THE IMPLICATIONS OF *RE WAKIM*

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I INTRODUCTION

Re Wakim; Ex parte McNally, *Re Wakim; Ex parte Darvall*, *Re Brown; Ex parte Amann* and *Spinks v Prentice* (referred to collectively as *Wakim*) were heard together and determined by the High Court on 17 June 1999.[1] The sets of proceedings are of great significance to Australian litigation generally and to commercial litigation in particular. In them, a substantial majority of the High Court ruled the main basis of two sets of jurisdictional cross-vesting legislation to be unconstitutional. The effect of the decision may be to prejudice the plans by the Federal Government to establish Australia as a banking and finance centre,[2] and may prejudice its future as an international dispute resolution centre (already hampered by geographical considerations). Commitment, co-operation and leadership on the part of all governments appear necessary to overcome the crisis that the decision in *Wakim* has brought about.[3] A full and continuing understanding of the decision itself seems an indispensable part of that process, and efforts by the commercial community and legal profession to do so are warranted.

Two other issues of significance were involved in *Wakim*: (i) how the doctrine of *res judicata* should be applied where the previous case concerned was determined unconstitutionally; and (ii) the uncertainties associated with the accrued jurisdiction of federal courts.

II THE FACTS AND LEGISLATION

The background of *Re Wakim; Ex parte McNally*, *Re Wakim; Ex parte Darvall* was that George Wakim in 1985 obtained a judgment for damages in the Supreme Court

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[1] (1999) 163 ALR 270. (At the time of writing, the authorised report was not published.)
[2] See Robert Baxt, 'Editorial' (1999) 27 *Australian Business Law Review* 257.
[3] Ibid.

of New South Wales in a personal injuries claim he brought against Tedros Nader, one of two partners who employed him at the time of his injury. Mr Nader became bankrupt later in 1985. The Official Receiver in Bankruptcy was appointed trustee of his estate and, pursuant to s 58 of the *Bankruptcy Act 1966* (Cwlth), Nader's estate vested in the Receiver. Nader was a substantial creditor of the estate, and alleged that he had been admitted to prove in it.

In 1987 the Official Receiver brought proceedings against Mrs Nader, the other partner, seeking a declaration that the partnership had been dissolved and an order that accounts be taken. The Official Receiver retained a firm of solicitors in the matter, of which Peter and Terence McNally were the partners. The McNallys retained Mr Darvall QC to give an opinion in relation to the proceeding against Mrs Nader, which was later compromised in March 1990.

The terms of the settlement were that Mr and Mrs Nader would pay $10,000 to Wakim, and that Mrs Nader would buy certain property vested in the Official Receiver for $400,000. In the case at hand, Mr Wakim alleged that the Official Receiver failed to take certain steps that would have resulted in an increased amount being available for distribution to creditors of Mr Nader's bankrupt estate. Accordingly, he commenced proceedings against the Official Receiver in the Federal Court under ss 176, 178 and 179 of the *Bankruptcy Act 1987* (Cth) alleging breach of duty and negligence.

Although the Official Receiver did not seek in the proceeding to blame either the McNallys or Darvall, Wakim thereafter commenced two separate proceedings against them in the Federal Court, alleging negligence. The McNallys and Darvall sought prerogative relief in the High Court alleging that s 4(1) of the *Jurisdiction of Courts (Cross-Vesting) Act* (NSW) and s 9(1) of the *Jurisdiction of Courts (Cross-Vesting) Act* (Cth) were invalid, so that the Federal Court did not have jurisdiction in the proceedings against them. (These provisions provided for the States to confer original and appellate jurisdiction on the Federal Court, Family Court and the Supreme Courts of the Territories (and other States) with respect to State civil matters.)

Re Brown; Ex parte Amann arose from an order made by the Federal Court in 1992 that a company incorporated in New South Wales, Amann Aviation Pty Ltd, be wound up and that Mr Brown be appointed liquidator. In 1995 the Court ordered under s 596A of the *Corporations Act 1989* (Cth) that various persons, including the applicants to the High Court, Amann and Gould, be summonsed to attend before the Court to be examined about the affairs of Amann Aviation Pty Ltd.

Mr Gould (though not Mr Amann) challenged this order, and certain questions were reserved on an application brought by Notice of Motion for consideration by a Full Federal Court. In substance, those questions were whether the Federal Court had jurisdiction either to wind up the company or order the examinations. The Full Court held that the Federal Court did have jurisdiction and, in the previous case of

Gould v Brown,[4] Gould appealed from that finding to the High Court. There, only six judges sat and were evenly divided in opinion, so the decision of the Full Federal Court that the cross-vesting legislation was valid, had accordingly been upheld. Nonetheless, although the examination proceeded to conclusion, no order was formally made disposing of the Notice of Motion, as would usually be the case.

In the instant case, both Amann and Gould sought prerogative relief of *certiorari* quashing the winding up and examination orders of the Federal Court and prohibition directed to the Federal Court to prevent it from proceeding further in respect of the examinations.

Spinks v Prentice also concerned orders for examination under the Corporations Law, but that of the Australian Capital Territory rather than a State. It was an appeal from a decision of the Full Federal Court that s 51(1) of the Commonwealth *Corporations Act* validly conferred jurisdiction on the Federal Court in respect of civil matters arising under the *Corporations Law* of the ACT and that the Court had power to make orders for examination under ss 596B and 597(9) of that law.

III THE DECISIONS AND REASONING

The leading judgment was that of Gummow and Hayne JJ, who considered that the effect of s 9(2) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and the *Corporation Act 1989* (Cth) was for the Commonwealth to confer jurisdiction on the Federal Court rather than for it to consent to the States doing so. Laws made by a State providing that another court is to have jurisdiction over certain matters cannot be of any effect unless the the laws of the other polity give the conferral effect, they said. Their Honours considered it significant that a federal compact has attendant advantages and disadvantages, that the federal judicial power under the Constitution is distinct from the State systems and that there is no provision in it for a unitary system of courts (save for the ultimate appellate jurisdiction of the High Court). They applied the view of the majority in *R v Kirby; Ex parte Boilermakers' Society of Australia*[5] that the provisions of Ch III of the Constitution are explained by the fact that under a federal system the federal government must have defined powers, within which it must be paramount but beyond which it must be incompetent to go. To this end, the powers of the federal judicature must also be at once paramount and limited. Thus, their Honours pointed out, the federal government can only confer jurisdiction on federal courts under s 76 in respect of the 'matters' specified in ss 75 and 76. They therefore applied the reasoning of the majority in *Re Judiciary and Navigation Acts*[6] that Ch III is 'an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested'.[7]

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[4] (1998) 193 CLR 346.
[5] (1956) 94 CLR 254, 267-8 ('*Boilermakers*' case).
[6] (1921) 29 CLR 257, 264-7.
[7] See *Wakim* (1999) 163 ALR 270, 303-4, quoting from the *Boilermakers*' case.

Gummow and Hayne JJ proceeded to reject the two principal arguments made in favour of validity. First, they rejected the argument that the required power was based on state-federal co-operation. They pointed out that no amount of co-operation between the federal and State governments can supply a power in either of them where it does not exist. Otherwise, they would effectively amend the Constitution by co-operative legislation, giving the Commonwealth power which the Constitution does not give to it.[8]

Secondly, they rejected the contention that the Commonwealth has power to consent to the conferral of jurisdiction by the States assuming, contrary to their view, that this was what the relevant sections of the cross-vesting legislation actually did. If 'consent' amounted only to a statement of intent not to have the legislation establishing a federal court or establishing its jurisdiction 'cover the field' so as to attract the operation of s 109 of the Constitution, they said, it would not involve the invocation of any substantive Commonwealth power and no resort to any incidental power would be required. It would rest on the assumption that the States could confer jurisdiction on federal courts by themselves, which they cannot do. If 'consent' was understood as having some operative effect in conferring or assisting in the conferral of jurisdiction, their Honours said, adopting the test laid down in the *Boilermakers* case for the operation of the incidental power, it could not be considered to be 'necessary or proper to render effective the judicial power that is given by Ch III'. They considered that the conferral of State power on the federal courts was to supplement the power given to the Commonwealth by the Constitution rather than to complement it.[9]

In respect of the first two proceedings, their Honours had no reason to apply this conclusion, because they considered that all of the matters concerned were within the jurisdiction of the Federal Court by reason of its accrued jurisdiction, the first involving a claim under the federal *Bankruptcy Act*. Thus, they considered that the applications of the McNallys and Darvall should be dismissed.[10]

In *Re Brown; Ex parte Amann*, they thought there should be an order extending time for the application for *certiorari* to quash the order for examination and an order absolute in the first instance to quash it, on the application of Mr Amann. (They would not, however, quash the winding up order itself, because it had been in existence and acted upon for some years and others' rights could be prejudiced.) They thought that Mr Gould's application should be dismissed, due to being out of time and the fact that Gould had previously litigated the same issue and lost.[11] With respect, it is submitted that this decision, while it could not be called unreasonable, was a somewhat unrelenting one given that Gould had lost on the earlier occasion in a court without jurisdiction.

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[8] Ibid 305.
[9] Ibid 306-8.
[10] Ibid 309-14.
[11] Ibid 314-18.

In *Spinks v Prentice*, their Honours applied *Northern Territory of Australia v GPAO*,[12] and concluded that s 51(1) of the *Corporations Law* of the ACT validly conferred jurisdiction with regard to civil matters on the Federal Court, because it was a conferral of federal jurisdiction on a federal court. Hence this appeal was dismissed with costs.[13]

Gleeson CJ proceeded expressly on the basis that approval or disapproval of a legislative policy was irrelevant to the question of its constitutional validity.[14] He agreed with Gummow and Hayne JJ, but made particular reference to two of the cases cited in argument.

First, he stressed that *Re Judiciary and Navigation Acts* has been an accepted and influential authority for 80 years, and was a formidable barrier to the cross-vesting schemes. That case invalidated Part XII of the *Judiciary Acts 1903-1920* (Cth), which purported to provide for the executive government to refer legislation to the High Court for authoritative determination of any question of law as to its validity, even though no adversary challenge to its validity was in progress. While accepting that the making of binding declarations like those proposed was a judicial function, the majority held Part XII to be invalid because it did not involve referral of a 'matter' of the kind specified in ss 75 and 76 in Ch III the Constitution. They expressed the view that Ch III operates 'as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction.'[15]

The second case referred to by the Chief Justice was *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*[16] (relied on by the proponents of the cross-vesting scheme), in which the High Court held that the Commonwealth and a State could jointly establish an authority. However, his Honour stressed that in that case there was no suggestion that there was an express or implied constitutional prohibition on the needed legislative power. Accordingly, he said, the case does not provide an answer to the argument here that there was such a prohibition, or that there is no constitutional power permitting the cross-vesting of State jurisdiction on federal courts.[17]

Like Gummow and Hayne JJ, his Honour specifically rejected the argument that cross-vesting was incidental to the Commonwealth's judicial power (and so authorised by s 51(xxxix) of the Constitution), on the grounds that it was in fact a substantial addition to the power, an attempt to circumvent the limitations imposed upon the principal power by the Constitution rather than an aid to the exercise of it.[18]

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[12] (1999) 161 ALR 318.
[13] *Wakim* (1999) 163 ALR 270, 318-21.
[14] See, ibid 275.
[15] *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265, quoted by Gleeson CJ in *Wakim*, ibid 277.
[16] (1983) 158 CLR 535.
[17] *Wakim* (1999) 163 ALR 270, 279-80.
[18] Ibid 280.

In a short judgment, Gaudron J also agreed with Gummow and Hayne JJ.[19]

McHugh J endorsed the merits of cross-vesting schemes from a litigant's point of view, but considered that this says nothing from the constitutional point of view.[20] He considered that when the Constitution is read as a whole and in the light of its judicial history there is no principled basis upon which the legislation concerned could be upheld.[21]

When adopting the reasoning in *Re Judiciary and Navigation Acts* concerning the exclusive operation of Ch III of the Constitution, he rejected the notion that 'co-operative federalism' nevertheless would permit State courts to invest a federal court with jurisdiction that the Commonwealth, having created the court, cannot invest in it. In this connection, he said:

> Cooperative federalism ... is a political slogan, not a criterion of constitutional validity or power. It records a result reached as the result of a State and the Commonwealth legislating *within the powers* conferred on them by the Constitution. Behind its invocation in the present case lies a good deal of loose thinking.[22]

He thought that Ch III does not expressly or implicitly authorise the Commonwealth Parliament to create federal courts to exercise State jurisdiction, nor the States to have them do so. Adopting the statements of Dixon CJ, McTiernan and Kitto JJ in *Cockle v Isaksen*[23] that the jurisdiction which a federal court established under Ch III may exercise cannot come from s 71 alone, but must be conferred and defined by the exercise of further legislative power to be found in ss 75-76, his Honour observed: '[i]t would be an extraordinary constitutional result if the power to create a federal court ... extended to creating ... curial vessels into which could be poured unlimited jurisdiction by any polity except their creator.'[24]

In the first two of these cases, his Honour would have dismissed the applications for prohibition as premature because the applicants had not shown that their cases did not fall within the accrued jurisdiction of the Federal Court. He agreed with the orders proposed by Gummow and Hayne JJ in respect of Mr Darvall, but did not expressly deal further with these applications. In *Re Brown; Ex parte Amann*, he agreed with Gummow and Hayne JJ that a writ of prohibition should issue for Mr Amann, but also considered that it should issue for Mr Gould on the grounds that the orders made in *Gould v Brown* have no constitutional effect. He agreed with them that the winding up order itself should not be quashed. As to *Spinks v Prentice*, he agreed with their Honour's reasons and orders.[25]

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[19] Ibid 281-2.
[20] Ibid 282.
[21] Ibid 287.
[22] Ibid 288 (emphasis in original).
[23] (1957) 99 CLR 155, 162-3.
[24] *Wakim* (1999) 163 ALR 270, 290.
[25] Ibid 294-6.

Callinan J agreed with the reasons of McHugh J, concluding that there was nothing in the Constitution even to suggest that the States might invest federal courts with State jurisdiction, with or without the concurrence of the Commonwealth.[26] As to the first two cases, he considered that there was no case for concluding that the negligence cases were validly before the Federal Court as part of its accrued jurisdiction. Thus, as Gibbs CJ expressed it in *R v Ross-Jones; Ex parte Green*,[27] he thought that since there had been an excess of jurisdiction prohibition should issue to the aggrieved party almost as of right.[28]

In *Re Brown; Ex parte Amann*, Callinan J thought that neither party should be caught by the doctrine of *res judicata*, given the unusual circumstances that:

- no judgment had been entered in *Gould v Brown*, and it was not compulsory to do so,
- the case was a constitutional one involving matters of great public importance,
- the Federal Court never had jurisdiction,
- the relief sought in the previous case was prerogative relief brought in the name of the Crown, and
- the applicants only failed because of the rare circumstance that the High Court was unable to reach a majority decision.[29]

For similar reasons, he would have extended the time for Mr Gould to make his application as necessary.[30] If this catalogue of special circumstances could not persuade the majority on this point, it is hard to imagine any that ever will.

As to *Spinks v Prentice*, he agreed with the orders of the majority and, in substance, with their reasons.[31]

Kirby J, dissenting, concluded that the cross-vesting legislation was valid. He viewed the grant of power under Ch III to vest Commonwealth jurisdiction in State Courts (but not the reverse) as 'indirectly but only partially' permitting cross-vesting of jurisdiction by the States, rather than excluding it.[32]

His general approach was that the Constitution is read by today's Australians to meet, so far as the text allows, their contemporary governmental needs. This may be contrasted immediately, for example, with the 'black letter' approach of McHugh J:

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[26] Ibid 344. He said that this was so 'regrettably'. Whether this regret reflected his own feelings or those of the proponents of cross-vesting was not clear, and of course it should not matter anyway.
[27] (1984) 156 CLR 185, 194.
[28] *Wakim* (1999) 163 ALR 270, 346-7.
[29] Ibid 351-2.
[30] Ibid 351.
[31] Ibid 352-3.
[32] Ibid 324.

> [T]he judiciary has no power to amend or modernise the Constitution to give effect to what the judges think is in the public interest. The function of the judiciary ... is to give effect to the intention of the makers of the Constitution as evinced by the terms in which they expressed that intention.[33]

Perhaps the real point of departure, however, was that Kirby J considered that the text of the Constitution allowed vesting of State jurisdiction in federal courts, while the majority did not. It is suggested that his eloquent and vigorous dissent, strongly influenced by his understandable preference for cross-vesting, is unlikely to bring about a change of heart in the High Court in the foreseeable future or, indeed, to find ultimate vindication.

In some respects, the force of his Honour's reasoning in support of his wide approach was not clearly evident. He considered, for example, that the *expressio unus* principle of construction should not be applied in respect of Ch III principally because the historical development for almost a century, during which federal jurisdiction has frequently been invested in State courts, has established a 'constitutional environment' in which reciprocal laws of the States were a natural and permissible development. Thus, he said, it is 'not self-evident' why it should not be open to States to make provision for conferral of part of the jurisdiction to exercise their judicial powers on established State courts or federal courts.[34]

The persuasive value of this conclusion may be questioned on the ground that the conferral of federal jurisdiction on State Courts has always been expressly contemplated by Ch III of the Constitution—a one way street—while there is no reference to conferral the other way. Indeed that drafting brings the opposite view to his Honour's very close to being self-evident itself. In any event, saying that it is 'not self-evident' that something should not be the case seems an unconvincing, tentative, almost apologetic answer to the majority's assertion that it was evident from the terms of Part III that the States were not given that power. The phrasing is not put highly; it falls far short even of 'not being evident'. This is not mere sophistry. Kirby J was contemplating a departure from the thrust of longstanding judicial utterances, and it may be strongly argued that the case for doing so should itself be at least clearly evident. As his Honour said concerning arguments that would invalidate the cross-vesting scheme, his own arguments in favour of such an apparent departure from precedent require 'very close scrutiny'.[35]

Further, while his Honour accepted that there were observations 'apparently to the contrary', especially in the *Boilermakers* case, in *Re Judiciary and Navigation Act* and *Collins v Charles Marshall Pty Ltd*,[36] he brushed them aside, saying without

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[33] Ibid 283.
[34] Ibid 328-9.
[35] Ibid 323.
[36] (1955) 92 CLR 529.

particularity that they were not addressed to the present problem and were written in earlier times when the constitutional setting was different.[37]

These are not the only examples of his Honour stretching argument and the interpretation of authority to the limit in seeking to justify the conclusion based on his liberal approach. For example, he relied heavily on the words of Gleeson CJ and McHugh J in *Abebe v The Commonwealth*,[38] where (Kirby J said) they suggested that rigid and impractical outcomes should only be taken to be compelled by 'clearest constitutional language'.[39] In *Abebe*, however, their Honours were talking specifically about a submission that the power to confer jurisdiction on the Federal Court to determine a 'matter' must compel the Court to consider the whole of any matter without statutory limitation, and they were talking about a specific list of impractical limits on the usual way of granting jurisdiction that would follow from adopting the submission. It was quite a leap to suggest that this was a general statement that the language of Part III should be interpreted this way, or that it should dominate the construction of the Constitution at large or so as to infer the grant of a power from it where none is expressed to exist.

Perhaps the most telling point that his Honour made was that the narrow interpretation was contrary to the practice of the legislature and the High Court itself, both in respect of appeals from the courts of Territories (not specifically addressed in the Constitution) and foreign countries.[40] Although Kirby J was not seeking to say that either practice was unlawful, this may have pointed to an inconsistency in the approach of the majority. It is interesting to note that Gummow and Hayne JJ, in support of their view that polities can only effect conferral of jurisdictions on their own courts, drew an approving analogy with the referral by the Nauruan government of matters to the High Court which were adjudicated by that Court.[41] It may well be asked how either is to be justified. Possibly, it would be by reference to the Territories, external affairs and incidental powers (ss 122, 51(xxix) and (xxxiv)). If so, it is hard to see how this approach could not equally be used in respect of the transfer of State judicial matters to federal courts pursuant to the corporations power (s 51(xx)) or the marriage and divorce powers (s 51(xxi) and (xxii)), respectively.

The only suggested explanation for this apparent exception put forward by the challengers of the legislation in *Wakim*, according to Kirby J, was 'that the negative implication existing in Ch III ... applied "within the Federal system" and thus had no application outside that system, of which Nauru and the Australian Territories were said to be examples.'[42] Gummow and Hayne JJ did not express any view on this, although they may have done so *impliciter*. It seems anomalous for the High Court and other federal courts not to have power to accept jurisdiction from other

[37] *Wakim* (1999) 163 ALR 270, 330.
[38] (1999) 162 ALR 1, 15 ('*Abebe*').
[39] *Wakim* (1999) 163 ALR 270, 324, 327.
[40] Ibid 330-1.
[41] Ibid 302.
[42] Ibid 331, n 264.

courts within the federation but to be able to do so from courts outside it, and nothing in the majority's reasoning clearly justifies that distinction.

Kirby J also addressed the argument that if the Commonwealth could not confer State jurisdiction on a federal court it could not consent to such conferral by the States. (His Honour conceded that such consent would be necessary. By implication, he rejected the primary analysis of Gummow and Hayne JJ that there was in fact a purported conferral of State jurisdiction on its courts by the Commonwealth itself.) He considered that the source of power to consent lay in the power to create federal courts (other than the High Court) in Part III and in the incidental power under s. 51(xxxiv). The source of the judicial power lies outside of the grant of judicial power to the Commonwealth, he said, but is incidental to such grant.[43] With respect, it is not easy to see how this adds much to the argument. If Ch III permitted conferral, *semble* the requisite power to consent would be implied as an integral part of that process, and resort to s 51(xxxviii) would be unnecessary.

His Honour also thought that a further source of power to consent lay in the implied nationhood power, although this had not been raised in argument.[44] As to this, Gummow and Hayne JJ said:

> Characterising a set of circumstances as having an Australian rather than a local flavour or as a desirable response to the complexity of a modern national society is to use perceived convenience as a criterion of constitutional validity instead of legal analysis and the application of accepted constitutional doctrine.[45]

Kirby J would have dismissed all the applications in the first three cases with costs. In *Spinks v Brown*, his Honour agreed with the conclusion of the Full Federal Court and would have dismissed the appeal with costs.[46]

IV CONCLUSIONS

Having observed in practice the costs and inconvenience caused to litigants by jurisdictional disputes, I am in full sympathy with Kirby J's valiant search for constitutional power to uphold the cross-vesting schemes. However, the majority's approach appears certain to prevail into the foreseeable future. It will be interesting to see whether and how the governments in Australia will be able to overcome the undoubtedly troublesome results of the decision, particularly for the commercial community.

Meanwhile, some early observations can be made. In anticipation of an adverse decision, Victoria drafted model legislation to validate existing judgments of the

[43] Ibid 335.
[44] Ibid 335-7.
[45] Ibid 309.
[46] Ibid 340.

Federal Court and Family Court made under the cross-vesting scheme by declaring the rights and liabilities of all persons to be (and always to have been) the same as if each 'ineffective judgment' had been a valid judgment of of the Supreme Court concerned. (Such legislation should not, in principle, be necessary in respect of the Territories, according to the reasoning of all judges in *Spinks v Prentice*, although the majority appeared to strike down all aspects of the cross-vesting schemes.) The legislation would permit enforcement of the decisions, including by the law of contempt, both before and after the commencement of the Acts, and provide that matters recommenced in the Supreme Courts will be taken for limitation of action purposes to have been commenced at the time they were commenced in the Federal Court. At the time of writing, corresponding legislation has been or is expected soon to be passed by all State legislatures.

Serious doubts have been expressed as to the constitutional validity of this legislation, and it could well be challenged with some prospect of success. In any event, it only deals with past decisions, not with any future jurisdictional problems.[47]

Another alternative, for the future at least, but even for the past if necessary, would be for the States to rely on s 51 (xxxvii) or (xxxviii) of the Constitution and cede the requisite power to the Commonwealth to pass legislation. The States have traditionally been reluctant to cede any powers to the Commonwealth, but perhaps this course could be made more attractive to them by ceding the power in strictly defined terms, even by limiting it to the power to pass legislation specifically in terms of the legislation struck down. (All States vigorously argued for preservation of that legislation in *Wakim*.) There is a potential problem with this, constitutionally, because both sub-sections are expressed to be 'subject to the Constitution', which of course includes Ch III. (In *Wakim*, Kirby J himself put forward as a further reason why the prohibition should not be implied in Ch III that s 51(xxxviii) is subject to that limitation.[48]) On the other hand, however, this problem could probably be overcome by the Commonwealth passing legislation, after the powers had been ceded, vesting the jurisdiction in federal courts. That law would be a valid Commonwealth law, and s 76(1) of the Constitution would grant the jurisdiction to hear any 'matter' arising under that law.

A third alternative would be constitutional amendment by referendum, to which the Australian electorate has traditionally been reluctant to agree. (If this process is followed, incidentally, it might be the first attempted retroactive amendment of the Constitution.) Considering that some States may be reluctant to cede the power themselves they could also be reluctant to promote a referendum, so that such amendment could not be assured of success.

In the immediate future, it is likely that State governments will have to appoint more Supreme Court judges, at least temporarily, and Federal Court judges (and Family Court judges to a much lesser extent) will be underused. Perhaps Federal

[47] See 'Recent Cases' (1999) 22 *CorpLaw Bulletin* 13.
[48] *Wakim* (1999) 163 ALR 270, 331.

Court judges might be seconded to act temporarily or part-time as Supreme Court judges.[49]

The decisions of federal courts in cases normally within the jurisdiction of the Territories or referred from the Territorial Supreme Courts remain safe after *Wakim*, even if enabling legislation is required. Federal Court decisions based on the determination of State issues as part of the accrued jurisdiction of the federal court concerned would be valid regardless of the validating legislation, given the reasoning in *Wakim*, although the differing views on that question in the case itself demonstrate that applying this doctrine to particular facts can be fraught with uncertainty. Similarly, State Supreme Court decisions in cases referred from other State Supreme Courts should not be affected by the reasoning in *Wakim*, unless those parts of the sections deemed invalid are not taken to be severed, in which case they could be replaced by uniform retrospective State legislation.

Happily, the grant of jurisdiction to all State and Territory courts in respect of federal legislation, including parts of the *Trade Practices Act 1974* (Cth) which include s 52, will remain effective (even where the empowering Act was passed in conjunction with the cross-vesting scheme), because such conferment of jurisdiction is specifically contemplated by Ch III of the Constitution and was not challenged in *Wakim*.

While this has been overshadowed by the main thrust of *Wakim*, it should cause some disquiet that any citizen—especially where the liberty of the subject may be at stake—can be precluded from reopening a matter when the previous decision in question is later held to be unconstitutional or otherwise unlawful.

Over time, further litigation may be spawned by other uncertainties. It has been pointed out, for example, that difficulties may arise because, as stated by Barwick CJ and Kitto J in *Driclad Pty Limited v Federal Commissioner of Taxation*,[50] reasons for judgment are separate from the judgments or orders to which they relate. Here, the remedial legislation will 'validate' judgments and orders only. Will the Federal Court's reasons 'travel' with an ineffective judgment or order to become reasons of the applicable Supreme Court? If so, what will their status be relative to conflicting Supreme Court reasoning and, if not, what will be the basis of an appeal to a State Court of Appeal?[51] Only time will sort these growing questions out.

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[49] 'Recent Cases', above n 47, 14.
[50] (1968) 121 CLR 45, 64.
[51] See Nunzio Lucarelli, '*Re Wakim:* Cross-Vesting and Back Again' (1999) 110 *Victorian Bar News* 23, 27.