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1. [\(CTH\) Judiciary Act 1903 \[5685\] s 56 Suits against the Commonwealth](#)

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(CTH) Judiciary Act 1903 [5685] s 56 Suits against the Commonwealth

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PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES [ss 56–67]

[5685] 56 Suits against the Commonwealth

(1) A person making a claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth:

- (a) in the High Court;
- (b) if the claim arose in a State or Territory — in the Supreme Court of that State or Territory or in any other court of competent jurisdiction of that State or Territory; or
- (c) if the claim did not arise in a State or Territory — in the Supreme Court of any State or Territory or in any other court of competent jurisdiction of any State or Territory.

(2) For the purposes of [paragraphs \(b\)](#) and [\(c\)](#) of the last preceding subsection:

- (a) any court exercising jurisdiction at any place in the capital city of a State, or in the principal or only city or town of a Territory, that would be competent to hear the suit if the Commonwealth were, or had at any time been, resident in that city or town, or in a particular area in that city or town, is a court of competent jurisdiction; and
- (b) any other court is not a court of competent jurisdiction if its competence to hear the suit would depend upon the place where the Commonwealth resides or carries on business or at any time resided or carried on business.

Section 56 Generally

[5685.5] “the Commonwealth”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) ss 55E, ss 56, 57, 61, 64, 65, 66, 67.

Where the term appears in [ss 56](#), [57](#) and [64](#) it includes statutory corporations representing the Crown. This is certainly so where it is the Commonwealth that is carrying on the relevant activity under a corporate name. There may be some question whether “the Commonwealth” bears such a broad meaning in [ss 55E](#), [61](#), [65](#), [66](#) and [67](#): see *Maguire v Simpson* (1977) 139 CLR 362; [18 ALR 469](#) [CB](#). See also *Breavington v Godleman* (1988) 169 CLR 41; [80 ALR 362](#) [CB](#) per Mason CJ CLR at 68; ALR at 365 where the case proceeded on the common ground that the Australian Telecommunications Commission was “the Commonwealth” within the meaning of [s 56](#).

[5685.10] Officers of the Commonwealth

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) ss 56, 64.

By virtue of [ss 56](#) and [64](#) of the Judiciary Act 1903, the Commonwealth is made responsible for the acts, negligence or defaults of its officers in the course of their service as in a suit between subject and subject unless the officer is executing some independent duty cast upon him by the law: *Groves v Commonwealth* (1982) 150 CLR 113; [40 ALR 193](#) [CB](#). See also [\[5725.30\]](#).

[5685.15] Comparison of ss 56 and 39(2)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Pt VI, s 39(1), s 39(2), s 56, s 64.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(iii), s 78.

In *Breavington v Godleman* (1988) 169 CLR 41 at 68–9; [80 ALR 362](#) at [365](#), Mason J said:

“It is not the function of [s 56](#) to invest jurisdiction in the High Court or the courts of the states in actions against the Commonwealth. That is the function of [s 75\(iii\)](#) of the Constitution and [s 39\(2\)](#) of the Judiciary Act 1903: *Baume v Commonwealth* (1906) 4 CLR 97 at 102; *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 264; [66 ALR 412](#). The presence of [s 56](#) in Pt IX dealing with ‘Suits by and against the Commonwealth and the states’ rather than in [Pt VI](#) dealing with ‘Exclusive and invested jurisdiction’ indicates that the section has a different purpose; as does the language of the provision. What it does is to confer a right to proceed against the Commonwealth in the circumstances mentioned. Whether [s 56](#) is the source of the Commonwealth’s liability in tort, either alone or in conjunction with [s 64](#) of the Judiciary Act 1903 and perhaps [s 75\(iii\)](#) and [s 78](#) of the Constitution, is a question I put to one side.

“Although, for these reasons, [s 56](#) does not limit or curtail the investment of jurisdiction achieved by [s 39\(2\)](#), the effect of [s 56](#) is to qualify or restrict what may be done in the exercise of that jurisdiction by providing that the right to proceed against the Commonwealth in respect of a claim in contract or tort arising in a territory is exercisable only in the circumstances mentioned in the section. The [Judiciary Act 1903](#) confers no such right in any other circumstances.”

The proceedings in *Breavington v Godleman* involved an action for damages for personal injury arising out of a motor vehicle accident in the Northern Territory. The action was brought in the Supreme Court of Victoria. Mason CJ observed that, on the basis of the analysis set out above, [s 56](#) of the Judiciary Act 1903 enabled the defendant Australian Telecommunications Commission “to defeat the action on the ground that the [plaintiff] had no right to proceed against the Commonwealth in the Supreme Court of Victoria”. However, because the commission had not taken such an objection, the Supreme Court of Victoria had jurisdiction to entertain and determine the claim for relief

against the commission. That jurisdiction was necessarily federal jurisdiction by reason of [s 75\(iii\)](#) of the Constitution and [s 39\(1\)](#) and [\(2\)](#) of the Judiciary Act 1903: CLR at 69; ALR at 365–6.

In *Commonwealth v Mewett* (1997) 191 CLR 471; [146 ALR 299](#) at [348](#) ^{CB}, Gummow and Kirby JJ (with whom Brennan CJ agreed) said: “[Section 56](#) of the Judiciary Act 1903 recognises, rather than provides the origin of, Commonwealth liability. It does so by identifying the forum in which certain (but not all) actions against the Commonwealth may be instituted. It deals solely with contract and tort and is facultative in nature. If sued in contract or tort, the Commonwealth may submit to the jurisdiction of a court which is invested with federal jurisdiction by [s 39\(2\)](#) of the Judiciary Act 1903, even though that court is not a court specified in [s 56](#).”

[5685.20] Relationship between s 56, s 39(2) and ss 79 and 80

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39(2), s 56, s 79, s 80.

[Section 79](#) of the Judiciary Act 1903 (possibly in conjunction with [s 80](#)) requires a court exercising federal jurisdiction to apply the law of the State or Territory in which the court is sitting, except as otherwise provided by the Constitution or by the laws of the Commonwealth. The law of the relevant State or Territory will be the whole body of that law, including the rules of private international law or conflict of laws: see *Breavington v Godleman* (1988) 169 CLR 41 at 87–8; [80 ALR 362](#) at [378–80](#) per Wilson and Gaudron JJ. However, where federal jurisdiction is being exercised in an action against the Commonwealth in respect of a tort that arose in a State or Territory, the court will apply the law of the State or Territory in which the tort occurred, whether the court hearing the matter derives its jurisdiction from [s 56](#) of the Judiciary Act 1903 or from [s 39\(2\)](#) of that Act: *Musgrave v Commonwealth* (1937) 57 CLR 514 at 547–8 550–1; *Suehle v Commonwealth* (1967) 116 CLR 353; [1967] ALR 572; 41 ALJR 23 ^{CB}; *Commonwealth v Dinnison* [\(1995\) 129 ALR 239](#) ^{CB}.

[5685.25] No jurisdiction vested in Federal Court of Australia

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B(1A)(c), s 44, s 56.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(iii).

“ ... [s 56](#) of the Judiciary Act does not empower this court (ie, the Federal Court of Australia), unlike the Supreme Courts of the States, to hear and determine claims against the Commonwealth. This court can only obtain such jurisdiction, pursuant to [s 44](#) of the Judiciary Act 1903, by way of remittal of proceedings commenced in the original jurisdiction of the High Court under s 75(iii) of the Constitution of the Commonwealth”: *Dinnison v Commonwealth* [\(1997\) 143 ALR 635](#) at [637](#) (Foster J). The possibility that the court might derive some jurisdiction in such matter from [s 39B\(1A\)\(c\)](#) of the Judiciary Act 1903 (see [5195]) now needs to be reconsidered.