Autochthonous Essential: State Courts and a Cooperative National Scheme of Civil Jurisdiction

REID MORTENSEN*

'... laws exist ... for the convenience of lay people who sue and are sued.'

Sir Frederick Pollock[1]

Civil Jurisdiction in Australia

Through the 1980s and 1990s, Australian governments and courts developed a uniform scheme for the exercise of civil jurisdiction across the country. The twentieth century saw increasing recognition that within federal and complex political associations, there is generally a positive relationship between the ability of courts to enforce their judgments throughout a federal or transnational market area and its economic and social integration.[2] However, a willingness to let courts' judgments 'circulate' freely over internal borders in a multistate area also suggests confidence that those courts exercise proportionate civil jurisdictions that are acceptable to all of its polities.

In Australia, where civil judgments have long had the freest circulation over State borders,[3] a common scheme of civil jurisdiction for all courts emerged after the cross-vesting scheme began in 1988 and reforms to territorial jurisdiction in the early 1990s. Although there were qualifications and exceptions at the edges, the scheme rested on the absolutely free circulation of all federal and State courts' civil process and judgments throughout the nation. To ensure that litigation was then dealt with in the best placed court, whether federal or State, it limited the

* Reader in Law, Centre for Public, International and Comparative Law, University of Queensland.

1 M Howe (ed), *Holmes-Pollock Letters: The Correspondence of Mr Justice Holmes and Sir Frederick Pollock 1874-1932* (1942) vol 1, 8; see F Burt, 'An Australian Judicature' (1982) 56 *Australian Law Journal* 509, 509.

2 Largely stimulated by work in the European Union: see A Dashwood, R J Hacon and R C A White, *Civil Jurisdiction and Judgments Convention* (1987) 5; J Newton, *The Uniform Interpretation of the Brussels and Lugano Conventions* (2002) 38-41.

3 *Service and Execution of Process Act 1901* (Cth) ss 20-1; *Service and Execution of Process Act 1992* (Cth) ss 104-9.

exercise of jurisdiction by a judge's decision to direct litigation to the *forum conveniens*, or 'most appropriate court'. Those simple principles balanced the sometimes competing goals of the quality of justice (in having litigation decided in the best placed or most expert court) and its speed (in limiting the time spent in court on deciding which court was best). By and large they worked, until *Gould v Brown*[4] and *Re Wakim: Ex parte McNally*[5] revealed a major structural problem with the involvement of federal courts in the cross-vesting scheme.

In *Gould* the federal courts' place in the national civil jurisdiction scheme was maintained on a procedural technicality, but this did not save it when in *Wakim* the High Court held that federal courts could not exercise non-federal jurisdictions and therefore could have only a limited role in the cross-vesting scheme. *Wakim* caused a haemorrhaging of litigation from the federal courts; especially corporations work in the Federal Court, which it almost lost completely. It also revived vague limits to the subject-matter jurisdictions of federal courts, which have promoted inefficient litigation about jurisdictional boundaries. *Wakim* has therefore provoked calls for major reform: by either constitutional amendment,[6] or restructuring the court system.[7] However, four years later the calls have become whispers.

4 (1998) 193 CLR 346.

5 (1999) 198 CLR 511.

6 R Baxt, 'The *Wakim* Decision' (1999) 17 *Company and Securities Law Journal* 518, 519; I Govey and H Manson, 'Measures to Address *Wakim* and *Hughes*: How the Reference of Powers Will Work' (2001) 12 *Public Law Review* 254, 258-9 G Hill, 'The Demise of the Cross-vesting Scheme' (1999) 27 *Federal Law Review* 547, 571; D Lam, '*Wakim*' (2000) 22 *Sydney Law Review* 155, 174; J Lovric, '*Re Wakim*: An Overview of the Fallout' (2000) 19 *Australian Bar Review* 237, 283; G Orr, 'The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective' (2000) 11 *Public Law Review* 117, 119; S Riley, '*Re Wakim; Ex Parte McNally*: Towards an Integrated and Efficient Judicial System or Towards Further Illogical Developments in the Administration of Australian Law? A Difficult Choice' (2000) 18 *Company and Securities Law Journal* 455, 469-70; C Saunders, 'A New Direction for Intergovernmental Arrangements' (2001) 12 *Public Law Review* 274, 282-5, 286; B M Selway, '*Hughes* Case and the Referral of Powers' (2001) 12 *Public Law Review* 288, 300, 300; J Silverii, 'On the Record' *Law Institute Journal*, September 2002, 18, 21; D Williams, 'Shaping Family Law for the Future' (Speech given at the National Press Club, Canberra, 27 October 1999) 8 ('*Shaping Family Law*'); 'Judicial Power and Good Government' (2000) 11 *Public Law Review* 133, 138 ('*Judicial Power*'); 'Constitutional Change in Australia' (Paper presented at the Australian Association of Constitutional Law National Conference, Perth, 22 September 2001) 3 ('*Constitutional Change*'); G Williams, 'Cooperative Federalism and the Revival of the Corporations Law: *Wakim* and Beyond' (2002) 20 *Company and Securities Law Journal* 160, 169-70.

7 L Aitken, 'The Toils of Laocoon: Aspects of Federal Jurisdiction after *Wakim*' (2000) 19 *Australian Bar Review* 223, 234; G L Davies, 'A Uniform Court System after

Why is this so? Governments have patched some of the injuries caused by *Wakim*: cleaning up the cross-vesting legislation to reflect its true status after *Wakim*;[8] easing the relocation of litigation that had been commenced, improperly, in a federal court;[9] and salvaging invalid judgments made by federal courts under the scheme.[10] More significantly, the Federal Court regained its corporations jurisdiction. The loss of this work had been its greatest concern, and fuelled much of the debate about a cure for *Wakim*. In 2001, the States referred power to the Commonwealth to legislate on corporations;[11] federalising the field by allowing the passage of the *Corporations Act 2001* (Cth) and the Federal Court to again deal with most kinds of corporations work. That seems to have stifled enthusiasm for further reform of civil jurisdiction in Australia.

However, the structural problems with federal courts' jurisdiction, which *Wakim* both revealed and caused, have not been addressed. Further, the patching that has been done has been inconsistent. No measures have been taken to stem the loss of work from the Family Court. Additionally, no measures other than the corporations reference have prevented the loss

McNally'(Paper presented at the 17th Annual Conference of the Australian Institute of Judicial Administration, Adelaide, 6-8 August 1999); J Wade, '*Re Wakim* – A Way Forward' (2000) 11 *Australian Journal of Corporate Law* 273.

8 This has not occurred in the Northern Territory. See *Jurisdiction of Courts Legislation Amendment Act 2000* (Cth) sch 1 [57]-[69]; *Jurisdiction of Courts Legislation Amendment Act 2001* (ACT) s 3 sch 1.21; *Federal Courts (Consequential Provisions) Act 2000* (NSW) s 3 sch 1.6; *Federal Courts (Consequential Amendments) Act 2001* (Qld) ss 37-45; *Statute Amendment (Federal Courts-State Jurisdiction) Act 2000* (SA) ss 36-41; *Federal Courts (Consequential Amendments) Act 2001* (Tas) ss 34-40; *Federal Courts (Consequential Amendments) Act 2001* (Vic) ss 24-7; *Acts Amendment (Federal Courts and Tribunals) Act 2001* (WA) ss 23-9.

9 *Federal Courts (State Jurisdiction) Act 1999* (ACT) s 11; *Federal Courts (State Jurisdiction) Act 1999* (NSW) s 11; *Federal Courts (State Jurisdiction) Act* (NT) s 11; *Federal Courts (State Jurisdiction) Act 1999* (Qld) s 11; *Federal Courts (State Jurisdiction) Act 1999* (SA) s 11; *Federal Courts (State Jurisdiction) Act 1999* (Tas) s 11; *Federal Courts (State Jurisdiction) Act 1999* (Vic) s 11; *Federal Courts (State Jurisdiction) Act 1999* s 11 (WA) (collectively the '*State Jurisdiction Acts*'). The validity of this provision was upheld in *Residual Assco Group Limited v Spalvins* (2000) 172 ALR 366.

10 *State Jurisdiction Acts* s 6; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 177 ALR 329; P H Lane, 'State Reference of Corporate Matters to the Commonwealth' (2001) 75 *Australian Law Journal* 289, 289.

11 As allowed by *Constitution* (Cth) s 51(xxxvii). See *Corporations (Commonwealth Powers) Act 2001* (NSW); *Corporations (Commonwealth Powers) Act 2001* (Qld); *Corporations (Commonwealth Powers) Act 2001* (SA); *Corporations (Commonwealth Powers) Act 2001* (Tas); *Corporations (Commonwealth Powers) Act 2001* (Vic); *Corporations (Commonwealth Powers) Act 2001* (WA) (collectively called the '*Corporations Referral Acts*'). See Govey and Manson, above n 6; Saunders, above n 6, 282-5; Selway, above n 6; G Williams, above n 6.

of commercial litigation from the Federal Court. Even the federalising of corporations law has failed to return to the Federal Court the corporations work it had before *Wakim*. The State Supreme Courts still hear most corporations applications, and the corporations workload in the Federal Court is only about a quarter of what it was in the mid-1990s,[12] and even that sits on an unstable foundation. The corporations reference remains on a statutory basis only until mid-2006, after which it is left to the State governments to extend it by proclamation.[13] Without an extension, the *Corporations Act* loses its constitutional validity. As happened with the premonition in *Gould* of the cross-vesting scheme's collapse,[14] even more corporations work will migrate to State Supreme Courts if in the next few years there is any sign of State ambivalence towards continuing the reference.[15]

This article is therefore an attempt to maintain debate about the need for structural reform to civil jurisdiction in Australia, and to give more definition to proposals to use State courts as the medium for that reform. It outlines how, before *Wakim*, a scheme developed by which litigation in Australia was sorted between courts by reference to the principle of *forum conveniens*. *Wakim*, its implications, and the qualifications it brought to the scheme are then discussed. Finally, the options for jurisdictional reform, including constitutional amendment, are dealt with, leading to the proposal for reviving the central role of the principle of *forum conveniens* in allocating jurisdiction in a national cooperative scheme of State courts.

Locating Litigation in Australia

The allocation of litigation by reference to the *forum conveniens* assumes that all courts in the federation have a right to exercise any jurisdiction, leaving the identification of the best court for the litigation to judicial discretion: a decision as to whether a proper jurisdiction that *can* be exercised *should*. Accordingly, the scheme rests on every court's right to exercise complete territorial and subject-matter jurisdiction in all proceedings in which a defendant has been served inside Australia. Inferior courts necessarily operate under restrictions on their subject-matter jurisdiction and, after *Wakim*, federal courts cannot be given complete subject-matter jurisdiction. Even so, that simple principle of

12 Federal Court, *Annual Report 2002-2003* (2003) 122 ('*Federal Court Report 2003*').

13 *Corporations Act 2001* (Cth) s 2; *Corporations Referral Acts* ss 6(1), 7.

14 See the decline in corporations applications from 1996: Federal Court, *Annual Report 1999-2000* (2000) 135 ('*Federal Court Report 2000*').

15 Cf G Williams, above n 6, 170.

forum conveniens is not self-evident in the legislation that constructs the scheme, and is nowhere stated explicitly. How a national civil jurisdiction scheme arose, and reached this point, therefore needs some reconstruction – by reference to its conceptual and chronological development.

Interstate Jurisdiction: Early Schemes

The traditional grounds on which State (and colonial) courts in Australia exercised jurisdiction over defendants in other States were based on order 11 of the English *Supreme Court Rules*.[16] This was a rules-based scheme of jurisdiction, requiring a nexus between the country or State and, usually, the subject-matter of the claim. The Australian progeny of order 11, though, followed two lines of descent. First, State Supreme Courts adopted and developed their own order 11 rules for extraterritorial service of writs, whether in another State or country. Secondly, since 1886, federal legislation has set its own order 11 rules for service of State (and colonial) writs within the federal area. The Federal Council of Australasia provided common rules of jurisdiction in the *Australasian Civil Process Act 1886*, and these were carried over *in toto* by the Commonwealth's *Service and Execution of Process Act 1901*.[17] The Act of 1901 also deepened the scheme by allowing the interstate service of inferior court - as well as Supreme Court - writs.[18] Under the Act, a writ could be served in another State without leave,[19] but where the defendant did not appear the court had jurisdiction only if there was a qualifying nexus with the State.[20] For example, jurisdiction could be exercised if the action related to land in the State, a contract made in the State, a contract broken in the State, an act that was done in the State, and so on.[21] These grounds of jurisdiction were generally interpreted along the same lines as the parallel grounds in order 11.[22] However, where the State Supreme Courts

16 See *Common Law Procedure Act 1852* (UK) ss 18-19, 123 (15 and 16 Victoria c 76).

17 The status of the English order 11 rules in the 1880s and 1890s is given in AV Dicey, *Conflict of Laws* (1st ed, 1896) 238-57. At this stage, in contrast to the various Australian rules, the English rules did not provide for service outside England when the action related to a contract made, or an act done, in England.

18 *Service and Execution of Process Act 1901* (Cth) s 3(c).

19 *Service and Execution of Process Act 1901* (Cth) s 4; *Australasian Civil Process Act 1886* (FCA) s 3.

20 *Service and Execution of Process Act 1901* (Cth) s 11; *Australasian Civil Process Act 1886* (FCA) s 8.

21 *Service and Execution of Process Act 1901* (Cth) ss 11(1)(a)-(d); *Australasian Civil Process Act 1886* (FCA) ss 8(1)-(4). Unlike order 11, the Acts of 1886 and 1901 also dealt with jurisdiction in matrimonial causes – based on the respondent's domicile in the State: *Service and Execution of Process Act 1901* (Cth) s 11(1)(f); *Australasian Civil Process Act 1886* (FCA) s 8(6).

22 E I Sykes and M C Pryles, *Australian Private International Law* (3rd ed, 1991) 53.

gradually expanded their order 11 jurisdictions, those in the Act of 1901 were barely ever touched:[23] in 1993 (when its repeal took effect) its rules of jurisdiction differed little from those of 1886.

From the beginning, adjudication on the interstate service of civil process accepted that the Supreme Courts' order 11 rules co-existed with the Act of 1901.[24] This enabled each State to set more generous interstate jurisdictions than those in the federal Act. For example, the New South Wales (NSW) rule allowing service outside the State just because a person received some medical treatment in NSW demanded (and still demands) only the slimmest connection with the State for the Supreme Court to exercise jurisdiction.[25] When this rule was considered in 1987 in *Flaherty v Girgis*,[26] Deane J said that if he could begin afresh, he would have held that the Act of 1901 was a code for interstate service and that States could not set rules like this for reaching defendants in other States.[27] Still, his Honour concurred in the High Court's decision endorsing the concurrence of the States' order 11 jurisdictions and those of the Act of 1901.[28] The State Supreme Courts could improve their interstate reach beyond what was possible under the federal Act by unilaterally altering their own rules.[29] Inferior courts' interstate jurisdictions were limited to those within the Act of 1901.[30]

23 The Act was amended to allow interstate service of process when a State court was exercising jurisdiction in a matrimonial cause under the *Matrimonial Causes Act 1945* (Cth): *Matrimonial Causes Act 1945* (Cth) s 16.

24 *Renton v Renton* (1918) 25 CLR 291, 298; *Luke v Mayoh* (1921) 29 CLR 435, 438-9; *Jones & Co Ltd v Gardner Bros* (1921) 23 WALR 23; *Kundt v Kundt* [1927] SASR 426; *Dowd v Dowd* [1946] SRQ 16; *Aston v Irvine* (1955) 92 CLR 353, 364; *KW Thomas (Melbourne) Pty Ltd v Groves* [1958] VR 189, 193; *Laurie v Carroll* (1958) 98 CLR 310, 322-3; *Ex parte Iskra*; *Ex parte Mercantile Transport Co Pty Ltd* (1962) 80 WN (NSW) 923. Supreme Court rules also operated concurrently with the *Australasian Civil Process Act 1886* (FCA): cf *Melbourne Chilled Butter Proprietary Company Limited v Dounes* (1900) 25 VLR 559.

25 *Supreme Court Rules 1970* (NSW) Pt 10 r 1(e): The rule formally provides that service of a writ is allowed if 'the proceedings are founded on, or are for the recovery of, damage suffered wholly or partly in the State caused by a tortious act or omission wherever occurring'.

26 (1987) 162 CLR 574.

27 (1987) 162 CLR 574, 610.

28 (1987) 162 CLR 574, 598 (Mason ACJ and Wilson and Dawson JJ), 607-8 (Brennan J).

29 For example, although in general State Supreme Courts corrected, by amending their rules, the narrow reading of the breach of contract ground of jurisdiction in *Johnson v Taylor Bros* [1920] AC 144, the Act always retained the earlier formulation of the rule.

30 Except the District Court of Queensland: *District Court of Queensland Act 1967* (Qld) s 101(1)(j); *District Court Rules 1968* (Qld) r 59.

Federal Jurisdiction

Federation brought another dimension to jurisdiction in Australia: the concept of federal jurisdiction. Chapter III of the *Constitution* (Cth) repeatedly refers to 'the judicial power of the Commonwealth' or to 'federal jurisdiction', which it invests in the High Court - the 'Federal Supreme Court'. It also provides that federal Parliament can invest federal jurisdiction in other courts.[31] The concept was adopted directly from the United States *Constitution*: but true to Australia's 'Washminister' constitutional settlement, the creation of federal jurisdiction was not accompanied by the American bifurcation of federal and State jurisdictions through separate federal and State courts. The *Constitution* gives this option, but also allows the 'autochthonous expedient'[32] of investing federal jurisdiction in State courts.[33] As will be seen, the present incoherence in Australia's civil jurisdiction scheme originates in the construction of a separate federal jurisdiction in the *Constitution*. However, until the 1970s, so far as its exercise and limits were concerned, federal jurisdiction was made practically irrelevant by Sir Samuel Griffith's deft drafting of the *Judiciary Act 1903* (Cth).

Griffith's suppression of federal jurisdiction was probably inspired by the *Judicature Act 1873* (UK).[34] To adapt Professor Saunders' metaphor for intergovernmental cooperation,[35] the English judicature model was that a single court of unrestricted jurisdiction would be established to provide a 'bucket' for the jurisdictions of all pre-existing courts (Chancery, Queen's Bench, Common Pleas, Admiralty, Probate and so on),[36] but that divisions within that court would provide concentrations of judicial expertise.[37] Litigation would be placed with the most appropriate division by either the litigants' choice or, if that didn't work, an internal transfer within the court by its administration.[38] Where previously a conflict of laws had been dealt with by costly litigation to establish the raw power of

31 *Constitution* (Cth) ss 71, 73(ii), 77(iii).

32 The term is thought to be Sir Owen Dixon's: see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ and McTiernan, Fullager and Kitto JJ); Z Cowen and L Zines, *Federal Jurisdiction in Australia* (2nd ed, 1978) 174-233.

33 *Constitution* (Cth) s 77(iii). That possibility had been considered in the USA, but rejected: Cowen and Zines, above n 32, 174-5.

34 As Queensland Attorney-General, Griffith sponsored the passage of the *Judicature Act 1876* (Qld). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 590 (Alfred Deakin AG).

35 Saunders, above n 6, 275.

36 *Judicature Act 1873* (UK) ss 3, 16.

37 *Judicature Act 1873* (UK) s 31.

38 *Judicature Act 1873* (UK) s 36.

one court over another (by common injunction), the judicature model effectively used a choice of law rule to establish the conceptual priority of one jurisdiction (equity) over the other (common law).[39]

Investing, with the smallest exceptions, complete federal jurisdiction in the State courts,[40] Griffith's *Judiciary Act* adapted the *Judicature Act*'s 'bucket' model of jurisdictional cooperation. There was too little federal law even to provoke the question of providing litigants with judges of federal expertise, and the *Constitution* itself provided the choice of law rule that made a federal law paramount over all others.[41] However, this model was reinforced by providing in the *Judiciary Act* that, when a court was exercising federal jurisdiction, it would apply all of the laws of the State in which it was sitting - except to the extent that federal law applied.[42] The State courts would therefore apply any laws (Imperial, federal or State statutes or the general law) that had force in their territorial jurisdiction. This actually made it unnecessary in most cases to consider whether a case was brought before a court in its federal or State jurisdiction.[43]

The concept of federal jurisdiction has received a comprehensive drubbing from some of Australia's most eminent lawyers. In 1935, Sir Owen Dixon argued that, within federations, there was no need to parallel the vertical division of legislative power in a division of the courts.[44] Dixon also lamented the adoption of the American concept of federal jurisdiction, giving it the memorable description of 'a special and peculiarly arid study'.[45] This gave Sir Owen no special preference for the State courts. He wanted courts independent of federal and State polities, deriving authority only from the *Constitution*.[46] Dixon's views served as a basis for Sir Zelman Cowen's seminal *Federal Jurisdiction*, which also

39 *Judicature Act 1873* (UK) ss 24-5. Cf Meagher, Gummow and Lehane, *Equity: Doctrines & Remedies* (4th ed, 2002) 74-83 where, despite the many reasons mustered for concluding that the judicature model could be a 'mistake', it is recognised that there are efficiencies in putting legal and equitable jurisdictions in the one 'bucket': ibid 74.

40 *Judiciary Act 1903* (Cth) s 39(2). The provision is ambulatory, investing jurisdiction in State courts even when they were created after the passage of the *Judiciary Act*: *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 536.

41 *Constitution* (Cth) s 109. See *Breavington v Godleman* (1988) 169 CLR 41, 126, where Deane J effectively characterised s 109 as a choice of law rule.

42 *Judiciary Act 1903* (Cth) ss 79, 80.

43 G Griffith and J Kennett, 'Judicial Federalism' in B Opeskin and F Wheeler (eds), *The Australian Federal Judicial System* (2000) 37, 57.

44 O Dixon, 'The Law and the Constitution' (1935) 204 *Law Quarterly Review* 590, 606.

45 Ibid 608.

46 Ibid 607.

regretted the 'technical, complicated, difficult and not infrequently absurd' law of federal jurisdiction. Cowen hoped that the achievement of *Federal Jurisdiction* would be 'its own relegation to the shelves of legal history'.[47] Nevertheless, in contrast to Dixon, he implicitly recognised the sensibility of using the State courts as a 'general base' for the court structure in Australia, with final appeals being taken by the High Court as the Federal Supreme Court.[48] Further, the *Judiciary Act* made it unnecessary, when exercising power over litigants within the reach of its process, for a State court to identify whether it was using a federal or State jurisdiction.

This was also the familiar pattern by which jurisdiction was exercised in Canada[49] and the United Kingdom: the Court of Session, for example, does not have to consider whether it is exercising a 'UK' or 'Scottish' jurisdiction. It meant that, when deciding whether a case could be heard, the concept of federal jurisdiction became irrelevant.[50] It was only with the creation of federal courts of intermediate jurisdiction in the 1970s that the concept of federal jurisdiction took on real legal significance, its boundaries were first appreciated, and its potential for initiating jurisdictional collision was realised.

Federal Courts: Rationale and Flex

The only federal courts created before 1976 – the Industrial and Bankruptcy Courts – had closely confined, specialised jurisdictions. The Bankruptcy Court never even had territorial jurisdiction throughout the whole nation.[51] The Commonwealth remains unprepared to create its own courts of general federal jurisdiction and, at best, the Family Court (which began to sit in 1976), the Federal Court (1977) and the Federal Magistrates Court (1999) have a middling jurisdiction in federal litigation and peripheral claims.[52] The Family Court does not even have national

47 Z Cowen, *Federal Jurisdiction* (1st ed, 1959) ix, xv.

48 Ibid xi.

49 Although the Exchequer Court of Canada had been established in 1875, and was replaced by the Federal Court of Canada in 1971: see now *Federal Court Act 1985* (C) s 3.

50 Until the abolition of all appeals to the Privy Council, the concept of federal jurisdiction was still important for identifying whether an appeal first had to be taken to the High Court: *Judiciary Act* s 39(2); *Felton v Mulligan* (1971) 124 CLR 367. See Cowen and Zines, above n 32, 203-14.

51 *Conciliation and Arbitration Act 1904* (Cth) s 11. The powers of the first Industrial Court were held to be invalid in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. The federal bankruptcy districts were limited to NSW, Victoria and Tasmania: *Bankruptcy Act 1924* (Cth) s 18A.

52 *Family Law Act 1975* (Cth) s 21; *Federal Court of Australia Act 1976* (Cth) s 5; *Federal Magistrates Act 1999* (Cth) s 8.

territorial jurisdiction, as a State court administers federal family law in Western Australia.[53] However, given the relative success of the 'autochthonous expedient' and that the State Supreme Courts continue to hold a larger federal jurisdiction, it is worth revisiting the reasons offered from the 1960s for creating federal courts of intermediate jurisdiction. These reasons, given both before and after the intermediate federal courts were established, include the following:

- The development of the sense of Australian *nationhood* and the decline of particular State identities suggested a need for national courts.[54]
- The claim that the Commonwealth has a *political interest* in expressing its judicial power through its own courts.[55]
- For enforcing a federal law with national application, there was a need for federal courts with *national territorial reach.*[56]
- To ensure *uniformity* in the interpretation of federal law, its administration had to be entrusted to one court of national territorial jurisdiction.[57]
- A need to promote *expertise* in the administration of federal law, surprisingly, does not figure prominently in federal government explanations for founding federal courts. More significant has been the need to develop a new judicial *ethos*. The Family Court especially was hoped to be a 'helping' tribunal, with supporting counselling and welfare staff.[58] The Federal Magistrates Court was designed to be a more 'user-friendly, streamlined' court than the two federal superior courts.[59]

53 *Family Law Act 1975* (Cth) s 41; *Family Court Act 1975* (WA).

54 M H Byers and P B Toose, 'The Necessity for a New Federal Court (A Survey of the Federal Court System in Australia)' (1963) 36 *Australian Law Journal* 308, 309; N Bowen, 'Federal and State Court Relationships' (1979) 53 *Australian Law Journal* 806, 807.

55 Constitutional Commission, *Final Report of the Constitutional Commission* (1988) 368 (Professor James Crawford, Gummow J) ('*Final Report*').

56 Byers and Toose, above n 54, 314.

57 Ibid 314; G Barwick, 'The State of the Australian Judicature' (1977) 51 *Australian Law Journal* 480, 488; Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1976, 2113 (Bob Ellicott AG).

58 Commonwealth, *Parliamentary Debates*, Senate, 13 December 1973, 2832; 3 April 1974, 644 (Senator Lionel Murphy AG); K Enderby, 'The Family Law Act 1975' (1975) 49 *Australian Law Journal* 477, 479.

59 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 1999, 7365 (Darryl Williams AG).

- Federal courts were needed to relieve the other courts of a growing *workload* in federal litigation.[60] This was the pre-eminent justification for the Federal Court, which took some of the trial litigation still being heard in the High Court, and at first was merely to replace the Industrial and Bankruptcy Courts.[61] It was later also the primary reason for the Federal Magistrates Court, which relieved the Federal and Family Courts of less complicated litigation.[62]
- There was a need to align *funding* with the political source of the laws being enforced in the courts. Specifically, the State courts received no tagged federal grants for the extra judicial salaries or court administration that could be attributed to federal work.[63]

The creation of intermediate federal courts was met with disapproval in their first few years. Sir Harry Gibbs' statement in 1981 that it was 'difficult to discover any valid reason in principle, or any practical necessity, for bringing into existence the new Federal Court and conferring upon it its present jurisdiction'[64] reinforced growing criticism from State judges who lamented the potential for conflicting jurisdictions to add to the complexity and cost of litigation.[65] The risks that federal courts presented to the judicature model were certainly known,[66] but discounted. The Federal Court's first Chief Judge, Sir Nigel Bowen, pointed out that jurisdictional collision was not likely when a federal court dealt with narrowly stated legal questions that were easily identified by lay people, and relatively insulated from issues that arose under the general law.[67] That had probably been the case for the Industrial and Bankruptcy Courts, but was patently untenable for Sir Nigel's court. The Federal Court's jurisdiction in trade practices claims spanned the same

60 Byers and Toose, above n 54, 309; Barwick, above n 57, 488; 'The Australian Judicial System: The Proposed New Federal Superior Court' (1964) 1 *Federal Law Review* 1, 2 ('*New Federal Court*').

61 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1976, 2110-11 (Bob Ellicott AG).

62 Ibid 24 June 1999, 7365 (Darryl Williams AG).

63 Byers and Toose, above n 54, 313, 327 (EG Whitlam).

64 HT Gibbs, 'The State of the Australian Judicature' (1981) 55 *Australian Law Journal* 677.

65 L Street, 'The Consequences of a Dual System of State and Federal Courts' (1978) 52 *Australian Law Journal* 434; W Campbell, 'The Relationship between the Federal Court and the Supreme Courts of the States' (1979) 11 *University of Queensland Law Journal* 3, 12-13; A Rogers, 'Federal/State Courts – The Need to Prevent Jurisdictional Conflicts' (1980) 54 *Australian Law Journal* 285.

66 Byers and Toose, above n 54, 322 (GL Hart), 323 (FTP Burt), 326 (K Bailey); Gibbs, above n 64, 678.

67 Cf Bowen, above n 54, 807-8.

field as the general body of commercial, contract and tort law[68] and, as the jurisdiction was the court's monopoly, its judges could not even defer to the traditional commercial jurisdictions of the State courts on emerging *forum non conveniens* grounds if a trade practices claim were made.[69] In short, the potential for jurisdictional collision was embedded in the very fabric of the Federal Court.

The intensification of jurisdictional collision between federal and State courts through the 1970s and 1980s is well-documented:[70] beginning with the split of litigation in single controversies across federal and State courts;[71] moving to the Federal Court's willingness (in associated jurisdiction) to deal with questions of State law that were incidental to a trade practices claim;[72] and finally (in accrued jurisdiction) its assumption of the power to deal with all questions arising in a single controversy that included, but was not exhausted by, a federal question.[73] In conceptual and practical terms, accrued jurisdiction is arguably a poor means of defining jurisdictional boundaries, having all of the consequences, but few of the certainties, of rule-based limits to jurisdiction. If litigation is held to be outside accrued jurisdiction, all of the steps taken and expense incurred in the federal court have been wasted and, if still in time, litigation in a State court has to begin again. However, the decision as to whether State questions are within accrued jurisdiction is a matter of 'impression' and 'practical judgment'[74] – the vaguest possible limits that only encourage agitation of the question.

Anti-suit injunctions, restraining proceedings within a State court's jurisdiction, were first issued by the Family Court in 1979[75] and the

68 Gibbs, above n 64, 678.

69 However, see *St Justin Properties Pty Ltd v Rule Holdings Pty Ltd* (1980) 3 ATPR 40-1146, where Toohey J was prepared to defer to State jurisdiction and refused an anti-suit injunction. The result was nevertheless 'split' litigation across the federal and State courts.

70 Eg, H T Gibbs, 'Developments in the Jurisdiction of Federal Courts' (1981) 12 *University of Queensland Law Journal* 3; L Zines, 'Federal, Associated and Accrued Jurisdiction' in Opeskin and Wheeler, above n 43, 290-8.

71 Eg, *Tansell v Tansell* (1977) 3 Fam LR 11,411; *In the Marriage of Tansell* (1977) 3 Fam LR 11,466; *Parish v World Series Cricket Pty Ltd* (1977) 16 ALR 172; Street, above n 65, 436.

72 *Federal Court of Australia Act 1976* (Cth) s 32; Rogers, above n 65.

73 *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261.

74 *Fencott v Muller* (1983) 152 CLR 570, 610 (Mason, Murphy, Brennan and Deane JJ).

75 *Esmore v Esmore* [1979] FLC 90-711. The power was first recognised, though not exercised, in *Tansell v Tansell* (1977) 3 Fam LR 11,466.

Federal Court in 1983.[76] More followed: reinforcing how the judicature model had been ignored and that, in some cases, decisions over the 'best court' for proceedings could not be made cooperatively.[77] This is not to suggest that cooperation was always lacking. In at least one dispute, both the Federal Court and a Supreme Court refused to anti-suit each other in recognition of the need to show comity. The result of this deference, though, was split litigation in which each party had successfully forced the other into the different court of its choice.[78] At first, the federal government seemed resigned to jurisdictional collision as inherent in any system of separate courts.[79] Then, having discovered the growth of the Federal Court's power in accrued jurisdiction, the Commonwealth legislated in 1983 to enable the Family Court to exercise it.[80] It has also provided the basis for the Federal Magistrates Court to exercise an accrued jurisdiction, which it does.[81]

However, while jurisdictional collision between the Federal and Supreme Courts undoubtedly spelt inefficiency and expense for litigants, the larger injustice inherent in the creation of intermediate federal courts was manifest in the Family Court. Its jurisdiction being limited by the

76 *Allpike Honda Pty Ltd v Marbellup Nominees* (1983) 47 ALR 86; *Turelin Nominees v Dainford Ltd* (1983) 47 ALR 326. The power was first recognised in *St Justin Properties Pty Ltd v Rule Holdings Pty Ltd* (1980) 3 ATPR 40-1146, 42-118.

77 *Bak v Bak* [1980] FLC 90-877; *St Justin Properties Pty Ltd v Rule Holdings Pty Ltd* (1980) 3 ATPR 40-1146, 42-118; *Rennie v Higgon* [1981] FLC 91-087; *Savage v Savage* [1982] FLC 91-281; *Gillies v Gillies* (1981) 7 Fam LR 106; *Yates v Yates (No 1)* [1982] FLC 77-224; *Allpike Honda Pty Ltd v Marbellup Nominees* (1983) 47 ALR 86; *Turelin Nominees v Dainford Ltd* (1983) 47 ALR 326; *Denpro Pty Ltd v Centrepoint Freeholds Pty Ltd* (1983) 48 ALR 39; *Novasonic Corp Ltd v Hagenmayer (Australasia) BV* (1983) 8 ACLR 303; *R v Ross-Jones; Ex part Green* (1984) 156 CLR 185; *Re F; Ex parte F* (1986) 161 CLR 376; cf *Stack v Coast Securities (No 9) Pty Ltd* (1983) 46 ALR 451.

78 *Stack v Coast Securities No 9 Pty Ltd* (1983) 46 ALR 451, 490-1 (Fitzgerald J); *Bargal Pty Ltd v Force* (1983) 47 ALR 91 (McPherson J).

79 P Durack, 'The Special Role of the Federal Court of Australia' (1981) 55 *Australian Law Journal* 677.

80 Accrued jurisdiction rests on having jurisdiction in 'matters', which was given to the Family Court by the *Family Law Amendment Act 1983* (Cth) s 16. Cf *Smith v Smith* (1986) 161 CLR 217; *Warby v Warby* (2001) 28 Fam LR 443; *Finlayson v Finlayson & Gillam* [2002] Fam CA 898.

81 *Federal Magistrates Act 1999* (Cth) s 10; *Acts Interpretation Act 1901* (Cth) s 15C. The court has recognised that it has an accrued jurisdiction in *Rainsford v State of Victoria* [2001] FMCA 115, [11]; *Neylon v Australian Rural Group Limited* [2001] FMCA 97, [48]; *Croker v Commissioner of Taxation* [2002] FMCA 128, [10]; *Crowe v Comcare Australia (No 1)* [2002] FMCA 146, [2]; *Windross v Transact Communications Pty Ltd* [2002] FMCA 145, [1]; *Trainor v BMW Melbourne Pty Ltd* [2003] FMCA 7, [29]; *Bartrop v Nilant* [2003] FMCA 23, [39]; *Fox v Robinson* [2003] FMCA 107, [39].

Commonwealth's inability to makes laws relating to ex-nuptial children,[82] child custody litigation in blended families of nuptial and ex-nuptial children had to be conducted across the Family Court and a State Supreme Court.[83] It is telling that this did not happen in Western Australia, where a State Family Court had a comprehensive federal and State jurisdiction in all questions involving children.[84]

Proposals for a Unified Court System

Inevitably, the rise of overlapping jurisdictions with vague boundaries between federal and State courts soon led to proposals for a national judicial system, centring on a superior court in the judicature model. Sir Francis Burt, for instance, suggested a scheme based on the existing Supreme Courts as the superior trial courts, each preferably incorporating a federal family division, but with first appeals in all questions to a federally appointed Australian Court of Appeal.[85] Former federal Attorney-General Bob Ellicott largely endorsed the Burt model, although he added that uniform procedural laws and statutes of limitation would reinforce it. In Dixonian style, he also wished to end executive government appointments of judges at any level, and preferred an appointments commission that included representatives of federal and State governments, judges, lawyers and suitable lay people.[86] In contrast, Sir Laurence Street preferred a single 'bucket' – an Australian Supreme Court – with a federal division and a division for each State at both trial and appellate levels. The Commonwealth and each State government would appoint judges to the relevant parallel division.[87]

The constitutional reform bodies that met over the 1980s also favoured a unified national court structure of this kind,[88] which would have required a significant constitutional amendment. Recognising the difficulties of constitutional change, they gradually threw more weight behind more modest proposals for a cross-vesting of jurisdictions between the federal

82 *Constitution* (Cth) ss 51(xxi), (xxii).

83 *Re F; Ex parte F* (1986) 161 CLR 376. See B Opeskin, 'Cross-vesting of Jurisdiction' in Opeskin and Wheeler, above n 43, 305.

84 *Family Court Act 1975* (WA).

85 Burt, above n 1, 511-13; J G Starke, 'Proposals for a National Court System' (1982) 56 *Australian Law Journal* 501, 502.

86 R J Ellicott, 'The Need for a Single All-Australia Court System' (1978) 52 *Australian Law Journal* 431, 432.

87 L Street, 'Towards an Australian Judicial System' (1982) 56 *Australian Law Journal* 515, 516-17.

88 Constitutional Commission, *Australian Judicial System Advisory Committee Report* (1987) 30-5 *(Advisory Committee)*; *Final Report*, above n 55, 365-9.

and State superior courts.[89] This had the broad approval of the Australian Constitutional Convention, the Standing Committee of Attorneys-General and the Australian Constitutional Commission.[90] The Constitutional Commission believed that, before any more substantial proposal should be considered, a cross-vesting scheme should be piloted to assess its workability.[91] This was implemented in 1987, and commenced on 1 July 1988.

The Cross-vesting Scheme

The central idea of the cross-vesting scheme was an enlargement of Griffith's adaptation of the judicature model – that in any superior court it should be unnecessary to identify the given jurisdiction it was exercising.[92] It was also the cheapest solution to jurisdictional collision – some judges thought it just 'palliative' or timid: an attempt (and, as it turned out, a poor one) to accommodate the constitutional limits 'without putting anyone's nose out of joint' by restructuring the existing courts.[93] The scheme was cooperative and, again to use Saunders' metaphors, used both 'template' and 'bucket' methods of intergovernmental cooperation.[94] The 'template' was roughly uniform legislation, passed by the federal and each of the State Parliaments.[95] As the preamble to the legislation indicated, 'it [was] desirable ... to establish a system of cross-vesting of jurisdiction between ... courts, without detracting from the ... jurisdiction of any court'. To achieve this, seven major grants of jurisdiction were made.

89 *Advisory Committee*, above n 88, 43-4; *Final Report*, above n 55, 371-3.

90 Opeskin, above n 83, 310-13.

91 Ibid 310-13; *Final Report*, above n 55, 370, 371.

92 Griffith and Kennett, above n 43, 57.

93 *Final Report*, above n 55, 369 (Jackson & Kennedy JJ); Burt, above n 1, 511-12.

94 Saunders, above n 6, 275.

95 For these purposes a State includes an internal Territory. See *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) ('*Cross-vesting Act* (Cth)'), and *Jurisdiction of Courts (Cross-vesting) Act 1987* (NSW); *Jurisdiction of Courts (Cross-vesting) Act* (NT); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Qld); *Jurisdiction of Courts (Cross-vesting) Act 1987* (SA); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Tas); *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic); *Jurisdiction of Courts (Cross-vesting) Act 1987* (WA) (collectively referred to as '*Cross-vesting Act* (State)'). The *Cross-vesting Act* (Cth) deals with jurisdictions of the federal courts, and the Supreme Courts of the external territories. It also dealt with the jurisdiction of the ACT Supreme Court, but this was removed when the ACT gained self-government and its Assembly passed the *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT).

- Each State granted the non-federal jurisdiction of its Supreme Court to the Supreme Court of every other State and Territory, and the Western Australian Family Court.[96]
- Western Australia granted the non-federal jurisdiction of its Family Court to the Supreme Court of every other State and Territory.[97]
- The Commonwealth granted the jurisdiction of the Federal Court to each of the State and Territory Supreme Courts.[98]
- The Commonwealth granted the jurisdiction of the Family Court of Australia to each of the State and Territory Supreme Courts.[99]
- The Commonwealth granted the federal and Territory jurisdiction of each of the external Territory Supreme Courts to the Supreme Court of every other State and Territory, the Western Australian Family Court, the Federal Court and the Family Court of Australia.[100]
- Each State granted the non-federal jurisdiction of its Supreme Court to the Federal Court and the Family Court of Australia.[101]
- Western Australia granted the non-federal jurisdiction of its Family Court to the Federal Court and the Family Court of Australia.[102]

The legislation also authorised the receipt of each of these grants.[103] It then set out mechanics of evidence, procedure and choice of law relevant to the operation of the scheme,[104] and important provisions for the transfer of proceedings (these are discussed later). Each participating court was thus a 'bucket' that was supposed to hold both federal and State jurisdictions, although the exchanges of jurisdiction were not completely reciprocal. The Supreme Courts almost received all possible Australian jurisdictions: the grants were only qualified by the Commonwealth's withholding federal industrial matters and competition claims – a gap that

96 See *Cross-vesting Act* (State) ss 4(3)-(4). The State Parliaments naturally have no power to deal with the federal jurisdictions of Supreme Courts.

97 *Cross-vesting Act* (WA) s 4(4).

98 *Cross-vesting Act* (Cth) s 4(1).

99 *Cross-vesting Act* (Cth) s 4(1).

100 *Cross-vesting Act* (Cth) s 4(2).

101 *Cross-vesting Act* (State) ss 4(1)-(2).

102 *Cross-vesting Act* (WA) ss 4(1)-(2).

103 *Cross-vesting Act* (Cth) s 9(2); *Cross-vesting Act* (State) s 9.

104 *Cross-vesting Act* (Cth) s 11; *Cross-vesting Act* (State) s 11. The provisions for choice of law in cross-vested jurisdiction are extremely complicated: D St L Kelly and J Crawford, 'Choice of Law under the Cross-vesting Legislation' (1988) 62 *Australian Law Journal* 589; D Rose, S Gageler & G Griffith, 'Choice of Law in Cross-vested Jurisdiction: A Reply to Kelly and Crawford' (1988) 62 *Australian Law Journal* 698. These complexities have been compounded by the decision in *Wakim*: see R G Mortensen, *Private International Law* (2000) 171-6.

perpetuated some jurisdictional collision.[105] The Supreme Courts possibly also had a limitation on subject-matter jurisdiction that stemmed from the limits on their territorial reach. The intermediate federal courts got supplementing State jurisdictions, which ended most of the jurisdictional collisions they had created.[106] There was certainly a *perception* that intermediate federal courts had equivalent jurisdictions to the Supreme Courts,[107] but the scheme actually did nothing to enhance their federal jurisdiction. This anomaly led the Federal Court, on occasion,[108] to hold that it lacked jurisdiction to hear some federal claims brought before it. However, the scheme removed the main sources of collision between federal and State courts. This meant that, while it might be necessary in a federal court to consider whether it had jurisdiction to deal with a federal claim, it was no longer necessary to consider whether a single controversy that gave rise to federal and State issues was within its associated or accrued jurisdiction. For a time, any exploring of the limits of federal jurisdiction was suspended. A superior court could usually apply any law applicable to the proceedings before it, without having to decide which jurisdiction fitted them best.

The Emergence of *Forum Conveniens* Principles

Superior Courts

The obvious departure of the cross-vesting scheme from the judicature model of cooperative jurisdictions was that, instead of using a single court of unrestricted jurisdiction as its 'bucket', it used over ten: all superior courts of a large, pooled jurisdiction. Accordingly, relations between the courts had to be coordinated if decisions about where litigation was best placed were to be made without compounding jurisdictional collision, expense, and applications for anti-suit injunctions. In the judicature model, the coordinating mechanism is an administrative

[105] *Cross-vesting Act* (Cth) s 4(4). For recent anti-suit injunctions, see *Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* [1999] FCA 1842; *Construction, Forestry, Mining & Energy Union v Mirvac Constructions Pty Ltd* [2000] FCA 341; *Construction, Forestry, Mining & Energy Union v Multiplex Constructions Pty Ltd* [2000] FCA 101; *Transport Workers' Union v Bentley* [2001] FCA 671.

[106] Opeskin, above n 83, 316.

[107] P Brereton, 'The Decline and Fall of Cross-vesting: Jurisdiction in Family Law after *Re Wakim* (2000) 14 *Australian Family Lawyer* 5.

[108] *Kodak (Australasia) Pty Ltd v Commonwealth* (1989) 98 ALR 424; *Courtice v Australian Electoral Commission* (1990) 95 ALR 297; *Bond v Sulan* (1990) 26 FCR 580, 584; *West Australian Psychiatric Nurses' Association (Union of Workers) v Australian Nursing Federation* (1991) 102 ALR 265; *NEC Information Systems Australia Pty Limited v Lockhart* (1992) 36 FCR 258, 264-5.

decision within the court to transfer litigation to the most expert division,[109] and the cross-vesting scheme tried to approximate that.

The scheme gives each of its participating courts a power to transfer *any* proceedings properly before it, no matter how it got them, to any other superior court in the country.[110] Naturally, as this is a transfer between different courts, and courts that are the creatures of different polities, the conditions under which a transfer is made had to be juridified, and cover more than five pages of the statute books. Still, for a number of reasons the transfer mechanism differs considerably from the use of rules of jurisdiction for placing litigation in the best court. First, there is a ban on appeals from decisions about transfers,[111] and so no opportunity to question a judge's decision to relocate (or keep) the litigation. Secondly, any steps already taken in the litigation when it was in the transferring court are deemed to have been taken in the receiving court as well.[112] This minimises any additional costs incurred, and the time lost, by the transfer. If litigation is relocated by a court's decision that it has no jurisdiction, or to stay proceedings, then when taken up in another court it has to be re-commenced, pre-trial procedures are effectively duplicated, and there is a risk that statutes of limitation will have expired. Thirdly, the judge (or the government) can initiate the transfer, and does not have to wait for litigants to raise the question of where to litigate in adversarial proceedings.[113] Fourthly, as will be seen soon, the decision to transfer has been officially interpreted as 'a "nuts and bolts" management decision'[114] in an effort, presumably, to replicate for nation-wide transfers between courts the mindset adopted when court administrators decide which division, or judge, within a court is the most expert for dealing with a given case.

Hopes that transfers to another court could be made efficiently could easily have been dashed if judges had demanded painstaking attention to the detail of the elaborate transfer provisions in the cross-vesting

[109] *Judicature Act 1873* (UK) s 36.

[110] *Cross-vesting Act* (Cth) ss 5-6; *Cross-vesting Act* (State) ss 5-6.

[111] *Cross-vesting Act* (Cth) s 13(a); *Cross-vesting Act* (State) s 13(a); *Tangalooma Island Resort Pty Ltd v Miles* (1989) 98 FLR 47, 48 (Kirby P). This legislates the policy that Australian and English courts have recommended, with limited success, for decisions about where to litigate – that they be left to trial judges: *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460, 465; *Berezovsky v Michaels* [2000] 2 All ER 986, 1002, 1011; *Voth v Manildra Flour Mills Pty Ltd* (1992) 171 CLR 538, 565.

[112] *Cross-vesting Act* (Cth) s 11(3); *Cross-vesting Act* (State) s 11(3).

[113] *Cross-vesting Act* (Cth) s 5(7); *Cross-vesting Act* (State) s 5(7).

[114] *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711, 714 (Street CJ).

legislation. However, although the terms of the legislation are certainly used as referents, judges have tended to envelop the detail of the statutory language in common law principle.[115] That has helped simplify the administration of transfers.

This may just result from a happy accident of drafting. The federal legislation provides for a transfer of 'special federal matters' (like competition claims, actions against Commonwealth officers and applications for federal administrative review) to the Federal Court.[116] Otherwise, there are lengthy provisions allowing a transfer in the two cases of *lis pendens* and the exercise of cross-vested jurisdiction (although no one is yet sure what that means). In both cases, one condition that must be satisfied before a transfer can be made is that it be 'in the interests of justice'.[117] However, in a third case it is merely sufficient for a transfer that it be 'in the interests of justice'[118] so there is apparently little sense in considering anything more. The litigation has certainly concentrated on the 'interests of justice' condition and, coincidentally, that language is reminiscent of the principle underlying the doctrine of *forum non conveniens* – 'the plea can never be sustained unless the Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'.[119] It is little wonder, then, that principles of *forum non conveniens*, in one form or another, have been adopted when deciding whether to transfer proceedings.

This is not the place to revisit the doctrine of *forum non conveniens*. For most of the Commonwealth,[120] the doctrine was settled by the House of Lords in its 1986 decision in *Spiliada Maritime Corporation v Cansulex Ltd.*[121] A court will stay or dismiss proceedings (otherwise within jurisdiction) if 'there is some other available forum which prima facie is clearly more appropriate for the trial of the action'.[122] In this search for the clearly more appropriate forum, the court weighs connecting factors

[115] This has also happened for stays and dismissals, technically governed by rules of court: *Regie National des Usines Renault SA v Zhang* (2002) 187 ALR 1, 40-1 (Kirby J), 57-8 (Callinan J); *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, 473 (Kirby J).

[116] *Cross-vesting Act* (Cth) ss 3(1), 6.

[117] *Cross-vesting Act* (Cth) s 5; *Cross-vesting Act* (State) s 5.

[118] *Cross-vesting Act* (Cth) s 5; *Cross-vesting Act* (State) s 5.

[119] *Sim v Robinow* (1892) 19 R 665, 668 (Lord Kinnear).

[120] See L Collins, *Dicey and Morris on the Conflict of Laws* (13th ed, 2000) 390-1.

[121] [1987] 1 AC 460.

[122] Ibid 478 (Lord Goff).

like the availability of witnesses, the places where the parties live or do business, the governing law of the claim,[123] related litigation in a foreign court,[124] and the expertise of local lawyers.[125] In controversial circumstances, *Spiliada* was rejected by the High Court on the day before the cross-vesting scheme commenced.[126] It nevertheless took the court another two years to agree on a different principle that would govern stays and dismissals of proceedings in Australia, which it did when a compromise was struck in *Voth v Manildra Flour Mills Pty Ltd*.[127] It appears that in *Voth*, the High Court accepted that the connecting factors listed in *Spiliada* still had to be weighed when a court was deciding whether it should keep litigation,[128] but weighed towards a different end. The proceedings could only be stayed or dismissed if it appeared to the court that it was itself 'a clearly inappropriate forum' for dealing with the dispute.[129] *Voth* therefore gives slightly more weight to the plaintiff's choice of court[130] and, in practice, has led to more parochial decisions as to whether litigation should be kept by the local court.[131]

However, *Voth*'s role in placing litigation involving defendants who are served inside Australia is limited, and limited to Western Australia at that. In the very first transfer case in the country, *Bankinvest AG v*

123 Ibid.

124 Ibid 485 (Lord Goff).

125 Ibid 485-6 (Lord Goff).

126 *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197. See also *Primesite Outdoor Advertising Ltd v City Clock (Australia) Ltd* (1991) 4 PRNZ 472, 478; M C Pryles, 'Judicial Darkness on the Oceanic Sun' (1988) 62 *Australian Law Journal* 774, 784-9; L Collins 'The High Court of Australia and *Forum Conveniens*: The Last Word?' (1991) 107 *Law Quarterly Review* 182, 187; M C Pryles '*Forum Non Conveniens* – The Next Chapter' (1991) 65 *Australian Law Journal* 442, 450; P E Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) 129-30.

127 (1990) 171 CLR 538.

128 Ie, by adopting (at 556) Deane J's approach in *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 and his 'connecting factors'. In *Oceanic Sun* (at 251) Deane J had himself adopted Lord Goff's discussion of 'connecting factors' from *Spiliada*.

129 (1990) 171 CLR 538, 558 (Mason CJ & Deane, Dawson & Gaudron JJ).

130 Ibid; R Garnett, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test' (1999) 23 *Melbourne University Law Review* 30, 35.

131 P Nygh, '*Voth* in the Family Court Re-visited: The High Court Pronounces on *Forum Conveniens* and *Lis Alibi Pendens*' (1996) 10 *Australian Journal of Family Law* 163, 169. High Court judges have recently expressed scepticism of *Voth*, but it remains settled law in Australia: *Regie National des Usines Renault SA v Zhang* (2002) 187 ALR 1, 24-5 (Kirby J), 56-8 (Callinan J); *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, 473 (Kirby J).

Seabrook,[132] Rogers J in the NSW Supreme Court, bypassing the ban on appeals, referred the case to the Court of Appeal for a statement of principle that would control transfer decisions made by NSW judges. The Court of Appeal (which included Rogers J for the reference) held that the interests of justice required the case to be transferred to Queensland. Street CJ held that a transfer was 'a "nuts and bolts" management decision as to which court, in the pursuit of the interests of justice, is the more appropriate to hear and determine the substantive dispute'.[133] With Rogers J, his Honour rejected any reference to the doctrine of *forum non conveniens*,[134] meaning the narrower doctrine that was developing in the High Court's adjudication. In deciding whether or not to transfer, Rogers J held that 'the relevant matters and considerations are essentially the same as were specified by the House of Lords in *Spiliada*.' Although the High Court had held that it was inapplicable in stays and dimissals, *Spiliada* had 'already, in effect, been made applicable in Australian courts in relation to transfers between Supreme Courts by the various Australian Parliaments.'[135]

At the least, therefore, the judges have found the language of the statute books useful in justifying a refusal to follow the High Court's rejection of *Spiliada*. *Bankinvest* and *Spiliada* govern the circumstances in NSW in which a transfer can be made to another court – federal or State. The ban on appeals naturally makes it more difficult to develop a common approach across participating courts, but the logic, practicality and cooperative ethos of the *Bankinvest-Spiliada* principles have led to their adoption in most of the other State Supreme Courts and the two participating federal courts.[136] The ACT Supreme Court presented an

[132] (1988) 14 NSWLR 711.

[133] Ibid 714.

[134] Ibid 714, 730.

[135] Ibid 730.

[136] Mortensen, above n 104, 75-6; Nygh and Davies, above n 126, 109-11; Sykes and Pryles, above n 22, 98-9. See NT: *Midland Montagu Australia Ltd v O'Connor* (1992) 2 NTLR 86; *Swanson v Harley* (1995) 102 NTR 25; SA: *Pegasus Leasing Limited v Tieco International (Australia) Ltd* (1993) 61 SASR 195; *Pegasus Leasing Limited v Balescope Ltd* (1994) 63 SASR 51; Tas: *McEntee v Connor* (1994) 4 Tas R 18; Vic: *Linter Group Ltd (In Liquidation) v Price Waterhouse* (1992) 2 ACSR 346; *Taylor v Trustees of Christian Brothers* [1994] Aust Torts Reps 81-288; *Schmidt v Won* [1998] 3 VR 435; Fed Ct: *Trade Practices Commission v Collings Construction Co Pty Ltd* (1994) 53 FCR 137; *Pegasus Leasing Ltd v Cadoroll Pty Ltd* (1996) 59 FCR 152; *Roff v Aqua Distributors Pty Ltd* [1996] 966 FCA 1; *Buckley v Gibbett* [1996] 836 FCA 1; *Charter Pacific Corp Ltd v Commonwealth Scientific & Industrial Research Organisation* [1998] FCA 1362; *Activate No 1 Pty Ltd v Equuscorp Pty Ltd* [1999] FCA 619, [12]; *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [1999] FCA 133, [11]-[13]; and cf *Tribond Developments Pty Lt v Attorney-General of South*

early challenge to *Bankinvest-Spiliada* by holding that the decision to transfer should be conditioned by the Australian principles of *forum non conveniens*,[137] which meant that a court would only transfer proceedings if it found that it was itself a clearly inappropriate forum for dealing with them. However, by 1994 a Full Court of the ACT Supreme Court spurned this earlier approach and adopted principles akin to those of *Bankinvest-Spiliada*.[138] That has isolated the Western Australian Supreme Court, which has gradually consolidated its refusal to recognise the *Bankinvest-Spiliada* principles for allocating jurisdiction. It has consistently taken the view that 'the interests of justice' do not imply appropriateness as a condition for transfer, and, not without inconsistency, considers that the principles of *forum non conveniens* need to be satisfied before a transfer can be made.[139] The Western Australian judges are aware that, within the federation, their approach is idiosyncratic, but consciously refuse to align their approach with *Bankinvest-Spiliada*.[140]

The superior courts could still technically use the power to stay or dismiss proceedings on *forum non conveniens* grounds (governed by *Voth*) to relocate litigation to another Australian court.[141] However, the cross-vesting scheme's provisions for transfer have effectively ousted the use of this power in proceedings internal to the federation.[142]

Australia [1997] FCA 106; Fam Ct: *Chapman v Jansen* (1990) 13 Fam LR 853, 855, 858-61, 869, 870.

137 *Waterhouse v Australian Broadcasting Corporation* (1989) 86 ACTR 1.

138 *Dawson v Baker* (1994) 120 ACTR 11. The only reservations that the court in *Dawson v Baker* had about the *Bankinvest-Spiliada* approach was that 'the interests of justice' condition for a transfer did not always turn on 'appropriateness': (1994) 120 ACTR 11, 22. A similar shift in thinking took placed in the Queensland Supreme Court: cf *Paul v Mid Coast Meat Co Pty Ltd* [1995] 1 Qd R 658 to *Ropat Pty Ltd v Scarfe* [1999] 2 Qd R 102; *Hub Capital Pty Ltd v Challock Pty Ltd* [1999] 2 Qd R 588; *World Firefighters Games Brisbane, 2002 v World Firefighters Games Western Australia* (2001) 161 FLR 355.

139 *Mullins Investments Pty Ltd v Elliott Exploration Co Pty Ltd* [1990] WAR 531; *Platz v Lambert* (1994) 12 WAR 319; *Douglas v Philip Parbury & Associates* [1999] WASC 15, [19]-[24]; *Whyalla Refineries Pty Ltd v Grant Thornton (a firm)* (2001) 182 ALR 274.

140 *Anderton v Enterprising Global Group Pty Ltd* [2003] WASC 67, [28]-[31].

141 *McEntee v Connor* (1994) 4 Tas R 18; *Schmidt v Won* [1998] 3 VR 435; *Douglas v Philip Parbury & Associates* [1999] WASC 15. Although in South Australia the position is that *Voth* is limited to international cases: *Pegasus Leasing Ltd v Balescope Pty Ltd* (1994) 63 SASR 51, 56 (Perry J).

142 *McEntee v Connor* (1994) 4 Tas R 18, 24 (Underwood J); *Douglas v Philip Parbury & Associates* [1999] WASC 15, [17] (McKechnie J).

Inferior Courts

Inferior State courts do not have the power to transfer proceedings interstate. Instead, a superior federal or State court can lift a case from a court below it, and then transfer it to another superior court.[143] Where this has occurred, the decision to transfer has been governed by the *Bankinvest-Spiliada* principles.[144] Inferior courts can still do this themselves, though indirectly, by using powers they have been given to stay proceedings under the *Service and Execution of Process Act 1992* (Cth) (an Act which is discussed later). The touchstone for the granting of a stay under this Act is that 'a court of another State ... is the appropriate court to determine' the proceedings.[145] This stay can be conditional,[146] and a condition that the parties agree to proceed in another State's court would be imposed as a matter of course. Significantly, the legislated standard for the granting of a stay is 'appropriateness', reflecting a conscious preference for the *Spiliada* measure over *Voth* and the growing reliance on appropriateness in cross-vesting scheme transfers. In fact, while an inferior court may, under the Act of 1992, have regard to *Spiliada* connections like 'the places of residence of the parties and of the witnesses likely to be called in the proceeding ... the law that would be most appropriate to apply in the proceeding ... and ... whether a related or similar proceeding has been commenced', it is forbidden from giving any weight to the plaintiff's choice of court[147] – implicitly a *Voth* factor. When granting stays, courts have noted the deference to be given to 'the more appropriate court'.[148]

Territorial Jurisdiction

The final step needed to bring the principle of *forum conveniens* into its central coordinating role in the allocation of jurisdiction inside Australia was the removal of limits on territorial jurisdiction applicable to the State

[143] *Cross-vesting Act* (Cth) s 8; *Cross-vesting Act* (State) s 8. The receiving court would normally have powers to remit the proceedings to a subordinate court.

[144] *James Hardie & Co Pty Ltd v Barry* [2000] NSWCA 353, [98]; *Simmonfi v Fimmel* [2000] ACTSC 54, [1].

[145] *Service and Execution of Process Act 1992* (Cth) s 20(3).

[146] *Service and Execution of Process Act 1992* (Cth) s 20(5).

[147] *Service and Execution of Process Act 1992* (Cth) s 20(4).

[148] *Valkama v Jamieson* (1994) 11 SR (WA) 246, 249; *Workcover Corporation v Pross Chiyoda Pty Limited* [1999] SAWCT 86; *Programmed Maintenance Services Limited v Shell Company of Australia Ltd* [2000] QDC 249; *Fertico v Murray River Corn* [2002] SADC 89, [20]. In applying the restrictive common law principles for the granting of stays (pre-dating the acceptance of any doctrine of *forum non conveniens*), the decision in *Daralievski v Transport Accident Commission* [2003] SADC 30, [12]-[14] is plainly incorrect.

courts for litigation internal to the federation. Until this happened, the principle of *forum conveniens* was only a further limitation operating inside the rules-based schemes of jurisdiction set by the common law and the *Service and Execution of Process Act 1901*. The Supreme Courts could rely on their more generous order 11 jurisdictions, and a theory also emerged that they could rely on 'cross-vested jurisdiction' to reach interstate defendants. This was based on the assumption that, in receiving the 'jurisdiction' of another State Supreme Court under the cross-vesting legislation, the Supreme Court necessarily received its common law jurisdiction over defendants present, and served with civil process, within the State, regardless of the subject-matter of the claim.[149] As a consequence, through the accumulated grants of other State Supreme Court jurisdictions, a Supreme Court would receive personal jurisdiction over any person anywhere else in Australia, also regardless of the subject-matter of the claim. The theory was accepted in NSW where the Supreme Court claimed power (under the cross-vesting scheme) to reach a defendant anywhere in Australia, limited only by principles of *forum non conveniens*.[150] And certainly, there was nothing in the legislation that suggested that the 'jurisdiction' that was pooled in the superior courts did not include their territorial jurisdiction. However, there were other grounds for denying this theory as there was nothing in the cross-vesting legislation to show that it was intended to supersede the rules-based *Service and Execution of Process Act* and order 11 jurisdictions. In practice,[151] and in one case explicitly,[152] the other Supreme Courts denied the cross-vesting of territorial jurisdiction and continued to rely on the *Service and Execution of Process Act* and order 11.[153] This meant that, outside NSW, rules of jurisdiction continued to restrict the reach of a

[149] *Laurie v Carroll* (1958) 98 CLR 310.

[150] *Seymour-Smith v Electricity Trust of South Australia* (1989) 17 NSWLR 648, 660 (Rogers J). In 1937, the ACT Supreme Court had also adopted a rule enabling it to have a defendant served anywhere in Australia, apparently without regard to that person's or the claim's connection with the Territory. However, the rule had been struck down as *ultra vires* the federal Parliament's power in respect of federal territories: *Cotter v Workman* (1972) 20 FLR 318, 329 (Fox J).

[151] *South Adelaide Football Club Inc v Fitzroy Football Club* (1988) 49 SASR 380; *Lee v Johnson & Taylor Co Pty Ltd* [1990] WAR 381; *Ansett Transport Industries (Operations) Pty Ltd v Alenia Aeritalia & Selenia SPA* (1991) 105 FLR 169; *Grey v David Syme & Co Ltd* (1992) 106 FLR 103; *Reardon v Yaffa Publishing Group Pty Ltd* (1992) 108 FLR 1; and see also *Fernace v Wreckair Pty Ltd* (1991) 22 NSWR 439, 459-60.

[152] *David Syme & Co Ltd (Receiver & Manager Appointed) v Grey* (1992) 115 ALR 247, 274 (Gummow J).

[153] *Australian Commercial Research and Development Limited v ANZ McCaughan Merchant Bank Limited* [1990] 1 Qd R 101.

Supreme Court beyond its State borders. Three consequences followed. First, disputes over territorial jurisdiction still occurred and, so, reduced the efficiency of the scheme's ability to place litigation in the best court.[154] Secondly, the emergent principle of *forum conveniens* in transfer cases only functioned as a further limitation on the conduct of litigation that first qualified for a hearing under the rules-based scheme of the *Service and Execution of Process Act* or order 11.[155] And thirdly, this necessarily qualified the subject-matter jurisdiction of the Supreme Courts in that, for example, they would not have jurisdiction in a claim relating to a contract broken outside the State or a tort that occurred outside the State if the defendant happened to be interstate.

At the time the cross-vesting scheme was introduced, the Australian Law Reform Commission was finalising a comprehensive review of the *Service and Execution of Process Act 1901*.[156] The commission recommended a radical departure from the order 11 assumptions beneath the Act. It suggested that there be no need to show any connection between the subject-matter of the claim and the State in question to justify interstate service of a State writ. The commission was impressed by the evolution of the principle of *forum conveniens*, and thought this a better means of distinguishing proportionate from exorbitant jurisdictions than was the definition of different, 'technical nexus requirements' that could not exhaust the claims sensibly thought to be within a State court's proper jurisdiction.[157] The *Service and Execution of Process Act 1992*, which commenced on 10 April 1993, made the commission's recommendations law. The Act of 1992 repeats the Acts of 1886 and 1901's rule that a writ issued from a State court can be served in any other State.[158] But then it breaks with its forebears, and requires nothing more for the court to have jurisdiction. A writ served interstate has the same effect as if it had been served in the State where it was issued.[159]

The Act of 1992 applies to all State courts, superior and inferior,[160] and so gives them all territorial jurisdiction across Australia. For the superior

154 See cases above nn 151, 153.

155 Eg, *Lee v Johnson & Taylor Co Pty Ltd* [1990] WAR 381, 385-7.

156 Law Reform Commission, *Service and Execution of Process, Report No 40* (1987).

157 Ibid 84-5.

158 *Service and Execution of Process Act 1992* (Cth) s 15.

159 *Service and Execution of Process Act 1992* (Cth) s 12. Notices advising the defendant of his rights have to be attached to the writ (s 16), but failure to attach them does not, in itself, render service void: *C & P Trading Pty Ltd v Roladuct Spiral Tubing Pty Ltd* [1994] 2 Qd R 247, 249.

160 *Service and Execution of Process Act 1992* (Cth) s 3.

courts, this means that the generous subject-matter jurisdiction that they received under the cross-vesting scheme is reinforced with a complete territorial jurisdiction that allows the unfettered circulation of their process throughout the federation. And, in another break with its forebears, the Act of 1992 makes its rules for interstate service exclusive and exhaustive. Interstate service under State law is expressly prohibited.[161] This ends the reliance on the Supreme Courts' order 11 rules for interstate service, and all speculation as to whether interstate jurisdiction could rest on the State cross-vesting legislation. It also elevated the idea of *forum conveniens* as the central coordinating principle for allocating jurisdiction inside Australia, no longer boxed inside rules of jurisdiction that rested on a subject-matter nexus with a given State.

Rule-less Jurisdiction

The outcome of these reforms to civil jurisdiction was therefore a simple principle that, whatever the case, it was to be heard in the *forum conveniens* and, unless that assessment were made by a Western Australian judge, the *forum conveniens* would be identified by reference to the *Bankinvest-Spiliada* standard of the more appropriate court. That outcome was remarkable, because it was to a significant extent unplanned, and sprung from a mix of federal and State legislative reform and the cooperation of judges who strained to make the allocation of jurisdiction between the different courts of the federation sensible and workable. A reliance on discretion to sort jurisdiction between courts certainly had potential for conflict. Judges could, quite reasonably, reach different conclusions about the *forum conveniens*, with the result that two courts, both equally capable of delivering judgments enforceable throughout the country, could have jurisdiction as of right in the proceedings. However, from the time that the cross-vesting scheme commenced in 1988, a stand-off between participating federal and State courts occurred only once (and was again solved by a federal anti-suit injunction).[162] Especially when compared with the courts' demarcation disputes of the 1980s, this proved that, though timid, the cooperative civil

[161] *Service and Execution of Process Act 1992* (Cth) s 8(4)(a).

[162] In the *Pegasus Leasing* litigation, both the ACT division of the Federal Court and the South Australian Supreme Court refused to transfer related proceedings to the other: *Pegasus Leasing Limited v Tieco International (Australia) Ltd* (1993) 61 SASR 195. The *impasse* having arisen, the South Australian Supreme Court decided it was unable to stay proceedings so as to end the duplicate litigation: *Pegasus Leasing Limited v Balescope Ltd* (1994) 63 SASR 51. The Full Court of the Federal Court then ended the conflict by issuing an anti-suit injunction against the Supreme Court proceedings: *Pegasus Leasing Limited v Cadoroll Ltd* (1996) 59 FCR 152.

jurisdiction scheme was a substantial improvement.[163] When it also transformed jurisdictional disputes into 'nuts and bolts' management decisions to transfer, the benefits to litigants were incalculable.

Wakim: Partial Collapse of the Civil Jurisdiction Scheme

The convenience of the national jurisdiction scheme did not stop the High Court from dismantling parts of it in 1999. Even when proposals for a cross-vesting scheme were first mooted, reservations were expressed about its compatibility with the federal *Constitution.* In the first proposal made by the Australian Constitution Convention in 1977, an amendment to the *Constitution* was recommended to let federal courts exercise jurisdiction in questions of State law.[164] The Constitutional Commission made a similar recommendation.[165] The scheme was nevertheless introduced without clarifying the constitutional uncertainties, although there was some expectation that its validity might be challenged even before its commencing date. But no real constitutional challenge took place until 1995,[166] when *Gould v Brown* surfaced in the Federal Court.

The High Court litigation about the cross-vesting scheme's validity involved provisions of the scheme that had been relocated to the uniform *Corporations Acts*, but which remained identical with the general scheme. Any decision on the corporations cross-vesting scheme therefore had equal implications for the general scheme. In *Gould*, the Full Court of the Federal Court held that the corporations cross-vesting scheme was valid.[167] But while the High Court upheld the appeal in *Gould* by a technical 3:3 majority,[168] this was only a temporary respite. In 1999 in *Re Wakim: Ex parte McNally*,[169] there were, amongst other issues, challenges to the validity of the Federal Court's reception of the NSW Supreme Court's jurisdiction in relation to corporations under the

[163] G J Moloney and S McMaster, *Cross-vesting of Jurisdiction: A Review of the Operation of the National Scheme* (1992) 147-8.

[164] Opeskin, above n 83, 310.

[165] *Advisory Committee*, above n 88, 44; *Final Report*, above n 55, 373.

[166] In *Grace Bros Pty Ltd v Magistrates of the Local Courts of New South Wales* (1989) ATPR 40-921 and *West Australian Psychiatric Nurses' Association (Union of Workers) v Australian Nursing Federation* (1991) 102 ALR 265, 274-80 (Lee J) no question of cross-vested jurisdiction arose, so arguments posed about the constitutional invalidity of the scheme were not addressed. In *Re T* [1990] 1 Qd R 196, 198-9 (Ryan J) the scheme was regarded as constitutionally valid.

[167] *BP Australia Ltd v Amann Aviation Pty Ltd* (1996) 62 FCR 451.

[168] *Gould v Brown* (1998) 193 CLR 346. In the case of an equally divided court, the decision appealed from is affirmed: *Judiciary Act 1903* (Cth) s 23(2)(a).

[169] (1999) 198 CLR 511.

Corporations (NSW) Act 1989,[170] and the Federal Court's reception of the ACT Supreme Court's jurisdiction under the federal *Corporations Act*.[171] With three new judges, the High Court held by a 6:1 majority that the Federal Court could only be invested with federal jurisdiction, and therefore the reception of the NSW corporations jurisdiction was invalid. From that point, federal courts could not take proceedings that mixed questions of federal and State law unless they fell within accrued jurisdiction.

According to *Wakim*, the reason why federal courts cannot hold State jurisdiction rests on the text of the *Constitution* itself. As McHugh J said:

> There is not a word in Chapter III [of the *Constitution*] which indicates expressly or by implication that it authorises the Parliament of the Commonwealth to create federal courts to exercise State jurisdiction or State judicial power.[172]

That gives rise to a negative implication that the federal Parliament has no power to authorise the reception of State jurisdictions by federal courts. Gummow and Hayne JJ's judgment rested squarely on that basis: hence, it was the federal reception of State jurisdiction, and not necessarily the State's grant of jurisdiction, that was impermissible.[173] McHugh J extended the negative implication to the initial grant of State jurisdiction, which he held was outside the States' constitutional powers.[174]

Consequences of *Wakim*

Wakim had a number of immediate consequences for the exercise of civil jurisdiction inside Australia. First, it should be noted that the decision had no effect on the Australia-wide territorial jurisdiction of State courts under the *Service and Execution of Process Act 1992*. In addition, most of the cross-vesting scheme remained intact. The exchange of Supreme Court jurisdictions between the States and Territories, and the grant of the Federal and Family Courts' jurisdictions to the Supreme Courts, are untouched by the decision. The State courts still hold the enlarged federal and State jurisdictions they were initially granted under the scheme. Furthermore, in *Wakim* itself, the power of the federal Parliament to give the Federal Court the ACT Supreme Court's jurisdiction in respect of

[170] *Corporations (NSW) Act 1990* (NSW) s 42(3); *Corporations Act 1989* (Cth) s 56(2).

[171] *Corporations Act 1989* (Cth) s 51(1).

[172] (1999) 198 CLR 511, 557.

[173] Ibid 577-82; see Hill, above n 6, 550-1.

[174] (1999) 198 CLR 511, 559-60.

corporations was upheld,[175] so the investing of external Territory Supreme Courts' jurisdiction in the federal courts by federal legislation is valid. *Wakim* also had little bearing on the cross-vesting scheme's provisions for the transfer of proceedings. Each participating court can still transfer proceedings rightly brought before it to any other. The federal courts' capacity to receive transfers is limited to those matters that are plainly within their expressly granted federal jurisdiction, although at least one transferring court has recently pushed the boundaries of this limitation. They also cannot transfer when, in the first place, they find that the proceedings are outside federal (including accrued) jurisdiction. In these cases, a dismissal or permanent unconditional stay is ordered.[176] The power to transfer presumes that the court is first properly seised of the case.

Secondly, the limitation of federal courts to grants of federal jurisdiction means that the Federal Court and Family Court cannot receive a grant of State jurisdictions. It also follows that, so far as the conferral of Territory Supreme Court jurisdiction on federal courts is concerned, this is probably invalid when the grant is made by Territory (instead of federal) legislation.[177] Substantial doubts must also exist as to whether federal courts can exercise powers granted by foreign legislatures. For example, the Federal Court is granted powers by the New Zealand Parliament under Trans-Tasman competition arrangements.[178] While no constitutional limits in Australia can stop the New Zealand Parliament from doing this, the reasoning in *Wakim* might possibly suggest that the Federal Court cannot receive a grant of this foreign (non-federal) jurisdiction.

Thirdly, federal courts still have a power to deal with State matters if they can be brought within the accrued jurisdiction that those courts can exercise. *Wakim* immediately revived the significance of accrued jurisdiction. In *Wakim* itself, the accrued jurisdiction of the Federal Court was extended, almost as a sop for its loss of cross-vested jurisdiction.[179] The High Court, by a 4:3 majority, allowed the Federal Court to deal with

[175] Ibid 547 (Gleeson CJ), 559-60 (Gaudron J), 565 (McHugh J), 635-6 (Callinan J).

[176] Lovric, above n 6, 250-78 lists cases.

[177] In *Wakim* (1999) 198 CLR 511, 594-6, Gummow and Hayne JJ emphasised the validity of the grant of ACT jurisdiction to the Federal Court on the basis that it was an exercise of federal power in relation to territories. This could not be said for the exercise of the powers of a Territory Parliament: cf Hill, above n 6, 565-6.

[178] *Judicature Amendment Act 1990* (NZ) s 3; *Judicature Act 1908* (NZ) ss 56J-56K, 56M-56Q; see R G Mortensen, 'Judgments Extension under CER' [1999] *New Zealand Law Review* 237, 249-51.

[179] Lam, above n 6, 172-3.

a claim in negligence against lawyers who advised on a (federal) bankruptcy matter.[180] The minority suspected that the negligence claim was severable from the insolvency claims that were within jurisdiction,[181] and Kirby J had no doubt that this led to an 'enlargement of the accrued jurisdiction of federal courts'.[182]

The revival of accrued jurisdiction naturally resurrected contests about the jurisdictional limits of the federal courts, which were unknown between 1988 and *Wakim*.[183] Disputes over the limits of accrued jurisdiction have ballooned,[184] which in many respects is lamentable. Federal judges are spending more courtroom time hearing arguments about where to litigate, and deciding them in light of a body of ambiguous case law that is delimited only by 'impression' and 'practical judgment'.[185] In at least one case, a State judge has transferred property proceedings to the Family Court, despite doubts about its jurisdiction, implying that the parties should first test its accrued jurisdiction over the whole dispute before it could not be considered the more appropriate court.[186] A mechanism designed to avoid jurisdictional contests was thus used to promote one. Applications for anti-suit injunctions also seem to be rising. Although the courts are still reluctant to grant them,[187] refusals to do so or to decline jurisdiction on *forum non conveniens* grounds have again led to split litigation across federal and State courts.[188] Further, a

180 Ibid 546 (Gleeson CJ), 547 (Gaudron J), 587-8 (Gummow & Hayne JJ).

181 Ibid 563 (McHugh J), 627-8 (Callinan J).

182 Ibid 618.

183 Opeskin, above n 83, 308.

184 Eg, see Lovric, above n 6, 250-78; Hill, above n 6, 557.

185 *Fencott v Muller* (1983) 152 CLR 570, 610 (Mason, Murphy, Brennan & Deane JJ).

186 *Foley v Farquharson* [2003] FLC 93-126 (Mackenzie J).

187 Anti-suit injunctions awarded by the Federal Court against Supreme Court proceedings, or *vice-versa*, include: *Construction, Forestry, Mining & Energy Union v Mirvac Constructions Pty Ltd* [2000] FCA 341; *Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* [1999] FCA 1842; *Construction, Forestry, Mining & Energy Union v Multiplex Constructions Pty Ltd* [2000] FCA 101; *Transport Workers' Union v Bentley* [2001] FCA 671. The Federal Court has refused to award an anti-suit injunction where it only held proceedings under its accrued jurisdiction, or where it had doubts about its accrued jurisdiction: *Cook Inc v World Medical Manufacturing Corp* [1999] FCA 1333, [26]-[30]; *Australian Workers' Union v Yallourn Energy Pty Ltd* [2000] FCA 65, [83]-[84].

188 *Cook Inc v World Medical Manufacturing Corp* [1999] FCA 1333; *Construction, Forestry, Mining & Energy Union v Master Builders' Association of Victoria (No 1)* [2000] FCA 168; *Construction, Forestry, Mining & Energy Union v Yallourn Energy Pty Ltd* [2000] FCA 1070; *Construction, Forestry, Mining and Energy Union v Yallourn Energy Pty Ltd* [2000] FCA 1284; *Meyer v Falcone* [2001] FCA 1497; *Australian Workers' Union v Yallourn Energy Pty Ltd* [2000] FCA 65, [83]-[84]; *Australian Competition & Consumer Commission v Simply No-Knead (Franchising)*

decision that proceedings are outside accrued jurisdiction means that they cannot be transferred. If taken up again in a State court, and the statute of limitation hasn't expired, they have to be re-started from scratch.

Fourthly, the key area in which there was concern that the federal courts might lack a jurisdiction they had usefully exercised before *Wakim* was addressed by federalising State power. A referral of powers over ex-nuptial children had already been made in 1990 by all States except Western Australia,[189] where the jurisdiction of the State Family Court made it unnecessary. In 2001, the States referred powers to the Commonwealth to allow it to legislate in respect of corporations until, at earliest, mid-2006.[190] After the cross-vesting scheme began, the Federal Court assumed some of the workload in corporations litigation. This peaked at almost 2000 applications in 1996, but after *Wakim* dropped to six.[191] The reference, which now supports the *Corporations Act 2001*, allowed the Federal Court to recover over 400 applications *per annum*.[192] No further references are planned,[193] despite an attempt to get one in relation to de facto couples,[194] but even if there were they would never replicate the breadth of jurisdiction planned for federal courts under the cross-vesting scheme - without a politically bizarre, wholesale surrender of State legislative power.[195]

After *Wakim*, litigation that mixed questions of federal and State law was therefore best brought in the State Supreme Courts.[196] The Federal Court lost business to the State courts in commercial law and, as seen already, has still not recovered the corporations work it had in the 1990s. The drift of litigation, reflected in net transfers between the Federal and Supreme Courts, remains towards the latter.[197] And the Family Court can no longer

Pty Ltd [1999] FCA 1842; *Transport Workers' Union v Bentley* [2001] FCA 671; *Bhagat v Global Custodians Ltd* [2002] FCA 926.

189 *Family Law Amendment Act 1991* (Cth); *Commonwealth Powers (Family Law–Children) Act 1986* (NSW); *Commonwealth Powers (Family Law–Children) Act 1990* (Qld); *Commonwealth Powers (Family Law) Act 1986* (SA); *Commonwealth Powers (Family Law) Act 1987* (Tas); *Commonwealth Powers (Family Law–Children) Act 1986* (Vic).

190 *Corporations Act 2001* (Cth); *Corporations Referral Acts*.

191 *Federal Court Report 2000*, above n 14, 135.

192 *Federal Court Report 2003*, above n 12, 122.

193 Silverii, above n 6, 21.

194 *Shaping Family Law*, above n 6, 8.

195 Cf Hill, above n 6, 571; G Williams, above n 6, 168.

196 *Friis v Friis* (2000) 26 Fam LR 205, 210-11 (McPherson JA).

197 *Federal Court Report 2003*, above n 12, 30. For other areas outside the court's jurisdiction, see B Sweeney, 'The Constitutional Basis of the Competition Code' (2001) 27 *Monash University Law Review* 78; P McAlister and E V Lanyon, 'Cross-

deal with disputes involving de facto couples, domestic torts, and a range of property questions where third parties are involved. These have also migrated to the Supreme Courts.[198] While *Wakim* has not displaced the central role of the principle of *forum conveniens* for allocating jurisdiction, it has re-boxed the principle inside the uncertain limits of federal jurisdiction and has allowed, and encouraged, the re-agitation of litigation about where to litigate. The Constitutional Commission had recommended that there was a need to examine how well cross-vesting worked before any proposal for a unified system of courts that held all federal and State jurisdictions could be considered.[199] The cross-vesting scheme's inability to deal with the very problem that motivated its introduction therefore suggests that it is time for more substantial proposals to be treated seriously.

Instating Cooperative Civil Jurisdiction

At present, nothing more is planned to remove the restrictions on federal courts' jurisdictions that *Wakim* revealed and created.[200] Soon after *Wakim* was decided, Darryl Williams, former federal Attorney-General, suggested that the Commonwealth's options were limited either to securing a referral of power from the States over areas thought desirable for adjudication in federal courts, or to amending the *Constitution* to allow federal courts to participate fully in the cross-vesting scheme.[201] As has been mentioned, the corporations reference and the *Corporations Act 2001* now put corporations work inside federal jurisdiction, but further references are not being considered. In any case, they are an incomplete and *ad hoc* response to the problem. In its review of the *Judiciary Act*, the Law Reform Commission was expressly directed not to consider the cross-vesting scheme.[202] The remaining solutions are therefore constitutional amendment or, to the extent that it is possible without constitutional change, a reconstructed court system.

vesting Arrangements under the Consumer Credit Code' (2000) 11 *Journal of Banking and Finance Law and Practice* 11.

198 D Kovaks, 'After the Fall: Recovering Property Jurisdiction in the Family Court in the Post Cross-vesting Era' (2001) 25 *Melbourne University Law Review* 58, 70-80; Riley, above n 6, 463-6.

199 *Final Report*, above n 55, 370, 371.

200 Cf C Saunders, 'In the Shadow of *Re Wakim*' (1999) 17 *Company and Securities Law Journal* 507, 515.

201 *Judicial Power*, above n 6, 138; Silverii, above n 6, 21.

202 Australian Law Reform Commission, *The Judicial Power of the Commonwealth* (2001) 81 ('*Judiciary Act Review*').

Amending the *Constitution*

All commissions that recommended the introduction of a cross-vesting scheme in the 1980s also recommended that the *Constitution* be amended beforehand to remove doubts about the capacities of federal courts to deal with State questions. Now *Wakim* has given certainty to these doubts, the wisdom of these recommendations has to be conceded. A constitutional amendment must be the preferred solution to the problems of *Wakim*.[203] This would require almost no restructuring of the courts, and would reinstate a scheme that operated with the general approval of all Australian governments and judiciaries.[204] The precise form that an amendment would take is another question, but would at least have to provide for the granting of power to the State parliaments to confer, with the consent of the federal Parliament, jurisdiction on federal courts.[205] If powers given to the Federal Court by the New Zealand Parliament are to be validated, it is also best to give the federal Parliament a power to consent to the conferral of foreign jurisdictions on federal courts.[206]

While a constitutional cure for *Wakim* is widely seen as desirable, it is equally regarded as impractical.[207] As late as 2001, Darryl Williams was supporting constitutional change,[208] but later appeared to rule it out.[209] The primary concerns about constitutional amendments to deal with *Wakim* have been that:

- The referendum procedure is fraught with uncertainties, and has high political risk.[210]

[203] See above n 6.

[204] Moloney and McMaster, above n 163, 147-8; *Judicial Power*, above n 6, 138.

[205] G Williams, above n 6, 170. Saunders, above n 6, 286-7 largely agrees, but suggests, as an alternative, a broader power for cooperative schemes between the Commonwealth and the States.

[206] A further suggestion has been made that the jurisdictional limits of federal courts could be extended by expanding their accrued jurisdiction: Lam, above n 6, 172-3. However, the limits of accrued jurisdiction are also defined by the reference to 'matters' in chapter III of the *Constitution*. Therefore, apart from the High Court's own changing interpretations of what constitutes a 'matter', accrued jurisdiction also could only be expanded by constitutional amendment – and an extraordinarily technical one at that.

[207] Eg, Baxt, above n 6, 519; Govey & Manson, above n 6, 258-9; Lam, above n 6, 174; Riley, above n 6, 469-70.

[208] *Shaping Family Law*, above n 6, 8; *Judicial Power*, above n 6, 138; *Constitutional Change*, above n 6, 3.

[209] Govey and Manson, above n 6, 258-9.

[210] Baxt, above n 6, 519; Govey and Manson, above n 6, 258; Lam, above n 6, 174; Riley, above n 6, 470.

- The required amendment is technical and unlikely to be broadly understood in the electorate. This compounds the political risk involved.[211]
- State governments could campaign against the amendment on the ground that it could further centralise power in the Commonwealth.[212]

Although some State politicians welcomed *Wakim*,[213] the last concern is probably overstated. The State governments supported the cross-vesting scheme itself, so presumably could be convinced that giving it a proper constitutional basis is worthwhile. Also, the amendment would not enhance federal power at the expense of the States. Indeed, it would negate any perceived need for the States to refer power to the Commonwealth, as in the corporations reference, simply to correct jurisdictional problems in the federal courts. However, the other impediments, which represent difficulties for federal constitutional change of any kind, are enough to make any federal government baulk at a constitutional solution to the problem. The present Government has.

A Unified Court System

The cross-vesting scheme was a pilot: an attempt to see if jurisdictional collision could be solved cheaply and without affecting the existing courts. The pilot failed, so, if the interests of litigants are still to have priority, more substantial solutions are needed. However, all of the proposals made in the 1970s and 1980s required a more fundamental reworking of the *Constitution*. If the federal government is unwilling to try a referendum on restoring the cross-vesting scheme, hopes that it will seek constitutional change to allow a unified court system are almost delusional.

Nevertheless, it is still possible to realise a unified court system, coordinated only by reference to the *forum conveniens*, and giving effect to cooperative arrangements between the federal and State governments, without any change to the *Constitution*. It necessarily relies on the sole use of State courts at all levels below the High Court, for all federal and State jurisdictions, and therefore requires the absorption of federal judges into the Supreme Courts and federal magistrates into appropriate inferior State courts.[214] The suggestion is simultaneously radical[215] and

[211] Lam, above n 6, 174; Riley, above n 6, 470

[212] Lovric, above n 6, 283.

[213] Baxt, above n 6, 520.

[214] Aitken, above n 7, 234; Davies, above n 7, 3; and see Riley, above n 6, 473;

[215] Aitken, above n 7, 234.

conservative (because it models the court structure on its basic pattern before the 1970s) and is therefore likely to be resisted in a political system that, mostly with good sense, prefers incremental change. In some respects, it also seems counter-intuitive that a national cooperative civil jurisdiction scheme would not involve federal courts because, as Saunders notes, intergovernmental cooperation in Australia normally relies on the Commonwealth providing the 'bucket'.[216] However, there is no inherent reason why this must be the case and, as *Wakim* has reinforced, the only constitutionally-approved 'bucket' that can hold all Australian jurisdictions is a State court.[217]

Once transitional arrangements preserving salaries, tenure and resources are resolved, this necessarily means the end of federal courts (other than the High Court). Over the years, those who have rejected similar suggestions have appealed to the 'history' of the federal courts and 'the strong arguments in favour of [their] creation'.[218] Temporarily putting 'history' to one side, the arguments that led to the creation of intermediate federal courts, noted earlier,[219] do not seem to demand courts that are necessarily federal. The *nationhood* and *political interest* arguments are cosmetic,[220] and must be secondary to the practical consideration of the courts' convenience to litigants. The *national territorial reach* argument was never based on an accurate assessment of State courts' interstate jurisdiction, and is irrelevant now that the *Service and Execution of Process Act 1992* enables the free circulation of State civil process throughout Australia.

There is, though, more weight in the suggestion that the *uniformity* of federal law is best secured by one court of national territorial jurisdiction. Nevertheless, it does seem that, before the creation of intermediate federal courts, the uniformity argument was exaggerated. The most significant recorded difference between State courts over the interpretation of federal law arose in relation to the *Matrimonial Causes Act 1945* (Cth), which required issues of substantive divorce law to be determined by the *lex domicilii* but 'practice and procedure' by the *lex fori*.[221] The Victorian Supreme Court and one Queensland Supreme Court judge held that the time to set between a decree *nisi* and absolute was

216 Saunders, above n 6, 275-6.

217 *Constitution* (Cth) s 77(iii).

218 Riley, above n 6, 473; see Durack, above n 79, 782.

219 See text above nn 54-63.

220 Cf Burt, above n 1, 510.

221 *Matrimonial Causes Act 1945* (Cth) s 11.

governed by the *lex fori*,[222] where another Queensland judge and one in NSW held it was governed by the *lex domicilii*.[223] This was hardly a major disagreement: the position in Queensland could have been settled within the State, it never made any difference to the granting of a divorce, and it was eventually resolved by the High Court in favour of the Victorian view.[224] If this is the worst difference that State courts had, then they actually maintained highly uniform interpretations of federal law, even without the first appeal to a national court that Burt, Ellicott, Street and, more recently, Davies JA have proposed to reinforce the uniformity of federal law.[225] Certainly, entrusting the administration of federal law exclusively to decentralised State court hierarchies does risk its fragmented interpretation. The interpretation of the cross-vesting scheme's provisions for transfer might show that[226] – but again, taking into account the ban on appeals, the uniformity that has been achieved across State borders in the interpretation of the transfer provisions shows a national judicial culture that prizes uniform interpretation of the statute law. In any case, correcting mechanisms can be introduced to promote uniformity: a statutory direction to courts to pay due regard to,[227] or even to follow, other States' appeal courts' interpretations of federal law; a first appeal to the High Court when (as would probably be rare) differing interpretations are reached; common rules of procedure; and a federal statute of limitation.[228]

As mentioned, *expertise* did not loom large in the official reasons for creating intermediate federal courts. From inception, the work of the Federal Court, while carried by judges of the highest calibre, did not encourage concentrations of expertise and the court assumed a more

[222] *White v White* [1947] VLR 434, 438, 440 (Herring CJ & Gavan Duffy & Barry JJ); *Tullett v Tullett* [1947] QWN 37, 55 (Mansfield SPJ).

[223] *Green v Green* [1947] QWN 12, 16 (Philp J); *Bushell Deans v Bushell Deans* (1947) 64 WN (NSW) 13, 15 (Bonney J); and see the *obiter* remarks in *Thornton v Thornton* (1947) 65 WN (NSW) 87, 89 (Bonney J).

[224] *Hooper v Hooper* (1955) 91 CLR 529, 538 (Dixon CJ and McTiernan, Williams, Webb, Fullager, Kitto & Taylor JJ).

[225] Burt, above n 1, 513; Davies, above n 7, 3, Ellicott, above n 86, 432; Street, above n 87, 517.

[226] See text above nn 132-40.

[227] Eg, see *Civil Jurisdiction and Judgments Act 1982* (UK) s 3B(1) that requires UK courts, when interpreting the Lugano Convention, to 'take account of any principles laid down in any relevant decision delivered by a court of any other Lugano Contracting State concerning provisions of the Convention'.

[228] Ellicott, above n 86, 432. The Australian Law Reform Commission has recommended a federal statute of limitation, and notes the national harmonisation of procedure already taking place through the work of the Lindgren Committee, commissioned by the Council of Chief Justices: *Judiciary Act Review*, above n 202, 578.

agglomerate character than the larger Supreme Courts.[229] After *Wakim*, the court's expertise in corporations work was nevertheless offered as a reason for maintaining the Federal Court's separate identity.[230] However, while Federal Court judges may well have this expertise,[231] it isn't unique. In fact, practitioners prefer, to an overwhelming extent, to file corporations applications in the Supreme Courts – particularly the NSW Supreme Court.[232] The Family Court has stronger claims to providing a concentration of expertise and a distinctive *ethos* (although admitting that its ethos is a point of hot controversy). Except for the Western Australian Family Court, there is no comparable specialised court in the country. The Family Court is also the only court that can claim to carry work that is structurally *federal*.[233] Despite this, the Commonwealth's official, legislated policy is that it will approve the relocation of federal family law to State courts.[234] But regardless of how sustainable arguments about expertise might be, the key point is that expertise is transportable. If appointed to a State court, a federal judge would bring any expertise the judge has as well, and only needs a court organisation in which it could be used and nurtured.[235]

This proposal combines the judicature model, fully realised within each State hierarchy, with a modified cross-vesting scheme to coordinate relations between State hierarchies by transfers made to or, for inferior courts, stays in favour of the *forum conveniens*. The State courts would therefore be the medium for terms of cooperation between federal and State governments on the structure, composition and management of a national court system. The political and legal justification for federal government involvement in State courts, conceding the validity of the concerns about their *workload* and *funding*, would be a cooperative funding agreement under a formula that commits both federal and State money to the State courts in rough proportions to their federal and State

229 Campbell, above n 65, 15; Gibbs, above n 64, 678.

230 Baxt, above n 6, 518; Riley, above n 6, 463.

231 And some dispute this: Aitken, above n 7, 235; M J Whincop, 'The National Scheme for Corporations and the Referral of Powers: A Sceptical View' (2001) 12 *Public Law Review* 263, 267.

232 Eg, in 2002, 346 applications were filed in the Federal Court, and 3113 in the NSW Supreme Court. In 2001, 1206 applications were filed in the Victorian Supreme Court: *Federal Court Report 2003*, above n 12, 122; Supreme Court of New South Wales, *Annual Review 2002* (2002) 33; Supreme Court of Victoria, *Annual Report 2001* (2001) 7; Davies, above n 7, 2; Whincop, above n 231, 267.

233 Cf Whincop, above n 231, 266.

234 *Family Law Act 1975* (Cth) s 41(3).

235 Whincop, above n 231, 267.

workloads. As has long been pointed out,[236] the separate existence of federal courts itself carries a cost. The economies of scale possible in a unified court system could well allow a more efficient allocation of resources altogether to the civil justice system, and increase its capacities. However, tagged federal money also gives the federal government an interest that, under the terms of cooperation, would allow its involvement in the judicial system to be maximised to a point - if the problems of *Wakim* are to be avoided - short of its appointing judges. The following terms of cooperation are suggested:

- The Supreme Courts should necessarily include family and general federal divisions - and could include others (as is now the case in NSW and Victoria) if the volume of litigation justifies it. In the judicature model, the use of divisions ensures that expertise can be used and developed but, as the placing of litigation with the best division ultimately depends on the court administration, without the cost to the litigants imposed by the use of jurisdictional boundaries to delimit expertise. As mentioned later, divisions may also be a means of accommodating the federal government's political interest in the courts.
- Territorial jurisdiction should be maintained by the present arrangements of the *Service and Execution of Process Act 1992*, and cross-vesting legislation should pool all federal and State jurisdictions in all Supreme Courts. The provisions for transfer could also be tidied, bringing the *Bankinvest-Spiliada* principles into the Western Australian Supreme Court.[237]

[236] *New Federal Court*, above n 60, 3; Campbell, above n 65, 16-17.

[237] The most technical terms of transfer relate to 'special federal matters', and these would be unnecessary: *Cross-vesting Act* (Cth) s 6; *Cross-vesting Acts* (State) s 6. It is also difficult to see why the *lis pendens* and 'cross-vested jurisdiction' grounds of transfer are necessary, when both also incorporate the 'interests of justice' requirements. Transfer provisions modelled on the *Service and Execution of Process Act 1992* (Cth) s 20 would align the jurisprudence of *forum conveniens* for superior and inferior courts.

- The federal government should have a voice in the appointment of State judges, and a louder voice for judges of the federal divisions. It could not itself appoint the judges without risking the creation of federal courts,[238] and joint federal-State appointments could similarly mire the judicature model in the problems of *Wakim*.[239] Davies has suggested that the federal government could nominate the judges that State governments would appoint to the federal divisions.[240] There are other reasons, outside the concerns of this article, to suggest that it is time that Australian governments adopted more open procedures for the appointment of all judges and magistrates, and within a State court structure this could include federal representation on an appointments commission.[241]
- Legislative mechanisms needed to reinforce the uniform interpretation of federal law should be introduced. These could include rules of precedent and a federal statute of limitation,[242] and the State courts should also be expected to progress the Lindgren Committee's work on the harmonisation of procedural law.[243]

There is plainly nothing needed for the administration of federal law, including the federal government's influence on the composition of the courts, which could not be done through State courts run under a cooperative national scheme. In the 1970s and 1980s, governments were conscious that intermediate federal courts might create jurisdictional collision and that they might not be able to receive State jurisdictions. Had what is known now been certain then, it is unlikely that Australia's scheme of civil jurisdiction would have its current form. Indeed, this suggests that 'history' is the real reason why, after *Wakim*, separate federal courts are maintained.[244] The federal courts exist: they have an impressive judiciary, large budgets and an imposing physical presence; giving them an institutional weight that is hard to shift. It is therefore, oddly, an essentially conservative argument that stands against Dixon's and Cowen's preference for a unified court system. Still, the interests of litigants could be better served. Although written to justify the opposite position, Sir Nigel Bowen's own words can be endorsed wholeheartedly:

238 *Constitution* (Cth) s 72(i).

239 Cf Wade, above n 7, 273.

240 Davies, above n 7, 3; Hill, above n 6, 572.

241 Ellicott, above n 86, 432.

242 *Judiciary Act Review*, above n 202, 576-8.

243 Ibid 580-4.

244 Riley, above n 6, 473.

> ... while the difficulties ... are real and require urgent remedy, it is clear that they are due to the form of the Constitution and the relevant legislation, and are in no sense the fault of the federal or the State courts concerned. It is equally clear that, as the law stands at present, the difficulties can be remedied by legislative action on the part of the appropriate governments, if they are willing to take this action.[245]

[245] Bowen, above n 54, 807.