# JURISDICTION, LIABILITY AND "DOUBLE FUNCTION" LEGISLATION

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## 1 INTRODUCTION: WHAT IS "DOUBLE FUNCTION" LEGISLATION?

As *Barrett's* case[1] long ago demonstrated, a provision in a Commonwealth Act may perform the "double function"[2] of conferring both a jurisdiction upon a court to grant a remedy, and a "substantive statutory right or duty"[3] upon a litigant by means of "providing that in certain circumstances a person may take proceedings in a particular court to obtain a specified remedy"[4]. The difficulty is in divining when the Parliamentary Counsel has intended that this double function be performed. Under s 76(ii) of the Constitution, Parliament may confer jurisdiction upon a federal court in "any matter *arising* under any laws made by the Parliament" (emphasis added). How is one to tell if "Parliament has been too sparing in the exercise of its powers and has made only a bare grant of jurisdiction without enacting a substantive law to which the exercise of jurisdiction is referable"?[5]

Mr Renfree, while acknowledging the possibility of such jurisdiction, notes that: "... the modern view seems to be that the jurisdiction of the Court on the one hand, and the existence of an actionable right ... are two different things, and should be the subject of separate legislative provisions".[6] It is not immediately

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1 *R v Commonwealth Court of Conciliation and Arbitration; ex parte Barrett* (1945) 70 CLR 141 (hereafter *Barrett's* case).

2 *Ibid* 165-166 *per* Dixon J. It might equally be called "*uno ictu*" legislation in that "with one stroke" (*uno ictu*) it confers a jurisdiction and a right to proceed: see *Hooper v Hooper* (1955) 91 CLR 529, 536. A similar difficulty has long existed in the United States; see *Hart and Wechsler's The Federal Courts and the Federal System* (3rd ed 1988) 995-1027 discussing the scope of the statutory grant of jurisdiction to the United States Federal Courts.

3 *Tobacco Institute of Australia v Australian Federation of Consumer Organisations Inc* (1988) 84 ALR 337, 342.

4 *Hooper v Hooper* (1955) 91 CLR 529, 536.

5 Z Cowen and L Zines, *Federal Jurisdiction in Australia* (2nd ed 1978) 124, who then go on to discuss the analogous United States position in relation to "protective jurisdiction" which the authors describe as "broadly similar", *ibid* 125.

6 H E Renfree, *The Federal Judicial System of Australia* (1984) 13, citing *Minister for Army v Parbury Henty & Co* (1945) 70 CLR 459, 504 and *Minister for Navy v Rae* (1945) 70 CLR 339. See also the recent Full Federal Court decision in *Tobacco Institute v AFCO* (1988) 84 ALR 337, 342 where the Court said: "... the best method, according to accepted canons, was to keep substantive and adjectival matters distinct, by creating the right or duty and then providing the remedy." It is interesting in this regard to note the "double function" which is achieved by s 75(iii) under the most recent

clear however what is meant by a "modern" view since, as an examination of the cases demonstrates, it is impossible to discover any coherent policy employed by the legislative draftsman to indicate that the "double function" was intended. It is, perhaps, for this reason that the Full Federal Court in *Tobacco Institute v Australian Federation of Consumer Organisations Inc*[7] described the recommended drafting approach as a "counsel of perfection".

The question is an important one if for no other reason than this: that the adoption of a presumption that a "double function" was intended would greatly increase the range of relief which is available to an applicant pursuant to federal statute. As the analysis which follows seeks to demonstrate, there appears to be no theoretical bar to a federal jurisdictional statute also conferring a right to seek a broad range of relief. The Administrative Decisions (Judicial Review) Act 1977 (Cth) for example, whilst conferring a jurisdiction upon the Federal Court to review administrative decisions of officers made under an enactment, could also provide for a complete range of remedies against the relevant department or Minister. At present, as we shall see, it has been held that damages, for example, cannot be sought directly in judicial review proceedings under the Act: *Park Oh Ho v Minister for Immigration and Ethnic Affairs*.[8] Adopting a "double function" approach would allow such relief to be granted by the Federal Court since the Act would then be regarded as conferring both a jurisdiction and a remedy.

*A A related problem: When does a matter properly "arise"?*

Involved also in the question is the broader one: when does a "matter" properly "arise" under s 76(ii) of the Constitution? Section 76(ii) of the Constitution provides:

> The Parliament may make laws conferring original jurisdiction on the High Court in any matter - ... (ii) Arising under any laws made by the Parliament.

Unless the matter does "arise" in the relevant sense there will be no basis upon which the "double function" can be performed. It has been argued that this is the more important issue since it has been suggested that the question of a "double function" may, perhaps, be resolved simply as a matter of statutory interpretation. As Aickin J noted in *Dowal v Murray*,[9] *Barrett's* case "is concerned only with mode [sic] of conferring jurisdiction and creating rights and obligations. It is a separate question whether there is a constitutional basis for conferring such jurisdiction or for creating such rights and imposing such obligations ...".[10]

That is, it is a question in each case whether, constitutionally, the matter "arises" properly to support the grant of jurisdiction. As Professor Lane has pointed out, this question is often one not so much to do with the operation of s 76(ii) itself but rather with the anterior consideration of the width of the

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interpretation and the more restricted operation given to s 75(iv): *Breavington v Godelman* (1988) 62 ALJR 447. This is discussed in more detail below.

7 (1988) 84 ALR 337, 342.

8 (1988) 81 ALR 288 (Full Federal Court); (1989) 88 ALR 517 (High Court) discussed *infra* text at nn 81ff.

9 (1978) 143 CLR 410, 438.

10 For an example of such an approach, see *Vitzdamm-Jones v Vitzdamm-Jones* (1981) 148 CLR 383, 411, 425, 429 *per* Gibbs CJ, Aickin and Wilson JJ respectively.

enumerated powers available to the Commonwealth Parliament under which it may pass the relevant Act which gives life to the conferral of jurisdiction.[11]

*B "Double Function" at a Constitutional Level: Sections 75(iii) and 75(v) of the Constitution.*

While the position in relation to Commonwealth enactments may, arguably, be resolved by statutory interpretation, no such simple solution is available to resolve the analogous "double function" questions at a constitutional level. Here the matter arises most acutely since there is nothing to guide the High Court's interpretation apart from a more or less imperfect understanding of what the Founding Fathers intended. In particular, do ss 75(iii) and 75(v) of the Constitution both confer jurisdiction upon the High Court to hear a matter and, simultaneously, a substantive right upon the litigant? Or, rather, must the substantive right be derived from some other Commonwealth enactment? Does s 75(iii) on its own confer a substantive right against the Commonwealth *as well* as conferring jurisdiction upon the High Court to hear such an action? Does s 75(v) provide a substantive right to seek the writs therein described *as well* as conferring jurisdiction upon the High Court to hear actions involving them but which are based on some other source of liability?

*(1) Barrett's Case*

It is appropriate to commence the discussion with *Barrett's* case. It was the first case which squarely raised[12] the possibility that "double function" legislation could operate at a federal level. *Barrett's* case[13] required the High Court to pass on the validity of s 141 of the *Conciliation and Arbitration Act* 1904 (Cth), which permitted a member of a trade union to apply to the Commonwealth Court of Conciliation and Arbitration for an order directing a person under an obligation to observe or perform the rules of such an organisation to, in fact, observe or perform them. The provision was "designed to remedy the difficulties which arise under the general law in the enforcement of the rules of a trade union".[14]

The argument against the validity of such legislation depends on the absence of "any matter ... arising under any laws made by the Parliament": s 76(ii). The conferral of jurisdiction, in turn, depends upon ss 77(i) and 77(iii) of the Constitution which respectively define and vest jurisdiction with respect to the matters to which it refers, "as if the existence of the matters must always be independently brought about, or must arise independently."[15] Since no such independent source (apart from s 141) could be shown, the acceptance of this restrictive approach would have struck down the legislation.

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11 P H Lane, *Commentary on the Australian Constitution* (1986) 430.

12 In an earlier case, *McGlew v New South Wales Malting Co Ltd* (1918) 25 CLR 416 the High Court had held that it was incidental to the provisions for the service of State process beyond the territorial limits of the State to provide for security to be given for the costs of the persons so served. It was said that the provision could be supported by relying on ss 76(ii) and 77(iii) of the Constitution. See too *Commonwealth v Cole* (1923) 32 CLR 602.

13 Since applied on numerous occasions; *eg Jess v Scott* (1984) 52 ALR 393 and *Bailey v Krantz* (1984) 55 ALR 345.

14 *Jess v Scott* (1984) 52 ALR 393, 396 *per* Beaumont J, commenting on s 141 which has replaced s 58E.

15 *Barrett's* case (1945) 70 CLR 141, 166 *per* Dixon J.

In holding that the legislation not only conferred a jurisdiction upon the Commonwealth Court of Conciliation and Arbitration but also a substantive right upon an aggrieved union member to obtain such relief, the High Court for the first time explicitly recognised the existence of "double function" legislation. Justice Dixon clearly spelt out the possibility that such legislation might exist.

> It is not unusual to find that statutes impose liabilities, create obligations or otherwise affect substantive rights, although they are expressed only to give jurisdiction or authority, whether of a judicial or administrative nature.[16]

The reasoning of Latham CJ was similar. He pointed out that the Commonwealth Parliament can, when legislating upon a matter within its legislative competence, provide that a federal court may make

> orders which are incidental to carrying into effect the legislative scheme, and that a proceeding to obtain such an order is a matter arising under the Federal law. A right is created by the provision that a court may make an order, and such a provision also gives jurisdiction to the court to make the order. The fact that the court may not be bound to make an order, but may exercise a discretion, does not alter the effect of such a provision.[17]

This approach, which allowed the syncopation or "compacting"[18] of adjectival and substantive elements has been confirmed in later cases.

*(2) Hooper v Hooper*

For example, in *Hooper v Hooper*[19] the High Court held that the Matrimonial Causes Act 1945 (Cth) operated to confer jurisdiction upon the Supreme Court of New South Wales to entertain a suit for divorce, even though the petitioner was not domiciled in New South Wales as required by the State Act.

At first instance, Nield J had held that the Commonwealth Act was unconstitutional, finding that, although the law relied upon could be supported under s 51(22) of the Constitution, s 77 of the Constitution only permitted State courts to be invested with federal jurisdiction with respect to any of the matters which were specified in sections 75 and 76 of the Constitution. It followed inexorably that, since neither divorce nor matrimonial causes were mentioned in those sections, no authority existed to invest a State court with federal jurisdiction with respect to them. Although his Honour recognised that divorce and matrimonial causes constituted a potential category of "matter" over which the Commonwealth Parliament could legislate if it so chose, no federal jurisdiction could be invested in State courts with respect to them until such legislation had been enacted.[20]

The High Court agreed that a placitum of s 51 (such as s 51(22)) would not, on its own, support the investing of federal jurisdiction in a State court were it not authorised by s 77. It pointed out however, that while it is usual for a substantive right to be created in two distinct stages so that the substantive and adjectival aspects are always kept separate, "this is not invariably the simplest or easiest course to follow, and it is by no means uncommon for an Act to be drafted in such a way that the two things are done, as has been said, *uno ictu*, by

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16 *Ibid* 165-166.
17 *Ibid* 155.
18 P H Lane, *supra* n 11.
19 (1955) 91 CLR 529.
20 *Ibid* 534-535.

providing that in certain specified circumstances a person may take proceedings in a particular court to obtain a specified remedy."[21]

Although the Court recognised that such legislation will cause difficulties of interpretation when the jurisdiction is to be conferred upon a State court under s 77 of the Constitution, it felt that when properly analysed the enactment "will generally be seen to be at once to create a right and provide a remedy."[22] It followed that the State judge was, in fact, administering federal law because, for the purposes of the suit, it was part of the law of the Commonwealth so that "the fact that [the Act] chose to adopt the law of the State of the domicil in each particular case cannot affect the substance of the matter".[23]

In *Hooper v Hooper* the Court observed that the same issue had arisen more acutely in *Barrett's* case.[24] The Court noted that in *Barrett's* case the obligation which the Court was asked to enforce was said to arise out of the contract between the parties who had joined the trade union rather than to be derived from the Act. After citing relevant passages from the judgments of Latham CJ and Dixon J, the Court held that *Hooper* was a "clearer case".[25]

*(3) Carter Bros v Renouf*

The limits of the approach approved in *Barrett* may be seen in the subsequent decision of the Court in *Carter Bros v Renouf*.[26] There one of two partners proposed an insurance policy to be issued on his life. At that time the partnership was in serious financial difficulty and, shortly after the policy was issued, the partner beneficially assigned the policy by way of mortgage as security for a loan made to the partnership. Upon his death, claim to the money under the policy was made by the lender, the partnership, and the partner's executors. The insurer paid the proceeds into court pursuant to s 105 of the Life Insurance Act 1945 (Cth). The lender was paid out and a dispute remained between the partnership and the executors.

An important question was: what jurisdiction was conferred on the Court by s 105 of the Act which authorised the payment into Court of the monies in dispute?[27] Chief Justice Dixon[28] held that while the sections conferred jurisdiction upon the High Court it was a strictly limited jurisdiction. Since the payment into Court under both sections operated "as a discharge of the company's liability under the policy ... in both cases a jurisdiction is, by necessary implication, given to this Court."[29]

The limitation on the jurisdiction so conferred arose because of the limitations imported into s 76(ii) of the Constitution. The Chief Justice observed that

> it seems to me that the conferring of a wider jurisdiction would not be authorised by the Constitution. The only relevant provision of the

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21 *Ibid* 535-536.

22 *Ibid* 536.

23 *Ibid* 537.

24 *Ibid* 537-538.

25 *Ibid* 538.

26 (1962) 111 CLR 140.

27 The Court also had to consider the operation of s 89 of the Act which authorised payment into court where the insurer received express notice of a trust or other claim to the money.

28 His Honour delivered the judgment of Fullagar J, who had died before judgment could be given, as his own.

29 (1962) 111 CLR 140, 147.

> Constitution is s 76(ii.), which enables the Parliament to make laws conferring original jurisdiction on the High Court in matters arising under any law made by the Parliament.... The payment into Court, which is authorised by the Commonwealth Act cannot, I think, be regarded as itself creating a "matter arising under" the Act. It is merely part of the machinery for the determination of a matter. What gives rise to a matter is the existence of conflicting claims, and I do not think that this Court can be given jurisdiction to decide on claims to policy moneys other than claims which are either made directly against the insuring company or may affect the liability of the insuring company.[30]

It followed that, so soon as the potential liability of the insurer was resolved, the operation of the legislation was discharged.

Thus, although the existence of a "double function" is to be determined by examining the legislation, an equally important factor is the extent of the Commonwealth's legislative competence under s 76(ii). Unless a matter properly "arises" under a law made by Parliament, no jurisdiction may be conferred on the Court and no question of a "double function" will arise. It is important to remember, however, that the mere fact that the legislation confers a discretion upon the Court will not render the grant of both a jurisdiction and a substantive right ineffective. The absence of "an absolute liability" is not decisive against the existence of a "double function".[31]

*(4) When does a matter "arise"?*

Sir John Latham's judgment in *Barrett's* case is also important on the "arising" issue. Indeed, it is the leading judgment on when a matter "arises" under s 76. His Honour observed that:

> a matter may properly be said to arise under a Federal law if the right or duty in question in the matter owes its existence to Federal law or depends upon Federal law for its enforcement, whether or not the determination of the controversy involves the interpretation (or validity) of the law.[32]

His Honour reached this conclusion because of the differences in the wording of ss 76(i) and 76(ii). Section 76(i) expressly distinguishes between a law which "arises under the Constitution" or "involves its interpretation". It follows that a "matter" may properly arise under a Commonwealth enactment even if it does *not* involve the "interpretation" of the Act.

The actual operation of the section has, however, continued to cause disagreement on the Court. For example, in *Felton v Mulligan*[33] the question arose whether the Supreme Court of New South Wales had been exercising federal jurisdiction in the matter before it. If it had been doing so, then no

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30 *Ibid* 148-149. In other words, every aspect of the matter had to be examined from the point of view of the insurer, not the actual recipient of the money, and "when once what was initially the company's problem has been solved, the rights and duties of the payee with respect to the policy moneys in his hands are not - or normally will not be - the concern of Commonwealth law. They will fall to be determined in accordance with the laws of a State, and are not, therefore, capable of being submitted to the jurisdiction of this Court under s 76(ii)": *ibid* 148.

31 *Barrett's* (1945) 70 CLR 141, 167 where Dixon J gave a large number of examples from existing Commonwealth statutes of "double function" legislation which involved the conferral of a discretion upon the Court to grant the substantive relief.

32 *Ibid* 154.

33 (1971) 124 CLR 367.

appeal lay to the Privy Council.[34] In this case the Supreme Court of New South Wales had dismissed an action brought by a woman against the legal personal representatives of her deceased former husband. In it she had sought a declaration that she was entitled to be paid amounts by way of periodical maintenance under a deed of separation she had entered with him. The Supreme Court of New South Wales, in granting a decree nisi for their divorce, had approved the deed pursuant to a provision of the Matrimonial Causes Act 1959 (Cth). In their defence, the executors argued that the deed was void since it attempted to oust the jurisdiction of the Court to assess the proper amount to be paid by way of maintenance.

By a majority, the High Court held that the matter did involve federal jurisdiction. "The fundamental difference between the views of the majority[35] and of the minority concerned whether, on analysis, the defence of the executors merely incidentally involved the interpretation of the Matrimonial Causes Act or was dependent upon that Act."[36] It is clear that the matter will arise under a law of the Parliament if the suit "could have been disposed of by deciding the matter, whether or not the suit was so disposed of".[37] As Barwick CJ observed, it may not be possible to express in "universally valid terms" when the interpretation of the statute which, *prima facie*, is an incidental consideration gives rise to a matter under it.[38]

The reason why the matter so arose in *Felton* was that the defence of the executors necessarily involved the invalidity of the order made in the matrimonial proceedings which had approved the deed. In his judgment, Menzies J stressed the distinction to be maintained between a "matter" and a "proceeding". A "matter" (for example a defence that the law authorising the proceeding is unconstitutional) may arise under a law made by Parliament, even though the proceeding itself does not. A proceeding, on the other hand, arises under a law only when it is authorised by the law. "So it is possible for a matter to arise under a law made by the Parliament in a proceeding which does not arise under that law."[39]

Cowen and Zines have noted that "[t]he decision in *Felton v Mulligan* has increased the difficulty of determining the distinction between a matter arising under a law made by Parliament and one that does not so arise but involves the interpretation of such a law."[40] This is because it is very difficult to imagine circumstances in which a matter might involve the "interpretation" of the federal enactment which does not also arise under it.[41] The approach in *Felton* was continued in *Moorgate Tobacco Ltd v Philip Morris Ltd*[42] where the High Court had to determine whether a claim involving copyright and other federal causes of

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34 Section 39(2) of the Judiciary Act precluded any appeal where the matter was one of federal jurisdiction.

35 Barwick CJ, Windeyer, and Walsh JJ; McTiernan J agreed on other grounds.

36 *Stack v Coast Securities* (1983) 46 ALR 451, 462-463 *per* Fitzgerald J.

37 *Felton v Mulligan* (1971) 124 CLR 367, 374 *per* Barwick CJ referring to *Nelungaloo Pty Ltd v Commonwealth* (1952) 85 CLR 545, and *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.

38 *Id.*

39 *Ibid* 383.

40 Z Cowen and L Zines, *supra* n 5, 59-60.

41 *Ibid* 60-61, citing the view of Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed 1975) 479.

42 (1980) 31 ALR 161.

action, as well as common law and equitable claims, arose under the federal legislation so as to preclude an appeal to the Privy Council.

Applying *Felton*, Gibbs J pointed out that the copyright claims "raised for judicial determination questions as to rights which owe their existence to the Act, or which can only be enforced by virtue of the Act" and, accordingly, arose under it.[43] Moreover, as the majority noted,[44] it is irrelevant if the matter has been pleaded by the parties or not "if the court finds it necessary to decide whether or not a right or duty based in federal law exists...".[45] If that occurs, then the matter automatically arises. So, too, "[i]f a federal matter is raised on the pleadings federal jurisdiction is exercised, notwithstanding that the court finds it unnecessary to decide the federal question because the case can be disposed of on other grounds."[46]

The majority adopted the analogy of cases which dealt with *inter se* questions; that is, those that arose under s 74 of the Constitution on the limits of appeal to the Privy Council.[47] It was, likewise, irrelevant if the jurisdiction was subsequently lost by a disclaimer of the parties, or by the failure of the primary judge to decide the matter.

*(5) Recent Cases on "arising"*

In *Poulos v Waltons Stores (Interstate) Ltd*[48] the Full Federal Court confronted both the question whether a matter arose under the relevant Commonwealth legislation, and whether the legislation performed a "double function". The appellant had obtained a judgment under the Conciliation and Arbitration Act 1904 (Cth) in respect of remuneration payable to him under an industrial award. He sought costs from the Court. A provision of the Act[49] prevented any award of costs unless the action was vexatious and undertaken without reasonable cause. The intention of the provision was to prevent the threat of an adverse costs award being held *in terrorem* over an employee so as to coerce him not to pursue an action against his more financially secure employer. The prohibition against costs, however, only operated in respect of "a matter arising under this Act." Justice Smithers, in dissent, neatly avoided the consequences of applying that section by holding that an action to recover outstanding wages did not arise under the legislation:

> [a] claim by a workman for money due to him for work and labour done in accordance with an award is the purest ground of common law action by one man against another for a debt and has nothing to do with the enforcement of industrial relations in the narrow sense.[50]

Unfortunately for the worker, Keely and Gray JJ disagreed, holding that the matter relevantly arose under the federal law. Justice Gray observed that

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43 *Ibid* 164.

44 *Ibid* 170 *per* Stephen, Mason, Aickin and Wilson JJ.

45 *Id.*

46 *Id.*

47 *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497, 624; *Lansell v Lansell* (1964) 110 CLR 353, 357-358.

48 (1986) 68 ALR 537.

49 Section 197A.

50 *Poulos v Waltons Stores (Interstate) Ltd* (1986) 68 ALR 537, 541.

> [a]n examination of those cases[51] suggests that the question whether a matter is one 'arising under' a law of the Commonwealth depends upon whether the matter involves the assertion of some right or defence provided by the law of the Commonwealth.[52]

In applying the conventional tests, Gray J held that the right to payment asserted by the plaintiff clearly owed its existence to the federal Act since without the power to make the award under the Act the award itself would have been a nullity. So, too, the enforcement of the award depended upon the Act. The case demonstrates the continuing difficulty which the courts face in assessing when a matter properly "arises".

Most recently, in *Grace Bros Pty Ltd v Magistrates, Local Courts of New South Wales*,[53] Gummow J synthesised the position as follows: [a] matter will arise under a federal law where that law is relied upon for an assertion that a party to a controversy is immune from the liability or obligation alleged against him....[54] In that case, a matter was held to arise where the defendant asserted that it was not liable under a state statute because it was inconsistent with a federal law, and of no effect pursuant to s 109 of the Constitution.

*(6) Recent authority on the "double function"*

Similarly, recent authority exemplifies the problems which the courts face in determining whether a "double function" has been performed.

For example, in *Thomson Australian Holdings Pty Ltd v Trade Practices Commission*[55] the High Court had to determine the extent of the jurisdiction conferred by ss 80 and 86 of the Trade Practices Act 1974 (Cth) and, more importantly, whether those provisions provided a right in an aggrieved party to proceed for relief without any other substantive enactment. Section 80 of that Act provided for the granting of injunctions by the Federal Court while s 86 defined the relevant jurisdiction. In brief, a publisher of a trade guide which contained price lists for various liquors sought to set aside orders and undertakings given by its subscribers in a suit brought against them by the Trade Practices Commission for alleged price fixing. The publisher argued that the Federal Court had no power to grant the relief it had purported to grant by relying on s 80 of the Trade Practices Act and its general power to grant injunctions.

The majority judgment of the High Court noted that:

> The Federal Court of Australia Act sets up the Federal Court and arms it with certain powers eg ss 22[56] and 23[57]. But generally speaking, and apart from

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51 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141; *Felton v Mulligan* (1972) 124 CLR 367; *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575.

52 *Poulos v Waltons Stores (Interstate) Ltd* (1986) 68 ALR 537, 543.

53 (1988) 84 ALR 492.

54 *Ibid* 496 (citations omitted).

55 (1981) 37 ALR 66.

56 Section 22 of the Federal Court Act 1976 (Cth) provides: "The Court shall, in every matter before the Court, grant, either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him in the matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of proceedings concerning any of those matters avoided.".

> s 32, the Act does not invest the court with jurisdiction. It leaves it to the Parliament to do so by other statutes (s 19). This the Parliament has done by other statutes such as the Trade Practices Act. When a specific statute which invests the court with jurisdiction in matters of a particular class does so in such a way as to limit the power of the court to grant relief of a particular kind, there is no basis for transcending that limitation by recourse to the general provisions of the Federal Court of Australia Act.[58]

The High Court, then, was regarding the Federal Court as following the "modern" model noted in Renfree's description above[59] where some further enactment, over and above the mere grant of jurisdiction, was required to confer a substantive right upon the litigant. It followed that "[s]ection 86 [of the Federal Court Act] is not a self-contained grant of jurisdiction".[60] Thus, it did not perform the double function of providing a jurisdiction and, simultaneously, a right to proceed.

This narrow view of s 86 of the Trade Practices Act may be contrasted with the more expansive view of s 163A[61] taken by the Federal Court in *Re Tooth & Co Ltd.*[62] In that case, Tooth & Co carried on business as a brewer in the course of which it leased many hotels to individual tenants. These leases invariably contained a "tie clause" which required the tenant to take its beer from Tooth and were, to that extent, in breach of the exclusive dealing provisions of the Trade Practices Act which invalidated such conduct. Tooth sought an authorisation for that conduct from the Trade Practices Commission. The initial application was dismissed by the Commission and Tooth applied to the Trade Practices Tribunal to review that decision. It also sought a declaration from the Federal Court under s 163A of the Trade Practices Act that its proposed conduct on the termination of the leases was lawful.

Section 163A[63] provided for the granting of a declaration in relation to a matter arising under the Trade Practices Act. In a case stated to the Full Federal Court to rule on the power conferred by the section, the Court held that it had discretion to grant a declaration although it declined to do so because the questions raised were hypothetical.

Section 163A was held to be constitutionally valid since it met the two requirements of s 76(ii) of the Constitution: the discretion to be exercised depended upon the existence of a "matter arising", and the discretion was a judicial discretion to be exercised in accordance with accepted principles.

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57 Section 23 of the Federal Court Act provides: "The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate."

58 (1981) 37 ALR 66, 73.

59 H E Renfree, *supra* n 6.

60 (1981) 37 ALR 66, 74.

61 In brief, s 163A provides that a person may institute proceedings in the Federal Court seeking a declaration or certain other orders in matters arising under the Act. See, generally, R V Miller, *Annotated Trade Practices Act* (10th ed 1989) 386-388.

62 (1978) 19 ALR 191; 31 FLR 314.

63 Section 163A relevantly provided: "(1) Subject to this section, a person may institute a proceeding in the Court seeking, in relation to a matter arising under this Act, the making of - (a) a declaration in relation to the operation or effect of any provisions of this Act ... or in relation to the validity of any act or thing done, proposed to be done or purporting to have been done under this Act; ...and the Court has jurisdiction to hear and determine the proceeding."

Bowen CJ and Franki J put the matter in this way:

> The court is given jurisdiction to hear and determine the proceeding. Because of the terms of Chapter III of the Constitution, the court can only validly be given jurisdiction where there is a "matter". This requirement is reflected in s 163A, which confers jurisdiction "in relation to a matter arising under the Act".... [T]he words used in s 163A do not necessarily require the existence of a `matter' separate and distinct from the "proceeding". Section 163A is an example of the method of legislating to confer jurisdiction which is referred to in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 C.L.R. 141 at 165 and *Hooper v Hooper* (1955) 91 C.L.R. 529 at 535-6 where the statute deals with substantive rights although expressed in terms conferring jurisdiction.[64]

In a concurring judgment, Brennan J noted:

> That section, in language which follows and imports the meaning of the phrase in s 76(ii) of the Constitution, confers jurisdiction to make a declaration conditional upon a "matter arising" under the Trade Practices Act and, when the condition is fulfilled, a judicial discretion is to be exercised.[65]

This interpretation, which involved a modern application of *Barrett's* case, was confirmed by the view which the High Court took in *Fisher v Fisher*[66] of s 79(8) of the Family Law Act 1975 (Cth). This provision conferred a discretion upon the Family Court to order the continuation by a party's personal representative of proceedings concerning property distribution after the death of a party to the proceedings. It was held that the law had sufficient connection with the marriage as to be sustainable under s 51(21) of the Constitution.[67]

In upholding the legislation, Mason and Deane JJ[68] pointed out that the rights conferred by the section fell within the central area of the marriage power.

> True it is that orders made under s 79 do not give effect to antecedent rights arising in virtue of the marital relationship. Instead they perform a dual function by creating and enforcing rights in one blow, so to speak ....[69]

It appears to have been important to the Court's reasoning that the rights which were created by the section arose "by virtue of the exercise of a judicial discretion"[70] and the criteria to be weighed in the exercise of that discretion had to take account of considerations which arose out of the marital relationship. This element had also been stressed in *Tooth's* case by Brennan J.[71]

The question is important constitutionally because it may be arguable that there is a range of declaratory relief which may be given on general principles by courts at common law which is yet beyond the scope of the jurisdiction of a federal court, for the reason that the latter must always be able to point to a relevant "matter arising" before it may validly exercise jurisdiction. In *Tooth*

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64 (1978) 19 ALR 191, 197.

65 *Ibid* 206.

66 (1986) 161 CLR 438.

67 *Cf R v Lambert* (1981) 146 CLR 447; *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227; *Dowal v Murray* (1978) 143 CLR 410.

68 (1986) 161 CLR 438, 453.

69 *Id*, citing *Barrett's* case.

70 *Id.*

71 *Re Tooth & Co Ltd* (1978) 19 ALR 191, 206-209.

Brennan J did not find it necessary to decide whether or not the area of the two was identical so that the "jurisdictional and discretionary limits coincide".[72]

The most recent decision to consider the operation of s 163A is that of Gummow J in *Grace Bros Pty Ltd v Magistrates, Local Courts of New South Wales*[73] where the applicant sought orders in the nature of prohibition and certiorari to prevent the continuation of a prosecution under a State Act[74] on the ground that it was relevantly inconsistent under s 109 of the Constitution with the federal Trade Practices Act which provided for prosecutions for similar behavious as that alleged. Since the operation of the federal Act was "an essential step"[75] in showing the inapplicability of the State Act, it was contended that a matter relevantly arose under s 163A.

> As Gummow J noted, the section does not require the existence of a "matter" separate and distinct from the proceeding in which the court grants or refuses relief of the character specified in the section. Section 163A deals at once with what have been described as substantive and adjective elements by providing, in the one form of words, for the right and the remedy.[76]

His Honour concluded that s 163A would authorise the granting of the relief sought.[77]

Equally instructive is the decision of Pincus J in *Minister for Health (Cth) v Ancient Order of Foresters Friendly Society in Queensland (Trustees) (No 2)*.[78] There the Federal Court held that it could not, pursuant to s 82Z of the National Health Act 1953 (Cth), make orders sought by a scheme administrator authorising the transfer of money between two different health funds which were being wound up under the Commonwealth enactment. In particular, s 82ZM gave the Federal Court "jurisdiction to hear and determine applications under this Part [of the Act] and to make orders in respect of those applications." Although his Honour did not advert to the possibility, it could have been argued that the section performed the "double function" of conferring a jurisdiction upon the Court and the substantive right to certain orders by analogy with the reasoning in *Thomson's* case.[79]

Similarly, although in *The Marriage of Smith*[80] Gibbs CJ, Wilson and Dawson JJ held that s 31 of the Family Provision Act 1982 (NSW) "performed the double function of dealing with substantive rights and liabilities, and giving jurisdiction to the Supreme Court in respect of those rights and liabilities" it nevertheless did not entitle the Family Court to exercise power under it in the

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72 *Ibid* 206. His Honour observed that the grant of a declaration at common law was discretionary (*Johnco Nominees Pty Ltd v Albury Wodonga NSW Corp* (1977) 1 NSWLR 43) but that earlier authority suggested that, in a federal Court, the discretion and jurisdiction overlapped; citing Isaacs J in *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia* (1925) 36 CLR 442, 450-451.

73 (1988) 84 ALR 492.

74 Section 32 of the Consumer Protection Act 1969 (NSW).

75 (1988) 84 ALR 492, 495 *per* Gummow J.

76 *Ibid* 495-496, citing *Hooper v Hooper* (1955) 51 CLR 529, 535-536, *Vitzdamm-Jones v Vitzdamm-Jones* (1981) 148 CLR 383, 411, 425, 429, and *Re Tooth & Co* (1978) 31 FLR 314, 320.

77 It is an interesting question whether the relief available under s 163A is limited in some way if it is sought against State as opposed to federal officers.

78 (1985) 61 ALR 302.

79 *Supra* text at nn 57, 59.

80 (1986) 66 ALR 1, 19.

accrued jurisdiction to approve a deed dealing with the distribution of matrimonial assets.

Recently, in *Park Oh Ho v Minister for Immigration and Ethnic Affairs* the Full Federal Court[81] and High Court[82] have confirmed what earlier decisions had suggested,[83] namely, that s 16 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) did not perform the "double function" of conferring jurisdiction upon the Federal Court to review certain decisions while simultaneously providing a substantive right to recover pecuniary damages for loss suffered because of illegal government action.[84]

In brief, the appellants had been arrested as prohibited non-citizens and deportation orders had been signed against them while the Director of Public Prosecutions was considering whether their assistance was required in prosecutions of those who had connived at their prohibited entry into Australia. Subsequently, the initial deportation order was revoked and the appellants were held in a detention centre for several months before a new order was made. It followed that, contrary to the Migration Act 1958 (Cth), the appellants were held for several months not for the purposes of deportation but rather because they might have been potentially able to assist in future prosecutions. In their appeal against the decision to deport them, the appellants also sought to recover damages for their unlawful detention by relying simply upon the provisions of the Administrative Decisions (Judicial Review) Act without otherwise impleading the Commonwealth.

Arguably, the right to recover for damage suffered through such activity could have been based on ss 22 and 23 of the Federal Court Act 1976 (Cth).[85] "But these sections do not confer authority on the court to grant relief where a claimant has no case for that relief under the general law or by statute...".[86] The Full Federal Court reasoned that since s 16 of the ADJR Act, and that Act in general, were confined to redressing administrative wrongs only by previously accepted means, there was no room for the implication that damages were also recoverable under the Act. In the Full Federal Court Sweeney J endorsed the reasoning of the trial judge that "damages are not a remedy of judicial review and s 16 of the ... Act, which specifies the orders which the court may make in its discretion when making an order of review in respect of a decision, does not include an award of damages."[87] With respect, however, the reasoning that "a

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81 (1988) 81 ALR 288.

82 (1989) 88 ALR 517.

83 *Conyngham v Minster for Immigration* (1986) 68 ALR 441; *Pearce v Button* (1986) 65 ALR 83; *O'Neil v Wratten* (1986) 65 ALR 451.

84 It would appear that the only method of proceeding to recover such losses is by relying on the accrued jurisdiction of the Federal Court and suing for malfeasance in a public office, false imprisonment, damages for breach of a statutory duty, or any other cause of action: *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570. It appears that the ultimate rejection of the federal claim does not preclude the exercise of the jurisdiction: *Burgundy Royale Investments Pty Ltd v Westpac Banking Corp* (1987) 76 ALR 173.

85 Section 22 authorises the court to give "all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought by him in the matter ...". Section 23 gives the court power in those matters over which it has jurisdiction to make those orders which to the court seem appropriate.

86 (1988) 81 ALR 288, 309-310 *per* Morling J.

87 *Ibid* 297.

claim for damages from the Commonwealth must be based upon a civil wrong or a breach of contract"[88] begs the question whether the proven maladministration is such a species of civil wrong entitling the aggrieved citizen to relief.

The reasoning behind the decision is identical to that which limited the scope of the Trade Practices Act as discussed in *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* and examined above.[89] What neither class of case articulated is why the legislation involved (that is, the Trade Practices Act and the ADJR Act) did not perform the double function for which the applicants contended. Why, to paraphrase the Full Federal Court in *Re Tooth* were *Thomson* and *Park Oh Ho* not cases "where the statute deals with substantive rights although expressed in terms conferring jurisdiction"?[90]

It would seem that the answer lies in the perceived absence of a relevant "matter" which would, pursuant to s 76(ii) "arise" under the legislation in such a way that the Federal Court could provide the relief sought under either the Trade Practices or the ADJR Act. As Sweeney J noted in *Park Oh Ho*,[91] s 22 of the Federal Court Act, while providing a range of remedies in appropriate circumstance, "does not enlarge the provisions of substantive law so as to authorise the award of damages in circumstances for which the law does not provide".[92] This must mean simply that the relevant claim for damages under the ADJR Act is not a relevant "matter" over which the Parliament may legislate without making some specific reference to it in the enacting legislation. It will be perceived, however, that such a conclusion is only supported by *a priori* reasoning: there is nothing inherently unlikely in the Commonwealth wishing to permit the recovery of damages against it where Commonwealth officers have misconducted themselves. Such a right of recovery could be specifically inserted in the ADJR Act and could be justified on a number of constitutional bases.[93]

Why then was no "double function" vouchsafed to the ADJR Act? In the end, the only reason which can be advanced is that such a right of recovery was unheard of in the context of the judicial review of administrative action in the Anglo-Australian legal system. That is, with respect, a question-begging approach.

The timidity so manifested is made all the more obvious when it is remembered that a claim which permits recovery of damages *is* permitted in the accrued jurisdiction of the Court. A claim for, say, damages for false imprisonment, may be tacked on as arising from the common substratum of fact which gives rise to the ADJR Act "matter". Even more incredibly, on present authority such an accrued claim may be maintained even if the underlying federal "matter" with which it is connected, and upon which it depends for its existence,

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88 *Id.*

89 *Supra* text at nn 53-60.

90 (1978) 19 ALR 191, 197.

91 (1988) 81 ALR 288.

92 *Ibid* 297-298.

93 Of course, both *Barrett's* case and *Hooper v Hooper* directed attention to *another* body of law which the relevant statute incorporated by reference, as it were, into the federal scheme whereas an expansion of the range of remedies under the ADJR Act would require the substantive law to be applied to be self-contained.

is ultimately rejected by the Court.[94] This possibility destroys any argument that some special aspect of Crown immunity is involved to prevent a claim for damages being brought without special legislation to permit it.

In this respect, the comments of the trial judge concerning Commonwealth liability are of interest.

> [Section 22 of the Federal Court Act does] not entitle the court in proceedings under the ADJR Act to make an order by way of damages when there is not before the court any cause in respect of which damages may be awarded.... The present proceedings are proceedings solely under the ADJR Act for orders of review with respect to decisions taken by delegates of the ... Minister. They are not proceedings against the Commonwealth or an officer of the Commonwealth for false imprisonment and make no claim for damages for civil wrong.[95]

In the High Court, the view that damages were not available to the plaintiffs under the ADJR Act was confirmed.[96] In relation to the relief which the plaintiffs could obtain, the Court noted that an injunctive order to secure the plaintiffs' release from unlawful detention was appropriate to do justice between the parties.[97] It went on to state:

> In that regard, it is relevant to mention that both declaratory and injunctive orders, as distinct from an order for damages, can readily be seen as appropriate remedies of judicial "review" of administrative decisions and actions.[98]

This reasoning, of course, is entirely *a priori*; there is no intrinsic reason why the ADJR Act, combined with the relevant sections[99] of the Federal Court Act, would not support the granting of a damages claim for, say, false imprisonment. To do so would allow all outstanding claims to be resolved once and for all in the one proceeding, thereby avoiding multiplicity of actions. Indeed, the High Court went so far as to confirm that the granting of declaratory relief against the Minister in relation to the unlawfulness of the actions would not preclude his being held vicariously liable in an action in the State court for the tortious aspects of his officers conduct.

By not assigning a "double function" to the ADJR Act the High Court has effectively precluded the growth of an independent ground of recovery of damages against the Commonwealth for misuse of administrative power. The fact that the issue was not discussed at all in terms of a "double function" illustrates the difficulty in determining what criteria are necessary for such an approach to the interpretation of the statute to be invoked.

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94 A point noted by Morling J at (1988) 81 ALR 288, 310: "The court could have entertained those claims under its accrued jurisdiction ... and granted relief in respect of them notwithstanding that the claim for relief under the Judicial Review Act did not succeed" (citation omitted).

95 *Ibid* 298, quoted by Sweeney J.

96 *Park Oh Ho v Minister* (1989) 88 ALR 517, 522.

97 Section 16(1)(d) of the ADJR Act provides that the Federal Court may, in its discretion, make "an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or refraining from the doing, of which the Court considers necessary to do justice between the parties."

98 (1989) 88 ALR 517, 522.

99 Sections 22 and 23 discussed *supra* text at n 85.

*(7) "Double Function" at a Constitutional Level*

As noted above, a "double function" question also arises at a constitutional level. Here the question is whether ss 75(iii) and 75(v) of the Constitution act to confer both an original jurisdiction *and* a substantive right upon a party or whether the right to proceed must be found in some other enactment.[100] The High Court has expressed mixed views about the operation of those sections. As Cowen and Zines note[101] "in view of the case law ... the position cannot be stated with any certainty". It now appears arguable that s 75(iii) on its own is the source of substantive rights against the Commonwealth without the necessity for discrete legislation which depends for its existence on s 78 of the Constitution. The very fact that the Commonwealth is sued authorises the Parliament to confer jurisdiction upon federal or State courts to hear the matter and determine the Commonwealth's liability. Such a view finds its legislative expression in provisions such as s 39 of the Judiciary Act 1903 (Cth) and s 19 of the Federal Court Act 1976 (Cth). The source of the substantive liability is not entirely clear but would seem to be based on the combined effect of s 75(iii) of the Constitution and ss 56 and 64 of the Judiciary Act.

An important consequence of bestowing a combined jurisdictional and substantive effect upon s 75(iii) is that the Commonwealth Parliament would be unable to limit the Commonwealth's liability in any way since any such limitation imposed by legislation would be overridden by the higher constitutional right secured by s 75(iii). This area is highly complicated, involving as it does a consideration of the opaque wording of s 78 of the Constitution as well.[102] The Commonwealth has recently proposed limiting its liability to suit under Commonwealth or State legislation: Commonwealth and Commonwealth Instrumentalities (Application of Laws) Bill.[103] It is not entirely clear how this new legislation would operate in the context of the widest "double function" interpretation of s 75(iii) since the widest view suggests, theoretically, such attempted limitation should be futile. Of course, any such argument must be read subject to the High Court's own view as expressed most recently in *Commonwealth v Evans Deakin Industries Ltd* where the majority said that "[t]here can be no doubt that the Commonwealth Parliament has full power to make laws governing the liability of the Commonwealth".[104] In *Evans Deakin* the High Court rested the Supreme Court of Queensland's jurisdiction to entertain the suit against the Commonwealth on "the combined effect of s 39(2) of the Judiciary Act and s 75(iii) of the Constitution."[105] What the High Court has nowhere to date articulated is how the apparent width of s 75(iii) is to be curtailed by s 78 of the Constitution. In *Evans Deakin* the High Court found "it unnecessary to consider whether s 78 of the Constitution ... is the sole source of [the] power"[106] to govern the liability of the Commonwealth. If it is,

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100 A detailed discussion of the issues is beyond the scope of this article.

101 Z Cowen and L Zines, *supra* n 5, 35.

102 Presented and read for the first time on 31 May 1989.

103 The main exception to this disinclination is the manner in which s 163A of the Trade Practices Act has been construed.

104 (1986) 66 ALR 412, 415.

105 *Ibid* 416.

106 *Ibid* 415.

there must be some implied reading down of s 75(iii) by s 78 which has not yet been fully expressed by the Court.

Equally, s 75(v), which authorises the granting of a writ of prohibition, mandamus or an injunction against an officer of the Commonwealth, may perform a "double function".[107] Although it is only expressed in terms of stating the remedies which are available to the High Court it arguably could be interpreted as importing with it all the relevant substantive law which previously existed in relation to them without the necessity for some separate enactment to define the jurisdiction which the remedies bring with them.[108]

## 2 CONCLUSION

This article has been concerned with a phenomenon of federal law: the performance by a single federal enactment of a "double function" involving both the conferral of a substantive right and the definition of the remedy available in support of that right. It has also examined the course of decision which defines when a matter properly "arises" under s 76(ii) of the Constitution.

It may be said that the High Court has generally leaned away from conferring a "double function" on legislation when it is possible to do so.[109] As an examination of the authorities reveals, it is by no means easy to determine whether a mere grant of jurisdiction should also carry with it a right to substantive relief. Indeed, the approach which the High Court has followed has injected an element of caprice into the ultimate decision so that it is not always possible to determine why a "double function" was not given to a jurisdictional statute. As the recent controversy over the ADJR Act reveals, any delimitation of remedies under that Act must depend, it seems, more on the absence of historical analogy than any manifest want of ability to permit access to the remedy pursued.

At the highest constitutional level, there is no objective basis upon which it is possible to determine whether or not the heads of jurisdiction contained in s 75 of the Constitution also carry with them a substantive right or not. It would appear that s 75(iii) is now considered to authorise an action to be

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107 Z Cowen and L Zines *supra* n 5, 54 note: "Section 75(v) like sec. 75(iii) and (iv) on its face appear to confer a *jurisdiction*. Extended reference has already been made to the debate over the question whether sec. 75(iii) conferred anything more, and particularly whether it gave any *substantive* right to proceed against the Commonwealth. It seems that the better view is that it does not and that sec. 75(v) should be similarly interpreted."

108 As Professor Zines has pointed out to the author in discussions, it is difficult to know what is meant by "substantive law" in relation to s 75(v). It is clear that the Commonwealth can determine the jurisdiction of a person or a body making a decision (subject always to considerations such as the separation of powers) and the purposes and considerations which may be taken into account in considering the impugned decision. The courts will examine, for example, whether the body or officer of the Commonwealth has acted contrary to law. Equally, the Commonwealth Parliament has the power, should it wish to exercise it, to determine the law that is to apply to any such consideration since this will, at the least, be incidental to the *placitum* under which he has operated. Usually, however, the Parliament has not specifically stated the body of substantive law to be applied. Special considerations apply in relation to privative clauses: *R v Coldham* (1984) 153 CLR 415, 422.

109 The main exception to this disinclination is the manner in which s 163A of the Trade Practices Act has been construed.

brought against the Commonwealth without further legislative intervention,[110] as does s 75(v) which both states the remedy available (prohibition, mandamus or an injunction) and may carry with it all the substantive law[111] in relation to those remedies.

It seems likely that the problem of "double function" legislation and "arising under" questions will continue to cause difficulties to both the High Court and inferior federal courts. It is suggested that the High Court has not made full use of a broad treatment of its possible powers under the "double function" doctrine and has, accordingly, missed the opportunity to extend the range of available remedies which may be requested from it by an aggrieved litigant. Since, in the absence of confirmation that s 75(iii) has a "double function", there is no constitutionally guaranteed right to proceed against the executive, this reluctance to develop new causes of action to restrain the executive is to be regretted.

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110 *Commonwealth v Evans Deakin Industries Pty Ltd v Commonwealth* (1986) 66 ALR 412; *Breavington v Godelman* (1988) 80 ALR 362.

111 But see *supra* text at n 102.