LEGISLATIVE COMMENTS

SOME ASPECTS OF STATE AND FEDERAL JURISDICTION UNDER THE AUSTRALIAN CONSTITUTION

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Studies concerning the relationship between Federal and State jurisdiction have typically characterized this segment of Australian constitutional law as "technical, complicated, difficult and not infrequently absurd".[1] Whilst such a description may still be correct, the assertion that these endeavours do not offer "any insight into more fundamental aspects of the Australian federal system of government"[2] can no longer be maintained. It is now more frequently being recognized that, like the United States experience, "[t]he jurisdiction of courts in a federal system is an aspect of the distribution of power between the states and the federal government".[3]

An aspect of this relationship which deserves closer attention than it has hitherto received is s. 5 of the *Commonwealth of Australia Constitution Act* of 1900.[4] Covering clause 5, as the section is commonly called, states *inter alia*

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1 Z. Cowen and L. Zines, *Federal Jurisdiction in Australia* xiv (2nd ed. 1978). "The subtleties and refinements which [federal jurisdiction] has developed form a special and peculiarly arid study." O. Dixon, *The Law and the Constitution* (1935) 51 L.Q.R. 590, 608. It has also been suggested that "as a result of the provisions of the Constitution and those of the [Commonwealth] Judiciary Act [1903] 'Federal jurisdiction' forms a grave impediment to the practical administration of justice". Memorandum prepared by the Committee of Counsel for Victoria. Royal Commission on the Constitution of the Commonwealth of Australia (1929), Minutes of Evidence 13 December 1927 at 789. Professor Sawer has described the case law as containing "metaphysical elements" and "attempts at distinguishing" verging "on the disingenuous". G. Sawer, "Judicial Power Under the Constitution" in *Essays on the Australian Constitution* 71, 85 (footnotes omitted) (R. Else-Mitchell (ed.) 2nd ed., Sydney, Law Book Co., 1961).

2 Ibid.

3 P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, Hart and Wechsler's, *The Federal Courts and the Federal System* (2nd ed., The Foundation Press, N.Y., 1973) xix [hereinafter cited as Hart and Wechsler]. "[A] discussion of those matters which may appear to be of interest at first sight, only to lawyers, involves us quite directly also in a number of broader issues of fundamental political and constitutional importance. . . ." E. St. John, "The High Court and the Privy Council; The New Epoch" (1976) 50 *A.L.J.* 389.

4 63 & 64 Vict. c. 12. The Constitution of the Commonwealth of Australia which comprises 128 sections is contained in the ninth clause of the British statute. "The distinction between the Constitution and the covering clauses is that whereas under the procedure by way of referendum set out in s. 128 the Constitution can be amended by the Parliament of the Commonwealth in conjunction with the Commonwealth electorate, the covering clauses can be amended only by the Parliament of the United Kingdom." C. Howard, *Australian Federal Constitutional Law* (2nd ed., Sydney, Law Book Co., 1972) pp. 2-3. By Proclamation dated 17 September 1900 the date of the establishment of Australia was declared to be 1 January 1901. See 1901-1927 4 *Clth Stat. Rules* 3621.

"This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges and people of every State and every part of the Commonwealth, notwithstanding anything in the laws of any State. . . ."

This provision bears a striking similarity to the Supremacy Clause of the Constitution of the United States of America.[5] Indeed, earlier drafts of the Australian clause followed the American text even more closely.[6] Unfortunately, the Constitutional Convention debates of the 1890s do not throw any light on the intended meaning or scope of that part of covering clause 5 quoted above.[7] Like many provisions of the Australian Constitution, adoption of this particular clause illustrates the often unquestioning reliance Australian Founding Fathers placed on the American document.[8] One result has been a marked divergence of opinion as to the necessity for, and status of, covering clause 5.[9]

5 "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."
U.S. Const. Art. 6 S.2. The Supremacy Clause and Covering Clause 5 have been equated by Australian courts. See e.g. *D'Emden* v. *Pedder* (1904) 1 C.L.R. 91, 117; *Baxter* v. *Commissioners of Taxation* (N.S.W.) (1907) 4 C.L.R. 1087, 1125.

6 For example clause 7 of the Draft Bill adopted by the 1891 Convention provided *inter alia*
"The Constitution established by this Act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, and all Treaties made by the Commonwealth, shall, according to their tenor, be binding on the Courts, Judges, and people of every State, and of every part of the Commonwealth, anything in the laws of any State to the contrary notwithstanding. . . ."
Official Report of the National Australasian Convention Debates, Sydney, 2 March to 9 April 1891, p. 994 (1891). The words "in pursuance of the powers conferred by the Constitution" were deleted by the Drafting Committee. *Proceedings of the Australasian Convention Held at Parliament House*, Melbourne, 20 January to 17 March, 1898 at 188-9 (1898). This change was apparently adopted by the Convention on 16 March 1898. 2 *Official Record of Debates of the Australasian Federal Convention*, Third Session, Melbourne, 20 January to 17 March, 1898 at 2445 (1898). The history of the reference to treaties in this clause is traced in J. A. Thomson, "A United States Guide to Constitutional Limitations Upon Treaties as a Source of Australian Municipal Law" (1977) 13 *U.W.A.L.R.* 110, 120-3.

7 Ibid. For a discussion of the use of draft bills and Convention debates by the High Court of Australia see J. A. Thomson, Book Review (1978) 13 *U.W.A.L.R.* 397, 402-4.

8 Professor Cowen has argued that "[m]uch of our present discontent in this area [of federal jurisdiction] arises from unintelligent and uncritical copying of the provisions of the United States Constitution". He maintains that there was an "inapposite transcription of another federal model" but also hastens to remind the reader that "[i]t is easy to be wise after the event and to charge the Founding Fathers with a stronger disposition to copy than to think. . . . Z. Cowen and L. Zines, supra fn 1, xiv, xv.

9 "Covering clause V. of the Constitution Act is a pivotal provision around and in connection with which most of the legal controversies involving the interpretation of the powers *inter se* of the Commonwealth and States have been concentrated. It may be described as the centre of gravity of the Federal system of Australia which largely maintains the balance and equilibrium of the whole. Every word and phrase in clause V. is of the utmost value and consequence in the interpretation of the constitutional powers of the Commonwealth and the States, and

A preliminary question arises as to whether this clause, which is not addressed to Justices of the High Court of Australia nor to Federal Judges,[10] confers jurisdiction on State courts. Some authority can be gathered in support of the view that the clause commands what law shall govern in judicial proceedings only if the State court already possesses jurisdiction.[11] Covering clause 5 is, however, more frequently interpreted as constituting a grant of jurisdiction to State courts.[12]

If the latter is in fact a correct reading of covering clause 5 the important question, for federal-State relations in Australia, is whether the Commonwealth Government can constitutionally withdraw the jurisdiction thereby granted to State courts. The most obvious source of legislative power to achieve this end, apart from amendment by the United Kingdom Parliament,[13] is s. 77(ii) of the Constitution.[14] This section provides *inter alia*[15]

> each of them has already been subjected to minute scrutiny and analysis by the Courts and Judges."
>
> J. Quick, *The Legislative Powers of the Commonwealth and the States of Australia with Proposed Amendments* (1919) p. 159. S. 109 of the Constitution "and covering clause V. form the keystone of the federal structure, and if they are once loosened, Australian union is but a name, and will reside chiefly in the pious aspirations for unity contained in the preamble to the Constitution". *Federated Saw Mill Timberyard and General Woodworkers' Employes' Association Australasia* v. *James Moore & Sons Pty Ltd* (1909) 8 C.L.R. 465, 535 (Isaacs J.). Professor Howard takes a different view.
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> "The function of the covering clauses was to provide a means, now necessarily exhausted, for the creation of the Commonwealth and to dispose of certain transitional and ancillary matters. Few questions arise on them. . . . It may be doubted as a matter of construction whether the first part of [covering clause 5] . . . was necessary. The remainder of the Act, including the Constitution, seems to have the binding effect contemplated irrespective of clause 5. . . ."
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> C. Howard, supra fn. 4, p. 3.

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10 Professor Bickel commenting on the American provision argues that "[o]nly as a forensic amusement can the phrase 'Judges in every State' be taken to include federal judges, on the ground that some of them sit in the states. After all, the Supreme Court does not". A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 9 Indianappolis, Bobbs-Merrill, 1962).

11 See, e.g., W. Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed., Melbourne, Harston Partridge, 1910) p. 212. A similar view of the United States Supremacy clause is taken by R. Berger, *Congress v. The Supreme Court* (1969) 244-7.

12 See e.g. *Baxter* v. *Commissioners of Taxation (N.S.W.)*, supra fn. 5, p. 1136; *Lorenzo* v. *Carey* (1921) 29 C.L.R. 243, 255 (Higgins J.); J. Quick, supra fn. 9, p. 727; Z. Cowen and L. Zines, supra fn. 1, pp. 176-8; P. H. Lane, *The Australian Federal System with United States Analogues* (Sydney, Law Book Co., 1972) p. 562; B. O'Brien, "The Law Applicable in Federal Jurisdiction" (1976) 1 *U.N.S.W.L.J.* 327, 334 fn. 21. For the United States see L. Hand, *The Bill of Rights* (Cambridge, Harvard University Press, 1958) p. 28.

13 See C. Howard, supra fn. 4. There is, however, a view that the United Kingdom Parliament can no longer effectually legislate within the Australian legal system. See generally, P. Bickovskii, "No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution" (1977) 8 *F.L.R.* 460, 465-70.

14 There is no parallel provision in the United States Constitution. It has, however, been held by the Supreme Court of the United States that Congress may vest exclusive jurisdiction in the Federal courts in all cases to which the judicial power of the United States extends. *The Moses Taylor* 71 U.S. 397 (4 Wall.) 411, 429, 430 (1867). See generally Hart and Wechsler, supra fn. 3, pp. 418-38.

15 "[I]t is somewhat odd to refer in one and the same provision to jurisdiction belonging to a court and jurisdiction invested in it, for invested jurisdiction as a

"With respect to any of the matters mentioned in [sections 75 and 76] the [Commonwealth] Parliament may make laws—defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States."

Due to a drafting mistake,[16] the word "vested" in the draft Bill approved by the 1898 Constitutional Convention,[17] became "invested" in the legislation introduced[18] and passed[19] by the United Kingdom Parliament. Subsequently, "invested" in s. 77(ii) has been interpreted as referring to federal jurisdiction invested in State courts by the Commonwealth Parliament pursuant to s. 77(iii) of the Constitution; the word "investing" being used in s. 77(iii). This segment of s. 77(ii) has, therefore, not been seen as providing authority to delete covering clause 5 jurisdiction. Whether a similar result would have eventuated if the drafting error had not occurred thus becomes a matter for speculation.

The "belonging to" provision of s. 77(ii) has given rise to three varying constructions and implications. Firstly, it is suggested that this phrase refers to both covering clause 5 jurisdiction and jurisdiction which State courts possess by virtue of State Constitutions and laws.[21] If this is the correct interpretation of the sub-section then the Commonwealth Parliament may legislatively withdraw all jurisdiction from State courts in relation to matters enumerated in ss. 75 and 76 of the Constitution.

Secondly, "belonging to" is considered to refer only to that jurisdiction granted to State courts by covering clause 5.[22] Following the removal of such jurisdiction State courts would be left with authority to adjudicate as conferred by State Constitutions and laws. If, however, State courts were invested with federal jurisdiction pursuant to s. 77(iii) the remaining State jurisdiction may become inoperative[23] by virtue of s. 109 of the Constitution.

matter of strict logic must form part of the whole of the jurisdiction which 'belongs' to a court."

W. A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed., Sydney, Law Book Co., 1976) p. 436.

16 J. Quick and R. R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901 Rep. 1976) p. 805.

17 2 *Official Record of Debates*, supra fn. 6, p. 2536.

18 The Bill introduced into the House of Commons on 14 May 1900 is set out in *Commonwealth of Australia Constitution Bill* (1900) 118-38. Clause 77(ii) is at 131.

19 Supra fn. 4.

20 See, e.g., *Pirrie* v. *McFarlane* (1925) 36 C.L.R. 170, 177 (Knox C.J.); K. M. Bailey, "The Federal Jurisdiction of State Courts" (1940) 2 *Res Judicatae* 109, 111; G. Sawer, *Australian Federalism in the Courts* (Melbourne, Melbourne University Press, 1967) p. 25.

21 See, e.g., *Pirrie* v. *McFarlane*, supra fn. 20, p. 177 (Knox C.J.); P. H. Lane, supra fn. 12, p. 562; G. Sawer, supra fn. 20, p. 25; W. A. Wynes, supra fn. 15, p. 436. The Constitutional Convention Debates of the 1890s offer no guidance on this point. The text of clause 7 of Chapter 3 of the 1891 Draft Bill favours this interpretation. *Official Report of National Australasian Debates* Sydney, supra fn. 6, p. 957. The United States analogy would also seem to favour this position. See supra fn. 14.

22 See, e.g., *Lorenzo* v. *Carey*, supra fn. 12, pp. 254-5 (Higgins J.); J. Quick, supra fn. 9, p. 727; O'Brien, supra fn. 12, p. 334 fn. 21.

23 *Carter* v. *Egg and Egg Pulp Marketing Board for the State of Victoria* (1942) 66 C.L.R. 557, 573 (Latham C.J.).

A final variation of "belonging to" is the view that it encompasses only State court jurisdiction given by State Constitutions and laws.[24] The trend of authority, however, runs against such a restrictive reading of this constitutional power. One result of this narrow interpretation is that State courts are left with covering clause 5 jurisdiction regardless of any parliamentary action pursuant to s. 77(ii). Furthermore, it may be that Commonwealth legislation cannot constitutionally deprive State courts of that jurisdiction either by direct removal or indirectly by investiture of Federal jurisdiction. Whether s. 109 would be available to give paramountcy to invested federal jurisdiction in these circumstances is debatable.

From the viewpoint of governmental structures and powers, two situations are of prime importance. The first is where federal court jurisdiction cannot, pursuant to s. 77(ii), be made exclusive of State court covering clause 5 jurisdiction. As noted, it is doubtful whether so limited a field of operation can now be ascribed to s. 77(ii). Rather, the situation which has commanded greater attention is that where no attempt through s. 77(ii) is made to withdraw State court jurisdiction, yet federal jurisdiction is invested in those courts pursuant to s. 77(iii).

Initially,[25] the prevailing view was that s. 77(iii) could not be so employed as to invest State courts with jurisdiction over those matters in respect of which the court already possessed jurisdiction by virtue of another source of authority. This restrictive view of s. 77(iii), although finding some support,[26] has been decisively rejected by the High Court.[27] Whilst affirming that s. 77(iii) covered all matters mentioned in s(s) 75 and 76, the Court held that State courts could be simultaneously seized of a double—State and Federal—jurisdiction with respect to any one or all of those matters.

It has been suggested by several Justices[28] that, even without using s. 77(ii), the State jurisdiction component can be validly removed. This is brought about by Commonwealth investing legislation utilizing s. 109. Yet, such a legislative plan will not succeed if covering clause 5 jurisdiction, which is granted by virtue of an Imperial statute,[29] is not "a law of a State" for the purposes of s. 109.[30] This issue has not been authoritatively determined.[31]

[24] *Baxter* v. *Commissioners of Taxation (N.S.W.)* supra fn. 5, p. 1142 (Isaacs J.); *In re Drew* [1919] V.L.R. 600, 607 (Irvine C.J.); Bailey, supra fn. 20, p. 111. *Cf. Commonwealth* v. *Limerick Steamship Co. Ltd and Kidman* (1924) 35 C.L.R. 69, 87 (Isaacs and Rich JJ.).

[25] *In re the Income Tax Acts* [1905] V.L.R. 463, 465-8 (Hodges J.); *Webb* v. *Outrim* (1907) A.C. 81, 91-2 (P.C.); *Lorenzo* v. *Carey*, supra fn. 12, pp. 245-6 (Dixon *arguendo*).

[26] Z. Cowen and L. Zines, supra fn. 1, pp. 205-6; G. Sawer, supra fn. 20, pp. 25-6.

[27] See, e.g., *Lorenzo* v. *Carey*, supra fn. 12, esp. pp. 251-2.

[28] *Felton* v. *Mulligan* (1971) 124 C.L.R. 367, 373 (Barwick C.J.), 392-4 (Windeyer J.), 411-3 (Walsh J.).

[29] Supra fn. 4.

[30] "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."
Australian Constitution s. 109.

[31] O'Brien, supra fn. 12, p. 334 fn. 21 seems to suggest that Imperial legislation is not

In connection with the foregoing, it should be emphasized that legislation based on s. 77(ii) cannot deny litigants a judicial forum. This is simply because the terms of that sub-section mandate that if State courts are denuded of jurisdiction pursuant thereto, corresponding jurisdiction must be found in a federal court.[32]

Despite the requirements of s. 77(ii) it is possible for a situation to develop whereby neither Federal nor State court process is available to secure rights or enforce obligations. Indeed, this situation prevailed during the years 1901-1903 in so far as actions were instituted against the Commonwealth or mandamus, prohibition, injunction or *habeas corpus* proceedings were directed against an officer of the Commonwealth. Even the enforcement of Commonwealth criminal laws in State courts was open to question. At that time, there were no federal courts, including the High Court of Australia, and State courts had not received federal jurisdicton pursuant to s. 77(iii) of the Constitution.

With the establishment of the High Court in 1903, a judicial forum in which to litigate these claims became available. If that jurisdiction, including ss. 75(iii) and 75(v),[33] was withdrawn and federal jurisdiction invested in State courts was also removed, the 1901-1903 situation would repeat itself.

Given that the doors of State courts are not closed, whether by the State or by judicially developed jurisdictional rules,[34] or political question doctrines,[35] will the existing case law deny litigants judicial remedies?[36] There appear to be at least three situations in which an affirmative answer could be supported.

The first is where a State court exercising non-federal jurisdiction is requested to entertain a suit against the Commonwealth. In the Australian context[37] the reason suggested for the inability to bring such a suit without federal jurisdiction has been "the independence of the Commonwealth".[38]

"a law of a State" within s. 109. In this context, note the different wording in ss. 108 and 109. See, e.g., *McKelvey* v. *Meagher* (1906) 4 C.L.R. 265, 279-80 (Griffith C.J.); *McArthur* v. *Williams* (1936) 55 C.L.R. 324, 360-1 (Dixon, Evatt and McTiernan JJ.); *Queen* v. *Phillips* (1970) 125 C.L.R. 93, 109 (Menzies J); P. H. Lane, "The Law in Commonwealth Places—A Sequel" (1971) 45 *A.L.J.* 138, 141.

[32] See, e.g., *Williams* v. *Hursey* (1959) 103 C.L.R. 30, 113 (Menzies J.). The term "federal court" in section 77(ii) includes the High Court. *Pirrie* v. *McFarlane*, supra fn. 20, p. 176 (Knox C.J.).

[33] The original jurisdiction conferred on the High Court by ss. 75(iii) and 75(v) can only be removed by an amendment to the Constitution.

[34] For example, standing, ripeness, mootness. See, e.g., Hart and Wechsler, supra fn. 2, pp. 64-214.

[35] See, e.g., Hart and Wechsler, supra fn. 3, pp. 214-41.

[36] For the United States see, e.g., Hart and Wechsler, supra fn. 3, pp. 423-31.

[37] Actions against the United States see, e.g., Hart and Wechsler, supra fn. 3, pp. 1326-31, 1339-56.

[38] W. Harrison Moore, supra fn. 11, p. 212. See also, *Commonwealth* v. *Limerick Steamship Co. Ltd and Kidman*, supra fn. 24, p. 76 (*arguendo*), 87 (Isaacs and Rich JJ.); *Commonwealth* v. *Kreglinger and Fernau Ltd and Bardsley* (1926) 37 C.L.R. 393, 405 (Isaacs J.); Bailey, supra fn. 20, p. 111; Z. Cowen and L. Zines, supra fn. 1, p. 177.

The second situation occurs where proceedings are brought against a Commonwealth officer in the non-federal jurisdiction of a State court.[39] In *Hannah* v. *Drake*[40] Pring J. held that the Supreme Court of New South Wales "had no jurisdiction where an action was brought against a person acting on behalf of the Commonwealth".[41] The plaintiff who was claiming damages resulting from the negligence of the servants of the Commonwealth Postmaster-General was non-suited.

In proceedings[42] brought by the Attorney-General of New South Wales to recover money paid by the State to the Federal Collector of Customs, only one member of the State Supreme Court commented on the possible lack of power in the Court to entertain the action. Acting Chief Justice Stephen merely noted

> "I wish it to be understood that if any question should in future arise as to the power of this Court to determine a dispute which is substantially one between this State and the Commonwealth, I am free to decide either way.
> "The Collector of Customs is an officer of the Commonwealth, though his duties are discharged here. The parties have submitted the case for our opinion, and no question of jurisdiction has been raised. Whether our judgment will be legally binding on the Commonwealth, I cannot say."[43]

In *Ex parte Goldring*,[44] counsel for the applicant, who was seeking a mandamus against the Collector of Customs for the Commonwealth, highlighted that if the Court held that it had no jurisdiction with regard to the matter, his client would be absolutely without a remedy.[45] Nevertheless, all three members of the Supreme Court of New South Wales decided that the Court could not grant a mandamus to compel Federal officers to perform duties imposed upon them by Commonwealth legislation even though the duties were performed within the State.[46]

The third situation which has been discussed is the question of enforcement by State courts without federal jurisdiction of Commonwealth penal legislation. There has been no definitive resolution of this problem.[47]

Although academic opinion within Australia[48] seems to accept the possibility of a vacuum in judicial power, American scholars are more critical of analogous decisions rendered by the courts in their country.[49] In addition to a critique of the reasoning in those cases, commentators have

[39] However, "[t]he Commonwealth as a party could have invoked State jurisdiction in [1901-1903] to protect or enforce its rights. . . ." P. H. Lane, supra fn. 12, p. 562.
[40] (1902) 8 A.L.R. C.N. 69. See also J. Quick, supra fn. 9, p. 9.
[41] (1902) 8 A.L.R. C.N. 69, 70.
[42] *Attorney-General of New South Wales* v. *Collector of Customs (Federal)* (1903) 9 A.L.R. C.N. 21. (Stephen A.C.J., Owen and Pring JJ.).
[43] Ibid. p. 21.
[44] (1903) 3 S.R. (N.S.W.) 260.
[45] Ibid. p. 261.
[46] Ibid. pp. 262-3 (Stephen A.C.J.), 264 (Owen and Walker JJ.).
[47] See, e.g., W. Harrison Moore, supra fn. 11, p. 213; Hart and Wechsler, supra fn. 2, pp. 437-8.
[48] See, e.g., Bailey, supra fn. 20, p. 111; Z. Cowen and L. Zines, supra fn. 1, pp. xvi, 177.
[49] See, supra fn. 36.

queried whether constitutional government can allow such a lacuna of power in the judicial arm of government. It is considered that nothing in the constitutional plan justifies the notion that State courts of general jurisdiction were deemed by the Founding Fathers to be incapable of judicially reviewing the legality of acts of the Federal Government and its officers. This premise is reinforced by the fact that during the Constitutional Convention debates it was uncertain whether federal courts would, in fact, be created.[50] That is, the framers recognized that there might be need of protection against an overreaching central government and officials, and that in so far as judicial protection was required, it would always be available in the State courts.

An identical line of reasoning can be formulated to justify without Commonwealth legislative assistance, State court intervention under the Australian Constitution. Indeed, this position comports with the framework of constitutional government and the ideal that individuals should live under a government of laws and not of men.

In contrast to American courts,[51] the Australian judiciary has been characterized as the most dangerous branch of government.[52] The States and the Commonwealth are therefore understandably anxious to preserve their judicial prerogatives. Yet, it should not be forgotten that the individual has an important, perhaps an overriding, interest in these manoeuvrings. Professor Hart has perceptively commented

> "[i]n the scheme of the Constitution [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."[53]

For that reason alone, jurisdictional arrangements are a vital component in the organization of a federal structure.

50 In Australia

> "[t]he authority to create federal courts is implied; nowhere in the Constitution is there any express power to establish them. In this respect, the Australian Constitution differs from the Constitution of the United States which specifically authorizes the constitution of tribunals inferior to the Supreme Court as one of the enumerated powers of Congress under Art. I, sec. 8"

Z. Cowen and L. Zines, supra fn. 1, p. 104.

51 "Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

Alexander Hamilton, in *The Federalist* (No. 78) (1788) (Intro. C. Rossiter, Mentor Book 1961) p. 465.

52 G. Evans, "The Most Dangerous Branch? The High Court and the Constitution in in a Changing Society", in *Australian Lawyers and Social Change* (D. Hambly and J. Goldring ed., Sydney, Law Book Co., 1976) p. 13.

53 Hart and Wechsler, supra fn. 3, p. 359.

REFORM OF THE LAW OF DOMICILE IN VICTORIA

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Following the lead given in the federal sphere by the *Family Law Act* 1975 (Cth),[1] the common law rules on domicile have now been altered for the purposes of Victorian Law by the *Domicile Act* 1978 (Vic.).[1a] The Victorian legislation does not purport to affect the rules for ascertaining a person's domicile at a point of time prior to the commencent of the Act, where this may be necessary.[2] An instance where this is likely to occur for some time concerns the formal validity of wills. A will is formally valid if, among other alternatives, it conforms to the law of the testator's domicile at the time the will was executed.[3] Thus in respect to this rule and concerning wills executed prior to the commencement of the Act, the common law rules still apply.

The ascertainment of a person's domicile at a time after the commencement of the Act proceeds, of course, in accordance with the rules set out in the Act and as if the Act had always been in force.[4] The latter qualification makes it quite clear that a person's domicile at a point of time after the commencement of the Act is not ascertained in accordance with the common law rules up to the commencement of the Act and thereafter in accordance with the Act. Rather, the statutory rules are applied at the outset.

It is provided that the Act has effect to the exclusion of the laws of any other country.[5] This conforms to the rule at common law that a person's domicile is ascertained in accordance with the *lex fori*.[6] The only doubt at common law concerns the particular question of the capacity of an infant to acquire a domicile of choice where there is some suggestion that foreign law might be relevant.[7]

Like the *Family Law Act*, the Victorian Act abolishes a married woman's domicile of dependency on her husband.[8] The common law rule[9] has long been criticized and has been changed by judicial decision in most American jurisdictions. The Victorian legislation also follows the federal legislation in abolishing the doctrine of revival of the domicile of origin.[10] At common law, when a domicile of choice was abandoned the domicile

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1 See s. 4(3).

1a The Act has not yet been proclaimed and may not be until corresponding legislation is enacted in other Australian jurisdictions.

2 *Domicile Act* 1978 (Vic.), s. 4(1).

3 *Wills (Formal Validity) Act* 1964 (Vic.).

4 *Domicile Act* 1978 (Vic.).

5 S. 4(4).

6 *Re Martin* [1900] P. 211, 227; *Re Cartier Deceased* [1952] S.A.S.R. 280; *Tee* v. *Tee* [1974] 1 W.L.R. 213, 215 (C.A.).

7 *Hague* v. *Hague* (1962) 108 C.L.R. 230, 240; *Urquhart* v. *Butterfield* (1887) 37 Ch.D. 357 (C.A.). On this point, see generally Sykes and Pryles, *Australian Private International Law* (1979) pp. 195-6.

8 S. 5.

9 See *Attorney-General for Alberta* v. *Cook* [1926] A.C. 444 (P.C.).

10 S. 6.