Case Note

Wakim

1. Introduction

The constitutional validity of conferring state jurisdiction on federal courts in cross-vesting schemes[1] has been a time bomb ticking away. Doubts concerning the potential conflict with the separation of powers existed even before these schemes commenced[2] and increased with the High Court's 3:3 split decision in *Gould v Brown*.[3] This was especially so because split decisions have no precedential value[4] and because the High Court's composition had since changed, with two of the justices who supported cross-vesting (Brennan CJ and Toohey J) having retired from the court.[5] Thus the High Court's ruling in *Re Wakim; Ex parte McNally, Re Wakim; Ex parte Darvall, Re Brown; Ex parte Amman, Spinks v Prentice*[6] that such a conferral was unconstitutional was not unexpected. Grappling with the effects of this decision, however, is another story.

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1 The two main state-federal cross-vesting schemes were the general scheme under *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) and the equivalent Acts in each other State and the Northern Territory; and the *Corporations Law* scheme. These schemes are discussed in more detail later in this case note. Other state-federal co-operative schemes which *Wakim* rules invalid include the Agriculture and Veterinary Chemicals scheme under the *Agricultural and Veterinary Chemicals (New South Wales) Act* 1994 (NSW), the Competition Policy scheme under the *Competition Policy Reform (New South Wales) Act* 1995 (NSW), the Gas Pipeline scheme under the *Gas Pipelines Access (New South Wales) Act* 1998 (NSW), the National Crime Authority scheme under the *National Crime Authority (State Provisions) Act* 1984 (NSW), the civil aviation scheme under the *Civil Aviation (Carriers' Liability) Act* 1967 (NSW) and the therapeutic goods regime under the *Poisons and Therapeutic Goods Act* 1966 (NSW).

2 The Constitutional Commission recommended before the general cross-vesting scheme came into being that its constitutional validity be secured by a referendum: Constitutional Commission, *Final Report* (Canberra: AGPS, 1988), Vol 1 at 371–373 and see proposed Bill, Vol 2 at 1013–1015. For the ensuing academic debate over the years see: O'Brien B, 'The Constitutional Validity of the Cross-vesting Legislation' (1989) 17 *MULR* 307; Mason K & Crawford J, 'The Cross-vesting Scheme' (1988) 62 *ALJ* 328; Griffith G, Rose D & Gageler S, 'Further Aspects of the Cross-vesting Scheme' (1988) 62 *ALJ* 1016.

3 (1998) 193 CLR 346 (hereinafter *Gould*). The effect of the split decision was that the unanimous decision of the Full Federal Court in *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 137 ALR 447 was affirmed under s23(2)(a) *Judiciary Act* 1903 (Cth). For an excellent case note on *Gould*, see Magoffin C, 'The Australian Court System and the Demands of Federalism: *Gould v Brown* and the Constitutional Issues Raised by the Cross-vesting Scheme' (1998) 20 *Syd LR* 329.

Wakim has broad implications both practically and theoretically. Practically it diminishes the Federal Court's standing and re-opens the great desert of dry arid jurisdictional disputes and gaps which plagued litigation during the 1980s.[7] Theoretically the decision maintains a strict view of the separation of powers which is arguably unjustifiable.

The structure of this case note is to first explore the background to split jurisdiction in Australia and what the cross-vesting schemes did to solve these problems. The High Court's decision and reasoning in *Wakim* is then scrutinised. The practical difficulties raised by the decision and possible solutions to these problems are examined in the latter parts of this case note.

2. *The Historical Background to Split Jurisdiction in Australia*

Split jurisdiction is inherent in the structure of our Constitution where limited legislative powers are conferred on the Commonwealth and exclusive federal jurisdiction is vested in it over matters outlined in ss75 and 76 of the Constitution.[8] Before the 1970s it posed few problems as the federal courts[9] were limited to the areas of industrial relations and bankruptcy.[10] Moreover the bulk of federal jurisdiction was vested in state courts under the 'autochthonous expedient'[11] of s77(iii).[12] With the establishment of the Family Court of Australia in 1975 and the Federal Court of Australia in 1976 split jurisdiction problems became more frequent and serious.[13]

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4 *Tasmania v Victoria* (1935) 52 CLR 157 at 183–185 (Dixon J); *Western Australia v Hamersley Iron Pty Ltd [No 2]* (1969) 120 CLR 74 at 82–83 (Kitto J), at 85 (Menzies J); *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* (1981) 146 CLR 336.

5 Opeskin B, 'Cross-vesting of Jurisdiction – Alive But Not Well' (1998) 16 *C & SLJ* 207 at 210–211.

6 (1999) 163 ALR 270 [1999] HCA 27 (hereinafter *Wakim*).

7 Sir Owen Dixon described such jurisdictional disputes as 'a special and peculiarly arid study': Dixon O, 'The Law and the Constitution' (1935) 51 *LQR* 590 at 608, whilst Cowen and Zines have described this field of litigation as 'technical, complicated, difficult and not infrequently absurd': Cowen Z & Zines L, *Federal Jurisdiction in Australia* (2nd ed, 1978) at xiv.

8 Moloney G & McMaster S, *Cross-vesting of Jurisdiction: A Review of the Operation of the National Scheme* (1992) at 5. Hereinafter all sections quoted come from the Constitution unless otherwise specified.

9 The High Court is a federal court itself, however, this case note uses the term 'federal courts' to mean the other federal courts besides the High Court.

10 Crock M & McCallum R, 'The Chapter III Courts: The Evolution of Australia's Federal Judiciary' (1995) 6 *PLR* 187 at 192–196; Opeskin BR, 'Allocating Jurisdiction in the Federal Judicial System' (1995) 6 *PLR* 204 at 208.

11 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268. 'Autochthonous expedient' means an indigenous solution.

12 The key provision for vesting federal jurisdiction in state courts is s39(2) of the *Judiciary Act* 1903 (Cth). Federal jurisdiction may also be conferred by federal acts which expressly exclude s39(2)'s operation and then invest federal jurisdiction on their own terms and conditions: Lane PH, *Lane's Commentary on The Australian Constitution* (2nd ed, 1997) at 632–634.

13 Constitutional Commission Vol 1, above n2 at 366.

The main jurisdictional problems affecting the Federal Court relate to laws with exclusive jurisdiction. A prime example of this occurred in the period before 1987 when the Federal Court had exclusive jurisdiction over proceedings under the *Trade Practices Act* 1974 (Cth).[14] Cases involving misleading and deceptive conduct[15] usually have related tort, contract or equity claims. The effect of exclusive jurisdiction was that state courts could not hear the federal claim, and in cases where the common law claims were severable from the federal claim the Federal Court had no jurisdiction over these former claims. Time and money was wasted in peripheral litigation on jurisdictional issues and in running multiple proceedings in different courts based on similar facts. Additionally, the fact that a case was split between different courts sometimes prevented parties from obtaining adequate remedies.[16]

The Family Court suffers split jurisdiction problems because, being a federal court, its jurisdiction is limited to the express legislative powers of the Commonwealth. These powers determine the breadth of the jurisdiction that can be given to it under s76(ii). The mainstays of Family Court jurisdiction are the marriage power[17] and the matrimonial causes power.[18] The scope of these powers is limited. The matrimonial causes power seems confined to divorce and nullity proceedings,[19] whilst the marriage power has been interpreted restrictively to only cover parties to and children of a marriage.[20] This poses a problem because the scope of family law is broader than marriage and divorce. For example before the states referred their powers to the Commonwealth in relation to the custody and maintenance of children,[21] these limitations caused havoc in custody proceedings

14 This problem of exclusive jurisdiction has been largely solved by the *Jurisdiction of Courts (Miscellaneous Amendments) Act* 1987 (Cth) which gave state courts concurrent jurisdiction over restrictive trade practices and consumer protection provisions in the *Trade Practices Act* 1974 (Cth). See *Trade Practices Act* 1974 (Cth) s82(2). Note hereinafter the *Trade Practices Act* 1974 (Cth) will be referred to as the *TPA*.

15 Arising under s52 *TPA*.

16 Opeskin BR, 'Federal Jurisdiction in Australian Courts: Policies and Prospects' (1995) 46 *South Carolina LR* 765 at 793.

17 Section 51(xxi).

18 Section 51(xxii). Other federal legislative powers have been used to validate provisions in the *Family Law Act* 1975. Opeskin states that s51(xxvii) (immigration and emigration power) and s51(xxix) (external affairs power) were used in *Re Vaughan* [1980] FLC 75,603 at 75,606 (withholding the passport of a child under threat of being removed from Australia) and *In the Marriage of Blair* (1988) 90 Fam LR 182 at 194–195 (recognising overseas custody orders): above n16 at 793, footnote 143.

19 The actual scope of this power is unclear with few High Court cases on it. It is known, however, that this power does not relate to all proceedings between spouses: *Lansell v Lansell* (1964) 110 CLR 353; *Russell v Russell and Farrelly v Farrelly* (1976) 134 CLR 495 (*Russell* and *Farrelly* were the same case); *Re F; Ex parte F* (1986) 161 CLR 376. See Dickey A, *Family Law* (3rd ed, 1997) at 17–20.

20 *In the Marriage of Cormick* (1984) 156 CLR 170; *R v Cook; Ex parte C* (1985) 156 CLR 249; *Re F; Ex parte F* (1986) 161 CLR 376.

where a family consisted of both children of the marriage and ex-nuptial children. Proceedings relating to matrimonial property and the children of the marriage could be commenced in the Family Court, but proceedings relating to ex-nuptial children had to be litigated in state courts.[22]

Split jurisdiction is partially solved by the doctrine of accrued jurisdiction.[23] This doctrine relies on the constitutional concept of a 'matter'[24] which roughly means the whole or part of a justiciable controversy between the parties.[25] Accrued jurisdiction allows federal courts to have jurisdiction over an entire matter even though it includes non-federal claims, provided that the non-federal claims fall into the same justiciable controversy as the federal claims and cannot be severed from those federal claims.[26] For example accrued jurisdiction could allow the Federal Court to hear an action for breach of federal trademark law in conjunction with a common law action for passing off.[27]

Accrued jurisdiction is a broad doctrine which is evidenced in the fact that there could be a single controversy (and hence a matter) even if the facts on which the claims were based did not 'wholly coincide'.[28] Also federal court jurisdiction is not lost even if the federal claim is dismissed on its merits or the case is decided on another non-federal ground.[29] Nor is jurisdiction lost where the federal claim is dismissed for want of jurisdiction.[30] Despite this broadness not all split jurisdiction cases are picked up by it. This is so where the state and federal claims can be severed from each other.[31] Uncertainty about what falls into the scope of a

21 *Commonwealth Powers (Family Law – Children) Act* 1986 (NSW); *Commonwealth Powers (Family Law – Children) Act* 1986 (Vic); *Commonwealth Powers (Family Law – Children) Act* 1990 (Qld); *Commonwealth Powers (Family Law) Act* 1986 (SA); *Commonwealth Powers (Family Law) Act* 1986 (Tas). Western Australia did not refer its state powers over children because it did not have this problem as it has its own family court, the Family Court of Western Australia.

22 Above n16 at 795.

23 For a detailed discussion on accrued jurisdiction see Aitken L, 'The Meaning of "Matter": A Matter of Meaning – Some Problems of Accrued Jurisdiction' (1988) 14 *Mon LR* 158. A related doctrine is associated jurisdiction which is a legislative mechanism that solves some federal jurisdictional gaps amongst the various federal courts. Associated jurisdiction however does not extend to state matters: *Federal Court of Australia Act* 1976 (Cth) s32; *Family Law Act* 1975 (Cth) s33 and *Industrial Relations Act* 1988 (Cth) s430. See Gummow WMC, 'Pendent Jurisdiction in the Australia – Section 32 of the Federal Court of Australia Act 1976' (1979) 10 *Fed LR* 211.

24 Sections 75 and 76 outline all the 'matters' within federal jurisdiction.

25 The definition of a 'matter' has recently been modified. Previous judicial statements in *Fencott v Muller* (1983) 152 CLR 570 at 603, 606 and 608; *Smith v Smith* (1986) 161 CLR 217 at 217, 237 and 250; *Stack v Coast Securities (No 9) Pty Ltd; Bargal Pty Ltd v Force* (1983) 154 CLR 261 at 293, seemed to suggest that a 'matter' denoted a whole justiciable controversy. However, this was rejected in *Abebe v Commonwealth* (1999) 162 ALR 1 where it was held that a 'matter' could be divided. In that case, the High Court upheld the Commonwealth's ability to restrict the grounds on which the Federal Court is able to review refugee claims under Part 8 of the *Migration Act* 1958 (Cth).

26 *Fencott v Muller*, id at 606.

27 Magoffin, above n3 at 331.

28 *Fencott v Muller*, above n25 at 607.

matter[32] and the fact that the exercise of accrued jurisdiction is discretionary[33] also limits the doctrine's usefulness. Finally the Family Court's accrued jurisdiction is narrower than the other federal courts.[34] It is unclear why this is so. Some explanations include the fact that the Family Court is statutorily restricted to matters covered by the marriage and matrimonial causes powers[35] and the perceived lower quality of its judges.[36]

3. *What the Cross-vesting Schemes Did*

These jurisdictional problems prompted numerous reform proposals.[37] Cross-vesting was a compromise solution born out of the failure of the states and the Commonwealth to agree on the establishment of a unified court system.[38] As noted above, there were two main state-federal cross-vesting schemes: the general scheme and the *Corporations Law* scheme. The general scheme commenced in 1988 and applied to each state and territory Supreme Court, the Family Court of Western Australia, the Family Court of Australia, and the Federal Court. In a reciprocal arrangement the states and territories conferred jurisdiction over state matters onto the federal courts,[39] and in return the Commonwealth conferred federal jurisdiction (save for a few exceptions) onto the state and territory courts.[40] Additionally, each state and territory court was vested with jurisdiction of other state and territory courts.[41] Only civil jurisdiction was cross-vested[42] and the jurisdiction conferred was both original and appellate. The effect of cross-vesting was to endow each participating court with the jurisdiction of every other court in the scheme. No proceeding within the scheme's compass could fail for want of

29 *Moorgate Tobacco Co Ltd v Phillip Morris Ltd* (1980) 145 CLR 457 at 476 Stephen J, Mason J, Aickin J and Wilson J; *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 76 ALR 173 at 181.

30 *Moorgate Tobacco Co Ltd v Phillip Morris Ltd,* id at 477 (Stephen, Mason, Aickin & Wilson JJ).

31 Above n16 at 805.

32 Even the High Court has admitted that ultimately this is a 'matter of impression' and 'practical judgement': *Fencott v Muller,* above n25 at 608; *Stack v Coast Securities (No 9) Pty Ltd; Bargall Pty Ltd v Force,* above n25 at 294.

33 *Phillip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 475; *Stack v Coast Securities (No 9) Pty Ltd; Bargal Pty Ltd v Force,* above n25 at 294–295. The spectre of a divided matter raised recently by *Abebe v Commonwealth,* above n25, makes the elusive concept of accrued jurisdiction even more elusive because it seemed formerly that an underlying theme of accrued jurisdiction was that justice demands that one court hear a whole controversy. With the prospect that a matter can be split, accrued jurisdiction becomes even more discretionary.

34 *Smith v Smith,* above n25; Aitken LJW, 'The Accrued and Associated Jurisdiction of the Family Court' (1989) 3 *AJFL* 101 at 102. Indeed one commentator reads *Smith v Smith* as suggesting the Family Court has no accrued jurisdiction at all: Errington MR, 'The Implications of *Smith v Smith*' (1986) 1 *AJFL* 255.

35 Above n12 at 510. Lane forcefully argues against this, noting that the Federal Court is also statutorily confined: ibid.

36 Aitken, above n34 at 113.

37 See Constitutional Commission Vol 1, above n2 at 367 for a brief history of these proposals.

jurisdiction.[43] Cross-vesting was not meant to affect the caseloads or status of participating courts or to encourage forum shopping,[44] and provisions were included to allow for the transfer of proceedings commenced in an inappropriate forum to a more appropriate forum.[45]

The *Corporations Law* cross-vesting scheme commenced in 1991. It mirrored the general scheme and operated to the exclusion of the general scheme.[46] The purpose of having a separate corporations scheme was to allow the *Corporations Law* to be enforced as a single national code.[47] Under the scheme, civil jurisdiction over the various state *Corporations Law* matters are vested in the Federal court[48] and in every other state and territory Supreme Court.[49] In return, the Commonwealth conferred civil jurisdiction over matters arising under the *Corporations Law* of the Australian Capital Territory on federal, state and territory courts.[50] The scheme's effect was to allow proceedings to be instigated under the *Corporations Law* in any participating court regardless of where a company was incorporated or where it carried out its business.[51]

Whilst cross-vesting had problems,[52] a 1992 study found that it had solved many jurisdictional problems and that the difficulties it raised were more manageable and remediable than the ones it had replaced.[53] A side benefit was that cross-vesting made judges and lawyers more aware of the other legal systems and procedures operating in Australia and so helped to overcome parochial tendencies.[54]

It is this history of fruitless jurisdictional litigation and the benefits which cross-vesting yielded which makes the High Court's ruling in *Wakim* so objectionable.

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38 Lindell GJ, 'The Cross-vesting Scheme and Federal Jurisdiction Conferred upon State Courts by the *Judiciary Act* 1903 (Cth)' (1991) 17(1) *Mon LR* 64 at 65; Mason & Crawford, above n2 at 328. This concept of a unified system of Australian courts, independent from both the States and Commonwealth, was championed by Sir Owen Dixon: Dixon O, *Jesting Pilate* (1965) at 247. Such a system would eliminate jurisdictional problems as all the courts would be under one system. This proposal has never been supported by the States and Commonwealth because of the loss of power it entails. It has also been criticised because it divides responsibility for running the courts between various parliaments: above n5 at 212; Constitutional Commission Vol 1, above n2 at 368.

39 *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) s4, and the equivalent Acts in each other state and the Northern Territory. Hereinafter *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) is used to represent all the other Acts.

40 *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) s4. See *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) s4(4) for exceptions.

41 *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) ss4(3) & (4).

42 The definition of a 'proceeding' explicitly excludes criminal proceedings: s3(1) *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) and *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) s3(1).

43 Griffith G, Rose D & Gageler S, 'Choice of Law in Cross-vested Jurisdiction: A Reply to Kelly and Crawford' (1988) 62 *ALJ* 698 at 698.

44 Bowen L, Commonwealth Attorney-General, House of Representatives, Parliamentary Debates (Hansard), 22 October 1986 at 2556; see also the Preambles to the general cross-vesting Acts which explicitly state that cross-vesting is not meant to detract from the existing jurisdiction of any court.

4. The Facts in *Wakim*

Four cases were heard together in *Wakim*.[55] *Re Wakim; Ex parte McNally* and *Re Wakim; Ex parte Darvall* concerned the travails of a hapless Mr Wakim. Wakim was injured in the course of his employment at a service station owned by Mr and Mrs Nader in a partnership. He won $786,800 in damages against Mr Nader. Mr Nader declared himself bankrupt and the Official Trustee in Bankruptcy brought proceedings in the NSW Supreme Court against Mrs Nader to dissolve the partnership and settle its accounts. The Trustee hired a firm of solicitors[56] to act in the matter and the solicitors in turn retained Mr Darvall QC to give an opinion. Proceedings against Mrs Nader were settled and it was agreed that the Naders would pay Wakim $10,000. This paltry amount prompted Wakim to seek orders against the Trustee under the *Bankrupty Act* 1966 (Cth)[57] in the Federal Court. He also claimed negligence against the Trustee. Wakim argued that the Trustee failed to take certain steps against Mrs Nader which would have increased the funds available to Mr Nader's creditors. After these proceedings had commenced, Wakim brought two more separate actions in the Federal Court. The first was against the solicitors and the second was against Darvall. In both actions negligence was alleged. The solicitors and Darvall countered by arguing that the general cross-vesting provisions[58] which purported to give the Federal Court jurisdiction over the proceedings against them were unconstitutional, because they sought to confer state jurisdiction on a federal court.

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45 *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) s5 and *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) s5. For the transfer of 'special federal matters' see *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) s6 and *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) s6.

46 *Corporations Act* 1989 (Cth) ss49(1); *Corporations (New South Wales) Act* 1990 (NSW) s40(1).

47 Commonwealth of Australia, House of Representatives, *Parliamentary Debates (Hansard)*, 8 November 1990 at 3665.

48 Above n46 ss42(3), and the equivalent Acts in each other State and the Northern Territory. Hereinafter the *Corporations (New South Wales) Act* 1990 (NSW) is used to represent all the other Acts.

49 Id at ss42(1).

50 *Corporations Act* 1989 (Cth) s1. Note hereinafter the Australian Capital Territory is referred to as the 'ACT'.

51 Above n5 at 208. The *Corporations Law* scheme also had transfer provisions similar to the general scheme, see *Corporations Act* 1989 (Cth) ss53, 53A and 53AA; *Corporations (New South Wales) Act* 1990 (NSW) ss44, 44A and 44AA.

52 These related to the fact that the federal jurisdiction invested in the states in the *Judiciary Act* 1903 (Cth) s39(2), was not conferred on the federal courts under the cross-vesting scheme: *Kodak (Australasia) Pty Ltd v Commonwealth* (1988) 98 ALR 424 and Lindell, above n38; and to differing interpretations of the transfer provisions: see Annetta V & Fraser K, 'Transfer Provisions of the Cross-vesting Legislation – the Need for Clarification' (1996) 24 *ABLR* 208.

53 Above n8 at 147.

54 Ibid.

55 The facts of all the cases were summarised in Gummow & Hayne JJ's judgment at paras 129–134, 151–155 and 169–171.

56 Peter McNally and Terence McNally were the partners in the firm.

57 s176, s177 and s178.

Re Brown; Ex parte Amann was a rerun of *Gould*, the only difference being that Mr Gould was joined by Mr Amann. They argued that the Federal Court had no jurisdiction to order that a company incorporated in NSW be wound up and that certain persons (including themselves) attend court to be examined on the company's affairs.[59] This was because the orders were made under provisions[60] of the corporations cross-vesting scheme which were unconstitutional in the same way as in *Wakim*'s case.

Spinks v Prentice concerned the winding up of a company incorporated in the ACT. The applicants challenged orders to produce documents[61] and examination orders[62] issued by the Federal Court under ACT *Corporations Law*. They argued that these orders were invalid, claiming the cross-vesting provision which purported to give the court jurisdiction was unconstitutional because it sought to confer territory jurisdiction[63] on a federal court.

Thus the key questions in *Wakim* were:

(1) Could state jurisdiction be conferred on federal courts?

(2) Could territory jurisdiction be conferred on federal courts?

5. The Decision in *Wakim*

A. The Exhaustive Nature of Chapter III

The crucial difference between the majority and minority judgements lay in their conception of Ch III of the Constitution.[64] The majority judges saw Ch III as exhaustively delimiting the original jurisdiction that could be conferred on federal courts.[65] Cross-vesting of state jurisdiction was therefore invalid as it purported to confer jurisdiction on federal courts from another source, that is, the states. The majority relied heavily on In *Re Judiciary and Navigation Acts*[66] and *R v Kirby; Ex parte Boilermakers' Society of Australia*[67] to support their position. Navigation concerned an attempt by the Commonwealth to confer jurisdiction on the High Court to give advisory opinions on legislation referred to it by the executive. The executive could refer legislation to the court even if its validity was not actually

58 *Jurisdiction of Courts (Cross-vesting) Act* 1987 (NSW) ss4(1) and *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) s9(2).

59 *Corporations Law* s596A.

60 *Corporations (New South Wales) Act* 1990 (NSW) ss42(3) and *Corporations Act* 1989 (Cth) s56(2).

61 *Corporations Law* s597(9).

62 Id at ss596A & 596B.

63 *Corporations Act* 1989 (Cth) s51(1).

64 Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ were in the majority; Kirby J dissenting.

65 Above n6 at 280 (Gleeson CJ); at 288 (McHugh J); at 303–304 (Gummow & Hayne JJ). NB Gaudron J agreed with all of Gummow & Hayne JJ's reasoning in relation to the cross-vesting of state jurisdiction (at 281), whilst Callinan J concurred with McHugh J's reasoning in *Gould* (at 545) which McHugh J restated in this case.

66 (1921) 29 CLR 257 (hereinafter *Navigation*).

67 Above n11 (hereinafter *Boilermakers' Case*).

challenged. It was held that even though the making of advisory opinions was a judicial function,[68] the reference procedure was invalid because the High Court had no jurisdiction. Under Ch III, the Commonwealth could only confer original jurisdiction on the High Court according to ss75 and 76 and these sections were controlled by the concept of a 'matter'. This was defined as 'some immediate right, duty or liability to be established by the determination of the Court'.[69] Advisory opinions which involve hypothetical questions rather than rights and duties did not fall within a matter. The High Court could not be conferred with jurisdiction from any source other than Ch III because this would conflict with the separation of powers. Ch III thus operated: 'as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and *as a necessary exclusion of any other exercise of original jurisdiction*'.[70] [Emphasis added.]

The exhaustive and exclusive nature of Ch III was later affirmed in the *Boilermakers' Case* where the court reasoned that the 'affirmative words' of Ch III, which enabled the Commonwealth to create and confer jurisdiction on the High Court,[71] carried with them a 'negative force' prohibiting the Commonwealth from conferring judicial power on the court from any other source and by any other method than that prescribed in Ch III.[72] For the majority in *Wakim*, this negative implication applied to the states and other federal courts in the same way as it applied to the Commonwealth and High Court.[73] ss75, 76 and 77 exhaustively defined federal court jurisdiction and so cross-vesting was invalid as state judicial power did not fall within these sections. McHugh J attacked the minority's contention that only state judicial power could be cross-vested.[74] State courts can exercise non-judicial power because there is no separation of powers in state constitutions.[75] The minority did not allow the states to vest non-judicial power because it would conflict with the *Boilermakers' Case*, which held that federal courts could not exercise non-judicial power. McHugh J saw this as an admission that Ch III operated over this vesting. If it did then the negative implication applied

68 Above n66 at 264. The view that advisory opinions are a judicial function was doubted in by Dixon CJ, McTiernan, Fullagar and Kitto JJ in the *Boilermakers' Case*, id at 274. However, it was reaffirmed by Jacobs J in *Commonwealth v Queensland* (1975) 134 CLR 298 at 325–328.

69 Above n66 at 265.

70 Ibid.

71 More specifically ss71, 75 and 76.

72 Above n11 at 270. This negative implication argument draws upon American jurisprudence which was cited by McHugh and Gummow JJ in *Gould*, above n2 at 419 and 451 respectively. In *Marbury v Madison* (1803) 5 US 137 the US Supreme Court used such an argument to rule that Congress could not increase the Supreme Court's original jurisdiction beyond what was provided in Art III of the US Constitution (the US version of Ch III). Marshall CJ contended that such an argument was necessary to give substance to the 'distribution of jurisdiction' in the Constitution, that is, the separation of powers: *Marbury v Madison* at 174.

73 Above n6 at 278 (Gleeson CJ); at 289–290 (McHugh J); at 303 (Gummow & Hayne JJ).

74 Id at 338 (Kirby J). See also *Gould*, above n3 at 385–386 (Brennan CJ & Toohey J); at 497 (Kirby J).

75 Though the exercise of federal judicial power by state courts cannot be incompatible with Ch III: *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577.

and if it did not then there could be no logical basis for the distinction.[76] Additional negative implications drawn by some majority judges centred on the absence of an express provision in the Constitution which would allow such cross-vesting. McHugh and Callinan JJ read this absence to suggest that there was nothing in the Constitution which allowed the Commonwealth to create federal courts to receive state judicial power or the states to vest it.[77] McHugh J also argued that the presence of s77(iii) in the Constitution, in the absence of an express cross-vesting provision, negatively implied that the states could not conscript the federal courts in the same way.[78]

The minority judge, Kirby J, drew a distinction between federal and non-federal jurisdiction, holding that Ch III only applied to the former; Ch III had nothing to say about non-federal jurisdiction.[79] His Honour accepted that previous decisions had stated that Ch III was exhaustive and exclusive,[80] however, he believed that these statements were obiter. For example, *Navigation* was decided on the fact that an advisory opinion did not fall within a matter as defined in Ch III.[81] Furthermore none of the decisions were on point for cross-vesting and all were written before the expansion of the federal courts and the split jurisdiction problems became more severe.[82] More importantly Kirby J questioned the purity of the majority's view of the separation of powers, noting that there were numerous examples of federal courts exercising jurisdiction and functions which were located outside Ch III.[83] These included the High Court and Federal Court's appellate jurisdiction over decisions from territory courts;[84] the High Court's appellate jurisdiction over decisions from the Supreme Court of Nauru;[85] the conferral of jurisdiction as a Colonial Court of Admiralty upon the High Court;[86] the creation of courts martial;[87] the appointment of federal judges to non-judicial functions as *personae designatae*;[88] and the High Court's constitution as a Court of Disputed Returns.[89]

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76 Above n6 at 291–292 (McHugh J).

77 Id at 289 (McHugh J); at 344 (Callinan J).

78 Id at 289 (McHugh J). See also *Gould*, above n3 at 423 (McHugh J); at 451 (Gummow J).

79 Id at 333–334 (Kirby J).

80 Kirby J cited in *Navigation*, above n66 at 264–265; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529; *Boilermakers' Case*, above n11 at 268.

81 Above n6 at 330 (Kirby J).

82 Ibid.

83 Id at 330–331 (Kirby J). See also *Gould*, above n2 at 380 (Brennan CJ & Toohey J); at 493–494 (Kirby J).

84 Under s122, The Constitution 1901 (Cth) (territories power).

85 *Nauru (High Court Appeals) Act* 1976 (Cth). The High Court has exercised this jurisdiction twice: *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627; *Amoe v Director of Public Prosecutions (Nauru)* (1991) 103 ALR 595.

86 *Colonial Courts of Admiralty Act* 1890 (Imp). This Act's application to Australia has since been repealed.

87 Courts martial under s51(vi), The Constitution 1901 (Cth) (defence power) have been held to exercise judicial power that is separate from the judicial power in Ch III: *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452; *R v Cox; Ex parte Smith* (1945) 71 CLR 1; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 and *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

Territory appeals are problematic because territory courts are not federal courts and they do not exercise federal jurisdiction which would allow an appeal to the High Court under s73.[90] The source of power underpinning territory appeals comes not from Ch III but rather statute under s122.[91] This conflicts squarely with the view that Ch III is exhaustive and exclusive. None of the majority judgements in *Wakim* discussed the implications of this exception, though some comments in *Gould* are noteworthy. McHugh J believed that the cases which stated that territory courts were not governed by Ch III[92] and that the source of power for territory appeals was s122[93] were wrongly decided.[94] His Honour also argued that these cases gave no support for cross-vesting because they suggested that Ch III only regulates the federal system as embodied by the states and Commonwealth. The territories were not a part of this federal system and so were not affected by Ch III's negative implications.[95] Gummow J was inclined to this latter view.[96]

This view of separate territories is debatable as there is conflicting High Court authority on it. Another line of cases sees the territories as part of the federal system because they are part of the Commonwealth[97] and so some parts of Ch III do apply to territory courts.[98] This latter view suggests against the contention that Ch III is exclusively concerned with the federal system. Gaudron J adhered to this alternative view. However, her explanation of the court's jurisdiction over territory appeals gave no support to cross-vesting. Gaudron J argued that territory courts should be treated like federal courts under s72 and that they could be invested with federal jurisdiction under s71.[99] Gaudron J was thus suggesting that contrary to *Porter*, appeals from territory courts were sourced within Ch III.[100] It is noted that

88 *Hilton v Wells* (1985) 157 CLR 57; *Jones v Commonwealth* (1987) 71 ALR 497; *Grollo v Palmer* (1995) 184 CLR 348.

89 *Commonwealth Electoral Act* 1978 (Cth) s354. Kirby J cites Walker K, 'Disputed Returns and Parliamentary Qualifications: Is the High Court's Jurisdiction Constitutional?' (1997) 20 *UNSWLJ* 257.

90 *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591.

91 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432. The ruling that territory appeals can be sourced from s122 The Constitution 1901 (Cth) has been consistently upheld: above n67 at 290; *Spratt v Hermes* (1965) 114 CLR 226 at 256–257, 279; id at 604, 612, 622–623 and 626.

92 *R v Bernasconi* (1915) 19 CLR 629.

93 *Porter v The King; Ex parte Yee*, above n91.

94 Above n3 at 426 (McHugh J).

95 Id at 427 (McHugh J). This is also supported by *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 and *Waters v The Commonwealth* (1951) 82 CLR 188.

96 Above n3 at 441 (Gummow J).

97 *Spratt v Hermes*, above n91 at 270–271 (Menzies J); *Lamshed v Lake* (1958) 99 CLR 132 at 145 (Dixon CJ), 154 (Kitto J). It is noted that Kitto J did later resile from this view in *Spratt*.

98 *Spratt v Hermes* decided that the High Court could exercise appellate jurisdiction under ss76(i) or (ii) in relation to a territory matter under The Constitution 1901 (Cth) s122.

99 Directly conflicting with *Spratt v Hermes*, above n91 and *Capital TV and Appliances Pty Ltd v Falconer*, above n3 at 402 (Gaudron J); *Northern Territory of Australia v GPAO* 161 ALR 318 at 348 (Gaudron J).

100 *Northern Territory of Australia v GPAO*, id at 351–352 (Gaudron J).

the most recent case on s122's relationship with Ch III supports the separatist view.[101]

The idea that Ch III only relates to the federal system may also explain the High Court's appellate jurisdiction over Nauru decisions.[102] The legislation conferring this jurisdiction was based on the external affairs power[103] as it implemented the terms of a treaty between Australia and Nauru, but the jurisdiction over such appeals is not within the scope of ss75 or 76. Section 76(ii) does not apply as the appeals are governed by Nauru law and not Commonwealth law, and s75(i) does not apply because it requires a right or duty arising from Commonwealth law which gives effect to the treaty.[104] A more serious difficulty with Nauru appeals are that they conflict with authority which states that s51 powers cannot be used to circumvent the restrictions of Ch III to expand federal jurisdiction.[105]

The other listed exceptions are more difficult to explain as they exist within the federal system. Perhaps the most troubling is persona designata which rests on an artificial distinction of personal and official capacity. If the vesting of state judicial power on federal courts is impermissible, how much more so is the conferral of non-judicial power on federal court judges. By listing all these exceptions Kirby J seems to be suggesting that the old blanket view of the separation of powers is untenable and needs revision in the light of modern needs. This is reflected in his comment that such a strict view would impede future cross-border jurisdictional arrangements such as the trans-Tasman market proceedings arrangement.[106]

Kirby J rejected the other negative implications drawn, reading the absence of an express cross-vesting provision as suggesting that the Constitution did not prohibit it.[107] The absence also reflected the fact that Ch III did not regulate state judicial power.[108] He explained the presence of s77(iii) as a historical necessity. At the time of federation state courts were well established and no federal courts existed. The provision was inserted into the Constitution so as to spare a fledgling Commonwealth with limited resources the expense of immediately establishing a federal judiciary.[109]

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101 Three out of six judges in this case affirmed this view: *Kruger v Commonwealth* (1997) 190 CLR 1 at 43 (Brennan CJ), 56 (Dawson J), 141–142, 143 (McHugh J). Interestingly in this same case Gummow J criticised this view at 162–176. See also *Northern Territory of Australia v GPAO*, id at 357–362 where McHugh & Callinan JJ laid out the major arguments for treating the territories as separate.

102 Above n6 at 331, footnote 264 (Kirby J); Magoffin C, above n3 at 337–339.

103 The Constitution 1901 (Cth) s51(xxix).

104 *Bluett v Fadden* [1956] SR (NSW) 254.

105 *Willocks v Anderson* (1971) 124 CLR 293. See Magoffin, above n3 at 338.

106 Under Pt IIIA *Federal Court of Australia Act* 1976 (Cth). Above n6 at 332 (Kirby J).

107 Id at 324 (Kirby J).

108 Id at 329 (Kirby J).

109 Id at 328 (Kirby J).

B. Cooperative Federalism

To understand the majority's ruling that cross-vesting could not be supported by the principle of cooperative federalism, it is instructive to first outline the minority position which did believe this principle supported cross-vesting. The leading case on cooperative federalism is *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd.*[110] In that case the Commonwealth and states jointly established a Coal Industry Tribunal and vested it with Commonwealth and State powers. This was held to be valid as there is nothing in the Constitution which prevents Commonwealth and states from cooperating 'so that each, acting in its own field, supplies the deficiencies in the power of the other, and so that together they may achieve ... a uniform and complete legislative scheme.'[111] Commonwealth-State cooperation was stated to be a 'positive objective of the Constitution'.[112] The fact that the Tribunal exercised Commonwealth and State powers concurrently and not separately from each other, was not a problem. A later case which affirmed *Duncan* held that the Tribunal could exercised powers vested in it by state legislation because the Commonwealth Act authorised it.[113]

The minority argued that with the passing of the *Australia Act* 1986 (Cth) any restrictions on state legislative power imposed by imperial law[114] were removed and subject to any constitutional limitations that power is plenary.[115] There were no constitutional limitations as Ch III only governed federal judicial power and so the states had the power to confer state judicial power on federal courts. However, Commonwealth statutes which confer federal jurisdiction on the federal courts carry with them a presumption that federal court jurisdiction should not be increased by another legislature. Section 109 would then operate to override the state law. To avoid this result, the Commonwealth had to expressly consent to this conferral and this consent had to be based on a legislative power.[116] Kirby J argued that this power came from either the express incidental power,[117] the implied incidental power within s71 or the implied nationhood power.[118] In regard to the latter power, Kirby J argued that cross-vesting was conducive to the national society envisaged by the Constitution as it ensured 'justice, efficiency and clarity

110 (1983) 158 CLR 535 (hereinafter *Duncan*).

111 Id at 552 (Gibbs CJ).

112 Id at 589 (Deane J).

113 *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 127–128.

114 That is the *Colonial Laws Validity Act* 1865 (Imp).

115 Above n6 at 330 (Kirby J).

116 In *Gould*, above n3 at 382 Brennan CJ and Toohey suggested that the Commonwealth did not have to base its consent on a legislative power as the consent did not purport to confer jurisdiction or prescribe a procedure for the state courts, all it did was negative a presumption. This was, however, rejected by all the other judges.

117 The Constitution 1901 (Cth) s51(xxxix).

118 Above n6 at 334–336 (Kirby J). The nationhood power has been espoused in *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338; *New South Wales v Commonwealth* (1975) 135 CLR 337; *Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1; *Davis v Commonwealth* (1988) 166 CLR 79.

in the nation's court system'.[119] This mix of State conferral and Commonwealth consent was thus seen as analogous to *Duncan*.

The majority did not reject the principle of cooperative federalism. Nor did they dispute the states' power to vest state jurisdiction in non-state courts. Their contention was that Ch III's negative implication prevented the Commonwealth cooperation. Gleeson CJ and McHugh J argued that since Ch III was an exhaustive statement of federal jurisdiction, the jurisdiction could not be supplemented through cooperation.[120] No question of consent arose because the federal courts just could not receive state jurisdiction.[121] Gummow and Hayne JJ disagreed with the consent argument; they construed the Commonwealth cross-vesting provisions[122] as impermissibly purporting to confer state jurisdiction on the federal courts.[123] They also argued that even if their construction was wrong cross-vesting still was invalid. Whilst the states could pass a law that conferred jurisdiction on courts of another polity, that law would have no effect unless the courts of the other polity gave effect to it and that could only be done according to the law of their polity.[124] The negative implication of Ch III prevented the federal courts from giving effect to state cross-vesting law.

Gleeson CJ rejected the incidental power argument because the conferral of state jurisdiction was not in aid of the principal power, that is, federal judicial power, rather it was 'both a substantial addition to the power, and an attempt to circumvent the limitations imposed upon the power by the Constitution.'[125] The other majority judges argued that state judicial power was not required for the effectiveness of federal judicial power.[126] It is submitted that this latter view is unsustainable, federal judicial power was greatly enhanced by cross-vesting as it allowed federal courts to deal with a whole case, rather than just parts of it. Kirby's suggestion of the implied nationhood power was rejected as unacceptably using 'convenience as a criterion of constitutional validity'.[127]

C. *Federal Courts do have Jurisdiction over ACT Corporations Law*

In relation to *Spinks v Prentice*, the High Court followed its recent decision in *Northern Territory of Australia v GPAO*[128] which held that federal courts did have original jurisdiction under ss76(ii) and 77(i) over laws made under s122. As the ACT *Corporations Law* was enacted under s122, the Federal Court has jurisdiction to hear matters relating to companies incorporated under this law. This result

119 Above n6 at 337 (Kirby J). This argument picks up on Mason J's use of the nationhood power in *Duncan*, above n110 at 560.

120 Above n6 at 280 (Gleeson CJ); at para 59 (McHugh J).

121 Id at 292 (McHugh J).

122 *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) s9(2) and *Corporations Act* 1989 (Cth) s56(2).

123 Above n6 at 301–302.

124 Id at 302.

125 Id at 280 (Gleeson CJ). See also Gummow & Hayne JJ at para 122.

126 Id at 293 (McHugh J); at para 118 (Gummow & Hayne JJ).

127 Id at 309 (Gummow & Hayne JJ).

128 Above n99.

provides a possible solution to the problem that *Wakim* deprives federal courts of jurisdiction over state *Corporations Law*. If all corporations are forced to register in the ACT then the federal courts would have jurisdiction over them.[129]

D. The Policy in *Wakim*

Wakim is a study of absence in the sense that there was nothing in the Constitution which expressly denied or approved of cross-vesting. The lack of an express text meant that policy dominated the judicial reasoning. This is shown in the different interpretative approaches adopted by the majority and minority judges, and their differing conceptions of federalism and the separation of powers. Kirby J took a progressive interpretative approach[130] arguing that because of the difficulties of referenda the Constitution should be read liberally to accommodate the changing needs of society.[131] Rigid and impractical outcomes could only be justified by the 'clearest constitutional language' which 'compel them',[132] and there was no text that compelled majority to take such a rigid view of Ch III. Federalism to Kirby J meant a strong united Commonwealth[133] and he saw the unanimous support of cross-vesting by all governments in the federation as a cogent reason against narrow interpretation.[134]

The majority took an orthodox interpretative approach based on precedent and legal doctrine.[135] They criticised the minority approach for substituting accepted legal doctrine for convenience.[136] Whilst it was in the public interest that federal courts have jurisdiction to deal with all the issues in a case, Ch III prevented this and the court could not amend the Constitution for modern needs because that would usurp the very function of the Constitution which is meant to be binding until changed by referendum.[137] The majority saw federalism as a weak structure[138] of disparate polities. This is seen in Gummow and Hayne JJ's likening of the states to being foreign countries like Nauru.[139]

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129 Noted by Lindgren KE in the 'Jurisdiction of Courts In *Corporations Law* Matters' Conference held on 21 October 1999 at Sydney University.

130 This reflects the much cited rule by O'Connor J in *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367–368. The most forceful exponent of this approach in recent times would be Sir Anthony Mason, see Mason A, 'The Role of a Constitutional Court in a Federation, A Comparison of the Australian and the United States Experience' (1986) 16 *Fed LR* 1, especially at 23.

131 Above n6 at 323–324 (Kirby J).

132 Id at 324 (Kirby J). Kirby J was actually citing a comment by Gleeson CJ and McHugh J in *Abebe v Commonwealth*, above n25 at 15. In that case the High Court rejected the argument that a 'matter' was indivisible because of the impractical results that such an interpretation would entail.

133 Above n6 at 325 (Kirby J).

134 Id at 322–323 (Kirby J).

135 Id at 283–287 McHugh J outlines the majority's interpretative approach.

136 Id at 276 Gleeson CJ, at 308 (Gummow & Hayne JJ).

137 Above n6 at 282–283 (McHugh J). McHugh J memorably quoted Jefferson's famous aphorism 'that the earth belongs in usufruct to the living' (that is, a constitution enacted by one generation could bind subsequent generations) and then rejected its import because of its effect on the rule of law: Jefferson T, *Writings* (1984) at 959, id at 283.

138 Id at 288–289 (McHugh J); at 302 (Gummow & Hayne JJ).

139 Id at 302 (Gummow & Hayne JJ).

The force of the majority's reasoning came from the fact that it was backed by precedent. However when these precedents are examined they are based more on policy than text and the policy seems to support Kirby J's stance. The basis of the separation of powers arguably is to protect the independence of the judiciary and to ensure the effective working of the Constitution by maintaining a division between the three arms of government so that each can check the other.[140] If this is so, then the view that Ch III is exclusive and exhaustive is unnecessary[141] to achieve these aims, and a much looser separation of powers doctrine could suffice.[142] Cross-vesting did not attack the independence of the judiciary, nor did it affect the Constitution's internal checks on power. The majority's vision of a weak and divided Commonwealth is also questionable because of its unattractive symbolism.

6. *Practical Implications of Wakim*

Wakim rules invalid all cases previously decided by federal courts under cross-vested state jurisdiction. To prevent the relitigation of these cases all states will enact legislation which deems these decisions to be Supreme Court decisions[143] and declares that the rights and liabilities of persons affected by those decisions to be the same as before *Wakim*.[144] As for future cases, three areas especially affected by Wakim are company, bankruptcy and family law.

As noted above *Wakim* strips the Federal Court of jurisdiction over state *Corporations Law*. This is a major blow to the court's status as *Corporations Law* matters formed a significant portion of its caseload. In 1997–1998 such matters constituted 23 per cent of the completed cases in the Federal Court.[145] The expertise and experience built up by the Federal Court over corporate matters will be lost to litigants and it is unlikely that accrued jurisdiction can fill this jurisdictional gap. The main vehicle by which accrued jurisdiction can be attracted is s52 of the *TPA*. Many areas of the *Corporations Law* would not involve an infringement of the *TPA* and so accrued jurisdiction cannot be invoked. These include remedies against oppression and breaches of substantial shareholder provisions.[146] Additionally because the *Corporations Law* aims to be a national code, misleading and deceptive conduct is already incorporated into some of its provisions; an example of this is s995 which regulates dealings in securities.

140 *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87 at 90 (Barwick CJ).

141 Barwick CJ criticised the ratio of the *Boilermakers' Case* arguing that it led to 'excessive subtlety and technicality in the operation of the Constitution without ... any compensating benefit': ibid; Mason J agreed with him at 102. Compare above n6 at 325 (Kirby J).

142 Zines L, *The High Court and the Constitution* (4th ed, 1997) at 169–170.

143 *Federal Courts (State Jurisdiction) Act* 1999 (NSW) ss7(3).

144 *Federal Courts (State Jurisdiction) Act* 1999 (NSW) s6.

145 *Federal Court of Australia Annual Report 1997–1998* at 97. Some of these cases may have been determined under accrued jurisdiction but Black CJ states that the bulk were under the corporations cross-vesting scheme: Black CJ, 'Memo to All Federal Court Judges', 19 April 1999 at 2.

146 Black, id at 2–3.

Where there is a breach of s995 it would be hard to see how s52 of the *TPA* could be alleged.[147]

Bankruptcy is affected by *Wakim* as personal bankruptcy is governed by federal law,[148] whilst corporate insolvency is covered by the *Corporations Law*.[149] In practice personal and corporate bankruptcy is often intertwined but after *Wakim* separate proceedings will have to be instigated. This problem could be remedied by Commonwealth legislation under the bankruptcy power.[150]

The main area in family law affected by *Wakim* is that of property proceedings of de facto couples. The Family Court has no jurisdiction over such proceedings because the marriage and matrimonial causes powers only relate to married couples. State legislation regulates these proceedings.[151] However, the Family Court does have jurisdiction over the children of de factos.[152] Cross-vesting allowed these couples to attach their property claims to Family Court proceedings concerning their children. Cross-vesting was advantageous for parties whose claims rest on non-financial contributions to the relationship because the Family Court exercises its discretion in property division more liberally than Supreme Courts.[153] This is no longer possible. Also eliminated is the practice of attaching the tort claims of victims of domestic violence to matrimonial property proceedings.[154] This was done in order to get property proceedings over as quick as possible so as to allow the victim to escape from the violent partner's control as soon as possible.[155] Jurisdictional gaps which cross-vesting papered over will now reappear. Significantly the Family Court loses jurisdiction over state wards, as this jurisdiction was not referred to it by the states.[156] There will also be problems in

147 Id at 3.

148 *Bankruptcy Act* 1966 (Cth).

149 Black, above n145 at 4.

150 Section 51(xvii). The bankruptcy power is held concurrent with the states: Gummow WMC, 'Bankruptcy and Insolvency in Australia' (1995) 46 *South Carolina LR* 893 at 893.

151 *Defacto Relationships Act* 1984 (NSW); *Property Law Act* 1958 (Vic) and *Property Law (Amendment) Act* 1987 (Vic); *De Facto Relationships Act* 1996 (SA); *De Facto Relationships Act* 1991 (NT); *Domestic Relationships Act* 1994 (ACT).

152 Under the reference of powers legislation noted above, eg, s3(1) *Commonwealth Powers (Family Law – Children) Act* 1986 (NSW).

153 Watts G, 'Conducting property proceedings between defacto couples in the Family Court' (1990) 28(2) *LSJ* 19 at 19; Pesce J, 'Cross-vesting – Crossed Wires?' (1996) 70(4) *Law Inst J* 45 at 45.

154 See Kennedy I, 'Domestic Torts: Fertile Field or Shifting Sands', Annual Family Law Intensive, May 1997, Leo Cussen Institute and Family Law Section, Law Council of Australia at 5.2.1.

155 This practice has declined in recent years with the Family Court preferring to deal with domestic violence under the general property provision, s79(4) *Family Law Act* 1975 (Cth): Kearney M, 'Cross-vesting in Family Law, Where Are We Now?' (1998) *Law Soc J* 50. A party who is the victim of domestic violence in a marriage, may be able to claim more of the marital property when they can show that the violent conduct has affected their homemaker contributions by making them significantly harder to carry out than they ought to have been: *Kennon v Kennon* (1997) FLC 92–757.

156 *Commonwealth Powers (Family Law – Children) Act* 1986 (NSW) s3(2). For a discussion of the jurisdiction conferred by the reference of powers legislation see Seymour J, 'The Role of the Family Court of Australia in Child Welfare Matters' (1992) 21 *Fed LR* 1 at 18–22.

cases involving the interests of third parties to a marriage such other family members and family companies. The Family Court does not have jurisdiction over third parties unless they are puppets or shams created by a party to the marriage to defeat property claims.[157]

7. *Possible Solutions*

A. Make More Use of Section 77(iii)

Vesting more federal jurisdiction in state courts via s77(iii) would prevent split jurisdiction. However, this is unlikely to be undertaken as it would deprive the Federal Court of even more cases as litigants would be attracted by the one stop shop of a Supreme Court. Additionally there may be reasons for exclusive federal jurisdiction such as desire for uniformity in interpretation.[158] Granting concurrent jurisdiction to state courts also encourages forum shopping.[159]

B. Expanded Accrued Jurisdiction

As indicated above accrued jurisdiction solves some jurisdictional problems. The scope of this doctrine has been widened by Gummow and Hayne JJ's approach in *Wakim*.[160] The proceedings in *Wakim* were separate. The claims against the solicitors and Darvall were purely common law, the pleadings showed that much of the facts underpinning these claims were irrelevant to the action against the trustee and the trustee made no cross-claims against the solicitors or Darvall. All this suggested that the claims against the solicitors and Darvall were severable from the federal claim against the trustee.[161] However, Gummow and Hayne JJ held that all the claims were part of a matter and so within Federal Court jurisdiction. This was because all the claims related to the conduct of proceedings against Mrs Nader and Wakim sought a single claim of damages against each of the parties; judgment against one diminishing his claim against the other.[162] They rejected the notion that each claim had to have a federal aspect before accrued jurisdiction applied[163] and doubted the view that accrued jurisdiction was discretionary. They suggested that comments suggesting this only meant to convey the fact that accrued jurisdiction involved difficult questions of fact and degree upon which reasonable minds may differ.[164] If this is so, the doctrine may have more teeth in the sense that a federal court cannot refuse to hear a case where the claims fall within a matter; though not much more considering how hard it is to work out what is within a matter.

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157 *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337.

158 See above n16 at 773–785 for more policy reasons for exclusive federal jurisdiction.

159 Id at 787.

160 Gleeson CJ and Gaudron J agreed with this approach.

161 For these reasons McHugh and Callinan JJ who were in the minority in this aspect of the decision, believed that the federal court had no jurisdiction: above n6 at 294, 295, 346–347.

162 Id at 313–314 (Gummow & Hayne JJ).

163 Id at 313.

164 Id at 314.

It seems that even though Gummow and Hayne JJ questioned whether split jurisdiction was a real problem,[165] they have tried to compensate for cross-vesting's loss with a wider doctrine of accrued jurisdiction. However, it is unlikely that even this expanded version will pick up all cases. The artificiality of such an approach is also questionable.[166]

C. *Reference Power*

The reference power[167] could be used to solve some jurisdictional gaps. This power allows the Commonwealth to make law over matters referred to it by the states.[168] The effect of a reference is to add another Commonwealth power to the list in s51.[169] A recent example of the use of this power is the mutual recognition scheme which allows the mutual recognition of standards and regulations relating to goods and entry into certain occupations amongst the states and territories.[170] Whilst the general cross-vesting of state jurisdiction cannot be supported by this power as s51 is prefaced with the words 'subject to this Constitution' and so the power is constrained by Ch III's negative implications,[171] the reference of specific matters such as state powers over corporations is possible. Ch III would not bar such a reference because the expansion to federal judicial power occurs via the mechanism of s76(ii). A federal *Corporations Law* could be achieved this way.[172] The main problems with the reference power are state reluctance to relinquish power, the difficulty of getting a uniform reference from all states[173] and the instability of the arrangement as a state can revoke its reference.[174]

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165 Id at 307. Kirby J at 326–327 rejected this contention, noting that the transfer statistics understated the use of cross-vesting as they did not include matters commenced in a jurisdiction which but for cross-vesting would not have been possible. Closer examination of the statistics supports Kirby J's argument. In 1997–1998 the Federal Court completed 4,085 cases. Forty five cases were transferred from the Federal Court to the state courts, whilst 33 cases were transferred to the Federal Court from state courts under the cross-vesting schemes. This makes cross-vesting seem insignificant. However, when it is noted that 956 completed cases involved the *Corporations Law* then is suggests that cross-vesting was extensively used: *Federal Court of Australia Annual Report 1997–1998* at 41–42, 97.

166 See above n6 at 337–339 (Kirby J).

167 Section 51(xxxvii).

168 Gummow J and Kirby J intimated that use may be made of this power in *Gould,* above n3 at 453 and 469.

169 *Graham v Paterson* (1950) 81 CLR 1 at 19.

170 This scheme is implemented by the *Mutual Recognition Act* 1992 (Cth); *Mutual Recognition (ACT) Act* 1992; *Mutual Recognition (NT) Act* 1992; *Mutual Recognition (NSW) Act* 1992; *Mutual Recognition (Qld) Act* 1992; *Mutual Recognition (SA) Act* 1998; *Mutual Recognition (Tas) Act* 1998; *Mutual Recognition (Vic) Act* 1993; *Mutual Recognition (WA) Act* 1995. For a detailed article on this scheme see Bini M, 'Mutual Recognition and the Reference Power' (1998) 72 *ALJ* 696.

171 The power in s51(xxxviii) is similarly constrained: above n6 at 331–332 (Kirby J, noting Moshinsky M, 'Gould v Brown – Death Knell of the Cross-vesting Scheme?' (1998) 9 *PLR* 152 at 155).

172 Above n5 at 211.

173 Id at 211.

D. Referendum

The most effective and enduring solution would be a referendum to insert a provision into the Constitution that permitted the vesting of state jurisdiction in federal courts.[175] The difficulty with this solution is that Australians are notoriously conservative and few referenda have been supported.[176] The technical nature of split jurisdiction is also problematic as people may vote no because they do not understand why a change is needed.

8. Conclusion

Wakim is a practical disaster, opening up jurisdictional gaps that will sap precious time and money in non-productive litigation over jurisdictional boundaries and in some cases where no one court can hear all the issues in the controversy, thwart justice. Intellectually the case is unsatisfying because it promotes an unnecessarily rigid separation of powers doctrine.

DUNG LAM *

174 Craven G, 'Death of a Placitum: The Fall and Fall of the Reference Power' (1990) 1 *PLR* 285 at 287 citing dicta in *R v Public Vehicles Licensing Appeal Tribunal (Tasmania); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225–226; *South Australia v Commonwealth* (1942) 65 CLR 373 at 416.

175 See above n2 at 373 for the proposed s77A amendment to the Constitution.

176 Only 8 out of 42 have been supported. Above n5 at 211.

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