

# THE HIGH COURT ON CONSTITUTIONAL LAW: THE 2001 TERM

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## Introduction

The title is not my own. George Williams gave it to me. He imported it from the United States. The “Supreme Court Term” is published in each edition of the Harvard Law Review. The publication began in the 1949 edition as a student note setting out statistics on the workload of the Supreme Court during its 1948 Term and containing summaries of selected cases grouped by subject matter.<sup>1</sup> The note was accompanied three years later by a foreword written by Paul Freund<sup>2</sup> prompted by the momentous decision of the Supreme Court in the *Steel Seizure Case*.<sup>3</sup> Since then the note has become more comprehensive and the foreword has become more formidable. For the most part the foreword has served to chronicle and to criticise the recent work of the Supreme Court in times mundane as well as in times exciting.

“The Supreme Court has ground through another term”

commenced Erwin Griswold in relation to the 1959 Term.<sup>4</sup>

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<sup>1</sup> “The Supreme Court, 1948 Term” (1949) 63 Harvard L Rev 120.

<sup>2</sup> (1952) 66 Harvard L Rev 89.

<sup>3</sup> *Youngstown Sheet & Tube Co v Sawyer* (1952) 343 US 579.

<sup>4</sup> (1960) 74 Harvard L Rev 8.

“On March 26, 1962 the Supreme Court startled the nation with the announcement of its decision in *Baker v Carr*.”

commenced Robert McCloskey of the 1961 Term.<sup>5</sup> Turning to style rather than substance:

“The opinions in the 1994 Term of the Supreme Court were redolent of first principles and revolutionary gesture”

wrote Charles Fried.<sup>6</sup> At times the foreword has served as a platform for great and original legal scholarship bearing only the most colourable connection to anything done by the Supreme Court during the relevant Term. Perhaps the most notable example is Alexander Bickel’s foreword to the “Supreme Court 1960 Term” subtitled “The Passive Virtues”.<sup>7</sup>

Translation of this tradition to Australia raises a couple of questions. One is a question of definition. The Supreme Court of the United States has a defined Term: from the first Monday in October to “adjournment Monday” in the middle of June. Cases are heard and determined in the same Term. The High Court has an annual calendar of sittings but it does not have a Term. Cases are heard when they are listed and determined when the Court is ready to deliver judgment. The delivery of judgment is now generally within six months of the hearing but very often not in the same calendar year. Does one focus on the time of hearing or the time of determination or some combination of the two? In the interests of precision, I have chosen to focus on the time of determination alone.

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<sup>5</sup> (1962) 76 Harvard L Rev 54.

<sup>6</sup> (1995) 109 Harvard L Rev 13.

I therefore take the High Court's 2001 Term' to refer to cases determined by the High Court during the 2001 calendar year.

I take the "High Court on Constitutional Law" to refer to that subset of cases decided by the High Court in the application of legal principle identified by the Court as being derived from the Commonwealth Constitution. That definition is framed deliberately to take in a wider category of cases than those simply involving matters falling within the constitutional description of "a matter arising under this Constitution or involving its interpretation". As I will seek to show, there is such a wider category of cases and it is growing.

The more difficult question is one of content. Does one deliver the note or the foreword? I have no head for statistics and I am too old for case notes. So, the foreword it is!

Eschewing – if only for reasons of self-preservation – any robust critique of the recent judgments of the Court, what I hope to achieve is to draw together some of the recent themes that emerge from those judgments. Those themes are illustrated by the cases decided in 2001. They did not emerge for the first time in 2001. They have been emerging for some years.

On any view, 2001 was not a watershed year. The High Court did not in 2001 "startle the nation". We had enough of that in 1999 when the cross-vesting legislation, having worked innocuously and efficiently for more than a decade, was declared in *Re*

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<sup>7</sup> (1961) 75 Harvard L Rev 40.

*Wakim; Ex parte McNally*<sup>8</sup> to contravene a fundamental principle of separation of state and federal judicial power enshrined in Chapter III of the Constitution. The national enforcement of the Corporations Law was thrown into chaos. We were driven back to what former Chief Justice Mason once described as the “arid jurisdictional disputes” of the late 1970s and early 1980s. There are those of us who thrive in that arid zone: the succulents or cacti of the law depending on your perspective. There are others for whom it is thirsty work indeed.

The subject matter of a number of the cases determined in and leading up to 2001, was the aftermath of *Wakim*. The subject matter of other cases was the aftermath of *Mabo* decided a decade ago when the High Court was very differently constituted. The hundredth year of the Constitution and the ninety-seventh year of the High Court was a time not for revolutionary change but for mopping up. The big picture had already been mapped out. It was time to tie up loose ends, to patch up the ship of state and to fill in the detail.

The very existence of the detail is something that is itself worthy of note. There is no doubt that High Court judgments have become longer and more complex in their construction. The decision of the High Court in September 2001 in *Re Patterson; Ex parte Taylor*<sup>9</sup> provides a useful although admittedly extreme example. The High Court there appears to have overruled *Nolan v Minister for Immigration and Ethnic Affairs*<sup>10</sup> decided by a differently constituted High Court in 1988. In *Nolan* there was a joint judgment of six members of the Court. There was a sole dissent. The totality occupies 12 pages of the Australian Law Reports. There are no footnotes. In *Patterson*, in so far

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<sup>8</sup> (1999) 198 CLR 511.

<sup>9</sup> (2001) 75 ALJR 1439.

as it dealt with the *Nolan* point, there were four judgments in the majority. In dissent there were two. The discussion of the *Nolan* point occupies about 140 pages of the Australian Law Reports and in excess of 250 footnotes. It is clear enough that the majority rejected the proposition for which *Nolan* once stood: that a person who was not an Australian citizen was thereby an “alien” for the purposes of section 51(xix) of the Constitution. What the majority put in its place is by no means clear. If there is a ratio, I cannot find it.

Through the thicket of detail broad themes do emerge. I want to take up two of them. They are not the only or perhaps even the most obvious ones. Plenty will be left for whoever has the job of dealing with the 2002 Term. The two themes I want to deal with are very much related. One is the evolving recognition of the Commonwealth Constitution as the source of much wider legal principle than that which traditionally has been seen to be the province of constitutional law. The other is the predominance within the Commonwealth Constitution of Chapter III and the importance of federal jurisdiction to the resolution of substantive legal issues.

Let me deal with the themes in that order allowing for a certain amount of spillage from one to the other.

### **Constitution as source of legal principle**

*Pfeiffer v Stevens*<sup>11</sup> was amongst the last batch of cases to be decided by the High Court in 2001. It was handed down on Friday 13 December. It was case about the

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<sup>10</sup> (1988) 165 CLR 178.

<sup>11</sup> [2001] HCA 71.

construction of one section of one state Act. At issue was the power of a state minister to extend the period for which particular delegated legislation was to remain in force. There was no federal element. In four judgments, one of them joint, the court split three-two. Justice Kirby said this:<sup>12</sup>

“It is important to approach the problem in the context of the relevant constitutional norms. In Australia, the legitimacy and authority of all law must ultimately be traced to, or be consistent with, the federal Constitution. That document envisages the Constitutions of the States and the power of the Parliaments of the States to make laws that will bind the people of the Commonwealth, and others, in and in relation to those States.”

Justice Kirby went on to identify in the structure of the Commonwealth Constitution certain “presuppositions” which he then used to derive a particular rule of statutory construction which was to govern the construction of the particular state statute with which he was concerned. Justice Kirby was in dissent in the result together with Justice Gummow. Justice Kirby’s reasons for judgment are stamped with his personal style and display his characteristic tendency to find very big answers to even very little questions. But in his invocation of the context of the Commonwealth Constitution as governing or at least guiding the development of broader legal principle, his Honour was expressing no maverick view. He was expressing what is now constitutional orthodoxy.

Two of the cases decided by the High Court in 2001 directly concerned state constitutions.<sup>13</sup> In *Durham Holdings Pty Ltd v New South Wales*<sup>14</sup> the Court unsurprisingly held that a state parliament could acquire property without compensation.

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<sup>12</sup> At 103.

<sup>13</sup> Appearing in the written version of this lecture with a lower case “s” and a lower case “c” not to be perjorative but to be generic.

<sup>14</sup> (2001) 177 ALR 436.

In *Yougarla v Western Australia*<sup>15</sup> the Court trod a tortuous path through colonial legal history to hold that the Western Australian legislature had in 1905 validly repealed a provision of the Constitution Act 1889 (WA) requiring one percent of the state's gross revenue to be "appropriated to the welfare of the aboriginal natives". Most interesting about both cases was the Court's unquestioning acceptance of the proposition that state constitutions derive their force from section 106 of the Commonwealth Constitution. According to the joint judgment in *Durham Holdings*:<sup>16</sup>

"[i]t is to that Constitution that the states owe their existence, and s 106 continues, subject to the Constitution, '[t]he Constitution of each State of the Commonwealth'."

It followed that acceptance of the novel submission that state parliaments were subject to a common law limitation on the exercise of their powers "would not be the development of the common law of Australia".<sup>17</sup>

"[r]ather, it would involve modification of the arrangements which comprise the Constitutions of the States within the meaning of s 106 of the Constitution, and by which the state legislatures are erected and maintained, and exercise their powers."

But it all goes much deeper than that. If we go back a few years to 1997 to *Lange v Australian Broadcasting Corporation*<sup>18</sup> we find the entire High Court saying this:<sup>19</sup>

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<sup>15</sup> (2001) 181 ALR 371.

<sup>16</sup> At [10].

<sup>17</sup> At [13].

<sup>18</sup> (1997) 189 CLR 520.

“The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form ‘one system of jurisprudence’. Covering cl 5 of the Constitution renders the Constitution ‘binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State’. Within that single system of jurisprudence, the basic law of the Constitution provides the authority for the enactment of valid statute law and may have effect on the content of the common law.”

It followed that:

“Of necessity, the common law must conform with the Constitution. The development of the common law in Australia cannot run counter to constitutional imperatives. The common law and the requirements of the Constitution cannot be at odds.”

The High Court in that case rejected the majority view in *Thephanous*<sup>20</sup> that the implied freedom of political communication gave rise to a constitutional defence to a defamation action. Instead, the High Court said that the common law of defamation in Australian was itself to be developed to conform to the constitutional freedom. The notion implicit in this that there is a single “common law of Australia” was explicitly confirmed in 1999 in *Lipohar v The Queen*.<sup>21</sup> The idea was then taken further in 2000 in *John Pfeiffer Pty Ltd v Rogerson*.<sup>22</sup> There the constitutional text and structure – and, in particular, notions drawn from Chapter III – were elaborately employed to mould a choice of law rule for the “common law of Australia” which made the law of the place of the tort the governing law of torts committed in Australia. The choice of law rule is in substance no different from that explained by former Chief Justice Mason in *McKain v R. W. Miller & Co (SA)*

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<sup>19</sup>

At 564.

<sup>20</sup>

*Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

<sup>21</sup>

(1999) 200 CLR 485.

<sup>22</sup>

(2000) 203 CLR 503.

*Pty Ltd*<sup>23</sup> and *Stevens v Head*<sup>24</sup> simply by reference to considerations of commonsense and public policy. Chief Justice Mason sought to fashion a common law rule against the background of the Commonwealth Constitution. In *Pfeiffer* the Commonwealth Constitution was not just in the background. It was the driving factor. The joint judgment in *Pfeiffer* went so far as to say this:<sup>25</sup>

“The matters we have mentioned as arising from the constitutional text and structure may amount collectively to a particular constitutional imperative which dictates the common law choice of law rule which we favour. It may be that those matters operate constitutionally to entrench that rule, or aspects of it concerning such matters as a ‘public policy exception’. If so, the result would be to restrict legislative power to abrogate or vary that common law rule.”

So there we were left – and are still left – with the tantalising prospect of the Commonwealth Constitution moulding a rule of the common law of Australia which is then beyond the competence of an Australian legislature to abrogate or vary.

We see the same ideas, albeit in glimpses, in 2001. In *ABC v Lenah Game Meats Pty Ltd*,<sup>26</sup> a case about interlocutory injunctions, Justice Kirby said:<sup>27</sup>

“This Court has said repeatedly that the common law must conform to the *Constitution*. There is no reason to adopt a different rule in the case of the principles of equity, so far as they still influence the grant of interlocutory injunctions provided pursuant to statute.”

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<sup>23</sup> (1991) 174 CLR 1.

<sup>24</sup> (1993) 176 CLR 433.

<sup>25</sup> At [70].

<sup>26</sup> (2001) 76 ALJR 1.

<sup>27</sup> At [192].

The Constitution controls the common law and it controls equity. Justice Kirby said much the same sort of things in *Palmer Bruyn & Parker Pty Ltd v Parsons*,<sup>28</sup> a case about the elements of the tort of injurious falsehood.<sup>29</sup> Again, it was just Justice Kirby. But, again, he was not being idiosyncratic. He just says it more often.

Is there is at work an element of constitutional imperialism? Or is the Commonwealth Constitution finally coming to be viewed as it should: not simply as an instrument establishing and regulating institutions of government but as the foundation of the entire Australian legal order? What is clear is that the Constitution – once thought to regulate only the affairs of government - is encroaching indirectly but increasingly on areas of private law.

More dramatic still has been the constitutionalisation of administrative law. A decade ago former Chief Justice Brennan drew a parallel between judicial review of administrative action and judicial review of legislative action. He said they were each rooted in the principle in *Marbury v Madison*: that it is the province and duty of the judiciary to declare and enforce the law including the law that governs the limits of a repository's powers. The province and duty of the judiciary is the same whether the law that governs those limits is found in a statute or in a constitution. Judicial review is rooted in the nature of the judicial function: it is an aspect of the rule of law.<sup>30</sup>

After lying dormant for a few years the idea has taken root. With the possible exception of Justice Kirby current members of the High Court have openly embraced

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<sup>28</sup> [2001] HCA 69 at [131].

<sup>29</sup> See also *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 75 ALJR 889 at [172]; *Cheung v The Queen* [2001] HCA 67 at [93], [116].

<sup>30</sup> *Attorney-General (NSW) v Quin* (1990) 170 CLR at 35 – 36.

Chief Justice Brennan's conception.<sup>31</sup> First principles are therefore seen to found the nature and scope of judicial review on the nature and scope of the judicial function. But to found the judicial review of administrative action on the nature and scope of the judicial function is to found it in the federal sphere on Chapter III of the Commonwealth Constitution. There has been a renewed focus in particular on section 75(v) which gives to the High Court an entrenched original jurisdiction to grant writs of prohibition or mandamus or injunctions against officers of the Commonwealth. The writs were once known as the "prerogative writs". Over the last couple of years they have been rebadged as the "constitutional writs". Over the last couple of years it has also been made clear that the whole basis for granting the writs is to prevent an officer of the Commonwealth from exceeding or refusing to exercise his or her power or jurisdiction: in short, to provide a remedy for "jurisdictional error".<sup>32</sup>

In 2001 section 75(v) was taken just a little bit further. In *CFMEU v Australian Industrial Relations Commission*<sup>33</sup> at the end of an otherwise unremarkable judgment all seven members of the High Court repeated something that had been said a few years ago but added considerably more emphasis and clarity. What the Court said this:<sup>34</sup>

" ... relief by way of prohibition is not relief for the enforcement of a right or duty created or conferred by statute. Rather, the right in issue when relief is sought by way of prohibition is the right conferred by s 75(v) of the Constitution to compel an officer of the Commonwealth to observe the limits of that officer's power or jurisdiction. The corresponding duty to observe those limits also derives from section 75(v)".

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<sup>31</sup> I have explored this elsewhere: Gageler, "The Legitimate Scope of Judicial Review" (2001) 21 Australian Bar Review 279.

<sup>32</sup> e.g. *Re Refugee Review Tribunal; Ex parte Aala* (2000) 176 ALR 219.

<sup>33</sup> (2001) 75 ALJR 670.

This is a very grand conception. Section 75(v) has become more than a source of jurisdiction for the High Court to grant relief in a case of jurisdictional error on the part of an officer of the Commonwealth. It has become the source of the officer's duty to observe that officer's jurisdictional limits. Chapter III of the Constitution it seems has become the source of a substantive legal duty. A Commonwealth officer, it seems, must stay within the limits of the jurisdiction set by a Commonwealth statute not because Parliament has told him to but because section 75(v) says he must.

True to that grand conception and to its great credit the High Court in 2001 stoically trudged its way through a mountain of immigration cases brought within its original jurisdiction under section 75(v). This mountain of cases was the direct result of the denial of jurisdiction to the Federal Court by Part 8 of the Migration Act 1958 (Cth). If section 109 cases were once the "running down jurisdiction" of the High Court then section 75(v) cases were in 2001 its contemporary equivalent. In May 2001 the High Court cleverly reinterpreted Part 8 of the Migration Act so as to expand the jurisdiction of the Federal Court<sup>35</sup> only to find Part 8 completely repealed and replaced in October.<sup>36</sup> What replaced it were provisions designed substantially to eliminate judicial review in the High Court as well as the Federal Court. There is another case in that.

### **Predominance of Chapter III and importance of federal jurisdiction**

I have touched already on Chapter III and on federal jurisdiction. Let me now move to my second theme more directly. As is apparent to anyone who looks at its text, the Commonwealth Constitution allocates power in two basic ways. There is an

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<sup>34</sup> At [43].

<sup>35</sup> *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 180 ALR 1 at [76] – [84].

allocation between the Commonwealth and the states. There is separately for the Commonwealth an allocation between the legislature, the executive and the judiciary: Chapter I, Chapter II, and Chapter III.

When Leslie Zines taught me constitutional law 20 years ago we were very much concerned with the former. We devoted very little attention to the latter. It just wasn't interesting. *Dignans case*<sup>37</sup> had long since made it clear that Chapter I and Chapter II pretty much worked together in harmony. The *Boilermaker's case*<sup>38</sup> had shown that Chapter III was out on its own. But, beyond the industrial sphere, that seemed to matter very little. There had even been suggestions that *Boilermakers* was ripe for reconsideration.

All of that has changed. In the last decade the allocation of power between the Commonwealth and the states has ceased to be the hot topic. These days it excites little emotion other than amongst a few state crown lawyers. With only occasional regressions the High Court has taken a consistently broad view of Commonwealth legislative power. There is, on the other hand, a new-found emphasis on the "dualist" nature of the Commonwealth Constitution and a new-found suspicion of "co-operative" legislative schemes.<sup>39</sup> There is perhaps another theme in that but it is one I do not wish now to pursue.

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<sup>36</sup> *Migration Legislation Amendments (Judicial Review) Act 2001* (Cth).

<sup>37</sup> *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73.

<sup>38</sup> *Attorney-General (Cth) v R; Ex parte Boilermakers' Society of Australia* (1957) 95 CLR 529.

<sup>39</sup> e.g. *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2000) 75 ALJR 363 at [11] – [12].

Chapter III is where the action is. In the last few years, there have been more cases in the High Court on the word “matter” than on any other word in the Constitution. Into that one word is packed the indefinable essence of the judicial function. To have a “matter” is the only way into federal jurisdiction. A thorough understanding of federal jurisdiction is in turn critical to an understanding of the way in which the entire judicial system in Australia is structured. For one thing, it is all that a federal court can have. For another, state courts must at all times be kept in a suitable condition to receive it. The first proposition comes from *Wakim*. The second comes from *Kable*.<sup>40</sup>

The most interesting “matter” case for 2001 was *Wong v The Queen*.<sup>41</sup> There the High Court pronounced judgment on the recently instituted practice of the New South Wales Court of Criminal Appeal of publishing “guideline judgments” in sentencing matters. In the High Court, three members of a court of six said in a joint judgment that the Court of Criminal Appeal was confined by the terms of the state’s own *Criminal Appeal Act*<sup>42</sup> to addressing only the circumstances of the particular offender whose sentencing “matter” was before that Court. The Court of Criminal Appeal:<sup>43</sup>

“had neither jurisdiction nor power to prescribe what sentences should be passed in future matters.”

Referring to the terms of the state legislation, the joint judgment said that it was not within the jurisdiction or power of the Court of Criminal Appeal to publish a guideline judgment:<sup>44</sup>

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<sup>40</sup> *Kable v Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51.  
<sup>41</sup> (2001) 76 ALJR 79.

<sup>42</sup> *Criminal Appeal Act 1912* (NSW), sections 5D and 12.

<sup>43</sup> At [49].

<sup>44</sup> At [84].

“because, to adopt constitutional terms, that is not directed to the quelling of the only dispute which constitutes the matter before the Court.”

Because it involved the sentencing of a person convicted of an offence against Commonwealth law, *Wong* was a case in federal jurisdiction. But because of the limitation found in any event to exist in the State Act, the joint judgment observed that no “separate question” about its conformity with Chapter III of the Constitution arose.<sup>45</sup> If such a “separate question” had arisen, there is no doubt as to how it would have been answered. We have the answer already.

To enter into federal jurisdiction is to enter into a mysterious and only partially explored realm which, in civil matters, is lorded over by sections 79 and 80 of the *Judiciary Act 1903* (Cth). The purpose of those provisions – one might be forgiven for thinking – was to declare that the law applicable in federal jurisdiction was to be no different from the law applicable in state jurisdiction. The sections refer to the application within federal jurisdiction of laws which have a hierarchy of application independently of anything that might be said in any Commonwealth statute:

- Constitution on top: because it is the Constitution and because of covering clause 5;
- Commonwealth laws next;

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<sup>45</sup> At [49].

- state laws after Commonwealth laws: because section 109 of the Constitution says so; and
- common law on the bottom: because statute law always trumps.

Not so, we are told. Being within federal jurisdiction has a huge impact not only on what cases a court can decide but on the substantive law the court must apply in deciding them. Sections 79 and 80 have taken on a quasi-constitutional significance.

One example is that section 79 has been suggested in recent times to set up a new test of inconsistency between Commonwealth and state laws. The test is different from, and subtly narrower than, the test of inconsistency that applies under section 109 of the Constitution. The reasoning goes something like this. Within federal jurisdiction, state laws do not apply of their own force. They are picked up and “federalised” by section 79. When such a “federalised” state law comes into conflict with a “real” federal law, that conflict has nothing to do with inconsistency between Commonwealth and state laws at all. It involves a clash between two Commonwealth laws. The test for inconsistency between two laws of the same legislature is one of repugnancy. When section 79 says that state laws apply in federal jurisdiction “except as otherwise provided by ... laws of the Commonwealth” it means to the extent to which they are not repugnant to laws of the Commonwealth. A state law is therefore picked up and “federalised” by section 79 to the extent to which it is not repugnant to an existing Commonwealth law. Section 109 has nothing to do with it.<sup>46</sup> I am yet to work out how all of this can apply in circumstances where the very thing that brings a “matter” within federal jurisdiction is a claim that a state law is invalid under section 109 of the Constitution. The claim is that

section 109 of the Constitution applies. Making the claim brings the “matter” within federal jurisdiction. But once within federal jurisdiction the state law can only apply in the “matter” if it gets “federalised” by section 79. Section 109 has no application. Catch 22?

Another example is that it has at least been mooted that sections 79 and 80 together may have an effect in federal jurisdiction of elevating the common law above state law. The reasoning appears to go something like this. Section 80 picks up the common law. The reference in section 79 to “laws of the Commonwealth” then picks up section 80. Section 79 in this way indirectly picks up the common law. When section 79 says that state laws apply in federal jurisdiction “except as otherwise provided by ... laws of the Commonwealth” one consequence is therefore that state laws (or perhaps some of them) cannot apply to the extent that they are repugnant to the common law (or so much of it) as is picked up by section 80. I do not think that the idea has been fully taken up but it has been bubbling below the surface.<sup>47</sup>

Section 80 had a quiet year. The “section 79” case for 2001 was *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*.<sup>48</sup> There it was held that the Full Court of the Federal Court got it terribly wrong in a post-*Wakim* ruling to the effect that it lacked jurisdiction to make orders under the *Corporations Law* at the suit of ASIC. ASIC was “the Commonwealth” for the purposes of section 75(iii) of the Constitution. That brought a claim by ASIC within the jurisdiction of the Federal Court under section 39B(1A)(a) of the *Judiciary Act*. Once within federal jurisdiction, section

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<sup>46</sup> e.g. *Austral Pacific Group Ltd v Air Services Australia* (2000) 74 ALJR 1184.

<sup>47</sup> e.g. *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [50] – [58] and the footnotes there cited.

<sup>48</sup> (2001) 75 ALJR 363.

79 of the *Judiciary Act* then picked up and made applicable the powers conferred on a state court by the relevant provisions of the *Corporations Law*. Complicated but effective.

## **Conclusion**

Finally, I hold George Williams personally responsible for everything I have said. He gave me the title. I have tried to work within it. I have to leave immediately at the close of this session to don the false anonymity of a wig and gown and appear before the High Court later this morning. Those familiar with High Court special leave proceedings will have observed the amber and red lights that are fixed to the bench just below where the presiding Justice sits. The lights are designed to signal to counsel in no uncertain terms just how far they are allowed to go. I suspect I may have hit the amber one already.