

Cross-Vesting of Jurisdiction

The joint Commonwealth State endeavour to facilitate the conduct of litigation throughout Australia, by the enactment of the *Jurisdiction of Courts (Cross-vesting) legislation* promises to avoid many of the jurisdictional problems which have arisen in the past. The Commonwealth Act has now been passed, but has not yet been proclaimed. Proclamation probably depends upon the States passing complementary legislation. In this article **Rowan Darke** explains how the legislation will work.

The **Jurisdiction of Courts (Cross-vesting) Act (Cth)**, currently awaiting Proclamation, forms the first part of an ambitious scheme aimed at reforming the existing arrangement of jurisdiction amongst the superior courts of Australia. The essence of this scheme is the vesting of the civil jurisdiction of the Federal Court and the Family Court in the State and Territory Supreme Courts and the vesting of the civil jurisdiction of the State and Territory Supreme Courts in the Federal and Family Courts. The scheme, which is the product of consultation within the Standing Committee of Attorneys-General, will be implemented through the enactment of complementary federal and State legislation and is designed to remove uncertainty as to the jurisdictional limits of courts.

The decision of the High Court in **Re Duncan; ex parte Australian Iron and Steel Pty Limited** (1983) 57 ALJR 649 no doubt fortified the designers of this new jurisdictional network as they undertook their task. In that case, the validity of the establishment of an Industrial Tribunal, which was constituted under corresponding provisions of a Commonwealth and State Statute, was upheld. In the course of his judgment, Gibbs CJ said that there was "no express provision in the Constitution, and no principle of constitutional law, that would prevent the Commonwealth and States from acting in co-operation, so that each, acting in its own field, supplies the deficiencies in the power of the other, and so that together they may achieve, subject to such limitations as those provided by s.92 of the Constitution, a uniform and complete legislative scheme". (at p.654).

Section 4 is the central provision of the Act. It provides for the conferral upon the State and Territory Supreme Courts of the civil jurisdiction of the Federal and Family Courts (save for jurisdiction with respect to matters arising under the **Conciliation and Arbitration Act** or under sections 45D and 45E of the **Trade Practices Act**) which is not already possessed by those Supreme Courts. Similar provision is made with respect to Territory Supreme Courts, the jurisdiction of which is conferred upon the Federal and Family Courts, State Supreme Courts and other Territory Supreme Courts. The Cross-vesting of the jurisdiction currently possessed by the State Supreme Courts will be achieved through corresponding State legislation.

Clearly, the cross-vesting provisions would, by themselves, increase the possibilities of "forum shopping" amongst the superior courts of Australia. To counter such tendencies, s.5 of the Bill makes detailed provision for the transfer of proceedings. Section 5 does not merely empower courts to transfer proceedings but requires them to do so when certain conditions are met. For example,

s.5(1) requires a State Supreme Court to transfer a pending proceeding to either the Federal or Family Court whenever it appears to the Supreme Court that either:

- (i) the proceeding arises out of or is related to another proceeding pending in the Federal or Family Court and it is more appropriate that the proceeding be determined by the Federal or Family Court;
- (ii) having regard to
 - (A) whether apart from any cross-vesting legislation and any accrued jurisdiction of the Federal or Family Court the proceeding or a substantial part of it would have been incapable of being instituted in the Supreme Court and capable of being instituted in the Federal or Family Court;
 - (B) the extent to which the matters for determination in the proceeding arise under or involve questions as to the application, interpretation or validity of a law of the Commonwealth and not within the jurisdiction of the Supreme Court apart from any cross-vesting legislation; and
 - (C) the interests of justiceit is more appropriate that the proceeding be determined by the Federal or Family Court; or
- (iii) it is otherwise in the interests of justice that the proceeding be determined by the Federal or Family Court.

Section 5 makes similar provision for the transfer of proceedings from State and Territory Supreme Courts to other State and Territory Supreme Courts, from the Federal or Family Courts to State and Territory Supreme Courts and from the Federal Court to the Family Court and vice versa. This may be done upon an application by a party or an Attorney-General or of the court's own motion. No appeal will lie from the decision of a court in relation to the transfer of a proceeding.

In addition, s.10 will permit the transfer in certain circumstances of proceedings pending in a superior court in which a matter for determination is a matter arising under Division 1 or 1A of Part V of the **Trade Practices Act**, to a court of a State or Territory other than a Supreme Court. To achieve this, the **Trade Practices Act** will be amended by the **Jurisdiction of Courts (Miscellaneous Amendments) Act (Cth)** to confer jurisdiction in relation to those matters upon the several courts of the States and Territories. That Act also gives the Federal Court power to transfer proceedings involving such matters to State or Territory Courts and to require State or Territory courts other than Supreme Courts to transfer such proceedings to the Federal Court.

It is interesting to note that a practitioner in a court which transfers a proceeding has the same entitlement to practise in relation to that proceeding in the transferee court as the practitioner would have if that court were a federal court exercising federal jurisdiction.

The provisions of the **Cross-vesting Act** only empower courts to transfer proceedings which are pending before

them. No court is given the power to require another court to transfer a proceeding to it. It follows that if a party is dissatisfied with the prospect of litigating in a particular court, he must make an application to that court to seek an order for the transfer of the proceeding.

Section 7 deals with the institution of appeals under the new jurisdictional regime. The section is designed to prevent a major disturbance of the prevailing appellate structure which could otherwise result from the cross-vesting scheme which is not, it seems, limited to the original jurisdiction possessed by the superior courts. Section 7 is aimed at ensuring, for example, that appeals do not lie from decisions of single Federal or Family Court judges to Full Courts of State or Territory Supreme Courts. Further, appeals from single judges of Supreme Courts must go to the Full Court of the relevant State or Territory, except in respect of proceedings involving matters arising under specified Commonwealth statutes (such as the **Bankruptcy Act**, **Family Law Act** and the intellectual property statutes).

Section 11 deals with the conduct of proceedings where it appears to a court that in determining a matter, it will, or will be likely to, be exercising jurisdiction conferred on it under the cross-vesting laws. The general rule is that a court must, in determining the matter, apply the law in force in the place where the court is sitting. That rule does not apply in respect of matters arising under written laws of States or Territories other than the place of sitting. Further, the rules of evidence and procedure to be applied in dealing with any matter in the proceeding shall be such as the court considers appropriate, being rules that are applied in a superior court in Australia. No appeal lies from a decision of a court as to which rules of evidence and procedure are to be applied.

Standing apart from the general cross-vesting scheme are matters defined as "special federal matters". These include matters arising under Part IV of the **Trade Practices Act** (other than ss.45D and 45E) and under the **Administrative Decisions (Judicial Review) Act**. Where a matter for determination in a proceeding pending in a State or Territory Supreme Court is a special federal matter, the Supreme Court must transfer it to the Federal Court unless the Supreme Court orders that it determine the matter itself by reason that to do so would be the appropriate course. Where the Supreme Court makes such an order, it may not proceed to determine the proceeding (save in respect to urgent interlocutory relief) until it has notified the Commonwealth Attorney-General and given him a reasonable time in which to request that the matter be transferred to the Federal Court. If the Attorney-General makes that request, a Supreme Court must then transfer the proceeding.

Finally, s.16, by which the Commonwealth has attempted to arm itself against any lions in the path of the scheme, should be noted. That unusual provision allows for the cessation of operation of the Act after three years from its commencement, upon the giving of six months notice to each State. The Act may also cease to operate where the Governor-General is not satisfied that complementary State legislation is effective or where such legislation is repealed or substantially altered. Perhaps the

authors of the legislation are of the view that, quite apart from any political difficulties which may arise, and notwithstanding the decision in **Re Duncan**, the cross-vesting scheme is bound to raise some interesting constitutional questions. □

SUPREME COURT OF NEW SOUTH WALES Appointment of Sittings for 1988

Court	Commencing Date	Duration of Sittings (weeks)
Central Criminal Court	Monday 1st February	46
Others:-		
Sydney	Monday 1st February	46
Albury	Monday 29th February	3
Armidale	Monday 7th November	1
Bathurst	Monday 10th October	3
Broken Hill	Monday 8th August	3
Coffs Harbour	Monday 16th May	2
Dubbo	Monday 30th May	3
Goulburn	Monday 8th February	3
Grafton	Monday 29th August	3
Griffith	Monday 19th September	3
Lismore	Monday 20th June	3
Narrabri	Monday 8th August	1
Newcastle	Monday 8th February (Civil - Jury)	3
	Monday 7th March (Criminal)	2
	Monday 11th April (Civil - Non-Jury)	2
	Tuesday 26th April (Criminal)	2
	Monday 23rd May (Civil - Jury)	3
	Monday 20th June (Civil - Non-Jury)	2
	Monday 11th July (Criminal)	2
	Tuesday 2nd August (Civil - Jury)	3
	Monday 5th September (Civil - Non-Jury)	2
	Monday 10th October (Criminal)	2
	Monday 7th November (Civil - Jury)	3
Orange	Monday 29th February	3
Tamworth	Monday 2nd May	3
Wagga Wagga	Monday 11th July	3
Wollongong	Monday 15th February (Civil - Jury)	3
	Monday 11th April (Criminal)	2
	Monday 2nd May (Civil - Non-Jury)	2
	Monday 30th May (Civil - Jury)	3
	Monday 4th July (Criminal)	2
	Monday 22nd August (Civil - Non-Jury)	2
	Monday 24th October (Criminal)	2
	Monday 14th November (Civil - Jury)	2

The fixed vacation begins on 19th December, 1988 and the first day of term in 1989 will be 30th January.