matters'. They have also acquired, for the first time, the supervisory jurisdictions of the Supreme Courts of the other States and of the Territories in State and Territory matters respectively. For practical purposes the supervisory jurisdictions of the Territory Supreme Courts are now co-extensive with those of the State Supreme Courts.

## JURISDICTIONAL ARRANGEMENTS PRIOR TO CROSS-VESTING

To understand the effects of the new jurisdictional regime, and the problems to which it is likely to give rise, it is necessary to have regard to the manner in

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<sup>1</sup> All Acts have the same short title as the federal Act and all were proclaimed to come into force on 1st July 1988.

which supervisory jurisdictions, and in particular the federal jurisdiction, were previously allocated.

### High Court of Australia

Under s 75 of the federal Constitution, the High Court possesses a fairly wide supervisory jurisdiction. This jurisdiction rests primarily on paragraphs (iii) and (v) of the section. These give the Court original jurisdiction:

In all matters —

(iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth is a party;

...

(v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

The Court has interpreted both of these heads of jurisdiction broadly. For example, for the purposes of paragraph (iii) a party may be a party suing or being sued on behalf of the Commonwealth even though it is not within the shield of the Crown in right of the Commonwealth.<sup>2</sup> The Court has also held that even though s 75 makes no mention of *certiorari*, that remedy may be granted if the Court has jurisdiction in the matter before it.<sup>3</sup> On the other hand State judges and officers exercising powers conferred by federal law are not, on that account, officers of the Commonwealth.<sup>4</sup>

### Federal Court of Australia

The *ADJR Act* invested in the Federal Court a fairly wide supervisory jurisdiction in federal matters. This jurisdiction was not, however, coextensive with that possessed by the High Court. Broadly, the Federal Court's jurisdiction was confined to decisions<sup>5</sup> of an administrative character made under federal enactments. Decisions of the Governor-General were excluded from the Court's mandate; likewise the classes of decisions itemised in Schedule 1.<sup>6</sup> The Court's supervisory jurisdiction was extended by s 39B of the *Judiciary Act* 1903, enacted in 1983.<sup>7</sup> This section gives the Court the same jurisdiction as the High Court possesses under s 75(v) of the Constitution, excepting cases

<sup>2</sup> See generally P H Lane, *Lane's Commentary on the Australian Constitution* (Sydney, Law Book Co, 1986) 397–401.

<sup>3</sup> *R v Cook; ex p Twigg* (1980) 147 CLR 15; *R v Toohey; ex p. Northern Land Council* (1981) 151 CLR 170; *R v Ross-Jones; ex p Green* (1984) 156 CLR 185, 203, 221; *R v Gray; ex p Marsh* (1985) 157 CLR 351, 388–9, 395–7.

*Certiorari* may also be granted if the matter falls within s 75(iii). See generally L J W Aitken, 'The High Court's Power to Grant Certiorari — The Unresolved Question' (1986) 17 *FL Rev* 370.

<sup>4</sup> *R v Murray and Cormie; ex p Commonwealth* (1916) 22 CLR 437. But State judges and officers may be defendants and respondents in s 75(iii) matters, ie when the suit is instituted or defended by the Commonwealth or a Commonwealth party.

<sup>5</sup> And conduct related to the making of decisions and failures to make decisions (see ss 5–7). The term decision is defined in s 3(2) and (3).

<sup>6</sup> Section 19 authorises the making of regulations to exempt classes of decisions from review under the Act. The regulations do in fact declare certain classes of decisions not to be reviewable.

<sup>7</sup> Operative from 20 December 1983.

in which the officer is a judge of the Family Court of Australia or an officer of certain industrial tribunals.<sup>8</sup>

The Federal Court may also exercise a supervisory jurisdiction on remittal by the High Court pursuant to s 44 of the *Judiciary Act* 1903. Matters which may be remitted to the Federal Court include matters of the kind referred to in s 75(iii) of the Constitution.<sup>9</sup>

The following general points about the supervisory jurisdiction of the Federal Court should be noticed:

- (a) Although, for the purposes of s 75(v) of the Constitution and s 39B of the *Judiciary Act* 1903 a State officer exercising powers under a federal enactment is not an officer of the Commonwealth, acts and decisions of such an officer may be reviewable by the Federal Court under the *ADJR Act*.
- (b) Acts and decisions which are not reviewable by the Court under the *ADJR Act* may, nonetheless, be reviewable by it under s 39B of the *Judiciary Act* 1903, eg decisions of the Governor-General, decisions of the kind itemised in Schedule 1 of the *ADJR Act* and decisions of officers of the Commonwealth otherwise than under an enactment.
- (c) If, as has been suggested,<sup>10</sup> a corporation created by federal legislation is not an officer of the Commonwealth, the Court has no jurisdiction to review decisions of such corporations unless they are decisions of an administrative character, under an enactment, and are thus reviewable under the *ADJR Act*.
- (d) The supervisory jurisdiction of the Court, like any other of its other statutory jurisdictions, encompasses a pendent or accrued jurisdiction. In the exercise of this accrued jurisdiction, the Court can, on an application for review, hear and determine an associated matter, not otherwise within its jurisdiction, which arises from a common substratum of facts and which is not severable from the claim for relief in the supervisory jurisdiction.<sup>11</sup>
- (e) One question which has not yet been resolved is whether, on an application for judicial review, the accrued jurisdiction of the Federal court

<sup>8</sup> Officers of the Commonwealth do not, for the purposes of the section, include persons holding office under the *Industrial Relations Act* 1986 or the *Coal Industry Act* 1946. The Chief Justice of the High Court and several Justices of the Court have criticised the absence of jurisdiction in the Federal Court to review decisions of members of industrial tribunals. See Sir Anthony Mason, 'The State of the Australian Judicature' (1987) 61 ALJ 681, 682-3; *R v Griffin, ex p Professional Radio and Electronics Institute of Australasia* (1989) 84 ALR 385, 387 (Brennan J).

<sup>9</sup> Sub-section 44(2A).

<sup>10</sup> *Broken Hill Pty Co Ltd v National Companies and Securities Commission* (1986) 67 ALR 545, 550-1 (Dawson J); *Post Office Agents Association Ltd v Australian Postal Commission* (1988) 84 ALR 563, 575 (Davies J); *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499 (Gummow J). See also *Waterhouse v Australian Broadcasting Corporation*, Australian Federal Court, unreported, 21 Oct 1987.

<sup>11</sup> *Phillip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261; *Eatts v Dawson* (1990) 93 ALR 497, 500-1; *Attorney-General (Cth) v Queensland* (1990) 94 ALR 516, 521-2, 536.

may be invoked so as to permit the court to adjudicate a separate claim for damages or for recovery of property or money had and received. The remedies which may be awarded under s 16 of the *ADJR Act* do not include damages. On the other hand, the Court may, on an application for review under that Act, declare certain administrative action to have been unlawful, which declaration will conclude that particular issue in subsequent litigation.<sup>12</sup>

In addition to its supervisory jurisdiction the Federal Court may, under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth), hear and determine appeals, on questions of law, from decisions of the federal Administrative Appeals Tribunal. Under s 45 of the same Act it also has jurisdiction to hear and determine questions of law referred to it by the Tribunal.

### State Courts

The Supreme Courts of the States exercise a plenary, supervisory jurisdiction in State matters, pursuant to the general statutes defining their jurisdiction. Under State legislation they also have jurisdiction to hear and determine appeals from certain State administrative tribunals. This appellate jurisdiction is usually limited to appeals on questions of law, but it need not be so limited. State courts are not, constitutionally, prohibited from exercising non-judicial powers and may thus be invested with jurisdiction to hear and determine appeals against administrative decisions on the merits.

From the early years of federation, it seems to have been accepted that the jurisdiction which State courts derived from State legislation did not extend to suits against the Commonwealth or applications for prerogative writs against officers of the Commonwealth.<sup>13</sup> The jurisdiction of State courts in these matters could exist only by grant from the federal Parliament.<sup>14</sup>

Under the *Judiciary Act 1903*, the courts of the States were invested with jurisdiction in all the matters referred to in ss 75 and 76 of the Constitution,<sup>15</sup> save those matters declared to come within the exclusive jurisdiction of the High Court.<sup>16</sup> In consequence, State Supreme Courts gained jurisdiction to entertain, *inter alia*, suits (other than State suits) against the Commonwealth and persons being sued on behalf of the Commonwealth, and matters in which an injunction was sought against an officer of the Commonwealth. While the matters expressly declared to be exclusive to the High Court included 'matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court',<sup>17</sup> the federal jurisdiction invested in the State Supreme Courts was sufficiently wide to enable them to grant *certiorari*

<sup>12</sup> *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 64 ALJR 34, 37. In *Teteron International Pty Ltd v Luckman* (1985) 8 ALD 243, Northrop J held that the Federal Court's accrued jurisdiction extended to a civil action arising from facts intimately connected with those involved in an application for judicial review.

<sup>13</sup> *Ex p Goldring* (1903) 3 SR (NSW) 260.

<sup>14</sup> Pursuant to s 77 of the Constitution.

<sup>15</sup> Section 76 matters included 'any matter . . . arising under any laws made by the [federal] Parliament'.

<sup>16</sup> Sections 38 and 39(1).

<sup>17</sup> Section 38(e).

against an officer of the Commonwealth so long as the matter before the Court was one in respect of which it had jurisdiction.

Section 9 of the *ADJR Act* stripped State courts almost entirely of the federal supervisory jurisdiction which had previously been given to them. Broadly the effect of s 9 was to denude State courts of jurisdiction to review, by grant of declarations, injunctions and prerogative writs or like remedies:

- (a) any decision or act reviewable by the Federal Court under the *ADJR Act*,<sup>18</sup>
- (b) any decision of a class mentioned in Schedule 1 of that Act;<sup>19</sup> and
- (c) 'any . . . decision given, or any order made, by an officer of the Commonwealth or . . . other conduct that has been, is being, or is proposed to be, engaged in by an officer of the Commonwealth, including a decision, order or conduct given, made or engaged in, as the case may be, in the exercise of judicial power'.<sup>20</sup>

The federal supervisory jurisdiction thus removed from State courts was wider in scope than that invested in the Federal Court by the *ADJR Act*. On the other hand, in cases in which judicial review was sought of an act or decision of a corporation of the Commonwealth, State courts could have a jurisdiction to review not possessed by the Federal Court. If the act or decision was not done or made under a federal enactment, the Federal Court would have no jurisdiction under the *ADJR Act*, and if the corporation was not an officer of the Commonwealth, no jurisdiction under s 39B of the *Judiciary Act* 1903. A State court might nevertheless exercise jurisdiction in the matter under s 39(2) of the *Judiciary Act* 1903.<sup>21</sup>

State courts, and in particular the Supreme Court of New South Wales, tended to interpret s 9 restrictively. A number of cases which could probably have been brought before the Federal Court were brought before State Supreme Courts by way of suits for declarations and, for various reasons, were held to have been properly brought in the State court.<sup>22</sup>

Exercise of the jurisdiction invested in State courts by s 39(2) of the *Judiciary Act* 1903 is qualified by s 56 of the same Act. The latter section provides, *inter alia*, that:

- (1) A person making a claim against the Commonwealth, whether in con-

<sup>18</sup> Sub-section 9(1) and para (2)(a).

<sup>19</sup> Sub-section 9(1) and para (2)(b). But there are some exceptions.

<sup>20</sup> Para 9(1)(d). The term 'officer of the Commonwealth' is defined to have the same meaning as in para 75(v) of the Constitution.

<sup>21</sup> The subsection provides that 'The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, 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, except as provided in section 38', subject to the conditions and restrictions thereafter set out.

<sup>22</sup> For a review of the cases see M Aronson and N Franklin, *Review of Administrative Action* (Sydney Law Book Co, 1987) 259-62; L J W Aitken, 'State Courts and The Administrative Decisions (Judicial Review) Act' (1984) 7 UNSWLJ 254; [1986] *Aust. Current Law* — Notes 36063; C Baker, 'State Courts and Federal Administrative Law: Problems of Federal Jurisdiction' (1987) 17 *FL Rev* 45.

tract or in tort, may in respect of the claim bring a suit against the Commonwealth -

- (a) in the High Court;
- (b) if the claim arose in a State or Territory — in the Supreme Court of that State or Territory or in any other court of competent jurisdiction of that State or Territory; or
- (c) if the claim did not arise in a State or Territory — in the Supreme Court of any State or Territory or in any other Court of competent jurisdiction of any State or Territory.

In *Breavington v Godleman*<sup>23</sup> the High Court held that s 56(1) does not divest State courts of the jurisdiction conferred on them by s 39(2) of the *Judiciary Act* 1903. It does, however, limit the exercise of that jurisdiction when the Commonwealth is sued in contract or tort such that if, for example, a claim in tort arose in State A or in a Territory, a court in State B cannot adjudicate the claim unless the Commonwealth submits to the jurisdiction of that court. According to Wilson and Gaudron JJ, if a matter is 'commenced other than in accordance with s 56' it is not *coram non judge*. 'However, if a court disregards or fails to observe the conditions attaching to the exercise of jurisdiction, then the judgment or order, although not void "may be set aside and avoided . . .".'<sup>24</sup>

It should be noted here that when an action against the Commonwealth has been commenced in the High Court and the High Court decides to remit the action to a State or Territory court, the court to which the action is remitted may be one which, under s 56, would not have been competent to determine the matter.<sup>25</sup>

## THE CROSS-VESTING SCHEME

### General

The cross-vesting scheme<sup>26</sup> operates only in relation to the Federal Court, the Family Court of Australia, the Supreme Courts of the States and Territories, and State Family Courts. The jurisdiction which is cross-vested under the scheme is limited to civil jurisdiction. In summary, jurisdiction is cross-vested as follows:

#### (a) *Federal jurisdiction*

Jurisdiction in a civil matter which is invested in the Federal Court or the Family Court of Australia and which, apart from s 4 of the federal cross-vesting Act, is a jurisdiction not exercisable by a Supreme Court

<sup>23</sup> (1988) 169 CLR 41, 68–9, 100–6, 117–8, 139–40, 151–3, 167–9.

<sup>24</sup> *Id.*, 465.

<sup>25</sup> *Johnstone v Commonwealth* (1979) 143 CLR 398. See also M Pryles, 'The Remission of High Court Actions to Subordinate Courts and the Law Governing Torts' (1984) 10 *Syd LR* 352.

<sup>26</sup> See footnote 1 *supra*.

of a State or Territory, is (subject to certain exceptions<sup>27</sup>) invested in those Supreme Courts.<sup>28</sup> The jurisdiction so invested is, in the case of the State Supreme Courts, described as federal jurisdiction. The Supreme Courts thus have the jurisdiction invested in the Federal Court by the *ADJR Act* and s 39B of the *Judiciary Act* 1903, notwithstanding anything to the contrary in s 9 of the *ADJR Act*. They are also invested with the Federal Court's jurisdiction under the *Administrative Appeals Tribunal Act* 1975 (Cth).<sup>29</sup>

(b) *Territory jurisdiction*

Jurisdiction invested in the Supreme Courts of the Territories by Acts of the federal Parliament or Territory laws, and not otherwise exercisable by the two federal courts, State Supreme Courts and Supreme Courts of other Territories is invested, by the federal cross-vesting Act, in those federal courts, State Supreme Courts and the Supreme Courts of other Territories.<sup>30</sup>

(c) *State jurisdiction*

Jurisdiction in 'State matters' is invested (by the State legislation and 'acceptance' by the federal Act) in the two federal courts and in the Supreme Courts of the Territories and of other States.<sup>31</sup> The expression 'State matter' is defined in the State Acts to mean a matter 'in which the Supreme Court [of the enacting State] has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State' or a matter removed to the Supreme Court of the enacting State, under the applicable section in the State cross-vesting Act, from a lower court of that State.<sup>32</sup> State matters do not include matters in which State courts have jurisdiction by federal law, eg under s 39(2) of the *Judiciary Act* 1903.<sup>33</sup>

(d) *Jurisdiction to transfer and jurisdiction by transfer*

The cross-vesting legislation empowers all of the courts to which that legislation relates to transfer civil proceedings commenced before them to other courts within the scheme. The circumstances in which the power of transfer is to be exercised will be considered presently. Here I deal only with the jurisdictional aspects of the transfer provisions.

The first point to be noticed is that a power of transfer is exercisable only in a case in which the court in which a proceeding has been commenced has jurisdiction in the matter, whether that jurisdiction derives from the cross-vesting legislation or some other source. Since the federal Act does not give the Federal Court additional jurisdiction, and in particular the plenitude of federal jurisdiction invested in State courts by s 39(2) of the *Judiciary Act* 1903, it follows that if a matter of federal

<sup>27</sup> Cth s 4(4) (matters arising under the *Industrial Relations Act* 1986 or under ss 45D or 45E of the *Trade Practices Act* 1974).

<sup>28</sup> Cth s 4(1).

<sup>29</sup> Sections 44 and 45.

<sup>30</sup> Cth s 4(2).

<sup>31</sup> See eg Vic s 4 and Cth s 9.

<sup>32</sup> See eg Vic s 3(1).

<sup>33</sup> *Kodak (Australasia) Pty Ltd v Commonwealth* (1989) 59 ATC 4010 (Lockhart J).

jurisdiction is raised in a proceeding before the Federal Court, and the Court has no jurisdiction whatsoever to determine it, the Court has no power to transfer the proceeding to a State court having federal jurisdiction in the matter.<sup>34</sup>

If exercise of a power to transfer a proceeding to another court involves the exercise of a jurisdiction by the transferring court, it follows that where the exercise of a federal jurisdiction is involved, the requisite authority to transfer must derive from a federal enactment. Likewise where the exercise of a State jurisdiction is involved, the requisite authority to transfer must derive from a State Act.<sup>35</sup> The general provisions on transfer contained in the federal cross-vesting Act seem to be sufficiently broad to enable a Supreme Court which is invested with a federal jurisdiction to transfer a proceeding which involves the exercise of that jurisdiction to transfer the proceeding to either the Federal Court or the Family Court, notwithstanding that, apart from the cross-vesting legislation, the proceeding could not have originated in either of those federal courts.<sup>36</sup> Where such a proceeding is transferred to, say, the Federal Court by a Supreme Court, s 4(3) of the federal cross-vesting Act operates to give the court to which the proceeding is transferred jurisdiction to determine it. This sub-section<sup>37</sup> provides that:

Where a proceeding is transferred to the Federal Court, the Family Court or a State Family Court of a State, that court has, by virtue of this sub-section, jurisdiction with respect to so many of the matters for determination in the proceeding as that court would not have apart from this sub-section.

If the above analysis is correct, it follows that if a suit for damages against the Commonwealth (or a Commonwealth party) is commenced in a State Supreme Court in exercise of its jurisdiction under s 39(2) of the *Judiciary Act* 1903, the proceeding may, in accordance with the federal transfer provisions, be transferred to the Federal Court, and that the Federal Court will, upon transfer of the proceeding, have authority to determine the matter. Such an analysis is entirely consistent with the High Court's interpretation of s 44 of the *Judiciary Act* 1903, the section which authorises that Court to remit matters within its original jurisdiction to courts of the States and Territories and to federal courts. Section 44(3) expressly provides that in cases in which the court to which a matter is remitted and in which, apart from remitter, the court would not have jurisdiction, the court has jurisdiction in the matter. The section has been interpreted as conferring jurisdiction on the courts

<sup>34</sup> Ibid.

<sup>35</sup> *McIntosh v National Australia Bank Ltd* (1988) 80 ALR 47, 49 (Gummow J) regarding the Federal Court's jurisdiction to transfer under s 86A(1) of the *Trade Practices Act* 1974 (Cth).

<sup>36</sup> Cth s 5(1).

<sup>37</sup> See also s 9(2).



to which a matter may be remitted in cases where the High Court 'is authorized to remit the proceedings . . . and does in fact so remit.'<sup>38</sup>

What is not entirely clear is whether a Supreme Court can transfer a matter with which, under s 56 of the *Judiciary Act* 1903, it cannot deal to the Supreme Court which is competent to determine it, or even to the Federal Court. If, however, the source of the Supreme Court's jurisdiction in the matter is s 39(2) of the *Judiciary Act* 1903, and s 56 merely establishes a condition precedent for the exercise of the jurisdiction,<sup>39</sup> it must surely follow that the federal cross-vesting legislation has the effect of authorising the Supreme Court to transfer to 'the appropriate' court.<sup>40</sup> The relationship between s 56 and the cross-vesting legislation does, however, need to be clarified.

(e) *Constitutional questions*

I do not propose to canvass here the constitutional bases of the cross-vesting scheme. It suffices to say, first, that there is no doubt about the validity of the provisions of the federal Act which confer jurisdiction in federal matters on the State Supreme Courts. Secondly, it may be that the federal Territories power, ie s 122 of the federal Constitution, supports the provisions in the federal Act investing the civil jurisdiction of Territory Supreme Courts in the two federal courts and the State Supreme Courts. What is more controversial is the constitutionality of the State legislation investing jurisdiction in State matters in the two federal courts, in Supreme Courts of other States and Supreme Courts of the Territories, and of the provision in the federal Act which authorises the two federal courts and the Supreme Court of a Territory to exercise the jurisdiction conferred on them by the State Acts.<sup>41</sup>

<sup>38</sup> *Johnstone v Commonwealth* (1979) 143 CLR 398, 409 (Aickin J). This interpretation was accepted by Dawson J in *Broken Hill Pty Co Ltd v National Companies and Securities Commission* (1986) 67 ALR 545. See also *State Bank (NSW) v Commonwealth Savings Bank* (1984) 154 CLR 579 on remitter of matters under s 75(iii) of the Constitution to the Federal Court under s 44(2A) of the *Judiciary Act* (1903).

<sup>39</sup> See footnote 23 *supra*. The effect of s 4(2) was considered by a Full Court of the Federal court in *Attorney-General (NT) v Kearney* (1990) 94 ALR 488. The court held that even if the ruling of the Aboriginal Land Commissioner (under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) was not a reviewable 'decision' for the purposes of the *ADJR Act*, the Court's jurisdiction to review the ruling under challenge was attracted either under s 39B of the *Judiciary Act* 1903 or under s 4(2) of the Commonwealth's cross-vesting Act.

<sup>40</sup> Griffith, Rose and Gageler (footnote 41 *infra* at 1023) maintain that 'whether or not instituted in accordance with s 56, a pending proceeding may be transferred to another court under s 5 of the Cross-vesting legislation'. 'In such a case' they suggest, 's 4(3) of the Commonwealth Act would confer any additional jurisdiction needed to determine the claim'. But that sub section only gives jurisdiction to the two federal courts and the Family Court of a State. Transfer of a s 56 matter to a Territory Supreme Court is covered by s 9(2)(b).

<sup>41</sup> The constitutional issues are discussed in K Mason and J Crawford, 'The Cross-vesting Scheme' (1988) 62 ALJ 328, 333-4 and G Griffith, D Rose and S Gageler, 'Further Aspects of the Cross-vesting Scheme' (1988) 62 ALJ 1016, 1023-5; O'Brien 'The Constitutional Validity of the Cross-Vesting Scheme' (1989) 17 MULR 307. Queensland's cross-vesting legislation was upheld by Ryan J in *Re T (An Infant)* [1990] 1 Qd R 196.

### Transfer of proceedings in special federal matters

If 'a matter for determination in a proceeding . . . in the Supreme Court of a State or Territory' is a 'special federal matter', the Supreme Court is obliged to transfer the proceeding to the Federal Court unless it makes an order that it itself shall determine the proceeding. No such order may be made unless it appears to the Supreme Court:

that, by reason of the particular circumstances of the case:

- (a) it is not appropriate that the proceeding be transferred to the Federal Court; and
- (b) it is appropriate that the Supreme Court determine the proceeding.<sup>42</sup>

If such an order is made, notice of its making must be given to the Attorney-General for the Commonwealth.<sup>43</sup> If he requests that the proceeding be transferred to the Federal Court, the proceeding must be so transferred.<sup>44</sup>

A 'special federal matter' is defined<sup>45</sup> to include a matter arising under the *ADJR Act* and a matter within the original jurisdiction of the Federal Court under s 39B of the *Judiciary Act* 1903, 'being a matter in respect of which the Supreme Court of a State or Territory would not, apart from . . . [the federal cross-vesting Act], have jurisdiction.'

The definition of 'special federal matter' also encompasses:

a matter involving the determination of questions of law on appeal from a decision of, or of questions of law referred or stated by, a tribunal or other body established by an Act [of the Commonwealth] or a person holding office under an Act [of the Commonwealth], not being a matter for determination in an appeal or a reference or case stated to the Supreme Court of a State or Territory under a law of the Commonwealth that specifically provides for such an appeal, reference or case stated to such a court.

The special federal matters thus include appeals from, and cases stated by, the federal Administrative Appeals Tribunal.

The provisions governing transfer of special federal matters do not apply to judicial review proceedings commenced in a State Supreme Court in the exercise of a federal jurisdiction which the Federal Court does not possess. Cases outside the purview of these provisions on special federal matters will therefore include —

- (a) proceedings in State Supreme Courts in respect of acts or decisions of corporations of the Commonwealth which are not acts or decisions under a federal enactment and which are not reviewable by the Federal Court under the *ADJR Act*.<sup>46</sup>
- (b) Proceedings in State Supreme Courts to review the acts and decisions of inferior State courts exercising federal jurisdiction. Such acts and decisions are not reviewable under the *ADJR Act* because they are not

<sup>42</sup> Cth s 6. There are corresponding provisions in the State and Northern Territory Acts.

<sup>43</sup> Cth s 3(1). The State and Northern Territory Acts adopt the federal definition.

<sup>44</sup> Cth s 6(3).

<sup>45</sup> Cth s 3(1).

<sup>46</sup> See footnote 10 *supra*.

relevantly administrative in character.<sup>47</sup> They are not reviewable under s 39B of the *Judiciary Act* 1903 because State officers exercising powers conferred by federal enactments are not officers of the Commonwealth.<sup>48</sup>

- (c) Proceedings in State Supreme Courts of the kind which have held to fall outside s 9 of the *ADJR Act*, eg certain suits for declarations as to rights and liabilities under federal law.<sup>49</sup>

One of the objects of the provisions on special federal matters is clearly to ensure that cases arising under the *ADJR Act* and s 39B of the *Judiciary Act* 1903 will, as a general rule, be determined by the Federal Court. The circumstances in which it would be appropriate for such a proceeding to continue in the Supreme Court remain to be worked out. One such circumstance could be that the issue or issues raised in the federal proceeding are related to another proceeding pending in the Supreme Court in a State matter<sup>50</sup> or in a federal matter in which the Federal Court has no jurisdiction except by transfer or remitter. On the other hand a Supreme Court would clearly not be entitled to order that a special matter be determined by it merely because the parties wished the matter to proceed before it. Indeed the legislation implies that even if none of the parties raises the issue of whether the proceeding involves a special federal matter, the Supreme Court must consider that issue and may transfer of its own motion.

The legislation does, however, provide that if a Supreme Court 'through inadvertence' determines a special federal matter without making an order that the matter be determined by it, or, has made such an order without the requisite notice of it being given to the Attorney-General for the Commonwealth, the Court's decision in the matter is not thereby invalidated.<sup>51</sup>

In considering whether, *prima facie*, a case is one that is required to be transferred to the Federal Court, a Supreme Court will obviously need to be satisfied that the matter is, or can be characterised as, a special federal matter. If an application for review is made under the *ADJR Act*, the matter is one arising under that Act even though there is dispute over whether the conduct, decision or omission complained of is reviewable under that Act.<sup>52</sup> That being so, the Supreme Court will be obliged to transfer the case to the Federal Court unless it expressly orders that the proceeding should continue before it. By transferring a case in which reviewability under the *ADJR Act* is in contest, the

<sup>47</sup> The concept 'administrative in character' has been generously construed. It excludes only decisions made in the exercise of federal judicial powers, in the strict sense, and legislative acts *per se*. See M Aronson and N Franklin, *op cit* (footnote 22 *supra*) 247-51.

<sup>48</sup> See footnote 10 *supra*.

<sup>49</sup> See footnote 22 *supra*.

<sup>50</sup> Eg a case in which the proceeding in the State court is a proceeding in a State matter of the kind which in *Lowe v Minister for Immigration and Ethnic Affairs* (1988) 16 ALD 156 was initiated in the Federal Court (along with a federal matter). (See 15 *infra*.)

<sup>51</sup> *Jurisdiction of Courts (Cross Vesting) Act* 1987 (Cth) s 6(8). There are corresponding provisions in the State and Northern Territory Acts.

<sup>52</sup> *Secretary, Department of Aviation v Ansett Transport Industries Ltd* (1987) 72 ALR 188, 198.

Supreme Court cannot be said to have decided that issue finally so as create any issue estoppel.<sup>53</sup>

The legislation also provides that a decision of a court 'in relation to the transfer or removal of a proceeding' under the legislation is not subject to appeal.<sup>54</sup> The provision presumably applies not only to a decision that a proceeding be transferred but also to an order made by a Supreme Court that a special federal matter be determined by it rather than by the Federal Court. Such an order may, however, effectively be countermanded by a request by the Attorney-General for the Commonwealth that the matter be transferred to the Federal Court.<sup>55</sup>

Should a Supreme Court rule that the provisions relating to special federal matters do not apply to a proceeding before it, and should it decide also not to transfer the proceeding to the Federal Court pursuant to the general provisions on transfer, it is possible that the party urging transfer or the Attorney-General of the Commonwealth might seek a writ of prohibition against the Supreme Court<sup>56</sup> under s 33(1)(b) of the *Judiciary Act* 1903. This paragraph empowers the Court to 'make orders or direct the issue of writs . . . requiring any court to abstain from the exercise of any federal jurisdiction which it does not possess'.<sup>57</sup> Such an application could not, however, succeed unless it could be shown that the Supreme Court lacks jurisdiction in a special federal matter unless it makes an order that the matter is appropriate for determination by it rather than by the Federal Court. Such an interpretation of the legislation would, in my opinion, be difficult to sustain. Jurisdiction in special federal matters is invested in the Supreme Courts and there is nothing to suggest that they are divested of that jurisdiction by reason of failure to comply with requirements as to the manner in which the jurisdiction is to be exercised.

### Transfer of proceedings in other matters

The cross-vesting legislation stipulates that when a proceeding, other than in a

<sup>53</sup> In the case cited in the preceding footnote a Full Court of the Federal Court held that a decision by the Court in relation to whether a decision was one in respect of which written reasons for decision could be required under s 13 of the *ADJR Act* could create an issue estoppel when a subsequent application was made for review of the decision under the Act. But such a case is distinguishable from that when a court exercises no more than a power to remit on transfer a matter to another court. See *Broken Hill Pty Co Ltd v National Companies and Securities Commission* (1986) 61 ALJR 124, 128 where the High Court remitted matters to a State Supreme Court without finally resolving whether the matters fell within the High Court's original jurisdiction.

<sup>54</sup> Section 13. There are corresponding sections in the State and Northern Territory Acts.

<sup>55</sup> Section 6(7).

<sup>56</sup> Strictly speaking, the writ would be sought against a member or members of the court.

<sup>57</sup> Section 33 is probably not a jurisdiction-conferring section, but rather a section which merely specifies remedies the Court may award when it has jurisdiction under s 75 of the Constitution or under federal legislation enacted pursuant to s 76 of the Constitution. The Court's jurisdiction to issue prohibition against a State judge will normally be contingent on the presence of a 'proper' Commonwealth party sufficient to attract s 75(iii) jurisdiction. See the discussion in Lane *op cit* (footnote 4 *supra*) 418-20 and *Re Loveday; Ex p Clyne* (1984) 61 ALR 136 (Mason J).

special federal matter, is pending before a court to which the legislation applies, and it appears to that court that certain defined circumstances exist, the court shall transfer the proceeding to another designated court. The circumstances in which such a proceeding is to be transferred are as follows<sup>58</sup> —

- (a) When it appears to the first court that the proceeding ‘arises out of, or is related to, another proceeding pending’ in another court within the system and that ‘it is more appropriate’ that the proceeding before it be determined by that other court.
- (b) When it appears to the first court that ‘it is more appropriate’ for the proceeding to be determined by another court of the system having regard to three factors: (i) whether, apart from the cross-vesting legislation, the proceeding before the first court, or any substantial part of it, ‘would have been incapable of being instituted’ in the first court; (ii) ‘the extent to which, in the opinion of the first court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law’ of the other polity; and (iii) ‘the interests of justice’.
- (c) When it appears to the first court that ‘it is in the interests of justice that the . . . proceeding’ before it be determined by the other court.

The power to transfer in the circumstances described may be exercised on the application of a party, the application of the relevant Attorney-General or on the motion of the court in which the proceeding is pending.<sup>59</sup> A decision in relation to the transfer of a proceeding is not subject to appeal.<sup>60</sup>

Although the general provisions on transfer of proceedings are expressed in terms of a duty to transfer, it is clear that in performing that duty courts also exercise a discretion. A judgment has to be made about which forum is more appropriate and about whether it is in the interests of justice for the proceeding to be determined by the other court. The discretion, like any other judicial discretion, cannot be fettered by hard and fast rules. It is to be exercised with reference to those considerations which the legislation has nominated as considerations to be taken into account and without regard to considerations which are legally irrelevant. Account may clearly be taken of the objects of the legislation, as stated in the preambles.<sup>61</sup> But according to the New South Wales Court of Appeal, notions drawn from the doctrine of *forum non conveniens* have no place in the administration of the transfer provisions.<sup>62</sup> The

<sup>58</sup> Section 5. There are parallel provisions in the State and Northern Territory Acts. The provisions take the form of separate sub sections according to the court in which a proceeding originates and then specify the court or courts to which the proceeding may be transferred. But the criteria which the court of origin is directed to apply are, in substance, the same throughout the sub sections.

<sup>59</sup> *Jurisdiction of Courts (Cross Vesting) Act 1987* (Cth) s 5(7). There are parallel provisions in the State and Northern Territory Acts.

<sup>60</sup> Section 13. There are parallel provisions in the State and Northern Territory Acts.

<sup>61</sup> This was recognised by the NSW Court of Appeal in *Bankinvest AG v Seabrook*, (1988) 14 NSWLR 711.

<sup>62</sup> Though Rogers A J A, in the case referred to supra fn 61 at 728, suggested that the concept of ‘the appropriate forum’ enunciated by Lord Goff of Chieveley in *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460, 476 (and accepted by the other Lords of Appeal)

relative speed with which the court of origin and the court to which the proceeding may be transferred is able to determine the proceeding may also be irrelevant.<sup>63</sup>

There are various kinds of situations in which the general transfer provisions will have a bearing on the disposition of proceedings involving questions of administrative law. The following are examples.

- (a) An application for review under the *ADJR Act* is pending before the Federal Court. There is also pending before the Supreme Court of a State an action for damages against the respondent (or a respondent) and/or the Commonwealth. The action, brought within the State Court's jurisdiction under s 39(2) of the *Judiciary Act* 1903, involves determination of the validity of the decision under review before the Federal Court.<sup>64</sup> The Supreme Court will have to consider whether it is more appropriate for the action to be determined by the Federal Court. Certainly it does not appear to be open to the Federal Court to transfer the special federal matter to the Supreme Court. To do so would be to defeat the objects of the provisions governing special federal matters.
- (b) An application for judicial review under the *ADJR Act* is pending before a Supreme Court of a State. There is also pending before the Court an action for damages against one of the respondents to the application for review. (This action could involve the exercise of State jurisdiction or federal jurisdiction under s 39(2) of the *Judiciary Act* 1903.) The action involves determination of the validity of the decision which is the subject of the application for judicial review. The Supreme Court must transfer the application for review to the Federal Court unless it makes an order that the proceeding continue before it. It may, in the light of the related pending civil action, conclude that it is appropriate that the application under the *ADJR Act* be determined by it. But it could decide that this proceeding should be transferred to the Federal Court and that, in the interests of justice, it is more appropriate that the civil action also be transferred to the Federal Court.
- (c) An application for judicial review under the *ADJR Act* is pending before the Federal Court. The applicant for review has also made an application to the Court for a further remedy, relying on the Court's cross-

was, broadly, the same as the concept of the appropriate forum which underlies the Australian cross-vesting legislation. Kirby P expressly declined to pronounce on the relevance of that English doctrine (716). Rogers CJ (Comm. D) elaborated his views on the considerations which may properly be taken into account in applying the 'interests of justice' test in *Seymour-Smith v Electricity Trust of South Australia* (1989) 17 NSWLR 648, 662.

<sup>63</sup> The case-law, so far, has not produced any clear guidance on the relevance of this factor. Compare, for example, *Bourke v State Bank of New South Wales* (1988) 85 ALR 61, 77 (Wilcox J) with *Ex p McDonald*, Fed Ct 7 Dec 1988 (Northrop J).

<sup>64</sup> For example, the decision the validity of which is challenged in the application under the *ADJR Act* may be an order for deportation which the federal Minister has purported to have made under the *Migration Act* 1958 (Cth). The action in the Supreme Court may be an action for damages for false imprisonment of the person detained in purported exercise of powers conferred by the same Act to arrest and detain persons against whom deportation orders have been made. See *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1988) 81 ALR 288, on appeal (1989) 64 ALJR 34.

vested jurisdiction in a State matter. The Federal Court will have to decide whether it is appropriate that the second proceeding be determined by the relevant Supreme Court. In so deciding it will need to have regard to whether the second proceeding is one which, apart from the cross-vesting legislation, would have been capable of being instituted before it, that is, whether it could have come within the Court's accrued jurisdiction. It will have to have regard also to the interests of justice.

*Lowe v Minister for Immigration and Ethnic Affairs*<sup>65</sup> was a case of the last kind. The applicants sought from the Federal Court an order under the *ADJR Act* to require the federal Minister to reconsider their application for grant of an entry permit to a child they had adopted in the Peoples' Republic of China. They also sought a declaration under s 47 of the *Adoption of Children Act 1965* (NSW) that the child was, under the law of the State, their adopted child. The connection between the proceedings was that the Minister's decision not to grant an entry permit had been based on the failure on the part of the State authorities to recognise the child as having been adopted for the purposes of the State law.

Wilcox J regarded the federal and State matters raised for decision as inseparable. He granted the declaration sought under State law and remitted to the Minister for further consideration the application for grant of an entry permit for the child. The question of whether the proceeding in the State matter should be transferred to the State Supreme Court was not even considered, though it should be said that no application for transfer was made by the State's Attorney-General, the second respondent. He simply submitted to such order as the Court might make, except as to costs.

*Lowe's* case raises the question of whether, when the cross-vested jurisdiction of a court is invoked, it is incumbent on that court to consider whether the proceeding should be transferred to the court (or a court) which would have had jurisdiction in the matter apart from the cross-vesting legislation, irrespective of whether any of the parties seek transfer. It is clear that where a proceeding in a Supreme Court involves a special federal matter, the question of transfer cannot be avoided. But even if a proceeding does not involve such a matter, the legislation can be read as requiring the court whose jurisdiction exists solely by virtue of that legislation to consider whether it is the appropriate forum. The general provisions on transfer speak of a duty to transfer, albeit a duty the performance of which involves the exercise of discretion. When a court's cross-vested jurisdiction is invoked, the court must, in determining what is the appropriate forum, have regard to the source of its jurisdiction; the extent to which, in its opinion, the matters for determination 'are matters arising under or involving questions as to the application, interpretation or validity of a law' of the polity whose jurisdiction is cross-vested and not within the court's jurisdiction apart from the cross-vesting legislation; and 'the interests of justice'. If having regard to these factors it adjudges that the more appropriate forum is the court which has jurisdiction

<sup>65</sup> (1988) 16 ALD 156.

apart from the cross-vesting legislation, it must transfer the proceeding to that court.

In *Lowe's* case, the Federal Court would not have had jurisdiction in the State matter, apart from the cross-vesting legislation. (It is very doubtful whether its accrued jurisdiction would have been attracted.<sup>66</sup>) That State matter clearly involved interpretation and application of State law, a matter not within the Federal Court's jurisdiction apart from the cross-vesting legislation. On the other hand, had 'the interests of justice' been considered, there would have been good grounds for concluding that those interests would not be well served by transfer of the State matter to the Supreme Court. The federal matter was intimately connected with the State matter and there was 'a measure of urgency' about the entire proceedings.<sup>67</sup> The Lowes had not been able to bring the child to Australia and had 'maintained contact with her under circumstances of difficulty and, no doubt, of considerable expense'.<sup>68</sup>

What factors it is permissible for a court to take into account in applying the 'interests of justice' criterion are not yet entirely clear. In *Bourke v State Bank of Victoria*<sup>69</sup>, Wilcox J expressed the view that the 'phrase ought to be read widely'. It seemed to him that —

Under that rubric . . . the court is entitled to consider not only the ability of a particular court to deal with all aspects of a matter, and to make and to enforce all the orders to which a party may be entitled, but also adjectival matters such as the availability of particular evidence, the procedures to be adopted, the desirable venue for trial and the likely hearing date. It is not in 'the interests of justice' to adopt a course, in relation to those matters, which places unnecessary burdens and delays upon the parties to the litigation.

Cases like that of *Lowe* are likely to be exceptional. Certainly Wilcox J's decision to exercise the cross-vested jurisdiction in the State matter should not be seen as offering any encouragement to the invocation of that jurisdiction where the only jurisdiction invoked is a cross-vested jurisdiction. The cross-vesting legislation is certainly not meant to facilitate 'forum shopping where all parties are engaged in the exercise and no party wishes to move for a transfer to the more appropriate tribunal'.<sup>70</sup> It is possible that in some cases the question of whether it is in the interests of justice to transfer or not to transfer is appropriately resolved by applying the same criteria as the High

<sup>66</sup> *Id.*, 158.

<sup>67</sup> *Id.*, 161.

<sup>68</sup> *Ibid.*

<sup>69</sup> (1988) 85 ALR 61, 77.

<sup>70</sup> *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711, 725 (Rogers A J A). In *Seymour-Smith v Electricity Trust of South Australia* (1989) 17 NSWLR 648, 662, Rogers CJ (Comm. D) rejected the suggestion made by Wilcox J in *Bourke v State Bank of New South Wales* (1988) 85 ALR 61, 78 that 'for an applicant's choice of forum to be overridden, there must be some objective factor which makes it possible to say that the interests of justice will be better served by transfer than by non-transfer'. According to Rogers CJ no weight should 'be ascribed to the fact that the Court may be overriding the plaintiff's choice of venue'.



Court applies in exercising its power under s 44 of the *Judiciary Act* 1903 to remit a matter to another court.<sup>71</sup>

## CONCLUSIONS

Although the cross-vesting legislation restores to State Supreme Courts substantially the same federal supervisory jurisdiction as they enjoyed before s 9 of the *ADJR Act* came into force and endows them with same federal supervisory jurisdiction as is possessed by the Federal Court, the provisions regarding special federal matters are meant to ensure that the principal forums for exercise of the federal supervisory jurisdiction will continue to be the High Court and the Federal Court. When an application for judicial review can be entertained by the Federal Court, the party seeking review would certainly be well advised not to initiate proceedings in a Supreme Court unless there is, or is to be, an associated proceeding involving a State matter or an exercise of a federal jurisdiction which the Federal Court does not possess, or arguably may not possess, except by transfer under the cross-vesting legislation.

A party contemplating an application for judicial review under the *ADJR Act* or s 39B of the *Judiciary Act* 1903 who also desires to claim damages (or restitution) in respect of an alleged wrong connected with the matter or matters to be raised in the application may seek review by the Federal Court and append a separate claim for damages (or restitution). But there can be no assurance that the Federal Court will accept either that the latter claim falls within its accrued federal jurisdiction or that it is a State matter in which it has jurisdiction under the cross-vesting legislation. If the damages (or restitution) claim involves the exercise of a federal jurisdiction not possessed by the Federal Court except by transfer, eg jurisdiction under s 39(2) of the *Judiciary Act* 1903, the better course may be either to initiate both the action and the application for review in a State Supreme Court, or to make the application for judicial review to the Federal Court and institute the civil action in the Supreme Court. Whatever alternative is adopted, there is a good chance that both proceedings will, through transfer, be decided by the one court.

If the Federal Court can, by transfer under the cross-vesting legislation, acquire a federal jurisdiction it would not otherwise possess, the question arises whether it should be invested with the same federal jurisdiction as has been invested in the Supreme Courts. Given that s 44(2A) of the *Judiciary Act* 1903 already empowers the High Court to remit to the Federal Court matters falling within the High Court's original jurisdiction under s 75(iii) of the Constitution, given also that State Supreme Courts have original jurisdiction in the same matters (except when the non-Commonwealth party is a State party) and may, under the cross-vesting legislation, transfer such matters to

<sup>71</sup> See *Seymour-Smith v Electricity Trust of South Australia* (1989) 17 NSWLR 648, 662 where the balance of convenience test as explained by Toohey J in *Crouch v Commissioner of Railways* (1989) 85 ALR 347, 350-1 (a s 44 case) was applied.

the Federal Court, a good case can surely be made for investing the Federal Court with co-extensive jurisdiction in such matters. Such a change would obviate difficulties of the kind encountered in *Sinclair v Commonwealth*.<sup>72</sup>

In that case application was made to the Federal Court, under the *ADJR Act*, for review of a refusal by the Collector of Customs (Qld) to return to the applicant banknotes which had been seized in 1978 pursuant to the *Customs Act 1901*. The notice of seizure asserted that the money was, under the same Act, forfeited to the Commonwealth. The action taken in 1978 was not reviewable under the *ADJR Act* since that Act only permits review of acts done and decisions made after the commencement of the Act, that is, after 1 October 1980. But, according to Northrop J, the refusal in 1982 to return the money to the applicant, as requested, was also not reviewable under the *ADJR Act* because it was not a decision within the meaning of that Act, or any other action reviewable under that Act. If the applicant claimed a right to have the money returned, on the ground that the money was not forfeited to the Commonwealth, or on the ground that it had been seized invalidly, that right could only be determined by an action at law, eg an action for detinue or conversion.<sup>73</sup> No such action had been instituted and the applicant had not made any claim based on the accrued jurisdiction of the Federal Court, or on the cross-vesting legislation.

In a case commenced in the Federal Court under the *ADJR Act* or s 39B of the *Judiciary Act 1903* in which there is room for dispute about the Court's jurisdiction to review, but where the matter raised for decision is a matter which could be raised in a suit of the kind referred to in s 75(iii) of the Constitution, it would surely make good sense for the Federal Court to be endowed with s 75(iii) jurisdiction so that the aggrieved party who elects to litigate in the Federal Court can invoke that jurisdiction, as well as the Court's judicial review jurisdiction, in case it is held that the latter jurisdiction does not embrace the cause. To invest the Federal Court with jurisdiction in s 75(iii) matters would also enable it to entertain suits for declarations against the Commonwealth and Commonwealth parties in those cases which, prior to the cross-vesting legislation, State Supreme Courts entertained, despite s 9 of the *ADJR Act*, on the ground that they were not relevantly applications for judicial review.<sup>74</sup> As the law now stands a person whose case for remedy involves the exercise of a federal jurisdiction, but a federal jurisdiction possibly not possessed by the Federal Court, is well advised to initiate proceedings in a State Supreme Court.

To invest the Federal Court with jurisdiction in s 75(iii) matters would have further advantages. It would permit a litigant to seek remedy by ordinary civil action rather than by an application for judicial review if that was thought to be the more appropriate mode of proceeding. It would enable the Court to review (eg by suit for a declaration) those acts and decisions of corporations of the Commonwealth which are not reviewable under the *ADJR*

<sup>72</sup> (1988) 16 ALD 771.

<sup>73</sup> Applying *Pearce v Button* (1986) 8 FCR 408.

<sup>74</sup> See footnote 22 *supra*.

*Act*, inasmuch as they have been done or made otherwise than under an enactment, and which are not reviewable under s 39B of the *Judiciary Act* 1903, inasmuch as a corporation is not an officer.<sup>75</sup> In cases in which damages or restitution are sought in addition to a remedy or remedies available on judicial review, it would diminish the need for recourse to the Court's accrued jurisdiction. To the extent that it would facilitate concurrent proceedings for review under the *ADJR Act* and for damages against the Commonwealth or a Commonwealth party, it would also ensure that the Court's discretion under s 16(1)(a) of the *Act* to quash or set aside a decision with effect from the date of the order, or from an earlier or later date, was exercised with attention to the effect of the Court's order on the disposition of the associated claim for damages or restitution.<sup>76</sup> Finally it would assure an unassailable forum in those cases where the proper forum, under s 56 of the *Judiciary Act* 1903, is uncertain.

Were the Federal Court to be invested with jurisdiction in s 75(iii) matters, that jurisdiction could be qualified so that the High Court retains exclusive jurisdiction in most of the matters listed in s 38 of the *Judiciary Act* 1903, subject to High Court's power of remitter under s 44 of the *Act*. Under the cross-vesting legislation the Federal Court would, of course, have power to transfer a proceeding in a s 75(iii) matter to a Supreme Court.

One other question arising from the cross-vesting legislation remains to be considered. Now that the federal *Act* has restored to State courts most of the jurisdiction of which they were divested by s 9 of the *ADJR Act*, should s 9 be retained? The cross-vesting *Act* does not operate to repeal s 9 entirely. It negates those parts of it which deny State Supreme Courts jurisdiction in matters within the Federal Court's jurisdiction under the *ADJR Act* and s 39B of the *Judiciary Act* 1903. But it continues to deny State courts (and not merely Supreme Courts) any federal jurisdiction they might otherwise possess under s 39(2) of the *Judiciary Act* to review decisions of officers of the Commonwealth in the exercise of judicial power (except presumably those which are reviewable by the Federal Court under s 39B of the *Judiciary Act* 1903).<sup>77</sup>

The Administrative Review Council has recently recommended that, despite the cross-vesting legislation, s 9 of the *ADJR Act* 'should remain on

<sup>75</sup> The Administrative Review Council's recommendation that the *ADJR Act* be amended to enable review, under that *Act*, of certain non-statutory decisions of officers of the Commonwealth would not, if adopted, cure this deficiency in the Federal Court's jurisdiction (Administrative Review Council Report to the Attorney-General *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act* (Report No 32 — 1989) 26).

<sup>76</sup> In *Wattmaster Alco Pty Ltd v Button* (1986) 70 ALR 330 a Full Court of the Federal Court reversed the decision of the judge at first instance that a quashing order operate from the date of the Court's order. Had it stood, that order would, by operation of principles of estoppel, have defeated any subsequent claim by the applicant for recovery of moneys paid in consequence of the administrative decision in dispute. The Full Court quashed that decision *ab initio*.

<sup>77</sup> Section 9 and the cross-vesting legislation means also that State courts cannot review decisions of those industrial tribunals which are not reviewable by the Federal Court in exercise of its jurisdiction under s 39B of the *Judiciary Act* 1903.

foot'.<sup>78</sup> The only reason given was that 'one of the purposes of the section was to ensure that actions of the federal judiciary were not subject to review in the State courts'.<sup>79</sup> With respect, this does not seem to me to be a sufficient reason for retaining s 9 in its present form, for that form misrepresents the current law. If the object is to strip State courts generally of any federal supervisory jurisdiction they might possess under s 39(2) of the *Judiciary Act* 1903 but to grant State Supreme Courts jurisdictions concurrent with those of the Federal Court under the *ADJR Act* and s 39B of the *Judiciary Act* 1903, subject to the provisions in the cross-vesting legislation on special federal matters, a statutory formula can surely be devised to express that object more directly.

<sup>78</sup> Administrative Review Council Report to the Attorney-General *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act* (Report No 32 — 1989) 116.

<sup>79</sup> *Ibid.*