



User Name: REECE STORME FERRARA

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1. [\(CTH\) High Court Rules 2004 \[12,505\] r 25.01 Form of an application for a constitutional or other writ](#)

Client/Matter: -None-

(CTH) High Court Rules 2004 [12,505] r 25.01 Form of an application for a constitutional or other writ

Practice & Procedure High Court & Federal Court of Australia

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Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court Rules](#) > [High Court Rules 2004](#)
> [CHAPTER 2 PROCEEDINGS IN THE ORIGINAL JURISDICTION OF THE COURT \[rr 20.01–28.01\]](#)
> **PART 25 MANDAMUS, PROHIBITION, CERTIORARI, HABEAS CORPUS AND QUO WARRANTO [rr 25.01–25.17]**

PART 25 MANDAMUS, PROHIBITION, CERTIORARI, HABEAS CORPUS AND QUO WARRANTO [rr 25.01–25.17]

[Pt 25 subst F2018L01443 s 4 and Sch 1 item 1, effective 1 November 2018]

INTRODUCTION TO PART 25

[12,501.5] Constitutional / prerogative writs

Originally these were writs of the Crown, issued through the Curia Regis, and later through the Court of King's (or Queen's) Bench, commanding magistrates or other persons of authority to "do what their duty required" when there was no other remedy. See *Halsbury's Laws of England*, 4th ed, vol 11, para 1451.

In modern times the remedies have been extended and modified. Note, for instance, the development of prohibition, particularly in Australia. Once limited to judicial bodies, the writ is now available against quasi-judicial decisions: *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 [CB](#); *R v Hickman; Ex parte Fox* (1945) 70 CLR 598; 19 ALJR 246 [CB](#); *R v Australian Stevedoring Industry Board* (1953) 88 CLR 100 at 118. Prohibition has also been extended to prevent the enforcement of orders or decisions (previously in such circumstances certiorari was the only appropriate remedy): *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1920) 28 CLR 456 [CB](#); *R v Spicer; Ex parte Waterside Workers Federation of Australia* (1958) 100 CLR 324 [CB](#), where the High Court held that prohibition would lie up to a very late stage in proceedings, until the effect of the challenged order was exhausted.

As a result of these extensions, the prerogative remedies can now be considered as complementary processes to other systems of appeal and review.

[12,501.10] Nature of remedies

L Legislation cited in this paragraph

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

A writ of mandamus compels an administrative authority to perform a public duty: *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 ^{CB}; *Re Bowen; Ex parte Federated Clerks Union of Australia* (1984) 154 CLR 207 at 209–10; [53 ALR 187](#); *Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513 at 515; [87 ALR 649](#). See M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* 3rd ed, Law Book Co, Sydney, 2004, pp 690–752; Harding, *Public Duties and Public Law*, Clarendon Press, Oxford, pp 86–97.

Prohibition aims at preventing an inferior court or tribunal or administrative authority committing jurisdictional error (*R v Australian Stevedoring Industry Board* (1953) 88 CLR 100 ^{CB}) or a breach of the rules of natural justice: *R v Cook; Ex parte Twigg* (1980) 147 CLR 15; [31 ALR 353](#) ^{CB}. Certiorari is available to quash a decision of an inferior court or tribunal involving a jurisdictional error, a breach of the rules of natural justice, or an error of law appearing on the face of the record. Prohibition is a preventive remedy, which would prevent the body entering onto or continuing with a particular function, while certiorari is a means of quashing a function already performed.

The High Court has, in the past, stretched the availability of prohibition to cover a situation where the body has made a decision but something remained to be done to enforce that decision: *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1920) 28 CLR 456 ^{CB}; *R v Hickman; Ex parte Fox* (1945) 70 CLR 598; 19 ALJR 246 ^{CB}. However, the court's increasing willingness to issue certiorari may have removed the need to adopt this liberal attitude to prohibition: *R v Cook; Ex parte Twigg*, above. See Allars, above, pp 280–2; Hotop, above, pp 270–7.

Quo warranto requires persons claiming a right to office to prove their legal entitlement to that office: see *Halsbury's Laws of England*, 4th ed, vol 11, para 1574.

Habeas corpus demands that a person or authority show just cause why a party ought to be kept in custody: *Ex parte Walsh; Re Yates* (1925) 37 CLR 36 ^{CB}. See M Aronson, B Dyer and M Groves, above, pp 753–81. See also *Ruddock v Vadarlis* (2001) 110 FCR 491; [183 ALR 1](#); [\[2001\] FCA 1329](#); [BC200105576](#) ^{CB}; *Hicks v Ruddock* (2007) 156 FCR 574; [239 ALR 344](#); [\[2007\] FCA 299](#); [BC200701311](#) ^{CB} at [35]–[49].

These remedies are overtly limited to enabling review of the legality of proceedings in and decisions by inferior courts, tribunals and government officers. They are said not to be available for a review of the merits or substance of those decisions: see *R v Nat Bell Liquors Ltd* [\[1922\] 2 AC 128](#) ^{CB} at [156](#) ^{CB}; [\[1922\] All ER Rep 335](#) ^{CB}, where the court declined to comment on the merits of the actual decision, preferring to send it back to the original tribunal to rehear de novo. See also *Overseers of the Poor of Walsall v London and North Western Railway Co* [\(1878\) 4 App Cas 30](#) ^{CB}; *Re Bowen; Ex parte Federated Clerks Union of Australia* (1984) 154 CLR 207; [53 ALR 187](#) ^{CB}.

The prerogative writs of prohibition and mandamus are of particular significance in relation to the High Court because [s 75\(v\)](#) of the Constitution confers original jurisdiction on the court “in all matters in which a writ of mandamus or prohibition ... is sought against an officer of the Commonwealth.”

In *Re Refugee Review Tribunal; Ex parte Aala* [\(2000\) 176 ALR 219](#); 75 ALJR 52; [62 ALD 285](#) at [\[21\]](#) ^{CB}, Gaudron and Gummow JJ said that the term “prerogative writ” was an “inapt description” of the remedies of prohibition and mandamus referred to in [s 75\(v\)](#) of the Constitution: “If any shorthand expression is to be used, ‘constitutional writ’ would be preferable.” In the same case at [138], Kirby J said:

There is nothing “prerogative” about the constitutional writs created by, and deriving their force from, the terms of [s 75\(v\)](#) of the Constitution. Conceiving of the constitutional writs as “prerogative writs” is liable to lead those who make that error to

the mistake of burdening an important Australian constitutional remedy, needlessly, with all the limitations, restrictions and procedural convolutions found in the history of English prerogative writs.

[12,501.15] Basis of High Court's jurisdiction

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) ss 73, 75, s 75(v), 76, s 76(i).

(CTH) [Judiciary Act 1903](#) s 30(a), s 33, s 35, s 38(e), 39, s 39B.

In addition to the limitations referred to above, which apply with varying degrees to all prerogative writs, there are further limitations which must be considered when applying for the issue of writs out of the High Court of Australia. As a rule, the remedies being developed at common law were available in any common law court. The High Court, however, is a statutory court, and “the Constitution does not in general terms, as in the case of the State Constitutions with reference to Supreme Courts, endow the High Court at a stroke with all the powers of the Court of King's Bench”: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54 at 75; *R v Bevan; Ex parte Elias* (1942) 66 CLR 452 at 465; [1942] ALR 170 [CB](#). The High Court's jurisdiction only runs as far as [ss 73](#) (appellate jurisdiction), [75](#) and [76](#) (original jurisdiction) allow.

This means the court may only grant relief via these remedies if:

- (1) the issue of the writ falls within the High Court's original jurisdiction to issue mandamus and prohibition against an officer of the Commonwealth, as set out in [s 75\(v\)](#) of the Constitution: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 [CB](#). This jurisdiction of the High Court is exclusive of the jurisdiction of state courts ([s 38\(e\)](#) Judiciary Act 1903) but is, for the most part, concurrent with the jurisdiction of the Federal Court: [s 39B](#) Judiciary Act 1903. Note that relief pursuant to [s 75\(v\)](#) is confined to injunction, mandamus and prohibition, and limited to officers of the Commonwealth. As to the meaning of “officer of the Commonwealth”, see [\[1695.95\]](#);
- (2) there is a matter arising under the Constitution or involving its interpretation and the issue of the writ is incidental to, or an inherent part of, the matter: this jurisdiction is conferred by [s 30\(a\)](#) of the Judiciary Act under [s 76\(i\)](#) of the Constitution; see also *Re Williams* (1934) 51 CLR 545 at 548 per Starke J. Thus, once a matter is proven to be within the court's jurisdiction, the High Court, as a superior court of record, may grant a prerogative writ without regard to the limitations in [s 75\(v\)](#). For, while the issue of the writ as a remedy in its own right is grounded in [s 75\(v\)](#) and limited by the conditions therein, when it is issued as a remedy attached to one of the grants of jurisdiction other than [s 75\(v\)](#), limitations as to the type of writ available, or against whom it is available, do not exist. For examples, see *R v Bevan; Ex parte Elias*, above; *R v Collins; Ex parte ACTU-Solo Enterprises Pty Ltd* ([1976](#)) 8 ALR 691; 50 ALJR 471 [CB](#); *R v Macdonald; Ex parte Macdonald* (1953) 88 CLR 197 [CB](#).
- (3) the issue raised falls within the appellate jurisdiction of the High Court ([s 73](#) of the Constitution): *Re Williams* (1934) 51 CLR 545 [CB](#). As with (2) above, once jurisdiction is established the court will be able to grant any writ. But this will be subject to the court allowing the appeal under [s 35](#) of the Judiciary Act.

[Section 33](#) of the Judiciary Act, on its face, grants the High Court a general power to make orders or issue writs in the nature of prohibition, mandamus, quo warranto and habeas corpus. However, this section is not to be taken as extending the original jurisdiction of the court in any way beyond those matters listed above: *Jerger v Pearce* (1920) 28 CLR 588 at 590; *R v Bevan; Ex parte Elias*, above per Rich J; *R v South Australia Governor* (1907) 4 CLR 1497; 14 ALR 98 [CB](#).

The High Court's jurisdiction to grant a prerogative writ exists independently of the processes of appeal: see *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190; [23 ALR 439](#) ^{CB}, where the High Court granted prohibition even though there was no right of appeal to the High Court. Note that this case was decided before the Judiciary Amendment Act 1984 No 7, and the Judiciary Amendment Act (No 2) 1984 No 12, when appeals as of right still existed to the High Court.

The basis of High Court jurisdiction as it relates to each writ is discussed separately below. See also [s 75\(v\)](#) of the Constitution and [ss 33](#) and [39](#) of the Judiciary Act.

[12,505] 25.01 Form of an application for a constitutional or other writ

25.01.1 An application for a constitutional or other writ must:

- (a) be in Form 12; and
- (b) be accompanied by one or more affidavits in support.

25.01.2 The application must be signed:

- (a) by a legal practitioner on behalf of the plaintiff; or
- (b) if the plaintiff is unrepresented — by the plaintiff.

25.01.3 The application:

- (a) must not exceed 12 pages; and
- (b) must be typed in at least 12 point (Times New Roman or equivalent font size) with line spacing of 1.5 lines.

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User Name: REECE STORME FERRARA

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Document (1)

1. [\(CTH\) Judiciary Act 1903 \[4825\] s 30 Original jurisdiction conferred](#)

Client/Matter: -None-

(CTH) Judiciary Act 1903 [4825] s 30 Original jurisdiction conferred

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: October 2020

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART IV ORIGINAL JURISDICTION OF THE HIGH COURT [ss 30–33A]

PART IV ORIGINAL JURISDICTION OF THE HIGH COURT [ss 30–33A]

Part IV Generally

[4820.5] Circumstances required to overrule previous High Court decisions

The High Court has never regarded itself as bound to follow its previous decisions: see, eg, *Australian Agricultural Co v Federated Engine Drivers and Firemen's Assn of Australia* (1913) 17 CLR 261; 19 ALR 509 [CB](#).

However, a party who seeks to persuade the Court to overrule a prior decision may require the leave of the Court before arguing that an earlier decision is wrong: see *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316; [52 ALR 401](#); 58 ALJR 307; [BC8400512](#) [CB](#); *Swain v Waverly Municipal Council* (2005) 220 CLR 517 at 557; 138 LGERA 50; [\[2005\] HCA 4](#); [BC200500186](#) [CB](#). Some Justices (notably Deane and Kirby JJ) have rejected the existence of any such requirement: see, eg, *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388; [211 ALR 18](#); [\[2004\] HCA 53](#); [BC200407491](#) at [\[179\]](#) [CB](#) per Kirby J (where a majority refused leave to allow a challenge to prior decisions). In *XYZ v Commonwealth* (2006) 227 CLR 532; [227 ALR 495](#); 80 ALJR 1036; [\[2006\] HCA 25](#); [BC200604187](#) at [\[38\]](#) [CB](#), Gummow, Hayne and Crennan JJ said that:

It is unnecessary to embark upon the question of what is involved in the statement in the joint judgment in *Evda Nominees Pty Ltd v Victoria* that leave of the Court is required before the Court hears argument urging it to depart from "the actual decision" in earlier cases...

Where personal liberty is at stake, said Gageler J in *Miller v The Queen* (2016) 259 CLR 380; [334 ALR 1](#); [\[2016\] HCA 30](#); [BC201607088](#) at [\[128\]](#) [CB](#), he had "no doubt that it is better that this Court be 'ultimately right' than that it be 'persistently wrong'." See also per Keane J in *North Australian Aboriginal Justice Agency Ltd v Northern Territory of Australia* (2015) 256 CLR 569; [326 ALR 16](#); [\[2015\] HCA 41](#); [BC201510937](#) at [\[162\]](#) [CB](#) for a different view.

[4820.10] Criteria

L Legislation cited in this paragraph

(CTH) [Privy Council \(Limitation of Appeals\) Act 1968](#) [9110].

(CTH) [Privy Council \(Appeals from the High Court\) Act 1975](#) [9225].

The power to overrule previous decisions will only be exercised with caution and for strong reasons. The following considerations have emerged from cases:

- (a) there should be no inhibitions about overruling a decision the error of which has been made manifest by later cases which however have not directly overruled it;
- (b) the Court will be slow to overrule or should refuse to overrule cases which go with a definite stream of authority and do not conflict with well-established principles;
- (c) other considerations are:
 - (i) whether the prior decision can be confined as an authority to the precise question which it decided or whether its consequences would extend beyond that question;
 - (ii) whether it is isolated as receiving no support from prior decisions and as forming no part of a stream of authority or a line of cases;
 - (iii) whether it concerns so fundamental a provision of the Constitution or involves a question of such vital Constitutional importance that its consequences are likely to be far reaching though not immediately foreseeable in detail;
- (d) the position was changed in relation to constitutional matters and all matters of federal jurisdiction by the Privy Council (Limitation of Appeals) Act 1968 (see [\[9110\]](#)) and in respect of all other matters by the Privy Council (Appeals from the High Court) Act 1975 (see [\[9225\]](#)) so that the High Court is in all respects the Court of ultimate appeal. The fact that error can no longer be corrected elsewhere is a factor that must affect the Court's approach.

For a discussion of the relevant principles see: *Queensland v Commonwealth* (1977) 139 CLR 585; [16 ALR 487](#) at [514](#); 52 ALJR 100; [BC7700083](#) [CB](#); *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49 at 55–8; [40 ALR 673](#); 56 ALJR 588; [BC8200070](#) [CB](#); *John v FCT* (1989) 166 CLR 417 at 438–9; [83 ALR 606](#); 63 ALJR 166; *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; [168 ALR 123](#); [\[1999\] HCA 67](#); [BC9908417](#) at [\[55\]](#), [\[152\]](#), [\[167\]](#) [CB](#); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; [203 ALR 143](#); [\[2003\] HCA 72](#); [BC200307491](#) at [\[39\]](#) [CB](#).

[4820.15] Constitutional cases

In constitutional cases, the High Court is particularly conscious of its primary duty to uphold the Constitution, with the result that the principle of stare decisis has less force: see *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 277–9; 19 ALR 509; *Queensland v Commonwealth* (1977) 139 CLR 585, at 592–4; [16 ALR 487](#); 52 ALJR 100; [BC7700083](#) [CB](#); *Stevens v Head* (1993) 176 CLR 433 at 461–2; [112 ALR 7](#); 67 ALJR 343; [BC9303608](#) [CB](#); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562–6; [145 ALR 96](#); 71 ALJR 818; [BC9702860](#) [CB](#); *Coleman v Power* (2004) 220 CLR 1; [209 ALR 182](#); [\[2004\] HCA 39](#); [BC200405576](#) at [\[289\]](#), [\[298\]](#) and [\[301\]](#) [CB](#). By contrast, however, see *Queensland v Commonwealth*, above.

In *North Australian Aboriginal Justice Agency Ltd v Northern Territory of Australia* (2015) 256 CLR 569; [326 ALR 16](#); [\[2015\] HCA 41](#); [BC201510937](#) at [\[162\]](#) [CB](#) Keane J spoke of the reasoning supporting a restrictive approach:

While it is the paramount duty of a Justice of this Court to give effect to the Constitution rather than to earlier interpretations if it, the essential constitutional values of certainty, continuity and stability require that, when questions as to the effect of the Constitution have been resolved by determination by this Court, and that determination has helped to shape the life of

the nation, those questions should not be reopened for no better reason than to allow the re-agitation of arguments which did not prevail in the earlier decision, and which have not, since their rejection, taken on new and compelling force from the experience of the nation and the insights generated by that experience.

[4820.20] Instances of High Court overruling previous decisions

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 92, s 96.

There are many examples of the Court overruling its previous decisions. See, for example:

- (1) *Ha v New South Wales* (1997) 189 CLR 465; [146 ALR 355](#); 71 ALJR 1080; [BC9703377](#) ^{CB}, in effect overruling the business franchise fee exception cases including *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529; [1960] ALR 129; (1960) 33 ALJR 470; [BC6000730](#) ^{CB};
- (2) *Cole v Whitfield* (1988) 165 CLR 360; [78 ALR 42](#); 62 ALJR 303; [BC8802596](#) ^{CB}, in effect overruling, or exposing to doubt, approximately 140 prior decisions on [s 92](#) of the Constitution;
- (3) *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [172 ALR 625](#); [\[2000\] HCA 36](#); [BC200003351](#) ^{CB}; *Street v Queensland Bar Assn* (1989) 168 CLR 461; [88 ALR 321](#); 63 ALJR 715; [BC8902696](#) ^{CB}, overruling *Henry v Boehm* (1973) 128 CLR 482; [1 ALR 181](#); 47 ALJR 429; [BC7300021](#) ^{CB};
- (4) *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372; [1963] ALR 304; (1962) 36 ALJR 97; [BC6200440](#) ^{CB}, overruling *Re Foreman & Sons Pty Ltd*; *Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508; [1947] ALR 589; (1947) 21 ALJR 360; [BC4700230](#) ^{CB}.

See also *Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 243-4; [1952] ALR 125 at 126; (1952) 25 ALJR 762; [BC5200100](#) ^{CB}; *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1949) 77 CLR 493 at 496; 23 ALJR 144; [BC4900700](#) ^{CB}; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54; [20 ALR 126](#); [BC1400054](#) ^{CB}; *Duncan v Queensland* (1916) 22 CLR 556; [22 ALR 465](#); [BC1600014](#) ^{CB}, which overruled *Foggitt Jones & Co Ltd v New South Wales* (1916) 21 CLR 357; 22 ALR 313; [BC1600036](#) ^{CB} and was itself subsequently overruled by *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530; 27 ALR 130; [BC2000012](#) ^{CB}; *Pilkington v Frank Hammond Pty Ltd* (1974) 131 CLR 124; [2 ALR 563](#); 48 ALJR 61; [BC7400018](#) ^{CB}, which overruled *Hughes v Tasmania* (1955) 93 CLR 113; [1955] ALR 624; [BC5500050](#) ^{CB}; *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; 15 ALR 241; [BC0900047](#) ^{CB}, overruled in *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468; [1972] ALR 3; (1971) 45 ALJR 485; [BC7100250](#) ^{CB}.

In contrast, in *Victoria v Commonwealth* (1957) 99 CLR 575 at 610–11; [1957] ALR 761; (1957) 31 ALJR 369; [BC5700970](#) ^{CB} (*Uniform Tax case (No 2)*), the Court unanimously refused to overrule *South Australia v Commonwealth* (1942) 65 CLR 373; [1942] ALR 186; (1942) 16 ALJR 109; [BC4200026](#) ^{CB} (*Uniform Tax case (No 1)*) in so far as it dealt with the meaning of [s 96](#) of the Constitution.

For examples of cases in which a previous decision sought to be overruled has been acted upon, see *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* (1970) 122 CLR 504; [1970] ALR 841; (1970) 44 ALJR 205; [BC7000420](#) ^{CB} (High Court); *Geelong Harbour Trust Commissioners v Gibbs Bright & Co* (1974) 129 CLR 576; [2 ALR 362](#); [\[1974\] AC 810](#) ^{CB} (Privy Council) and *Point v Federal Commissioner of Taxation (No 2)* (1971) 124 CLR 669; 45 ALJR 104; 71 ATC 4014; [BC7000050](#) ^{CB}.

[4825] 30 Original jurisdiction conferred

In addition to the matters in which original jurisdiction is conferred on the High Court by the Constitution, the High Court shall have original jurisdiction:

- (a) in all matters arising under the Constitution or involving its interpretation; and
- (b) *[Repealed]*
- (c) in trials of indictable offences against the laws of the Commonwealth.

Section 30 Generally

[4825.5] Jurisdiction conferred by the Constitution

L Legislation cited in this paragraph

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

[Section 75](#) of the Constitution lists the matters in which original jurisdiction is conferred on the High Court. The Court's jurisdiction in those matters cannot be reduced or limited without an alteration of the Constitution.

[4825.7] Conferral of original jurisdiction

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75, s 75(iii), s 76, s 76(ii).

(CTH) [Judiciary Act 1903](#) s 30, s 30(c), s 44.

[Section 76](#) of the Constitution empowers Parliament to confer original jurisdiction on the High Court in a range of specified matters. The power has never been fully exercised. There has not, for example, been any general investment of original jurisdiction in the High Court in relation to *any* matter that arises under a law made by the Parliament, because that would impose an intolerable burden upon the High Court. The original jurisdiction that was invested in the High Court under many specific Acts in relation to matters such as patents, trade marks, taxation and enemy property, was divested after the establishment of the Federal Court of Australia.

The significance of [s 30](#) is that it was only upon the enactment of that section that the High Court acquired original jurisdiction in relation to all “matters arising under the Constitution or involving its interpretation” (that being one of the topics listed in [s 76](#) of the Constitution). Absent this provision, the High Court would not have a general original jurisdiction to decide constitutional questions, although some such matters would undoubtedly fall within the grant of jurisdiction in [s 75](#) of the Constitution: see *Re McBain*; *Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 394, 403–4, 445; [188 ALR 1](#); [\[2002\] HCA 16](#); [BC200201733](#) ^{CB}. See also commentary at [1700.10]–[1700.20].

It is arguable that [s 30\(c\)](#) of the Judiciary Act is unnecessary, as the relevant jurisdiction may fall within s 75(iii) of the Constitution, on the basis that a trial of an indictable offence against the laws of

the Commonwealth involves a matter in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party: see *R v Kidman* (1915) 20 CLR 425 at 439, 444; 21 ALR 405; [BC1500019](#) ^{CB}.

If the provision is necessary, there are potential problems with it, as the reference in [s 30\(c\)](#) to the “laws of the Commonwealth” does not fit aptly with s 76(ii), which refers to laws made by “the Parliament”. It seems, however, unlikely to arise in practice, as cases falling within [s 30\(c\)](#) would be likely to be remitted under [s 44](#) of the Act if commenced in the High Court. It seems the last example of such a case was *R v Brewer* (1942) 66 CLR 535; [1942] ALR 353; (1942) 16 ALJR 245; [BC4200007](#) ^{CB}.

[4825.10] Requirement in s 30(a)

Toohey J has said that a case does not involve a matter arising under the Commonwealth Constitution or involve its interpretation merely because the litigant says so: *Re Finlayson; Ex parte Finlayson* (1997) 72 ALJR 73 at 74 (HCA). See also *Luck v Secretary, Department of Human Services* (2017) 72 AAR 219; [\[2017\] FCA 540](#); [BC201703744](#) at [\[32\]](#) ^{CB}; *Somasundaram v Luxton* [\[2020\] FCA 1076](#); [BC202006985](#) at [\[53\]](#) ^{CB}. It must be established that a challenge does involve a matter arising under the Constitution: *Glennan v Commissioner of Taxation* [\(2003\) 198 ALR 250](#); 77 ALJR 1195; [\[2003\] HCA 31](#); [BC200303045](#) at [\[14\]](#) ^{CB}.

[4825.15] Matter arising under State Constitution

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 106, 107.

According to the Supreme Court of Western Australia, [s 106](#) of the Constitution is not a source of legislative authority for State Constitutions. Hence, if so, a matter arising under a State Constitution is not, by reason alone of [s 106](#), a matter arising under the Constitution within the meaning of s 30(a). However, [s 106](#), by its own force and for its own purposes, is a law which requires that such manner and form provisions as are to be found in State Constitutions conditioning the power to amend the those Constitutions be observed. Thus the question as to whether this has or has not been done is a matter arising under the Constitution within the meaning of s 30(a): *Western Australia v Wilsmore* [1981] WAR 179; [\(1981\) 33 ALR 13](#) ^{CB}.

In *Boath v Wyvill* [1989] FCA 24 at [36] [\(1989\) 85 ALR 621](#) at [634](#), the Full Federal Court (Sheppard, Beaumont and Gummow JJ) held that:

Questions as to the legislative competence of State Parliaments ... involve a matter involving the interpretation of [ss 106](#) and [107](#) of the Constitution, even if that matter may not, in a particular case, arise under those provisions.



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1. [\(CTH\) Judiciary Act 1903 \[4840\] s 31 Judgment and execution](#)

Client/Matter: -None-

(CTH) Judiciary Act 1903 [4840] s 31 Judgment and execution

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Alexander Flecknoe-Brown

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[4840] 31 Judgment and execution

The High Court in the exercise of its original jurisdiction may make and pronounce all such judgments as are necessary for doing complete justice in any cause or matter pending before it, and may for the execution of any such judgment in any part of the Commonwealth direct the issue of such process, whether in use in the Commonwealth before the commencement of this Act or not, as is permitted or prescribed by this or any Act or by Rules of Court.

Section 31 Generally

[4840.5] “original jurisdiction”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75, s 76.

(CTH) [Judiciary Act 1903](#) ss 30, 33.

The original jurisdiction of the High Court is defined in [s 75](#) of the Commonwealth Constitution; and in Commonwealth legislation conferring jurisdiction on the High Court in certain of the matters referred to in [s 76](#) of the Commonwealth Constitution: Judiciary Act [ss 30](#) and [33](#).

[4840.10] “judgments”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 2.

The term “judgment” includes any judgment decree, order or sentence: Judiciary Act [s 2](#).

[4840.15] “cause”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 2.

The term “cause” includes any suit and also includes criminal proceedings: Judiciary Act [s 2](#). See *Green v Jones* [\[1979\] 2 NSWLR 812](#); (1979) 39 FLR 428 [CB](#).

[4840.20] “matter”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 2.

The term “matter” includes any proceeding in a court whether between the parties or not, and also any incidental proceeding in a cause or matter: Judiciary Act [s 2](#).

[4840.25] “issue of such process”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77M.

[Section 77M](#) of the Judiciary Act provides that a person in whose favour a judgment of the High Court is given is entitled to the same remedies for the enforcement of the judgment in a State or Territory, by execution or otherwise, against the person, or against the property of the person, against whom the judgment is given, as are allowed in like cases by the laws of that State or Territory to persons in whose favour a judgment of the Supreme Court of that State or Territory is given.

[4840.30] Injunctions and declarations against the Commonwealth

The remedies of injunction and declaration are available against the Commonwealth. The jurisdiction of the Court to make a declaration of right and to grant an injunction is established where: (i) a statute under which an alleged power is asserted is itself wholly invalid; or (ii) a government instrumentality is attempting, under cover of a valid statute, to assert powers which are not capable of being conferred on it by the Commonwealth Parliament; or (iii) a government instrumentality is attempting to exert, under cover of the instrument creating it, powers which that instrument does not confer: see *Colonial Sugar Refining Co Ltd v A-G (Cth)* (1912) 15 CLR 182 [CB](#) at 193 per Griffith CJ. If the Crown gives an invalid direction or makes an invalid order, this does not of itself give rise to a cause of action unless some wrongful act is done in pursuance of that direction or order. An action may be brought for a declaration of right under the principles established in *Dyson v A-G* [\[1911\] 1 KB 410](#) [CB](#). It is accepted that superior courts have inherent powers to grant declaratory relief since that decision: see *Macks v Viscaviello* (2017) 130 SASR 1; [353 ALR 201](#); [2017] SASFC 172; [BC201711707](#) at [\[661\]–\[662\]](#) [CB](#).

In *Croome v Tasmania* (1997) 191 CLR 119 at 124; [142 ALR 397](#) at [400](#); 71 ALJR 430; [BC9700297](#) [CB](#), Brennan CJ, Dawson and Toohey JJ referred to “a long-standing doctrine” that a matter may consist of a controversy between a person with a sufficient interest in the subject who asserts that a law is invalid and the polity whose law it purports to be. Their Honour’s quoted from *Toowoomba Foundry Pty Ltd v Commonwealth* (1945) 71 CLR 545 at 570; [1945] ALR 282; (1945) 19 ALJR 164; [BC4500024](#) [CB](#), where Latham CJ referred to:

... the practice of the Court in allowing the constitutional validity of statutes and regulations and orders made thereunder to be challenged by interested persons in actions claiming only declarations of invalidity ...

In *Croome v Tasmania*, above, Brennan CJ, Dawson and Toohey JJ said, at CLR 124; ALR 401, that:

A declaration of validity or invalidity of an impugned law administers the law governing the controversy about the impugned law.

See also:

- *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; 98 LGERA 410; [155 ALR 684](#); [BC9803589](#) ^{CB};
- the judgment of Latham CJ in *Arthur Yates & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37; 51 ALR 474 ^{CB};
- compare *Attorney-General (Qld); Ex rel Goldsbrough Mort & Co Ltd v A-G (Cth)* (1915) 20 CLR 148 ^{CB}, where the High Court refused to make a declaratory order as to the validity or invalidity of State legislation because, inter alia, there was no allegation that a case had arisen in which provisions of a State Act were to be enforced;
- *Australian Boot Trade Employees Federation v Commonwealth* (1954) 90 CLR 24; 61 ALR 321 ^{CB}, where the majority of the High Court declined to entertain a case stated because no prosecution had been launched, was pending or threatened, pursuant to the provisions of the Commonwealth statute which was being attacked;
- *James v South Australia* (1927) 40 CLR 1; 33 ALR 334 ^{CB}, where the majority indicated the jurisdiction of the Court to declare a statute in contravention of the Constitution could only be invoked when that declaration is necessary to secure the rights of a party against an unwarranted exercise of legislative power;
- *Luna Park Ltd v Commonwealth* (1923) 32 CLR 596 ^{CB}, where it was held, inter alia, that the Court should not make a declaratory order when the facts upon which the claim for declaration was based were purely hypothetical;
- compare *Attorney-General (NSW) v Brewery Employee's Union* (1908) 6 CLR 469; 14 ALR 565 ^{CB}, where the High Court granted a declaration as to the invalidity of part of the Trade Marks Act 1905.

[4840.35] “necessary to give complete relief” — power to join other parties

In *John Cooke & Co Pty Ltd v Commonwealth* (1922) 31 CLR 394, the High Court would not make a declaration or order affecting the rights of absent parties unless those parties were properly represented. The Court said that it was able to add parties who ought to have been joined or whose presence before the Court was necessary to enable an effectual and complete adjudication upon, and settlement of, all questions in the cause or matter. See also *Commonwealth Bank of Australia v Peto (No 2)* (2006) 152 FCR 362; [231 ALR 433](#); [\[2006\] FCA 516](#); [BC200603126](#) at [\[32\]](#) ^{CB}, [\[37\]](#); *Australian Securities and Investments Commission v Axis International Management Pty Ltd* [\[2008\] FCA 1605](#); [BC200809521](#) at [\[5\]](#) ^{CB}.

The Court will hesitate before making a declaration of right in the absence of an interested party. See *Dairy Farmers Co-op Milk Co Ltd v Commonwealth* (1946) 73 CLR 381 ^{CB}.

[4840.40] Determination of abstract questions of law

There must be an “immediate right, duty or liability to be established by a determination of the” High Court. It is not competent to “determine abstract questions of law” and make consequential declarations “without the right or duty of any body or person being involved”: see *Re Judiciary and Navigation Acts* (1921) 29 CLR 257; 27 ALR 193; [BC2100041](#) ^{CB}. Hence, only “matters” fall within Chp III; a matter “as a justiciable controversy, is not co-extensive with a legal proceeding, but rather means the subject-matter for determination in a legal proceeding — ‘controversies which might come

before a Court of Justice”: *Palmer v Ayres* (2017) 259 CLR 478; [341 ALR 18](#); [\[2017\] HCA 5](#); [BC201700461](#) at [\[26\]](#) .

However, answers given by the Court to questions reserved for its consideration in the course of proceedings in a matter pending in that Court do not involve “abstract questions”, whether those answers, of themselves, determine the rights of the parties or not, because they are not given in circumstances divorced from an attempt to administer the law as stated by the answers: *Mellifont v A-G (Qld)* (1991) 173 CLR 289 at 303–5; [104 ALR 89](#) at [96–7](#); 66 ALJR 107; [BC9102613](#) ; *O’Toole v Charles David Pty Ltd* (1990) 171 CLR 232; [96 ALR 1](#); 64 ALJR 618; [BC9002918](#) ; *Croome v Tasmania* (1997) 191 CLR 119 at 124, 136; [142 ALR 397](#); 71 ALJR 430; [BC9700297](#) . The rule in *Mellifont* was stated as being of the effect that the Court “lacks original or appellate jurisdiction to answer any question of law (including but not confined to a question of constitutional law) if that question is divorced from the administration of the law”: *Clubb v Edwards* [\(2019\) 366 ALR 1](#); [\[2019\] HCA 11](#); [BC201902725](#) at [\[136\]](#) .

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Document (1)

1. [\(CTH\) Judiciary Act 1903 \[4845\] s 32 Complete relief to be granted](#)

Client/Matter: -None-

(CTH) Judiciary Act 1903 [4845] s 32 Complete relief to be granted

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Last updated: October 2020

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IV ORIGINAL JURISDICTION OF THE HIGH COURT \[ss 30–33A\]](#)

[4845] 32 Complete relief to be granted

The High Court in the exercise of its original jurisdiction in any cause or matter pending before it, whether originated in the High Court or removed into it from another Court, shall have power to grant, and shall grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter; so that as far as possible all matters in controversy between the parties regarding the cause of action, or arising out of or connected with the cause of action, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided.

Section 32 Generally

[4845.5] Derivation and effect of section

L Legislation cited in this paragraph

(CTH) [Federal Court of Australia Act 1976](#) s 22.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(v), s 76(i).

(CTH) [Judiciary Act 1903](#) s 30, s 32.

The provisions of this section, with some minor deviation, are derived from s 43 of the Supreme Court of Judicature (Consolidation) Act 1925 (UK) and the earlier s 27(4) of the Judicature Act 1873 (UK). From the authorities it appears that the settled effect of the section is “that whenever a subject of controversy arises in an action which can conveniently be determined between the parties to the action, the Court should, if possible, determine it so as to prevent further and needless litigation”: *In the Goods of Tharp* [\(1878\) 3 PD 76](#)  at [81](#) .

In *EPU19 v Minister for Home Affairs* [\[2020\] FCA 541](#); [BC202003289](#) at [\[56\]](#)  Steward J indicated that he considered s 32 as equivalent to s 22 of the Federal Court of Australia Act 1976 and that it, accordingly, “commands the Court, on such terms as I consider just, to grant sufficient remedies, 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.”

The section should be construed liberally to allow this: *Roberts v Gippsland Agriculture and Earth Moving Contracting Co Pty Ltd* [1956] VLR 555 at 564–5; *McLeish v Faure* (1979) 25 ALR 403 at 413–14. Note however, that the section has been said to be a section which confers “power” on the Court once jurisdiction is established and is not to be regarded as a section from which the Court derives jurisdiction: *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; 33 ALR 465 ^{CB} per Barwick CJ (CLR at 477), per Gibbs J (CLR at 489).

A similar provision, to which the same principles apply, is [s 22](#) of the Federal Court of Australia Act 1976.

In *Thomson Australian Holdings Ltd v Trade Practices Commission* (1981) 148 CLR 150; 37 ALR 66; [1981] HCA 48; [BC8100114](#) at [161](#) ^{CB} the plurality speaking of s 22 said that “its effect is to enable the Court to dispose of all rights, legal and equitable, in the one action, so far as that is possible”. This was quoted by Rares J in *Strong Wise Ltd v Esso Australia Resources Pty Ltd (No 2)* (2010) 185 FCR 237; [\[2010\] FCA 575](#); [BC201003827](#) at [\[55\]](#) ^{CB}.

In *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld)* (1995) 184 CLR 620 at 651–2; [132 ALR 198](#) at [213](#); 70 ALJR 93; [BC9501518](#) ^{CB}, Toohey, McHugh and Gummow JJ remarked that:

[A]s to the proceedings initiated in this Court for prerogative relief in reliance upon [s 75\(v\)](#) of the Constitution, the presence in that controversy of a matter involving the interpretation of the Constitution would appear to attract the jurisdiction of this Court on an additional footing, namely [s 76\(i\)](#) of the Constitution as implemented by [s 30](#) of the Judiciary Act 1903 (Cth). This, together with [s 32](#) of that statute, would provide a foundation for the issue of certiorari, if that remedy were otherwise appropriate.

[4845.10] Power to grant certiorari

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) ss 30(a), s 32, s 33.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 73, s 75, s 76.

Certiorari does not appear in the list of remedies under [s 33](#) of the Judiciary Act. A question therefore arises as to whether [s 32](#) empowers the Court to grant that remedy.

In *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; [188 ALR 1](#); [\[2002\] HCA 16](#); [BC200201733](#) ^{CB}, the High Court considered whether it had jurisdiction to grant certiorari in the case of a non-jurisdictional error by reason of the combined operation of [ss 30\(a\)](#) and [32](#) of the Judiciary Act. Ultimately the Court did not need to decide the point. There was, however, some discussion of the scope of [s 32](#) of the Act. Gleeson CJ said (at [21]):

it should be noted that the argument for the applicants assumes that a writ of certiorari is a remedy of the kind to which [s 32](#) refers, and that such a remedy may be granted in respect of a decision of the Federal Court on the basis of non-jurisdictional error of law on the face of the record. The second part of that assumption was strongly disputed, reliance being placed on the reasoning of Deane J in *R v Gray; Ex parte Marsh*. It is unnecessary to decide that question in this case.

Gaudron and Gummow JJ, having set out the text of [s 32](#), said (at [56]–[58]):

In his reasons for judgment, Hayne J refers to the affinity between [s 32](#) and the All Writs Act (being s 14 of the United States Judiciary Act 1789). The tenor of the decisions upon the All Writs Act is that, save to test the jurisdiction of the inferior court or tribunal in question, certiorari should not be granted in any case (including for error of law on the face of the record) where there is an adequate remedy by way of appeal or writ of error.

In respect of the litigation tried by Sundberg J, there were adequate appellate avenues to the Full Court and thence by special leave to this Court. The circumstance that appellate standing was limited to parties to the Federal Court litigation cannot render those appellate processes inadequate because strangers lack the standing to meddle in concluded litigation.

Different considerations would, for example, arise in respect of an alleged non-jurisdictional error of law by a federal court which was not created as a superior court of record and from whose decisions there was no appeal and, in particular, a law complying with [s 73](#) of the Constitution precluded any appeal to this court. In such a situation, where a party to the decision could frame the complaint within one or more of the species of “matter” in respect of which this Court had original jurisdiction under [s 75](#) of the Constitution, or a law made under [s 76](#), then a remedy under [s 32](#) of the Judiciary Act in the nature of certiorari might well be appropriate. But that is not this case.

McHugh J said (at [84]) that:

As the judgment of Hayne J shows, decisions of federal courts — including the Supreme Court — in the United States have held that s 14 of the Judiciary Act 1789 (the US equivalent of [s 32](#)) authorises the writ of certiorari in appropriate cases. Similarly, this court should hold that the broad grant of power conferred by [s 32](#) authorises the issue of certiorari in appropriate cases.

Kirby J was of the same view (at [190]–[191]). Hayne J (at [267]–[269]) said:

[Section 33](#) of the Judiciary Act 1903 (Cth) provides that this court may make orders or direct the issue of writs of various descriptions. None of these is apt to include certiorari. Further, [s 32](#) of the Judiciary Act states that “[t]he High Court in the exercise of its original jurisdiction in any cause or matter pending before it... shall have power to grant, and shall grant, either absolutely or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto are entitled to in respect of any legal or equitable claim properly brought forward by them respectively in the cause or matter...”

Section 14 of the United States Judiciary Act 1789 (known as “the All Writs Act”) conferred on the courts of the United States generally the power to issue writs of scire facias, habeas corpus, “and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law”. The leading commentary says of the All Writs Act:

The limits of this open-ended authority have never been precisely defined. The Court has expanded the theoretical availability of extraordinary writs far beyond the limits that might have been found in nineteenth century opinions, but at the same time it has sharply curtailed actual use of the writs... Statutory authority to issue extraordinary writs is limited by the constitutional constraints of Article III. Justiciability requirements must be met. [Footnotes omitted]

The affinity will be apparent between the terms of s 14 of the 1789 statute, provisions a century later in the English Judicature legislation, and [s 32](#) of the Judiciary Act.

In *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; [234 ALR 114](#); [\[2007\] HCA 14](#); [BC200702595](#) at [\[61\]](#)  the High Court apparently considered that the power to issue certiorari in a matter otherwise within the jurisdiction of the Court derived from [s 32](#) of the Judiciary Act, although on the facts no error was established warranting the grant of relief.

(CTH) Judiciary Act 1903 [4845] s 32 Complete relief to be granted

The question was left open by Nettle J in *Construction Forestry Mining and Engineering Union v Director of Fair Work Building Industry Inspectorate* [\(2016\) 153 ALD 399](#); [338 ALR 360](#); [\[2016\] HCA 41](#); [BC201609183](#) at [\[35\]](#)  his Honour noting that it involved a matter of “some controversy”

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Document (1)

1. [\(CTH\) Judiciary Act 1903 \[4850\] s 33 Mandamus Prohibition Ouster of office](#)

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(CTH) Judiciary Act 1903 [4850] s 33 Mandamus Prohibition Ouster of office

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2009

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IV ORIGINAL JURISDICTION OF THE HIGH COURT \[ss 30–33A\]](#)

[4850] 33 Mandamus Prohibition Ouster of office

(1) The High Court may make orders or direct the issue of writs:

- (a) commanding the performance by any court invested with federal jurisdiction, of any duty relating to the exercise of its federal jurisdiction; or
- (b) requiring any court to abstain from the exercise of any federal jurisdiction which it does not possess; or
- (c) commanding the performance of any duty by any person holding office under the Commonwealth; or
- (d) removing from office any person wrongfully claiming to hold any office under the Commonwealth; or
- (e) of mandamus; or
- (f) of *habeas corpus*.

(2) This section shall not be taken to limit by implication the power of the High Court to make any order or direct the issue of any writ.

Section 33 Generally

SECTION 33(1)

[4850.5] Generally

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 75(v).

[Section 75\(v\)](#) does not exhaustively define the writs that may be issued by the High Court. As Kirby J explained in *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; [188 ALR 1](#); [\[2002\] HCA 16](#); [BC200201733](#) at [\[191\]](#) [\[CB\]](#):

[191]... It is incorrect to say that [s 75\(v\)](#) was intended, for all time, to exhaust the writs that would be available in the

original jurisdiction of this court. Had that been so, it would mean that this court would be powerless to grant the writ of habeas corpus or a writ in the nature of quo warranto or a writ directed to a person who was not an officer of the Commonwealth, but was invalidly purporting to exercise federal jurisdiction, or a writ to restrain a person (or a court) from the exercise of federal jurisdiction when it was beyond power. It is erroneous to read constitutional grants of power in such a narrow, compartmentalised way. Whilst the provisions of Ch III, indeed of the entire Constitution, must be read as a whole, taking into account their language and structure, each grant of power must be given full force and effect. This must occur unless to do so would destroy the operation of another part of the Constitution, as for example where a head of power is subject to an express qualification.

[4850.10] Mandamus — s 33 (a), (c) and (e)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Subss 33(a), (c), (e), s 33(1)(e).

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

The writ of mandamus is one which commands an inferior court or a person, or anyone invested with a public duty, to perform that duty. For a discussion of this remedy see the commentary at [1695.100].

Subsections 33(a), (c) and (e) of the Judiciary Act turn on the fact of a person or body owing a “public duty”. They cover a wider ground than most other prerogative writs, as included in their ambit are executive and ministerial, as well as judicial, processes. However, the courts will not strain the law to find that a public duty exists: see *Stepney Borough Council v John Walker & Sons Ltd* [1934] AC 365  [CB](#). The key question is not whether the person performing the duty came to a correct decision, but rather whether the error was of such a kind that the duty itself had not in law been performed: see *Wade v Burns* (1966) 115 CLR 537; [1966] ALR 1137; (1966) 40 ALJR 82; [BC6600620](#)  [CB](#).

When mandamus is sought against an officer of the Commonwealth, the power to issue the writ derives from [s 75\(v\)](#) of the Constitution itself. Otherwise, the writ can only be issued out of the High Court pursuant to [s 33\(1\)\(e\)](#) as an incident to the exercise of its original or appellate jurisdiction: *Re Superintendent of Training Centre at Goulburn; Ex parte Pelle* (1983) 48 ALR 225; 57 ALJR 679; [5 ALN No 232](#); [BC8300089](#)  [CB](#). See also *Jerger v Pearce* (1920) 28 CLR 588 at 590; *Re Williams* (1934) 51 CLR 545 at 551-2; [1934] ALR 422; (1934) 8 ALJR 313; [BC3400010](#)  [CB](#); *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 462, 465 and 480; [1942] ALR 170; (1942) 16 ALJR 213; [BC4200027](#)  [CB](#).

[4850.15] Prohibition — s 33(1)(b)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 33(1)(b).

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

[Section 33\(1\)\(b\)](#) empowers the High Court to issue prohibition, in relation to the exercise of federal jurisdiction. For a discussion of this remedy see the commentary at [1695.105].

When prohibition is sought against an officer of the Commonwealth, the power to issue the writ derives from [s 75\(v\)](#) of the Constitution itself. Otherwise, the writ can only be issued out of the High Court pursuant to [s 33\(1\)\(b\)](#) as an incident to the exercise of its original or appellate jurisdiction: see *Re Superintendent of Training Centre at Goulburn; Ex parte Pelle* (1983) 48 ALR 225; 57 ALJR 679;

[5 ALN No 232](#); [BC8300089](#) . See also *Jerger v Pearce* (1920) 28 CLR 588 at 590; *Re Williams* (1934) 51 CLR 545 at 551–2; [1934] ALR 422; (1934) 8 ALJR 313; [BC3400010](#) ; *R v Bevan*; *Ex parte Elias and Gordon* (1942) 66 CLR 452 at 462, 465 and 480; [1942] ALR 170; (1942) 16 ALJR 213; [BC4200027](#) .

The High Court can only grant prohibition to a state court exercising federal jurisdiction if that court does not possess the jurisdiction which is prohibited: see *R v Anderson*; *Ex parte Bateman* [\(1978\) 21 ALR 56](#); [BC7800058](#) .

[4850.20] “removing from office any person ... ” — s 33(1)(d)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 32, Section 33(1)(d).

(CTH) [High Court Rules 2004](#) r 25.14.

[Section 33\(1\)\(d\)](#) relates to the ancient royal writ of quo warranto, which “is a writ that lies against him that usurps any franchise or liberty or office” (see *Stroud’s Judicial Dictionary*, 4th ed, Vol 4, p 2232) and is brought against a person requiring them to show “by what authority they hold” certain offices: see *R v Macfarlane*; *Ex parte O’Flanagan* (1923) 32 CLR 518; 29 ALR 353; [BC2300031](#) ; *Re Skyring’s Application* (1984) 59 ALJR 123 . The history of the writ was analysed by Dixon J in *Liston v Davies* (1937) 57 CLR 424 at 431–44; [1937] ALR 305; (1937) 11 ALJR 75a; [BC3700048](#) . Quo warranto will prevent the usurpation of office so long as the office is by its nature a public and substantial office, and not merely the function or employment of a deputy or servant held at the will or pleasure of others: see *Darley v R* (1846) 12 Cl & Fin 520 at 541; [8 ER 1513](#); compare *R v Speyer and Cassell* [\[1916\] 1 KB 595](#)  . Generally procedure in relation to the writ is the same as where a writ of mandamus is sought: *Halsbury’s Laws of England*, 4th ed, Vol 11, para 1574.

For further discussion of quo warranto see the High Court Rules 2004 [r 25.14](#) (at [12,570]), and annotations thereunder.

The writ can only be issued out of the High Court pursuant to [Section 33\(1\)\(d\)](#), as an incident to the exercise of its original or appellate jurisdiction: see *Re Superintendent of Training Centre at Goulburn*; *Ex parte Pelle* [\(1983\) 48 ALR 225](#); 57 ALJR 679; [5 ALN No 232](#); [BC8300089](#) . See also *Jerger v Pearce* (1920) 28 CLR 588 at 590; *Re Williams* (1934) 51 CLR 545 at 551–2; [1934] ALR 422; (1934) 8 ALJR 313; [BC3400010](#) ; *R v Bevan*; *Ex parte Elias and Gordon* (1942) 66 CLR 452 at 462, 465, 480; [1942] ALR 170; (1942) 16 ALJR 213; [BC4200027](#) . If some other basis of jurisdiction exists, the court may also grant the writ pursuant to the general powers embodied in [s 32](#) of the Judiciary Act 1903.

[4850.25] Habeas corpus — s 33(1)(f)

L Legislation cited in this paragraph

(CTH) [High Court Rules 2004](#) r 25.08.

(CTH) [Judiciary Act 1903](#) s 33(1)(f).

The writ of habeas corpus is a “prerogative process for securing the liberty of a person by affording an effective means of immediate release from unlawful or unjustified detention whether in prison or private custody”: see *Halsbury’s Laws of England*, 3rd ed, Vol 11, p 24. The procedure for seeking the writ is specified in High Court Rules 2004 [r 25.08](#) (at [12,545]). The writ can only be issued out of

the High Court pursuant to [s 33\(1\)\(f\)](#), as an incident to the exercise of its original or appellate jurisdiction: see *Jerger v Pearce* (1920) 28 CLR 588 at 590; *Re Williams* (1934) 51 CLR 545 at 551–2; [1934] ALR 422; (1934) 8 ALJR 313; [BC3400010](#) ^{CB}; *R v Bevan*; *Ex parte Elias and Gordon* (1942) 66 CLR 452 at 462, 465, 480; [1942] ALR 170; (1942) 16 ALJR 213; [BC4200027](#) ^{CB}.

[4850.30] Certiorari

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 32, s 33.

None of the paragraphs of [s 33](#) of the Judiciary Act are apt to empower the court to grant certiorari: *Re McBain*; *Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; [188 ALR 1](#); [\[2002\] HCA 16](#); [BC200201733](#) at [\[267\]–\[270\]](#) ^{CB}. The power to grant that remedy is generally thought to derive from [s 32](#) of the Judiciary Act: see [\[4845.10\]](#) and [12,530.10].

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Document (1)

1. [\(CTH\) Judiciary Act 1903 \[4975\] s 35A Criteria for granting special leave to appeal](#)

Client/Matter: -None-

[\(CTH\) Judiciary Act 1903 \[4975\] s 35A Criteria for granting special leave to appeal](#)

Practice & Procedure High Court & Federal Court of Australia
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Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART V APPELLATE JURISDICTION OF THE HIGH COURT \[ss 34–37\]](#) > [DIVISION 1 APPEALS \[ss 34–35A\]](#)

[4975] 35A Criteria for granting special leave to appeal

In considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to:

- (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
 - (i) that is of public importance, whether because of its general application or otherwise; or
 - (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
- (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

Section 35A Generally

[4975.10] Function of the court in granting special leave to appeal

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 35A.

In *Morris v R* (1987) 163 CLR 454 at 475; [74 ALR 161](#) at [176–7](#) Dawson J said:

All too often in applications before this court insufficient attention is given to the distinction between leave to appeal and special leave to appeal. Leave to appeal may be given where an applicant makes out a prima facie case of error. That is not enough to attract special leave to appeal, which should only be given where, in addition, there is some special feature of the case which warrants the attention of this court. It would be wrong to attempt to formulate rules which would confine the exercise of the jurisdiction to grant special leave. It remains a discretionary jurisdiction. Sufficient has, however, been established in the decided cases to provide a clear guide to those occasions when it is appropriate to grant special leave and those when it is not.

[Section 35A](#) of the Judiciary Act 1903 (Cth) allows the court to have regard to any matters that it considers relevant, which confirms the discretionary nature of the jurisdiction to grant special leave. The section goes on to provide that, in exercising that jurisdiction, the court shall have regard to the public importance of any question of law and the need to resolve judicial differences of opinion concerning the state of the law. In addition the court shall, under the section, consider whether the administration of justice, either generally or in the particular case, requires an application for special leave to be granted. Those criteria are to be found in previous decisions of the court and the section, as far as it goes, is declaratory.

In exercising its wide discretion to grant special leave to appeal, it is proper that the court should be influenced by the function which it performs as the final appellate court in the judicial hierarchy. The number of applications for special leave increases year by year, particularly in the criminal law. Since the number of cases with which the court can properly deal in any one year is limited, it is inevitable that a careful choice must be made having regard to the duty which the court has to develop and clarify the law and to maintain procedural regularity in the courts below. The court must necessarily place greater emphasis upon its public role in the evolution of the law than upon the private rights of the litigants before it. Whilst procedurally and otherwise this court performs in many ways a truly appellate function, more significantly it operates as a court of review and this must ultimately be the most important factor in the selection of those cases in which special leave to appeal is to be granted: see generally Jolowicz, "Appeal and Review in Comparative Law: Similarities, Differences and Purposes", *Melbourne University Law Review*, vol 15 (1986), at 618.

See also Mason CJ, *Morris v R* (1987) 163 CLR 454 at 456; [74 ALR 161](#) at [162](#).

In *R v Taufahema* (2007) 228 CLR 232; [234 ALR 1](#); [\[2007\] HCA 11](#); [BC200701674](#) ^{CB} Kirby J, although in dissent, correctly and succinctly observed (citations omitted; see also *Ryan v R* (2001) 206 CLR 267; [179 ALR 193](#); [\[2001\] HCA 21](#); [BC200102011](#) at [\[153\]](#) ^{CB} per Hayne J, adopting *Postiglione v R* (1997) 189 CLR 295 at 337; [145 ALR 408](#); 94 A Crim R 397; [BC9703177](#) ^{CB} per Kirby J):

[105] ... as has been said many times, this Court is not simply another court of criminal appeal. The Court's constitutional functions constitute it a court of error. In discharging that responsibility, and considering an application for special leave to appeal, this Court is required to exercise its discretion, whether to grant or refuse special leave, so as to fulfil that function. In accordance with federal law, it is required to have regard, amongst other things, to considerations of national and public importance as to the state of the law and also to the interests of the administration of justice, including in the particular case.

In an appropriate case, special leave to appeal may be revoked: see, eg, *Klein v Minister for Education* (2007) [232 ALR 306](#); (2007) Aust Torts Reports ¶81-871; [\[2007\] HCA 2](#); [BC200700229](#) ^{CB}.

SPECIAL LEAVE IN CIVIL CASES

[4975.15] Special leave in civil cases generally

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 35A(a)(i).

Prior to the 1984 amendment, an application for special leave was considered in every case on its distinctive features. The court would make an inquiry as to what was "special" about the case. The policy of the court was restrictive and the onus was on the applicant to establish why special leave should be granted. In *White v R* (1962) 107 CLR 174 at 176 the court said, in terms which are now reflected in [s 35A\(a\)\(i\)](#):

Efforts over a long period of years to define the effect of the word "special" have broken down but it remains true that what we are required to look for is something that is special in the case. Prima facie we do not think a case is special unless it involves some point of law of general application and, therefore, of importance.

The court, even if disposed to grant special leave, would not grant special leave if the respondent to the application had altered its position prejudicially because of undue delay or apparent acquiescence of the applicant. In *Ex parte Bucknell* (1936) 56 CLR 221 at 223–4; [1937] ALR 34 at 35, the court said:

The power thus given [to the High Court] to admit an appeal where otherwise it would not lie is discretionary but, beyond the use of the word “special”, the grounds upon which the discretion should be exercised are not indicated. This was inevitable in view of the great variety of circumstances which might make it desirable to permit in particular cases an appeal to be brought and of the impossibility of foreseeing them all and defining them in advance.

The grounds upon which special leave might be denied were numerous though the principal ground of denial was that the appeal did not involve an important question of law of general application or matter of public interest. Special leave was denied in cases where:

- (a) it was the court's view that the judgment appealed from was clearly correct and unattended by sufficient doubt;
- (b) the case depended only upon the construction of particular documents;
- (c) the case involved questions of fact only;
- (d) the case involved a question which is highly unlikely to arise again;
- (e) an appeal as to costs only was sought;
- (f) the appeal was upon the ground that there had been a technical error or irregularity in the court below; or
- (g) there had been a failure to exercise other remedies.

[4975.20] Application for leave to appeal against refusal to grant interlocutory injunction

“In the ordinary case, it would be most inappropriate for this court to entertain an appeal from the refusal of an interlocutory injunction by a court of trial ... In general, the orderly administration of justice would be impeded if this court intervened in interlocutory proceedings in a matter pending in a court of trial. It is the responsibility of a court of trial to determine the course of interlocutory proceedings, subject to appeal to the relevant intermediate appellate court”: *Paringa Mining and Exploration Co plc v North Flinders Mines Ltd* (1988) 165 CLR 452; 52 SASR 22; [81 ALR 609](#) at [613](#)  per Mason CJ, Brennan and Gaudron JJ.

However, in an extraordinary case the High Court may grant special leave to appeal against such a refusal, as the court did in *Paringa*, above. A trial judge had refused to grant an interlocutory injunction and had dissolved an injunction, granted by another judge pending the determination of an appeal from the first judge's decision; and the Full Court of the state Supreme Court had been unable to hear an appeal from the first judge or to grant an injunction pending the determination of that appeal.

The result is that the appellant to the Full Court has been denied the independent consideration of its application for an injunction pending the appeal to which it was entitled ... [I]t is necessary for this court to make an order which will reserve to the Supreme Court an effective jurisdiction to determine what should be done.

Paringa, above, ALR at 615. The court proceeded to grant special leave from the trial judge's decision to dissolve the injunction, granted an injunction pending the determination of the appeal to the Full Court of the state Supreme Court, and remitted the matter to the Supreme Court.

[4975.25] Attempt to challenge unanimous decision of High Court

In reaching the decision from which special leave to appeal was sought in *Computermate Products (Aust) Pty Ltd v Ozi-Soft Pty Ltd* (1989) 63 ALJR 517 , the Full Court of the Federal Court had relied on the unanimous decision of the High Court in *International Parcel Express Co Pty Ltd v Time-*

Life International (Nederlands) BV (1977) 138 CLR 534; [15 ALR 353](#) ^{CB}. The High Court refused special leave to appeal:

Needless to say, we would be extremely reluctant to grant special leave to appeal to enable a challenge to be mounted to a unanimous decision of the court when the applicant is unable to point to any subsequent decision or development that has undermined the authority of the decision, or the reasoning on which it was based: *Computermate Products (Aust) Pty Ltd v Ozi-Soft Pty Ltd* (1989) 63 ALJR 517 ^{CB} per Mason CJ, Dawson and Gaudron JJ.

[4975.30] “Public importance whether because of its general application or otherwise”

The High Court may rescind an order granting special leave to appeal where circumstances have so changed as to remove a case from the category of those cases which involve a question of law that is of public importance, etc. In *Australian Airlines Ltd v Cmr of Stamp Duties (Qld)* [\(1988\) 79 ALR 425](#) ^{CB} the High Court rescinded a grant of special leave to appeal and ordered the appellant to pay the respondent's costs of the application for special leave to appeal and of the application for rescission of the grant of special leave to appeal. The court further ordered that costs of the application for rescission should be taxed on the basis that the hearing of that application involved a full hearing of the appeal. The court in its combined judgment said at 428:

The starting point is the fact that the appeal can no longer be seen as involving a question of general importance. The transaction in question is an extraordinary one. The determination by this court of the liability to duty which the relevant instruments attract involves the construction of statutory provisions which have since been materially altered and which are not, in their unaltered state, applicable in respect of any other pending cases.

Nor does the appeal involve any general principle of wide-ranging application. True it is that the legislation in force in other jurisdictions contains somewhat similar provisions. But the resolution of this case is unlikely to provide guidance in the interpretation of those provisions.

[4875.35] Bail pending appeal against extradition

It has been said that this court will grant bail [on a special leave application] only in exceptional circumstances ... Brennan J has expressed the tentative view that this court possesses no jurisdiction to grant bail pending an application for special leave to appeal against an order dismissing an application for leave under the Extradition (Commonwealth Countries) Act 1966 (Cth) unless the order is required to save the application for special leave from futility: *Narain v Director of Public Prosecutions* (1987) 61 ALJR 317 at 318; 71 ALR 248 at 250 ... It may be that the jurisdiction is exercisable in other cases that are exceptional where, for example, the grant of special leave is irresistible and the appeal is bound to succeed as a result of a recent decision of this court. Be that as it may, it can scarcely be supposed that the jurisdiction is enlivened by something less than exceptional circumstances. At the point when bail is sought pending the hearing of a special leave application, the ordinary processes of appeal have been exhausted; they have resulted in a final order committing the applicant to prison. The process of appeal revives only in the event that this court exercises its jurisdiction, an extraordinary jurisdiction, to grant special leave to appeal. There can be no assumption that the court will, or is likely to, make such a grant. Hence, to justify an order for bail, something exceptional must be shown.

Zoeller v Federal Republic of Germany [\(1989\) 90 ALR 161](#) at [164](#); 64 ALJR 137 at 138 per Mason CJ.

The above authorities, and the source of jurisdiction to grant bail pending an appeal against extradition, were discussed by three Justices in *Pelechowski v Registrar, Court of Appeal* (1998) 72 ALJR 711; [1998] 8 Leg Rep 30 ^{CB}.

[4975.40] Appellant failed to exploit full jurisdiction of court below

L Legislation cited in this paragraph

(CTH) [Family Law Act 1975](#) s 79A(1)(c).

“There are strong reasons why this court should not embark upon the determination of questions which, in the light of what we now know, may prove to be academic or hypothetical, the more so as the proceedings between these parties have been numerous and protracted.” More importantly, s 79A(1)(c) of the Family Law Act gave the Family Court “ample power ... to deal with a situation of the kind that arose in this case. Yet it is now common ground that the appellant did not at any stage ask the court to exercise its power under that subsection. In the result, the case has been dealt with in the courts below otherwise than by reference to the critical statutory provision. In the circumstances, it is appropriate that we grant the grant of special leave to appeal and that we make no order as to costs”: *Johnson v Rzetelski* (1989) 64 ALJR 142 at 143.

[4975.45] Federal Court review of committal proceeding

“It would require an exceptional case to warrant the grant of special leave to appeal in relation to a review by the Federal Court of a magistrate's decision to commit a person for trial. The undesirability of fragmenting the criminal process is so powerful a consideration that it requires no elaboration by us. It is a factor which should ... inhibit this court from granting special leave to appeal”: *Yates v Wilson* (1989) 168 CLR 338 at 339; 64 ALJR 140 at 140 per Mason CJ, Toohey and Gaudron JJ.

[4975.50] Procedure in special leave application

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 21.

(CTH) [High Court Rules 2004](#) Pt 41.

Applications for leave or special leave to appeal to the High Court from a judgment of another court may be heard and determined by a single justice or by Full Court and the Rules of Court may provide for enabling such applications to be dealt with subject to conditions prescribed in the Rules, without an oral hearing: see Judiciary Act [s 21](#). The applicable procedure is set out in [Pt 41](#) of the High Court Rules 2004.

[4975.60] Conditions imposed on special leave

Where the High Court granted special leave prior to 1984, it often imposed conditions or obtained undertakings. For examples of conditions and undertakings which the court imposed, see *MacNamara v Martin* (1908) 7 CLR 699; 15 ALR 357 [CB](#) (in allowing an appeal which involved important principles of law, the High Court ordered the respondent to pay costs, although special leave had been granted on the appellant's undertaking, view of the smallness of the amount involved, to abide by any order of the court) and *A'Beckett v Backhouse* (1907) 4 CLR 1334 [CB](#) (special leave to appeal was granted on the undertaking by the appellant that, in the event of the appeal being allowed, he would not claim a refund of moneys paid by trustees on the faith of the order not having been appealed from within the time, and to indemnify the trustees against any such payments). See also *Pemberton v Banfield* (1912) 15 CLR 323; 18 ALR 486 [CB](#).

It remains reasonably common, particularly in cases involving applications by the Commonwealth for special leave to appeal, for the court to grant special leave on the condition that the Commonwealth does not seek to disturb any orders for costs made below, and sometimes on condition that it pay the respondent's costs of the hearing in the High Court: see, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566; [230 ALR 370](#); [\[2006\] HCA 50](#); [BC200608923](#) at [\[170\]](#) [CB](#).

[4975.145] Providing security after special leave granted

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 77S, s 77S(1), s 77S(2).

(CTH) [High Court Rules 2004](#) Pt 59, r 59.03.

The power to order security stems from [s 77S\(1\)](#) of the Judiciary Act. The security is for the prosecution of the appeal without delay and for the payment of costs that may be awarded against the appellant. If security is not given as required by or in accordance with the rules the High Court may order the appeal be dismissed: see Judiciary Act [s 77S\(2\)](#). [Section 77S](#) does not affect the operation of any provision made by or under any other Act for or in relation to the giving of security. The statutory powers enacted by [s 77S](#) are enhanced by the operation of Pt 59 of the High Court Rules 2004. It is prudent for the respondent to an application to have an appropriate affidavit grounding an application for security already filed in time for the hearing of the application in the event that the applicant is successful in obtaining a grant of special leave. A party seeking security should bear in mind the fact that [s 77S](#) extends security to ensure prosecution of the appeal without delay as well as for costs. The sanction for non-payment of security within the time limited by the order for payment of security is dismissal of the appeal: High Court Rules 2004 r 59.03.

[4975.150] Original jurisdiction proceedings following refusal of special leave

In *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [\(2021\) 392 ALR 186](#); [\[2021\] HCA 24](#); [BC202106918](#) ^{CB}, Edelman J considered an application for constitutional writs which was brought shortly after the court refused special leave to appeal from a decision of a Full Court of the Federal Court. The original jurisdiction application raised new grounds that had not been agitated in the Federal Court, many of which would have fallen within that court's jurisdiction.

Edelman J noted the “long-standing principle that it is usually an abuse of process for this Court's original jurisdiction to be used in place of the statutory process of appeals” (citing *Dimitrov v Supreme Court of Victoria* (2017) 263 CLR 130; [350 ALR 191](#); [\[2017\] HCA 51](#); [BC201710423](#) at [\[19\]](#) ^{CB} and the authorities cited therein), but the issues of abuse of process and *Anshun* estoppel were not fully argued.

SPECIAL LEAVE IN CRIMINAL CASES

[4975.235] Circumstances where special leave granted

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 35A.

Dawson J reviewed the factors which would influence the discretion to grant special leave in *Morris v R* (1987) 163 CLR 454 at 475–6; [74 ALR 161](#) at [177–8](#):

In exercising its wide discretion to grant special leave to appeal, it is proper that the court should be influenced by the function which it performs as the final appellate court in the judicial hierarchy. The number of applications for special leave increases year by year, particularly in the criminal law. Since the number of cases with which the court can properly deal in any one year is limited, it is inevitable that a careful choice must be made having regard to the duty which the court has to develop and clarify the law and to maintain procedural regularity in the courts below. The court must necessarily place greater emphasis upon its public role in the evolution of the law than upon the private rights of the litigants before it. Whilst procedurally and otherwise this court performs in many ways a truly appellate function, more significantly it operates as a court of review and this must ultimately be the most important factor in the selection of those cases in which special leave to appeal is to be granted: see generally Jolowicz, “Appeal and Review in Comparative Law: Similarities, Differences and Purposes”, Melbourne University Law Review, vol 15 (1986), at 618.

From the beginning the court has refused to grant special leave to appeal in criminal cases upon questions of fact: see *Bataillard v R* (1907) 4 CLR 1282 at 1289; *Collis v Smith* (1909) 9 CLR 490 at 495. The most recent example of this

approach is to be found in *Liberato v R* (1985) 159 CLR 507; [61 ALR 623](#) ^{CB}. The majority in that case said (CLR at 509; ALR at 624–5):

It has been repeatedly affirmed by this court that it is not a Court of Criminal Appeal and that it will not grant special leave to appeal in criminal cases unless some point of general importance is involved, which, if wrongly decided, might seriously interfere with the administration of criminal justice: see now Judiciary Act 1903 (Cth), [s 35A](#) ...

But perhaps the most striking example of this invariable attitude is *Raspor v R* (1958) 99 CLR 346 ^{CB}. In that case the trial judge had advised the jury to stop the trial and acquit the accused because of the inadequacy of the evidence identifying him as the culprit. The jury rejected this advice and proceeded to convict. There was no error in the directions given by the trial judge to the jury. The Court of Criminal Appeal of Victoria rejected an application for leave to appeal and the accused sought special leave to appeal to this court.

This court (Dixon CJ, Fullagar and Taylor JJ) stated the accepted practice as follows at 349–50:

In the circumstances it was clearly a matter for the Court of Criminal Appeal to decide whether they considered that upon the evidence the conviction should be allowed to stand. If there were no more in the case, no ground for hesitation on our part would exist; there would be no foundation for an application to the special discretion of this court.

The court... refused special leave to appeal because the case turned on nothing but a question of fact.

[4975.240] Reluctance to disturb verdict of jury

Gibbs CJ and Mason J pointed out in *Chamberlain v R (No 2)* (1984) 153 CLR 521 at 534; [51 ALR 225](#) at [236](#):

The responsibility of deciding upon the verdict, whether of conviction or acquittal, lies with the jury and we can see no justification, in the absence of express statutory provisions leading to a different result, for an appellate tribunal to usurp the function of the jury and disturb a verdict of conviction simply because it disagrees with the jury's conclusion. We do agree that in many cases the distinction will be of no practical consequence; it will be merely a matter of words. That will not generally be the case where questions of credibility are decisive. However, whether it matters from a practical point of view or not in a particular case, it is not unimportant to observe the distinction — the trial is by jury, and (absent other sources of error) the jury's verdict should not be interfered with unless the Court of Criminal Appeal concludes that a reasonable jury ought to have had a reasonable doubt.

See also *Whitehorn v R* (1983) 152 CLR 657 at 687; [49 ALR 448](#); *Morris v R* (1987) 163 CLR 454 at 478–9; [74 ALR 161](#) at [179–80](#) per Dawson J.

[4975.245] Appeal against sentence

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 35A(b).

In *Radenkovic v R* (1990) 170 CLR 623; [97 ALR 198](#) ^{CB}, the applicant sought leave to appeal against a decision of the New South Wales Court of Criminal Appeal, which had allowed the Crown's appeal against sentence and varied the sentence imposed on the applicant. In granting special leave to appeal, Mason CJ and McHugh J noted (ALR at 206) that:

[A]n application asserting no more than that a sentence imposed on appeal is excessive will not normally attract a grant of special leave: *Colefax v R* [1962] ALR 399 ^{CB}; *Lowe v R* (1984) 54 ALR 193; 154 CLR 606, per Gibbs CJ at 608, Dawson J at 621; *Deakin v R* (1984) 54 ALR 765; 58 ALJR 367 ^{CB}. The court's reluctance to grant special leave against sentencing decisions has been frequently reiterated: *Veen v R* (1979) 143 CLR 458 per Stephen J at 461,

Mason J at 467, Aickin J at 497; *Lowe*, per Gibbs CJ (CLR) at 608–9, Mason J at 611, Brennan J at 620, Dawson J at 621–2.

Mason CJ and McHugh J further said (ALR at 206) that special leave should be granted in the present case because “the Court of Criminal Appeal had proceeded to its decision in this case by following an approach inconsistent with settled principle. In that respect the decision is anomalous and it has resulted in an increase in the applicant's sentences by a factor of 6.8 ... The interests of the administration of justice warrant the grant of special leave to appeal in this particular case: Judiciary Act 1903 (Cth), [s 35A\(b\)](#)”. See also Toohey and Gaudron JJ, ALR at 214–15.

[4975.247] Verdict of acquittal

In *R v Taufahema* (2007) 228 CLR 232; [234 ALR 1](#); [\[2007\] HCA 11](#); [BC200701674](#)  Gleeson CJ and Callinan J, although in dissent on the outcome, said (citations omitted):

[32] In *R v Benz*, this Court discussed the considerations relevant to the exercise of its power to grant special leave to appeal from a decision of a Court of Criminal Appeal which has quashed a conviction and entered a verdict of acquittal. An example of the exercise of that power is *R v Rogerson*. As Mason CJ explained in *Benz*, while there is a reluctance to grant special leave to appeal against an acquittal by an intermediate appellate court, sometimes expressed by reference to the need to show “very exceptional circumstances”, the considerations of double jeopardy that would apply to an attempt to appeal from a verdict of acquittal by a jury are not the same as those that apply when a convicted person has initiated the appellate process, which includes the possibility of a decision by a final court of appeal. If an intermediate court of appeal, whose jurisdiction has been invoked by a convicted person, makes an error in that person's favour, the possibility remains of correction of that error within the appellate process itself. This will be of special importance if the error is of such a kind as is likely to affect the general administration of the criminal law, as in the case of an erroneous decision on a point of law or procedure of general application. It may also be of significance where correction of error is necessary to ensure the due administration of justice in the individual case.

[4975.250] Procedure for special leave applications in criminal cases

L Legislation cited in this paragraph

(CTH) [High Court Rules 2004](#) Pt 41.

The procedure for special leave applications, including special leave applications in criminal cases, is set out in [Pt 41](#) of the High Court Rules 2004.

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User Name: REECE STORME FERRARA

Date and Time: Friday, September 23, 2022 1:24:00 AM AEST

Job Number: 180065244

Document (1)

1. [\(CTH\) Judiciary Act 1903 \[5075\] s 36 New Trials](#)

Client/Matter: -None-

[\(CTH\) Judiciary Act 1903 \[5075\] s 36 New Trials](#)

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: June 2007

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART V APPELLATE JURISDICTION OF THE HIGH COURT \[ss 34–37\]](#) > [DIVISION 2 POWER OF COURT \[ss 36, 37\]](#)

DIVISION 2 POWER OF COURT [ss 36, 37]

[\[5075\] 36 New Trials](#)

The High Court in the exercise of its appellate jurisdiction shall have power to grant a new trial in any cause in which there has been a trial whether with or without a jury.

Section 36 Generally

[5075.5] Full Court to hear applications for new trial

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 20, s 36, s 72(1), s 73.

The jurisdiction to hear and determine applications for a new trial of any cause or matter must be exercised by a Full Court: [s 20](#). The power given to the court under [s 36](#) is quite distinct from the power given to the High Court to order a new trial pursuant to [s 73](#) after determination of a question of law reserved to the court under [s 72\(1\)](#).

[5075.10] Powers relating to new trials

L Legislation cited in this paragraph

(CTH) [High Court Rules 2004](#).

(CTH) [Judiciary Act 1903](#) Pt XA.

The [High Court Rules 2004](#) do not contain any equivalent of many of the provisions of the former rules that related to trials. That change recognises that it is now very rare for trials to be conducted in the High Court, because with the exception of constitutional matters most matters in the original jurisdiction of the court are now remitted for hearing in another court.

Provisions relating to the powers of the High Court in relation to trials (dealing with matters such as juries, admission of evidence, etc) are found in [Pt XA](#) of the Judiciary Act.

[5075.25] Directions, admissions in new trial applications

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 77C.

In any case in which a new trial is granted, the court or a justice may, pursuant to the provisions of [s 77C](#) of the Judiciary Act (inserted by Act No 138 of 1979) impose such conditions on the parties respectively and may direct such admissions to be made by them or either of them for the purpose of the new trial as are just, and the court may grant a new trial generally or on some particular point only as the court or justice thinks fit and may order that the testimony of any witness examined at the former trial may be read from the justice's notes instead of being again examined in open court.

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User Name: REECE STORME FERRARA

Date and Time: Friday, September 23, 2022 1:19:00 AM AEST

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Document (1)

1. [\(CTH\) Judiciary Act 1903 \[5180\] s 38 Matters in which jurisdiction of High Court exclusive](#)

Client/Matter: -None-

(CTH) Judiciary Act 1903 [5180] s 38 Matters in which jurisdiction of High Court exclusive

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: May 2020

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART VI EXCLUSIVE AND INVESTED JURISDICTION [ss 38–39B]

PART VI EXCLUSIVE AND INVESTED JURISDICTION [ss 38–39B]

[5180] 38 Matters in which jurisdiction of High Court exclusive

Subject to [sections 39B](#) and [44](#), the jurisdiction of the High Court shall be exclusive of the jurisdiction of the several Courts of the States in the following matters:

- (a) matters arising directly under any treaty;
- (b) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;
- (c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;
- (d) suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth;
- (e) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court.

Note:

Under the [Jurisdiction of Courts \(Cross-vesting\) Act 1987](#), State Supreme Courts are, with some exceptions and limitations, invested with the same civil jurisdiction as the Federal Court has, including jurisdiction under [section 39B](#) of this Act.

[s 38 am Act 57 of 2000 s 3 and Schs 1, 2]

SECTION 38 GENERALLY

[5180.5] Federal jurisdiction

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75, s 77(ii).

(CTH) [Judiciary Act 1903](#) ss 38, 38A, 39, s 39B, s 44, ss 57, 59.

Pursuant to [s 77\(ii\)](#) of the Constitution, the Commonwealth Parliament has enacted provisions in the Judiciary Act 1903 which define the matters that are exclusive to the High Court and those that are, while still within the jurisdiction of State courts, in the federal jurisdiction of these courts. The three major sections are [ss 38](#), [38A](#) (now repealed) and [39](#). “The expression ‘federal jurisdiction’ simply means that a law made by the Parliament of the Commonwealth or the Constitution itself is, in fact, the source of a court’s authority to adjudicate in a particular matter ...”: *Treasury Wine Estates Vintners Ltd v Pearson* (2019) 268 FCR 12; [367 ALR 29](#); [\[2019\] FCAFC 21](#); [BC201900761](#) at [\[33\]](#) [CB](#).

For a general analysis of considerations relating to making the jurisdiction of the High Court exclusive, and the Constitutional provisions that are relevant, see *MZXOT v Minister for Immigration and Citizenship (the Remitter Case)* (2008) 233 CLR 601; [247 ALR 58](#); [\[2008\] HCA 28](#); [BC200804501](#) [CB](#).

What might be called the more federal or national jurisdictional matters, covered by [s 75](#) of the Constitution, are vested in the High Court in its exclusive original jurisdiction (unless remitted by the High Court to some other court under [s 44](#) of the Judiciary Act). Matters arising directly under treaty are within the federal jurisdiction, while matters that arise incidentally under treaty are left to concurrent jurisdiction. Matters affecting consuls or other representatives of other countries remain within concurrent jurisdiction. Commonwealth-State or State-State disputes are within the exclusive jurisdiction of the High Court, while suits in which the Commonwealth and a private individual are parties are within the concurrent jurisdiction of federal and State courts. Jurisdiction in respect of writs of mandamus or prohibition against an officer of the Commonwealth is vested in the High Court exclusive of State Supreme Courts (although the Federal Court has jurisdiction in relation to such matters pursuant to [s 39B](#) of the Judiciary Act), while injunctions remain within concurrent jurisdiction.

By virtue of [s 38](#), the jurisdiction of the High Court is exclusive with respect to matters falling within [ss 57](#) and [59](#) of the Judiciary Act. [Section 57](#) provides that where a State makes a claim against the Commonwealth in contract or tort, the suit may be brought in the High Court; while [s 59](#) provides that a State making a claim against another State may bring the suit in the High Court.

[5180.10] Effect of s 38(a) — “matters arising under any treaty”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 38(a).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 76(ii).

[Section 38\(a\)](#) makes exclusive to the jurisdiction of the High Court matters arising *directly* under any treaty. This implies that matters arising indirectly under a treaty are within the concurrent jurisdiction of State courts as well as the High Court.

In Australian constitutional law, a matter is said to “arise under” a Commonwealth law only if the rights or duties in controversy owe their existence to that law. As Latham CJ said *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154; [\[1945\] ALR 245](#); (1945) 19 ALJR 169; [BC4500028](#) [CB](#):

... 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.

That passage has been quoted with approval many times in the context of s 76(ii), including by six members of the High Court in *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575 at 581; [49 ALR 599](#) at [602](#); 57 ALJR 701; [BC8300118](#) ^{CB}. See also *Re McJannet; Ex parte Australian Workers' Union of Employees (Qld)* (1997) 189 CLR 654 at 656; [146 ALR 569](#); 74 IR 361; [BC9703569](#) ^{CB}; *CGU Insurance Ltd v Blakeley* [\[2016\] HCA 1](#) at [\[28\]](#).

That meaning of “arising under” was applied in the context of the phrase “matter arising under a treaty” in *R v Donyadideh* [\(1993\) 115 ACTR 1](#) at [6](#); 114 FLR 43. Its effect is that a matter will rarely, if ever, arise under a treaty at all, whether directly or indirectly: see *R v Donyadideh*, above, at [6](#); compare *Bluett v Fadden* (1956) 56 SR (NSW) 254 at 261; *Re East; Ex parte Nguyen* (1998) 196 CLR 354; [159 ALR 108](#); 73 ALJR 140; [BC9806358](#) at [\[65\]–\[73\]](#) ^{CB} per Kirby J, the other justices not deciding at [\[18\]](#).

“There may be room for debate about the nature and degree of connection required to justify characterisation of a justiciable controversy as a matter ‘arising under’ and ‘arising directly under’ a treaty.” (Citing the decision in *Re East*, above). “There can be no doubt, however, that the term ‘treaty’ in s 75(i) of the *Constitution* and in s 38(a) of the *Judiciary Act* refers to an international agreement ...” between nations: *Young; Re Young* [\(2020\) 376 ALR 567](#); [\[2020\] HCA 13](#); [BC202002863](#) at [\[31\]](#) ^{CB} per Gageler J.”

[5180.15] Effect of s 38(a) — direct and indirect

L Legislation cited in this paragraph

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

(CTH) [Judiciary Act 1903](#) s 38, s 38(a), s 75(1).

In Australia, subject to limited exceptions, implementing legislation is necessary to give treaty obligations effect in Australian law: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286–7, 298, 304, 315; [128 ALR 353](#); 69 ALJR 423; [BC9506417](#) ^{CB}; *Re East; Ex parte Nguyen* (1998) 196 CLR 354; [159 ALR 108](#); 73 ALJR 140; [BC9806358](#) at [\[19\]](#) ^{CB}. In this sense, there is no such thing as a self-executing treaty, so it is difficult to see how a matter could ever arise “directly” under a treaty.

In *Bluett v Fadden* (1956) 56 SR (NSW) 254, the Supreme Court of New South Wales was called upon to interpret the meaning of [s 75\(i\)](#) of the *Constitution* and [s 38](#) of the *Judiciary Act*. An action was brought against the Commonwealth Treasurer in relation to the vesting in a treasury official of certain shares that were alleged to come under the operation of enemy property legislation (that is, to be “enemy-tainted”). Under the Act, and Regulations made pursuant to it, the Governor-General could make orders for the purpose of giving effect to an international agreement on reparation payments which allowed enemy property to be confiscated. In this case he made an order affecting shares which were claimed to be enemy-tainted. McLelland J said that s 75(1) referred to cases where the decision was dependent on the interpretation of the treaty. Where rights had been conferred by legislation implementing a treaty, the matter could not be said to arise directly under the treaty. The pleadings in the case were amended to accommodate this expression of opinion, so as to bring out the fact that the basis of the dispute was a question of whether the shares were “enemy-tainted” in the light of various provisions of the agreement on reparation. In the result, McLelland J held that it was a matter falling within the exclusive jurisdiction of the High Court.

This case supports the proposition that, where a case depends upon the interpretation of a treaty the terms of which have been incorporated into a statute, the matter arises *indirectly* under the treaty and that it is therefore within the concurrent jurisdiction of both the High Court and the State courts.

By contrast, where the statute itself does not give immediate operative effect to the terms of the treaty but empowers the executive to take action in accordance with those terms (as was the case in *Bluett v Fadden*, above), it may be said that the question arises directly under the treaty (as the power will depend on interpreting the treaty). Similarly, where an Act of Parliament simply approves or ratifies a treaty without transforming the words of the treaty into the terms of the actual legislation, and a question of interpretation of the treaty arises, the matter might be regarded as arising directly under the treaty. That is consistent with the view expressed by Kirby J in *Re East; Ex parte Nguyen* (1998) 196 CLR 354; [159 ALR 108](#); 73 ALJR 140; [BC9806358](#) at [\[72\]](#) ^{CB}, where his Honour approved *Bluett v Fadden* and concluded:

[72] A matter arises under a treaty if, directly or indirectly, the right claimed or the duty asserted owes its existence to the treaty, depends upon the treaty for its enforcement or directly or indirectly draws upon the treaty as the source of the right or duty in controversy.

However, in *R v Donyadideh* ([1993](#)) [115 ACTR 1](#) at [6](#); 114 FLR 43, Miles CJ disagreed with the views expressed in *Bluett v Fadden*, and held that a matter could only arise under a treaty where “the right, duty or liability in question ‘owes its existence’ to the treaty or depends upon the treaty for its enforcement, or has its source in the treaty”; it was “not enough that recourse is to be had to the treaty for the purposes of construction and interpretation”.

Conti J raised this issue of the difference of judicial opinion regarding *Bluett v Fadden* in *Ualesi v Expeditors International Pty Ltd* [\[2004\] FCA 1705](#); [BC200408965](#) at [\[19\]](#) ^{CB} but found no need to resolve it or examine it further.

On the approach in *R v Donyadideh*, [s 38\(a\)](#) of the Judiciary Act and [s 75\(i\)](#) of the Constitution have little work to do, and probably reflect unthinking copying of the US Constitution (where some treaties have self-executing effect as a matter of domestic law). They may, however, have some limited content, by reason of the limited exceptions to the general rule that a treaty does not have effect in domestic law: see M Leeming, “Federal Treaty Jurisdiction” (1999) 10 *Public Law Review* 173.

In *Scott v Bowden* ([2002](#)) [194 ALR 593](#); [\[2002\] HCA 60](#); [BC200207730](#) at [\[7\]](#) ^{CB}, McHugh J held that a claim that the defendant's actions breached the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment did not raise a matter within [s 38\(a\)](#) because the Convention:

[7] ... is not part of the municipal law of Australia. It creates no legally enforceable rights. A dispute concerning the application of a treaty that has not been enacted as part of the law of Australia gives rise to no justiciable controversy and is incapable of being the subject of a matter for the purpose of [s 75](#) of the Constitution or [s 38\(a\)](#) of the Judiciary Act. Whatever the meaning of [s 75\(i\)](#) of the Constitution, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment gives no “immediate right, duty or liability to be established by the determination of the Court” [*Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; 27 ALR 193] ...

In *Ruhani v Director of Police* (2005) 222 CLR 489; [219 ALR 199](#); [\[2005\] HCA 42](#); [BC200506306](#) ^{CB}, Kirby J repeated the view he had expressed in *Re East*, above. The applicant had argued that an appeal from the Supreme Court of Nauru to the High Court of Australia involved a matter arising under a 1976 treaty pursuant to which Australia had agreed that such appeals could be brought to the High Court. His Honour would not, however, have accepted that the substantive issue arising in that appeal (which related to the validity of the applicant's detention in Nauru) arose under the treaty, because those issues turned on the provisions of Nauruan law (see at [\[211\]](#)).

In both *Re East* and *Ruhani*, above, the majority did not need to examine in any detail the circumstances, if any, in which a matter would arise under a treaty, because the case could be decided on other grounds. In *Ruhani*, however, Callinan and Heydon JJ, who dissented, rejected the attempt to rely on [s 75\(i\)](#), stating (at [\[297\]](#)):

[297] Another submission of the appellant is that the “appeal” arises under a treaty within the meaning of s 75(i) of the Constitution. We would reject that argument also. Here there are two matters. The first and the substantive one raises the question whether the appellant is entitled to a writ of habeas corpus to be enforced in Nauru. The other is whether the appellant is entitled to come to this Court, effectively to have the domestic Act and the Constitution construed. Self-evidently, the first of the matters does not arise under a treaty. It arises under Nauruan law exclusively. One aspect of the other matter touches upon but does not arise under the treaty. That is the construction of the domestic Act, and although it may arise out of an Act enacted to give effect to the treaty, that is a different matter from something arising under the treaty itself. Even if it did however, it is not a matter which, if resolved in the appellant’s favour, would entitle him to relief enforceable under the treaty and in Nauru.

“There can be no doubt, however, that the term ‘treaty’ in s 75(i) of the *Constitution* and in s 38(a) of the Judiciary Act refers to an international agreement ...” between nations even though, said Gageler J, “There may be room for debate about the nature and degree of the connection required to justify characterisation of a justiciable controversy as a matter ‘arising under’ and ‘arising directly under’ a treaty.”: *Young; Re Young* (2020) 376 ALR 567; [2020] HCA 13; BC202002863 at [31] .

[5180.17] Specific legislation

L Legislation cited in this paragraph

(CTH) [Civil Aviation \(Damage by Aircraft\) Act 1958](#) s 9(4).

(CTH) [Consular Privileges and Immunities Act 1972](#) s 5(5).

For Acts that provide that actions arising under conventions or treaties are deemed not to be matters arising directly under a treaty, see Civil Aviation (Carriers’ Liability) Act 1959 s 19; Civil Aviation (Damage by Aircraft) Act 1958 s 9(4); Civil Aviation (Offenders on International Aircraft) Act 1970 s 6(5); Extradition (Foreign States) Act 1966 s 25; Consular Privileges and Immunities Act 1972 s 5(5).

[5180.20] Effect of s 38(b)

Under this paragraph, suits between states, or between persons suing or being sued on behalf of different states, or between a state and a person or being sued on behalf of another state, are exclusive to the High Court.

[5180.25] Suits between the Commonwealth and a state

L Legislation cited in this paragraph

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

(CTH) [Judiciary Act 1903](#) s 38(c), (d).

Matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party are within the original jurisdiction of the High Court: see [s 75\(iii\)](#) of the Constitution. [Section 38\(c\)](#) and [\(d\)](#) of the Judiciary Act 1903 make part of that original jurisdiction exclusive of the jurisdiction of the several state courts. A state court will lack jurisdiction in the following cases:

- where the Commonwealth sues a state;
- where a person suing on behalf of the Commonwealth sues a state;
- where the Commonwealth sues a person on behalf of a state;
- where a person suing on behalf of the Commonwealth sues a person on behalf of a state;
- where a state sues the Commonwealth;

(CTH) Judiciary Act 1903 [5180] s 38 Matters in which jurisdiction of High Court exclusive

- where a person suing on behalf of a state sues the Commonwealth;
- where a state sues a person on behalf of the Commonwealth; and
- where a person suing on behalf of a state sues a person on behalf of the Commonwealth.

The High Court's jurisdiction in such matters, while exclusive of the jurisdiction of the several state courts, is not otherwise exclusive. [Section 38\(c\)](#) and [\(d\)](#) do not attempt to exclude any jurisdiction that the Federal Court of Australia or a court of a territory may have in such matters.

For discussion of the circumstances in which a person is suing or sued “on behalf of” the Commonwealth (and, by parity of reasoning, a state) see [1695.27].

[5180.30] Effect of s 38(e)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 38(e), s 39, s 39B(1).

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

By virtue of [s 38\(e\)](#) only the High Court (under [s 75\(v\)](#) of the Constitution) and the Federal Court (under [s 39B\(1\)](#) of the Judiciary Act 1903) have jurisdiction in matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court. For a discussion of these writs see the commentary at [1695.90]–[1695.107].

This exclusive jurisdiction excludes the general investiture of state courts with federal jurisdiction effected by [s 39](#) of the Judiciary Act: *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190; [23 ALR 439](#) at [447](#) ^{CB} per Barwick CJ.

[5180.40] Statutory prohibition

L Legislation cited in this paragraph

(CTH) [Excise Act 1901](#).

(CTH) [Judiciary Act 1903](#) s 35, s 38.

In *Wilcox v Donohoe* (1906) 3 CLR 83, the appellant, who had been convicted and fined, obtained a rule nisi for a statutory prohibition from the Supreme Court of New South Wales. The matter then came before a judge in chambers, exercising the powers of the Supreme Court, who (without going into the merits) discharged the rule on the ground that he had no jurisdiction to entertain an application for prohibition against a court exercising federal jurisdiction. The High Court decided that the judge had jurisdiction, in as much as the appellant was entitled under the Excise Act 1901 to apply to the Supreme Court for a statutory prohibition, instead of appealing directly to the High Court under [s 35](#) of the Judiciary Act. In so deciding, the High Court held that the “writ of prohibition” referred to in [s 38](#) is the prerogative writ for control by the superior courts of inferior courts exceeding their jurisdiction, and does not include a statutory writ of prohibition in New South Wales, which is in reality a form of appeal.

[5180.45] “officer of the Commonwealth”

See commentary at [1695.95].

[5180.50] Whether a local court is a federal court within the meaning of s 38(e)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 38(e).

In *Astone v Hatjiyiannakis* (1948) 51 WALR 9 [CB](#), a judge of the Supreme Court of Western Australia held that the Local Court, while exercising jurisdiction under the National Security (Landlord and Tenant) Regulations, was a federal court for the purposes of [s 38\(e\)](#).

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1. [\(CTH\) Judiciary Act 1903 \[5195\] s 39B Original jurisdiction of Federal Court of Australia](#)

Client/Matter: -None-

[\(CTH\) Judiciary Act 1903 \[5195\] s 39B Original jurisdiction of Federal Court of Australia](#)

Practice & Procedure High Court & Federal Court of Australia
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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VI EXCLUSIVE AND INVESTED JURISDICTION \[ss 38–39B\]](#)

[5195] 39B Original jurisdiction of Federal Court of Australia

(1) Scope of original jurisdiction Subject to [subsections \(1B\), \(1C\)](#) and [\(1EA\)](#), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.

[subs (1) am Act 57 of 2000 s 3 and Sch 2; Act 89 of 2005 s 3 and Sch 1, effective 3 August 2005]

(1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:

- (a) in which the Commonwealth is seeking an injunction or a declaration; or
- (b) arising under the Constitution, or involving its interpretation; or
- (c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

Note:

[Paragraph \(c\)](#) does not prevent other laws of the Commonwealth conferring criminal jurisdiction on the Federal Court of Australia.

[subs (1A) insrt Act 34 of 1997 s 3 and Sch 11; am Act 125 of 1999 s 3 and Sch 10; Act 106 of 2009 s 3 and Sch 1[99], effective 4 December 2009]

(1B) Jurisdiction for certain writs that relate to criminal prosecutions etc If a decision to prosecute a person for an offence against a law of the Commonwealth, a State or a Territory has been made by an officer or officers of the Commonwealth and the prosecution is proposed to be commenced in a court of a State or Territory:

- (a) the Federal Court of Australia does not have jurisdiction with respect to any matter in which a person seeks a writ of mandamus or prohibition or an injunction against the officer or officers in relation to that decision; and
- (b) the Supreme Court of the State or Territory in which the prosecution is proposed to be commenced is invested with, or has conferred on it, jurisdiction with respect to any such matter.

[subs (1B) insrt Act 57 of 2000 s 3 and Sch 2; am Act 89 of 2005 s 3 and Sch 1, effective 3 August 2005]

(1C) Subject to subsection (1D), at any time when:

- (a) a prosecution for an offence against a law of the Commonwealth, a State or a Territory is before a court of a State or Territory; or
- (b) an appeal arising out of such a prosecution is before a court of a State or Territory;

the following apply:

- (c) the Federal Court of Australia does not have jurisdiction with respect to any matter in which the person who is or was the defendant in the prosecution seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth in relation to a related criminal justice process decision;
- (d) the Supreme Court of the State or Territory in which the prosecution or appeal is before a court is invested with, or has conferred on it, jurisdiction with respect to any such matter.

[subs (1C) insrt Act 57 of 2000 s 3 and Sch 2]

(1D) Subsection (1C) does not apply where a person has applied for a writ of mandamus or prohibition, or an injunction, against an officer or officers of the Commonwealth in relation to a related criminal justice process decision before the commencement of a prosecution for an offence against a law of the Commonwealth, or of a State or a Territory.

[subs (1D) insrt Act 57 of 2000 s 3 and Sch 2]

(1E) Where subsection (1D) applies, the prosecutor may apply to the court for a permanent stay of the proceedings referred to in that subsection, and the court may grant such a stay if the court determines that:

- (a) the matters the subject of the proceedings are more appropriately dealt with in the criminal justice process; and
- (b) a stay of proceedings will not substantially prejudice the person.

[subs (1E) insrt Act 57 of 2000 s 3 and Sch 2]

(1EA) Jurisdiction for certain writs that relate to civil proceedings If:

- (a) a civil proceeding is before the Federal Circuit and Family Court of Australia or a court of a State or Territory; or
- (b) an appeal arising out of such a proceeding is before the Federal Circuit and Family Court of Australia (Division 1) or a court of a State or Territory;

the following apply:

- (c) the Federal Court of Australia does not have jurisdiction with respect to any matter in which a person who is or was a party to the proceeding seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth in relation to a related civil proceeding decision;
- (d) the following court is invested with, or has conferred on it, jurisdiction with respect to any such matter:

(CTH) Judiciary Act 1903 [5195] s 39B Original jurisdiction of Federal Court of Australia

- (i) if the civil proceeding or appeal is before the Federal Circuit and Family Court of Australia (Division 1) — that court; or
- (ii) if the civil proceeding or appeal is before the Federal Circuit and Family Court of Australia (Division 2) — that court; or
- (iii) if the civil proceeding or appeal is before a court of a State or Territory — the Supreme Court of the State or Territory.

[subs (1EA) insrt Act 89 of 2005 s 3 and Sch 1, effective 3 August 2005; am Act 13 of 2013 s 3 and Sch 2 item 2, effective 12 April 2013; Act 13 of 2021 s 3 and Sch 2 items 501–503, effective 1 September 2021]

(1F) Jurisdictional rules to apply despite any other law Subsections [\(1B\)](#), [\(1C\)](#), [\(1D\)](#), [\(1E\)](#) and [\(1EA\)](#) have effect despite anything in any other law. In particular:

- (a) neither the [Jurisdiction of Courts \(Cross-vesting\) Act 1987](#), nor any other law, has the effect of giving the Federal Court of Australia jurisdiction contrary to subsection [\(1B\)](#), [\(1C\)](#) or [\(1EA\)](#); and
- (b) neither [section 9](#) of the Administrative Decisions (Judicial Review) Act 1977, nor any other law, has the effect of removing from the Supreme Court of a State or Territory the jurisdiction given to that Court by [subsection \(1B\)](#), [\(1C\)](#) or [\(1EA\)](#).

[subs (1F) insrt Act 57 of 2000 s 3 and Sch 2; am Act 89 of 2005 s 3 and Sch 1, effective 3 August 2005]

(2) References to officer or officers of the Commonwealth The reference in [subsection \(1\)](#), [\(1B\)](#), [\(1C\)](#) or [\(1D\)](#) to an officer or officers of the Commonwealth does not include a reference to a Judge or Judges of the Federal Circuit and Family Court of Australia (Division 1).

[subs (2) am Act 87 of 1988 s 86 and Sch 2; Act 98 of 1993 s 62 and Sch 4; Act 60 of 1996 s 3 and Sch 19; Act 60 of 1996 s 3 and Sch 16; Act 57 of 2000 s 3 and Sch 2; Act 89 of 2005 s 3 and Sch 1, effective 3 August 2005; Act 54 of 2009 s 3 and Sch 5[38], effective 1 July 2009; Act 13 of 2021 s 3 and Sch 2 item 504, effective 1 September 2021]

(3) Definitions In this section:

civil proceeding has the same meaning as in the National Security Information (Criminal and Civil Proceedings) Act 2004.

[def insrt Act 89 of 2005 s 3 and Sch 1, effective 3 August 2005]

Federal Circuit and Family Court of Australia means:

- (a) the Federal Circuit and Family Court of Australia (Division 1); or
- (b) the Federal Circuit and Family Court of Australia (Division 2).

[def am Act 13 of 2021 s 3 and Sch 2 item 505, effective 1 September 2021]

related civil proceeding decision, in relation to a civil proceeding, means:

- (a) a decision of the Attorney-General to give:
 - (i) notice under section 6A of the National Security Information (Criminal and Civil Proceedings) Act 2004 in relation to the proceeding; or
 - (ii) a certificate under section 38F or 38H of that Act in relation to the proceeding; or

(CTH) Judiciary Act 1903 [5195] s 39B Original jurisdiction of Federal Court of Australia

- (b) a decision of the Minister appointed by the Attorney-General under section 6A of that Act to give:
 - (i) notice under section 6A of that Act in relation to the proceeding; or
 - (ii) a certificate under section 38F or 38H of that Act in relation to the proceeding.

[def insrt Act 89 of 2005 s 3 and Sch 1, effective 3 August 2005]

related criminal justice process decision in relation to an offence, means:

- (a) a decision (other than a decision to prosecute) made in the criminal justice process in relation to the offence, including:
 - (i) a decision in connection with the investigation, committal for trial or prosecution of the defendant; and
 - (ii) a decision in connection with the appointment of investigators or inspectors for the purposes of such an investigation; and
 - (iii) a decision in connection with the issue of a warrant, including a search warrant or a seizure warrant; and
 - (iv) a decision requiring the production of documents, the giving of information or the summoning of persons as witnesses; and
 - (v) a decision in connection with an appeal arising out of the prosecution; or
- (b) a decision of the Attorney-General to give a certificate under section 26 or 28 of the National Security Information (Criminal and Civil Proceedings) Act 2004 before or during a federal criminal proceeding (within the meaning of that Act) in relation to the offence.

[def subst Act 151 of 2004 s 3 and Sch 2, effective 11 January 2005; am Act 89 of 2005 s 3 and Sch 1, effective 3 August 2005]

SECTION 39B GENERALLY

SECTION 39B(1)

[5195.5] Determination of jurisdiction

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B, Section 39B(1).

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

[Section 39B\(1\)](#) vests jurisdiction in the Federal Court in terms identical to that vested in the High Court of Australia by [s 75\(v\)](#) of the Constitution: *Duff v McCulloch* (1985) 11 FCR 237; [65 ALR 677](#) [CB](#). For that reason, see generally the commentary relating to s 75(v) at [1695.90]–[1695.125]. Where there are a number of proceedings brought before the Federal Court relating to one incident, it is not enough that jurisdiction exists for one of the proceedings. The court must consider each action separately. Thus, the question the court must ask itself is:

- (i) who in the circumstances is the appropriate party to sue? (this varies, according to which of the remedies set out in [s 39B](#) is sought); and
- (ii) having established (i), is that person “an officer of the Commonwealth” as required by [s 39B](#) ?

For example, see *Coward v Allen* (1984) 52 ALR 320 ^{CB} where the applicant sought prohibition, certiorari, and injunctions against federal police officers who seized documents, and against the Victorian magistrate who issued the warrant under which the documents were taken. The Federal Court held that when several proceedings arise out of one incident the court must consider each proceeding distinctly and separately to decide if there is jurisdiction. Certiorari was held to be unavailable, for, though the police were officers of the Commonwealth, they were not amenable to a writ of certiorari as they did not issue the search warrant. The magistrate who issued the warrant was outside the jurisdiction of the court as he was not an officer of the Commonwealth. The plaintiff was successful, however, in obtaining prohibition against the federal police.

[5195.7] Jurisdiction not available against another judge of the Federal Court or against a judge of the Family Court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B(1), s 39B(2), s 39B, s 44.

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

A judge of the Federal Court has no jurisdiction to issue a writ of prohibition or an injunction against another judge of the court acting as such: *Bird v Free* (1994) 126 ALR 475 at 478–9; 35 ALD 552 at 555; [BC9400182](#) ^{CB}.

The jurisdiction conferred by [s 39B](#) of the Judiciary Act is vested in the Federal Court; and when a judge of the court hears an application that invokes the court's jurisdiction, the judge is exercising the authority that is vested in that judge and all other judges of the court, as a group — not an authority vested in the judge as an individual.

To say that a judge of the Federal Court can prohibit or enjoin another judge of the court acting as such would mean that the authority vested only in all the judges as a group can be treated, as occasion arises, as an authority vested in all save one of the judges and exercisable against that one judge, by the rest. Section 39B of the Judiciary Act does not permit of such a segmented or divisible exercise of the authority it confers. It permits only the exercise of the authority vested by the statute in the court ie in all the judges who make up the court... [a]uthority conferred only on the entire group cannot be exercised by one member, or by some of the members, of that group against another member of the group. To so exclude one member from the exercise of the authority in question by making that member the object of the exercise of that authority would be to do something quite different from exercising the collective authority: *Bird v Free*, above, ALR at 479; ALD at 555.

An application for prohibition against a judge of the Federal Court may be made to the High Court of Australia under [s 75\(v\)](#) of the Constitution (see [\[1695\]](#)) and remitted to the Federal Court under [s 44](#) of the Judiciary Act. On remittal, such an application will be heard by the Full Court: see *Re Wilcox; Ex parte Venture Industries Pty Ltd* (1996) 66 FCR 511; [137 ALR 47](#) at [65–6](#); (1996) ATPR ¶41-496; [BC9602007](#) ^{CB} per Black CJ, Cooper and Merkel JJ.

Section 39B(2) provides that the phrase “officer of the Commonwealth” when used in, inter alia, s 39B(1) does not include a judge of the Family Court of Australia, with the result that the Federal Court has no jurisdiction to issue a writ of prohibition, mandamus or an injunction against a judge of the Family Court.

[5195.8] Exclusion of jurisdiction — eg, migration and corporations decisions

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B.

(CTH) [Migration Act 1958](#) s 476A, s 5.

The jurisdiction of the Federal Court pursuant to s 39B can be excluded by other legislation. In practical terms, one of the most important such exclusions is found in s 476A of the Migration Act 1958, which excludes the jurisdiction of the Federal Court in relation to “migration decisions” (as defined in s 5 of the Act) except in relation to certain limited classes of proceeding (principally matters transferred from the Federal Magistrates Court, appeals from the Administrative Appeals Tribunal, and proceedings to review the cancellation or refusal of visas on character grounds).

Another important exclusion of the operation of s 39B is found in s 1337A of the Corporations Act 2001, which deals with civil jurisdiction in relation to corporations matters.

[5195.10] “officer or officers of the Commonwealth”

See the commentary at [1695.95].

[5195.15] Mandamus

See the commentary at [1695.100] and [12,535.5]–[12,535.65].

[5195.25] Prohibition

See the commentary at [1695.105] and [12,600.5]–[12,600.35].

[5195.30] Certiorari

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B, Section 39B(1).

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

See the commentary at [1695.115] and [\[12,530.5\]–\[12,530.100\]](#).

[Section 39B\(1\)](#) refers only to writs of mandamus and prohibition taken out against “officers of the Commonwealth”. It is similar in effect to [s 75\(v\)](#) of the Constitution which also omits reference to the writ of certiorari. Difficulties therefore arise when considering whether a writ of certiorari will be available pursuant to [s 39B](#): see *Coward v Allen* (1984) 52 ALR 320 ^{CB}; *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 25–6; [31 ALR 353](#) at [361](#) per Gibbs J.

In *Madden v Madden* (1996) 65 FCR 354; [136 ALR 98](#) at [138–9](#); 96 ATC 4268; [BC9600942](#) ^{CB}, Foster J considered the individual observations of Gibbs, Mason and Aickin JJ in *R v Cook; Ex parte Twigg*, above, and concluded that, where prohibition was not available because the decision in question had been fully implemented and there was “simply nothing left to prohibit”, certiorari was not available under [s 39B](#). In the same case, Sheppard J declined to express a view on the availability of certiorari but said (at ALR 100) that, if certiorari was not available and the court was satisfied that an applicant had established that a decision was invalid, “the position would be likely to be cured by the making of an appropriate declaration ... and, if it were necessary, the grant of an injunction — something which is plainly within the jurisdiction of the court to grant under [s 75\(v\)](#) of the Constitution and thus under [s 39B](#) of the Judiciary Act 1903”.

[5195.31] Jurisdictional error

L Legislation cited in this paragraph

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

The writs of prohibition and mandamus are available only when jurisdictional error is established: see *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; [234 ALR 114](#); [\[2007\] HCA 14](#); [BC200702595](#) at [\[70\]](#) [CB](#); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [176 ALR 219](#); [\[2000\] HCA 57](#); [BC200006927](#) at [\[14\]](#) [CB](#).

A decision-maker commits jurisdictional error where it breaches the rules of natural justice (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [195 ALR 24](#); [\[2003\] HCA 2](#); [BC200300103](#) at [\[83\]](#) [CB](#)) or falls into an error of law which causes the decision-maker to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material: *Craig v South Australia* (1995) 184 CLR 163 at 179; [131 ALR 595](#) at [602](#); 69 ALJR 873; [BC9506437](#) [CB](#); *Minister for Immigration and Multicultural and Indigenous Affairs v Yusuf* (2001) 206 CLR 323; [180 ALR 1](#); [\[2001\] HCA 30](#); [BC200102757](#) at [\[82\]](#) [CB](#); *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; [113 ALD 1](#); [\[2010\] HCA 1](#); [BC201000230](#) [CB](#).

In *Bodruddaza v Minister for Immigration and Multicultural Affairs*, above, at [70], the High Court apparently proceeded on the basis that, where certiorari was sought as a remedy ancillary to the forms of relief specified in s 75(v) of the Constitution, it would only be available if jurisdictional error was established, review in the case of error on the face of the record not being available because the primary relief sought would only have been available once jurisdictional error was established.

[5195.32] Declaratory relief

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B(1).

(CTH) [Federal Court of Australia Act 1976](#) s 21.

In a case where prohibition or injunctive relief is sought under [s 39B\(1\)](#) of the Judiciary Act 1903, the Federal Court may award appropriate declaratory relief pursuant to [s 21](#) of the Federal Court of Australia Act: *Dhillon v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 48 FCR 107 at 127 per French J. See also *Singh v Minister for Immigration and Ethnic Affairs* (FCA, Sackville J, NG 319 of 1994, 6 December 1994, unreported, [BC9400250](#)). In the latter case, Sackville J granted both injunctive and declaratory relief to the applicant.

The same is true in the High Court, as is illustrated by *Plaintiff M61/2010E v Commonwealth* [\(2010\) 272 ALR 14](#); 85 ALJR 133; [\[2010\] HCA 41](#); [BC201008390](#) [CB](#).

[5195.33] Damages

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B, s 39B(1).

It may be open to an applicant in a proceeding under [s 39B](#) of the Judiciary Act to seek damages as well as relief by way of mandamus: *Scott v Handley* (1997) 79 FCR 236; [149 ALR 33](#); [BC9705233](#) [CB](#) (Full Court). The “matter” in respect of which the Federal Court is given jurisdiction by [s 39B\(1\)](#) of the Judiciary Act is the justiciable controversy or dispute or the subject matter for determination in the legal proceeding. In this context, the “matter” can include a number of causes of action, including a cause of action for a claim for damages. Whether the court had jurisdiction to award damages in the exercise of its jurisdiction under s 39B(1) of the Judiciary Act in any particular case depends upon identification of “the matter” which is before the court.

[5195.35] Federal Court Rules relating to applications under s 39B(1)

L Legislation cited in this paragraph

(CTH) [Federal Court Rules](#) O 4 r 1, O 4 r 6, Order 54A r 1, Order 54A r 2, Order 54A r 3(1), O 54A r 3(2), Form 5, Form 56.

(CTH) [Judiciary Act 1903](#) s 39B.

(CTH) [Administrative Decisions \(Judicial Review\) Act 1977](#).

Order 54A r 1 of the Federal Court Rules provides that an application under [s 39B](#) of the Judiciary Act is to be made in the manner prescribed by the Rules — namely, by filing an application in accordance with O 4 r 1 and an affidavit or statement of claim in accordance with O 4 r 6.

Order 54A r 2 requires that the application shall be in or substantially in Form 5 — the standard form of application in the Federal Court.

Order 54A r 3(1) permits the joinder in an application of any other claim for relief within the jurisdiction of the court arising out of or connected with the same subject matter; but O 54A r 3(2) requires the use of Form 56 where the applicant seeks relief under both the [Administrative Decisions \(Judicial Review\) Act 1977](#) and [s 39B](#).

[5195.40] Judicial review of decisions made in exercise of royal prerogative

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B.

The power, if any, of the Federal Court to review a decision made in exercise of the royal prerogative derives from [s 39B](#) of the Judiciary Act 1903: see *Minister for Arts Heritage and the Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; [75 ALR 218](#) at [224](#) [CB](#).

It appears that executive action is not immune from judicial review merely because it was carried out in pursuance of a power derived from the prerogative rather than a statutory source: *Minister for Arts Heritage and the Environment v Peko-Wallsend Ltd*, above, at 224; *Council of Civil Service Unions v Minister for the Civil Service* (1985) AC 374 [☐](#); [\[1984\] 3 All ER 935](#) [CB](#) (the CCSU case); *McRae v A-G (NSW)* (1987) 9 NSWLR 268 [CB](#).

[5195.45] Review of Governor-General in Council

L Legislation cited in this paragraph

(CTH) [Administrative Decisions \(Judicial Review\) Act 1977](#).

(CTH) [Judiciary Act 1903](#) s 39B.

[T]he courts of this country should now accept responsibility for reviewing the decisions of ministers or the Governor-General in Council notwithstanding the decision carried out in pursuance of a power determined not from statute but from the common law or the prerogative ... In this court, since the [Administrative Decisions \(Judicial Review\) Act 1977](#) would not apply to a decision made in exercise of the prerogative, such jurisdiction could only be exercised under [s 39B](#) of the Judiciary Act 1903: *Minister for Arts Heritage and the Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; [75 ALR 218](#) at [224](#) [CB](#) per Bowen CJ.

[5195.50] Alternative to Administrative Decisions (Judicial Review) Act 1977 proceedings

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B, s 39B(1).

(CTH) [Administrative Decisions \(Judicial Review\) Act 1977](#).

The jurisdiction conferred on the Federal Court by [s 39B\(1\)](#) of the Judiciary Act is essentially a jurisdiction to conduct judicial review of the acts and decisions officers of the Commonwealth. The jurisdiction conferred by [s 39B](#) is wider than that conferred by the [Administrative Decisions \(Judicial Review\) Act 1977](#) (the ADJR Act). For example, the [s 39B\(1\)](#) jurisdiction is not confined to review of decisions of an “administrative character”, nor to decisions made under an enactment; and the [s 39B\(1\)](#) jurisdiction will be available in relation to a number of decisions that have been expressly excluded from the ADJR Act. For that reason, it is prudent for an application for mandamus, prohibition or an injunction under [s 39B\(1\)](#) to be joined with an application for an order of review under the ADJR Act. See, for example, *Attorney-General (NT) v Kearney* (1990) 25 FCR 408 at 412; [94 ALR 488](#) at [492](#); *Austral Fisheries Pty Ltd v Minister for Primary Industries & Energy* (1992) 37 FCR 463 at 464; [27 ALD 633](#) at [634](#); *Melbourne Pathology Pty Ltd v Minister for Human Services & Health, Health Insurance Commission & Wood* [\(1996\) 40 ALD 565](#) at [573](#).

An applicant for review of a decision to implement a deportation based that application on the [ADJR Act](#), and obtained an order for review. On appeal the Federal Court decided that the decision was not reviewable under that Act. The applicant then sought to base his application on [s 39B](#) of the Judiciary Act. However, the Full Federal Court refused to allow the applicant to invoke [s 39B](#): “Since the respondent’s [that is, the applicant for judicial review] application was based on the [Judicial Review Act](#) it would be wrong to permit him to raise a different case at this stage”: *Mahoney v Dillon* [\(1987\) 71 ALR 395](#) at [402](#) per Beaumont and Gummow JJ.

[5195.55] Privative clauses and s 39B

L Legislation cited in this paragraph

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

(CTH) [Migration Act 1958](#) s 474, s 474(2), s 476A.

(CTH) [Judiciary Act 1903](#) s 39B, s 39B(1).

(CTH) [Income Tax Assessment Act 1936](#) s 177(1).

A provision in a statute that declares that any decision made under the statute shall not be challenged, called into question or be subject to review on any ground is generally known as a “privative clause”. There are significant limitations on the utility of privative clauses: see [1695.125] in relation to privative clauses and s 75(v) of the Constitution.

In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [195 ALR 24](#) ^{CB}, the High Court considered the relationship between s 474 of the Migration Act 1958, on the one hand, and s 75(v) of the Constitution and [s 39B](#), on the other. Section 474 declared that a “privative clause decision”, defined as a decision made or proposed or required to be made, under the Act, is final and conclusive, must not be challenged, appealed against, reviewed, quashed or called into question in any court, and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

The court held that s 474 did not oust the High Court's jurisdiction under s 75(v) of the Constitution to grant prohibition or mandamus against an officer of the Commonwealth who purported to make a decision under the Migration Act where that decision was vitiated by jurisdictional error, including where the decision-maker had denied natural justice or procedural fairness to the person affected by the decision. The expression used in the definition of "privative clause decision" in s 474, "decision ... made under this Act", Gaudron, McHugh, Gummow, Kirby and Hayne JJ said, "must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act" because "an administrative decision which involves jurisdictional error is 'regarded, in law, as no decision at all': *Plaintiff S157/2002*, above, at [76].

Their Honours noted at [94] that [s 39B](#) of the Judiciary Act conferred on the Federal Court a jurisdiction similar to the High Court's jurisdiction under s 75(v) of the Constitution and indicated at [95] that the construction given to s 474 in the present case would control any limitation on the jurisdiction otherwise enjoyed by the Federal Court (and the Federal Magistrates Court) under [s 39B](#) of the Judiciary Act.

The Full Federal Court has since followed that indication and held that s 474 does not affect the Federal Court's jurisdiction under [s 39B](#) to review a decision purportedly made under the Migration Act where the ground on which review is sought is jurisdictional error. See, for example, *Lobo v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 200 ALR 359; 75 ALD 667 ^{CB}; *Minister for Immigration and Multicultural & Indigenous Affairs v WAFJ* (2004) 203 ALR 581; [2004] FCAFC 5; [BC200400019](#) ^{CB}. In the latter case, the Full Court said at [65]:

[65] ... [A] decision which is flawed, by jurisdictional error, by reason of a failure to comply with the principles of natural justice is not a "privative clause decision" within s 474(2) of the Act. What this means, in effect, is that procedural unfairness amounting to jurisdictional error is a basis upon which application may be made for the issue of a constitutional writ in the High Court under s 75(v) of the Constitution or relief in the Federal Court under [s 39B](#) of the Judiciary Act 1903 (Cth).

Notwithstanding that result, however, since 2005 the jurisdiction of the Federal Court in relation to migration decisions has been substantially excluded by s 476A of the Migration Act 1958: see [\[5195.8\]](#).

In *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168; [127 ALR 21](#) ^{CB}, the High Court considered the relationship between a different form of privative clause, s 177(1) of the Income Tax Assessment Act 1936, and [s 39B\(1\)](#) of the Judiciary Act. Section 177(1) declared that a notice of assessment under the Income Tax Assessment Act was conclusive evidence of the due making and the correctness of that assessment. Although different views on the effect of s 177(1) were expressed by members of the High Court, the majority view was that s 177(1) protected the assessment against challenge on the ground that the commissioner had not followed the prescribed procedure in making the assessment.

[5195.60] Discretion where alternative relief available

Even if a jurisdictional error is established that could ground a constitutional writ, it is plain that the court retains a discretion not to grant relief. The same principles apply in relation to applications under s 39B as apply to applications to the High Court under s 75(v) of the Constitution: see *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609; 96 ALD 1; [2007] HCA 26; [BC200704430](#) at [28] ^{CB}; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [176 ALR 219](#); [2000] HCA 57; [BC200006927](#) at [56] ^{CB}.

[5195.65] No jurisdiction where claim for relief colourable

(CTH) [Judiciary Act 1903](#) s 39B, s 39B(1).

In *New South Wales Aboriginal Land Council v Aboriginal and Torres Strait Islander Commission* (1995) 59 FCR 369; [131 ALR 559](#) at 572; [38 ALD 573](#) ^{CB}, Hill J held that [s 39B\(1\)](#) of the Judiciary Act did not confer jurisdiction on the Federal Court where the jurisdictional element (in that case, the claim for injunctive or prohibitory relief) was merely colourable. Hill J accepted (at ALR 573) a submission from the respondents that relief against the second respondent (an officer of the Commonwealth), whether in the nature of prohibition or injunction, would be pointless because she had no substantive decision-making role in relation to the subject matter of the proceedings; and that the only reason why the second respondent had been joined was to obtain jurisdiction under [s 39B](#). “Being colourable”, Hill J said, “the jurisdiction of the court under [s 39B](#) is not attracted”.

In *Vietnam Veterans’ Affairs Association of Australia (NSW Branch) Inc v Cohen* (1996) 70 FCR 419 at 432–3; [46 ALD 290](#), Tamberlin J held that [s 39B](#) of the Judiciary Act conferred no jurisdiction on the Federal Court where the inclusion of officers of the Commonwealth (members of a body corporate, the Specialist Medical Review Council) as respondents to an application was colourable — in the sense that they had been included as parties, not because any relief could be granted against them, but in order to attract the [s 39B](#) jurisdiction (the functions and exercises of power which the applicant sought to challenge in the application were vested in body corporate and not in the individuals who constituted the council from time to time).

[5195.70] Where use of s 39B an abuse of process

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B.

It is an abuse of process to bring proceedings under [s 39B](#) in order to prevent an officer of the Commonwealth tendering documents in evidence in a Victorian court (on the ground that the documents had been unlawfully seized by the respondent). “The prospect of the Federal Court exercising supervisory jurisdiction over Victorian courts ... is, in the words of Foster J, contrary to ‘commonsense, practical convenience and federal comity’”: *Second Life Decor Pty Ltd v Comptroller-General of Customs* (1994) 53 FCR 78 at 85 per Heerey J. See also *Kovess v DPP* (1997) 74 FCR 297; 90 A Crim R 579 ^{CB}.

SECTION 39B(1A)

[5195.100] Additional jurisdiction

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B(1A).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75, s 76.

The jurisdiction conferred on the Federal Court by [s 39B\(1A\)](#) reflects part of the original jurisdiction of the High Court conferred by s 75 (see [1695]) and part of that contemplated by s 76 of the Constitution: see [1700].

[5195.105] Commonwealth seeking an injunction or a declaration

L Legislation cited in this paragraph

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

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

(CTH) [Federal Court of Australia Act 1976](#) s 23.

The jurisdiction conferred on the Federal Court by s 39B(1A)(a) reflects part of the original jurisdiction of the High Court conferred by s 75(iii) of the Constitution in matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party (see [1695.25]–[1695.40]). Section 39B(1A)(a) limits the corresponding jurisdiction conferred on the Federal Court in two ways (see *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559; [177 ALR 329](#); [\[2001\] HCA 1](#); [BC200100154](#) at [\[40\]](#) ^{CB}):

- (1) the jurisdiction is only available where the Commonwealth is the applicant, not where the Commonwealth is the respondent — although a similar but not identical jurisdiction where an “officer of the Commonwealth” is the respondent is conferred by s 39B(1);
- (2) the jurisdiction is confined to proceedings seeking relief by way of an injunction or a declaration — although, once that jurisdiction is established, there will be power under [s 23](#) of the Federal Court of Australia Act 1976 to make such orders as the court thinks appropriate.

For the meaning of “the Commonwealth” see [1695.33].

“[T]he term ‘injunction’ in para (a) of section 39B(1A) should not be restricted to remedies having the particular characteristics of the remedy given traditionally by courts of equity”, but extends to an application for an enforcement order under the Corporations Law: *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*, above, at [45].

Section 39B(1A)(a) appears to exclude jurisdiction in matters in which a person suing on behalf of the Commonwealth seeks an injunction or a declaration. The significance of that limitation is, however, reduced by the wide meaning given to the term “the Commonwealth”, which has been held to be of sufficient width to include a corporation that is an agency or instrumentality of the Commonwealth: *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*, above, at [39]; see also [1695.27]. In that case, ASIC was held to be “the Commonwealth” for the purposes of s 39B(1A)(a) of the Judiciary Act. The court held (at [41]–[42]) that the omission from s 39B(1A)(a) of the phrase “or a person suing... on behalf of the Commonwealth” did not indicate an intention by the Parliament to exclude a body such as ASIC from the grant of jurisdiction.

[5195.106] Section 39B(1A)(a) does not obviate need for “justiciable controversy”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B(1A)(b).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 76.

In *Commonwealth v Lyon* (2003) 133 FCR 265; [203 ALR 553](#); [\[2003\] FCAFC 284](#); [BC200307682](#) ^{CB}, the Commonwealth commenced proceedings in the Federal Court seeking a declaration that certain information, namely, information that was about to be disclosed in committal proceedings before a state magistrate, was subject to public interest immunity. It also sought injunctions restraining the publication of that material. At first instance, the primary judge held that the asserted right of the Commonwealth did not give rise to a justiciable controversy other than in the court in which the claim of public interest immunity arose. The Full Court disagreed, and held that there was a real controversy between the parties as to the entitlement of the Commonwealth to protect the confidentiality of the contentious material — the Commonwealth asserting a common law right to

protect the confidentiality of the contentious material; and the respondents disputing that right. The matter could be litigated pursuant to s 39B(1A)(a) of the Judiciary Act.

In *Layton v Civil Aviation Safety Authority* [2002] FCA 1231; BC200205999 at [6] ^{CB}, Kiefel J dismissed an application in which the applicant sought bare declarations as to the validity of certain legislation. Her Honour dismissed the application on the basis that there was no “matter” within s 39B(1A)(b):

[6] Whilst the court has jurisdiction with respect to matters arising under the Constitution, or involving its interpretation, pursuant to s 39B(1A)(b) of the Judiciary Act (1903) (Cth), absent a present, right, duty or liability to be determined by the court, there is no relevant matter within the meaning of s 76 of the Constitution: see *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257 and *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510. If there is no legal remedy for a wrong, there is “no matter”...

[5195.110] Arising under the Constitution or involving its interpretation

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 30(a), s 39B(1A)(b).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 76(i).

The jurisdiction conferred on the Federal Court by [s 39B\(1A\)\(b\)](#) is equivalent to the original jurisdiction of the High Court contemplated by s 76(i) of the Constitution and invested in that court by [s 30\(a\)](#) of the Judiciary Act: see [1700.10]–[1700.20].

[5195.115] Arising any laws made by the parliament

L Legislation cited in this paragraph

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

(CTH) [Commonwealth of the Australia Constitution Act](#) s 76(ii).

(CTH) [Federal Airports Corporation Act 1986](#).

(CTH) [Native Title Act 1993](#).

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974, Pt VI, s 86(1).

The jurisdiction conferred on the Federal Court by [s 39B\(1A\)\(c\)](#) is equivalent to the potential original jurisdiction of the High Court contemplated by s 76(ii) of the Constitution (see [1700.35]). General jurisdiction in relation to matters arising under federal law has never been conferred on the High Court.

A matter arises under a law made by the Commonwealth Parliament if the right or duty in question in the matter owes its existence to federal law or depends upon federal law for its enforcement: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154; 19 ALJR 169 per Latham CJ; *LNC Industries Ltd v BMW (Aust) Ltd* (1983) 151 CLR 575 at 581; [49 ALR 599](#); 57 ALJR 701; [BC8300118](#) ^{CB}; *Northern Territory v GPAO* (1999) 196 CLR 553; [161 ALR 318](#); [\[1999\] HCA 8](#); [BC9900714](#) at [\[90\]](#), [\[133\]](#) ^{CB}. A matter will not come within the ambit of s 76(ii) merely because the interpretation of a federal law is involved. It will, however, arise under a federal law if a Commonwealth statute is relied upon as giving a right claimed or as the direct source of a defence asserted: see *Felton v Mulligan* (1971) 124 CLR 367 at 374, 388; [1972] ALR 33; (1971) 45 ALJR

525; [BC7100220](#) ^{CB} per Windeyer J. See also at CLR 408 per Walsh J; CLR 374 per Barwick CJ; and CLR 416 per Gibbs J.

In *Australian Solar Mesh Sales Pty Ltd v Anderson* (2000) 101 FCR 1; [175 ALR 566](#); [\[2000\] FCA 864](#); [BC200003629](#) at [\[15\]](#), [\[16\]](#) ^{CB}, the Full Court pointed out that:

- (1) where the respondent pleads a defence said to be based on law of the Commonwealth, a matter will arise under a law made by the parliament within s 39B(1A)(c). The proposition asserted by the defence does not have to be correct. It is sufficient that it is raised bona fide;
- (2) it may be that it is sufficient that the relevant issue (necessary for the matter to arise under a law made by the parliament) comes under serious examination by the court as an issue in the proceeding, whatever the issue on which the decision ultimately turns.

The Full Court has recognised the breadth of the jurisdiction that it has been given following the enactment of s 39B(1A)(c) of the Judiciary Act.

In *Federal Airports Corporation v Aerolineas Argentinas* (1997) 76 FCR 582 at 593; [147 ALR 649](#) at [659](#); [50 ALD 54](#), Lehane J (with whom Beaumont and Whitlam JJ agreed) observed that it appeared that [39B\(1A\)\(c\)](#), by conferring jurisdiction on the Federal Court in any matter arising under any laws made by the parliament, would resolve any doubts as to the court's jurisdiction to hear a claim to recover moneys said to have been unlawfully collected under the Federal Airports Corporation Act 1986.

In *Fejo v Northern Territory* [\(1998\) 152 ALR 477](#) at [482](#); [BC9800459](#) ^{CB} O'Loughlin J rejected an argument that the Federal Court lacked jurisdiction to hear an application for a declaration that native title existed in relation to a specified area because no native title application had been made under the [Native Title Act 1993](#) and referred to the court by the registrar of the Native Title Tribunal. O'Loughlin J referred to s [39B\(1A\)](#) of the Judiciary Act 1903 as founding the court's jurisdiction:

If these proceedings went to trial one matter that would have to be addressed would be the power of this court to make a declaration with respect to native title. The answer to that question would require an investigation of the provisions of the [Native Title Act](#) and so the court would become seized of a matter arising under a law made by the parliament.

See, on appeal, *Fejo v Northern Territory* (1998) 195 CLR 96 at 120, 140; [156 ALR 721](#); 72 ALJR 1442; [BC9804555](#) ^{CB}.

In *Bertran v Minister for Justice* (1999) 94 FCR 404; [165 ALR 155](#); [\[1999\] FCA 1117](#); [BC9904984](#) at [\[8\]–\[9\]](#) ^{CB}, the Full Court held that [s 39B\(1A\)\(c\)](#) gave the court jurisdiction to entertain an application for a declaration that a magistrate had erred in his construction and application of s 15(6) of the Extradition Act 1988. In their joint judgment, Sundberg and Merkel JJ said (at [9]):

The appellant based his claim to relief on s 15(6). The “matter” raised by the motion was whether s 15(6) conferred the right claimed. It thus arose under s 15(6) for the purposes of [s 39B\(1A\)\(c\)](#). Put another way, the “matter”, being the litigious or justiciable controversy between the parties (*Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 290; [49 ALR 193](#) per Mason, Brennan and Deane JJ; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; [33 ALR 465](#) ^{CB}; *Fencott v Muller* (1983) 152 CLR 570; [46 ALR 41](#) ^{CB}; *Re Wakim*; *Ex parte McNally* (1999) 198 CLR 511; [163 ALR 270](#) ^{CB} at [135] per Gummow and Hayne JJ), was whether the magistrate had heard and determined the appellant's application for bail under s 15(2) in accordance with law.

In *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1; [167 ALR 358](#); [\[1999\] FCA 1584](#); [BC9907490](#) ^{CB}, the Full Court held that [s 39B\(1A\)\(c\)](#) gave the court jurisdiction to entertain an application for preliminary discovery in anticipation of a claim being made for a breach of the [Trade Practices Act 1974](#). The

court rejected a submission that, because [s 86\(1\)](#) of the Trade Practices Act 1974 conferred jurisdiction to grant discovery only where a civil proceeding had been instituted under Pt VI of that Act, [s 39B\(1A\)\(c\)](#) should not be read as extending the jurisdiction of the Federal Court in matters under the Trade Practices Act. Wilcox, Sackville and Katz JJ said (at [69]) that [s 39B\(1A\)\(c\)](#) was “plainly intended to confer a broad supplementary jurisdiction on the court in matters arising under laws made by the parliament”; and, while acknowledging that there might be legislation which contained or should be interpreted as containing an implied proscription on the court exercising jurisdiction of a particular kind, said that [s 86\(1\)](#) of the Trade Practices Act “is not legislation of this kind”.

In *Transport Workers’ Union v Lee* (1998) 84 FCR 60; [BC9802980](#) ^{CB}, a Full Court held that it had jurisdiction to hear an application for an injunction to restrain the bringing of proceedings against them under the law of Queensland in the Industrial Magistrates’ Court at Kingaroy, being proceedings from which the applicant claimed to be immune, according to s 170MT(2) of the Workplace Relations Act 1996. The Full Court said (FCR at 67):

That claim is a matter arising under a law made by the Parliament, in this case the Workplace Relations Act, because it is necessary for the Court to determine whether that law confers the rights which the applicants claim in this proceeding. There being a matter before the Court arising under a law made by the Parliament, the Court has jurisdiction derived from [s 39B\(1A\)\(c\)](#) to determine the controversy between the parties.

The Full Court went on to reject submissions to the effect that [s 39B\(1A\)](#) did not itself confer jurisdiction but depended upon other laws made by the parliament to confer specific jurisdiction (that submission, the court said, failed “to give full recognition to the express language of s 39B(1A) and the content of a ‘matter’ which is... the subject-matter for determination in a legal proceeding”). It was also argued that s 39B(1A) could not be invoked because the Workplace Relations Act conferred jurisdiction on the Federal Court in specified matters, not including a matter arising under s 170MT(2). The court rejected that submission, which it said failed to give effect to the general conferral of jurisdiction expressed in s 39B(1A), and ignored the contrast between [s 39B\(1A\)](#) and “the prior history of limited Act by Act conferral of jurisdiction upon the Federal Court, a history which had produced consequences such as those identified by Lockhart J in *Kodak (A’asia) Pty Ltd v Commonwealth* (1988) 22 FCR 197; [98 ALR 424](#) ^{CB} “.

See also *Independent Education Union of Australia v Canonical Administrators* (1998) 87 FCR 49; [157 ALR 531](#) at [543](#); 84 IR 123; [BC9804646](#) ^{CB}.

In *Coffey v Secretary, Dept of Social Security* (1999) 86 FCR 434; [56 ALD 338](#); [\[1999\] FCA 375](#); [BC9901357](#) ^{CB}, a Full Court of the Federal Court held that [s 39B\(1A\)](#) gave the court jurisdiction to hear a claim in debt brought by a person qualified to receive job search allowance under the Social Security Act 1991 against the secretary to the department responsible for administering the Act. The applicant claimed that the respondent had wrongly withheld moneys from the payment to which the applicant was entitled, in order to recover what was said to be an overpayment. In their joint judgment, von Doussa, Branson and Sundberg JJ said (at [22]):

The appellant claims that he was entitled under ss 559 and 1068 [of the Social Security Act] to a benefit in the amount that was actually paid to him. The right that he seeks to enforce is conferred by those sections. The fact that in order to vindicate the right he has to deflect the operation of s 1224, by showing that his claim forms did not contain false information, does not signify. The claim remains one made under ss 559 and 1068. In our view, therefore, the debt claim arises under the Act for the purposes of [s 39B\(1A\)\(c\)](#).

[5195.117] Derivative rights under state law “picked up” by Commonwealth law

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B(1A)(c), s 79.

In *von Arnim v Group 4 Correctional Services Pty Ltd* (2002) 117 FCR 346; [\[2002\] FCA 310](#); [BC200200978](#) ^{CB}, the Federal Court held that it had jurisdiction under [s 39B\(1A\)\(c\)](#) to determine the applicant's claim that, as a person remanded in a Victorian prison under the Extradition Act 1988, he was being denied the right to education conferred by s 47 of the Corrections Act 1986 (Vic). Section 53 of the Extradition Act provided that state or territory laws with respect to the treatment of prisoners applied, so far as they were capable of application, in relation to persons who have been committed to prison in that state or territory under the Extradition Act. The operation of s 53, Kenny J said (at [27]–[28]) was relevantly similar to [s 79](#) of the Judiciary Act which was described by the High Court in *R v Hughes* (2000) 202 CLR 535; [171 ALR 155](#); [\[2000\] HCA 22](#); [BC200002055](#) at [\[24\]](#) ^{CB} as operating to “pick up” certain state laws as surrogate federal laws”. Kenny J concluded at [29]:

[W]hen s 47 of the Victorian Corrections Act applies as a surrogate federal law in proceedings concerning the matters referred to in s 53 of the Extradition Act, it does so by force of federal law. Section 53, when it applies, becomes the source of any relevant right. Although the “matter” in the present proceeding concerns the definition of a right in state law, it nonetheless arises under a federal law which picks up the state law and gives it the force of a federal law under certain conditions. It was for this reason that I formed the view that the court had jurisdiction under [s 39B\(1A\)\(c\)](#) of the Judiciary Act to entertain the applicant's application.

[5195.120] Retrospective effect of s 39B(1A)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B(1A).

In *Arnhem Land Aboriginal Land Trust v Minister for Mines and Energy (NT)* (1997) 78 FCR 556; [158 ALR 427](#) ^{CB}, O'Loughlin J held that the addition of [s 39B\(1A\)](#) to the Judiciary Act on 17 April 1997 had the effect of enlarging the court's jurisdiction to hear and determine a matter which had been commenced before 17 April 1997, on the basis that the amendment did not affect substantive rights but simply enlarged the jurisdiction which the court would otherwise possess to entertain a proceeding to vindicate substantive rights: ALR at 434–5.

SECTION 39B(1B)

[5195.130] Exclusion of s 39B(1) jurisdiction in relation to decision to prosecute

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39B, s 39B(1B), s 39B(1B)(a).

In *Phong v A-G (Cth)* (2001) 114 FCR 75; [185 ALR 753](#); [\[2001\] FCA 1241](#); [BC200105288](#) at [\[67\]](#) ^{CB}, Hely J (with whom Black CJ agreed on this point) said that [s 39B\(1B\)](#), on a literal reading, was capable of being confined in its operation to the period in which a prosecution in a court of a state or territory “is proposed to be commenced”, such that the operation of the section is spent on the commencement of the prosecution. However, Hely J said, such a construction of the section would not promote the purpose or object underlying the Act as expressed so clearly in the second reading speech, which had stated the intention that defendants in state and territory courts would not be able to rely on [s 39B](#) to bring an application in the Federal Court to review decisions of Commonwealth officers made in the prosecution process, so as to remove the opportunity to disrupt and delay prosecutions by repeated, unmeritorious applications to a different court system. The section should be construed, Hely J said at [68]:

... on the basis that once a decision to prosecute has been made by an officer of the Commonwealth and the prosecution is proposed to be commenced in a court of a state or territory, then *thereafter* the jurisdiction referred to in [s 39B\(1B\)\(a\)](#) is conferred on the Supreme Court of the state or territory in which the prosecution is proposed to be commenced to the exclusion of what would otherwise have been the jurisdiction of the Federal Court in that regard.

See also *O'Meara v Magistrates of the Local Courts of NSW* [\[2001\] FCA 1542](#); [BC200106682](#) at [\[6\]](#) [CB](#).

SECTION 39B(1C)

[5195.150] Exclusion of s 39B(1) jurisdiction in relation to “related criminal justice decision”

L Legislation cited in this paragraph

(CTH) [Customs Act 1901](#) s 198.

(CTH) [Judiciary Act 1903](#) s 39B(1B)–(3), s 39B(1C).

In *Chief Executive Officer of Customs v Jiang* [\(2001\) 183 ALR 604](#); [\[2001\] FCA 145](#); [BC200102369](#) at [\[77\]](#) [CB](#), the Full Court of the Federal Court said that a decision taken in the course of an investigation leading to a prosecution for an offence against the Customs Act 1901, such as a decision to issue a search warrant under s 198 of that Act, was a “related criminal justice process decision”, and was properly to be regarded as one “made in the criminal justice process”.

The Full Court said at [81] that the meaning to be attributed to an expression such as “a related criminal justice process decision” which was a legislative construct, did not reflect any established usage. It was necessary to bear in mind the purpose of the Jurisdiction of Courts Legislation Amendment Act 2000, which introduced [s 39B\(1B\)–\(3\)](#), “as expressed so clearly in the Second Reading Speech”. Earlier, the court had noted at [4] that the second reading speech stated that the legislation was drafted in order to meet “the use of unmeritorious delaying tactics in the criminal justice process by removing the collateral access of defendants to federal administrative law procedures and remedies”.

In *Clarke v DPP (Cth)* (2000) 99 FCR 294; [\[2000\] FCA 849](#); [BC200003459](#) [CB](#), the Federal Court held that its s 39B jurisdiction was excluded by [s 39B\(1C\)](#) where prohibition and an injunction were sought to restrain the Director of Public Prosecutions from maintaining a prosecution against the applicant.

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User Name: REECE STORME FERRARA

Date and Time: Friday, September 23, 2022 1:51:00 AM AEST

Job Number: 180068763

Document (1)

1. [\(CTH\) Judiciary Act 1903 \[5585\] s 55E Attorney-General's lawyers](#)

Client/Matter: -None-

(CTH) Judiciary Act 1903 [5585] s 55E Attorney-General's lawyers

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIA LEGAL PRACTITIONERS \[ss 55A–55H\]](#)

[5585] 55E Attorney-General's lawyers

(1) In this section and in [sections 55F](#) and [55G](#):

Attorney-General's lawyer means a person:

- (a) whose name is on:
 - (i) the roll of barristers and solicitors of the High Court kept under the Rules of Court; or
 - (ii) the roll of barristers, solicitors, barristers and solicitors or legal practitioners of the Supreme Court of a State or Territory; and
- (b) who is either:
 - (i) the Secretary of the Attorney-General's Department; or
 - (ii) a person in the Attorney-General's Department who is engaged under the Public Service Act 1999.

[def am Act 3 of 2011 s 3 and Sch 6, effective 3 March 2011; Act 5 of 2011 s 3 and Sch 7 [84], effective 19 April 2011]

[subs (1) am Act 146 of 1999 s 3 and Sch 1]

(2) An Attorney-General's lawyer acting in that capacity is entitled:

- (a) to do everything necessary or convenient for that purpose; and
- (b) to practise as a barrister, solicitor, or barrister and solicitor in any court and in any State or Territory; and
- (c) to all the rights and privileges of so practising;

whether or not he or she is so entitled apart from this subsection.

(3) An Attorney-General's lawyer acting in that capacity in a State or Territory is not subject to a law of a State or Territory that relates to legal practitioners except to the extent that such laws:

- (a) impose rights, duties or obligations on legal practitioners in relation to their clients or to the courts; or
- (b) provide for disciplinary proceedings in relation to the misconduct of legal practitioners.

(4) Subsection (3) is subject to subsection (6) and to [section 55F](#) (Attorney-General's lawyer may act for more than one party).

(5) In considering the nature of the rights, duties and obligations of an Attorney-General's lawyer in relation to a client, regard must be had to the lawyer's position as a person in the Attorney-General's Department engaged under the Public Service Act 1999.

[subs (5) am Act 146 of 1999 s 3 and Sch 1]

(6) An Attorney-General's lawyer acting in that capacity is not subject to a law of a State or Territory that is prescribed for the purposes of this section.

[s 55E subst Act 7 of 1999 s 3 and Sch 1]

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User Name: REECE STORME FERRARA

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Document (1)

1. [\(CTH\) Judiciary Act 1903 \[5665\] s 55ZG Compliance with Legal Services Directions](#)

Client/Matter: -None-

(CTH) Judiciary Act 1903 [5665] s 55ZG Compliance with Legal Services Directions

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIC ATTORNEY-GENERAL'S LEGAL SERVICES DIRECTIONS \[ss 55ZF–55ZI\]](#)

[5665] 55ZG Compliance with Legal Services Directions

(1) The following persons or bodies must comply with Legal Services Directions that have been published and with Legal Services Directions of which the person or body has been notified:

- (a) a person or body referred to in subsection [55N\(1\)](#);
- (b) a person or body referred to in subsection [55N\(2\)](#), in relation to a matter, if the AGS is acting for the person or body in that matter;
- (c) a person or body in respect of whom the Attorney-General has made a request under subsection [55N\(3\)](#), in relation to a matter, if the AGS is acting for the person or the body in that matter;
- (d) a person or body in respect of whom the AGS has made a determination under subsection [55N\(4\)](#), in relation to a matter, if the AGS is acting for the person or body in that matter;
- (e) the AGS;
- (f) a legal practitioner or firm of legal practitioners, in relation to a matter, if the legal practitioner or firm is acting for a person or body referred to in subsection [55N\(1\)](#) in that matter.

[subs (1) am Act 64 of 2015 s 3 and Sch 1 item 16, effective 1 July 2015]

(2) Compliance with a Legal Services Direction is not enforceable except by, or upon the application of, the Attorney-General.

(3) The issue of non-compliance with a Legal Services Direction may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth.



User Name: REECE STORME FERRARA

Date and Time: Friday, September 23, 2022 1:51:00 AM AEST

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Document (1)

1. [\(CTH\) Judiciary Act 1903 \[5670\] s 55ZH Legal Services Directions and legal professional privilege](#)

Client/Matter: -None-

(CTH) Judiciary Act 1903 [5670] s 55ZH Legal Services Directions and legal professional privilege

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: June 2007

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIC ATTORNEY-GENERAL'S LEGAL SERVICES DIRECTIONS \[ss 55ZF–55ZI\]](#)

[5670] 55ZH Legal Services Directions and legal professional privilege

(1) If a Legal Services Direction requires a person to provide any information, or produce a document or record, to another person, the person must not refuse to comply with the Direction on the ground of legal professional privilege or of any other duty of confidence.

(2) A person performing Commonwealth legal work (within the meaning of [subsection 55ZF\(3\)](#)) may provide information or produce a document or record relating to that work to the Attorney-General or to a person authorised by the Attorney-General for that purpose.

(3) If:

- (a) a person provides information or produces a document or record under subsection (2); and
- (b) the person would, apart from this subsection, be breaching legal professional privilege or any other duty of confidence in so doing;

the person is taken, for all purposes, not to have breached legal professional privilege or the duty of confidence in so providing the information or producing the document or record.

(4) If a communication that is the subject of legal professional privilege is disclosed under subsection (1) or (2), then, in spite of the disclosure, privilege is taken not to have been waived in respect of the communication.

Section 55ZG Generally

[5670.5] Waiver of privilege

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) subs 55ZH(1), subs 55ZF(2), subs 55ZF(3), subs 55ZF(4).

In *NSW Council for Civil Liberties Inc v Classification Review Board (No 1)* [2006] FCA 1409; [BC200608819](#) at [23] , Edmonds J said that:

[23]... [w]hile cl 10 of the Legal Services Directions 2005 is confined to sharing of legal advice within government, [subs 55ZH\(1\)](#) of the Judiciary Act 1903 (Cth) is not confined to cl 10 of the Legal Services Directions 2005 but extends to any requirement of a Legal Services Direction of the kind described whether the person to whom the information is being provided or the document is being produced is within government or not. Moreover, having regard to the definition of "Commonwealth legal work" in [subs 55ZF\(3\)](#), in particular sub-para (b)(iii), [subs 55ZF\(2\)](#) is clearly not confined to the provision of information or the production of a document to the Attorney-General, or to a person authorised by him, in which Commonwealth privilege already subsists. So understood, a provision such as a [subs 55ZF\(4\)](#) is necessary to prevent waiver of privilege where the privilege holder is not the Commonwealth.

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User Name: REECE STORME FERRARA

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Document (1)

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

Client/Matter: -None-

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

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES [ss 56–67]

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.

User Name: REECE STORME FERRARA

Date and Time: Friday, 23 September 2022 5:13:00 AM AEST

Job Number: 180092389

Documents (56)

1. [\[6325\] s 77A Trial without jury](#)

Client/Matter: -None-

2. [\[6330\] s 77B Power of High Court to direct trial with jury](#)

Client/Matter: -None-

3. [\[6335\] s 77C Trial of an issue and new trials](#)

Client/Matter: -None-

4. [\[6340\] s 77D Juries](#)

Client/Matter: -None-

5. [\[6445\] s 77E Production of books](#)

Client/Matter: -None-

6. [\[6450\] s 77F Oaths and affirmations](#)

Client/Matter: -None-

7. [\[6455\] s 77G Orders and commissions for examination of witnesses](#)

Client/Matter: -None-

8. [\[6460\] s 77H Oral and affidavit evidence](#)

Client/Matter: -None-

9. [\[6565\] s 77J Amendment](#)

Client/Matter: -None-

10. [\[6570\] s 77K Formal defects not to invalidate](#)

Client/Matter: -None-

11. [\[6575\] s 77L Reserved judgments](#)

Client/Matter: -None-

12. [\[6775\] s 77M Enforcement of judgments](#)

Client/Matter: -None-

13. [\[6780\] s 77MA Interest up to judgment](#)

Client/Matter: -None-

14. [\[6785\] s 77N Interest on judgment debts](#)

Client/Matter: -None-

15. [\[6790\] s 77P Interpleader](#)

Client/Matter: -None-

16. [\[6795\] s 77Q Discharge of property taken in execution](#)

Client/Matter: -None-

17. [\[6895\] s 77R Receivers and managers](#)

Client/Matter: -None-

18. [\[6900\] s 77RA Definitions](#)

- Client/Matter:** -None-
19. [\[6905\] s 77RB Powers of High Court not affected](#)
- Client/Matter:** -None-
20. [\[6910\] s 77RC Other laws not affected](#)
- Client/Matter:** -None-
21. [\[6915\] s 77RD Safeguarding public interest in open justice](#)
- Client/Matter:** -None-
22. [\[6920\] s 77RE Power to make orders](#)
- Client/Matter:** -None-
23. [\[6925\] s 77RF Grounds for making an order](#)
- Client/Matter:** -None-
24. [\[6930\] s 77RG Procedure for making an order](#)
- Client/Matter:** -None-
25. [\[6935\] s 77RH Interim orders](#)
- Client/Matter:** -None-
26. [\[6940\] s 77RI Duration of orders](#)
- Client/Matter:** -None-
27. [\[6945\] s 77RJ Exception for court officials](#)
- Client/Matter:** -None-
28. [\[6950\] s 77RK Contravention of order](#)
- Client/Matter:** -None-
29. [\[6955\] s 77RL Definitions](#)
- Client/Matter:** -None-
30. [\[6960\] s 77RM Powers of the High Court not affected](#)
- Client/Matter:** -None-
31. [\[6965\] s 77RN Making vexatious proceedings orders](#)
- Client/Matter:** -None-
32. [\[6970\] s 77RO Notification of vexatious proceedings orders](#)
- Client/Matter:** -None-
33. [\[6975\] s 77RP Proceedings in contravention of vexatious proceedings order](#)
- Client/Matter:** -None-
34. [\[6980\] s 77RQ Application for leave to institute proceedings](#)
- Client/Matter:** -None-
35. [\[6985\] s 77RR Dismissing application for leave](#)
- Client/Matter:** -None-
36. [\[6990\] s 77RS Granting application for leave](#)
- Client/Matter:** -None-
37. [\[7690\] THE SCHEDULE](#)
- Client/Matter:** -None-
38. [\[7005\] s 77S Security](#)
- Client/Matter:** -None-
39. [\[7010\] s 77T Institution of appeals](#)
- Client/Matter:** -None-
40. [\[7015\] s 77U Stay of proceedings](#)

Client/Matter: -None-

41. [\[7020\] s 77V Death of party to an appeal](#)

Client/Matter: -None-

42. [\[7125\] s 78 Appearance of parties](#)

Client/Matter: -None-

43. [\[7130\] s 78AA State includes Australian Capital Territory and Northern Territory](#)

Client/Matter: -None-

44. [\[7135\] s 78A Intervention by Attorneys-General](#)

Client/Matter: -None-

45. [\[7140\] s 78B Notice to Attorneys-General](#)

Client/Matter: -None-

46. [\[7245\] s 79 State or Territory laws to govern where applicable](#)

Client/Matter: -None-

47. [\[7250\] s 80 Common law to govern](#)

Client/Matter: -None-

48. [\[7255\] s 80A Application of sections 79 and 80 to Territory courts](#)

Client/Matter: -None-

49. [\[7260\] s 81 Security of the peace and for good behaviour](#)

Client/Matter: -None-

50. [\[7365\] s 82 Venue in suits for penalties](#)

Client/Matter: -None-

51. [\[7370\] s 83 Venue in suits for taxes](#)

Client/Matter: -None-

52. [\[7375\] s 84 Venue in suits for forfeiture](#)

Client/Matter: -None-

53. [\[7380\] s 85 Property seized as forfeited](#)

Client/Matter: -None-

54. [\[7485\] s 86 Rules of Court](#)

Client/Matter: -None-

55. [\[7490\] s 87 Application of sections 48, 48A, 48B, 49 and 50 of the Acts Interpretation Act 1901](#)

Client/Matter: -None-

56. [\[7590\] s 88 Regulations](#)

Client/Matter: -None-

(CTH) Judiciary Act 1903 [6325] s 77A Trial without jury

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XA PROCEDURE OF THE HIGH COURT [ss 77A–77R] > DIVISION 1 TRIALS [ss 77A–77D]

PART XA PROCEDURE OF THE HIGH COURT [ss 77A–77R]

DIVISION 1 TRIALS [ss 77A–77D]

[6325] 77A Trial without jury

In every suit in the High Court, unless the Court otherwise orders, the trial shall be by a Justice without a jury.

Section 77A Generally

[6325.5] Discretion to order trial by jury

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77A.

[Section 77A](#) substantially reproduces the provisions of s 12 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. See *Huntley v Alexander* (1922) 30 CLR 566 [CB](#) for a discussion of the court's discretion in ordering trial without jury under the former s 12 of the High Court Procedure Act.

(CTH) Judiciary Act 1903 [6330] s 77B Power of High Court to direct trial with jury

Practice & Procedure High Court & Federal Court of Australia
Current to: Act 3 of 2022 • Commentary Published: February 2001
Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 1 TRIALS \[ss 77A–77D\]](#)

[6330] 77B Power of High Court to direct trial with jury

The High Court may, in any suit in which the ends of justice appear to render it expedient to do so, direct the trial with a jury of the suit or of an issue of fact, and may for that purpose make all such orders, issue all such writs and cause all such proceedings to be had and taken as the Court thinks necessary, and upon the finding of the jury the Court may give such decision and pronounce such judgment as the case requires.

Section 77B Generally

[6330.5] Trial by jury

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77B.

[Section 77B](#) substantially reproduces the provisions of s 13 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. For consideration of applications for trial by jury, see *McDermott v Collien* (1953) 87 CLR 154 [CB](#) and *Huntley v Alexander* (1922) 30 CLR 566 [CB](#).

In *McDermott v Collien* (1953) 87 CLR 154 at 157, Fullagar J said: “Trial by jury is the normal mode of trial of actions in this court, and some special reason must be shown for a departure in any particular case from that mode. The second thing that seems clear is that it is not enough to show that the cause of action is of a kind which could quite properly be tried with a jury and which was normally tried with a jury before the Judicature Act 1873 ... ”

See also *Huntley v Alexander*, *above*; and *Henry v Commonwealth* [1937] ALR 409 [CB](#) where an application for trial of an action for damages by jury was refused.

(CTH) Judiciary Act 1903 [6335] s 77C Trial of an issue and new trials

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 1 TRIALS \[ss 77A–77D\]](#)

[6335] 77C Trial of an issue and new trials

(1) The High Court may, in any case in which the Court directs the trial of an issue or grants a new trial, impose such conditions on a party, and direct such submissions to be made by a party, for the purpose of the trial or new trial as are just.

(2) Where the High Court grants a new trial, the Court may:

- (a) grant the new trial, either generally or on particular issues only, as the Court thinks fit; and
- (b) order that testimony of a witness examined at the former trial may be used in the new trial in such manner as is specified in the order.

End of Document

(CTH) Judiciary Act 1903 [6340] s 77D Juries

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 1 TRIALS \[ss 77A–77D\]](#)

[6340] 77D Juries

(1) Subject to [subsection \(4\)](#) and to any other law of the Commonwealth, the laws in force in a State or Territory relating to:

- (a) the qualification of jurors;
- (b) the preparation of jury lists and jury panels;
- (c) the summoning, attendance and impanelling of juries;
- (d) the number of jurors;
- (e) the right of challenge;
- (f) the discharge of juries;
- (g) the disagreement of jurors;
- (h) the remuneration of jurors; and
- (i) other matters concerning jurors after they have been summoned, appointed or sworn;

that apply for the purposes of the trial of civil proceedings in the Supreme Court of that State or Territory extend and shall be applied in civil matters in which a trial is had with a jury in the High Court in that State or Territory.

(2) Subject to [subsection \(4\)](#) and to any other law of the Commonwealth, the laws in force in a State or Territory relating to the matters mentioned in [paragraphs \(1\)\(a\) to \(i\)](#), inclusive, that apply for the purposes of the trial of criminal matters in the Supreme Court of that State or Territory extend and shall be applied in the trial of indictable offences in the High Court in that State or Territory.

(3) For the purposes of a trial of a civil or criminal matter in the High Court in a State or Territory as mentioned in [subsection \(1\)](#) or [\(2\)](#), the lists of jurors made for the purposes of the Supreme Court of the State or Territory shall be deemed to have been made as well for the purposes of the High Court.

(4) The precept for a jury shall be issued by the Registrar or such other officer of the High Court as the Court directs, and the Marshal shall prepare the jury panels and summon jurors.

(5) An officer of a State or Territory who has the custody of a jury list shall furnish a copy of the list to the proper officer of the Commonwealth on demand and on payment of a reasonable fee.

End of Document

(CTH) Judiciary Act 1903 [6445] s 77E Production of books

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 2 EVIDENCE [ss 77E–77H]**

DIVISION 2 EVIDENCE [ss 77E–77H]

[6445] 77E Production of books

(1) The High Court may in any suit order a party to produce any books or writings in his or her possession or power that contain evidence pertinent to any issue in the suit.

[subs (1) am Act 141 of 1994 s 4 and Sch 2]

(2) If a party fails to comply with an order under [subsection \(1\)](#), the High Court may:

- (a) where the party is the plaintiff — dismiss the suit; or
- (b) where the party is the defendant — give judgment against the defendant as by default.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [6450] s 77F Oaths and affirmations

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 2 EVIDENCE \[ss 77E–77H\]](#)

[6450] 77F Oaths and affirmations

(1) The High Court may require and administer all necessary oaths and affirmations.

(2)

[subs (2) rep Act 3 of 1995 s 24]

(3)

[subs (3) rep Act 175 of 1995 s 3 and Sch 2]

(4)

[subs (4) rep Act 3 of 1995 s 24]

End of Document

(CTH) Judiciary Act 1903 [6455] s 77G Orders and commissions for examination of witnesses

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 2 EVIDENCE \[ss 77E–77H\]](#)

[6455] 77G Orders and commissions for examination of witnesses

The High Court may, in any cause pending in the Court and at any stage of the proceedings:

- (a) order the examination of a person upon oath orally or on interrogatories before the Court, an officer of the Court or another person at any place within Australia; or
- (b) order that a commission issue to a person, either within or beyond Australia, authorizing him or her to take the testimony upon oath of a person orally or on interrogatories;

and the Court may;

- (c) by the same or a subsequent order give any necessary directions concerning the time, place and manner of the examination; and
- (d) empower any party to the cause to give in evidence in the cause the testimony so taken on such terms (if any) as the Court directs.

[s 77G am Act 141 of 1994 s 4 and Sch 2]

★

Editor's Note: [Section 77F\(2\)](#) and [s 77F\(4\)](#) were repealed by the Evidence (Transitional Provisions and Consequential Amendments) Act 1995 No 3.

However, s 14 of the Evidence (Transitional Provisions and Consequential Amendments) Act provided for the continued application of the repealed provisions in relation to proceedings the hearing of which began before the repeal.

The repealed provisions provided as follows:

“(2) A person may, for the purposes of any proceeding before the High Court, make an affirmation instead of an oath.

...

“(4) Subject to the Rules of Court, the forms of oaths and affirmations shall be the same, as nearly as practicable, as those that are used in the Supreme Court of the State or Territory in which the oath or affirmation is administered.”

End of Document

(CTH) Judiciary Act 1903 [6460] s 77H Oral and affidavit evidence

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 2 EVIDENCE \[ss 77E–77H\]](#)

[6460] 77H Oral and affidavit evidence

(1) On the hearing of any matter, not being the trial of a cause, evidence may be given by affidavit or as otherwise directed or allowed by the High Court.

(2) At the trial of a cause, proof may be given by affidavit of the service of a document in or incidental to the proceedings in the cause or of the signature of a party to the cause or of his or her solicitor to such a document.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) The High Court may at any time, for sufficient reason and on such conditions as are just, order that particular facts may be proved by affidavit at the trial of a cause, or that the affidavit of a person may be read at the trial of a cause.

(4) Notwithstanding any order under [subsection \(3\)](#), if a party to a cause desires in good faith that the maker of an affidavit (other than an affidavit referred to in [subsection \(2\)](#)) proposed to be used in the cause be cross-examined with respect to the matters in the affidavit, the affidavit may not be used in the cause unless that person appears as a witness for cross-examination or the High Court, in its discretion, permits the affidavit to be used without the person so appearing.

(5) If the parties to a suit so agree and the High Court does not otherwise order, testimony at the trial of the suit may be given by affidavit.

(6) Subject to the foregoing provisions of this section, testimony at the trial of a cause shall be given orally.

(CTH) Judiciary Act 1903 [6565] s 77J Amendment

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 3 DEFECTS AND ERRORS [ss 77J, 77K]**

DIVISION 3 DEFECTS AND ERRORS [ss 77J, 77K]

[6565] 77J Amendment

(1) At any stage of a proceeding before the High Court, the Court may, on such terms as are just, make such amendment as it thinks necessary to correct any defect or error in the proceeding.

(2) All necessary amendments shall be made for the purpose of determining the real questions in controversy or otherwise depending on the proceedings.

End of Document

(CTH) Judiciary Act 1903 [6570] s 77K Formal defects not to invalidate

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 3 DEFECTS AND ERRORS \[ss 77J, 77K\]](#)

[6570] 77K Formal defects not to invalidate

(1) No proceedings in the High Court are invalidated by a formal defect or an irregularity unless the Court is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of the Court.

(2) The High Court may, on such conditions (if any) as the Court thinks fit, make an order declaring that a proceeding is not invalid by reason of a defect that it considers to be formal, or by reason of an irregularity.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [6575] s 77L Reserved judgments

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 4 RESERVED JUDGMENTS [s 77L]**

DIVISION 4 RESERVED JUDGMENTS [s 77L]

[6575] 77L Reserved judgments

(1) When any cause or matter, after being fully heard before a Full Court, is ordered to stand for judgment, it is not necessary that all the Justices before whom it was heard be present together in court to declare their opinions on the cause or matter, but the opinion of any of them may be reduced to writing and may be read or otherwise made known by any other Justice at any subsequent sitting of a Full Court at which judgment in the cause or matter is delivered. At that subsequent sitting, it is only necessary for a single Justice to be present in court for the purpose of delivering that judgment.

[subs (1) am Act 84 of 1994 s 88]

(2) In any such case the question shall be decided in the same manner, and the judgment of the Court has the same force and effect, as if the Justice whose opinion is so read or otherwise made known had been present in court and had declared his or her opinion in person.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [6775] s 77M Enforcement of judgments

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > DIVISION 5 JUDGMENT AND EXECUTION [ss 77M–77Q]

DIVISION 5 JUDGMENT AND EXECUTION [ss 77M–77Q]

[6775] 77M Enforcement of judgments

(1) Subject to the Rules of Court, a person in whose favour a judgment of the High Court is given is entitled to the same remedies for the enforcement of the judgment in a State or Territory, by execution or otherwise, against the person, or against the property of the person, against whom the judgment is given, as are allowed in like cases by the laws of that State or Territory to persons in whose favour a judgment of the Supreme Court of that State or Territory is given.

(2) This section does not affect the operation of any provision made by or under any other Act or by the Rules of Court for the execution and enforcement of judgments of the High Court.

Section 77M Generally

[6775.5] Non-payment of costs of appeal

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77M.

(CTH) [High Court Rules 1952](#) O XXXV.

[Section 77M](#) substantially reproduces the provisions of s 26 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. In *Lysaght Bros & Co Ltd v Falk (No 2)* (1905) 2 CLR 443 at 445–6, Griffith CJ noted that O XXXV of the High Court Rules imposed a limitation on the remedies available for enforcement of an order of the court for the payment of money to a person, by precluding enforcement through a writ of attachment. It followed that an order of the High Court for payment of the costs of an appeal from a state Supreme Court would not be enforced by attachment.

End of Document

(CTH) Judiciary Act 1903 [6780] s 77MA Interest up to judgment

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6780] 77MA Interest up to judgment

(1) In any proceedings, other than proceedings on appeal, for the recovery of any money (including any debt or damages or the value of any goods) in respect of a cause of action that arises after the commencement of this section, the High Court shall, upon application, unless good cause is shown to the contrary, either:

- (a) order that there be included in the sum for which judgment is given interest at such rate as the Court thinks fit on the whole or any part of the money for the whole or part of the period between the date when the cause of action arose and the date as of which judgment is entered; or
- (b) without proceeding to calculate interest in accordance with [paragraph \(a\)](#), order that there be included in the sum for which judgment is given a lump sum in lieu of any such interest.

(2) [Subsection \(1\)](#) does not:

- (a) authorize the giving of interest upon interest or of a sum in lieu of such interest;
- (b) apply in relation to any debt upon which interest is payable as of right whether by virtue of an agreement or otherwise;
- (c) affect the damages recoverable for the dishonour of a bill of exchange;
- (d) limit the operation of any enactment or rule of law which, apart from this section, provides for the award of interest; or
- (e) authorize the giving of interest, or a sum in lieu of interest, otherwise than by consent, upon any sum for which judgment is given by consent.

(3) Where the sum for which judgment is given (in this subsection referred to as **the relevant sum**) includes, or where the High Court, in its absolute discretion, determines that the relevant sum includes, any amount for:

- (a) compensation in respect of liabilities incurred which do not carry interest as against the person claiming interest or claiming a sum in lieu of interest;
- (b) compensation for loss or damage to be incurred or suffered after the date on which judgment is given; or
- (c) exemplary or punitive damages;

interest, or a sum in lieu of interest, shall not be given under [subsection \(1\)](#) in respect of any such amount or in respect of so much of the relevant sum as in the opinion of the Court represents any such amount.

(4) [Subsection \(3\)](#) shall not be taken to preclude interest or a sum in lieu of interest being given, pursuant to this section, upon compensation in respect of a liability of the kind referred to in [paragraph \(3\)\(a\)](#) where that liability has been met by the plaintiff, as from the date upon which that liability was so met.

End of Document

(CTH) Judiciary Act 1903 [6785] s 77N Interest on judgment debts

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6785] 77N Interest on judgment debts

A judgment debt under a judgment of the High Court carries interest, at such rate as is fixed by the Rules of Court, from the date as of which the judgment is entered.

Section 77N Generally

[6785.5] Section 77N excludes state laws providing for interest

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 77N, s 79.

[Section 77N](#) substantially reproduces the provisions of s 26A of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. In *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 ; [6 ALR 433](#) at [436](#) [CB](#), Mason J held that the former s 26A was a “comprehensive expression of the entitlement in this court of a litigant to interest on damages to the exclusion of any provision in state law which would otherwise be made applicable by virtue of [s 79](#)”.

(CTH) Judiciary Act 1903 [6790] s 77P Interpleader

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6790] 77P Interpleader

When any claim is made to property taken in execution upon process issued out of the High Court, the Marshal or a Deputy Marshal may take in the Supreme Court of the State or Territory in which the property is situated the same proceedings by way of interpleader as if the process had been issued out of that Supreme Court, and that Supreme Court and the Judges of that Supreme Court have jurisdiction to entertain and determine the matter.

Section 77P Generally

[6790.5] Power of sheriff to sell goods

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77P.

[Section 77P](#) substantially reproduces the provisions of s 27 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. In *Dent v Snell* (1927) 43 WN (NSW) 140, the powers of the sheriff under the former s 27 of the High Court Procedure Act to sell goods not returned by the court to a claimant were considered.

End of Document

(CTH) Judiciary Act 1903 [6795] s 77Q Discharge of property taken in execution

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6795] 77Q Discharge of property taken in execution

A seizure or attachment of property in execution upon process issued out of the High Court becomes inoperative upon the occurrence of any event by which, according to the laws of the State or Territory in which the property is situated, the seizure or attachment would become inoperative if made upon like process issued out of the Supreme Court of that State or Territory.

End of Document

(CTH) Judiciary Act 1903 [6895] s 77R Receivers and managers

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 6 RECEIVERS AND MANAGERS [s 77R]**

DIVISION 6 RECEIVERS AND MANAGERS [s 77R]

[6895] 77R Receivers and managers

(1) The High Court may, at any stage of a proceeding and on such terms and conditions as the Court thinks fit, appoint a receiver or manager in any case in which it appears to the Court to be just or convenient to do so.

(2) A receiver or manager appointed under [subsection \(1\)](#) may, without the previous leave of the High Court, be sued in respect of any act or transaction done or entered into by him or her in carrying on the business connected with the property of which he or she is receiver or manager.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) When in any cause pending in the High Court a receiver or manager appointed by the Court is in possession of any property, the receiver or manager shall manage and deal with the property according to the requirements of the laws of the State or Territory in which the property is situated in the same manner as that in which the owner or possessor of the property would be bound to do if in possession of the property.

End of Document

(CTH) Judiciary Act 1903 [6900] s 77RA Definitions

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RA–77RK] > DIVISION 1 PRELIMINARY [ss 77RA–77RC]

PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RA–77RK]

[Pt XAA insrt Act 186 of 2012 s 3 and Sch 2 item 8, effective 12 December 2012]

DIVISION 1 PRELIMINARY [ss 77RA–77RC]

[6900] 77RA Definitions

In this Part:

information includes any document.

news publisher means a person engaged in the business of publishing news or a public or community broadcasting service engaged in the publishing of news through a public news medium.

non-publication order means an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information).

party to a proceeding includes the complainant or victim (or alleged victim) in a criminal proceeding and any person named in evidence given in a proceeding and, in relation to a proceeding that has concluded, means a person who was a party to the proceeding before the proceeding concluded.

proceeding means a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding, and also includes an appeal.

publish means disseminate or provide access to the public or a section of the public by any means, including by:

- (a) publication in a book, newspaper, magazine or other written publication; or
- (b) broadcast by radio or television; or
- (c) public exhibition; or
- (d) broadcast or publication by means of the internet.

suppression order means an order that prohibits or restricts the disclosure of information (by publication or otherwise).

End of Document

(CTH) Judiciary Act 1903 [6905] s 77RB Powers of High Court not affected

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[6905] 77RB Powers of High Court not affected

This Part does not limit or otherwise affect any powers that the High Court has apart from this Part to regulate its proceedings or to deal with a contempt of the Court.

End of Document

(CTH) Judiciary Act 1903 [6910] s 77RC Other laws not affected

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[6910] 77RC Other laws not affected

This Part does not limit or otherwise affect the operation of a provision made by or under any Act (other than this Act) that prohibits or restricts, or authorises a court to prohibit or restrict, the publication or other disclosure of information in connection with proceedings.

End of Document

(CTH) Judiciary Act 1903 [6915] s 77RD Safeguarding public interest in open justice

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RD–77RK]

[6915] 77RD Safeguarding public interest in open justice

In deciding whether to make a suppression order or non-publication order, the High Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

End of Document

(CTH) Judiciary Act 1903 [6920] s 77RE Power to make orders

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Current to: Act 3 of 2022

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[6920] 77RE Power to make orders

(1) The High Court may, by making a suppression order or non-publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:

- (a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or
- (b) information that relates to a proceeding before the Court and is:
 - (i) information that comprises evidence or information about evidence; or
 - (ii) information obtained by the process of discovery; or
 - (iii) information produced under a subpoena; or
 - (iv) information lodged with or filed in the Court.

(2) The High Court may make such orders as it thinks appropriate to give effect to an order under [subsection \(1\)](#).

End of Document

(CTH) Judiciary Act 1903 [6925] s 77RF Grounds for making an order

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Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6925] 77RF Grounds for making an order

(1) The High Court may make a suppression order or non-publication order on one or more of the following grounds:

- (a) the order is necessary to prevent prejudice to the proper administration of justice;
- (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
- (c) the order is necessary to protect the safety of any person;
- (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).

(2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

End of Document

(CTH) Judiciary Act 1903 [6930] s 77RG Procedure for making an order

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Current to: Act 3 of 2022

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[6930] 77RG Procedure for making an order

(1) The High Court may make a suppression order or non-publication order on its own initiative or on the application of:

- (a) a party to the proceeding concerned; or
- (b) any other person considered by the Court to have a sufficient interest in the making of the order.

(2) Each of the following persons is entitled to appear and be heard by the High Court on an application for a suppression order or non-publication order:

- (a) the applicant for the order;
- (b) a party to the proceeding concerned;
- (c) the Government (or an agency of the Government) of the Commonwealth or a State or Territory;
- (d) a news publisher;
- (e) any other person who, in the Court's opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made.

(3) A suppression order or non-publication order may be made at any time during a proceeding or after a proceeding has concluded.

(4) A suppression order or non-publication order may be made subject to such exceptions and conditions as the High Court thinks fit and specifies in the order.

(5) A suppression order or non-publication order must specify the information to which the order applies with sufficient particularity to ensure that the court order is limited to achieving the purpose for which the order is made.

(CTH) Judiciary Act 1903 [6935] s 77RH Interim orders

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Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6935] 77RH Interim orders

(1) If an application is made to the High Court for a suppression order or non-publication order, the Court may, without determining the merits of the application, make the order as an interim order to have effect, subject to revocation by the Court, until the application is determined.

(2) If an order is made as an interim order, the High Court must determine the application as a matter of urgency.

End of Document

(CTH) Judiciary Act 1903 [6940] s 77RI Duration of orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6940] 77RI Duration of orders

- (1) A suppression order or non-publication order operates for the period decided by the High Court and specified in the order.
- (2) In deciding the period for which an order is to operate, the High Court is to ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made.
- (3) The period for which an order operates may be specified by reference to a fixed or ascertainable period or by reference to the occurrence of a specified future event.

End of Document

(CTH) Judiciary Act 1903 [6945] s 77RJ Exception for court officials

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Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6945] 77RJ Exception for court officials

A suppression order does not prevent a person from disclosing information if the disclosure is not by publication and is in the course of performing functions or duties or exercising powers in a public official capacity:

- (a) in connection with the conduct of a proceeding or the recovery or enforcement of any penalty imposed in a proceeding; or
- (b) in compliance with any procedure adopted by the High Court for informing a news publisher of the existence and content of a suppression order or non-publication order made by the Court.

End of Document

(CTH) Judiciary Act 1903 [6950] s 77RK Contravention of order

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Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6950] 77RK Contravention of order

(1) A person commits an offence if:

- (a) the person does an act or omits to do an act; and
- (b) the act or omission contravenes an order made by the High Court under [section 77RE](#).

Penalty: Imprisonment for 12 months, 60 penalty units or both.

(2) An act or omission that constitutes an offence under this section may be punished as a contempt of court even though it could be punished as an offence.

(3) An act or omission that constitutes an offence under this section may be punished as an offence even though it could be punished as a contempt of court.

(4) If an act or omission constitutes both an offence under this section and a contempt of court, the offender is not liable to be punished twice.

End of Document

(CTH) Judiciary Act 1903 [6955] s 77RL Definitions

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > **PART XAB VEXATIOUS PROCEEDINGS [ss 77RL–77RS]** > **DIVISION 1 PRELIMINARY [ss 77RL, 77RM]**

PART XAB VEXATIOUS PROCEEDINGS [ss 77RL–77RS]

[Pt XAB insrt Act 186 of 2012 s 3 and Sch 3 item 10, effective 11 June 2013]

DIVISION 1 PRELIMINARY [ss 77RL, 77RM]

[6955] 77RL Definitions

(1) In this Part:

Australian court or tribunal means a court or tribunal of the Commonwealth, a State or a Territory.

Chief Executive and Principal Registrar means the Chief Executive and Principal Registrar of the High Court appointed under section 18 of the High Court of Australia Act 1979.

institute , in relation to proceedings, includes:

- (a) for civil proceedings — the taking of a step or the making of an application that may be necessary before proceedings can be started against a party; and
- (b) for proceedings before a tribunal — the taking of a step or the making of an application that may be necessary before proceedings can be started before the tribunal; and
- (c) for criminal proceedings — the making of a complaint or the obtaining of a warrant for the arrest of an alleged offender; and
- (d) for civil or criminal proceedings or proceedings before a tribunal — the taking of a step or the making of an application that may be necessary to start an appeal in relation to the proceedings or to a decision made in the course of the proceedings.

proceeding :

- (a) in relation to a court — means a proceeding in the court, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding, and also includes an appeal; and
- (b) in relation to a tribunal — means a proceeding in the tribunal, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding.

proceedings of a particular type includes:

- (a) proceedings in relation to a particular matter; and

- (b) proceedings against a particular person.

vexatious proceeding includes:

- (a) a proceeding that is an abuse of the process of a court or tribunal; and
- (b) a proceeding instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
- (c) a proceeding instituted or pursued in a court or tribunal without reasonable ground; and
- (d) a proceeding conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

vexatious proceedings order means an order made under [subsection 77RN\(2\)](#).

(2) A reference in this Part to a person acting in concert with another person in instituting or conducting proceedings does not include a reference to a person who is so acting as a legal practitioner or representative of the other person.

End of Document

(CTH) Judiciary Act 1903 [6960] s 77RM Powers of the High Court not affected

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 1 PRELIMINARY \[ss 77RL, 77RM\]](#)

[6960] 77RM Powers of the High Court not affected

This Part does not limit or otherwise affect any powers that the High Court has apart from this Part to deal with vexatious proceedings.

End of Document

(CTH) Judiciary Act 1903 [6965] s 77RN Making vexatious proceedings orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > **DIVISION 2 VEXATIOUS PROCEEDINGS ORDERS [ss 77RN, 77RO]**

DIVISION 2 VEXATIOUS PROCEEDINGS ORDERS [ss 77RN, 77RO]

[6965] 77RN Making vexatious proceedings orders

(1) This section applies if the High Court is satisfied:

- (a) a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals; or
- (b) a person, acting in concert with another person who is subject to a vexatious proceedings order or who is covered by [paragraph \(a\)](#), has instituted or conducted a vexatious proceeding in an Australian court or tribunal.

(2) The High Court may make any or all of the following orders:

- (a) an order staying or dismissing all or part of any proceedings in the High Court already instituted by the person;
- (b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the High Court;
- (c) any other order the High Court considers appropriate in relation to the person.

Note:

Examples of an order under [paragraph \(c\)](#) are an order directing that the person may only file documents by mail, an order to give security for costs and an order for costs.

(3) The High Court may make a vexatious proceedings order on its own initiative or on the application of any of the following:

- (a) the Attorney-General of the Commonwealth or of a State or Territory;
- (b) the Chief Executive and Principal Registrar;
- (c) a person against whom another person has instituted or conducted a vexatious proceeding;
- (d) a person who has a sufficient interest in the matter.

(4) The High Court must not make a vexatious proceedings order in relation to a person without hearing the person or giving the person an opportunity of being heard.

(5) An order made under [paragraph \(2\)\(a\)](#) or [\(b\)](#) is a final order.

(6) For the purposes of [subsection \(1\)](#), the High Court may have regard to:

- (a) proceedings instituted (or attempted to be instituted) or conducted in any Australian court or tribunal; and
- (b) orders made by any Australian court or tribunal; and
- (c) the person's overall conduct in proceedings conducted in any Australian court or tribunal (including the person's compliance with orders made by that court or tribunal);

including proceedings instituted (or attempted to be instituted) or conducted, and orders made, before the commencement of this section.

End of Document

(CTH) Judiciary Act 1903 [6970] s 77RO Notification of vexatious proceedings orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 2 VEXATIOUS PROCEEDINGS ORDERS \[ss 77RN, 77RO\]](#)

[6970] 77RO Notification of vexatious proceedings orders

(1) A person may request the Chief Executive and Principal Registrar for a certificate stating whether a person named in the request is or has been the subject of a vexatious proceedings order.

(2) If a person makes a request under [subsection \(1\)](#) and the person named in the request is or has been the subject of a vexatious proceedings order, the Chief Executive and Principal Registrar must issue to the person making the request a certificate:

- (a) specifying the date of the order; and
- (b) specifying any other information prescribed by Rules of Court.

(3) This section is subject to any law of the Commonwealth, or order of the High Court, restricting the publication or disclosure of the name of a party to proceedings in the High Court.

Note:

Section 155 of the Evidence Act 1995 deals with adducing evidence of Commonwealth records.

End of Document

(CTH) Judiciary Act 1903 [6975] s 77RP Proceedings in contravention of vexatious proceedings order

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > **DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS [ss 77RP–77RS]**

DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS [ss 77RP–77RS]

[6975] 77RP Proceedings in contravention of vexatious proceedings order

(1) If the High Court makes a vexatious proceedings order prohibiting a person from instituting proceedings, or proceedings of a particular type, in the High Court:

- (a) the person must not institute proceedings, or proceedings of that type, in the High Court without the leave of the High Court under [section 77RS](#); and
- (b) another person must not, acting in concert with the person, institute proceedings, or proceedings of that type, in the High Court without the leave of the High Court under [section 77RS](#).

(2) If a proceeding is instituted in contravention of [subsection \(1\)](#), the proceeding is stayed.

(3) Without limiting [subsection \(2\)](#), the High Court may make:

- (a) an order declaring a proceeding is a proceeding to which [subsection \(2\)](#) applies; and
- (b) any other order in relation to the stayed proceeding it considers appropriate, including an order for costs.

(4) The High Court may make an order under [subsection \(3\)](#) on its own initiative or on the application of any of the following:

- (a) the Attorney-General of the Commonwealth or of a State or Territory;
- (b) the Chief Executive and Principal Registrar;
- (c) a person against whom another person has instituted or conducted a vexatious proceeding;
- (d) a person who has a sufficient interest in the matter.

(CTH) Judiciary Act 1903 [6980] s 77RQ Application for leave to institute proceedings

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS \[ss 77RP–77RS\]](#)

[6980] 77RQ Application for leave to institute proceedings

- (1) This section applies to a person (the **applicant**) who is:
 - (a) subject to a vexatious proceedings order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the High Court; or
 - (b) acting in concert with another person who is subject to an order mentioned in [paragraph \(a\)](#).
- (2) The applicant may apply to the High Court for leave to institute a proceeding that is subject to the order.
- (3) The applicant must file an affidavit with the application that:
 - (a) lists all the occasions on which the applicant has applied for leave under this section; and
 - (b) lists all other proceedings the applicant has instituted in any Australian court or tribunal, including proceedings instituted before the commencement of this section; and
 - (c) discloses all relevant facts about the application, whether supporting or adverse to the application, that are known to the applicant.
- (4) The applicant must not serve a copy of the application or affidavit on a person unless an order is made under [paragraph 77RS\(1\)\(a\)](#). If the order is made, the applicant must serve the copy in accordance with the order.

End of Document

(CTH) Judiciary Act 1903 [6985] s 77RR Dismissing application for leave

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS \[ss 77RP–77RS\]](#)

[6985] 77RR Dismissing application for leave

(1) The High Court, or a Justice sitting other than in open court, may make an order dismissing an application under [section 77RQ](#) for leave to institute a proceeding if the High Court or Justice considers the affidavit does not substantially comply with [subsection 77RQ\(3\)](#).

[subs (1) am Act 3 of 2022 s 3 and Sch 1 item 115, effective 18 February 2022]

(2) The High Court, or a Justice sitting other than in open court, must make an order dismissing an application under [section 77RQ](#) for leave to institute a proceeding if the High Court or Justice considers the proceeding is a vexatious proceeding.

[subs (2) am Act 3 of 2022 s 3 and Sch 1 item 115, effective 18 February 2022]

(3) The High Court, or a Justice sitting other than in open court, may dismiss the application without an oral hearing (either with or without the consent of the applicant).

[subs (3) am Act 3 of 2022 s 3 and Sch 1 item 115, effective 18 February 2022]

End of Document

(CTH) Judiciary Act 1903 [6990] s 77RS Granting application for leave

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS \[ss 77RP–77RS\]](#)

[6990] 77RS Granting application for leave

(1) Before the High Court makes an order granting an application under [section 77RQ](#) for leave to institute a proceeding, it must:

(a) order that the applicant serve:

- (i) the person against whom the applicant proposes to institute the proceeding; and
- (ii) any other person specified in the order;

with a copy of the application and affidavit and a notice that the person is entitled to be heard on the application; and

(b) give the applicant and each person described in [subparagraph \(a\)\(i\)](#) or [\(iii\)](#), on appearance, an opportunity to be heard at the hearing of the application.

(2) At the hearing of the application, the High Court may receive as evidence any record of evidence given, or affidavit filed, in any proceeding in any Australian court or tribunal in which the applicant is, or at any time was, involved either as a party or as a person acting in concert with a party.

(3) The High Court may make an order granting the application. The order may be made subject to the conditions the High Court considers appropriate.

(4) The High Court may grant leave only if it is satisfied the proceeding is not a vexatious proceeding.

End of Document

(CTH) Judiciary Act 1903 [7690] THE SCHEDULE

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > **[High Court — Principal Legislation](#)** > **[Judiciary Act 1903](#)**

[7690] THE SCHEDULE

[Section 65](#)

[Sch am Act 141 of 1994 s 4 and Sch 2; Act 31 of 2014 s 3 and Sch 1 items 46, 47, effective 24 June 2014]

FORM OF CERTIFICATE OF JUDGMENT

AB v The Commonwealth (*or as the case may be*).

I hereby certify that AB of (*address and occupation*) did on the _____ day of _____, 20____, obtain a judgment of the (*name of Court*) in his or her (*as the case may be*) favour and that by that judgment the sum of _____ was awarded to him or her (*as the case may be*).

Dated this _____ day of _____, 20____

Registrar (*or as the case may be*).

End of Document

(CTH) Judiciary Act 1903 [7005] s 77S Security

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XB APPEALS TO THE HIGH COURT [ss 77S–77V] > DIVISION 1 SECURITY [s 77S]

PART XB APPEALS TO THE HIGH COURT [ss 77S–77V]

DIVISION 1 SECURITY [s 77S]

[7005] 77S Security

(1) The Rules of Court may make provision for and in relation to the giving, in an appeal to the Court, of security for the prosecution of the appeal without delay and for the payment of costs that may be awarded against the appellant.

(2) If security is not given as required by or in accordance with the Rules of Court, the High Court may order that the appeal be dismissed.

(3) This section does not affect the operation of any provision made by or under any other Act for or in relation to the giving of security.

Section 77S Generally

[7005.5] Security for costs

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 2, s 35, s 35(2), s 77S, Section 77S(1).

(CTH) [High Court Rules 1952](#) High Court Rules, [18,845], [18,945].

Since the amendments to [s 35](#) of the Judiciary Act 1903 (by Act 12 of 1984), no appeal may be brought from a judgment of the Supreme Court of a state unless the High Court gives special leave to appeal: [s 35\(2\)](#). This requirement is reflected in the High Court Rules: O 69A (see [18,845]) deals with applications for special leave to appeal and O 70 (see [18,945]) deals with appeals per se. Only O 70 contains an express provision for security for costs.

[Section 77S](#) was inserted by Act 138 of 1979, 5 years before the amendments to [s 35](#). [Section 77S\(1\)](#) has remained unchanged. The term “appeal” as defined in [s 2](#) of the Judiciary Act 1903 does not include an application for special leave to appeal.

“Thus, neither within the [Judiciary Act](#) nor within the High Court Rules is any reference to be found on the subject of security for costs of the prosecution of an application for special leave to appeal ... I can find nothing in the [Judiciary Act](#) or in the High Court Rules from which it may be inferred that a power to order security for costs of an application for special leave to appeal is incidental and necessary to the exercise of some other power conferred on the court. Inherent power, if it exists at all in the present case, must exist because it is incidental and necessary to the exercise of the jurisdiction vested in the court. This is only another way of acknowledging the power of a court to regulate its procedure and prevent the abuse of its process, a power which may include the awarding of costs and the provision of security”: *Bahr v Nicolay (No 1)* (1987) 163 CLR 490; [72 ALR 361](#)  per Toohey J at 362–3.

End of Document

(CTH) Judiciary Act 1903 [7010] s 77T Institution of appeals

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XB APPEALS TO THE HIGH COURT \[ss 77S–77V\]](#) > **DIVISION 2 PROCEDURE [ss 77T–77V]**

DIVISION 2 PROCEDURE [ss 77T–77V]

[7010] 77T Institution of appeals

Appeals to the High Court shall be instituted within such time and in such manner as are prescribed by Rules of Court.

Section 77T Generally

[7010.5] Procedure for appeals

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77T.

[Section 77T](#) substantially reproduces the provisions of s 37 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. See *Grayndler v Cunich* (1939) 62 CLR 573 [CB](#), as to the procedure on appeal to the High Court from an inferior state court exercising federal jurisdiction.

Speaking of the former s 37 of the High Court Procedure Act, Griffith CJ, Barton and Gavan Duffy JJ said: “We think that compliance with the rules as to the time of instituting an appeal is a condition precedent to the coming into existence of a cause in the appellate jurisdiction [of the High Court]”: *Singh v Karbowsky* (1914) 18 CLR 197 at 201. Their Honours held that a failure, by an appellant, to provide security for costs within the time fixed by the High Court Rules brought to an end the appellant’s inchoate right to appeal.

(CTH) Judiciary Act 1903 [7015] s 77U Stay of proceedings

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XB APPEALS TO THE HIGH COURT \[ss 77S–77V\]](#) > [DIVISION 2 PROCEDURE \[ss 77T–77V\]](#)

[7015] 77U Stay of proceedings

When an appeal has been instituted, the High Court or the Court or Judge appealed from may order a stay of all or any proceedings under the judgment appealed from.

Section 77U Generally

[7015.5] Section 77U and applications for special leave

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 77U.

The jurisdiction to seek a stay under [s 77U](#) until an appeal is heard must be distinguished from the inherent jurisdiction of the court to grant a stay pending an application for special leave to appeal. In *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* (1986) 161 CLR 681; [69 ALR 265](#); 61 ALJR 102 [\[CB\]](#) the High Court considered the principles under which that court would grant a stay in the context of an application for special leave. The applicants attempted to ground the application under [s 77U](#) but the court held that the application came within the inherent jurisdiction and the stay was otherwise granted. It is a relevant consideration to establish that the applicant has taken whatever steps are necessary to seek a stay from the court in which the matter is pending but failure to so apply would not be fatal to the application for a stay being made in the first instance to the High Court. Brennan J said:

“When an application for special leave to appeal is made to this court, a jurisdiction to stay may be exercised by the court below and it is to that court — the court in which the matter is pending and which is familiar with the matter — that an application to stay should first be made. In this case the Court of Appeal, not wishing to pre-empt the view that may be expressed in this court, tailored its order accordingly. In future, there should be no inhibition on the court in which the matter is pending framing a stay order if a stay be appropriate, to avoid the necessity for application to this court”: ALR at 267.

“[T]he provisions of the present [s 77U](#) of the Judiciary Act 1903 ... are not such as implicitly to deprive this court of power to order a stay” of execution pending an appeal: *Patton v Minister for*

Defence (1987) 13 FCR 476; [71 ALR 637](#) at [639](#) ^{CB} per Pincus J. Such an application invokes the original, and not the appellate, jurisdiction of the court, execution of whose order is sought to be stayed: *Patton*, above, ALR at 640.

End of Document

(CTH) Judiciary Act 1903 [7020] s 77V Death of party to an appeal

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XB APPEALS TO THE HIGH COURT \[ss 77S–77V\]](#) > [DIVISION 2 PROCEDURE \[ss 77T–77V\]](#)

[7020] 77V Death of party to an appeal

(1) When a party to a judgment from which an appeal lies to the High Court has, whether before or after the commencement of this section, died before the time allowed for instituting an appeal has expired, it is not necessary to revive the cause or matter by any formal proceedings.

(2) If the personal representative of the deceased party desires to appeal, he or she may file in the Court by which the judgment was given or made a duly certified copy of the instrument by which he or she is appointed, and thereupon may institute an appeal in the same manner as the party whom he or she represents might have done.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) In the case of the death of the party in whose favour the judgment is given or made, notice of appeal may be given to his or her personal representative, or, if there is no such representative, to such person as the High Court directs.

[subs (3) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [7125] s 78 Appearance of parties

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XI SUPPLEMENTARY PROVISIONS [ss 78–88] > DIVISION 1 APPEARANCE OF PARTIES [s 78]

PART XI SUPPLEMENTARY PROVISIONS [ss 78–88]

DIVISION 1 APPEARANCE OF PARTIES [s 78]

[7125] 78 Appearance of parties

In every Court exercising federal jurisdiction the parties may appear personally or by such barristers or solicitors as by this Act or the laws and rules regulating the practice of those Courts respectively are permitted to appear therein.

Section 78 Generally

[7125.5] No right to counsel of choice

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 78.

[Section 78](#) of the Judiciary Act 1903 does not confer on a party to a proceeding before the Federal Court the right to counsel of the party's choice. Rather, s 78 confers on a party who does not wish to appear in person the right to the services of lawyers who are admitted to practice. Further, s 78 does not preclude the making of an order under s 50 of the Federal Court of Australia Act 1976 restricting access to certain evidence given in proceeding under the Native Title Act 1993 to persons of a particular gender, where the interests of justice dictated the making of such an order: *Western Australia v Ward (on behalf of Miriuwung Gajerrong Peoples)* (1997) 76 FCR 492; [145 ALR 512](#) at [521–2](#); [BC9702911](#)  (Hill and Sundberg JJ), disapproving *Yamirr v Northern Territory* (1997) 74 FCR 99; [143 ALR 687](#); [BC9701382](#) .

(CTH) Judiciary Act 1903 [7130] s 78AA State includes Australian Capital Territory and Northern Territory

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > **DIVISION 1A PROVISIONS RELATING TO CONSTITUTIONAL MATTERS [ss 78AA–78B]**

**DIVISION 1A PROVISIONS RELATING TO CONSTITUTIONAL MATTERS
[ss 78AA–78B]**

[7130] *78AA State includes Australian Capital Territory and Northern Territory

In this Division:

State includes the Australian Capital Territory and the Northern Territory.

[s 78AA subst Act 34 of 1997 s 3 and Sch 11]

*

Editor's note: Note 3 to Reprint No 4 (15 December 1992) of the Judiciary Act 1903 provides as follows in relation to [s 78AA](#):

“The [Judiciary Act 1903](#) was modified by regulation 2 and Schedule 1 of the ACT Self-Government (Consequential Provisions) Regulations as amended. The provision of Schedule 1 applicable to the abovementioned Act quoted below is not incorporated in this reprint.

[‘Section 78AA:](#)

After “includes” insert “the Australian Capital Territory and” .”

End of Document

(CTH) Judiciary Act 1903 [7135] s 78A Intervention by Attorneys-General

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 1A PROVISIONS RELATING TO CONSTITUTIONAL MATTERS \[ss 78AA–78B\]](#)

[7135] 78A Intervention by Attorneys-General

(1) The Attorney-General of the Commonwealth may, on behalf of the Commonwealth, and the Attorney-General of a State may, on behalf of the State, intervene in proceedings before the High Court or any other federal court or any court of a State or Territory, being proceedings that relate to a matter arising under the Constitution or involving its interpretation.

(2) Where the Attorney-General of the Commonwealth or of a State intervenes in proceedings in a court under this section, the court may, in the proceedings, make such order as to costs against the Commonwealth or the State, as the case may be, as the court thinks fit.

(3) Where the Attorney-General of the Commonwealth or of a State intervenes in proceedings in a court under this section, then, for the purposes of the institution and prosecution of an appeal from a judgment given in the proceedings, the Attorney-General of the Commonwealth or the State, as the case may be, shall be taken to be a party to the proceedings.

[subs (3) insrt Act 38 of 1988 s 3 and Sch 1]

(4) Where the Attorney-General of the Commonwealth or of a State institutes an appeal from a judgment given in proceedings in which the Attorney-General of the Commonwealth or the State, as the case may be, has intervened under this section, a court hearing the appeal may make such order as to costs against the Commonwealth or the State, as the case may be, as the court thinks fit.

[subs (4) insrt Act 38 of 1988 s 3 and Sch 1]

SECTION 78A GENERALLY

SECTION 78A(1)

[7135.2] Can Attorney-General intervene where already a party?

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78A, s 78A(1).

In *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 188 ALR 1; 76 ALJR 694 ^{CB}, four members of the High Court considered whether the Commonwealth Attorney-General could intervene under [s 78A\(1\)](#) in a matter in which a writ of certiorari was sought to quash orders made by a judge of the Federal Court, the applicant for the writ being the Commonwealth Attorney-General at the relation of the Australian Catholic Bishops Conference.

Gaudron and Gummow JJ suggested at [53]:

[U]pon its true construction, [s 78A](#) of the Judiciary Act does not authorise the Attorney-General to intervene in a proceeding which already is the Attorney-General's action, albeit on relation of private interests. Any other reading of [s 78A](#) may imperil its validity.

Hayne J noted, at [286], that the Attorney-General sought to intervene to make submissions which were, in part, contrary to those advanced in the Attorney-General's name in the application made at the relation of the Episcopal Conference. His Honour concluded:

It was not open to an Attorney-General who had granted a fiat for the institution of a proceeding thereafter to intervene in that proceeding or to make submissions either in support of or opposing the case advanced in the name of the Attorney-General as plaintiff or applicant in that proceeding.

On the other hand, Kirby J said, at [214], that there was no difficulty in the Attorney-General appearing to be in conflict with the relator over some parts of the relator's submissions, although his Honour was concerned primarily with the validity of the Attorney-General's fiat rather than with the question of whether [s 78A\(1\)](#) authorised the Attorney-General to intervene.

SECTION 78A(2)

[7135.5] Discretion of the court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78A, s 78B.

An order by the High Court in the exercise of its discretion concerning costs of proceedings before that court does not bind a state Supreme Court in relation to proceedings before the state Supreme Court. It is however desirable that a state court's order for costs reflect the same considerations as are inherent in the order of the High Court, if this is appropriate. Hence it is not a universal rule that private citizens, caught up in litigation involving the consideration of constitutional issues which are sufficient to warrant the intervention of the Attorney-General under [s 78B](#) of the Judiciary Act 1903, will automatically be entitled to costs from the Attorney-General: see *University of Wollongong v Metwally* (1985) 1 NSWLR 722 ^{CB}.

[I]t seems plain that the contemplated purpose of [s 78A](#) of the Judiciary Act 1903 was to provide only for increased costs to be ordered against the Commonwealth and the state ... To burden the Commonwealth and state with all the costs of the appeal might be unjust. They did not initiate the proceedings in the first place. The fact that proceedings between private parties incidentally raise constitutional questions does not remove the fact that it is the private litigants who are the initiators. The intervention of the law officers is provided for by the 1976 amendments to the [Judiciary Act 1903](#) as part of a scheme to obviate automatic removal to the High Court. It is also to ensure that the lower court, dealing with the matter, has the assistance of skilled intervention, if the case is judged sufficiently important to warrant that course. If a general rule were adopted by which it was established that intervention carried with it the price of an order to pay all of the costs of the proceedings in which the law officers intervened, the results might be undesirable.

To avoid such an order, intervention might be withheld in a case that would otherwise benefit from that course. Settlement of the dispute between the litigants might be delayed in the knowledge that the public purse would be ordered to pay the costs of litigation after intervention. The sanction of avoiding protracted intervention or unnecessary removal to the High Court would be swamped in the general regime for the payment of costs by the intervenor: *Australian Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497; 69 ALR 125 at 137 ^{CB} per Kirby P.

SECTION 78A(3)

[7135.10] Intervening Attorney-General becomes a party

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78A(3).

In *Cheesman v Waters* (1997) 77 FCR 221; [148 ALR 21](#) ^{CB}, the Full Federal Court held that, once the Attorney-General of the Commonwealth had intervened in proceedings, the Attorney-General became a party to those proceedings, including any appeal brought by one of the other parties. This result did not flow from [s 78A\(3\)](#), which was inserted by the Statute Law (Miscellaneous Provisions) Act 1988 to remove a doubt as to the Attorney-General's right to appeal, and not to confer a right of appeal which did not otherwise exist. According to the Full Court, comprising Hill, Heerey and Sundberg JJ at ALR 27:

... the fact that [\[s 78A\(3\)\]](#) requires the Attorney to be treated as a party for the purposes of an appeal by him, and is silent as to his status when someone else appeals, is not a reason for treating the subsection as providing by implication that when another party appeals, an Attorney who participates in the appeal does so otherwise than as a party ...

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(CTH) Judiciary Act 1903 [7140] s 78B Notice to Attorneys-General

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 1A PROVISIONS RELATING TO CONSTITUTIONAL MATTERS \[ss 78AA–78B\]](#)

[7140] 78B Notice to Attorneys-General

(1) Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.

(2) For the purposes of [subsection \(1\)](#), a court in which a cause referred to in that subsection is pending:

- (a) may adjourn the proceedings in the cause for such time as it thinks necessary and may make such order as to costs in relation to such an adjournment as it thinks fit;
- (b) may direct a party to give notice in accordance with that subsection; and
- (c) may continue to hear evidence and argument concerning matters severable from any matter arising under the Constitution or involving its interpretation.

(3) For the purposes of [subsection \(1\)](#), a notice in respect of a cause:

- (a) shall be taken to have been given to an Attorney-General if steps have been taken that, in the opinion of the court, could reasonably be expected to cause the matters to be notified to be brought to the attention of that Attorney-General; and
- (b) is not required to be given to the Attorney-General of the Commonwealth if he or she or the Commonwealth is a party to the cause and is not required to be given to the Attorney-General of a State if he or she or the State is a party to the cause.

[subs (3) am Act 141 of 1994 s 4 and Sch 2]

(4) The Attorney-General may authorize the payment by the Commonwealth to a party of an amount in respect of costs arising out of the adjournment of a cause by reason of this section.

(5) Nothing in [subsection \(1\)](#) prevents a court from proceeding without delay to hear and determine

proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where the court thinks it necessary in the interests of justice to do so.

Section 78B Generally

[7140.5] Meaning of “cause”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 2, s 78B(1).

The term “cause” as used in the section includes criminal proceedings: see [s 2](#). Proceedings for committal for a criminal offence on indictment are criminal proceedings notwithstanding that the magistrate hearing them acts in an executive capacity. Such proceedings are a “cause” for the purposes of [s 78B\(1\)](#): *Green v Jones* [\[1979\] 2 NSWLR 812](#); (1979) 39 FLR 428 [CB](#).

[7140.10] Genuine belief not sufficient

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78B(1).

A party to a cause forming a bona fide or genuine belief that the cause involves a matter arising under the Constitution is not sufficient to make it a matter for the purposes of [s 78B\(1\)](#): *Green v Jones* [\[1979\] 2 NSWLR 812](#); (1979) 39 FLR 428 [CB](#).

A cause does not “involve” a matter arising under the Constitution or involving its interpretation merely because someone asserts that it does. That is not to say that the strength or weakness of the proposition is critical [see *Green v Jones* [\[1979\] 2 NSWLR 812](#) at 817–18]. But it must be established that the challenge does involve a matter arising under the Constitution: *Re Finlayson; Ex parte Finlayson* (1997) 72 ALJR 73 at 74 per Toohey J, indorsed by Gummow, Hayne and Callinan JJ in *Glennan v Cmr of Taxation* [\(2003\) 198 ALR 250](#); 77 ALJR 1195 at [14] [CB](#).

The section only operates when the circumstances it postulates are made to appear to the court, not simply because the party asserts those circumstances: *Narain v Parnell* (1986) 9 FCR 479 at 489; [64 ALR 561](#), approved in *Australian Competition & Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292; [167 ALR 303](#); [\[1999\] FCA 1151](#); [BC9907104](#) at [\[13\]](#) [CB](#) (French J)

[7140.15] Who raises s 78B and when?

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78B.

It is for the parties to the proceedings to raise a point under [s 78B](#) and to obtain an adjournment at the earliest possible stage in order that the appropriate notices may be served: *Okmasich v Evans* (1980) 25 SASR 481.

[7140.20] Questions relating to state parliaments

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78B.

(CTH) [Commonwealth of the Australia Constitution Act](#) ss 106, 107.

The constitutions of the former colonies were not the same after federation as before; they continued “subject to this Constitution” and thus subjected to territorial limitations on state legislative powers inter se which are expressed or implied in the Australian Constitution ... Questions as to the legislative competence of state parliaments thus, within the meaning of [s 78B](#) of the Judiciary Act 1903 (Cth) ... involve a matter involving the interpretation of [ss 106](#) and [107](#) of the Constitution, even if that matter may not, in a particular case, arise under those provisions: *Boath v Wyvill* (1989) [85 ALR 621](#) at [634](#) per Sheppard, Beaumont and Gummow JJ.

[7140.25] Application of s 78B

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 40, s 78B, s 78B(2)(c).

[Section 78B](#) was criticised by Fitzgerald J in *Capelverre v Omega Developments Corp Pty Ltd* (1983) ATPR ¶40-386 on the ground that it would give rise to spurious or insubstantial claims which would lead to costly delays. For example, challenges could arise under [s 78B](#) where the High Court had decided the same issue in precisely the same circumstances, yet it would still be open to a party to raise the issue again, thereby holding up the state or territory court and wasting time in the High Court. Those observations may have occasioned the enactment of [s 78B\(2\)\(c\)](#): see *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* (2010) 184 FCR 516; [267 ALR 623](#); [\[2010\] FCA 428](#); [BC201002771](#) at [\[14\]](#) [CB](#).

[Section 78B](#) does not impose on a Court a duty not to proceed pending the issue of a notice no matter how trivial, unarguable or concluded the constitutional point may be. If the asserted constitutional point is frivolous or vexatious or raised as an abuse of process, it will not attach to the matter in which it is raised the character of a matter arising under the Constitution or involving its interpretation: *Nikolic v MGIC Ltd* [\[1999\] FCA 849](#); [BC9906969](#) [CB](#); *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292; [\(1999\) 167 ALR 303](#); [\[1999\] FCA 1151](#); [BC9907104](#) at [\[14\]](#) [CB](#) (French J); *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* (2010) 184 FCR 516; [267 ALR 623](#); [\[2010\] FCA 428](#); [BC201002771](#) at [\[14\]](#) [CB](#).

The courts in applying [s 78B](#) seem so far to have avoided these inherent problems. In *Green v Jones* [\[1979\] 2 NSWLR 812](#); (1979) 39 FLR 428 [CB](#), Hunt J refused an application for a declaration based on [s 78B](#), on the grounds that the circumstances did not justify an exceptional use of the declaratory power. However he also noted (NSWLR at 818; FLR at 435) that although the challenge technically fell under [s 78B](#), it was unlikely that the section “was intended to permit never-ending challenges to matters which have already been determined (particularly recently) by the High Court”.

Similarly, in *In the Marriage of Smith and Saywell* (1980) 47 FLR 267 at 269 the Full Court of the Family Court of Australia rejected a challenge under [s 78B](#) on the ground that the validity of the provision in question had already been tested and upheld by the High Court. However, it should be noted that the High Court has taken a different attitude in relation to [s 40](#), which concerns the removal of constitutional questions to that court. In *Re Application by Public Service Association of New South Wales* (1947) 75 CLR 430 [CB](#) the High Court held that, notwithstanding that a question appeared to have been decided in the High Court, the court was still obliged to remove a question which “really and substantially arose” under the Constitution, or involved its interpretation. See *Narain v Parnell* (1986) 9 FCR 479; [64 ALR 561](#) [CB](#), where these issues were raised but found unnecessary to decide on the facts of the case.

[7140.27] Continuing with hearing

L Legislation cited in this paragraph(CTH) [Judiciary Act 1903](#) s 78B, s 78B(2), s 78B(2)(c).

The operation of [s 78B\(2\)\(c\)](#) is not confined to a case where the hearing has actually commenced. “[T]he Court is entitled to embark on a hearing provided that it can be conducted in a way that severs the matter arising under the Constitution, or involving its interpretation, until the proceedings reach the point where such severance cannot be maintained. It is possible in some cases, such as the present, to meet an oversight that has caused one Attorney-General not to be given a notice under [s 78B](#) by promptly giving a notice and asking for a timely response. In the meantime the Court can craft a procedure whereby the proceedings may otherwise continue. That could be by hearing, as in this case, the application to amend which may not have been able to be determined until after the Attorney had made known his attitude, or by dealing with other matters that were severable, including the taking of evidence from witnesses who were not concerned with the issue that is the subject of the notice”: see *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* (2010) 184 FCR 516; [267 ALR 623](#); [\[2010\] FCA 428](#); [BC201002771](#) at [\[16\]](#) [\[CB\]](#) (Rares J).

In *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292 at 296; [167 ALR 303](#); [\[1999\] FCA 1151](#); [BC9907104](#) [\[CB\]](#), French J described [s 78B\(2\)](#) as a “facility to continue proceedings on matters severable from the constitutional matter”.

Other cases where evidence and argument have been heard concerning severable matters include *Oreb v Professional Services Review Committee No 298* [\[2004\] FCA 1408](#); [BC200407425](#) at [\[17\]–\[21\]](#) [\[CB\]](#); *Tavalu v Minister for Immigration and Multicultural and Indigenous Affairs* [\[2002\] FCA 1027](#); [BC200204660](#) at [\[7\]](#) [\[CB\]](#).

[7140.30] Order for costs**L** Legislation cited in this paragraph(CTH) [Judiciary Act 1903](#) s 78B.

Where the party who raises a constitutional issue has failed to give timely notice under [s 78B](#) and it is necessary to adjourn the hearing of the matter to permit that notice to be given, the other party will be entitled to an order for costs relating to the adjournment. Where the constitutional issue is one that is not obscure (having been widely publicised in the profession for a considerable period of time) and no satisfactory reason is advanced to explain the late notice, costs may be awarded on a solicitor/client basis: *Lidcombe Plastering Services (NSW) Pty Ltd v Intercool Construction Pty Ltd* (FCA, Tamberlin J, Nos NG 3359 and 3360 of 1995, 12 April 1996, unreported, [BC9601876](#)).

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > **DIVISION 2 APPLICATION OF LAWS [ss 79–81]**

DIVISION 2 APPLICATION OF LAWS [ss 79–81]

[7245] 79 State or Territory laws to govern where applicable

(1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

[subs (1) am Act 71 of 2008 s 3 and Sch 1[1], effective 2 July 2008]

(1A) For the purposes of subsection (1), a Court exercising federal jurisdiction in a proceeding is taken to be exercising federal jurisdiction in:

- (a) if the laws of a State or Territory apply to a part of the proceeding because of [subsection 68C\(5\)](#) — that State or Territory; or
- (b) if paragraph (a) does not apply:
 - (i) if the proceeding is transferred or remitted — the State or Territory to which the proceeding is transferred or remitted; and
 - (ii) otherwise — the State or Territory in which the proceeding is commenced;

except as otherwise provided by the Constitution or the laws of the Commonwealth.

[subs (1A) insrt Act 3 of 2022 s 3 and Sch 2 item 8, effective 18 February 2022]

(2) A provision of this Act does not prevent a law of a State or Territory covered by [subsection \(3\)](#) from binding a court under this section in connection with a suit relating to the recovery of an amount paid in connection with a tax that a law of a State or Territory invalidly purported to impose.

[subs (2) insrt Act 71 of 2008 s 3 and Sch 1[2], effective 2 July 2008]

(3) This subsection covers a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law doing any of the following:

- (a) limiting the period for bringing the suit to recover the amount;

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

- (b) requiring prior notice to be given to the person against whom the suit is brought;
- (c) barring the suit on the grounds that the person bringing the suit has charged someone else for the amount.

[subs (3) insrt Act 71 of 2008 s 3 and Sch 1[2], effective 2 July 2008]

(4) For the purposes of [subsection \(2\)](#), some examples of an amount paid in connection with a tax are as follows:

- (a) an amount paid as the tax;
- (b) an amount of penalty for failure to pay the tax on time;
- (c) an amount of penalty for failure to pay enough of the tax;
- (d) an amount that is paid to a taxpayer by a customer of the taxpayer and is directly referable to the taxpayer's liability to the tax in connection with the taxpayer's dealings with the customer.

[subs (4) insrt Act 71 of 2008 s 3 and Sch 1[2], effective 2 July 2008]

Section 79 Generally

[7245.5] Section 79 and federal courts

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 79.

"To ensure that state laws dealing with the particular topics mentioned in the section are applied in the exercise of federal jurisdiction by courts other than state courts, it is necessary that state laws be applied according to the hypothesis that federal courts do not necessarily lie outside their field of application. [Section 79](#) requires the assumption to be made that federal courts lie within the field of application of state laws on the topics to which it refers, at least in those cases in which the state laws are expressed to apply to courts generally": *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 95; [1 ALR 21](#).

[7245.10] Application to Family Court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 79.

[Section 79](#) applies to the Family Court the laws of the state in which it sits relating to procedure and evidence: *In the Marriage of Miller* (1977) 30 FLR 552; 3 Fam LN N57; (1977) FLC ¶90-308.

[7245.15] The role and function of s 79

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 79.

Of their own force, state laws have no application to proceedings involving the exercise of federal jurisdiction. [Section 79](#) fills the gap in the law that would otherwise apply: see *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; [161 ALR 399](#); [\[1999\] HCA 9](#); [BC9901019](#) at [\[35\]](#) [CB](#); *APLA Ltd v*

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Legal Services Cmr (NSW) (2005) 224 CLR 322; [219 ALR 403](#); [\[2005\] HCA 44](#); [BC200506315](#) at [\[230\]](#) [CB](#); *Gordon v Tolcher (liq Senafield Pty Ltd (in liq))* (2006) 231 ALR 582; [60 ACSR 522](#); [\[2006\] HCA 62](#); [BC200610441](#) at [\[30\]](#) [CB](#); *CSL Australia Pty Ltd v Formosa* (2009) 261 ALR 441; 235 FLR 273; [\[2009\] NSWCA 363](#); [BC200910120](#) at [\[23\]–\[24\]](#), [\[29\]](#) [CB](#).

In *Pavich v Bobra Nominees Pty Ltd* [\(1988\) 84 ALR 285](#) at [289–90](#), French J offered the following analysis of [s 79](#):

“It has been said that the section does not purport to do more than ‘pick up state laws with their meaning unchanged’: *Pedersen v Young* (1964) 110 CLR 162 at 165; [\[1964\] ALR 798](#) [CB](#) per Kitto J; *Re Young's Horsham Garage Pty Ltd (in liq)* [\[1969\] VR 977](#); (1967) 17 FLR 410 at 413 [CB](#) per Menhennitt J; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65; [1 ALR 21](#) at [80](#), [83](#), [88](#) [CB](#) per Menzies, Walsh and Gibbs JJ; *Scotland v Bargaen* [\(1982\) 41 ALR 65](#) at [67](#) per Stephen J; *Adams v Anthony Bryant & Co Pty Ltd* (1986) 15 FCR 513; [67 ALR 616](#) at [619](#) [CB](#) per Wilcox J. But that proposition is necessarily qualified by the rationale of the provision, which is to apply rules of state law in cases to which they might otherwise be inapplicable. The section therefore requires the assumption to be made that courts exercising federal jurisdiction are bound to apply the rules of state law adopted by it: *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*, above, CLR at 88 per Gibbs J; CLR at 95 per Mason J; CLR at 80 per Menzies J, agreeing. Courts exercising federal jurisdiction include state courts exercising such jurisdiction. Extension of the rules of state law via [s 79](#) to a state court exercising federal jurisdiction will no doubt be limited to the extension necessary to enable those rules to so apply.

There are at least three questions theoretically raised by any invocation of [s 79](#): (1) Which is the state whose law is applied by the section? (2) What is the proper construction of the state law? (3) How does the application of the rules of the state law adopted by the section vary from their direct application?

See generally, C Cook, “[Section 79](#) Judiciary Act 1903 — How widely does it travel?” (1987) 17 *Federal Law Review* 199; G Hill and A Beech SC, “‘Picking up’ State and Territory laws under [s 79](#) of the Judiciary Act — three questions” (2005) 27 *ABR* 25.

In *Solomons v District Court of New South Wales* [\(2002\) 192 ALR 217](#); 76 ALJR 1601 at [\[23\]](#) [CB](#), Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ referred to four limitations on the operation of [s 79](#):

First, the section operates only where there is already a court “exercising federal jurisdiction”, “exercising” being used in the present continuous tense. Secondly, [s 79](#) is addressed to those courts; the laws in question “shall ... be binding” upon them. The section is not, for example, directed to the rights and liabilities of those engaged in non-curial procedures under state laws. Thirdly, the compulsive effect of the laws in question is limited to those “cases to which they are applicable”. To that it may be added, fourthly, the binding operation of the state laws is “except as otherwise provided by the Constitution”.

[7245.20] Section 79 does not enlarge reach of state law

L Legislation cited in this paragraph

(VIC) [Companies Act 1961](#) s 263(2).

(CTH) [Judiciary Act 1903](#) s 64, s 79.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974 (Cth).

In *Re Young's Horsham Garage Pty Ltd (in liq)* [\[1969\] VR 977](#); (1967) 17 FLR 410 [CB](#), Menhennitt J

held that neither the Commonwealth nor the Deputy Commissioner of Taxation required leave under s 263(2) of the Companies Act 1961 (Vic) to institute Supreme Court proceedings seeking to recover moneys from a company in liquidation. This was because the Companies Act did not apply to the Crown in right of the Commonwealth; a provision declaring its intention to bind “the Crown” was to be read as a reference to the Crown in right of the state; and “[s 79](#) [of the Judiciary Act] as a matter of construction does not give s 263(2) of the Victorian Companies Act a new and more extensive meaning than it has as a matter of construction itself”: *Re Young's Horsham Garage Pty Ltd (in liq)* [1969] VR 977 at 979; (1967) 17 FLR 410 [CB](#).

In *Trade Practices Commission v Manfal Pty Ltd* (1990) 97 ALR 231 [CB](#), the Federal Court (Northrop, Wilcox and French JJ) held that the Trade Practices Commission did not require the leave under s 371(2) of the Companies (Western Australia) Code 1981 (WA) to institute proceedings in the Federal Court of Australia under the *Trade Practices Act 1974 (Cth)* against a company in liquidation. Wilcox J (with whose reasons Northrop J agreed) noted that the Companies Code was intended to bind the Crown in right of the Commonwealth “so far as the legislative power of the [Western Australian] Parliament permits” (s 358) and continued, at 244–5:

Unlike the position which applied in *Young's Horsham Garage* ... it cannot be said that, as a matter of construction, the relevant state law is not intended to bind the Commonwealth. Does this alter the situation?

I do not think that it does ... [Section 371(2)] would never have applied [to the Crown in right of the Commonwealth], not because the Western Australian Parliament intended that it should not apply, but because, as a matter of constitutional law, it was incapable of application. Whilst I accept that it would have been within the competence of the Commonwealth to pass legislation subjecting itself and its instrumentalities to this, as with any other, state law, it has not done so. [Section 79](#) can do no more than pick up, and apply to litigation in federal jurisdiction, a state law which would operate against a party in state jurisdiction

In *Re Pollack; Ex parte DCT* (1991) 32 FCR 40; [103 ALR 133](#) at [153–4](#) [CB](#), Gummow J observed:

... when the District Court [of New South Wales] exercises federal jurisdiction it is bound by [s 79](#) of the Judiciary Act to apply the laws of the State of New South Wales. The laws which may be picked up are not confined to those which are procedural in character; eg *Musgrave v Commonwealth* (1937) 57 CLR 514 [CB](#). But [s 79](#) binds the District Court only to the extent that provision otherwise is not made by the Constitution or the laws of the Commonwealth: *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 368–9; [97 ALR 555](#); (1990) ATPR 41–061. And the laws of the state only bind the District Court in “cases to which they are applicable”; if the relevant litigant in the District Court matter is the Commonwealth, it is [s 64](#) of the Judiciary Act 1903 which applies state law to the Commonwealth: *Trade Practices Commission v Manfal Pty Ltd* (1990) 97 ALR 231 at [262–3](#).

[7245.21] “except as otherwise provided”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(WA) [Justices Act 1902 \(repealed\)](#) s 206A(2).

In *Northern Territory v GPAO* (1999) 196 CLR 553; [161 ALR 318](#) at [337](#); [\[1999\] HCA 8](#); [BC9900714](#) [CB](#), Gleeson CJ and Gummow J said:

The objective of [s 79](#) is to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements in which may comprise the laws of the State or Territory in which the jurisdiction is being exercised, together with the laws of the Commonwealth, but subject always to the overriding effect of the Constitution itself. Seen in that light, the notion of “inconsistency” involved in the phrase “otherwise provided” in [s 79](#) is akin to that first identified by Mason J in the passage from the judgment in *University of Wollongong v Metwally* (1984) 56 ALR 1 at 463 set out earlier in these reasons. This is the need to resolve the problem that arises by conflict between conflicting

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

statutes having the same source. The law of a State or Territory which is to operate as a surrogate law of the Commonwealth is to be measured beside other laws of the Commonwealth.

Their Honours' reference is to a passage in which Mason J referred to the situation where "the provisions of two statutes are in conflict, so much so that they cannot be reconciled one with the other": ALR at 318, 330. See also *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136; [173 ALR 619](#); [\[2000\] HCA 39](#); [BC200004309](#) at [\[17\]](#) [CB](#), at [53] and at [106].

In *Macleod v ASIC* (2002) 211 CLR 287; [191 ALR 543](#); [\[2002\] HCA 37](#); [BC200205250](#) [CB](#), the High Court held that a state law, s 206A(2) of the Justices Act 1902 (WA) (which authorised the bringing of an appeal to the Full Court of the state Supreme Court against a single judge's decision to allow an appeal against conviction by a magistrate), was not picked up by [s 79](#) and applied to an appeal instituted by ASIC relating to a prosecution brought by ASIC. Section 49(2) of the Australian Securities Commission Act 1989 (Cth) authorised ASIC to "cause a prosecution of the person for the offence to be begun and carried on". That provision, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said at [43], did not authorise ASIC to take the step of appealing. So far as the state law (s 206A(2)) was concerned, their Honours said at [44]:

Where the law of a state purports to grant some wider power or authority to such an officer or body, then the law of the Commonwealth will be one by which it is "otherwise provided" for the purposes of [s 79](#) of the Judiciary Act. The result is that federal law did not empower the ASC to institute and conduct the appeal to the Full Court, nor did [s 79](#) "pick up" any provision of state law otherwise expressed in terms sufficiently broad to endow the ASC with the capacity to take those steps.

In *Gordon v Tolcher (liq Senafield Pty Ltd (in liq))* [\(2006\) 231 ALR 582](#); [60 ACSR 522](#); [\[2006\] HCA 62](#); [BC200610441](#) [CB](#), the High Court held that provisions of the District Court Rules 1973 (NSW) that allowed the court to extend the times fixed under the Rules (including extensions after the relevant time periods had expired) were picked up by [s 79](#) of the Judiciary Act, and that s 588FF of the Corporations Act 2001, which required certain applications to be made within 3 years or such longer period as a superior court specified on an application made within 3 years, did not "otherwise provide": see, above, at [32], [41].

[7245.22] Limitations on adoption of state laws

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Customs Act 1901](#).

(NSW) [Costs in Criminal Cases Act 1967](#) s 2, s 4.

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III.

In *Commonwealth v Mewett* (1997) 191 CLR 471 at 556; [146 ALR 299](#) at [352](#), Gummow and Kirby JJ pointed out that where a particular provision of state law is an integral part of a state legislation, [s 79](#) could not operate to pick up some but not all of the state legislative scheme, if to do so would be to give an altered meaning to the severed part of the state legislation.

In *Solomons v District Court of New South Wales* [\(2002\) 192 ALR 217](#); 76 ALJR 1601 [CB](#), the High Court held that [s 79](#) did not empower a judge of the District Court, exercising federal jurisdiction in respect of an offence against the Customs Act 1901 (Cth), to grant a certificate to the person found not guilty of the offence under s 2 of the Costs in Criminal Cases Act 1967 (NSW) (the Costs

Act). The certificate, on presentation to a state official under s 4 of the Costs Act, would have authorised payment of the person's costs out of the consolidated revenue fund.

Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ raised several objections to the argument that [s 79](#) picked up the Costs Act:

- first, the certificate could only be used for the making of an application to an officer of the Executive Government of the state; but [s 79](#) “is not addressed to officers of the executive governments of the states. It is directed to certain courts”: at [25];
- second, the authority to make an application under s 4 of the Costs Act was conferred only upon the grantee of a certificate “pursuant to this Act”, but “[a] certificate granted on the hypothesis under consideration would not have been granted under the Costs Act. It would have been granted by operation of federal law upon the Costs Act”: at [26];
- third, no federal law effected “a corresponding transmutation upon s 4 of the Costs Act”, because the operation of [s 79](#) “does not reach the state officials specified in s 4 in the performance of their functions under that section”: at [27];
- fourth, “the grant of a certificate by a court exercising federal jurisdiction would involve it in the exercise of power not provided by [Ch III](#) of the Constitution. It would be productive of a futility, not the resolution of any claim or controversy ... Nor would the grant of a certificate be the exercise by the court of an administrative function ‘truly appurtenant’ to the exercise by the court of its judicial power to conduct the trial of the applicant for the certificate [cf *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation (No 2)* (1982) 152 CLR 179 at 186–7; [43 ALR 693](#) at [698–9](#) per Brennan J]. The terms of [s 79](#) expressly deny any operation which would require or empower courts exercising federal jurisdiction to pass beyond the limits of [Ch III](#) of the Constitution”: at [28].

[7245.25] Application of laws of another state

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

Where an action was commenced in the Melbourne registry of the High Court and remitted to the Supreme Court of New South Wales for hearing, [s 79](#) of the Judiciary Act 1903 required the Supreme Court to apply New South Wales laws of procedure, and did not permit the court to apply Victorian legislation barring the proceedings: “[L]imitation provisions of a procedural nature, if they are picked up by [s 79](#) at all, are picked up only in proceedings being heard in a court of the state which has enacted the limitation legislation ... [\[Section\] 79](#) does not authorise a state court exercising federal jurisdiction to apply the legislation of another state to the proceedings”: *Commonwealth v Dixon* ([1988](#)) [13 NSWLR 601](#); [82 ALR 359](#) at [364–5](#) ^{CB} per Hope JA.

[7245.27] Application of laws of State where suit against Commonwealth remitted to Federal Court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 64, s 79.

(NSW) [Limitation Act 1969](#).

In *Commonwealth v Mewett* (1997) 191 CLR 471; [146 ALR 299](#) ^{CB}, the High Court considered the question of the statute of limitations to be applied when the Commonwealth was sued in tort in three

matters commenced in the Sydney Registry of the High Court and remitted to the Federal Court for hearing, where the cause of action was said to have arisen, in two of the matters, in New South Wales and, in one of the matters, in Victoria. Brennan CJ held that [s 79](#) of the Judiciary Act 1903 picked up and applied the Limitation Act 1969 (NSW) to the suits against the Commonwealth: ALR at 301. Dawson J (with whom McHugh J agreed) came to the same conclusion (ALR at 313, 315), as did Gummow and Kirby JJ: ALR at 351–2.

Among the propositions developed by Gummow and Kirby JJ (ALR at 352), and indorsed by Brennan J (ALR at 301) were the following:

The first is that the consequence of the rendition by [s 79](#) of the Judiciary Act 1903 of the NSW Act as a surrogate law of the Commonwealth was, in conjunction with [s 64](#) of the Judiciary Act 1903, to afford to the Commonwealth such defences under the NSW Act as apply in litigation between citizens.

Secondly, the adoption of the NSW Act allowed the plaintiffs to utilise the means and procedures for extensions of time as counters to what otherwise would be limitation defences against them.

Thirdly, the Commonwealth could utilise the NSW Act only on its own terms and after the amendments by the 1990 Act. These provide for a regime of extensions of limitation periods as an integral part of the legislative scheme. [Section 79](#) could not operate to pick up some but not all of the otherwise applicable terms of the NSW Act, for to do so would be to give an altered meaning to the state legislation.

[7245.28] State law providing for remedy in state court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Corporations Act 2001](#) s 737.

(NSW) [Contracts Review Act 1980](#).

In *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* ([2001](#)) [177 ALR 329](#); 19 ACLC 427; [\[2001\] HCA 1](#); [BC200100154](#) [\[CB\]](#), a majority of the High Court held that the effect of [s 79](#) was that, when exercising jurisdiction to determine a controversy, the Federal Court had the power in the exercise of that jurisdiction to grant a remedy provided by state legislation (s 737 of the Corporations Law of Victoria) notwithstanding that the state legislation identified a particular state court as the forum in which that remedy was available. Gleeson CJ, Gaudron and Gummow J said at [68]:

“It is well established from the decisions under [s 79](#) of the Judiciary Act, most recently that in *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136; [173 ALR 619](#); 74 ALJR 1184 at [13] [\[CB\]](#), that a State statute may be applicable as a source of rights and remedies in federal jurisdiction even though, on its own terms, that law identifies only the courts of the enacting State as the courts to provide those remedies.”

At [72]–[74], their Honours recognised that particular statutory provisions might be couched in terms which made it impossible for those provisions to be picked up by [s 79](#) — for example, a state law expressed in terms which made it impossible for the power conferred by the law to be exercised otherwise than by a state court; and a state law which conferred a function that was incapable of being exercised as part of the judicial power of the Commonwealth.

McHugh J said at [137]:

The fact that a state statute either expressly or as a matter of construction provides only for state courts to enforce its

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

provisions does not mean that it cannot be “picked up” and applied by [s 79](#) of the Judiciary Act in the exercise of federal jurisdiction.

Similarly, in *Murphy v Overton Investments Pty Ltd* ([2001](#)) [182 ALR 138](#); (2001) ATPR ¶41-819 [CB](#), the Full Federal Court held that, where the Federal Court was exercising federal jurisdiction in NSW in relation to a controversy arising out of a contract, [s 79](#) of the Judiciary Act gave the Federal Court power to grant a remedy under the Contracts Review Act 1980 (NSW). After referring to *Edensor Nominees*, above, Branson J (with whose reasons Nicholson and Gyles JJ agreed) said:

[T]he majority in *Edensor* made it plain that a state statute may be applicable as a source of rights and remedies in federal jurisdiction even though by its terms, the state statute identifies only a court of the state as the forum for the enforcement of the rights and remedies.

INTEREST ON DAMAGES

[7245.30] Application of s 94 of the Supreme Court Act 1970 (NSW)

L Legislation cited in this paragraph

(NSW) [Supreme Court Act 1970](#) Section 94.

(CTH) [Judiciary Act 1903](#) s 79.

Section 94 of the Supreme Court Act 1970 (NSW) confers power on the Supreme Court of New South Wales to award interest in respect of damages as part of the judgment. In *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582; [6 ALR 433](#) [CB](#), Mason J said that [s 79](#) of the Judiciary Act 1903 did not render s 94 applicable to proceedings in the High Court. “No matter how widely it may travel in some respects, [s 79](#) does not in my view pick up and apply in this court a provision which empowers a particular court of a state to make orders and enter judgments in proceedings in that court. The relevant powers of this court are conferred by the [Judiciary Act 1903](#) and the [High Court Procedure Act 1903](#) ... as I see it they are not to be supplemented by the operation of [s 79](#) of the Judiciary Act in the manner suggested”: ALR at 435–6.

The views expressed by Mason J were described by Gibbs CJ as obiter in *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1984) 154 CLR 579 at 585; [53 ALR 625](#) at [629](#). Gibbs CJ said that “[t]he operation of [s 79](#) in a case such as this raises very difficult questions” and declined to express any concluded opinion on the question whether [s 79](#) rendered s 94 of the Supreme Court Act applicable to proceedings in the High Court or the Federal Court: CLR at 585–6. In *State Bank of New South Wales v Commonwealth Savings Bank of Australia* ([1986](#)) [67 ALR 123](#) [CB](#), Lockhart J held that [s 79](#) did not make s 94 of the Supreme Court Act applicable to proceedings in the Federal Court, sitting in New South Wales. Section 94 “is a substantive, not a procedural, provision and ... it is cast in language necessarily confined to the power of the Supreme Court of New South Wales, thus being inapplicable by virtue of [s 79](#) of the Judiciary Act to this court as a court exercising federal jurisdiction in New South Wales”: at 127.

See however the differing views on the scope and operation of [s 79](#) set out in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65; [1 ALR 21](#) [CB](#).

[7245.35] Application of s 30C of the Supreme Court Act 1935 (SA)

L Legislation cited in this paragraph

(SA) [Supreme Court Act 1935](#) Section 30C.

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974.

Section 30C of the Supreme Court 1935 Act (SA) authorises the Supreme Court of South Australia to award interest in respect of damages as part of the judgment. In *Hubbards Pty Ltd v Simpson Ltd* (1982) 41 ALR 509; 60 FLR 430; (1982) ATPR ¶40-295 ^{CB}, the Federal Court (Lockhart J) held that [s 79](#) of the Judiciary Act 1903 did not operate to pick and apply s 30C of the Supreme Court Act to an action under the [Trade Practices Act 1974](#) brought in the Federal Court, sitting in South Australia. In coming to this conclusion, Lockhart J adopted the reasoning of Mason J in *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582; [6 ALR 433](#) ^{CB} and *Hubbards Pty Ltd v Simpson Ltd*, above, ALR at 525–6; FLR at 447–8.

[7245.40] Application of s 79A of the Supreme Court Act 1958 (Vic)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 60, s 79.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974.

Section 79A of the Supreme Court Act 1958 (Vic) directs the Supreme Court of Victoria, in all actions for recovery of debt or damages to give damages in the nature of interest from the commencement of the action until entry of judgment. [Section 60](#) applied s 79A to all Victorian courts having jurisdiction to determine actions for recovery of debt or damages. In *Centrepont Freeholds Pty Ltd v TN Lucas Pty Ltd* (1985) 6 FCR 133 at 143; [60 ALR 187](#) at [197](#) the Federal Court (Sweeney and Woodward JJ) held that [s 79](#) of the Judiciary Act 1903 made s 79A of the Supreme Court Act applicable in an action for damages for deceit being heard by the Federal Court, sitting in Victoria, together with a claim for damages under the [Trade Practices Act 1974](#):

In the present case this court is exercising federal jurisdiction in the State of Victoria and in the course of doing so [is] enforcing rights which derive from the law of that state. It seems hardly appropriate to construe [s 79](#) in a fashion which would make part only of that law applicable to the grant of the appropriate relief, so that there would be a difference between the award to be made in this court and that which would be made in a state court in respect of the identical cause of action, namely deceit

[7245.45] Application of s 72 of the Common Law Practice Act (Qld)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Competition and Consumer Act 2010](#) s 52.

(CTH) [Bankruptcy Act 1966](#).

Section 72 of the Common Law Practice Act (Qld) provides that in any proceedings in “a court of record” for the recovery of money, the court may include interest in the sum for which judgment is given. In *Neilsen v Hempston Holdings Pty Ltd* (1986) 65 ALR 302 at [311–12](#), the Federal Court (Pincus J) held that [s 79](#) of the Judiciary Act 1903 made 72 of the Common Law Practice Act applicable where the Federal Court, sitting in Queensland, awarded damages for a breach of s 52 of the Trade Practices Act 1974 (Cth).

The expression “court of record” in the Queensland section means a Queensland court of record, but that does not prevent [s 79](#) of the Judiciary Act from making it applicable in cases in this court. State statutes picked up by [s 79](#), especially those relating to “procedure, evidence and the competency of witnesses”, must be so drawn as to apply to state courts only and when [s 79](#) makes such statutes binding on “all courts exercising federal jurisdiction in that state ...” it must mean to make them binding as if they referred to the latter category of courts. As Gibbs J (as he then was) remarked in *Maguire v Simpson* (1977) 139 CLR 362 at 376; [18 ALR 469](#) at [478](#): “... a state law may be rendered applicable by [s 79](#) to a court exercising federal jurisdiction, which is not a state court, notwithstanding that the law according to its own terms is limited in its application to the courts of the state.”

In *Re Lyons; Ex parte Allpass v Qantas Staff Credit Union Ltd* ([1989](#)) [87 ALR 69](#) ^{CB}, the Federal Court (Spender J) held that [s 79](#) of the Judiciary Act 1903 made s 72 of the Common Law Practice Act applicable where the Federal Court, sitting in Queensland, declared that a payment was a preference under the [Bankruptcy Act](#), so that the court could order the recipient of the preference to pay interest on the amount wrongfully received.

In *Truss v Brazier* ([1990](#)) [96 ALR 767](#) at [790](#), the majority of the Supreme Court of Queensland (Kneipp and Sheperdson JJ) left open the question whether [s 79](#) of the Judiciary Act 1903 made s 72 of the Common Law Practice Act applicable where the District Court of Queensland awarded damages under s 52 of the Trade Practices Act 1974.

In *Smallacombe v Lockyer Investment Co Pty Ltd* (1993) 42 FCR 97; [114 ALR 568](#) ^{CB} Spender J held that the power to award interest, in a claim under s 52 of the Trade Practices Act 1974, arose “by operation of [s 79](#) of the Judiciary Act 1903 in relation to s 72 of the Common Law Practice Act (Qld)”.

[7245.50] Application of s 32 of the Supreme Court Act 1935 (WA)

L Legislation cited in this paragraph

(WA) [Supreme Court Act 1935](#) s 32, Section 34.

(CTH) [Judiciary Act 1903](#) s 79, s 82.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974, s 52.

Section 32 of the Supreme Court Act 1935 (WA) authorises the Supreme Court of Western Australia, in any proceedings for the recovery of money, to order that interest be paid on the amount for which judgment is given. Section 34 makes s 32 applicable “in all courts whatsoever in Western Australia so far as [it] shall be ... cognisable by such courts”. In *Nella v Kingia Pty Ltd* (1985) 11 FCR 281; [61 ALR 603](#) ^{CB}, the Federal Court (Toohey J) held that [s 79](#) of the Judiciary Act 1903 made s 32 of the Supreme Court Act applicable where the Federal Court, sitting in Western Australia, has awarded damages in a common law cause of action, in the exercise of its accrued jurisdiction. Toohey J observed that a similar conclusion would not necessarily operate in the case of a judgment for breach of a section of the [Trade Practices Act 1974](#) (Cth): FCR at 284; ALR at 606.

In *Schepis v Elders IXL Ltd* ([1986](#)) [70 ALR 729](#) ^{CB}, the Federal Court (Pincus J) held that [s 79](#) of the Judiciary Act made s 32 of the Supreme Court Act applicable where the Federal Court, sitting in Western Australia, entered judgment in an application for a breach of s 52 of the Trade Practices Act 1974, breach of contract and negligence.

In *Pavich v Bobra Nominees Pty Ltd* ([1988](#)) [84 ALR 285](#) at [293](#), the Federal Court (French J) held that [s 79](#) of the Judiciary Act did not make s 32 of the Supreme Court Act applicable where the

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Federal Court, sitting in Western Australia, entered judgment in relation to a claim made under the Trade Practices Act 1974.

Section 32 does not apply to the cause of action created by [s 82](#) [of the Judiciary Act] and could not be so transmuted by [s 79](#) of the Judiciary Act 1903 as to apply it in the exercise of jurisdiction by this court under [s 82](#). A contrary view would be inconsistent with the limitation that [s 79](#) picks up state laws “with their meaning unchanged”. And it could not be justified by the qualification on that limitation referred to in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65; [1 ALR 21](#) ^{CB} for that qualification could only operate in this case to extend the range of courts which could exercise the power. It would not authorise its exercise on a subject-matter to which it never applied directly.

PROCEEDINGS AGAINST COMPANY IN LIQUIDATION

[7245.55] Application of s 371(2) of the Companies (Western Australia) Code 1981 (WA)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Competition and Consumer Act 2010](#) s 52A.

Section 371(2) of the Companies (Western Australia) Code 1981 (WA) provided that, upon the appointment of a liquidator or the winding up of a company, no action or other civil proceeding may be commenced or proceeded with against that company without the leave of the Supreme Court. In *Trade Practices Commission v Manfal Pty Ltd* ([1990](#)) [97 ALR 231](#) ^{CB}, the Full Federal Court (Northrop, Wilcox and French JJ) held that [s 79](#) of the Judiciary Act 1903 did not make s 371(2) of the Companies (Western Australia) Code applicable to proceedings in the Federal Court for a declaration that a company had breached [s 52A](#) of the Trade Practices Act. Although the Companies Code purported to apply to the Crown in right of the Commonwealth, Wilcox J said, “as a matter constitutional law, it was incapable of application”; and [s 79](#) could “do no more than pick up, and apply to litigation in federal jurisdiction, a state law which would operate against a party in state jurisdiction”: at 244, 245.

LAWS RELATING TO EVIDENCE

[7245.57] Effect of the Evidence Act 1995

L Legislation cited in this paragraph

(CTH) [Evidence Act 1995](#) s 4(1), s 5, s 8(1), s 9, s 9(1), (2), (3).

(CTH) [Judiciary Act 1903](#) ss 68, 79, 80, 80A.

The commentary in the following paragraphs (from 18 April 1995) must be read in the light of the provisions of the [Evidence Act 1995 \(Cth\)](#).

The Evidence Act introduces a comprehensive federal code of evidence. The Act applies in relation to all proceedings in “a federal court or an ACT court”: [s 4\(1\)](#). The term “federal court” is defined in the Act’s Dictionary to mean the High Court and any other court created by the Parliament (other than the Supreme Court of a Territory); and “ACT court” is defined to mean the Supreme Court of the Australian Capital Territory or any other court of that territory.

Certain other provisions of the Act (listed in the Table to [s 5](#)) apply in relation to all proceedings in an

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

“Australian court”: [s 5](#); and the term “Australian court” is defined in the Dictionary to mean (inter alia) the High Court, a court exercising federal jurisdiction or a court of a state or territory.

[Section 8\(1\)](#) of the Act declares: “This Act does not affect the provisions of any other Act, other than [sections 68, 79, 80](#) and [80A](#) of the Judiciary Act 1903.”

[Section 9](#) of the Act declares that the Act does not affect the operation of a law of a state or territory so far as the law relates to the matters listed in [s 9\(1\)](#), [\(2\)](#) and [\(3\)](#) of the Act.

[7245.60] Application of s 5 of the Printing and Newspapers Act 1973 (NSW)

L Legislation cited in this paragraph

(NSW) [Printing and Newspapers Act 1973](#) Section 5.

(CTH) [Judiciary Act 1903](#) s 79.

Section 5 of the Printing and Newspapers Act 1973 (NSW) provides that a document on which is printed a name purporting to be the name of the person on whose instructions the document was printed “shall be received by all courts ... in any proceedings ... as prima facie evidence” that the document was printed on that person’s instructions. In *Trade Practices Commission v TNT Management Pty Ltd* [\(1984\) 56 ALR 647](#) at [700](#), the Federal Court (Franki J) held that [s 79](#) of the Judiciary Act 1903 made s 5 of the Printing and Newspapers Act applicable to proceedings in the Federal Court, sitting in New South Wales. Franki J said (at 701) that “the purpose of [s 79](#) is to ensure that any law relating to evidence is available in a Federal Court exercising jurisdiction in New South Wales unless it is so ‘otherwise provided’ by a law of the Commonwealth”.

[7245.65] Application of s 29 of the Stamp Duties Act 1920 (NSW)

L Legislation cited in this paragraph

(NSW) [Stamp Duties Act 1920](#) Section 29.

(CTH) [Judiciary Act 1903](#) s 79.

Section 29 of the Stamp Duties Act 1920 (NSW) provides that no instrument executed in New South Wales or relating to any property, matter or thing in New South Wales shall be admissible in any proceedings unless duly stamped. In *Davis v FCT* [\(1989\) 86 ALR 195](#) [CB](#), the Federal Court (Hill J) held that [s 79](#) of the Judiciary Act 1903 made s 29 of the Stamp Duties Act applicable to proceedings in the Federal Court, sitting in New South Wales, where one of the parties sought to tender in evidence an unstamped deed of assignment relating to property in New South Wales. The judgment of the court contains a detailed discussion of the history and effect of [s 79](#). The court held, inter alia (at 214), that if a state Act is not expressly or by necessary implication limited to a state court, [s 79](#) of the Judiciary Act 1903 will operate to make the state law applicable to a court exercising federal jurisdiction; s 29 of the Stamp Duties Act is expressed in general terms and there was no reason to read it as restricted in its application to a state court (at 215); and, even if s 29 of the Stamp Duties Act was a substantive rather than a procedural provision, there was no reason to limit [s 79](#) of the Judiciary Act to procedural matters: at 216.

[7245.70] Application of s 11 of the Evidence Act 1906 (WA)

L Legislation cited in this paragraph

(WA) [Evidence Act 1906](#) Section 11.

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

Section 11 of the Evidence Act 1906 (WA) modifies the right of a witness to decline to answer a question put to him or her in the course of a court proceeding so as to avoid self-incrimination. In *Re Application for Inquiry, Election of Officers, Transport Workers Union of Australia, Western Australian Branch* (1989) 89 ALR 575 ^{CB}, the Federal Court (French J) held that either [s 79](#) or [80](#) of the Judiciary Act 1903 made s 11 of the Evidence Act applicable in proceedings before the Federal Court, sitting in Western Australia, commenced under Div 5 of Pt IX of the Industrial Relations Act 1988. French J said (at 579) that s 11 was “intended to be exercised by the judge of a superior court and certainly not restricted to a particular court of the state. Such a provision may be distinguished from a state law which nominates a specific court to exercise a power in which event other effects of the provision may be adopted by virtue of [s 79](#) of the Judiciary Act 1903, but the exercise of the particular power provided by the state Act will remain reserved to the nominated court”.

[7245.75] Application of s 79C of the Evidence Act 1906 (WA)

L Legislation cited in this paragraph

(WA) [Evidence Act 1906](#) Section 79C.

(CTH) [Judiciary Act 1903](#) s 79.

Section 79C of the Evidence Act 1906 (WA) deals with the admissibility into evidence of certain documents. It “is plainly a law of the state relating to evidence”; the Evidence Act 1905 (Cth) deals with the admissibility of business records but not of other documents, so that the Commonwealth Act does not “otherwise provide” within the meaning of [s 79](#) of the Judiciary Act 1903. It follows that, in relation to documents other than business records, s 79C of the Evidence Act 1906 (WA) is binding on a court exercising federal jurisdiction: *Multi Modal Ltd v Polakow* (1987) 78 ALR 553 at [560](#).

[7245.80] Application of s 92(1)(a) of the Evidence Act 1977 (Qld)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(QLD) [Evidence Act 1977](#) s 92(1)(a).

“The Commonwealth has covered the field of the admissibility of business records. In my view, however, it has not entered on the field of the admissibility of other statements in writing. The absence of any provision concerning such statements is consistent with a desire to allow state laws to operate in courts exercising federal jurisdiction, pursuant to [s 79](#) of the Judiciary Act 1903 so that s 92(1)(a) Evidence Act 1977 (Qld) operates in this case”: *McGarry v Boonah Clothing Pty Ltd* (1988) 80 ALR 284 at [288](#) per Gray J.

[7245.85] Application of s 92(1)(b) of the Evidence Act 1977 (Qld)

L Legislation cited in this paragraph

(QLD) [Evidence Act 1977](#) s 92(1)(b).

(CTH) [Judiciary Act 1903](#) s 79.

Where a document forming part of a record of business was sought to be tendered in proceedings before the Federal Court sitting in Queensland, under s 92(1)(b) of the Evidence Act, the Federal

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Court (Spender J) decided that the state provision was inconsistent with Pt IIIA of the Evidence Act 1905 (Cth) and, to the extent that [s 79](#) would have otherwise made s 92(1)(b), the state provision was invalid: *Supetina Pty Ltd v Lombok Pty Ltd* (1984) 5 FCR 439; [59 ALR 581](#) [CB](#).

[7245.90] Application of Pt IIC of the Evidence Act 1898 (NSW)

L Legislation cited in this paragraph

(NSW) [Evidence Act 1898](#) Part IIC.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974.

(CTH) [Judiciary Act 1903](#) s 79.

Part IIC of the Evidence Act 1898 (NSW) provides for the admission into evidence in court proceedings of certain business documents. In *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313; [97 ALR 555](#); (1990) ATPR ¶41-061 [CB](#), the Full Federal Court (Lockhart, Wilcox and Gummow JJ) held that Pt IIC could not be invoked in proceedings before the Federal Court, sitting in New South Wales, under the [Trade Practices Act 1974](#). This was because the Evidence Act 1905 (Cth) “makes extensive provision for the admission into evidence of business records and effectively covers that field. It has ‘otherwise provided’ within the meaning of [s 79](#) of the Judiciary Act 1903: compare *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 64; [78 ALR 641](#) at 664. There is no room, therefore, for the application of the provisions of the New South Wales Evidence Act to the admissibility of business records”: *Arnotts Ltd v Trade Practices Commission*, above, ALR at 613.

[7245.92] Application of s 464M of the Crimes Act 1958 (Vic)

L Legislation cited in this paragraph

(VIC) [Crimes Act 1958](#) Section 464M.

(CTH) [Judiciary Act 1903](#) s 79.

Section 464M of the Crimes Act 1958 (Vic), authorising a magistrate to order that a “suspect” provide her or his fingerprints, is not a law relating to evidence within [s 79](#) of the Judiciary Act 1903 and is not rendered applicable to a person suspected of a federal offence by that provision of the [Judiciary Act 1903](#): *Grollo v Bates* (1994) 53 FCR 218; [125 ALR 492](#) at 510; 75 A Crim R 271 [CB](#) perinfeld J.

[7245.93] Application of s 97(3) of the Community Welfare Act 1983 (NT)

L Legislation cited in this paragraph

(NT) [Community Welfare Act 1983](#) Section 97(3).

Section 97(3) of the Community Welfare Act 1983 (NT), prohibiting an “authorised person” from producing in court a document that has come into the person's possession or under the person's control, is rendered binding on the Family Court of Australia when that court is exercising jurisdiction in the Northern Territory, and prevents the issue of a subpoena requiring the production to the court of documents protected by s 97(3): *Northern Territory v GPAO* (1999) 161 ALR 318; 73 ALJR 470 [CB](#).

ARBITRATION CLAUSE

[7245.95] Application of s 53 of the Commercial Arbitration Act 1985 (WA)

L Legislation cited in this paragraph

(WA) [Commercial Arbitration Act 1985](#) Section 53.

(CTH) [Judiciary Act 1903](#) s 79.

Section 53 of the Commercial Arbitration Act 1985 (WA) authorises a court to stay proceedings in that court where the proceedings relate to a matter which the parties had previously agreed should have been referred to arbitration. In *Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 17 FCR 487; [71 ALR 125](#), the Federal Court (French J) noted that s 53 “applies to courts generally, although as a matter of construction it would be limited in its direct application to Western Australian courts” and held that s 53 was “therefore picked up by [s 79](#) [of the Judiciary Act] and made applicable to the proceedings now before the court” (an action for damages arising out of a contract between the parties): *Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 17 FCR 487; [71 ALR 125](#) at [139](#).

LIMITATION OF ACTIONS

[7245.100] Application of s 38(1)(a)(i) of the Limitation Act 1935 (WA)

L Legislation cited in this paragraph

(WA) [Limitation Act 1935](#) s 38(1)(a)(i).

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Racial Discrimination Act 1975](#) s 25Z.

In *Ardeshirian v Robe River Iron Associates* (1993) 43 FCR 475; [116 ALR 173](#) ^{CB}, French J, said that s 38(1)(a)(i) of the Limitation Act 1935 (WA) could have no direct application to proceedings in the Federal Court, nor to proceedings in a state court exercising federal jurisdiction. It could only apply in such proceedings by virtue of [s 79](#) of the Judiciary Act 1903. Section 38(1)(a)(i) fixed a two-year limitation period for actions for penalties, damages or sums given by any enactment to the party aggrieved; and the question raised in *Ardeshirian* was whether that limitation period applied to a proceeding in the Federal Court to enforce a decision of the Human Rights and Equal Opportunity Commission, pursuant to s 25Z of the Racial Discrimination Act 1975, that the respondent had engaged in conduct rendered unlawful by the Racial Discrimination Act and should pay the applicant \$10,000 by way of compensation. Although it seemed probable, French J said, that [s 79](#) of the Judiciary Act would operate to apply the Limitation Act 1935 (WA) to some classes of actions instituted in the Federal Court, s 38(1)(a)(i) of the Limitation Act did not apply to the present proceedings because the claim under the Racial Discrimination Act was for compensatory and remedial relief and was not a penalty action.

[7245.105] Application of s 14(1) of the Limitation Act 1969 (NSW)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

In *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581; [144 ALR 89](#) ^{CB}, the Full Court of the Federal Court held that s 14(1) of the Limitation Act 1969 (NSW) applied to a proceeding for recovery of moneys paid under mistake of law brought in the New South Wales Registry of the Federal Court. In a judgment adopted by both Foster and Lindgren JJ, Sackville J (FCR at 592–3; ALR at 98–9)

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

indorsed the following remarks of Mahoney JA from *Commonwealth v Dixon* [\(1988\) 13 NSWLR 601](#) at [622](#); [82 ALR 359](#) at [378–9](#):

I am inclined to the view that, in any event, the Judiciary Act (Cth) [s 79](#), would cause a State statute of limitation to apply in an appropriate case where the plaintiff's claim was determined by a court exercising federal jurisdiction ... If a general statute of limitation is not a "law relating to procedure" within that section, then it will be applied by operation of the section. If it is a "law relating to procedure" within that section, then it will be applied by operation of the section. If it is a "law relating to procedure" then prima facie it is applied directly by terms of [s 79](#) ("including the laws relating to procedure ...") ...

And, in my opinion, the State limitation law would apply even if, on its proper construction, it was intended to apply only to proceedings brought in State Courts ... However, if the State limitation statutes be so construed, the effect of [s 79](#) is, in my opinion, to apply them, appropriately extended, in proceedings in the relevant federal courts.

[7245.110] Application of s 68 of the Supreme Court Act 1970 (NSW)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(NSW) [Supreme Court Act 1970](#) s 68.

In *Matthews v ACP Publishing Pty Ltd* [\(1998\) 157 ALR 564](#) at [572](#), Beaumont J held that [s 79](#) of the Judiciary Act 1903 rendered s 68 of the Supreme Court Act 1970 (NSW) applicable to a proceeding in the Federal Court sitting in New South Wales, so that the court was empowered to award damages in support of or in lieu of an injunction for breach of copyright.

End of Document

(CTH) Judiciary Act 1903 [7250] s 80 Common law to govern

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 2 APPLICATION OF LAWS \[ss 79–81\]](#)

[7250] 80 Common law to govern

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

[s 80 am Act 120 of 1988 s 41]

Section 80 Generally

[7250.5] Common law in Australia

L Legislation cited in this paragraph

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

(CTH) [Australia Act 1986](#).

In 1988 the phrase “common law in Australia” substituted in [s 80](#) the phrase “common law of England”. This followed criticism of the anachronistic nature of [s 80](#) in *Adams v ETA Foods Ltd* (1987) 19 FCR 93; [78 ALR 611](#) at [614](#); (1987) ATPR ¶40-831 [CB](#) per Gummow J:

[Section 80](#) rests upon the premise, which would have been accepted without question in 1903, that the common law was universal and indivisible in character. However, at least since *Australian Consolidated Press v Uren* (1967) 117 CLR 221; [\[1969\] 1 AC 590](#) [CB](#), it has been plain that this premise is no longer true and that the common law as evolved in this country may diverge from that of England. The preservation of [s 80](#) in its original form thus has become an anachronism. This is so a fortiori since the coming into effect of the [Australia Act 1986 \(Cth\)](#); see generally Sir Anthony Mason “Future Directions in Australian Law”, being the Wilfred Fullagar Memorial Lecture 1987, pp 5–12. The result is that the application of [s 80](#) now, strictly, may require evidence of foreign law to be proved as a factual matter (*Cross on Evidence*, 3rd Aust ed, s 21.2), a strange situation.

[Section 80](#) has particular relevance where a court exercises federal jurisdiction in a matter where the laws of more than one law area may be applicable to the issues in dispute between the parties — where a “choice of law” is required. In *Commonwealth v Mewett* (1997) 191 CLR 471; [146 ALR 299](#) ^{CB}, Gaudron J said that a court exercising federal jurisdiction (whether the High Court, the Federal Court or a state court) did so throughout Australia, not merely in its states (CLR at 525), and identified [s 80](#) of the Judiciary Act as taking primacy over [s 79](#) and directing the application of the choice of law rules that were part of the common law in Australia: CLR at 522, 525, 526.

In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [172 ALR 625](#) ^{CB}, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ adopted the reasoning of Gaudron J in *Mewett*, above and noted that, in a case brought in the Australian Capital Territory arising out of a tort said to have been committed in New South Wales, all parties “proceeded on the basis that the Territory Court was obliged by [s 80](#) to apply the common law choice of law rules as part of the common law of Australia”: at [55]. Their Honours invoked [s 80](#) of the Judiciary Act as the basis for holding that the choice of law rule which was part of the common law in Australia required the trial court to apply the law of the place where the tort was committed: at [103].

In *Blunden v Commonwealth* (2003) [203 ALR 189](#); 78 ALJR 236 ^{CB}, the High Court held that the applicable law to determine the liability of the Commonwealth arising out of a tort committed on the high seas was to be identified by proceeding directly through [s 80](#) to the modification of the common law respecting limitation of actions effected by the relevant statute law of the forum where the Commonwealth was sued: at [45], [101], [109]. Gleeson CJ, Gummow, Hayne and Heydon JJ referred to Gaudron J’s analysis in *Mewett*, above and at [18] added two points to her Honour’s proposition that s 80 directed the application of the common law rules for choice of law in federal jurisdiction:

The first is that the application of any rules of the common law will, in the terms of [s 80](#), be subjected to any modification, in the present case, by the statute law in force in the territory. The second is that, if there is no common law choice of law rule relevant to the issues in the litigation, but the common law rule as to the absence of time bars is modified by territory law, then [s 80](#) applies that modification, and this furnishes the limitation law which governs the action.

[7250.10] Common law displaced by state or federal legislation

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) ss 79, s 80.

(NSW) [Crimes Act 1900](#) s 404.

In *Adams v ETA Foods Ltd* (1987) 19 FCR 93; [78 ALR 611](#) at [614–15](#); (1987) ATPR ¶40-831 ^{CB}, Gummow J said that the need for evidence to prove the common law of England did not arise in the present case. This was “because state and federal law operates to modify common law and, in the result, [s 80](#) has effect before one reaches English common law”. The common law rule, upon which the defendant sought to rely in the present matter, was “the apparent rule in England that formal admissions of particular facts, as opposed to the plea of guilty, are disallowed at a criminal trial”. Gummow J held that this rule was displaced by s 404 of the Crimes Act 1900 (NSW), which was made applicable to the present proceedings by [ss 79](#) and [80](#) of the Judiciary Act 1903 (as the Federal Court was sitting in New South Wales), “thereby making it unnecessary to follow [s 80](#) through to the English common law”.

EVIDENCE ACT 1995

[7250.15] Effect of the Evidence Act 1995

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) ss 68, 79, 80, 80A.

Section 8(1) of the Evidence Act 1995 (Cth) declares: “This Act does not affect the provisions of any other Act, other than [sections 68](#), [79](#), [80](#) and [80A](#) of the Judiciary Act 1903.” The provisions of the Evidence Act, so far as they are likely to affect the operation of [s 80](#) of the Judiciary Act, are summarised in [\[7245.57\]](#).

End of Document

[\(CTH\) Judiciary Act 1903 \[7255\] s 80A Application of sections 79 and 80 to Territory courts](#)

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 2 APPLICATION OF LAWS \[ss 79–81\]](#)

[\[7255\] 80A Application of sections 79 and 80 to Territory courts](#)

The provisions of the last two preceding sections apply, in so far as they are capable of application, to and in relation to a court of a Territory exercising jurisdiction in a suit brought by virtue of [section 56](#) or [Part IXA](#).

[7255.5] Effect of the Evidence Act 1995

L Legislation cited in this paragraph

(CTH) [Evidence Act 1995](#) Section 8(1).

(CTH) [Judiciary Act 1903](#) ss 68, 79, 80, 80A.

[Section 8\(1\)](#) of the Evidence Act 1995 (Cth) declares: “This Act does not affect the provisions of any other Act, other than [sections 68](#), [79](#), [80](#) and [80A](#) of the Judiciary Act 1903.” The provisions of the [Evidence Act](#), so far as they are likely to affect the operation of [s 80A](#) of the Judiciary Act, are summarised at [\[7245.57\]](#).

(CTH) Judiciary Act 1903 [7260] s 81 Security of the peace and for good behaviour

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 2 APPLICATION OF LAWS \[ss 79–81\]](#)

[7260] 81 Security of the peace and for good behaviour

The Justices of the High Court, the Judges of the Federal Court of Australia, and the Judges and magistrates of the several States and Territories who are empowered by law to authorize arrests for offences against the laws of the Commonwealth, shall have the like authority to hold to security of the peace and for good behaviour in matters arising under the laws of the Commonwealth as may be lawfully exercised by any Judge or Magistrate of the respective States and Territories in other cases cognisable before them.

[s 81 am Act 106 of 2009 s 3 and Sch 1[108], effective 4 December 2009]

End of Document

(CTH) Judiciary Act 1903 [7365] s 82 Venue in suits for penalties

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > **DIVISION 3 VENUE [ss 82–85]**

DIVISION 3 VENUE [ss 82–85]

[7365] 82 Venue in suits for penalties

Suits to recover pecuniary penalties and forfeitures under the laws of the Commonwealth may be brought either in the State or Territory where they accrue or in the State or Territory where the offender is found.

End of Document

(CTH) Judiciary Act 1903 [7370] s 83 Venue in suits for taxes

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 3 VENUE \[ss 82–85\]](#)

[7370] 83 Venue in suits for taxes

Suits to recover taxes accruing under any revenue law of the Commonwealth may be brought either in the State or Territory where the liability for the tax occurs or in the State or Territory where the debtor resides.

End of Document

(CTH) Judiciary Act 1903 [7375] s 84 Venue in suits for forfeiture

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 3 VENUE \[ss 82–85\]](#)

[7375] 84 Venue in suits for forfeiture

Proceedings on seizures made on the high seas for forfeiture under any law of the Commonwealth may be prosecuted in any State or Territory into which the property seized is brought. Proceedings on such seizures made within any State or Territory shall be prosecuted in the State or Territory where the seizure is made, except in cases when it is otherwise provided by law.

End of Document

(CTH) Judiciary Act 1903 [7380] s 85 Property seized as forfeited

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 3 VENUE \[ss 82–85\]](#)

[7380] 85 Property seized as forfeited

All property taken or obtained by any officer or person under the authority of any revenue law of the Commonwealth shall be deemed to be in the custody of the law, and subject only to the orders and judgments of the Courts having jurisdiction thereof under this or any Act.

End of Document

(CTH) Judiciary Act 1903 [7485] s 86 Rules of Court

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: March 2005

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > **DIVISION 4 RULES OF COURT [ss 86–88]**

DIVISION 4 RULES OF COURT [ss 86–88]

[7485] 86 Rules of Court

(1) The Justices of the High Court or a majority of them may make Rules of Court necessary or convenient to be made for carrying into effect the provisions of this Act or so much of the provisions of any other Act as confers jurisdiction on the High Court or relates to the practice or procedure of the High Court, and in particular for the following matters, that is to say:

- (a) Appointing and regulating the sittings of the High Court and of the Justices;
- (b) Regulating procedure pleading and practice in the High Court in civil or criminal matters in the exercise both of its original and of its appellate jurisdiction;
- (ba) Regulating the means by which particular facts may be proved and the mode in which evidence thereof may be given;
- (c) *[repealed]*
- (d) making provision for or in relation to the forms to be used for the purposes of the proceedings of the High Court;
- (e) Prescribing and regulating the fees to be charged by practitioners practising in the High Court for the work done by them in relation to proceedings in the Court and for the taxation of their bills of costs, either as between party and party or as between solicitor and client;
- (f) *[repealed]*
- (g) *[repealed]*
- (ga) Providing for the admission of persons to practise as barristers or solicitors in any Federal Court, and prescribing the conditions of and qualifications for admission, and continuance of the right to practise as aforesaid;
- (h) Generally regulating all matters of practice and procedure in the High Court.

[subs (1) am Act 3 of 2022 s 3 and Sch 1 item 116, effective 18 February 2022]

(2) The Legislation Act 2003 (other than sections 8, 9, 10 and 16 and Part 4 of Chapter 3 of that Act) applies in relation to rules of court made by the Court under this Act or another Act:

- (a) as if a reference to a legislative instrument (other than in subparagraph 14(1)(a)(ii) and subsection 14(3) of that Act) were a reference to a rule of court; and
- (b) as if a reference to a rule-maker were a reference to the Chief Justice acting on behalf of the Justices of the Court; and
- (c) subject to such further modifications or adaptations as are provided for in regulations made under [paragraph 88\(cb\)](#) of this Act.

[subs (2) insrt Act 140 of 2003 s 3 and Sch 1, effective 1 January 2005; am Act 10 of 2015 s 3 and Sch 1 item 152, effective 5 March 2016; Act 78 of 2018 s 3 and Sch 1 items 19, 20, effective 25 August 2018]

(3) Despite the fact that section 16 of the Legislation Act 2003 does not apply in relation to rules of court made by the Court under this Act or another Act, the Office of Parliamentary Counsel (established by subsection 2(1) of the Parliamentary Counsel Act 1970) may provide assistance in the drafting of any of those Rules if the Chief Justice so desires.

[subs (3) insrt Act 140 of 2003 s 3 and Sch 1, effective 1 January 2005; am Act 107 of 2012 s 3 and Sch 2 item 11, effective 1 October 2012; Act 10 of 2015 s 3 and Sch 1 item 153, effective 5 March 2016]

[s 86 am Act 157 of 1989 s 20]

SECTION 86 GENERALLY

[7485.5] Transitional arrangements

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Part 7, paragraph (a), paragraph 86(f), paragraph 88(ca).

(CTH) [Acts Interpretation Act 1901](#) subsection 48(7).

Section 25 of Act 157 of 1989 provides as follows:

“25

(1) If:

- (a) [Part 7](#) commences before regulations have been made under [paragraph 88\(ca\)](#) of the Judiciary Act 1903 as amended by this Act; or
- (b) when [Part 7](#) commences, regulations have been so made but have not commenced;

Rules of Court in force under paragraph 86(f) of that Act immediately before the commencement of [Part 7](#) continue to have effect, as if that Part had not been enacted, until regulations first commence under [paragraph 88\(ca\)](#) of the Judiciary Act 1903 as amended by this Act.

(2) Where:

- (a) regulations have been made under [paragraph 88\(ca\)](#) of the Judiciary Act 1903 as amended by this Act; and
- (b) immediately before the commencement of those regulations, Rules of Court made under paragraph 86(f) of that Act had effect;

subsection 48(7) of the Acts Interpretation Act 1901 has effect in relation to those Rules of Court as if they were regulations repealed by the regulations referred to in paragraph (a).”

End of Document

(CTH) Judiciary Act 1903 [7490] s 87 Application of sections 48, 48A, 48B, 49 and 50 of the Acts Interpretation Act 1901

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Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 4 RULES OF COURT \[ss 86–88\]](#)

[7490] 87 Application of sections 48, 48A, 48B, 49 and 50 of the Acts Interpretation Act 1901

[s 87 rep Act 140 of 2003 s 3 and Sch 1, effective 1 January 2005]

End of Document

(CTH) Judiciary Act 1903 [7590] s 88 Regulations

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 4 RULES OF COURT \[ss 86–88\]](#)

[7590] 88 Regulations

The Governor-General may make regulations, not inconsistent with this Act, prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act;

and, in particular, may make regulations:

- (c) prescribing the content and form of a notice to be given under [subsection 78B\(1\)](#) and specifying the documents (if any) that are to accompany such a notice;
- (ca) prescribing the fees payable in respect of proceedings in the High Court and the execution of the process of the High Court;
- (cb) modifying or adapting provisions of the Legislation Act 2003 (other than the provisions of Part 2 of Chapter 3 of that Act or any other provisions whose modification or adaptation would affect the operation of that Part) in their application to the Court;
- (d) prescribing the practice and procedure for the filing and giving of such a notice, including the manner in which, the time within which, the persons to whom, and the persons by whom, such a notice is to be given; and
- (e) specifying any affidavits to be filed following the giving of a notice under [subsection 78B\(1\)](#) and prescribing the persons by whom and times within which the affidavits are to be filed.

[s 88 am Act 157 of 1989 s 21; Act 140 of 2003 s 3 and Sch 1, effective 1 January 2005; Act 10 of 2015 s 3 and Sch 1 item 154, effective 5 March 2016]

SECTION 88 GENERALLY

[7590.5] Transitional arrangements

See [\[7485.5\]](#).

End of Document

User Name: REECE STORME FERRARA

Date and Time: Friday, 23 September 2022 5:06:00 PM AEST

Job Number: 180127235

Documents (90)

1. [\[5435\] s 46 Interpretation](#)

Client/Matter: -None-

2. [\[5440\] s 47 Application](#)

Client/Matter: -None-

3. [\[5445\] s 48 Crown to be bound](#)

Client/Matter: -None-

4. [\[5450\] s 49 Contravention of order to constitute contempt](#)

Client/Matter: -None-

5. [\[5455\] s 50 Reports](#)

Client/Matter: -None-

6. [\[5460\] s 51 Application of this Part](#)

Client/Matter: -None-

7. [\[5565\] s 55A Right of barristers and solicitors admitted in federal courts to practise in those courts](#)

Client/Matter: -None-

8. [\[5570\] s 55B Right to practise as barrister or solicitor in federal courts and courts exercising federal jurisdiction](#)

Client/Matter: -None-

9. [\[5575\] s 55C Register of Practitioners](#)

Client/Matter: -None-

10. [\[5580\] s 55D Right to practise as barrister or solicitor in Territories](#)

Client/Matter: -None-

11. [\[5585\] s 55E Attorney-General's lawyers](#)

Client/Matter: -None-

12. [\[5590\] s 55F Attorney-General's lawyer may act for more than one party](#)

Client/Matter: -None-

13. [\[5595\] s 55G Commonwealth may charge for services of Attorney-General's lawyer](#)

Client/Matter: -None-

14. [\[5600\] s 55H Lawyers employed by a State, the Australian Capital Territory or the Northern Territory](#)

Client/Matter: -None-

15. [\[5602\] s 55I Definitions](#)

Client/Matter: -None-

16. [\[5605\] s 55J The Australian Government Solicitor](#)

Client/Matter: -None-

17. [\[5607\] s 55K Functions](#)

Client/Matter: -None-

18. [\[5610\] s 55L Powers](#)
Client/Matter: -None-
19. [\[5612\] s 55M Constitution](#)
Client/Matter: -None-
20. [\[5615\] s 55N Persons and bodies for whom the AGS may provide services](#)
Client/Matter: -None-
21. [\[5617\] s 55P AGS may charge for services](#)
Client/Matter: -None-
22. [\[5620\] s 55Q AGS lawyers](#)
Client/Matter: -None-
23. [\[5622\] s 55R AGS may act for more than one party](#)
Client/Matter: -None-
24. [DIVISION 4 APPOINTMENT AND TERMS AND CONDITIONS OF CEO AND STAFF \(Repealed\)](#)
Client/Matter: -None-
25. [DIVISION 5 MONEY \(Repealed\)](#)
Client/Matter: -None-
26. [\[5660\] s 55ZF Attorney-General may issue directions](#)
Client/Matter: -None-
27. [\[5665\] s 55ZG Compliance with Legal Services Directions](#)
Client/Matter: -None-
28. [\[5670\] s 55ZH Legal Services Directions and legal professional privilege](#)
Client/Matter: -None-
29. [\[5675\] s 55ZI Anything done under Legal Services Directions not actionable](#)
Client/Matter: -None-
30. [\[5685\] s 56 Suits against the Commonwealth](#)
Client/Matter: -None-
31. [\[5690\] s 57 Suits by a State against the Commonwealth](#)
Client/Matter: -None-
32. [\[5695\] s 58 Suits against a State in matters of federal jurisdiction](#)
Client/Matter: -None-
33. [\[5700\] s 59 Suits between States](#)
Client/Matter: -None-
34. [\[5705\] s 60 Injunction against a State and its officers](#)
Client/Matter: -None-
35. [\[5710\] s 61 Suits by Commonwealth](#)
Client/Matter: -None-
36. [\[5715\] s 62 Suits by a State](#)
Client/Matter: -None-
37. [\[5720\] s 63 Service of process when Commonwealth or State is party](#)
Client/Matter: -None-
38. [\[5725\] s 64 Rights of parties](#)
Client/Matter: -None-
39. [\[5730\] s 65 No execution against Commonwealth or a State](#)
Client/Matter: -None-

40. [\[5735\] s 66 Performance by Commonwealth or State](#)
Client/Matter: -None-
41. [\[5740\] s 67 Execution by Commonwealth or State](#)
Client/Matter: -None-
42. [\[5850\] s 67A Interpretation](#)
Client/Matter: -None-
43. [\[5855\] s 67B Suits between Commonwealth and Northern Territory](#)
Client/Matter: -None-
44. [\[5860\] s 67C Jurisdiction of Supreme Court of Territory](#)
Client/Matter: -None-
45. [\[5865\] s 67D Prosecution of indictable offences in Supreme Court of Territory](#)
Client/Matter: -None-
46. [\[5870\] s 67E No execution against Territory](#)
Client/Matter: -None-
47. [\[5875\] s 67F Effect of this Part](#)
Client/Matter: -None-
48. [\[5975\] s 68 Jurisdiction of State and Territory courts in criminal cases](#)
Client/Matter: -None-
49. [\[5980\] s 68A Committals jurisdiction if both Federal Court of Australia and State or Territory court have jurisdiction in relation to indictable offence](#)
Client/Matter: -None-
50. [\[5985\] s 68B Application of State and Territory laws if Federal Court of Australia and State or Territory court both have jurisdiction in relation to an offence](#)
Client/Matter: -None-
51. [\[5990\] s 68C Adjustments to State and Territory laws applying to proceedings before Federal Court of Australia](#)
Client/Matter: -None-
52. [\[6075\] s 69 Indictments](#)
Client/Matter: -None-
53. [\[6080\] s 70 Offences committed in several States](#)
Client/Matter: -None-
54. [\[6085\] s 70A Indictable offence not committed in a State](#)
Client/Matter: -None-
55. [\[6090\] s 71 Discharge of persons committed for trial](#)
Client/Matter: -None-
56. [\[6095\] s 71A Trial of indictable offence without preliminary examination](#)
Client/Matter: -None-
57. [\[6195\] s 72 Reservation of points of law](#)
Client/Matter: -None-
58. [\[6200\] s 73 Hearing](#)
Client/Matter: -None-
59. [\[6205\] s 74 Effect of order of Full Court](#)
Client/Matter: -None-
60. [\[6210\] s 75 Certain errors not to avoid conviction](#)

- Client/Matter:** -None-
61. [\[6215\] s 76 Appeal from arrest of judgment](#)
- Client/Matter:** -None-
62. [\[6220\] s 77 No other appeal](#)
- Client/Matter:** -None-
63. [\[6325\] s 77A Trial without jury](#)
- Client/Matter:** -None-
64. [\[6330\] s 77B Power of High Court to direct trial with jury](#)
- Client/Matter:** -None-
65. [\[6335\] s 77C Trial of an issue and new trials](#)
- Client/Matter:** -None-
66. [\[6340\] s 77D Juries](#)
- Client/Matter:** -None-
67. [\[6445\] s 77E Production of books](#)
- Client/Matter:** -None-
68. [\[6450\] s 77F Oaths and affirmations](#)
- Client/Matter:** -None-
69. [\[6455\] s 77G Orders and commissions for examination of witnesses](#)
- Client/Matter:** -None-
70. [\[6460\] s 77H Oral and affidavit evidence](#)
- Client/Matter:** -None-
71. [\[6565\] s 77J Amendment](#)
- Client/Matter:** -None-
72. [\[6570\] s 77K Formal defects not to invalidate](#)
- Client/Matter:** -None-
73. [\[6575\] s 77L Reserved judgments](#)
- Client/Matter:** -None-
74. [\[6775\] s 77M Enforcement of judgments](#)
- Client/Matter:** -None-
75. [\[6780\] s 77MA Interest up to judgment](#)
- Client/Matter:** -None-
76. [\[6785\] s 77N Interest on judgment debts](#)
- Client/Matter:** -None-
77. [\[6790\] s 77P Interpleader](#)
- Client/Matter:** -None-
78. [\[6795\] s 77Q Discharge of property taken in execution](#)
- Client/Matter:** -None-
79. [\[6895\] s 77R Receivers and managers](#)
- Client/Matter:** -None-
80. [\[6900\] s 77RA Definitions](#)
- Client/Matter:** -None-
81. [\[6905\] s 77RB Powers of High Court not affected](#)
- Client/Matter:** -None-
82. [\[6910\] s 77RC Other laws not affected](#)

Client/Matter: -None-

83. [\[6915\] s 77RD Safeguarding public interest in open justice](#)

Client/Matter: -None-

84. [\[6920\] s 77RE Power to make orders](#)

Client/Matter: -None-

85. [\[6925\] s 77RF Grounds for making an order](#)

Client/Matter: -None-

86. [\[6930\] s 77RG Procedure for making an order](#)

Client/Matter: -None-

87. [\[6935\] s 77RH Interim orders](#)

Client/Matter: -None-

88. [\[6940\] s 77RI Duration of orders](#)

Client/Matter: -None-

89. [\[6945\] s 77RJ Exception for court officials](#)

Client/Matter: -None-

90. [\[6950\] s 77RK Contravention of order](#)

Client/Matter: -None-

(CTH) Judiciary Act 1903 [5435] s 46 Interpretation

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

Practice & Procedure High Court & Federal Court > High Court — Principal Legislation > Judiciary Act 1903 > PART VIII ENFORCEMENT OF CERTAIN ORDERS CONCERNING COURT PROCEEDINGS [ss 46–51]

PART VIII ENFORCEMENT OF CERTAIN ORDERS CONCERNING COURT PROCEEDINGS [ss 46–51]

[5435] 46 Interpretation

In this Part:

Australia includes the external Territories.

court means a court of Victoria, and includes a Judge of such a court and any Magistrate, Justice of the Peace or Coroner of Victoria.

make , in relation to an order being a direction, includes give.

order includes a direction.

proceedings means criminal proceedings arising out of, or in any way relating to, the incident that occurred at the Sheraton Hotel in Melbourne on the night of 30 November 1983 involving the Australian Secret Intelligence Service.

End of Document

(CTH) Judiciary Act 1903 [5440] s 47 Application

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIII ENFORCEMENT OF CERTAIN ORDERS CONCERNING COURT PROCEEDINGS \[ss 46–51\]](#)

[5440] 47 Application

This Part applies to and in relation to:

- (a) all natural persons, whether resident in Australia or not and whether Australian citizens or not;
and
- (b) all bodies corporate, whether incorporated in Australia or not;

and extends to acts done or omitted to be done outside Australia.

End of Document

(CTH) Judiciary Act 1903 [5445] s 48 Crown to be bound

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Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIII ENFORCEMENT OF CERTAIN ORDERS CONCERNING COURT PROCEEDINGS \[ss 46–51\]](#)

[5445] 48 Crown to be bound

This Part binds the Crown in right of the Commonwealth, of each of the States and of the Northern Territory.

[s 48 am Act 59 of 2015 s 3 and Sch 2 item 233, effective 1 July 2016]

End of Document

(CTH) Judiciary Act 1903 [5450] s 49 Contravention of order to constitute contempt

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Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIII ENFORCEMENT OF CERTAIN ORDERS CONCERNING COURT PROCEEDINGS \[ss 46–51\]](#)

[5450] 49 Contravention of order to constitute contempt

(1) If a court makes an order to which this subsection applies in relation to proceedings before the court on the ground, or on grounds that include the ground, however the ground is expressed, that the making of the order is necessary or desirable in the interests of the national or international security of Australia or in the interests of the physical safety of the accused, of a witness or of any other person, a person shall not contravene or fail to comply with the order so far as it is applicable in relation to the last- mentioned person.

(2) By force of this subsection, an order referred to in [subsection \(1\)](#) applies, except so far as is inconsistent with the express terms of the order, in like manner as this Part applies by virtue of [section 47](#).

(3) [Subsection \(1\)](#) applies to:

- (a) an order that the proceedings are, or part of the proceedings is, to take place in a closed hearing;
- (b) an order that a person is, or persons included in a specified class of persons are, to be excluded from the whole or part of the proceedings;
- (c) an order prohibiting or restricting the disclosure of information with respect to the whole or part of the proceedings;
- (d) an order prohibiting or restricting the publication of a report of or relating to the whole or part of the proceedings;
- (e) an order for the purpose of ensuring that no person without the approval of the court has access, whether before, during or after the hearing of the proceedings, to any indictment, affidavit, exhibit or other document used in the proceedings or to the records of the court relating to the proceedings; or
- (f) an order combining any 2 or more of the foregoing orders.

(4) If a person contravenes or fails to comply with an order referred to in [subsection \(1\)](#), the Federal Court of Australia has the same powers to punish the person for the contravention or failure as if the order had been made by that Court.

End of Document

(CTH) Judiciary Act 1903 [5455] s 50 Reports

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Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIII ENFORCEMENT OF CERTAIN ORDERS CONCERNING COURT PROCEEDINGS \[ss 46–51\]](#)

[5455] 50 Reports

(1) Subject to [subsection \(2\)](#), the Attorney-General of the Commonwealth shall, as soon as practicable after each 30 June, lay before each House of the Parliament a report setting out:

- (a) the number of proceedings in which, to his or her knowledge, orders referred to in [subsection 49\(1\)](#) were made during the year that ended on that date; and
- (b) particulars of those proceedings, including particulars of the judgments.

[subs (1) am Act 141 of 1994 s 4 and Sch 2]

(2) [Subsection \(1\)](#) does not require the making of a report in terms that would be inconsistent with any order referred to in [subsection 49\(1\)](#).

End of Document

(CTH) Judiciary Act 1903 [5460] s 51 Application of this Part

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Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIII ENFORCEMENT OF CERTAIN ORDERS CONCERNING COURT PROCEEDINGS \[ss 46–51\]](#)

[5460] 51 Application of this Part

This Part does not apply in relation to an order made later than 2 years after the commencement of the Criminal Proceedings Act 1984 of Victoria.

End of Document

**(CTH) Judiciary Act 1903 [5565] s 55A Right of barristers and solicitors
admitted in federal courts to practise in those courts**

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) >
[Judiciary Act 1903](#) > PART VIIIA LEGAL PRACTITIONERS [ss 55A–55H]

PART VIIIA LEGAL PRACTITIONERS [ss 55A–55H]

[5565] 55A Right of barristers and solicitors admitted in federal courts to practise in those courts

A person who has been admitted to practise as a barrister or solicitor, or as both, under rules made in pursuance of paragraph (ga) of section 86 of this Act is, subject to those rules, entitled to practise in any federal court as a barrister or solicitor, or as both, as the case may be.

End of Document

(CTH) Judiciary Act 1903 [5570] s 55B Right to practise as barrister or solicitor in federal courts and courts exercising federal jurisdiction

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: May 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIA LEGAL PRACTITIONERS \[ss 55A–55H\]](#)

[5570] 55B Right to practise as barrister or solicitor in federal courts and courts exercising federal jurisdiction

(1) Subject to this section, a person who:

- (a) is for the time being entitled to practise as a barrister or solicitor, or as both, in the Supreme Court of a State; or
- (b) is for the time being entitled, under a law (including this Act) in force in a Territory, to practise as a barrister or solicitor, or as both, in the Supreme Court of that Territory;

has the like entitlement to practise in any federal court.

(2) A person is not entitled to practise in a federal court as a solicitor by reason of [paragraph \(b\)](#) of the last preceding subsection unless:

- (a) he or she has been admitted to practise as a solicitor or legal practitioner by the Supreme Court of the Territory; or
- (b) he or she practises as a solicitor in the Territory and his or her sole or principal place of business as a solicitor is in the Territory.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) A person is not entitled to practise as a barrister or solicitor in a federal court by reason of [subsection \(1\)](#) unless his or her name appears in the Register of Practitioners kept in accordance with the next succeeding section as a person entitled to practise in that capacity.

[subs (3) am Act 141 of 1994 s 4 and Sch 2]

(4) A person who is, under [subsection \(1\)](#), entitled to practise as a barrister or solicitor, or both, in any federal court has a right of audience:

- (a) in any court of a State in relation to the exercise by the court of federal jurisdiction; and
- (b) in any court of an internal Territory in relation to the exercise by the court of federal-type jurisdiction.

[subs (4) subst Act 38 of 1988 s 3 and Sch 1]

(CTH) Judiciary Act 1903 [5570] s 55B Right to practise as barrister or solicitor in federal courts and courts exercising federal jurisdiction

(5) The Chief Justice of the Supreme Court of a State or an internal Territory may direct the Registrar or other proper officer of that Supreme Court to keep a Register of Practitioners for the purposes of [subsection \(4\)](#) and, where such a Register is kept in a State or Territory, a person is not entitled, in a court of that State or Territory, to the right of audience referred to in [subsection \(4\)](#) unless he or she is registered in that Register.

[subs (5) am Act 38 of 1988 s 3 and Sch 1; Act 141 of 1994 s 4 and Sch 2]

(6) Where a Register is kept in a State or Territory in accordance with [subsection \(5\)](#), a person who satisfies the Registrar or other officer keeping the Register that he or she is a person referred to in [subsection \(4\)](#) is entitled to be registered in that Register.

[subs (6) am Act 38 of 1988 s 3 and Sch 1; Act 141 of 1994 s 4 and Sch 2]

(7) Where it is proved to the satisfaction of the Supreme Court of a State or Territory constituted by 2 or more Judges that a person who is registered in the Register kept in that State or Territory in accordance with [subsection \(5\)](#) has been guilty of conduct that justifies it in so doing, the Supreme Court may order that person's registration be cancelled or be suspended for a specified period, but the Supreme Court may, at any time, order that the registration of the person be restored or that the suspension be terminated.

[subs (7) am Act 38 of 1988 s 3 and Sch 1]

(8) The Registrar or other proper officer of the Supreme Court shall make such alterations and notations in a Register kept by him or her as are required by reason of orders of the Supreme Court under [subsection \(7\)](#).

[subs (8) am Act 141 of 1994 s 4 and Sch 2]

(9) Notwithstanding [subsection \(6\)](#), where the registration of a person has been cancelled in accordance with [subsection \(7\)](#) and has not been restored, or is for the time being suspended, that person is not entitled again to be registered in the Register except pursuant to an order under [subsection \(7\)](#).

(10) In this section:

federal-type jurisdiction , in relation to a court of an internal Territory, means jurisdiction conferred on the court by or under a law of the Commonwealth, but does not include jurisdiction conferred on the court under an Act providing for the acceptance, administration or government of that Territory.

[subs (10) insrt Act 38 of 1988 s 3 and Sch 1; am Act 125 of 1999 s 3 and Sch 10]

Section 55B Generally

[5570.5] “entitled to practise”

L Legislation cited in this paragraph

(NSW) [Legal Profession Regulation 2002](#) Pt 14.

(CTH) [Judiciary Act 1903](#) Pt VIIIA, ss 55B, s 55B(1), s 55B(3), s 55B(4), s 55B(5), 55C, s 55D, s 55E.

(CTH) Judiciary Act 1903 [5570] s 55B Right to practise as barrister or solicitor in federal courts and courts exercising federal jurisdiction

(WA) [Legal Practitioners Act 1893 \(repealed\)](#).

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III.

In *APLA Ltd v Legal Services Cmr* (2005) 224 CLR 322; [219 ALR 403](#); [\[2005\] HCA 44](#); [BC200506315](#) at [\[22\]](#) ^{CB}, the High Court rejected an argument that Pt 14 of the Legal Profession Regulation 2002 (NSW) was inconsistent with [Pt VIIIA](#) of the Judiciary Act. Gleeson CJ and Heydon J summarised the scheme of Pt VIIIA as follows:

[22]... the Judiciary Act, in [ss 55B](#) and [55C](#), accommodates the state and territory based scheme of admission and regulation in the following manner. [Section 55B\(1\)](#) provides that, subject to [s 55B\(3\)](#), a person who is for the time being entitled to practise as a barrister or solicitor or both in the Supreme Court of a state or territory has the like entitlement to practise in any federal court. Section 55B(3) provides that such entitlement depends upon a person's name appearing in the Register of Practitioners kept in accordance with s 55C. Section 55C requires that a Register of Practitioners shall be kept at the Registry of the High Court. It is to be kept by the Chief Executive and Principal Registrar of the High Court. Entry in the Register is determined by reference back to s 55B, which, in effect, means entitlement to practise in the Supreme Court of a State or Territory. [Section 55B\(4\)](#) provides that a person who is entitled to practise in a federal court has a right of audience in any State or Territory court exercising federal or "federal-type" jurisdiction. Section 55C(5) empowers the High Court to order that the name of a person be struck off the Register of Practitioners if it is proved to the satisfaction of the Court that the person has been guilty of conduct that justifies that course.

In *De Pardo v Legal Practitioners Complaints Committee* (2000) 97 FCR 575 at 595–6; [170 ALR 709](#); [\[2000\] FCA 335](#); [BC200001132](#) ^{CB}, the Full Court held that there was no inconsistency between the provisions of the Legal Practitioners Act 1893 (WA) and [Pt VIIIA](#) of the Judiciary Act; to the contrary, the legislative scheme apparent in Pt VIIIA is complementary to the provisions of the state legislation regulating the admission and control of legal practitioners. Thus, [s 55B](#) assumes the existence of provisions of state law entitling a person to practise as a barrister and solicitor in state Supreme Courts and [s 55D](#) assumes the existence of provisions in state law for the suspension or removal of that entitlement. Further, [s 55E](#) assumes the existence of state laws imposing rights, duties or obligations on legal practitioners in relation to their clients or to the courts, and providing for disciplinary proceedings. French J explained that the power in a federal court to regulate the conduct of legal practitioners appearing before it to the extent necessary to ensure the observance of their duties to the court and the integrity of its procedures is an implied incidental power, with its source in Ch III of the Constitution.

De Pardo, above, was discussed with apparent approval by Gummow J (with whom Hayne J agreed on this point) in *APLA Ltd v Legal Services Cmr* (2005) 224 CLR 322; [219 ALR 403](#); [\[2005\] HCA 44](#); [BC200506315](#) at [\[185\]–\[186\]](#) ^{CB}.

[T]he entitlement created by [ss 55B](#) and [55C](#) to practise in federal courts is ambulatory. It operates upon the range of legislative schemes which from time to time regulate the right to practise in state and territory courts. Its sense is to be derived from the ordinary meaning of the word "entitle" which is "to give a rightful claim to anything": *Shorter Oxford English Dictionary*. In that ordinary sense it attaches only to a practitioner who has satisfied all conditions necessary to establish the rightful claim to practice. And most telling in the immediate context of these proceedings is the fact that the second reading speech which introduced the 1966 amendments [including ss 55B and 55C] proceeded upon the express assumption that the entitlement to practise would be conditioned upon the holding of a current practising certificate... A legal practitioner who, by virtue of s 90(1)(b) of the Legal Profession Practice Act 1958, is not qualified to practise in Victoria is not "entitled to practise" in the Supreme Court of that state within the meaning of ss 55B and 55C of the Judiciary Act 1903. Such a practitioner therefore has no "like entitlement to practise in any federal court" under s 55B(1): *Little v Registrar of High Court of Australia* (1991) 29 FCR 544; [101 ALR 247](#) at [255–6](#) ^{CB} per Sheppard, Ryan and French JJ.

(CTH) Judiciary Act 1903 [5570] s 55B Right to practise as barrister or solicitor in federal courts and courts exercising federal jurisdiction

See also *University of Western Australia v Gray (No 25)* (2009) 180 FCR 483; [262 ALR 1](#); [\[2009\] FCA 1227](#); [BC200909777](#) at [\[25\]](#) [CB](#), where it is noted that as at the date of that judgment it appears that no Supreme Court has established a Register of the kind contemplated by [s 55B\(5\)](#).

[5570.10] Jurisdiction to discipline practitioners

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 55B.

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III.

In *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224; [117 ALR 253](#) [CB](#), the Full Court (Lee, Hill and Cooper JJ) observed that the Federal Court has no jurisdiction to admit solicitors. It does not maintain a roll of solicitors and has no power in consequence to strike solicitors off any roll. The maintenance of the register of persons entitled to practise in the Federal Court and the power to erase a person's name from that register resides with the Registrar of the High Court. However, it does not follow that persons who practise in the Federal Court owe no duty to the court nor that the court could not in an appropriate case discipline a practitioner who acted in breach of a duty to the court. Their Honours said at 263:

As presently advised, we see no reason, [s 55B](#) notwithstanding, to doubt that in an appropriate case, involving, for example, dishonesty by a legal practitioner, the court could refuse to permit that practitioner to represent a client before it or otherwise discipline that practitioner.

In *De Pardo v Legal Practitioners Complaints Committee* (2000) 97 FCR 575; [170 ALR 709](#); [\[2000\] FCA 335](#); [BC200001132](#) at [\[53\]](#) [CB](#), French J (with whom Whitlam J agreed) said:

[53] There is no role for federal courts other than the High Court in removing practitioners from the Register of Practitioners: *Yamaji v Westpac Banking Corp (No 1)* (1993) 42 FCR 431 at 432–3. As the learned trial judge observed, that limitation does not affect the power of federal courts to make orders effecting the supervision of the conduct of legal practitioners where such orders are necessary to redress a breach of duty to the court or to maintain the integrity of its procedures: *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224 at 232–3; [117 ALR 253](#). The power in a federal court to regulate the conduct of legal practitioners appearing before it to the extent necessary to ensure the observance of their duties to the court and the integrity of its procedures is an implied incidental power. Like the power of the court to punish for contempt, even if such power is not to be found in some express statutory provision, it has its source in Ch III of the Constitution ...

[5570.15] Costs

L Legislation cited in this paragraph

(CTH) [Federal Court Rules](#).

(CTH) [Judiciary Act 1903](#) s 55B, s 55C.

In *University of Western Australia v Gray (No 25)* (2009) 180 FCR 483; [262 ALR 1](#); [\[2009\] FCA 1227](#); [BC200909777](#) [CB](#), Barker J held that a party was not entitled to re-cover costs of a solicitor as a “solicitor” under the Federal Court Rules if the solicitor was entitled to have his or her name entered on the Register of Practitioners under [s 55C](#) of the Judiciary Act 1903, and so to practice in federal courts by reason of [s 55B](#), if the solicitor’s name had not actually been entered on the Register of Practitioners. See also *Guss v Veenhuizen (No 2)* (1976) 136 CLR 47 at 52, 59–60; [2 ALR 271](#); [51 ALJR 209](#); [BC7600103](#) [CB](#).

End of Document

(CTH) Judiciary Act 1903 [5575] s 55C Register of Practitioners

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: May 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIA LEGAL PRACTITIONERS \[ss 55A–55H\]](#)

[5575] 55C Register of Practitioners

(1) For the purposes of [section 55B](#), the Chief Executive and Principal Registrar of the High Court shall cause a Register of Practitioners to be kept at the Registry of the High Court.

[subs (1) am Act 13 of 1994 s 41]

(2) Where it is shown to the satisfaction of the Chief Executive and Principal Registrar that a person would, but for [subsection \(3\)](#) of the last preceding section, be for the time being entitled by reason of that section to practise as a barrister or solicitor, or as both, in federal courts, the Chief Executive and Principal Registrar shall cause the name of the person, and the capacity in which he or she is to be entitled to practise, to be entered in the Register of Practitioners.

[subs (2) am Act 13 of 1994 s 41; Act 141 of 1994 s 4 and Sch 2]

(3) Where, otherwise than by reason of an order by the High Court under [subsection \(5\)](#), the Chief Executive and Principal Registrar is satisfied that a person whose name appears in the Register of Practitioners:

- (a) is not for the time being entitled by reason of the last preceding section:
 - (i) to practise in federal courts; or
 - (ii) to practise in federal courts in a capacity specified in the Register; or
- (b) would, but for [subsection \(3\)](#) of the last preceding section, be for the time being entitled by reason of that section to practise in federal courts in a capacity not specified in the Register;

the Chief Executive and Principal Registrar shall cause the particulars in the Register in relation to the person to be struck out or amended, as the case requires.

[subs (3) am Act 13 of 1994 s 41]

(4) Where the Chief Executive and Principal Registrar is satisfied that a person whose name appears in the Register of Practitioners has died, the Chief Executive and Principal Registrar shall cause the particulars in the Register in relation to the person to be struck out.

[subs (4) am Act 13 of 1994 s 41]

(5) Where it is proved to the satisfaction of the High Court that a person whose name appears in the Register of Practitioners has been guilty of conduct that justifies it in so doing, the High Court may:

- (a) order that the person be not entitled to practise in federal courts and that his or her name be struck off the Register; or
- (b) order that the person's entitlement to practise in federal courts be suspended for a specified period;

but the High Court may at any time, by order, revoke or vary such an order.

[subs (5) am Act 141 of 1994 s 4 and Sch 2]

(6) Where the High Court makes an order under the last preceding subsection, the Chief Executive and Principal Registrar shall cause such entries or amendments to be made in the Register of Practitioners as are necessary to give effect to, or show the effect of, the order.

[subs (6) am Act 13 of 1994 s 41]

(7) Where the Chief Executive and Principal Registrar causes an entry to be made in the Register of Practitioners, or causes an entry in the Register to be struck out or amended, the Registrar shall cause the ground on which, and the date upon which, the entry is so made, struck out or amended to be noted in the Register.

[subs (7) am Act 13 of 1994 s 41; Act 141 of 1994 s 4 and Sch 2]

Section 55C Generally

[5575.5] Review of decision under s 55C(3)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 55C(3).

A decision by the registrar under [s 55C\(3\)](#) to remove a person's name from the Register of Practitioners, on the ground that the person is no longer entitled to practise as a barrister or solicitor or both in the Supreme Court of a state, does not involve an exercise of the judicial power of the Commonwealth. Rather, the decision is "a decision of an administrative character" within the meaning of the Administrative Decisions (Judicial Review) Act: *Little v Registrar of High Court of Australia* (1991) 29 FCR 544; [101 ALR 247](#) ^{CB} per Jenkinson J.

[5575.10] Registrar has no discretion

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 55C(3).

"... where a person is shown to be not entitled to practise in a federal court, the registrar has no discretion. He is required by [s 55C\(3\)](#) to cause the particulars in the register in relation to that person to be struck out": *Little v Registrar of High Court of Australia* (1991) 29 FCR 544; [101 ALR 247](#) at [256](#) ^{CB} per Sheppard, Ryan and French JJ.

[5575.15] Jurisdiction to remove practitioners not exclusive

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Pt VIIIA, s 55C(5).

In *De Pardo v Legal Practitioners Complaints Committee* (2000) 97 FCR 575; [170 ALR 709](#); [2000] FCA 335; [BC200001132](#) ^{CB}, the Full Federal Court held that the jurisdiction conferred on the High Court under [s 55C\(5\)](#) of the Judiciary Act 1903 was to be read as an additional disciplinary power that did not exclude the power of a State Supreme Court to remove a practitioner from the roll of those entitled to practise in the courts, including Federal courts. French J (with whom Whitlam J agreed) said (at [54]):

[54]... it may be seen that the legislative scheme of [Pt VIIIA](#) of the Judiciary Act is complementary to that of the Legal Practitioners Act. The provisions of the Legal Practitioners Act authorise the tribunal to inquire into unprofessional conduct in relation to the practise of law by practitioners admitted in Western Australia whether that unprofessional conduct arises in State courts, federal courts, courts exercising federal jurisdiction or otherwise. There is no relevant inconsistency between the provisions of the Legal Practitioners Act in this regard and those of the Judiciary Act.

End of Document

(CTH) Judiciary Act 1903 [5580] s 55D Right to practise as barrister or solicitor in Territories

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIA LEGAL PRACTITIONERS \[ss 55A–55H\]](#)

[5580] 55D Right to practise as barrister or solicitor in Territories

[s 55D rep Act 3 of 2011 s 3 and Sch 6, effective 3 March 2011]

End of Document

(CTH) Judiciary Act 1903 [5585] s 55E Attorney-General's lawyers

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIA LEGAL PRACTITIONERS \[ss 55A–55H\]](#)

[5585] 55E Attorney-General's lawyers

(1) In this section and in [sections 55F](#) and [55G](#):

Attorney-General's lawyer means a person:

- (a) whose name is on:
 - (i) the roll of barristers and solicitors of the High Court kept under the Rules of Court; or
 - (ii) the roll of barristers, solicitors, barristers and solicitors or legal practitioners of the Supreme Court of a State or Territory; and
- (b) who is either:
 - (i) the Secretary of the Attorney-General's Department; or
 - (ii) a person in the Attorney-General's Department who is engaged under the Public Service Act 1999.

[def am Act 3 of 2011 s 3 and Sch 6, effective 3 March 2011; Act 5 of 2011 s 3 and Sch 7 [84], effective 19 April 2011]

[subs (1) am Act 146 of 1999 s 3 and Sch 1]

(2) An Attorney-General's lawyer acting in that capacity is entitled:

- (a) to do everything necessary or convenient for that purpose; and
- (b) to practise as a barrister, solicitor, or barrister and solicitor in any court and in any State or Territory; and
- (c) to all the rights and privileges of so practising;

whether or not he or she is so entitled apart from this subsection.

(3) An Attorney-General's lawyer acting in that capacity in a State or Territory is not subject to a law of a State or Territory that relates to legal practitioners except to the extent that such laws:

- (a) impose rights, duties or obligations on legal practitioners in relation to their clients or to the courts; or
- (b) provide for disciplinary proceedings in relation to the misconduct of legal practitioners.

(4) Subsection (3) is subject to subsection (6) and to [section 55F](#) (Attorney-General's lawyer may act for more than one party).

(5) In considering the nature of the rights, duties and obligations of an Attorney-General's lawyer in relation to a client, regard must be had to the lawyer's position as a person in the Attorney-General's Department engaged under the Public Service Act 1999.

[subs (5) am Act 146 of 1999 s 3 and Sch 1]

(6) An Attorney-General's lawyer acting in that capacity is not subject to a law of a State or Territory that is prescribed for the purposes of this section.

[s 55E subst Act 7 of 1999 s 3 and Sch 1]

End of Document

(CTH) Judiciary Act 1903 [5590] s 55F Attorney-General's lawyer may act for more than one party

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIA LEGAL PRACTITIONERS \[ss 55A–55H\]](#)

[5590] 55F Attorney-General's lawyer may act for more than one party

An Attorney-General's lawyer may act in a matter for 2 or more parties who have conflicting interests in the matter if to do so has been approved by the Attorney-General:

- (a) by way of approval in relation to the particular matter; or
- (b) by way of written arrangements covering the circumstances in which an Attorney-General's lawyer may so act.

[s 55F subst Act 7 of 1999 s 3 and Sch 1]

End of Document

(CTH) Judiciary Act 1903 [5595] s 55G Commonwealth may charge for services of Attorney-General's lawyer

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIA LEGAL PRACTITIONERS \[ss 55A–55H\]](#)

[5595] 55G Commonwealth may charge for services of Attorney-General's lawyer

(1) The Commonwealth may charge fees:

- (a) in relation to services of a legal professional nature provided by an Attorney-General's lawyer in his or her capacity as a person in the Attorney-General's Department engaged under the Public Service Act 1999; and
- (b) for disbursements incurred by the Commonwealth in the course of providing those services.

[subs (1) am Act 146 of 1999 s 3 and Sch 1]

(2) If the Commonwealth has charged a client an amount under subsection (1), the amount may be recovered by the client as costs incurred by the client.

[s 55G subst Act 7 of 1999 s 3 and Sch 1]

End of Document

(CTH) Judiciary Act 1903 [5600] s 55H Lawyers employed by a State, the Australian Capital Territory or the Northern Territory

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIA LEGAL PRACTITIONERS \[ss 55A–55H\]](#)

[5600] 55H Lawyers employed by a State, the Australian Capital Territory or the Northern Territory

(1) If:

- (a) services of a legal professional nature are provided to a person or body (the **client**) by an officer of, or a person employed in, a Government Department of a State, of the Australian Capital Territory or of the Northern Territory in his or her capacity as such an officer or employee in the course of acting for the client in proceedings in a federal court or in a tribunal established by a law of the Commonwealth; and
- (b) the Department charges the client for any of the services or for disbursements incurred in connection with any of the services;

the amount charged may be recovered by the client as costs incurred by the client in the proceedings.

(2) If an amount charged as mentioned in paragraph (1)(b) is not an amount of disbursement then, for the following purposes:

- (a) an application to a federal court, or to a tribunal established by a law of the Commonwealth, for the award of costs;
- (b) the taxation of those costs;
- (c) the recovery of those costs by the client;

the amount charged is taken to have been paid by the client.

[s 55H insrt Act 34 of 1997 s 3 and Sch 11]

(CTH) Judiciary Act 1903 [5602] s 55I Definitions

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > **PART VIIIB THE AUSTRALIAN GOVERNMENT SOLICITOR [ss 55I–55R] > DIVISION 1 DEFINITIONS [s 55I]**

PART VIIIB THE AUSTRALIAN GOVERNMENT SOLICITOR [ss 55I–55R]

[Pt VIIIB insrt Act 7 of 1999 s 3 and Sch 1]

DIVISION 1 DEFINITIONS [s 55I]

[5602] 55I Definitions

In this Part, unless the contrary intention appears:

AGS lawyer means:

- (a) the AGS; or
- (b) a person:
 - (i) whose name is on the roll of barristers and solicitors of the High Court kept under the Rules of Court, or the roll of barristers, solicitors, barristers and solicitors or legal practitioners of the Supreme Court of a State or Territory; and
 - (ii) who is a person in the Attorney-General's Department who is engaged under the Public Service Act 1999; and
 - (iii) who ordinarily performs work for clients of the AGS under the supervision or direction of the AGS.

[def subst Act 64 of 2015 s 3 and Sch 1 item 2, effective 1 July 2015]

CEO

[def subst Act 64 of 2015 s 3 and Sch 1 item 3, effective 1 July 2015]

company means a body corporate that is incorporated, or taken to be incorporated, under the Corporations Act 2001.

[def am Act 55 of 2001 s 3 and Sch 3, effective 15 July 2001]

Finance Minister

[def subst Act 64 of 2015 s 3 and Sch 1 item 4, effective 1 July 2015]

State includes the Australian Capital Territory and the Northern Territory.

Territory does not include the Australian Capital Territory or the Northern Territory.

End of Document

(CTH) Judiciary Act 1903 [5605] s 55J The Australian Government Solicitor

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIB THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55J–55R\]](#) > **DIVISION 2 IDENTITY AND ACTIVITY OF THE AUSTRALIAN GOVERNMENT SOLICITOR [ss 55J–55P]**

DIVISION 2 IDENTITY AND ACTIVITY OF THE AUSTRALIAN GOVERNMENT SOLICITOR [ss 55J–55P]

[Div 2 Heading subst Act 64 of 2015 s 3 and Sch 1 item 5, effective 1 July 2015]

[5605] 55J The Australian Government Solicitor

- (1) There is to be an Australian Government Solicitor (the **AGS**).
- (2) The AGS must be a person:
 - (a) whose name is on:
 - (i) the roll of barristers and solicitors of the High Court kept under the Rules of Court; or
 - (ii) the roll of barristers, solicitors, barristers and solicitors or legal practitioners of the Supreme Court of a State or Territory; and
 - (b) who is a person in the Attorney-General's Department who is engaged under the Public Service Act 1999.

[s 55J subst Act 64 of 2015 s 3 and Sch 1 item 6, effective 1 July 2015]

End of Document

(CTH) Judiciary Act 1903 [5607] s 55K Functions

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIB THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55I–55R\]](#) > [DIVISION 2 IDENTITY AND ACTIVITY OF THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55J–55P\]](#)

[5607] 55K Functions

[s 55K subst Act 64 of 2015 s 3 and Sch 1 item 6, effective 1 July 2015]

End of Document

(CTH) Judiciary Act 1903 [5610] s 55L Powers

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIB THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55I–55R\]](#) > [DIVISION 2 IDENTITY AND ACTIVITY OF THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55J–55P\]](#)

[5610] 55L Powers

[s 55L subst Act 64 of 2015 s 3 and Sch 1 item 6, effective 1 July 2015]

End of Document

(CTH) Judiciary Act 1903 [5612] s 55M Constitution

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIB THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55I–55R\]](#) > [DIVISION 2 IDENTITY AND ACTIVITY OF THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55J–55P\]](#)

[5612] 55M Constitution

[s 55M subst Act 64 of 2015 s 3 and Sch 1 item 6, effective 1 July 2015]

End of Document

(CTH) Judiciary Act 1903 [5615] s 55N Persons and bodies for whom the AGS may provide services

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIB THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55I–55R\]](#) > [DIVISION 2 IDENTITY AND ACTIVITY OF THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55J–55P\]](#)

[5615] 55N Persons and bodies for whom the AGS may provide services

(1) The AGS may provide legal services and related services to or for the following:

- (a) the Commonwealth;
- (b) a person suing or being sued on behalf of the Commonwealth;
- (c) a Minister of the Commonwealth;
- (d) a body established by an Act or regulations or by a law of a Territory;
- (e) an officer of, or a person employed by:
 - (i) the Commonwealth; or
 - (ii) a body established by an Act or regulations or by a law of a Territory;
- (f) a person holding office under an Act or a law of a Territory;
- (g) a member of the Defence Force;
- (h) a company in which the Commonwealth has a controlling interest (including a company in which the Commonwealth has a controlling interest through one or more interposed Commonwealth authorities or Commonwealth companies);
- (i) a person who has at any time been a person referred to in paragraph (c), (e), (f) or (g).

Note:

For **Territory** see subsection (5).

[subs (1) am Act 64 of 2015 s 3 and Sch 1 item 7, effective 1 July 2015]

(2) The AGS may provide legal services and related services to or for the following persons and bodies if the AGS receives a request to do so from the executive government of the State concerned:

- (a) a State;
- (b) a person suing or being sued on behalf of a State;
- (c) a Minister for a State;

(CTH) Judiciary Act 1903 [5615] s 55N Persons and bodies for whom the AGS may provide services

- (d) a body established by a law of a State;
- (e) a person employed by:
 - (i) a State; or
 - (ii) a body established by a law of a State;
- (f) a person holding office under a law of a State;
- (g) a company in which a State has a controlling interest (including a company in which the State has a controlling interest through one or more interposed State authorities or State companies).

Note:

For **State** see [section 55I](#).

[subs (2) am Act 64 of 2015 s 3 and Sch 1 item 8, effective 1 July 2015; Act 59 of 2015 s 3 and Sch 1 item 142, effective 17 June 2015; Act 59 of 2015 s 3 and Sch 2 item 234–241, effective 1 July 2016]

(3) The AGS may provide legal services and related services to or for a person or body, or class of persons or bodies, not referred to in [subsection \(1\)](#) or [\(2\)](#) if the Attorney-General requests the AGS to do so.

[subs (3) subst Act 64 of 2015 s 3 and Sch 1 item 8, effective 1 July 2015]

(4) The AGS may provide legal services and related services to or for a person or body, or class of persons or bodies, not referred to in subsection (1) or (2) if the AGS so determines.

- (a) the CEO so determines; and
- (b) to do so would be within the functions of the AGS.

[subs (4) subst Act 64 of 2015 s 3 and Sch 1 item 8, effective 1 July 2015]

(4A) The AGS may provide services under subsection (3) or (4) only for a purpose for which the Commonwealth has power to make laws.

[subs (4A) insrt Act 64 of 2015 s 3 and Sch 1 item 8, effective 1 July 2015]

(5) In this section:

Territory does not include the Australian Capital Territory or the Northern Territory.

[def am Act 59 of 2015 s 3 and Sch 2 item 242, effective 1 July 2016]

(CTH) Judiciary Act 1903 [5617] s 55P AGS may charge for services

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIB THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55I–55R\]](#) > [DIVISION 2 IDENTITY AND ACTIVITY OF THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55J–55P\]](#)

[5617] 55P AGS may charge for services

- (1) The AGS, on behalf of the Commonwealth, may charge fees:
- (a) in relation to services provided by the AGS in accordance with section 55N; and
 - (b) for disbursements incurred by the AGS in the course of providing those services.

[subs (1) am Act 64 of 2015 s 3 and Sch 1 items 10, 11, effective 1 July 2015]

- (2) If the AGS has charged a client an amount under subsection (1), the amount may be recovered by the client as costs incurred by the client.

- (3) A fee charged under subsection (1):
- (a) is a debt due to the Commonwealth; and
 - (b) is recoverable by the Commonwealth in a court of competent jurisdiction.

[subs (3) insrt Act 64 of 2015 s 3 and Sch 1 item 12, effective 1 July 2015]

- (4) Fees charged to the Commonwealth (or to a part of the Commonwealth) under subsection (1) are notionally payable by the Commonwealth (or by the part of the Commonwealth). Subsection (3) does not apply to such fees.

[subs (3) insrt Act 64 of 2015 s 3 and Sch 1 item 12, effective 1 July 2015]

End of Document

(CTH) Judiciary Act 1903 [5620] s 55Q AGS lawyers

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIB THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55I–55R\]](#) > **DIVISION 3 CAPACITY OF AGS AND AGS LAWYERS TO ACT [ss 55Q, 55R]**

DIVISION 3 CAPACITY OF AGS AND AGS LAWYERS TO ACT [ss 55Q, 55R]

[5620] 55Q AGS lawyers

(1) An AGS lawyer acting in that capacity is entitled:

- (a) to do everything necessary or convenient for that purpose; and
- (b) to practise as a barrister, solicitor, or barrister and solicitor in any court and in any State or Territory; and
- (c) to all the rights and privileges of so practising;

whether or not he or she is so entitled apart from this subsection.

(2) An AGS lawyer acting in that capacity in a State or Territory is not subject to a law of a State or Territory that relates to legal practitioners except to the extent that such laws:

- (a) impose rights, duties, or obligations on legal practitioners in relation to their clients or to the courts; or
- (b) provide for disciplinary proceedings in relation to the misconduct of legal practitioners.

(3) Subsection (2) is subject to subsection (5) and to [section 55R](#) (AGS may act for more than one party).

(4) In considering the nature of the rights, duties and obligations of an AGS lawyer in relation to a client, regard must be had to his or her position as an AGS lawyer.

[subs (4) am Act 64 of 2015 s 3 and Sch 1 item 13, effective 1 July 2015]

(5) Neither the AGS, nor an AGS lawyer acting in that capacity, is subject to a law of a State or Territory that is prescribed for the purposes of this section.

(CTH) Judiciary Act 1903 [5622] s 55R AGS may act for more than one party

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIB THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55I–55R\]](#) > [DIVISION 3 CAPACITY OF AGS AND AGS LAWYERS TO ACT \[ss 55Q, 55R\]](#)

[5622] 55R AGS may act for more than one party

The AGS may act in a matter for 2 or more parties who have conflicting interests in the matter if to do so has been approved by the Attorney-General:

- (a) by way of approval in relation to the particular matter; or
- (b) by way of written arrangements covering the circumstances in which the AGS may so act.

End of Document

**(CTH) Judiciary Act 1903 DIVISION 4 APPOINTMENT AND TERMS AND
CONDITIONS OF CEO AND STAFF (Repealed)**

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) >
[Judiciary Act 1903](#) > [PART VIIIB THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55I–55R\]](#)

**DIVISION 4 APPOINTMENT AND TERMS AND CONDITIONS OF CEO
AND STAFF [Repealed]**

[Div 4 rep Act 64 of 2015 s 3 and Sch 1 item 14, effective 1 July 2015]

End of Document

(CTH) Judiciary Act 1903 DIVISION 5 MONEY (Repealed)

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) >
[Judiciary Act 1903](#) > [PART VIIIB THE AUSTRALIAN GOVERNMENT SOLICITOR \[ss 55I–55R\]](#)

DIVISION 5 MONEY [Repealed]

[Div 6 rep Act 64 of 2015 s 3 and Sch 1 item 14, effective 1 July 2015]

End of Document

(CTH) Judiciary Act 1903 [5660] s 55ZF Attorney-General may issue directions

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART VIIIC ATTORNEY-GENERAL'S LEGAL SERVICES DIRECTIONS [ss 55ZF–55ZI]

**PART VIIIC ATTORNEY-GENERAL'S LEGAL SERVICES DIRECTIONS
[ss 55ZF–55ZI]**

[Pt VIIIC insrt Act 7 of 1999 s 3 and Sch 1]

[5660] 55ZF Attorney-General may issue directions

(1) The Attorney-General may issue directions (**Legal Services Directions**):

- (a) that are to apply generally to Commonwealth legal work; or
- (b) that are to apply to Commonwealth legal work being performed, or to be performed, in relation to a particular matter.

(2) The Attorney-General may publish or give notice of Legal Services Directions in any manner the Attorney-General considers appropriate.

(3) In this section:

Commonwealth legal work means:

- (a) any work performed by or on behalf of the AGS in providing services in accordance with section 55N; or
- (b) any legal work performed by a person for any of the following:
 - (i) the Commonwealth;
 - (ii) a body established by an Act or regulations or by a law of a Territory (other than the Australian Capital Territory or the Northern Territory);
 - (iii) a company in which the Commonwealth has a controlling interest (including a company in which the Commonwealth has a controlling interest through one or more interposed Commonwealth authorities or Commonwealth companies);
 - (iv) other persons or bodies referred to in [subsection 55N\(1\)](#), to the extent that the work relates to the person's or body's performance of a Commonwealth or Territory function.

(CTH) Judiciary Act 1903 [5660] s 55ZF Attorney-General may issue directions

[def am Act 64 of 2015 s 3 and Sch 1 item 15, effective 1 July 2015; Act 59 of 2015 s 3 and Sch 2 item 243, effective 1 July 2016]

End of Document

(CTH) Judiciary Act 1903 [5665] s 55ZG Compliance with Legal Services Directions

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIC ATTORNEY-GENERAL'S LEGAL SERVICES DIRECTIONS \[ss 55ZF–55ZI\]](#)

[5665] 55ZG Compliance with Legal Services Directions

(1) The following persons or bodies must comply with Legal Services Directions that have been published and with Legal Services Directions of which the person or body has been notified:

- (a) a person or body referred to in subsection [55N\(1\)](#);
- (b) a person or body referred to in subsection [55N\(2\)](#), in relation to a matter, if the AGS is acting for the person or body in that matter;
- (c) a person or body in respect of whom the Attorney-General has made a request under subsection [55N\(3\)](#), in relation to a matter, if the AGS is acting for the person or the body in that matter;
- (d) a person or body in respect of whom the AGS has made a determination under subsection [55N\(4\)](#), in relation to a matter, if the AGS is acting for the person or body in that matter;
- (e) the AGS;
- (f) a legal practitioner or firm of legal practitioners, in relation to a matter, if the legal practitioner or firm is acting for a person or body referred to in subsection [55N\(1\)](#) in that matter.

[subs (1) am Act 64 of 2015 s 3 and Sch 1 item 16, effective 1 July 2015]

(2) Compliance with a Legal Services Direction is not enforceable except by, or upon the application of, the Attorney-General.

(3) The issue of non-compliance with a Legal Services Direction may not be raised in any proceeding (whether in a court, tribunal or other body) except by, or on behalf of, the Commonwealth.

(CTH) Judiciary Act 1903 [5670] s 55ZH Legal Services Directions and legal professional privilege

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: June 2007

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART VIIIC ATTORNEY-GENERAL'S LEGAL SERVICES DIRECTIONS \[ss 55ZF–55ZI\]](#)

[5670] 55ZH Legal Services Directions and legal professional privilege

(1) If a Legal Services Direction requires a person to provide any information, or produce a document or record, to another person, the person must not refuse to comply with the Direction on the ground of legal professional privilege or of any other duty of confidence.

(2) A person performing Commonwealth legal work (within the meaning of [subsection 55ZF\(3\)](#)) may provide information or produce a document or record relating to that work to the Attorney-General or to a person authorised by the Attorney-General for that purpose.

(3) If:

- (a) a person provides information or produces a document or record under subsection (2); and
- (b) the person would, apart from this subsection, be breaching legal professional privilege or any other duty of confidence in so doing;

the person is taken, for all purposes, not to have breached legal professional privilege or the duty of confidence in so providing the information or producing the document or record.

(4) If a communication that is the subject of legal professional privilege is disclosed under subsection (1) or (2), then, in spite of the disclosure, privilege is taken not to have been waived in respect of the communication.

Section 55ZG Generally

[5670.5] Waiver of privilege

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) subs 55ZH(1), subs 55ZF(2), subs 55ZF(3), subs 55ZF(4).

In *NSW Council for Civil Liberties Inc v Classification Review Board (No 1)* [2006] FCA 1409; [BC200608819](#) at [23] [CB](#), Edmonds J said that:

[23]... [w]hile cl 10 of the Legal Services Directions 2005 is confined to sharing of legal advice within government, [subs 55ZH\(1\)](#) of the Judiciary Act 1903 (Cth) is not confined to cl 10 of the Legal Services Directions 2005 but extends to any requirement of a Legal Services Direction of the kind described whether the person to whom the information is being provided or the document is being produced is within government or not. Moreover, having regard to the definition of "Commonwealth legal work" in [subs 55ZF\(3\)](#), in particular sub-para (b)(iii), [subs 55ZF\(2\)](#) is clearly not confined to the provision of information or the production of a document to the Attorney-General, or to a person authorised by him, in which Commonwealth privilege already subsists. So understood, a provision such as a [subs 55ZF\(4\)](#) is necessary to prevent waiver of privilege where the privilege holder is not the Commonwealth.

End of Document

**(CTH) Judiciary Act 1903 [5675] s 55ZI Anything done under Legal Services
Directions not actionable**

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) >
[Judiciary Act 1903](#) > [PART VIIIC ATTORNEY-GENERAL'S LEGAL SERVICES DIRECTIONS \[ss
55ZF–55ZI\]](#)

[5675] 55ZI Anything done under Legal Services Directions not actionable

(1) The Attorney-General is not liable to an action or other proceeding, whether civil or criminal, for or in relation to an act done or omitted to be done in compliance, or purported compliance, with a Legal Services Direction.

(2) A person (other than the Attorney-General) is not liable to an action or other proceeding, whether civil or criminal, for or in relation to an act done or omitted to be done by the person in compliance, or in good faith in purported compliance, with a Legal Services Direction.

End of Document

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

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES [ss 56–67]

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.

(CTH) Judiciary Act 1903 [5690] s 57 Suits by a State against the Commonwealth

Practice & Procedure High Court & Federal Court of Australia
Current to: Act 3 of 2022 • Commentary Published: February 2001
Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES \[ss 56–67\]](#)

[5690] 57 Suits by a State against the Commonwealth

Any State making any claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court.

Section 57 Generally

[5690.5] “the Commonwealth”

See [\[5685.5\]](#).

End of Document

(CTH) Judiciary Act 1903 [5695] s 58 Suits against a State in matters of federal jurisdiction

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES \[ss 56–67\]](#)

[5695] 58 Suits against a State in matters of federal jurisdiction

Any person making any claim against a State, whether in contract or in tort, in respect of a matter in which the High Court has original jurisdiction or can have original jurisdiction conferred on it, may in respect of the claim bring a suit against the State in the Supreme Court of the State, or (if the High Court has original jurisdiction in the matter) in the High Court.

End of Document

(CTH) Judiciary Act 1903 [5700] s 59 Suits between States

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES \[ss 56–67\]](#)

[5700] 59 Suits between States

Any State making any claim against another State may in respect of the claim bring a suit against that State in the High Court.

End of Document

(CTH) Judiciary Act 1903 [5705] s 60 Injunction against a State and its officers

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES \[ss 56–67\]](#)

[5705] 60 Injunction against a State and its officers

In a suit against a State brought in the High Court, the High Court may grant an injunction against the State and against all officers of the State and persons acting under the authority of the State, and may enforce the injunction against all such officers and persons.

End of Document

(CTH) Judiciary Act 1903 [5710] s 61 Suits by Commonwealth

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES \[ss 56–67\]](#)

[5710] 61 Suits by Commonwealth

Suits on behalf of the Commonwealth may be brought in the name of the Commonwealth by the Attorney-General or by any person appointed by him or her in that behalf.

[s 61 am Act 141 of 1994 s 4 and Sch 2]

Section 61 Generally

[5710.5] “the Commonwealth”

See [\[5685.5\]](#).

[5710.10] “suits”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 2, s 61.

The word “suits” in [s 61](#) has a wide meaning consistent with the definition of “suit” in [s 2](#) of the Act. Bankruptcy proceedings are not a “suit” within the meaning of [s 61](#): see *Re Oskar; Ex parte Commonwealth* [\(1984\) 55 ALR 717](#) .

End of Document

(CTH) Judiciary Act 1903 [5715] s 62 Suits by a State

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES \[ss 56–67\]](#)

[5715] 62 Suits by a State

Suits on behalf of a State may be brought in the name of the State by the Attorney-General of the State, or by any person appointed by him or her in that behalf.

[s 62 am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [5720] s 63 Service of process when Commonwealth or State is party

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES \[ss 56–67\]](#)

[5720] 63 Service of process when Commonwealth or State is party

Where the Commonwealth or a State is a Party to a suit, all process in the suit required to be served upon that party shall be served upon the Attorney-General of the Commonwealth or of the State, as the case may be, or upon some person appointed by him or her to receive service.

[s 63 am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [5725] s 64 Rights of parties

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES \[ss 56–67\]](#)

[5725] 64 Rights of parties

In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

Section 64 Generally

[5725.5] Ambulatory operation

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 64.

[Section 64](#) has the ambulatory operation. Hence the section is capable of making applicable to the Commonwealth or a Commonwealth instrumentality a state statute notwithstanding that the state statute may have been passed after the enactment of [s 64](#). See *Moore v Commonwealth* (1958) 99 CLR 177 at 182; *Suehle v Commonwealth* (1967) 116 CLR 353 at 356–7; [1967] ALR 572 at 574; 41 ALJR 23; *Downs v Williams* (1971) 126 CLR 61 at 100; [1972] ALR 91. See also *Parker v Commonwealth* (1965) 112 CLR 295; [1965] ALR 1094 [CB](#); and *Maguire v Simpson* (1977) 139 CLR 362 at 388, 395, 397 and 407; [18 ALR 469](#).

[5725.10] “rights of parties”

L Legislation cited in this paragraph

(NSW) [Limitation Act 1969](#) s 63.

(CTH) [Judiciary Act 1903](#) s 64.

The term “rights of parties” includes substantive as well as procedural rights. In *Maguire v Simpson* (1977) 139 CLR 362; [18 ALR 469](#) [CB](#) a majority of the High Court (Barwick CJ, Gibbs, Mason, Jacobs and Murphy JJ; Stephen J not deciding) held that the Commonwealth Trading Bank’s cause of action to recover a debt in the Supreme Court of New South Wales had been destroyed by

s 63 of the Limitations Act 1969 (NSW). The majority concluded that [s 64](#) of the Judiciary Act 1903 ensured that, whenever the Commonwealth was a litigant, its substantive rights were to be settled, as nearly as possible, as if it were a private litigant.

[5725.15] Operation of s 64 not dependent on cause of action otherwise arising

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 64.

(QLD) [Subcontractors' Charges Act 1974](#) Subcontractors' Charges Act 1974 (Qld).

The reading of [s 64](#) adopted in *Maguire v Simpson* (1977) 139 CLR 362; [18 ALR 469](#) ^{CB} was confirmed and expanded in *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254; [66 ALR 412](#) ^{CB}. The majority of the High Court (Gibbs CJ, Mason, Wilson, Deane and Dawson JJ; Brennan J dissenting) held that the Subcontractors' Charges Act 1974 (Qld) had created a legal liability in the Commonwealth, which Evans Deakin Industries Ltd could enforce by an action in the Queensland Supreme Court. The five justices rejected an argument that [s 64](#) did not begin to operate against the Commonwealth until there was otherwise a cause of action which brought the Commonwealth before a court as a party. They conceded (at 263) “that there must be a suit to which the Commonwealth is a party before [s 64](#) commences to operate”, but this did not mean that the cause of action against the Commonwealth must arise under some other law of the Commonwealth before [s 64](#) could apply. The commencement of a suit against the Commonwealth, the precondition for [s 64](#), required no more than the bringing of an action against the Commonwealth in a court of competent jurisdiction: at 264.

[5725.20] Section s 64 operates in anticipation of litigation

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 64.

In *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254; [66 ALR 412](#) ^{CB}, Gibbs CJ, Mason, Wilson, Deane and Dawson JJ said that [s 64](#) extended beyond the context of litigation. It was, they said, “only a half-truth to say that [s 64](#) has the effect that upon the commencement of a suit the Commonwealth becomes subject to obligations which did not exist beforehand. The section does not have a retrospective operation. At all times before a suit is commenced, it can be known what the rights of the parties will be once the suit is commenced”: at 265–6.

In *Trimboli v Secretary, Dept of Social Security* [\(1989\) 86 ALR 64](#) ^{CB}, the Federal Court (Woodward, Beaumont and Hill JJ) held that, where the respondent had wrongfully detained moneys of the applicant, “the Commonwealth was subject to a potential liability to pay interest under one or other of the statutes in force in the several jurisdictions in which the applicant could have litigated his claims”; that the statutory provisions in force in New South Wales conferring power upon courts to award interest provided an authorisation for payment of interest by the Commonwealth; and that “[t]his source is available notwithstanding that proceedings have not yet been instituted in a court for recovery of the amount in dispute”: at 69.

[5725.25] “as nearly as possible”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 64.

In *Baillieu v Australian Electoral Commission* (1996) 63 FCR 210; [33 IPR 494](#) ^{CB}, Sundberg J offered (at pp 28–9) the following summary of the authorities: “Since *Maguire v Simpson* (1977) 139 CLR 362; [18 ALR 469](#) ^{CB} it has been established that in every suit to which the Commonwealth is a party [s 64](#) requires the rights of the parties to be ascertained, as nearly as possible by the same rules of law, substantive and procedural, statutory and otherwise, as would apply if the Commonwealth were a subject instead of being the Crown. The Commonwealth acquires no special privilege except where it is not possible to give it the same rights and subject it to the same liabilities as an ordinary subject: see *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 264–5; [66 ALR 412](#).

“In *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397 at 427, Kitto J rendered the expression ‘as nearly as possible’ as ‘as completely as possible’, and went on to say that [s 64](#) in effect requires the court ‘to put out of account any special position of the Crown, and so far as possible to decide all questions of right in the same way as they would have been decided if the Commonwealth ... had been a subject’: at 428. In *Evans Deakin*, at 264–5, Gibbs CJ, Mason, Wilson, Deane and Dawson JJ agreed that ‘as completely as possible’ was the natural meaning of ‘as nearly as possible’, and after quoting the passage I have just set out, said it was ‘unnecessary to consider whether in some cases at least it would be right to consider the special position of the Crown’, as the Commonwealth in that case ‘was not performing a function peculiar to government’. In *Deputy Cmr of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 68; [78 ALR 641](#), the court said it was not necessary to consider whether, and if so to what extent, [s 64](#) would be ineffective to apply the provisions of State laws in circumstances where their application would interfere with the discharge of ‘an essentially governmental function such as the collection of taxes’. See also *Maguire v Simpson* (1977) 139 CLR 362 at 393–5; [18 ALR 469](#).”

Sundberg J proceeded to hold that the Commonwealth, as owner of the copyright in material published by the Australian Electoral Commission, could be estopped from enforcing its copyright against the applicant, who represented the Liberal Party of Australia.

[5725.30] “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](#) of the Judiciary Act 1903, it includes a statutory corporation representing the Crown. It is certainly so where the Commonwealth carries on the relevant activity under a corporate name: see *Pitcher v Federal Capital Commission* (1928) 41 CLR 385 ^{CB}; *Naismith v McGovern* (1953) 90 CLR 336 ^{CB}; *Maguire v Simpson* (1977) 139 CLR 362; [18 ALR 469](#) ^{CB}. 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 at 362, 389–90, 391, 397–8, 405–6 and 407; [18 ALR 469](#).

[5725.35] Constitutional authority

L Legislation cited in this paragraph

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

The power of the Parliament to enact a law giving the subject substantive rights against the Commonwealth in respect of any matter within the judicial competence of the Commonwealth is grounded upon [s 78](#) of the Constitution. The power of a Commonwealth instrumentality to sue is grounded on [s 75\(iii\)](#) of the Constitution as when it sues on behalf of the Commonwealth.

[5725.40] State law inconsistent with Commonwealth law

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 64.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 109.

(CTH) [Income Tax Assessment Act 1936](#) ss 206, 207, 209,.

(VIC) [Judgment Debt Recovery Act 1984](#).

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974, s 52A.

[Section 64](#) “was intended to fill what would otherwise be lacunae or gaps in the law of the Commonwealth. It is not to be understood as intended to have the practical effect of overriding [s 109](#) of the Constitution by indirectly applying a provision of a law of a state to circumstances to which its direct application is invalidated by reason of inconsistency with a provision of an existing law of the Commonwealth ... Rather, the section should and must be construed as intended to extend a litigant's rights in a suit in particular circumstances only if, and to the extent that, there be no directly applicable and inconsistent (in the relevant sense) Commonwealth law already regulating those circumstances. It follows that if examination of the relevant law leads to the conclusion that the state Act is inconsistent with the Commonwealth Act with the result that by force of [s 109](#) of the Constitution the state Act cannot directly apply to the [Australian Postal] Commission in respect of its engagement and dismissal of staff then, whatever other difficulties may have confronted the appellants in their attempted reliance upon [s 64](#) of the Judiciary Act 1903, there remains no foothold at all for an argument invoking that section”: *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 331–2; [70 ALR 449](#) at [453](#).

“[W]hen a Commonwealth legislative scheme is complete on its face, [s 64](#) will not operate to insert into it some provision of state law for whose operation the Commonwealth provisions can, when properly understood, be seen to have left no room”: *Deputy Cmr of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55; [78 ALR 641](#) ^{CB} per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ at 64. Accordingly, where the court concluded that the Income Tax Assessment Act 1936 (Cth) provided a comprehensive scheme relating to liability for and recovery of income tax (including additional tax), [s 64](#) could not be invoked by a taxpayer as a means of applying state statutory limitation periods to bar recovery of income tax and additional tax by the Deputy Commissioner of Taxation.

In *Deputy Cmr of Taxation v Zarzycki* [\(1990\) 96 ALR 146](#) ^{CB}, the Supreme Court of Victoria (O'Bryan J) applied the High Court's reasoning in *Deputy Cmr of Taxation v Moorebank Pty Ltd*, above, and held that the discretionary powers conferred on the Commissioner of Taxation by ss 206, 207 and 209 of the Income Tax Assessment Act 1936 (Cth), in relation to the recovery of taxes, were inconsistent with the Judgment Debt Recovery Act 1984 (Vic). (The Victorian legislation allows a judgment debtor to obtain an instalment order, the effect of which is to stay enforcement of the judgment.) It followed that, where judgment had been obtained by the Deputy Commissioner of Taxation for recovery of unpaid taxes, the judgment debtor could not rely on [s 64](#) of the Judiciary Act 1903 in order to invoke the Victorian legislation against the deputy commissioner.

In *Trade Practices Commission v Manfal Pty Ltd* [\(1990\) 97 ALR 231](#) ^{CB}, the Full Federal Court (Northrop, Wilcox and French JJ) followed *Deputy Cmr of Taxation v Moorebank Pty Ltd*, above, and held that the Trade Practices Commission was not obliged, before commencing proceedings under the [Trade Practices Act 1974](#) against a company in liquidation, to obtain the leave of the Western Australian Supreme Court under s 371(2) of the Companies (Western Australia) Code 1981 (WA).

Wilcox J, with whose reasons Northrop J agreed, said (ALR at 242): “The Trade Practices Act sets up a scheme for enforcement of its terms, which scheme includes provisions for the commencement of actions by the Trade Practices Commission for contraventions of [s 52A](#) of the Act. Section 371(2) of the Western Australian Code is inconsistent with that scheme; its operation may have the effect of denying to the Commission the remedy granted to it by the Commonwealth Act.” It followed that [s 64](#) of the Judiciary Act 1903 did not operate to subject the Trade Practices Commission to s 371(2) of the Companies Code.

In *Re Pollack; Ex parte DCT* (1991) 32 FCR 40; [103 ALR 133](#) at [154](#) ^{CB}, Gummow J said: “ ... [s 64](#) is a law of a special character. It operates in respect of laws which of their own force do not apply to the suit to which the Commonwealth is a party. Therefore, without more, no question of inconsistency between Commonwealth and state laws would arise. But the consequence of giving effect to [s 64](#) could be to render applicable in the suit a state law which, if it had been applicable of its own force, would have been inconsistent with some other Commonwealth law. Accordingly, [s 64](#) is properly construed as intended to fill what otherwise would be gaps in the federal law applicable in the suit and as not intended ‘to manufacture a new kind of indirect inconsistency’ by applying a state law which, if it had been directly applicable, would have been inconsistent with federal law: *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 331–2; [70 ALR 449](#).”

[5725.45] Whether invocation of state law “a decision made under” s 64

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 64.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 61.

“While no occasion could arise to make a decision whether the Commonwealth will plead a state limitation statute unless [s 64](#) of the Judiciary Act 1903, or some other Commonwealth enactment, made that state statute applicable in a suit to which the Commonwealth was a party, yet in my opinion the decision [to plead the state limitation statute] is not made in pursuance of [s 64](#): the decision is made under the authority conferred on the Executive Government to manage such a suit for the Commonwealth, an authority which the Executive Government has by the common law and by the declaration contained in [s 61](#) of the Constitution”: *Dixon v A-G (Cth)* (1987) 15 FCR 338; [75 ALR 300](#) ^{CB} per Jenkinson J at 307.

[5725.50] Discovery against the Commonwealth

L Legislation cited in this paragraph

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

(CTH) [Federal Court of Australia Act 1976](#) ss 23, 59.

(CTH) [Federal Court Rules](#) O 15.

In *Commonwealth v Northern Land Council* (1991) 30 FCR 1; [103 ALR 267](#) at [289–90](#) ^{CB}, Black CJ, Gummow and French JJ said:

“The Crown's general immunity from discovery came to Australia undiminished but, as in the United Kingdom, is now subject to statutory modification. Modification was effected by [s 64](#) of the Judiciary Act 1903 (Cth) ... Its operation is ambulatory. By virtue of that provision, a party bringing an action against the Commonwealth can invoke the general provisions of the rules of court to enable an order to be made that the Commonwealth give discovery and answer interrogatories ... The interaction of

[ss 23 and 59 of the Federal Court Act 1976 (Cth) and O 15 of the Federal Court Rules] with s 64 of the Judiciary Act enables this court to make orders against the Commonwealth for discovery, inspection and production of documents. Discovery given by the Crown in right of the Commonwealth in proceedings in this court does not differ qualitatively from discovery between subject and subject. It carries no lesser implication as to the relevance of the documents listed.”

In *Commonwealth v Miller* (1910) 10 CLR 742 ^{CB}, the High Court held that, where the Commonwealth was a party to proceedings in the Supreme Court of Victoria, that court had jurisdiction, through the combined effect of ss 56 and 64 of the Judiciary Act 1903 and the Rules of the Supreme Court, to order the Commonwealth to answer interrogatories and make discovery of documents. Higgins J noted at 758 that the Commonwealth could not itself take the oath: “Therefore, to comply with the words ‘as nearly as possible’ in s 64, the obvious course is to direct that the answer to interrogatories and the affidavit of discovery be made by some suitable officer of the Commonwealth”. See also Griffith CJ at 747 and O'Connor J at 752–3.

[5725.55] Application of Commonwealth law to a state litigant

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) [Section] 64.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974.

“ ... [\[Section\] 64](#), which is a provision of a law of the Commonwealth, cannot operate to apply to the Crown in right of a state another and later law of the Commonwealth which, upon its proper construction, is not intended to bind the Crown in that capacity. In particular, s 64 does not operate to apply the provisions of the [Trade Practices Act 1974](#) to the Crown in right of the State of New South Wales”: *State Government Insurance Corp v GIO (NSW)* (1991) 28 FCR 511; [101 ALR 259](#) at [307](#); ATPR 41–110 ^{CB} per French J.

[5725.60] Commonwealth

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 64.

(CTH) [Defence Force Regulations 1952](#).

(WA) [Mining Act 1978](#).

In *Commonwealth v Western Australia* [\(1999\) 160 ALR 638](#) ^{CB} the High Court held that s 64 of the Judiciary Act 1903 did not operate to render Commonwealth land, designated as a defence practice area under the Defence Force Regulations 1952 (Cth), subject to the Mining Act 1978 (WA). That conclusion was reached because, according to all members of the court, such an effect would be to create rights and obligations that were not provided for by the Mining Act and that would not be recognised in any proceeding between subject and subject. In addition, according to Gleeson CJ, Gaudron and Gummow JJ, the Mining Act operated by reference to applications for exploration licences before the mining wardens, and those applications did not constitute a “suit” for the purposes of s 64 of the Judiciary Act 1903.

[5725.65] Exclusion of s 64 by terms of another law of the Commonwealth

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 64.

(CTH) [Competition and Consumer Act 2010](#) ss 51AB, 52, ss 6(3) , 75B(1).

In *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; [161 ALR 399](#) ^{CB}, the High Court held that [s 64](#) of the Judiciary Act 1903 did not operate to render the State of NSW subject to liability pursuant to ss 51AB and 52 of the Trade Practices Act 1974 (Cth). This result followed because [ss 6\(3\)](#) and [75B\(1\)](#) of the Trade Practices Act, which applied ss 51AB and 52 to a “person”, did apply those provisions to a body politic, such as the Commonwealth or a State. In their joint judgment, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said (at 411):

“It was acknowledged in *Moorebank* at 63 that the ‘application or operation [of [s 64](#)] to or with respect to cases falling within the provisions of a subsequent Act will be excluded to the extent that such application or operation would be inconsistent with those subsequent statutory provisions’. That is because [s 64](#) is ‘neither a constitutional provision nor an entrenched law... [and] can be expressly or impliedly amended or repealed... by a subsequent Act’.

“Once there is discerned an intention that [ss 6\(3\)](#) and [75B\(1\)](#) of the Act not apply to the States, it follows that, to that extent, those provisions, being provisions of a later Commonwealth Act, impliedly repeal [s 64](#) of the Judiciary Act. Accordingly, [s 64](#) does not operate to apply those provisions to the State of New South Wales in these proceedings.”

End of Document

(CTH) Judiciary Act 1903 [5730] s 65 No execution against Commonwealth or a State

Practice & Procedure High Court & Federal Court of Australia
Current to: Act 3 of 2022 • Commentary Published: February 2001
Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES \[ss 56–67\]](#)

[5730] 65 No execution against Commonwealth or a State

No execution or attachment, or process in the nature thereof, shall be issued against the property or revenues of the Commonwealth or a State in any such suit; but when any judgment is given against the Commonwealth or a State, the Registrar or other appropriate officer shall give to the party in whose favour the judgment is given a certificate in the form of the Schedule, or to a like effect.

Section 65 Generally

[5730.5] “the Commonwealth”

See [\[5685.5\]](#).

[5730.10] Judgment against the Crown

A contract of the Crown, subject to the provision by Parliament of sufficient moneys, is binding on the Crown. Although the contract must be regarded as containing an implied condition that payments under it by the Crown should be made only out of moneys lawfully available for the purpose under parliamentary appropriation, that condition does not go to the validity of the contract and under the Judiciary Act 1903 the contract may be sued on whether or not sufficient moneys have been so appropriated: see *New South Wales v Bardolph* (1934) 52 CLR 455 [CB](#); cf *New South Wales v Commonwealth (No 1)* (1932) 46 CLR 155 [CB](#); *Australian Railways Union v Victorian Railways Cmr* (1930) 44 CLR 319 [CB](#).

End of Document

(CTH) Judiciary Act 1903 [5735] s 66 Performance by Commonwealth or State

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES \[ss 56–67\]](#)

[5735] 66 Performance by Commonwealth or State

On receipt of the certificate of a judgment against the Commonwealth or a State the Minister for Finance or the Treasurer of the State as the case may be shall satisfy the judgment out of moneys legally available.

Section 66 Generally

[5735.5] “the Commonwealth”

See [\[5685.5\]](#).

End of Document

(CTH) Judiciary Act 1903 [5740] s 67 Execution by Commonwealth or State

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Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IX SUITS BY AND AGAINST THE COMMONWEALTH AND THE STATES \[ss 56–67\]](#)

[5740] 67 Execution by Commonwealth or State

When in any such suit a judgment is given in favour of the Commonwealth or of a State and against any person, the Commonwealth or the State, as the case may be, may enforce the judgment against that person by process of extent, or by such execution, attachment, or other process as could be had in a suit between subject and subject.

Section 67 Generally

[5740.5] “the Commonwealth”

See [\[5685.5\]](#).

[5740.10] Enforcement of a judgment

Where the Commonwealth is a judgment creditor, the judgment may be enforced at the instance of any person authorised by the Commonwealth to do so, as distinct from being authorised by the Attorney-General or an officer appointed by him: see *Re Oskar; Ex parte Commonwealth* (1984) 55 ALR 717 [CB](#).

[5740.15] Effect of s 67

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 67.

“[Section 67](#) was designed as a facultative provision to overcome the cumbersome procedures previously in existence for the recovery of debts and property by the Crown: *Re Oskar; Ex parte Commonwealth* (1984) 55 ALR 717 at 719–20. It is a provision that is procedural in character: *Maguire v Simpson* (1977) 139 CLR 362 at 369; [18 ALR 469](#) per Barwick CJ. It does not import supervening restrictions upon what otherwise are existing rights of enforcement held by the Commonwealth”: *Re Pollack; Ex parte DCT* (1991) 32 FCR 40; [103 ALR 133](#) at 153 [CB](#) per Gummow J.

End of Document

(CTH) Judiciary Act 1903 [5850] s 67A Interpretation

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Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART IXA SUITS RELATING TO THE NORTHERN TERRITORY [ss 67A–67F]

PART IXA SUITS RELATING TO THE NORTHERN TERRITORY [ss 67A–67F]

Part IXA Generally

[5845.5] Introductory note

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Part IXA, s 67E.

[Part IXA](#) was inserted as a result of the repeal of the Northern Territory Supreme Court Act 1961 by the Northern Territory Supreme Court (Repeal) Act 1979. The Part confers jurisdiction upon the Northern Territory Supreme Court in respect of the following:

- (i) suits between the Commonwealth and the Northern Territory;
- (ii) certain prerogative writs and injunctions sought against Commonwealth and territory officers; and
- (iii) matters arising under Commonwealth legislation in respect of which the Northern Territory Supreme Court has traditionally had jurisdiction.

Further, the Part enables provision to be made in territorial laws for the prosecution of indictable offences against territory laws. Finally, [s 67E](#) extends to the property and moneys of the Northern Territory the same protection from execution or attachment as applies to the Commonwealth and states.

[5850] 67A Interpretation

In this part, unless the contrary intention appears:

Commonwealth includes a person suing or being sued on behalf of the Commonwealth.

Territory means the Northern Territory, and includes a person suing or being sued on behalf of the Territory.

End of Document

(CTH) Judiciary Act 1903 [5855] s 67B Suits between Commonwealth and Northern Territory

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IXA SUITS RELATING TO THE NORTHERN TERRITORY \[ss 67A–67F\]](#)

[5855] 67B Suits between Commonwealth and Northern Territory

The Commonwealth may bring a suit against the Territory, and the Territory may bring a suit against the Commonwealth, in the Supreme Court of the Territory in respect of a cause of any description, whether at law or in equity, including (but without limiting the generality of the foregoing) a claim in tort.

End of Document

(CTH) Judiciary Act 1903 [5860] s 67C Jurisdiction of Supreme Court of Territory

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IXA SUITS RELATING TO THE NORTHERN TERRITORY \[ss 67A–67F\]](#)

[5860] 67C Jurisdiction of Supreme Court of Territory

The jurisdiction of the Supreme Court of the Territory extends to:

- (a) matters in which an injunction or declaratory order or a writ of mandamus, prohibition or certiorari is sought by the Commonwealth against the Territory or an officer of the Territory;
- (b) matters in which a writ of mandamus or prohibition or an injunction is sought against the Commonwealth or an officer of the Commonwealth, being matters arising in, or under the laws in force in, the Territory; and
- (c) matters in which the Supreme Court of the Territory would, but for the repeal of the Northern Territory Supreme Court Act 1961, have jurisdiction by virtue of subsection 15(2) of that Act.

End of Document

(CTH) Judiciary Act 1903 [5865] s 67D Prosecution of indictable offences in Supreme Court of Territory

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IXA SUITS RELATING TO THE NORTHERN TERRITORY \[ss 67A–67F\]](#)

[5865] 67D Prosecution of indictable offences in Supreme Court of Territory

Nothing in this or any other Act shall be taken to limit the power of the Legislative Assembly of the Territory in relation to the making of laws relating to the prosecution in the Supreme Court of the Territory of indictable offences against laws in force in the Territory under or by virtue of the Northern Territory (Self-Government) Act 1978.

End of Document

(CTH) Judiciary Act 1903 [5870] s 67E No execution against Territory

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IXA SUITS RELATING TO THE NORTHERN TERRITORY \[ss 67A–67F\]](#)

[5870] 67E No execution against Territory

No execution or attachment, or process in the nature thereof, shall be issued against the property or moneys of the Territory.

End of Document

(CTH) Judiciary Act 1903 [5875] s 67F Effect of this Part

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART IXA SUITS RELATING TO THE NORTHERN TERRITORY \[ss 67A–67F\]](#)

[5875] 67F Effect of this Part

(1) Subject to [section 67D](#), nothing in this part shall be taken to limit the operation of any other provision of this Act.

(2) The jurisdiction conferred on the Supreme Court of the Territory by this Part is in addition to, and not in derogation of, any jurisdiction otherwise conferred on that Court.

End of Document

(CTH) Judiciary Act 1903 [5975] s 68 Jurisdiction of State and Territory courts in criminal cases

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART X CRIMINAL JURISDICTION [ss 68–77] > DIVISION 1 APPLICATION OF LAWS [ss 68–68C]

PART X CRIMINAL JURISDICTION [ss 68–77]

DIVISION 1 APPLICATION OF LAWS [ss 68–68C]

[5975] 68 Jurisdiction of State and Territory courts in criminal cases

(1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:

- (a) their summary conviction; and
- (b) their examination and commitment for trial on indictment; and
- (c) their trial and conviction on indictment; and
- (d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;

and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.

(2) The several Courts of a State or Territory exercising jurisdiction with respect to:

- (a) the summary conviction; or
- (b) the examination and commitment for trial on indictment; or
- (c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to [section 80](#) of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

(3)

[subs (3) rep Act 151 of 2006 s 3 and Sch 1[3], effective 7 December 2006]

(4) The several Courts of a State or Territory exercising the jurisdiction conferred upon them by this section shall, upon application being made in that behalf, have power to order, upon such terms as they think fit, that any information laid before them in respect of an offence against the laws of the Commonwealth shall be amended so as to remove any defect either in form or substance contained in that information.

(5) Subject to [subsection \(5A\)](#):

- (a) the jurisdiction conferred on a court of a State or Territory by [subsection \(2\)](#) in relation to the summary conviction of persons charged with offences against the laws of the Commonwealth; and
- (b) the jurisdiction conferred on a court of a State or Territory by virtue of [subsection \(7\)](#) in relation to the conviction and sentencing of persons charged with offences against the laws of the Commonwealth in accordance with a provision of the law of that State or Territory of the kind referred to in [subsection \(7\)](#);

is conferred notwithstanding any limits as to locality of the jurisdiction of that court under the law of that State or Territory.

(5A) A court of a State on which jurisdiction in relation to the summary conviction of persons charged with offences against the laws of the Commonwealth is conferred by [subsection \(2\)](#) may, where it is satisfied that it is appropriate to do so, having regard to all the circumstances, including the public interest, decline to exercise that jurisdiction in relation to an offence against a law of the Commonwealth committed in another State.

(5B) In [subsection \(5A\)](#), **State** includes Territory.

(5C) The jurisdiction conferred on a court of a State or Territory by [subsection \(2\)](#) in relation to:

- (a) the examination and commitment for trial on indictment; and
- (b) the trial and conviction on indictment;

of persons charged with offences against the laws of the Commonwealth, being offences committed elsewhere than in a State or Territory (including offences in, over or under any area of the seas that is not part of a State or Territory), is conferred notwithstanding any limits as to locality of the jurisdiction of that court under the law of that State or Territory.

(6) Where a person who has committed, or is suspected of having committed, an offence against a law of the Commonwealth, whether in a State or Territory or elsewhere, is found within an area of waters in respect of which sovereignty is vested in the Crown in right of the Commonwealth, he or she may be arrested in respect of the offence in accordance with the provisions of the law of any State or Territory that would be applicable to the arrest of the offender in that State or Territory in respect of such an offence committed in that State or Territory, and may be brought in custody into any State or Territory and there dealt with in like manner as if he or she had been arrested in that State or Territory.

[subs (6) am Act 141 of 1994 s 4 and Sch 2]

(7) The procedure referred to in [subsection \(1\)](#) and the jurisdiction referred to in [subsection \(2\)](#) shall be deemed to include procedure and jurisdiction in accordance with provisions of a law of a State or Territory under which a person who, in proceedings before a court of summary jurisdiction, pleads guilty to a charge for which he or she could be prosecuted on indictment may be committed to a court having jurisdiction to try offences on indictment to be sentenced or otherwise dealt with without being tried in that court, and the reference in [subsections \(1\)](#) and [\(2\)](#) to **any such trial or conviction** shall be read as including any conviction or sentencing in accordance with any such provisions.

[subs (7) am Act 141 of 1994 s 4 and Sch 2]

(8) Except as otherwise specifically provided by an Act passed after the commencement of this subsection, a person may be dealt with in accordance with provisions of the kind referred to in [subsection \(7\)](#) notwithstanding that, apart from this section, the offence would be required to be prosecuted on indictment, or would be required to be prosecuted either summarily or on indictment.

(9) Where a law of a State or Territory of the kind referred to in [subsection \(7\)](#) refers to indictable offences, that reference shall, for the purposes of the application of the provisions of the law in accordance with that subsection, be read as including a reference to an offence against a law of the Commonwealth that may be prosecuted on indictment.

(10) Where, in accordance with a procedure of the kind referred to in [subsection \(7\)](#), a person is to be sentenced by a court having jurisdiction to try offences on indictment, that person shall, for the purpose of ascertaining the sentence that may be imposed, be deemed to have been prosecuted and convicted on indictment in that court.

(11) Nothing in this section excludes or limits any power of arrest conferred by, or any jurisdiction vested or conferred by, any other law, including an Act passed before the commencement of this subsection.

Section 68 Generally

[5975.5] Aim of s 68

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 68.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 77(iii).

[Section 68](#) is the central provision in the Judiciary Act 1903 for the administration and enforcement of federal criminal law. Consistent with the aims of [s 77\(iii\)](#) of the Constitution, it allows federal and state criminal law to be administered on the same footing in each state, thus avoiding the development of independent systems of law: see *Williams v R (No 2)* (1934) 50 CLR 551 at 560; *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 345; [4 ALR 293](#); *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338; [4 ALR 293](#) ^{CB}; *R v Murphy* (1985) 158 CLR 596 at 617; [61 ALR 139](#); *R v LK* (2010) 241 CLR 177; [266 ALR 399](#); [\[2010\] HCA 17](#); [BC201003366](#) at [\[13\]](#) and [\[86\]](#) ^{CB}; *R v Gee* (2003) 212 CLR 230 at 241; [196 ALR 282](#); [\[2003\] HCA 12](#); [BC200300830](#) ^{CB}.

[5975.6] Ambulatory operation

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 68.

[Section 68](#) confers federal jurisdiction upon State and Territory courts in ambulatory terms: *R v LK* (2010) 241 CLR 177; [266 ALR 399](#); [\[2010\] HCA 17](#); [BC201003366](#) at [\[13\]](#) and [\[86\]](#) ^{CB}; *R v Gee* (2003) 212 CLR 230; [196 ALR 282](#); [\[2003\] HCA 12](#); [BC200300830](#) at [\[6\]–\[7\]](#) and [\[24\]](#) ^{CB}.
SECTION 68(1)

[5975.7] Warrant for arrest

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 68(1).

(NSW) [Justices Act 1902](#) Pt IV.

The arrest, by a constable with a warrant, of a person for a Commonwealth offence is governed by [s 68\(1\)](#) of the Judiciary Act 1903, which provides for the application of state law in respect of charges of offences against Commonwealth law. In the case of a person arrested in New South Wales, “the relevant procedures in relation to the approaching of a justice, the laying of an information and the obtaining of a first instance warrant are governed by the provisions in Pt IV of the Justices Act 1902 (NSW)”: *Chung v Elder* (1991) 31 FCR 43; [104 ALR 379](#) at [382](#) ^{CB} per Foster J.

[5975.8] Compulsory fingerprinting

L Legislation cited in this paragraph

(VIC) [Crimes Act 1958](#) s 464M.

(CTH) [Judiciary Act 1903](#) s 68(1).

The provisions of s 464M of the Crimes Act 1958 (Vic), authorising a magistrate to order that a “suspect” provide her or his fingerprints, is not a law concerning the arrest and custody of offenders within [s 68\(1\)](#) and is not rendered applicable to a person suspected of a Federal offence by that provision of the Judiciary Act 1903: *Grollo v Bates* (1994) 53 FCR 218; [125 ALR 492](#) at [509–10](#); 75 A Crim R 271 ^{CB} per Einfeld J.

SECTION 68(2)

[5975.10] Validity of s 68(2)(b)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 68(2)(b).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxix), s 77(iii).

The granting of jurisdiction in relation to committal proceedings pursuant to [s 68\(2\)\(b\)](#) is valid under [s 77\(iii\)](#) of the Constitution. It may be that [s 51\(xxxix\)](#), which relates to “matters incidental to the execution of any power ...”, would be enough to support the validity of [s 68\(2\)\(b\)](#): see *R v*

Murphy (1985) 158 CLR 596 at 614; [61 ALR 139](#), where the High Court found it unnecessary to decide this point.

[5975.15] Jurisdiction vested in several courts

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 68(2).

[Section 68\(2\)](#) clearly empowers the Federal Parliament to invest a single state court with jurisdiction to determine a federal criminal matter in its entirety, from committal to trial. However, given that the various existing state court structures split the determination of criminal matters between the state courts (trial) and the state inferior courts (committal), Parliament can invest jurisdiction pursuant to [s 68\(2\)](#) in accordance with that structure: see *R v Murphy* (1985) 158 CLR 596; [61 ALR 139](#) ^{CB}, where the High Court, in a joint judgment, held that there was “no constitutional objection” to the acceptance by the Federal Parliament of such a “traditional division” of functions. See also *Pearce v Cocchiario* (1977) 137 CLR 600; [14 ALR 440](#) ^{CB}.

[5975.20] Wide construction given to “appeals” in s 68(2)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 68(2).

[Section 68\(2\)](#) was inserted in the Judiciary Act 1903 by Act 60 of 1932 to overcome the High Court's decision in *Seaegg v R* (1932) 48 CLR 251 ^{CB}. Per Dixon J in *Williams v R (No 2)* (1934) 50 CLR 551 at 559–60:

“It is, therefore, certain that the amendment was intended to confer upon the courts of criminal appeal of the states a jurisdiction to hear and determine appeals in the case of federal offences such as existed in the case of state offences ... No construction of the provision should be adopted which defeats that object, unless the language in which it is expressed is found incapable of any construction that would accomplish it...

“A provision conferring jurisdiction to hear and determine appeals of a specified kind may, perhaps, be taken to mean to do no more than to say which shall be the court to entertain appeals and administer the remedies that other provisions of the law give to the party. But it is also open to an interpretation by which it gives a jurisdiction to review proceedings not hitherto subject to appeal and so creates new remedies by conferring new power to administer them. The first construction would defeat the clear object of the legislature. The second would achieve it, and ought, therefore, to be adopted...

“But when this construction is given to the words of the provision, they necessarily extend to all remedies given by state law which fall within the description ‘appeals arising out of the trial or conviction on indictment or out of any proceedings connected therewith’. This accords with the general policy disclosed by the enactment, namely, to place the administration of the criminal law of the Commonwealth in each state upon the same footing as that of the state and to avoid the establishment of two independent systems of criminal justice.”

[5975.21] Committal proceedings under s 68(2)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 68(2).

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III, s 77(iii).

In *Gillis v DPP (Cth)* (1993) 42 FCR 181; [119 ALR 510](#) at [514](#) ^{CB} Lee J noted that, in relation to committal proceedings, [s 68\(2\)](#) had not vested state courts with federal jurisdiction as provided for in [s 77\(iii\)](#) of the Constitution; the provision had given to state courts more than the federal jurisdiction referred to in [Ch III](#) of the Constitution. Lee J proceeded to hold that a magistrate had not exceeded his powers when, in the course of considering an application to commit a defendant for trial on a Commonwealth offence, the magistrate declined to do so but decided to commit the defendant for trial on a state offence. Lee J said (ALR at 515):

“If the material presented to a Court of Petty Sessions on a committal proceeding is relevant to the charge alleged in the complaint and does not involve a ‘roving inquiry’ as to whether the person charged had committed an indictable offence... a magistrate has power to administer the system of criminal justice by committing a person for trial on indictment upon any offence disclosed by that evidence. The fact that the power to sign and present indictments may be divided between Commonwealth and state authorities in the name of the Crown in the right of the Commonwealth and in the right of the state respectively according to whether the matter for which a person has been committed for trial involves an offence against Commonwealth or state law does not affect the magistrate's power to commit a person for trial in the administration of a single system of criminal justice.”

[5975.25] Operation of s 68(2) in relation to appeals

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 68(2).

(NSW) [Crimes \(Appeal and Review\) Act 2001](#) s 107.

(NSW) [Criminal Appeal Act 1912](#) Section 5D.

(VIC) [Crimes Act 1958](#) Section 567A.

(CTH) [Director of Public Prosecutions Act 1983](#) s 9(7).

(CTH) [Crimes Act 1914](#).

(ACT) [Crimes Act 1900](#) s 474E(1), s 474E(1)(a), s 474E(1)(b).

(CTH) [Customs Act 1901](#).

[Section 68\(2\)](#) operates to confer the like jurisdiction to entertain an appeal against a directed verdict of acquittal as is conferred upon the Court of Criminal Appeal of New South Wales by s 107 of the Crimes (Appeal and Review) Act 2001 (NSW): see *R v LK* (2010) 241 CLR 177; [266 ALR 399](#); [BC201003366](#) at [\[20\]](#) and [\[86\]](#) ^{CB}.

Section 5D of the Criminal Appeal Act 1912 (NSW) provides that the Attorney-General of the state may appeal to the Court of Criminal Appeal against any sentence pronounced, inter alia, in the Supreme Court. [Section 68\(2\)](#) of the Judiciary Act 1903 operates upon s 5D so as to give the Attorney-General of the Commonwealth a right of appeal against a sentence pronounced by the Supreme Court of New South Wales in the exercise of the criminal jurisdiction of that court upon the conviction of any person charged with an offence against a law of the Commonwealth: *Peel v R* (1971) 125 CLR 447; [1972] ALR 231 ^{CB}; *R v Cangham* (1978) 140 CLR 487 ^{CB}.

Section 567A of the Crimes Act 1958 (Vic), authorises the Director of Public Prosecutions for the State of Victoria to appeal to the Full Court of the Victorian Supreme Court against the sentence imposed on a person convicted on indictment. Because [s 68\(2\)](#) of the Judiciary Act 1903 proceeds “by analogy” in the adoption of state law, “the appropriate analogy to the Victorian Director of Public Prosecutions is the Attorney-General of the Commonwealth ... because, in the absence of any express statutory provision, he is the proper officer to represent the Commonwealth”; and s 9(7) of the Director of Public Prosecutions Act 1983 (Cth) operates so as to vest the same right of appeal in the Commonwealth Director of Public Prosecutions: *Rohde v DPP (Cth)* (1986) 161 CLR 119 at 124–5; [66 ALR 593](#) per Gibbs CJ, Mason and Wilson JJ.

In *Adams v Carr* (1987) 47 SASR 205; [81 ALR 151](#) ^{CB}, the Full Court of the South Australian Supreme Court held that [s 68\(2\)](#) of the Judiciary Act 1903 conferred on the Full Court jurisdiction to hear an appeal against sentence imposed by a South Australian magistrate following conviction for an offence against the Crimes Act 1914 (Cth), there being a sufficient analogy between the federal offence and those state offences in respect of which the Full Court had been given appellate jurisdiction by s 163(1B) of the Justices Act 1921 (SA).

Section 474E(1) of the Crimes Act 1900 (NSW) gives the Supreme Court jurisdiction: (a) to direct that an inquiry be conducted into a conviction or sentence; or (b) to refer the case to the Court of Criminal Appeal, to be dealt with as an appeal under the Criminal Appeal Act 1912 (NSW). In *Re Application of Pearson* (1999) [162 ALR 248](#) ^{CB}, Wood CJ at CL held that [s 68\(2\)](#) of the Judiciary Act 1903 operated to “pick up” s 474E(1)(b), so that a person convicted of offences against the Customs Act 1901 (Cth) by a New South Wales court (exercising federal jurisdiction) could invoke s 474E(1)(b). Wood CJ at CL also held that [s 68\(2\)](#) of the Judiciary Act did not “pick up” s 474E(1)(a) because that provision did not confer judicial power.

Wood CJ at CL noted at 262 that the decisions in *Kesavarajah v R* (1994) 181 CLR 230; [123 ALR 463](#) ^{CB}, *Brown v R* (1986) 160 CLR 171; [64 ALR 161](#) ^{CB} and *Cheatle v R* (1993) 177 CLR 541; [116 ALR 1](#) ^{CB} provided examples of the partial picking up of state laws and concluded (at 263–4):

“[P]icking up s 474E(1)(b), without s 474E(1)(a) does not give any altered meaning or application to the State legislation. The only difference lies in the fact that, if the court determines that an application is suitable for an inquiry, then, in the case of a conviction or sentence arising under federal law, the way in which it is to be determined is limited to that provided in s 474E(1)(b). Parliament may be taken to have adopted, in this regard, one of the modes for determination of the remedy or procedure which State law provides for its analogous jurisdiction concerning convictions under State law. To that extent the difference is procedural, and not unlike that seen in *Brown* and *Cheatle*, where the State legislation was taken up, but with restrictions as to the mode of trial, precluding majority verdicts and trial by judge alone. In the present case, if the court considers that an application merits review, then one of the two ways prescribed for its determination is taken up.”
[5975.30] “Laws of the Commonwealth”

L Legislation cited in this paragraph

(CTH) [Securities Industry Act 1980](#) Securities Industries Act 1980 (Cth).

(CTH) [Judiciary Act 1903](#) s 68(2).

(CTH) [Acts Interpretation Act 1901](#) s 22(1)(c).

The Securities Industries Act 1980 (Cth) is a “law of the Commonwealth” within [s 68\(2\)](#). It is not

excluded from that category of laws by s 22(1)(c) of the Acts Interpretation Act 1901 (Cth): *Australian Securities Commission v Burns* (1993) 41 FCR 407; [113 ALR 468](#) ^{CB}.

[5975.35] Section 68(2) and reservation of questions for a Full Court

L Legislation cited in this paragraph

(CTH) [Crimes Act 1914](#).

(CTH) [Judiciary Act 1903](#) s 68(2).

In *R v Gee* (2003) 212 CLR 230; [196 ALR 282](#) ^{CB}, the High Court held that, in a prosecution for an offence against the Crimes Act 1914 (Cth), the effect of [s 68\(2\)](#) of the Judiciary Act was that the Commonwealth Director of Public Prosecutions could invoke s 350 of the Criminal Law Consolidation Act 1935 (SA), which provides that a trial court may reserve for determination by the Full Court a question relevant to a trial or to sentencing. McHugh and Gummow JJ said at [69] that [s 68\(2\)](#) operated to invest federal jurisdiction in the South Australia Full Court in two ways:

“First, the determination was the exercise of jurisdiction with respect to the trial of the respondents. The respective steps taken in the District Court and the Full Court were elements in the adjudication of the one matter arising under Commonwealth law, the determination of the charges laid against the respondents. Secondly, the proceeding in the Full Court was an ‘appeal’ for the purposes of [s 68\(2\)](#).”

EVIDENCE ACT 1995

[5975.40] Proceedings affected by Evidence Act 1995

L Legislation cited in this paragraph

(CTH) [Evidence Act 1995](#) s 4(1), s 5, Section 8(1).

(CTH) [Judiciary Act 1903](#) ss 68, 79, 80, 80A.

The [Evidence Act 1995 \(Cth\)](#) (“the Act”) commenced operation on 18 April 1995. The Act introduces a comprehensive Federal code of evidence. The Act applies in relation to all proceedings in “a federal court or an ACT court”: [s 4\(1\)](#). The term “federal court” is defined in the Act’s Dictionary to mean the High Court and any other court created by the Parliament (other than the Supreme Court of a territory); and “ACT court” is defined to mean the Supreme Court of the Australian Capital Territory or any other court of that territory.

Certain other provisions of the Act (listed in the Table to [s 5](#)) apply in relation to all proceedings in an “Australian court” ([s 5](#)) and the term “Australian court” is defined in the Dictionary to mean (inter alia) the High Court, a court exercising federal jurisdiction or a court of a state or territory.

[Section 8\(1\)](#) of the Act declares: “This Act does not affect the provisions of any other Act, other than [sections 68](#), [79](#), [80](#) and [80A](#) of the Judiciary Act 1903.”

(CTH) Judiciary Act 1903 [5980] s 68A Committals jurisdiction if both Federal Court of Australia and State or Territory court have jurisdiction in relation to indictable offence

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > [DIVISION 1 APPLICATION OF LAWS \[ss 68–68C\]](#)

[5980] 68A Committals jurisdiction if both Federal Court of Australia and State or Territory court have jurisdiction in relation to indictable offence

(1) This section applies if both:

- (a) the Federal Court of Australia; and
- (b) a court of a State or Territory (the **superior State or Territory court**);

have jurisdiction to try a person on indictment for an indictable offence against a law of the Commonwealth (the **indictable offence**).

(2) **Working out which court the person should be committed to** If a court of the State or Territory (the **State or Territory committals court**) has, under [subsection 68\(2\)](#), jurisdiction with respect to the examination and commitment for trial on indictment of a person who is charged with the indictable offence, the court may, in exercising that jurisdiction:

- (a) commit the person for trial on indictment for the offence before either:
 - (i) the Federal Court of Australia; or
 - (ii) the superior State or Territory court; or
- (b) if the person pleads guilty to the offence, commit the person for sentencing for the offence by either:
 - (i) the Federal Court of Australia; or
 - (ii) the superior State or Territory court.

This subsection has effect subject to [subsections \(3\)](#) and [\(4\)](#).

Note:

[Paragraph \(2\)\(b\)](#) refers to committal for sentencing. For the power of the State or Territory committal court to commit for sentencing, see [subsection 68\(7\)](#).

(3) Despite [subsection 68\(1\)](#), if:

(CTH) Judiciary Act 1903 [5980] s 68A Committals jurisdiction if both Federal Court of Australia and State or Territory court have jurisdiction in relation to i....

- (a) a person is charged with the indictable offence; and
- (b) at the end of the proceedings before the State or Territory committals court, the State or Territory committals court proposes to make an order (the **committal order**) that the person be committed for trial on indictment, or for sentencing, for the indictable offence;

the State or Territory committals court must invite the Director of Public Prosecutions to suggest the court before which the person is to be tried or sentenced.

Note:

The State or Territory committals court must make this invitation even if the Director of Public Prosecutions is not a party to the committal proceedings.

(4) When making the committal order, the State or Territory committals court must consider specifying the court suggested by the Director of Public Prosecutions as the court before which the person is to be tried or sentenced.

(5) Committal court may grant bail to person to appear before Federal Court If the committal order relating to the person specifies the Federal Court of Australia, then a power of the State or Territory committals court:

- (a) that is conferred by a law applying under [subsection 68\(1\)](#) in relation to indictable offences against the laws of the Commonwealth; and
- (b) that enables the State or Territory committals court to grant bail to persons accused of such offences to appear before the superior State or Territory court if committed for trial, or for sentencing, before the superior State or Territory court;

applies as if the power included the power to grant bail to the first-mentioned person to appear before the Federal Court of Australia.

Note:

Appeals or reviews of the exercise of this power will be dealt with under the laws of the State or Territory applying under [subsection 68\(1\)](#). However, bail will be dealt with under [Part VIB](#) of the Federal Court of Australia Act 1976 once indictable primary proceedings (within the meaning of that Act) commence for the person.

(6) If question about person's fitness to be tried Subsection 20B(1) of the Crimes Act 1914 applies as if the reference in that subsection to the court to which the proceedings would have been referred had the person been committed for trial were a reference to a court to which the proceedings could have been referred had the person been committed for trial.

Note:

This means the committal court may choose whether to refer a question of the person's fitness to be tried to either the Federal Court of Australia or the superior State or Territory court.

[s 68A insrt Act 106 of 2009 s 3 and Sch 1[6], effective 4 December 2009]

(CTH) Judiciary Act 1903 [5985] s 68B Application of State and Territory laws if Federal Court of Australia and State or Territory court both have jurisdiction in relation to an offence

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > [DIVISION 1 APPLICATION OF LAWS \[ss 68–68C\]](#)

[5985] 68B Application of State and Territory laws if Federal Court of Australia and State or Territory court both have jurisdiction in relation to an offence

(1) To avoid doubt:

(a) [subsection 68\(1\)](#) applies to a person:

- (i) who is charged with an offence against a law of the Commonwealth; and
- (ii) in respect of whom jurisdiction is conferred on a court of a State or Territory by [section 68](#);

even if jurisdiction in relation to that person and that offence is also conferred on the Federal Court of Australia by another law of the Commonwealth; and

(b) [subsection 68\(1\)](#) applies to the person and the offence in relation to:

- (i) any proceedings in relation to the offence that are brought before a court of the State or Territory; and
- (ii) any proceedings in relation to the offence that are brought before the Federal Court of Australia.

(2) [Paragraph \(1\)\(b\)](#) has effect subject to [section 68C](#).

[s 68B insrt Act 106 of 2009 s 3 and Sch 1[6], effective 4 December 2009]

(CTH) Judiciary Act 1903 [5990] s 68C Adjustments to State and Territory laws applying to proceedings before Federal Court of Australia

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > [DIVISION 1 APPLICATION OF LAWS \[ss 68–68C\]](#)

[5990] 68C Adjustments to State and Territory laws applying to proceedings before Federal Court of Australia

(1) This section applies if:

- (a) an offence referred to in [subsection 68\(1\)](#) is an indictable offence; and
- (b) the Federal Court of Australia (the **Federal Court**) has jurisdiction to try a person on indictment for the offence; and
- (c) proceedings commence in the Federal Court in relation to the offence that are:
 - (i) indictable primary proceedings (within the meaning of the [Federal Court of Australia Act 1976](#)) (**primary proceedings**); or
 - (ii) criminal appeal proceedings (within the meaning of that Act) that relate to primary proceedings; or
 - (iii) proceedings under [section 30CA](#) of that Act that relate to primary proceedings; or
 - (iv) proceedings under [section 30CB](#) of that Act that relate to primary proceedings; or
 - (v) proceedings referred to the Federal Court under section 20B of the Crimes Act 1914 (as that section applies because of [subsection 68A\(6\)](#)).

(2) **The State or Territory in which trial proceedings must be heard** If the proceedings are primary proceedings that:

- (a) are to include either the person, the prosecutor or both appearing before the Federal Court in accordance with an order of a court of a State or Territory committing the person for trial on indictment before the Court for the offence; or
- (b) if [paragraph \(a\)](#) does not apply — include the filing in the Federal Court, in a State or Territory, of an indictment against the person for the offence;

the Federal Court must hear the proceedings in that State or Territory unless and until the Federal Court makes an order under [subsection \(3\)](#).

Note:

The place in which any other proceedings are to be heard is a matter for the Court.

(3) If the proceedings are covered by [subsection \(2\)](#), the Federal Court may, before the jury is empanelled for the trial, make an order specifying the State or Territory in which the Federal Court will hear the proceedings.

(4) [Subsections \(2\)](#) and [\(3\)](#) have effect subject to section 80 of the Constitution and sections 70 and 70A.

(5) **Which State's or Territory's laws are to apply?** The laws to be applied under [subsection 68\(1\)](#) in relation to the proceedings are those referred to in the following table:

Laws applicable in relation to the proceedings

Item	If the proceedings are ...	the laws to be applied are ...
1	primary proceedings (other than proceedings for the sentencing of the person following a trial in the Federal Court)	the laws of the State or Territory in which the Federal Court hears the proceedings.
2	primary proceedings for the sentencing of the person following a trial in the Federal Court	the laws of the State or Territory applying in relation to the trial at the end of the trial.
3	appeal proceedings covered by subparagraph (1)(c)(ii)	the laws of the State or Territory applying in relation to the corresponding primary proceedings at the end of those primary proceedings.
4	proceedings covered by subparagraph (1)(c)(iii) in relation to a case stated, or question reserved, by a court	the laws of the State or Territory applying in the proceedings during which the court stated the case or reserved the question.
5	proceedings covered by subparagraph (1)(c)(iv)	the laws of the State or Territory applying in relation to the corresponding primary proceedings at the end of those primary proceedings.
6	proceedings covered by subparagraph (1)(c)(v) as a result of a referral by a court	the laws of the State or Territory applying in the proceedings during which the court made the referral.

(6) **What those laws include** The laws of that State or Territory are taken:

- (a) to include the Rules of the Supreme Court of that State or Territory that apply in relation to criminal proceedings; and
- (b) not to include the Rules of any other court of that State or Territory.

(7) **How those laws apply** The laws of that State or Territory apply as if any reference in those laws to the Supreme Court of that State or Territory, and any reference to a court that includes a reference to the Supreme Court of that State or Territory, were a reference to the Federal Court.

(8) The laws of that State or Territory apply to the proceedings only to the extent to which they are:

- (a) not inconsistent with the laws of the Commonwealth; and

(CTH) Judiciary Act 1903 [5990] s 68C Adjustments to State and Territory laws applying to proceedings before
Federal Court of Australia

(b) not inconsistent with the Rules of the Federal Court.

[s 68C insrt Act 106 of 2009 s 3 and Sch 1[6], effective 4 December 2009]

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(CTH) Judiciary Act 1903 [6075] s 69 Indictments

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: December 2009

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > **DIVISION 2 INDICTABLE OFFENCES [ss 69–71A]**

DIVISION 2 INDICTABLE OFFENCES [ss 69–71A]

[6075] 69 Indictments

(1) Indictable offences against the laws of the Commonwealth shall be prosecuted by indictment in the name of the Attorney-General of the Commonwealth or of such other person as the Governor-General appoints in that behalf.

(2) Any such appointment shall be by commission in the Queen's name, and may extend to the whole Commonwealth or to any State or part of the Commonwealth.

(2A) Nothing in [subsection \(1\)](#):

- (a) affects the power of the Director of Public Prosecutions to prosecute by indictment in his or her official name; or
- (b) affects, or shall be taken to have affected, the power of a Special Prosecutor to prosecute by indictment in his or her own name;

indictable offences against the laws of the Commonwealth.

[subs (2A) am Act 141 of 1994 s 4 and Sch 2]

(3) Any person committed for trial for an offence against the laws of the Commonwealth may at any time within fourteen days after committal and before the jury is sworn apply to a Justice sitting other than in open court or to a Judge of the Supreme Court of a State for the appointment of counsel for his or her defence. If it be found to the satisfaction of the Justice or Judge that such person is without adequate means to provide defence for himself or herself, and that it is desirable in the interests of justice that such an appointment should be made, the Justice or Judge shall certify this to the Attorney-General, who may if he or she thinks fit thereupon cause arrangements to be made for the defence of the accused person or refer the matter to such legal aid authorities as the Attorney-General considers appropriate. Upon committal the person committed shall be supplied with a copy of this subsection.

[subs (3) am Act 141 of 1994 s 4 and Sch 2; Act 3 of 2022 s 3 and Sch 1 item 113, effective 18 February 2022]

SECTION 69(1)

[6075.5] “or of such other person as the Governor-General appoints in that behalf”

L Legislation cited in this paragraph

(CTH) [Director of Public Prosecutions Act 1983](#).

(CTH) [Judiciary Act 1903](#) s 69.

The Director of Public Prosecutions acting pursuant to the Director of Public Prosecutions Act 1983 (Cth) is not a person appointed by the Governor-General pursuant to [s 69](#) of the Judiciary Act 1903. The enactment of the Director of Public Prosecutions Act 1983 does not derogate from the powers of the Attorney-General under this section: *Re Evans; Ex parte Clyne* (1984) 2 FCR 515; [55 ALR 624](#) [CB](#).

[6075.10] “Indictable offences ... shall be prosecuted by indictment”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 69(1).

(VIC) [Crimes Act 1958](#) s 353.

An indictment under [s 69\(1\)](#) is identical with a presentment under s 353 of the Crimes Act 1958 (Vic). Accordingly, a prosecution for an indictable offence against a law of the Commonwealth may be initiated by a presentment in accordance with s 353 of the Crimes Act: *R v Nicola* [\[1987\] VR 1040](#); [\(1987\) 79 ALR 469](#) [CB](#).

SECTION 69(3)

[6075.15] “adequate means to provide defence for himself”

This expression does not only comprehend the accused's capacity to use her or his own property to provide the necessary means. The expression includes her or his capacity to secure the provision of the necessary means from a person willing to provide the means on terms which the justice or judge considers reasonable: *Maher v A-G (Cth)* (1985) 5 FCR 514; [60 ALR 373](#) [CB](#).

(CTH) Judiciary Act 1903 [6080] s 70 Offences committed in several States

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > [DIVISION 2 INDICTABLE OFFENCES \[ss 69–71A\]](#)

[6080] 70 Offences committed in several States

(1) When an offence against the laws of the Commonwealth is begun in one State or part of the Commonwealth and completed in another, the offender may be dealt with tried and punished in either State or part in the same manner as if the offence had been actually and wholly committed therein.

[subs (1) am Act 106 of 2009 s 3 and Sch 1[100], effective 4 December 2009]

(2) This section has effect subject to [section 68C](#).

[subs (2) insrt Act 106 of 2009 s 3 and Sch 1[101], effective 4 December 2009]

End of Document

(CTH) Judiciary Act 1903 [6085] s 70A Indictable offence not committed in a State

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > [DIVISION 2 INDICTABLE OFFENCES \[ss 69–71A\]](#)

[6085] 70A Indictable offence not committed in a State

(1) The trial on indictment of an offence against a law of the Commonwealth not committed within any State and not being an offence to which [section 70](#) applies may be held in any State or Territory.

[subs (1) am Act 106 of 2009 s 3 and Sch 1[102], effective 4 December 2009]

(2) This section has effect subject to [section 68C](#).

[subs (2) insrt Act 106 of 2009 s 3 and Sch 1[103], effective 4 December 2009]

End of Document

(CTH) Judiciary Act 1903 [6090] s 71 Discharge of persons committed for trial

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: December 2009

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > [DIVISION 2 INDICTABLE OFFENCES \[ss 69–71A\]](#)

[6090] 71 Discharge of persons committed for trial

(1) When any person is under commitment upon a charge of an indictable offence against the laws of the Commonwealth, the Attorney-General or such other person as the Governor-General appoints in that behalf may decline to proceed further in the prosecution, and may, if the person is in custody, by warrant under his or her hand direct the discharge of the person from custody, and he or she shall be discharged accordingly.

[subs (1) am Act 141 of 1994 s 4 and Sch 2]

(2) Nothing in [subsection \(1\)](#):

- (a) affects the power under subsection 9(4) of the Director of Public Prosecutions Act 1983 of the Director of Public Prosecutions; or
- (b) affects, or shall be taken to have affected, the power under subsection 8(2) of the Special Prosecutors Act 1982 of a Special Prosecutor.

Section 71 Generally

[6090.5] Discretion of the Attorney-General

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 71.

The power of the Attorney-General under [s 71](#) is not exercised for the public benefit or for the purpose of conferring rights or benefits upon persons but is merely a power to be exercised as and when appropriate in the administration of criminal law. [Section 71](#) does not impose a duty on the Attorney-General to make a decision: *Re Evans; Ex parte Clyne* (1984) 2 FCR 515; [55 ALR 624](#) .

End of Document

(CTH) Judiciary Act 1903 [6095] s 71A Trial of indictable offence without preliminary examination

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > [DIVISION 2 INDICTABLE OFFENCES \[ss 69–71A\]](#)

[6095] 71A Trial of indictable offence without preliminary examination

(1) Notwithstanding anything contained in this Part, or any provision of any law of a State or Territory, the Attorney-General of the Commonwealth may file an indictment for any indictable offence against the laws of the Commonwealth in:

- (a) the High Court; or
- (b) if the Federal Court of Australia has jurisdiction to try a person for the offence — that Court; or
- (c) the Supreme Court of a State or Territory;

without examination or commitment for trial.

[subs (1) subst Act 106 of 2009 s 3 and Sch 1[104], effective 4 December 2009]

(2) Upon an indictment being so filed, the Court or a Justice or Judge thereof, may cause a summons to be issued to the defendant to appear at the time and place mentioned in the summons there to answer the charge mentioned in the indictment, or may issue a warrant for the defendant's arrest, and may hold the defendant in custody or admit the defendant to bail.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) Nothing in [subsection \(1\)](#) affects the power under subsection 6(2D) of the Director of Public Prosecutions Act 1983 of the Director of Public Prosecutions.

[subs (3) insrt Act 108 of 1989 s 35]

(CTH) Judiciary Act 1903 [6195] s 72 Reservation of points of law

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: December 2009

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > **DIVISION 3 APPEALS [ss 72–77]**

DIVISION 3 APPEALS [ss 72–77]

[6195] 72 Reservation of points of law

(1) This section applies if a person is indicted before a Court, other than:

- (a) the Federal Court of Australia; or
- (b) the Supreme Court of a Territory (other than the Australian Capital Territory or the Northern Territory);

for an indictable offence against a law of the Commonwealth.

[subs (1) subst Act 106 of 2009 s 3 and Sch 1[105], effective 4 December 2009]

(1A) The Court (the **trial court**) before which the person is tried:

- (a) must, if an application is made by or on behalf of the person before the jury delivers its verdict on a count in the indictment in relation to the person; and
- (b) may in its discretion (either before or after judgment without such an application);

reserve a question of law, in relation to that count, which arises on the trial for the consideration of:

- (c) a Full Court of the High Court; or
- (d) a Full Court of the Supreme Court of the same State or Territory as the trial court.

[subs (1A) insrt Act 106 of 2009 s 3 and Sch 1[105], effective 4 December 2009]

(2) If the accused person is convicted, and a question of law has been so reserved before judgment, the Court before which he or she was tried may either pronounce judgment on the conviction and respite execution of the judgment, or postpone the judgment until the question has been considered and decided, and may either commit the person convicted to prison or admit him or her to bail on recognizance with or without sureties, and in such sum as the Court thinks fit, conditioned to appear at such time and place as the Court directs and to render himself or herself in execution or to receive judgment as the case may be.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) The presiding judge is thereupon required to state in a case signed by him or her the question of law so reserved with the special circumstances upon which it arose, and if it be reserved for the High Court the case shall be transmitted to the Registry of the High Court.

[subs (3) am Act 141 of 1994 s 4 and Sch 2]

Section 72 Generally

[6195.5] Court may order a new trial

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 73.

When any question of law is reserved to the High Court, it may order a new trial: [s 73](#).

[6195.10] Reservation of points of law by a State Court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 44, s 72, s 72(1).

The original view of the High Court, as expressed in *R v O'Donoghue* (1917) 23 CLR 9 [CB](#), was that [s 72\(1\)](#) was limited to questions of law reserved by a Federal Court or a single judge of the High Court. The High Court has since revised this view and accepted jurisdiction to decide questions of law reserved from state courts: see *R v Sharkey* (1949) 79 CLR 121 [CB](#); *R v Murphy* (1985) 158 CLR 596 at 619; [61 ALR 139](#).

However, [s 72](#) does not confer upon an accused person the right to nominate the court to which questions will be reserved: see *R v Murphy*, *above*, where the High Court noted with approval the comments of Mason J in *Re Loveday; Ex parte Clyne* (1984) [61 ALR 136](#) [CB](#), where his Honour emphasised that such procedure would otherwise “stand in marked disconformity” with the structure of the appellate jurisdiction of the High Court.

The major question for the court to consider with regard to [s 72](#) now appears to be, not whether the High Court has jurisdiction to hear a case stated from a state trial judge, but whether the court ought to exercise its power pursuant to [s 44](#) of the Judiciary Act 1903 and remit the matter to the Court of Appeal of the state where the matter arose: see *R v Murphy*, *above*; and [s 44](#) of the Judiciary Act 1903 and annotations thereunder.

[6195.15] Time for stating case

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 72, Section 72(1).

[Section 72\(1\)](#) envisages an application being made by the accused person at any time before verdict, with the case being stated after verdict, but before or after judgment is entered on the verdict: *R v Bright* (1980) [31 ALR 496](#); [\[1980\] Qd R 490](#) [CB](#) (Full Supreme Court, Queensland); *Rogers v*

R [\(1995\) 130 ALR 635](#)  (Court of Criminal Appeal, South Australia). Accordingly, a trial court should refuse an application to state a case under [s 72](#) where that application is made before the jury is empanelled: *Rogers v R* [\(1995\) 130 ALR 635](#) at [639](#).

End of Document

(CTH) Judiciary Act 1903 [6200] s 73 Hearing

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > [DIVISION 3 APPEALS \[ss 72–77\]](#)

[6200] 73 Hearing

Any question so reserved shall be heard and determined after argument by and on behalf of the Crown and the convicted person or persons if they desire that the question shall be argued, and the Court may:

- (a) affirm the judgment given at the trial; or
- (b) set aside the verdict and judgment and order a verdict of not guilty or other appropriate verdict to be entered; or
- (c) arrest the judgment; or
- (d) amend the judgment; or
- (e) order a new trial; or
- (f) make such other order as justice requires;

or the Court may send the case back to be amended or restated.

End of Document

(CTH) Judiciary Act 1903 [6205] s 74 Effect of order of Full Court

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Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > [DIVISION 3 APPEALS \[ss 72–77\]](#)

[6205] 74 Effect of order of Full Court

(1) The proper officer of the Court by which the question reserved was determined shall certify the judgment of the Court under his or her hand and the seal of the Court to the proper officer of the Court in which the trial was had, who shall enter the same on the original record.

[subs (1) am Act 141 of 1994 s 4 and Sch 2]

(2) If the convicted person is in custody, the proper officer of the Court by which the question reserved was determined shall also forthwith transmit another certificate of the same tenor under his or her hand and the seal of the Court to the superintendent of the prison or other person who has the custody of the convicted person. The certificate shall be a sufficient warrant to all persons for the execution of the judgment if it is certified to have been affirmed or as it is certified to be amended, and execution shall thereupon be executed upon the judgment as affirmed or amended: And if the judgment is set aside or arrested the certificate shall be a sufficient warrant for the discharge of the convicted person from further imprisonment under that judgment, and in that case the superintendent is required forthwith to discharge him or her from imprisonment under that judgment, and if he or she is at large on bail the recognizance of bail shall be vacated at the next criminal sitting of the Court in which the trial was had: And if that Court is directed to pronounce judgment, judgment shall be pronounced at the next criminal sitting of the Court at which the convicted person appears to receive judgment.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [6210] s 75 Certain errors not to avoid conviction

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > [DIVISION 3 APPEALS \[ss 72–77\]](#)

[6210] 75 Certain errors not to avoid conviction

A conviction cannot be set aside upon the ground of the improper admission of evidence if it appears to the Court that the evidence was merely of a formal character or not material, nor upon the ground of the improper admission of evidence adduced for the defence.

End of Document

(CTH) Judiciary Act 1903 [6215] s 76 Appeal from arrest of judgment

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > [DIVISION 3 APPEALS \[ss 72–77\]](#)

[6215] 76 Appeal from arrest of judgment

(1) This section applies if a Court, other than:

- (a) the Federal Court of Australia; or
- (b) the Supreme Court of a Territory (other than the Australian Capital Territory or the Northern Territory);

convicts an accused person on indictment for an offence against the laws of the Commonwealth.

[subs (1) subst Act 106 of 2009 s 3 and Sch 1[106], effective 4 December 2009]

(1A) If the Court (the **trial court**) before which the accused person is convicted arrests judgment at the trial, the Court must on the application of counsel for the prosecution state a case for the consideration of:

- (a) a Full Court of the High Court; or
- (b) a Full Court of the Supreme Court of the same State or Territory as the trial court.

[subs (1A) insrt Act 106 of 2009 s 3 and Sch 1[106], effective 4 December 2009]

(2) On the hearing of the case the Full Court may affirm or reverse the order arresting judgment. If the order is reversed the Court shall direct that judgment be pronounced upon the offender, and he or she shall be ordered to appear at such time and place as the Court directs to receive judgment, and an issuing officer (within the meaning of Part IAA of the Crimes Act 1914) may issue a warrant for the arrest of the offender.

[subs (2) am Act 141 of 1994 s 4 and Sch 2; Act 106 of 2009 s 3 and Sch 1[107], effective 4 December 2009]

(3) An offender so arrested may be admitted to bail by order of the Court which may be made in Court or otherwise, at the time when the order directing judgment to be pronounced is made or afterwards.

[subs (3) am Act 3 of 2022 s 3 and Sch 1 item 114, effective 18 February 2022]

(CTH) Judiciary Act 1903 [6220] s 77 No other appeal

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Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART X CRIMINAL JURISDICTION \[ss 68–77\]](#) > [DIVISION 3 APPEALS \[ss 72–77\]](#)

[6220] 77 No other appeal

Except as aforesaid, and except in the case of error apparent on the face of the proceedings, an appeal shall not without the special leave of the High Court be brought to the High Court from a judgment or sentence pronounced on the trial of a person charged with an indictable offence against the laws of the Commonwealth.

End of Document

(CTH) Judiciary Act 1903 [6325] s 77A Trial without jury

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XA PROCEDURE OF THE HIGH COURT [ss 77A–77R] > DIVISION 1 TRIALS [ss 77A–77D]

PART XA PROCEDURE OF THE HIGH COURT [ss 77A–77R]

DIVISION 1 TRIALS [ss 77A–77D]

[6325] 77A Trial without jury

In every suit in the High Court, unless the Court otherwise orders, the trial shall be by a Justice without a jury.

Section 77A Generally

[6325.5] Discretion to order trial by jury

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77A.

[Section 77A](#) substantially reproduces the provisions of s 12 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. See *Huntley v Alexander* (1922) 30 CLR 566 [CB](#) for a discussion of the court's discretion in ordering trial without jury under the former s 12 of the High Court Procedure Act.

(CTH) Judiciary Act 1903 [6330] s 77B Power of High Court to direct trial with jury

Practice & Procedure High Court & Federal Court of Australia
Current to: Act 3 of 2022 • Commentary Published: February 2001
Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 1 TRIALS \[ss 77A–77D\]](#)

[6330] 77B Power of High Court to direct trial with jury

The High Court may, in any suit in which the ends of justice appear to render it expedient to do so, direct the trial with a jury of the suit or of an issue of fact, and may for that purpose make all such orders, issue all such writs and cause all such proceedings to be had and taken as the Court thinks necessary, and upon the finding of the jury the Court may give such decision and pronounce such judgment as the case requires.

Section 77B Generally

[6330.5] Trial by jury

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77B.

[Section 77B](#) substantially reproduces the provisions of s 13 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. For consideration of applications for trial by jury, see *McDermott v Collien* (1953) 87 CLR 154 [CB](#) and *Huntley v Alexander* (1922) 30 CLR 566 [CB](#).

In *McDermott v Collien* (1953) 87 CLR 154 at 157, Fullagar J said: “Trial by jury is the normal mode of trial of actions in this court, and some special reason must be shown for a departure in any particular case from that mode. The second thing that seems clear is that it is not enough to show that the cause of action is of a kind which could quite properly be tried with a jury and which was normally tried with a jury before the Judicature Act 1873 ... ”

See also *Huntley v Alexander*, *above*; and *Henry v Commonwealth* [1937] ALR 409 [CB](#) where an application for trial of an action for damages by jury was refused.

(CTH) Judiciary Act 1903 [6335] s 77C Trial of an issue and new trials

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 1 TRIALS \[ss 77A–77D\]](#)

[6335] 77C Trial of an issue and new trials

(1) The High Court may, in any case in which the Court directs the trial of an issue or grants a new trial, impose such conditions on a party, and direct such submissions to be made by a party, for the purpose of the trial or new trial as are just.

(2) Where the High Court grants a new trial, the Court may:

- (a) grant the new trial, either generally or on particular issues only, as the Court thinks fit; and
- (b) order that testimony of a witness examined at the former trial may be used in the new trial in such manner as is specified in the order.

End of Document

[\(CTH\) Judiciary Act 1903 \[6340\] s 77D Juries](#)

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 1 TRIALS \[ss 77A–77D\]](#)

[6340] 77D Juries

(1) Subject to [subsection \(4\)](#) and to any other law of the Commonwealth, the laws in force in a State or Territory relating to:

- (a) the qualification of jurors;
- (b) the preparation of jury lists and jury panels;
- (c) the summoning, attendance and impanelling of juries;
- (d) the number of jurors;
- (e) the right of challenge;
- (f) the discharge of juries;
- (g) the disagreement of jurors;
- (h) the remuneration of jurors; and
- (i) other matters concerning jurors after they have been summoned, appointed or sworn;

that apply for the purposes of the trial of civil proceedings in the Supreme Court of that State or Territory extend and shall be applied in civil matters in which a trial is had with a jury in the High Court in that State or Territory.

(2) Subject to [subsection \(4\)](#) and to any other law of the Commonwealth, the laws in force in a State or Territory relating to the matters mentioned in [paragraphs \(1\)\(a\) to \(i\)](#), inclusive, that apply for the purposes of the trial of criminal matters in the Supreme Court of that State or Territory extend and shall be applied in the trial of indictable offences in the High Court in that State or Territory.

(3) For the purposes of a trial of a civil or criminal matter in the High Court in a State or Territory as mentioned in [subsection \(1\)](#) or [\(2\)](#), the lists of jurors made for the purposes of the Supreme Court of the State or Territory shall be deemed to have been made as well for the purposes of the High Court.

(4) The precept for a jury shall be issued by the Registrar or such other officer of the High Court as the Court directs, and the Marshal shall prepare the jury panels and summon jurors.

(5) An officer of a State or Territory who has the custody of a jury list shall furnish a copy of the list to the proper officer of the Commonwealth on demand and on payment of a reasonable fee.

End of Document

(CTH) Judiciary Act 1903 [6445] s 77E Production of books

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 2 EVIDENCE [ss 77E–77H]**

DIVISION 2 EVIDENCE [ss 77E–77H]

[6445] 77E Production of books

(1) The High Court may in any suit order a party to produce any books or writings in his or her possession or power that contain evidence pertinent to any issue in the suit.

[subs (1) am Act 141 of 1994 s 4 and Sch 2]

(2) If a party fails to comply with an order under [subsection \(1\)](#), the High Court may:

- (a) where the party is the plaintiff — dismiss the suit; or
- (b) where the party is the defendant — give judgment against the defendant as by default.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [6450] s 77F Oaths and affirmations

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Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 2 EVIDENCE \[ss 77E–77H\]](#)

[6450] 77F Oaths and affirmations

(1) The High Court may require and administer all necessary oaths and affirmations.

(2)

[subs (2) rep Act 3 of 1995 s 24]

(3)

[subs (3) rep Act 175 of 1995 s 3 and Sch 2]

(4)

[subs (4) rep Act 3 of 1995 s 24]

End of Document

(CTH) Judiciary Act 1903 [6455] s 77G Orders and commissions for examination of witnesses

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 2 EVIDENCE \[ss 77E–77H\]](#)

[6455] 77G Orders and commissions for examination of witnesses

The High Court may, in any cause pending in the Court and at any stage of the proceedings:

- (a) order the examination of a person upon oath orally or on interrogatories before the Court, an officer of the Court or another person at any place within Australia; or
- (b) order that a commission issue to a person, either within or beyond Australia, authorizing him or her to take the testimony upon oath of a person orally or on interrogatories;

and the Court may;

- (c) by the same or a subsequent order give any necessary directions concerning the time, place and manner of the examination; and
- (d) empower any party to the cause to give in evidence in the cause the testimony so taken on such terms (if any) as the Court directs.

[s 77G am Act 141 of 1994 s 4 and Sch 2]

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Editor's Note: [Section 77F\(2\)](#) and [s 77F\(4\)](#) were repealed by the Evidence (Transitional Provisions and Consequential Amendments) Act 1995 No 3.

However, s 14 of the Evidence (Transitional Provisions and Consequential Amendments) Act provided for the continued application of the repealed provisions in relation to proceedings the hearing of which began before the repeal.

The repealed provisions provided as follows:

“(2) A person may, for the purposes of any proceeding before the High Court, make an affirmation instead of an oath.

...

“(4) Subject to the Rules of Court, the forms of oaths and affirmations shall be the same, as nearly as practicable, as those that are used in the Supreme Court of the State or Territory in which the oath or affirmation is administered.”

End of Document

(CTH) Judiciary Act 1903 [6460] s 77H Oral and affidavit evidence

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 2 EVIDENCE \[ss 77E–77H\]](#)

[6460] 77H Oral and affidavit evidence

(1) On the hearing of any matter, not being the trial of a cause, evidence may be given by affidavit or as otherwise directed or allowed by the High Court.

(2) At the trial of a cause, proof may be given by affidavit of the service of a document in or incidental to the proceedings in the cause or of the signature of a party to the cause or of his or her solicitor to such a document.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) The High Court may at any time, for sufficient reason and on such conditions as are just, order that particular facts may be proved by affidavit at the trial of a cause, or that the affidavit of a person may be read at the trial of a cause.

(4) Notwithstanding any order under [subsection \(3\)](#), if a party to a cause desires in good faith that the maker of an affidavit (other than an affidavit referred to in [subsection \(2\)](#)) proposed to be used in the cause be cross-examined with respect to the matters in the affidavit, the affidavit may not be used in the cause unless that person appears as a witness for cross-examination or the High Court, in its discretion, permits the affidavit to be used without the person so appearing.

(5) If the parties to a suit so agree and the High Court does not otherwise order, testimony at the trial of the suit may be given by affidavit.

(6) Subject to the foregoing provisions of this section, testimony at the trial of a cause shall be given orally.

(CTH) Judiciary Act 1903 [6565] s 77J Amendment

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 3 DEFECTS AND ERRORS [ss 77J, 77K]**

DIVISION 3 DEFECTS AND ERRORS [ss 77J, 77K]

[6565] 77J Amendment

(1) At any stage of a proceeding before the High Court, the Court may, on such terms as are just, make such amendment as it thinks necessary to correct any defect or error in the proceeding.

(2) All necessary amendments shall be made for the purpose of determining the real questions in controversy or otherwise depending on the proceedings.

End of Document

(CTH) Judiciary Act 1903 [6570] s 77K Formal defects not to invalidate

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 3 DEFECTS AND ERRORS \[ss 77J, 77K\]](#)

[6570] 77K Formal defects not to invalidate

(1) No proceedings in the High Court are invalidated by a formal defect or an irregularity unless the Court is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of the Court.

(2) The High Court may, on such conditions (if any) as the Court thinks fit, make an order declaring that a proceeding is not invalid by reason of a defect that it considers to be formal, or by reason of an irregularity.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [6575] s 77L Reserved judgments

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 4 RESERVED JUDGMENTS [s 77L]**

DIVISION 4 RESERVED JUDGMENTS [s 77L]

[6575] 77L Reserved judgments

(1) When any cause or matter, after being fully heard before a Full Court, is ordered to stand for judgment, it is not necessary that all the Justices before whom it was heard be present together in court to declare their opinions on the cause or matter, but the opinion of any of them may be reduced to writing and may be read or otherwise made known by any other Justice at any subsequent sitting of a Full Court at which judgment in the cause or matter is delivered. At that subsequent sitting, it is only necessary for a single Justice to be present in court for the purpose of delivering that judgment.

[subs (1) am Act 84 of 1994 s 88]

(2) In any such case the question shall be decided in the same manner, and the judgment of the Court has the same force and effect, as if the Justice whose opinion is so read or otherwise made known had been present in court and had declared his or her opinion in person.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [6775] s 77M Enforcement of judgments

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 5 JUDGMENT AND EXECUTION [ss 77M–77Q]**

DIVISION 5 JUDGMENT AND EXECUTION [ss 77M–77Q]

[6775] 77M Enforcement of judgments

(1) Subject to the Rules of Court, a person in whose favour a judgment of the High Court is given is entitled to the same remedies for the enforcement of the judgment in a State or Territory, by execution or otherwise, against the person, or against the property of the person, against whom the judgment is given, as are allowed in like cases by the laws of that State or Territory to persons in whose favour a judgment of the Supreme Court of that State or Territory is given.

(2) This section does not affect the operation of any provision made by or under any other Act or by the Rules of Court for the execution and enforcement of judgments of the High Court.

Section 77M Generally

[6775.5] Non-payment of costs of appeal

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77M.

(CTH) [High Court Rules 1952](#) O XXXV.

[Section 77M](#) substantially reproduces the provisions of s 26 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. In *Lysaght Bros & Co Ltd v Falk (No 2)* (1905) 2 CLR 443 at 445–6, Griffith CJ noted that O XXXV of the High Court Rules imposed a limitation on the remedies available for enforcement of an order of the court for the payment of money to a person, by precluding enforcement through a writ of attachment. It followed that an order of the High Court for payment of the costs of an appeal from a state Supreme Court would not be enforced by attachment.

End of Document

(CTH) Judiciary Act 1903 [6780] s 77MA Interest up to judgment

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6780] 77MA Interest up to judgment

(1) In any proceedings, other than proceedings on appeal, for the recovery of any money (including any debt or damages or the value of any goods) in respect of a cause of action that arises after the commencement of this section, the High Court shall, upon application, unless good cause is shown to the contrary, either:

- (a) order that there be included in the sum for which judgment is given interest at such rate as the Court thinks fit on the whole or any part of the money for the whole or part of the period between the date when the cause of action arose and the date as of which judgment is entered; or
- (b) without proceeding to calculate interest in accordance with [paragraph \(a\)](#), order that there be included in the sum for which judgment is given a lump sum in lieu of any such interest.

(2) [Subsection \(1\)](#) does not:

- (a) authorize the giving of interest upon interest or of a sum in lieu of such interest;
- (b) apply in relation to any debt upon which interest is payable as of right whether by virtue of an agreement or otherwise;
- (c) affect the damages recoverable for the dishonour of a bill of exchange;
- (d) limit the operation of any enactment or rule of law which, apart from this section, provides for the award of interest; or
- (e) authorize the giving of interest, or a sum in lieu of interest, otherwise than by consent, upon any sum for which judgment is given by consent.

(3) Where the sum for which judgment is given (in this subsection referred to as **the relevant sum**) includes, or where the High Court, in its absolute discretion, determines that the relevant sum includes, any amount for:

- (a) compensation in respect of liabilities incurred which do not carry interest as against the person claiming interest or claiming a sum in lieu of interest;
- (b) compensation for loss or damage to be incurred or suffered after the date on which judgment is given; or
- (c) exemplary or punitive damages;

interest, or a sum in lieu of interest, shall not be given under [subsection \(1\)](#) in respect of any such amount or in respect of so much of the relevant sum as in the opinion of the Court represents any such amount.

(4) [Subsection \(3\)](#) shall not be taken to preclude interest or a sum in lieu of interest being given, pursuant to this section, upon compensation in respect of a liability of the kind referred to in [paragraph \(3\)\(a\)](#) where that liability has been met by the plaintiff, as from the date upon which that liability was so met.

End of Document

(CTH) Judiciary Act 1903 [6785] s 77N Interest on judgment debts

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6785] 77N Interest on judgment debts

A judgment debt under a judgment of the High Court carries interest, at such rate as is fixed by the Rules of Court, from the date as of which the judgment is entered.

Section 77N Generally

[6785.5] Section 77N excludes state laws providing for interest

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 77N, s 79.

[Section 77N](#) substantially reproduces the provisions of s 26A of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. In *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 ; [6 ALR 433](#) at [436](#) [CB](#), Mason J held that the former s 26A was a “comprehensive expression of the entitlement in this court of a litigant to interest on damages to the exclusion of any provision in state law which would otherwise be made applicable by virtue of [s 79](#)”.

(CTH) Judiciary Act 1903 [6790] s 77P Interpleader

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6790] 77P Interpleader

When any claim is made to property taken in execution upon process issued out of the High Court, the Marshal or a Deputy Marshal may take in the Supreme Court of the State or Territory in which the property is situated the same proceedings by way of interpleader as if the process had been issued out of that Supreme Court, and that Supreme Court and the Judges of that Supreme Court have jurisdiction to entertain and determine the matter.

Section 77P Generally

[6790.5] Power of sheriff to sell goods

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77P.

[Section 77P](#) substantially reproduces the provisions of s 27 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. In *Dent v Snell* (1927) 43 WN (NSW) 140, the powers of the sheriff under the former s 27 of the High Court Procedure Act to sell goods not returned by the court to a claimant were considered.

End of Document

(CTH) Judiciary Act 1903 [6795] s 77Q Discharge of property taken in execution

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6795] 77Q Discharge of property taken in execution

A seizure or attachment of property in execution upon process issued out of the High Court becomes inoperative upon the occurrence of any event by which, according to the laws of the State or Territory in which the property is situated, the seizure or attachment would become inoperative if made upon like process issued out of the Supreme Court of that State or Territory.

End of Document

(CTH) Judiciary Act 1903 [6895] s 77R Receivers and managers

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 6 RECEIVERS AND MANAGERS [s 77R]**

DIVISION 6 RECEIVERS AND MANAGERS [s 77R]

[6895] 77R Receivers and managers

(1) The High Court may, at any stage of a proceeding and on such terms and conditions as the Court thinks fit, appoint a receiver or manager in any case in which it appears to the Court to be just or convenient to do so.

(2) A receiver or manager appointed under [subsection \(1\)](#) may, without the previous leave of the High Court, be sued in respect of any act or transaction done or entered into by him or her in carrying on the business connected with the property of which he or she is receiver or manager.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) When in any cause pending in the High Court a receiver or manager appointed by the Court is in possession of any property, the receiver or manager shall manage and deal with the property according to the requirements of the laws of the State or Territory in which the property is situated in the same manner as that in which the owner or possessor of the property would be bound to do if in possession of the property.

End of Document

(CTH) Judiciary Act 1903 [6900] s 77RA Definitions

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RA–77RK] > DIVISION 1 PRELIMINARY [ss 77RA–77RC]

PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RA–77RK]

[Pt XAA insrt Act 186 of 2012 s 3 and Sch 2 item 8, effective 12 December 2012]

DIVISION 1 PRELIMINARY [ss 77RA–77RC]

[6900] 77RA Definitions

In this Part:

information includes any document.

news publisher means a person engaged in the business of publishing news or a public or community broadcasting service engaged in the publishing of news through a public news medium.

non-publication order means an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information).

party to a proceeding includes the complainant or victim (or alleged victim) in a criminal proceeding and any person named in evidence given in a proceeding and, in relation to a proceeding that has concluded, means a person who was a party to the proceeding before the proceeding concluded.

proceeding means a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding, and also includes an appeal.

publish means disseminate or provide access to the public or a section of the public by any means, including by:

- (a) publication in a book, newspaper, magazine or other written publication; or
- (b) broadcast by radio or television; or
- (c) public exhibition; or
- (d) broadcast or publication by means of the internet.

suppression order means an order that prohibits or restricts the disclosure of information (by publication or otherwise).

End of Document

(CTH) Judiciary Act 1903 [6905] s 77RB Powers of High Court not affected

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 1 PRELIMINARY \[ss 77RA–77RC\]](#)

[6905] 77RB Powers of High Court not affected

This Part does not limit or otherwise affect any powers that the High Court has apart from this Part to regulate its proceedings or to deal with a contempt of the Court.

End of Document

(CTH) Judiciary Act 1903 [6910] s 77RC Other laws not affected

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Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 1 PRELIMINARY \[ss 77RA–77RC\]](#)

[6910] 77RC Other laws not affected

This Part does not limit or otherwise affect the operation of a provision made by or under any Act (other than this Act) that prohibits or restricts, or authorises a court to prohibit or restrict, the publication or other disclosure of information in connection with proceedings.

End of Document

(CTH) Judiciary Act 1903 [6915] s 77RD Safeguarding public interest in open justice

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > **DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RD–77RK]**

DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RD–77RK]

[6915] 77RD Safeguarding public interest in open justice

In deciding whether to make a suppression order or non-publication order, the High Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

End of Document

(CTH) Judiciary Act 1903 [6920] s 77RE Power to make orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6920] 77RE Power to make orders

(1) The High Court may, by making a suppression order or non-publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:

- (a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or
- (b) information that relates to a proceeding before the Court and is:
 - (i) information that comprises evidence or information about evidence; or
 - (ii) information obtained by the process of discovery; or
 - (iii) information produced under a subpoena; or
 - (iv) information lodged with or filed in the Court.

(2) The High Court may make such orders as it thinks appropriate to give effect to an order under [subsection \(1\)](#).

End of Document

(CTH) Judiciary Act 1903 [6925] s 77RF Grounds for making an order

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6925] 77RF Grounds for making an order

(1) The High Court may make a suppression order or non-publication order on one or more of the following grounds:

- (a) the order is necessary to prevent prejudice to the proper administration of justice;
- (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
- (c) the order is necessary to protect the safety of any person;
- (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).

(2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

End of Document

(CTH) Judiciary Act 1903 [6930] s 77RG Procedure for making an order

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Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6930] 77RG Procedure for making an order

(1) The High Court may make a suppression order or non-publication order on its own initiative or on the application of:

- (a) a party to the proceeding concerned; or
- (b) any other person considered by the Court to have a sufficient interest in the making of the order.

(2) Each of the following persons is entitled to appear and be heard by the High Court on an application for a suppression order or non-publication order:

- (a) the applicant for the order;
- (b) a party to the proceeding concerned;
- (c) the Government (or an agency of the Government) of the Commonwealth or a State or Territory;
- (d) a news publisher;
- (e) any other person who, in the Court's opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made.

(3) A suppression order or non-publication order may be made at any time during a proceeding or after a proceeding has concluded.

(4) A suppression order or non-publication order may be made subject to such exceptions and conditions as the High Court thinks fit and specifies in the order.

(5) A suppression order or non-publication order must specify the information to which the order applies with sufficient particularity to ensure that the court order is limited to achieving the purpose for which the order is made.

(CTH) Judiciary Act 1903 [6935] s 77RH Interim orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6935] 77RH Interim orders

(1) If an application is made to the High Court for a suppression order or non-publication order, the Court may, without determining the merits of the application, make the order as an interim order to have effect, subject to revocation by the Court, until the application is determined.

(2) If an order is made as an interim order, the High Court must determine the application as a matter of urgency.

End of Document

(CTH) Judiciary Act 1903 [6940] s 77RI Duration of orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6940] 77RI Duration of orders

- (1) A suppression order or non-publication order operates for the period decided by the High Court and specified in the order.
- (2) In deciding the period for which an order is to operate, the High Court is to ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made.
- (3) The period for which an order operates may be specified by reference to a fixed or ascertainable period or by reference to the occurrence of a specified future event.

End of Document

(CTH) Judiciary Act 1903 [6945] s 77RJ Exception for court officials

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6945] 77RJ Exception for court officials

A suppression order does not prevent a person from disclosing information if the disclosure is not by publication and is in the course of performing functions or duties or exercising powers in a public official capacity:

- (a) in connection with the conduct of a proceeding or the recovery or enforcement of any penalty imposed in a proceeding; or
- (b) in compliance with any procedure adopted by the High Court for informing a news publisher of the existence and content of a suppression order or non-publication order made by the Court.

End of Document

(CTH) Judiciary Act 1903 [6950] s 77RK Contravention of order

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6950] 77RK Contravention of order

(1) A person commits an offence if:

- (a) the person does an act or omits to do an act; and
- (b) the act or omission contravenes an order made by the High Court under [section 77RE](#).

Penalty: Imprisonment for 12 months, 60 penalty units or both.

(2) An act or omission that constitutes an offence under this section may be punished as a contempt of court even though it could be punished as an offence.

(3) An act or omission that constitutes an offence under this section may be punished as an offence even though it could be punished as a contempt of court.

(4) If an act or omission constitutes both an offence under this section and a contempt of court, the offender is not liable to be punished twice.

End of Document

User Name: REECE STORME FERRARA

Date and Time: Friday, 23 September 2022 5:06:00 PM AEST

Job Number: 180127247

Documents (56)

1. [\[6325\] s 77A Trial without jury](#)

Client/Matter: -None-

2. [\[6330\] s 77B Power of High Court to direct trial with jury](#)

Client/Matter: -None-

3. [\[6335\] s 77C Trial of an issue and new trials](#)

Client/Matter: -None-

4. [\[6340\] s 77D Juries](#)

Client/Matter: -None-

5. [\[6445\] s 77E Production of books](#)

Client/Matter: -None-

6. [\[6450\] s 77F Oaths and affirmations](#)

Client/Matter: -None-

7. [\[6455\] s 77G Orders and commissions for examination of witnesses](#)

Client/Matter: -None-

8. [\[6460\] s 77H Oral and affidavit evidence](#)

Client/Matter: -None-

9. [\[6565\] s 77J Amendment](#)

Client/Matter: -None-

10. [\[6570\] s 77K Formal defects not to invalidate](#)

Client/Matter: -None-

11. [\[6575\] s 77L Reserved judgments](#)

Client/Matter: -None-

12. [\[6775\] s 77M Enforcement of judgments](#)

Client/Matter: -None-

13. [\[6780\] s 77MA Interest up to judgment](#)

Client/Matter: -None-

14. [\[6785\] s 77N Interest on judgment debts](#)

Client/Matter: -None-

15. [\[6790\] s 77P Interpleader](#)

Client/Matter: -None-

16. [\[6795\] s 77Q Discharge of property taken in execution](#)

Client/Matter: -None-

17. [\[6895\] s 77R Receivers and managers](#)

Client/Matter: -None-

18. [\[6900\] s 77RA Definitions](#)

- Client/Matter:** -None-
19. [\[6905\] s 77RB Powers of High Court not affected](#)
- Client/Matter:** -None-
20. [\[6910\] s 77RC Other laws not affected](#)
- Client/Matter:** -None-
21. [\[6915\] s 77RD Safeguarding public interest in open justice](#)
- Client/Matter:** -None-
22. [\[6920\] s 77RE Power to make orders](#)
- Client/Matter:** -None-
23. [\[6925\] s 77RF Grounds for making an order](#)
- Client/Matter:** -None-
24. [\[6930\] s 77RG Procedure for making an order](#)
- Client/Matter:** -None-
25. [\[6935\] s 77RH Interim orders](#)
- Client/Matter:** -None-
26. [\[6940\] s 77RI Duration of orders](#)
- Client/Matter:** -None-
27. [\[6945\] s 77RJ Exception for court officials](#)
- Client/Matter:** -None-
28. [\[6950\] s 77RK Contravention of order](#)
- Client/Matter:** -None-
29. [\[6955\] s 77RL Definitions](#)
- Client/Matter:** -None-
30. [\[6960\] s 77RM Powers of the High Court not affected](#)
- Client/Matter:** -None-
31. [\[6965\] s 77RN Making vexatious proceedings orders](#)
- Client/Matter:** -None-
32. [\[6970\] s 77RO Notification of vexatious proceedings orders](#)
- Client/Matter:** -None-
33. [\[6975\] s 77RP Proceedings in contravention of vexatious proceedings order](#)
- Client/Matter:** -None-
34. [\[6980\] s 77RQ Application for leave to institute proceedings](#)
- Client/Matter:** -None-
35. [\[6985\] s 77RR Dismissing application for leave](#)
- Client/Matter:** -None-
36. [\[6990\] s 77RS Granting application for leave](#)
- Client/Matter:** -None-
37. [\[7005\] s 77S Security](#)
- Client/Matter:** -None-
38. [\[7010\] s 77T Institution of appeals](#)
- Client/Matter:** -None-
39. [\[7015\] s 77U Stay of proceedings](#)
- Client/Matter:** -None-
40. [\[7020\] s 77V Death of party to an appeal](#)

Client/Matter: -None-

41. [\[7125\] s 78 Appearance of parties](#)

Client/Matter: -None-

42. [\[7130\] s 78AA State includes Australian Capital Territory and Northern Territory](#)

Client/Matter: -None-

43. [\[7135\] s 78A Intervention by Attorneys-General](#)

Client/Matter: -None-

44. [\[7140\] s 78B Notice to Attorneys-General](#)

Client/Matter: -None-

45. [\[7245\] s 79 State or Territory laws to govern where applicable](#)

Client/Matter: -None-

46. [\[7250\] s 80 Common law to govern](#)

Client/Matter: -None-

47. [\[7255\] s 80A Application of sections 79 and 80 to Territory courts](#)

Client/Matter: -None-

48. [\[7260\] s 81 Security of the peace and for good behaviour](#)

Client/Matter: -None-

49. [\[7365\] s 82 Venue in suits for penalties](#)

Client/Matter: -None-

50. [\[7370\] s 83 Venue in suits for taxes](#)

Client/Matter: -None-

51. [\[7375\] s 84 Venue in suits for forfeiture](#)

Client/Matter: -None-

52. [\[7380\] s 85 Property seized as forfeited](#)

Client/Matter: -None-

53. [\[7485\] s 86 Rules of Court](#)

Client/Matter: -None-

54. [\[7490\] s 87 Application of sections 48, 48A, 48B, 49 and 50 of the Acts Interpretation Act 1901](#)

Client/Matter: -None-

55. [\[7590\] s 88 Regulations](#)

Client/Matter: -None-

56. [\[7690\] THE SCHEDULE](#)

Client/Matter: -None-

(CTH) Judiciary Act 1903 [6325] s 77A Trial without jury

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XA PROCEDURE OF THE HIGH COURT [ss 77A–77R] > DIVISION 1 TRIALS [ss 77A–77D]

PART XA PROCEDURE OF THE HIGH COURT [ss 77A–77R]

DIVISION 1 TRIALS [ss 77A–77D]

[6325] 77A Trial without jury

In every suit in the High Court, unless the Court otherwise orders, the trial shall be by a Justice without a jury.

Section 77A Generally

[6325.5] Discretion to order trial by jury

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77A.

[Section 77A](#) substantially reproduces the provisions of s 12 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. See *Huntley v Alexander* (1922) 30 CLR 566 [CB](#) for a discussion of the court's discretion in ordering trial without jury under the former s 12 of the High Court Procedure Act.

(CTH) Judiciary Act 1903 [6330] s 77B Power of High Court to direct trial with jury

Practice & Procedure High Court & Federal Court of Australia
Current to: Act 3 of 2022 • Commentary Published: February 2001
Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 1 TRIALS \[ss 77A–77D\]](#)

[6330] 77B Power of High Court to direct trial with jury

The High Court may, in any suit in which the ends of justice appear to render it expedient to do so, direct the trial with a jury of the suit or of an issue of fact, and may for that purpose make all such orders, issue all such writs and cause all such proceedings to be had and taken as the Court thinks necessary, and upon the finding of the jury the Court may give such decision and pronounce such judgment as the case requires.

Section 77B Generally

[6330.5] Trial by jury

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77B.

[Section 77B](#) substantially reproduces the provisions of s 13 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. For consideration of applications for trial by jury, see *McDermott v Collien* (1953) 87 CLR 154 [CB](#) and *Huntley v Alexander* (1922) 30 CLR 566 [CB](#).

In *McDermott v Collien* (1953) 87 CLR 154 at 157, Fullagar J said: “Trial by jury is the normal mode of trial of actions in this court, and some special reason must be shown for a departure in any particular case from that mode. The second thing that seems clear is that it is not enough to show that the cause of action is of a kind which could quite properly be tried with a jury and which was normally tried with a jury before the Judicature Act 1873 ... ”

See also *Huntley v Alexander*, *above*; and *Henry v Commonwealth* [1937] ALR 409 [CB](#) where an application for trial of an action for damages by jury was refused.

(CTH) Judiciary Act 1903 [6335] s 77C Trial of an issue and new trials

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 1 TRIALS \[ss 77A–77D\]](#)

[6335] 77C Trial of an issue and new trials

(1) The High Court may, in any case in which the Court directs the trial of an issue or grants a new trial, impose such conditions on a party, and direct such submissions to be made by a party, for the purpose of the trial or new trial as are just.

(2) Where the High Court grants a new trial, the Court may:

- (a) grant the new trial, either generally or on particular issues only, as the Court thinks fit; and
- (b) order that testimony of a witness examined at the former trial may be used in the new trial in such manner as is specified in the order.

End of Document

(CTH) Judiciary Act 1903 [6340] s 77D Juries

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 1 TRIALS \[ss 77A–77D\]](#)

[6340] 77D Juries

(1) Subject to [subsection \(4\)](#) and to any other law of the Commonwealth, the laws in force in a State or Territory relating to:

- (a) the qualification of jurors;
- (b) the preparation of jury lists and jury panels;
- (c) the summoning, attendance and impanelling of juries;
- (d) the number of jurors;
- (e) the right of challenge;
- (f) the discharge of juries;
- (g) the disagreement of jurors;
- (h) the remuneration of jurors; and
- (i) other matters concerning jurors after they have been summoned, appointed or sworn;

that apply for the purposes of the trial of civil proceedings in the Supreme Court of that State or Territory extend and shall be applied in civil matters in which a trial is had with a jury in the High Court in that State or Territory.

(2) Subject to [subsection \(4\)](#) and to any other law of the Commonwealth, the laws in force in a State or Territory relating to the matters mentioned in [paragraphs \(1\)\(a\) to \(i\)](#), inclusive, that apply for the purposes of the trial of criminal matters in the Supreme Court of that State or Territory extend and shall be applied in the trial of indictable offences in the High Court in that State or Territory.

(3) For the purposes of a trial of a civil or criminal matter in the High Court in a State or Territory as mentioned in [subsection \(1\)](#) or [\(2\)](#), the lists of jurors made for the purposes of the Supreme Court of the State or Territory shall be deemed to have been made as well for the purposes of the High Court.

(4) The precept for a jury shall be issued by the Registrar or such other officer of the High Court as the Court directs, and the Marshal shall prepare the jury panels and summon jurors.

(5) An officer of a State or Territory who has the custody of a jury list shall furnish a copy of the list to the proper officer of the Commonwealth on demand and on payment of a reasonable fee.

End of Document

(CTH) Judiciary Act 1903 [6445] s 77E Production of books

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 2 EVIDENCE [ss 77E–77H]**

DIVISION 2 EVIDENCE [ss 77E–77H]

[6445] 77E Production of books

(1) The High Court may in any suit order a party to produce any books or writings in his or her possession or power that contain evidence pertinent to any issue in the suit.

[subs (1) am Act 141 of 1994 s 4 and Sch 2]

(2) If a party fails to comply with an order under [subsection \(1\)](#), the High Court may:

- (a) where the party is the plaintiff — dismiss the suit; or
- (b) where the party is the defendant — give judgment against the defendant as by default.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [6450] s 77F Oaths and affirmations

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 2 EVIDENCE \[ss 77E–77H\]](#)

[6450] 77F Oaths and affirmations

(1) The High Court may require and administer all necessary oaths and affirmations.

(2)

[subs (2) rep Act 3 of 1995 s 24]

(3)

[subs (3) rep Act 175 of 1995 s 3 and Sch 2]

(4)

[subs (4) rep Act 3 of 1995 s 24]

End of Document

(CTH) Judiciary Act 1903 [6455] s 77G Orders and commissions for examination of witnesses

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 2 EVIDENCE \[ss 77E–77H\]](#)

[6455] 77G Orders and commissions for examination of witnesses

The High Court may, in any cause pending in the Court and at any stage of the proceedings:

- (a) order the examination of a person upon oath orally or on interrogatories before the Court, an officer of the Court or another person at any place within Australia; or
- (b) order that a commission issue to a person, either within or beyond Australia, authorizing him or her to take the testimony upon oath of a person orally or on interrogatories;

and the Court may;

- (c) by the same or a subsequent order give any necessary directions concerning the time, place and manner of the examination; and
- (d) empower any party to the cause to give in evidence in the cause the testimony so taken on such terms (if any) as the Court directs.

[s 77G am Act 141 of 1994 s 4 and Sch 2]

★

Editor's Note: [Section 77F\(2\)](#) and [s 77F\(4\)](#) were repealed by the Evidence (Transitional Provisions and Consequential Amendments) Act 1995 No 3.

However, s 14 of the Evidence (Transitional Provisions and Consequential Amendments) Act provided for the continued application of the repealed provisions in relation to proceedings the hearing of which began before the repeal.

The repealed provisions provided as follows:

“(2) A person may, for the purposes of any proceeding before the High Court, make an affirmation instead of an oath.

...

“(4) Subject to the Rules of Court, the forms of oaths and affirmations shall be the same, as nearly as practicable, as those that are used in the Supreme Court of the State or Territory in which the oath or affirmation is administered.”

End of Document

(CTH) Judiciary Act 1903 [6460] s 77H Oral and affidavit evidence

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 2 EVIDENCE \[ss 77E–77H\]](#)

[6460] 77H Oral and affidavit evidence

(1) On the hearing of any matter, not being the trial of a cause, evidence may be given by affidavit or as otherwise directed or allowed by the High Court.

(2) At the trial of a cause, proof may be given by affidavit of the service of a document in or incidental to the proceedings in the cause or of the signature of a party to the cause or of his or her solicitor to such a document.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) The High Court may at any time, for sufficient reason and on such conditions as are just, order that particular facts may be proved by affidavit at the trial of a cause, or that the affidavit of a person may be read at the trial of a cause.

(4) Notwithstanding any order under [subsection \(3\)](#), if a party to a cause desires in good faith that the maker of an affidavit (other than an affidavit referred to in [subsection \(2\)](#)) proposed to be used in the cause be cross-examined with respect to the matters in the affidavit, the affidavit may not be used in the cause unless that person appears as a witness for cross-examination or the High Court, in its discretion, permits the affidavit to be used without the person so appearing.

(5) If the parties to a suit so agree and the High Court does not otherwise order, testimony at the trial of the suit may be given by affidavit.

(6) Subject to the foregoing provisions of this section, testimony at the trial of a cause shall be given orally.

(CTH) Judiciary Act 1903 [6565] s 77J Amendment

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 3 DEFECTS AND ERRORS [ss 77J, 77K]**

DIVISION 3 DEFECTS AND ERRORS [ss 77J, 77K]

[6565] 77J Amendment

(1) At any stage of a proceeding before the High Court, the Court may, on such terms as are just, make such amendment as it thinks necessary to correct any defect or error in the proceeding.

(2) All necessary amendments shall be made for the purpose of determining the real questions in controversy or otherwise depending on the proceedings.

End of Document

(CTH) Judiciary Act 1903 [6570] s 77K Formal defects not to invalidate

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 3 DEFECTS AND ERRORS \[ss 77J, 77K\]](#)

[6570] 77K Formal defects not to invalidate

(1) No proceedings in the High Court are invalidated by a formal defect or an irregularity unless the Court is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of the Court.

(2) The High Court may, on such conditions (if any) as the Court thinks fit, make an order declaring that a proceeding is not invalid by reason of a defect that it considers to be formal, or by reason of an irregularity.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [6575] s 77L Reserved judgments

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 4 RESERVED JUDGMENTS [s 77L]**

DIVISION 4 RESERVED JUDGMENTS [s 77L]

[6575] 77L Reserved judgments

(1) When any cause or matter, after being fully heard before a Full Court, is ordered to stand for judgment, it is not necessary that all the Justices before whom it was heard be present together in court to declare their opinions on the cause or matter, but the opinion of any of them may be reduced to writing and may be read or otherwise made known by any other Justice at any subsequent sitting of a Full Court at which judgment in the cause or matter is delivered. At that subsequent sitting, it is only necessary for a single Justice to be present in court for the purpose of delivering that judgment.

[subs (1) am Act 84 of 1994 s 88]

(2) In any such case the question shall be decided in the same manner, and the judgment of the Court has the same force and effect, as if the Justice whose opinion is so read or otherwise made known had been present in court and had declared his or her opinion in person.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [6775] s 77M Enforcement of judgments

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 5 JUDGMENT AND EXECUTION [ss 77M–77Q]**

DIVISION 5 JUDGMENT AND EXECUTION [ss 77M–77Q]

[6775] 77M Enforcement of judgments

(1) Subject to the Rules of Court, a person in whose favour a judgment of the High Court is given is entitled to the same remedies for the enforcement of the judgment in a State or Territory, by execution or otherwise, against the person, or against the property of the person, against whom the judgment is given, as are allowed in like cases by the laws of that State or Territory to persons in whose favour a judgment of the Supreme Court of that State or Territory is given.

(2) This section does not affect the operation of any provision made by or under any other Act or by the Rules of Court for the execution and enforcement of judgments of the High Court.

Section 77M Generally

[6775.5] Non-payment of costs of appeal

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77M.

(CTH) [High Court Rules 1952](#) O XXXV.

[Section 77M](#) substantially reproduces the provisions of s 26 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. In *Lysaght Bros & Co Ltd v Falk (No 2)* (1905) 2 CLR 443 at 445–6, Griffith CJ noted that O XXXV of the High Court Rules imposed a limitation on the remedies available for enforcement of an order of the court for the payment of money to a person, by precluding enforcement through a writ of attachment. It followed that an order of the High Court for payment of the costs of an appeal from a state Supreme Court would not be enforced by attachment.

End of Document

(CTH) Judiciary Act 1903 [6780] s 77MA Interest up to judgment

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6780] 77MA Interest up to judgment

(1) In any proceedings, other than proceedings on appeal, for the recovery of any money (including any debt or damages or the value of any goods) in respect of a cause of action that arises after the commencement of this section, the High Court shall, upon application, unless good cause is shown to the contrary, either:

- (a) order that there be included in the sum for which judgment is given interest at such rate as the Court thinks fit on the whole or any part of the money for the whole or part of the period between the date when the cause of action arose and the date as of which judgment is entered; or
- (b) without proceeding to calculate interest in accordance with [paragraph \(a\)](#), order that there be included in the sum for which judgment is given a lump sum in lieu of any such interest.

(2) [Subsection \(1\)](#) does not:

- (a) authorize the giving of interest upon interest or of a sum in lieu of such interest;
- (b) apply in relation to any debt upon which interest is payable as of right whether by virtue of an agreement or otherwise;
- (c) affect the damages recoverable for the dishonour of a bill of exchange;
- (d) limit the operation of any enactment or rule of law which, apart from this section, provides for the award of interest; or
- (e) authorize the giving of interest, or a sum in lieu of interest, otherwise than by consent, upon any sum for which judgment is given by consent.

(3) Where the sum for which judgment is given (in this subsection referred to as **the relevant sum**) includes, or where the High Court, in its absolute discretion, determines that the relevant sum includes, any amount for:

- (a) compensation in respect of liabilities incurred which do not carry interest as against the person claiming interest or claiming a sum in lieu of interest;
- (b) compensation for loss or damage to be incurred or suffered after the date on which judgment is given; or
- (c) exemplary or punitive damages;

interest, or a sum in lieu of interest, shall not be given under [subsection \(1\)](#) in respect of any such amount or in respect of so much of the relevant sum as in the opinion of the Court represents any such amount.

(4) [Subsection \(3\)](#) shall not be taken to preclude interest or a sum in lieu of interest being given, pursuant to this section, upon compensation in respect of a liability of the kind referred to in [paragraph \(3\)\(a\)](#) where that liability has been met by the plaintiff, as from the date upon which that liability was so met.

End of Document

(CTH) Judiciary Act 1903 [6785] s 77N Interest on judgment debts

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6785] 77N Interest on judgment debts

A judgment debt under a judgment of the High Court carries interest, at such rate as is fixed by the Rules of Court, from the date as of which the judgment is entered.

Section 77N Generally

[6785.5] Section 77N excludes state laws providing for interest

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 77N, s 79.

[Section 77N](#) substantially reproduces the provisions of s 26A of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. In *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 ; [6 ALR 433](#) at [436](#) [CB](#), Mason J held that the former s 26A was a “comprehensive expression of the entitlement in this court of a litigant to interest on damages to the exclusion of any provision in state law which would otherwise be made applicable by virtue of [s 79](#)”.

(CTH) Judiciary Act 1903 [6790] s 77P Interpleader

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6790] 77P Interpleader

When any claim is made to property taken in execution upon process issued out of the High Court, the Marshal or a Deputy Marshal may take in the Supreme Court of the State or Territory in which the property is situated the same proceedings by way of interpleader as if the process had been issued out of that Supreme Court, and that Supreme Court and the Judges of that Supreme Court have jurisdiction to entertain and determine the matter.

Section 77P Generally

[6790.5] Power of sheriff to sell goods

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77P.

[Section 77P](#) substantially reproduces the provisions of s 27 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. In *Dent v Snell* (1927) 43 WN (NSW) 140, the powers of the sheriff under the former s 27 of the High Court Procedure Act to sell goods not returned by the court to a claimant were considered.

End of Document

(CTH) Judiciary Act 1903 [6795] s 77Q Discharge of property taken in execution

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6795] 77Q Discharge of property taken in execution

A seizure or attachment of property in execution upon process issued out of the High Court becomes inoperative upon the occurrence of any event by which, according to the laws of the State or Territory in which the property is situated, the seizure or attachment would become inoperative if made upon like process issued out of the Supreme Court of that State or Territory.

End of Document

(CTH) Judiciary Act 1903 [6895] s 77R Receivers and managers

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 6 RECEIVERS AND MANAGERS [s 77R]**

DIVISION 6 RECEIVERS AND MANAGERS [s 77R]

[6895] 77R Receivers and managers

(1) The High Court may, at any stage of a proceeding and on such terms and conditions as the Court thinks fit, appoint a receiver or manager in any case in which it appears to the Court to be just or convenient to do so.

(2) A receiver or manager appointed under [subsection \(1\)](#) may, without the previous leave of the High Court, be sued in respect of any act or transaction done or entered into by him or her in carrying on the business connected with the property of which he or she is receiver or manager.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) When in any cause pending in the High Court a receiver or manager appointed by the Court is in possession of any property, the receiver or manager shall manage and deal with the property according to the requirements of the laws of the State or Territory in which the property is situated in the same manner as that in which the owner or possessor of the property would be bound to do if in possession of the property.

End of Document

(CTH) Judiciary Act 1903 [6900] s 77RA Definitions

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RA–77RK] > DIVISION 1 PRELIMINARY [ss 77RA–77RC]

PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RA–77RK]

[Pt XAA insrt Act 186 of 2012 s 3 and Sch 2 item 8, effective 12 December 2012]

DIVISION 1 PRELIMINARY [ss 77RA–77RC]

[6900] 77RA Definitions

In this Part:

information includes any document.

news publisher means a person engaged in the business of publishing news or a public or community broadcasting service engaged in the publishing of news through a public news medium.

non-publication order means an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information).

party to a proceeding includes the complainant or victim (or alleged victim) in a criminal proceeding and any person named in evidence given in a proceeding and, in relation to a proceeding that has concluded, means a person who was a party to the proceeding before the proceeding concluded.

proceeding means a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding, and also includes an appeal.

publish means disseminate or provide access to the public or a section of the public by any means, including by:

- (a) publication in a book, newspaper, magazine or other written publication; or
- (b) broadcast by radio or television; or
- (c) public exhibition; or
- (d) broadcast or publication by means of the internet.

suppression order means an order that prohibits or restricts the disclosure of information (by publication or otherwise).

End of Document

(CTH) Judiciary Act 1903 [6905] s 77RB Powers of High Court not affected

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 1 PRELIMINARY \[ss 77RA–77RC\]](#)

[6905] 77RB Powers of High Court not affected

This Part does not limit or otherwise affect any powers that the High Court has apart from this Part to regulate its proceedings or to deal with a contempt of the Court.

End of Document

(CTH) Judiciary Act 1903 [6910] s 77RC Other laws not affected

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 1 PRELIMINARY \[ss 77RA–77RC\]](#)

[6910] 77RC Other laws not affected

This Part does not limit or otherwise affect the operation of a provision made by or under any Act (other than this Act) that prohibits or restricts, or authorises a court to prohibit or restrict, the publication or other disclosure of information in connection with proceedings.

End of Document

(CTH) Judiciary Act 1903 [6915] s 77RD Safeguarding public interest in open justice

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > **DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RD–77RK]**

DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RD–77RK]

[6915] 77RD Safeguarding public interest in open justice

In deciding whether to make a suppression order or non-publication order, the High Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

End of Document

(CTH) Judiciary Act 1903 [6920] s 77RE Power to make orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6920] 77RE Power to make orders

(1) The High Court may, by making a suppression order or non-publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:

- (a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or
- (b) information that relates to a proceeding before the Court and is:
 - (i) information that comprises evidence or information about evidence; or
 - (ii) information obtained by the process of discovery; or
 - (iii) information produced under a subpoena; or
 - (iv) information lodged with or filed in the Court.

(2) The High Court may make such orders as it thinks appropriate to give effect to an order under [subsection \(1\)](#).

End of Document

(CTH) Judiciary Act 1903 [6925] s 77RF Grounds for making an order

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6925] 77RF Grounds for making an order

(1) The High Court may make a suppression order or non-publication order on one or more of the following grounds:

- (a) the order is necessary to prevent prejudice to the proper administration of justice;
- (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
- (c) the order is necessary to protect the safety of any person;
- (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).

(2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

End of Document

(CTH) Judiciary Act 1903 [6930] s 77RG Procedure for making an order

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Current to: Act 3 of 2022

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[6930] 77RG Procedure for making an order

(1) The High Court may make a suppression order or non-publication order on its own initiative or on the application of:

- (a) a party to the proceeding concerned; or
- (b) any other person considered by the Court to have a sufficient interest in the making of the order.

(2) Each of the following persons is entitled to appear and be heard by the High Court on an application for a suppression order or non-publication order:

- (a) the applicant for the order;
- (b) a party to the proceeding concerned;
- (c) the Government (or an agency of the Government) of the Commonwealth or a State or Territory;
- (d) a news publisher;
- (e) any other person who, in the Court's opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made.

(3) A suppression order or non-publication order may be made at any time during a proceeding or after a proceeding has concluded.

(4) A suppression order or non-publication order may be made subject to such exceptions and conditions as the High Court thinks fit and specifies in the order.

(5) A suppression order or non-publication order must specify the information to which the order applies with sufficient particularity to ensure that the court order is limited to achieving the purpose for which the order is made.

(CTH) Judiciary Act 1903 [6935] s 77RH Interim orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6935] 77RH Interim orders

(1) If an application is made to the High Court for a suppression order or non-publication order, the Court may, without determining the merits of the application, make the order as an interim order to have effect, subject to revocation by the Court, until the application is determined.

(2) If an order is made as an interim order, the High Court must determine the application as a matter of urgency.

End of Document

(CTH) Judiciary Act 1903 [6940] s 77RI Duration of orders

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Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6940] 77RI Duration of orders

- (1) A suppression order or non-publication order operates for the period decided by the High Court and specified in the order.
- (2) In deciding the period for which an order is to operate, the High Court is to ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made.
- (3) The period for which an order operates may be specified by reference to a fixed or ascertainable period or by reference to the occurrence of a specified future event.

End of Document

(CTH) Judiciary Act 1903 [6945] s 77RJ Exception for court officials

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6945] 77RJ Exception for court officials

A suppression order does not prevent a person from disclosing information if the disclosure is not by publication and is in the course of performing functions or duties or exercising powers in a public official capacity:

- (a) in connection with the conduct of a proceeding or the recovery or enforcement of any penalty imposed in a proceeding; or
- (b) in compliance with any procedure adopted by the High Court for informing a news publisher of the existence and content of a suppression order or non-publication order made by the Court.

End of Document

(CTH) Judiciary Act 1903 [6950] s 77RK Contravention of order

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Current to: Act 3 of 2022

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[6950] 77RK Contravention of order

(1) A person commits an offence if:

- (a) the person does an act or omits to do an act; and
- (b) the act or omission contravenes an order made by the High Court under [section 77RE](#).

Penalty: Imprisonment for 12 months, 60 penalty units or both.

(2) An act or omission that constitutes an offence under this section may be punished as a contempt of court even though it could be punished as an offence.

(3) An act or omission that constitutes an offence under this section may be punished as an offence even though it could be punished as a contempt of court.

(4) If an act or omission constitutes both an offence under this section and a contempt of court, the offender is not liable to be punished twice.

End of Document

(CTH) Judiciary Act 1903 [6955] s 77RL Definitions

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

Practice & Procedure High Court & Federal Court > High Court — Principal Legislation > Judiciary Act 1903 > PART XAB VEXATIOUS PROCEEDINGS [ss 77RL–77RS] > DIVISION 1 PRELIMINARY [ss 77RL, 77RM]

PART XAB VEXATIOUS PROCEEDINGS [ss 77RL–77RS]

[Pt XAB insrt Act 186 of 2012 s 3 and Sch 3 item 10, effective 11 June 2013]

DIVISION 1 PRELIMINARY [ss 77RL, 77RM]

[6955] 77RL Definitions

(1) In this Part:

Australian court or tribunal means a court or tribunal of the Commonwealth, a State or a Territory.

Chief Executive and Principal Registrar means the Chief Executive and Principal Registrar of the High Court appointed under section 18 of the High Court of Australia Act 1979.

institute , in relation to proceedings, includes:

- (a) for civil proceedings — the taking of a step or the making of an application that may be necessary before proceedings can be started against a party; and
- (b) for proceedings before a tribunal — the taking of a step or the making of an application that may be necessary before proceedings can be started before the tribunal; and
- (c) for criminal proceedings — the making of a complaint or the obtaining of a warrant for the arrest of an alleged offender; and
- (d) for civil or criminal proceedings or proceedings before a tribunal — the taking of a step or the making of an application that may be necessary to start an appeal in relation to the proceedings or to a decision made in the course of the proceedings.

proceeding :

- (a) in relation to a court — means a proceeding in the court, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding, and also includes an appeal; and
- (b) in relation to a tribunal — means a proceeding in the tribunal, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding.

proceedings of a particular type includes:

- (a) proceedings in relation to a particular matter; and

- (b) proceedings against a particular person.

vexatious proceeding includes:

- (a) a proceeding that is an abuse of the process of a court or tribunal; and
- (b) a proceeding instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
- (c) a proceeding instituted or pursued in a court or tribunal without reasonable ground; and
- (d) a proceeding conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

vexatious proceedings order means an order made under [subsection 77RN\(2\)](#).

(2) A reference in this Part to a person acting in concert with another person in instituting or conducting proceedings does not include a reference to a person who is so acting as a legal practitioner or representative of the other person.

End of Document

(CTH) Judiciary Act 1903 [6960] s 77RM Powers of the High Court not affected

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 1 PRELIMINARY \[ss 77RL, 77RM\]](#)

[6960] 77RM Powers of the High Court not affected

This Part does not limit or otherwise affect any powers that the High Court has apart from this Part to deal with vexatious proceedings.

End of Document

(CTH) Judiciary Act 1903 [6965] s 77RN Making vexatious proceedings orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > **DIVISION 2 VEXATIOUS PROCEEDINGS ORDERS [ss 77RN, 77RO]**

DIVISION 2 VEXATIOUS PROCEEDINGS ORDERS [ss 77RN, 77RO]

[6965] 77RN Making vexatious proceedings orders

(1) This section applies if the High Court is satisfied:

- (a) a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals; or
- (b) a person, acting in concert with another person who is subject to a vexatious proceedings order or who is covered by [paragraph \(a\)](#), has instituted or conducted a vexatious proceeding in an Australian court or tribunal.

(2) The High Court may make any or all of the following orders:

- (a) an order staying or dismissing all or part of any proceedings in the High Court already instituted by the person;
- (b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the High Court;
- (c) any other order the High Court considers appropriate in relation to the person.

Note:

Examples of an order under [paragraph \(c\)](#) are an order directing that the person may only file documents by mail, an order to give security for costs and an order for costs.

(3) The High Court may make a vexatious proceedings order on its own initiative or on the application of any of the following:

- (a) the Attorney-General of the Commonwealth or of a State or Territory;
- (b) the Chief Executive and Principal Registrar;
- (c) a person against whom another person has instituted or conducted a vexatious proceeding;
- (d) a person who has a sufficient interest in the matter.

(4) The High Court must not make a vexatious proceedings order in relation to a person without hearing the person or giving the person an opportunity of being heard.

(5) An order made under [paragraph \(2\)\(a\)](#) or [\(b\)](#) is a final order.

(6) For the purposes of [subsection \(1\)](#), the High Court may have regard to:

- (a) proceedings instituted (or attempted to be instituted) or conducted in any Australian court or tribunal; and
- (b) orders made by any Australian court or tribunal; and
- (c) the person's overall conduct in proceedings conducted in any Australian court or tribunal (including the person's compliance with orders made by that court or tribunal);

including proceedings instituted (or attempted to be instituted) or conducted, and orders made, before the commencement of this section.

End of Document

(CTH) Judiciary Act 1903 [6970] s 77RO Notification of vexatious proceedings orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 2 VEXATIOUS PROCEEDINGS ORDERS \[ss 77RN, 77RO\]](#)

[6970] 77RO Notification of vexatious proceedings orders

(1) A person may request the Chief Executive and Principal Registrar for a certificate stating whether a person named in the request is or has been the subject of a vexatious proceedings order.

(2) If a person makes a request under [subsection \(1\)](#) and the person named in the request is or has been the subject of a vexatious proceedings order, the Chief Executive and Principal Registrar must issue to the person making the request a certificate:

- (a) specifying the date of the order; and
- (b) specifying any other information prescribed by Rules of Court.

(3) This section is subject to any law of the Commonwealth, or order of the High Court, restricting the publication or disclosure of the name of a party to proceedings in the High Court.

Note:

Section 155 of the Evidence Act 1995 deals with adducing evidence of Commonwealth records.

End of Document

(CTH) Judiciary Act 1903 [6975] s 77RP Proceedings in contravention of vexatious proceedings order

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > **DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS [ss 77RP–77RS]**

DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS [ss 77RP–77RS]

[6975] 77RP Proceedings in contravention of vexatious proceedings order

(1) If the High Court makes a vexatious proceedings order prohibiting a person from instituting proceedings, or proceedings of a particular type, in the High Court:

- (a) the person must not institute proceedings, or proceedings of that type, in the High Court without the leave of the High Court under [section 77RS](#); and
- (b) another person must not, acting in concert with the person, institute proceedings, or proceedings of that type, in the High Court without the leave of the High Court under [section 77RS](#).

(2) If a proceeding is instituted in contravention of [subsection \(1\)](#), the proceeding is stayed.

(3) Without limiting [subsection \(2\)](#), the High Court may make:

- (a) an order declaring a proceeding is a proceeding to which [subsection \(2\)](#) applies; and
- (b) any other order in relation to the stayed proceeding it considers appropriate, including an order for costs.

(4) The High Court may make an order under [subsection \(3\)](#) on its own initiative or on the application of any of the following:

- (a) the Attorney-General of the Commonwealth or of a State or Territory;
- (b) the Chief Executive and Principal Registrar;
- (c) a person against whom another person has instituted or conducted a vexatious proceeding;
- (d) a person who has a sufficient interest in the matter.

(CTH) Judiciary Act 1903 [6980] s 77RQ Application for leave to institute proceedings

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS \[ss 77RP–77RS\]](#)

[6980] 77RQ Application for leave to institute proceedings

- (1) This section applies to a person (the **applicant**) who is:
 - (a) subject to a vexatious proceedings order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the High Court; or
 - (b) acting in concert with another person who is subject to an order mentioned in [paragraph \(a\)](#).
- (2) The applicant may apply to the High Court for leave to institute a proceeding that is subject to the order.
- (3) The applicant must file an affidavit with the application that:
 - (a) lists all the occasions on which the applicant has applied for leave under this section; and
 - (b) lists all other proceedings the applicant has instituted in any Australian court or tribunal, including proceedings instituted before the commencement of this section; and
 - (c) discloses all relevant facts about the application, whether supporting or adverse to the application, that are known to the applicant.
- (4) The applicant must not serve a copy of the application or affidavit on a person unless an order is made under [paragraph 77RS\(1\)\(a\)](#). If the order is made, the applicant must serve the copy in accordance with the order.

End of Document

(CTH) Judiciary Act 1903 [6985] s 77RR Dismissing application for leave

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Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS \[ss 77RP–77RS\]](#)

[6985] 77RR Dismissing application for leave

(1) The High Court, or a Justice sitting other than in open court, may make an order dismissing an application under [section 77RQ](#) for leave to institute a proceeding if the High Court or Justice considers the affidavit does not substantially comply with [subsection 77RQ\(3\)](#).

[subs (1) am Act 3 of 2022 s 3 and Sch 1 item 115, effective 18 February 2022]

(2) The High Court, or a Justice sitting other than in open court, must make an order dismissing an application under [section 77RQ](#) for leave to institute a proceeding if the High Court or Justice considers the proceeding is a vexatious proceeding.

[subs (2) am Act 3 of 2022 s 3 and Sch 1 item 115, effective 18 February 2022]

(3) The High Court, or a Justice sitting other than in open court, may dismiss the application without an oral hearing (either with or without the consent of the applicant).

[subs (3) am Act 3 of 2022 s 3 and Sch 1 item 115, effective 18 February 2022]

End of Document

(CTH) Judiciary Act 1903 [6990] s 77RS Granting application for leave

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Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS \[ss 77RP–77RS\]](#)

[6990] 77RS Granting application for leave

(1) Before the High Court makes an order granting an application under [section 77RQ](#) for leave to institute a proceeding, it must:

(a) order that the applicant serve:

- (i) the person against whom the applicant proposes to institute the proceeding; and
- (ii) any other person specified in the order;

with a copy of the application and affidavit and a notice that the person is entitled to be heard on the application; and

(b) give the applicant and each person described in [subparagraph \(a\)\(i\)](#) or [\(iii\)](#), on appearance, an opportunity to be heard at the hearing of the application.

(2) At the hearing of the application, the High Court may receive as evidence any record of evidence given, or affidavit filed, in any proceeding in any Australian court or tribunal in which the applicant is, or at any time was, involved either as a party or as a person acting in concert with a party.

(3) The High Court may make an order granting the application. The order may be made subject to the conditions the High Court considers appropriate.

(4) The High Court may grant leave only if it is satisfied the proceeding is not a vexatious proceeding.

End of Document

(CTH) Judiciary Act 1903 [7005] s 77S Security

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XB APPEALS TO THE HIGH COURT [ss 77S–77V] > DIVISION 1 SECURITY [s 77S]

PART XB APPEALS TO THE HIGH COURT [ss 77S–77V]

DIVISION 1 SECURITY [s 77S]

[7005] 77S Security

(1) The Rules of Court may make provision for and in relation to the giving, in an appeal to the Court, of security for the prosecution of the appeal without delay and for the payment of costs that may be awarded against the appellant.

(2) If security is not given as required by or in accordance with the Rules of Court, the High Court may order that the appeal be dismissed.

(3) This section does not affect the operation of any provision made by or under any other Act for or in relation to the giving of security.

Section 77S Generally

[7005.5] Security for costs

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 2, s 35, s 35(2), s 77S, Section 77S(1).

(CTH) [High Court Rules 1952](#) High Court Rules, [18,845], [18,945].

Since the amendments to [s 35](#) of the Judiciary Act 1903 (by Act 12 of 1984), no appeal may be brought from a judgment of the Supreme Court of a state unless the High Court gives special leave to appeal: [s 35\(2\)](#). This requirement is reflected in the High Court Rules: O 69A (see [18,845]) deals with applications for special leave to appeal and O 70 (see [18,945]) deals with appeals per se. Only O 70 contains an express provision for security for costs.

[Section 77S](#) was inserted by Act 138 of 1979, 5 years before the amendments to [s 35](#). [Section 77S\(1\)](#) has remained unchanged. The term “appeal” as defined in [s 2](#) of the Judiciary Act 1903 does not include an application for special leave to appeal.

“Thus, neither within the [Judiciary Act](#) nor within the High Court Rules is any reference to be found on the subject of security for costs of the prosecution of an application for special leave to appeal ... I can find nothing in the [Judiciary Act](#) or in the High Court Rules from which it may be inferred that a power to order security for costs of an application for special leave to appeal is incidental and necessary to the exercise of some other power conferred on the court. Inherent power, if it exists at all in the present case, must exist because it is incidental and necessary to the exercise of the jurisdiction vested in the court. This is only another way of acknowledging the power of a court to regulate its procedure and prevent the abuse of its process, a power which may include the awarding of costs and the provision of security”: *Bahr v Nicolay (No 1)* (1987) 163 CLR 490; [72 ALR 361](#)  per Toohey J at 362–3.

End of Document

(CTH) Judiciary Act 1903 [7010] s 77T Institution of appeals

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XB APPEALS TO THE HIGH COURT \[ss 77S–77V\]](#) > **DIVISION 2 PROCEDURE [ss 77T–77V]**

DIVISION 2 PROCEDURE [ss 77T–77V]

[7010] 77T Institution of appeals

Appeals to the High Court shall be instituted within such time and in such manner as are prescribed by Rules of Court.

Section 77T Generally

[7010.5] Procedure for appeals

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77T.

[Section 77T](#) substantially reproduces the provisions of s 37 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. See *Grayndler v Cunich* (1939) 62 CLR 573 [CB](#), as to the procedure on appeal to the High Court from an inferior state court exercising federal jurisdiction.

Speaking of the former s 37 of the High Court Procedure Act, Griffith CJ, Barton and Gavan Duffy JJ said: “We think that compliance with the rules as to the time of instituting an appeal is a condition precedent to the coming into existence of a cause in the appellate jurisdiction [of the High Court]”: *Singh v Karbowsky* (1914) 18 CLR 197 at 201. Their Honours held that a failure, by an appellant, to provide security for costs within the time fixed by the High Court Rules brought to an end the appellant’s inchoate right to appeal.

(CTH) Judiciary Act 1903 [7015] s 77U Stay of proceedings

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XB APPEALS TO THE HIGH COURT \[ss 77S–77V\]](#) > [DIVISION 2 PROCEDURE \[ss 77T–77V\]](#)

[7015] 77U Stay of proceedings

When an appeal has been instituted, the High Court or the Court or Judge appealed from may order a stay of all or any proceedings under the judgment appealed from.

Section 77U Generally

[7015.5] Section 77U and applications for special leave

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 77U.

The jurisdiction to seek a stay under [s 77U](#) until an appeal is heard must be distinguished from the inherent jurisdiction of the court to grant a stay pending an application for special leave to appeal. In *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* (1986) 161 CLR 681; [69 ALR 265](#); 61 ALJR 102 [CB](#) the High Court considered the principles under which that court would grant a stay in the context of an application for special leave. The applicants attempted to ground the application under [s 77U](#) but the court held that the application came within the inherent jurisdiction and the stay was otherwise granted. It is a relevant consideration to establish that the applicant has taken whatever steps are necessary to seek a stay from the court in which the matter is pending but failure to so apply would not be fatal to the application for a stay being made in the first instance to the High Court. Brennan J said:

“When an application for special leave to appeal is made to this court, a jurisdiction to stay may be exercised by the court below and it is to that court — the court in which the matter is pending and which is familiar with the matter — that an application to stay should first be made. In this case the Court of Appeal, not wishing to pre-empt the view that may be expressed in this court, tailored its order accordingly. In future, there should be no inhibition on the court in which the matter is pending framing a stay order if a stay be appropriate, to avoid the necessity for application to this court”: ALR at 267.

“[T]he provisions of the present [s 77U](#) of the Judiciary Act 1903 ... are not such as implicitly to deprive this court of power to order a stay” of execution pending an appeal: *Patton v Minister for*

Defence (1987) 13 FCR 476; [71 ALR 637](#) at [639](#) ^{CB} per Pincus J. Such an application invokes the original, and not the appellate, jurisdiction of the court, execution of whose order is sought to be stayed: *Patton*, above, ALR at 640.

End of Document

(CTH) Judiciary Act 1903 [7020] s 77V Death of party to an appeal

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XB APPEALS TO THE HIGH COURT \[ss 77S–77V\]](#) > [DIVISION 2 PROCEDURE \[ss 77T–77V\]](#)

[7020] 77V Death of party to an appeal

(1) When a party to a judgment from which an appeal lies to the High Court has, whether before or after the commencement of this section, died before the time allowed for instituting an appeal has expired, it is not necessary to revive the cause or matter by any formal proceedings.

(2) If the personal representative of the deceased party desires to appeal, he or she may file in the Court by which the judgment was given or made a duly certified copy of the instrument by which he or she is appointed, and thereupon may institute an appeal in the same manner as the party whom he or she represents might have done.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) In the case of the death of the party in whose favour the judgment is given or made, notice of appeal may be given to his or her personal representative, or, if there is no such representative, to such person as the High Court directs.

[subs (3) am Act 141 of 1994 s 4 and Sch 2]

End of Document

[\(CTH\) Judiciary Act 1903 \[7125\] s 78 Appearance of parties](#)

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XI SUPPLEMENTARY PROVISIONS [ss 78–88] > DIVISION 1 APPEARANCE OF PARTIES [s 78]

PART XI SUPPLEMENTARY PROVISIONS [ss 78–88]

DIVISION 1 APPEARANCE OF PARTIES [s 78]

[\[7125\] 78 Appearance of parties](#)

In every Court exercising federal jurisdiction the parties may appear personally or by such barristers or solicitors as by this Act or the laws and rules regulating the practice of those Courts respectively are permitted to appear therein.

Section 78 Generally

[\[7125.5\] No right to counsel of choice](#)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 78.

[Section 78](#) of the Judiciary Act 1903 does not confer on a party to a proceeding before the Federal Court the right to counsel of the party's choice. Rather, s 78 confers on a party who does not wish to appear in person the right to the services of lawyers who are admitted to practice. Further, s 78 does not preclude the making of an order under s 50 of the Federal Court of Australia Act 1976 restricting access to certain evidence given in proceeding under the Native Title Act 1993 to persons of a particular gender, where the interests of justice dictated the making of such an order: *Western Australia v Ward (on behalf of Miriuwung Gajerrong Peoples)* (1997) 76 FCR 492; [145 ALR 512](#) at [521–2](#); [BC9702911](#)  (Hill and Sundberg JJ), disapproving *Yamirr v Northern Territory* (1997) 74 FCR 99; [143 ALR 687](#); [BC9701382](#) .

(CTH) Judiciary Act 1903 [7130] s 78AA State includes Australian Capital Territory and Northern Territory

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > **DIVISION 1A PROVISIONS RELATING TO CONSTITUTIONAL MATTERS [ss 78AA–78B]**

**DIVISION 1A PROVISIONS RELATING TO CONSTITUTIONAL MATTERS
[ss 78AA–78B]**

[7130] *78AA State includes Australian Capital Territory and Northern Territory

In this Division:

State includes the Australian Capital Territory and the Northern Territory.

[s 78AA subst Act 34 of 1997 s 3 and Sch 11]

*

Editor's note: Note 3 to Reprint No 4 (15 December 1992) of the Judiciary Act 1903 provides as follows in relation to [s 78AA](#):

“The [Judiciary Act 1903](#) was modified by regulation 2 and Schedule 1 of the ACT Self-Government (Consequential Provisions) Regulations as amended. The provision of Schedule 1 applicable to the abovementioned Act quoted below is not incorporated in this reprint.

[‘Section 78AA:](#)

After “includes” insert “the Australian Capital Territory and” .”

(CTH) Judiciary Act 1903 [7135] s 78A Intervention by Attorneys-General

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 1A PROVISIONS RELATING TO CONSTITUTIONAL MATTERS \[ss 78AA–78B\]](#)

[7135] 78A Intervention by Attorneys-General

(1) The Attorney-General of the Commonwealth may, on behalf of the Commonwealth, and the Attorney-General of a State may, on behalf of the State, intervene in proceedings before the High Court or any other federal court or any court of a State or Territory, being proceedings that relate to a matter arising under the Constitution or involving its interpretation.

(2) Where the Attorney-General of the Commonwealth or of a State intervenes in proceedings in a court under this section, the court may, in the proceedings, make such order as to costs against the Commonwealth or the State, as the case may be, as the court thinks fit.

(3) Where the Attorney-General of the Commonwealth or of a State intervenes in proceedings in a court under this section, then, for the purposes of the institution and prosecution of an appeal from a judgment given in the proceedings, the Attorney-General of the Commonwealth or the State, as the case may be, shall be taken to be a party to the proceedings.

[subs (3) insrt Act 38 of 1988 s 3 and Sch 1]

(4) Where the Attorney-General of the Commonwealth or of a State institutes an appeal from a judgment given in proceedings in which the Attorney-General of the Commonwealth or the State, as the case may be, has intervened under this section, a court hearing the appeal may make such order as to costs against the Commonwealth or the State, as the case may be, as the court thinks fit.

[subs (4) insrt Act 38 of 1988 s 3 and Sch 1]

SECTION 78A GENERALLY

SECTION 78A(1)

[7135.2] Can Attorney-General intervene where already a party?

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78A, s 78A(1).

In *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 188 ALR 1; 76 ALJR 694 ^{CB}, four members of the High Court considered whether the Commonwealth Attorney-General could intervene under [s 78A\(1\)](#) in a matter in which a writ of certiorari was sought to quash orders made by a judge of the Federal Court, the applicant for the writ being the Commonwealth Attorney-General at the relation of the Australian Catholic Bishops Conference.

Gaudron and Gummow JJ suggested at [53]:

[U]pon its true construction, [s 78A](#) of the Judiciary Act does not authorise the Attorney-General to intervene in a proceeding which already is the Attorney-General's action, albeit on relation of private interests. Any other reading of [s 78A](#) may imperil its validity.

Hayne J noted, at [286], that the Attorney-General sought to intervene to make submissions which were, in part, contrary to those advanced in the Attorney-General's name in the application made at the relation of the Episcopal Conference. His Honour concluded:

It was not open to an Attorney-General who had granted a fiat for the institution of a proceeding thereafter to intervene in that proceeding or to make submissions either in support of or opposing the case advanced in the name of the Attorney-General as plaintiff or applicant in that proceeding.

On the other hand, Kirby J said, at [214], that there was no difficulty in the Attorney-General appearing to be in conflict with the relator over some parts of the relator's submissions, although his Honour was concerned primarily with the validity of the Attorney-General's fiat rather than with the question of whether [s 78A\(1\)](#) authorised the Attorney-General to intervene.

SECTION 78A(2)

[7135.5] Discretion of the court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78A, s 78B.

An order by the High Court in the exercise of its discretion concerning costs of proceedings before that court does not bind a state Supreme Court in relation to proceedings before the state Supreme Court. It is however desirable that a state court's order for costs reflect the same considerations as are inherent in the order of the High Court, if this is appropriate. Hence it is not a universal rule that private citizens, caught up in litigation involving the consideration of constitutional issues which are sufficient to warrant the intervention of the Attorney-General under [s 78B](#) of the Judiciary Act 1903, will automatically be entitled to costs from the Attorney-General: see *University of Wollongong v Metwally* (1985) 1 NSWLR 722 ^{CB}.

[I]t seems plain that the contemplated purpose of [s 78A](#) of the Judiciary Act 1903 was to provide only for increased costs to be ordered against the Commonwealth and the state ... To burden the Commonwealth and state with all the costs of the appeal might be unjust. They did not initiate the proceedings in the first place. The fact that proceedings between private parties incidentally raise constitutional questions does not remove the fact that it is the private litigants who are the initiators. The intervention of the law officers is provided for by the 1976 amendments to the [Judiciary Act 1903](#) as part of a scheme to obviate automatic removal to the High Court. It is also to ensure that the lower court, dealing with the matter, has the assistance of skilled intervention, if the case is judged sufficiently important to warrant that course. If a general rule were adopted by which it was established that intervention carried with it the price of an order to pay all of the costs of the proceedings in which the law officers intervened, the results might be undesirable.

To avoid such an order, intervention might be withheld in a case that would otherwise benefit from that course. Settlement of the dispute between the litigants might be delayed in the knowledge that the public purse would be ordered to pay the costs of litigation after intervention. The sanction of avoiding protracted intervention or unnecessary removal to the High Court would be swamped in the general regime for the payment of costs by the intervenor: *Australian Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497; 69 ALR 125 at 137 ^{CB} per Kirby P.

SECTION 78A(3)

[7135.10] Intervening Attorney-General becomes a party

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78A(3).

In *Cheesman v Waters* (1997) 77 FCR 221; [148 ALR 21](#) ^{CB}, the Full Federal Court held that, once the Attorney-General of the Commonwealth had intervened in proceedings, the Attorney-General became a party to those proceedings, including any appeal brought by one of the other parties. This result did not flow from [s 78A\(3\)](#), which was inserted by the Statute Law (Miscellaneous Provisions) Act 1988 to remove a doubt as to the Attorney-General's right to appeal, and not to confer a right of appeal which did not otherwise exist. According to the Full Court, comprising Hill, Heerey and Sundberg JJ at ALR 27:

... the fact that [\[s 78A\(3\)\]](#) requires the Attorney to be treated as a party for the purposes of an appeal by him, and is silent as to his status when someone else appeals, is not a reason for treating the subsection as providing by implication that when another party appeals, an Attorney who participates in the appeal does so otherwise than as a party ...

End of Document

(CTH) Judiciary Act 1903 [7140] s 78B Notice to Attorneys-General

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 1A PROVISIONS RELATING TO CONSTITUTIONAL MATTERS \[ss 78AA–78B\]](#)

[7140] 78B Notice to Attorneys-General

(1) Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.

(2) For the purposes of [subsection \(1\)](#), a court in which a cause referred to in that subsection is pending:

- (a) may adjourn the proceedings in the cause for such time as it thinks necessary and may make such order as to costs in relation to such an adjournment as it thinks fit;
- (b) may direct a party to give notice in accordance with that subsection; and
- (c) may continue to hear evidence and argument concerning matters severable from any matter arising under the Constitution or involving its interpretation.

(3) For the purposes of [subsection \(1\)](#), a notice in respect of a cause:

- (a) shall be taken to have been given to an Attorney-General if steps have been taken that, in the opinion of the court, could reasonably be expected to cause the matters to be notified to be brought to the attention of that Attorney-General; and
- (b) is not required to be given to the Attorney-General of the Commonwealth if he or she or the Commonwealth is a party to the cause and is not required to be given to the Attorney-General of a State if he or she or the State is a party to the cause.

[subs (3) am Act 141 of 1994 s 4 and Sch 2]

(4) The Attorney-General may authorize the payment by the Commonwealth to a party of an amount in respect of costs arising out of the adjournment of a cause by reason of this section.

(5) Nothing in [subsection \(1\)](#) prevents a court from proceeding without delay to hear and determine

proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where the court thinks it necessary in the interests of justice to do so.

Section 78B Generally

[7140.5] Meaning of “cause”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 2, s 78B(1).

The term “cause” as used in the section includes criminal proceedings: see [s 2](#). Proceedings for committal for a criminal offence on indictment are criminal proceedings notwithstanding that the magistrate hearing them acts in an executive capacity. Such proceedings are a “cause” for the purposes of [s 78B\(1\)](#): *Green v Jones* [\[1979\] 2 NSWLR 812](#); (1979) 39 FLR 428 [CB](#).

[7140.10] Genuine belief not sufficient

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78B(1).

A party to a cause forming a bona fide or genuine belief that the cause involves a matter arising under the Constitution is not sufficient to make it a matter for the purposes of [s 78B\(1\)](#): *Green v Jones* [\[1979\] 2 NSWLR 812](#); (1979) 39 FLR 428 [CB](#).

A cause does not “involve” a matter arising under the Constitution or involving its interpretation merely because someone asserts that it does. That is not to say that the strength or weakness of the proposition is critical [see *Green v Jones* [\[1979\] 2 NSWLR 812](#) at 817–18]. But it must be established that the challenge does involve a matter arising under the Constitution: *Re Finlayson; Ex parte Finlayson* (1997) 72 ALJR 73 at 74 per Toohey J, indorsed by Gummow, Hayne and Callinan JJ in *Glennan v Cmr of Taxation* [\(2003\) 198 ALR 250](#); 77 ALJR 1195 at [14] [CB](#).

The section only operates when the circumstances it postulates are made to appear to the court, not simply because the party asserts those circumstances: *Narain v Parnell* (1986) 9 FCR 479 at 489; [64 ALR 561](#), approved in *Australian Competition & Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292; [167 ALR 303](#); [\[1999\] FCA 1151](#); [BC9907104](#) at [\[13\]](#) [CB](#) (French J)

[7140.15] Who raises s 78B and when?

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78B.

It is for the parties to the proceedings to raise a point under [s 78B](#) and to obtain an adjournment at the earliest possible stage in order that the appropriate notices may be served: *Okmasich v Evans* (1980) 25 SASR 481.

[7140.20] Questions relating to state parliaments

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78B.

(CTH) [Commonwealth of the Australia Constitution Act](#) ss 106, 107.

The constitutions of the former colonies were not the same after federation as before; they continued “subject to this Constitution” and thus subjected to territorial limitations on state legislative powers inter se which are expressed or implied in the Australian Constitution ... Questions as to the legislative competence of state parliaments thus, within the meaning of [s 78B](#) of the Judiciary Act 1903 (Cth) ... involve a matter involving the interpretation of [ss 106](#) and [107](#) of the Constitution, even if that matter may not, in a particular case, arise under those provisions: *Boath v Wyvill* (1989) [85 ALR 621](#) at [634](#) per Sheppard, Beaumont and Gummow JJ.

[7140.25] Application of s 78B

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 40, s 78B, s 78B(2)(c).

[Section 78B](#) was criticised by Fitzgerald J in *Capelverre v Omega Developments Corp Pty Ltd* (1983) ATPR ¶40-386 on the ground that it would give rise to spurious or insubstantial claims which would lead to costly delays. For example, challenges could arise under [s 78B](#) where the High Court had decided the same issue in precisely the same circumstances, yet it would still be open to a party to raise the issue again, thereby holding up the state or territory court and wasting time in the High Court. Those observations may have occasioned the enactment of [s 78B\(2\)\(c\)](#): see *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* (2010) 184 FCR 516; [267 ALR 623](#); [\[2010\] FCA 428](#); [BC201002771](#) at [\[14\]](#) [CB](#).

[Section 78B](#) does not impose on a Court a duty not to proceed pending the issue of a notice no matter how trivial, unarguable or concluded the constitutional point may be. If the asserted constitutional point is frivolous or vexatious or raised as an abuse of process, it will not attach to the matter in which it is raised the character of a matter arising under the Constitution or involving its interpretation: *Nikolic v MGIC Ltd* [\[1999\] FCA 849](#); [BC9906969](#) [CB](#); *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292; [\(1999\) 167 ALR 303](#); [\[1999\] FCA 1151](#); [BC9907104](#) at [\[14\]](#) [CB](#) (French J); *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* (2010) 184 FCR 516; [267 ALR 623](#); [\[2010\] FCA 428](#); [BC201002771](#) at [\[14\]](#) [CB](#).

The courts in applying [s 78B](#) seem so far to have avoided these inherent problems. In *Green v Jones* [\[1979\] 2 NSWLR 812](#); (1979) 39 FLR 428 [CB](#), Hunt J refused an application for a declaration based on [s 78B](#), on the grounds that the circumstances did not justify an exceptional use of the declaratory power. However he also noted (NSWLR at 818; FLR at 435) that although the challenge technically fell under [s 78B](#), it was unlikely that the section “was intended to permit never-ending challenges to matters which have already been determined (particularly recently) by the High Court”.

Similarly, in *In the Marriage of Smith and Saywell* (1980) 47 FLR 267 at 269 the Full Court of the Family Court of Australia rejected a challenge under [s 78B](#) on the ground that the validity of the provision in question had already been tested and upheld by the High Court. However, it should be noted that the High Court has taken a different attitude in relation to [s 40](#), which concerns the removal of constitutional questions to that court. In *Re Application by Public Service Association of New South Wales* (1947) 75 CLR 430 [CB](#) the High Court held that, notwithstanding that a question appeared to have been decided in the High Court, the court was still obliged to remove a question which “really and substantially arose” under the Constitution, or involved its interpretation. See *Narain v Parnell* (1986) 9 FCR 479; [64 ALR 561](#) [CB](#), where these issues were raised but found unnecessary to decide on the facts of the case.

[7140.27] Continuing with hearing

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78B, s 78B(2), s 78B(2)(c).

The operation of [s 78B\(2\)\(c\)](#) is not confined to a case where the hearing has actually commenced. “[T]he Court is entitled to embark on a hearing provided that it can be conducted in a way that severs the matter arising under the Constitution, or involving its interpretation, until the proceedings reach the point where such severance cannot be maintained. It is possible in some cases, such as the present, to meet an oversight that has caused one Attorney-General not to be given a notice under [s 78B](#) by promptly giving a notice and asking for a timely response. In the meantime the Court can craft a procedure whereby the proceedings may otherwise continue. That could be by hearing, as in this case, the application to amend which may not have been able to be determined until after the Attorney had made known his attitude, or by dealing with other matters that were severable, including the taking of evidence from witnesses who were not concerned with the issue that is the subject of the notice”: see *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* (2010) 184 FCR 516; [267 ALR 623](#); [\[2010\] FCA 428](#); [BC201002771](#) at [\[16\]](#) [\[CB\]](#) (Rares J).

In *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292 at 296; [167 ALR 303](#); [\[1999\] FCA 1151](#); [BC9907104](#) [\[CB\]](#), French J described [s 78B\(2\)](#) as a “facility to continue proceedings on matters severable from the constitutional matter”.

Other cases where evidence and argument have been heard concerning severable matters include *Oreb v Professional Services Review Committee No 298* [\[2004\] FCA 1408](#); [BC200407425](#) at [\[17\]–\[21\]](#) [\[CB\]](#); *Tavalu v Minister for Immigration and Multicultural and Indigenous Affairs* [\[2002\] FCA 1027](#); [BC200204660](#) at [\[7\]](#) [\[CB\]](#).

[7140.30] Order for costs

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78B.

Where the party who raises a constitutional issue has failed to give timely notice under [s 78B](#) and it is necessary to adjourn the hearing of the matter to permit that notice to be given, the other party will be entitled to an order for costs relating to the adjournment. Where the constitutional issue is one that is not obscure (having been widely publicised in the profession for a considerable period of time) and no satisfactory reason is advanced to explain the late notice, costs may be awarded on a solicitor/client basis: *Lidcombe Plastering Services (NSW) Pty Ltd v Intercool Construction Pty Ltd* (FCA, Tamberlin J, Nos NG 3359 and 3360 of 1995, 12 April 1996, unreported, [BC9601876](#)).

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > **DIVISION 2 APPLICATION OF LAWS [ss 79–81]**

DIVISION 2 APPLICATION OF LAWS [ss 79–81]

[7245] 79 State or Territory laws to govern where applicable

(1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

[subs (1) am Act 71 of 2008 s 3 and Sch 1[1], effective 2 July 2008]

(1A) For the purposes of subsection (1), a Court exercising federal jurisdiction in a proceeding is taken to be exercising federal jurisdiction in:

- (a) if the laws of a State or Territory apply to a part of the proceeding because of [subsection 68C\(5\)](#) — that State or Territory; or
- (b) if paragraph (a) does not apply:
 - (i) if the proceeding is transferred or remitted — the State or Territory to which the proceeding is transferred or remitted; and
 - (ii) otherwise — the State or Territory in which the proceeding is commenced;

except as otherwise provided by the Constitution or the laws of the Commonwealth.

[subs (1A) insrt Act 3 of 2022 s 3 and Sch 2 item 8, effective 18 February 2022]

(2) A provision of this Act does not prevent a law of a State or Territory covered by [subsection \(3\)](#) from binding a court under this section in connection with a suit relating to the recovery of an amount paid in connection with a tax that a law of a State or Territory invalidly purported to impose.

[subs (2) insrt Act 71 of 2008 s 3 and Sch 1[2], effective 2 July 2008]

(3) This subsection covers a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law doing any of the following:

- (a) limiting the period for bringing the suit to recover the amount;

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

- (b) requiring prior notice to be given to the person against whom the suit is brought;
- (c) barring the suit on the grounds that the person bringing the suit has charged someone else for the amount.

[subs (3) insrt Act 71 of 2008 s 3 and Sch 1[2], effective 2 July 2008]

(4) For the purposes of [subsection \(2\)](#), some examples of an amount paid in connection with a tax are as follows:

- (a) an amount paid as the tax;
- (b) an amount of penalty for failure to pay the tax on time;
- (c) an amount of penalty for failure to pay enough of the tax;
- (d) an amount that is paid to a taxpayer by a customer of the taxpayer and is directly referable to the taxpayer's liability to the tax in connection with the taxpayer's dealings with the customer.

[subs (4) insrt Act 71 of 2008 s 3 and Sch 1[2], effective 2 July 2008]

Section 79 Generally

[7245.5] Section 79 and federal courts

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 79.

"To ensure that state laws dealing with the particular topics mentioned in the section are applied in the exercise of federal jurisdiction by courts other than state courts, it is necessary that state laws be applied according to the hypothesis that federal courts do not necessarily lie outside their field of application. [Section 79](#) requires the assumption to be made that federal courts lie within the field of application of state laws on the topics to which it refers, at least in those cases in which the state laws are expressed to apply to courts generally": *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 95; [1 ALR 21](#).

[7245.10] Application to Family Court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 79.

[Section 79](#) applies to the Family Court the laws of the state in which it sits relating to procedure and evidence: *In the Marriage of Miller* (1977) 30 FLR 552; 3 Fam LN N57; (1977) FLC ¶90-308.

[7245.15] The role and function of s 79

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 79.

Of their own force, state laws have no application to proceedings involving the exercise of federal jurisdiction. [Section 79](#) fills the gap in the law that would otherwise apply: see *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; [161 ALR 399](#); [\[1999\] HCA 9](#); [BC9901019](#) at [\[35\]](#) [CB](#); *APLA Ltd v*

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Legal Services Cmr (NSW) (2005) 224 CLR 322; [219 ALR 403](#); [\[2005\] HCA 44](#); [BC200506315](#) at [\[230\]](#) [CB](#); *Gordon v Tolcher (liq Senafield Pty Ltd (in liq))* (2006) 231 ALR 582; [60 ACSR 522](#); [\[2006\] HCA 62](#); [BC200610441](#) at [\[30\]](#) [CB](#); *CSL Australia Pty Ltd v Formosa* (2009) 261 ALR 441; 235 FLR 273; [\[2009\] NSWCA 363](#); [BC200910120](#) at [\[23\]–\[24\]](#), [\[29\]](#) [CB](#).

In *Pavich v Bobra Nominees Pty Ltd* [\(1988\) 84 ALR 285](#) at [289–90](#), French J offered the following analysis of [s 79](#):

“It has been said that the section does not purport to do more than ‘pick up state laws with their meaning unchanged’: *Pedersen v Young* (1964) 110 CLR 162 at 165; [\[1964\] ALR 798](#) [CB](#) per Kitto J; *Re Young's Horsham Garage Pty Ltd (in liq)* [\[1969\] VR 977](#); (1967) 17 FLR 410 at 413 [CB](#) per Menhennitt J; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65; [1 ALR 21](#) at [80](#), [83](#), [88](#) [CB](#) per Menzies, Walsh and Gibbs JJ; *Scotland v Bargaen* [\(1982\) 41 ALR 65](#) at [67](#) per Stephen J; *Adams v Anthony Bryant & Co Pty Ltd* (1986) 15 FCR 513; [67 ALR 616](#) at [619](#) [CB](#) per Wilcox J. But that proposition is necessarily qualified by the rationale of the provision, which is to apply rules of state law in cases to which they might otherwise be inapplicable. The section therefore requires the assumption to be made that courts exercising federal jurisdiction are bound to apply the rules of state law adopted by it: *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*, above, CLR at 88 per Gibbs J; CLR at 95 per Mason J; CLR at 80 per Menzies J, agreeing. Courts exercising federal jurisdiction include state courts exercising such jurisdiction. Extension of the rules of state law via [s 79](#) to a state court exercising federal jurisdiction will no doubt be limited to the extension necessary to enable those rules to so apply.

There are at least three questions theoretically raised by any invocation of [s 79](#): (1) Which is the state whose law is applied by the section? (2) What is the proper construction of the state law? (3) How does the application of the rules of the state law adopted by the section vary from their direct application?

See generally, C Cook, “[Section 79](#) Judiciary Act 1903 — How widely does it travel?” (1987) 17 *Federal Law Review* 199; G Hill and A Beech SC, “‘Picking up’ State and Territory laws under [s 79](#) of the Judiciary Act — three questions” (2005) 27 *ABR* 25.

In *Solomons v District Court of New South Wales* [\(2002\) 192 ALR 217](#); 76 ALJR 1601 at [\[23\]](#) [CB](#), Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ referred to four limitations on the operation of [s 79](#):

First, the section operates only where there is already a court “exercising federal jurisdiction”, “exercising” being used in the present continuous tense. Secondly, [s 79](#) is addressed to those courts; the laws in question “shall ... be binding” upon them. The section is not, for example, directed to the rights and liabilities of those engaged in non-curial procedures under state laws. Thirdly, the compulsive effect of the laws in question is limited to those “cases to which they are applicable”. To that it may be added, fourthly, the binding operation of the state laws is “except as otherwise provided by the Constitution”.

[7245.20] Section 79 does not enlarge reach of state law

L Legislation cited in this paragraph

(VIC) [Companies Act 1961](#) s 263(2).

(CTH) [Judiciary Act 1903](#) s 64, s 79.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974 (Cth).

In *Re Young's Horsham Garage Pty Ltd (in liq)* [\[1969\] VR 977](#); (1967) 17 FLR 410 [CB](#), Menhennitt J

held that neither the Commonwealth nor the Deputy Commissioner of Taxation required leave under s 263(2) of the Companies Act 1961 (Vic) to institute Supreme Court proceedings seeking to recover moneys from a company in liquidation. This was because the Companies Act did not apply to the Crown in right of the Commonwealth; a provision declaring its intention to bind “the Crown” was to be read as a reference to the Crown in right of the state; and “[s 79](#) [of the Judiciary Act] as a matter of construction does not give s 263(2) of the Victorian Companies Act a new and more extensive meaning than it has as a matter of construction itself”: *Re Young's Horsham Garage Pty Ltd (in liq)* [1969] VR 977 at 979; (1967) 17 FLR 410 [CB](#).

In *Trade Practices Commission v Manfal Pty Ltd* (1990) 97 ALR 231 [CB](#), the Federal Court (Northrop, Wilcox and French JJ) held that the Trade Practices Commission did not require the leave under s 371(2) of the Companies (Western Australia) Code 1981 (WA) to institute proceedings in the Federal Court of Australia under the *Trade Practices Act 1974 (Cth)* against a company in liquidation. Wilcox J (with whose reasons Northrop J agreed) noted that the Companies Code was intended to bind the Crown in right of the Commonwealth “so far as the legislative power of the [Western Australian] Parliament permits” (s 358) and continued, at 244–5:

Unlike the position which applied in *Young's Horsham Garage* ... it cannot be said that, as a matter of construction, the relevant state law is not intended to bind the Commonwealth. Does this alter the situation?

I do not think that it does ... [Section 371(2)] would never have applied [to the Crown in right of the Commonwealth], not because the Western Australian Parliament intended that it should not apply, but because, as a matter of constitutional law, it was incapable of application. Whilst I accept that it would have been within the competence of the Commonwealth to pass legislation subjecting itself and its instrumentalities to this, as with any other, state law, it has not done so. [Section 79](#) can do no more than pick up, and apply to litigation in federal jurisdiction, a state law which would operate against a party in state jurisdiction

In *Re Pollack; Ex parte DCT* (1991) 32 FCR 40; [103 ALR 133](#) at [153–4](#) [CB](#), Gummow J observed:

... when the District Court [of New South Wales] exercises federal jurisdiction it is bound by [s 79](#) of the Judiciary Act to apply the laws of the State of New South Wales. The laws which may be picked up are not confined to those which are procedural in character; eg *Musgrave v Commonwealth* (1937) 57 CLR 514 [CB](#). But [s 79](#) binds the District Court only to the extent that provision otherwise is not made by the Constitution or the laws of the Commonwealth: *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 368–9; [97 ALR 555](#); (1990) ATPR 41–061. And the laws of the state only bind the District Court in “cases to which they are applicable”; if the relevant litigant in the District Court matter is the Commonwealth, it is [s 64](#) of the Judiciary Act 1903 which applies state law to the Commonwealth: *Trade Practices Commission v Manfal Pty Ltd* (1990) 97 ALR 231 at [262–3](#).

[7245.21] “except as otherwise provided”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(WA) [Justices Act 1902 \(repealed\)](#) s 206A(2).

In *Northern Territory v GPAO* (1999) 196 CLR 553; [161 ALR 318](#) at [337](#); [\[1999\] HCA 8](#); [BC9900714](#) [CB](#), Gleeson CJ and Gummow J said:

The objective of [s 79](#) is to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements in which may comprise the laws of the State or Territory in which the jurisdiction is being exercised, together with the laws of the Commonwealth, but subject always to the overriding effect of the Constitution itself. Seen in that light, the notion of “inconsistency” involved in the phrase “otherwise provided” in [s 79](#) is akin to that first identified by Mason J in the passage from the judgment in *University of Wollongong v Metwally* (1984) 56 ALR 1 at 463 set out earlier in these reasons. This is the need to resolve the problem that arises by conflict between conflicting

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

statutes having the same source. The law of a State or Territory which is to operate as a surrogate law of the Commonwealth is to be measured beside other laws of the Commonwealth.

Their Honours' reference is to a passage in which Mason J referred to the situation where "the provisions of two statutes are in conflict, so much so that they cannot be reconciled one with the other": ALR at 318, 330. See also *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136; [173 ALR 619](#); [\[2000\] HCA 39](#); [BC200004309](#) at [\[17\]](#) [CB](#), at [53] and at [106].

In *Macleod v ASIC* (2002) 211 CLR 287; [191 ALR 543](#); [\[2002\] HCA 37](#); [BC200205250](#) [CB](#), the High Court held that a state law, s 206A(2) of the Justices Act 1902 (WA) (which authorised the bringing of an appeal to the Full Court of the state Supreme Court against a single judge's decision to allow an appeal against conviction by a magistrate), was not picked up by [s 79](#) and applied to an appeal instituted by ASIC relating to a prosecution brought by ASIC. Section 49(2) of the Australian Securities Commission Act 1989 (Cth) authorised ASIC to "cause a prosecution of the person for the offence to be begun and carried on". That provision, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said at [43], did not authorise ASIC to take the step of appealing. So far as the state law (s 206A(2)) was concerned, their Honours said at [44]:

Where the law of a state purports to grant some wider power or authority to such an officer or body, then the law of the Commonwealth will be one by which it is "otherwise provided" for the purposes of [s 79](#) of the Judiciary Act. The result is that federal law did not empower the ASC to institute and conduct the appeal to the Full Court, nor did [s 79](#) "pick up" any provision of state law otherwise expressed in terms sufficiently broad to endow the ASC with the capacity to take those steps.

In *Gordon v Tolcher (liq Senafield Pty Ltd (in liq))* [\(2006\) 231 ALR 582](#); [60 ACSR 522](#); [\[2006\] HCA 62](#); [BC200610441](#) [CB](#), the High Court held that provisions of the District Court Rules 1973 (NSW) that allowed the court to extend the times fixed under the Rules (including extensions after the relevant time periods had expired) were picked up by [s 79](#) of the Judiciary Act, and that s 588FF of the Corporations Act 2001, which required certain applications to be made within 3 years or such longer period as a superior court specified on an application made within 3 years, did not "otherwise provide": see, above, at [32], [41].

[7245.22] Limitations on adoption of state laws

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Customs Act 1901](#).

(NSW) [Costs in Criminal Cases Act 1967](#) s 2, s 4.

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III.

In *Commonwealth v Mewett* (1997) 191 CLR 471 at 556; [146 ALR 299](#) at [352](#), Gummow and Kirby JJ pointed out that where a particular provision of state law is an integral part of a state legislation, [s 79](#) could not operate to pick up some but not all of the state legislative scheme, if to do so would be to give an altered meaning to the severed part of the state legislation.

In *Solomons v District Court of New South Wales* [\(2002\) 192 ALR 217](#); 76 ALJR 1601 [CB](#), the High Court held that [s 79](#) did not empower a judge of the District Court, exercising federal jurisdiction in respect of an offence against the Customs Act 1901 (Cth), to grant a certificate to the person found not guilty of the offence under s 2 of the Costs in Criminal Cases Act 1967 (NSW) (the Costs

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Act). The certificate, on presentation to a state official under s 4 of the Costs Act, would have authorised payment of the person's costs out of the consolidated revenue fund.

Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ raised several objections to the argument that [s 79](#) picked up the Costs Act:

- first, the certificate could only be used for the making of an application to an officer of the Executive Government of the state; but [s 79](#) “is not addressed to officers of the executive governments of the states. It is directed to certain courts”: at [25];
- second, the authority to make an application under s 4 of the Costs Act was conferred only upon the grantee of a certificate “pursuant to this Act”, but “[a] certificate granted on the hypothesis under consideration would not have been granted under the Costs Act. It would have been granted by operation of federal law upon the Costs Act”: at [26];
- third, no federal law effected “a corresponding transmutation upon s 4 of the Costs Act”, because the operation of [s 79](#) “does not reach the state officials specified in s 4 in the performance of their functions under that section”: at [27];
- fourth, “the grant of a certificate by a court exercising federal jurisdiction would involve it in the exercise of power not provided by [Ch III](#) of the Constitution. It would be productive of a futility, not the resolution of any claim or controversy ... Nor would the grant of a certificate be the exercise by the court of an administrative function ‘truly appurtenant’ to the exercise by the court of its judicial power to conduct the trial of the applicant for the certificate [cf *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation (No 2)* (1982) 152 CLR 179 at 186–7; [43 ALR 693](#) at [698–9](#) per Brennan J]. The terms of [s 79](#) expressly deny any operation which would require or empower courts exercising federal jurisdiction to pass beyond the limits of [Ch III](#) of the Constitution”: at [28].

[7245.25] Application of laws of another state

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

Where an action was commenced in the Melbourne registry of the High Court and remitted to the Supreme Court of New South Wales for hearing, [s 79](#) of the Judiciary Act 1903 required the Supreme Court to apply New South Wales laws of procedure, and did not permit the court to apply Victorian legislation barring the proceedings: “[L]imitation provisions of a procedural nature, if they are picked up by [s 79](#) at all, are picked up only in proceedings being heard in a court of the state which has enacted the limitation legislation ... [\[Section\] 79](#) does not authorise a state court exercising federal jurisdiction to apply the legislation of another state to the proceedings”: *Commonwealth v Dixon* ([1988](#)) [13 NSWLR 601](#); [82 ALR 359](#) at [364–5](#) ^{CB} per Hope JA.

[7245.27] Application of laws of State where suit against Commonwealth remitted to Federal Court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 64, s 79.

(NSW) [Limitation Act 1969](#).

In *Commonwealth v Mewett* (1997) 191 CLR 471; [146 ALR 299](#) ^{CB}, the High Court considered the question of the statute of limitations to be applied when the Commonwealth was sued in tort in three

matters commenced in the Sydney Registry of the High Court and remitted to the Federal Court for hearing, where the cause of action was said to have arisen, in two of the matters, in New South Wales and, in one of the matters, in Victoria. Brennan CJ held that [s 79](#) of the Judiciary Act 1903 picked up and applied the Limitation Act 1969 (NSW) to the suits against the Commonwealth: ALR at 301. Dawson J (with whom McHugh J agreed) came to the same conclusion (ALR at 313, 315), as did Gummow and Kirby JJ: ALR at 351–2.

Among the propositions developed by Gummow and Kirby JJ (ALR at 352), and indorsed by Brennan J (ALR at 301) were the following:

The first is that the consequence of the rendition by [s 79](#) of the Judiciary Act 1903 of the NSW Act as a surrogate law of the Commonwealth was, in conjunction with [s 64](#) of the Judiciary Act 1903, to afford to the Commonwealth such defences under the NSW Act as apply in litigation between citizens.

Secondly, the adoption of the NSW Act allowed the plaintiffs to utilise the means and procedures for extensions of time as counters to what otherwise would be limitation defences against them.

Thirdly, the Commonwealth could utilise the NSW Act only on its own terms and after the amendments by the 1990 Act. These provide for a regime of extensions of limitation periods as an integral part of the legislative scheme. [Section 79](#) could not operate to pick up some but not all of the otherwise applicable terms of the NSW Act, for to do so would be to give an altered meaning to the state legislation.

[7245.28] State law providing for remedy in state court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Corporations Act 2001](#) s 737.

(NSW) [Contracts Review Act 1980](#).

In *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* ([2001](#)) [177 ALR 329](#); 19 ACLC 427; [\[2001\] HCA 1](#); [BC200100154](#) [\[CB\]](#), a majority of the High Court held that the effect of [s 79](#) was that, when exercising jurisdiction to determine a controversy, the Federal Court had the power in the exercise of that jurisdiction to grant a remedy provided by state legislation (s 737 of the Corporations Law of Victoria) notwithstanding that the state legislation identified a particular state court as the forum in which that remedy was available. Gleeson CJ, Gaudron and Gummow J said at [68]:

“It is well established from the decisions under [s 79](#) of the Judiciary Act, most recently that in *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136; [173 ALR 619](#); 74 ALJR 1184 at [13] [\[CB\]](#), that a State statute may be applicable as a source of rights and remedies in federal jurisdiction even though, on its own terms, that law identifies only the courts of the enacting State as the courts to provide those remedies.”

At [72]–[74], their Honours recognised that particular statutory provisions might be couched in terms which made it impossible for those provisions to be picked up by [s 79](#) — for example, a state law expressed in terms which made it impossible for the power conferred by the law to be exercised otherwise than by a state court; and a state law which conferred a function that was incapable of being exercised as part of the judicial power of the Commonwealth.

McHugh J said at [137]:

The fact that a state statute either expressly or as a matter of construction provides only for state courts to enforce its

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

provisions does not mean that it cannot be “picked up” and applied by [s 79](#) of the Judiciary Act in the exercise of federal jurisdiction.

Similarly, in *Murphy v Overton Investments Pty Ltd* ([2001](#)) [182 ALR 138](#); (2001) ATPR ¶41-819 [CB](#), the Full Federal Court held that, where the Federal Court was exercising federal jurisdiction in NSW in relation to a controversy arising out of a contract, [s 79](#) of the Judiciary Act gave the Federal Court power to grant a remedy under the Contracts Review Act 1980 (NSW). After referring to *Edensor Nominees*, above, Branson J (with whose reasons Nicholson and Gyles JJ agreed) said:

[T]he majority in *Edensor* made it plain that a state statute may be applicable as a source of rights and remedies in federal jurisdiction even though by its terms, the state statute identifies only a court of the state as the forum for the enforcement of the rights and remedies.

INTEREST ON DAMAGES

[7245.30] Application of s 94 of the Supreme Court Act 1970 (NSW)

L Legislation cited in this paragraph

(NSW) [Supreme Court Act 1970](#) Section 94.

(CTH) [Judiciary Act 1903](#) s 79.

Section 94 of the Supreme Court Act 1970 (NSW) confers power on the Supreme Court of New South Wales to award interest in respect of damages as part of the judgment. In *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582; [6 ALR 433](#) [CB](#), Mason J said that [s 79](#) of the Judiciary Act 1903 did not render s 94 applicable to proceedings in the High Court. “No matter how widely it may travel in some respects, [s 79](#) does not in my view pick up and apply in this court a provision which empowers a particular court of a state to make orders and enter judgments in proceedings in that court. The relevant powers of this court are conferred by the [Judiciary Act 1903](#) and the [High Court Procedure Act 1903](#) ... as I see it they are not to be supplemented by the operation of [s 79](#) of the Judiciary Act in the manner suggested”: ALR at 435–6.

The views expressed by Mason J were described by Gibbs CJ as obiter in *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1984) 154 CLR 579 at 585; [53 ALR 625](#) at [629](#). Gibbs CJ said that “[t]he operation of [s 79](#) in a case such as this raises very difficult questions” and declined to express any concluded opinion on the question whether [s 79](#) rendered s 94 of the Supreme Court Act applicable to proceedings in the High Court or the Federal Court: CLR at 585–6. In *State Bank of New South Wales v Commonwealth Savings Bank of Australia* ([1986](#)) [67 ALR 123](#) [CB](#), Lockhart J held that [s 79](#) did not make s 94 of the Supreme Court Act applicable to proceedings in the Federal Court, sitting in New South Wales. Section 94 “is a substantive, not a procedural, provision and ... it is cast in language necessarily confined to the power of the Supreme Court of New South Wales, thus being inapplicable by virtue of [s 79](#) of the Judiciary Act to this court as a court exercising federal jurisdiction in New South Wales”: at 127.

See however the differing views on the scope and operation of [s 79](#) set out in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65; [1 ALR 21](#) [CB](#).

[7245.35] Application of s 30C of the Supreme Court Act 1935 (SA)

L Legislation cited in this paragraph

(SA) [Supreme Court Act 1935](#) Section 30C.

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974.

Section 30C of the Supreme Court 1935 Act (SA) authorises the Supreme Court of South Australia to award interest in respect of damages as part of the judgment. In *Hubbards Pty Ltd v Simpson Ltd* (1982) 41 ALR 509; 60 FLR 430; (1982) ATPR ¶40-295 ^{CB}, the Federal Court (Lockhart J) held that [s 79](#) of the Judiciary Act 1903 did not operate to pick and apply s 30C of the Supreme Court Act to an action under the [Trade Practices Act 1974](#) brought in the Federal Court, sitting in South Australia. In coming to this conclusion, Lockhart J adopted the reasoning of Mason J in *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582; [6 ALR 433](#) ^{CB} and *Hubbards Pty Ltd v Simpson Ltd*, above, ALR at 525–6; FLR at 447–8.

[7245.40] Application of s 79A of the Supreme Court Act 1958 (Vic)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 60, s 79.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974.

Section 79A of the Supreme Court Act 1958 (Vic) directs the Supreme Court of Victoria, in all actions for recovery of debt or damages to give damages in the nature of interest from the commencement of the action until entry of judgment. [Section 60](#) applied s 79A to all Victorian courts having jurisdiction to determine actions for recovery of debt or damages. In *Centrepont Freeholds Pty Ltd v TN Lucas Pty Ltd* (1985) 6 FCR 133 at 143; [60 ALR 187](#) at [197](#) the Federal Court (Sweeney and Woodward JJ) held that [s 79](#) of the Judiciary Act 1903 made s 79A of the Supreme Court Act applicable in an action for damages for deceit being heard by the Federal Court, sitting in Victoria, together with a claim for damages under the [Trade Practices Act 1974](#):

In the present case this court is exercising federal jurisdiction in the State of Victoria and in the course of doing so [is] enforcing rights which derive from the law of that state. It seems hardly appropriate to construe [s 79](#) in a fashion which would make part only of that law applicable to the grant of the appropriate relief, so that there would be a difference between the award to be made in this court and that which would be made in a state court in respect of the identical cause of action, namely deceit

[7245.45] Application of s 72 of the Common Law Practice Act (Qld)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Competition and Consumer Act 2010](#) s 52.

(CTH) [Bankruptcy Act 1966](#).

Section 72 of the Common Law Practice Act (Qld) provides that in any proceedings in “a court of record” for the recovery of money, the court may include interest in the sum for which judgment is given. In *Neilsen v Hempston Holdings Pty Ltd* (1986) 65 ALR 302 at [311–12](#), the Federal Court (Pincus J) held that [s 79](#) of the Judiciary Act 1903 made 72 of the Common Law Practice Act applicable where the Federal Court, sitting in Queensland, awarded damages for a breach of s 52 of the Trade Practices Act 1974 (Cth).

The expression “court of record” in the Queensland section means a Queensland court of record, but that does not prevent [s 79](#) of the Judiciary Act from making it applicable in cases in this court. State statutes picked up by [s 79](#), especially those relating to “procedure, evidence and the competency of witnesses”, must be so drawn as to apply to state courts only and when [s 79](#) makes such statutes binding on “all courts exercising federal jurisdiction in that state ...” it must mean to make them binding as if they referred to the latter category of courts. As Gibbs J (as he then was) remarked in *Maguire v Simpson* (1977) 139 CLR 362 at 376; [18 ALR 469](#) at [478](#): “... a state law may be rendered applicable by [s 79](#) to a court exercising federal jurisdiction, which is not a state court, notwithstanding that the law according to its own terms is limited in its application to the courts of the state.”

In *Re Lyons; Ex parte Allpass v Qantas Staff Credit Union Ltd* ([1989](#)) [87 ALR 69](#) ^{CB}, the Federal Court (Spender J) held that [s 79](#) of the Judiciary Act 1903 made s 72 of the Common Law Practice Act applicable where the Federal Court, sitting in Queensland, declared that a payment was a preference under the [Bankruptcy Act](#), so that the court could order the recipient of the preference to pay interest on the amount wrongfully received.

In *Truss v Brazier* ([1990](#)) [96 ALR 767](#) at [790](#), the majority of the Supreme Court of Queensland (Kneipp and Sheperdson JJ) left open the question whether [s 79](#) of the Judiciary Act 1903 made s 72 of the Common Law Practice Act applicable where the District Court of Queensland awarded damages under s 52 of the Trade Practices Act 1974.

In *Smallacombe v Lockyer Investment Co Pty Ltd* (1993) 42 FCR 97; [114 ALR 568](#) ^{CB} Spender J held that the power to award interest, in a claim under s 52 of the Trade Practices Act 1974, arose “by operation of [s 79](#) of the Judiciary Act 1903 in relation to s 72 of the Common Law Practice Act (Qld)”.

[7245.50] Application of s 32 of the Supreme Court Act 1935 (WA)

L Legislation cited in this paragraph

(WA) [Supreme Court Act 1935](#) s 32, Section 34.

(CTH) [Judiciary Act 1903](#) s 79, s 82.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974, s 52.

Section 32 of the Supreme Court Act 1935 (WA) authorises the Supreme Court of Western Australia, in any proceedings for the recovery of money, to order that interest be paid on the amount for which judgment is given. Section 34 makes s 32 applicable “in all courts whatsoever in Western Australia so far as [it] shall be ... cognisable by such courts”. In *Nella v Kingia Pty Ltd* (1985) 11 FCR 281; [61 ALR 603](#) ^{CB}, the Federal Court (Toohey J) held that [s 79](#) of the Judiciary Act 1903 made s 32 of the Supreme Court Act applicable where the Federal Court, sitting in Western Australia, has awarded damages in a common law cause of action, in the exercise of its accrued jurisdiction. Toohey J observed that a similar conclusion would not necessarily operate in the case of a judgment for breach of a section of the [Trade Practices Act 1974](#) (Cth): FCR at 284; ALR at 606.

In *Schepis v Elders IXL Ltd* ([1986](#)) [70 ALR 729](#) ^{CB}, the Federal Court (Pincus J) held that [s 79](#) of the Judiciary Act made s 32 of the Supreme Court Act applicable where the Federal Court, sitting in Western Australia, entered judgment in an application for a breach of s 52 of the Trade Practices Act 1974, breach of contract and negligence.

In *Pavich v Bobra Nominees Pty Ltd* ([1988](#)) [84 ALR 285](#) at [293](#), the Federal Court (French J) held that [s 79](#) of the Judiciary Act did not make s 32 of the Supreme Court Act applicable where the

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Federal Court, sitting in Western Australia, entered judgment in relation to a claim made under the Trade Practices Act 1974.

Section 32 does not apply to the cause of action created by [s 82](#) [of the Judiciary Act] and could not be so transmuted by [s 79](#) of the Judiciary Act 1903 as to apply it in the exercise of jurisdiction by this court under [s 82](#). A contrary view would be inconsistent with the limitation that [s 79](#) picks up state laws “with their meaning unchanged”. And it could not be justified by the qualification on that limitation referred to in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65; [1 ALR 21](#) ^{CB} for that qualification could only operate in this case to extend the range of courts which could exercise the power. It would not authorise its exercise on a subject-matter to which it never applied directly.

PROCEEDINGS AGAINST COMPANY IN LIQUIDATION

[7245.55] Application of s 371(2) of the Companies (Western Australia) Code 1981 (WA)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Competition and Consumer Act 2010](#) s 52A.

Section 371(2) of the Companies (Western Australia) Code 1981 (WA) provided that, upon the appointment of a liquidator or the winding up of a company, no action or other civil proceeding may be commenced or proceeded with against that company without the leave of the Supreme Court. In *Trade Practices Commission v Manfal Pty Ltd* ([1990](#)) [97 ALR 231](#) ^{CB}, the Full Federal Court (Northrop, Wilcox and French JJ) held that [s 79](#) of the Judiciary Act 1903 did not make s 371(2) of the Companies (Western Australia) Code applicable to proceedings in the Federal Court for a declaration that a company had breached [s 52A](#) of the Trade Practices Act. Although the Companies Code purported to apply to the Crown in right of the Commonwealth, Wilcox J said, “as a matter constitutional law, it was incapable of application”; and [s 79](#) could “do no more than pick up, and apply to litigation in federal jurisdiction, a state law which would operate against a party in state jurisdiction”: at 244, 245.

LAWS RELATING TO EVIDENCE

[7245.57] Effect of the Evidence Act 1995

L Legislation cited in this paragraph

(CTH) [Evidence Act 1995](#) s 4(1), s 5, s 8(1), s 9, s 9(1), (2), (3).

(CTH) [Judiciary Act 1903](#) ss 68, 79, 80, 80A.

The commentary in the following paragraphs (from 18 April 1995) must be read in the light of the provisions of the [Evidence Act 1995 \(Cth\)](#).

The Evidence Act introduces a comprehensive federal code of evidence. The Act applies in relation to all proceedings in “a federal court or an ACT court”: [s 4\(1\)](#). The term “federal court” is defined in the Act’s Dictionary to mean the High Court and any other court created by the Parliament (other than the Supreme Court of a Territory); and “ACT court” is defined to mean the Supreme Court of the Australian Capital Territory or any other court of that territory.

Certain other provisions of the Act (listed in the Table to [s 5](#)) apply in relation to all proceedings in an

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

“Australian court”: [s 5](#); and the term “Australian court” is defined in the Dictionary to mean (inter alia) the High Court, a court exercising federal jurisdiction or a court of a state or territory.

[Section 8\(1\)](#) of the Act declares: “This Act does not affect the provisions of any other Act, other than [sections 68, 79, 80](#) and [80A](#) of the Judiciary Act 1903.”

[Section 9](#) of the Act declares that the Act does not affect the operation of a law of a state or territory so far as the law relates to the matters listed in [s 9\(1\)](#), [\(2\)](#) and [\(3\)](#) of the Act.

[7245.60] Application of s 5 of the Printing and Newspapers Act 1973 (NSW)

L Legislation cited in this paragraph

(NSW) [Printing and Newspapers Act 1973](#) Section 5.

(CTH) [Judiciary Act 1903](#) s 79.

Section 5 of the Printing and Newspapers Act 1973 (NSW) provides that a document on which is printed a name purporting to be the name of the person on whose instructions the document was printed “shall be received by all courts ... in any proceedings ... as prima facie evidence” that the document was printed on that person’s instructions. In *Trade Practices Commission v TNT Management Pty Ltd* [\(1984\) 56 ALR 647](#) at [700](#), the Federal Court (Franki J) held that [s 79](#) of the Judiciary Act 1903 made s 5 of the Printing and Newspapers Act applicable to proceedings in the Federal Court, sitting in New South Wales. Franki J said (at 701) that “the purpose of [s 79](#) is to ensure that any law relating to evidence is available in a Federal Court exercising jurisdiction in New South Wales unless it is so ‘otherwise provided’ by a law of the Commonwealth”.

[7245.65] Application of s 29 of the Stamp Duties Act 1920 (NSW)

L Legislation cited in this paragraph

(NSW) [Stamp Duties Act 1920](#) Section 29.

(CTH) [Judiciary Act 1903](#) s 79.

Section 29 of the Stamp Duties Act 1920 (NSW) provides that no instrument executed in New South Wales or relating to any property, matter or thing in New South Wales shall be admissible in any proceedings unless duly stamped. In *Davis v FCT* [\(1989\) 86 ALR 195](#) [\[CB\]](#), the Federal Court (Hill J) held that [s 79](#) of the Judiciary Act 1903 made s 29 of the Stamp Duties Act applicable to proceedings in the Federal Court, sitting in New South Wales, where one of the parties sought to tender in evidence an unstamped deed of assignment relating to property in New South Wales. The judgment of the court contains a detailed discussion of the history and effect of [s 79](#). The court held, inter alia (at 214), that if a state Act is not expressly or by necessary implication limited to a state court, [s 79](#) of the Judiciary Act 1903 will operate to make the state law applicable to a court exercising federal jurisdiction; s 29 of the Stamp Duties Act is expressed in general terms and there was no reason to read it as restricted in its application to a state court (at 215); and, even if s 29 of the Stamp Duties Act was a substantive rather than a procedural provision, there was no reason to limit [s 79](#) of the Judiciary Act to procedural matters: at 216.

[7245.70] Application of s 11 of the Evidence Act 1906 (WA)

L Legislation cited in this paragraph

(WA) [Evidence Act 1906](#) Section 11.

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

Section 11 of the Evidence Act 1906 (WA) modifies the right of a witness to decline to answer a question put to him or her in the course of a court proceeding so as to avoid self-incrimination. In *Re Application for Inquiry, Election of Officers, Transport Workers Union of Australia, Western Australian Branch* (1989) 89 ALR 575 ^{CB}, the Federal Court (French J) held that either [s 79](#) or [80](#) of the Judiciary Act 1903 made s 11 of the Evidence Act applicable in proceedings before the Federal Court, sitting in Western Australia, commenced under Div 5 of Pt IX of the Industrial Relations Act 1988. French J said (at 579) that s 11 was “intended to be exercised by the judge of a superior court and certainly not restricted to a particular court of the state. Such a provision may be distinguished from a state law which nominates a specific court to exercise a power in which event other effects of the provision may be adopted by virtue of [s 79](#) of the Judiciary Act 1903, but the exercise of the particular power provided by the state Act will remain reserved to the nominated court”.

[7245.75] Application of s 79C of the Evidence Act 1906 (WA)

L Legislation cited in this paragraph

(WA) [Evidence Act 1906](#) Section 79C.

(CTH) [Judiciary Act 1903](#) s 79.

Section 79C of the Evidence Act 1906 (WA) deals with the admissibility into evidence of certain documents. It “is plainly a law of the state relating to evidence”; the Evidence Act 1905 (Cth) deals with the admissibility of business records but not of other documents, so that the Commonwealth Act does not “otherwise provide” within the meaning of [s 79](#) of the Judiciary Act 1903. It follows that, in relation to documents other than business records, s 79C of the Evidence Act 1906 (WA) is binding on a court exercising federal jurisdiction: *Multi Modal Ltd v Polakow* (1987) 78 ALR 553 at [560](#).

[7245.80] Application of s 92(1)(a) of the Evidence Act 1977 (Qld)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(QLD) [Evidence Act 1977](#) s 92(1)(a).

“The Commonwealth has covered the field of the admissibility of business records. In my view, however, it has not entered on the field of the admissibility of other statements in writing. The absence of any provision concerning such statements is consistent with a desire to allow state laws to operate in courts exercising federal jurisdiction, pursuant to [s 79](#) of the Judiciary Act 1903 so that s 92(1)(a) Evidence Act 1977 (Qld) operates in this case”: *McGarry v Boonah Clothing Pty Ltd* (1988) 80 ALR 284 at [288](#) per Gray J.

[7245.85] Application of s 92(1)(b) of the Evidence Act 1977 (Qld)

L Legislation cited in this paragraph

(QLD) [Evidence Act 1977](#) s 92(1)(b).

(CTH) [Judiciary Act 1903](#) s 79.

Where a document forming part of a record of business was sought to be tendered in proceedings before the Federal Court sitting in Queensland, under s 92(1)(b) of the Evidence Act, the Federal

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Court (Spender J) decided that the state provision was inconsistent with Pt IIIA of the Evidence Act 1905 (Cth) and, to the extent that [s 79](#) would have otherwise made s 92(1)(b), the state provision was invalid: *Supetina Pty Ltd v Lombok Pty Ltd* (1984) 5 FCR 439; [59 ALR 581](#) [CB](#).

[7245.90] Application of Pt IIC of the Evidence Act 1898 (NSW)

L Legislation cited in this paragraph

(NSW) [Evidence Act 1898](#) Part IIC.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974.

(CTH) [Judiciary Act 1903](#) s 79.

Part IIC of the Evidence Act 1898 (NSW) provides for the admission into evidence in court proceedings of certain business documents. In *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313; [97 ALR 555](#); (1990) ATPR ¶41-061 [CB](#), the Full Federal Court (Lockhart, Wilcox and Gummow JJ) held that Pt IIC could not be invoked in proceedings before the Federal Court, sitting in New South Wales, under the [Trade Practices Act 1974](#). This was because the Evidence Act 1905 (Cth) “makes extensive provision for the admission into evidence of business records and effectively covers that field. It has ‘otherwise provided’ within the meaning of [s 79](#) of the Judiciary Act 1903: compare *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 64; [78 ALR 641](#) at 664. There is no room, therefore, for the application of the provisions of the New South Wales Evidence Act to the admissibility of business records”: *Arnotts Ltd v Trade Practices Commission*, above, ALR at 613.

[7245.92] Application of s 464M of the Crimes Act 1958 (Vic)

L Legislation cited in this paragraph

(VIC) [Crimes Act 1958](#) Section 464M.

(CTH) [Judiciary Act 1903](#) s 79.

Section 464M of the Crimes Act 1958 (Vic), authorising a magistrate to order that a “suspect” provide her or his fingerprints, is not a law relating to evidence within [s 79](#) of the Judiciary Act 1903 and is not rendered applicable to a person suspected of a federal offence by that provision of the [Judiciary Act 1903](#): *Grollo v Bates* (1994) 53 FCR 218; [125 ALR 492](#) at 510; 75 A Crim R 271 [CB](#) perinfeld J.

[7245.93] Application of s 97(3) of the Community Welfare Act 1983 (NT)

L Legislation cited in this paragraph

(NT) [Community Welfare Act 1983](#) Section 97(3).

Section 97(3) of the Community Welfare Act 1983 (NT), prohibiting an “authorised person” from producing in court a document that has come into the person's possession or under the person's control, is rendered binding on the Family Court of Australia when that court is exercising jurisdiction in the Northern Territory, and prevents the issue of a subpoena requiring the production to the court of documents protected by s 97(3): *Northern Territory v GPAO* (1999) 161 ALR 318; 73 ALJR 470 [CB](#).

ARBITRATION CLAUSE

[7245.95] Application of s 53 of the Commercial Arbitration Act 1985 (WA)

L Legislation cited in this paragraph

(WA) [Commercial Arbitration Act 1985](#) Section 53.

(CTH) [Judiciary Act 1903](#) s 79.

Section 53 of the Commercial Arbitration Act 1985 (WA) authorises a court to stay proceedings in that court where the proceedings relate to a matter which the parties had previously agreed should have been referred to arbitration. In *Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 17 FCR 487; [71 ALR 125](#), the Federal Court (French J) noted that s 53 “applies to courts generally, although as a matter of construction it would be limited in its direct application to Western Australian courts” and held that s 53 was “therefore picked up by [s 79](#) [of the Judiciary Act] and made applicable to the proceedings now before the court” (an action for damages arising out of a contract between the parties): *Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 17 FCR 487; [71 ALR 125](#) at [139](#).

LIMITATION OF ACTIONS

[7245.100] Application of s 38(1)(a)(i) of the Limitation Act 1935 (WA)

L Legislation cited in this paragraph

(WA) [Limitation Act 1935](#) s 38(1)(a)(i).

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Racial Discrimination Act 1975](#) s 25Z.

In *Ardeshirian v Robe River Iron Associates* (1993) 43 FCR 475; [116 ALR 173](#) ^{CB}, French J, said that s 38(1)(a)(i) of the Limitation Act 1935 (WA) could have no direct application to proceedings in the Federal Court, nor to proceedings in a state court exercising federal jurisdiction. It could only apply in such proceedings by virtue of [s 79](#) of the Judiciary Act 1903. Section 38(1)(a)(i) fixed a two-year limitation period for actions for penalties, damages or sums given by any enactment to the party aggrieved; and the question raised in *Ardeshirian* was whether that limitation period applied to a proceeding in the Federal Court to enforce a decision of the Human Rights and Equal Opportunity Commission, pursuant to s 25Z of the Racial Discrimination Act 1975, that the respondent had engaged in conduct rendered unlawful by the Racial Discrimination Act and should pay the applicant \$10,000 by way of compensation. Although it seemed probable, French J said, that [s 79](#) of the Judiciary Act would operate to apply the Limitation Act 1935 (WA) to some classes of actions instituted in the Federal Court, s 38(1)(a)(i) of the Limitation Act did not apply to the present proceedings because the claim under the Racial Discrimination Act was for compensatory and remedial relief and was not a penalty action.

[7245.105] Application of s 14(1) of the Limitation Act 1969 (NSW)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

In *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581; [144 ALR 89](#) ^{CB}, the Full Court of the Federal Court held that s 14(1) of the Limitation Act 1969 (NSW) applied to a proceeding for recovery of moneys paid under mistake of law brought in the New South Wales Registry of the Federal Court. In a judgment adopted by both Foster and Lindgren JJ, Sackville J (FCR at 592–3; ALR at 98–9)

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

indorsed the following remarks of Mahoney JA from *Commonwealth v Dixon* [\(1988\) 13 NSWLR 601](#) at [622](#); [82 ALR 359](#) at [378–9](#):

I am inclined to the view that, in any event, the Judiciary Act (Cth) [s 79](#), would cause a State statute of limitation to apply in an appropriate case where the plaintiff's claim was determined by a court exercising federal jurisdiction ... If a general statute of limitation is not a "law relating to procedure" within that section, then it will be applied by operation of the section. If it is a "law relating to procedure" within that section, then it will be applied by operation of the section. If it is a "law relating to procedure" then prima facie it is applied directly by terms of [s 79](#) ("including the laws relating to procedure ...") ...

And, in my opinion, the State limitation law would apply even if, on its proper construction, it was intended to apply only to proceedings brought in State Courts ... However, if the State limitation statutes be so construed, the effect of [s 79](#) is, in my opinion, to apply them, appropriately extended, in proceedings in the relevant federal courts.

[7245.110] Application of s 68 of the Supreme Court Act 1970 (NSW)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(NSW) [Supreme Court Act 1970](#) s 68.

In *Matthews v ACP Publishing Pty Ltd* [\(1998\) 157 ALR 564](#) at [572](#), Beaumont J held that [s 79](#) of the Judiciary Act 1903 rendered s 68 of the Supreme Court Act 1970 (NSW) applicable to a proceeding in the Federal Court sitting in New South Wales, so that the court was empowered to award damages in support of or in lieu of an injunction for breach of copyright.

End of Document

(CTH) Judiciary Act 1903 [7250] s 80 Common law to govern

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 2 APPLICATION OF LAWS \[ss 79–81\]](#)

[7250] 80 Common law to govern

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

[s 80 am Act 120 of 1988 s 41]

Section 80 Generally

[7250.5] Common law in Australia

L Legislation cited in this paragraph

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

(CTH) [Australia Act 1986](#).

In 1988 the phrase “common law in Australia” substituted in [s 80](#) the phrase “common law of England”. This followed criticism of the anachronistic nature of [s 80](#) in *Adams v ETA Foods Ltd* (1987) 19 FCR 93; [78 ALR 611](#) at [614](#); (1987) ATPR ¶40-831 [CB](#) per Gummow J:

[Section 80](#) rests upon the premise, which would have been accepted without question in 1903, that the common law was universal and indivisible in character. However, at least since *Australian Consolidated Press v Uren* (1967) 117 CLR 221; [\[1969\] 1 AC 590](#) [CB](#), it has been plain that this premise is no longer true and that the common law as evolved in this country may diverge from that of England. The preservation of [s 80](#) in its original form thus has become an anachronism. This is so a fortiori since the coming into effect of the [Australia Act 1986 \(Cth\)](#); see generally Sir Anthony Mason “Future Directions in Australian Law”, being the Wilfred Fullagar Memorial Lecture 1987, pp 5–12. The result is that the application of [s 80](#) now, strictly, may require evidence of foreign law to be proved as a factual matter (*Cross on Evidence*, 3rd Aust ed, s 21.2), a strange situation.

[Section 80](#) has particular relevance where a court exercises federal jurisdiction in a matter where the laws of more than one law area may be applicable to the issues in dispute between the parties — where a “choice of law” is required. In *Commonwealth v Mewett* (1997) 191 CLR 471; [146 ALR 299](#) ^{CB}, Gaudron J said that a court exercising federal jurisdiction (whether the High Court, the Federal Court or a state court) did so throughout Australia, not merely in its states (CLR at 525), and identified [s 80](#) of the Judiciary Act as taking primacy over [s 79](#) and directing the application of the choice of law rules that were part of the common law in Australia: CLR at 522, 525, 526.

In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [172 ALR 625](#) ^{CB}, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ adopted the reasoning of Gaudron J in *Mewett*, above and noted that, in a case brought in the Australian Capital Territory arising out of a tort said to have been committed in New South Wales, all parties “proceeded on the basis that the Territory Court was obliged by [s 80](#) to apply the common law choice of law rules as part of the common law of Australia”: at [55]. Their Honours invoked [s 80](#) of the Judiciary Act as the basis for holding that the choice of law rule which was part of the common law in Australia required the trial court to apply the law of the place where the tort was committed: at [103].

In *Blunden v Commonwealth* (2003) [203 ALR 189](#); 78 ALJR 236 ^{CB}, the High Court held that the applicable law to determine the liability of the Commonwealth arising out of a tort committed on the high seas was to be identified by proceeding directly through [s 80](#) to the modification of the common law respecting limitation of actions effected by the relevant statute law of the forum where the Commonwealth was sued: at [45], [101], [109]. Gleeson CJ, Gummow, Hayne and Heydon JJ referred to Gaudron J’s analysis in *Mewett*, above and at [18] added two points to her Honour’s proposition that s 80 directed the application of the common law rules for choice of law in federal jurisdiction:

The first is that the application of any rules of the common law will, in the terms of [s 80](#), be subjected to any modification, in the present case, by the statute law in force in the territory. The second is that, if there is no common law choice of law rule relevant to the issues in the litigation, but the common law rule as to the absence of time bars is modified by territory law, then [s 80](#) applies that modification, and this furnishes the limitation law which governs the action.

[7250.10] Common law displaced by state or federal legislation

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) ss 79, s 80.

(NSW) [Crimes Act 1900](#) s 404.

In *Adams v ETA Foods Ltd* (1987) 19 FCR 93; [78 ALR 611](#) at [614–15](#); (1987) ATPR ¶40-831 ^{CB}, Gummow J said that the need for evidence to prove the common law of England did not arise in the present case. This was “because state and federal law operates to modify common law and, in the result, [s 80](#) has effect before one reaches English common law”. The common law rule, upon which the defendant sought to rely in the present matter, was “the apparent rule in England that formal admissions of particular facts, as opposed to the plea of guilty, are disallowed at a criminal trial”. Gummow J held that this rule was displaced by s 404 of the Crimes Act 1900 (NSW), which was made applicable to the present proceedings by [ss 79](#) and [80](#) of the Judiciary Act 1903 (as the Federal Court was sitting in New South Wales), “thereby making it unnecessary to follow [s 80](#) through to the English common law”.

EVIDENCE ACT 1995

[7250.15] Effect of the Evidence Act 1995

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) ss 68, 79, 80, 80A.

Section 8(1) of the Evidence Act 1995 (Cth) declares: “This Act does not affect the provisions of any other Act, other than [sections 68](#), [79](#), [80](#) and [80A](#) of the Judiciary Act 1903.” The provisions of the Evidence Act, so far as they are likely to affect the operation of [s 80](#) of the Judiciary Act, are summarised in [\[7245.57\]](#).

End of Document

(CTH) Judiciary Act 1903 [7255] s 80A Application of sections 79 and 80 to Territory courts

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 2 APPLICATION OF LAWS \[ss 79–81\]](#)

[7255] 80A Application of sections 79 and 80 to Territory courts

The provisions of the last two preceding sections apply, in so far as they are capable of application, to and in relation to a court of a Territory exercising jurisdiction in a suit brought by virtue of [section 56](#) or [Part IXA](#).

[7255.5] Effect of the Evidence Act 1995

L Legislation cited in this paragraph

(CTH) [Evidence Act 1995](#) Section 8(1).

(CTH) [Judiciary Act 1903](#) ss 68, 79, 80, 80A.

[Section 8\(1\)](#) of the Evidence Act 1995 (Cth) declares: “This Act does not affect the provisions of any other Act, other than [sections 68](#), [79](#), [80](#) and [80A](#) of the Judiciary Act 1903.” The provisions of the [Evidence Act](#), so far as they are likely to affect the operation of [s 80A](#) of the Judiciary Act, are summarised at [\[7245.57\]](#).

(CTH) Judiciary Act 1903 [7260] s 81 Security of the peace and for good behaviour

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 2 APPLICATION OF LAWS \[ss 79–81\]](#)

[7260] 81 Security of the peace and for good behaviour

The Justices of the High Court, the Judges of the Federal Court of Australia, and the Judges and magistrates of the several States and Territories who are empowered by law to authorize arrests for offences against the laws of the Commonwealth, shall have the like authority to hold to security of the peace and for good behaviour in matters arising under the laws of the Commonwealth as may be lawfully exercised by any Judge or Magistrate of the respective States and Territories in other cases cognisable before them.

[s 81 am Act 106 of 2009 s 3 and Sch 1[108], effective 4 December 2009]

End of Document

(CTH) Judiciary Act 1903 [7365] s 82 Venue in suits for penalties

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > **DIVISION 3 VENUE [ss 82–85]**

DIVISION 3 VENUE [ss 82–85]

[7365] 82 Venue in suits for penalties

Suits to recover pecuniary penalties and forfeitures under the laws of the Commonwealth may be brought either in the State or Territory where they accrue or in the State or Territory where the offender is found.

End of Document

(CTH) Judiciary Act 1903 [7370] s 83 Venue in suits for taxes

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 3 VENUE \[ss 82–85\]](#)

[7370] 83 Venue in suits for taxes

Suits to recover taxes accruing under any revenue law of the Commonwealth may be brought either in the State or Territory where the liability for the tax occurs or in the State or Territory where the debtor resides.

End of Document

(CTH) Judiciary Act 1903 [7375] s 84 Venue in suits for forfeiture

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 3 VENUE \[ss 82–85\]](#)

[7375] 84 Venue in suits for forfeiture

Proceedings on seizures made on the high seas for forfeiture under any law of the Commonwealth may be prosecuted in any State or Territory into which the property seized is brought. Proceedings on such seizures made within any State or Territory shall be prosecuted in the State or Territory where the seizure is made, except in cases when it is otherwise provided by law.

End of Document

(CTH) Judiciary Act 1903 [7380] s 85 Property seized as forfeited

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 3 VENUE \[ss 82–85\]](#)

[7380] 85 Property seized as forfeited

All property taken or obtained by any officer or person under the authority of any revenue law of the Commonwealth shall be deemed to be in the custody of the law, and subject only to the orders and judgments of the Courts having jurisdiction thereof under this or any Act.

End of Document

(CTH) Judiciary Act 1903 [7485] s 86 Rules of Court

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: March 2005

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > **DIVISION 4 RULES OF COURT [ss 86–88]**

DIVISION 4 RULES OF COURT [ss 86–88]

[7485] 86 Rules of Court

(1) The Justices of the High Court or a majority of them may make Rules of Court necessary or convenient to be made for carrying into effect the provisions of this Act or so much of the provisions of any other Act as confers jurisdiction on the High Court or relates to the practice or procedure of the High Court, and in particular for the following matters, that is to say:

- (a) Appointing and regulating the sittings of the High Court and of the Justices;
- (b) Regulating procedure pleading and practice in the High Court in civil or criminal matters in the exercise both of its original and of its appellate jurisdiction;
- (ba) Regulating the means by which particular facts may be proved and the mode in which evidence thereof may be given;
- (c) *[repealed]*
- (d) making provision for or in relation to the forms to be used for the purposes of the proceedings of the High Court;
- (e) Prescribing and regulating the fees to be charged by practitioners practising in the High Court for the work done by them in relation to proceedings in the Court and for the taxation of their bills of costs, either as between party and party or as between solicitor and client;
- (f) *[repealed]*
- (g) *[repealed]*
- (ga) Providing for the admission of persons to practise as barristers or solicitors in any Federal Court, and prescribing the conditions of and qualifications for admission, and continuance of the right to practise as aforesaid;
- (h) Generally regulating all matters of practice and procedure in the High Court.

[subs (1) am Act 3 of 2022 s 3 and Sch 1 item 116, effective 18 February 2022]

(2) The Legislation Act 2003 (other than sections 8, 9, 10 and 16 and Part 4 of Chapter 3 of that Act) applies in relation to rules of court made by the Court under this Act or another Act:

- (a) as if a reference to a legislative instrument (other than in subparagraph 14(1)(a)(ii) and subsection 14(3) of that Act) were a reference to a rule of court; and
- (b) as if a reference to a rule-maker were a reference to the Chief Justice acting on behalf of the Justices of the Court; and
- (c) subject to such further modifications or adaptations as are provided for in regulations made under [paragraph 88\(cb\)](#) of this Act.

[subs (2) insrt Act 140 of 2003 s 3 and Sch 1, effective 1 January 2005; am Act 10 of 2015 s 3 and Sch 1 item 152, effective 5 March 2016; Act 78 of 2018 s 3 and Sch 1 items 19, 20, effective 25 August 2018]

(3) Despite the fact that section 16 of the Legislation Act 2003 does not apply in relation to rules of court made by the Court under this Act or another Act, the Office of Parliamentary Counsel (established by subsection 2(1) of the Parliamentary Counsel Act 1970) may provide assistance in the drafting of any of those Rules if the Chief Justice so desires.

[subs (3) insrt Act 140 of 2003 s 3 and Sch 1, effective 1 January 2005; am Act 107 of 2012 s 3 and Sch 2 item 11, effective 1 October 2012; Act 10 of 2015 s 3 and Sch 1 item 153, effective 5 March 2016]

[s 86 am Act 157 of 1989 s 20]

SECTION 86 GENERALLY

[7485.5] Transitional arrangements

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Part 7, paragraph (a), paragraph 86(f), paragraph 88(ca).

(CTH) [Acts Interpretation Act 1901](#) subsection 48(7).

Section 25 of Act 157 of 1989 provides as follows:

“25

(1) If:

- (a) [Part 7](#) commences before regulations have been made under [paragraph 88\(ca\)](#) of the Judiciary Act 1903 as amended by this Act; or
- (b) when [Part 7](#) commences, regulations have been so made but have not commenced;

Rules of Court in force under paragraph 86(f) of that Act immediately before the commencement of [Part 7](#) continue to have effect, as if that Part had not been enacted, until regulations first commence under [paragraph 88\(ca\)](#) of the Judiciary Act 1903 as amended by this Act.

(2) Where:

- (a) regulations have been made under [paragraph 88\(ca\)](#) of the Judiciary Act 1903 as amended by this Act; and
- (b) immediately before the commencement of those regulations, Rules of Court made under paragraph 86(f) of that Act had effect;

subsection 48(7) of the Acts Interpretation Act 1901 has effect in relation to those Rules of Court as if they were regulations repealed by the regulations referred to in paragraph (a).”

End of Document

(CTH) Judiciary Act 1903 [7490] s 87 Application of sections 48, 48A, 48B, 49 and 50 of the Acts Interpretation Act 1901

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 4 RULES OF COURT \[ss 86–88\]](#)

[7490] 87 Application of sections 48, 48A, 48B, 49 and 50 of the Acts Interpretation Act 1901

[s 87 rep Act 140 of 2003 s 3 and Sch 1, effective 1 January 2005]

End of Document

(CTH) Judiciary Act 1903 [7590] s 88 Regulations

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: March 2005

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 4 RULES OF COURT \[ss 86–88\]](#)

[7590] 88 Regulations

The Governor-General may make regulations, not inconsistent with this Act, prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act;

and, in particular, may make regulations:

- (c) prescribing the content and form of a notice to be given under [subsection 78B\(1\)](#) and specifying the documents (if any) that are to accompany such a notice;
- (ca) prescribing the fees payable in respect of proceedings in the High Court and the execution of the process of the High Court;
- (cb) modifying or adapting provisions of the Legislation Act 2003 (other than the provisions of Part 2 of Chapter 3 of that Act or any other provisions whose modification or adaptation would affect the operation of that Part) in their application to the Court;
- (d) prescribing the practice and procedure for the filing and giving of such a notice, including the manner in which, the time within which, the persons to whom, and the persons by whom, such a notice is to be given; and
- (e) specifying any affidavits to be filed following the giving of a notice under [subsection 78B\(1\)](#) and prescribing the persons by whom and times within which the affidavits are to be filed.

[s 88 am Act 157 of 1989 s 21; Act 140 of 2003 s 3 and Sch 1, effective 1 January 2005; Act 10 of 2015 s 3 and Sch 1 item 154, effective 5 March 2016]

SECTION 88 GENERALLY

[7590.5] Transitional arrangements

See [\[7485.5\]](#).

End of Document

(CTH) Judiciary Act 1903 [7690] THE SCHEDULE

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > **[High Court — Principal Legislation](#)** > **[Judiciary Act 1903](#)**

[7690] THE SCHEDULE

[Section 65](#)

[Sch am Act 141 of 1994 s 4 and Sch 2; Act 31 of 2014 s 3 and Sch 1 items 46, 47, effective 24 June 2014]

FORM OF CERTIFICATE OF JUDGMENT

AB v The Commonwealth (*or as the case may be*).

I hereby certify that AB of (*address and occupation*) did on the _____ day of _____, 20____, obtain a judgment of the (*name of Court*) in his or her (*as the case may be*) favour and that by that judgment the sum of _____ was awarded to him or her (*as the case may be*).

Dated this _____ day of _____, 20____

Registrar (*or as the case may be*).

End of Document

User Name: REECE STORME FERRARA

Date and Time: Friday, 23 September 2022 5:13:00 AM AEST

Job Number: 180092389

Documents (56)

1. [\[6325\] s 77A Trial without jury](#)

Client/Matter: -None-

2. [\[6330\] s 77B Power of High Court to direct trial with jury](#)

Client/Matter: -None-

3. [\[6335\] s 77C Trial of an issue and new trials](#)

Client/Matter: -None-

4. [\[6340\] s 77D Juries](#)

Client/Matter: -None-

5. [\[6445\] s 77E Production of books](#)

Client/Matter: -None-

6. [\[6450\] s 77F Oaths and affirmations](#)

Client/Matter: -None-

7. [\[6455\] s 77G Orders and commissions for examination of witnesses](#)

Client/Matter: -None-

8. [\[6460\] s 77H Oral and affidavit evidence](#)

Client/Matter: -None-

9. [\[6565\] s 77J Amendment](#)

Client/Matter: -None-

10. [\[6570\] s 77K Formal defects not to invalidate](#)

Client/Matter: -None-

11. [\[6575\] s 77L Reserved judgments](#)

Client/Matter: -None-

12. [\[6775\] s 77M Enforcement of judgments](#)

Client/Matter: -None-

13. [\[6780\] s 77MA Interest up to judgment](#)

Client/Matter: -None-

14. [\[6785\] s 77N Interest on judgment debts](#)

Client/Matter: -None-

15. [\[6790\] s 77P Interpleader](#)

Client/Matter: -None-

16. [\[6795\] s 77Q Discharge of property taken in execution](#)

Client/Matter: -None-

17. [\[6895\] s 77R Receivers and managers](#)

Client/Matter: -None-

18. [\[6900\] s 77RA Definitions](#)

- Client/Matter:** -None-
19. [\[6905\] s 77RB Powers of High Court not affected](#)
- Client/Matter:** -None-
20. [\[6910\] s 77RC Other laws not affected](#)
- Client/Matter:** -None-
21. [\[6915\] s 77RD Safeguarding public interest in open justice](#)
- Client/Matter:** -None-
22. [\[6920\] s 77RE Power to make orders](#)
- Client/Matter:** -None-
23. [\[6925\] s 77RF Grounds for making an order](#)
- Client/Matter:** -None-
24. [\[6930\] s 77RG Procedure for making an order](#)
- Client/Matter:** -None-
25. [\[6935\] s 77RH Interim orders](#)
- Client/Matter:** -None-
26. [\[6940\] s 77RI Duration of orders](#)
- Client/Matter:** -None-
27. [\[6945\] s 77RJ Exception for court officials](#)
- Client/Matter:** -None-
28. [\[6950\] s 77RK Contravention of order](#)
- Client/Matter:** -None-
29. [\[6955\] s 77RL Definitions](#)
- Client/Matter:** -None-
30. [\[6960\] s 77RM Powers of the High Court not affected](#)
- Client/Matter:** -None-
31. [\[6965\] s 77RN Making vexatious proceedings orders](#)
- Client/Matter:** -None-
32. [\[6970\] s 77RO Notification of vexatious proceedings orders](#)
- Client/Matter:** -None-
33. [\[6975\] s 77RP Proceedings in contravention of vexatious proceedings order](#)
- Client/Matter:** -None-
34. [\[6980\] s 77RQ Application for leave to institute proceedings](#)
- Client/Matter:** -None-
35. [\[6985\] s 77RR Dismissing application for leave](#)
- Client/Matter:** -None-
36. [\[6990\] s 77RS Granting application for leave](#)
- Client/Matter:** -None-
37. [\[7690\] THE SCHEDULE](#)
- Client/Matter:** -None-
38. [\[7005\] s 77S Security](#)
- Client/Matter:** -None-
39. [\[7010\] s 77T Institution of appeals](#)
- Client/Matter:** -None-
40. [\[7015\] s 77U Stay of proceedings](#)

Client/Matter: -None-

41. [\[7020\] s 77V Death of party to an appeal](#)

Client/Matter: -None-

42. [\[7125\] s 78 Appearance of parties](#)

Client/Matter: -None-

43. [\[7130\] s 78AA State includes Australian Capital Territory and Northern Territory](#)

Client/Matter: -None-

44. [\[7135\] s 78A Intervention by Attorneys-General](#)

Client/Matter: -None-

45. [\[7140\] s 78B Notice to Attorneys-General](#)

Client/Matter: -None-

46. [\[7245\] s 79 State or Territory laws to govern where applicable](#)

Client/Matter: -None-

47. [\[7250\] s 80 Common law to govern](#)

Client/Matter: -None-

48. [\[7255\] s 80A Application of sections 79 and 80 to Territory courts](#)

Client/Matter: -None-

49. [\[7260\] s 81 Security of the peace and for good behaviour](#)

Client/Matter: -None-

50. [\[7365\] s 82 Venue in suits for penalties](#)

Client/Matter: -None-

51. [\[7370\] s 83 Venue in suits for taxes](#)

Client/Matter: -None-

52. [\[7375\] s 84 Venue in suits for forfeiture](#)

Client/Matter: -None-

53. [\[7380\] s 85 Property seized as forfeited](#)

Client/Matter: -None-

54. [\[7485\] s 86 Rules of Court](#)

Client/Matter: -None-

55. [\[7490\] s 87 Application of sections 48, 48A, 48B, 49 and 50 of the Acts Interpretation Act 1901](#)

Client/Matter: -None-

56. [\[7590\] s 88 Regulations](#)

Client/Matter: -None-

(CTH) Judiciary Act 1903 [6325] s 77A Trial without jury

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XA PROCEDURE OF THE HIGH COURT [ss 77A–77R] > DIVISION 1 TRIALS [ss 77A–77D]

PART XA PROCEDURE OF THE HIGH COURT [ss 77A–77R]

DIVISION 1 TRIALS [ss 77A–77D]

[6325] 77A Trial without jury

In every suit in the High Court, unless the Court otherwise orders, the trial shall be by a Justice without a jury.

Section 77A Generally

[6325.5] Discretion to order trial by jury

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77A.

[Section 77A](#) substantially reproduces the provisions of s 12 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. See *Huntley v Alexander* (1922) 30 CLR 566 [CB](#) for a discussion of the court's discretion in ordering trial without jury under the former s 12 of the High Court Procedure Act.

(CTH) Judiciary Act 1903 [6330] s 77B Power of High Court to direct trial with jury

Practice & Procedure High Court & Federal Court of Australia
Current to: Act 3 of 2022 • Commentary Published: February 2001
Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 1 TRIALS \[ss 77A–77D\]](#)

[6330] 77B Power of High Court to direct trial with jury

The High Court may, in any suit in which the ends of justice appear to render it expedient to do so, direct the trial with a jury of the suit or of an issue of fact, and may for that purpose make all such orders, issue all such writs and cause all such proceedings to be had and taken as the Court thinks necessary, and upon the finding of the jury the Court may give such decision and pronounce such judgment as the case requires.

Section 77B Generally

[6330.5] Trial by jury

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77B.

[Section 77B](#) substantially reproduces the provisions of s 13 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. For consideration of applications for trial by jury, see *McDermott v Collien* (1953) 87 CLR 154 [CB](#) and *Huntley v Alexander* (1922) 30 CLR 566 [CB](#).

In *McDermott v Collien* (1953) 87 CLR 154 at 157, Fullagar J said: “Trial by jury is the normal mode of trial of actions in this court, and some special reason must be shown for a departure in any particular case from that mode. The second thing that seems clear is that it is not enough to show that the cause of action is of a kind which could quite properly be tried with a jury and which was normally tried with a jury before the Judicature Act 1873 ... ”

See also *Huntley v Alexander*, above; and *Henry v Commonwealth* [1937] ALR 409 [CB](#) where an application for trial of an action for damages by jury was refused.

(CTH) Judiciary Act 1903 [6335] s 77C Trial of an issue and new trials

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 1 TRIALS \[ss 77A–77D\]](#)

[6335] 77C Trial of an issue and new trials

(1) The High Court may, in any case in which the Court directs the trial of an issue or grants a new trial, impose such conditions on a party, and direct such submissions to be made by a party, for the purpose of the trial or new trial as are just.

(2) Where the High Court grants a new trial, the Court may:

- (a) grant the new trial, either generally or on particular issues only, as the Court thinks fit; and
- (b) order that testimony of a witness examined at the former trial may be used in the new trial in such manner as is specified in the order.

End of Document

[\(CTH\) Judiciary Act 1903 \[6340\] s 77D Juries](#)

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 1 TRIALS \[ss 77A–77D\]](#)

[6340] 77D Juries

(1) Subject to [subsection \(4\)](#) and to any other law of the Commonwealth, the laws in force in a State or Territory relating to:

- (a) the qualification of jurors;
- (b) the preparation of jury lists and jury panels;
- (c) the summoning, attendance and impanelling of juries;
- (d) the number of jurors;
- (e) the right of challenge;
- (f) the discharge of juries;
- (g) the disagreement of jurors;
- (h) the remuneration of jurors; and
- (i) other matters concerning jurors after they have been summoned, appointed or sworn;

that apply for the purposes of the trial of civil proceedings in the Supreme Court of that State or Territory extend and shall be applied in civil matters in which a trial is had with a jury in the High Court in that State or Territory.

(2) Subject to [subsection \(4\)](#) and to any other law of the Commonwealth, the laws in force in a State or Territory relating to the matters mentioned in [paragraphs \(1\)\(a\) to \(i\)](#), inclusive, that apply for the purposes of the trial of criminal matters in the Supreme Court of that State or Territory extend and shall be applied in the trial of indictable offences in the High Court in that State or Territory.

(3) For the purposes of a trial of a civil or criminal matter in the High Court in a State or Territory as mentioned in [subsection \(1\)](#) or [\(2\)](#), the lists of jurors made for the purposes of the Supreme Court of the State or Territory shall be deemed to have been made as well for the purposes of the High Court.

(4) The precept for a jury shall be issued by the Registrar or such other officer of the High Court as the Court directs, and the Marshal shall prepare the jury panels and summon jurors.

(5) An officer of a State or Territory who has the custody of a jury list shall furnish a copy of the list to the proper officer of the Commonwealth on demand and on payment of a reasonable fee.

End of Document

(CTH) Judiciary Act 1903 [6445] s 77E Production of books

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 2 EVIDENCE [ss 77E–77H]**

DIVISION 2 EVIDENCE [ss 77E–77H]

[6445] 77E Production of books

(1) The High Court may in any suit order a party to produce any books or writings in his or her possession or power that contain evidence pertinent to any issue in the suit.

[subs (1) am Act 141 of 1994 s 4 and Sch 2]

(2) If a party fails to comply with an order under [subsection \(1\)](#), the High Court may:

- (a) where the party is the plaintiff — dismiss the suit; or
- (b) where the party is the defendant — give judgment against the defendant as by default.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [6450] s 77F Oaths and affirmations

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 2 EVIDENCE \[ss 77E–77H\]](#)

[6450] 77F Oaths and affirmations

(1) The High Court may require and administer all necessary oaths and affirmations.

(2)

[subs (2) rep Act 3 of 1995 s 24]

(3)

[subs (3) rep Act 175 of 1995 s 3 and Sch 2]

(4)

[subs (4) rep Act 3 of 1995 s 24]

End of Document

(CTH) Judiciary Act 1903 [6455] s 77G Orders and commissions for examination of witnesses

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 2 EVIDENCE \[ss 77E–77H\]](#)

[6455] 77G Orders and commissions for examination of witnesses

The High Court may, in any cause pending in the Court and at any stage of the proceedings:

- (a) order the examination of a person upon oath orally or on interrogatories before the Court, an officer of the Court or another person at any place within Australia; or
- (b) order that a commission issue to a person, either within or beyond Australia, authorizing him or her to take the testimony upon oath of a person orally or on interrogatories;

and the Court may;

- (c) by the same or a subsequent order give any necessary directions concerning the time, place and manner of the examination; and
- (d) empower any party to the cause to give in evidence in the cause the testimony so taken on such terms (if any) as the Court directs.

[s 77G am Act 141 of 1994 s 4 and Sch 2]

★

Editor's Note: [Section 77F\(2\)](#) and [s 77F\(4\)](#) were repealed by the Evidence (Transitional Provisions and Consequential Amendments) Act 1995 No 3.

However, s 14 of the Evidence (Transitional Provisions and Consequential Amendments) Act provided for the continued application of the repealed provisions in relation to proceedings the hearing of which began before the repeal.

The repealed provisions provided as follows:

“(2) A person may, for the purposes of any proceeding before the High Court, make an affirmation instead of an oath.

...

“(4) Subject to the Rules of Court, the forms of oaths and affirmations shall be the same, as nearly as practicable, as those that are used in the Supreme Court of the State or Territory in which the oath or affirmation is administered.”

End of Document

(CTH) Judiciary Act 1903 [6460] s 77H Oral and affidavit evidence

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 2 EVIDENCE \[ss 77E–77H\]](#)

[6460] 77H Oral and affidavit evidence

(1) On the hearing of any matter, not being the trial of a cause, evidence may be given by affidavit or as otherwise directed or allowed by the High Court.

(2) At the trial of a cause, proof may be given by affidavit of the service of a document in or incidental to the proceedings in the cause or of the signature of a party to the cause or of his or her solicitor to such a document.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) The High Court may at any time, for sufficient reason and on such conditions as are just, order that particular facts may be proved by affidavit at the trial of a cause, or that the affidavit of a person may be read at the trial of a cause.

(4) Notwithstanding any order under [subsection \(3\)](#), if a party to a cause desires in good faith that the maker of an affidavit (other than an affidavit referred to in [subsection \(2\)](#)) proposed to be used in the cause be cross-examined with respect to the matters in the affidavit, the affidavit may not be used in the cause unless that person appears as a witness for cross-examination or the High Court, in its discretion, permits the affidavit to be used without the person so appearing.

(5) If the parties to a suit so agree and the High Court does not otherwise order, testimony at the trial of the suit may be given by affidavit.

(6) Subject to the foregoing provisions of this section, testimony at the trial of a cause shall be given orally.

(CTH) Judiciary Act 1903 [6565] s 77J Amendment

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 3 DEFECTS AND ERRORS [ss 77J, 77K]**

DIVISION 3 DEFECTS AND ERRORS [ss 77J, 77K]

[6565] 77J Amendment

(1) At any stage of a proceeding before the High Court, the Court may, on such terms as are just, make such amendment as it thinks necessary to correct any defect or error in the proceeding.

(2) All necessary amendments shall be made for the purpose of determining the real questions in controversy or otherwise depending on the proceedings.

End of Document

(CTH) Judiciary Act 1903 [6570] s 77K Formal defects not to invalidate

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 3 DEFECTS AND ERRORS \[ss 77J, 77K\]](#)

[6570] 77K Formal defects not to invalidate

(1) No proceedings in the High Court are invalidated by a formal defect or an irregularity unless the Court is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of the Court.

(2) The High Court may, on such conditions (if any) as the Court thinks fit, make an order declaring that a proceeding is not invalid by reason of a defect that it considers to be formal, or by reason of an irregularity.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [6575] s 77L Reserved judgments

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 4 RESERVED JUDGMENTS [s 77L]**

DIVISION 4 RESERVED JUDGMENTS [s 77L]

[6575] 77L Reserved judgments

(1) When any cause or matter, after being fully heard before a Full Court, is ordered to stand for judgment, it is not necessary that all the Justices before whom it was heard be present together in court to declare their opinions on the cause or matter, but the opinion of any of them may be reduced to writing and may be read or otherwise made known by any other Justice at any subsequent sitting of a Full Court at which judgment in the cause or matter is delivered. At that subsequent sitting, it is only necessary for a single Justice to be present in court for the purpose of delivering that judgment.

[subs (1) am Act 84 of 1994 s 88]

(2) In any such case the question shall be decided in the same manner, and the judgment of the Court has the same force and effect, as if the Justice whose opinion is so read or otherwise made known had been present in court and had declared his or her opinion in person.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

End of Document

(CTH) Judiciary Act 1903 [6775] s 77M Enforcement of judgments

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > DIVISION 5 JUDGMENT AND EXECUTION [ss 77M–77Q]

DIVISION 5 JUDGMENT AND EXECUTION [ss 77M–77Q]

[6775] 77M Enforcement of judgments

(1) Subject to the Rules of Court, a person in whose favour a judgment of the High Court is given is entitled to the same remedies for the enforcement of the judgment in a State or Territory, by execution or otherwise, against the person, or against the property of the person, against whom the judgment is given, as are allowed in like cases by the laws of that State or Territory to persons in whose favour a judgment of the Supreme Court of that State or Territory is given.

(2) This section does not affect the operation of any provision made by or under any other Act or by the Rules of Court for the execution and enforcement of judgments of the High Court.

Section 77M Generally

[6775.5] Non-payment of costs of appeal

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77M.

(CTH) [High Court Rules 1952](#) O XXXV.

[Section 77M](#) substantially reproduces the provisions of s 26 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. In *Lysaght Bros & Co Ltd v Falk (No 2)* (1905) 2 CLR 443 at 445–6, Griffith CJ noted that O XXXV of the High Court Rules imposed a limitation on the remedies available for enforcement of an order of the court for the payment of money to a person, by precluding enforcement through a writ of attachment. It followed that an order of the High Court for payment of the costs of an appeal from a state Supreme Court would not be enforced by attachment.

End of Document

(CTH) Judiciary Act 1903 [6780] s 77MA Interest up to judgment

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6780] 77MA Interest up to judgment

(1) In any proceedings, other than proceedings on appeal, for the recovery of any money (including any debt or damages or the value of any goods) in respect of a cause of action that arises after the commencement of this section, the High Court shall, upon application, unless good cause is shown to the contrary, either:

- (a) order that there be included in the sum for which judgment is given interest at such rate as the Court thinks fit on the whole or any part of the money for the whole or part of the period between the date when the cause of action arose and the date as of which judgment is entered; or
- (b) without proceeding to calculate interest in accordance with [paragraph \(a\)](#), order that there be included in the sum for which judgment is given a lump sum in lieu of any such interest.

(2) [Subsection \(1\)](#) does not:

- (a) authorize the giving of interest upon interest or of a sum in lieu of such interest;
- (b) apply in relation to any debt upon which interest is payable as of right whether by virtue of an agreement or otherwise;
- (c) affect the damages recoverable for the dishonour of a bill of exchange;
- (d) limit the operation of any enactment or rule of law which, apart from this section, provides for the award of interest; or
- (e) authorize the giving of interest, or a sum in lieu of interest, otherwise than by consent, upon any sum for which judgment is given by consent.

(3) Where the sum for which judgment is given (in this subsection referred to as **the relevant sum**) includes, or where the High Court, in its absolute discretion, determines that the relevant sum includes, any amount for:

- (a) compensation in respect of liabilities incurred which do not carry interest as against the person claiming interest or claiming a sum in lieu of interest;
- (b) compensation for loss or damage to be incurred or suffered after the date on which judgment is given; or
- (c) exemplary or punitive damages;

interest, or a sum in lieu of interest, shall not be given under [subsection \(1\)](#) in respect of any such amount or in respect of so much of the relevant sum as in the opinion of the Court represents any such amount.

(4) [Subsection \(3\)](#) shall not be taken to preclude interest or a sum in lieu of interest being given, pursuant to this section, upon compensation in respect of a liability of the kind referred to in [paragraph \(3\)\(a\)](#) where that liability has been met by the plaintiff, as from the date upon which that liability was so met.

End of Document

(CTH) Judiciary Act 1903 [6785] s 77N Interest on judgment debts

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6785] 77N Interest on judgment debts

A judgment debt under a judgment of the High Court carries interest, at such rate as is fixed by the Rules of Court, from the date as of which the judgment is entered.

Section 77N Generally

[6785.5] Section 77N excludes state laws providing for interest

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 77N, s 79.

[Section 77N](#) substantially reproduces the provisions of s 26A of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. In *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 ; [6 ALR 433](#) at [436](#) [CB](#), Mason J held that the former s 26A was a “comprehensive expression of the entitlement in this court of a litigant to interest on damages to the exclusion of any provision in state law which would otherwise be made applicable by virtue of [s 79](#)”.

(CTH) Judiciary Act 1903 [6790] s 77P Interpleader

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6790] 77P Interpleader

When any claim is made to property taken in execution upon process issued out of the High Court, the Marshal or a Deputy Marshal may take in the Supreme Court of the State or Territory in which the property is situated the same proceedings by way of interpleader as if the process had been issued out of that Supreme Court, and that Supreme Court and the Judges of that Supreme Court have jurisdiction to entertain and determine the matter.

Section 77P Generally

[6790.5] Power of sheriff to sell goods

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77P.

[Section 77P](#) substantially reproduces the provisions of s 27 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. In *Dent v Snell* (1927) 43 WN (NSW) 140, the powers of the sheriff under the former s 27 of the High Court Procedure Act to sell goods not returned by the court to a claimant were considered.

End of Document

(CTH) Judiciary Act 1903 [6795] s 77Q Discharge of property taken in execution

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > [DIVISION 5 JUDGMENT AND EXECUTION \[ss 77M–77Q\]](#)

[6795] 77Q Discharge of property taken in execution

A seizure or attachment of property in execution upon process issued out of the High Court becomes inoperative upon the occurrence of any event by which, according to the laws of the State or Territory in which the property is situated, the seizure or attachment would become inoperative if made upon like process issued out of the Supreme Court of that State or Territory.

End of Document

(CTH) Judiciary Act 1903 [6895] s 77R Receivers and managers

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XA PROCEDURE OF THE HIGH COURT \[ss 77A–77R\]](#) > **DIVISION 6 RECEIVERS AND MANAGERS [s 77R]**

DIVISION 6 RECEIVERS AND MANAGERS [s 77R]

[6895] 77R Receivers and managers

(1) The High Court may, at any stage of a proceeding and on such terms and conditions as the Court thinks fit, appoint a receiver or manager in any case in which it appears to the Court to be just or convenient to do so.

(2) A receiver or manager appointed under [subsection \(1\)](#) may, without the previous leave of the High Court, be sued in respect of any act or transaction done or entered into by him or her in carrying on the business connected with the property of which he or she is receiver or manager.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) When in any cause pending in the High Court a receiver or manager appointed by the Court is in possession of any property, the receiver or manager shall manage and deal with the property according to the requirements of the laws of the State or Territory in which the property is situated in the same manner as that in which the owner or possessor of the property would be bound to do if in possession of the property.

End of Document

(CTH) Judiciary Act 1903 [6900] s 77RA Definitions

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Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RA–77RK] > DIVISION 1 PRELIMINARY [ss 77RA–77RC]

PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RA–77RK]

[Pt XAA insrt Act 186 of 2012 s 3 and Sch 2 item 8, effective 12 December 2012]

DIVISION 1 PRELIMINARY [ss 77RA–77RC]

[6900] 77RA Definitions

In this Part:

information includes any document.

news publisher means a person engaged in the business of publishing news or a public or community broadcasting service engaged in the publishing of news through a public news medium.

non-publication order means an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information).

party to a proceeding includes the complainant or victim (or alleged victim) in a criminal proceeding and any person named in evidence given in a proceeding and, in relation to a proceeding that has concluded, means a person who was a party to the proceeding before the proceeding concluded.

proceeding means a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding, and also includes an appeal.

publish means disseminate or provide access to the public or a section of the public by any means, including by:

- (a) publication in a book, newspaper, magazine or other written publication; or
- (b) broadcast by radio or television; or
- (c) public exhibition; or
- (d) broadcast or publication by means of the internet.

suppression order means an order that prohibits or restricts the disclosure of information (by publication or otherwise).

End of Document

(CTH) Judiciary Act 1903 [6905] s 77RB Powers of High Court not affected

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Current to: Act 3 of 2022

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[6905] 77RB Powers of High Court not affected

This Part does not limit or otherwise affect any powers that the High Court has apart from this Part to regulate its proceedings or to deal with a contempt of the Court.

End of Document

(CTH) Judiciary Act 1903 [6910] s 77RC Other laws not affected

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 1 PRELIMINARY \[ss 77RA–77RC\]](#)

[6910] 77RC Other laws not affected

This Part does not limit or otherwise affect the operation of a provision made by or under any Act (other than this Act) that prohibits or restricts, or authorises a court to prohibit or restrict, the publication or other disclosure of information in connection with proceedings.

End of Document

(CTH) Judiciary Act 1903 [6915] s 77RD Safeguarding public interest in open justice

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > **DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RD–77RK]**

DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS [ss 77RD–77RK]

[6915] 77RD Safeguarding public interest in open justice

In deciding whether to make a suppression order or non-publication order, the High Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

End of Document

(CTH) Judiciary Act 1903 [6920] s 77RE Power to make orders

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Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6920] 77RE Power to make orders

(1) The High Court may, by making a suppression order or non-publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:

- (a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or
- (b) information that relates to a proceeding before the Court and is:
 - (i) information that comprises evidence or information about evidence; or
 - (ii) information obtained by the process of discovery; or
 - (iii) information produced under a subpoena; or
 - (iv) information lodged with or filed in the Court.

(2) The High Court may make such orders as it thinks appropriate to give effect to an order under [subsection \(1\)](#).

End of Document

(CTH) Judiciary Act 1903 [6925] s 77RF Grounds for making an order

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6925] 77RF Grounds for making an order

(1) The High Court may make a suppression order or non-publication order on one or more of the following grounds:

- (a) the order is necessary to prevent prejudice to the proper administration of justice;
- (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
- (c) the order is necessary to protect the safety of any person;
- (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).

(2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

End of Document

(CTH) Judiciary Act 1903 [6930] s 77RG Procedure for making an order

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6930] 77RG Procedure for making an order

(1) The High Court may make a suppression order or non-publication order on its own initiative or on the application of:

- (a) a party to the proceeding concerned; or
- (b) any other person considered by the Court to have a sufficient interest in the making of the order.

(2) Each of the following persons is entitled to appear and be heard by the High Court on an application for a suppression order or non-publication order:

- (a) the applicant for the order;
- (b) a party to the proceeding concerned;
- (c) the Government (or an agency of the Government) of the Commonwealth or a State or Territory;
- (d) a news publisher;
- (e) any other person who, in the Court's opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made.

(3) A suppression order or non-publication order may be made at any time during a proceeding or after a proceeding has concluded.

(4) A suppression order or non-publication order may be made subject to such exceptions and conditions as the High Court thinks fit and specifies in the order.

(5) A suppression order or non-publication order must specify the information to which the order applies with sufficient particularity to ensure that the court order is limited to achieving the purpose for which the order is made.

(CTH) Judiciary Act 1903 [6935] s 77RH Interim orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6935] 77RH Interim orders

(1) If an application is made to the High Court for a suppression order or non-publication order, the Court may, without determining the merits of the application, make the order as an interim order to have effect, subject to revocation by the Court, until the application is determined.

(2) If an order is made as an interim order, the High Court must determine the application as a matter of urgency.

End of Document

(CTH) Judiciary Act 1903 [6940] s 77RI Duration of orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6940] 77RI Duration of orders

- (1) A suppression order or non-publication order operates for the period decided by the High Court and specified in the order.
- (2) In deciding the period for which an order is to operate, the High Court is to ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made.
- (3) The period for which an order operates may be specified by reference to a fixed or ascertainable period or by reference to the occurrence of a specified future event.

End of Document

(CTH) Judiciary Act 1903 [6945] s 77RJ Exception for court officials

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6945] 77RJ Exception for court officials

A suppression order does not prevent a person from disclosing information if the disclosure is not by publication and is in the course of performing functions or duties or exercising powers in a public official capacity:

- (a) in connection with the conduct of a proceeding or the recovery or enforcement of any penalty imposed in a proceeding; or
- (b) in compliance with any procedure adopted by the High Court for informing a news publisher of the existence and content of a suppression order or non-publication order made by the Court.

End of Document

(CTH) Judiciary Act 1903 [6950] s 77RK Contravention of order

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Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAA SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RA–77RK\]](#) > [DIVISION 2 SUPPRESSION AND NON-PUBLICATION ORDERS \[ss 77RD–77RK\]](#)

[6950] 77RK Contravention of order

(1) A person commits an offence if:

- (a) the person does an act or omits to do an act; and
- (b) the act or omission contravenes an order made by the High Court under [section 77RE](#).

Penalty: Imprisonment for 12 months, 60 penalty units or both.

(2) An act or omission that constitutes an offence under this section may be punished as a contempt of court even though it could be punished as an offence.

(3) An act or omission that constitutes an offence under this section may be punished as an offence even though it could be punished as a contempt of court.

(4) If an act or omission constitutes both an offence under this section and a contempt of court, the offender is not liable to be punished twice.

End of Document

(CTH) Judiciary Act 1903 [6955] s 77RL Definitions

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > **PART XAB VEXATIOUS PROCEEDINGS [ss 77RL–77RS]** > **DIVISION 1 PRELIMINARY [ss 77RL, 77RM]**

PART XAB VEXATIOUS PROCEEDINGS [ss 77RL–77RS]

[Pt XAB insrt Act 186 of 2012 s 3 and Sch 3 item 10, effective 11 June 2013]

DIVISION 1 PRELIMINARY [ss 77RL, 77RM]

[6955] 77RL Definitions

(1) In this Part:

Australian court or tribunal means a court or tribunal of the Commonwealth, a State or a Territory.

Chief Executive and Principal Registrar means the Chief Executive and Principal Registrar of the High Court appointed under section 18 of the High Court of Australia Act 1979.

institute , in relation to proceedings, includes:

- (a) for civil proceedings — the taking of a step or the making of an application that may be necessary before proceedings can be started against a party; and
- (b) for proceedings before a tribunal — the taking of a step or the making of an application that may be necessary before proceedings can be started before the tribunal; and
- (c) for criminal proceedings — the making of a complaint or the obtaining of a warrant for the arrest of an alleged offender; and
- (d) for civil or criminal proceedings or proceedings before a tribunal — the taking of a step or the making of an application that may be necessary to start an appeal in relation to the proceedings or to a decision made in the course of the proceedings.

proceeding :

- (a) in relation to a court — means a proceeding in the court, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding, and also includes an appeal; and
- (b) in relation to a tribunal — means a proceeding in the tribunal, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding.

proceedings of a particular type includes:

- (a) proceedings in relation to a particular matter; and

- (b) proceedings against a particular person.

vexatious proceeding includes:

- (a) a proceeding that is an abuse of the process of a court or tribunal; and
- (b) a proceeding instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
- (c) a proceeding instituted or pursued in a court or tribunal without reasonable ground; and
- (d) a proceeding conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.

vexatious proceedings order means an order made under [subsection 77RN\(2\)](#).

(2) A reference in this Part to a person acting in concert with another person in instituting or conducting proceedings does not include a reference to a person who is so acting as a legal practitioner or representative of the other person.

End of Document

(CTH) Judiciary Act 1903 [6960] s 77RM Powers of the High Court not affected

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 1 PRELIMINARY \[ss 77RL, 77RM\]](#)

[6960] 77RM Powers of the High Court not affected

This Part does not limit or otherwise affect any powers that the High Court has apart from this Part to deal with vexatious proceedings.

End of Document

(CTH) Judiciary Act 1903 [6965] s 77RN Making vexatious proceedings orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > **DIVISION 2 VEXATIOUS PROCEEDINGS ORDERS [ss 77RN, 77RO]**

DIVISION 2 VEXATIOUS PROCEEDINGS ORDERS [ss 77RN, 77RO]

[6965] 77RN Making vexatious proceedings orders

(1) This section applies if the High Court is satisfied:

- (a) a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals; or
- (b) a person, acting in concert with another person who is subject to a vexatious proceedings order or who is covered by [paragraph \(a\)](#), has instituted or conducted a vexatious proceeding in an Australian court or tribunal.

(2) The High Court may make any or all of the following orders:

- (a) an order staying or dismissing all or part of any proceedings in the High Court already instituted by the person;
- (b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the High Court;
- (c) any other order the High Court considers appropriate in relation to the person.

Note:

Examples of an order under [paragraph \(c\)](#) are an order directing that the person may only file documents by mail, an order to give security for costs and an order for costs.

(3) The High Court may make a vexatious proceedings order on its own initiative or on the application of any of the following:

- (a) the Attorney-General of the Commonwealth or of a State or Territory;
- (b) the Chief Executive and Principal Registrar;
- (c) a person against whom another person has instituted or conducted a vexatious proceeding;
- (d) a person who has a sufficient interest in the matter.

(4) The High Court must not make a vexatious proceedings order in relation to a person without hearing the person or giving the person an opportunity of being heard.

(5) An order made under [paragraph \(2\)\(a\)](#) or [\(b\)](#) is a final order.

(6) For the purposes of [subsection \(1\)](#), the High Court may have regard to:

- (a) proceedings instituted (or attempted to be instituted) or conducted in any Australian court or tribunal; and
- (b) orders made by any Australian court or tribunal; and
- (c) the person's overall conduct in proceedings conducted in any Australian court or tribunal (including the person's compliance with orders made by that court or tribunal);

including proceedings instituted (or attempted to be instituted) or conducted, and orders made, before the commencement of this section.

End of Document

(CTH) Judiciary Act 1903 [6970] s 77RO Notification of vexatious proceedings orders

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 2 VEXATIOUS PROCEEDINGS ORDERS \[ss 77RN, 77RO\]](#)

[6970] 77RO Notification of vexatious proceedings orders

(1) A person may request the Chief Executive and Principal Registrar for a certificate stating whether a person named in the request is or has been the subject of a vexatious proceedings order.

(2) If a person makes a request under [subsection \(1\)](#) and the person named in the request is or has been the subject of a vexatious proceedings order, the Chief Executive and Principal Registrar must issue to the person making the request a certificate:

- (a) specifying the date of the order; and
- (b) specifying any other information prescribed by Rules of Court.

(3) This section is subject to any law of the Commonwealth, or order of the High Court, restricting the publication or disclosure of the name of a party to proceedings in the High Court.

Note:

Section 155 of the Evidence Act 1995 deals with adducing evidence of Commonwealth records.

End of Document

(CTH) Judiciary Act 1903 [6975] s 77RP Proceedings in contravention of vexatious proceedings order

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > **DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS [ss 77RP–77RS]**

DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS [ss 77RP–77RS]

[6975] 77RP Proceedings in contravention of vexatious proceedings order

(1) If the High Court makes a vexatious proceedings order prohibiting a person from instituting proceedings, or proceedings of a particular type, in the High Court:

- (a) the person must not institute proceedings, or proceedings of that type, in the High Court without the leave of the High Court under [section 77RS](#); and
- (b) another person must not, acting in concert with the person, institute proceedings, or proceedings of that type, in the High Court without the leave of the High Court under [section 77RS](#).

(2) If a proceeding is instituted in contravention of [subsection \(1\)](#), the proceeding is stayed.

(3) Without limiting [subsection \(2\)](#), the High Court may make:

- (a) an order declaring a proceeding is a proceeding to which [subsection \(2\)](#) applies; and
- (b) any other order in relation to the stayed proceeding it considers appropriate, including an order for costs.

(4) The High Court may make an order under [subsection \(3\)](#) on its own initiative or on the application of any of the following:

- (a) the Attorney-General of the Commonwealth or of a State or Territory;
- (b) the Chief Executive and Principal Registrar;
- (c) a person against whom another person has instituted or conducted a vexatious proceeding;
- (d) a person who has a sufficient interest in the matter.

(CTH) Judiciary Act 1903 [6980] s 77RQ Application for leave to institute proceedings

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS \[ss 77RP–77RS\]](#)

[6980] 77RQ Application for leave to institute proceedings

- (1) This section applies to a person (the **applicant**) who is:
 - (a) subject to a vexatious proceedings order prohibiting the person from instituting proceedings, or proceedings of a particular type, in the High Court; or
 - (b) acting in concert with another person who is subject to an order mentioned in [paragraph \(a\)](#).
- (2) The applicant may apply to the High Court for leave to institute a proceeding that is subject to the order.
- (3) The applicant must file an affidavit with the application that:
 - (a) lists all the occasions on which the applicant has applied for leave under this section; and
 - (b) lists all other proceedings the applicant has instituted in any Australian court or tribunal, including proceedings instituted before the commencement of this section; and
 - (c) discloses all relevant facts about the application, whether supporting or adverse to the application, that are known to the applicant.
- (4) The applicant must not serve a copy of the application or affidavit on a person unless an order is made under [paragraph 77RS\(1\)\(a\)](#). If the order is made, the applicant must serve the copy in accordance with the order.

End of Document

(CTH) Judiciary Act 1903 [6985] s 77RR Dismissing application for leave

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS \[ss 77RP–77RS\]](#)

[6985] 77RR Dismissing application for leave

(1) The High Court, or a Justice sitting other than in open court, may make an order dismissing an application under [section 77RQ](#) for leave to institute a proceeding if the High Court or Justice considers the affidavit does not substantially comply with [subsection 77RQ\(3\)](#).

[subs (1) am Act 3 of 2022 s 3 and Sch 1 item 115, effective 18 February 2022]

(2) The High Court, or a Justice sitting other than in open court, must make an order dismissing an application under [section 77RQ](#) for leave to institute a proceeding if the High Court or Justice considers the proceeding is a vexatious proceeding.

[subs (2) am Act 3 of 2022 s 3 and Sch 1 item 115, effective 18 February 2022]

(3) The High Court, or a Justice sitting other than in open court, may dismiss the application without an oral hearing (either with or without the consent of the applicant).

[subs (3) am Act 3 of 2022 s 3 and Sch 1 item 115, effective 18 February 2022]

End of Document

(CTH) Judiciary Act 1903 [6990] s 77RS Granting application for leave

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XAB VEXATIOUS PROCEEDINGS \[ss 77RL–77RS\]](#) > [DIVISION 3 PARTICULAR CONSEQUENCES OF VEXATIOUS PROCEEDINGS ORDERS \[ss 77RP–77RS\]](#)

[6990] 77RS Granting application for leave

(1) Before the High Court makes an order granting an application under [section 77RQ](#) for leave to institute a proceeding, it must:

(a) order that the applicant serve:

- (i) the person against whom the applicant proposes to institute the proceeding; and
- (ii) any other person specified in the order;

with a copy of the application and affidavit and a notice that the person is entitled to be heard on the application; and

(b) give the applicant and each person described in [subparagraph \(a\)\(i\)](#) or [\(iii\)](#), on appearance, an opportunity to be heard at the hearing of the application.

(2) At the hearing of the application, the High Court may receive as evidence any record of evidence given, or affidavit filed, in any proceeding in any Australian court or tribunal in which the applicant is, or at any time was, involved either as a party or as a person acting in concert with a party.

(3) The High Court may make an order granting the application. The order may be made subject to the conditions the High Court considers appropriate.

(4) The High Court may grant leave only if it is satisfied the proceeding is not a vexatious proceeding.

End of Document

(CTH) Judiciary Act 1903 [7690] THE SCHEDULE

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > **[High Court — Principal Legislation](#)** > **[Judiciary Act 1903](#)**

[7690] THE SCHEDULE

[Section 65](#)

[Sch am Act 141 of 1994 s 4 and Sch 2; Act 31 of 2014 s 3 and Sch 1 items 46, 47, effective 24 June 2014]

FORM OF CERTIFICATE OF JUDGMENT

AB v The Commonwealth (*or as the case may be*).

I hereby certify that AB of (*address and occupation*) did on the _____ day of _____, 20____, obtain a judgment of the (*name of Court*) in his or her (*as the case may be*) favour and that by that judgment the sum of _____ was awarded to him or her (*as the case may be*).

Dated this _____ day of _____, 20____

Registrar (*or as the case may be*).

End of Document

(CTH) Judiciary Act 1903 [7005] s 77S Security

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XB APPEALS TO THE HIGH COURT [ss 77S–77V] > DIVISION 1 SECURITY [s 77S]

PART XB APPEALS TO THE HIGH COURT [ss 77S–77V]

DIVISION 1 SECURITY [s 77S]

[7005] 77S Security

(1) The Rules of Court may make provision for and in relation to the giving, in an appeal to the Court, of security for the prosecution of the appeal without delay and for the payment of costs that may be awarded against the appellant.

(2) If security is not given as required by or in accordance with the Rules of Court, the High Court may order that the appeal be dismissed.

(3) This section does not affect the operation of any provision made by or under any other Act for or in relation to the giving of security.

Section 77S Generally

[7005.5] Security for costs

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 2, s 35, s 35(2), s 77S, Section 77S(1).

(CTH) [High Court Rules 1952](#) High Court Rules, [18,845], [18,945].

Since the amendments to [s 35](#) of the Judiciary Act 1903 (by Act 12 of 1984), no appeal may be brought from a judgment of the Supreme Court of a state unless the High Court gives special leave to appeal: [s 35\(2\)](#). This requirement is reflected in the High Court Rules: O 69A (see [18,845]) deals with applications for special leave to appeal and O 70 (see [18,945]) deals with appeals per se. Only O 70 contains an express provision for security for costs.

[Section 77S](#) was inserted by Act 138 of 1979, 5 years before the amendments to [s 35](#). [Section 77S\(1\)](#) has remained unchanged. The term “appeal” as defined in [s 2](#) of the Judiciary Act 1903 does not include an application for special leave to appeal.

“Thus, neither within the [Judiciary Act](#) nor within the High Court Rules is any reference to be found on the subject of security for costs of the prosecution of an application for special leave to appeal ... I can find nothing in the [Judiciary Act](#) or in the High Court Rules from which it may be inferred that a power to order security for costs of an application for special leave to appeal is incidental and necessary to the exercise of some other power conferred on the court. Inherent power, if it exists at all in the present case, must exist because it is incidental and necessary to the exercise of the jurisdiction vested in the court. This is only another way of acknowledging the power of a court to regulate its procedure and prevent the abuse of its process, a power which may include the awarding of costs and the provision of security”: *Bahr v Nicolay (No 1)* (1987) 163 CLR 490; [72 ALR 361](#)  per Toohey J at 362–3.

End of Document

(CTH) Judiciary Act 1903 [7010] s 77T Institution of appeals

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XB APPEALS TO THE HIGH COURT \[ss 77S–77V\]](#) > **DIVISION 2 PROCEDURE [ss 77T–77V]**

DIVISION 2 PROCEDURE [ss 77T–77V]

[7010] 77T Institution of appeals

Appeals to the High Court shall be instituted within such time and in such manner as are prescribed by Rules of Court.

Section 77T Generally

[7010.5] Procedure for appeals

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 77T.

[Section 77T](#) substantially reproduces the provisions of s 37 of the High Court Procedure Act 1903 (Cth), repealed by Act 138 of 1979. See *Grayndler v Cunich* (1939) 62 CLR 573 [CB](#), as to the procedure on appeal to the High Court from an inferior state court exercising federal jurisdiction.

Speaking of the former s 37 of the High Court Procedure Act, Griffith CJ, Barton and Gavan Duffy JJ said: “We think that compliance with the rules as to the time of instituting an appeal is a condition precedent to the coming into existence of a cause in the appellate jurisdiction [of the High Court]”: *Singh v Karbowsky* (1914) 18 CLR 197 at 201. Their Honours held that a failure, by an appellant, to provide security for costs within the time fixed by the High Court Rules brought to an end the appellant’s inchoate right to appeal.

(CTH) Judiciary Act 1903 [7015] s 77U Stay of proceedings

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: February 2001

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XB APPEALS TO THE HIGH COURT \[ss 77S–77V\]](#) > [DIVISION 2 PROCEDURE \[ss 77T–77V\]](#)

[7015] 77U Stay of proceedings

When an appeal has been instituted, the High Court or the Court or Judge appealed from may order a stay of all or any proceedings under the judgment appealed from.

Section 77U Generally

[7015.5] Section 77U and applications for special leave

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 77U.

The jurisdiction to seek a stay under [s 77U](#) until an appeal is heard must be distinguished from the inherent jurisdiction of the court to grant a stay pending an application for special leave to appeal. In *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* (1986) 161 CLR 681; [69 ALR 265](#); 61 ALJR 102 [CB](#) the High Court considered the principles under which that court would grant a stay in the context of an application for special leave. The applicants attempted to ground the application under [s 77U](#) but the court held that the application came within the inherent jurisdiction and the stay was otherwise granted. It is a relevant consideration to establish that the applicant has taken whatever steps are necessary to seek a stay from the court in which the matter is pending but failure to so apply would not be fatal to the application for a stay being made in the first instance to the High Court. Brennan J said:

“When an application for special leave to appeal is made to this court, a jurisdiction to stay may be exercised by the court below and it is to that court — the court in which the matter is pending and which is familiar with the matter — that an application to stay should first be made. In this case the Court of Appeal, not wishing to pre-empt the view that may be expressed in this court, tailored its order accordingly. In future, there should be no inhibition on the court in which the matter is pending framing a stay order if a stay be appropriate, to avoid the necessity for application to this court”: ALR at 267.

“[T]he provisions of the present [s 77U](#) of the Judiciary Act 1903 ... are not such as implicitly to deprive this court of power to order a stay” of execution pending an appeal: *Patton v Minister for*

Defence (1987) 13 FCR 476; [71 ALR 637](#) at [639](#) ^{CB} per Pincus J. Such an application invokes the original, and not the appellate, jurisdiction of the court, execution of whose order is sought to be stayed: *Patton*, above, ALR at 640.

End of Document

(CTH) Judiciary Act 1903 [7020] s 77V Death of party to an appeal

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XB APPEALS TO THE HIGH COURT \[ss 77S–77V\]](#) > [DIVISION 2 PROCEDURE \[ss 77T–77V\]](#)

[7020] 77V Death of party to an appeal

(1) When a party to a judgment from which an appeal lies to the High Court has, whether before or after the commencement of this section, died before the time allowed for instituting an appeal has expired, it is not necessary to revive the cause or matter by any formal proceedings.

(2) If the personal representative of the deceased party desires to appeal, he or she may file in the Court by which the judgment was given or made a duly certified copy of the instrument by which he or she is appointed, and thereupon may institute an appeal in the same manner as the party whom he or she represents might have done.

[subs (2) am Act 141 of 1994 s 4 and Sch 2]

(3) In the case of the death of the party in whose favour the judgment is given or made, notice of appeal may be given to his or her personal representative, or, if there is no such representative, to such person as the High Court directs.

[subs (3) am Act 141 of 1994 s 4 and Sch 2]

End of Document

[\(CTH\) Judiciary Act 1903 \[7125\] s 78 Appearance of parties](#)

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > PART XI SUPPLEMENTARY PROVISIONS [ss 78–88] > DIVISION 1 APPEARANCE OF PARTIES [s 78]

PART XI SUPPLEMENTARY PROVISIONS [ss 78–88]

DIVISION 1 APPEARANCE OF PARTIES [s 78]

[\[7125\] 78 Appearance of parties](#)

In every Court exercising federal jurisdiction the parties may appear personally or by such barristers or solicitors as by this Act or the laws and rules regulating the practice of those Courts respectively are permitted to appear therein.

Section 78 Generally

[\[7125.5\] No right to counsel of choice](#)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 78.

[Section 78](#) of the Judiciary Act 1903 does not confer on a party to a proceeding before the Federal Court the right to counsel of the party's choice. Rather, s 78 confers on a party who does not wish to appear in person the right to the services of lawyers who are admitted to practice. Further, s 78 does not preclude the making of an order under s 50 of the Federal Court of Australia Act 1976 restricting access to certain evidence given in proceeding under the Native Title Act 1993 to persons of a particular gender, where the interests of justice dictated the making of such an order: *Western Australia v Ward (on behalf of Miriuwung Gajerrong Peoples)* (1997) 76 FCR 492; [145 ALR 512](#) at [521–2](#); [BC9702911](#)  (Hill and Sundberg JJ), disapproving *Yamirr v Northern Territory* (1997) 74 FCR 99; [143 ALR 687](#); [BC9701382](#) .

(CTH) Judiciary Act 1903 [7130] s 78AA State includes Australian Capital Territory and Northern Territory

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > **DIVISION 1A PROVISIONS RELATING TO CONSTITUTIONAL MATTERS [ss 78AA–78B]**

**DIVISION 1A PROVISIONS RELATING TO CONSTITUTIONAL MATTERS
[ss 78AA–78B]**

[7130] *78AA State includes Australian Capital Territory and Northern Territory

In this Division:

State includes the Australian Capital Territory and the Northern Territory.

[s 78AA subst Act 34 of 1997 s 3 and Sch 11]

*

Editor's note: Note 3 to Reprint No 4 (15 December 1992) of the Judiciary Act 1903 provides as follows in relation to [s 78AA](#):

“The [Judiciary Act 1903](#) was modified by regulation 2 and Schedule 1 of the ACT Self-Government (Consequential Provisions) Regulations as amended. The provision of Schedule 1 applicable to the abovementioned Act quoted below is not incorporated in this reprint.

[‘Section 78AA:](#)

After “includes” insert “the Australian Capital Territory and” .”

End of Document

(CTH) Judiciary Act 1903 [7135] s 78A Intervention by Attorneys-General

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 1A PROVISIONS RELATING TO CONSTITUTIONAL MATTERS \[ss 78AA–78B\]](#)

[7135] 78A Intervention by Attorneys-General

(1) The Attorney-General of the Commonwealth may, on behalf of the Commonwealth, and the Attorney-General of a State may, on behalf of the State, intervene in proceedings before the High Court or any other federal court or any court of a State or Territory, being proceedings that relate to a matter arising under the Constitution or involving its interpretation.

(2) Where the Attorney-General of the Commonwealth or of a State intervenes in proceedings in a court under this section, the court may, in the proceedings, make such order as to costs against the Commonwealth or the State, as the case may be, as the court thinks fit.

(3) Where the Attorney-General of the Commonwealth or of a State intervenes in proceedings in a court under this section, then, for the purposes of the institution and prosecution of an appeal from a judgment given in the proceedings, the Attorney-General of the Commonwealth or the State, as the case may be, shall be taken to be a party to the proceedings.

[subs (3) insrt Act 38 of 1988 s 3 and Sch 1]

(4) Where the Attorney-General of the Commonwealth or of a State institutes an appeal from a judgment given in proceedings in which the Attorney-General of the Commonwealth or the State, as the case may be, has intervened under this section, a court hearing the appeal may make such order as to costs against the Commonwealth or the State, as the case may be, as the court thinks fit.

[subs (4) insrt Act 38 of 1988 s 3 and Sch 1]

SECTION 78A GENERALLY

SECTION 78A(1)

[7135.2] Can Attorney-General intervene where already a party?

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78A, s 78A(1).

In *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 188 ALR 1; 76 ALJR 694 ^{CB}, four members of the High Court considered whether the Commonwealth Attorney-General could intervene under [s 78A\(1\)](#) in a matter in which a writ of certiorari was sought to quash orders made by a judge of the Federal Court, the applicant for the writ being the Commonwealth Attorney-General at the relation of the Australian Catholic Bishops Conference.

Gaudron and Gummow JJ suggested at [53]:

[U]pon its true construction, [s 78A](#) of the Judiciary Act does not authorise the Attorney-General to intervene in a proceeding which already is the Attorney-General's action, albeit on relation of private interests. Any other reading of [s 78A](#) may imperil its validity.

Hayne J noted, at [286], that the Attorney-General sought to intervene to make submissions which were, in part, contrary to those advanced in the Attorney-General's name in the application made at the relation of the Episcopal Conference. His Honour concluded:

It was not open to an Attorney-General who had granted a fiat for the institution of a proceeding thereafter to intervene in that proceeding or to make submissions either in support of or opposing the case advanced in the name of the Attorney-General as plaintiff or applicant in that proceeding.

On the other hand, Kirby J said, at [214], that there was no difficulty in the Attorney-General appearing to be in conflict with the relator over some parts of the relator's submissions, although his Honour was concerned primarily with the validity of the Attorney-General's fiat rather than with the question of whether [s 78A\(1\)](#) authorised the Attorney-General to intervene.

SECTION 78A(2)

[7135.5] Discretion of the court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78A, s 78B.

An order by the High Court in the exercise of its discretion concerning costs of proceedings before that court does not bind a state Supreme Court in relation to proceedings before the state Supreme Court. It is however desirable that a state court's order for costs reflect the same considerations as are inherent in the order of the High Court, if this is appropriate. Hence it is not a universal rule that private citizens, caught up in litigation involving the consideration of constitutional issues which are sufficient to warrant the intervention of the Attorney-General under [s 78B](#) of the Judiciary Act 1903, will automatically be entitled to costs from the Attorney-General: see *University of Wollongong v Metwally* (1985) 1 NSWLR 722 ^{CB}.

[I]t seems plain that the contemplated purpose of [s 78A](#) of the Judiciary Act 1903 was to provide only for increased costs to be ordered against the Commonwealth and the state ... To burden the Commonwealth and state with all the costs of the appeal might be unjust. They did not initiate the proceedings in the first place. The fact that proceedings between private parties incidentally raise constitutional questions does not remove the fact that it is the private litigants who are the initiators. The intervention of the law officers is provided for by the 1976 amendments to the [Judiciary Act 1903](#) as part of a scheme to obviate automatic removal to the High Court. It is also to ensure that the lower court, dealing with the matter, has the assistance of skilled intervention, if the case is judged sufficiently important to warrant that course. If a general rule were adopted by which it was established that intervention carried with it the price of an order to pay all of the costs of the proceedings in which the law officers intervened, the results might be undesirable.

To avoid such an order, intervention might be withheld in a case that would otherwise benefit from that course. Settlement of the dispute between the litigants might be delayed in the knowledge that the public purse would be ordered to pay the costs of litigation after intervention. The sanction of avoiding protracted intervention or unnecessary removal to the High Court would be swamped in the general regime for the payment of costs by the intervenor: *Australian Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497; 69 ALR 125 at 137 ^{CB} per Kirby P.

SECTION 78A(3)

[7135.10] Intervening Attorney-General becomes a party

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78A(3).

In *Cheesman v Waters* (1997) 77 FCR 221; [148 ALR 21](#) ^{CB}, the Full Federal Court held that, once the Attorney-General of the Commonwealth had intervened in proceedings, the Attorney-General became a party to those proceedings, including any appeal brought by one of the other parties. This result did not flow from [s 78A\(3\)](#), which was inserted by the Statute Law (Miscellaneous Provisions) Act 1988 to remove a doubt as to the Attorney-General's right to appeal, and not to confer a right of appeal which did not otherwise exist. According to the Full Court, comprising Hill, Heerey and Sundberg JJ at ALR 27:

... the fact that [\[s 78A\(3\)\]](#) requires the Attorney to be treated as a party for the purposes of an appeal by him, and is silent as to his status when someone else appeals, is not a reason for treating the subsection as providing by implication that when another party appeals, an Attorney who participates in the appeal does so otherwise than as a party ...

End of Document

(CTH) Judiciary Act 1903 [7140] s 78B Notice to Attorneys-General

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 1A PROVISIONS RELATING TO CONSTITUTIONAL MATTERS \[ss 78AA–78B\]](#)

[7140] 78B Notice to Attorneys-General

(1) Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.

(2) For the purposes of [subsection \(1\)](#), a court in which a cause referred to in that subsection is pending:

- (a) may adjourn the proceedings in the cause for such time as it thinks necessary and may make such order as to costs in relation to such an adjournment as it thinks fit;
- (b) may direct a party to give notice in accordance with that subsection; and
- (c) may continue to hear evidence and argument concerning matters severable from any matter arising under the Constitution or involving its interpretation.

(3) For the purposes of [subsection \(1\)](#), a notice in respect of a cause:

- (a) shall be taken to have been given to an Attorney-General if steps have been taken that, in the opinion of the court, could reasonably be expected to cause the matters to be notified to be brought to the attention of that Attorney-General; and
- (b) is not required to be given to the Attorney-General of the Commonwealth if he or she or the Commonwealth is a party to the cause and is not required to be given to the Attorney-General of a State if he or she or the State is a party to the cause.

[subs (3) am Act 141 of 1994 s 4 and Sch 2]

(4) The Attorney-General may authorize the payment by the Commonwealth to a party of an amount in respect of costs arising out of the adjournment of a cause by reason of this section.

(5) Nothing in [subsection \(1\)](#) prevents a court from proceeding without delay to hear and determine

proceedings, so far as they relate to the grant of urgent relief of an interlocutory nature, where the court thinks it necessary in the interests of justice to do so.

Section 78B Generally

[7140.5] Meaning of “cause”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 2, s 78B(1).

The term “cause” as used in the section includes criminal proceedings: see [s 2](#). Proceedings for committal for a criminal offence on indictment are criminal proceedings notwithstanding that the magistrate hearing them acts in an executive capacity. Such proceedings are a “cause” for the purposes of [s 78B\(1\)](#): *Green v Jones* [\[1979\] 2 NSWLR 812](#); (1979) 39 FLR 428 [CB](#).

[7140.10] Genuine belief not sufficient

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78B(1).

A party to a cause forming a bona fide or genuine belief that the cause involves a matter arising under the Constitution is not sufficient to make it a matter for the purposes of [s 78B\(1\)](#): *Green v Jones* [\[1979\] 2 NSWLR 812](#); (1979) 39 FLR 428 [CB](#).

A cause does not “involve” a matter arising under the Constitution or involving its interpretation merely because someone asserts that it does. That is not to say that the strength or weakness of the proposition is critical [see *Green v Jones* [\[1979\] 2 NSWLR 812](#) at 817–18]. But it must be established that the challenge does involve a matter arising under the Constitution: *Re Finlayson; Ex parte Finlayson* (1997) 72 ALJR 73 at 74 per Toohey J, indorsed by Gummow, Hayne and Callinan JJ in *Glennan v Cmr of Taxation* [\(2003\) 198 ALR 250](#); 77 ALJR 1195 at [14] [CB](#).

The section only operates when the circumstances it postulates are made to appear to the court, not simply because the party asserts those circumstances: *Narain v Parnell* (1986) 9 FCR 479 at 489; [64 ALR 561](#), approved in *Australian Competition & Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292; [167 ALR 303](#); [\[1999\] FCA 1151](#); [BC9907104](#) at [\[13\]](#) [CB](#) (French J)

[7140.15] Who raises s 78B and when?

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78B.

It is for the parties to the proceedings to raise a point under [s 78B](#) and to obtain an adjournment at the earliest possible stage in order that the appropriate notices may be served: *Okmasich v Evans* (1980) 25 SASR 481.

[7140.20] Questions relating to state parliaments

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78B.

(CTH) [Commonwealth of the Australia Constitution Act](#) ss 106, 107.

The constitutions of the former colonies were not the same after federation as before; they continued “subject to this Constitution” and thus subjected to territorial limitations on state legislative powers inter se which are expressed or implied in the Australian Constitution ... Questions as to the legislative competence of state parliaments thus, within the meaning of [s 78B](#) of the Judiciary Act 1903 (Cth) ... involve a matter involving the interpretation of [ss 106](#) and [107](#) of the Constitution, even if that matter may not, in a particular case, arise under those provisions: *Boath v Wyvill* (1989) [85 ALR 621](#) at [634](#) per Sheppard, Beaumont and Gummow JJ.

[7140.25] Application of s 78B

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 40, s 78B, s 78B(2)(c).

[Section 78B](#) was criticised by Fitzgerald J in *Capelverre v Omega Developments Corp Pty Ltd* (1983) ATPR ¶40-386 on the ground that it would give rise to spurious or insubstantial claims which would lead to costly delays. For example, challenges could arise under [s 78B](#) where the High Court had decided the same issue in precisely the same circumstances, yet it would still be open to a party to raise the issue again, thereby holding up the state or territory court and wasting time in the High Court. Those observations may have occasioned the enactment of [s 78B\(2\)\(c\)](#): see *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* (2010) 184 FCR 516; [267 ALR 623](#); [\[2010\] FCA 428](#); [BC201002771](#) at [\[14\]](#) [CB](#).

[Section 78B](#) does not impose on a Court a duty not to proceed pending the issue of a notice no matter how trivial, unarguable or concluded the constitutional point may be. If the asserted constitutional point is frivolous or vexatious or raised as an abuse of process, it will not attach to the matter in which it is raised the character of a matter arising under the Constitution or involving its interpretation: *Nikolic v MGIC Ltd* [\[1999\] FCA 849](#); [BC9906969](#) [CB](#); *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292; [\(1999\) 167 ALR 303](#); [\[1999\] FCA 1151](#); [BC9907104](#) at [\[14\]](#) [CB](#) (French J); *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* (2010) 184 FCR 516; [267 ALR 623](#); [\[2010\] FCA 428](#); [BC201002771](#) at [\[14\]](#) [CB](#).

The courts in applying [s 78B](#) seem so far to have avoided these inherent problems. In *Green v Jones* [\[1979\] 2 NSWLR 812](#); (1979) 39 FLR 428 [CB](#), Hunt J refused an application for a declaration based on [s 78B](#), on the grounds that the circumstances did not justify an exceptional use of the declaratory power. However he also noted (NSWLR at 818; FLR at 435) that although the challenge technically fell under [s 78B](#), it was unlikely that the section “was intended to permit never-ending challenges to matters which have already been determined (particularly recently) by the High Court”.

Similarly, in *In the Marriage of Smith and Saywell* (1980) 47 FLR 267 at 269 the Full Court of the Family Court of Australia rejected a challenge under [s 78B](#) on the ground that the validity of the provision in question had already been tested and upheld by the High Court. However, it should be noted that the High Court has taken a different attitude in relation to [s 40](#), which concerns the removal of constitutional questions to that court. In *Re Application by Public Service Association of New South Wales* (1947) 75 CLR 430 [CB](#) the High Court held that, notwithstanding that a question appeared to have been decided in the High Court, the court was still obliged to remove a question which “really and substantially arose” under the Constitution, or involved its interpretation. See *Narain v Parnell* (1986) 9 FCR 479; [64 ALR 561](#) [CB](#), where these issues were raised but found unnecessary to decide on the facts of the case.

[7140.27] Continuing with hearing

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78B, s 78B(2), s 78B(2)(c).

The operation of [s 78B\(2\)\(c\)](#) is not confined to a case where the hearing has actually commenced. “[T]he Court is entitled to embark on a hearing provided that it can be conducted in a way that severs the matter arising under the Constitution, or involving its interpretation, until the proceedings reach the point where such severance cannot be maintained. It is possible in some cases, such as the present, to meet an oversight that has caused one Attorney-General not to be given a notice under [s 78B](#) by promptly giving a notice and asking for a timely response. In the meantime the Court can craft a procedure whereby the proceedings may otherwise continue. That could be by hearing, as in this case, the application to amend which may not have been able to be determined until after the Attorney had made known his attitude, or by dealing with other matters that were severable, including the taking of evidence from witnesses who were not concerned with the issue that is the subject of the notice”: see *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* (2010) 184 FCR 516; [267 ALR 623](#); [\[2010\] FCA 428](#); [BC201002771](#) at [\[16\]](#) [\[CB\]](#) (Rares J).

In *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292 at 296; [167 ALR 303](#); [\[1999\] FCA 1151](#); [BC9907104](#) [\[CB\]](#), French J described [s 78B\(2\)](#) as a “facility to continue proceedings on matters severable from the constitutional matter”.

Other cases where evidence and argument have been heard concerning severable matters include *Oreb v Professional Services Review Committee No 298* [\[2004\] FCA 1408](#); [BC200407425](#) at [\[17\]–\[21\]](#) [\[CB\]](#); *Tavalu v Minister for Immigration and Multicultural and Indigenous Affairs* [\[2002\] FCA 1027](#); [BC200204660](#) at [\[7\]](#) [\[CB\]](#).

[7140.30] Order for costs

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 78B.

Where the party who raises a constitutional issue has failed to give timely notice under [s 78B](#) and it is necessary to adjourn the hearing of the matter to permit that notice to be given, the other party will be entitled to an order for costs relating to the adjournment. Where the constitutional issue is one that is not obscure (having been widely publicised in the profession for a considerable period of time) and no satisfactory reason is advanced to explain the late notice, costs may be awarded on a solicitor/client basis: *Lidcombe Plastering Services (NSW) Pty Ltd v Intercool Construction Pty Ltd* (FCA, Tamberlin J, Nos NG 3359 and 3360 of 1995, 12 April 1996, unreported, [BC9601876](#)).

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > **DIVISION 2 APPLICATION OF LAWS [ss 79–81]**

DIVISION 2 APPLICATION OF LAWS [ss 79–81]

[7245] 79 State or Territory laws to govern where applicable

(1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

[subs (1) am Act 71 of 2008 s 3 and Sch 1[1], effective 2 July 2008]

(1A) For the purposes of subsection (1), a Court exercising federal jurisdiction in a proceeding is taken to be exercising federal jurisdiction in:

- (a) if the laws of a State or Territory apply to a part of the proceeding because of [subsection 68C\(5\)](#) — that State or Territory; or
- (b) if paragraph (a) does not apply:
 - (i) if the proceeding is transferred or remitted — the State or Territory to which the proceeding is transferred or remitted; and
 - (ii) otherwise — the State or Territory in which the proceeding is commenced;

except as otherwise provided by the Constitution or the laws of the Commonwealth.

[subs (1A) insrt Act 3 of 2022 s 3 and Sch 2 item 8, effective 18 February 2022]

(2) A provision of this Act does not prevent a law of a State or Territory covered by [subsection \(3\)](#) from binding a court under this section in connection with a suit relating to the recovery of an amount paid in connection with a tax that a law of a State or Territory invalidly purported to impose.

[subs (2) insrt Act 71 of 2008 s 3 and Sch 1[2], effective 2 July 2008]

(3) This subsection covers a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law doing any of the following:

- (a) limiting the period for bringing the suit to recover the amount;

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

- (b) requiring prior notice to be given to the person against whom the suit is brought;
- (c) barring the suit on the grounds that the person bringing the suit has charged someone else for the amount.

[subs (3) insrt Act 71 of 2008 s 3 and Sch 1[2], effective 2 July 2008]

(4) For the purposes of [subsection \(2\)](#), some examples of an amount paid in connection with a tax are as follows:

- (a) an amount paid as the tax;
- (b) an amount of penalty for failure to pay the tax on time;
- (c) an amount of penalty for failure to pay enough of the tax;
- (d) an amount that is paid to a taxpayer by a customer of the taxpayer and is directly referable to the taxpayer's liability to the tax in connection with the taxpayer's dealings with the customer.

[subs (4) insrt Act 71 of 2008 s 3 and Sch 1[2], effective 2 July 2008]

Section 79 Generally

[7245.5] Section 79 and federal courts

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 79.

"To ensure that state laws dealing with the particular topics mentioned in the section are applied in the exercise of federal jurisdiction by courts other than state courts, it is necessary that state laws be applied according to the hypothesis that federal courts do not necessarily lie outside their field of application. [Section 79](#) requires the assumption to be made that federal courts lie within the field of application of state laws on the topics to which it refers, at least in those cases in which the state laws are expressed to apply to courts generally": *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 95; [1 ALR 21](#).

[7245.10] Application to Family Court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 79.

[Section 79](#) applies to the Family Court the laws of the state in which it sits relating to procedure and evidence: *In the Marriage of Miller* (1977) 30 FLR 552; 3 Fam LN N57; (1977) FLC ¶90-308.

[7245.15] The role and function of s 79

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 79.

Of their own force, state laws have no application to proceedings involving the exercise of federal jurisdiction. [Section 79](#) fills the gap in the law that would otherwise apply: see *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; [161 ALR 399](#); [\[1999\] HCA 9](#); [BC9901019](#) at [\[35\]](#) [CB](#); *APLA Ltd v*

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Legal Services Cmr (NSW) (2005) 224 CLR 322; [219 ALR 403](#); [\[2005\] HCA 44](#); [BC200506315](#) at [\[230\]](#) [CB](#); *Gordon v Tolcher (liq Senafield Pty Ltd (in liq))* (2006) 231 ALR 582; [60 ACSR 522](#); [\[2006\] HCA 62](#); [BC200610441](#) at [\[30\]](#) [CB](#); *CSL Australia Pty Ltd v Formosa* (2009) 261 ALR 441; 235 FLR 273; [\[2009\] NSWCA 363](#); [BC200910120](#) at [\[23\]–\[24\]](#), [\[29\]](#) [CB](#).

In *Pavich v Bobra Nominees Pty Ltd* [\(1988\) 84 ALR 285](#) at [289–90](#), French J offered the following analysis of [s 79](#):

“It has been said that the section does not purport to do more than ‘pick up state laws with their meaning unchanged’: *Pedersen v Young* (1964) 110 CLR 162 at 165; [\[1964\] ALR 798](#) [CB](#) per Kitto J; *Re Young's Horsham Garage Pty Ltd (in liq)* [\[1969\] VR 977](#); (1967) 17 FLR 410 at 413 [CB](#) per Menhennitt J; *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65; [1 ALR 21](#) at [80](#), [83](#), [88](#) [CB](#) per Menzies, Walsh and Gibbs JJ; *Scotland v Bargaen* [\(1982\) 41 ALR 65](#) at [67](#) per Stephen J; *Adams v Anthony Bryant & Co Pty Ltd* (1986) 15 FCR 513; [67 ALR 616](#) at [619](#) [CB](#) per Wilcox J. But that proposition is necessarily qualified by the rationale of the provision, which is to apply rules of state law in cases to which they might otherwise be inapplicable. The section therefore requires the assumption to be made that courts exercising federal jurisdiction are bound to apply the rules of state law adopted by it: *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd*, above, CLR at 88 per Gibbs J; CLR at 95 per Mason J; CLR at 80 per Menzies J, agreeing. Courts exercising federal jurisdiction include state courts exercising such jurisdiction. Extension of the rules of state law via [s 79](#) to a state court exercising federal jurisdiction will no doubt be limited to the extension necessary to enable those rules to so apply.

There are at least three questions theoretically raised by any invocation of [s 79](#): (1) Which is the state whose law is applied by the section? (2) What is the proper construction of the state law? (3) How does the application of the rules of the state law adopted by the section vary from their direct application?

See generally, C Cook, “[Section 79](#) Judiciary Act 1903 — How widely does it travel?” (1987) 17 *Federal Law Review* 199; G Hill and A Beech SC, “‘Picking up’ State and Territory laws under [s 79](#) of the Judiciary Act — three questions” (2005) 27 *ABR* 25.

In *Solomons v District Court of New South Wales* [\(2002\) 192 ALR 217](#); 76 ALJR 1601 at [\[23\]](#) [CB](#), Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ referred to four limitations on the operation of [s 79](#):

First, the section operates only where there is already a court “exercising federal jurisdiction”, “exercising” being used in the present continuous tense. Secondly, [s 79](#) is addressed to those courts; the laws in question “shall ... be binding” upon them. The section is not, for example, directed to the rights and liabilities of those engaged in non-curial procedures under state laws. Thirdly, the compulsive effect of the laws in question is limited to those “cases to which they are applicable”. To that it may be added, fourthly, the binding operation of the state laws is “except as otherwise provided by the Constitution”.

[7245.20] Section 79 does not enlarge reach of state law

L Legislation cited in this paragraph

(VIC) [Companies Act 1961](#) s 263(2).

(CTH) [Judiciary Act 1903](#) s 64, s 79.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974 (Cth).

In *Re Young's Horsham Garage Pty Ltd (in liq)* [\[1969\] VR 977](#); (1967) 17 FLR 410 [CB](#), Menhennitt J

held that neither the Commonwealth nor the Deputy Commissioner of Taxation required leave under s 263(2) of the Companies Act 1961 (Vic) to institute Supreme Court proceedings seeking to recover moneys from a company in liquidation. This was because the Companies Act did not apply to the Crown in right of the Commonwealth; a provision declaring its intention to bind “the Crown” was to be read as a reference to the Crown in right of the state; and “[s 79](#) [of the Judiciary Act] as a matter of construction does not give s 263(2) of the Victorian Companies Act a new and more extensive meaning than it has as a matter of construction itself”: *Re Young's Horsham Garage Pty Ltd (in liq)* [1969] VR 977 at 979; (1967) 17 FLR 410 [CB](#).

In *Trade Practices Commission v Manfal Pty Ltd* (1990) 97 ALR 231 [CB](#), the Federal Court (Northrop, Wilcox and French JJ) held that the Trade Practices Commission did not require the leave under s 371(2) of the Companies (Western Australia) Code 1981 (WA) to institute proceedings in the Federal Court of Australia under the *Trade Practices Act 1974 (Cth)* against a company in liquidation. Wilcox J (with whose reasons Northrop J agreed) noted that the Companies Code was intended to bind the Crown in right of the Commonwealth “so far as the legislative power of the [Western Australian] Parliament permits” (s 358) and continued, at 244–5:

Unlike the position which applied in *Young's Horsham Garage* ... it cannot be said that, as a matter of construction, the relevant state law is not intended to bind the Commonwealth. Does this alter the situation?

I do not think that it does ... [Section 371(2)] would never have applied [to the Crown in right of the Commonwealth], not because the Western Australian Parliament intended that it should not apply, but because, as a matter of constitutional law, it was incapable of application. Whilst I accept that it would have been within the competence of the Commonwealth to pass legislation subjecting itself and its instrumentalities to this, as with any other, state law, it has not done so. [Section 79](#) can do no more than pick up, and apply to litigation in federal jurisdiction, a state law which would operate against a party in state jurisdiction

In *Re Pollack; Ex parte DCT* (1991) 32 FCR 40; [103 ALR 133](#) at [153–4](#) [CB](#), Gummow J observed:

... when the District Court [of New South Wales] exercises federal jurisdiction it is bound by [s 79](#) of the Judiciary Act to apply the laws of the State of New South Wales. The laws which may be picked up are not confined to those which are procedural in character; eg *Musgrave v Commonwealth* (1937) 57 CLR 514 [CB](#). But [s 79](#) binds the District Court only to the extent that provision otherwise is not made by the Constitution or the laws of the Commonwealth: *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 368–9; [97 ALR 555](#); (1990) ATPR 41–061. And the laws of the state only bind the District Court in “cases to which they are applicable”; if the relevant litigant in the District Court matter is the Commonwealth, it is [s 64](#) of the Judiciary Act 1903 which applies state law to the Commonwealth: *Trade Practices Commission v Manfal Pty Ltd* (1990) 97 ALR 231 at [262–3](#).

[7245.21] “except as otherwise provided”

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(WA) [Justices Act 1902 \(repealed\)](#) s 206A(2).

In *Northern Territory v GPAO* (1999) 196 CLR 553; [161 ALR 318](#) at [337](#); [\[1999\] HCA 8](#); [BC9900714](#) [CB](#), Gleeson CJ and Gummow J said:

The objective of [s 79](#) is to facilitate the particular exercise of federal jurisdiction by the application of a coherent body of law, elements in which may comprise the laws of the State or Territory in which the jurisdiction is being exercised, together with the laws of the Commonwealth, but subject always to the overriding effect of the Constitution itself. Seen in that light, the notion of “inconsistency” involved in the phrase “otherwise provided” in [s 79](#) is akin to that first identified by Mason J in the passage from the judgment in *University of Wollongong v Metwally* (1984) 56 ALR 1 at 463 set out earlier in these reasons. This is the need to resolve the problem that arises by conflict between conflicting

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

statutes having the same source. The law of a State or Territory which is to operate as a surrogate law of the Commonwealth is to be measured beside other laws of the Commonwealth.

Their Honours' reference is to a passage in which Mason J referred to the situation where "the provisions of two statutes are in conflict, so much so that they cannot be reconciled one with the other": ALR at 318, 330. See also *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136; [173 ALR 619](#); [\[2000\] HCA 39](#); [BC200004309](#) at [\[17\]](#) [CB](#), at [53] and at [106].

In *Macleod v ASIC* (2002) 211 CLR 287; [191 ALR 543](#); [\[2002\] HCA 37](#); [BC200205250](#) [CB](#), the High Court held that a state law, s 206A(2) of the Justices Act 1902 (WA) (which authorised the bringing of an appeal to the Full Court of the state Supreme Court against a single judge's decision to allow an appeal against conviction by a magistrate), was not picked up by [s 79](#) and applied to an appeal instituted by ASIC relating to a prosecution brought by ASIC. Section 49(2) of the Australian Securities Commission Act 1989 (Cth) authorised ASIC to "cause a prosecution of the person for the offence to be begun and carried on". That provision, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said at [43], did not authorise ASIC to take the step of appealing. So far as the state law (s 206A(2)) was concerned, their Honours said at [44]:

Where the law of a state purports to grant some wider power or authority to such an officer or body, then the law of the Commonwealth will be one by which it is "otherwise provided" for the purposes of [s 79](#) of the Judiciary Act. The result is that federal law did not empower the ASC to institute and conduct the appeal to the Full Court, nor did [s 79](#) "pick up" any provision of state law otherwise expressed in terms sufficiently broad to endow the ASC with the capacity to take those steps.

In *Gordon v Tolcher (liq Senafield Pty Ltd (in liq))* [\(2006\) 231 ALR 582](#); [60 ACSR 522](#); [\[2006\] HCA 62](#); [BC200610441](#) [CB](#), the High Court held that provisions of the District Court Rules 1973 (NSW) that allowed the court to extend the times fixed under the Rules (including extensions after the relevant time periods had expired) were picked up by [s 79](#) of the Judiciary Act, and that s 588FF of the Corporations Act 2001, which required certain applications to be made within 3 years or such longer period as a superior court specified on an application made within 3 years, did not "otherwise provide": see, above, at [32], [41].

[7245.22] Limitations on adoption of state laws

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Customs Act 1901](#).

(NSW) [Costs in Criminal Cases Act 1967](#) s 2, s 4.

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III.

In *Commonwealth v Mewett* (1997) 191 CLR 471 at 556; [146 ALR 299](#) at [352](#), Gummow and Kirby JJ pointed out that where a particular provision of state law is an integral part of a state legislation, [s 79](#) could not operate to pick up some but not all of the state legislative scheme, if to do so would be to give an altered meaning to the severed part of the state legislation.

In *Solomons v District Court of New South Wales* [\(2002\) 192 ALR 217](#); 76 ALJR 1601 [CB](#), the High Court held that [s 79](#) did not empower a judge of the District Court, exercising federal jurisdiction in respect of an offence against the Customs Act 1901 (Cth), to grant a certificate to the person found not guilty of the offence under s 2 of the Costs in Criminal Cases Act 1967 (NSW) (the Costs

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Act). The certificate, on presentation to a state official under s 4 of the Costs Act, would have authorised payment of the person's costs out of the consolidated revenue fund.

Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ raised several objections to the argument that [s 79](#) picked up the Costs Act:

- first, the certificate could only be used for the making of an application to an officer of the Executive Government of the state; but [s 79](#) “is not addressed to officers of the executive governments of the states. It is directed to certain courts”: at [25];
- second, the authority to make an application under s 4 of the Costs Act was conferred only upon the grantee of a certificate “pursuant to this Act”, but “[a] certificate granted on the hypothesis under consideration would not have been granted under the Costs Act. It would have been granted by operation of federal law upon the Costs Act”: at [26];
- third, no federal law effected “a corresponding transmutation upon s 4 of the Costs Act”, because the operation of [s 79](#) “does not reach the state officials specified in s 4 in the performance of their functions under that section”: at [27];
- fourth, “the grant of a certificate by a court exercising federal jurisdiction would involve it in the exercise of power not provided by [Ch III](#) of the Constitution. It would be productive of a futility, not the resolution of any claim or controversy ... Nor would the grant of a certificate be the exercise by the court of an administrative function ‘truly appurtenant’ to the exercise by the court of its judicial power to conduct the trial of the applicant for the certificate [cf *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation (No 2)* (1982) 152 CLR 179 at 186–7; [43 ALR 693](#) at [698–9](#) per Brennan J]. The terms of [s 79](#) expressly deny any operation which would require or empower courts exercising federal jurisdiction to pass beyond the limits of [Ch III](#) of the Constitution”: at [28].

[7245.25] Application of laws of another state

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

Where an action was commenced in the Melbourne registry of the High Court and remitted to the Supreme Court of New South Wales for hearing, [s 79](#) of the Judiciary Act 1903 required the Supreme Court to apply New South Wales laws of procedure, and did not permit the court to apply Victorian legislation barring the proceedings: “[L]imitation provisions of a procedural nature, if they are picked up by [s 79](#) at all, are picked up only in proceedings being heard in a court of the state which has enacted the limitation legislation ... [\[Section\] 79](#) does not authorise a state court exercising federal jurisdiction to apply the legislation of another state to the proceedings”: *Commonwealth v Dixon* ([1988](#)) [13 NSWLR 601](#); [82 ALR 359](#) at [364–5](#) ^{CB} per Hope JA.

[7245.27] Application of laws of State where suit against Commonwealth remitted to Federal Court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 64, s 79.

(NSW) [Limitation Act 1969](#).

In *Commonwealth v Mewett* (1997) 191 CLR 471; [146 ALR 299](#) ^{CB}, the High Court considered the question of the statute of limitations to be applied when the Commonwealth was sued in tort in three

matters commenced in the Sydney Registry of the High Court and remitted to the Federal Court for hearing, where the cause of action was said to have arisen, in two of the matters, in New South Wales and, in one of the matters, in Victoria. Brennan CJ held that [s 79](#) of the Judiciary Act 1903 picked up and applied the Limitation Act 1969 (NSW) to the suits against the Commonwealth: ALR at 301. Dawson J (with whom McHugh J agreed) came to the same conclusion (ALR at 313, 315), as did Gummow and Kirby JJ: ALR at 351–2.

Among the propositions developed by Gummow and Kirby JJ (ALR at 352), and indorsed by Brennan J (ALR at 301) were the following:

The first is that the consequence of the rendition by [s 79](#) of the Judiciary Act 1903 of the NSW Act as a surrogate law of the Commonwealth was, in conjunction with [s 64](#) of the Judiciary Act 1903, to afford to the Commonwealth such defences under the NSW Act as apply in litigation between citizens.

Secondly, the adoption of the NSW Act allowed the plaintiffs to utilise the means and procedures for extensions of time as counters to what otherwise would be limitation defences against them.

Thirdly, the Commonwealth could utilise the NSW Act only on its own terms and after the amendments by the 1990 Act. These provide for a regime of extensions of limitation periods as an integral part of the legislative scheme. [Section 79](#) could not operate to pick up some but not all of the otherwise applicable terms of the NSW Act, for to do so would be to give an altered meaning to the state legislation.

[7245.28] State law providing for remedy in state court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Corporations Act 2001](#) s 737.

(NSW) [Contracts Review Act 1980](#).

In *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* ([2001](#)) [177 ALR 329](#); 19 ACLC 427; [\[2001\] HCA 1](#); [BC200100154](#) [\[CB\]](#), a majority of the High Court held that the effect of [s 79](#) was that, when exercising jurisdiction to determine a controversy, the Federal Court had the power in the exercise of that jurisdiction to grant a remedy provided by state legislation (s 737 of the Corporations Law of Victoria) notwithstanding that the state legislation identified a particular state court as the forum in which that remedy was available. Gleeson CJ, Gaudron and Gummow J said at [68]:

“It is well established from the decisions under [s 79](#) of the Judiciary Act, most recently that in *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136; [173 ALR 619](#); 74 ALJR 1184 at [13] [\[CB\]](#), that a State statute may be applicable as a source of rights and remedies in federal jurisdiction even though, on its own terms, that law identifies only the courts of the enacting State as the courts to provide those remedies.”

At [72]–[74], their Honours recognised that particular statutory provisions might be couched in terms which made it impossible for those provisions to be picked up by [s 79](#) — for example, a state law expressed in terms which made it impossible for the power conferred by the law to be exercised otherwise than by a state court; and a state law which conferred a function that was incapable of being exercised as part of the judicial power of the Commonwealth.

McHugh J said at [137]:

The fact that a state statute either expressly or as a matter of construction provides only for state courts to enforce its

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

provisions does not mean that it cannot be “picked up” and applied by [s 79](#) of the Judiciary Act in the exercise of federal jurisdiction.

Similarly, in *Murphy v Overton Investments Pty Ltd* ([2001](#)) [182 ALR 138](#); (2001) ATPR ¶41-819 [CB](#), the Full Federal Court held that, where the Federal Court was exercising federal jurisdiction in NSW in relation to a controversy arising out of a contract, [s 79](#) of the Judiciary Act gave the Federal Court power to grant a remedy under the Contracts Review Act 1980 (NSW). After referring to *Edensor Nominees*, above, Branson J (with whose reasons Nicholson and Gyles JJ agreed) said:

[T]he majority in *Edensor* made it plain that a state statute may be applicable as a source of rights and remedies in federal jurisdiction even though by its terms, the state statute identifies only a court of the state as the forum for the enforcement of the rights and remedies.

INTEREST ON DAMAGES

[7245.30] Application of s 94 of the Supreme Court Act 1970 (NSW)

L Legislation cited in this paragraph

(NSW) [Supreme Court Act 1970](#) Section 94.

(CTH) [Judiciary Act 1903](#) s 79.

Section 94 of the Supreme Court Act 1970 (NSW) confers power on the Supreme Court of New South Wales to award interest in respect of damages as part of the judgment. In *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582; [6 ALR 433](#) [CB](#), Mason J said that [s 79](#) of the Judiciary Act 1903 did not render s 94 applicable to proceedings in the High Court. “No matter how widely it may travel in some respects, [s 79](#) does not in my view pick up and apply in this court a provision which empowers a particular court of a state to make orders and enter judgments in proceedings in that court. The relevant powers of this court are conferred by the [Judiciary Act 1903](#) and the [High Court Procedure Act 1903](#) ... as I see it they are not to be supplemented by the operation of [s 79](#) of the Judiciary Act in the manner suggested”: ALR at 435–6.

The views expressed by Mason J were described by Gibbs CJ as obiter in *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1984) 154 CLR 579 at 585; [53 ALR 625](#) at [629](#). Gibbs CJ said that “[t]he operation of [s 79](#) in a case such as this raises very difficult questions” and declined to express any concluded opinion on the question whether [s 79](#) rendered s 94 of the Supreme Court Act applicable to proceedings in the High Court or the Federal Court: CLR at 585–6. In *State Bank of New South Wales v Commonwealth Savings Bank of Australia* ([1986](#)) [67 ALR 123](#) [CB](#), Lockhart J held that [s 79](#) did not make s 94 of the Supreme Court Act applicable to proceedings in the Federal Court, sitting in New South Wales. Section 94 “is a substantive, not a procedural, provision and ... it is cast in language necessarily confined to the power of the Supreme Court of New South Wales, thus being inapplicable by virtue of [s 79](#) of the Judiciary Act to this court as a court exercising federal jurisdiction in New South Wales”: at 127.

See however the differing views on the scope and operation of [s 79](#) set out in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65; [1 ALR 21](#) [CB](#).

[7245.35] Application of s 30C of the Supreme Court Act 1935 (SA)

L Legislation cited in this paragraph

(SA) [Supreme Court Act 1935](#) Section 30C.

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974.

Section 30C of the Supreme Court 1935 Act (SA) authorises the Supreme Court of South Australia to award interest in respect of damages as part of the judgment. In *Hubbards Pty Ltd v Simpson Ltd* (1982) 41 ALR 509; 60 FLR 430; (1982) ATPR ¶40-295 ^{CB}, the Federal Court (Lockhart J) held that [s 79](#) of the Judiciary Act 1903 did not operate to pick and apply s 30C of the Supreme Court Act to an action under the [Trade Practices Act 1974](#) brought in the Federal Court, sitting in South Australia. In coming to this conclusion, Lockhart J adopted the reasoning of Mason J in *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582; [6 ALR 433](#) ^{CB} and *Hubbards Pty Ltd v Simpson Ltd*, above, ALR at 525–6; FLR at 447–8.

[7245.40] Application of s 79A of the Supreme Court Act 1958 (Vic)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 60, s 79.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974.

Section 79A of the Supreme Court Act 1958 (Vic) directs the Supreme Court of Victoria, in all actions for recovery of debt or damages to give damages in the nature of interest from the commencement of the action until entry of judgment. [Section 60](#) applied s 79A to all Victorian courts having jurisdiction to determine actions for recovery of debt or damages. In *Centrepont Freeholds Pty Ltd v TN Lucas Pty Ltd* (1985) 6 FCR 133 at 143; [60 ALR 187](#) at [197](#) the Federal Court (Sweeney and Woodward JJ) held that [s 79](#) of the Judiciary Act 1903 made s 79A of the Supreme Court Act applicable in an action for damages for deceit being heard by the Federal Court, sitting in Victoria, together with a claim for damages under the [Trade Practices Act 1974](#):

In the present case this court is exercising federal jurisdiction in the State of Victoria and in the course of doing so [is] enforcing rights which derive from the law of that state. It seems hardly appropriate to construe [s 79](#) in a fashion which would make part only of that law applicable to the grant of the appropriate relief, so that there would be a difference between the award to be made in this court and that which would be made in a state court in respect of the identical cause of action, namely deceit

[7245.45] Application of s 72 of the Common Law Practice Act (Qld)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Competition and Consumer Act 2010](#) s 52.

(CTH) [Bankruptcy Act 1966](#).

Section 72 of the Common Law Practice Act (Qld) provides that in any proceedings in “a court of record” for the recovery of money, the court may include interest in the sum for which judgment is given. In *Neilsen v Hempston Holdings Pty Ltd* (1986) 65 ALR 302 at [311–12](#), the Federal Court (Pincus J) held that [s 79](#) of the Judiciary Act 1903 made 72 of the Common Law Practice Act applicable where the Federal Court, sitting in Queensland, awarded damages for a breach of s 52 of the Trade Practices Act 1974 (Cth).

The expression “court of record” in the Queensland section means a Queensland court of record, but that does not prevent [s 79](#) of the Judiciary Act from making it applicable in cases in this court. State statutes picked up by [s 79](#), especially those relating to “procedure, evidence and the competency of witnesses”, must be so drawn as to apply to state courts only and when [s 79](#) makes such statutes binding on “all courts exercising federal jurisdiction in that state ...” it must mean to make them binding as if they referred to the latter category of courts. As Gibbs J (as he then was) remarked in *Maguire v Simpson* (1977) 139 CLR 362 at 376; [18 ALR 469](#) at [478](#): “... a state law may be rendered applicable by [s 79](#) to a court exercising federal jurisdiction, which is not a state court, notwithstanding that the law according to its own terms is limited in its application to the courts of the state.”

In *Re Lyons; Ex parte Allpass v Qantas Staff Credit Union Ltd* [\(1989\) 87 ALR 69](#) ^{CB}, the Federal Court (Spender J) held that [s 79](#) of the Judiciary Act 1903 made s 72 of the Common Law Practice Act applicable where the Federal Court, sitting in Queensland, declared that a payment was a preference under the [Bankruptcy Act](#), so that the court could order the recipient of the preference to pay interest on the amount wrongfully received.

In *Truss v Brazier* [\(1990\) 96 ALR 767](#) at [790](#), the majority of the Supreme Court of Queensland (Kneipp and Sheperdson JJ) left open the question whether [s 79](#) of the Judiciary Act 1903 made s 72 of the Common Law Practice Act applicable where the District Court of Queensland awarded damages under s 52 of the Trade Practices Act 1974.

In *Smallacombe v Lockyer Investment Co Pty Ltd* (1993) 42 FCR 97; [114 ALR 568](#) ^{CB} Spender J held that the power to award interest, in a claim under s 52 of the Trade Practices Act 1974, arose “by operation of [s 79](#) of the Judiciary Act 1903 in relation to s 72 of the Common Law Practice Act (Qld)”.

[7245.50] Application of s 32 of the Supreme Court Act 1935 (WA)

L Legislation cited in this paragraph

(WA) [Supreme Court Act 1935](#) s 32, Section 34.

(CTH) [Judiciary Act 1903](#) s 79, s 82.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974, s 52.

Section 32 of the Supreme Court Act 1935 (WA) authorises the Supreme Court of Western Australia, in any proceedings for the recovery of money, to order that interest be paid on the amount for which judgment is given. Section 34 makes s 32 applicable “in all courts whatsoever in Western Australia so far as [it] shall be ... cognisable by such courts”. In *Nella v Kingia Pty Ltd* (1985) 11 FCR 281; [61 ALR 603](#) ^{CB}, the Federal Court (Toohey J) held that [s 79](#) of the Judiciary Act 1903 made s 32 of the Supreme Court Act applicable where the Federal Court, sitting in Western Australia, has awarded damages in a common law cause of action, in the exercise of its accrued jurisdiction. Toohey J observed that a similar conclusion would not necessarily operate in the case of a judgment for breach of a section of the [Trade Practices Act 1974](#) (Cth): FCR at 284; ALR at 606.

In *Schepis v Elders IXL Ltd* [\(1986\) 70 ALR 729](#) ^{CB}, the Federal Court (Pincus J) held that [s 79](#) of the Judiciary Act made s 32 of the Supreme Court Act applicable where the Federal Court, sitting in Western Australia, entered judgment in an application for a breach of s 52 of the Trade Practices Act 1974, breach of contract and negligence.

In *Pavich v Bobra Nominees Pty Ltd* [\(1988\) 84 ALR 285](#) at [293](#), the Federal Court (French J) held that [s 79](#) of the Judiciary Act did not make s 32 of the Supreme Court Act applicable where the

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Federal Court, sitting in Western Australia, entered judgment in relation to a claim made under the Trade Practices Act 1974.

Section 32 does not apply to the cause of action created by [s 82](#) [of the Judiciary Act] and could not be so transmuted by [s 79](#) of the Judiciary Act 1903 as to apply it in the exercise of jurisdiction by this court under [s 82](#). A contrary view would be inconsistent with the limitation that [s 79](#) picks up state laws “with their meaning unchanged”. And it could not be justified by the qualification on that limitation referred to in *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65; [1 ALR 21](#) ^{CB} for that qualification could only operate in this case to extend the range of courts which could exercise the power. It would not authorise its exercise on a subject-matter to which it never applied directly.

PROCEEDINGS AGAINST COMPANY IN LIQUIDATION

[7245.55] Application of s 371(2) of the Companies (Western Australia) Code 1981 (WA)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Competition and Consumer Act 2010](#) s 52A.

Section 371(2) of the Companies (Western Australia) Code 1981 (WA) provided that, upon the appointment of a liquidator or the winding up of a company, no action or other civil proceeding may be commenced or proceeded with against that company without the leave of the Supreme Court. In *Trade Practices Commission v Manfal Pty Ltd* ([1990](#)) [97 ALR 231](#) ^{CB}, the Full Federal Court (Northrop, Wilcox and French JJ) held that [s 79](#) of the Judiciary Act 1903 did not make s 371(2) of the Companies (Western Australia) Code applicable to proceedings in the Federal Court for a declaration that a company had breached [s 52A](#) of the Trade Practices Act. Although the Companies Code purported to apply to the Crown in right of the Commonwealth, Wilcox J said, “as a matter constitutional law, it was incapable of application”; and [s 79](#) could “do no more than pick up, and apply to litigation in federal jurisdiction, a state law which would operate against a party in state jurisdiction”: at 244, 245.

LAWS RELATING TO EVIDENCE

[7245.57] Effect of the Evidence Act 1995

L Legislation cited in this paragraph

(CTH) [Evidence Act 1995](#) s 4(1), s 5, s 8(1), s 9, s 9(1), (2), (3).

(CTH) [Judiciary Act 1903](#) ss 68, 79, 80, 80A.

The commentary in the following paragraphs (from 18 April 1995) must be read in the light of the provisions of the [Evidence Act 1995 \(Cth\)](#).

The Evidence Act introduces a comprehensive federal code of evidence. The Act applies in relation to all proceedings in “a federal court or an ACT court”: [s 4\(1\)](#). The term “federal court” is defined in the Act’s Dictionary to mean the High Court and any other court created by the Parliament (other than the Supreme Court of a Territory); and “ACT court” is defined to mean the Supreme Court of the Australian Capital Territory or any other court of that territory.

Certain other provisions of the Act (listed in the Table to [s 5](#)) apply in relation to all proceedings in an

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

“Australian court”: [s 5](#); and the term “Australian court” is defined in the Dictionary to mean (inter alia) the High Court, a court exercising federal jurisdiction or a court of a state or territory.

[Section 8\(1\)](#) of the Act declares: “This Act does not affect the provisions of any other Act, other than [sections 68, 79, 80](#) and [80A](#) of the Judiciary Act 1903.”

[Section 9](#) of the Act declares that the Act does not affect the operation of a law of a state or territory so far as the law relates to the matters listed in [s 9\(1\)](#), [\(2\)](#) and [\(3\)](#) of the Act.

[7245.60] Application of s 5 of the Printing and Newspapers Act 1973 (NSW)

L Legislation cited in this paragraph

(NSW) [Printing and Newspapers Act 1973](#) Section 5.

(CTH) [Judiciary Act 1903](#) s 79.

Section 5 of the Printing and Newspapers Act 1973 (NSW) provides that a document on which is printed a name purporting to be the name of the person on whose instructions the document was printed “shall be received by all courts ... in any proceedings ... as prima facie evidence” that the document was printed on that person’s instructions. In *Trade Practices Commission v TNT Management Pty Ltd* [\(1984\) 56 ALR 647](#) at [700](#), the Federal Court (Franki J) held that [s 79](#) of the Judiciary Act 1903 made s 5 of the Printing and Newspapers Act applicable to proceedings in the Federal Court, sitting in New South Wales. Franki J said (at 701) that “the purpose of [s 79](#) is to ensure that any law relating to evidence is available in a Federal Court exercising jurisdiction in New South Wales unless it is so ‘otherwise provided’ by a law of the Commonwealth”.

[7245.65] Application of s 29 of the Stamp Duties Act 1920 (NSW)

L Legislation cited in this paragraph

(NSW) [Stamp Duties Act 1920](#) Section 29.

(CTH) [Judiciary Act 1903](#) s 79.

Section 29 of the Stamp Duties Act 1920 (NSW) provides that no instrument executed in New South Wales or relating to any property, matter or thing in New South Wales shall be admissible in any proceedings unless duly stamped. In *Davis v FCT* [\(1989\) 86 ALR 195](#) [\[CB\]](#), the Federal Court (Hill J) held that [s 79](#) of the Judiciary Act 1903 made s 29 of the Stamp Duties Act applicable to proceedings in the Federal Court, sitting in New South Wales, where one of the parties sought to tender in evidence an unstamped deed of assignment relating to property in New South Wales. The judgment of the court contains a detailed discussion of the history and effect of [s 79](#). The court held, inter alia (at 214), that if a state Act is not expressly or by necessary implication limited to a state court, [s 79](#) of the Judiciary Act 1903 will operate to make the state law applicable to a court exercising federal jurisdiction; s 29 of the Stamp Duties Act is expressed in general terms and there was no reason to read it as restricted in its application to a state court (at 215); and, even if s 29 of the Stamp Duties Act was a substantive rather than a procedural provision, there was no reason to limit [s 79](#) of the Judiciary Act to procedural matters: at 216.

[7245.70] Application of s 11 of the Evidence Act 1906 (WA)

L Legislation cited in this paragraph

(WA) [Evidence Act 1906](#) Section 11.

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

Section 11 of the Evidence Act 1906 (WA) modifies the right of a witness to decline to answer a question put to him or her in the course of a court proceeding so as to avoid self-incrimination. In *Re Application for Inquiry, Election of Officers, Transport Workers Union of Australia, Western Australian Branch* (1989) 89 ALR 575 ^{CB}, the Federal Court (French J) held that either [s 79](#) or [80](#) of the Judiciary Act 1903 made s 11 of the Evidence Act applicable in proceedings before the Federal Court, sitting in Western Australia, commenced under Div 5 of Pt IX of the Industrial Relations Act 1988. French J said (at 579) that s 11 was “intended to be exercised by the judge of a superior court and certainly not restricted to a particular court of the state. Such a provision may be distinguished from a state law which nominates a specific court to exercise a power in which event other effects of the provision may be adopted by virtue of [s 79](#) of the Judiciary Act 1903, but the exercise of the particular power provided by the state Act will remain reserved to the nominated court”.

[7245.75] Application of s 79C of the Evidence Act 1906 (WA)

L Legislation cited in this paragraph

(WA) [Evidence Act 1906](#) Section 79C.

(CTH) [Judiciary Act 1903](#) s 79.

Section 79C of the Evidence Act 1906 (WA) deals with the admissibility into evidence of certain documents. It “is plainly a law of the state relating to evidence”; the Evidence Act 1905 (Cth) deals with the admissibility of business records but not of other documents, so that the Commonwealth Act does not “otherwise provide” within the meaning of [s 79](#) of the Judiciary Act 1903. It follows that, in relation to documents other than business records, s 79C of the Evidence Act 1906 (WA) is binding on a court exercising federal jurisdiction: *Multi Modal Ltd v Polakow* (1987) 78 ALR 553 at [560](#).

[7245.80] Application of s 92(1)(a) of the Evidence Act 1977 (Qld)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(QLD) [Evidence Act 1977](#) s 92(1)(a).

“The Commonwealth has covered the field of the admissibility of business records. In my view, however, it has not entered on the field of the admissibility of other statements in writing. The absence of any provision concerning such statements is consistent with a desire to allow state laws to operate in courts exercising federal jurisdiction, pursuant to [s 79](#) of the Judiciary Act 1903 so that s 92(1)(a) Evidence Act 1977 (Qld) operates in this case”: *McGarry v Boonah Clothing Pty Ltd* (1988) 80 ALR 284 at [288](#) per Gray J.

[7245.85] Application of s 92(1)(b) of the Evidence Act 1977 (Qld)

L Legislation cited in this paragraph

(QLD) [Evidence Act 1977](#) s 92(1)(b).

(CTH) [Judiciary Act 1903](#) s 79.

Where a document forming part of a record of business was sought to be tendered in proceedings before the Federal Court sitting in Queensland, under s 92(1)(b) of the Evidence Act, the Federal

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

Court (Spender J) decided that the state provision was inconsistent with Pt IIIA of the Evidence Act 1905 (Cth) and, to the extent that [s 79](#) would have otherwise made s 92(1)(b), the state provision was invalid: *Supetina Pty Ltd v Lombok Pty Ltd* (1984) 5 FCR 439; [59 ALR 581](#) [CB](#).

[7245.90] Application of Pt IIC of the Evidence Act 1898 (NSW)

L Legislation cited in this paragraph

(NSW) [Evidence Act 1898](#) Part IIC.

(CTH) [Competition and Consumer Act 2010](#) Trade Practices Act 1974.

(CTH) [Judiciary Act 1903](#) s 79.

Part IIC of the Evidence Act 1898 (NSW) provides for the admission into evidence in court proceedings of certain business documents. In *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313; [97 ALR 555](#); (1990) ATPR ¶41-061 [CB](#), the Full Federal Court (Lockhart, Wilcox and Gummow JJ) held that Pt IIC could not be invoked in proceedings before the Federal Court, sitting in New South Wales, under the [Trade Practices Act 1974](#). This was because the Evidence Act 1905 (Cth) “makes extensive provision for the admission into evidence of business records and effectively covers that field. It has ‘otherwise provided’ within the meaning of [s 79](#) of the Judiciary Act 1903: compare *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 64; [78 ALR 641](#) at 664. There is no room, therefore, for the application of the provisions of the New South Wales Evidence Act to the admissibility of business records”: *Arnotts Ltd v Trade Practices Commission*, above, ALR at 613.

[7245.92] Application of s 464M of the Crimes Act 1958 (Vic)

L Legislation cited in this paragraph

(VIC) [Crimes Act 1958](#) Section 464M.

(CTH) [Judiciary Act 1903](#) s 79.

Section 464M of the Crimes Act 1958 (Vic), authorising a magistrate to order that a “suspect” provide her or his fingerprints, is not a law relating to evidence within [s 79](#) of the Judiciary Act 1903 and is not rendered applicable to a person suspected of a federal offence by that provision of the [Judiciary Act 1903](#): *Grollo v Bates* (1994) 53 FCR 218; [125 ALR 492](#) at 510; 75 A Crim R 271 [CB](#) perinfeld J.

[7245.93] Application of s 97(3) of the Community Welfare Act 1983 (NT)

L Legislation cited in this paragraph

(NT) [Community Welfare Act 1983](#) Section 97(3).

Section 97(3) of the Community Welfare Act 1983 (NT), prohibiting an “authorised person” from producing in court a document that has come into the person's possession or under the person's control, is rendered binding on the Family Court of Australia when that court is exercising jurisdiction in the Northern Territory, and prevents the issue of a subpoena requiring the production to the court of documents protected by s 97(3): *Northern Territory v GPAO* (1999) 161 ALR 318; 73 ALJR 470 [CB](#).

ARBITRATION CLAUSE

[7245.95] Application of s 53 of the Commercial Arbitration Act 1985 (WA)

L Legislation cited in this paragraph

(WA) [Commercial Arbitration Act 1985](#) Section 53.

(CTH) [Judiciary Act 1903](#) s 79.

Section 53 of the Commercial Arbitration Act 1985 (WA) authorises a court to stay proceedings in that court where the proceedings relate to a matter which the parties had previously agreed should have been referred to arbitration. In *Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 17 FCR 487; [71 ALR 125](#), the Federal Court (French J) noted that s 53 “applies to courts generally, although as a matter of construction it would be limited in its direct application to Western Australian courts” and held that s 53 was “therefore picked up by [s 79](#) [of the Judiciary Act] and made applicable to the proceedings now before the court” (an action for damages arising out of a contract between the parties): *Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 17 FCR 487; [71 ALR 125](#) at [139](#).

LIMITATION OF ACTIONS

[7245.100] Application of s 38(1)(a)(i) of the Limitation Act 1935 (WA)

L Legislation cited in this paragraph

(WA) [Limitation Act 1935](#) s 38(1)(a)(i).

(CTH) [Judiciary Act 1903](#) s 79.

(CTH) [Racial Discrimination Act 1975](#) s 25Z.

In *Ardeshirian v Robe River Iron Associates* (1993) 43 FCR 475; [116 ALR 173](#) ^{CB}, French J, said that s 38(1)(a)(i) of the Limitation Act 1935 (WA) could have no direct application to proceedings in the Federal Court, nor to proceedings in a state court exercising federal jurisdiction. It could only apply in such proceedings by virtue of [s 79](#) of the Judiciary Act 1903. Section 38(1)(a)(i) fixed a two-year limitation period for actions for penalties, damages or sums given by any enactment to the party aggrieved; and the question raised in *Ardeshirian* was whether that limitation period applied to a proceeding in the Federal Court to enforce a decision of the Human Rights and Equal Opportunity Commission, pursuant to s 25Z of the Racial Discrimination Act 1975, that the respondent had engaged in conduct rendered unlawful by the Racial Discrimination Act and should pay the applicant \$10,000 by way of compensation. Although it seemed probable, French J said, that [s 79](#) of the Judiciary Act would operate to apply the Limitation Act 1935 (WA) to some classes of actions instituted in the Federal Court, s 38(1)(a)(i) of the Limitation Act did not apply to the present proceedings because the claim under the Racial Discrimination Act was for compensatory and remedial relief and was not a penalty action.

[7245.105] Application of s 14(1) of the Limitation Act 1969 (NSW)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

In *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581; [144 ALR 89](#) ^{CB}, the Full Court of the Federal Court held that s 14(1) of the Limitation Act 1969 (NSW) applied to a proceeding for recovery of moneys paid under mistake of law brought in the New South Wales Registry of the Federal Court. In a judgment adopted by both Foster and Lindgren JJ, Sackville J (FCR at 592–3; ALR at 98–9)

(CTH) Judiciary Act 1903 [7245] s 79 State or Territory laws to govern where applicable

indorsed the following remarks of Mahoney JA from *Commonwealth v Dixon* [\(1988\) 13 NSWLR 601](#) at [622](#); [82 ALR 359](#) at [378–9](#):

I am inclined to the view that, in any event, the Judiciary Act (Cth) [s 79](#), would cause a State statute of limitation to apply in an appropriate case where the plaintiff's claim was determined by a court exercising federal jurisdiction ... If a general statute of limitation is not a "law relating to procedure" within that section, then it will be applied by operation of the section. If it is a "law relating to procedure" within that section, then it will be applied by operation of the section. If it is a "law relating to procedure" then prima facie it is applied directly by terms of [s 79](#) ("including the laws relating to procedure ...") ...

And, in my opinion, the State limitation law would apply even if, on its proper construction, it was intended to apply only to proceedings brought in State Courts ... However, if the State limitation statutes be so construed, the effect of [s 79](#) is, in my opinion, to apply them, appropriately extended, in proceedings in the relevant federal courts.

[7245.110] Application of s 68 of the Supreme Court Act 1970 (NSW)

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 79.

(NSW) [Supreme Court Act 1970](#) s 68.

In *Matthews v ACP Publishing Pty Ltd* [\(1998\) 157 ALR 564](#) at [572](#), Beaumont J held that [s 79](#) of the Judiciary Act 1903 rendered s 68 of the Supreme Court Act 1970 (NSW) applicable to a proceeding in the Federal Court sitting in New South Wales, so that the court was empowered to award damages in support of or in lieu of an injunction for breach of copyright.

End of Document

(CTH) Judiciary Act 1903 [7250] s 80 Common law to govern

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 2 APPLICATION OF LAWS \[ss 79–81\]](#)

[7250] 80 Common law to govern

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

[s 80 am Act 120 of 1988 s 41]

Section 80 Generally

[7250.5] Common law in Australia

L Legislation cited in this paragraph

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

(CTH) [Australia Act 1986](#).

In 1988 the phrase “common law in Australia” substituted in [s 80](#) the phrase “common law of England”. This followed criticism of the anachronistic nature of [s 80](#) in *Adams v ETA Foods Ltd* (1987) 19 FCR 93; [78 ALR 611](#) at [614](#); (1987) ATPR ¶40-831 [CB](#) per Gummow J:

[Section 80](#) rests upon the premise, which would have been accepted without question in 1903, that the common law was universal and indivisible in character. However, at least since *Australian Consolidated Press v Uren* (1967) 117 CLR 221; [\[1969\] 1 AC 590](#) [CB](#), it has been plain that this premise is no longer true and that the common law as evolved in this country may diverge from that of England. The preservation of [s 80](#) in its original form thus has become an anachronism. This is so a fortiori since the coming into effect of the [Australia Act 1986 \(Cth\)](#); see generally Sir Anthony Mason “Future Directions in Australian Law”, being the Wilfred Fullagar Memorial Lecture 1987, pp 5–12. The result is that the application of [s 80](#) now, strictly, may require evidence of foreign law to be proved as a factual matter (*Cross on Evidence*, 3rd Aust ed, s 21.2), a strange situation.

[Section 80](#) has particular relevance where a court exercises federal jurisdiction in a matter where the laws of more than one law area may be applicable to the issues in dispute between the parties — where a “choice of law” is required. In *Commonwealth v Mewett* (1997) 191 CLR 471; [146 ALR 299](#) ^{CB}, Gaudron J said that a court exercising federal jurisdiction (whether the High Court, the Federal Court or a state court) did so throughout Australia, not merely in its states (CLR at 525), and identified [s 80](#) of the Judiciary Act as taking primacy over [s 79](#) and directing the application of the choice of law rules that were part of the common law in Australia: CLR at 522, 525, 526.

In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [172 ALR 625](#) ^{CB}, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ adopted the reasoning of Gaudron J in *Mewett*, above and noted that, in a case brought in the Australian Capital Territory arising out of a tort said to have been committed in New South Wales, all parties “proceeded on the basis that the Territory Court was obliged by [s 80](#) to apply the common law choice of law rules as part of the common law of Australia”: at [55]. Their Honours invoked [s 80](#) of the Judiciary Act as the basis for holding that the choice of law rule which was part of the common law in Australia required the trial court to apply the law of the place where the tort was committed: at [103].

In *Blunden v Commonwealth* (2003) [203 ALR 189](#); 78 ALJR 236 ^{CB}, the High Court held that the applicable law to determine the liability of the Commonwealth arising out of a tort committed on the high seas was to be identified by proceeding directly through [s 80](#) to the modification of the common law respecting limitation of actions effected by the relevant statute law of the forum where the Commonwealth was sued: at [45], [101], [109]. Gleeson CJ, Gummow, Hayne and Heydon JJ referred to Gaudron J’s analysis in *Mewett*, above and at [18] added two points to her Honour’s proposition that s 80 directed the application of the common law rules for choice of law in federal jurisdiction:

The first is that the application of any rules of the common law will, in the terms of [s 80](#), be subjected to any modification, in the present case, by the statute law in force in the territory. The second is that, if there is no common law choice of law rule relevant to the issues in the litigation, but the common law rule as to the absence of time bars is modified by territory law, then [s 80](#) applies that modification, and this furnishes the limitation law which governs the action.

[7250.10] Common law displaced by state or federal legislation

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) ss 79, s 80.

(NSW) [Crimes Act 1900](#) s 404.

In *Adams v ETA Foods Ltd* (1987) 19 FCR 93; [78 ALR 611](#) at [614–15](#); (1987) ATPR ¶40-831 ^{CB}, Gummow J said that the need for evidence to prove the common law of England did not arise in the present case. This was “because state and federal law operates to modify common law and, in the result, [s 80](#) has effect before one reaches English common law”. The common law rule, upon which the defendant sought to rely in the present matter, was “the apparent rule in England that formal admissions of particular facts, as opposed to the plea of guilty, are disallowed at a criminal trial”. Gummow J held that this rule was displaced by s 404 of the Crimes Act 1900 (NSW), which was made applicable to the present proceedings by [ss 79](#) and [80](#) of the Judiciary Act 1903 (as the Federal Court was sitting in New South Wales), “thereby making it unnecessary to follow [s 80](#) through to the English common law”.

EVIDENCE ACT 1995

[7250.15] Effect of the Evidence Act 1995

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) ss 68, 79, 80, 80A.

Section 8(1) of the Evidence Act 1995 (Cth) declares: “This Act does not affect the provisions of any other Act, other than [sections 68](#), [79](#), [80](#) and [80A](#) of the Judiciary Act 1903.” The provisions of the Evidence Act, so far as they are likely to affect the operation of [s 80](#) of the Judiciary Act, are summarised in [\[7245.57\]](#).

End of Document

[\(CTH\) Judiciary Act 1903 \[7255\] s 80A Application of sections 79 and 80 to Territory courts](#)

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 2 APPLICATION OF LAWS \[ss 79–81\]](#)

[\[7255\] 80A Application of sections 79 and 80 to Territory courts](#)

The provisions of the last two preceding sections apply, in so far as they are capable of application, to and in relation to a court of a Territory exercising jurisdiction in a suit brought by virtue of [section 56](#) or [Part IXA](#).

[7255.5] Effect of the Evidence Act 1995

L Legislation cited in this paragraph

(CTH) [Evidence Act 1995](#) Section 8(1).

(CTH) [Judiciary Act 1903](#) ss 68, 79, 80, 80A.

[Section 8\(1\)](#) of the Evidence Act 1995 (Cth) declares: “This Act does not affect the provisions of any other Act, other than [sections 68](#), [79](#), [80](#) and [80A](#) of the Judiciary Act 1903.” The provisions of the [Evidence Act](#), so far as they are likely to affect the operation of [s 80A](#) of the Judiciary Act, are summarised at [\[7245.57\]](#).

(CTH) Judiciary Act 1903 [7260] s 81 Security of the peace and for good behaviour

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 2 APPLICATION OF LAWS \[ss 79–81\]](#)

[7260] 81 Security of the peace and for good behaviour

The Justices of the High Court, the Judges of the Federal Court of Australia, and the Judges and magistrates of the several States and Territories who are empowered by law to authorize arrests for offences against the laws of the Commonwealth, shall have the like authority to hold to security of the peace and for good behaviour in matters arising under the laws of the Commonwealth as may be lawfully exercised by any Judge or Magistrate of the respective States and Territories in other cases cognisable before them.

[s 81 am Act 106 of 2009 s 3 and Sch 1[108], effective 4 December 2009]

End of Document

(CTH) Judiciary Act 1903 [7365] s 82 Venue in suits for penalties

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > **DIVISION 3 VENUE [ss 82–85]**

DIVISION 3 VENUE [ss 82–85]

[7365] 82 Venue in suits for penalties

Suits to recover pecuniary penalties and forfeitures under the laws of the Commonwealth may be brought either in the State or Territory where they accrue or in the State or Territory where the offender is found.

End of Document

(CTH) Judiciary Act 1903 [7370] s 83 Venue in suits for taxes

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 3 VENUE \[ss 82–85\]](#)

[7370] 83 Venue in suits for taxes

Suits to recover taxes accruing under any revenue law of the Commonwealth may be brought either in the State or Territory where the liability for the tax occurs or in the State or Territory where the debtor resides.

End of Document

(CTH) Judiciary Act 1903 [7375] s 84 Venue in suits for forfeiture

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 3 VENUE \[ss 82–85\]](#)

[7375] 84 Venue in suits for forfeiture

Proceedings on seizures made on the high seas for forfeiture under any law of the Commonwealth may be prosecuted in any State or Territory into which the property seized is brought. Proceedings on such seizures made within any State or Territory shall be prosecuted in the State or Territory where the seizure is made, except in cases when it is otherwise provided by law.

End of Document

(CTH) Judiciary Act 1903 [7380] s 85 Property seized as forfeited

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 3 VENUE \[ss 82–85\]](#)

[7380] 85 Property seized as forfeited

All property taken or obtained by any officer or person under the authority of any revenue law of the Commonwealth shall be deemed to be in the custody of the law, and subject only to the orders and judgments of the Courts having jurisdiction thereof under this or any Act.

End of Document

(CTH) Judiciary Act 1903 [7485] s 86 Rules of Court

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: March 2005

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[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > **DIVISION 4 RULES OF COURT [ss 86–88]**

DIVISION 4 RULES OF COURT [ss 86–88]

[7485] 86 Rules of Court

(1) The Justices of the High Court or a majority of them may make Rules of Court necessary or convenient to be made for carrying into effect the provisions of this Act or so much of the provisions of any other Act as confers jurisdiction on the High Court or relates to the practice or procedure of the High Court, and in particular for the following matters, that is to say:

- (a) Appointing and regulating the sittings of the High Court and of the Justices;
- (b) Regulating procedure pleading and practice in the High Court in civil or criminal matters in the exercise both of its original and of its appellate jurisdiction;
- (ba) Regulating the means by which particular facts may be proved and the mode in which evidence thereof may be given;
- (c) *[repealed]*
- (d) making provision for or in relation to the forms to be used for the purposes of the proceedings of the High Court;
- (e) Prescribing and regulating the fees to be charged by practitioners practising in the High Court for the work done by them in relation to proceedings in the Court and for the taxation of their bills of costs, either as between party and party or as between solicitor and client;
- (f) *[repealed]*
- (g) *[repealed]*
- (ga) Providing for the admission of persons to practise as barristers or solicitors in any Federal Court, and prescribing the conditions of and qualifications for admission, and continuance of the right to practise as aforesaid;
- (h) Generally regulating all matters of practice and procedure in the High Court.

[subs (1) am Act 3 of 2022 s 3 and Sch 1 item 116, effective 18 February 2022]

(2) The Legislation Act 2003 (other than sections 8, 9, 10 and 16 and Part 4 of Chapter 3 of that Act) applies in relation to rules of court made by the Court under this Act or another Act:

- (a) as if a reference to a legislative instrument (other than in subparagraph 14(1)(a)(ii) and subsection 14(3) of that Act) were a reference to a rule of court; and
- (b) as if a reference to a rule-maker were a reference to the Chief Justice acting on behalf of the Justices of the Court; and
- (c) subject to such further modifications or adaptations as are provided for in regulations made under [paragraph 88\(cb\)](#) of this Act.

[subs (2) insrt Act 140 of 2003 s 3 and Sch 1, effective 1 January 2005; am Act 10 of 2015 s 3 and Sch 1 item 152, effective 5 March 2016; Act 78 of 2018 s 3 and Sch 1 items 19, 20, effective 25 August 2018]

(3) Despite the fact that section 16 of the Legislation Act 2003 does not apply in relation to rules of court made by the Court under this Act or another Act, the Office of Parliamentary Counsel (established by subsection 2(1) of the Parliamentary Counsel Act 1970) may provide assistance in the drafting of any of those Rules if the Chief Justice so desires.

[subs (3) insrt Act 140 of 2003 s 3 and Sch 1, effective 1 January 2005; am Act 107 of 2012 s 3 and Sch 2 item 11, effective 1 October 2012; Act 10 of 2015 s 3 and Sch 1 item 153, effective 5 March 2016]

[s 86 am Act 157 of 1989 s 20]

SECTION 86 GENERALLY

[7485.5] Transitional arrangements

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Part 7, paragraph (a), paragraph 86(f), paragraph 88(ca).

(CTH) [Acts Interpretation Act 1901](#) subsection 48(7).

Section 25 of Act 157 of 1989 provides as follows:

“25

(1) If:

- (a) [Part 7](#) commences before regulations have been made under [paragraph 88\(ca\)](#) of the Judiciary Act 1903 as amended by this Act; or
- (b) when [Part 7](#) commences, regulations have been so made but have not commenced;

Rules of Court in force under paragraph 86(f) of that Act immediately before the commencement of [Part 7](#) continue to have effect, as if that Part had not been enacted, until regulations first commence under [paragraph 88\(ca\)](#) of the Judiciary Act 1903 as amended by this Act.

(2) Where:

- (a) regulations have been made under [paragraph 88\(ca\)](#) of the Judiciary Act 1903 as amended by this Act; and
- (b) immediately before the commencement of those regulations, Rules of Court made under paragraph 86(f) of that Act had effect;

subsection 48(7) of the Acts Interpretation Act 1901 has effect in relation to those Rules of Court as if they were regulations repealed by the regulations referred to in paragraph (a).”

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(CTH) Judiciary Act 1903 [7490] s 87 Application of sections 48, 48A, 48B, 49 and 50 of the Acts Interpretation Act 1901

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 4 RULES OF COURT \[ss 86–88\]](#)

[7490] 87 Application of sections 48, 48A, 48B, 49 and 50 of the Acts Interpretation Act 1901

[s 87 rep Act 140 of 2003 s 3 and Sch 1, effective 1 January 2005]

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(CTH) Judiciary Act 1903 [7590] s 88 Regulations

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 3 of 2022 • Commentary Published: March 2005

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [High Court — Principal Legislation](#) > [Judiciary Act 1903](#) > [PART XI SUPPLEMENTARY PROVISIONS \[ss 78–88\]](#) > [DIVISION 4 RULES OF COURT \[ss 86–88\]](#)

[7590] 88 Regulations

The Governor-General may make regulations, not inconsistent with this Act, prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act;

and, in particular, may make regulations:

- (c) prescribing the content and form of a notice to be given under [subsection 78B\(1\)](#) and specifying the documents (if any) that are to accompany such a notice;
- (ca) prescribing the fees payable in respect of proceedings in the High Court and the execution of the process of the High Court;
- (cb) modifying or adapting provisions of the Legislation Act 2003 (other than the provisions of Part 2 of Chapter 3 of that Act or any other provisions whose modification or adaptation would affect the operation of that Part) in their application to the Court;
- (d) prescribing the practice and procedure for the filing and giving of such a notice, including the manner in which, the time within which, the persons to whom, and the persons by whom, such a notice is to be given; and
- (e) specifying any affidavits to be filed following the giving of a notice under [subsection 78B\(1\)](#) and prescribing the persons by whom and times within which the affidavits are to be filed.

[s 88 am Act 157 of 1989 s 21; Act 140 of 2003 s 3 and Sch 1, effective 1 January 2005; Act 10 of 2015 s 3 and Sch 1 item 154, effective 5 March 2016]

SECTION 88 GENERALLY

[7590.5] Transitional arrangements

See [\[7485.5\]](#).

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