

The importance of federal jurisdiction*

*Justice Alan Robertson***

This paper does not primarily deal with the jurisdiction of the Federal Court of Australia, although the jurisdiction of that Court is necessarily federal. Most of what I will discuss is about the jurisdiction of State courts and whether they are exercising federal jurisdiction, and why that matters. I will refer to the current question of State tribunals as well.

Why is all this important? You need to be sure you are in the right court or tribunal — does it have jurisdiction and, if so, over what subject matter? What law will be applied and why? The judge will want to know.

Strong authority states that a fundamental question to be considered in every case is the identification of the character of the jurisdiction being exercised by the Court — whether federal or state. It is of course the duty of a court to be satisfied about its jurisdiction (as distinct from whether it is State or federal) regardless of whether the matter is raised by counsel.

In this context, the context of Ch III of the *Constitution*, jurisdiction means the authority to decide.

I will approach the topic by reference to six or seven illustrative cases. None of these cases is old or obscure. One, *Rizeq v Western Australia*¹ is a decision of the High Court given in June 2017 — it is of first importance, not only to criminal lawyers although it was a criminal case.

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** Federal Court of Australia.

¹ [2017] HCA 23 (*'Rizeq'*).

To know the answer to whether you are in federal jurisdiction, you need to keep a clear eye on: (i) whether the *Constitution* is involved; (ii) whether Commonwealth legislation is involved; and (iii) who are the parties.

Sometimes, although this will be much more obvious, you will need to think about remedies.² Is the Commonwealth seeking an injunction or a declaration or is a writ of mandamus or prohibition or an injunction sought against an officer of the Commonwealth?.

All of this is referable to the Commonwealth *Constitution* and, in most cases, to the *Judiciary Act 1903* (Cth). This is because, by definition, federal jurisdiction is the authority to adjudicate derived from the Commonwealth *Constitution* and Commonwealth laws.

One then turns immediately to ss 71, 75 and 76 of the *Constitution* which are in the following terms, for present purposes (and note the use of the word ‘matters):

71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in ... the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction....

75 Original jurisdiction of High Court

In all matters:

...

- (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- (iv) between States, or between residents of different States, or between a State and a resident of another State;
- (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

76 Additional original jurisdiction

² *Constitution* s 75(v); *Judiciary Act 1903* (Cth) ss 39B(1), (1A)(a).

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

- (i) arising under this Constitution, or involving its interpretation;
- (ii) arising under any laws made by the Parliament;
- (iii) of Admiralty and maritime jurisdiction;

...

Then, to complete the picture, s 77:

77 Power to define jurisdiction

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

- (i) defining the jurisdiction of any federal court other than the High Court;
- (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
- (iii) investing any court of a State with federal jurisdiction.

Also s 109 of the *Constitution* has work to do here. You will recall its terms as follows:

109 Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

I will try to avoid the complex doctrinal thickets and give you an overview. All the complexities are explored by Professor Lindell in his recent book, which is essential reading.³ Note that, at pages 6-8 of that work, Professor Lindell lists nine reasons why it is necessary to identify whether a court is exercising federal jurisdiction.

Federal jurisdiction is one of those areas of the law in which, unless you have some awareness of its existence, unpleasant surprises may arise for counsel: such as the following exchange in argument in *CGU Insurance Ltd v Blakeley*:

FRENCH CJ: Did the Court of Appeal [of Victoria] decide whether they were involved in an exercise of federal jurisdiction or State judicial power or simply that it did not matter?

³ *Cowen and Zines's Federal Jurisdiction in Australia* (4th ed) GJ Lindell (Federation Press, 2016).

COUNSEL: It was not an issue that arose, your Honour, or that either our learned friends or ourselves referred to. The court did not refer to it.

FRENCH CJ: It is generally a good idea to know.

COUNSEL: We would accept that, your Honour, and we would accept that it is a good idea to know whether it makes any difference in the end or not.

FRENCH CJ: Or what kind of jurisdiction you are exercising. If Justice Gummow were here he would probably put it in far more trenchant terms than I did.⁴

I will come back to *CGU* shortly.

This jurisdiction is not ‘a question of establishing an intention to engage federal jurisdiction or an awareness that this has occurred’. Whether federal jurisdiction has been attracted is a matter of ‘objective assessment’.⁵

You should also be aware of the key provisions of the *Judiciary Act*.

38 Matters in which jurisdiction of High Court exclusive

Subject to sections 39B and 44, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:

- (a) matters arising directly under any treaty;
- (b) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;
- (c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;
- (d) suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth;
- (e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.

...

39 Federal jurisdiction of State Courts in other matters

- (1) The jurisdiction of the High Court, so far as it is not exclusive of the jurisdiction of any Court of a State by virtue of section 38, shall be exclusive of the jurisdiction of the several Courts of the States, except as provided in this section.

⁴ [2015] HCATrans 324.

⁵ *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 [32].

- (2) 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, and subject to the following conditions and restrictions:

...

One hundred and ten years ago, the effect of s 39 was held to be that the jurisdiction which otherwise ‘belonged to’ State courts (s 77(ii)) was taken away and invested as federal jurisdiction subject to conditions (s 77(iii)).⁶

As a result of s 39 of the *Judiciary Act*, where a matter which would otherwise be within the jurisdiction of a State court answers the description of a matter within s 75 or s 76 of the *Constitution*, (and is not otherwise made exclusive to a federal court under s 77(ii) of the *Constitution*), the State court is invested with federal jurisdiction with respect to that matter, to the exclusion of State jurisdiction, by the operation of s 109 of the *Constitution*.

There must of course be a ‘matter’, comprising the justiciable controversy. In many cases that analysis is most relevant to determining the extent of the subject matter of the relevant court’s jurisdiction (what used to be called for the purposes of the Federal Court ‘accrued jurisdiction’ but is better seen as the scope of the ‘matter’).⁷

I need to refer also to s 79 of the *Judiciary Act*:

79 State or Territory laws to govern where applicable

- (1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

...

⁶ *Baxter v Commissioners of Taxation* (1907) 4 CLR 1087, 1137–8 (Griffith CJ, Barton and O’Connor JJ).

⁷ See *Fencott v Muller* (1983) 152 CLR 570, 607–8; see *Rizeq* [2017] HCA 23 [55].

Section 79 has very recently been authoritatively construed by the High Court in *Rizeq* and now has a distinctly narrower field of operation than was previously thought. In *Rizeq*, s 80 of the *Judiciary Act* was left to another day. I will do the same.⁸

How does all this play out in the cases?

I will start with a short but important judgment of the High Court in *LNC Industries Ltd v BMW (Australia) Ltd*.⁹

There was a commercial dispute in the Supreme Court of New South Wales. LNC Industries brought an action against BMW alleging that it held licences granted under the *Customs (Import Licensing) Regulations* to import a certain number of motor vehicles during the quota years 1978 and 1979. This was pre-globalisation. LNC sought a declaration that BMW was obliged in April 1980 to transfer to it units of quota for the importation of passenger motor vehicles. Rogers J gave judgment for the defendant. The plaintiff applied for leave to appeal to the Privy Council. The cause was removed into the High Court. LNC argued that it founded its claim and the defendant founded its defence solely upon the terms of the agreements. It was argued that neither the existence of the contractual rights nor their enforcement depended upon any provision of the *Customs Act 1901* (Cth), so as not to constitute a matter arising under a law made by the Federal Parliament, within the meaning of s 76(ii) of the *Constitution*, and, therefore, that the Supreme Court was not exercising federal jurisdiction.

⁸ It provides:

80 Common law to govern

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

⁹ (1983) 151 CLR 575 ('*LNC Industries*').

If the Supreme Court was exercising federal jurisdiction by virtue of s 39 of the *Judiciary Act* then no appeal lay to the Privy Council.

The High Court held, in a short judgment which is still significant today, that although it was true to say that a matter did not arise under a law made by the Parliament merely because the interpretation of the law was involved, a matter may properly be said to arise under a federal law so as to come within s 76(ii) of the *Constitution* if the right or duty in question in the matter owes its existence to federal law or depends on federal law for its enforcement. This did not mean that the question depended on the form of the relief sought and on whether that relief depended on federal law. If the contract, or trust, is in respect of a right or property which is the creation of federal law, the claim arises under federal law. The subject matter exists as a result of federal law. It was then straightforward for the unanimous High Court (Murphy J agreeing with the reasons of the plurality) to conclude that the contracts were concerned solely with entitlements under the *Customs (Import Licensing) Regulations*. The claim was identified as any benefit accruing as a result of the utilisation of a quota under those *Regulations*. The subject matter of the contracts and of the action arose under and existed only by reason of the provisions of those *Regulations* and of the *Customs Act*. The Act was a law of the Parliament and the *Regulations* were made under it. The *Regulations* were not merely lurking in the background but the very subject of the issue between the parties was an entitlement under the *Regulations*. The Supreme Court was exercising federal jurisdiction because of s 76(ii) of the *Constitution* and the matter was in federal jurisdiction because of the *Customs Act* and the *Regulations*. Therefore s 39(2)(a) of the *Judiciary Act* precluded an appeal to the Privy Council.

Although appeals to the Privy Council are long gone, the principles articulated by the High Court for deciding when a matter is one arising under any laws made by the Parliament remain current.

LNC Industries was recently applied by the High Court in *CGU Insurance Ltd v Blakeley*.¹⁰ (I earlier set out an excerpt from the transcript of argument.)

The question there was whether the Supreme Court of Victoria was authorised to entertain a claim for a declaration, by a plaintiff against a defendant's insurer, that the insurer was liable to indemnify the defendant. As indicated in the transcript I set out earlier, the Supreme Court may well have thought that it was not exercising federal jurisdiction. Why did it matter? Because if that Court was exercising federal jurisdiction then the question arose whether the claim was within the scope of a 'justiciable controversy' capable of constituting a 'matter' for the purposes of federal jurisdiction. It was held that the question raised by the liquidators' claim was one within the subject matter area of federal jurisdiction. Subject to the question of 'matter', it was a matter arising under the *Corporations Act 2001* (Cth). It was held, by the plurality, that the interest upon which the claim for declaratory relief was based and the insurance company's denial of liability under the policy were sufficient to constitute a justiciable controversy between the liquidators and the insurance company involving a question arising under a law of the Commonwealth.¹¹

Thus the High Court's analysis was different to the Court of Appeal's because the existence of federal jurisdiction meant that what had to be looked for were the elements of a 'matter' within the meaning of s 76(ii) of the *Constitution*. The identification of the subject matter of the proceeding was necessary to determine whether judicial power was invoked within its prescribed limits. The reasoning of the primary judge and the Court of Appeal focused on the availability of the relief sought, the declaratory relief. This could only be treated as a surrogate for argument on the question whether the liquidators' claim against the insurance

¹⁰ (2016) 327 ALR 564.

¹¹ [67].

company involved a controversy cognisable in the exercise of federal jurisdiction.

Another important case I should mention briefly is *Felton v Mulligan*.¹² Again the immediate context was whether the applicant could seek leave to appeal to the Privy Council from an order of the Supreme Court of New South Wales. If the Supreme Court had been exercising federal jurisdiction then no appeal lay to the Privy Council. Had the primary judge exercised jurisdiction in a matter arising under any laws made by the Commonwealth Parliament?

Before a decree nisi was made, the parties entered into a deed providing for the payment of maintenance and other benefits to the wife. After her former husband's death, the applicant Felton sought to enforce the deed against the executors. By way of defence, they contended the maintenance agreement was invalid for unlawfully ousting the jurisdiction of the Supreme Court from making a maintenance order under the *Matrimonial Causes Act* (Cth).

The High Court held that the applicability of s 39(2) of the *Judiciary Act* could not be determined once and for all as soon as the proceedings were instituted and the claim made by them was formulated. The 'federal' questions may arise at a later stage, and thereafter the whole matter remains in federal jurisdiction. Here the Commonwealth Act, the *Matrimonial Causes Act*, was the basis of the respondent's defence. The source of the defence which asserted that the defendant was immune from the liability or obligation alleged against him was a law of the Parliament.

The second important principle to flow from this case was that there was no double jurisdiction: the Commonwealth law was to be treated as paramount and as excluding the operation of the law under which the State jurisdiction of the court would be exercised. The laws under which the State courts would exercise

¹² (1971) 124 CLR 367.

their ‘belonging’ jurisdiction — that is, by virtue of the authority derived from the Constitution or law of a State — were made inoperative by s 39(2) of the *Judiciary Act*. There is no State jurisdiction capable of concurrent exercise with the federal jurisdiction invested in the State court.¹³

As Allsop J said in *Macteldir Pty Ltd v Dimovski*:

It is a fundamental tenet of federal jurisdiction that once a federal claim is made, even a bad one, and even one that is abandoned, or struck out, the whole matter in which that claim is made is, and remains, federal jurisdiction.¹⁴

You can see the relevant analysis play out in a commercial context in *Facade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd*,¹⁵ although this now is to be read subject to *Rizeq*.¹⁶

The judgment of the Court of Appeal set out in short order the key steps:

It was accepted by both parties that here the judge was exercising federal jurisdiction. Although the proceeding for summary judgment was brought under the [*Building and Construction Industry Security of Payment Act 2002*] ... in a State Court the reliance upon s 553C of the *Corporations Act*, and the allegation of an inconsistency under s 109 of the *Constitution*, converted the entire proceedings to a proceeding in federal jurisdiction within the meaning of s 76(i), s 76(ii) and s 77(iii) of the *Constitution*. Federal jurisdiction was exercised by the Court pursuant to s 39(2) of the *Judiciary Act 1903* (Cth). The laws applicable to the proceeding are those provided for under s 79(1) of the *Judiciary Act* ...¹⁷

The Court of Appeal ultimately held that the State Act, the *Building and Construction Industry Security of Payment Act 2002* (Vic), was inconsistent with the *Corporations Act 2001* (Cth) so that the company could not enforce a claim under the State Act.

¹³ 373–4 (Barwick CJ), 412–13 (Walsh J).

¹⁴ (2005) 226 ALR 773 [36].

¹⁵ (2016) 337 ALR 452 [92]–[98] (*‘Façade Treatment’*).

¹⁶ *Rizeq v Western Australia* [2017] HCA 23 (21 June 2017).

¹⁷ *Façade Treatment* (2016) 337 ALR 452 [92].

One can see an example in the High Court of s 76(i) federal jurisdiction (a matter arising under the *Constitution* or involving its interpretation) in *British American Tobacco Australia Ltd v Western Australia*.¹⁸

In that case, in the Supreme Court of Western Australia the question was whether the company had complied with s 6(1) of the *Crown Suits Act 1947* (WA). Section 6 of that Act provided that no right of action lay against the Crown unless the party proposing to take action gave, as soon as practicable or within three months after the cause of action accruing, written notice containing certain information. The State Supreme Court entered summary judgment against the company on the basis that s 6 had not been complied with.

The issue in the High Court was whether that section was relevant at all. What was overlooked in the Full Court of Western Australia was that the proceedings were in federal jurisdiction and the State Act therefore did not directly apply. The question became whether the provisions of the State Act were picked up and rendered applicable by federal law. That question was not addressed in the State Full Court.

Why were the proceedings in federal jurisdiction? There was a claim to declaratory relief respecting the invalidity of the *Business Franchise (Tobacco) Act 1975* (WA). The claim was for repayment of licence fees under the State legislation said to be invalid because of s 90 of the *Constitution* which confers exclusive power upon the Commonwealth Parliament to impose duties of excise. The High Court had decided in *Ha v New South Wales*¹⁹ that the licence fees were duties of excise. The plurality in *British American Tobacco* said that the company's action for monies had and received was a claim that 'arises under' the *Constitution* because the asserted obligation to repay would not exist were it not for the operation of s 90 of the *Constitution* to invalidate the State

¹⁸ (2003) 217 CLR 30.

¹⁹ (1997) 189 CLR 465.

legislation, applying *LNC Industries*.²⁰ The matter was therefore one arising under the *Constitution* within s 76(i). The jurisdiction that was enlivened when the proceedings were commenced in the Supreme Court of Western Australia was the jurisdiction given to the State Court by s 39(2) of the *Judiciary Act*.

The plurality held that s 39(2) of the *Judiciary Act* was a law of the Commonwealth which ‘otherwise provided’ within s 79 of the *Judiciary Act* and thus the relevant provisions of the *Crown Suits Act* were not picked up by s 79.

It was held by the High Court that the company had a right to proceed against the State and that right did not depend upon and was not subject to the *Crown Suits Act*. It followed that there should not have been summary judgment for the State.

I now turn briefly from s 76(i) to s 75(iii) of the *Constitution*. The question now is the identity of the party (a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party). An important case is *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*.²¹

At that time the *Corporations Law 1990* (Vic) provided that ‘the Court’ on the application of the Australian Securities and Investments Commission (‘ASIC’) might make orders where a person had acquired shares in a company in contravention of s 615. ASIC applied for declaratory relief in relation to contravention of s 615 (the prohibition provision) and injunctive relief under ss 737, 739 (the remedial provisions). A judge of the Federal Court had made an order. On appeal to the Full Court of the Federal Court it was held that, because of the collapse of the cross-vesting scheme in *Re Wakim; Ex parte McNally*,²²

²⁰ Ibid [39].

²¹ (2001) 204 CLR 559.

²² (1999) 198 CLR 511 (‘*Re Wakim*’).

the judge lacked jurisdiction to make the orders under either s 737 or s 739 of the *Corporations Law* (Vic) or to hear the proceeding. The essential reasoning of the Full Court, *Edensor Nominees Pty Ltd v Australian Securities and Investments Commission*,²³ was that s 58AA of the *Corporations Law*, when read with the substantive provisions to which it attached, including ss 737 and 739, purported to confer on the Federal Court the jurisdiction of the State of Victoria. It empowered the court to make orders under provisions such as ss 737 and 739 only when it is ‘exercising the jurisdiction’ of that State. That was held not to be accrued federal jurisdiction but State jurisdiction.

The High Court considered first the status of ASIC. It was held to answer the description of ‘the Commonwealth’ in s 75(iii) of the *Constitution*. It was then held that s 77(i) of the *Constitution* supported s 39B(1A)(a) of the *Judiciary Act*. That provision conferred original jurisdiction on the Federal Court of Australia in any matter: (a) in which the Commonwealth is seeking an injunction or a declaration.

It was held that the Federal Court was exercising federal jurisdiction so conferred.

The plurality then turned to consider the content of the ‘matter’. After querying the appropriateness of the continued use of the term ‘accrued jurisdiction’, (because, on analysis, there is one ‘matter’) particularly where federal jurisdiction is attracted by the identity of the parties or a party, the plurality said that the substance of the dispute was provided by ASIC’s contention that there had been contraventions of s 615 of the *Corporations Law* and that those contraventions should be answered by the administration of declaratory and injunctive remedies. In the present litigation, s 79 of the *Judiciary Act* operated to ‘pick up’ the remedial provisions of the laws of Victoria because the Federal

²³ (1999) 95 FCR 42 [25].

Court was exercising federal jurisdiction in that State. That reasoning was explained in *Rizeq*,²⁴ in the judgment of the plurality, as meaning that s 615, the prohibition provision, was beyond the scope of s 79 of the *Judiciary Act* and its status as a law of Victoria applicable to that conduct was unaffected by the invocation of federal jurisdiction. In other words, it applied directly as a State law. It was only ss 737 and 739, the remedial provisions, which were rendered applicable by force of s 79 of the *Judiciary Act*.

While on the subject of the scope of the ‘matter’, recall that in *Re Wakim*, the High Court held that the three ‘separate’ proceedings were within the jurisdiction of the Federal Court, those proceedings being: (1) proceedings in the Federal Court against the Official Trustee seeking orders under ss 176, 178 and 179 of the *Bankruptcy Act* and claims against the Official Trustee in negligence; (2) proceedings against Mr Darvall QC for negligence; and (3) proceedings against partners in the firm of solicitors for negligence.²⁵ Gummow and Hayne JJ held that there was no warrant for holding that federal jurisdiction ended as soon as a new party (against whom no federal claim was made) was added. It was held that the three cases arose out of one set of events and that therefore they were within the (federal) jurisdiction of the Federal Court.

I come next to *Burns v Corbett*, a tribunal case.²⁶ In the New South Wales Court of Appeal, this concerned the question of federal jurisdiction by reason of s 75(iv) of the *Constitution* — a matter between residents of different States — and whether the New South Wales Civil and Administrative Tribunal (‘NCAT’) could hear and determine the dispute. But that point was not taken until at least a year of litigation. The point was taken and heard and determined for the first time in (a) an appeal pending in the Court of Appeal; and (b) as a question

²⁴ *Rizeq* [98].

²⁵ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

²⁶ (2017) 316 FLR 448 (an application for special leave to appeal has been granted: *Burns v Gaynor* [2017] HCATrans 136 (22 June 2017)).

removed from Mr Burns' prosecution of Ms Corbett for contempt in the Supreme Court for failing to apologise, as ordered. There were two distinct proceedings, each commenced by Mr Burns: he complained to the Anti-Discrimination Board of New South Wales about statements made by Ms Corbett and Mr Gaynor, which he claimed were public acts which vilified homosexuals contrary to s 49ZT of the *Anti-Discrimination Act 1977* (NSW). Both complaints were referred to NCAT. Mr Burns was a resident of NSW, Ms Corbett was a resident of Victoria and Mr Gaynor was a resident of Queensland.

The question was whether NCAT could determine a dispute arising under the *Anti-Discrimination Act 1977* (NSW) between residents of different States. It was common ground that NCAT was not a 'court of a State' within s 77(iii) of the *Constitution*, but that it was exercising judicial power. It was held that it was impossible for a State tribunal which is not a 'court of a State' to exercise the judicial power of the Commonwealth. It was held that the effect of s 39 of the *Judiciary Act* and s 109 of the *Constitution* was to deny the State tribunal jurisdiction because it would 'alter, impair or detract from' and therefore be inconsistent with the investment of federal jurisdiction in State courts by s 39(2) of the *Judiciary Act*. It was held that there was no operative power to refer a complaint from the Anti-Discrimination Board to NCAT, nor for NCAT to determine a complaint which has been referred, nor for NCAT's order purporting to determine such a complaint to be enforced.

An application for special leave to appeal to the High Court was granted on 22 June 2017.

Why would the result be different in Queensland? Because in *Owen v Menzies*,²⁷ it was held that QCAT was a 'court' of the State for the purposes of s 77(iii) of the *Constitution*. Section 164 of the *Queensland Civil and*

²⁷ [2013] 2 Qd R 327.

Administrative Tribunal Act 2009 (Qld) provides: ‘the tribunal is a court of record’. Thus, federal jurisdiction may be conferred on QCAT in matters arising under ss 75 and 76 of the *Constitution*.

In *Rizeq*, the recent decision of the High Court which I have mentioned earlier, Mr Rizeq was a resident of New South Wales who was indicted in Western Australia on two charges of offences in Western Australia against s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA). A jury of 12 was unable to reach a unanimous verdict on either charge. The decisions of 11 of the 12 jurors were taken to be verdicts of guilty under s 114(2) of the *Criminal Procedure Act 2004* (WA). Mr Rizeq was convicted of both offences.

His argument in the High Court was that s 80 of the *Constitution* applied to require a unanimous verdict of the jury: this was because the District Court of Western Australia was exercising federal jurisdiction in his trial so that, it was submitted, Western Australian law was incapable of valid application to the determination of his criminal liability. The argument was that s 6(1)(a) of the *Misuse of Drugs Act* was applicable because it was picked up by s 79 of the *Judiciary Act* with the result that the trial in the Western Australian Court was a trial on indictment of offences against a law of the Commonwealth to which s 80 of the *Constitution* applied to require the verdicts of the jury to be unanimous.

Why was it federal jurisdiction? Because it was a matter between a State and a resident of another State within the meaning of s 75(iv) of the *Constitution*. Did Mr Rizeq’s argument succeed so that unanimous verdicts were required? No, it did not.

The High Court took the opportunity to state comprehensively how s 79 of the *Judiciary Act* works. There were three judgments, one by Kiefel CJ, the next by

the plurality, Bell, Gageler, Keane, Nettle and Gordon JJ, and the third by Edelman J.

In essence, the plurality explained:

The short answer to Mr Rizeq's argument is that s 6(1)(a) of the *Misuse of Drugs Act* applied to impose criminal liability on him as a law of Western Australia at the time of his offences and continued to apply to govern his criminal liability notwithstanding that the jurisdiction subsequently exercised by the District Court to resolve the controversy between him and the State of Western Australia about the existence and consequences of that criminal liability was federal jurisdiction.

Notwithstanding that the District Court was exercising federal jurisdiction in conducting the trial and entering the convictions, s 79 of the *Judiciary Act* was not needed, and was not engaged, to pick up and apply the text of s 6(1)(a) of the *Misuse of Drugs Act* as a law of the Commonwealth. The trial was of offences against a law of a State and not of offences against a law of the Commonwealth, and s 80 of the Constitution had no application.

That the District Court was exercising federal jurisdiction in conducting the trial did, in contrast, mean that s 79 of the *Judiciary Act* was needed, and was engaged, to pick up and apply the text of s 114(2) of the *Criminal Procedure Act* as a law of the Commonwealth. As a consequence, the decisions of 11 of the 12 jurors were properly taken by the District Court to be verdicts of guilty.²⁸

I will attempt a summary of the key steps in the plurality judgment:

- (1) it is essential to distinguish between 'jurisdiction' as used in Ch III of the *Constitution* and the power that a court exercises: 'jurisdiction' as so used is the authority to decide;
- (2) the authority of the Western Australian court to decide the controversy, its 'jurisdiction', was federal because there was a matter within s 75(iv) of the *Constitution*;
- (3) the investment of federal jurisdiction is not a direction as to the law to be applied;
- (4) State laws by virtue of the constitutional structure (importantly ss 106 and 107 of the *Constitution*) form part of the single composite body of

²⁸ [40]-[42].

- federal and non-federal law that is applicable to cases determined in the exercise of federal jurisdiction in the same way, and for the same reason, as they form part of the same single composite body of law that is applicable to cases determined in the exercise of State jurisdiction;
- (5) s 6(1)(a) of the *Misuse of Drugs Act* applied because it was a law having application independently of anything done by a court and because it was a law squarely within State legislative competence (and was therefore outside the operation of s 79 of the *Judiciary Act*). It applied in the trial of Mr Rizeq as Western Australian law just as it applied to him before any court was called upon to exercise jurisdiction in relation to the charges brought against him;
 - (6) Ch III of the *Constitution* has an exclusory operation; that exclusory operation means that a State Parliament is not able to add to or detract from federal jurisdiction: s 109 of the *Constitution* is not necessary for that purpose;
 - (7) s 51(xxxix) of the *Constitution*, the express incidental power, does not permit the Commonwealth Parliament to impose liabilities or confer rights on persons who are parties to a justiciable controversy merely because the adjudication of the controversy is or has come within the purview of Ch III;
 - (8) that incapacity explains the necessity for s 79 of the *Judiciary Act* which fills a gap governing the actual exercise of federal jurisdiction, which gap exists by reason of the absence of State legislative power;
 - (9) s 79 of the *Judiciary Act* has a limited field of operation: here it did not operate to pick up the offence provision, s 6(1)(a) of the *Misuse of Drugs Act*;
 - (10) s 79 of the *Judiciary Act* did however operate to apply s 114(2) of the *Criminal Procedure Act*: that section could not otherwise apply to a State court exercising federal jurisdiction because it was beyond the

competence of the State Parliament to so provide: s 79 filled that gap, being the gap governing the actual exercise of federal jurisdiction, the “manner of exercise” of federal jurisdiction.

Rizeq will not be the last word on the operation of Ch III of the *Constitution* and s 79, even in relation to State courts exercising federal jurisdiction. But it is certainly one that will endure. One outstanding question is whether there is a relevant practical distinction between the second and third constructions of s 79 identified by Edelman J. The second construction is that the laws to which s 79(1) refers are those statutory laws which confer powers on courts or which govern or regulate a court’s powers and the third construction is that the laws to which s 79(1) refers are only those statutory laws which govern or regulate the powers that a court (in that case, a State court) exercises as part of its authority to decide. Edelman J preferred the third construction and said the plurality preferred the second.

As I read the plurality in *Rizeq*, s 79 of the *Judiciary Act* would remain necessary in the case of a legislative provision which, as described by Dixon J,²⁹ performs a double function, namely to deal with substantive liabilities or substantive legal relations and to give jurisdiction with reference to them.

In case you may think that the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) means you do not have to worry about which court you are in, you need to be aware of the structure of that Act.

The starting point is s 4, which invests the Supreme Courts with federal jurisdiction with respect to a civil matter where the Supreme Court would not, apart from s 4, have jurisdiction with respect to that matter. That leaves the jurisdiction invested in those courts by s 39 of the *Judiciary Act* unaffected in the sense that s 4 of the *Jurisdiction of Courts (Cross-vesting) Act* has no work

²⁹ *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141, 165-166.

to do in such a case. Then be aware that s 4 does not apply to matters arising under Commonwealth fair work legislation, the Commonwealth *Native Title Act* and, broadly, certain matters arising under Pt IV of the *Competition and Consumer Act*.

You must also be aware of special federal matters. In the *Jurisdiction of Courts (Cross-vesting) Act* ‘special federal matter’ means (s 3):

- (a) a matter arising under Part IV of the *Competition and Consumer Act 2010* (other than under section 45D, 45DA, 45DB, 45E or 45EA); or
- (aa) a matter arising under the Competition Code (as defined in section 150A of the *Competition and Consumer Act 2010*) of the Australian Capital Territory or the Northern Territory; or
- (ab) a matter arising under section 60G of the *Family Law Act 1975* in a court other than the Family Court of Western Australia or the Supreme Court of the Northern Territory; or
- (b) 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 or a person holding office under an Act, 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; or
- (c) a matter arising under the *Administrative Decisions (Judicial Review) Act 1977*; or
- (e) a matter that is within the original jurisdiction of the Federal Court by virtue of section 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 this Act, have jurisdiction.

Section 6 concerns special federal matters and where such a matter for determination in a proceeding is pending in the Supreme Court of the State or Territory the court must transfer so much of the proceeding as is within the jurisdiction of the Federal Court to the Federal Court, unless the Supreme Court is satisfied that there are special reasons for ordering that the proceeding be determined by it ‘in the particular circumstances of the proceeding other than reasons relevant to the convenience of the parties’.

And, for appeals, you need to be aware of s 7 and of the Commonwealth legislation in the Schedule to the *Jurisdiction of Courts (Cross-vesting) Act*. Those Acts deal with intellectual property, family law, shipping registration et cetera.

In certain areas of ‘exclusive’ jurisdiction: patents,³⁰ family law³¹ and insolvency,³² you may well need to pay close attention to the terms of the cross-vesting legislation.

Also bear in mind that while the State legislature may not confer State jurisdiction on federal courts,³³ as I have explained, s 77(iii) of the *Constitution* expressly permits the Commonwealth Parliament to make laws investing any court of a State with federal jurisdiction. As I have already noted, the Commonwealth did this with the enactment of s 39(2) of the *Judiciary Act* in 1903.

Finally, on the general importance of federal jurisdiction:

- (i) because of the effect of *R v Kirby; Ex parte Boilermakers’ Society of Australia*³⁴ and *Queen Victoria Memorial Hospital v Thornton*,³⁵ the Federal Parliament cannot vest non-judicial power when it vests a State court with federal jurisdiction;
- (ii) the ability of State courts to exercise federal jurisdiction has resulted in extending to them some aspects of the separation of powers doctrine, because of *Kable v Director of Public Prosecutions (NSW)*,³⁶ which is still evolving.

³⁰ *Bramco Electronics Pty Ltd v ATF Mining Electrics Pty Ltd* (2013) 86 NSWLR 115.

³¹ *Eberstaller v Poulos* (2014) 87 NSWLR 394.

³² *Truthful Endeavour Pty Ltd v Condon (Trustee) Re Rayhill (Bankrupt)* (2015)233 FCR 174.

³³ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

³⁴ (1956) 94 CLR 254.

³⁵ (1953) 87 CLR 144.

³⁶ (1996) 189 CLR 51.

FURTHER READING

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Authority to Decide: The Law of Jurisdiction in Australia Mark Leeming (The Federation Press, 2012)

The Federal Judicature James Stellios (LexisNexis Butterworths, 2010)

Justice Ronald Sackville "The re-emergence of federal jurisdiction in Australia" (2001) 21 *Australian Bar Review* 133

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Commonwealth Constitution ss 71, 75, 76, 77, 109

Judiciary Act 1903 (Cth) ss 38, 39, 79

Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)

Baxter v Commissioners of Taxation [1907] HCA 76; 4 CLR 1087

Re Judiciary and Navigation Acts [1921] HCA 20; 29 CLR 257

Felton v Mulligan [1971] HCA 39; 124 CLR 367

Fencott v Muller [1983] HCA 12; 152 CLR 570

LNC Industries Ltd v BMW (Australia) Ltd [1983] HCA 31; 151 CLR 575

Re Wakim; Ex parte McNally [1999] HCA 27; 198 CLR 511

Australian Securities and Investments Commission v Edensor Nominees Pty Ltd [2001] HCA 1; 204 CLR 559

British American Tobacco Australia Ltd v Western Australia [2003] HCA 47; 217 CLR 30

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Rizeq v State of Western Australia [2017] HCA 23