# HISTORICAL AND CONSTITUTIONAL PERSPECTIVES ON CROSS-VESTING OF COURT JURISDICTION

BY HERBERT A. JOHNSON*

[*Australian historical development has resulted in similar substantive law and court structure among the States and Territories. However, differences in statutes of limitation, the right to a jury trial in civil cases, and the method of computing damages in torts cases can cause choice of law and procedural problems in the cross-vesting environment. The well-established separation of judicial power from legislative action is challenged by the sweeping jurisdictional changes wrought by the cross-vesting legislation. The transfer sections of the scheme may deny a fair trial and they prohibit an appeal from a transfer order. The author lists factors that should guide judicial consideration of a cross-vesting transfer decision and suggests that the burden of persuasion should rest with the moving party.*]

Innovations in the administration of justice profoundly upset the proverbial 'seamless web of the law', and in nations and states with federal forms of constitution their ramifications may go far beyond the modest ambitions of their proponents. Cross-vesting of jurisdiction in Australian courts has been in operation for slightly more than four years,[1] and some assessment of its operations and conceptual underpinning would seem to be in order. This article represents an attempt to place the cross-vesting concept in the context of Australian legal history, to examine the difficult administrative problems raised by the cross-vesting statutes, to evaluate the operation of the cross-vesting scheme, and to identify any pitfalls in its application.

The Commonwealth cross-vesting statute[2] sets forth in its preamble the ration-

* A.B.(Columbia), M.A.(Columbia), Ph.D.(Columbia), LL.B.(New York). Member of the Bars of New York, the District of Columbia and South Carolina. Ernest F. Hollings Professor of Constitutional Law, University of South Carolina, and Visiting Fellow, Centre for Comparative Constitutional Studies, University of Melbourne Faculty of Law in 1992. The author wishes to thank Professor Cheryl Saunders, Director of the Centre for Comparative Constitutional Studies, for the opportunity to conduct this research at the Centre and for her generous support and encouragement during the period of his residence. Professor Saunders also provided a valued first reading of the text of this article, as did the Hon. L.J. Priestley of the New South Wales Court of Appeal, and John Finemore, Q.C., of the Victorian Bar. Mr. Justice Priestley and the Hon. William M.C. Gummow, of the Federal Court of Australia, kindly called materials to the attention of the author that might otherwise have been overlooked. A painstaking reading by a referee for the M.U.L.R. did much to correct errors of interpretation. All errors and omissions that remain belong to the author in fee simple.

[1] Research for this article was completed in early October 1992. Cases and other materials published after this date have been included only as they have come to the author's attention. The Australian Institute for Judicial Administration published its exhaustive report on cross-vesting in December 1992, drawing upon statistical materials and unreported cases not available to the author. The AIJA report — Moloney, G.J., and McMaster, S., *Cross-Vesting of Jurisdiction: A Review of the Operation of the National Scheme* (1992) — has been noted in the footnotes when appropriate, and will be referred to as *AIJA 1992 Report*.

[2] Jurisdiction of Courts (Cross-vesting) 1987 (Cth). For a general outline of the cross-vesting system, see Mason, K., and Crawford, J., 'The Cross-vesting Scheme' (1988) 62 *Australian Law Journal* 328. There are actually cross-vesting statutes in each of the States and Territories, without which the scheme would not have come into effect. For simplicity, this article refers to the Commonwealth Act only; while the various State Acts may vary from the precise formula of the Commonwealth Act. The major provisions are parallel to those in the Commonwealth Act. The major differences are the different constitutional bases for court jurisdiction in the States, Territories and the Commonwealth. See also Griffith, G., Rose D., and Gageler, 'Choice of Law in Cross-vested Jurisdiction: A Reply to Kelly and Crawford' (1988) 62 *Australian Law Journal* 698; and by the same authors, 'Further Aspects of the Cross-vesting Scheme' (1988) 62 *Australian Law Journal*, 1016; Kovacs, D., 'Cross-vesting of Jurisdiction: New Solutions or New Problems' (1988) 62 M.U.L.R. 669.

ale of the legislation and identifies the difficulties sought to be addressed by its provisions. The first of these is the 'inconvenience and expense' occasionally caused to litigants by limitations upon the jurisdiction of federal, State or Territory courts. On its face this purpose is laudable, although it might more properly be viewed as raising serious questions about the availability and quality of justice within the court systems of Australia. The preamble incorrectly infers that counsel for these inconvenienced litigants lack familiarity with basic rules of court jurisdiction within the federal system. It is in fact far more likely that the need for greater clarity in jurisdictional matters is caused by errors in judgment on the part of individual inexperienced counsel. This should be all that the Federal Parliament and State and Territorial legislatures seek to remedy with the cross-vesting legislation.[3] Regardless, the interests of justice, rather than convenience of counsel or litigants, should be paramount in the enactment of the legislation.

Second, the enacting clause declares that jurisdiction will be cross-vested without 'detracting from the existing jurisdiction of any court'. Theoretically at least, this expression of support for tradition is commendable, but given the situation of Australian courts before cross-vesting occurred, the declaration seems contrary to the operative provisions of the statute. Since State courts had plenary and exclusive jurisdiction in several areas not affected by Commonwealth law, and all federal courts possessed only limited jurisdiction as defined by the Commonwealth Constitution or statutes passed in accordance with the Constitution, the State courts after the passage of cross-vesting statutes are sharing their traditional jurisdiction with federal courts. Technically this does not detract from State Supreme Court jurisdiction, but, in practice, cases may be diverted into the Federal Court of Australia or the Family Court of Australia that previously would have been brought in a State Supreme Court. Despite the disclaimer, the cross-vesting legislation enhances the jurisdiction of the federal courts, but adds little to the authority of the State Supreme Courts.

Third, the Act is designed to ensure that the court in which a case originates has adequate jurisdiction to determine all matters relating to that case. This provision is designed to address the reluctance of federal courts to expand their limited jurisdiction by resorting to what has been called 'associated jurisdiction'. This judge-made accretion to jurisdiction occurs when the resolution of a federal matter properly before the court involves related State matters not normally within the court's purview.[4] In effect, cross-vesting provides statutory authority for both Federal and State Supreme Court judges to decide related matters that otherwise

[3] The statistics would seem to indicate that cross-vesting was not needed, since there has been comparatively little resort to inter-court transfers in the four year period that the scheme has been in operation. See the conclusions and statistical appendices in the *AIJA 1992 Report* 148, Tables B, C and D of Appendix I. The *Federal Court of Australia Annual Report 1990-91* (1991) Appendix III, 67-82 indicates no substantial impact of cross-vesting on that Court's workload.

[4] Associated or pendant jurisdiction is discussed in Renfree, H.E., *The Federal Judicial System of Australia* (1984) 387-94; see also sub-section 32(1) of the Federal Court of Australia Act, and s.33 of the Family Law Act 1975. For an analysis of associated jurisdiction and the federal courts prior to cross-vesting see Gummow, W.M.C., 'Pendant Jurisdiction in Australia — s.32 of the Federal Court of Australia Act 1976' (1979) 10 *Federal Law Review* 211. Another complement to statutory jurisdiction is 'inherent' jurisdiction, based upon the implication within the statutory grant that certain powers essential to exercise of statutory jurisdiction are conferred upon the Federal or Family Court. See Renfree, *supra*. 394-5.

would fall within the limitations imposed by the doctrine of associated jurisdiction.

Finally, the enacting clause evidences the aim of empowering courts to transfer a pending case to another court within the scheme when such a procedure seems appropriate. Obviously a court that has traditionally exercised jurisdiction in a given area of litigation will be more expert and hence efficiency will be increased. Litigation will be less expensive and more convenient for the parties when witnesses and physical evidence are more readily accessible. Consolidation of related cases pending in two or more courts can achieve efficiencies at trial as well as avoiding conflicting judgments in different cases that form part of the same complex litigation. However, the plaintiff or petitioner in an action clearly chooses to petition that court which he or she deems appropriate, and before responding on the merits the defending party makes a similar decision concerning the appropriateness of the tribunal selected. The forum court's determination that the action is inappropriate disturbs the litigants' willingness to submit the case to a court of their choice; it can also be the first step in so altering the course of litigation that injustice may occur.

By its terms, the Commonwealth Cross-Vesting Act does not apply to the High Court of Australia,[5] nor does it involve State courts below the level of a Supreme Court or a State Family Court.[6] It does not cross-vest jurisdiction in any criminal matter.[7] Certain 'special federal matters' may be transferred only after notice to the Commonwealth Attorney-General. Briefly, these matters involve portions of the Trade Practices Act 1974 (Cth), certain appeals removed from the jurisdiction of State Supreme Courts by Commonwealth statute, and matters arising under the Administrative Decisions (Judicial Review) Act 1977 (Cth) and the National Crime Authority Act 1984 (Cth)[8]. The Federal Court's original jurisdiction to issue mandamus, prohibition or injunction writs to Commonwealth officers is also considered a 'special federal matter.'[9]

In one of the earliest cases dealing with the cross-vesting scheme, *Bankinvest A.G. v. Seabrook*,[10] Chief Justice Street of the New South Wales Supreme Court observed that the disposition of a cross-vesting motion was a mere 'nuts and bolts' administrative decision. With all due respect, this is a most misleading

5 However, as we shall discuss later, the Act does prohibit appeals from cross-vesting orders, and this indirectly limits the authority of the High Court of Australia to review such an order by appeal. It is unclear whether review by injunction, prohibition or *mandamus* would be available to the High Court in an appropriate case.

6 Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth) s.3, which does not include the High Court within its definitions. The High Court is not mentioned in any of the cross-vesting provisions. Thus the High Court of Australia's powers of removal or remitter remain intact and examples of their exercise may well serve as persuasive models for the drafting of cross-vesting judgments.

7 *Ibid.* S.3 defines a 'matter' as not including a criminal proceeding.

8 *Ibid.* s.6.

9 *Ibid.* ss3 and 6; also s.39B of the Judiciary Act 1903 (Cth).

10 (1988) 14 N.S.W.L.R. 711, 714. This was one of the first State Supreme Court pronouncements on cross-vesting, brought on by certification of a question from the Commercial Division of the New South Wales Supreme Court. A similar procedure was used in *Chapman v. Jansen* (1990) 100 F.L.R. 66, where a Family Court judge referred a cross-vesting question to a three judge panel, hoping to get definitive advice. Instead, he received three widely divergent judgments for his trouble. *Bankinvest* and *Chapman* suggest that serious divergences of opinion exist concerning the cross-vesting process; without an outlet in published appellate reports, neither bench nor bar will have a method for resolving those differences. This morass of conflicting views has been criticized in the *AIJA 1992 Report* 98-102, which contends that a formal monitoring committee would be preferable to appellate review.

approach to cross-vesting orders. The decision to invoke the cross-vesting transfer authority involves significant choices that may very well impact upon the substantive outcome of the litigation.[11] Unless the transferring court (the 'first court' in the language of the statute) carefully assesses all the consequences of the transfer, injustice may be done, even if inadvertently.[12] Additionally, while the transfer decision is a matter of judicial discretion, the cross-vesting statute specifically precludes appellate review of the cross-vesting order,[13] thereby rendering it unlikely that any precedential guidelines will be provided to judges contemplating such a transfer. At the same time, the lack of appellate review denies litigants any remedy for abuse of the discretion. Undoubtedly there is justification for applying flexible standards to a cross-vesting transfer, but certainly more regularity can be expected than a process seen to be reaching 'an ultimate judgment which is little more than one of impression'.[14] Complicated choice of law issues, varying degrees of access to jury trial, and divergent State rules concerning liability and damages make this a hazardous judicial determination rather than a 'nuts and bolts' balancing of convenience or efficiency.[15]

As the latest in a long series of Australian efforts to streamline judicial business, cross-vesting is a product of those historical circumstances that created both the need for its enactment and the conditions that have nurtured its initial application. This article will attempt to identify those factors, many of which relate back to the earliest years of New South Wales settlement and which continue to shape Australian law and judicial institutions. Following this an attempt will be made to examine, in a summary way, Commonwealth experience with court structure since 1901. To a degree, these historical events may be the catalytic agents which triggered cross-vesting acceptance at Commonwealth, State and Territorial levels. Finally, an effort will be made to pin-point those areas where cross-vesting activity either has not worked or has resulted in substantial injustice.

[11] President Michael Kirby in his concurring opinion in *Bankinvest* demurred to Chief Justice Street's statement concerning the administrative character of cross-vesting orders, but unfortunately he did not elaborate: see (1988) 14 N.S.W.L.R. 711, 716.

[12] The decision of Nygh J. of the Family Court of Australia is one of the better and more carefully articulated approaches to the transfer provisions of the cross-vesting legislation. See *Re Staples and McCall* (1989) 13 Fam.L.R. 279.

[13] Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) sub-section 13(a). Appeals concerning the transferee court's decision to apply its forum rules under sub-section 11(a) are also precluded. Since removal by the High Court is technically not an appeal, it is possible that if some right under the Commonwealth Constitution is raised by the transfer order, removal might be ordered. However, in the absence of a due process clause in the Commonwealth Constitution or in the Judiciary Act 1903 (Cth), this seems unlikely.

[14] President Michael Kirby of the New South Wales Court of Appeal in *Bankinvest A.G. v. Seabrook* (1987) 14 N.S.W.L.R. 711, 716.

[15] *AIJA 1992 Report* 89 notes that jury trial considerations were accepted as justifications for denying a cross-vesting transfer motion. In their conclusion, the authors consider the need to attend to such matters to be a useful educational tool, observing that under cross-vesting: 'judges and practitioners have become more aware of the legal systems and procedures operating in other Australian jurisdictions. Helping to break down our parochial tendencies has been a more subtle but equally important benefit of the scheme': *ibid.* 147. There is some irony in this, since at least one of the justifications for cross-vesting was that Australian lawyers did not understand court jurisdiction!

## I. *FOUNDATIONS IN AUSTRALIAN LEGAL HISTORY*

While cross-vesting can be understood without recourse to history, historical perspectives are illuminating and provide some helpful insight into the constitutional and jurisdictional underpinning of this latest Australian venture into court reform.[16]

### A. *THE COLONIAL PERIOD*

Cross-vesting is fortunate to take place in the 'lucky country' of Australia, which, despite its federal form of government, enjoys many national commonalities in its substantive and procedural law. The first settlement in New South Wales in 1788 occupied an anomalous position in English law because of the large number of convicts in its population.[17] The perceived need for harsh, military-style discipline in the penal colony retarded both the grant of legislative powers and the development of an English system of civil courts. Not until the passage of the Australia Courts Act of 1828[18] was the common and statutory law of England (except as locally altered) considered to be applicable in New South Wales. From the original territory of New South Wales the colonies of Tasmania (1825), Victoria (1851) and Queensland (1859) were erected,[19] and after the establishment of the Commonwealth, the Australian Capital Territory was located on land which was formerly New South Wales territory, and was therefore covered by the 1828 Australia Courts Act. This sequence of events resulted in eastern Australia, from the tip of Queensland in the north to Tasmania in the south, having the same date for the extension of English law — 25 July 1828. Shortly thereafter, settlements were made in Western Australia (1829) and South Australia (1836).[20] These were composed almost entirely of free settlors, and in accordance with standard English practice, English statutes enacted prior to settlement were applicable.[21] Because English statutes and common law as they existed in the period 1828 to 1836 constituted a relatively uniform corpus for all of

16 *Ibid.* 715-6. Kirby P. listed the history of the cross-vesting legislation as germane in considering transfer requests. However, he did not extend his proposed historical analysis beyond the legislative background of the statute nor did he consider the detailed history of judicial arrangements in Australia.

17 Castles, A.C., *An Australian Legal History* (1982) 32-45.

18 Australia Courts Act, 1828, 9 Geo. IV, c.83, s.24 sets 25 July 1828 as the date upon which statutes then in force in England applied in New South Wales. See Castles, *op. cit.* 400-5; Morison, W.L., *The System of Law and Courts Governing New South Wales* (1979) 6-7; Melbourne, A.C.V., *Early Constitutional Development in Australia* (2nd ed. 1963) 158-9.

19 Castles, *op. cit.* n.17, 153 and 252; Melbourne, *supra.* n.18, 109 and 445 dates Tasmanian separation from 3 December 1825, and Queensland separation from 6 June 1859; Victorian separation may possibly date from the separate gubernatorial commission to Sir Charles Fitzroy delivered on 13 January 1851: Melbourne, *supra.* n.18, 381. Tasmania was separated from New South Wales' government in 1825, but s.1 of the Australia Courts Act 1828 covered both New South Wales and Tasmania (Van Diemen's Land). During the late 1840s and early 1850s, imperial statesmen made efforts to erect a federated colony in Australia and to provide uniform constitutions for the various Australian colonies: Melbourne, *supra* n.18, 331-56, 366-80, particularly 370.

20 Castles, *op. cit.* n.17, 294.

21 The formal introduction of English law into the Australian colonies within an eight year period is in stark contrast to the century and a half extension to the English colonies in North America, where English law, (as of 1607, or 1753, or dates in between, depending upon the colony), was considered part of colonial law. Because of the uncertainty concerning which English statutes were in force in Australia as of 25 July 1828, State statutes have 'recognised' certain provisions as being in effect. See the discussion of the Imperial Acts Application Act 1969 (N.S.W.) in *Jago v. District Court of New South Wales* (1989) 168 C.L.R. 23, 62-3 and 78.

Australia, there has been a more uniform foundation upon which to build national legal institutions than might otherwise have been the case.

Law in each Australian colony was subject to alteration, both by imperial legislation mentioning the colony and by local legislative action or court decision.[22] Colonial legislation was reviewed by the Privy Council, as were colonial court decisions involving more than £3000.[23] While British administrative review of colonial legislation was neither efficient nor thorough, it did ensure that major alterations in colonial law that impacted upon imperial trade or the royal prerogative were not made without Crown approval.[24] Oversight of colonial court decisions was subject to the vagaries of a litigant's determination whether or not to undertake the expense of an appeal.[25]

Subsequent to the establishment of the Commonwealth of Australia in 1901, the High Court has exercised general appellate review of all cases decided in the Supreme Courts of the various States, and substantial areas of legislative power have been vested in the Commonwealth Parliament.[26] Upon the insistence of British statesmen at the time of federation, appeals to the Privy Council were retained after the establishment of the Commonwealth. Rarely allowed in areas of federal public law, appeals to the Privy Council in private law matters remained an alternative source of review until 1968, when they were discontinued in regard to federal court (including High Court of Australia) cases, and until 1986 in regard to the decisions of State Supreme Courts.[27] Although neither the High Court of Australia nor the Privy Council created complete uniformity of law throughout the continent and its dependencies, both forums facilitated harmonizing substantive law among the colonies and their successor States. In addition, British imperial initiatives during the nineteenth century tended to deal with Australian problems across separate colonial lines. The result was a greater level of constitutional uniformity among the Australian colonies, and a tendency to anticipate some form of federated government.[28]

22 See generally Castles, *op. cit.* n.17, 1-19. The dynamics of colonial acceptance of the reception of English statutes are complex. For an American colonial example see Johnson, H.A., 'English Statutes in Colonial New York' (1977) 58 *New York History,* 277; for a more comprehensive discussion of the problem see Smith, J.H., *Appeals to the Privy Council from the American Plantations* (1950) 464-503.

23 Castles, *op. cit.* n.17, 102-6. The original jurisdictional amount for Privy Council appeals was £300, but the large number of requests for review delayed recovery in Australian cases. The jurisdictional amount was raised to £3000 in 1814.

24 The quantity of business pending, coupled with the cumbersome referral procedures before the Privy Council, created administrative difficulties. Colonial resort to temporary laws, or laws of short duration, permitted avoidance of Privy Council directives. Many disallowances never reached the colonies involved. For a survey of legislative review see Russell, E.B., *The Review of American Colonial Legislation by the King in Council* (1915) especially 203-27. In the case of nineteenth century colonies, some of the uncertainties concerning colonial legislation were resolved by the Colonial Laws Validity Act, 1865, (U.K.), 28 & 29 Vic., c.63, s.7, which, amongst other things, provided that a colonial assembly's Act that had been approved by the Governor would be valid until such time as notice of Crown disallowance was received within the colony.

25 For a general assessment of Privy Council functions as an appellate court from 1607-1783, see Smith, *Appeals to the Privy Concil* (1950) 654-64, which concludes that in the First British Empire the Council never established a workable body of precedents, and that the various court systems in the colonies made uniformity of appellate practice difficult. The Australian colonies had more uniformity in their court arrangements, and British supervision seems to have been more vigorous.

26 See generally, Commonwealth Constitution ss51-2 and 73.

27 See generally, Renfree, *op. cit.* n.4, 783-95; also Hanks, P.J., *Constitutional Law in Australia* (1991) 18-19.

28 See *supra.* n. 7, and *infra.* nn.33-4.

Nineteenth century Australian legal history, along with contemporary developments in England and the United States, predisposed Australian State courts to marked similarity in their structure and procedure. From 1823, the New South Wales Supreme Court possessed the combined jurisdiction of the English common law courts of the King's Bench, Common Pleas and the Exchequer, as well as the equity jurisdiction of the English Court of Chancery. In addition, it exercised probate jurisdiction and authority over incompetents; the criminal jurisdiction of admiralty courts also attached to the Supreme Court.[29] This New South Wales model, perpetuated in the 1828 Australia Courts Act, served as the prototype for the other superior courts established in Australia. Professor Castles notes this persistence of the New South Wales model throughout Australia, and he also suggests that English court reform initiatives, ultimately responsible for the Supreme Court of Judicature Act of 1873 (UK), were highly influential in Australia.[30]

During the nineteenth century, Anglo-American law was under pressure to simplify procedure and to merge common law and equity.[31] Well before Australian federation in 1901, each of the State Supreme Courts possessed plenary jurisdiction in law and equity and shared a common structure with the Supreme Courts in the other States. It was therefore reasonable for the Commonwealth Constitution to provide that State courts might be authorised to exercise federal (*i.e.* Commonwealth) judicial power. Similarity in structure and authority among the State Supreme Courts facilitated the so-called 'autochthonous expedient.'[32]

When the Commonwealth Parliament conferred authority to exercise federal judicial power upon State Supreme Courts in 1903, there was no need for realignment of the courts in any of the States, nor were there difficulties caused by

29 Preliminary proposals for a Supreme Court in New South Wales were made by Ellis Bent as early as 1811, and were incorporated in the New South Wales Act, 1823, Geo. IV, c.96. See Castles, *op. cit.* n.17, 133-43; Melbourne, *op. cit.* n.18, 42-6 and 160.

30 Castles, *op. cit.* n.17, 333-6. There were American antecedents for a superior colonial Court which united the jurisdiction of the King's Bench, the Court of Common Pleas and the Court of the Exchequer, based upon the short-lived court system for the Dominion of New England. See Hamlin, P.M. and Baker, C.E. (eds), *Supreme Court of Judicature of the Province of New York 1691-1704* (1959) 38-57. However, this court structure was not uniform throughout British North America prior to 1776, and as a general rule did not apply south of the province of New York.

31 One may cite the English merger of the Westminster Courts, including the Court of Chancery in 1873, but even earlier than this the American system of code pleading, launched by David Dudley Field in 1851, had begun a major revolution in pleading. It forced a simplification of court structure through a merger of law and equity jurisdiction.

32 On the floor of the Philadelphia Convention in 1787 it was proposed that State courts serve as trial courts in federal matters, reserving an appeal to the United States Supreme Court. To this James Madison replied that '[a] government without a proper executive and judiciary would be the mere trunk of a body, without arms or legs to act or move.' See Elliot, J., (ed.), *Debates on the Adoption of the Federal Constitution at the Convention held in Philadelphia* (1907) 158-9. During the ratification debates in the State conventions the proposal was revived. See Goebel, J., *Antecedents and Beginnings to 1801* Volume I, *History of the Supreme Court of the United States* (1971) 356, 383-9 and 401; and Allen, W.B. and Lloyd, G. (eds), *The Essential Antifederalist* (1985) 105 and 133. In a practical sense, the wide variety of court structures within the American states and differing systems of appellate review would have made the administration of federal law by American State courts a very tentative matter. The term 'autochthonous' refers to something indigenous, and has evolved in Australian legal jargon to describe the unusual step taken in sub-section 77(iii) of the Commonwealth Constitution authorising Parliament to confer the judicial power of the Commonwealth upon State courts. The term has been taken up in Pakistan's constitutional law. See Hogg, P., 'Necessity in a Constitutional Crisis' (1989) 15 *Monash University Law Review* 253, 260 especially footnote 39.

a lack of authority to exercise common law and equity concurrently in those courts.

The conferral of federal jurisdiction upon State Supreme Courts[33] is the most significant statutory precedent to the 1987 cross-vesting legislation. After nearly nine decades of exercising the judicial power of the Commonwealth, State Supreme Courts were accustomed to accepting transferred cases from federal tribunals, just as they have traditionally been available for service as the primary trial courts for federal cases both before and after the establishment in 1976 of the Federal Court of Australia.

Australia's 'autochthonous expedient' and the more recent cross-vesting legislation also draw upon Australian constitutional theories of sovereignty for their legitimacy. There is a strong tradition of legislative supremacy, based upon the historical circumstance that New South Wales and the subsequent settlements were made at a time when Sir William Blackstone's constitutional views held sway in Britain. Unlike the constitutional experiences of Canada and the United States, there has been little inclination to challenge the authority of the Imperial Parliament to legislate for Australia or for her constitutive States. The exercise of legislative power, particularly by the Imperial Parliament[34] in conjunction with the Commonwealth Parliament and the Parliaments of the States and Territories, may have wide-ranging constitutional significance, as it did in the passage of the Australia Act 1986 (Cth and U.K.) which abolished appeals from State Supreme Courts to the Privy Council.[35]

In the aftermath of the 1986 alterations in Australia's constitutional relationship with the U.K., it is conceivable that, despite the Commonwealth Constitution's specific amendment provisions,[36] joint action by the Commonwealth Parliament and the legislative bodies of all Australian States and Territories could alter the basic form of government without the formality of constitutional amendment. The cross-vesting of court jurisdiction presumably rests upon this seemingly plenary authority of Australia's legislative bodies. Indeed, it is questionable whether imperial limitations on State constitutional authority prior to 1986 would not have defeated an earlier effort to cross-vest State judicial authority in federal courts. These questions concerning the constitutional law of the Australian federation are beyond the scope of this article, but they involve serious doctrinal questions as to whether the Commonwealth Constitution is a document that limits Commonwealth legislative powers, and whether State constitutions are mere creations of statute subject to repeal by a simple legislative majority.

More pertinent to the cross-vesting experiment is the tendency to view sovereignty as being shared between the Commonwealth and the States and Territories.

33 Judiciary Act 1903 (Cth) sub-section 39(2).

34 The term 'Imperial Parliament' is a simple adoption of Australian terminology. Essentially it accepts the concept that members of Parliament elected by English, Scottish, Welsh and Irish constituencies 'virtually represent' the peoples of the far-flung British Empire. As a governmental principle this was challenged by the American Revolution, and during the nineteenth century it was modified through the British acceptance of the concept of 'responsible government' for colonial peoples. Given the virtual disappearance of any British control over the Australian governments, the term 'Imperial Parliament' can be considered valid only in a historical context.

35 See discussion in Hanks, *op.cit.* n.27, 18-19.

36 Commonwealth Constitution s.128.

This has historical roots in the colonial experience of the Australian States. Well before Australian federation, British statesmen were engaged in a two-pronged effort to give substantial self-determination to those British North American colonies that would become the Dominion of Canada in 1867, and at the same time to ensure representative and responsible Canadian governments at both the federal and the provincial levels.[37] While the details of Canadian confederation need not concern us here, it is important to recognize that at the same time the these British administrators were considering the future political institutions of Australia. Within their discussions was the premise that all Australian colonies would be united under one federal system of government. Thus nearly a half century before actual Australian federation, the intellectual seeds had been sown, both in Whitehall and in Australia. Ultimate federation in Australia would not occur until 1901, but nearly half a century previously both British colonial administrators and Australians themselves had begun to think in those terms.[38]

This historical background provided a unique Australian view of sovereignty within the federation. When the Commonwealth Constitution was proposed, it represented the collective effort of the separate Australian States, growing out of their initiative, but drawing upon cultural and economic affinities and political speculations reaching back to the first years of settlement. At the same time, the actual establishment of the Commonwealth depended upon ratification by the British (or Imperial) Parliament. Ultimately, the three streams for federation all took their source in the British Crown and Parliament: first, each colonial constitution could trace its origins directly to action by Whitehall; second, in international law and in terms of the Constitution of Great Britain, Parliamentary action was needed for a smooth transition of most governmental authority to the new Commonwealth of Australia and its constitutive States; and third, a constitutional consent by referenda among the Australian people approved the establishment of a new federal nation, predicated upon long-held imperial and colonial views of law and constitution, and conditioned by ancient concepts of the rule of law nurtured by the English historical experience under the Crown.

Viewed in these terms, in practice Australian sovereignty remained divided between Westminster, the Commonwealth and the States after federation, but in theory it continued to be exercised by the Crown. As a consequence of this *de jure* view of sovereignty, there was ready acceptance of the Commonwealth Constitution's authorization of the State courts' exercise of federal jurisdiction.[39] Both State and federal judges owed their commissions to the same sovereign monarch. With the passage of enabling legislation in the Judiciary Act of 1903,[40] State courts became the primary trial courts within the federal system and continued to perform this function for three-quarters of a century. At the same time,

[37] For Australian-Canadian parallels, see Melbourne, *op. cit.* n.18, 342-56, 369-75, 383-4 and 403-5.

[38] The contrasting experience of the North American colonies that formed the United States may help to demonstrate the impact of this factor. Each American colony was subject to individual administration, and the single effort at unification, the Dominion of New England, fell with the Stuart monarchy. Some limited co-operation between colonies was obtained for purposes of mutual defense, but no formal arrangements worked toward a unified colonial interest.

[39] Commonwealth Constitution s.128.

[40] Judiciary Act 1903 (Cth) sub-section 39(2).

the High Court of Australia was constitutionally vested with broad appellate authority over fields of State law that lacked any federal element, given extensive original jurisdiction over interstate matters and international cases, and made a general court of appeal for the Commonwealth.[41] Not only did this tend to unify Australian law, but it evidenced the intention of the founding fathers of Australia that sharp lines of distinction did not need to be drawn between the constitutional sphere of State court jurisdiction on the one hand, and that of the High Court and any lower federal courts that might be erected by legislation on the other.

Two further factors must be mentioned concerning sovereignty and court jurisdiction. First, Australian colonial courts originally existed by virtue of the royal prerogative, and more recently by State legislative establishment. Except for the High Court, federal courts are creatures of Parliamentary establishment under the provisions of s.77 of the Commonwealth Constitution. With the single exception of the High Court, Australian courts are not constitutional tribunals insulated from the exercise of political (*i.e.* legislative) power.[42] Rather than being established as a matter of constitutional right, they are creatures of legislative power — they are subject to the parliamentary control of the States and the Commonwealth.[43] Second, both legislatively and by judicial construction, Australian court jurisdiction has become nationalized through a blur of traditional boundaries. Service of process is, for most purposes, national in scope.[44] While the High Court has extensive original jurisdiction, it has become customary for cases involving interstate matters, as well as cases in which the Commonwealth is a party, to be remitted to State courts for trial.[45] Again the explanation would seem to be that the same sovereignty is involved, whether State or federal courts act.

Despite all of the historical pressures toward uniformity of the law and elimination of the territorial limits to the exercise of court jurisdiction, there are notable

41 The Commonwealth Constitution sub-section 73(ii) gives the High Court of Australia appellate jurisdiction over the decisions of federal courts, the Supreme Court of any State, and over any court from which, at the establishment of the Commonwealth, an appeal would lie to the Queen in Council. Ss75 and 76 form the basis for the High Court's broad original jurisdiction in the interstate and international fields.

42 Professor Enid Campbell noted that in colonial New South Wales, courts were erected by resorting to the royal prerogative, and that only the Court of criminal jurisdiction and the vice-admiralty Court had statutory foundations. In no instance, she asserted, did the imperial authorities concede the right of colonial legislatures to erect courts in Australia, and even the governors were not allowed to erect courts (as American colonial govenors were able to do before 1776). See Campbell, E., 'The Royal Prerogative to Create Colonial Courts: A Study of the Constitutional Foundation of the Judicial System in New South Wales, 1788-1823' (1964) 4 *Sydney Law Review* 343.

43 By way of contrast, as early as 1734 New York colonial lawyers were arguing that no court of equity could be erected in that province except as authorised by an Act of the GeneralAssembly, or in the alternative, that such courts existed by the common custom and law of England, and as such extended automatically to the colony of New York. 'It is one part of the Privilege of an Englishman, to have his Property determined by such Courts as are Fundamental Courts, and are by the Law, without Act of Parliament' asserted attorney Joseph Murray. See the opinions of Murray and William Smith, Sr, reproduced in Smith, J.H., (ed.), *Cases and Materials on the Development of Legal Institutions* (1965) 440.

44 The Service and Execution of Process Act 1992 (Cth) provides for the Commonwealth-wide service of original writs and for an expedited mode of entering judgment on the certificate of a judgment rendered in another Australian State or Territory. By way of contrast, the United States has a complex set of constitutional principles concerning what judgments are entitled to full faith and credit in states or territories other than that of the issuing tribunal, and service of process across state and territorial lines is available in only a limited number of circumstances.

45 In a case pending before the High Court, the matter may be remitted to a State or federal court of the High Court's selection for the purposes of adjudication. However, cases involving the Commonwealth are to be remitted to the Federal Court of Australia since its creation in 1975: Judiciary Act 1903 (Cth) sub-sections 44(1) and 44(2A).

exceptions to the ostensible symmetry of Australian legal institutions. One of the most glaring is the varying approach to jury trial in civil cases. Because of the penal colony origins of New South Wales, jury trials were late in arrival and irregular in application. The Australia Courts Act of 1828 permitted jury trial of civil matters if both parties requested such a trial, but jurors were restricted to those who held a £300 freehold. Cases not so tried were submitted to a judge and four assessors who were military officers. By local ordinances, juries were authorised in civil cases in 1831, but the practice was to eliminate all former convicts (emancipists) from jury service.[46]

Tasmania adopted trial by jury with variations from New South Wales practice, permitting juries of four persons drawn from a special list, but making provision for a twelve man jury upon the demand of a party.[47] By 1852 New South Wales used trial juries in all cases involving more than £25, but Victoria clung to the use of assessors.[48] Tasmania abolished the use of assessors in 1834, resorting to a jury of four to try issues of fact, but permitting a jury of twelve if the parties demanded one. By 1854, Tasmanian courts moved to utilize a full jury of twelve on a routine basis, but this was reduced to a seven person jury in 1959, with the parties having the option of drawing a three or five person jury by their agreement.[49] Juries in civil cases in Western Australia disappeared almost without notice at some time between 1914 and 1926.[50] In New South Wales there are recurrent complaints that jurors are too lavish with their damage awards in tort cases.[51]

State variations in the use of juries in civil trials cannot fail to have a profound impact upon trial practice and the law of evidence among the various States. It certainly raises complications for barristers and solicitors accustomed to practice in one mode of trial having to adapt to another when a case is cross-vested. A litigant may be substantially disadvantaged by a cross-vesting decision which, through the transferee court's application of the law of the forum, deprives him or her of a just expectation of jury trial. Unlike American constitutional law, which provides for jury trial in most civil cases, Australian law treats juries, even in criminal matters, as 'granted of grace' by legislative action.[52] In *Jago v. District Court of New South Wales*,[53] the High Court seems to have adhered to this narrow

[46] Melbourne, *op. cit.* n.18, 76-8, 90, 100, 146, 160 and 192-3. Bennett, J.M., 'The Establishment of Jury Trial in New South Wales' (1961) 3 *Sydney Law Review* 463 provides a good chronology and description of the process. Dr David Neal underlines the importance of courts to the political history of colonial New South Wales, and provides a perceptive analysis of the struggle for jury trial in *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991).

[47] Castles, *op. cit.* n.17, 274. Should the jury fail to reach a unanimous conclusion after six hours deliberation, a verdict of three-quarters of the members was acceptable to decide a case.

[48] *Ibid.* 369. Closely related to the introduction of civil jury trial was the persistence of a small claims type procedure in the Courts of Request. These were abolished in Victoria in 1852 and in Western Australia in 1863, but they persisted in Tasmania into the twentieth century.

[49] Henchman, P.H., 'The New South Wales Jury of Four Persons' (1959) 33 *Australian Law Journal* 235, 236-7. Henchman notes that special juries, drawn from individuals with particular status, continued to be used in Tasmania in 1959, but that they had been abandoned in New South Wales practice.

[50] Hale, J., 'Juries: The Western Australian Experience' 11 *Western Australian Law Review* (1973) 99, 100-1.

[51] See Derham, D. H., 'Some Notes on the Role of Juries in Running-down Cases' (1962) 36 *Australian Law Journal* 59, 63. However, recourse to jury trial in civil cases is on the decline even in New South Wales.

[52] Bennett, 'The Establishment of Jury Trial in New South Wales' (1961) 3 *Sydney Law Review* 463, 482.

[53] (1989) 168 C.L.R. 23. The High Court agreed that a defendant in a criminal case is entitled to a

concept of due process based upon a theory of 'fair trial'. Despite its careful attention to the Magna Carta, the English Habeas Corpus Act of 1679, and the Imperial Acts Application Act 1969 (N.S.W.), the High Court refused to include a speedy trial within the concept of 'fair trial'. It seems unlikely that in a civil case a party's right to jury trial would be considered an essential ingredient of a 'fair trial'.

Another area in which there is diversity of law among the States is the substantive law of torts. As of 1974 interspousal tort immunity existed in New South Wales, but not in Victoria.[54] The Northern Territory has adopted 'no fault' insurance rules, while the States continue to apply a liability-based system.[55] Juries or judges in one State may well have differing views about the computation of damages, or have already established standards.[56] Even-handed justice in cross-vested cases is directly related to the uniformity of substantive and procedural law throughout Australia. To achieve both justice and flexibility in cross-vesting, State substantive and procedural law must become strictly uniform. Even if State Parliaments were to acquiesce in the wisdom of such drastic changes, would not the difficult constitutional and doctrinal alterations necessary to facilitate cross-vesting result in an undesirable loss of State legislative initiative and the eventual homogenization of Australian State law? In measuring the cross-vesting costs imposed upon the federal system, it is helpful to recall the admonition of Mr. Justice Louis Brandeis:

> To stay experimentation in things social and economic is a grave responsibility. . . . It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[57]

## B. *THE JUDICIARY AND THE COMMONWEALTH CONSTITUTION*

Despite special characteristics of Australian federal sovereignty and the modern tendency of Commonwealth and State governments to cooperate in a variety of areas, the very existence of a Commonwealth Constitution restricts the way in which combined Commonwealth-State power may be utilized.[58] Patterned after the United States' federal constitution, the Commonwealth Constitution outlines federal judicial power in Chapter III, and, since 1903, the High Court has vigilantly maintained the independence of the federal courts as required by its view

fair trial, but held, for various reasons, that a delay in prosecution would not justify a permanent stay against prosecution.

54 Rumble, G.A., 'Case Notes — *Corcoran v. Corcoran* . . .' (1974) 6 *Federal Law Review* 397.

55 *Breavington v. Godleman* (1988) 169 C.L.R. 41, 44. The parties differed on whether the Northern Territory's 'no fault' liability statute concerning motor vehicle accidents was applicable to the case, and whether it was a limitation upon the defendant's liability when the matter was tried in Victoria.

56 In *Pozniak v. Smith* (1982) 151 C.L.R. 38, one of the considerations in a remittal by the High Court was the fact that in computing a lump sum immediate payment concerning future earning capacity, Queensland courts discounted at 5 percent, but New South Wales courts discounted at 3 percent, resulting in a damage computation more advantageous to the plaintiffs.

57 Dissenting opinion in *New State Ice Co. v. Liebman* (1932) 285 U.S. 262, 311.

58 The power of the Commonwealth Parliament to define jurisdiction of federal courts is limited by the nine 'matters' enumerated in ss75 and 76 of the Commonwealth Constitution: Renfree, *op. cit.* n.4, 367. Renfree also offers the persuasive argument that it is likely that federal court jurisdiction will be limited in subject matter to those enumerated heads of authority conferred upon the Commonwealth Parliament under s.51, but that this will not necessarily always be the case. See the discussion of the *Bank Nationalisation Case*: *infra.* n.70.

of the separation of powers doctrine. It has been held that federal courts may not be assigned arbitral duties and that judges who exercise federal judicial power must be appointed for life.[59] In addition, federal courts may not give advisory opinions and the exercise of judicial power may not be mingled with administrative activities.[60] These restrictions do not apply to State court judges who are governed by provisions in the State constitutions.

Although the Commonwealth Parliament was empowered to erect lower federal courts, it was content for most purposes during the first half century of federation to invest State Supreme Courts with federal jurisdiction. One exceptional situation was the creation of the Commonwealth Court of Conciliation and Arbitration, which arbitrated interstate labour-management disputes.[61] Another special purpose federal court was the Federal Court of Bankruptcy, created in 1930.[62] The Family Court of Australia was created by Commonwealth statute in 1975 in the course of a comprehensive revision of family law.[63] Family law is a field designated as federal under the 1901 Commonwealth Constitution, but for many years was subject to State family law and administered in State courts.[64]

Prior to 1976 federal courts were created for specific and limited purposes, and even after the passage of the 1976 Federal Court Act,[65] only the High Court of Australia, among the old and new federal tribunals, exercised broad original and appellate jurisdiction. This tradition of limited jurisdiction in federal courts, predicated upon express constitutional or statutory grants of authority, continues to the present day, although cross-vesting of State Supreme Court powers in federal and Territorial courts threatens to undermine limited jurisdiction, in practice if not in theory. The 1976 Federal Court of Australia Act conferred appellate power upon the Federal Court of Australia to relieve the heavy burden of appeals previously imposed upon the High Court.[66] However, the substantial amount of original

[59] *The Queen v. Kirby, ex parte Boilermaker's Society of Australia* (1956) 94 C.L.R. 254. In an early five to two decision, the High Court insisted that functions assigned to the Commonwealth Court of Conciliation and Arbitration were judicial in nature, and that Commonwealth judicial power could only be conferred constitutionally upon judges appointed for life: *Waterside Worker's Federation of Australia v. J.W. Alexander Ltd. (Alexander's Case)* (1918) 25 C.L.R. 434. See also discussion in Cowen, Z., and Zines, L., *Federal Jurisdiction in Australia* (2nd ed. 1978) 115. A 1977 constitutional amendment mandated retirement at 70 for all judges thereafter appointed: s.72 of the Commonwealth Constitution, as amended.

[60] See discussion in Cowen and Zines, *op. cit.* n.59, 16-7.

[61] The Court of Conciliation and Arbitration, which existed since 1926 with judges appointed for life, was held to violate the Commonwealth Constitution in *The Queen v. Kirby (The Boilermaker's Case)* (1956) 94 C.L.R. 254, and was reconstituted as the Commonwealth Industrial Court in 1956. Its name was changed to the Australian Industrial Court in 1973: Cowen and Zines, *op. cit.* n.59, 109-10. Upon the establishment of the Federal Court of Australia, the judicial business of the Australian Industrial Court was assigned to the Industrial Division of the Federal Court.

[62] Cowen and Zines, *op. cit.* n.59, 106-7: the Bankruptcy Court operated only in Victoria and New South Wales. In 1976 its jurisdiction was transferred to the Federal Court of Australia, General Division. Bankruptcy jurisdiction also exists in the Supreme Courts of some States and in the Insolvency Courts of other States under the Bankruptcy Act 1966 (Cth).

[63] Family Law Act 1975 (Cth).

[64] Prior to 1959 there was no uniform federal law concerning matrimonial causes, but temporary laws were enacted during the Second World War. After the Commonwealth Parliament enacted the Matrimonial Causes Act 1959, in the exercise of Commonwealth jurisdiction State Supreme Courts applied that law, and in the exercise of their own State jurisdiction they applied their own State matrimonial causes statutes and case law: Cowen, Z., and da Costa, D.M., *Matrimonial Causes Jurisdiction, Choice of Law and Recognition of Foreign Decrees Under the Matrimonial Causes Act 1959* (1961) 1-9.

[65] Federal Court of Australia Act 1976 (Cth).

[66] Federal Court of Australia Act 1976 (Cth) ss24-5. Generally, the Federal Court has appellate authority in matters decided by a single judge of the Federal Court, in appeals from Supreme Courts

federal litigation generated by the diversity of litigants' places of residence remained with the High Court or the State Supreme Courts exercising federal jurisdiction.[67]

The recent cross-vesting arrangement represents the most extensive grant of general jurisdiction yet to be made to any trial or intermediate federal court in Australia. It is surprising that such a wide-ranging jurisdictional alteration was attempted without constitutional amendment, and some serious constitutional difficulties may lurk within the cross-vesting scheme.

Undoubtedly the most significant constitutional difficulty is whether the Commonwealth courts as currently constituted can 'receive' the full range of State Supreme Court jurisdiction purportedly conferred upon them by the State legislation.[68] Can the States confer jurisdiction upon Commonwealth courts that exceeds the powers that the Commonwealth Parliament could grant under Chapter III of the Constitution? Basic to this question are three factors. First, the careful delineation of High Court jurisdiction in Chapter III, coupled with specificity concerning jurisdiction that may be legislatively conferred on federal courts, may well be taken to show that the Constitution limits the jurisdiction of federal courts.[69] Second, to what degree are constitutional custom and symmetry violated by the cross-vesting of State jurisdiction in federal courts?[70] Third, the High Court

of the Australian Capital Territory and dependent overseas territories (but not from the Northern Territory), and from judgments by a Supreme Court of a State while exercising federal jurisdiction (but not in matters decided by a Full Court or by two or more judges, or by a Court of Appeal). The High Court of Australia, except as otherwise authorized, will not hear appeals from the judgment of a single judge of the Federal Court, and appeals from a Full Court of the Federal Court are only heard by special leave of the High Court. S.33 provides that when appeals are taken from the Full Court of the Federal Court, at least three judges of the High Court must constitute the Full Court hearing the appeal.

67 Renfree, *op. cit.* n.4, 182-3. The Federal Court has appellate jurisdiction under the Administrative Decisions (Judicial Review) Act 1977, and for a variety of other administrative matters. It continues to act in bankruptcy and industrial matters, and is also the exclusive tribunal for the trial of matters under the Trade Practices Act 1974: *ibid.* 443-60. Sub-section 75(iv) of the Commonwealth Constitution gives the High Court original jurisdiction in matters between residents of different States; sub-section 17(1) invests the Supreme Courts of the States with authority to exercise federal jurisdiction in such a matter pending in the High Court; and sub-section 39(2) of the Judiciary Act 1903 (Cth) makes provision for such matters to be litigated in State Supreme Courts. Under its remittal power, the High Court may remit to a State Supreme Court any matter in which the High Court does not have exclusive jurisdiction; after passage of the Federal Court Act 1976 (Cth), litigation within the exclusive jurisdiction of the High Court may be remitted to the Federal Court of Australia. See sub-sections 44(1) and 44(2) of the Judiciary Act 1903 (Cth).

68 Although the Australian Institute of Judicial Administration considered the constitutional validity of cross-vesting to be beyond the purview of its study, there is a useful summary of the divergence of opinion on the point in *AIJA 1992 Report* 69-70. Ultimately, the issue can be resolved only by a vigorous reconsideration of the nature of Australian federalism, with attention to the desirability of interposing federal tribunals into areas hitherto considered subject to State court jurisdiction. Federal-State relations and separation of powers considerations are also significant factors in this consideration.

69 This would, of course, mirror the limited jurisdiction of federal courts established under the United States Constitution which, to a degree, served as a model for those who drafted this Chapter of the Commonwealth Constitution.

70 The majority judges in the *Bank Nationalisation Case* (*Bank of New South Wales v. Commonwealth* (1948) 76 C.L.R. 1) concurred with Latham C.J.'s view that the extent of Commonwealth legislative power was restricted by the enumeration of powers in the Commonwealth Constitution. Among them was Starke J., who observed that '[t]he maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers': *supra.* 304. Dixon J., who would become chief justice in his subsequent distinguished career, disagreed and observed that '[t]he purpose of the enumeration of powers in s.51 is not to define or delimit the description of law that the Parliament may make upon any of the subjects assigned to it. Speaking generally the legislative power so given is plenary in its quality': *supra.* 333. Subsequently, Dixon J. stated that when a State availed itself of any part of the established organization of the Australian

has not previously hesitated to nullify those Commonwealth statutes which touch upon its jurisdiction and which vary from Chapter III provisions.[71]

We have already mentioned the separation of powers principles that have been applied to secure the independence of the federal judiciary, and it is arguable that part of the constitutional scheme consists of isolating federal tribunals from determining State law matters, except as they relate directly to the federal judging function. Additionally, even though State courts have long exercised invested federal judicial power, the practice in those instances has been that federal and not State procedures are applicable.[72] Cross-vesting has blurred these carefully maintained distinctions between Commonwealth and State judicial power.

In addition to the separation of powers issues between the Commonwealth Parliament and federal courts, including the High Court, there may be unresolved questions concerning the plenary authority of the Commonwealth Parliament to legislate in regard to State governments. A brief summary must suffice at this point, but it will serve to cast additional doubt upon the constitutionality of the cross-vesting legislation. The classic statement of Commonwealth-State relationships is in the *Engineers' Case*,[73] which upheld the validity of Commonwealth labour-management legislation as applied to State enterprises. Observing that s.109 of the Commonwealth Constitution provides that where inconsistencies exist between a federal and a State statute, the former is to prevail, the High Court majority reasoned that express grants of authority to the Commonwealth might not be limited by judicially implied prohibitions against their exercise. In considering the relationship of the Commonwealth and State governments, they held: first, that unless there is an express reservation of power under the Commonwealth Constitution, s.107 cannot be read to reserve powers to the States,[74] and second, that in construing Commonwealth legislative powers under the Constitution, no exception from s.51 in favour of the States could be implied.[75]

Largely forgotten is the dissent of Justice Sir Frank Gavan Duffy, which, two decades later, seems to have influenced the majority judges in the *Bank Nationalisation Case*:

community, it had to take that facility as it found it unless it possessed legislative power to change it. If the Commonwealth Parliament lawfully established a monopoly in banking, the State 'must put up with it': *supra.* 337. However, it should be noted that the *Bank Nationalisation Case* involved legislative action regulating business under s.51; the High Court has been much narrower in its construction of judicial power granted in Chapter III of the Commonwealth Constitution, as discussed below. More recently, the High Court has affirmed six to one its narrow construction of s.51 powers, finding that the Commonwealth's power to legislate in relation to trading and financial corporations formed within the Commonwealth does not include the power to make laws for the incorporation of such corporations: *New South Wales v. Commonwealth* (1990) 169 C.L.R. 482, particularly 497-8.

71 In the *Bank Nationalisation Case* all six judges agreed that sections of the statute which limited review of compensation awards were invalid, since they touched upon original jurisdiction constitutionally bestowed on the High Court to issue writs of prohibition, *mandamus* and injunction: *ibid.* 175, 274, 368 and 397, referring to sub-sections 75(iii) and 75(v) of the Commonwealth Constitution.

72 For example, after appeals to the Privy Council in federal matters were eliminated in 1975, appeals from State Supreme Courts were available until 1986. However, when a State court was exercising federal jurisdiction, no appeal to the Privy Council was possible. See Renfree, *op. cit.* n.4, 789-92.

73 *Amalgamated Society of Engineers v. Adelaide Steamship Company* (1920) 28 C.L.R. 129, 149-53.

74 *Ibid.* 149, 154-5 and 166.

75 *Ibid.* 150, 156 and 163.

> The existence of the State as a polity is as essential to the Constitution as the existence of the Commonwealth. The fundamental conception of the Federation as set out in the Constitution, is that the people of Australia, who had theretofore existed in several distinct communities under distinct polities, should thenceforward unite for certain specific purposes in one Federal Commonwealth, but for all other purposes should remain precisely as they had been before Federation.[76]

Based upon the *Engineer's Case*, the High Court was willing to accept a broad construction of s.51 legislative powers, but in the *Bank Nationalisation Case*, as we have seen, the majority refused to validate statutory provisions which restricted the constitution-based jurisdiction of the High Court.[77] The High Court's sensitivity concerning legislative tampering with its constitutional jurisdiction was reaffirmed in the *Boilermaker's Case*,[78] suggesting that there may be a serious question about the constitutionality of denying appeals from cross-vesting decisions. Certainly, in this limited area, Sir Owen Dixon's assertion of a plenary power in the Commonwealth Parliament[79] seems, in retrospect, to be a questionable nationalistic approach to Australian federalism. An industrial law case suggests that cross-vesting is not a panacea for eliminating jurisdictional barriers. In *West Australian Psychiatric Nurses Association (Union of Workers) v. Australian Nursing Federation* it was held that where a party was otherwise disqualified from appearing in a case, the cross-vesting legislation does not confer jurisdiction.[80] A union registered under the Industrial Relations Act 1979 (W.A.) sought an injunction against the defendant, an organization registered under the Industrial Relations Act 1988 (Cth), asserting that the cross-vesting legislation conferred this additional jurisdiction upon the Federal Court of Australia. Mr Justice Lee disagreed and dismissed the case, pointing out that the Commonwealth Industrial Relations Act conferred jurisdiction only over organizations duly registered under its provisions, and therefore the plaintiff could not bring an action in the Federal Court.[81] On the other hand, the subject matter of the dispute precluded the State Supreme Court from employing its State jurisdiction.[82] Thus there was a gap in jurisdiction that could not be filled through resort to the general provisions of cross-vesting. Going further, Lee J. raised serious constitutional questions concerning cross-vesting, but utilized statutory construction to deny that the Federal Court had been granted expanded industrial jurisdiction by means of the cross-vesting acts.[83] He observed that the Commonwealth Constitution does not contemplate that a State legislature can confer either the power or the obligation upon a federal court to exercise the judicial powers of the State.[84] Even if the State

[76] *Ibid.* 174. According to Justice Gavan Duffy, ss106 and 107 of the Constitution preserved each of the States as it existed prior to federation unless the Constitution either vested State power in the Commonwealth or withdrew it from the States.

[77] See n.69 *supra*.

[78] (1956) 94 C.L.R. 254; see n.59 *supra*.

[79] See n.68 *supra*.

[80] (1991) 30 F.C.R. 120.

[81] *Ibid.* 126-7.

[82] *Ibid.* 129.

[83] *Ibid.* 132-5. Lee J.'s judgment argued that the Commonwealth Parliament created the industrial courts to function in a certain way set forth in clear statutory language. By passing the cross-vesting legislation, the Commonwealth Parliament cannot be assumed to have intended to alter the jurisdiction of industrial courts without an express provision to that effect. In addition, State cross-vesting legislation cannot impose an obligation upon the Commonwealth without clear evidence that the Commonwealth Parliament was willing to accept such additional jurisdiction. On the other hand, he suggested that if such an acceptance could be shown, such a 'cooperative arrangement' would be acceptable.

[84] *Ibid.* 132.

enabling legislation enacted the transfer of jurisdiction for the peace, order and good government of the State, such a statute would conflict with the Commonwealth of Australia Constitution Act 1900 (UK) and covering clause 4 of that statute. Furthermore, such an imposition of State duties upon a federal court would interfere with Commonwealth functions under the Constitution.[85] Cross-vesting generally rests upon Commonwealth assent to the conferral of State judicial power, but in this instance, where a Commonwealth industrial matter was involved, the cross-vesting legislation standing alone was insufficient evidence that such legislative consent was given.[86]

On the other hand, a strong counter-argument can be mounted in support of the validity and sweeping impact of the cross-vesting scheme. The so-called 'referral power' contained in the Commonwealth Constitution makes it possible for the Federal Parliament, with the concurrence of the States directly concerned, to legislate either on particular matters referred to it, or, in the alternative, to exercise powers exercisable prior to 1901 only by the Imperial Parliament or by the Federal Council of Australia.[87] Ostensibly, these constitutional bases of power might be seen to provide doctrinal support for the cross-vesting scheme. However, the High Court has ruled that the legislative powers enumerated in s.51 do not provide the Commonwealth Parliament with flexibility in the creation of federal courts; rather the provisions of Chapter III control the way in which the Commonwealth Parliament may legislate concerning the judicial power.[88]

On balance, the better view of Australian constitutional doctrine would seem to draw into question the validity of vesting State judicial power in federal courts. However, arguments based upon Commonwealth and State legislative supremacy, coupled with an unprecedented broad reading of ss 51 and 52, may provide de facto underpinnings for the cross-vesting scheme.

The denial of a litigant's right to appeal a cross-vesting order will make it awkward to raise these issues of constitutionality. However, that denial itself presents even more constitutional difficulty. There is no 'due process clause' in the Commonwealth Constitution, and trial by jury is secured only in federal criminal prosecutions.[89] Although the provisions of the Magna Carta and the 1689 English Bill of Rights form part of the common and statutory law of Australia, any arguments based upon them may well be discounted on the basis that the right to appeal a judge's decision is not subsumed in the right to a fair trial, particularly in civil cases.[90] However, it is remarkable that under a Constitution in which the High Court of Australia has broad powers to review both State and Commonwealth judicial decisions on appeal, it cannot hear an appeal against a cross-vesting order that may jeopardize a right to fair trial or jeopardize access to natural justice.[91]

85 *Ibid.* 132-3.

86 *Ibid.* 135.

87 Sub-sections 51(xxxvii) and 51(xxxviii) of the Commonwealth Constitution.

88 The preeminence of Chapter III in construing legislative grants of judicial power is strongly underlined in *The Queen v. Kirby (Ex Parte Boilermaker's Society)* 94 C.L.R. 254, 269 and 289-90; see also Renfree, *op. cit.* n.4, 16-25.

89 S.80 of the Commonwealth Constitution.

90 See the discussion of *Jago v. District Court of New South Wales*: n. 54 *supra*.

91 One interesting question still left dormant is whether the High Court might utilize prohibition, *mandamus* and injunction in bringing a cross-vesting order before it for review. That would raise the

## II. *FEDERAL COURTS IN AUSTRALIA*

### A. *THE 'FALL OUT' FROM THE 'AUTOCHTONOUS EXPEDIENT'*

The 1901 constitutional authorization for vesting Commonwealth judicial power in State courts, relatively simple on its face, raised a series of issues for decision by the High Court of Australia. While that process has been exhaustively discussed elsewhere,[92] some of the major developments should be mentioned because they shape the traditional Australian view of court jurisdiction.

Complications arose from investing State Supreme Courts with federal judicial power, particularly in regard to State court utilization of non-judicial officials (*e.g.* masters in equity or bankruptcy registrars) to determine minor questions concerning pending litigation. After a group of initial rulings that such an official was not a judge of the Supreme Court, and thus could not be invested with federal jurisdiction, the High Court reversed its own previous decisions by reasoning that the official acted as a delegate of the Supreme Court and might act validly if his decisions were subject to review by, or appeal to, the Court.[93] Similar subtleties and distinctions are made concerning whether the Commonwealth judicial power has been invested in a court, or whether the judicial officer designated to perform the function is not simply a *persona designata.*[94]

Generally the Commonwealth Parliament, when investing State courts with federal jurisdiction, may prescribe the procedures to be utilized in the exercise of that jurisdiction. The matter is not without subtlety, however. In *Russell v. Russell*[95] the High Court permitted State practice to control whether the judge and counsel in a juvenile case would robe, but insisted that the case be tried in open court. In this particular instance the need for a public hearing was deemed essential to State procedure, whereas robing was considered a matter of custom and tradition and subject to Parliamentary direction. These cases suggest that variations in practice between federal tribunals and State courts create difficulties in the exercise of invested federal jurisdiction and that in applying the cross-vesting provisions similar complications will arise.

After appeals to the Privy Council from federal court decisions were abolished in 1968, it still remained possible to appeal State Supreme Court decisions to the Privy Council, and thus it was critical to determine whether a State court proceeding was based upon invested Commonwealth jurisdiction or upon State jurisdiction. The problem presented itself in *LNC Industries Ltd v. BMW (Australia) Ltd*,[96] which involved the operation of customs law and importation licenses. Although the Commonwealth government was not a party, the High Court held

question whether the Commonwealth Parliament had, in this connection, legislated in violation of sub-section 75(v) of the Commonwealth Constitution. The broader issue is whether the Commonwealth and State Parliaments have not themselves violated separation of powers, and simultaneously prevented the High Court from protecting the independence of the judiciary. This would seem contrary to the spirit and practice of Australian constitutionalism.

92 See Cowen and Zines, *op. cit.* n.59 and Renfree, *op. cit.* n.4.

93 See Renfree, *op. cit.* n.4, 582-8.

94 *Ibid.* 588 and 603-9 for the complexities of conferring extra-territorial jurisdiction upon State courts.

95 (1976) 134 C.L.R. 495; see Renfree, *op. cit.* n.4, 668-71.

96 (1983) 151 C.L.R. 575.

that a matter arose under the Commonwealth Constitution and statutes when a federal law was involved, either as the basis for the rights asserted or as a ground upon which the action was defended.[97] In this instance, the High Court concluded that there was invested federal jurisdiction and as a consequence the parties had no right to apply for leave to appeal to the Privy Council. With the 1986 abolition of State appeals to the Privy Council by the Australia Act 1986 (U.K.),[98] the need to make this type of a distinction disappeared, but the need for some care in defining the jurisdictional basis for a proceeding has not completely vanished. For example, when one party claims that federal jurisdiction is involved because the party is an agency of a State or the Commonwealth, the court must decide the status of the party.[99] While these cases involve the jurisdiction of the High Court, which is not involved in the cross-vesting scheme, they reflect the long tradition of distinguishing causes of action and cases based upon State law from those falling within the scope either of invested judicial power of the Commonwealth or the original jurisdiction of the High Court of Australia.

Critical to the decision to invest State courts with federal jurisdiction was the role of High Court in appellate review of those cases. Hearing appeals, coupled with occasional resort to the writs of prohibition, mandamus and injunction, gave the High Court continuing control over all courts operating in the Commonwealth's name. When issues arose concerning the interpretation of sub-section 39(2) of the Judiciary Act 1903 (Cth), or some application of its provisions, an authoritative decision by the High Court clarified the matter for all courts exercising federal jurisdiction. The process created a relatively efficient system with well defined guidelines and wide public acceptance. It is unfortunate that a similar process of normal appellate review has been denied to the cross-vesting legislation, since similar technicalities may well arise in relation to cross-vested cases.

## B. *THE HIGH COURT'S EXERCISE OF THE REMITTER POWER*

Under the Judiciary Act of 1903 the High Court is empowered to remove from a federal, State, or Territorial court any cause or part of a cause which arises under the Commonwealth Constitution or involves its interpretation.[100] Customarily, the issues involved have been remitted to a State Supreme Court for further proceeding.[101] Alternatively, the High Court exercises original jurisdiction when a claim is filed against the Commonwealth, but the claimant may elect to proceed by filing a claim in the Supreme Court of the State or Territory where the claim arose.[102] In the event that the claimant elects to invoke the High Court's original

[97] *Ibid.* 581, referring to *R v. Commonwealth Court of Arbitration; ex parte Barrett* (1945) 70 C.L.R. 141, 154 and *Felton v. Mulligan* (1971) 124 C.L.R. 367, 408.

[98] S.11 of the Australia Act 1986 (U.K.).

[99] See *State Bank of New South Wales v. Commonwealth Savings Bank of Australia* (1986) 161 C.L.R. 639, where the High Court set out specific criteria to judge whether a banking institution was an agency of a State governmment. Deciding that the institution was a State institution, the High Court held the case to be within its original jurisdiction.

[100] S.40 of the Judiciary Act 1903 (Cth).

[101] *Ibid.* ss42-5. Under the amended s.44, provision is made for remittal to the Federal Court of Australia, as well as to the State Supreme Courts.

[102] *Ibid.* s.56.

jurisdiction, the case will usually be remitted to a State Supreme Court exercising federal jurisdiction or to a federal court.

As in the case of a transfer under the cross-vesting statute, the remittal of a case to a given State Supreme Court, or to a federal court sitting in a State or Territory (and hence bound by the substantive and procedural laws of that State[103]), can impact on substantive rights, depending upon which court is selected. A series of High Court decisions dealing with this problem established some general guidelines for High Court remission. Since these standards might be of value in deciding the question of cross-vesting transfers, they are worthy of more than passing attention.

*Johnstone v. The Commonwealth*[104] involved a tort claim against the Commonwealth for negligence causing injury in South Australia, but the plaintiff commenced his action in the Registry of the High Court in Sydney and requested remittal to the Supreme Court of New South Wales. In a three to two decision, the High Court held that it might remit the case to the New South Wales Supreme Court, even though the claimant could not have initially commenced his action in that Court. Justice Gibbs reasoned that since the High Court would have had jurisdiction originally, there was no disadvantage to the Commonwealth and no waiver of sovereign immunity if remittal was made to the New South Wales Court. He felt that there was no reason to give a narrow construction to the remittal provisions in s.44 of the Judiciary Act.[105] Justice Murphy agreed that to read s.44 narrowly would unduly restrict what was intended to be a very general power of remittal in the High Court.[106] Justice Aitken joined the majority, observing that once a party brings an action in the High Court of Australia, he or she submits to the jurisdiction of that Court. In addition, the existence of rules concerning extraterritorial service would subject the Commonwealth to federal jurisdiction even if the action were originally brought in the Supreme Court of New South Wales. In his view, federal jurisdiction was given to the State Supreme Courts by the Constitution and the Judiciary Act, not by the High Court's decision to remit.[107] In dissent, Justice Stephen elected to read s.44 narrowly, feeling that remittal should be only to those State Supreme Courts which would qualify for jurisdiction because the claim arose within that State. Agreeing that the High Court would have authority to try the case itself, he nevertheless contended that it was for Parliament and not the High Court to confer jurisdiction upon the New South Wales Supreme Court. Broadening s.44 to include the circumstances of this case was beyond the powers of the High Court.[108] Joining in the dissent, Justice Jacobs asserted that the State Court would have jurisdiction only if the party were subject to personal jurisdiction there. Since the Commonwealth, by statute, had submitted to suit only where the claim arose (in South Australia), it was to that State's Supreme Court that the remittal should be directed.[109] Although

103 *Ibid.* s.79.
104 (1979) 143 C.L.R. 398.
105 *Ibid.* 401-2.
106 *Ibid.* 405-6.
107 *Ibid.* 407-9.
108 *Ibid.* 403.
109 *Ibid.* 404-5.

the decision does not help to resolve the issue, it does suggest that in the remittal of cases the High Court is inclined to examine whether the court to which the matter is transferred would have had jurisdiction without the High Court's decision to make the transfer.[110] The majority viewed a remitted case as continuing within the jurisdiction of the High Court, while the two dissenting judges emphasized the standing of the transferee court to hear the matter. The majority voted for High Court power, the minority favoured a strict reading of the Judiciary Act and reliance upon Parliament to broaden the remittal power.

Two motor vehicle accident cases involving parties with widely differing places of residence raised the question of remittal when there are conflicts of law between the State where the wrong occurred, the *lex loci delicti*, and the State where a party wishes to litigate the case, the *lex fori*. Both involved motor vehicle accidents in Queensland. In *Guzowski v. Cook*,[111] the plaintiff and defendant were residents of Queensland, but after the accident the plaintiff returned to his former home in Victoria before he sued. A number of the plaintiff's witnesses who were to give evidence about hospitalisation costs were located in Victoria. *Robinson v. Shirley*[112] involved the estate of a New South Wales resident who had been injured by a Queensland resident while driving in Queensland. The parties had stipulated that the shorter Queensland statute of limitations would not be entered as a defence. Both Queensland and Victoria had similar statutory provisions permitting the action to survive for the estate of the deceased victim. However, the measure of damages differed in the two States.

In both cases it was noted by a High Court judge sitting in chambers that the measure of damages was the major issue, although the convenience of the parties was an additional consideration. After an extensive discussion of the requirements of s.79 of the Judiciary Act, (requiring the federal court to apply the law of the State in which it sits), Justice Brennan in *Robinson v. Shirley* cited strong considerations for remitting the case to the State in which the wrong had occurred, therefore conforming the *lex loci delicti* to the *lex fori*.[113] In answer to the plaintiff's plea that the estate should have access to the higher damages available under New South Wales computations, he commented that it was not appropriate to allow a difference of benefit to control the exercise of discretion to remit.[114] He held that the convenience of the witnesses might favour the plaintiff's request for a New South Wales remittal, but on the other hand he was:

> not persuaded that convenience in the conduct of the trial is a factor which is capable of affecting the exercise of the discretion which must choose between two systems of law which confer rights of different measures upon the plaintiff.[115]

Dealing with the same disparity in the measure of damages in *Guzkowski v. Cook*, Chief Justice Gibbs stressed the fact that the accident, the nervous breakdown asserted to have evolved from the accident and the injuries had all occurred

110 The concept expressed is close to that of sub-sub-paragraph 5(1)(b)(ii)(A) of the Jurisdiction of Courts (Cross-vesting) Act 1987.
111 (1981) 149 C.L.R. 128.
112 (1982) 149 C.L.R. 132.
113 *Ibid.* 135.
114 *Ibid.* 136.
115 *Ibid.* 137.

in Queensland, and, in addition, the Victorian Supreme Court would not have had jurisdiction if the action had been started there.[116]

*Pozniak v. Smith*[117] provided the High Court with an opportunity to clarify the relationship between prejudice to a party in terms of damage computation on one hand, and the convenience of trial on the other. Again, the accident occurred in Queensland[118], and the plaintiff asked that the case be remitted for trial in New South Wales, where most of the medical witnesses were readily available, and where the plaintiff was resident. Chief Justice Gibbs, joined by Justices Wilson and Brennan, held that the High Court had no authority to direct the conduct of proceedings after remittal, but that 'the substantive rights of the parties will be determined by the law of the forum.'[119] Given the more generous computation of damages available under New South Wales law, remittal to New South Wales would confer a fortuitous advantage upon the plaintiff.[120] Sub-section 75(iv) of the Commonwealth Constitution was designed to provide an impartial forum, but unfortunately it provided no guidance concerning its exercise. In making its remittal decision, the High Court should not be bound by the convenience of witnesses where an unfair benefit would be conferred on one party:

> The balance of convenience cannot be allowed to lead to injustice. The only safe course, in a case where the relevant law in the competing jurisdiction is materially different in its effect on the rights of the parties, is to remit to the State whose law has given rise to the cause of action.[121]

In dissent, Justice Mason felt that the High Court in *Johnstone* had held that it had the right to create jurisdiction in a remitter court that otherwise lacked jurisdiction to try a case. He was reluctant to limit that flexible authority. Although he believed that the law of the *situs* normally would be the 'proper law', that would not necessarily be so, and in any event the remitter court would be obliged to apply not only its substantive forum rules, but also its private international choice of law rules to arrive at the proper law governing the case.[122]

Justice Mason's position should not be dismissed, because it provides a broader approach to the problem of choice of law in remitter questions. *Lex loci delicti* is very helpful in personal injury cases, but problems arise with multi-jurisdictional torts such as media defamation cases. *Situs* rules have never been helpful in contract litigation, which may depend upon the law of the place of making, or the law of the place of performance. While a general preference for *situs* rules in personal injury cases makes good sense and will work substantial justice in most instances, there is a need to examine the manner in which all choice of law rules are applied in courts receiving cases on remittal. These questions are raised in the similar situation of transferring a case under the cross-vesting legislation. There are a number of policy choices available: a series of rules can be established selecting one element of a case as determinative — *situs*, in the case of negligent operation of motor vehicles; reliance can be placed upon private international law

116 *Ibid.* 135-7.
117 (1982) 151 C.L.R. 38.
118 Apparently it is statistically unwise for non-residents to drive in Queensland, if the High Court of Australia's caseload is an adequate sample.
119 (1982) 151 C.L.R. 38, 44.
120 *Ibid.* 45.
121 *Ibid.* 46-7.
122 *Ibid.* 47-53.

choice of law rules, assuming they are sufficiently clear to ensure uniformity and justice in application; or statutory change to the governing acts can be made in order to permit the remitting or transferring court to stipulate the procedures to be followed by the receiving court.

The remittal cases in the High Court illustrate very clearly that the question needs to be addressed, both in regard to the remittal power, and now in connection with the far more numerous transfer applications that will be heard in the cross-vesting environment.

## III. *THE EVOLUTION OF A FEDERAL COURT SYSTEM, 1959-1987*

In addition to State courts exercising federal jurisdiction, prior to 1976 there were two other courts that exercised federal jurisdiction. The first was the Commonwealth Court of Conciliation and Arbitration, established early in the history of the Commonwealth to determine interstate labour disputes, and the second was the Federal Court of Bankruptcy, which functioned in the most populous Australian States of New South Wales and Victoria.[123] Although marriage and matrimonial causes were assigned to Commonwealth legislative competence by the Constitution, only emergency measures dealing with wartime situations had been enacted, with jurisdiction left to State courts. When the federal Matrimonial Causes Act of 1959 became effective in 1961, jurisdiction was again left with the State Supreme Courts.[124]

Discontent with the old jurisdictional arrangement that relied upon State Supreme Courts to exercise invested federal jurisdiction surfaced shortly after the Matrimonial Causes Act 1959 (Cth) became effective. It was pointed out that State courts exercising invested federal jurisdiction still resorted to State procedures in trying cases, and that the arrangement put the Commonwealth at the mercy of State governments in the administration of justice. When Matrimonial Causes Act causes of action were involved, the State Supreme Courts were hampered by Commonwealth constitutional restrictions from using their efficient system of hearings before Masters. The High Court of Australia and the State Supreme Courts bore the brunt of federal litigation, but the Commonwealth Industrial Court and its three judges lacked enough litigation to keep it fully occupied.[125] Virtually echoing the views of the Founding Fathers of American federalism[126] — that a federal government without courts was like a body without arms — the critics concluded that:

> This device of investing the State courts with federal jurisdiction virtually means that the Federal Government hands over administration of the Statutes involved to the State Government without considering whether such State Governments might become hostile, friendly, or merely disinterested. . . . It is easy to see why no other Federation has ever adopted this expedient.[127]

By 1976 it had become obvious that the extensive original jurisdiction of the High Court had been heavily burdened with the accretion of new statutory grants of authority,[128] and that some intermediate appellate tribunal was needed. This

123 Cowen, and Zines, op. cit. n.59, 106-7.
124 Cowen, Z. and da Costa, D.M., *Matrimonial Causes Jurisdiction* (1961) 122-35.
125 Byers, M.H., and Toose, P.B., 'The Necessity for a New Federal Court' (1962) 36 *Australian Law Journal* 308, 314-6.
126 See n.32 *supra*.
127 Byers and Toose, op. cit. n.125, 313.

situation eventuated in the creation of the Federal Court of Australia, effective on 9 December 1976.[129] Meanwhile, in 1975 a further revision of the law of matrimonial causes resulted in the enactment of the Family Law Act 1975 (Cth), which established the Family Court of Australia. The Family Court of Australia was designed to supplement the State Supreme Courts' exercise of federal jurisdiction in matrimonial litigation, but provision was also made for the establishment of State Family Courts. These would be invested with Commonwealth jurisdiction for the purposes of the Act.[130] The only State to establish its own Family Court has been Western Australia. For the first time since the establishment of the Commonwealth, there was a system of federal courts exercising jurisdiction over Commonwealth matters, either to the exclusion of State Supreme Courts, or concurrently with those Supreme Courts in matters where invested jurisdiction was continued. Furthermore, in the exercise of their federal jurisdiction, State Supreme Courts became subject to appellate review by the Federal Court of Australia, rather than the High Court.

The establishment of new federal courts raised issues of the relationship between those courts and State tribunals. In 1979 it was suggested, on the basis of discussions held at the Perth Constitutional Convention, that some method should be developed for the 'cross-vesting of certain jurisdiction' between the two groups of courts.[131]

### A. *'SPLIT JURISDICTION' AND 'ASSOCIATED' ANCILLARY POWERS*

A convenient by-product of the 'autochthonous expedient' was the manner in which State Supreme Courts could, either through their federal judicial authority or through their more plenary State jurisdiction, provide remedies and relief drawn from both sources. For example, a State Supreme Court proceeding in a matrimonial matter in which there was a child of a prior marriage, or a child of the marriage and property to distribute, would find little difficulty. Dissolving a marriage fell within the Family Law Act 1975 (Cth), and hence involved resort to invested federal jurisdiction. On the other hand, the custody and maintenance of a child not born of the marriage was entirely within the State Supreme Court's jurisdiction. The settlement of property issues was not complicated by whether the division involved a marital union, since under its State jurisdiction the Supreme Court could render a decision concerning the rights of any of the parties before it, or join other parties as necessary.

Once the Family Court of Australia had been established, matrimonial causes

128 A list of statutory additions to the High Court's original jurisdiction and statutes providing for High Court review of administrative decisions is in Barwick, G., 'The Australian Judicial System: The Proposed New Federal Superior Court' (1964) 1 *Federal Law Review* 1, 22-3.

129 Federal Court of Australia Act 1976 (Cth).

130 Ss31-5 and 39-40(8) provided for concurrent jurisdiction of State Supreme Courts and the Family Court in most matters involved in matrimonial causes. Sub-sections 41(1) and 41(4A) apply to the creation of State Family Courts and their function within the Family Law Act 1975. The action of Western Australia in creating a State Family Court has resulted in cross-vesting provisions providing for that court participating in cross-vesting with the Supreme Courts of all the States.

131 A helpful discussion of the jurisdiction of the new courts, as well as reference to the cross-vesting concept, may be found in Bowen, N., 'Federal and State Court Relationships' (1979) 53 *Australian Law Journal* 806.

involving non-marital children or complex property issues might still be brought in the Supreme Courts, which continued to be vested with federal jurisdiction. However, the Family Courts, possessing only limited powers — in our example, authority to deal only with the child of the marriage and with certain property matters — were at a distinct disadvantage. To provide more comprehensive relief, the Family Courts began a gradual expansion of their 'associated' jurisdiction, based upon the need to decide issues ancillary to their statutory jurisdiction. However, many matters could not be approached through 'associated' jurisdiction, since the statutory grant of authority was subject to constitutional limitations. This resulted in the need to refer certain matters to a State court while the remainder of the case was dealt with in the Family Court, hence the term 'split jurisdiction.' Similar 'split jurisdiction' situations might arise in the field of labour law, where many matters involving only one State were beyond federal jurisdiction. The best 'jurisdictional package' was still the two-headed jurisdiction of State Supreme Courts vested with federal jurisdiction.

## B. *THE FEDERAL COURT OF AUSTRALIA*

By 1975, resort to State Supreme Courts for most civil litigation had become well-established throughout Australia. Not only were these courts repositories of a broad spectrum of remedies based upon both Commonwealth and State law; they were also located in areas where the volume of litigation justified their existence. Increases in population, or in the number of cases filed, were handled locally by increasing the number of court days, or, eventually, the number of judges assigned to the area. In effect the vesting of federal jurisdiction in State Supreme Courts built upon this stability, and the Commonwealth benefited from State allocation of judicial resources as needed.

Early efforts to establish federal courts met with difficulties because of the limited need for such tribunals in some areas of the Commonwealth. An example is the Federal Bankruptcy Court, which was established only in Victoria and New South Wales, the remainder of the nation being served by State Supreme Courts exercising the federal bankruptcy power.[132] The increase in population coupled with a growing number of federal regulatory areas created renewed pressure for a federal court of general jurisdiction by 1976. As the Federal Court is now constituted, most of its judges reside in the heavily populated metropolitan areas, and those in the smaller population centres tend to hold appointments to the Federal Court in conjunction with other, and primary, judicial duties.[133]

The Federal Court Act of 1976 does not specify all of the areas of jurisdiction bestowed upon the court — at least 97 other statutes confer jurisdiction upon the court.[134] The General Division of the Federal Court has maintained a steady volume of cases under the Trade Practices Act 1974 (Cth), as well as a high (but

[132] Cowen and Zines, *op. cit.* n.59, 106-7.

[133] The 1990-91 Annual Report shows that 11 judges resided in Melbourne, 12 in Sydney, 2 in Brisbane, 4 in Canberra (3 are also judges of the Territorial Supreme Court), 2 in Perth and 2 in Adelaide. As at the date of the report, 33 judges were in commission: *Federal Court of Australia Annual Report, 1990-1991* (1991) 2-3.

[134] *Ibid.* Appendix I, 59-61.

declining) number of judicial review cases under the Administrative Decisions (Judicial Review) Act 1977 (Cth), mainly dealing with immigration matters.[135] In 1987 more than 3500 taxation appeals were either transferred to the General Division or filed with the Commissioner of Taxation, causing a sharp rise in the case load for that year and for 1988.[136] The caseload of the Federal Court and the sources of its jurisdiction would indicate that prior to the enactment of cross-vesting legislation, the maxim expressed by Chief Justice Sir Garfield Barwick in 1964[137] was applicable — some special 'federal' reason had to exist for the creation of a federal court.[138]

Although the Federal Court of Australia, as a federal tribunal, is a court of limited jurisdiction, it has statutory authorization to exercise 'associated' jurisdiction as well as resort to the doctrine of 'pendant' jurisdiction.[139] This authorization was a major step in bestowing limited powers upon the Federal Court to proceed in areas where its lack of common law or equity jurisdiction might have been awkward. However, the Court, in its 1990-91 Annual Report, seems to suggest that the expansion of Federal Court powers into a general jurisdiction rests upon the cross-vesting legislation of 1987.[140] As we have seen, a similar grant of 'associated' jurisdiction was made to the Family Court of Australia by s.33 of the Family Law Act 1975 (Cth). Both statutory provisions granting 'associated' jurisdiction powers are limited by the phrase 'to the extent the Constitution permits.' The major questions are just how far the Constitution permits 'associated' matters jurisdiction, and whether it supports cross-vesting legislation as it affects each of these federal courts.

## IV. *THE EARLY YEARS OF CROSS-VESTING*

Undoubtedly a number of difficult and well-considered cross-vesting decisions have been made since the enactment of the legislation. However, few are reported and no clear judicial guidelines have emerged. The sheer volume of matrimonial litigation, coupled with the publication of an unofficial reporter devoted to that field, provides what is currently the best indication of how cross-vesting is working. There are small clusters of cases that highlight one or more aspect of cross-vesting, such as instances where abuse of the process has been prevented, where difficult choices of law are involved, or where constitutional issues of full faith and credit are presented.

### A. *FAMILY LAW CASES*

Three cases involving substantial property interests initiated in State or Territorial Supreme Courts were concerned with motions to transfer to the Family

135 *Ibid.* Appendix III, 72-3.

136 *Ibid.* 68. The Industrial Division experienced a similar peak in business in 1987, but on a much more limited scale.

137 'The Australian Judicial System' (1964) 1 *F.L.R.* 1, 3.

138 He also proposed that divorce matters, since they lacked such a 'special' federal quality, should not have been made the subject of federal legislation in the Matrimonial Causes Act of 1959. In the light of 'split jurisdiction' questions in the Family Court of Australia today, Sir Garfield may well be credited with some prophetic powers.

139 Federal Court of Australia Act 1976 (Cth) s.32; see Renfree, *op. cit.* n.4, 387-94.

140 *Federal Court Annual Report 1990-1991* (1991) 12.

Court where related domestic relations cases were pending. In *Stevens v. Stevens*,[141] the former husband's mother sued in the New South Wales Supreme Court to impress a trust on the marital home registered in the husband's name. The court permitted transfer to the Family Court of Australia where an action brought by the former wife asked for an order distributing property that included the marital home. Justice McClelland observed that, under the circumstances, there was no likelihood that the husband and wife would collude against the plaintiff mother-in-law's interest, that joinder of the cases in the Family Court would ensure that the plaintiff's claims would be considered by that court, and that if the matter were tried in the Supreme Court, the former wife would have no standing to litigate her property interests. Because consolidation was needed, and the Supreme Court could not order the Family Court to enter a consolidation order, the only way that the Supreme Court could provide relief would be to order its action transferred to the Family Court. In addition, Justice McClelland noted that the Family Court action had been filed prior to the institution of the mother's property action in the Supreme Court.

An Australian Capital Territory case which involved a family financial structure, *Mourd v. Atlantis Nominees Pty Ltd*,[142] was likewise transferred to the Family Court, where the wife's matrimonial action asking for property settlement was pending. Observing that the Supreme Court proceeding was unquestionably related to issues to be raised in the Family Court, and that no interests of third parties would be adversely impacted by the transfer, Justice Higgins felt that the interests of justice would be best served by the Family Court deciding the issues. He further observed that the Family Court, being a specialist court accustomed to dealing in family issues, would be better equipped to try the case. Some other factors conditioned the decision to transfer. If the Supreme Court action decided that the defendant corporations before it were indebted to the husband, the creation of a debtor-creditor relationship might hamper the Family Court in subsequently shaping its decree. The former husband who was the plaintiff in the Supreme Court action complained that a transfer would hinder his obtaining access to corporate records, and that it would delay trial of the case; Justice Higgins rejected both contentions.

A somewhat more complicated set of facts was presented to the Common Law Division of the New South Wales Supreme Court in *Westpac Banking Corporation v. Grace*.[143] Acting Justice Lee had before him the foreclosure of a two and a half million dollar mortgage on the marital home. Although the case was against the husband and wife, the wife defended by asserting that her husband had misrepresented the situation to her, causing her to execute the mortgage without understanding its implications. She asked that the mortgage be set aside as far as she was concerned. In pending litigation in the Family Court, instituted in 1989, the husband asked that the marital home be sold and the proceeds divided between him and his wife. She opposed that application asserting that all of the proceeds should be paid to her. While both the husband and wife were agreeable to transfer

141 (1990) 14 Fam.L.R. 149.
142 (1990) 14 Fam.L.R. 222.
143 (1991) 15 Fam.L.R. 261.

of the Supreme Court foreclosure action to the Family Court, the mortgagee bank opposed the transfer, asserting that such a transfer would involve it in attendance at a complicated Family Court hearing when its only interest was the foreclosure of the mortgage. In granting the motion Acting Justice Lee pointed out that the cases clearly were related since they involved the same tract of land, but that there was a question about the appropriateness of a transfer to the Family Court.[144] He pointed out that family issues were involved between a husband and wife, and that since an asset of considerable value was involved, the bank's participation in these Family Court proceedings should not cause it any embarrassment or inconvenience.[145] In fairness to Acting Justice Lee it should be pointed out that he was concerned about the awkwardness of two contrary results if the proceedings were not consolidated.[146] Certainly that is much more persuasive than the reasoning that the bank had nothing to lose by participating in a consolidated proceeding. Given the fact that the bank was a commercial creditor of both parties to the matrimonial decision, it would seem more just that the Supreme Court action should have proceeded promptly, focusing upon the wife's claim of misrepresentation only if sale of the mortgaged premises did not cover the outstanding loan. While the residence was the largest asset to be dealt with in a Family Court property settlement, both of the parties were aware of the outstanding indebtedness, and regardless of how it was resolved between them, the outstanding amount was payable to the bank. In addition, there was a considerable additional burden upon the bank to retain counsel for a matrimonial cause hearing that might cover a multitude of issues totally unrelated to the question of mortgage foreclosure.

In each of these cases, consolidation of matters for trial may have resulted in some economies of time and judicial personnel, and in all but the last it would seem that no third parties were inconvenienced by the transfer. On the other hand, there is much to be said for the policy that commercial transactions should be dealt with by common law or equity courts, and not by Family Law courts. It is the normal expectation of the parties to such transactions that, should legal remedies be sought, they will be available from other than Family Courts. The first two cases involved family financial arrangements, one a purported trust, and the other an express trust in the form of a family corporation established for the benefit of the couple and other relatives. Despite the broader powers of Family Courts under the cross-vesting legislation, there should be an intentional choice to restrict their property decisions to the respective rights of the marital couple before them. Adding parties that have commercial claims against the couple does not simplify the property settlement task; in fact, it would be preferable that before a Family Court proceeds to allocation of marital property, it should await the resolution of all outstanding litigation in which both husband's and wife's property interests are at stake.

Alternatively, a Family Court forced to decide the allocation of property subject to litigation in another forum might award a percentage of that property to each spouse pending the outcome of the litigation. Since the property settlement decree

144 *Ibid.* 263.
145 *Ibid.* 264.
146 *Ibid.* 263.

represents an effort to balance the economic situation of the parties, a percentage allocation of one asset would not be possible unless some other property allocation were made conditional upon the allocation of the asset under litigation. Ultimately, it is the total division of all assets which is of primary significance in matrimonial litigation.

There are circumstances in which one party may lack standing to litigate in the original or the transferee forum. This occurred in *Mattock v. Mattock*,[147] where the husband and wife were defendants in a Supreme Court action brought by the beneficiaries under the will of the husband's deceased first wife. The husband had indicated that he did not intend to defend the action, and the wife asserted that he had depleted his beneficial interest in the estate in order to benefit his children and grandchildren by his first marriage. As Justice McLelland noted, it was not clear what interest the second wife had in the estate corpus, and he felt that her standing to litigate the case was doubtful. Furthermore, it was clear that all of the parties in the Supreme Court case, including the defendant husband, had a common interest which excluded the second wife. Implicit in His Honour's comment was the probability that the second wife was in a precarious position in defending what interests she might have had because the available evidence would be in the control of the husband and his family.[148] Despite the objection that far more issues were involved in the Family Court action, Justice McLelland ordered the transfer, deeming it both appropriate and in the interests of justice.[149]

In *Marks v. Helliar*,[150] a claim of professional negligence was asserted; a matrimonial action was pending in the Family Court. Since the wife was a defendant in the Supreme Court action there was no question about her standing in the Supreme Court. On the other hand, there was no reason why it should be preferable that the Family Court dispose of the professional negligence claim, which might have been barred by the statute of limitations in any event. However, the Supreme Court wished to retain that portion of the proceeding for itself; consequently, it ordered that one cause of action be severed and tried in the Family Court with the action pending there, and that when that proceeding was completed 'the file then be returned to the Supreme Court to enable it to proceed',[151] along with the other cause of action, which included professional negligence.

In the case of de facto marital relationships, the jurisdiction of the Family Court of Australia is complicated by the fact that where the States have not referred power to the Commonwealth to deal with ex nuptial children in the Family Court, no jurisdiction exists.[152] However, 'matrimonial causes' include the authority to declare the invalidity of a marriage, and in litigation where issues of validity are involved, the Family Court of Australia is the appropriate court under the cross-

147 (1989) 13 Fam.L.R. 288.
148 *Ibid.* 290.
149 *Ibid.*
150 (1990) 14 Fam.L.R. 276.
151 *Ibid.* 280.
152 See discussion in *Chapman v. Jansen* (1990) 100 F.L.R. 66, 71 and 76, pointing out that Victorian legislation permitted the Family Court to act in regard to the custody and maintenance of *ex parte* children, but that it had not authorised Commonwealth courts to deal with the property of a *de facto* couple.

vesting legislation. When such a case was brought in the New South Wales Supreme Court[153], Justice McLelland stressed the mandatory words in the cross-vesting legislation — the case 'shall' be transferred to the appropriate court. He observed:

> . . . if all litigants were able to institute proceedings in whatever court they thought amenable to their particular claim. . . . [i]t is clear that chaos and distortion would result. It is not in the interests of justice.[154]

De facto relationship cases can also be complicated by the selection of the court in which the cross-vesting motion is made. In *Re Staples and McCall*,[155] the de facto couple had no children but sought to resolve property issues. The woman brought her proceeding in the Family Court, and shortly thereafter the man commenced a similar case in the Supreme Court. However, the motion to transfer was made in the Family Court, which, after careful analysis, concluded that either tribunal was appropriate, but that transfer should be made to the Supreme Court of New South Wales for the purposes of consolidation.[156] Justice Nygh noted that the Supreme Court of New South Wales had reputedly been conservative in its allocation of assets between de facto couples, and had been academically criticised for that tendency.[157] Given the circumstances, it was likely that the case in the Family Court had been instituted with a view towards better treatment than would be available in the Supreme Court. Ordering the transfer to the Supreme Court Justice Nygh expressed 'a certain feeling of regret';[158] one reason may have been the award of $2500 in costs to the male respondent, but another may well have been that, recognizing a need to consolidate the two actions, he had no authority to order the Supreme Court to transfer its action to the Family Court, but could transfer the proceeding before him to the Supreme Court. Perhaps, despite all of Justice Nygh's careful analysis of the cross-vesting statutes, this case was decided not by his informed preference, but rather by the simple fact that his power was limited to the case pending before him, and since consolidation was most appropriate, he was compelled to make the transfer from his court.

### B. *CHOICE OF LAW IN CROSS-VESTING TRANSFERS*

Australia has recently been engaged in re-examination of the choice of law rules that should apply in regard to cases with non-forum State elements, and the likelihood is that these complications will increase as more cases are cross-vested.[159] One of the fundamental requirements for efficient cross-vesting is uniformity of the law, both common and statutory, throughout Australia. Some of the recent High Court judgments dealing with choice of law draw upon the ideal of a uniform national law,[160] and suggest that the full faith and credit clause of the

153 *Lengyl v. Rasad* (1989) 13 Fam.L.R. 648.
154 *Ibid.* 650.
155 (1989) 13 Fam.L.R. 279.
156 *Ibid.* 283.
157 *Ibid.*
158 *Ibid.*
159 The relationship between cross-vesting legislation and choice of law problems was explored initially in Kelly, D.S., and Crawford, J., 'Choice of Law under the Cross-vesting Legislation' (1988) 62 *Australian Law Journal* 589, which points out drafting inconsistencies in the statutory provisions intended to alter choice of law rules to accommodate cross-vesting situations.
160 Wilson and Gaudron JJ. in *Breavington v. Godleman* (1988) 169 C.L.R. 41, 98 assert that s.118

Commonwealth Constitution[161] provides a vehicle to achieve that goal. The majority of the judges, however, decline to invoke full faith and credit considerations when applying choice of law rules.

Traditionally, Australian courts have applied private international law conflicts rules to cases having non-forum elements. *Koop v. Bebb*[162] represents the older view of the subject. In this case, the Court, citing English authority, held that a tort action arising from an event occurring in another State could be maintained if, first, the wrong would be actionable in the State where the case was brought and, second, if it would not be justified by the law of the State in which the wrong was done. The majority opinion defined 'not justifiable' to mean that the act must attract civil liability in the State where the wrong occurred.[163]

*Breavington v. Godleman*[164] involved an action by the passenger in a car against the driver and Australian Telecom, an agency of the Commonwealth government. The injury occurred in the Northern Territory, which has a partial 'no fault' statute concerning liability for motor vehicle torts. Among other things, the Northern Territory statute limited the damages that could be recovered in a civil action beyond the amount payable on a 'no fault' claim. When the accident occurred, the plaintiff was a Northern Territory resident, but he moved to Victoria, and resided there when the action was commenced in the Supreme Court of Victoria. The defendant, Telecom, did not contest the plaintiff bringing the action in Victoria, even though this was contrary to the provisions of paragraph 56(1)(b) of the Judiciary Act 1903,[165] but rather Telecom asserted that the Northern Territory Act either barred the plaintiff's recovery or limited it to $100,000. Each judge felt that the law of the place of the accident, (the Northern Territory), combined with the plaintiff's residence there at the time of the injury, required them to apply the Northern Territory's limits upon recovery. Also expressed was a strong preference for resort to the *lex loci delicti*; as Chief Justice Mason pointed out, when an Australian travels in another State he expects its law to apply to him.[166] Hence the private international choice of law rules did not necessarily apply to torts occurring within Australia. Because they felt that the law concerning a given event should be uniform throughout Australia, Justices Wilson and Gaudron concurred in this application of the *lex loci delicti*. Justices Brennan, Dawson and Toohey agreed that the *lex loci delicti* should apply to the question of damages;

obliges the court of the forum to apply the law of the State of the wrong, lest the court refuse to give full faith and credit to that State's law. Gaudron J., in holding that view, was in opposition to the High Court's subsequent decision in *McKain v. R.W. Miller & Co. (S.A.) Pty Ltd* (1991) 104 A.L.R. 258, 287.

161 S.118 of the Commonwealth Constitution. In comparison with a similar provision in the United States Constitution, which forms the basis for interstate recognition of statutes, judgments, and final decrees, the Australian doctrine has been relatively unused. In the new environment of cross-vesting it will undoubtedly become much more significant.

162 (1951) 84 C.L.R. 629.

163 *E.g. Phillips v. Eyre* (1870) L.R. 6 Q.B. 1, 28-9.

164 (1988) 169 C.L.R. 41.

165 *Ibid.* 105-6. The Commonwealth may be sued in contract or tort either in the High Court, or in the Supreme Court of the State or Territory, or any other competent court of the State in which 'the claim arose'. In general, the High Court judges agreed that the appearance of the Commonwealth in the Victorian Supreme Court was a submission by the Commonwealth to the Court's jurisdiction. However, they pointed out that sub-section 39(2) conferred federal jurisdiction on the Supreme Court, and that s.56 was not designed to confer or remove that jurisdiction.

166 (1988) 169 C.L.R. 41, 77-9.

however Justice Brennan felt that State independence would be jeopardized if an inflexible application of that rule forced States to open their courts to actions deemed contrary to public policy or to permit litigants to recover when they could not succeed in the State where the wrong occurred. The net result of *Breavington* was that the choice of law rules in personal injury cases were recast in a form that strongly favored the *lex loci delicti*, and this new preference was strongly tied to the concept of a uniform resolution of the action regardless of the trial forum.

Five months after the announcement of the *Breavington* judgment the New South Wales Court of Appeal decided *Byrnes v. Groote Eylandt Mining Co. Pty Ltd*,[167] an appeal dealing with injuries suffered in the Northern Territory, but which were subject to special provisions under the Workmen's Compensation Act (N.T.). Those provisions included the requirement that any supplementary actions at law be brought within three years after receipt of the first payment under workmen's compensation. The plaintiff had not commenced his action within the time limit, and the Court of Appeal affirmed the trial court's dismissal of the action. However, the reasoning underlying the judgment exposed the varieties of interpretation to which *Breavington* was subject. President Kirby strictly construed the term 'procedural' to include only those 'adjectival and procedural' matters that governed the presentation and trial of the case. All other matters, under *Breavington,* should therefore be substantive. Furthermore, the statute limiting bringing supplementary actions was phrased as a removal of entitlement, which reinforced the conclusion that it was substantive in nature.[168] Justice Hope concurred with the President's conclusion, but felt that a statute of limitation could be both substantive and procedural. In the case of the statute in question, the right to bring an action was conditioned upon bringing the case within the statutory period, hence the statutory cause of action ceased to exist in accordance with the express statutory provision.[169] Whatever the classification in this case, the right to sue was conditioned upon bringing the action within a given time period after workmen's compensation had begun. Since the plaintiff failed to so commence his action, he was precluded from pursuing it in the New South Wales courts as well.[170] In dissent, Justice Mahoney was convinced that the situation fell within the category of issues characterized in *Breavington* as 'merely procedural', and held that the Northern Territory limitation was not applicable in New South Wales.[171] Of the three judgments, only that of President Kirby seems to have given due weight to the 'substantive characterization' of *Breavington*, and even he sought support in the fact that the statute removed entitlement, and therefore appeared to be a substantive, right-destroying provision under older law. Clearly the 'unitary law' or nationalist thrust of *Breavington* had not impressed itself upon the New South Wales judges. President Kirby, while recognising the need for a change in the choice of law rules for personal injury cases arising in another Australian State, pointed out that *Breavington* represented an appropriate, but 'faltering' and 'obscure' step in the direction of change.[172]

167 (1990) 19 N.S.W.L.R. 13, decided on 2 February 1990.
168 *Ibid.* 22-3.
169 *Ibid.* 36-7.
170 *Ibid.*
171 *Ibid.* 27.
172 *Ibid.* 22.

Within a short time it would be obvious that the High Court itself was far from a single mind on these issues. A workmen's compensation case arising from injuries in South Australia was brought in the Supreme Court of New South Wales, despite the fact that the statute of limitations had expired in South Australia. In a four to three decision, the High Court held that the statute was procedural in nature, and therefore not a bar to recovery in New South Wales.[173] Chief Justice Mason maintained his earlier view that such a statute is substantive, observing that the classification as procedural and giving recovery in spite of the *lex loci delicti* would not only defeat the intention of the limitation, but also violate full faith and credit considerations.[174] He suggested that 'procedural rules' should be redefined as those dealing with the 'machinery of litigation' or pertaining to the 'mode or conduct of court proceedings.'[175] Since the South Australian limitation was subject to extension by order of the court, the New South Wales court might apply the South Australian procedure to determine whether the plaintiff might bring the action in New South Wales.[176] Justices Brennan, Dawson, Toohey and McHugh formed the majority, holding that the law of the forum court, including its common law rules on choice of law, should govern.[177] They rejected the idea that full faith and credit or any other constitutional imperative should be seen as restricting the legislative powers of the States, and accepted as inevitable the possibility that the same set of circumstances might be judged differently depending upon which was the forum State.[178] This was 'the hallmark of a federation as distinct from a union.'[179] Justices Gaudron and Deane, adhering to their 'one law for Australia' views in *Breavington*, provided support for Chief Justice Mason's position.[180]

Although the consensus of *Breavington* has been fractured badly, dogged reliance upon a *lex loci delicti* seems the best hope for reducing forum shopping in personal injury litigation. There may be serious questions concerning restrictions upon State legislative power and the freedom of State judges to make choice of law decisions on the basis of local common law. However, it is apparent that the High Court as currently constituted is not inclined to mandate a *lex loci delicti* rule in all choice of law matters. It remains to be seen whether the Commonwealth Parliament will act upon the suggestion that a federal statute should govern the matter if uniformity throughout Australia is necessary. Given the requirements of cross-vesting as well as a need for even-handed administration of justice throughout the Commonwealth, it would seem such statutory effort is long overdue. Whether a legislative solution to the internal choice of law problem is desirable is another matter, for it is difficult to frame a rule for every conceivable choice of law situation and some judicial flexibility is appropriate. The difficulty is that the High Court, having moved strongly in the direction of a *lex loci delicti* rule, has

173 *McKain v. R.W. Miller & Co. (S.A.) Pty Ltd* (1991) 104 A.L.R. 257.
174 *Ibid.* 264-70. Chief Justice Mason in *Breavington* had considered full faith and credit as too narrow a concept for use in the choice of law arena: *Breavington v. Godleman* (1988) 169 C.L.R. 41, 70.
175 *McKain v. R.W. Miller & Co. (S.A.) Pty Ltd* (1991) 104 A.L.R. 257, 267.
176 *Ibid.* 269-70.
177 *Ibid.* 273.
178 *Ibid.* 273-4.
179 *Ibid.* 274.
180 *Ibid.* 281-6 and 293.

backed off rather awkwardly, leaving courts to apply their forum rules, presumably including their private international law rules for choice of law.

Ideally, cross-vested tort cases and similar litigation begun extraterritorially should take the substantive law of the place where the purported injury occurred. What Justice Deane in *McKain* called the '*lex causae*'[181] should be the same throughout Australia. To ensure such a result, legislative action by the Commonwealth and State Parliaments may be required, unless the High Court can shape a clear standard for interstate choice of law decisions throughout Australia.[182] To leave the cross-vesting scheme afloat in the currently turbulent choice of law seas is to invite serious inefficiency and possible miscarriages of justice.[183]

Cross-vesting also raises procedural difficulties, and these are traditionally determined by the law of the forum. Some of the trouble spots have been suggested earlier, particularly in regard to jury trial and evidentiary principles.[184] It would greatly complicate litigation to impose upon bench and bar the rule that the *lex loci delicti* in regard to procedure will be applied to cases pending before the court, for each judge and barrister would be required to acquire expertise in the practice of the eight States and Territories. On the other hand, the interrelationship between substantive and adjectival law is so intimate that a substantive right is rarely the same in two different procedural systems. Perhaps the cross-vesting legislation itself provides the seed of a solution, namely that instituting a case in a jurisdiction other than that in which the claim arose is to bring it in an inappropriate forum. Lack of appropriateness touches upon both the substantive and procedural aspects of the case, and the wise practice might be to routinely transfer the case to the State or Territory where the claim arose, assessing costs against the plaintiff for selecting the inappropriate court.

Both *Breavington* and *McKain* involved personal injuries occurring in one State or Territory, and even in those relatively uncomplicated circumstances cross-vesting presents significant problems. In a modern world multi-jurisdictional torts are becoming more frequent as a source of choice of law decisions and as a cause of proliferating litigation. Shortly before *McKain* was decided, the New South Wales Court of Appeal dealt with a defamation action in which publication was alleged in New South Wales, Victoria, South Australia, Western Australia, the Australian Capital Territory and the Northern Territory. Originally instituted in the Australian Capital Territory, *Australian Broadcasting Co. v. Waterhouse*[185] was transferred to New South Wales under the cross-vesting legislation. The Supreme Court denied the defendant the right to plead the *lex fori* defences to the various causes of action. Observing that nothing in *Breavington* or *Byrnes* required

[181] *Ibid.* 286.

[182] Legislation mandating choice of law rules may raise three constitutional objections: first, can the Commonwealth Parliament enact rules of decision for State courts? Second, can State Parliaments prescribe rules to be applied by their State courts, as well as for federal courts sitting in their States? Third, do such statutes trespass on the independence of the judiciary and hence violate the separation of powers doctrine?

[183] The latest wave in the tossing sea is *Stevens v. Head* (1993) 67 *A.L.J.R.* 343, in which a majority of the High Court held that computation of damages was procedural, and not substantive, and hence subject to the *lex fori* rather than the *lex loci delicti*.

[184] One case involving possible denial of jury trial in the event of cross-vesting transfer is noted in the *AIJA 1992 Report* 89.

[185] (1991) 25 N.S.W.L.R. 519.

a court to permit *lex fori* defences, and that indeed the thrust of the rule in *Breavington* was against such a practice, the Court of Appeal upheld the trial court's decision.[186] Justice Samuels observed that the *Breavington lex loci delicti* rule had two virtues: first, it provided certainty, and second, it met the expectation of the parties, who would presume that the place of the events giving rise to the claim would also control the law applicable to the litigation. Reviewing United States choice of law rules, Justice Samuels preferred the grouping of contacts provisions in the Second Restatement of Conflicts, which take into account the domicile of the party defamed. He was willing to allow *lex fori* defences if New South Wales were alleged and shown to be the domicile of the plaintiff, but that submission had not been made to the trial court.[187] Justice Samuels suggested that *Breavington* should be limited in application to the holding of the case until the full implications of *Breavington* were subjected to more extended judicial comment.[188] *McKain* substantiates the wisdom of that narrow construction of *Breavington*, but does nothing to clarify the choice of law rules.

*Waterhouse* triggered a brief exchange between Justice Samuels and Justice Priestley concerning the 'common law of Australia', the latter observing that careful examination might reveal the law of South Australia and Western Australia to be a separate body of law from that of New South Wales.[189] However that interesting issue might be resolved, the fact is that the case illustrates the wide choice of law and defences that are available for 'forum shopping' in the area of defamation. Justice Samuels listed some of the differences in substantive defamation law among the States and Territories involved. In Queensland and Tasmania the law was codified, in New South Wales it had been partially codified, and in Western Australia it was based upon the common law.[190] In terms of defences, where the plaintiff's rights arose under statute, (as in New South Wales), the defendant could not plead a New South Wales defence, but for those causes of action based upon State common law defamation rules, the defendant argued that forum defences were available. Justice Samuels rejected the contention that such defences were available under pre-*Breavington* law, and asserted that the cross-vesting legislation permitted a transferee court to apply its own choice of law rules.[191]

It would be difficult to find a better example of choice of law difficulties under cross-vesting than *Waterhouse*. Justice Samuels observed that the plaintiff had elected to commence the action in the Australian Capital Territory where the extensive array of defences that might have been available under New South Wales law were absent. In addition, defamation cases were not heard by a jury in the Australian Capital Territory as they were in New South Wales.[192]

While it is unlikely that the Commonwealth and State Parliaments that enacted the cross-vesting legislation intended it to have any impact upon substantive law,

186 *Ibid.* 534.
187 *Ibid.* 539-40.
188 *Ibid.* 532.
189 *Ibid.* 523 and 540.
190 *Ibid.* 524.
191 *Ibid.* 524-5.
192 *Ibid.* 534.

these choice of laws considerations make it clear that to be effective and just, cross-vesting must have a substantive law component. First of all, (and perhaps most difficult), the choice of law rules must be standardised throughout Australia. In the case of personal injury actions this might well proceed upon a vigorous application of the *lex loci delicti*. Similarly, simple and fairly rigid rules will have to be established for multi-jurisdictional torts, contracts, and perhaps even some property and corporations matters. While this may seem a simple matter, it will involve both Commonwealth and State action, either legislative or judicial, directed toward a commonly agreed rule. In the case of Commonwealth courts, and matters in which State courts exercise federal jurisdiction, there may be a need to amend ss 79, 80 and 80A of the Judiciary Act 1903, which require that federal courts apply the law of the State in which the court sits.

Second, it will be necessary, in applying interstate choice of law rules, to strictly construe the term 'procedural', (which triggers resort to the *lex fori)*, as was done in *Breavington*. The term should exclude any statutory requirement or rule which has any impact upon the substantive law of the case, including all aspects of imposing and computing damages. Since a large portion of adjectival law would thus come within the '*lex causae*', this might require jury trial in State court systems where it has been unknown for most of this century. As a related matter, consideration will then have to be given to the qualification of counsel to adequately protect their clients' interests in the procedural environment imposed by the '*lex causae*'.

Finally, it will be necessary to take punitive action against litigants who blatantly engage in 'forum shopping' or otherwise abuse the spirit of the cross-vesting legislation. For example, the party who petitions the Industrial Division of the Federal Court of Australia to dissolve a marriage is clearly dealing with an inappropriate court even though it may technically have jurisdiction by virtue of cross-vesting. Similarly, the Sydney resident who is a beneficiary of a New South Wales testamentary trust which is being administered by a trustee in Sydney is guilty of harrassment when the case is brought in the Supreme Court of Western Australia. Outright dismissals with assessment of costs will make a clear statement that while all courts may technically have cross-vested jurisdiction, counsel rely upon cross-vesting at their peril to justify inappropriate recourse to an implausible forum.

### C. *FULL FAITH AND CREDIT IN 'PROTECTION' CASES*

While full faith and credit considerations under s.118 of the Commonwealth Constitution have been raised in choice of law discussions, they have been held to be as yet largely inapplicable in that area. However, one case in the Protective Division of the New South Wales Supreme Court suggests that cross-vesting may raise problems where State court protective procedures are involved.

In *Re An Alleged Incapable Person F.C.C. and The Protected Estates Act 1983*,[193] the New South Wales court was confronted with a decree of the Supreme

[193] (1990) 19 N.S.W.L.R. 541.

Court of Queensland which had heard a motor vehicle accident case in which the incapable person was seriously injured and deprived of all higher intellectual brain functions. In the course of settling the litigation, the Queensland Justice directed that the moneys received in settlement be placed in the hands of the Protective Commissioner of New South Wales. The money was so paid and was held by the Commissioner, but when the incompetent's parents asked permission to apply part of the money to buy a residence for him, the authority of the Commmissioner was brought into question. Justice Powell recognized that, pursuant to the cross-vesting legislation, the Supreme Court of Queensland could apply ss 13 and 24 of the Protective Estates Act 1983 (N.S.W.). However, the issue was not whether the Queensland Court had jurisdiction, but how it had applied that jurisdiction in the case of a New South Wales resident. In this particular instance, New South Wales procedures stipulated that before incompetence could be found, it was necessary to empanel an inquest brought on by the ancient writ *de lunatico inquiriendo*. According to the New South Wales statute, only appointments made in this manner were entitled to be registered with the Supreme Court.[194] Although full faith and credit did require that the decrees of other Australian States and Territories be recognized, that should be done through a summons served upon the alleged incapable person and any foreign curator.

The case turned upon the Queensland Supreme Court's failure to proceed by inquest, as required by New South Wales statutes, and possibly because it exceeded its authority by appointing a New South Wales, rather than a Queensland, curator. Presumably, if a Queensland curator had been appointed, and the proper procedures had been commenced to institute a curatorship in New South Wales, an inquest could be held to cure the defect in the Queensland proceeding. In this particular case, the lack of a formal inquest meant that the appointment of a New South Wales curator was flawed. Given the significant personal and financial consequences of a lunacy decree, it is not unreasonable that New South Wales public policy should insist upon an inquest as protection against abuse of this *ex parte* process. The appointment of a curator in Queensland simply to commence an incompetency proceeding in New South Wales seems awkward to say the least, but it would exceed the proper limits of full faith and credit to insist that New South Wales accept the Queensland determination concerning capacity.

Another question not raised by the case is whether Queensland has the authority to appoint a curator for a New South Wales resident who has become incompetent as the result of a motor vehicle accident in Queensland. If the incapacitated person remains in Queensland at the time the order is requested, there should be no difficulty in following Queensland procedures. However, such a curator would be a Queensland appointee subject to the direction of the Supreme Court of Queensland. If the incapacitated person is resident in New South Wales at the time the order is entered, it would seem that the Queensland courts lack jurisdiction over his person for the purposes of making a judgment. Physical location rather than residence might provide the best rule in these circumstances.[195]

[194] *Ibid.* 547-9.

[195] Possibly the concept of residence or domicile could be utilized to contend that a New South Wales resident should not be declared incapable except by New South Wales procedures, wherever

For the purposes of cross-vesting, the case raises the possibility that not all aspects of Supreme Court jurisdiction may have been cross-vested in the federal and other State and Territorial courts. Protective orders for incompetent persons or regarding children are certainly within this doubtful category. Similarly, the appointment of executors, trustees and others concerned with deceased estates might be excluded. All of these are situations in which the local court exercises the *parens patriae* authority of the State, and they may for that reason be exempt from cross-vesting and full faith and credit considerations.

## D. *TRANSFER DECISIONS IN THE CROSS-VESTING ENVIRONMENT*

In making decisions to transfer a case to another tribunal, the judge in the 'first court' must consider a number of factors set forth in the cross-vesting statutes. Some of these are objective factors, in the sense that information concerning them is readily available and they do not involve any subjective or impressionistic discretion on the part of the decision-maker. Others are quite subjective and may, if construed broadly, fit into President Kirby's category of 'judgments of impression'.[196]

The objective factors can be grouped as follows: first, the question of the appropriate forum. Which court is the traditional forum to exercise this jurisdiction? Does the 'first court' have jurisdiction independent of the cross-vesting legislation? Does the proposed transferee court have jurisdiction independent of the cross-vesting legislation? Is it clearly improper for either the 'first court' or the proposed transferee court to exercise jurisdiction?

Second, given the state of the existing law, and independent of the cross-vesting of jurisdiction, would the parties expect the case to be determined in the 'first court' or in the proposed transferee court? Is the substantive law involved such that the 'first court' or the transferee court is most appropriate? Is the matter one that has been referred to the Commonwealth Parliament by the States? If a related case is pending in another court, does that case or this case involve the larger number of common issues to be resolved?

Third, will efficiency be served if this case is transferred to the proposed transferee court? How far has litigation in this court progressed? Would justice be served by a transfer, or would it give undue advantage to one of the other parties? Has the moving party presented a reasonable basis upon which transfer should be made? Will the transfer add to the convenience of the parties or their witnesses?

Finally, are there reasons in substantive law or procedure which make it unjust to grant the transfer?

Among these factors, four would appear to involve subjective, or non-quantifiable, exercises of judicial discretion. The last three factors raised in the

he or she happens to be situated within Australia. This might cause confusion in some cases where residence or domicile is difficult to determine, and it would hinder trial courts in the conduct and settlement of cases when the incapable person is within the State's territorial boundaries. The better procedure would be for the trial court to appoint a curator within its jurisdiction; should a curator be needed in the State of the incompetent's domicile, the forum curator might request such an appointment, either of himself or of another, following the procedures of the domiciliary State.

[196] *Bankinvest A.G. v. Seabrook* (1988) 14 N.S.W.L.R. 711, 716.

third group, as well as the final factor mentioned, bring issues of justice, undue advantage and reasonableness into consideration, and the third factor in the third group involves the onus of proof and the imposition of that burden upon the moving party. Of course, the court on its own motion can order a cross-vesting transfer, and presumably the test in that case would be whether the court was convinced that transfer was justified. It is helpful to see from the reports of transfer judgments how various courts and judges approach these factors.[197]

### 1. *The traditional forum*

Prior to the enactment of the cross-vesting legislation, the traditional pattern of court jurisdiction in Australia was that the Supreme Courts of the States and Territories exercised plenary jurisdiction by virtue of State authorization, and because of their investment with federal jurisdiction by the Commonwealth Parliament. The Federal Court of Australia had special jurisdiction, in part transferred to it from the Federal Bankruptcy Court and Australian Industrial Court, and in part conferred by numerous statutory provisions, the most statistically significant being the Trade Practices Act 1974 (Cth). The Family Court of Australia was assigned jurisdiction in federal family law matters, supplemented by referral of State authority under sub-section 51(xxxvii) in regard to de facto relationships or extra-marital children. The Family Court of Western Australia provided both federal and State family law jurisdiction in that State.[198] This usual allocation of judicial business was well-established and is a reliable indicator of the traditional forum in which a case should be litigated.

In making decisions to transfer cases under cross-vesting legislation, judges have tended to comment on the 'natural' or 'appropriate'[199] tribunal for the litigation at hand, and some have had recourse to the traditional (*i.e.* pre-1987) forum rules.[200] In his judgment in *Chapman v. Jansen*,[201] Justice Fogarty relied

[197] Clearly quantification would serve no useful purpose, since few judgments are reported, and an inordinate number of them would be in family law because of the volume of litigation in the field and because of the existence of an unofficial reporter devoted to reporting judgments in that area of litigation. The *AIJA 1992 Report* 82-9, while making no pretense to statistical precision, points out that *Bankinvest* (and particularly the extensive opinion of Acting Justice of Appeal Rogers) has dominated State judicial thought in regard to transfer applications. However, there is no commonly accepted group of principles governing judicial decision in the area.

[198] See the judgment of Justice Rogers in *Bankinvest A.G. v. Seabrook* (1988) 14 N.S.W.L.R. 711, 723 for a succinct summary of the jurisdictional picture in 1987. He contends that the new federal court situation created questions concerning where jurisdiction resided.

[199] The cross-vesting statutes refer to the 'appropriate' or the 'more appropriate' court. Justice Rogers in *Bankinvest* equated 'natural' with 'more appropriate', but did not apply a traditional test concerning the historical allocation of jurisdiction in Australia. *Bankinvest* is noteworthy for its failure to deal with this issue, focussing instead upon the Queensland connections of the case before it, and the 'interests of justice' provisions in the cross-vesting legislation. Interestingly, all three judgments tend to ignore the caution of the New South Wales Parliament in enacting its cross-vesting statute. The second reading speech quoted in *Bankinvest* (and italicized in the opinion by Justice Rogers) reads as follows: '[t]he provisions relating to cross-vesting will need to be applied only in those exceptional cases where there are jurisdictional uncertainties and where there is a real need to have matters tried together in one court.'

[200] President Kirby in *Bankinvest* suggested that the 'history of judicial arrangements in Australia which preceded the [cross-vesting] Act' was a pertinent consideration in a transfer motion, but did not elaborate, except to say that Queensland, and not New South Wales, was appropriate, presumably because the predominant contacts of the defendant bank (with the exception of the location of its only Australian place of business — Sydney) were in Queensland: *supra.* 716.

[201] (1990) 100 F.L.R. 66, 80-1.

heavily upon the fact that the State Supreme Court had been the traditional forum for litigating cases in which the property of a de facto couple and the status of their extra-marital child were involved. Justice Wilcox in *Bourke v. State Bank of New South Wales*[202] pointed out that in Trade Practices Act litigation the Federal Court had always had jurisdiction, as had the Supreme Courts of the States; cross-vesting was not the sole source of the Federal Court's authority to act. Similarly, Justice O'Loughlin of the Federal Court examined the authority of the State Supreme Courts and the Federal Court prior to cross-vesting legislation in considering whether to transfer a proceeding involving misrepresentation and violation of the South Australia Fair Trading Act.[203] Dealing with a de facto relationship, Justice Nygh in *Re Staples and McCall*[204] noted at the outset that the Family Court of Australia traditionally did not have jurisdiction, and then proceeded to examine whether the New South Wales cross-vesting legislation had conferred jurisdiction, finding that it did.

In each case where cross-vesting transfer motions are made, consideration of the 'traditional forum' is an appropriate first test. First, it will reveal that in bringing the matter, and in submitting to jurisdiction, both parties have decided to proceed in an unusual and probably inappropriate forum.[205] A circumspect judge will ask why.

Second, it may reveal that the situation is one in which both the first court and the proposed transferee court have historically exercised jurisdiction. Determining which is 'more appropriate' then becomes a task of analyzing the case in terms of efficiency in trial, expertise of the courts involved, and the other factors that may touch upon the decision.

Third, it may show that the transfer is *prima facie* inappropriate, because the proposed transferee court's jurisdiction rests only upon cross-vesting legislation. This places a substantial burden upon the moving party to show that this is an exceptional case in which cross-vesting is justified by the special circumstances.

The preamble and language of the legislation reflect this approach to the cross-vesting decision. Paragraph (a) of the preamble states clearly that the statute is establishing cross-vesting 'without detracting from the existing jurisdiction of any court', and paragraph (c) provides for transfer if 'a proceeding is instituted in a court that is *not the appropriate court*'.[206]

2. *The more appropriate forum*

Closely related to considerations of the 'natural' or 'traditional' forum are judicial efforts to determine, by balancing, which court would be more appropriate

202 (1988) 85 A.L.R. 61, 77.

203 *Perpetual Holdings Pty Ltd v. Leviathan Pty Ltd* (1991) 30 F.C.R. 524, 526-8.

204 (1989) 13 Fam.L.R. 279, 279-81.

205 In *Down to Earth Spring Water Pty Ltd v. State Bank of New South Wales* (1992) 31 F.C.R. 81, Justice Beaumont experienced little difficulty in dealing with a transfer request. The case was based upon the Fair Trading Act (N.S.W.), and he observed that the State Supreme Court was the 'natural forum' for trial. In addition, the Federal Court 'is not a court of general jurisdiction'. Furthermore, 'this Court is clearly an inappropriate forum for a claim against a State bank involving the interpretation and application of a State statute.' The brevity of the opinion suggests that traditional forum tests help to expedite consideration of cross-vesting transfers.

206 See the preamble to the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth). In defining 'special federal matter', s.3 of the statute refers to matters which, without the provisions of the cross-vesting acts, would be outside the jurisdiction of the State or Territory Supreme Courts.

for the trial of a case. The initial inquiry is whether the 'first court', that is the court in which the case and transfer motion is pending, would have jurisdiction had cross-vesting legislation not been enacted. If the first court finds that without cross-vesting it would not have jurisdiction, there is a strong tendency to grant the transfer request.[207] On the other hand, the progress of the matter before the first court or other special circumstances may persuade the first court to retain jurisdiction relying entirely upon cross-vesting provisions.[208]

### 3. *The expectation of the parties*

In commencing an action in a certain court, the parties and their counsel may have expectations concerning procedure or judicial interpretations which will be disappointed by a cross-vesting transfer. Those anticipations may well include presumptions concerning substantive and procedural aspects of the case. It is not clear from the cross-vesting legislation that the first court ordering a transfer has any continuing control once the cross-vesting order is entered. In *Chapman v. Jansen*,[209] Chief Justice Nicholson assumed that the transferee court would apply the procedural rules of the first court. To the contrary, in *Bourke*,[210] Justice Wilcox was quite adamant that all the first court could do was order a transfer; thereafter the procedural handling of the case, coupled with its assignment to a division of the Court for trial, was a matter for decision by the transferee Supreme Court.

At first thought it may appear that the plaintiff or petitioner would have an unfair advantage in 'forum shopping' if status quo expectations were paramount in deciding a cross-vesting application. However, a defendant may raise objections to the jurisdiction of the first court at an early stage of the pleadings; the party who appears in an action and pleads is in effect acquiescing in the plaintiff or petitioner's selection of a forum court. In *Staples and McCall*,[211] Justice Nygh noted that his Court's precedents differed from those of the Equity Division of the Supreme Court of New South Wales concerning property division among married and de facto couples. Thus the petitioner's decision to launch her case in the Family Court of Australia, was 'in the hope of obtaining better treatment

207 *Re Staples and McCall* (1989) 13 Fam.L.R. 279, 282; *Chapman v. Jansen* (1990) 100 F.L.R. 66, 81 and 83-84; *Down to Earth Spring Water Pty Ltd v. State Bank of New South Wales* (1992) 31 F.C.R. 81, 82.

208 In *Mulhall v. Hartnell* (1988) 12 Fam.L.R. 316, the petition to the Supreme Court of New South Wales was for a custody order, which, but for cross-vesting, was within the exclusive jurisdiction of the Family Court of Australia. While the case was pending in the Supreme Court, cross-vesting was declared to be in effect, thereby conferring jurisdiction upon the Supreme Court. Justice Young decided that in the interest of justice and efficiency he would retain jurisdiction. In *Rural Industries Bank of Western Australia v. Larchill Corporation Ltd* (1990) 1 W.A.R. 407, 409 the Supreme Court of Western Australia was asked to 'wind up' the affairs of a South Australia corporation. Prior to cross-vesting the Supreme Court of the State of corporation had been designated as the court responsible for 'winding up'. Since no similar proceeding was pending in South Australia, the petitioner was the only party concerned, and the corporation had done business in Western Australia, the Western Australian Supreme Court elected to retain jurisdiction under cross-vesting authorization. The Court in *Bankinvest* did not comment upon its own jurisdiction, but it would seem that there was jurisdiction, given the location of defendant's principal place of business in New South Wales. The heavy concentration of Queensland parties and the involvement of Queensland witnesses and evidence would make this case a suitable one for declining jurisdiction on the basis of *forum non conveniens*.

209 (1990) 100 F.L.R. 66, 75.

210 *Bourke v. State Bank of New South Wales* (1988) 85 A.L.R. 61, 63-4.

211 (1989) 13 Fam.L.R. 279

on the part of the applicant — and I certainly would not criticise anybody for that'.[212] The male respondent filed his petition in the Supreme Court of New South Wales the following day, and then moved to stay the Family Court proceeding and transfer it to the Supreme Court for consolidation and trial there. In fact, while he had appeared in the Family Court, his petition in the Supreme Court coupled with the cross-vesting application evidenced his objection to trial taking place there. If the petitioner had any expectations concerning her advantageous position in the Family Court, they were premature.

A party's hesitation in requesting transfer may be a factor in denying such a request. Justice Fogarty in *Chapman* pointed out that the successful cross-vesting application was made at an early stage of the proceeding,[213] but in *Anagnostis & Anor v. Davies Brothers Ltd*,[214] the parties waited far beyond the time for discovery, and a request in the Supreme Court for a discovery order was denied. The unsuccessful applicant for additional discovery then moved for cross-vesting in the Federal Court of Australia. The request was denied on the basis that to allow such a late transfer would not serve the interests of justice, and that the matter would soon come on for trial in the Supreme Court, but would be delayed by transfer to the Federal Court.[215]

While the articulation of this rule is not very precise, it seems obvious that the longer the case remains pending in one court, without objections to jurisdiction or applications for transfer, the less likely it is that a transfer application will be successful. Acquiescence in the court's jurisdiction by both parties increases their right to expect that the court selected will ultimately decide the case.

4. *Consolidation considerations*

Sub-section 5(1)(a) of the Commonwealth Cross-Vesting Act anticipates that for a consolidation transfer to be made a related proceeding must be pending in another participating court. While consolidation is within the discretion of the transferee court, the statutory intention of achieving efficiency in disposing of litigation would suggest that the possibility of consolidation is a significant factor in assessing cross-vesting transfer requests.

In *Bankinvest A.G. v. Seabrook*,[216] the New South Wales Court of Appeal considered transfer of a case to the Supreme Court of Queensland where the only New South Wales connection was the Sydney location of the bank's principal place of business. The bank had extended substantial credit for Queensland real estate operations and the defendants were guarantors for the repayment of the loans. The agreements stipulated that Queensland law would govern them, although there was a provision that the bank could institute enforcement proceedings in the courts of any competent jurisdiction. The guarantor defendants pleaded non-compliance with the Queensland Money Lenders Act 1916 on the part of the plaintiff bank, and asked that the matter be transferred to the Supreme Court of Queensland where actions had been pending since 1984.[217] Justice Rogers observed

212 *Ibid.* 283.
213 (1990) 100 F.L.R. 66, 83.
214 (1989) 99 F.L.R. 196.
215 *Ibid.* 202-3.
216 (1988) 14 NSWLR 711.

that while different parties were involved in the two pending actions, the Queensland proceedings included all issues raised by the New South Wales proceedings, and that if both proceeded there would be two Australian courts making separate determinations of the same issues.[218]

Counsel for the bank, in opposing the transfer, argued that when the proceedings in two States were related, the question was simply which court could give relief or make a determination 'more completely' than the other. Only when the first court could not give all the relief required should transfer be ordered.[219] Justice Rogers flatly rejected this position, observing that under the cross-vesting legislation all courts had the jurisdiction of all other participating courts, and that the substantive law applications were as stipulated in s.11. Conceding Justice Rogers' position to be correctly stated, it nevertheless seems to miss the point that counsel was attempting to make — that among the considerations was the comprehensivness of one proceeding in relation to the other. Justice Rogers seized upon the 'lodestar' of 'the interests of justice' as the basis for deciding the transfer application,[220] hence the judgment does not consider the relative comprehensiveness of the two proceedings. However, we do know that pre-trial negotiations and procedures had reached the point in Queensland that settlement had been discussed, but then suspended. Presumably the Queensland proceeding was well advanced and transfer of the New South Wales case, if followed by consolidation, would have resulted in substantial economy in court time and litigant expense.[221] Of course that was the ultimate result, but it is surprising that the efficiency and economy produced by consolidation was not a factor mentioned by the Court of Appeal.

In *AccFin International Securities Co. Ltd v. National Executors and Agency Co. of Australia*,[222] the Supreme Court of Queensland was faced with the request to transfer to the Supreme Court of Victoria a complex case involving a trust and its creditors. The Queensland action had been commenced in 1985 and the Victorian case was begun in 1988 by a third party in the Queensland case. The majority of the Queensland litigants did not object to the transfer, but as the Queensland Court pointed out, their wishes were not decisive.[223] Moving to the affidavits supporting the cross-vesting application, the court noted that while the evidence and witnesses were largely grouped in Queensland, as long as the Victorian proceeding continued, they would also have to testify there. In addition, the Victorian case was broader in scope and contained the major issues raised in the Queensland proceeding.[224] Thus transfer to Victoria was appropriate.

The *AccFin* approach seems preferable to Justice Rogers' 'judgment of impression' on the basis of 'interests of justice'. It would be inappropriate to transfer a large case to another court simply because a minor, but related, matter

217 *Ibid.* 718-22.
218 *Ibid.* 721.
219 *Ibid.* 726. This is Roger J.'s paraphrase of the argument.
220 *Ibid.* 726-7.
221 *Ibid.* 721.
222 (1990) 99 F.L.R. 432-5.
223 *Ibid.* 434.
224 *Ibid.* 435.

is pending there. Is it beyond imagination that a court faced with the trial of an extremely difficult and time-consuming case might prefer 'in the interests of justice' to transfer it to another court, which 'in the interests of justice' might find still another 'appropriate court'? Could there not be cases, like international shipments of rubbish, which keep travelling along (like the fabled ship, the *Flying Dutchman*) on a cross-vesting sea? That is obviously contrary to the spirit, if not the letter, of the cross-vesting scheme. Questions of magnitude and duplication of judicial effort are significant factors to be considered before ordering a cross-vesting transfer.[225]

5. *The 'interests of justice'*

Cross-vesting legislation under s.5 of the Commonwealth statute lists 'interests of justice' twice. The first use is in conjunction with the detailed provisions of sub-paragraph 5(1)(b)(ii), which lists the matters to be taken into consideration by the first court in deciding to make a transfer. As has been pointed out,[226] this listing among other matters does not control the separate listing of 'interests of justice' as a single ground upon which to order transfer. Technically there is a good argument for Justice Rogers' position in *Bankinvest*,[227] that the 'lodestar' for decision is the 'interests of justice', but can the legislature have intended that the detailed provisions of sub-paragraph 5(1)(b)(ii) be ignored in reaching a decision? Is it not more likely that the separate listing of 'interests of justice' provides a basis upon which a court might be persuaded that a transfer is appropriate, even if the criteria of the detailed provisions are not met? Justice Wilcox in *Bourke*, although not briefed on the question of 'interests of justice' as a single factor, rejected its general use unconnected with the more specific criteria. He observed that:

> the legislature does not authorise the transfer of a proceeding to another court simply because a judge forms an intuitive view that this would be an appropriate thing to do.[228]

Indeed there is reason to commend the view of the Supreme Court of Western Australia, that the party moving for transfer under the single 'interests of justice' standard should satisfy a heavier burden of persuasion than that applicable to 'interests of justice' coupled with the other factors in sub-paragraph (ii).[229]

6. *Abuses of cross-vesting*

To the credit of the manner in which cross-vesting has been implemented it can be said that only two possible instances of abuse have been identified in this survey. One involves the use of the 'interests of justice' to frustrate a party's attempt to circumvent a State Supreme Court order which denied the transfer applicant the right to amend pleadings and add new parties.[230] The case had been

225 *AIJA 1992 Report* 71-2 would suggest that this is a remote possibility. Certainly the converse has not been true, the report argues, since the courts of the more populous States have not hoarded cases to themselves through resort to cross-vesting procedures. The report also claims that there has been 'unambiguous recognition in the cases that the scheme cannot be used to permit the federal courts to transgress upon what has been regarded as the traditional jurisdiction of the State Supreme Courts.'

226 Justice Fogarty in *Chapman v. Jansen* (1990) 100 F.L.R. 66, 83.

227 See nn.199 and 219 *supra*.

228 (1988) 85 A.L.R. 61, 77.

229 *Mullins Investments Pty Ltd v. Elliott Exploration Co. Pty Ltd* (1990) 1 W.A.R. 531, 537.

pending for nearly three years when the defendant had it marked for trial. At that point the plaintiff asked leave to amend his pleadings to add parties and insert new allegations concerning the Trade Practices Act 1974 (Cth). In addition, the plaintiff requested additional time for discovery. Upon denial of these requests by the Supreme Court, the plaintiff applied for cross-vesting of the case to the Federal Court. Citing delay, the unfair advantage sought by the applicant, and the more than ample opportunity that had already been available for discovery, the Tasmanian Supreme Court denied the cross-vesting motion.

The second case, *Baffsky v. John Fairfax & Sons Ltd*,[231] came to a less satisfactory conclusion. The plaintiff, a veteran solicitor in Sydney, but who had no practice in the Australian Capital Territory, sued the defendant newspaper for libel in the Supreme Court of the Territory. Over 95% of the defendant newspaper's circulation was in Sydney, and in moving for a cross-vesting transfer to the Supreme Court of New South Wales, the defendant pointed out that it would cost an additional $9,000 to defend the case in Canberra. Justice Higgins observed that there was no obvious reason why the plaintiff chose to sue in the Australian Capital Territory, but that choice was lawfully open to him. Possibly, the judge continued, the decision was made because of the reputation of one party allegedly implicated with the plaintiff, which would adversely influence a New South Wales jury.[232] Apparently the motive of harrassment did not occur to Justice Higgins. Quite to the contrary, he construed the cross-vesting transfer request to be an unwarranted interference with the plaintiff's lawful forum, and observed that the interests of justice would not be served by ordering a transfer.[233] Significantly, the judge relied upon the single ground of 'interests of justice' rather than the more detailed standards set out under sub-paragraph (ii) of the cross-vesting statute. Hopefully cross-vesting will not become a vehicle for harrassing defendants, nor will it be construed as repealing the concept of *forum non conveniens* in appropriate cases. The Australian Capital Territory was both an inappropriate and an inconvenient forum for the trial of *Baffsky*. It deprived the defendant of the right of trial by a New South Wales jury, which could best judge both liability and the measure of damages. The case illustrates how dangerous it is to make ill-considered 'nuts and bolts' judgments, or to enter 'judgments of impression' orders in the cross-vesting environment. The difference between *Bankinvest* and *Baffsky* is that *Bankinvest* was an effort to provide appellate guidance early in the life of the cross-vesting scheme. As such it could not draw upon two years of judicial experience with the cross-vesting statutes, and its overly optimistic tone is understandable. In *Baffsky* the application of the same rationale two years later was unforgiveable.

## V. *CONCLUSION*

Cross-vesting is based on the assumption that there is, or should be, a national Australian law which all courts will administer and that the fortuitous fact that a case is commenced in one forum, or is transferred to another, will not alter the

230 *Anagnostis v. Davies Brothers Ltd* (1989) 99 F.L.R. 196.
231 (1990) 97 A.C.L.R. 1.
232 *Ibid.* 3.
233 *Ibid.*

outcome. In a very general way that initial impression is reinforced by historical experience and many cross-vesting situations will raise few difficulties. At most they will require a careful balancing of the convenience of the parties to identify the tribunal that will best accommodate the interests of all. But once there is a need to face the ugly reality presented by divergent rules in two competing jurisdictions, there is a baffling problem of making a cross-vesting decision without doing injustice in the process. The responsibility is made more burdensome by the knowledge that a wrong choice cannot be rectified on appeal.

Since statutory revision in all States and Territories with a view toward making Australian law uniform is unlikely to occur, the most practical alternative is reshaping choice of law rules to accommodate the requirements of cross-vesting. When the question of cross-vesting is raised, the single issue presented should be the convenience of the parties and witnesses. Thus the law of the case must be fixed and predictable *prior to* consideration of the cross-vesting request. The law of the forum invoked by the plaintiff would normally govern all aspects of the case, both adjectival and substantive; it would include that jurisdiction's conflicts law and the concept of *forum non conveniens* as applicable there. When a cross-vesting application is made, and it can be shown that a party has chosen a forum that has no connection with the case, the matter should be transferred to the appropriate court, with assessment of costs against the plaintiff. Such a transfer should not give the plaintiff an opportunity to avoid a shorter statute of limitations in the transferee court. In personal injury litigation the law of the *situs* of the tort should apply wherever the matter is tried, and in multiple jurisdiction torts a statutory choice for cross-vesting purposes must be made in favor of one jurisdiction. Choice of law rules in contract cases will have to be modified by making a clear delineation between the law of the place in which the contract is made and the law of the place in which it is to be enforced. While the normal operation of choice of law rules within the various State and federal courts need not be changed, some adjustment must be made for cross-vesting to work with justice as well as efficiency.

The hitherto little invoked concept of full faith and credit, resting quietly in the Commonwealth Constitution, will need to be more vigorously enforced if the full sweep of cross-vested authority is to go unquestioned. For example, the cross-vested court of another State must be empowered to appoint a guardian for an incompetent person, even though it normally would not have such jurisdiction. A very narrow window can be permitted for full faith and credit examination of the rendering court's decision, and presumably the permissible bounds will be established by the High Court. Since the acceptance or non-acceptance of the sister State's action would not be a cross-vesting order as such, there would be ample opportunity for the High Court to establish guidelines in this connection.

If the cross-vesting legislation is to serve justice as well as efficiency, some legislative and judicial reconsideration seems to be in order. There is universal agreement that 'forum shopping' is wrong, yet the legal advisor who does not take every advantage of the cross-vesting legislation is inadequately representing his or her client. The point is not that people should not 'forum shop', it is that the circumstances should be such that 'forum shopping' is non-productive. So far,

cross-vesting seems to make litigation fraught with the danger of being tactically surprised or ambushed by an opponent determined to acquire unjust advantage. If left unreformed, cross-vesting could well become the twentieth century's counterpart to seventeenth century special pleading, from which only the legal profession's pocketbooks could benefit.