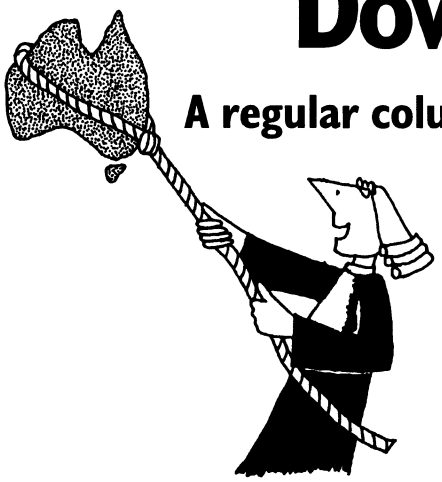
DownUnderAllOver

A regular column of developments around the country



Federal Developments

High Court decision has negative implications for cross-vesting

National cross-vesting schemes had perhaps been living on borrowed time ever since the 3:3 split decision in *Gould v Brown* (1998) 193 CLR 346, and on 17 June 1999 their time ran out. In four cases concerning cross-vesting schemes, six judges of the High Court held that key provisions of those schemes were unconstitutional, with Kirby J dissenting (*Re Wakim etc* (1999) 163 ALR 270).

Background

Cross-vesting schemes are designed to overcome difficulties posed by the federal nature of the Australian court system. Each of the nine governments in Australia (Commonwealth, six State and two Territory) has its own court system, which means from time to time it is unclear which court has power to determine a dispute, and occasionally there is no single court with authority to determine the whole dispute. In response to these difficulties, Commonwealth, State and Territory governments passed legislation enabling the Federal Court, Family Court, and State and Territory Supreme Courts to hear all civil matters that could be heard by any one of those courts, and enabling those courts, where appropriate, to transfer matters to another of those courts.

Two cross-vesting schemes were challenged in the High Court: a scheme that applied to civil matters generally, and one that applied only to civil matters arising under the Corporations Law. The argument against both schemes was the same: a federal court cannot be given power to hear matters that could otherwise be heard only by a State or Territory court.

The decision

The High Court decided that federal courts could not be given a general power to hear State matters and consequently the provisions which attempted to do this were invalid. The Constitution sets out a list of matters which federal courts can be given power to hear, and provides in s.77(iii) that the Commonwealth may confer 'federal jurisdiction' on State courts. The majority concluded from this that the Constitution sets out the *only* matters federal courts can be given power to hear; if it were intended that the States could supplement these matters, the Constitution would have said so expressly.

In two of the cases, however, the Court held that the Federal Court could hear the particular matters in dispute under its 'accrued jurisdiction'. If a dispute raises some issues that a federal court has power to hear, and some issues that it otherwise does not, the court can determine all the issues if they are sufficiently closely connected. Whether the connection is sufficient is not beyond disagreement, as indicated by the fact that there were four different views on this score among the six majority justices.

All members of the Court agreed that the Federal Court could hear matters arising under the Corporations Law of the ACT (enacted by the Commonwealth Parliament under the territories power). It remains unclear, however, whether a federal court can be given power to hear matters arising under a law of a self-governing territory, or to hear a purely common law matter arising in a territory.

Consequences

The Court's decision means federal courts cannot hear State matters unless these issues come within the courts' 'accrued jurisdiction'. In particular, State Corporations Law matters will generally need to be heard by State Supreme Courts, rather than the Federal Court. The decision will also affect other cooperative schemes under which States attempted to give the Federal Court power to hear matters arising under State law (for example, the Competition Code).

It is intended that each State will pass legislation to deal with the effect of the decision. Past decisions of the Federal and Family Court made in reliance on cross-vesting schemes will be validated by treating them as decisions of the relevant Supreme Court, and part-heard matters will in effect be transferred to State Supreme Courts.

This decision is one of the most important of recent cases concerning the separation of judicial power provided by Chapter III of the Constitution. While it has a significant effect on the Australian court system, its effect need not be disastrous if the different levels of government can demonstrate the same level of cooperation that led to the enactment of the original cross-vesting schemes.

Graeme Hill

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The views expressed in this article are those of the author and do not represent the views of AGS.

The Heather Hill case

In the federal election held on 3 October 1998, Ms Heather Hill of Pauline Hanson's One Nation Party was elected as a Senator for the State of Queensland.

By birth, Ms Hill was a citizen of the United Kingdom, but in January 1998 she was granted Australian citizenship. However, while she had become a naturalised Australian, at the time of the election she had not renounced her British citizenship.

Section 44 of the Constitution states that any person who is 'a subject or a citizen of a foreign power' cannot sit in the Federal Parliament. In 1992 in *Sykes v Cleary* the High Court held that the section applies to dual citizens who have not taken 'reasonable steps' to renounce their foreign nationality.

The question before the High Court in *Sue v Hill* was whether Ms Hill was disqualified because Britain should now be regarded as a 'foreign power' under s.44.

Three of the High Court judges, Justices McHugh, Kirby and Callinan, dissented in finding that the relevant legislation did not confer jurisdiction on the Court even to hear the matter. They did not decide the foreign power issue. On the other hand, the four majority judges, Chief Justice Gleeson and Justices Gaudron, Gummow and Hayne, held that the Court could hear the case and that Britain is now a foreign power for the purposes of s.44. Ms Hill was accordingly disqualified.

The Australian Constitution came into force in 1901, the last year of the reign of Queen Victoria. It was given legal effect not by the will of the Australian people, but as an Act of the British Parliament.

In 1901 Britain could not have been described as a foreign power. Australia was then one of the Queen's Dominions within the British Empire. Over the intervening decades the British Empire has dwindled and Australia has become an international player in its own right. Australian citizenship has also replaced the notion of being a British subject. Finally, the Australia Acts of 1986 were enacted by the Federal and State Parliaments, as well as by the British Parliament. These Acts cut the remaining substantive legal ties between Australia and Britain. At least by the time that the Australia Acts were passed, Australia had evolved into an independent sovereign nation.

This shift was recognised by the High Court in the Hill case. The majority judges found that Australian courts are not bound to recognise the exercise of legislative, executive and judicial power by the institutions of British government. The High Court thereby recognised what is a matter of political and practical reality. Australia and Britain are separate independent nations with separate and sometimes conflicting interests.

The decision in the Hill case highlights the fact that the Constitution is rife with anomalies and anachronisms. Most significantly, our Head of State, the Queen of the United Kingdom, who also happens to be the Queen of Australia, is a citizen and resident of a foreign power.

George Williams

George Williams teaches law at the Australian National University. He advised Phillips Fox, Solicitors, who acted for Henry Sue, one of the petitioners in the Hill Case.

ACT

Pro-choice laws not no choice laws

In August 1998, Independent Member of the ACT Legislative Assembly Paul Osborne, tabled a draconian Bill attempting to deny a woman's right to choose how to manage an unplanned pregnancy. It was no surprise to learn that the muddled and judgmental information used in this Bill was prepared in federal Senator Brian Harridine's office. Months of intense community outrage followed and it was disturbing to see the levels of discussion by some members of the 15 men, two women Legislative Assembly. In November Mr Osborne withdrew his original Bill, immediately tabling an amended version. The *Health Regulation (Maternal Health Information) Act,* written by Liberal Attorney-General Gary Humphries, was passed after a 16-hour marathon debate.

This Act specifies that women seeking to terminate a pregnancy be given information detailing the medical risks of termination of pregnancy and of carrying a pregnancy to term. A three-day 'cooling-off' period is mandatory after receiving this information before a woman can have the termination. A seven-member Advisory Panel of medical experts was convened, as specified in the Act, to approve this information. The Advisory Panel examined existing material and based the booklet primarily on information contained in WA and New Zealand publications. Although the Act states that pictures or drawings and descriptions of the anatomical and physiological characteristics of a foetus at regular intervals *may* be inserted in the booklet, the Advisory Panel unanimously elected *not* to include pictures. They felt this was irrelevant and in some cases could be counterproductive and cloud the issues.

Health Minister and Independent MLA Michael Moore was forced to withdraw the *Considering An Abortion* booklet containing the information on the eve of its launch in June 1999. It appears that Mr Humphries and Mr Osborne are unhappy that women will not be forced to view these images, believing that the intention of the Legislative Assembly in passing the legislation was that pictures would be included. The Attorney-General is adamant that these images be included, stating he will gazette a regulation effectively overriding the Advisory Panel's decision not to include images. Mr Moore claims he is caught between his personal pro-choice beliefs and his role as Health Minister trying to '. . . execute the legislation in good faith and make the new regime work successfully.' He maintains he is trying to reach a compromise to avert the whole debate going back to the Assembly. Labor MLA Wayne Berry intends to move a disallowance of the regulation as the Act clearly states that the Advisory Panel is vested with the power to approve the health information materials — not the Health Minister, nor any other MLAs.

Pro-choice community organisations have been galvanised into action. There is a level of disbelief that women are again fighting for access to safe, legal abortions and it is scandalous that when it comes to the vote, men will make the decision. Unless the outcome reflects the stated view of the majority of women, the fundamental rights of women to participate in the formulation of government policy will be violated. If foetal pictures are inserted into this mandatory information booklet, it will be an abuse of women's human rights, in particular our right not to be subjected to degrading and inhumane treatment as stated in Article 7 of the International Covenant on Civil and Political Rights. Would pregnant women want to view pictures of the result of 'backyard' abortions, of battered unwanted babies, which are possible consequences of not having access to safe and legal abortions? The compulsion to read officially sanctioned information and view pictures of foetuses contained in the booklet is an insult to women and their medical practitioners.

Tania Browne

Administrator, Women's Centre for Health Matters, Canberra.

NSW

Guarding the guards

The Inspector of the NSW Police Integrity Commission (PIC) has just released his Annual Report for the year ended 30 June 1999. The PIC was created in 1996 to inquire into and report on police misconduct and corruption (see (1999) 24 *Alt.LJ* 2).

The report is a very good read. Who is this person and why read his report?

The Inspector's job is to monitor the PIC to ensure compliance with NSW law, to assess PIC procedures relating to their propriety and legality and to deal with complaints of abuse of power, impropriety or other misconduct by the PIC or its officers.

The report outlines the action taken to fulfil these functions and refreshingly notes deficiencies in PIC procedures and conduct regarding specific complaints, but also notes PIC acknowledgment of the problems and action taken to accept and implement the Inspector's recommendations to make changes.

One issue raised concerned whether PIC procedures to notify affected individuals of corrupt findings were effective, appropriate and proper. The Inspector found the procedures were unsatisfactory and is now monitoring the steps being taken by the PIC to change them.

A second matter concerned the propriety of the time taken to supply information to affected individuals. The Inspector found the PIC had, not infrequently, failed to respond within a reasonable time to requests (p.16) and again he recommended procedures for timely responses. These are apparently being implemented.

The Inspector lamented one important limitation on his ability to conduct his job. In order to fully appraise PIC propriety in relation to material obtained by way of telephone intercepts the Inspector needs access to such material. Federal law needs to be amended to allow this and despite raising the matter in his 1998 annual report, having the NSW Attorney-General urge priority for an amendment and receiving advice from the Federal Attorney-General promising amendment, the change still has not taken place.

Dear Mr Williams, can we please have some action!

Should any other investigatory/ accountability body have an Inspector appointed to be part of the oversight apparatus? The usual model in NSW, for bodies such as the ICAC, Ombudsman, Health Care Complaints Commission and the newly created Commissioner for Children, is to have a Parliamentary Committee overseeing the body, but such committees are usually prevented from looking at specific operational matters.

In contrast, the Inspector can look at specific operational issues, so it may be an appropriate position to create. Take the ICAC as a case in point. It has defied the recommendation of a NSW Parliamentary Committee that it should give reasons for its actions (in other words it is acting contrary to the entire direction taken in other areas of administrative conduct). The ICAC simply refuses to tell citizens what it has done in relation to complaints or protected disclosures. Leaving aside legislative action to compel the ICAC to give reasons, the appointment of a position of Inspector would enable citizens to be a little more confident that bodies with massive powers are operating properly. Paulatim • **PW**

Northern Territory

Lock em all up (I)

Immediately following his recent appointment, Chief Minister Denis Burke announced he'd review the Territory's notorious mandatory sentencing laws. But if you thought we'd progressed past the Stone Age, think again. Amidst national outrage at the mandatory 12-month 'third strike' sentence handed out to a destitute man in Darwin who stole a towel from a clothesline, Burke proudly prefaced his proposed 'reforms' with the following hairy-chested threat: 'Make no mistake. If you're a thief, housebreaker, thug or sexual deviant, you're going to jail.' This was no idle boast. Under the new improved regime a select few first offenders will be able to avoid prison, but only in the most exceptional circumstances. These have been apparently tailored to assist some middle-class suburban miscreants, to the virtual exclusion of Aboriginal offenders, not to mention anyone whose offending is due, for example, to a behavioural disorder or substance abuse (which is expressly excluded as an exceptional circumstance).

So far, so bad. But wait, there's more. Mandatory sentencing has also been extended from property offenders to all adult sexual offenders and to all adults found guilty of a second or subsequent assault or other offence against the person.

In the meantime, the Opposition claims that statistics of rising property crime in Darwin show mandatory sentencing isn't working. In response, the government says (directly contrary to its own previous assertions) that mandatory sentencing was not imposed to reduce crime, but because 'the community demands its government intervene ... Governments have no option but to act upon the will of the people' (NT Hansard, 2nd Reading Speech, 1 June 1999). Mind you, the opposition's statistics are rather rudimentary, based as they are on the chatty Neighbourhood Watch newsletters stuffed into suburban letterboxes by police. Without FoI laws in the Territory, and with the refusal of the government to divulge crime figures, that's the best they can do. • **RG**

Lock em all up (2)

In Alice Springs, the partial closure of the town's only juvenile bail facility, Aranda House, has precipitated the detention on remand of young people for the sole reason that no suitable accommodation is available for them. As Commonwealth and Territory funding agencies play pass the buck, street kids seeking shelter are being turned away every night. Of course, the cost of sending juveniles in detention up to Darwin, keeping them there for a short period, and then returning them to Alice Springs for their court case, is astronomically more than the cost of caring for them in a supervised setting in their home town. There is also the subsidiary matter of human rights. • **RG**

Queensland

Chief Magistrate 'gone fishing'

Queensland Chief Magistrate, Stan Deer resigned in July 'to go fishing'. Well at least that's the reason he gave. No doubt, Mr Deer's enthusiasm for fishing was intensified by his involvement in a stand-off with newly appointed magistrate, Jacqui Payne over his attempt to transfer Payne to work in Townsville.

Jacqui Payne, Queensland's first indigenous magistrate, understandably objected to Deer's attempted transfer, of which she was given only two weeks notice. Payne was concerned that the move would have given her no opportunity to make arrangements for the care of her five young children. Since 1991, legislation gives the Chief Magistrate almost total control over transfers, and other magistrates had

expressed serious concerns about other transfer decisions made by Deer.

Payne and Deer were unable to resolve their differences over the transfer and their disagreement escalated, becoming increasingly public. In late May, Payne sought judicial review of the transfer decision. Supreme Court Chief Justice De Jersey called on the parties to settle their differences and expressed concern at the impact of the dispute on public perceptions of the judicial system. Ultimately, however, he decided that the attempted transfer involved an 'improper use of power' and was 'plainly unreasonable'. The transfer decision along with a subsequent reprimand and a refusal to allocate work in Brisbane to Magistrate Payne were all set aside.

The Beattie Government has now appointed Di Fingleton, a recent appointment to the bench, as Chief Magistrate. Fingleton worked for Caxton Legal Centre during the 1980s and forged a strong reputation as a consumer affairs advocate. She was also a Queensland State Editor of the then *Legal Service Bulletin* (see (1989) 14(4) *LSB*). *DownUnderAllOver* wishes her well.

Legal profession reform

The Queensland Government has released a Green Paper on Legal Profession Reform which proposes a range of significant changes. The powers of the Supreme Court to supervise the profession would be significantly strengthened with the establishment of two key committees comprised of Supreme Court judges. The investigation of complaints regarding professional conduct and the auditing of trust accounts would be the responsibility of an independent Legal Practice Authority.

The current division between barristers and solicitors would be removed although an independent bar would continue to exist as a voluntary association. While doing away with the solicitor–barrister distinction, there would still be separate practising certificates for 'solicitors and barristers' and those wishing to practice as 'barristers only'.

Articles of clerkship (two years in Queensland) would be abolished. The proposed Legal Practice Committee would be responsible for implementing the proposed replacement of articles with the concept of supervised work and for transitional arrangements. The Green Paper states that 'Enhanced standards for current practitioners could be addressed through compulsory academic or practical legal training for restricted practitioners and continuing legal education for unrestricted practitioners'. • **JG**

South Australia

Improving access to justice in the Magistrates Court

A 'pre-lodgement system' has recently been implemented in the Magistrates Court of South Australia. The system aims to encourage parties to resolve their dispute without resorting to the formal legal system. At present issuing a formal claim costs $55 for claims up to $5000 and $105 for claims between $5000 and $30,000. It is hoped that this new system will provide a more cost efficient means of resolving disputes by removing the cost barrier to justice, introducing alternative dispute resolution, and providing broad access.

Under the scheme, individuals or organisations who wish to sue must first issue a Final Notice of Claim (or risk losing costs) before issuing a formal claim. Claimants serve the Notice themselves and the potential defendant then has 21 days to respond to the Notice. If the defendant does not respond within 21 days then the claimant can issue formal proceedings through the Court. Claimants can purchase the Notice for $10.00 over the counter at Registries or via the Internet at <www.claims.courts.sa.gov.au>. The pre-lodgement system is available 24 hours a day, 7 days a week.

The Final Notice of Claim provides the potential defendant with a number of alternatives:

1. to pay the claimant the money sought,
2. to negotiate a settlement with the claimant,
3. to seek mediation, or
4. to ignore the Notice and run the risk that the claimant lodges a formal claim with the Court.

If both parties wish to have their dispute mediated, they can do so through the Magistrates Court. The Court, in association with LEADR, has set up a panel of mediators who have offered their services on a pro-bono basis. Parties interested in mediation may make arrangements through the Court to have the dispute mediated at no cost. Alternatively, they may make their own arrangements to have the matter mediated. If the parties are unable to reach a satisfactory agreement, the claimant has the option of then lodging a formal claim.

Further information on the scheme can be obtained at the Internet address above or by contacting Mr Graeme Rice, Managing Registrar or Ms Melana Virgo, Graduate Project Officer, at Adelaide Magistrates Court (Civil Registry). • **FP**

VICTORIA

All roads lead to ... more roads

At the end of May 1999, the first stage of the State's first private road was scheduled to open. It is a part of the Citylink project headed by the private company, Transurban. The 'new' road is actually a widening and extending of the existing Tullamarine freeway, which connects central Melbourne to the airport, the north-western suburbs and beyond. While the recent controversy surrounding the project has focused on the allegedly politically motivated opening delays (an election was hinted at by the Premier in a 'few months'); and purported conspiracies surrounding the audit of the 'e-tag' tolling telephone operators, Translink, the government has proposed that yet a fourth link may be added to the road toll network. The proposed $700 million tunnel under the Royal Melbourne Cemetery and Royal Park, would connect the Eastern and Tullamarine motorways. This has angered locally affected, innercity resident and environmental groups, who fear toll-avoiding traffic choking the streets, and are concerned at the possibility of exhaust vents in Royal Park. The potential plans were announced by Premier Kennett without consultation with or approval from the local City of Yarra or VicRoads.

Meanwhile, residents of the inner north and west, the group most proximate to the first tollway, mounted their protest. They hosted a 'funeral' for their 'free'-way, in contrast to the new billboards over existing freeways, which along with the typical sales pitches of the body beautiful or the diamonds and international jetset, carry pictures of a traffic-free, wide open city

road, where one can discover 'a new kind of freedom'. This newly marketed sensibility carries over to television advertising, where a solitary man in his large car recounts how much time he saved in driving on the new road. One would imagine that any ideas for improved city public transport, or perhaps a train link to Melbourne's Airport have gone off the rails.

Gambling: a sure thing?

In the past few years, Victoria has seen gambling proliferate. The success of the Crown Casino project has been tumultuous, with the company's share prices plummeting initially and now gradually strengthening. There is one certainty however: that people will participate. The Productivity Commission has released alarming figures concerning such 'entertainment' — estimates of up to 35% of the $11 billion annual revenue is raised from so-called gambling addicts. The difficult issue for the State government is that it must now try to find some happy medium of 'cautious encouragement' (hey, there are taxes and licencing fees to be generated from this).

In recent announcements following the report, it has been suggested by the Premier to cap poker machine numbers and reduce misleading 'in your face' advertising. On the other hand, the Premier rejected the suggestion of rethinking the distribution of poker machine venues (currently most gaming and poker machine venues are located in lower income areas), all whilst sporting a tie with the 'Crown' logo. One may ask is there any, indeed could there be any, consistency within this gambling exercise? This author is puzzled.

One step closer to non-discrimination for lesbian and gay relationships

In September of this year, a Private Members Bill, the Equal Opportunity (Same Sex Relationships) Bill will be up for debate in the Victorian parliament. The Bill, introduced by a Labor MP, would amend the current EO legislation so as to repeal and substitute sections of 19 other pieces of legislation which discriminate against people with same sex partners. It is a substantial change in recognition of same sex unions, affecting a variety of laws, including superannuation, transport accident compensation and land tax benefits, whilst also adding same sex couples to the ambit of laws prohibiting spousal violence. The potential for legal recognition of same sex unions has been a long time coming, so let's hope that they get to be addressed before the impending election. • **MR**

Western Australia

Queen's Council Appointments

WA Attorney-General Peter Foss QC has recently announced changes to the procedure for appointment of Queen's Counsel in this State. Under the new procedures, Mr Foss and Premier Richard Court will assume a more direct role in the process of choosing and appointing Queen's Counsel. Historically, the choice of new appointees has been made by the Chief Justice in council with other members of the judiciary. The Attorney- General's plan has met with a largely negative response from the profession, with which there was apparently little or no consultation. Spokespersons for both the Bar Association and the Law Society have expressed concern that the move may unnecessarily politicise the process of Queen's Counsel appointments. Clearly the plan enhances the potential for politically motivated appointments as reward for party patronage. However, there are some positive aspects of the plan such as the opportunity to broaden the range of candidates for Queen's Counsel status to include more women and senior solicitors. Indeed, Mr Foss has already demonstrated his willingness to look beyond the traditional field of candidates from the bar — one of his first actions on becoming Attorney-General in 1996 was to appoint himself a Queen's Counsel!

A 'great leap forward'

Having only as recently as 1997 removed the 'Mr' from 'Mr Justice' to welcome our first female judge to the bench of the Supreme Court, it appears WA has quickly surpassed the rest of the nation to become the first State to boast a court with a 25% female bench. The recent appointment of former Law Society President, Kate O'Brien to the bench of the District Court brings that Court's ratio of female to male judges to 5:15. Chief Justice David Malcolm is reported as describing this phenomenon as 'a great leap forward'. Of course, the Western Australian Supreme Court record of 1 female to 16 male judges leaves much to be desired.

De-wigged

Speaking of the Supreme Court, we have recently become witness to yet another 'great leap forward'. In a decision aimed at bringing the profession 'into the 21st century', the Chief Justice has directed judges and lawyers to abandon their wigs in civil cases. The result is no doubt a lot of newly admitted civil solicitors wondering why they wasted up to $1000 on something they'll never wear. For those practising in the criminal arena, however, the purchase is still a good one — the formality and anonymity apparently afforded by the traditional attire outweighed the reasons for change in the view of the Chief Justice. • **TH**

DownUnderAllOver was compiled by Alt.LJ committee members Jeff Giddings (Qld), Russell Goldflam (NT), Tatum Hands (WA), Franca Petrone (SA), Michael Ryall (Vic), Peter Wilmshurst (NSW) together with invited writers listed under their contribution above.