

# Legislating against Constitutional Invalidity: Constitutional Deeming Legislation

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## Abstract

It is a little known feature of Australian constitutional law that the High Court has upheld the constitutional validity of legislation that reverses the effect of an earlier declaration of constitutional invalidity. Such legislation operates by deeming all persons' rights and liabilities to be the same 'as if' no constitutional defect existed, and has been passed in the wake of the some of the Court's most momentous decisions concerning ch III of the Constitution: *Kotsis v Kotsis*, *Knight v Knight*, *Re Wakim*; *Ex parte McNally* and *Lane v Morrison*. The cases that have considered the constitutional validity of such legislation, *R v Humby*; *Ex parte Rooney*, *Residual Assoc Corp v Spalvins*, *Re Macks*; *Ex parte Saint* and *Haskins v Commonwealth*, are among the most complex in the Court's history. Until now they have not received detailed scholarly examination. This article analyses that case law, noting in particular the shift in the Court's interpretation of constitutional deeming legislation in the 2011 case of *Haskins v Commonwealth*. It goes on to evaluate the uncomfortable position occupied by constitutional deeming legislation in the Australian constitutional context and concludes by commenting briefly on the applicability of alternative mechanisms, drawn from other constitutional systems, which achieve the same outcome as deeming legislation.

## I Introduction

In 1920 a unanimous High Court held that '[w]here a thing is declared illegal, whatever may be the object of the prohibition, the thing declared illegal is of no force or validity, and everything dependent on that thing...shares the fate of the thing prohibited'.<sup>1</sup> That holding invoked the 'void ab initio' doctrine in relation to unconstitutional legislation and the acts of government predicated on such legislation. In that context, the void ab initio doctrine holds that:

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<sup>1</sup> *R v Brisbane Licensing Court*; *Ex parte Daniell* (1920) 28 CLR 23, 29–30, 32 (Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ).

[a] pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour — but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it — and thereafter invalid. If it is beyond power it is invalid *ab initio*.<sup>2</sup>

The void *ab initio* doctrine sets out the orthodox view of the consequences of constitutional invalidity.<sup>3</sup>

Despite the theoretical appeal of the void *ab initio* doctrine, it is clear that it can cause immense inconvenience, especially in the context of an unconstitutional statute that has facilitated a vast number of governmental acts and private transactions. When such a statute is declared invalid, the void *ab initio* doctrine holds that all public and private acts performed in reliance on that statute have no legal foundation. In a pen-stroke, governments and private individuals can be exposed to potentially enormous liability. Indeed, this may be a context in which it is timely to recall that ‘a written constitution is not a suicide pact’.<sup>4</sup>

At certain times in Australia, Commonwealth and state governments have been disinclined to weather the unqualified consequences of the void *ab initio* doctrine and have passed legislation ‘deeming’ constitutionally defective acts to be treated ‘as if’ no constitutional defect existed. For want of an established name, I term such legislation constitutional ‘deeming legislation’.<sup>5</sup> Importantly, deeming legislation does not qualify the void *ab initio* doctrine; indeed, it assumes its applicability. The passage of deeming legislation has followed some of the most momentous constitutional law decisions of the modern High Court. After *Re Wakim; Ex parte McNally*,<sup>6</sup> deeming legislation was passed to save the myriad orders made by the Federal Court pursuant to the cross-vesting legislation held to be unconstitutional. Constitutional challenges to that legislation were mounted in *Residual Assoc Corp v Spalvins*<sup>7</sup> and *Re Macks; Ex parte Saint*,<sup>8</sup> but were rejected. Deeming legislation was also passed to save the verdicts and sentences imposed by

<sup>2</sup> *South Australia v Commonwealth* (1942) 65 CLR 373, 408 (Latham CJ). See also, *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327, 342 (Latham CJ).

<sup>3</sup> The doctrine has been recently acknowledged by the Court in *Haskins v Commonwealth* (2011) 244 CLR 22, 42 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ quoting *Norton v Shelby County*, (1886) 118 US 425, 442 (Field J)) (*‘Haskins’*) ‘an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no offices; it is, in legal contemplation, as inoperative as though it had never been passed.’

<sup>4</sup> John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 275 adopting terminology coined by Jackson J in *Terminiello v City of Chicago* 337 US 1, 36 (1949).

<sup>5</sup> There are many kinds of ‘deeming legislation’ that employ similar terminology, but do not deem unconstitutional acts to be valid: see the legislation considered in *R v Hughes* (2000) 202 CLR 535 and *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337. The Court has recently rejected a constitutional challenge to legislation that operated in a very similar way to constitutional deeming legislation: *Australian Education Union v General Manager of Fair Work Australia* (2012) 286 ALR 625 (*‘AEU’*). Importantly, however, the legislation upheld in *AEU* did not deem a constitutionally invalid act to be lawful and, in that sense, is an example of non-constitutional deeming legislation.

<sup>6</sup> (1999) 198 CLR 511 (*‘Wakim’*).

<sup>7</sup> (2000) 202 CLR 629 (*‘Residual’*).

<sup>8</sup> (2000) 204 CLR 158 (*‘Macks’*).

the Australian Military Court following the invalidation of that body in *Lane v Morrison*.<sup>9</sup> The constitutionality of that deeming legislation was recently challenged, but upheld, in *Haskins*.<sup>10</sup>

Despite these prominent instances, there is a dearth of scholarly output scrutinising the law concerning deeming legislation.<sup>11</sup> This article seeks to rectify that situation. Part II surveys the circumstances that have provoked the passage of deeming legislation and the constitutional challenges brought against such legislation, commencing with the first serious<sup>12</sup> challenge in *R v Humby; Ex parte Rooney*,<sup>13</sup> then turning to *Residual, Macks* and *Haskins*. The Court ultimately rejected the challenges brought in *Humby*, *Residual* and *Macks* by adopting a non-retrospective interpretation of the impugned deeming legislation. The Court shifted away from that interpretation in *Haskins*, interpreting the impugned deeming legislation as analogous to Indemnity Acts. Part II concludes by observing that this shift casts into doubt much of the previous law on deeming legislation.<sup>14</sup>

Part III critiques the various constitutional objections raised against deeming legislation in light of the Court's shift in *Haskins*. Significant attention is devoted to exploring an argument that the constitutional guarantee against the acquisition of property without just terms in s 51(xxxi) prohibits legislation that 'indemnifies' a government from claims based on unconstitutional acts. Part III concludes that serious difficulties lie in wait for future uses of deeming legislation.

Part IV comments briefly on the alternative mechanisms employed in other common law jurisdictions to address the drastic consequences that occasionally flow from declarations of invalidity: the de facto officer doctrine and prospective overruling. This article concludes by observing that although such mechanisms have their own set of constitutional problems, they are likely to be more appropriate responses to the occasionally perilous consequences of constitutional invalidity than deeming legislation.

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<sup>9</sup> (2009) 239 CLR 230 ('*Lane*').

<sup>10</sup> (2011) 244 CLR 22.

<sup>11</sup> The two major works of the last 20 years to focus on the consequences of constitutional invalidity in Australia have either ante-dated or overlooked the major deeming provision cases: Enid Campbell, 'Unconstitutionality and Its Consequences' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 90; Enid Campbell, 'The Retrospectivity of Judicial Decisions and the Legality of Governmental Acts' (2003) 29 *Monash University Law Review* 48. An examination of comparative constitutional law concerning deeming legislation is beyond the scope of this article: cf Oliver Field, *The Effect of an Unconstitutional Statute* (University of Minnesota Press, 1935) 295–304.

<sup>12</sup> Provisions in deeming legislation were briefly considered by the Court in *Antill Ranger & Co Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83 ('*Antill Ranger*'), a case analysed below text following n 145.

<sup>13</sup> (1973) 129 CLR 231 ('*Humby*').

<sup>14</sup> The term 'Indemnity Act' describes legislation passed following a period of civil war or rebellion, designed to indemnify all public and private acts committed during the war or rebellion that would otherwise be illegal. Such legislation is discussed in detail below text accompanying n 108.

## II Deeming Legislation: Causes and Controversies

### A *Non-judicial State Officers Exercising Federal Judicial Power in Matrimonial Causes: Invalidity and Responses*

In 1959, the Commonwealth exercised its powers under s 51(xxii) of the *Constitution* to establish a uniform set of family law rules applicable in ‘matrimonial causes’ by passage of the *Matrimonial Causes Act 1959* (Cth) (‘1959 Act’).<sup>15</sup> Section 23 vested jurisdiction in ‘the Supreme Court of each State’. The 1959 Act did not, however, enumerate the procedural rules applicable in matrimonial causes. Instead, s 127 picked up and applied the rules of procedure contained in state laws in the federal jurisdiction.<sup>16</sup> Certain of those state procedural rules provided for the exercise of powers in matrimonial causes by non-judicial court officers, such as registrars and masters. Those rules had serious consequences for the validity of the system established by the 1959 Act.

#### 1 *Invalidity: Kotsis v Kotsis and Knight v Knight*

The constitutional validity of orders made by registrars and masters under the 1959 Act was challenged in *Kotsis v Kotsis*<sup>17</sup> and *Knight v Knight*<sup>18</sup> on the basis that s 77(iii) of the *Constitution* only permitted the Commonwealth to invest a state ‘court’ with federal jurisdiction, and registrars and masters were not a part of the relevant ‘court’. Those challenges were upheld in both cases.<sup>19</sup> Registrars and masters had, however, been making orders, most importantly divorce decrees, in purported reliance on the 1959 Act for over a decade when the Court’s decisions in *Kotsis* and *Knight* were handed down in the early 1970s. Thus, one consequence of *Kotsis* and *Knight* was that an enormous number of orders purportedly made in the matrimonial jurisdiction were void ab initio. However, thousands of people had received or paid money, and in some cases been exposed to criminal penalties, on the basis of those constitutionally defective decrees.

#### 2 *Deeming Legislation: Matrimonial Causes Act 1971 (Cth)*

To head off the deluge of applications challenging, directly or collaterally, the constitutionally defective orders, the Commonwealth enacted the *Matrimonial Causes Act 1971* (Cth) (‘1971 Act’). That Act contained a number of constitutional deeming provisions. Sub-sections 5(3) and (4) provided that:

<sup>15</sup> For the earlier history, see Geoff Monahan and Lisa Young, *Family Law in Australia* (LexisNexis, 6<sup>th</sup> ed, 2006) 25.

<sup>16</sup> Following the example set by the *Judiciary Act 1903* (Cth) ss 68 and 79.

<sup>17</sup> (1970) 122 CLR 69 (‘*Kotsis*’).

<sup>18</sup> (1971) 122 CLR 114 (‘*Knight*’).

<sup>19</sup> *Kotsis* decided that registrars were not a part of the ‘state court’, *Knight* arrived at the same conclusion in relation to masters. Both cases were later overruled in *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49. See generally, Leslie Zines, *Cowen and Zines’s Federal Jurisdiction in Australia* (Federation Press, 3<sup>rd</sup> ed, 2002) 206–9.

The rights, liabilities, obligations...of all persons are by force of this Act, declared to be, and always to have been, the same *as if (a) in the case of a purported decree made by an officer of the Supreme Court of a State...— the purported decree had been made by the Supreme Court of that State constituted by a single justice.*<sup>20</sup>

The constitutional validity of the deeming provisions contained in the *1971 Act* was challenged, but upheld, in *Humby*.<sup>21</sup>

### 3 Constitutional Challenge: Humby

Mr Rooney was prosecuted in a South Australian Court of Petty Sessions for a failure to execute his obligations under a 1962 maintenance order purportedly made by a Master of the Supreme Court of South Australia under the *1959 Act*. Because of the decision in *Knight*, that order had no constitutional foundation. Mr Rooney applied to the Supreme Court of South Australia, seeking prohibition against the magistrate hearing the charge and certiorari to remove the prosecution to the Supreme Court and quash it. The judicial review application was removed to the High Court pursuant to s 40 of the *Judiciary Act 1903* (Cth).

Mr Rooney made three arguments in support of the conclusion that the magistrate was without jurisdiction. The first turned on statutory interpretation: because the 1962 order was a nullity, the *1971 Act* never applied to it.<sup>22</sup> The second and third arguments directly challenged the constitutional validity of the *1971 Act*: that s 5(3) lay outside the Commonwealth's legislative power with respect to 'matrimonial causes' in s 51(xxii); and that s 5(3) was an invalid attempt by the legislature to exercise judicial power in violation of the *Constitution's* exclusive vesting of judicial power in ch III courts.<sup>23</sup>

The Court dismissed Mr Humby's application. Stephen J's reasoning on the first of Mr Humby's arguments, concerning the proper interpretation of s 5(3), expressed the view of the majority of the Court.<sup>24</sup> He held that:

[section 5(3)] does not deem those decrees to have been made by a judge nor does it confer validity upon them; it leaves them, so far as their inherent quality is concerned, as they were before the passing of this Act. They retain the character of having been made without jurisdiction, as was decided in *Knight v Knight*; as attempts at the exercise of judicial power they remain ineffective. Instead, the sub-section operates by attaching to them, *as acts in the law*, consequences which it declares them to have always had and it describes those consequences

<sup>20</sup> Emphasis added.

<sup>21</sup> (1973) 129 CLR 231.

<sup>22</sup> The same reasoning would be adopted by the Court in *S157 v Commonwealth* (2003) 211 CLR 476, 506 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*S157*') and *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 582–3 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Kirk*').

<sup>23</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*').

<sup>24</sup> (1973) 129 CLR 231, 240 (Menzies J and Gibbs J agreeing at 240). Mason J reasoned along substantially the same lines (at 248–9). McTiernan J did not rule on the proper interpretation of s 5.

by reference to the consequences flowing from the making of decrees by a single judge of the Supreme Court of the relevant State.<sup>25</sup>

Describing the purported decrees as ‘acts in the law’ somewhat obscures the distinction which Stephen J drew between ‘legal acts’ and what were later termed<sup>26</sup> ‘historical facts’.<sup>27</sup> The logic of his Honour’s reasoning was that s 5(3) did not refer to the ‘legal’ act of the constitutionally defective order, but rather, operated by reference to the ‘historical’ fact that such an order was made. Of course, the void ab initio doctrine holds that an order made without constitutional authority never existed as a ‘legal’ act.<sup>28</sup> The ‘legal’ non-existence of such an act does not, however, erase the historical fact that such an act was done. The judge was present in the court and spoke the words that made the purported decree. Those words, according to Stephen J, were the historical facts to which s 5(3) referred. This interpretation of deeming provisions holds that such provisions do not ‘validate’ or ‘affect’ constitutionally defective acts: they operate prospectively by creating ‘new’ rights modeled on the defective decrees. A convenient short-hand for this interpretation of deeming provisions is the ‘non-retrospective interpretation’.

For Stephen J, this interpretation of s 5(3) also determined the ch III issue. There could be no legislative exercise of judicial power because s 5(3) only referred to the decree ‘as descriptive of the effect which it gives to the non-judicial proceedings, the purported decrees, with which it is concerned.’<sup>29</sup> His Honour reasoned that by enacting s 5(3), Parliament did not *exercise* judicial power, it merely used a defective past exercise of judicial power as a referent for imposing prospective legislative obligations.<sup>30</sup> Mason J reasoned in a similar fashion, holding that s 5(3) committed no violation of ch III, because it did not authorise a non-judicial member of a state Supreme Court to exercise federal jurisdiction.

The Court also rejected Mr Humby’s argument that the deeming provisions in the *1971 Act* were beyond the legislative power conferred in s 51(xxii). Stephen and Mason JJ both reasoned that the Commonwealth had legislative power to grant a divorce without involving the judiciary.<sup>31</sup> Thus, lying behind the ch III issue was a recognition that an alternative means of avoiding the defect identified in *Kotsis* and *Knight* would simply be to directly re-impose the substance of each order by legislative fiat. The historical practice of ‘dissolving a marriage by private Act of Parliament’<sup>32</sup> indicated strongly that simply to exclude the judiciary altogether from the disposition of matrimonial causes would not offend ch III. More will be said about this mode of reasoning in Pt II, but it suffices to observe here that the

<sup>25</sup> (1973) 129 CLR 231, 243 (citations omitted).

<sup>26</sup> *Residual* (2000) 202 CLR 629, 642 (Gleeson CJ, Gaudron, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). The terminology of ‘historical facts’ has spread beyond the Court’s consideration of constitutional deeming legislation: see, eg, *AEU* (2012) 286 ALR 625, 637, 639–40 (French CJ, Crennan and Kiefel J) and 656 (Heydon J).

<sup>27</sup> A point recognised by Heydon J in *Haskins* (2011) 244 CLR 22, 53.

<sup>28</sup> See above text accompanying n 1.

<sup>29</sup> (1973) 129 CLR 231, 244.

<sup>30</sup> *Ibid* 248. McTiernan J dealt with the ch III argument briefly at 239.

<sup>31</sup> *Ibid* 243–4 (Stephen J), 248 (Mason J).

<sup>32</sup> *Ibid* 248 (Mason J).

Court in *Humby* did not draw a clear distinction between the questions of legislative power under s 51 and limitations imposed by ch III.

The statutory formula approved by the Court in *Humby* was again pressed into service following the Court's decision in *Wakim*.

## **B State Judicial Power in Federal Courts: Invalidity and Responses**

In 1987, the Commonwealth and the states enacted legislation 'cross-vesting' federal jurisdiction in state courts and state jurisdiction in federal courts.<sup>33</sup> While the 'autochthonous expedient'<sup>34</sup> of vesting federal jurisdiction in state courts had express constitutional approval,<sup>35</sup> no similar constitutional authorisation existed for the inverse expedient. The cross-vesting scheme was a grand political compromise and an example of 'co-operative federalism'.<sup>36</sup> Its constitutionality was, however, tenuous. In 1984, Professor Zines advised the Judicature Sub-Committee of the Australian Constitutional Convention that although the cross-vesting legislation was probably valid, 'there are no decisions, or even dicta, that are directly in point'. As events transpired, that equivocal advice proved itself to be completely sensible.

The bulk of cross-vested state jurisdiction was exercised by federal courts in proceedings involving corporations, under a system of corporate regulation referred to as the *Corporations Law*.<sup>37</sup> Under that system, the Commonwealth passed comprehensive corporations legislation that applied only to the Australian Capital Territory: the *Corporations Act 1989* (Cth). Each state and the Northern Territory then enacted legislation declaring that the laws set down in the *Corporations Act 1989* (Cth) would be applied in its jurisdiction as that state's *Corporations Law*.<sup>38</sup> Under this system of statutory cross-referencing, the rules in the *Corporations Act 1989* (Cth) were transformed into state laws. A crucial part of this system was that the state Acts conferred jurisdiction on the Federal Court in respect of proceedings under their *Corporations Laws*.<sup>39</sup> Thus, when the Federal Court sitting in Sydney heard a proceeding concerning, for example, the insolvency of a company incorporated in New South Wales, it would apply the rules contained in the *Corporations Act 1989* (Cth) as rules of the *Corporations Law* (NSW): the Federal Court would, thus, apply rules originating in

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<sup>33</sup> See, eg, *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth); *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW). This general scheme of cross-vesting was designed to reduce the frequency of jurisdictional disputes between state and federal courts and reduce the opportunity for forum shopping: see Graeme Hill, 'Wakim' (2000) 22 *Sydney Law Review* 155, 159–60 and sources cited therein.

<sup>34</sup> *Boilermakers* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

<sup>35</sup> *Constitution* s 77(iii). Since 1903, Commonwealth legislation has vested a large portion of federal jurisdiction in state courts: *Judiciary Act 1903* (Cth) s 39(2).

<sup>36</sup> A term popularised following *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.

<sup>37</sup> For the history of corporations legislation prior to 1989 see, Robert Austin and Ian Ramsey, *Ford's Principles of Corporations Law* (Butterworths, 14<sup>th</sup> ed, 2010) 39–43.

<sup>38</sup> See, eg, *Corporations (South Australia) Act 1990* (SA) s 7, applying the Corporations Law set out in s 82 of *Corporations Act 1989* (Cth).

<sup>39</sup> See, eg, *Corporations (New South Wales) Act 1990* (NSW) s 42(3).

Commonwealth legislation that had been transformed into state laws. The cross-vesting provision in the *Corporations Law* scheme were a lightning rod for constitutional challenges.

## 1 *Invalidity: Wakim*

The *Corporations Law* scheme, and the vesting of state jurisdiction in federal courts, was brought undone by the High Court's decision in *Wakim*.<sup>40</sup> The year before *Wakim* was decided, the co-operative federal scheme had narrowly survived constitutional challenge in *Gould v Brown*.<sup>41</sup> However, following the retirement of two of the judges who voted to affirm the validity of the legislation in *Gould* (Brennan CJ and Toohey J), a new challenge, in *Wakim*, against the cross-vesting provisions was upheld by six votes (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ)<sup>42</sup> to one (Kirby J).

When viewed against the destruction wrought by the judgment, the technical holding of the Court in *Wakim* appears deceptively innocuous. The majority decided that 'neither the federal Parliament nor the legislature of a state, alone or in combination, could vest state judicial power in a federal court'.<sup>43</sup> The repercussions of *Wakim* were, however, anything but innocuous. The decision's financial consequences had the potential to be far more expensive than those of *Kotsis* and *Knight*. A great deal of the cross-vested state jurisdiction exercised by the Federal Court related to corporate insolvencies. Corporate insolvency, involving as it does the change in status of companies, reallocates the rights and liabilities of companies, members and creditors. Vast sums of money, in liquidated and un-liquidated claims and entitlements, are transferred on the predicate of an order winding up a company. If all winding-up orders made by the Federal Court under the cross-vesting provisions were constitutionally defective, the macro and micro-economic consequences to commerce and the Commonwealth could have been enormous. The potential for claims in excess of billions of dollars to be brought on the basis of unconstitutional Federal Court orders was very real.

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<sup>40</sup> (1999) 198 CLR 511.

<sup>41</sup> (1998) 193 CLR 346 ('*Gould*') and in the earlier decision of the Full Federal Court *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451. *Gould* was an appeal to the High Court from Full Court of the Federal Court of Australia which affirmed the validity of the cross-vesting provisions. Six High Court judges (Dawson J did not sit due to his impending retirement) heard the appeal from the Federal Court. Three judges (Brennan CJ, Toohey and Kirby JJ) held the relevant parts of the scheme valid, three held them invalid (Gaudron, McHugh and Gummow JJ). In accordance with s 23(2)(a) of the *Judiciary Act 1903* (Cth), the decision of the Federal Court was affirmed.

<sup>42</sup> (1999) 198 CLR 511, 548 (McHugh J), 582 (Gummow and Hayne JJ, Gleeson CJ agreeing at 540 and Gaudron J agreeing at 546), 625 (Callinan J).

<sup>43</sup> *Residual* (2000) 202 CLR 629, 635 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).



## 2 *Deeming legislation: State Jurisdiction Acts*

To close the abyss that opened before them following the decision in *Wakim*, all states passed legislation bearing the title *Federal Courts (State Jurisdiction) Act 1999* ('*State Jurisdiction Acts*'). The *State Jurisdiction Acts* sought to address the problems caused by *Wakim* in two ways. First, s 11 provided for all state proceedings before the Federal Court to be transferred to the relevant state Supreme Court. That section also provided for the recognition of orders made by the Federal Court in the interlocutory phase of the transferred proceeding. Second, ss 6–9 enacted deeming provisions providing that the constitutionally defective orders of the Federal Court and all rights and liability determined by those orders were as valid 'as if' the Federal Court orders were made by a state Supreme Court. The constitutional validity of s 11 was challenged but upheld in *Residual*,<sup>44</sup> as was the validity of ss 6–9 in *Macks*.<sup>45</sup>

## 3 *Constitutional challenge: Residual and Macks*

### (a) *Residual*

The plaintiff company in *Residual* had brought proceedings against a number of individuals in the South Australian District Registry of the Federal Court in 1994 in reliance on the cross-vesting provisions. Prior to the case coming on for trial, the High Court handed down its decision in *Wakim*. The Federal Court then stayed the proceedings for want of jurisdiction. The plaintiff duly applied to the Supreme Court of South Australia for an order under s 11 of the South Australian *State Jurisdiction Act*, requesting that the proceeding be 'recognised' in the Supreme Court and carried on there. The defendants contended that the plaintiff's application to the Supreme Court should be struck out for want of jurisdiction because s 11 was constitutionally invalid. The question of the validity of the *State Jurisdiction Act* was removed to the High Court.

In the High Court, the defendants argued that the effect of s 11 was to 'convert a Federal Court proceeding into a Supreme Court proceeding'.<sup>46</sup> They fixed on the use of the word 'becomes' in s 11 as evidence of the *State Jurisdiction Acts* attempt to transform the Federal Court proceedings into state proceedings. This attempt, it was argued, was an invalid interference with the judicial power of the Commonwealth, as the Federal Court order staying the proceeding was valid until set aside or quashed. It was also argued that s 11 was invalidated by s 109 of the *Constitution* because it was incompatible with orders made under a Commonwealth Act: the *Federal Court of Australia Act 1976* (Cth) ('*Federal Court Act*').

The South Australian and Victorian Attorneys-General argued that any orders purportedly made by the Federal Court in a proceeding within state

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<sup>44</sup> (2000) 202 CLR 629.

<sup>45</sup> (2000) 204 CLR 158.

<sup>46</sup> (2000) 202 CLR 629, 632.

jurisdiction were nullities and, on this basis, there could be no interference with the judicial power of the Commonwealth, nor invalidity under s 109. The remainder of the intervenors and the plaintiffs argued that s 11 should be construed in a similar fashion to the legislation impugned in *Humby* — it simply took a constitutionally defective order as the referent for a future obligation, rather than validating that defective order.

The Court rejected the defendants' arguments. Following *Humby*, the Court adopted a non-retrospective interpretation of s 11. The plurality held that s 11 took 'a federal court order dismissing, staying or otherwise dealing with a proceeding relating to a State matter as an historical fact that the Federal Court had no jurisdiction to determine that proceeding'.<sup>47</sup> Their Honours reasoned:

If that historical fact existed, s 11 authorised a party to the Federal Court proceeding to apply to commence a proceeding in the Supreme Court of South Australia and deems the Supreme Court proceeding to have been commenced on the day that the federal court proceeding was commenced in that court.<sup>48</sup>

Thus, s 11 did not validate the defective Federal Courts orders. It did not validate invalid acts. The terminology of 'historical fact' replaced Stephen J's 'act in law', but, otherwise, the reasoning is identical to that in *Humby*. As a result, no issue of interference with Commonwealth judicial power,<sup>49</sup> nor inconsistency under s 109 arose.<sup>50</sup>

The plurality was, however, less dismissive of alternative constructions of deeming provisions than the Court in *Humby*. Indeed, it was recognised that the defendants' arguments had 'much force'.<sup>51</sup> But, two factors pointed against s 11 effecting 'a unilateral transfer' of federal proceedings to the Supreme Court. First, was s 11(3)(b), which provided that the limitation period started running from the date of institution of the Federal Court proceedings. The plurality reasoned that s 11(3)(b) would be superfluous if s 11 transferred federal proceedings to the Supreme Court because, on that interpretation, any relevant limitation Act would already apply as at the date of commencement in the Federal Court.<sup>52</sup> The second factor was the 'evident purpose' of s 11, which was 'to enable a party to proceedings in a federal court relating to a state matter to bring new proceedings in the Supreme Court whenever the federal court has disposed of its proceedings on the basis that it had no jurisdiction to deal with them.'<sup>53</sup> On this reasoning, the correct interpretation of s 11, informed by the provision's purpose, was that it created a *new state proceeding*, rather than *transferring an existing federal proceeding*.

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<sup>47</sup> *Ibid* 642 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid* 641–2.

<sup>50</sup> *Ibid* 642.

<sup>51</sup> *Ibid* 643. See also Kirby J at 663.

<sup>52</sup> *Ibid*. This reasoning relies on the principles of statutory interpretation (though not expressly stated) that an interpretation of an Act should give each provision in the Act a useful operation: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381–2 (McHugh, Gummow, Kirby and Hayne JJ).

<sup>53</sup> *Residual* (2000) 202 CLR 629, 643. Kirby J adopted substantially the same reasoning at 663–5.

The majority also held that the orders of the Federal Court dismissing the proceedings for want of jurisdiction were not nullities. They reasoned that the:

[r]elevant orders to which s 11 refers were not made *in the exercise of* invalidly conferred cross-vesting jurisdiction. ‘Relevant orders’ are orders of federal courts that dismiss for want of jurisdiction proceeding relating to State matters. They are to be contrasted with order by those courts dismissing or upholding *on their merits* proceedings relating to State matter brought under cross-vesting legislation. Orders of the latter kind were invalidly made because the jurisdiction to make them depended on invalid legislation. They were orders made or purported to be made in the exercise of State jurisdiction. They may or may not be nullities.<sup>54</sup>

The essence of this reasoning is that the Federal Court orders staying the proceedings were not constitutionally defective, because they were made within that court’s jurisdiction to determine its own jurisdiction. That jurisdiction was not conferred by the State cross-vesting provisions, but by the *Federal Court Act*. The question whether orders purportedly made directly under the cross-vesting provisions were nullities was, thus, sidestepped in *Residual*. The Court also avoided directly confronting this point in the next case to consider the constitutional validity of the *State Jurisdiction Acts: Macks*.<sup>55</sup>

(b) *Macks*

Between 1995 and 1996, the Federal Court made orders under the cross-vesting provisions winding up a company, appointing a liquidator (Mr Macks) and related orders concerning the insolvency of companies in a corporate group. The Federal Court also made orders permitting the liquidator to borrow money to fund negligence proceeding in the Supreme Court of South Australia against certain persons (including Mr Saint) relating to the insolvency of the companies. The defendants in the Supreme Court proceedings sought orders in the High Court’s s 75(v) jurisdiction quashing the Federal Court orders and preventing the liquidator from taking any further action in the Supreme Court proceedings.

The applicants put their arguments on several alternative bases. First, that all orders made by the Federal Court under the invalid cross-vesting provisions were infected with jurisdictional error as a result of *Wakim* and should be quashed on that basis. Second, that, aside from s 11,<sup>56</sup> the *State Jurisdiction Acts* were invalid. Two grounds of invalidity were asserted: first, s 109 due to the inconsistency with the *Federal Court Act* and, second, ch III. The ch III arguments were put on the basis of an ‘interference with’ and/or ‘usurpation of’ federal judicial power and the *Kable* principle.<sup>57</sup> These arguments directly confronted the issue, avoided in *Residual*, whether deeming provisions could navigate around constitutionally defective orders. Third, the applicants argued that even if the *State Jurisdiction Acts* were valid, a valid order of the Federal Court was a condition precedent to their operation, and following their quashing, no such orders existed.

<sup>54</sup> Ibid 640–1. See also, Kirby J at 656–7.

<sup>55</sup> (2000) 204 CLR 158.

<sup>56</sup> Because of the earlier decision in *Residual* (2000) 202 CLR 629.

<sup>57</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (‘*Kable*’).

A majority of the Court quashed the orders of the Federal Court, but dismissed the plaintiffs' arguments on all other bases, effectively dismissing their case.

*Macks* is a complex judgment. The observation of McHugh J in relation to a suite of very difficult cases concerning the correct interpretation of s 51(vi)<sup>58</sup> applies with equal force to *Macks*: 'it is impossible to extract a ratio decidendi from...the case... [The] decision is authority...for what it decided'.<sup>59</sup> With that in mind, the following three propositions relevant to the present inquiry can be distilled from the six judgments given by the Court.

First, six judges (Kirby J dissenting) gave the *State Jurisdiction Act* deeming provisions the same non-retrospective interpretation adopted in *Humby* and *Residual*. Gleeson CJ neatly summarised this interpretation:

The State Jurisdiction Acts operate to confer, impose and affect rights and liabilities of persons. They do that by reference to ineffective judgments of the Federal Court, as defined. They do not purport to affect those judgments. They do not purport to validate ineffective judgments of the Federal Court, or to deem such judgments to be judgments of the relevant State Supreme Court.<sup>60</sup>

The same interpretation was adopted by Gaudron, McHugh, Gummow, Hayne and Callinan JJ.<sup>61</sup>

Second, following the pattern of reasoning adopted in *Humby* and *Residual*, the non-retrospective interpretation was highly influential in the Court's determination of the constitutional issues. With respect to s 109, there could be no direct inconsistency between the *State Jurisdiction Acts* and the Commonwealth Act that authorised the defective Federal Court orders, the *Federal Court Act*, because the deeming provisions simply used the Federal Court orders as the historical fact for imposing *new* rights and liabilities. Thus, they did not conflict with the Federal Court's constitutionally defective determination of rights and liabilities under the *cross-vesting provisions*.<sup>62</sup> With respect to ch III, the deeming provisions neither interfered with, nor usurped, Commonwealth judicial power, because they did not affect the Federal Court orders.<sup>63</sup> Nor could they undermine the institutional integrity of the state Supreme Courts. Following the non-retrospective interpretation, the deeming provisions created 'no judgment, whether of the Supreme Court or any other court', rather they created 'rights and liabilities';<sup>64</sup> thus they did not make state Supreme Courts 'instrument[s] of the legislature' by 'imposing statutory judgments' on, them in violation of *Kable*.

Third, all judges of the Court held that the defective orders of the Federal Court were not nullities. Different judges located the ultimate foundation of the 'bindingness' of the Federal Court orders in different places. Chief Justice Gleeson

<sup>58</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460.

<sup>59</sup> *Re Tyler; Ex parte Foley* (1994) 181 CLR 18, 37.

<sup>60</sup> *Macks* (2000) 204 CLR 158, 178.

<sup>61</sup> *Ibid* 190 (Gaudron J), 200–1 (McHugh J), 233 (Gummow J), 282–3 (Hayne and Callinan JJ).

<sup>62</sup> *Ibid* 178 (Gleeson CJ), 187–90 (Gaudron J), 209 (McHugh J), 240 (Gummow J), 281 (Hayne and Callinan JJ).

<sup>63</sup> *Ibid* 179 (Gleeson CJ), 191–3 (Gaudron J), 202–4, 209 (McHugh J), 233 (Gummow J).

<sup>64</sup> *Ibid* 286 (Hayne and Callinan JJ), 179 (Gleeson CJ), 143 (Gaudron J), 203–4 (McHugh J), 232–3 (Gummow J).

was content to point to the designation of the Federal Court of Australia as a 'superior court of record' in s 5 of the *Federal Court Act*.<sup>65</sup> The remainder of the Court, however, pointed more specifically to the scope of 'judicial power' in s 71, translated into legislative form by s 51(xxxix).<sup>66</sup> The 'bindingness' of the Federal Court orders would prevent them from being re-litigated until they were set aside.<sup>67</sup> The significance of this reasoning should not be overstated. Gaudron, McHugh, Hayne and Callinan JJ all expressly confined the 'binding effect' of the orders of the Federal Court, to orders otherwise within constitutional power. As such, the defective orders contained no 'rights and obligations' because their content was constitutionally ultra vires, and it was on this basis that the s 109 arguments ultimately failed.<sup>68</sup>

On the issue of the bindingness of the defective orders, the Court drew an extremely delicate distinction: between the jurisdiction and merits aspects of each defective order. On the one hand, the fact that each defective order was made by the Federal Court implied that a finding as to jurisdiction under s 5(2) of the *Federal Court Act* had been made.<sup>69</sup> Because the Commonwealth had constitutional power to confer on the Federal Court the power to make a determination of its jurisdiction, that implied finding meant that each order had some valid legal effect until set aside. On the other hand, the determination of rights and liabilities contained in each defective order was beyond power, thus the content, or merits, of each order could not create any rights or liabilities. However, because the two aspects of the defective orders could not be disentangled, it could not be said that the whole order was a nullity.<sup>70</sup> The reasons of McHugh J are the clearest on this point:

Although [the Federal Court] had no jurisdiction under the cross-vesting legislation, it was acting within jurisdiction when it erroneously determined by necessary implication that it had jurisdiction under the cross-vesting legislation. That is because it had jurisdiction under s 19(1) to determine whether any particular grant of original jurisdiction was validly conferred on it. In practical terms, it seems impossible to challenge the merits part of a relevant order and its continuing effect without also challenging the implied finding of jurisdiction.<sup>71</sup>

Whether anything turns on this distinction is unclear. But it is clear that this reasoning chafes against the Court's decision in *Kirk*. There, the Court held that an order of a 'superior court of record',<sup>72</sup> infected with jurisdictional error is no

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<sup>65</sup> Ibid 177–8.

<sup>66</sup> Ibid 185–6 (Gaudron J), 214–6 (McHugh J), 241 (Gummow J), 249 (Kirby J), 277 (Hayne and Callinan JJ).

<sup>67</sup> Ibid 178 (Gleeson CJ), 185 (Gaudron J), 216 (McHugh J), 237 (Gummow J), 279, 283 (Hayne and Callinan JJ).

<sup>68</sup> Ibid 188–9 (Gaudron J), 216 (McHugh J), 276 (Hayne and Callinan JJ).

<sup>69</sup> Ibid 177–8 (Gleeson CJ), 187 (Gaudron J), 215 (McHugh J), 236–7 (Gummow J), 279 (Hayne and Callinan JJ).

<sup>70</sup> This reasoning followed that adopted in *DMW v CGW* (1982) 151 CLR 491, 507 (Mason, Murphy, Wilson, Brennan and Deane JJ).

<sup>71</sup> *Macks* (2000) 204 CLR 158, 215.

<sup>72</sup> *Industrial Relations Act 1992* (NSW) s 152.

order in law.<sup>73</sup> It was no reply to the charge of jurisdictional error in *Kirk* that the designation of the Industrial Court of New South Wales as a ‘superior court of record’ conferred jurisdiction on it to determine its own jurisdiction. *Kirk* and *Macks* do not sit comfortably beside one another on the question of the bindingness of the orders of a ‘superior court of record’.<sup>74</sup>

The third context in which the Court has considered constitutional deeming provisions followed a successful challenge to the Australian Military Court (‘AMC’).

## **B** *Military Tribunals and Ch III: Invalidity and Responses*

From Federation until 2006, offences against military and civilian laws had been prosecuted within a system of courts-martial or service tribunals. The *Defence Act 1903* (Cth), *Naval Defence Act 1910* (Cth) and *Airforce Act 1923* (Cth) provided for a system of courts-martial.<sup>75</sup> Although legislation was passed in 1955<sup>76</sup> and 1982<sup>77</sup> with the objective of reforming the military justice system, such reforms were mainly cosmetic. The terminology of ‘courts-martial’ was replaced with that of ‘service tribunals’, a Defence Discipline Appeals Tribunal was created, to which decisions of service tribunals could be appealed, and the process of commanding-officer review was, to some degree, formalised. The changes wrought to the system did not, however, take military tribunals completely outside the chain-of-command.

A constitutionally significant feature of that system of military justice was that decisions of the service tribunals were not self-executing — they were automatically subject to review from a commanding officer. Although this feature of the military justice system saved it from constitutional invalidation on numerous occasions,<sup>78</sup> it also created concerns about the independence and impartiality of military tribunals.<sup>79</sup> To allay these concerns, in 2005 the Senate Foreign Affairs, Defence and Trade References Committee inquiry recommended moving military tribunals outside the chain of command.<sup>80</sup> It recommended the creation of a ch III court, with judges given the full protection of tenure provided in s 72. The Commonwealth decided to adopt a median point between the old system of service tribunals and a ch III court. The institution created to walk this middle line was the

<sup>73</sup> *Kirk* (2010) 239 CLR 531, 583 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ applying *S157* (2003) 211 CLR 476). See also at 572.

<sup>74</sup> See Will Bateman, ‘Binding and Conclusive Judicial Orders’ (forthcoming).

<sup>75</sup> Those Acts picked up and applied the laws contained in Imperial legislation concerning the ‘composition, procedures and powers’ of courts martial: *Naval Discipline Act 1866* (Imp) and *Army Act 1881* (Imp).

<sup>76</sup> *Courts-Martial Appeals Act 1955* (Cth).

<sup>77</sup> *Defence Force (Miscellaneous Provisions) Act 1982* (Cth).

<sup>78</sup> See, eg, *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452; *R v Cox; Ex parte Smith* (1945) 71 CLR 1; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; *Re Aird; Ex parte Alpert* (2004) 220 CLR 308; *White v Director of Military Prosecutions* (2007) 231 CLR 570.

<sup>79</sup> Following the challenges to tribunals drawing their antecedence from the English model for violation of constitutional and human rights in America (*Weiss v United States* 510 US 163 (1994)), Canada (*R v Généreux* [1992] 1 SCR 259) and the EU (*Findlay v United Kingdom* (1997) 24 EHRR 221; *Grievs v United Kingdom* (2004) 39 EHRR 2).

<sup>80</sup> Foreign Affairs, Defence and Trade References Committee, Commonwealth Senate, *The Effectiveness of Australia’s Military Justice System* (2005).

AMC.<sup>81</sup> Its decisions were taken outside the chain of command review structure, and integrated into the regular system of courts, by providing for an appeal to the Appeal Tribunal or the Federal Court, but its judges were not given s 72 tenure.<sup>82</sup> The decision not to create a court in accordance with s 72 augured poorly for the constitutional validity of the AMC.

## 1 *Invalidity: Lane*

The AMC was declared constitutionally invalid in *Lane*.<sup>83</sup>

The plaintiff, Mr Lane, was prosecuted in the AMC.<sup>84</sup> The defendant, Colonel Morrison, was the AMC judge assigned to hear the charge against Mr Lane. Mr Lane applied in the High Court's original jurisdiction for prohibition and a declaration that the provisions of the *Defence Force Discipline Act 1982* (Cth) creating the AMC were invalid. The Court held unanimously in favour of Mr Lane.

The Court reasoned that because AMC judges did not hold tenure under s 72, the AMC could only be constitutionally supported if its decisions could be characterised as an exercise of the power in s 51(vi) to provide for the maintenance of discipline within the defence forces.<sup>85</sup> This characterisation depended on whether decisions of the AMC remained reviewable within the chain of command.<sup>86</sup> The Court held they did not. French CJ and Gummow J focused on the fact that the decisions of the AMC were immediately effective, without the need for confirmation or approval from a commanding authority<sup>87</sup> and were, thus, 'conclusive' on the question of guilt or innocence.<sup>88</sup> For them, this feature of the AMC's decisions meant that it exercised the judicial power of the Commonwealth without compliance with s 72. Hayne, Heydon, Crennan, Kiefel and Bell JJ identified the same flaw, but also focused on the designation of the AMC as a 'court of record' in s 114(1A). For them, this designation had the effect that judgments of the AMC would preclude subsequent prosecution for the same offence in the regular criminal courts system.<sup>89</sup> The AMC's judgments would be 'binding and authoritative determination of the issues of fact and law which are tendered on the trial of an offence the elements of which are identified by the generally applicable criminal law.'<sup>90</sup> They concluded that by making binding and authoritative declarations of issues of fact and law, the AMC exercised the judicial power of the Commonwealth without compliance with s 72.

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<sup>81</sup> A less anodyne description of the compromise settled upon by the Commonwealth is given by Heydon J in *Haskins*: 'the fatal legislative mingling of boldness and pusillanimity': (2011) 244 CLR 22, 63 (Heydon J).

<sup>82</sup> *Defence Force Discipline Act 1982* (Cth) s 114.

<sup>83</sup> (2009) 239 CLR 230.

<sup>84</sup> For offences against the *Defence Force Discipline Act 1982*, picking up and applying several substantive provisions of the *Crimes Act 1900* (ACT).

<sup>85</sup> *Lane* (2009) 239 CLR 230, 237 (French CJ and Gummow J), 251 (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>86</sup> *Ibid* 250–1 (French CJ, Gummow J), 256 (Hayne, Heydon, Crennan, Kiefel and Bell JJ).

<sup>87</sup> *Ibid* 249.

<sup>88</sup> *Ibid* 248.

<sup>89</sup> *Ibid* 266.

<sup>90</sup> *Ibid*.

## 2 *Deeming legislation: Interim Measures Act 2009 (Cth)*

The Commonwealth responded to *Lane* by passing two pieces of legislation. The first, the *Military Justice (Interim Measures) Act (No 1) 2009* (Cth), restored the system of military tribunals that existed prior to the creation of the AMC. The second, the *Military Justice (Interim Measures) Act (No 2) 2009* (Cth) (*'Interim Measures Act'*) contained deeming provisions that attempted to save the punishments imposed by the AMC during its brief life.

Item 5 of sch1 of the *Interim Measures Act* relevantly provided that:<sup>91</sup>

(2) The rights and liabilities of all persons are, by force of this item, declared to be, and always to have been, the same as if...(a) the...Defence Force Discipline Act had been in force on and after the time...when the punishment or order was purportedly imposed or made; and (b) the punishment or order had instead been properly imposed or made at the punishment time, under that Act as so in force, by a general court martial.

The explanatory memorandum to the Bill spruiked the Commonwealth's desire that the Court would approach the deeming provisions in the same manner as it had in *Humby, Residual* and *Macks*:

the Bill does not purport to *validate* any convictions or punishments imposed by the AMC. Nor does the Bill purport to convict any person of any offence. Rather, the Bill, by its own force, purports to impose disciplinary sanctions.<sup>92</sup>

## 3 *Constitutional challenge: Haskins*

Before *Lane* was decided, Able Seaman Haskins was convicted by the AMC. He was sentenced to, and served, a period of detention in a military prison. Following *Lane*, Haskins brought proceedings in the original jurisdiction of the High Court seeking declarations that he was falsely imprisoned and that item 5 sch 1 of the *Interim Measures Act* did not affect his right to sue in tort or the quantum of damages due to him. The parties stated a special case putting two questions before the Full Court:

1. On its proper construction does the [Interim Measures No 2 Act] provide lawful authority justifying the detention of the Plaintiff?
2. If the answer to question 1 is 'yes', are items 3, 4 and 5 of Schedule 1 to the [Interim Measures No 2 Act] valid laws of the Commonwealth Parliament?

On the first question, Mr Haskins argued that the deeming provisions should be construed not to deprive him of his common law right to be free from unlawful imprisonment. On the second question, Mr Haskins put two arguments in favour of invalidity. First, that the Act contravened ch III by, either usurping

<sup>91</sup> Emphasis in original. Part 7 provided for review of invalid decisions of the AMC from within the command chain. Such review was automatic in the case of detention (item 26(4)), but required a person subjected to another punishment to apply within 60 days: see, eg, items 25(3), 26(3), 28(3).

<sup>92</sup> Explanatory Memorandum, *Military Justice (Interim Measures) Bill (No 2) 2009* (Cth) 2 (emphasis added).



judicial power or enacting a bill of pains and penalties and, secondly, that the Act acquired his right to sue the Commonwealth for false imprisonment without providing just terms and was accordingly invalid under s 51(xxxi).

The ch III point had significantly more strength in *Haskins* than *Humby*, *Residual* or *Macks*. In *Macks*, Gummow J observed that a non-retrospective interpretation would not exempt from ch III 'provisions for the conduct of insolvent administration which attach sanctions which involve the determination of criminal guilt. That determination is a function appropriate exclusively to the exercise of judicial power.'<sup>93</sup> Mr Haskins' case directly confronted this point. The primary authority on 'usurpation' of judicial power, *Polyukhovich v Commonwealth*, indicated that a law which 'imprisons' a person without a judicial trial usurps judicial power, as the legislature is exercising the exclusively judicial power to adjudge and punish criminal guilt.<sup>94</sup> The fly in the plaintiff's ointment was, however, that the Court has interpreted the defence power in s 51(vi) to give the Commonwealth power to imprison a person without abiding by the strictures of ch III.<sup>95</sup>

A majority of the Court (Heydon J dissenting) held against the plaintiff, answering both questions in the affirmative.<sup>96</sup> On the first question, the majority held that the Act should be construed to validate the warrant of detention under which the plaintiff's detention was obtained.<sup>97</sup> On the second question, the majority held that the Act did not offend ch III. The majority reasoned that an integer of the plaintiff's ch III argument was not made out: as a serviceman he was liable to be imprisoned by a body other than a ch III court, thus, the deeming provisions of the *Interim Measures Act* did not exercise an exclusively judicial power.<sup>98</sup>

The majority did not, however, stop there. They reasoned that the deeming provisions in the *Interim Measures Act* did not *impose* punishments on people. They were, rather, 'in the nature of an act of indemnity intended to preclude liability for past acts. More particularly...the impugned provisions sought to 'confirm irregular acts', not to void and punish 'what had been lawful when done.'<sup>99</sup> Indeed, the majority acknowledged that 'the impugned provisions seek...to *validate* the imposition of punishment that has been imposed invalidly.'<sup>100</sup> That interpretation was contrary to the interpretation suggested in the Act's explanatory memorandum.<sup>101</sup> More significantly, it differed from the approach taken by the Court in *Humby*, *Residual* and *Macks*. Those cases all stuck firmly to the position that deeming provisions did not 'affect' defective acts.<sup>102</sup> More will be said about the impact of this shift in the Court's interpretation of

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<sup>93</sup> *Macks* (2000) 204 CLR 158, 234.

<sup>94</sup> (1991) 172 CLR 501, 539 (Mason CJ), 612–4 (Deane J), 648–9 (Dawson J), 686 (Toohey J), 706 (Gaudron J), 721 (McHugh J) ('*Polyukhovich*').

<sup>95</sup> *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452; *R v Cox; Ex parte Smith* (1945) 71 CLR 1; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.

<sup>96</sup> *Haskins* (2011) 244 CLR 22.

<sup>97</sup> *Ibid* 34 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>98</sup> *Ibid* 39–40 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>99</sup> *Ibid* 38 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>100</sup> *Ibid* 40 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>101</sup> See text accompanying n 92 above.

<sup>102</sup> See text accompanying n 25, 47, 60 above.

deeming legislation in Part II. For present purposes it is enough to observe the shift and recognise that it probably occurred for two reasons. The first is the way the issues were presented to the Court in *Haskins*. In *Humby*, *Residual* and *Macks* the deeming provisions were impugned with a view to preventing future action being taken under them, thus the Court's attention was firmly on the prospective operation of those provisions. In *Haskins* the retrospective effect of the deeming legislation was the central plank of the plaintiff's argument: if its provisions operated according to their terms, they retrospectively adjusted the plaintiff's common law rights to sue the Commonwealth. In that context, the retrospective operation of the deeming legislation could not be ignored.

The second possible reason for the shift away from a non-retrospective interpretation may be that *Haskins* was decided after the Court's important decisions in *S157* and *Kirk*. Those cases held that where a statute refers to a governmental act, decision or order, it is referring to one lawfully made, a decision within jurisdiction.<sup>103</sup> It is not referring to the 'historical fact' that a decision infected with jurisdictional error had been made. This holding stands at odds with the non-retrospective interpretation of deeming legislation adopted in *Humby*, *Residual* and *Macks*. The incompatibility of the two streams of reasoning is made even more apparent when it is recalled that a want of constitutional power is a category of jurisdictional error. It is, thus, likely that the interpretation of deeming legislation adopted prior to *Haskins* cannot sit alongside that adopted in respect of privative clauses in *S157* and *Kirk* in a consistent body of jurisprudence.

The majority also held that item 5 did not contravene s 51(xxxi) because the plaintiff had no right of action against the Commonwealth for false imprisonment. This holding was based on two streams of reasoning. The first was premised on an incredibly narrow forensic point: that the plaintiff's counsel had failed properly to raise whether the warrant issued for his detention was invalid as a result of the unconstitutional order made by the AMC.<sup>104</sup> The second was based on a development of the common law: the majority held that an action for false imprisonment will not lie against a member of the armed forces 'acting in obedience to orders of superior officers implementing disciplinary decisions which, on their face, were lawful orders'.<sup>105</sup> Thus, because the serviceman who deprived Mr Haskins of his liberty was not primarily liable in tort, the Commonwealth could not be vicariously liable and so Mr Haskins had no rights against the Commonwealth that would trigger s 51(xxxi).

### ***C Deeming Legislation Following Haskins: Indemnity Acts and Retrospective Legislation***

One aspect of *Haskins* is of particular moment to the future of deeming legislation: the majority's interpretation of deeming legislation as analogous to an 'act of

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<sup>103</sup> *S157* (2003) 211 CLR 476; *Kirk* (2010) 239 CLR 531.

<sup>104</sup> *Haskins* (2011) 244 CLR 22, 43 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>105</sup> *Ibid* 48 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

indemnity intended to preclude liability for past acts.<sup>106</sup> In support of this interpretation, the majority said:

There is a long history of enactment of statutes which may treat as effective transactions which when conducted lacked legal authority, and may also exempt persons from what otherwise would be liabilities for acts purportedly done in the public service. Thus, the *Indemnity Act 1920* (UK) restricted the taking of legal proceedings in respect of certain acts done in the Great War and validated sentences, judgments and orders of certain military courts during that conflict.<sup>107</sup>

To use the majority's terminology, deeming provisions treat the AMC's orders 'as effective' even though they 'lacked legal authority'. This represents a subtle but important development in the interpretation of deeming provisions. *Humby*, *Residual* and *Macks* all firmly maintained that deeming provisions do not 'validate' constitutionally-defective acts, they simply declare future rights and liabilities modelled on those defective acts. However, by drawing an analogy with Indemnity Acts, the *Haskins* Court was referring to legislation that is understood to be retrospective.

## 1 *Indemnity Acts: Retrospectivity and Parliamentary Sovereignty*

Dicey wrote of Indemnity Acts in *The Law of the Constitution* as 'retrospective statutes which free persons who have broken the law from responsibility for its breach.'<sup>108</sup> Professor Wade also considered Indemnity Acts, including the *Indemnity Act 1920*, referred to in *Haskins*, as 'retrospective legislation'.<sup>109</sup> So too does the authority referred to in *Haskins: Phillips*.<sup>110</sup> Willes J, delivering the judgment of the Exchequer Chamber,<sup>111</sup> interpreted the Indemnity Act considered there, 'as being retrospective in character'.<sup>112</sup> If deeming legislation operates in the

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<sup>106</sup> Ibid 38.

<sup>107</sup> Ibid 38 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added and citations omitted). Conveniently, the majority neglected to note the infamy of that history. Indemnity Acts have generally been enacted following a period of revolution, rebellion or war to excuse the patently illegal acts committed by public officials during hostilities: see *Phillips v Eyre* (1870) LR 6 QB 1, 17–18 ('*Phillips*'). In England they have generally followed close on the heels of legislation suspending the issue of habeas corpus: A V Dicey, *The Law of the Constitution* (Macmillan, 10<sup>th</sup> ed, 1985) 230. Indemnity Acts are so widely recognised as fundamentally offensive to the basic values of the rule of law that even judges applying their terms have been driven to acknowledge that '[t]here can be no doubt that every so-called Indemnity Act involves a manifest violation of justice, inasmuch as it deprives those who have suffered wrongs of their vested right to the redress which the law would otherwise afford them': *Phillips v Eyre* [1869] LR 4 QB 225, 242 (Cockburn CJ, Lush and Hayes JJ). The scholarship on Indemnity Acts is sparse, but for a good coverage of their relationship to habeas corpus in England and the United States, see: Trevor Morrison, 'Suspension and the Extrajudicial Constitution' (2007) 107 *Columbia Law Review* 1533, 1544–75.

<sup>108</sup> Dicey, above n 107, 232.

<sup>109</sup> ECS Wade and WA Bradley, *Constitutional Law* (Longman, 8<sup>th</sup> ed, 1970) 47. That interpretation is reiterated in the 15<sup>th</sup> edition of that text: see AW Bradley and KD Ewing, *Constitutional Law* (Longman, 15<sup>th</sup> ed, 2011) 588.

<sup>110</sup> (1870) LR 6 QB 1.

<sup>111</sup> Affirming *Phillips v Eyre* [1869] LR 4 QB 225.

<sup>112</sup> (1870) LR 6 QB 1, 23.

same way as an Indemnity Act, as *Haskins* holds it does, then it operates retrospectively to validate all unconstitutional acts. This is a significant move away from the non-retrospective interpretation adopted in *Humby*, *Residual* and *Macks* and raises a number of problems in the Australian context.

Some of the problems with adopting the English law on Indemnity Acts in the context of Australian deeming legislation are exposed by considering an argument made in *Phillips*.<sup>113</sup> The plaintiff in *Phillips* argued that the Indemnity Act passed following the Morant Bay Rebellion in Jamaica was 'contrary to natural justice' and should not be applied by an English court.<sup>114</sup> The Exchequer Chamber rejected that argument, holding that 'to affirm that it is naturally or reasonably unjust to take away a vested right of action by act [sic] subsequent, is inconsistent both with the common law and constant practice of legislation.'<sup>115</sup> That holding was premised on the principle of parliamentary sovereignty, because the plaintiff's argument assumed the power of an English court to refuse to apply legislation. Dicey referred to Indemnity Acts as 'the last and supreme exercise of parliamentary sovereignty' because they 'legalise illegality'.<sup>116</sup> Wade also cited Indemnity Acts as illustrative of the proposition that 'the validity of an Act of Parliament cannot be questioned by the courts which are bound to accept as law the validity of all parliamentary enactments.'<sup>117</sup> Thus, Indemnity Acts are saved from impeachment in England by the operation of the principle of parliamentary sovereignty. However, that principle cannot be invoked to save deeming legislation in the Australia constitutional context. Rather, the text and structure, and the decisional law, of the *Australian Constitution* provide the legal principles against which deeming legislation should be measured. Part II considers the operation of those principles to deeming legislation, in light of the interpretation adopted in *Haskins*.

### III Deeming Legislation: Australian Constitutional Dimensions

Arguments against deeming legislation have focused, in the main, on the principles of ch III. As Part I observed, until *Haskins* those arguments were rebuffed by adopting a non-retrospective interpretation of deeming legislation. Given the shift away from that interpretation, it is important to reconsider the applicability of some of those principles. Section 51(xxxi) is another area where the Court's shift in *Haskins* is likely to have significant consequences. Before considering the applicability of the principles of ch III and s 51(xxxi), a brief word should be said of the principles surrounding the heads of legislative power in s 51 and s 109.

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<sup>113</sup> Ibid.

<sup>114</sup> Ibid 23.

<sup>115</sup> Ibid.

<sup>116</sup> Dicey, above n 107, 413.

<sup>117</sup> ECS Wade and WA Bradley, *Constitutional Law* (Longman, 8<sup>th</sup> ed, 1970) 47.

## A Commonwealth Legislative Power: s 51

The heads of legislative power in s 51 have been considered in two contexts in the deeming legislation cases. The first has been to inquire whether the deeming provisions answered the description of ‘laws with respect to’ a head of power in s 51.<sup>118</sup> This is an entirely proper line of inquiry as it must be established whether a valid head of power exists before turning to consider constitutional limitations.

The second context in which s 51 has appeared is more problematic. Several members of the Court in *Humby*, *Residual* and *Macks* suggested that, ignoring the defective orders, the Commonwealth (in *Humby*) and the states (in *Residual* and *Macks*) had power to achieve the result obtained by constitutionally defective legislation by alternative means. In *Humby* Stephen J noted that counsel had conceded that ‘it would be within power for the legislature, under s 51 (xxii), to provide for divorce without recourse to a judicial proceeding. It is equally within power to legislate in respect of ancillary relief in terms that do not involve a determination by means of a judicial proceeding.’<sup>119</sup> In *Macks*, Gummow J endorsed Stephen J’s comments in *Humby* and suggested that a similar concession applied in *Macks* because ‘the winding up of companies in insolvency at least as regards the change in status that is brought about by making of the winding up order...may be effected by legislative authority.’<sup>120</sup>

The relevance of these remarks is not entirely clear. If they are taken as gratuitous gems of judicial advice, they are unobjectionable.<sup>121</sup> Such remarks are more difficult to justify if they indicate that deeming provisions are unobjectionable because an alternative method of legislative implementation existed. There are many instances where a policy *could* be implemented in a constitutionally valid manner, but is not. The Inter-State Commission *could* have been saved if its members were given tenure in accordance with s 72,<sup>122</sup> as *could* the various incarnations of the Commonwealth industrial court.<sup>123</sup> However, to point to possible alternative, constitutionally valid, methods of implementation of policies as curative of the unconstitutional method chosen is to put the cart before the horse. The relevant question is what is to be done about the constitutionally defective governmental acts that *were* performed. It is not relevant to inquire as to what could have been done if history were different.

With that rider in mind, the strongest proposition that can be distilled from *Humby*, *Residual* and *Macks* on this point is that when the subject-matter of a deeming provision falls within a subject-matter of s 51, it will be within Commonwealth legislative power.<sup>124</sup> To state this proposition does not, however, foreclose further inquiry.<sup>125</sup> The Court has drawn a distinction between a grant of

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<sup>118</sup> See *Humby* (1973) 129 CLR 231, 238–9 (McTiernan J), 248 (Mason J).

<sup>119</sup> *Ibid* 243.

<sup>120</sup> *Macks* (2000) 204 CLR 158, 234; see similar comments by Gleeson CJ, at 176.

<sup>121</sup> See *Momcilovic v The Queen* (2011) 280 ALR 221259 (French CJ), 392–3 (Crennan and Kiefel JJ).

<sup>122</sup> *New South Wales v Commonwealth* (‘*The Wheat Case*’) (1915) 20 CLR 54.

<sup>123</sup> *Waterside Workers’ Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434; *Boilermakers* (1956) 94 CLR 254.

<sup>124</sup> A point recognised by McHugh J in *Macks* (2000) 204 CLR 158, 200.

<sup>125</sup> As Heydon J recognised in *Haskins* (2011) 244 CLR 22, 56–7.

legislative power and limitation on legislative power.<sup>126</sup> In the context of deeming legislation, examination of legislative power under s 51 only addresses the first of these two tasks.

## **B *Inconsistent State Laws: s 109***

As observed in Part I, the arguments made in *Residual* and *Macks* that state deeming provisions conflicted with the *Federal Court Act* were dismissed for two reasons. First, by adopting a ‘non-retrospective’ interpretation, the Court held that because the deeming provisions simply used the defective federal orders as referents for the imposition of new rights and liabilities, they could not conflict with a Commonwealth law. Second, because the substantive criteria on which the Federal Court orders were based were unconstitutional, they could not contain any rights or liabilities with which a state law could conflict.

The second of these two reasons exposes the fundamental flaw in applying s 109 arguments in the context of state deeming provisions. When stripped back to their essential components, those arguments operate on the logic that a state law that creates rights and liabilities that conflict with governmental acts done pursuant to invalid Commonwealth legislation are invalid under s 109. That logic is faulty for the simple reason that a constitutionally defective act cannot produce any rights or obligations with which a state law can conflict.<sup>127</sup> It was that faultiness that drove the plaintiffs in *Macks* to argue that the defective orders of the Federal Court were not nullities. It is an indication of the Court’s determination to uphold the deeming provisions in *Macks* that even though the Court agreed they were not nullities, s 109 was still given no role to play. This aspect of *Macks* was unaffected by the interpretation given to the impugned deeming legislation. Thus, even given the shift in *Haskins* away from the non-retrospective interpretation, the fundamental flaw still lies at the heart of any argument for invalidity premised on s 109.

## **C *The Separation of Judicial Power: Ch III***

Ch III arguments for the invalidity of deeming provisions have been roundly unsuccessful. In *Humby*, *Residual* and *Macks*, such arguments were rejected on the basis of the non-retrospective interpretation given to the deeming provisions.<sup>128</sup> However, as observed in Part I, the majority in *Haskins* signalled a shift away from the non-retrospective interpretation given to deeming provisions. Given this shift, it is worth revisiting the possible applicability of ch III arguments premised on interference with, and usurpation of, judicial power to deeming provisions.

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<sup>126</sup> See, eg, *Macks* (2000) 204 CLR 158, 201, 207–8 (McHugh J).

<sup>127</sup> This point underpins the reasoning of McHugh J in *Macks* (2000) 204 CLR 158, 194–5.

<sup>128</sup> See above, text accompanying n 25, 47, 60.

## 1 *Interference with Judicial Power and Deeming Provisions*

Despite being enlisted in many arguments based on ch III,<sup>129</sup> it is not entirely clear what constitutes an ‘interference’ with judicial power. ‘Interference’ appears as a protean concept: what will constitute ‘interference’ changes according to the context in which it is deployed. In some contexts, ‘interference’ may connote an attempt to meddle in a case pending before a court, by changing the law applicable in the proceeding or statute-barring the plaintiff’s claim.<sup>130</sup> In other contexts, ‘interference’ may connote an attempt to confer a function on a court that is ‘contrary to the manner of judicial power’.<sup>131</sup> With the prominent exception of the Court’s decision in *Lim*,<sup>132</sup> arguments based on ‘interference’ of judicial power have been unsuccessful.

In the context of deeming legislation an ‘interference’, argument could be made that such legislation ‘interferes’ with Commonwealth judicial power by attempting to reverse the judicial order that declared unconstitutional the legislation on which the defective orders were premised. A consequence of an order that legislation is constitutionally invalid is that governmental acts made under that legislation are themselves invalid. Legislation that sought to ‘validate’ those defective acts would be an operational reversal of the court’s decision; and thus an ‘interference’ with that exercise of judicial power.

Prima facie, deeming provisions could fall foul of such reasoning. They seek to reverse the effect of an exercise of the exclusive judicial power to determine the constitutional validity of governmental acts. The principle in *Marbury v Madison*, said to be axiomatic in the *Constitution*,<sup>133</sup> holds that it is the responsibility of the judiciary to declare the boundaries of constitutional power. And a weighty plurality of the Court has held that the power to determine the constitutional validity of legislation is exclusively judicial.<sup>134</sup>

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<sup>129</sup> See, eg, *AEU* (2012) 286 ALR 625; *MZXOT v Minister for Immigration and Citizenship* (2008) 23 CLR 601; *Nicholas v The Queen* (1998) 193 CLR 173; *Polyukhovich* (1991) 172 CLR 501; *Australian Building Construction Employees’ & Builders Labourers’ Federation v Commonwealth* (1986) 161 CLR 88; *Sorby v Commonwealth* (1983) 152 CLR 281.

<sup>130</sup> Peter Gerangelos, ‘The Separation of Powers and Legislative Interference in Pending Cases’ (2008) 30 *Sydney Law Review* 61; ‘The Decisional Independence of Chapter III Courts and Constitutional Limitations on Legislative Power: Notes from the United States’ (2005) 33 *Federal Law Review* 391; ‘The Separation of Powers and Legislative Interference with Judicial Functions in Pending Cases’ (2002) 30 *Federal Law Review* 1.

<sup>131</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ); Will Bateman, ‘Procedural Due Process under the Australian Constitution’ (2009) 31 *Sydney Law Review* 411, 417–18.

<sup>132</sup> In *Lim*, the Court held invalid a number of provisions (ss 54L, 54N and 54R) of the *Migration Act 1958* (Cth) that enjoined all courts, including the High Court, from releasing an unlawfully detained person was an ‘interference’ with judicial power and invalid: (1992) 176 CLR 1.

<sup>133</sup> *Communist Party Case* (1951) 83 CLR 1, 262 (Fullagar J).

<sup>134</sup> *S157* (2003) 211 CLR 476, 514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); James Stellios, *The Federal Judicature: Chapter III of the Constitution* (Butterworths, 2010) 213.

## 2 *Usurpations of Judicial Power and Deeming Provisions*

A usurpation of judicial power occurs when the legislature exercises judicial power: it is a ‘legislative judgment’ limitation.<sup>135</sup> In this sense, the prohibition on ‘usurpation’ of judicial power is, ultimately, an expression of the first limb of the *Boilermakers* principle, which prohibits judicial power from being exercised by a body other than a ch III court.<sup>136</sup> While the precise metes and bounds of the ‘usurpation’ principle are not clear-cut,<sup>137</sup> it is settled that where the legislature exercises an exclusive judicial power, such as the power to ‘adjudge and punish criminal guilt’, it usurps judicial power.<sup>138</sup> As the Court held in *S157*,<sup>139</sup> the power to determine the constitutionality of governmental Acts is exclusively judicial. Accordingly, deeming provisions may ‘usurp’ judicial power, in the sense of the legislature exercising the exclusive judicial power to determine the constitutional validity of legislation.

## 3 *Ch III and Deeming Legislation: Conclusion*

Despite the prima facie applicability of both interference and usurpation arguments to deeming legislation, such arguments would be stymied by a non-retrospective interpretation of deeming. There would be no ‘interference’ with, nor usurpation of, judicial power because deeming legislation would not retrospectively ‘validate’ the defective orders. However, the shift in *Haskins* towards construing such legislation as analogous to Indemnity Acts breathes life into those ch III arguments, on the basis that the retrospective ‘validation’ of constitutionally defective orders constitutes an operational reversal of the Court’s decision on invalidity or an exercise of the exclusive judicial power to determine constitutional validity of governmental acts. Equally fruitful is the argument that arises under s 51(xxxi), the constitutional guarantee against acquisitions of property without just terms.

### D *Private Law Claims and Constitutionally Defective Acts: s 51(xxxi)*

It is significant that the majority in *Haskins*<sup>140</sup> did not generally reject the applicability of an argument based on s 51(xxxi). Rather, they dismissed the plaintiff’s s 51(xxxi) argument by concluding that he never had a right to sue in

<sup>135</sup> *Polyukhovich* (1991) 172 CLR 501, 539 (Mason CJ), 612–4 (Deane J), 648–9 (Dawson J), 686 (Toohey J), 706 (Gaudron J), 721 (McHugh J); *Nicholas v The Queen* (1998) 193 CLR 173, 220 (McHugh J).

<sup>136</sup> *Ibid* 536 (Mason CJ); Leslie Zines, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008) 282–5.

<sup>137</sup> A number of judges in *Nicholas v The Queen* suggest that the usurpation principle has some role to play in circumscribing the legislature’s power to deem facts to exist: (1998) 193 CLR 173, 190 (Brennan CJ), 232, 236 (Gummow J), 278 (Hayne J); *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 166 (Gummow, Hayne, Heydon and Crennan JJ).

<sup>138</sup> *Polyukhovich* (1991) 172 CLR 501, 539 (Mason CJ), 612–14 (Deane J), 648–9 (Dawson J), 686 (Toohey J), 706 (Gaudron J), 721 (McHugh J).

<sup>139</sup> (2003) 211 CLR 476, 514 (Gaudron, McHugh, Gummow, Hayne and Kirby JJ).

<sup>140</sup> (2011) 244 CLR 22, 41–2 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).



false imprisonment, thus saying nothing about the position of deeming legislation deployed against a person who has a right to sue the Commonwealth. Once it is appreciated that the Court has moved away from a non-retrospective interpretation of deeming legislation, by viewing such legislation as analogous to Indemnity Acts, there appears to be much scope for the operation of s 51(xxxi).

Several doctrinal propositions should be recognised at the outset of any examination of the relevance of s 51(xxxi) to deeming provisions. First, a breach of the *Constitution* does not create a private law action against the Commonwealth, the states or private entities.<sup>141</sup> Rather than adopting the American expedient of conceiving of a violation of constitutional prohibitions as creating a ‘constitutional tort’,<sup>142</sup> the High Court views the private law consequences of government actions undertaken in violation of the *Constitution* solely in terms of the pre-existing principles of common law and equity.<sup>143</sup> Thus, a person who has suffered loss as a result of an act done in violation of the *Constitution* must frame any claim for relief within the parameters of the general law.

Second, a declaration of constitutional invalidity can lead to the creation of a common law right to recover money from the Commonwealth, the states and private parties. This proposition merits a review of the most frequently invoked private law action in this context, the restitutionary claim for money had and received under unconstitutional legislation.<sup>144</sup>

## E *Private Law Actions to Recover Money Levied under Unconstitutional Statutes*

### 1 *Restitution Claims and s 92*

The first case clearly to suggest that a government act done in violation of the *Constitution* can create a common law right was *Antill Ranger*.<sup>145</sup> In that case, the Court was presented with New South Wales legislation<sup>146</sup> that attempted to abolish the right to recover money paid under legislation, the *State Transport (Co-ordination) Act 1931–1951* (NSW) (‘*State Transport Act*’), which had been declared unconstitutional for contravention of s 92 by the Privy Council.<sup>147</sup> Dixon CJ and McTiernan, Williams, Webb, Kitto and Taylor JJ reasoned that a provision

<sup>141</sup> *Antill Ranger* (1955) 93 CLR 83, 99 (Dixon CJ, McTiernan, Williams, Webb, Kitto and Taylor JJ); *Kruger v Commonwealth* (1997) 190 CLR 1, 46–47 (Brennan CJ) 93 (Toohey J), 125–6 (Gaudron J), 146–8 (Gummow J).

<sup>142</sup> *Bivens v Six Unknown Named Agents*, 403 US 388 (1971).

<sup>143</sup> This view of the interaction between unconstitutional acts and general law rights can be seen as an accommodation of the principle that the common law must conform to the *Constitution*: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 556, 566 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>144</sup> Many of these cases were decided during the point of transition from quasi-contract to restitution, but the latter term is used for ease of reference: See Keith Mason, John Carter and Greg Tolhurst, *Restitution Law in Australia* (LexisNexis, 2<sup>nd</sup> ed, 2008) 13–33.

<sup>145</sup> (1955) 93 CLR 83.

<sup>146</sup> *State Transport Co-ordination (Barring of Claims and Remedies) Act 1954* (NSW).

<sup>147</sup> *Hughes & Vale Pty Ltd v New South Wales (No 1)* (1954) 93 CLR 1, reversing the High Court in *Hughes & Vale Pty Ltd v New South Wales* (1953) 87 CLR 49.

which sought to validate governmental acts that are invalid under s 92, itself infringed s 92.<sup>148</sup> The most important aspect of *Antill Ranger* is not what it held, but what it assumed. The silent premise on which that case proceeded was that an action for money had and received lay against a state for money paid under legislation subsequently adjudged unconstitutional: a proposition affirmed in *Mason v New South Wales*.<sup>149</sup>

In *Mason*, the plaintiffs brought the same claim as *Antill Ranger*, but unlike *Antill Ranger*, the appeal focused, not on whether a claim against New South Wales could be statute barred, but whether such a claim existed at all. The Court focused, for the most part, on the scope of ‘compulsion’ in an action for money had and received. To succeed in its claim, on the state of the law at the time,<sup>150</sup> the plaintiffs had to prove that they had not voluntarily made the payment, which, in turn, required them to prove that they had protested the authority of New South Wales to collect money.

A majority of the Court (Dixon CJ, Fullagar, Kitto, Menzies and Windeyer JJ, McTiernan J dissenting) held in favour of the plaintiffs, holding that the threat of prosecution or seizure of a vehicle for transporting without a licence was sufficient to render the payments compulsory.<sup>151</sup>

## 2 *The Constitutional Significance of the s 92 Cases*

*Mason*, *Carter* and *Tolhurst* confine the significance of *Antill Ranger* and *Mason* to an extension of the concept of ‘compulsion’<sup>152</sup> or certain propositions regarding the constitutional validity of ‘statutory shields’.<sup>153</sup> Despite the eminence of those authors, it is submitted that the significance of these cases runs far deeper. If the Privy Council had not invalidated the *State Transport Act* it would have been irrelevant that officers of New South Wales had threatened to seize the plaintiffs’ vehicles or prosecute them for failing to possess a licence. It was a want of constitutional power that gave the plaintiffs a prima facie right to recover their funds in *Mason*.<sup>154</sup> This was highlighted by the observations of Dixon CJ and Menzies J. The Chief Justice observed that ‘[w]e are dealing with the assumed possession by the officers of government of what turned out to be a void authority’,<sup>155</sup> while Menzies J wryly commented, ‘to put it bluntly, the charges were unlawfully exacted’.<sup>156</sup> The principle that underpins these cases is that where

<sup>148</sup> (1955) 93 CLR 83, 101. See also Fullagar J at 103. The same conclusion was reached in *Barton v Commonwealth* (1959) 97 CLR 633.

<sup>149</sup> (1959) 102 CLR 108 (*Mason*).

<sup>150</sup> As will be discussed below, the law changed after *Mason*: see the discussion of *British American* (2003) 217 CLR 30, text accompanying n xx, below.

<sup>151</sup> (1959) 102 CLR 108, 117 (Dixon CJ) 124 (Fullagar J), 129 (Kitto J), 130 (Taylor J), 133 (Menzies J), 146 (Windeyer J).

<sup>152</sup> See, *Mason*, *Carter* and *Tolhurst*, above n 144, 792.

<sup>153</sup> *Ibid* 794–6, 800.

<sup>154</sup> Professor Birks interprets *Mason* along the same lines: Peter Birks, ‘Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights’ in Paul Finn (ed) *Essays on Restitution* (1990) 164, 188–90.

<sup>155</sup> (1959) 102 CLR 108, 117.

<sup>156</sup> *Ibid* 133–4. Similar emphasis appears in the reasons of Kitto J (122) and Windeyer J (140).

money is levied under unconstitutional legislation a person who paid that money has a right to recover it. That same proposition is the basis of the decisions in *Roxborough v Rothmans Pall Mall Pty Ltd*<sup>157</sup> and *British American*.<sup>158</sup>

### 3 *Restitution Claims and s 90*

The plaintiffs *Roxborough* and *British American* brought claims for money had and received following the Court's decision in *Ha v New South Wales*.<sup>159</sup> *Ha* held that a 'franchise fee' for a licence to sell tobacco was an excise within the meaning of s 90 of the *Constitution*, and thus could only be validly imposed by the Commonwealth, not the states.<sup>160</sup> The wash-up of *Ha* was that all funds collected by the states under the invalid franchise fee scheme were retained without legal authority. The legislation declared invalid in *Ha* permitted a wholesaler to pass the cost of the excise on to the retailer,<sup>161</sup> who would inevitably pass it on again to the customer in the form of a higher price of cigarettes. Retailers who paid wholesalers amounts representing the licence fee declared unconstitutional in *Ha* commenced proceeding seeking repayment of those amounts in *Roxborough*.<sup>162</sup>

By majority (Kirby J dissenting), the Court ruled in favour of the retailers, holding that the High Court's decision in *Ha* caused a total failure of consideration, permitting the retailer to recover money advanced on the expectation that it would be paid by the wholesaler to the state.<sup>163</sup> The Court's consideration of the issues in *Roxborough* proceeded, alike *Antill Ranger* and *Mason*, on the basis of the principles of the general law: the majority's central focus was on the contractual relationship between the retailers and the wholesalers. The declaration of constitutional invalidity was treated as a factual event: it was the event that removed the basis on which the consideration had been advanced. Thus, like *Antill Ranger* and *Mason*, the declaration of unconstitutionality was the event that enlivened the plaintiff's right to restitution. However, unlike *Antill Ranger* and *Mason*, *Roxborough* concerned a claim between two private parties. A claim for restitution by a taxpayer against a state for money paid under the legislation declared unconstitutional in *Ha* was the basis of the claim litigated in *British American*.

In *British American*, like *Antill Ranger*, the Court's attention was not focused on the substantive right to recover, but upon the attempt of Western Australia to limit that right to recover. Western Australia argued the appellant's right to proceed was conferred by s 5 of the *Crown Suits Act 1947* (WA) and that s 6 of that Act time-barred *British American*'s claims for recovery of the taxes paid under the legislation declared invalid in *Ha*. The Court unanimously disagreed. All judges held that a proceeding to recover an unconstitutional tax was in federal jurisdiction as a 'matter...arising under' the *Constitution*, s 76(i)), thus s 79 of the *Judiciary Act* could only pick up ss 5 and 6 of the *Crown Suits Act* if no federal

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<sup>157</sup> (2001) 208 CLR 516.

<sup>158</sup> (2003) 217 CLR 30.

<sup>159</sup> (1997) 189 CLR 465 ('*Ha*').

<sup>160</sup> *Ibid.*

<sup>161</sup> *Business Franchise Licences (Tobacco) Act 1987* (NSW).

<sup>162</sup> (2001) 208 CLR 516.

<sup>163</sup> *Ibid* 528–9 (Gleeson CJ, Gaudron and Hayne JJ), 558 (Gummow J), 589 (Callinan J).

law ‘otherwise provided’ a right to proceed against Western Australia. Gleeson CJ (Kirby J agreeing) held that the *Constitution* itself provided the right to proceed,<sup>164</sup> while McHugh, Gummow and Hayne JJ (Callinan J agreeing) held that s 39(2) of the *Judiciary Act* (conferring s 76(i) jurisdiction on state courts) ‘otherwise provided’.<sup>165</sup> Both views of the right to proceed meant that s 79 could not pick up s 6 to time-bar British American’s claims against Western Australia.

En route to this conclusion, a majority of the Court recognised the general principle that ‘[t]he common law of Australia is to the effect that, at least in certain circumstances, when a public authority purports to impose, and collects, a tax which is beyond its power, a taxpayer may sue to recover the tax.’<sup>166</sup> McHugh, Gummow and Hayne JJ observed that: ‘[s]ince the decision of this Court in *David Securities Pty Ltd v Commonwealth Bank of Australia*, a mistake...as to the validity of the [invalid State excise Acts], a matter of law, would not stand in the way of a claim for money had and received put on [the] ground of mistaken payment.’<sup>167</sup> The reference to *David Securities*<sup>168</sup> is significant in this context, as it recognised that a mistake of law is sufficient to ground a claim for restitution.

#### 4 *Restitution Cases: Conclusion*

A public lawyer wandering through the thicket of private law doctrine can lose sight of the constitutional significance of the restitution cases. All cases proceeded on the basis that the High Court’s or the Privy Council’s declaration of invalidity gave rise to a right to proceed against the Commonwealth, a state or a private party to recover money paid under the unconstitutional statute. The most important feature of the restitution cases is that a declaration of invalidity brought the plaintiff’s common law right into existence. This feature has particular significance for the application of s 51(xxxi), the *Constitution*’s guarantee of just terms for the acquisition of property, a guarantee that includes acquisitions of incorporeal property such as choses in action.

#### F *Rights to Sue the Commonwealth and s 51(xxxi)*

The foregoing analysis of the restitution cases makes abundantly clear that a governmental act made under legislation subsequently adjudged unconstitutional can create a private law cause of action against the Commonwealth or a state. Once this is recognised, the remaining steps in the s 51(xxxi) argument are short indeed.

Section s 51(xxxi) prevents the Commonwealth from ‘acquiring’ ‘property’ without providing just terms. ‘Property’ includes ‘choses in action’.<sup>169</sup> For property

<sup>164</sup> (2003) 217 CLR 30, 43–7 (Kirby J agreeing at 87).

<sup>165</sup> Ibid 58–9 (Callinan J agreeing at 90).

<sup>166</sup> Ibid 42 (Gleeson CJ), 53 (McHugh, Gummow and Hayne JJ), 69 (Kirby J).

<sup>167</sup> Ibid 53 (footnotes omitted).

<sup>168</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

<sup>169</sup> *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416, 559 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 290 (Starke J).

to be ‘acquired’, it is generally ‘not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be.’<sup>170</sup> This statement has sometime been enlisted to argue that simply ‘extinguishing’ a legal right is not an ‘acquisition’.<sup>171</sup> Those arguments have been unsuccessful where the rights ‘extinguished’ lie against the Commonwealth.<sup>172</sup> *Georgiadis* and *Mewett* held that ‘a right of action against the Commonwealth is “property” within the meaning of s 51(xxxi) and a law which extinguishes such a right of action may bear the character of a law with respect to the acquisition of property.’<sup>173</sup> Where the Commonwealth extinguishes a person’s right to sue it, it acquires an interest in the right, to the value of the claim against it.

### 1 *The Constitutional Prohibition on Self-Indemnification: s 51(xxxi)*

A deeming provision is no less an ‘extinguishment’ of a person’s right to sue the Commonwealth for action taken under an unconstitutional statute than the provisions considered in *Georgiadis* and *Mewett*. The form of words is different, but the effect is the same: a person who once possessed a right to sue the Commonwealth to recover money collected under an invalid statute, has that right abolished. It could be countered, as McHugh J opined in dissent in *Georgiadis* that ‘it is difficult to see how the retrospective abolition of an element of a cause of action can constitute an acquisition of property’ for s 51(xxxi).<sup>174</sup> But that view of s 51(xxxi) did not prevail in *Georgiadis*, nor in *Mewett*, and the case law does not disclose any reason for applying it to deeming legislation.

The foregoing considerations should be sufficient to make good the proposition that the Commonwealth cannot ‘indemnify’ itself against claims based on constitutionally defective acts. Section 51(xxxi) operates explicitly to prevent it from doing so. However, other principles could be invoked to achieve the same outcome. In *Mewett* a majority of the Court held that s 75(iii) entrenched a right to proceed against the Commonwealth in private law, and, thus, forever abrogated the Commonwealth’s immunity from suit.<sup>175</sup> The judgment of Gummow and Kirby JJ, with whom Brennan CJ concurred, pointed to a number of reasons why the traditional conception of crown immunity could not be comfortably accommodated in the Australian constitutional context. The most relevant of those reasons was that:

litigation by which an individual or corporation seeks redress for tortious injury to private or individual rights by government action in administration of

<sup>170</sup> *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480, 499–500 (Mason CJ, Brennan, Deane and Gaudron JJ citing *Tasmanian Dams* (1983) 158 CLR 1, 145 (Mason J)).

<sup>171</sup> *Georgiadis v Australian & Overseas Telecommunications Corporation* (1994) 179 CLR 297 (‘*Georgiadis*’); *Commonwealth v Mewett* (1997) 191 CLR 471 (‘*Mewett*’).

<sup>172</sup> The situation is quite different if the rights extinguished lie against persons other than the Commonwealth: see recently, *JT International SA v Commonwealth* [2012] HCA 43 (5 October 2012).

<sup>173</sup> *Wurridjal v Commonwealth* (2009) 237 CLR 309, 361 (French CJ) citing *Georgiadis* (1994) 179 CLR 297; *Mewett* (1997) 191 CLR 471; *Smith v ANL Ltd* (2000) 204 CLR 493.

<sup>174</sup> (1994) 179 CLR 297, 328.

<sup>175</sup> (1997) 191 CLR 471.

a law which the plaintiff asserts was not authorised by the *Constitution* but upon which the defendant relies for justification of the alleged tortious conduct.<sup>176</sup>

They continued, speaking of the Commonwealth's argument that, absent legislation conferring a right to proceed, crown immunity would attach to private law claims flowing from unconstitutional acts:

[t]o deny such a claim on the footing that, in the absence of enabling legislation, the Crown can do no wrong and cannot be sued in its own court would be to cut across the principle in *Marbury v Madison*. It would mean that the operation of the Constitution itself was crippled by doctrines devised in other circumstances and for a different system of government.<sup>177</sup>

The majority's decision in *Haskins* that a deeming provision is 'in the nature of an act of indemnity'<sup>178</sup> against a private law action premised on a breach of the *Constitution* comes dangerously close to similarly cutting across the principle of judicial review, axiomatic to the *Constitution*.<sup>179</sup>

## G *The States and Cooperative Federalism*

### 1 *State Deeming Legislation*

A complication arises in the context of the deeming provisions considered in *Residual* and *Macks*. In both cases, a Commonwealth instrumentality (the Federal Court) had performed acts that were without any constitutional authority. But, it was state, not Commonwealth, legislation that had deemed those acts valid and, thus, on the *Haskins* view, indemnified the Commonwealth against future liability. Because s 51(xxxi) does not apply to the states,<sup>180</sup> it may be argued that the states are free, within their plenary legislative power, to pass deeming legislation indemnifying the Commonwealth (or themselves). There are, however, a number of problems with this reasoning, at both the level of detailed application and high constitutional principle.

Turning first to the detail, there is a battery of problems associated with defining state legislative power as 'plenary'. The Court has recently disapproved of the terminology 'plenary power'. In *Queanbeyan City Council v ACTEW Corporation Ltd*,<sup>181</sup> French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ said that the expression 'plenary power...is apt to mislead, or at least to confuse, when applied to the structure created for Australia by the *Constitution*.'<sup>182</sup> A

<sup>176</sup> Ibid 548 (Gummow and Kirby JJ: Brennan J agreeing at 491).

<sup>177</sup> Ibid.

<sup>178</sup> (2011) 244 CLR 22, 38.

<sup>179</sup> *Communist Party Case* (1951) 83 CLR 1.

<sup>180</sup> *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.

<sup>181</sup> (2011) 281 ALR 671.

<sup>182</sup> Ibid 674; see also *Rowe v Electoral Commissioner* (2011) 243 CLR 1, 14 (French CJ); *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 117 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). It should be acknowledged that the Court's attitude to the concept of 'plenary power' has shifted considerably since 1996; see, eg, *Newcrest Mining (WA) Ltd v*

number of provisions of the *Constitution* limit the legislative powers of the states. Section 90 prevents the states from imposing duties of excise. Sections 114 and 115 prevent the states from ‘raising forces’ or ‘coining money’. Section 52 prevents the states from legislating with respect to the ‘seat of government’, ‘Commonwealth places’ and the Commonwealth ‘public service’. The *Constitution* also imposes implied limits on the powers of the states to legislate with respect to the Commonwealth and its officers<sup>183</sup> and ch III imposes a number of limitations on the states.<sup>184</sup> In light of these limitations it appears unwise to put too much faith in the legislative power of the states.

Second, turning to high principle, it would be a distortion of basic constitutional values to permit a state legislature to ‘acquire’ the rights of people who have suffered a loss as a result of the unconstitutional acts of Commonwealth government officers. To permit such an indemnity would allow the total circumvention of the guarantee in s 51(xxxi) in all cases where the Commonwealth and the states could reach political agreement. In this context it appears appropriate to reiterate one of Sir Owen Dixon’s favourite maxims: ‘in relation to constitutional guarantees and prohibitions...; you cannot do indirectly what you are forbidden to do directly’.<sup>185</sup> The reasoning of Fullagar J in *Antill Ranger* is directly on point:

If the unlawfulness of the exaction depended upon State law, the State could, of course, by statute make the exaction retrospectively lawful, or abolish the common law remedy in respect of the exaction. But the unlawfulness of the exaction does not depend upon State law. It depends on the Constitution. No State law can make lawful, either prospectively or retrospectively, that which the Constitution says is unlawful. And that is what s. 3 of the Act of 1954 in substance purports to do, when it says that every cause of action arising out of an exaction made unlawful by the Constitution shall be ‘extinguished’.<sup>186</sup>

This reasoning seems to foreclose the argument that a state can indemnify itself or the Commonwealth from claims based on constitutionally defective acts. It would be a perverse outcome indeed if a state were prevented from extinguishing (an option foreclosed by *Antill Ranger*) or statute barring (an option foreclosed by *Antill Ranger* and *British American*) such a private law right, but could simply acquire that right without providing compensation, while protesting that s 51(xxxi) does not apply to the states.

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*Commonwealth* (1997) 190 CLR 513, 540 (Brennan CJ), 548 (Dawson J), 575 (McHugh J), 654–5 (Kirby J), but see 604–5 (Gummow J).

<sup>183</sup> *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410; *Commonwealth v Cigamatic Pty Ltd* (1962) 108 CLR 372.

<sup>184</sup> *Wakim* (1999) 198 CLR 511; *Kable* (1996) 189 CLR 51.

<sup>185</sup> *Georgiadis* (1994) 179 CLR 297, 305 (Mason CJ, Deane and Gaudron JJ citing *Bank Nationalisation Case* (1948) 76 CLR 1, 349–50 (Dixon J); *Wragg v State of New South Wales* (1953) 88 CLR 353, 387–8 (Dixon CJ); *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 169, 371 (Dixon CJ); *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 78 (Dixon CJ, McTiernan, Webb and Kitto JJ)); *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516, 522–3 (Mason CJ, Gaudron and McHugh JJ).

<sup>186</sup> (1955) 93 CLR 83, 103.

## 2 *Co-operative Federalism*

It could be argued that the foregoing problems can be simply circumvented by relying on a co-operative federal solution. Such a solution might provide that where an act is constitutionally defective because of a want of power that is unique to the Commonwealth or a state, the other constitutional entity can supply the necessary power by a deeming provision. In one sense that is what occurred following *Wakim*. The acts of a Commonwealth institution, the Federal Court, were prohibited by the *Constitution*, but the same acts would have been valid in a state court. The states promptly legislated to supply the constitutional foundation, thus restoring the validity of the Commonwealth acts. Such a solution is attractive because the heads of legislative power in s 51 do not limit the states. Only s 109 prevents the operation of state laws that conflict with a Commonwealth law validly made under s 51.<sup>187</sup>

To use the terminology adopted in *Haskins*, the operational effect of these Acts is that one polity in the federation ‘indemnifies’ the constitutionally defective acts of another. Such solutions draw heavily on the once fashionable concept of co-operative federalism.<sup>188</sup> Given the High Court’s express disavowal of that concept in *Wakim*<sup>189</sup> it is unlikely alone to provide a strong constitutional foundation for co-operative solutions to constitutionally defective acts. What should have been clear following the *Communist Party Case*, is put beyond doubt by *Wakim*: political agreement, even federal-state consensus, cannot overcome the express terms of the *Constitution*.<sup>190</sup>

### H *Conclusion: Constitutional Difficulties with Deeming Provisions*

The central difficulty presented by deeming provisions is that they invert the institutional hierarchy presupposed by *Marbury v Madison* judicial review. Under that system of constitutional review, the judiciary is charged with determining the constitutional limitations on the powers of the various arms of government. Any attempt by the legislature to second-guess the judiciary’s assessment of the limitations of its constitutional power is inconsistent with that system. Such an attempt would simply be an iteration of the deficiency identified in the *Communist Party Case*: it would be an invalid attempt by the Parliament to ‘recite itself into a field the gates of which are locked against it by superior law.’<sup>191</sup>

A recognition of this difficulty lay behind the reasoning of McHugh J in *Coleman v Power* when he said that ‘a constitutional prohibition or immunity

<sup>187</sup> A species of the same solution was adopted following the Court’s decision in *Ha* by the passage of the *Franchise Fees Windfall Tax (Collection) Act 1997 (Cth)*, the *Franchise Fees Windfall Tax (Imposition) Act 1997 (Cth)* and the *Franchise Fees Windfall Tax (Consequential Amendments) Act 1997 (Cth)*. These Acts were mentioned in passing in *British American*, but no clue was given as to their operation or validity: (2003) 217 CLR 30, 49–50.

<sup>188</sup> *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535.

<sup>189</sup> (1999) 211 CLR 511, 544–5 (Gleeson CJ), 548–50 (McHugh J), 577 (Gummow and Hayne JJ).

<sup>190</sup> Nor, would it appear, is the Court kind towards indirect attempts to circumvent s 51(xxxi): *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 170 (French CJ, Gummow and Crennan JJ), 198 (Hayne, Kiefel and Bell JJ).

<sup>191</sup> (1951) 83 CLR 1, 263 (Fullagar J).



extends to invalidating not only a law directly infringing the prohibition or immunity but also any consequential law that seeks to validate conduct that occurred under the first law.’ He then quoted Viscount Simonds in the Privy Council appeal in *Antill Ranger*:

Neither prospectively nor retrospectively (to use the words of Fullagar J) can a State law make lawful that which the Constitution says is unlawful. A simple test thus appears to be afforded. For if a statute enacted that charges in respect of inter-State trade should be imposed and that, if they were held to be illegally imposed and collected, they should nevertheless be retained, such an enactment could not be challenged if the illegality of the charge rested only on the then existing State law ... But it is otherwise if the illegality arises out of a provision of the Constitution itself. Then the question is whether the statutory immunity accorded to illegal acts is not as offensive to the Constitution as the illegal acts themselves...<sup>192</sup>

It is clear that the ‘simple test’ of which Viscount Simonds spoke, has not carried the day. An enormous amount of ‘Baroque’<sup>193</sup> complexity has accreted around the Court’s consideration of deeming legislation. Notwithstanding that complexity, the central difficulty remains that deeming legislation is a legislative mechanism and, as such, a flawed attempt to circumvent the hierarchy inherent to *Marbury v Madison* judicial review. Judicial mechanisms for addressing the occasionally drastic consequences of constitutional invalidity have been adopted in other jurisdictions. Those mechanisms, and their possible applicability in Australia, are considered in Part IV.

## IV Alternatives to Deeming Legislation

It appears to be accepted in every mature constitutional system that occasionally the consequences of a declaration of constitutional invalidity are so perilous that the void ab initio doctrine cannot apply with full effect. In America, the Supreme Court has formulated a doctrine of prospective overruling and applied the de facto officer doctrine. The applicability of such mechanisms in Australia would depend on their conformability to the *Constitution*. Before moving to consider these doctrines, it is worth reflecting briefly on the existing resources that may be available at common law to achieve a similar end.

### A *The Common Law: Res Judicata and Issue Estoppel*

The common law contains principles that could operate in the same field as constitutional deeming legislation; most notably the principles of res judicata and issue estoppel. Those principles operate to prevent the re-litigation of matters that have been decided by a court. The difference between res judicata and issue estoppel is that:

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<sup>192</sup> *Coleman v Power* (2004) 220 CLR 1, 63 (footnotes omitted).

<sup>193</sup> To appropriate the terminology used by Cowen and Zines to describe the relationship between s 122 and ch III: Cowen and Zines, above n 19, 172, cited in *Wakim* (1999) 198 CLR 511, 594 (Gummow and Hayne JJ).

in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.<sup>194</sup>

At first blush, these principles could appear to save judicial orders from being re-litigated following a declaration of constitutional invalidity, because the cause of action has merged in the orders. However, upon closer inspection, such principles are poorly equipped to respond to the issues that arise in the wake of a declaration of constitutional invalidity.

The doctrine of *res judicata* and the principles of issue estoppel only operate in respect of an order or determination made within jurisdiction.<sup>195</sup> In the case of *res judicata*, causes of action only ‘merge’ in the final orders of a court of ‘competent jurisdiction’.<sup>196</sup> If a court purports to make an order outside its jurisdiction there is no merger. The same limitation applies to issue estoppel: a plea of issue estoppel cannot be raised with respect to a determination of fact or law made beyond jurisdiction.<sup>197</sup> Given that an order made by a court in breach of a constitutional limitation is a species of jurisdictional error, it is clear that neither *res judicata* nor issue estoppel can save a constitutionally defective judicial order.

The difficulty with relying on the common law rules of *res judicata* and issue estoppel in a constitutional context are exposed when they are applied to the cases considered in Part II. The orders invalidated in *Knight* and *Kotsis* could not have been protected by *res judicata*, because the High Court held that the registrars and masters who made the orders were never invested with jurisdiction under the *1959 Act*. A variant of the same shortcoming would apply in relation to the defective orders of the AMC considered in *Haskins*. Given that the AMC was never properly constituted under ch III, because of the failure to provide tenure in accordance with s 72, the AMC simply never had any jurisdiction to make any orders at all. It is more difficult to draw clear conclusions on this point from *Macks*, because the Court pointedly refused to view the case in terms of the doctrine of *res judicata*.<sup>198</sup> In some respects, *Macks* seems the perfect vehicle to consider the interaction of constitutional principles and *res judicata*, but the Court preferred to view the ‘binding’ effect of its orders by reference to the designation of the Federal Court as a ‘superior court of record’. One could surmise that the reluctance of the Court to discuss *res judicata* was an indication of its

<sup>194</sup> *Blair v Curran* (1939) 62 CLR 464, 532 (Dixon J) quoted in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 597 (Gibbs CJ, Mason and Aickin JJ).

<sup>195</sup> *Hoysted v Federal Commissioner of Taxation* (1926) 37 CLR 290, 303 (Lord Shaw speaking for the Privy Council); *Jackson v Goldsmith* (1950) 81 CLR 446, 460 (Williams J); *Re Jackson; Ex parte Amalgamated Engineering Union (Australian Section)* (1937) 38 SR (NSW) 13, 20 (Jordan CJ).

<sup>196</sup> *Attorney-General for Trinidad and Tobago v Eriche* [1893] AC 518, 522 (Lord Hobhouse speaking for the Privy Council).

<sup>197</sup> *King v Henderson* [1898] AC 720, 730 (Lord Watson speaking for the Privy Council).

<sup>198</sup> The only judge to mention the doctrine, McHugh J, dismissed its relevance: ‘the application of the doctrine of *res judicata* where constitutional issues have been at stake, does not arise for consideration here.’ *Macks* (2000) 204 CLR 158, 177–8.

inapplicability. The statements of the Court concerning the operation of res judicata in a constitutional context certainly point in that direction.<sup>199</sup>

It should come as no surprise that res judicata and issue estoppel cannot respond to the problems caused by constitutionally defective judicial orders. Those principles evolved in the English constitutional system, which contains no concept of constitutional invalidity and, as such, were never designed to accommodate the issues that arise in the wake of cases such as *Wakim* and *Lane*. The other common law mechanism which has been suggested as curative of constitutionally defective acts is the de facto officer doctrine and, like res judicata and issue estoppel, it is poorly suited to deployment in the Australian constitutional context.

## B *The De Facto Officer Doctrine*

The de facto officer doctrine has been mooted as a mechanism for dealing with the more acute problems arising from constitutionally defective acts.<sup>200</sup> That doctrine operates to validate the decisions of a person occupying a public office where that person has no lawful right to occupy that office. If the powers of such a person were exercised under *colour of office*, certain of their acts have legal consequences.

Despite the superficial attraction of the de facto officer doctrine, care must be taken lest its relevance be overstated. In the three instances of invalidation discussed in Part I, the de facto officer doctrine would have no application to the orders invalidated in *Knight*, *Kotsis* or *Wakim*. In *Knight* and *Kotsis*, the question was not whether masters or registrars were validly or invalidly appointed. Rather, the constitutional objection was that they simply did not form part of the ‘court’ into which the Commonwealth had vested federal jurisdiction. That objection was, in the main, determined on the basis of an investigation of the state legislation that constituted the Supreme Court. The masters and registrars had good title to the offices they occupied. The question was simply whether those offices formed part of the ‘court’ spoken of in ss 71 and 77(iii). Nor could the doctrine assist with validating order made by judges invalidly exercising state judicial power in *Wakim*. Judges of the Federal Court of Australia held office under the *Federal Court Act*. There was never any contest as to their title to hold that office.

The de facto officer doctrine could, possibly, have had an effect on the question of the validity of the AMC’s orders following *Lane*. Following *Lane*, a person convicted by the AMC would have call to protest that the judge had no title to the office of judge of the AMC. The majority in *Haskins*, however, expressly refused to consider whether the doctrine had any valid application in the case,<sup>201</sup>

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<sup>199</sup> See, *Queensland v Commonwealth* (1977) 139 CLR 585, 597 (Gibbs J), 605 (Stephen J), 615 (Aickin J); *Wakim* (1999) 198 CLR 511, 564–5 (McHugh J), 590 (Gummow and Hayne JJ).

<sup>200</sup> See, Owen Dixon, ‘De Facto Officers’ (1938) 1 *Res Judicatae* 285, 285; Leslie Katz, ‘Ex parte Daniell and the Operation of Inoperative Laws’ (1976) 7 *Federal Law Review* 66, 70–71; Clifford L Pannam, ‘Unconstitutional Statutes and De Facto Officers’ (1966) 2 *Federal Law Review* 37; Campbell, ‘Unconstitutionality and Its Consequences’, above n 11, 94–9.

<sup>201</sup> *Haskins* (2011) 244 CLR 22, 42 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

reiterating the Court's position in *Bond v The Queen* that the doctrine has no application where the relevant defect in title is a constitutional defect.<sup>202</sup>

In *Bond*, the Commonwealth Director of Public Prosecutions ('CDPP') had instituted an appeal against a sentence imposed by the Supreme Court of Western Australia. As an incident of the cross-vesting scheme declared invalid in *Wakim*, the states had conferred power on the CDPP to prosecute offences against the states' *Corporations Laws*. The CDPP had exercised this power in relation to the initial prosecution and the appeal. The High Court held, solely on the basis of the interpretation of the state and Commonwealth Acts,<sup>203</sup> that although the CDPP had power to prosecute the appellant, it did not have power to institute an appeal against the sentence imposed.<sup>204</sup>

*Bond* also had a constitutional dimension, as the Court held that if the state legislation did confer a power to appeal on the CDPP it would be inconsistent with the narrower powers given to the CDPP by Commonwealth legislation and invalid under s 109.<sup>205</sup> Western Australia argued that the de facto officer doctrine could save the exercise of power by the CDPP from constitutional invalidity. This argument was rejected for two reasons. First, the Court confined the doctrine solely to acts concerning title to hold an office, and reasoned that there was no argument that the CDPP validly held his office.<sup>206</sup> Second, and more fundamentally, the Court held that the doctrine had no application where the 'the question of the power of the particular officer of the Commonwealth is...a question arising under the *Constitution* or involving its interpretation'. Signalling the de facto officer doctrine's death knell in the constitutional context, the Court held:

[the question of the powers of the particular officer] cannot be resolved by ignoring the alleged want of power on some basis of colourable or ostensible authority let alone, as would be necessary in this case, on the basis that the bare fact of the purported exercise of a power is to be accorded some constitutional significance. If, as is the case here, s 109 operates to invalidate State legislation which purports to confer power on an officer of the Commonwealth, that constitutional consequence of the inconsistency between State and Commonwealth laws cannot be ignored.<sup>207</sup>

This emphatic rejection leaves little room for the operation of the de facto officer doctrine in the Australian constitutional context.

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<sup>202</sup> (2000) 201 CLR 213, 225 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*Bond*').

<sup>203</sup> Following the earlier decision of *Byrnes v The Queen* (1999) 199 CLR 1.

<sup>204</sup> (2000) 201 CLR 213, 223 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>205</sup> *Ibid* 220, 225 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>206</sup> *Ibid* 225 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ). In so ruling, the Court followed the lead of the US Supreme Court in *Norton v Shelby County*, (1886) 118 US 425.

<sup>207</sup> *Bond* (2000) 201 CLR 213, 225 (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

### C *Prospective Overruling*

Another possible mechanism for ameliorating the extreme inconvenience that can flow from constitutional invalidity is prospective overruling.<sup>208</sup> For a time, this mechanism was adopted by the Supreme Court of the United States,<sup>209</sup> but has now fallen into disrepute.<sup>210</sup> It is similarly out of favour with the High Court. In *Ha*, the Court rejected a submission that it should prospectively overrule a long-standing line of prior authority on the basis that to overrule prospectively is to exercise a non-judicial power:

This Court has no power to overrule cases prospectively. A hallmark of the judicial process has long been the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct. The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power. Prospective overruling is thus inconsistent with judicial power on the simple ground that the new regime that would be ushered in when the overruling took effect would alter existing rights and obligations.<sup>211</sup>

The Court's refusal to adopt the doctrine of prospective overruling was not simply the outcome of a mechanical application of the *Boilermakers* doctrine. It was also motivated by fundamental principles of fairness and constitutionalism:

If an earlier case is erroneous and it is necessary to overrule it, it would be a perversion of judicial power to maintain in force that which is acknowledged not to be the law. This would be especially so where, as here, non-compliance with a properly impugned statute exposes a person to criminal prosecution.<sup>212</sup>

When compared with the Court's attitude towards deeming provisions that reasoning seems a little Janus-faced. The operational effect of the legislation implemented in the wake of *Knight*, *Kotsis*, *Wakim* and *Lane* was that decisions made without any constitutional foundation were saved, including those decisions that brought about criminal consequences. In that way the deeming legislation maintained 'in force that which is acknowledged not to be the law'. The Court's hostility towards prospective overruling seems impossible to reconcile with its amenability towards deeming legislation. Despite this discontinuity, the Court has firmly turned its face against prospective overruling.

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<sup>208</sup> See, Pannam, above n 200, 65–9; Campbell, 'Unconstitutionality and Its Consequences', above n 11, 99–106; Campbell, 'Retrospectivity of Judicial Decisions', above n 11, 68–71.

<sup>209</sup> See *Chicot County Drainage District v Baxter State Bank*, 308 US 371 (1940); *Linkletter v Walker*, 381 US 618 (1965); *Chevron Oil Co v Huson*, 404 US 97 (1971). The Court of Justice of the European Union adopted a similar practice: see generally, Campbell, 'Retrospectivity of Judicial Decisions', above n 11, 72–4.

<sup>210</sup> See *Harper v Virginia Department of Taxation* 509 US 86 (1993).

<sup>211</sup> (1997) 189 CLR 465, 504–5 (Brennan CJ, McHugh, Gummow and Kirby JJ, Dawson, Toohey and Gaudron JJ agreeing at 515).

<sup>212</sup> *Ibid* 505.

## V Conclusion

Underlying deeming legislation, and doctrines such as the de facto officer and prospective overruling, is a recognition that, in certain instances, a declaration of constitutional invalidity can bring about extreme inconvenience. ‘Inconvenience’ has been recognised as a potential downside to the power of the judiciary to determine the constitutional validity of governmental acts. In *HC Sleight Ltd v South Australia*<sup>213</sup> Mason J observed that:

[g]enerally speaking, the Court should be slow to depart from its previous decisions, especially in constitutional cases where the overturning of past decisions may well disturb the justifiable assumptions on which legislative powers have been exercised by the Commonwealth and the States and on which financial appropriations, budget plans and administrative arrangements have been made by governments.<sup>214</sup>

That statement is premised on the recognition that judicial review of the constitutional validity of governmental acts, be they legislative, executive or judicial, carries with it potential to wreak great social, political and economic inconvenience. Care must be taken, however, lest the significance of ‘inconvenience’ be overstated.

From one perspective, any inconvenience caused by a declaration of constitutional invalidity is not, nor could it ever be, germane to the task of constitutional review. Such a conclusion follows from a basal principle of constitutionalism: the rules of a constitution exist *ex ante*, not *ex post*, the political or economic organisation of a given society. Accordingly, any inconvenience caused by a declaration concerning those boundaries could be viewed as the cost of bringing an unlawful state of affairs into constitutional regularity. Such a view privileges a formalistic view of constitutional law.

Another perspective would emphasise the general recognition that different judges see the constitutional text in different ways. From such a perspective any suggestion that the inconvenience caused by a declaration of invalidity is irrelevant to a constitutional court would appear simplistic and narrow. Such a view would privilege a sociological view of constitutional law.

Underpinning each perspective is an unstated, non-legal, position regarding the values which attach to constitutional law and to ‘the law’ more generally. Underlying the first, formalistic, view is a strong adherence to a Diceyan model of the rule of law: that law, and the enforcement of the law, has inherent value. Underlying the second, sociological, view is an equally strong adherence to an instrumentalist model of law: that law, and the enforcement of the law, only has value relative to its capacity to promote other, non-legal, values.

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<sup>213</sup> (1977) 136 CLR 475.

<sup>214</sup> *Ibid* 501. See also *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 56–8 (Gibbs CJ); *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438–9 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

Once it is accepted that both views have a place in a constitutional system, the difficult issue becomes locating the point of compromise between the two. Deeming legislation is a legislative mechanism for brokering that compromise, while the *de facto* officer doctrine and prospective overruling are judicial mechanisms. For the reasons set out in Part II, there are serious doctrinal problems with relying on a legislative mechanism in the Australian constitutional context. The mechanisms set out in Part III have their own shortcomings, chief amongst which is their disavowal by the High Court. In light of those circumstances, the future is uncertain. Perhaps a better solution lies in recognising that in the rare circumstances when fidelity to the *Constitution* produces perilously inconvenient consequences a declaration of invalidity will only operate prospectively: a doctrine of prospective invalidation. Such a principle would operate outside the currently accepted process of judicial decision-making in constitutional cases — new ground would need to be struck. This would, of course, involve the difficult process of constructing a judicially applicable standard for determining when circumstances are sufficiently ‘perilous’ to declare a law prospectively invalid. A consideration of the amount, nature and consequences of the governmental acts performed under the invalid legislation could be useful criteria to flesh out such a test. The Court’s disavowal of any doctrine of prospective overruling is an additional difficulty.

However, despite these difficulties, such a doctrine would address the chief problem with relying on deeming legislation to respond to the problems occasionally created by a declaration of constitutional invalidity: such legislation exists under the *Constitution* and, as such, its capacity to supply deficiencies in governmental power caused by a want of constitutional power is always limited. Thus, an enduring solution to the problems presented by the perilous consequences of constitutional invalidity will need to be fashioned by the institution charged with the exclusive responsibility for determining the boundaries of constitutional power, the judiciary.

