SERVICE AND EXECUTION OF PROCESS ACT 1992 (CTH)

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INTRODUCTION

On 10 April 1993, the Service and Execution of Process Act 1992 (Cth) commenced. Simultaneously, the Service and Execution of Process Act 1901 (Cth) was repealed by section 3 of the Service and Execution of Process (Transitional Provisions and Consequential Amendments) Act 1992 (Cth). Adopting many of the recommendations of the Australian Law Reform Commission,[1] the new Act recognises the changes in Australian society, technology, commerce and legal environment since Federation. It updates the original legislation,[2] attempting to strike a balance between the competing rights and interests of interstate and inter-territorial litigants, including their witnesses. Although not apparent on the face of the new legislation, consideration has also been given to the cost-effectiveness of many of the changes.[3]

CONSTITUTIONAL FOUNDATIONS

Until Federation, Colonial boundaries made the service and execution of process and the enforcement of any judgments or judicial decisions very difficult. In certain circumstances, where a nexus could be established

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1. Australian Law Reform Commission, Service and Execution of Process (Report No 40, 1987).
2. State Tribunals are included: see s 3, pt 4 and pt 5 div 2.
3. A full discussion of the need to balance procedural requirements, individual freedoms and the cost of proceedings in relation to their benefit is to be found in the detailed analysis of the issue contained in Report No 40 of the Australian Law Reform Commission supra n 1.

between the forum and the subject matter of the litigation or the parties, and if the leave of a Colonial Supreme Court was obtained, service of process might occur, though the judgment was not necessarily enforceable. Recognising the need to obtain service and enforce execution throughout the entire country, the Federal Government was granted power to make laws with respect to the service and execution throughout the Commonwealth of the civil and criminal process and judgments of the Courts of the States by section 51(xxiv) of the Constitution. The Federal Parliament was also empowered to make laws with respect to the recognition throughout the Commonwealth of the laws, public acts and records, and judicial proceedings of the States in section 51(xxv) of the Constitution. Significantly, one of the first enactments of the embryonic Commonwealth of Australia was the Service and Execution of Process Act 1901 (Cth).

Since 1901, the service and execution of process power of the Federal Parliament has generally been regarded as concurrent with the powers of the States. For example, in Western Australia, a party wishing to serve a writ out of the State but within Australia could choose between applying under Order 10 of the Rules of the Supreme Court[4] or following the procedure under the Service and Execution of Process Act 1901 (Cth). Judicial comment has been to the effect that the service provisions of the 1901 Act were complementary to State and Territorial laws.[5]

The 1992 Act assumes that the Commonwealth can validly "cover the field".[6] However, High Court authority has not necessarily endorsed the approach. For example, in *Renton v Renton*,[7] Barton J was of the view that nothing in the 1901 Act would be in conflict with or displace State legislation covering the same field. More recently, the High Court confirmed that there was no inconsistency between the 1901 Act and State rules for service.[8] The Federal Government has presumably relied upon the recommendations of its Law Reform Commission that the broad view of section 51(xxiv) found in such cases as *Aston v Irvine*[9] and *Ammann v Wegener*[10] is correct. Similar assumptions have been made about the status of orders of those Tribunals which are caught by the new Act and whose decisions are now treated as

4. Promulgated pursuant to Supreme Court Act 1935 (WA) s 167.
5. *K W Thomas (Melbourne) Pty Ltd v Groves* [1958] VR 189, 192.
6. Ss 51(xxiv), (xxv), (xxxix), 118. The Territories Power, s 122, has also been called in aid.
7. (1918) 25 CLR 291, 298.
8. *Flaherty v Girgis* (1987) 162 CLR 574.
9. (1955) 92 CLR 353.
10. (1972) 129 CLR 415.

"judgments" for the purposes of section 51(xxiv) of the Constitution.[11] Whether or not these provisions are squarely within power remains to be seen.

REFORMS

1. General

The 1992 Act simplifies and streamlines previous procedures and provides a new approach to others. A detailed analysis and discussion of all the important substantive and procedural reforms is beyond the scope of this note, but the most significant ones have been summarised below with several being singled out for slightly expanded commentary.

2. An exclusive code

The most notable aspect of the 1992 Act is its intention to cover the field. By section 8, the Act applies to the exclusion of a law of a State with respect to the service or execution in another State of process, judgments or orders of Tribunals.[12] Territorial boundaries have also been notionally extended. By section 5, Territories are regarded as States and by section 7 certain Territories are actually deemed to be parts of States.[13] States' powers to make laws with respect to substituted service of process have not been affected.[14]

3. Abolition of nexus requirement

One of the most difficult aspects of the 1901 Act was the need to establish a nexus between the parties or the litigation and the forum. Strict rules were set out in section 11. If the defendant did not appear to the writ or originating process, the plaintiff was required to seek leave of the court before proceeding and convince the court of the relevant nexus. There were always legal dilemmas. Perennial questions included things such as when the defendant could dispute the nexus and what amounted to satisfactory proof

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11. For a full examination of the constitutional arguments, see ch 2 ("Constitutional Considerations") Report No 40 of the Australian Law Reform Commission supra n 1.
12. There are very limited exceptions in s 8(1), (2) and (3) dealing with the interstate transfer of prisoners, the Family Law Act 1975 (Cth) and certain types of subpoena.
13. Not all of the Territories caught by s 7 were covered by the commencement of the Act. The Christmas Island Territory and the Territory of Cocos (Keeling) Islands are linked to proclamations pursuant to the Territories Law Reform Act 1992 (Cth), the relevant sections of which are yet to be proclaimed.
14. S 8(1).

of the nexus.[15]

The 1992 Act solves these problems by removing the requirement to establish the nexus. The obvious benefits include a reduction in the costs incurred in obtaining leave, a saving in judicial time spent in hearing applications for leave, certainty in the progress of the litigation and uniformity in the method of interstate service of originating process. Once an initiating process in a civil proceeding has been served under the 1992 Act, a court of a State that is not the place of issue must not restrain a party from taking a step on the ground that the place of issue is not the appropriate forum.[16] The onus is now on the defendant to challenge the forum's convenience or propriety in the manner provided for in section 20. Section 20(4) lists the matters to be taken into account in determining the proper venue. The procedure is intended to be informal, proceeding by video link or telephone at the discretion of the court, and the issue may be determined without a hearing if both parties consent. The court's power to stay proceedings on other grounds is preserved, as is the operation of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) and corresponding State laws.[17]

4. Service on bodies corporate

The new Act introduces an exclusive code for the interstate service of process, orders or documents on companies and registered bodies. It effectively adopts the Corporations Law rules.[18]

5. Proof of service

There is now a uniform regime for proof of service of process, orders or documents[19] and the effect of service of process under the Act is clarified. Service is to have the same effect and give rise to the same proceedings as if the relevant process had been served in the place of issue.[20]

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15. See such cases as *Luke v Mayoh* (1921) 29 CLR 435; *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93; *Re Caldwell's Wines Ltd; Ex parte Walker* (1931) 31 SR (NSW) 494.
16. See Service and Execution of Process Act 1992 (Cth) s 21.
17. S 20(9), (10).
18. Supra n 16, ss 9, 10.
19. Id, s 11.
20. Id, s 12.

6. Subpoenas: notices, abolition of leave requirements and relief

The Act has introduced specified forms of notices to accompany the service of subpoenas.[21] It is no longer necessary to obtain the leave of the court to serve a subpoena interstate. However, any person subject to an interstate subpoena may apply to the court for relief.[22]

7. Appearance; expenses for interstate witnesses

The meaning of "appearance" has been specifically defined for the purposes of the Act.[23] Minimum time limits for appearances to interstate service of initiating process and subpoenas have been imposed.[24] The new Act provides for the payment of expenses for interstate witnesses[25] removing the need for a court to determine proper amounts.

8. Interstate execution of warrants

The simplified procedure for the interstate execution of warrants is an overdue and sensible reform. The new regime appears in section 82 and a uniform scheme to govern post-apprehension processes is spelt out in detail in section 83. For example, adjournments may not be more than five days for persons who were not under restraint when brought before the Magistrate[26] or more than seven days for others.[27] Review of section 83 orders is provided for and standardised.[28] Entitlement to expenses and procedures for bail, custody and release are clarified in sections 87, 88, 89 and 90. A similar code applies to warrants issued by Tribunals.[29]

9. Suppression orders

A curious innovation in the new Act is the availability of suppression orders.[30] By virtue of section 96(2) a court may, if requested, order that a report of part of the proceedings or review (of a warrant), or a finding which

21. Id, ss 31, 41, 51, 59(a), 69.
22. Id, ss 33, 43, 44.
23. Id, ss 14, 18.
24. Id, ss 17, 25, 30, 52.
25. Id, ss 35, 42.
26. Id, s 83(3)(b).
27. Id, s 84.
28. Id, s 86.
29. Id, pt 5 div 2.
30. Id, pt 5 div 3.

has been publicly made, "is not to be published". The court must be satisfied that publication of the report would give rise to a "substantial risk" that one or more of the scenarios listed in section 96(3) will occur. Such things as the likelihood of a fair trial being prejudiced, a witness or family member being at risk of death or personal injury, the national security or the welfare of a child might trigger a suppression order. Section 100 then empowers certain people to apply for a suppression order. The dramatis personae change with the area of "substantial risk" complained of. Suppression orders endure for varying periods or until revoked[31] and interim suppression orders may be made without an obligation on the court to enquire into the merits.[32] On application, they may be varied, revoked or appealed.[33]

On one view, to introduce such a complex and regulated scheme for imposing and appealing suppression orders adds unnecessary complications to routine procedures. Suppression orders may even be challenged by a publishing organisation,[34] which is defined in section 95 to mean a person or body in the business of publishing newspapers, magazines, periodicals, books or pamphlets, or "broadcasting radio or television programs". Streamlining procedures for bringing a person to court might, in some cases, be totally overshadowed by applications to grant, vary, revoke or appeal suppression orders. The consequential increase in judicial time and expense may well outweigh the obvious benefits of the reforms.

10. Judgments

The Australian Register of Judgments has been abolished by Part 6 of the new Act. A few short but important sections detail a new method of enforcing interstate judgments. The full procedure is in section 105. The "appropriate court" of a State is now obliged to register a sealed copy of a judgment from another State. When registered it may be enforced as if it had been given, entered or made by the court in which it is registered. A certificate of judgment is no longer required. The result is a greatly simplified method of enforcing interstate judgments. Even a facsimile or photocopy judgment may be registered, provided a sealed copy is lodged within seven days. The requirement to lodge an affidavit of compliance is also abolished, the usual pre-conditions for execution of domestic judgments applying. Enforcement is only limited to the extent that the judgment is enforceable in the "court of

31. Id, s 97.
32. Id, s 98.
33. Id, ss 99, 101.
34. Id, s 102.

rendition" to safeguard against multiple enforcements. Cross-notification requirements have been abolished and there is a new scheme for calculating costs and interest.[35] Judgment debtors may still seek stays, but section 106 requires any stay order to be conditional upon making a relief application within a specified time and "in an expeditious manner".[36]

CONCLUSION

The new Act tacitly acknowledges the enormous advances in national and international business dealings in Australia. The modern trends in travel, communication and information technology are catered for by the Act, which recognises the increasingly artificial nature of the boundaries between the States and Territories with respect to interstate trade.

While constitutional lawyers may find reason to question the source of the Federal government's power to legislate in some of the areas covered, the overall benefits to interstate service and execution processes are welcome and long overdue.

35. Id, ss 107, 108.
36. Id, s 106(2).