PROSECUTING COURT-APPOINTED LIQUIDATORS IN NON-APPOINTING COURTS: A CASE FOR OVERTURNING OUTDATED LAW†

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Given the national adjudication scheme established under the Corporations Act 2001 *(Cth) ('*Act*'), which 'deals distinctly' with matters concerning liquidation and distribution of federal jurisdiction among federal and state courts,[1] this article demonstrates it is 'plainly wrong' for Australian courts to continue to apply the principle propounded in* Re Maidstone Palace of Varieties *that the 'proper remedy for anyone aggrieved by [the liquidator's] conduct is to apply to [the] Court in the action in which he was appointed'.[2] That the appointing court may invoke its inherent power to control the circumstances in which its own officers are to be subjected to personal pecuniary liability does not derogate from the fact that the requirement of appointing-court leave is directly inconsistent with the* Act *and impermissibly undermines the constitutional competence of non-appointing courts.*

I INTRODUCTION

The Supreme Court of New South Wales in *Merhi v Green*[3] recently confirmed that leave of the appointing court is necessary to maintain proceedings commenced in a non-appointing court against a court-appointed liquidator. In dismissing the appeal from the decision of the Local Court Magistrate ('LCM'), who struck out a property damages claim initiated by owners of premises against the liquidator of a company that had leased the premises, the Supreme Court applied an earlier decision of McLelland J in *Re Siromath* restraining by injunction claimants from bringing proceedings in a foreign court against a supreme court-appointed liquidator for fear of abuse of the Court's own processes.[4]

Relying on a long line of authorities dating back to *Aston v Heron*,[5] McLelland J held that the Court enjoys inherent jurisdiction to:

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1 See *Gordon v Tolcher* (2006) 231 CLR 334, 340 [3].

2 *Re Maidstone Palace of Varieties Ltd* [1909] 2 Ch 283, 286 ('*Re Maidstone*').

3 *Merhi v Green* [2007] NSWSC 722 (9 July 2007) ('*Merhi*').

4 See *Re Siromath Pty Ltd (No 3)* (1991) 25 NSWLR 25, 29E ('*Re Siromath*'). See also *Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd* (2007) 69 NSWLR 374, 387 [56]–[57] (Beazley JA), Hodgson and Siopis JJ agreeing; *Lanepoint Enterprises Pty Ltd (Receivers and Managers Appointed) v ASIC* (2010) 78 ACSR 487, 495 (North and Siopis JJ).

5 *Aston v Heron* (1834) 2 My & K 390.

> control … the circumstances in which, and the extent to which, its own officers are to be subjected to pecuniary liability in respect of their activities in the course of the performance of their official duties …[6]

McLelland J went on to further refine the *Re Siromath* injunction in subsequent cases, stating that proceedings cannot be properly brought against a court-appointed liquidator except by application in the winding-up proceedings or pursuant to leave of the appointing court.[7] Other first instance judges of the Supreme Courts of New South Wales,[8] Queensland[9] and Tasmania[10] have subsequently applied the *Re Siromath* injunction. And with the New South Wales Court of Appeal recently refusing to grant leave to appeal the decision of Malpass AsJ in *Merhi v Green*, *Re Siromath* now represents the entrenched law in New South Wales and unless shown to be 'plainly wrong'[11] must be followed by co-ordinate Australian courts in other jurisdictions.[12]

In what follows, it will be demonstrated that courts cannot continue applying *Re Siromath* in determining any claim against a liquidator by a person aggrieved by the liquidator's conduct given Australia's federal system. Appointing-court leave to proceed against a court-appointed liquidator personally is not required under the *Act*, which 'deals distinctly with the creation of rights and liabilities, and with the conferral of federal jurisdiction to adjudicate [external administration] matters arising thereunder'.[13] As will appear, a proceeding initiated by a person aggrieved by the liquidator's conduct constitutes a 'matter arising under the Act' and may be initiated in any court with jurisdiction.[14]

The concept of the appointing court has been supplanted in the *Act* with the concept of a capital 'C' Court (viz any state or territory supreme court, federal court and the Family Court). It is to the *Act* that one must first turn in discerning whether a non-appointing court has jurisdiction to 'quell a controversy' concerning conduct of a court-appointed liquidator. And unless clearly expressed in the *Act* with the term 'the Court', any court is inhered with federal judicial power and jurisdiction to determine if it has jurisdiction to hear a matter arising under the *Act*. To this

6 *Re Siromath* (1991) 25 NSWLR 25, 29E.

7 See *Re Magic Aust Pty Ltd (in liq)* (1992) 10 ACLC 929, 932; *Boulton v Nathan Nominees Pty Ltd* (1992) 7 ACSR 701, 702.

8 *Mamone v Pantzer* [2001] NSWSC 26 (29 January 2001) (Santow J); *Merhi* [2007] NSWSC 722 (9 July 2007) (Malpass AsJ).

9 *McDonald v Dare* [2001] QSC 405 (1 October 2010) (Mullins J).

10 *Baxter v Hamilton* [2005] TASSC 64 (21 July 2005) (Tennet J).

11 To be plainly wrong, the alleged error 'must be manifest or, if it does not rise to that level, at least capable of being easily demonstrated …': *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 214, 250 [148]–[149] (Weinberg J), cited with approval in *Saeed v Minister for Immigration and Citizenship* [2009] FCAFC 41 (1 April 2009) 63 [39] (Spender, Buchanan and Logan JJ).

12 See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also *CAL No 14 Pty Ltd v Motor Accidents Board* (2009) 239 CLR 390, 412 [50]–[51] (Gummow, Heydon and Crennan JJ), Hayne J agreeing: at 417 [63]; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

13 See *Gordon v Tolcher* (2006) 231 CLR 334, 340 [3].

14 See *Sihota v Pacific Sands Motel Pty Ltd (in liq)* (2003) 56 NSWLR 721, 722–5 (Austin J).

end, inferior and superior Australian courts have been equally co-opted to apply the *Act* and, significantly, enjoy 'unlimited' power to protect the integrity of their own processes.[15]

Reliance on 19th century English authorities is outmoded and unnecessary. A closer examination of Lord Brougham's decision in *Aston v Heron* reveals his Lordship was primarily concerned to preserve the primacy of the appointing court's jurisdiction for fear execution of its orders may be frustrated by another court.[16] No such threat exists under the *Act*, which confers jurisdiction on lower courts to hear actions that, historically, 'had to be conducted in the superior courts'.[17] This change has occurred because a national legislative scheme now operates that clearly differentiates between small 'c' court and 'the Court' for matters arising under the *Act*.

As will appear, the *Re Siromath* injunction constitutes an invalid non-concurrent state law that is directly inconsistent with the *Act*, derogating from the power of a non-appointing court to quell a controversy concerning a matter arising under the *Act*. It is also inimical to the non-appointing court's 'institutional integrity' as a court established under Chapter III of the *Constitution*, dictating the manner and outcome of exercise of its conferred federal jurisdiction under the *Act*.

Toward the preceding end, the paper will be divided into five parts. Part I (The State Law) examines the evolution of the *Re Siromath* injunction and its application, particularly by reference to the decisions at first instance and on appeal in *Merhi v Green* (where the non-appointing Court, uniquely, construed the *Act* and cited *Re Siromath* to dismiss, for want of appointing-court leave, a claim in negligence against a court-appointed liquidator). Part II (The Construction Argument) examines the intention and purpose of the *Act* by reference to its context and background and demonstrates how it covers the field for investiture of federal jurisdiction on state courts. Parts III (The Direct Inconsistency Argument) and IV (The Judicial Power Infringement Argument), respectively, expound why the requirement of appointing-court leave impermissibly derogates from the *Act* and the institutional integrity of the non-appointing court as a repository of federal judicial power. Part V (The Conclusion) concludes with a summary of the discussion demonstrating why the precondition of appointing-court leave is 'plainly wrong'.

15 See *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75, 78 [27]–[28] (French CJ, Gummow, Hayne and Crennan JJ). See also *BUSB v R* (2011) 209 A Crim R 390, 396 [22] (Spigelman CJ), Allsop P, Hodgson JA, McClellan and Johnson JJ agreeing.

16 *Aston v Heron* (1834) 39 ER 993, 994.

17 Lawbook Co, *McPherson's Law of Company Liquidation*, 11-9059.

II THE STATE LAW

A *The Appointing Court's Restraining Power*

In *Re Siromath*, McLelland J refused to discharge an injunction granted on the principle expressed in *Re Maidstone* where, after referring to *Aston v Heron*, Neville J said that '[t]he proper remedy for anyone aggrieved by [a liquidator's] conduct is to apply to this Court in the action in which he was appointed …'[18] McLelland J could see no reason why the same principle could not apply where the two courts are of different jurisdictions notwithstanding that that in both English cases the two courts involved were courts of the same jurisdiction. This is particularly so given the Court's long arm jurisdiction in pt 10 r 3 of the *Supreme Court Rules 1970*.[19]

Referring to Gummow J's observation in *National Mutual Holdings Pty Ltd v Sentry Corporation*,[20] McLelland J explained that the juridical basis on which the Court's injunctive power is exercisable has to do with the domestic court's concern with the protection of the integrity of its own processes, where the 'relevant injunction is binding not on the court but only on the party enjoined'.[21]

Fearing a real possibility that the foreign proceedings could undermine the integrity of the Supreme Court's winding-up processes or prove 'intimidatory or oppressive' to the liquidator where no reason is advanced for joinder and the liquidator had not made any distribution to creditors,[22] McLelland J held:

> In my opinion the court should *in the circumstances of the present case* take such steps as are available to it in order to prevent its officers being put to the risk of having personal liability established against them in the Pennsylvania court.[23]

Earlier, McLelland J agreed that the principle in *Re Maidstone* 'should not be treated as being intended to lay down an unqualified rule'[24] and warned that the Court's injunctive power 'should be exercised with great caution'.[25] Despite this however, his Honour did go on in subsequent cases to make the requirement of appointing-court leave an unqualified rule, noting that:

> proceedings cannot properly be brought against a Court-appointed liquidator personally with reference to the duties of his office except by application in the winding up proceedings, or pursuant to leave of the Court which is normally to be sought in an application made in the winding up proceedings, and in a proper case the Court will protect its officer, the

18 *Re Maidstone* [1909] 2 Ch 283, 286.

19 Since repealed and replaced by *Uniform Civil Procedure Rules 2005* (NSW) pt 10.5.

20 *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209, 232.

21 *Re Siromath (No 3)* (1991) 25 NSWLR 25, 29B–C.

22 Ibid 29–30.

23 Ibid 29 (emphasis added).

24 Ibid 28E.

25 Ibid 30.

> liquidator, from being subjected to proceedings brought without its leave, by the grant of an appropriate injunction, or by staying the proceedings … This would provide sufficient protection to the liquidator against vexatious proceedings …[26]

In resorting to the English authorities of *Aston v Heron* and *Re Maidstone*, McLelland J implicitly acknowledged that the power to issue the injunction in *Re Siromath* was sourced in the Court's inherent jurisdiction. This much may be gleaned from the speech of Brougham LC, where his Lordship said:

> Wherever the title of its officers … is disputed, the Court has no choice: it cannot allow any proceedings of the kind to go on without abandoning its own jurisdiction; it must restrain as of course, otherwise it permits its own orders to be rescinded, and its jurisdiction to be questioned … by Courts of inferior or co-ordinate authority … [or that may] frustrate that order by preventing its execution … It is fit, and even necessary, that in all such cases the Court should possess the *power of itself* interposing and drawing exclusively within its own precincts the functions of both penal and remedial judicature.[27]

The Supreme Court's inherent jurisdiction stems from the very nature of the Court as a superior court of record which was established under the terms of the *Act 4 George IV c 96* and the *Third Charter of Justice for New South Wales* issued in 1823.

Given the Supreme Court's responsibility for the administration of justice in New South Wales, inherent jurisdiction is necessarily wide and incapable of being confined to defined and closed categories.[28] And may be asserted notwithstanding some statute or rule of court enabling the Court to deal with the particular problem in a particular way and, indeed, where the conduct complained of may be in literal compliance with some statute or rule of court.[29] In one particular instance, the Supreme Court's inherent jurisdiction was exercised to order proceedings be transferred from a lower court where removal was deemed essential for the administration of justice.[30]

Concomitantly, the Supreme Court is conferred with original jurisdiction under s 23 of the *Supreme Court Act 1970* (NSW) ('*SCA*'), which vests in the Court power to do all that is necessary for the administration of justice in New South

26 *Re Magic Australia Pty Ltd (in liq)* (1992) 10 ACLC 929, 932. See also *Boulton v Nathan Nominees Pty Ltd* (1992) 7 ACSR 701, 702.

27 *Aston v Heron* (1834) 2 My & K 390, 393–4 (emphasis added).

28 *Tringali v Stewardson Stubbs & Collett Pty Ltd* [1966] 1 NSWR 354. See also *Newmont Yandal Operations Pty Ltd v The J Aron Corporation & The Goldman Sachs Group Inc* (2007) 70 NSWLR 411, 417 [18], [19], 444 [185], 445 [194] (Spigelman CJ), Santow JA and Handley AJA agreeing.

29 Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 *Australian Law Journal* 449.

30 *Buzera Pty Ltd v Mezan Enterprises Pty Ltd* (1998) NSW Conv R 55–851.

Wales.[31] The amplitude of the Court's jurisdiction under s 23 encourages the view that the Supreme Court has an unlimited original jurisdiction.[32]

Now, s 56 of the *Civil Procedure Act 2005* (NSW) ('*CPA*') directs the Supreme Court to seek to give effect to the 'overriding purpose' of the *CPA* when exercising any power given by the *CPA* or by rules of court. That purpose is 'to facilitate the just, quick and cheap resolution of the real issues in the proceedings'.[33] However, s 5(1) of the *CPA*, in turn, qualifies this overriding purpose by providing that '[n]othing in this Act or the uniform rules limits the jurisdiction of the Supreme Court'.[34] With the continued conferral of statutory powers on the Court to make rules, the Supreme Court's inherent jurisdiction is 'seldom called on'.[35]

B *Practical Application of the* Re Siromath *Injunction*

Following a line of authority ending with *Re Siromath*,[36] Tamberlin J in the Federal Court noted:

> The discretionary power of the court to grant leave must be exercised having regard to all the circumstances of the particular cases and bearing in mind the need to protect the integrity of its process. It does not necessarily follow that, in order to obtain leave, a *prima facie* case must be demonstrated. There is no specific threshold appropriate in all cases … The court's discretion may be exercised on many grounds, including, but not limited to, the sufficiency of the evidence adduced, as to the prospects of success of the action on the application for leave.[37]

Ordinarily, to obtain appointing-court leave the claimant must demonstrate that the claim has sufficient merit which, in turn, is 'affected by the circumstances and timing in which that leave is sought … [where] liquidators, like administrators, often have to make decisions on the run; to expect perfection in those circumstances is unrealistic …'[38]

In *Baxter and Hamilton* (a case involving a claim against a liquidator personally for damages for breach of s 14 of the *Fair Trading Act* (misleading or deceptive conduct)), Tennent J refused to grant leave in circumstances where the plaintiff's case was 'so manifestly hopeless in all the circumstances'.[39] In *Mamone v Pantzer*

31 See *Riley McKay Pty Ltd v McKay* (1982) 1 NSWLR 264, 270. See also ibid.

32 See *SCA* 23.5, 23.35. See also *Re S* (1998) 6 BPR 13, 781, where in making an order appointing a receiver and trustee to an accountant's practice the Court held that s 23 of the *SCA* gave power to make any order 'in furtherance of the interests of justice'.

33 *Civil Procedure Act 2005* (NSW) s 56(1).

34 Ibid s 5(1).

35 Mason, above n 29, 449.

36 (1991) 25 NSWLR 25.

37 *Sydlow Pty Ltd (in liq) v T G Kotselas Pty Ltd* (1996) 65 FCR 234, 242.

38 *Mamone v Pantzer* [2001] NSWSC 26 (29 January 2001) [4]. See also ibid 242 (Tamberlin J).

39 *Baxter v Hamilton* (2005) 15 TasR 59, 77 [72] — upon review of all the evidence filed in the case, his Honour concluded that '[i]t would be virtually impossible to characterise the conduct of the liquidator or lack of it … as misleading or deceptive conduct': at 77 [71].

(a case involving a claim lodged in the Supreme Court against a liquidator alleging breach of duty owed to the lessor under a lease of the company in liquidation), Santow J refused to give leave *nunc pro tunc*[40] where the liquidator had completed his liquidation tasks without a word of complaint from the plaintiffs. His Honour thought the public purpose underlying the need for leave was not served by such a weak case.[41]

In contrast, the plaintiffs/lessor in *Merhi v Green* complained contemporaneously about the actions of the liquidator and had legitimate reasons for joining the liquidator given the liquidation was complete and the claim against the company in liquidation abandoned.[42] The claim against the court-appointed liquidator alleged that, as liquidator of the plaintiffs' former tenant Moonprom Pty Ltd ('Moonprom'), Mr Green arranged for the auction sale of certain plant and equipment owned by Moonprom and was responsible for damages occasioned to the plaintiffs' premises by the removal of plant and equipment. The plaintiffs claimed $11 860 as the cost of the repairs to their property.[43] While not clearly articulated, nevertheless it was common ground that the damage occurred during the liquidation process[44] and the liquidator, who owes a general duty of skill, care and diligence,[45] breached his duty by engaging a careless auctioneer to realise the assets of Moonprom.

The plaintiffs in *Merhi* sought to invoke the federal jurisdiction of the Local Court, contending that by reason of the *Act* (viz s 1337E) the Local Court had power to entertain the proceedings without leave in circumstances where the amount claimed fell within the Court's jurisdictional limit.[46] Alternatively, the plaintiffs' submitted that, if leave was required, the Local Court had power to grant leave.

As an inferior court of record,[47] the local court sitting in its General Division is vested with explicit jurisdiction under the *Local Court Act 2007* (NSW) ('*LCA*') to, relevantly, hear and determine proceedings on any money claim not exceeding the court's jurisdictional limit, or that are required to be dealt with by any other Act.[48] And although it does not have inherent jurisdiction, the local court nevertheless

40 Leave of the appointing court 'is normally to be sought in an application made in the winding-up proceedings': *Re Magic Aust Pty Ltd (in liq)* (1992) 10 ACLC 929, 932. However, leave may nevertheless be granted *nunc pro tunc* in the case of proceedings instituted without leave: *Re Sydney Formworks Pty Ltd (in liq)* [1965] NSWR 646. Mere delay will not of itself prevent leave being granted: *Ex parte Walker* (1982) 6 ACLR 423.

41 *Mamone v Pantzer* [2001] NSWSC 26 (29 January 2001) 28 [6]–[9].

42 On 20 April 2006 the claim against Moonprom (in liq) was dismissed by consent.

43 See *Merhi v Moonprom (in liq)* [2006] NSWLC 42 (31 October 2006) [1].

44 *Merhi* [2007] NSWSC 722 (9 July 2007) 725 [21].

45 For a general discussion of liquidators' duties see Andrew R Keay, *McPherson: The Law of Company Liquidation* (LBC Information Services, 4th ed, 1999) 294–5; Stephen Walmsley, Alister Abadee and Ben Zipser, *Professional Liability in Australia* (Thompson Law Book Co, 2nd ed, 2002) 486–7.

46 The amount of damages sought by the plaintiffs fell within the jurisdictional limit of the Local Court, which at the time was $40 000.

47 The Local Court of New South Wales is constituted by s 8A of the *Local Courts Act 1982* (NSW) as a court of record (see now the *LCA* s 7).

48 *LCA* ss 30(1)(a), (c).

has incidental[49] or implied[50] powers to protect the integrity of its own processes. The terms 'jurisdiction' and 'power' in this regard being interchangeable and non-discrete concepts such that the term 'inherent jurisdiction' may be used, for example, in relation to the granting of stays for abuse of process to describe what in truth is the power of a court to make orders of a particular description.[51]

Upholding the liquidator's notice of motion for summary dismissal, the LCM struck out the plaintiffs' proceedings as an abuse of process pursuant to r 4.28(c) of the now repealed *Local Court Rules* ('*LCR*'), stating that he was 'satisfied that leave is required from the Supreme Court, being the court which appointed the defendant as Liquidator'.[52] The plaintiffs' appeal to the Supreme Court was dismissed where, applying *Re Siromath*, Malpass AsJ confirmed 'the proper remedy for anyone aggrieved by [the liquidator's] conduct is to apply to the Court in which he was appointed'[53] and additionally held that the appointing court's controlling power prevailed notwithstanding any 'requirement of the Corporations Act'.[54]

The Court of Appeal refused to grant leave to appeal the decision of Malpass AsJ in view of his Honour's adverse factual finding concerning the pleadings. Nevertheless, for Malpass AsJ to suggest that the leave requirement prevails despite the *Act* bespeaks a flawed approach in discerning the relationship between federal and state jurisdiction, which, as Gleeson CJ, Gaudron and Gummow JJ explained in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*:

> is not to be approached from a vantage point where the Supreme Courts are seen as superior to the operation of the *Constitution* by reason of their earlier establishment by or pursuant to Imperial legislation. It is, after all, s 73 of the *Constitution* which now ensures the continued existence of those Supreme Courts.[55]

And as explained by the High Court in *John Pfeiffer Pty Ltd v Rogerson*, in the context of law concerning qualified privilege and choice of law rule for tort:

49 *Cocker v Tempest* (1841) 7 M & W 502, 503–4 (Alderson B). See also *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* (2009) 239 CLR 75, 93 [27]–[28], where French CJ, Gummow, Hayne and Crennan JJ held that 'the categories of abuse of process are not closed'.

50 *BUSB v R* (2011) 209 A Crim R 390, 396 [24]–[36] (Spigelman CJ), Allsop P, Hodgson JA, McLellan and Johnson JJ agreeing.

51 See *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 590 [64] (Gleeson CJ, Gaudron and Gummow JJ), relying on *Williams v Spautz* (1992) 174 CLR 509, 518–9.

52 *Merhi v Moonprom (in liq)* [2006] NSWLC 42 (31 October 2006) [34].

53 *Merhi* [2007] NSWSC 722 (9 July 2007) 725 [22].

54 Ibid 725 [23].

55 *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 592 [69] (footnotes omitted). See also *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 617 [18] (Gleeson CJ, Gummow and Hayne JJ).

> the common law … should be developed to take into account … the existence and scope of federal jurisdiction, including the investment of state courts with federal jurisdiction pursuant to s 77(iii) of the *Constitution*.[56]

C *Policy Underpinning Appointing-Court Control and Supervision*

Notwithstanding the preceding review of cases confirming appointing-court leave, it has not been possible to discern any clear policy or normative reasons (apart from those advanced in *Re Siromath*) for control by the appointing court of the circumstances in which court-appointed liquidators may be sued.

In *Merhi v Green*, the liquidator conceded that the *Act* does not differentiate between a capital 'C' Court and the appointing court when identifying specific instances proscribing commencement of proceedings against a liquidator; contending 'that the Act made it clear that all of the important powers, sanctions and supervision of Liquidators was [sic] to be carried out by a Capital C Court'.[57] Paradoxically however, the liquidator further submitted 'the application for leave was to be made "to the Court in the action which the officer was appointed"'.[58]

Questioning the efficacy of seeking leave from a court other than the appointing court, the LCM was nevertheless prepared to accept (based on Federal Court authority)[59] that the *Act* evinced an intention that any superior court apart from the appointing court may have had jurisdiction to grant leave. Finding that the requirement of leave is coexistent with the jurisdiction conferred exclusively on superior courts under the *Act* by reference to a capital 'C' Court, the LCM added that it would be 'a quantum leap' to find the jurisdiction of a superior court extended to other than a capital 'C' Court.[60]

In *Mamone v Pantzer*, Santow J explained the general policy underpinning the leave requirement is protection of the liquidator against vexatious proceedings and the integrity of the winding-up process from wrongful interference.[61] His Honour did not proffer reasons why promotion of that general policy was the exclusive preserve of the appointing court. The latter, it appears, is integrally linked with the policy underlying control of claims against companies in liquidation where

56 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 534 [67] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ). See also *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

57 *Merhi v Moonprom Pty Ltd (in liq)* [2006] NSWLC 42 (31 October 2006) [18], [19], [21]. As will appear from the discussion in Part II however, none of the alleged important powers vested exclusively in a capital 'C' Court applied to the plaintiffs in *Merhi*.

58 Ibid [22] (emphasis in original).

59 *Acton Engineering Pty Ltd v Campbell* (1991) 103 ALR 437, 450 (Lockhart J), Black CJ agreeing, followed by *Sihota v Pacific Sands Motel Pty Ltd (in liq)* (2003) 56 NSWLR 721, 725 (Austin J) and also *Sydlow Pty Ltd (in liq) v T G Kotselas Pty Ltd* (1996) 65 FCR 234 (Tamberlin J).

60 *Merhi v Moonprom Pty Ltd (in liq)* [2006] NSWLC 42 (31 October 2006) [33].

61 *Mamone v Pantzer* [2001] NSWSC 26 (29 January 2001) [4].

the appointing court is concerned to prevent actions in 'harassment'[62] of the company in liquidation and 'minimise the costs of the liquidation in the interest of the creditors as a whole'.[63] To this may be added the principle in *Aston v Heron* propounded in the passage already quoted above — viz protection from interference with the appointing court's orders.[64]

However, given the implied powers of non-appointing courts to protect liquidators against vexatious proceedings and the national adjudication regime introduced in the *Act* (see below), there is no longer any clear policy reason for the appointing court to continue to assert control over the circumstances in which a court-appointed liquidator may be sued in another court for breach of common law duty of care in proceedings brought independently of the winding-up process (albeit that those proceedings may constitute the single controversy).

And although the standard of care required of liquidators must necessarily be influenced by the 'special qualifications, training and experience relevant to their role … [with] recognition that they are often obliged to make commercial decisions about which competent and commercial liquidators may … [differ]',[65] this alone cannot justify nor deter non-appointing courts (vested with federal jurisdiction under the *Act*) from bringing their experience and expertise to bear to properly and adequately assess the requisite standard of skill and care expected of liquidators. That is what expert evidence is there for! Like any other professional, a liquidator must equally satisfy a non-appointing court (if the monetary sum claimed is small) or an appointing or superior court (in a large claim matter) that they exercised the necessary degree of skill and care in carrying out their duties.

Indeed, being an officer of the Supreme Court does not mean the liquidator is a servant of the appointing court since the liquidator cannot be directed to act in a manner at variance with his or her statutory duties.[66] A liquidator is a 'hybrid composite with elements of fiduciary, trustee, agent, officer of the corporation and (in some instances) "officer" of the court'.[67] And it cannot be in the 'interests of justice', as stipulated in s 1337K of the *Act*,[68] for a lower court with federal jurisdiction not to exercise its jurisdiction by reason of its inexperience (as was suggested by the LCM in *Merhi* during the hearing of the liquidator's motion).[69] Rather, it is questions of 'practical connections' such as geographical convenience

62 *Contra Re David Lloyd and Co* (1877) 6 Ch D 339, 344 (James LJ), cited with approval in *Acton Engineering Pty Ltd v Campbell* (1991) 103 ALR 437, 448–9 (Lockhart J).

63 *Chand v Azurra Pty Ltd (in liq)* [2011] NSWCA 58 (11 March 2011) 66 [28] (Campbell JA). See also the comments of Young JA, Campbell and Macfarlane JJA agreeing: at [7].

64 See above n 16.

65 Michael Gronow and Rosalind Mason, Lawbook, *McPherson's Law of Company Liquidation*, 8-8052.

66 *Re Dominion Trust Co* (1916) 27 DLR 580 ('*Critchley's Case*'). See also Keay, above n 45, 287.

67 *Sydlow Pty Ltd v Kotselas Pty Ltd, Kotselas and Hamilton* (1996) 65 FCR 234, 238 (Tamberlin J). See also Keay, above n 45, 287, 295.

68 Section 1337K(2) of the *Act* permits the lower court to transfer the proceedings to another lower court or a superior court having regard to the 'interests of justice'.

69 *Merhi* [2007] NSWSC 722 (9 July 2007).

and expedition of litigation (not expertise or experience of the court hearing the matter) that govern the national scheme of the *Act*.[70]

As will appear from the discussion in Parts II–IV below, it is erroneous for state courts to continue to uphold the *Re Siromath* injunction by insisting on appointing-court leave without particular regard to the *Act*, which is complete on its face and has left no room for the operation of state law beyond that provided in ss 5E and 5G of the *Act* (inserted to preserve state law provisions capable of concurrent operation with the *Act*).[71] For despite the Supreme Court's inherent (or original) jurisdiction being of unlimited amplitude,[72] in reality the jurisdiction of any court in the federal system is limited by questions of constitutional competence.[73]

Therefore, to insist on appointing-court leave not only misconstrues the policy and provisions of the *Act* it inappropriately implies that another court with jurisdiction is incapable of protecting liquidators against unmeritorious claims. And notwithstanding its wide acceptance and application, the principle propounded in *Re Siromath* should be confined to the particular facts in that case as McLelland J's observations reflect a time when statutory company law was predominantly a matter for each state. They fail to consider the national co-operative system established in 1991 under the *Corporations Law* (which replaced the various state *Companies Codes*) and cross-vesting legislation (which removed the exclusive jurisdiction of state supreme courts to make orders in company law matters).[74]

III THE STATUTORY CONSTRUCTION ARGUMENT

A *Source of the Non-Appointing Court's Federal Jurisdiction to Consider a Matter under the* Act

Part 9.6A of the *Act* is entitled 'Jurisdiction and Procedure of Courts' and establishes a jurisdictional scheme in civil and criminal matters arising under the *Act*.[75] Subdivision A of Division 1, 'Civil Jurisdiction', comprises s 1337A[76]

70 See *Acton Engineering Pty Ltd v Campbell* (1991) 31 FCR 1, 3 (Black CJ), 4–5 (Davies J), Black CJ agreeing with the latter.

71 See *HIH Casualty and General Insurance Limited (in liq) v Building Insurers' Guarantee Corporation* (2003) 202 ALR 610, 643 [80] (Barrett J).

72 See *Thaina Town (On Goulburn) Pty Ltd v City of Sydney Council* (2007) 71 NSWLR 230, 251 [97] (Spigelman CJ), Mason P, Beazley, Giles and Ipp JJA agreeing; *W O v DPP (NSW)* [2009] NSWCA 370 (16 November 2009) [10] (Basten JA, Fullerton and McCallum AJA).

73 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 46 ALR 451, 460 (Fitzgerald J). See also *BUSB v R* (2011) 209 A Crim R 390, 396 [22].

74 For general discussion of the evolution of the national company law legislative scheme in Australia see *Sihota v Pacific Sands Motel Pty Ltd (in liq)* (2003) 56 NSWLR 721, 724 (Austin J). See also John Gooley, *Corporations & Associations Law: Principles and Issues* (Butterworths, 3rd ed, 1995) 149–52.

75 See also Robert Austin and Ian Ramsay, LexisNexis, *Ford's Principles of Corporations Law* (at service 82) [3.331].

76 Section 1337A is based on s 40 of the now repealed *Corporations Act 1989* (Cth).

which relevantly operates to the exclusion of s 39B of the *Judiciary Act 1903*[77] but without limiting the operation of s 39(2) of the *Judiciary Act 1903*, which is the principal provision conferring federal jurisdiction on state courts.[78] Subdivision B of Division 1 (comprising ss 1337B–1337G) contains the relevant provisions conferring and defining the jurisdiction of the various state and federal courts.

Parliament's authority to confer federal jurisdiction on state courts derives from s 77(iii) of the *Constitution*,[79] which empowers the Commonwealth to make laws investing any court of a state with federal jurisdiction with respect to any one of the matters mentioned in ss 75 (original jurisdiction of the High Court) and 76 (additional original jurisdiction) of the *Constitution*. To this end, a 'matter' includes a claim under common law or statute.[80]

Relevantly, s 1337E(1) of the *Act* confers jurisdiction on 'lower courts' (ie non-superior state courts)[81] 'with respect to civil matters (other than superior court matters) arising under the Corporations Legislation'. The expression 'Corporations Legislation' includes the *Act* and any rules of a capital 'C' Court (s 9 of the *Act*). The conferred jurisdiction is further qualified in s 1337E(2) by reference to the inferior court's jurisdictional limits so far as they relate to the amounts and value of property with which the court may deal.

The term 'superior court matters' is defined in s 9 of the *Act* to mean 'a civil matter that this Act clearly intends (for example, by use of the expression *the Court*) to be dealt with only by a superior court'. Section 58AA(2) of the *Act*, in turn, provides that '[e]xcept where there is a *clear expression* of a *contrary intention* (for example, by use of the expression "the Court"), proceedings in relation to a *matter under this Act* may, subject to Part 9.7, be brought in *any court*'.[82]

Therefore, the combined operation of ss 1337E and 58AA allows non-superior courts (such as state district and county courts) to hear a civil matter arising under the *Act* and coming within the jurisdictional limit of the court in circumstances where there is no explicit provision clearly ousting the lower court's jurisdiction by reference to a capital 'C' Court.[83]

77 Section 39B confers original jurisdiction of the High Court in s 75(v) of the *Constitution* on the Federal Court (to review and remit decisions of certain Commonwealth officers) and, relevantly, limits the jurisdiction of the Federal Court in criminal matters 'arising in any laws made by Parliament': *Judiciary Act 1903* (Cth) s 39B(1A)(c).

78 *Gordon v Tolcher* (2006) 231 CLR 334, 345 [29].

79 Section 77(iii) of the *Constitution* has been described as the 'sole source of power to confer Federal jurisdiction on State courts': *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 586 (Dixon and Evatt JJ), cited in *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 556 (Taylor J); *Russell v Russell* (1976) 134 CLR 495, 517 (Gibbs J).

80 *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 571 [7].

81 See s 9 of the *Act*.

82 (emphasis added). *Contra* the position under former s 58AA(2) where it was held that it did not purport to confer jurisdiction on any court or to restrict jurisdiction otherwise conferred. Instead it was held that the respective state corporations law conferred such jurisdiction: *ASIC v Edensor Nominees Pty Ltd* (2001) 209 CLR 559, 598 [92] (Gleeson CJ, Gaudron and Gummow JJ).

83 See also *Gordon v Tolcher* (2006) 231 CLR 334, 341 [9] (per the Full Court).

B *A Matter Arising under the* Act

The term a 'matter under this Act' or 'a matter arising under the Act' is not defined. This is not surprising as '"matters" which are the subject of the [*Act*] … are numerous and varied'.[84] However, once it is objectively determined that there is a 'matter' arising under the *Act* then the power of the state court to adjudicate upon that matter derives from the judicial power of the Commonwealth.[85] In other words, the state court's federal jurisdiction is 'engaged'[86] such that it has power in the exercise of that jurisdiction to give the remedies sought.[87] And where federal jurisdiction is invoked in relation to a 'matter' there is no room for the exercise of state jurisdiction apart from the concurrent operation of state law 'picked up' by s 79[88] of the *Judiciary Act 1902* (Cth).[89]

The word 'matter' in Ch III of the *Constitution* is of 'wide connotation' and refers to a matter for determination in a legal proceeding rather than the legal proceeding itself. It focuses attention upon the substance of the dispute.[90] Accordingly, '[t]he question then becomes one of identifying the metes and bounds of any matter said so to arise'.[91]

In the general context of federal legislation, a matter has been held to arise under federal law 'if the right or duty in question in the matter owes its existence to federal law or depends upon federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law'.[92] Being of 'such generality', the term 'matter' 'necessarily takes its content from the categories of matter which fall within federal jurisdiction and from the

84 See also Austin and Ramsay, above n 75, [3.070].

85 See *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20, 30 (Kitto J). See also *CSL Australia Pty Ltd v Formosa* [2009] NSWCA 363 (11 November 2009) [23].

86 Cf *Gedeon v Commissioner of NSW Crime Commission* (2008) 236 CLR 120, 134 [28]; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251, 262 [32].

87 *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 279–80; *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 590 [65].

88 Section 79(1) states:

> The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, *except as otherwise provided* by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable (emphasis added).

89 See *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 594–5 [7] (Gleeson CJ, Gaudron and Gummow JJ). See also *Felton v Mulligan* (1971) 124 CLR 367, 413 (Walsh J), Barwick CJ and Windeyer J agreeing on this issue, cited with approval by Gibbs J in *Moorgate Tobacco Company Ltd v Philip Morris Ltd* (1980) 145 CLR 457, 471.

90 *Crouch v Commissioner for Railways (Qld)* (1985) 159 CLR 22, 37 (Mason, Wilson, Brennan, Deane and Dawson JJ) ('*Crouch*').

91 *Re McJannet; Ex parte Minister for Employment and Industrial Relations* (1995) 184 CLR 620, 653 (Toohey, McHugh and Gummow JJ).

92 *Felton v Mulligan* (1971) 124 CLR 367, 408 (Latham CJ), cited with approval in *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575, 581 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ). See also *Bankstown Handicapped Childrens' Centre Association Inc v Hillman* (2010) 182 FCR 483, 488 [14] (Moore, Mansfield and Perram JJ); *Re McJannet; Ex parte Australia Workers' Union of Employees (Qld) (No 2)* (1997) 189 CLR 654, 656–7 (Brennan CJ, McHugh and Gummow JJ), citing *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett v Opitz* (1945) 70 CLR 141, 154 (Latham CJ).

concept of "judicial power" ',[93] where the scope of a controversy constituting a 'matter' is illuminated by the claims for relief.[94]

To this end, the content of a matter is 'not restricted to the determination of the … cause of action in the proceeding, but extend[s] beyond that to the litigious or justiciable controversy between parties of which … the cause of action forms part'.[95] Specifically, it has been held that the expression a 'matter arising under the Corporations Law' (the predecessor to the *Act*) is 'a justiciable controversy, identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of the controversy'.[96] This, in turn, dictates scrutiny of the pleadings and the factual basis of each claim to identify the justiciable controversy.[97]

In *Re Wakim* a creditor of a bankrupt brought proceedings in the Federal Court against the Official Trustee under the *Bankruptcy Act 1966* (Cth), and then brought separate proceedings (also in the Federal Court) against a barrister and a firm of solicitors alleging breaches of duty not arising under a federal law. Finding that there were three separate proceedings, which ordinarily suggests more than one matter, Gummow and Hayne JJ (with whom Gleeson CJ and Gaudron J agreed) explained that because the question of jurisdiction usually arises before evidence is adduced and the pleadings are complete, it was a matter of 'impression' and 'practical judgment' what constitutes a single controversy: 'There is but a single matter if different claims arise out of "common transactions and facts" or "*a common substratum of facts*", notwithstanding that the facts upon which the claims depend "do not wholly coincide" …'[98]

In *Joye v Beach Petroleum NL*, Beaumont and Lehane JJ relied on the High Court decisions in *Crouch* and *Fencott* to reject Mr Joye's submission that the word 'matter' (in the predecessor to the *Act*) should be confined to legal proceedings relating to the winding up of a company. Their Honours confirmed that 'for the purposes of the exercise of federal judicial power, the word "matter" means the subject matter for determination in a legal proceeding, rather than the proceeding itself'[99] and went on to state that:

> As to 'winding up', in our view, it means the process that follows the making of a winding up order, including collecting and realising assets and distributing the proceeds … [and] any step taken by a liquidator in getting in the assets of the corporation is a step taken in the winding up; and this

93 *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 610 [42] (Gaudron J).

94 *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ) ('*Fencott*'); *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 590 [65] (Gleeson CJ, Gaudron and Gummow JJ).

95 *Stack v Coast Securities (No 9)* (1983) 154 CLR 261, 290 (Mason, Brennan and Deane JJ). See also *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457.

96 *Acton Engineering Pty Ltd v Campbell* (1991) 31 FCR 1, 13 (Lockhart J), Black CJ and Davies J agreeing, applying *Fencott v Muller* (1983) 152 CLR 570.

97 See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 585 [139] (Gummow and Hayne JJ).

98 Ibid 585 [140] (Gummow and Hayne JJ) (emphasis added). See also *Abebe v Commonwealth* (1999) 197 CLR 510, 533–4 [47] (Gleeson CJ and McHugh J).

99 *Joye v Beach Petroleum NL* (1996) 67 FCR 275, 287 (Beaumont and Lehane JJ), 290 (Spender J).

> is so whether or not the step taken involves litigation aimed at recovery of the assets. If litigation is necessary, the conduct of that litigation is, in our view, a 'matter' that 'relates to' the 'winding up'.[100]

From the preceding it may be gleaned that because liquidators have legal obligations which 'emanate from the statutory duties of diligence, good faith, proper use of position and proper use of information in Pt 2D.1 of the [*Act*]'[101] a claim brought against a liquidator personally is a matter arising under the *Act*. It arises out of a common substratum of facts that materially concern a matter under the *Act* — viz external administration of a company (ie winding up). The proceedings form part of the one justiciable controversy, namely, the skill and care exercised in winding up a company.

With the exception of *Merhi*, the contention that the *Act* (and not *Re Siromath*) governs whether a non-appointing court has jurisdiction to determine a claim against a liquidator personally has not been considered in any of the cases applying *Re Siromath*. As mentioned however, Malpass AsJ in *Merhi* eschewed application of the *Act* notwithstanding that the Local Court's federal jurisdiction was engaged as the damages claim against the liquidator personally for negligence in collecting and realising assets of the company arose from a common substratum of facts, namely, the winding up. That his Honour additionally found the statement of claim failed to adequately plead a cause of action in negligence was immaterial as his Honour had discerned the content of the matter, observing 'the defendant was being sued for something alleged to have been done in the course of his duties as liquidator'[102] with the case before the LCM 'presented by general reference to negligence and breach of duty'.[103]

However obliquely pleaded therefore, the liquidator's duties in *Merhi* fundamentally owed their existence to a federal law, namely, the *Act*.[104] And being a matter arising under the *Act* notwithstanding the proceedings were heard at the conclusion of the liquidation process, the Court was required to exercise jurisdiction conferred under the *Act*.[105] To this end, the LCM's remarks in *Merhi v Green* concerning the important powers conferred on capital 'C' Courts appear to engage the Court's federal jurisdiction but do not obviate the reality that a Court is required to consider whether there was a clear expression of a '*contrary intention*' (for example, by use of the expression 'the Court') that the proceedings may only be brought in a capital 'C' Court or with leave of an appointing court. For as will appear immediately below, focusing on the court's lack of experience or expertise 'in the appointment, supervision, control or dismissal of Liquidators'[106] does not

100 Ibid 287–8 (Beaumont and Lehane JJ), 290 (Spender J).

101 Harold Arthur John Ford, R P Austin and Ian M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 11th ed, 2003) 1203.

102 *Merhi* [2007] NSWSC 722 (9 July 2007) [25].

103 Ibid [18].

104 Cf *Austral Pacific Group Ltd (in liq) v Airservices Australia Ltd* (2000) 203 CLR 136, 141 [9] (Gleeson CJ, Gummow and Hayne JJ).

105 See *Australian Trade Commission v Film Funding & Management Pty Ltd* (1989) 24 FCR 595, 599 (Gummow J).

106 *Merhi v Moonprom Pty Ltd* [2006] NSWLC 42 (31 October 2006) [33].

conform to the well-established rule of construction that all words in a statute must prima facie be given some meaning and effect.

C *A Contrary Intention*

The modern approach to statutory construction is that '[a] construction which is reasonably open and more closely conforms with the legislative intent is to be preferred'.[107] Discerning legislative intent involves not only consideration of the language of the *Act* 'viewed as a whole'[108] but the 'context in which the statutory language appears'.[109] As explained by the majority in the leading High Court decision on statutory interpretation, 'the process of construction must always begin by examining the context of the provision that is being construed'.[110]

The context and background to the *Act* may readily be gleaned from the Explanatory Memorandum ('EM') accompanying the Bill which introduced the *Act* into Parliament. It states that the Bill was introduced to overcome the 'uncertainty and inefficiency in relation to Australia's system of national corporate regulation'[111] by re-enactment of the scheme as a 'single federal law of national application'.[112] To this end, the *Act* was designed so that it:

- may be administered and enforced on a national basis by Commonwealth bodies; and
- will re-instate an integrated system of adjudication by Commonwealth, State and Territory courts.[113]

The scheme that predated the *Act*, known as 'the Corporations Law scheme', commenced on 1 January 1991 and 'was designed to operate as a single national scheme even though it actually applies in each State and the Northern Territory as a law of the State or Territory'.[114] The main advantage of having a single national scheme was, at the time, observed to be the amelioration of problems (in terms of costs and inconvenience) for litigants arising from the existence of separate systems of federal and state courts.[115] However, the predecessor scheme was

107 *Minister for Immigration and Citizenship v Dhanoa* (2009) 180 FCR 510, 515 [13] (Moore J), citing *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, 651 [9] (French CJ and Bell J), 668 [62] (Crennan and Kiefel JJ).

108 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ). See also *South West Water Authority v Rumble's* [1985] 1 AC 609, 617 (Lord Scarman); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] ('*Project Blue Sky*').

109 See *Chahwan v Euphoric Pty Ltd* [2008] NSWCA 52 (8 April 2008) [124] (Tobias JA), Beazley and Bell JJA agreeing, citing *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408.

110 *Project Blue Sky* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

111 Explanatory Memorandum, Corporations Bill 2001 (Cth) 4.7.

112 Ibid 4.8.

113 Ibid 4.9.

114 Ibid 4.1.

115 See *BP v Amann Aviation Pty Ltd* (1996) 62 FCR 451, 454 (Black CJ), 470 (Lockhart J), 498 (Lindgren J).

fatally compromised in the aftermath of the High Court decisions in *Wakim*[116] and *Hughes*.[117] Both decisions rendered ineffective the cross-vesting provisions of the former scheme '[which] were intended to establish a seamless and efficient system of adjudication by, among other things, allowing federal courts to exercise relevant State jurisdiction and State courts to exercise relevant federal jurisdiction'.[118]

A two-fold reference process under s 51(xxxvii) of the *Constitution* was employed to overcome the *Wakim* problem — viz, a reference by the states and territories of their Corporations Law amended so that it may operate as an *Act* of the Commonwealth Parliament throughout Australia[119] and a reference of 'the matters of the formation of corporations, corporate regulation, and the regulation of financial products and services' to the extent that they are not otherwise within the legislative powers of the Commonwealth.[120] The *Hughes* problem is addressed by conferral of administrative power on Commonwealth officers, supported by the state referral of power.[121]

According to Gleeson CJ, Gaudron and Gummow JJ in *Edensor v ASIC*, the *Act* now achieves 'fully', albeit 'tortuously', its evident purpose of directing the mind of the reader of the *Act* to the distribution of federal jurisdiction between inferior and superior Australian courts, where the definition of capital 'C' Court 'serves to throw light only upon what follows from the use of the expression "the Court", this being a *clear expression of intention* that proceedings … may not be brought in all [state] courts … but only in a limited class thereof'.[122]

Despite the clear direction in *Edensor* and without identifying a relevant provision in the *Act* containing a clear expression of a contrary intention that the Local Court had jurisdiction to determine the claim in *Merhi* without superior court leave, the LCM nevertheless sought to justify the need for Capital 'C' Court leave on the basis 'that the Local Court plays no role in the appointment, supervision, control or dismissal of Liquidators'.[123] At its core, the LCM's preferred construction implies that the words appearing in brackets in s 58AA(2) — '(for example, by use of the expression "the Court")' — derogated from the immediately preceding words outside the brackets — 'clear expression of a contrary intention' — such that even in the absence of a clear expression the legislative intent remained that anything

116 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, which rendered the cross-vesting arrangements invalid to the extent that they purported to confer state jurisdiction on federal courts.

117 *The Queen v Hughes* (2000) 202 CLR 535, where the High Court decided that the Commonwealth cannot authorise its authorities or officers to undertake a function under state law involving the performance of a duty (particularly a function having the potential to adversely affect the rights of individuals) unless the function has a sufficient nexus with a Commonwealth legislative power.

118 Explanatory Memorandum, Corporations Bill 2001 (Cth) 4.3.

119 Ibid 5.3.

120 Ibid 4.10.

121 See also Austin and Ramsay, above n 76, [3.070].

122 See *ASIC v Edensor Nominees* (2001) 204 CLR 559, 597 [90]–[93] (Gleeson CJ, Gaudron and Gummow JJ) (emphasis added); See also *Gordon v Tolcher* (2006) 231 CLR 334, 342 [15].

123 *Merhi v Moonprom Pty Ltd* [2006] NSWLC 42 (31 October 2006) [33].

to do with liquidators and the winding up process was the exclusive preserve of a superior court and, preferably, the court that appointed the liquidator.

However, given the widespread use of the expression 'the Court' throughout the *Act*, Parliament could not have intended for readers of the *Act* to have to speculate about other examples manifesting a contrary intention that are not clearly expressed.[124] For as noted, use of the expression 'the Court' 'sheds light' on the task of ascertaining jurisdiction of state courts, where the absence of such an expression means that an inferior court may exercise federal jurisdiction conferred by s 1337E to quell a controversy involving a matter arising under the *Act*. To reiterate:

> Section 1337E of the *Corporations Act* confers jurisdiction on 'the lower courts' of New South Wales with respect to 'matters' arising under the *Corporations Act*, not being 'superior court matters'. Jurisdiction is conferred with respect to *Corporations Act* 'matters', subject to the general jurisdictional limits of the court in question relating to amounts and value of property *but is not made subject to other jurisdictional limits* (s 1337E(2)).[125]

Indeed, if one turns to the provisions of the *Act* the liquidator in *Merhi* said clearly indicated that the most important powers (pertaining to the winding up process and liquidators) were to be exercised by a capital 'C' Court, in each, the expression 'the Court' is uniformly and clearly used. And as appears, the circumstances to which each of those provisions are directed did not arise in *Merhi*, rendering them otiose for the purposes of ascertaining whether a non-appointing or inferior state court had jurisdiction to hear and determine a claim against a court-appointed liquidator personally.

One of the most important powers the liquidator agreed was conferred by the *Act* on a Capital 'C' Court is s 471B of the *Act*. That section requires leave of a capital 'C' Court (which includes the supreme court of a state or the Federal Court) before proceedings can be initiated against a company in liquidation or against the property of the company. This provision clearly did not apply to the circumstances in *Merhi* as the claim against the company in liquidation was dismissed prior to determination of the liquidator's strike out motion.

The liquidator also referred to s 1321(d), which is considered a more appropriate provision than s 471B when complaining about the liquidator's conduct.[126] Section 1321(d) specifically confers jurisdiction on a capital 'C' Court to entertain an application by a 'person aggrieved' by an act or omission of the liquidator to reverse or modify any act or decision of the liquidator and make

124 Cf *John v FCT* (1989) 166 CLR 417, 434, where Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ endorsed the primacy of the maxim *expressum facit cessare tacitum* as a general rule of statutory construction dictating 'that where there is specific statutory provision on a topic there is no room for implication of any further matter on the same topic'.

125 *Gordon v Tolcher* (2006) 231 CLR 334, 341 [10] (emphasis added).

126 See *Re Grant* (1982) 6 ACLR 727, affd on appeal in *Ogilvy-Grant v East* (1983) 1 ACLC 742. See also Keay, above n 45, 390–1.

such order it thinks fit. Notwithstanding that the plaintiffs in *Merhi* sought monetary compensation from the liquidator personally on the ground that they were aggrieved by the liquidator's conduct, that did not mean they were a 'person aggrieved' for purposes of s 1321(d) of the *Act*.

Although it is readily accepted that the concept of 'person aggrieved' is not exhaustively encapsulated by the much quoted words of James LJ as 'a man who has suffered a legal grievance',[127] which may be too restrictive in some contexts, particularly where the public interest is affected,[128] the term is ordinarily applied to a creditor or contributory (eg shareholder).[129] As McLelland J observed in *Northbourne Developments Pty v Reiby Chambers Pty Ltd* '[i]t should not be overlooked that the wider the class of persons to appeal to the court [under s 1321(d)] the greater scope for potential disruption of an orderly administration'.[130]

The claimants in *Merhi* were neither contributories nor creditors of the company in liquidation and their legal rights had not been 'infringed'[131] or 'affected'[132] vis-a-vis claims in the winding up process by the alleged failure of the liquidator to properly supervise the auctioneer in realising the assets of the company. What the Merhis suffered as a consequence of the liquidator's conduct was the opportunity to avoid damage to their premises. And even if they were deemed a 'person aggrieved', nevertheless a court would unlikely be able to exercise the 'very wide discretion'[133] conferred upon it by s 1321(d) in circumstances where the liquidation process had been completed by the time their claim was struck out.

Concomitantly, while a capital 'C' Court may order an inquiry into conduct of a liquidator under s 536 of the *Act*, such an order 'does not involve any prima facie finding of failure to discharge duties or to comply with legal requirements'.[134] Again, this provision was not invoked in *Merhi* as the civil proceedings commenced were more than a 'complaint' which, in the context of s 536, 'is used to provide a basis for the initiation of an inquiry on broadly disciplinary grounds'.[135] Rather, the claimants were seeking monetary compensation for damages allegedly caused by the liquidator's negligence in carrying out his duties; thus making their claim more than a complaint warranting investigation of the liquidator's conduct and giving rise to the possible defence of 'act[ing] honestly' in s 1318(1) of the *Act*, which may be considered by 'the court' (rather than 'the Court').

127 *Ex Parte Sidebotham* (1880) 14 Ch D 458, 465 (James LJ), applied by McLelland J in interpreting the equivalent to s 1321(d) in *Northbourne Developments Pty v Reiby Chambers Pty Ltd* (1990) 8 ACLC 39, 42 ('*Northbourne*').

128 See *AG Gambia v N'jie* [1961] AC 617, 634, where Lord Denning said the words 'person aggrieved' are of 'wide import' and should not be restrictively interpreted.

129 See *Re Capital Project Homes Pty Ltd* (1991) 10 ACLC 75, where it was said that to be a person aggrieved a creditor would have to have his proof of debt rejected by the liquidator. See also *Starmaker (No 51) Pty Ltd v Mawson KLM Holdings Pty Ltd* [2005] SASC 313 (17 August 2005) 322 [50] (Layton J); *Rousseau v Jay-O-Bees* (2004) 50 ACSR 565, [46] (Campbell J).

130 *Northbourne* (1990) 8 ACLC 39, 43.

131 See *Strapp v Fear* (1991) 5 ACSR 693, 701 (White AJ).

132 See *Northbourne* (1990) 8 ACLC 39, 43.

133 *Strapp v Fear* (1991) 5 ACSR 693, 701.

134 *Hall v Poolman* (2009) 75 NSWLR 99,104 [4] (Spigelman CJ, Hodgson JA and Austin J).

135 Ibid 127 [94].

Similarly, the claimants were not seeking removal of the liquidator or review of his remuneration (which requires application in a capital 'C' Court (see s 473 of the *Act*)); or asserting that the liquidator improperly (ie without 'approval of the Court, of the committee of inspection or of a resolution of the creditors') compromised a debt to the company in liquidation (see s 477(2A) of the *Act*); or entered into an agreement on the company's behalf where the term of the agreement may end three months after the agreement is entered into (see s 477(2B) of the *Act*); or that the liquidator failed to apply to the Court 'for directions in relation to any particular matter arising under the winding up' (see s 479(3) of the *Act*). In all these matters, only a capital 'C' Court is seised with the necessary jurisdiction to quell the controversy.

By focusing only on the 'important' capital 'C' Court powers the LCM overlooked other equally important powers that were vested in lower courts, for example, to deem voidable certain company transactions (s 588FF) or to excuse negligence where the liquidator has 'acted honestly' (s 1318(1)). Thus, the LCM erred as a matter of law, misconstruing the *Act* and its intention by suggesting Parliament conditioned the Local Court's grant of jurisdiction on experience in the appointment and remuneration of liquidators or review and regulation of their conduct. The *Act* simply confers jurisdiction on a court to determine non-superior court matters arising under the *Act* and falling within its jurisdictional limit.

More importantly, the construction of the *Act* adopted by the LCM breaches one of the most fundamental canons of modern statutory construction, namely, to give 'meaning and effect'[136] to every word appearing in the relevant provision to be construed.[137] It not only completely ignores the words 'clear expression of a contrary intention' and the words appearing in brackets in s 58AA(2) (viz, '(for example, by use of the expression "the Court")'), it gives no effect to ss 58AA and 1337E of the *Act* in conferring jurisdiction on inferior state courts.

To give meaning to the expression 'a clear expression of a contrary intention' in s 58AA(2) requires that it be given some work to do in directing the reader's mind to the exclusive jurisdiction conferred on 'the Court'. And although the expression in brackets in s 58AA(2) suggests that there may be other examples manifesting in a contrary intention without the use of the expression 'the Court', nevertheless, to make sense of every word in the provision, 'while maintaining the unity of all the statutory provisions',[138] there must be a clear expression of a contrary intention that the lower court has jurisdiction to consider the matter.

It could not be the case, as the liquidator in *Merhi* contended, that the Local Court did not have jurisdiction to consider the claim because 'all of the important powers, sanctions and supervision of Liquidators' were conferred on 'the Court'.[139] To construe the *Act* in such a manner relies on such a level of abstraction

136 See *Preston v Commissioner for Fair Trading* [2011] NSWCA 40 (11 March 2011) [90] (Campbell JA), Tobias and Young JJA agreeing.

137 *Project Blue Sky* (1998) 194 CLR 355, 382 [71] (McHugh, Gummow, Kirby and Hayne JJ).

138 Ibid 382 [70].

139 See *Merhi v Moonprom Pty Ltd* [2006] NSWLC 42 (31 October 2006) [18].

to be unworkable. It effectively requires one to assiduously search through the *Act* to find if in one place a word has been used other than as defined and from the discovery assert that the word could be regarded as being used other than in its defined sense wherever it appeared.[140] To be expected to undertake such an arduous task of comparisons is not only a fruitless and meaningless exercise, it is inefficient and contrary to the intentions of the *Act*.

Apart from any procedural rules of court picked up by s 79 of the *Judiciary Act 1903* (Cth) (discussed below), the *Act* as a whole leaves no room for state law to regulate the distribution and exercise of federal jurisdiction amongst the various state courts.[141] It adumbrates specific instances where leave of 'the Court' is required in respect to a matter arising under the *Act*. Thus necessarily implying that in all other instances the *Act otherwise provides* that a court with jurisdiction cannot exercise it until such time as grant of leave from the appointing court.[142] The Latin maxim *expressio unius est exclusio alterius* — an express reference to one matter indicates that other matters are excluded — may further be called in aid of this construction of the intention of the *Act* to cover the field, albeit that this maxim is 'not a rule of universal application'[143] and should be 'applied with caution'.[144]

And although Malpass AsJ did not see error in the LCM summarily dismissing the claim in *Merhi* for want of leave and was driven by considerations of judicial comity[145] to apply *Re Siromath*, his Honour's statement about the primacy[146] of the Supreme Court's inherent jurisdiction meant there was no need to comment on the LCM's construction of the *Act*. Be that as it may, Malpass AsJ's finding ignores the deprecatory effects of the *Re Siromath* injunction on the *Act* and the national adjudication scheme it establishes. As will appear immediately below, it undermines the constitutional character and institutional integrity of the non-appointing court.

140 Cf *Duperouzel v Cameron* [1973] WAR 181; *Simpson v Nominal Defendant* (1976) 13 ALR 218, 224 (Forster J).

141 *Gordon v Tolcher* (2006) 231 CLR 334, 335 [3].

142 Cf *O'Sullivan v Noarlunga* (1954) 92 CLR 565, 591 (Fullagar J), Dixon CJ agreeing. Upon examining the 'extremely elaborate and detailed' Commonwealth regulations for slaughtering of livestock for export, his Honour found they intended to cover that field, rendering the state law on the same subject invalid to the extent that it purported to regulate those relevant abattoirs.

143 *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334, 348 [22] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *Eastman v Commissioner for Superannuation* (1987) 15 FCR 139.

144 *Rylands Brothers (Aust) Ltd v Morgan* (1927) 27 SR (NSW) 161, 168–9 (Long Innes J).

145 For elucidation of benefits of judicial comity, see *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 190, 206 [52] (French J), cited with approval in *Saeed v Minister for Immigration and Citizenship* (2009) 176 FCR 53, 63 [38] (Spender, Buchanan and Logan JJ).

146 *Contra Commonwealth of Australia Constitution Act 1900* (Cth) cl 5.

IV THE DIRECT INCONSISTENCY ARGUMENT

According to s 109 of the *Constitution*: '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'. To this end, it has been held that state and federal laws will be inconsistent where one law 'takes away a right conferred by [the] other',[147] including rights conferred in common law.[148]

Being an enactment of the Commonwealth Parliament, the *Act* is obviously a law of the Commonwealth. And although in the context of s 109 'law' does not expressly refer to the common law, the 'laws of any State' were understood at the time of Federation to include 'the Common law so far as applicable and not modified by colonial or State legislation'.[149] At any rate, the *Re Siromath* injunction is a 'law of a State' as defined in s 9 of the *Act* (viz 'a law of, or in force in, the State'), where the power to restrain parties from pursuing proceedings in non-appointing courts derives either from the terms of the imperial legislation founding the Supreme Court and/or the *SCA*.[150]

Alternatively, the equity founding the *Re Siromath* injunction may be inferred from the 'rule-making procedures plainly intended'[151] by the *SCA* to promote administration of justice in New South Wales and protect the Court's officers from spurious litigation. And its widespread application in subsequent cases and other jurisdictions thus cements its status, at the very least, as a law of a state if not also as the common law of Australia.

Adding a level of complexity is the fact that the administrative procedure governing commencement of proceedings in the non-appointing court is generally left to that court's procedural rules, which are picked up by s 79 of the *Judiciary Act*.[152] Without s 79, any state law that is picked up could not directly and of its own force operate in the exercise of federal jurisdiction.[153] Once picked up, the state law is characterised as a 'surrogate federal law'.[154] As mentioned however, there were no procedural rules of either the Local Court or the supreme court mandating appointing-court leave.

147 *Clyde Engineering v Cowburn* (1926) 37 CLR 466, 478 (Knox CJ and Duffy J).

148 *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 594–5 [7] (Gleeson CJ, Gaudron and Gummow JJ). See also *Felton v Mulligan* (1971) 124 CLR 367, 413 (Walsh J), Barwick CJ and Windeyer J agreeing on this issue, cited with approval by Gibbs J in *Moorgate Tobacco Company Ltd v Philip Morris Ltd* (1980) 145 CLR 457, 471.

149 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, first published 1852, 1976 ed) 356.

150 See *Felton v Mulligan* (1971) 124 CLR 367, 412 (Walsh J).

151 Cf *Residual Assco Group v Spalvins* (2000) 202 CLR 629, 641–2 [21] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

152 See *Gordon v Tolcher* (2006) 231 CLR 334, 346 [32], [40].

153 See *APLA v Legal Services Commissioner* (2005) 224 CLR 322, 406 [230] (Gummow J).

154 See *Kelly v Saadat-Talab* (2008) 72 NSWLR 305, [6] (Allsop P).

Equally, that the decision in *Re Siromath* predated commencement of the *Act* is immaterial to whether inconsistency exists.[155] As is the fact that the LCM's decision to strike out the claim in *Merhi* was interlocutory in nature. The LCM's decision was a court order that had 'operative effect upon a person's rights, interests, or expectations'.[156] Further, it was not an interlocutory injunction that is granted '*until further order*' (eg on condition of Supreme Court leave), which 'is frequently construed as operating until the determination of the proceedings'.[157] And it could not be said that the requirement of appointing-court leave is merely an 'administrative direction' since failure to obtain such leave resulted in legal consequences, namely, dismissal of proceedings for abuse of process, making the decision capable of review on appeal.[158]

A *The 'Collision'*

It has been held that where a state law 'alters, impairs or detracts from the operation of the Act, then to that extent it is invalid'.[159] To avoid invalidity, the state law must be capable of concurrent operation with federal law such that it does not involve a 'direct inconsistency' or 'collision' of the kind which arises, for example, when Commonwealth and state laws make contradictory provision upon the same topic, making it impossible for both laws to be obeyed.[160] Or where both federal and state laws deal with the same subject matter and are incapable of 'simultaneous obedience'.[161] This will occur, for instance, where:

> it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.[162]

155 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 657 [177] (Heydon, Crennan and Kiefel JJ).

156 See *Salter v Director of Public Prosecutions* (2009) 75 NSWLR 392, [14]–[17] (Spigelman CJ), McColl and Campbell JA agreeing.

157 See *Klewer v Official Bankruptcy in Trustee (No 2)* [2010] NSWCA 258 (6 October 2010) [6].

158 Cf *Airlines of NSW v NSW (No 1)* (1964) 113 CLR 1, where a majority of the High Court found that administrative directions such as air navigation orders, information and notices to pilots, and similar directives did not amount to 'laws of the Commonwealth'.

159 *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J).

160 See *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253, 258–9 (Barwick CJ), 270 (Taylor J), 272 (Menzies J), cited with approval by the Full Court in *Telstra Corp Ltd v Worthing* (1999) 197 CLR 61, [27]. See also *R v Credit Tribunal; Ex parte General Motors Acceptance Corp Australia* (1977) 137 CLR 545, 565 (Mason J), Barwick CJ, Gibbs, Stephen, Jacobs and Murphy JJ agreeing; *HIH Casualty and General Insurance Limited (in liq) v Building Insurers' Guarantee Corporation* (2003) 202 ALR 610, 642 [78].

161 *Ex parte McLean* (1930) 42 CLR 472, 484 (Dixon J).

162 *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J), applying ibid, cited with approval in *Telstra Corp Ltd v Worthing* (1999) 197 CLR 61, 76 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

To be picked up as surrogate federal law therefore, the *Re Siromath* injunction must not detract from the *Act* by seeking to 'withdraw' or 'limit' the federal jurisdiction the local court may otherwise exercise under the *Act*.[163] This, in turn, requires resolution of whether the *Act* provides a complete statement of the law governing prosecution of liquidators in non-appointing courts that is otherwise regulated by state law? In the specific context of the *Act*, this entails discernment of whether the *Act* evinces an intention to save the *Re Siromath* injunction as a concurrent state provision.

B *A Complete Statement of Concurrent State Laws*

The *Act* contains specific provisions designed to preserve the validity and operation of concurrent state law. Part 1.1A (ss 5D–5I) of the *Act*, which reflects the referral of power mechanism adopted by the states and Commonwealth in enacting the *Act* and the scheme for resolving potential problems of inconsistency, regulates the relationship between the *Act* and a law of a state.[164] It has been said that by preserving the concurrent operation of a law of a state, pt 1.1A of the *Act* 'shows a general intention of forestalling or minimising conflict' by not covering the field.[165]

Being the 'leading provision in Part 1.1A',[166] s 5E permits the concurrent operation of state laws that may be obeyed simultaneously. An example of a concurrent state provision is provided in s 5E(2) where, inter alia, the state law imposes additional obligations or confers additional powers on a director or a company. The *Act* further excludes from its application, in whole or in part, matters declared by state law to be 'excluded matters', subject to contrary Commonwealth regulation.[167]

Section 5E(4), in turn, upholds the primacy of the *Act* by expressly withdrawing the guarantee of concurrent operation if there is a 'direct inconsistency' between the *Act* and a state law. This is consonant with established construction principles dictating that a Commonwealth law cannot curtail the operation of the *Constitution* by attempting to declare valid that which s 109 makes invalid.[168] In the event of direct inconsistency, s 5G operates (notwithstanding s 5E(4)) to salvage the particular state law. This reflects the unique circumstances in which the *Act* came into existence.[169] In general, s 5G limits or qualifies the operation of the *Act* to allow for continued operation of state laws which, inter alia, were enacted and came into force prior to the *Act*. Once conditions specified in sub-s

163 Cf *ASIC v Edensor* (2001) 204 CLR 559, 588 [59] (Gleeson CJ, Gaudron and Gummow JJ).

164 See *DPP (Vic) v Loo* (2002) 130 A Crim R 452, 467 [61] (Ashley J).

165 *HIH Casualty & General Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation* (2003) 202 ALR 610, 635 [72] (Barrett J).

166 Ibid [78].

167 *Corporations Act 2001* (Cth) s 5F. See also Cheryl Saunders, 'A New Direction for Intergovernmental Arrangements' (2001) 12(4) *Public Law Review* 274, 284.

168 See *University of Wollongong v Metwally* (1984) 158 CLR 447, 457–8 (Gibbs CJ); *Western Australia v Commonwealth* (1995) 183 CLR 373, [83] (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

169 *DPP (Vic) v Loo* (2002) 130 A Crim R 452, 467 [61] (Ashley J).

(3) are satisfied, the *Act* is taken to yield to the state law if one of the provisions in sub-ss 5G(4)–(11) applies.

The conditions specified in Item 1 of the Table in sub-s 5G(3) (viz that the state provision operated before commencement of the *Act* and that it is not declared by regulation made under the *Act* or state law to be excluded from s 5G), appear to embrace the requirement of leave in *Re Siromath* such that it would be termed a 'pre-commencement (commenced) provision'.[170] Thus necessitating consideration of sub-ss 5G(4)–(11). However, it is not entirely clear whether the leave requirement also constitutes a 'provision of a law of a State' for the purposes of the *Act*.

Section 9 of the *Act* defines 'provision of a law of a State' to include: (a) 'a subsection, section, Subdivision, Division, Part or Chapter of the law'; and (b) 'a Schedule, or an item in a Schedule, to the law'. Given the non-exhaustive definition of that expression and the fact that s 5G was designed to facilitate state laws 'that expressly authorise or require the doing of an act',[171] there is no compelling reason or logic that the requirement of Supreme Court leave would not constitute a provision of a law of a state where the Supreme Court's order is binding on all courts in New South Wales.

Therefore, the leave requirement is a provision of a 'law of a State' for the purposes of the *Act*. And given that it operated prior to the commencement of the *Act* and the *Act* is silent on whether the additional obligation of leave is excluded from the operation of s 5G of the *Act*, it may be characterised as a 'pre-commencement (commenced) provision'. This, however, does not automatically mean that it falls within the protective/preservative provisions of the *Act*. Relevantly, sub-s 5G(8) which is headed: *External Administration under State and Territory Laws*, provides that the provisions of ch 5 of the *Act* 'do not apply to a scheme of arrangement, receivership, winding up or other external administration of a company to the extent to which the scheme, receivership, winding up or administration is carried out in accordance with a provision of a law of a State or Territory'.

Since commencement of the *Act* in July 2001 however, winding up proceedings are always carried out in accordance with the *Act*. Therefore, sub-s 5G(8) does not apply to the additional obligation created by application of the *Re Siromath* injunction to a matter arising under the *Act*. Similarly, sub-ss 5G(9) and (10), which broadly deem any additional requirement of a provision of a law of a state to be included in a company's constitution for purposes of the *Act*, are irrelevant as the *Re Siromath* injunction applies only to claims against the liquidator personally and not the company in liquidation. On the other hand, sub-s 5G(11), which has been attributed an 'expansive' meaning (albeit limited by the terms of sub-s 5G(3) of the *Act*),[172] is headed '*Other Cases*' and may apply if sub-ss 5G(4)–(10) are inapplicable. It provides that a provision of the *Act* does not operate in a state to the extent necessary to ensure that no inconsistency arises between a provision

170 See also *Corporations Act 2001* (Cth) s 5G(12).

171 Explanatory Memorandum, Corporations Bill 2001 (Cth) 5.67.

172 See *DPP (Vic) v Loo* (2002) 130 A Crim R 452, 467 [61], cited in *HIH Casualty & General Insurance Ltd (in liq) v Building Insurers' Guarantee Corporation* (2003) 202 ALR 610, 641 [76] (Barrett J).

of the *Act* and a provision of a law of the state that would be inconsistent, but for the subsection.

Notwithstanding, sub-s 5G(11) cannot be invoked in aid of the *Re Siromath* injunction where suspension of the operation of s 1337E of the *Act* to allow for operation of the state law would effectively undermine the fundamental operation of the *Act*, contrary to s 5E(4). That could not have been Parliament's intention and, if it was, it is 'forbidden by the constitution' to the extent that it effectively seeks to validate a directly inconsistent state provision contrary to s 109 of the *Constitution*.[173]

On any view of sub-s 5G(11) it cannot operate to save the additional leave requirement advocated in *Re Siromath* in light of the *Act*, which does not condition conferral of jurisdiction exercisable by lower courts on grant of leave by the appointing court in a manner other than by use of the 'clear expression' 'the Court' in the *Act*; and where conferral of federal jurisdiction includes the power to exercise such jurisdiction 'effectively and practically'.[174]

Therefore, while the *Act* was framed to operate in the context of local laws in the various states and territories, it nevertheless covers the field in so far as it makes detailed provision for conferral of jurisdiction on any court in respect to a matter arising under the *Act*. To this end, use of the expression the 'Court' throughout the *Act* sheds light on the matters lower courts may entertain.[175] Sections 1337E and 58AA(2) operate to confirm that the *Act* is the 'sole and sovereign authority' governing the division of power between the Commonwealth and the states.[176] The two-step referral process merely serves to reinforce this primary object.

A state law directing non-appointing state courts on each occasion to dismiss proceedings concerning a matter under the *Act* for want of supreme court leave is invalid to the extent that it negates, diminishes or withdraws the right of a 'relevantly affected person' to invoke the jurisdiction conferred by Parliament on state courts pursuant to ss 76(ii) and 77(iii) of the *Constitution*.[177] And although prima facie the 'mere coexistence of two laws may be susceptible of simultaneous obedience',[178] nevertheless, to allow the state law to operate in those circumstances would impermissibly deny a relevantly affected person the right to have his matter determined 'in accordance with the independently existing

173 See above n 168. See also *BP Australia Ltd v Amann Pty Ltd* (1996) 62 FCR 451, 468 (Lockhart J), Black CJ agreeing, citing *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 579–80 (Brennan J); *Deputy Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735, 774 (Starke J).

174 See *Abebe v Commonwealth* (1999) 197 CLR 510, 534 [46] (Gleeson CJ and McHugh J).

175 See above n 122.

176 Cf *Grace Bros Pty Ltd v Magistrates, Local Courts of New South Wales* (1988) 84 ALR 492, 498 (Gummow J).

177 See *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 205 (Deane and Gaudron JJ).

178 See *Ex parte McLean* (1930) 42 CLR 472, 484 (Dixon J), Rich J agreeing.

substantive law' (viz the *Act* and any concurrent state law, including the common law of the state modified by federal law).[179]

The requirement of appointing-court leave cannot operate 'in aid' of or concurrently with the *Act* where it covers the same matter in respect of which a court is seised of federal jurisdiction under the *Act* and results in conflicting and unintended consequences.[180] This additional obligation cannot be characterised as ancillary to the federal law and has the potential to apply asymmetrically across the various Australian jurisdictions, contrary to the national adjudication scheme in the *Act*. It derogates from the operation of the *Act* in relation to non superior-court matters arising under the *Act*.

That the *Act* appears silent about the specific factual matrix in *Merhi* or the concomitant leave requirement in *Re Siromath* does not mean that this 'field is free for the States'[181] or that there can be no inconsistency, where silence is not due to the subject matter's irrelevance to the *Act*.[182] The present is unlike *Ansett v Wardley*, where, in rejecting a submission that the *Federal Pilot's Agreement* was intended to 'cover the field' regarding the employment conditions of pilots or, at least, the dismissal of pilots, such that there was no room for operation of the Victorian anti-discrimination legislation, Stephen J observed that the federal law was 'understandably silent' on the general question of 'discrimination based upon sex or marital status and occurring in a variety of human activity'.[183] His Honour observed the *Federal Pilot's Agreement* was concerned with 'industrial matters' and did not trespass upon 'alien areas' such as foreign affairs or sexual discrimination.[184]

In contrast, the *Act*'s silence on the general question of leave is justifiable because of the futility, impracticality and inefficiency in exhaustively defining the 'matters' which are the subject of the *Act* when the legal and commercial environment in which the *Act* operates is constantly evolving. At any rate, the *Act* is definitely not silent about which court has jurisdiction to entertain proceedings under the *Act*. This is precisely the subject matter with which the leave requirement affirmed in *Merhi* is concerned. Therefore, it could not be said that the state law did not concern itself with the question of jurisdiction dealt with under the *Act*.[185]

179 See *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 586 [55] (Gleeson CJ, Gaudron and Gummow JJ).

180 Cf *Australian Trade Commission v Film Funding and Management Pty Ltd* (1989) 24 FCR 595, 599 (Gummow J), cited in *BP Australia Pty Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 468, 472 (Lockhart J), 491 (Lindgren J).

181 Cf *Wenn v A-G (Vic)* (1948) 77 CLR 84, 109, 111–12 (Latham CJ), McTiernan J agreeing. See also *New South Wales v Commonwealth* (2006) 229 CLR 1, [371] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices*').

182 *Contra Ansett v Wardley* (1980) 142 CLR 237, 251 (Stephen J).

183 Ibid.

184 Ibid 247.

185 Cf *O'Sullivan v Noarlunga Meat* (1954) 92 CLR 565, affd *O'Sullivan v Noarlunga Meat* (1955) 95 CLR 177.

C *Suspension of Rights and Jurisdiction*

Being more than an administrative direction, the prerequisite of leave precludes lower courts from exercising jurisdiction in relation to a 'matter' under the *Act* and determining whether they have jurisdiction to quell the particular controversy. Dismissal of the proceedings in *Merhi* for want of leave was 'final in all respects', notwithstanding that dismissal occurred pursuant to (former) *LCR* s 4.28(c) such that it was open to the plaintiffs to re-plead.[186] This is because it would have been futile to lodge a new and better-particularised claim in the Local Court given the unanimous view that the lower court does not have jurisdiction to determine proceedings against a liquidator personally.

In *Stock Motor Ploughs Ltd v Forsyth*, Dixon J (in dissent) held that '[a] provision which prevents or suspends the enforcement of an accrued right cannot do otherwise than impair the enjoyment of that right'.[187] That case concerned the interrelation between the *Federal Bills of Exchange Act 1909* (Cth) and the *Moratorium Act 1930–31 of New South Wales* ('*MA*'), specifically whether the payee of a promissory note given as a collateral security for an installment payable under a hire-purchase agreement, may, without the leave of a district court or a court of petty sessions (as required by *MA*), maintain an action against the maker to enforce payment of the note. His Honour found the *MA* intended to restrain proceedings to enforce promissory notes given as collateral security and, to that extent, breached s 109 of the *Constitution*.

Although Dixon J was in dissent as to the outcome in *Forsyth*, his Honour's statement of the underlying principle is well-accepted.[188] Gummow J in *APLA* referred to Dixon J's statement when noting that it may be necessary to look at the 'practical effect' of the state law in relation to the Commonwealth right.[189] The practical effect of the *Re Siromath* injunction is that it has a direct and significant impact on the operation of the *Act* by altering, impairing and/or detracting from the enjoyment of rights arising under the *Act*.[190] It impermissibly modifies the circumstances when federal jurisdiction can be exercised and will therefore not be picked up as a surrogate federal law as the *Act* has 'otherwise provided'.[191] And, as will appear immediately below, the requirement of leave is also repugnant to exercise of judicial power of the Commonwealth by non-appointing state courts.

186 Cf *Gordon v Tolcher* (2006) 231 CLR 334, 349 [44].

187 *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128, 137.

188 See, eg, *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330, 337; *APLA v Legal Services Commissioner NSW* (2005) 224 CLR 322, 400–401 [205]–[209] (Gummow J).

189 *APLA v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322, 399 [201].

190 Cf *Re Macks; Ex parte Saint* (2000) 204 CLR 158, 186 [54] (Gaudron J), cited in ibid 406 [231] (Gummow J).

191 See also *Wenn v A-G (Vic)* (1948) 77 CLR 84, 108–9 (Latham CJ), cited with approval in *Western Australia v Commonwealth* (1995) 183 CLR 373.

V THE JUDICIAL POWER INFRINGEMENT ARGUMENT

A *Federal Judicial Power*

Because the proceedings in *Merhi* constituted a non-superior court matter arising under the *Act* that was within the Local Court's jurisdictional limit, the Local Court was required to exercise federal judicial power vested under s 71 of the *Constitution*.[192] It is said that s 71 speaks of the 'function of a court rather than the law which a court is to apply in the exercise of its function'.[193] With the aim of the legislature in conferring judicial power being 'to project … as far as possible into the future, and to provide in terms as general as possible for all contingencies likely to arise in the application of the law'.[194]

To this end, federal judicial power is 'the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects … [where] exercise of this power does not begin until some tribunal … is called upon to take action'.[195] It centrally involves 'a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy'[196] by 'application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process',[197] including 'exercise, where appropriate, of judicial discretion'[198] and incidental powers,[199] described variously as:

> 'Everything necessary to the effective exercise of a power'; 'everything that is reasonably necessary to carry [the power] into effect'; a provision that is 'conducive to the success of the legislation'; a 'choice of means to an authorised end [that] was to complement, and *not to supplement*, the power granted …'[200]

Where the tribunal exercising federal judicial power is a state court, it will also have conferred state jurisdiction to quell a justiciable controversy. In *Merhi*,

192 See *Re McJannet; Ex parte Australia Workers' Union of Employees (Qld) (No 2)* (1997) 189 CLR 654, 656–7, where Brennan CJ, McHugh and Gummow JJ referred to the decision in *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1945) 173 CLR 78, directing Mr Deputy President Polites to hear and determine a matter pending under the *Act*.

193 See *APLA v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322, 407 [233] (Gummow J). See also *Leeth v Commonwealth* (1992) 174 CLR 455, 469; *Kable v DPP* (1996) 189 CLR 51, 104 (Gaudron J).

194 *Baxter v Ah Way* (1909) 8 CLR 626, 637 (O'Connor J), cited with approval in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 496 (Gibbs J).

195 *Huddart Parker and Co v Moorhead* (1909) 8 CLR 330, 357 (Griffith CJ).

196 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355 [45] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

197 Ibid 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

198 *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ). See also *Abebe v Cth* (1999) 197 CLR 510, 570 [164] (Gummow and Hayne JJ).

199 See *Hinch v Hogan* (2011) 243 CLR 506, 553 [89] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

200 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 580 [122] (Gummow and Hayne JJ) (footnotes omitted) (emphasis added).

the Local Court was required by s 30(1)(c) of the *LCA*[201] to hear and determine the matter. However, when required to determine the circumstances when its federal jurisdiction is invoked and apply that jurisdiction to quell the particular controversy the state court must do so impartially and independently. The latter attributes being 'essential'[202] to the court's position as the object of an exercise of power by the Parliament manifested in s 39(2) of the *Judiciary Act*. Even 'the appearance of departure from [impartiality and independence] is prohibited lest the integrity of the judicial system be undermined'.[203]

In the specific context of this paper, the relevant question is whether in applying *Re Siromath* a non-appointing court is exercising its federal judicial power independently and impartially. To this end, it is inconsistent with the essential characteristics of a Chapter III court for the court to accept instructions to exercise judicial power in a particular way.[204] And while it may be possible to have the decision of a non-appointing court dismissing proceedings for want of appointing-court leave reviewed on appeal, this does not render the present inquiry futile in circumstances where a majority in the High Court recently held a provision of a state law permitting the Crime Commission to bring an ex parte application for confiscation of proceeds of serious crime repugnant to judicial power notwithstanding that those affected by the ex parte restraining order could apply to the Supreme Court to set it aside.[205]

As an inferior court of record, the Local Court in *Merhi* felt compelled to follow *Re Siromath* and strike out the proceedings for want of appointing-court leave despite the absence of a clear expression of a contrary intention in the *Act* that the Local Court lacked jurisdiction. To this end, the Local Court was effectively 'conscripted' as 'an essential actor' in the scheme for restraining litigants from proceeding in inferior state courts with claims against liquidators personally.[206] For while it is not necessary for litigants to obtain appointing-court leave to litigate a matter under the *Act* within the non-appointing court's jurisdiction, that is precisely what the LCM in *Merhi* deemed reasonably necessary for the plaintiffs to maintain their claim given the decision in *Re Siromath*.

201 *LCA* s 30(1)(c) relevantly provides that the court 'sitting in its General Division has jurisdiction to hear and determine … proceedings that, pursuant to any other Act, are required to be dealt with by the Court sitting in that Division'.

202 See *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 535 [111] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), [92] (French CJ), citing *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

203 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 345 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also *South Australia v Totani* (2010) 242 CLR 1, [78]–[82] (French CJ).

204 See *Nicholas v R* (1998) 193 CLR 173, 188 [20] (Brennan CJ), 208 [74] (Gaudron J), 232 [146] (Gummow J); See also *International Finance Trust Co v Crime Commission* (2009) 240 CLR 319, 353 [50] (French CJ).

205 See *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [96] (Gummow and Bell JJ), [60] (French CJ), [161] (Heydon J).

206 Cf Ibid 362 [84], 366 [97] (Gummow and Bell JJ), French CJ and Heydon J generally agreeing. See also *South Australia v Totani* (2010) 241 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J), 92 [236] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J).

In those circumstances, the LCM also respectfully failed to exercise federal judicial power by finding, without adverting to any provision in the *Act*, that the local court does not have 'power to grant leave if an application for leave was made'.[207] A court with authority to decide a question 'cannot give, or deprive itself, of that jurisdiction by erroneously determining the question of whether the jurisdiction does or does not exist'.[208] Such a finding does not answer the question whether the court in fact has jurisdiction under the *Act* to consider the claim. Neither does the additional remark that the local court 'plays no role' in the appointment and supervision of liquidators. In both instances, the LCM respectfully failed to exercise judicial power of the Commonwealth.

That Malpass AsJ upheld the LCM's decision by reiterating the primacy of *Re Siromath*, confirms that that decision has the character of directing (in unqualified terms) all courts in the state not to entertain proceedings arising under the *Act* without appointing-court leave, thus derogating from the non-appointing courts' federal jurisdiction. An analogous provision was held by the High Court in *Chu Kheng Lim* to constitute an impermissible intrusion into exercise of judicial power insofar as it directs courts exercising federal jurisdiction as to the 'manner and outcome' of exercise of that jurisdiction. There, it was held that the former s 54R of the *Migration Act 1958* (Cth) (which purported to direct, in unqualified terms, that no court shall order the release from custody of a person) 'derogates' from the direct vesting of judicial power on Chapter III courts.[209]

Similarly, that Malpass As J found it was 'open'[210] to the claimants to re-plead did not detract from the conclusion that the controversy was not quelled where the continued application of the *Re Siromath* injunction would effectively put an end to any proceedings initiated in a non-appointing court. In those circumstances, it could not be said *Re Siromath* merely modifies the right of claimants under the *Act* to prosecute liquidators personally in a non-appointing court.[211] Nor could it be an appropriate exercise of discretion to dismiss proceedings based on a non-concurrent state law directing the manner and exercise of federal jurisdiction. An unqualified direction of that nature derogates from the court as a repository of federal law, undermining its character as Ch III court.

In *Gypsy Jokers*, Gummow, Hayne, Heydon and Kiefel JJ accepted that 'legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals'.[212] Restraining

207 *Merhi v Moonprom* [2006] NSWLC 42 (31 October 2006) [35].

208 See *Duarte v Australian Maritime Safety Authority* (2010) 188 FCR 429, 437 [38] (Ryan, Mansfield and Rares JJ), relying on *Mutual Life & Citizens' Assurance Co Ltd v A-G (Qld)* (1961) 106 CLR 48, 56 (Dixon CJ and Taylor J), 58–9 (Windeyer J).

209 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 36–7 (Brennan CJ, Deane and Dawson JJ). See also *Bodruddaza v Minister for Immigration and Citizenship* (2007) 228 CLR 651, 669 [47]; *International Finance Trust Company v New South Wales Crime Commission* (2009) 240 CLR 319, 352 [50]–[51] (French CJ).

210 *Merhi* [2007] NSWSC 722 (9 July 2007) [10].

211 Cf *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 307.

212 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 594 [175], [39].

litigants from proceeding in a non-appointing court is not a requirement under the *Act* and/or necessary to promote the administration of justice, where, as noted, non-appointing courts enjoy powers to protect against abuse of process. And, unless geographically inconvenient, 'interests of justice' considerations in s 1337K(2)[213] or s 1337H(2)[214] cannot apply to justify the transfer of proceedings in a non-appointing court to the appointing court.

Toward the preceding end, *Re Siromath* impermissibly impairs the character of a non-appointing court as an independent and impartial tribunal, directing the manner and outcome of exercise of its federal jurisdiction by pre-conditioning its exercise on appointing-court approval. Indeed, and despite the *Act*, the LCM in *Merhi* observed that without leave of the appointing court the claimants could not safely proceed against the liquidator.

This differs substantially from the precondition upheld by the High Court in *Smith v Smith*, where the application for curial approval under s 31[215] of the *Family Provision Act 1982* (NSW) was held not to be a justiciable controversy but a condition precedent to a binding contract.[216] In contrast, the precondition of appointing-court leave is an integral part of the justiciable controversy where, as mentioned, grant of leave depends on the merits of the claim. Unlike *Smith*, the precondition of leave could never have a 'pure' state operation.[217] It integrally concerned external administration of a company and involved pursuing a remedy against a liquidator whose duties emanate from the *Act*.

B *The Institutional Integrity of State Courts*

The inevitable consequence of the *Re Siromath* injunction is that the non-appointing court can never conclusively and authoritatively declare by reference to the *Act* that it has power to quell a controversy concerning conduct of a court-appointed liquidator. In that sense, the *Re Siromath* injunction is 'preventative' rather than 'facilitative' of claimants' rights to litigate their claim in the most appropriate and convenient jurisdiction, contrary to 'interests of justice' considerations in s 1337K of the *Act*.[218] Based on *Re Siromath* and numerous subsequent decisions applying it, there is no entitlement for litigants to proceed in non-appointing courts without appointing-court leave. This is unlike the 28 day time limitation period in s 478 of the *Migration Act 1958* (Cth) considered by the High Court in

213 See above n 73.

214 *Corporations Act* 2001 (Cth), which applies where the transferor court is either a superior state or federal court.

215 *Family Provision Act 1982* (NSW) s 31 allows parties to contract out of certain statutory benefits under the *Family Law Act 1975* (Cth).

216 See *Smith v Smith* (1986) 161 CLR 217, 241 (Gibbs CJ, Wilson and Dawson JJ), 250 (Mason, Brennan and Deane JJ); *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 588 [59] (Gleeson CJ, Gaudron and Gummow JJ).

217 Cf Ibid 588–9 [60].

218 Cf *WACB v Minister for Immigration* (2005) 80 ALD 69, 77 [31]–[32] (Gleeson CJ, McHugh, Gummow and Heydon JJ).

WACB, which at least entitled visa applicants to lodge a review application 'albeit with a limited threshold'.[219]

To this end, the *Re Siromath* injunction effectively 'stultifies the exercise of judicial power'[220] by restricting the right to litigate proceedings against a liquidator in a non-appointing court and operates to extinguish rather than limit or 'modify'[221] an existing right to commence an action in the most appropriate jurisdiction. The injunction impermissibly 'supplements' the *Act* and is not conducive to its success.[222] It improperly establishes that only the court appointing the liquidator is capable of regulating the liquidator's conduct and protecting the court's processes and officers. This flies in the face of the national scheme established under the *Act* and the powers of all courts in the Australian judicial system to protect against abuse of process and/or vexatious proceedings.

Because non-appointing courts 'are an integral and equal part of the judicial system set up by Ch III [of the *Constitution*]',[223] non-appointing courts are vital in realising the object of the *Act* to establish a seamless and efficient national adjudication system. However, by preventing non-appointing courts from resolving matters arising under the *Act* involving court-appointed liquidators without the additional inconvenience and expense of appointing-court leave, the *Re Siromath* injunction impermissibly derogates from the non-appointing court's institutional integrity in exercise of its federal jurisdiction.[224] It 'alter[s]'[225] the constitutional scheme set up by Ch III of the *Constitution* and diminishes 'public confidence' [226] in the non-appointing court's capacity to perform its function of administering and enforcing the *Act* impartially and independently.

Moreover, being a state law that limits entitlement to relief under a national co-operative scheme asymmetrically (such that claimants initiating proceedings in the federal system are treated differently to those commencing the same proceedings in the state system, where initiation of two sets of proceedings is required for small claims), the *Re Siromath* injunction stultifies exercise of judicial power by the non-appointing court. And notwithstanding that the equity founding the requirement for leave arises from administration of justice concerns in the particular state, nevertheless such an injunction impermissibly authorises the appointing court to 'enlist'[227] the non-appointing court to restrain litigants in

219 Ibid 77 [32].

220 Cf *Abebe v Commonwealth* (1999) 197 CLR 510, 562 [143] (Gummow and Hayne JJ), Gaudron J agreeing.

221 Cf *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297, 307.

222 See above n 200.

223 *Kable v DPP (NSW)* (1996) 189 CLR 51, 116 (McHugh J), 103 (Gaudron J), 143 (Gummow J).

224 Cf *BP v Amman* (1996) 62 FCR 451, 454, where Black CJ presaged the prohibition of national cooperative schemes that compromised the institutional integrity of state courts.

225 See *Kable v DPP (NSW)* (1996) 189 CLR 51, 115 (McHugh J).

226 It was to the concept of 'public confidence' that Gaudron J turned to in *Kable* to strike down the state law that permitted 'different grades or qualities of justice': ibid 103. See also *Fardon v A-G (Qld)* (2004) 223 CLR 575, 789 [102] (Gummow J).

227 See above n 206.

a manner incompatible with the latter court's institutional integrity and role as an independent and impartial Ch III court.

VI CONCLUSION

The preceding demonstrates, by reference to claims initiated in non-appointing courts against court-appointed liquidators, how the decision in *Re Siromath* frustrates the *Act* and why it is plainly wrong and should not be followed by other courts in Australia. As shown, the *Act* confers federal jurisdiction on a non-appointing court to consider a matter arising under the *Act* so long as there is not a clear expression of a contrary intention by use of the expression 'the Court' and the sum claimed does not exceed the court's general jurisdictional limits.

Exercise of federal jurisdiction in this regard essentially requires assessment (without fear from, or distraction by, non-concurrent state laws) of whether the matter is a 'matter under the Act' and, if so, whether the non-appointing court has jurisdiction to hear by discerning whether the matter is a 'superior-court matter', in which case it falls within the exclusive preserve of the court. Then, and only then, will the non-appointing court have exhausted its federal powers.

As demonstrated by reference to the only decision to date of a non-appointing court to consider the scope of federal jurisdiction conferred under s 1337E of the *Act*, the attempts by the LCM in *Merhi* to construe the *Act* were, respectfully, beset with errors. Not being a claim against the company in liquidation, concerns about extending the federal jurisdiction of a capital 'C' Court to a lower court were overstated and misconceived in circumstances where no such extension was requested, required or warranted. Those concerns do not reflect the intention of the *Act* as a whole and improperly conflate grant of federal jurisdiction with the experience of local courts by paying undue reverence to the importance of the appointing court. That a matter concerning external administration under the *Act* may be commenced in a lower court without leave of the appointing court is neither unique nor controversial.[228]

And, respectfully, Malpass AsJ's reliance on *Re Siromath* and the appointing court's inherent power to dismiss the appeal from the LCM's decision without advertence to the *Act* bespeaks a flawed understanding of the integral role of state courts in the judicial system set up by Ch III of the *Constitution*.

In all, it was demonstrated that the decision in *Re Siromath* establishes a two-tier system whereby parties considering commencing proceedings against a liquidator personally would be ill-advised to proceed in any court other than the court that appointed the liquidator irrespective of the size of the claim. The creation of such additional expense and procedure is inconsistent with the *Act* (read 'as a whole'). It restricts (rather than modifies) the non-appointing court's federal jurisdiction and

228 In *Gordon v Tolcher* (2006) 231 CLR 334, the liquidator (Tolcher) commenced proceedings in the District Court seeking declarations that certain transactions between the company in liquidation and its sole director/shareholder were 'voidable transactions'.

undermines the rights of claimants to institute proceedings against the liquidator by reference to a state law that collides with the *Act*. And which impermissibly purports to direct the manner and outcome of exercise of federal judicial power.

It is counter-intuitive and counter-productive to impose, by application of outmoded principles, an additional barrier on litigants bringing proceedings arising under the *Act* in a non-appointing court. This is particularly so as, under the *Act*, proceedings may be brought against a court-appointed liquidator personally with reference to his duties of care and skill in any court with jurisdiction. The additional expense, time and inconvenience of having to also seek the leave of the appointing court means that those aggrieved by a liquidator's negligence are disadvantaged relative to litigants seeking redress for the negligence of other professionals who are equally expected to exhibit skill and care in performance of their duties. This is particularly acute for those claiming relatively small sums of monetary compensation.

The continued prevalence of appointing-court leave, arguably, is due largely to its historical significance and the high regard in which McLelland J is held as well as the absence to date of a well-pleaded case questioning its relevance. As shown, the equity sufficient to warrant a *Re Siromath*-type injunction is no longer valid given the *Act* and the scheme it establishes. For while the need to control the circumstances in which a court-appointed liquidator is to be held personally accountable was real and quite familiar to nineteenth century judges, what would not have been familiar is the concept of co-operative scheme of regulation and adjudication. The appointing court is no longer the only court capable of protecting the integrity of the liquidation process and/or the liquidator from unmeritorious claims.