CHAPTER 5

Jurisdictional issues – the interface between the federal and state judicial systems

What are the issues?

5.1 This part of the terms of reference for the inquiry gave rise in submissions to the discussion of two main topics, which have overlapping themes:

- is a national judicial system desirable? If so, what are the practical and constitutional impediments? Alternatively, is an improved system of vertical and horizontal judicial exchange feasible?
- is it possible, and desirable, to establish a constitutional arrangement for the horizontal and vertical transfer of cases (overcoming the constitutional difficulties previously identified with the cross vesting of cases)?

5.2 In this chapter, these issues are discussed in detail, as are some additional issues raised with the committee.

National judiciary

5.3 A number of submitters identified the topic of a national judicial framework as being a key item relating to the interface between the federal and state judicial systems. As Mr Glen McGowan, Chairman of the International Commission of Jurists, Victoria, explained, there are a number of reasons it could be useful, but there is a caveat about the practical challenges that would be encountered:

> We would be spared jurisdictional issues in crime and contract, change of venue applications—all sorts of problems are solved. But how you do it in our complicated federal system is going to be difficult.[1]

5.4 The Standing Committee of Attorneys-General (SCAG) has undertaken some work relating to a national judiciary. The objectives of a national judicial framework identified by SCAG are to:

- enhance the administration of law and justice at a national level;
- facilitate nationally consistent standards of judicial decision-making and efficiency;
- provide opportunities for career enhancement for individual judicial officers; and
- promote a more flexible, responsive and engaged judiciary.

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1 *Committee Hansard*, 12 June 2009, p. 12.

5.5 The existing legislation limits the scope to implement a national judiciary because State and Territory judges are prohibited by The Constitution from acting in a federal capacity. As the Federal Court has observed, 'there are many instances of Federal Court judges holding commissions as members of the Supreme Courts of the Territories and, occasionally, as acting judges of State courts', but that a reciprocal arrangement cannot happen under present constitutional arrangements.[2]

5.6 The ICJ-Victoria expressed the view that 'a national judiciary is desirable.'[3] Indeed, the Attorney-General's Department has advised the committee that at its July 2008 meeting SCAG 'agreed to establish a working group to examine the feasibility of establishing a national judiciary.'[4] The most recent SCAG activity in this area was described by the Attorney-General's Department:

> In August 2009, the SCAG working group put a proposal to SCAG that it determine the feasibility of implementing a national judicial framework in three phases: Phase 1 – a national judicial complaints system and a judicial exchange program (being progressed separately by a SCAG working group); Phases 2 and 3 – possible development of common federal, State and Territory legislation relating to the pre-requisites for judicial appointment, tenure and retirement ages and development of more uniform judicial remuneration structures, and judicial remuneration packages and terms and conditions of office.
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> The judicial exchange and national complaints scheme currently being progressed by SCAG working groups would form part of the framework.
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> SCAG has referred the national judicial framework item to the National Justice CEOs (NJCEOs) Group to determine the feasibility of progressing proposals in Phases 2 and 3.[5]

5.7 The Department has noted that 'The issue of removal from office is not being considered as part of the national judicial framework project.[6] The national complaints project will be discussed further later in this report.

5.8 The development of a national judicial structure is not necessarily the same as the development of a national court structure. As the Law Council of Australia explained:

> The development of a national court structure would not be possible without significant constitutional reform. However, the development of a national judicial framework would potentially be more achievable.[7]

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2 Registrar and Chief Executive Officer, Federal Court of Australia, *Submission 3*, p. 2.

3 International Commission of Jurists, Victoria, *Submission J2*, p. 8.

4 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 6.

5 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 6.

6 Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 6.

7 Law Council of Australia, *Submission 11*, p. 9.

5.9 In relation to the structure and purpose of a national judiciary, the Law Council has given the matter detailed consideration and has identified a number of important aspects requiring further thought. For example, will a more widespread scheme of judicial exchange 'undermine the specialist jurisdiction of Federal courts and State courts'?[8] The Law Council believes that 'judicial exchange, unless done in a way that is mindful of the relevant expertise of a court, has the potential to undermine confidence in the specialist expertise of a Court.'[9]

5.10 The Law Council also highlights that it is important for any formal judicial exchange program 'to demonstrate that any benefits to litigants are not merely illusory'.[10] Other aspects of concern raised by the Law Council are that:

> A general comment is that it is not clear what 'greater consistency and uniformity in the provision of judicial services' is meant to mean – or that such consistency is necessarily desirable as an end in itself. Different kinds of cases merit using different approaches.
>
> The realisable benefits of the proposal with regard to these broader objectives of enhancing the administration of law and justice may be seen as uncertain without elaboration of how the scheme would work.
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> We agree that there is merit in exposing judges to different types of case management systems…
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> Although it is contended that judicial exchange would have the potential for dealing with resourcing issues, careful consideration will need to be given to how exchanges will be funded, along with other practical issues such as the arrangements for determining when an exchange may be appropriate and who is selected.[11]

5.11 Nonetheless, the Law Council expressed the view that there can be real benefits in terms of an education process for the judges themselves.[12]

5.12 The Judicial Conference of Australia is in favour of horizontal and vertical judicial exchange.[13] Justice McColl articulated the benefits for the committee:

> Just dealing with the substantive legal position, one's experience is always enhanced by the infusion of ideas from other jurisdictions, and so just the

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8 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 25.

9 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 25.

10 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 25.

11 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, pp 25 and 26.

12 Mr Colbran, *Committee Hansard*, 12 June 2009, p. 22.

13 Justice McColl, *Committee Hansard*, 11 June 2009, p. 3.

> fact of sitting on various different courts would bring a benefit to the public in a form of indirect legal education. For the courts, the obvious advantage to which I referred earlier is the immediate filling of holes when there is a shortage of judges and the like and, if there was an objective of ultimately having a national judiciary that would work towards that object as well, providing a testing ground for that ultimate concept.[14]

5.13 A Head of Jurisdiction model protocol for judicial exchange was provided to the committee by Justice McColl, who noted that it was developed 'with a view to providing a framework for arrangements to be made for the short term exchange of judges between those Courts.'[15] The model developed outlines detailed objectives of judicial exchange (such as to promote best practice and the effective allocation of judicial resources) with the exchange to take place only with the agreement of the Attorney-General of the relevant jurisdictions and head of jurisdiction of the courts involved. The protocol also has some provisions dealing with costs, duration and administrative arrangements.[16]

5.14 The model protocol is a useful starting point for the further work needed to develop a national judiciary or a national approach to judicial exchange. Another contribution to this area is a detailed paper delivered in 2005 by the current Chief Justice of the High Court titled *Judicial Exchange – Debalkanising the Court* when he was a judge of the Federal Court of Australia.[17] The purpose of the paper was to:

> …propose the development of a comprehensive system of horizontal and vertical judicial exchanges throughout Australia with a view to advancing:
>
> 1. Individual judicial performance.
> 2. The performance of the courts as institutions.
> 3. Allocation of national judicial resources to areas of local need including the need for specific expertise.

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14 *Committee Hansard*, 11 June 2009, p.14.

15 The model protocol was raised with the committee and tabled by Justice McColl, see *Committee Hansard*, 11 June 2009, p. 4 and following. Justice McColl explained that the model protocol 'was developed following the delivery of a paper to the 2005 Judicial Conference annual conference on judicial exchange by Justice Robert French, then a judge of the Federal Court of Australia. The model was approved by the Judicial Conference and the Council of Chief Justices. I understand it was distributed to the members of the Standing Committee of Attorneys-General in May 2009 and some but not all states and territories have approved it. It is still a current matter with the standing committee.' The object of the protocol as quoted in the body of this report is outlined at Clause 1, *Model Protocol between heads of Jurisdiction for Short Term Judicial Exchange*, tabled at public hearing by the Judicial Conference of Australia, Thursday 11 June 2009.

16 See generally, *Model Protocol between heads of Jurisdiction for Short Term Judicial Exchange*, tabled at public hearing by the Judicial Conference of Australia, Thursday 11 June 2009.

17 Justice French, *Judicial Exchange – Debalkanising the Courts*, Judicial Conference of Australia, 2005 Colloquium Papers, 4 September 2005.

4. The attractiveness of judicial appointments in all jurisdictions.
5. Consistent Australia-wide approaches to the administration of justice while maintaining healthy institutional pluralism.
6. National collegiality between Australian judges.[18]

5.15 The paper extensively examines the historical context and constitutional framework and develops options for effective judicial exchange, including considerations for horizontal and vertical exchange programs. Importantly, the author's view is that 'exchange can be done for the most part administratively although statutory amendments may facilitate it,'[19] though constitutional amendment will be needed if exchanges to the Federal Court or Family Court are contemplated with judges from other jurisdictions.[20]

5.16 Challenges are inherent in a project of this complexity. Even the preliminary step of increased and formalised vertical and horizontal judicial exchange is not straightforward. As Justice McColl pointed out:

> … it may be possible for federal judges to sit on state courts but, as I say, not vice versa and that would have to be addressed…It does require legislation in each state and territory…to enable judges from other jurisdictions to sit in other states and obviously follow up on administrative arrangements.[21]

5.17 In addition to the constitutional reform needed for state judges to work in the federal jurisdiction, there are other complications. As the ICJ-Victoria commented:

> … such a step would not be straightforward. The history of each of the Australian States has resulted in the development of six or more similar but separate systems. In some cases those systems have been tailored to cope with the particular needs or requirements of particular jurisdictions. Ultimately, however, the ICJ supports a national judicial system and supports a trend in that direction.[22]

5.18 And as a further cautionary note the ICJ-Victoria added:

> …the principle of separation of legislative, executive and judicial powers reflected in the Australian Constitution has not been taken to apply with the same strictness at the State level.[23]

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18 French J, *Judicial Exchange – Debalkanising the Courts*, Judicial Conference of Australia, 2005 Colloquium Papers, 4 September 2005, pp 3 and 4.

19 French J, *Judicial Exchange – Debalkanising the Courts*, Judicial Conference of Australia, 2005 Colloquium Papers, 4 September 2005, p. 5.

20 French J, *Judicial Exchange – Debalkanising the Courts*, Judicial Conference of Australia, 2005 Colloquium Papers, 4 September 2005, p. 26.

21 *Committee Hansard*, 11 June 2009, p. 13.

22 International Commission of Jurists, Victoria, *Submission J2*, p. 8.

23 International Commission of Jurists, Victoria, *Submission J2*, p.8.

Committee view

5.19 The committee notes that even support for the development of a national judicial framework (as opposed to the even more vexing establishment of a national court structure) is constrained by the likelihood of it facing significant challenges: the assessment that a national framework is 'potentially more achievable' than a national court structure demonstrates little confidence in its speedy development. The committee is cautious about what can be achieved through a national judiciary. Although not as pessimistic as the Law Council, the committee agrees with the council that it is important to ensure that:

- in any scheme advantages of the approach need to be practically directed to material and worthwhile changes to the way that justice is administered, as well as delivering benefits to judges;
- the practical issues of a judicial exchange scheme will need to be very carefully considered to ensure that any system is effective and efficient; and
- while there are potential benefits to litigants and to the administration of justice 'arising from a carefully designed protocol for judicial exchange the dangers of weakening the system and undermining confidence in the judiciary are real.'[24]

5.20 The Law Council suggests this process should 'start slowly and at appellate level, with agreement between particular courts to ensure that visiting judges are likely to be able to contribute to cross-fertilisation.'[25]

5.21 Despite the challenges, the committee view is informed by (now) Chief Justice French's view that:

> In my opinion a judicial exchange system has much to offer both the judiciary and the Australian community. Formulating, promoting and implementing it will be a significant task. It is, however, a necessary aspect of the maturing of the Australian judiciary which is in itself an important element of our nation building.[26]

5.22 Therefore the committee supports the Attorney-General's Department and SCAG consideration of progressing arrangements for improved judicial exchange and, eventually, the establishment of a national judiciary.

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24 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 30.

25 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 30.

26 French J, *Judicial Exchange – Debalkanising the Courts*, Judicial Conference of Australia, 2005 Colloquium Papers, 4 September 2005, p. 31.

Cross-vesting

5.23 Another aspect of the interface between the federal and state judicial systems that was the subject of comment to the committee was the federal-state cooperative arrangements that were rendered impossible by the High Court's 1999 decision in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. That decision held that The Constitution establishes that disputes arising under State law could not be determined in the Federal Court, but can only be determined in the separate courts of each State. This meant that aspects of schemes such as the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) were unconstitutional. As described by Justice McColl of the Judicial Conference of Australia:

> the real, practical effect of the cross-vesting system was to facilitate the ease of transfer of cases both horizontally and vertically. Unfortunately, there were constitutional obstacles identified in *Wakim* which prevented that, at least insofar as cross-vesting matters from state to federal courts was concerned.[27]

5.24 Therefore, the result of the *Wakim* case is 'that except in an incidental fashion where Federal courts exercise accrued jurisdiction, it is not possible for state jurisdiction to be vested in federal courts.'[28]

5.25 As has been well documented elsewhere, the High Court decision the following year of *R v Hughes* (2000) 202 CLR 535 was a further set-back for cooperative Commonwealth-State relations: it meant that a national enforcement agency might only be able to enforce an offence where the offence could have been legislated independently by the Commonwealth under one of its constitutional heads of power. As the Gilbert + Tobin Centre noted:

> Of course, if the Commonwealth already had the power to enact the scheme there would not have been the need for a cooperative arrangement underpinning the [law] in the first place.

5.26 These issues have a link to the idea of a national judicial framework to the extent that it would complement an arrangement where judges could move from jurisdiction to jurisdiction. As the Law Council noted:

> The goals of judicial integration and a single court system in Australia have been debated extensively over the years. In the absence of constitutional amendment, these were sought to be effected by the cross-vesting scheme, but this effectively collapsed in 1999. The full potential of judicial exchange would be best served if it was able to be married to effective jurisdictional exchange.[29]

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27 *Committee Hansard* , 11 June 2009, p. 12.

28 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 24.

29 Law Council of Australia, *Submission 11*, p. 10.

5.27 Direct solutions to these difficulties are limited. The options apparent to the Gilbert + Tobin Centre are either a change of approach by the High Court or removing the flaw in the Constitution that prohibits the Federal Court from resolving disputes under state law.[30] The Centre notes that in technical terms the amendment would be straightforward and would not need to grant or transfer power to the Commonwealth: it would simply entrench the legal propositions that (1) the States may consent to federal courts determining matters arising under their law; and (2) the States may consent to federal agencies administering their law.[31]

5.28 Not everyone is of the view that there is a problem that needs solving. For the States, the issues are more limited, or non-existent. For example, Chief Justice Warren of the Supreme Court of Victoria does not identify any concerns, and notes that 'Australia is fortunate to have a system in which federal jurisdiction is vested in State courts avoiding the difficulties experienced in federations with entirely separate State and Federal jurisdictions and court systems.'[32]

5.29 Particularly in relation to criminal matters there is a view that the current system in which the state Supreme and District Courts have the capacity to exercise the jurisdiction of the Commonwealth in criminal matters operates effectively. As Acting Chief Justice Murray of the Supreme Court of Western Australia observed:

> I cannot see why one would want to depart from that system and create a separate criminal jurisdiction within, presumably, the Federal Court to run in parallel with the handling of federal criminal matters by state courts.

5.30 While noting that amendment to The Constitution, which requires a referendum, is notoriously costly and difficult, the issue of 'cross-vesting' remains a matter of significant concern to some. For example, the 1988 Constitutional Commission recommended amending the Constitution and more recently the Business Council of Australia listed, in November 2006, as one of its official 'action points':

> ACTION 8 The Commonwealth and state governments should work together to initiate and support an amendment to the Constitution to include an express provision that the states may choose to allow Commonwealth courts to determine matters under state laws and to allow Commonwealth agencies to administer state laws.[33]

5.31 The Gilbert + Tobin Centre argues that despite the costs associated with constitutional amendment, it is unsatisfactory for The Constitution to remain outdated in this way:

> On the other hand, the cost of not adapting the Constitution to Australia's contemporary needs is potentially far higher, including wasted expenditure

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30 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 9.

31 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 9.

32 Chief Justice Supreme Court of Victoria, *Submission J3*, p. 4.

33 As quoted in Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 10.

> on courts because the cross-vesting of matters is not possible and the associated costs for parties. Less quantifiable costs can include a loss of confidence in the stability of a regulatory regime and an inability to achieve appropriate policy outcomes because cooperative schemes based upon a referral of power are not politically achievable.[34]

5.32 The Attorney-General's Department has advised the committee that it '…has given careful consideration to the High Court's decision in *Re Wakim; ex parte McNally* (1999) 198 CLR 511. There is no proposal to amend the Constitution.'[35]

Committee view

5.33 Despite the fact that there continues to be some grumbling about the failure of the cross-vesting and similar legislation, the committee is not persuaded that this is an issue that should be at the forefront of constitutional reform. The committee agrees that the arrangements are not optimal, but is of the view that it is incumbent upon those who are significantly adversely affected by the impact of the *Re Wakim* and *R* v *Hughes* decisions to fully articulate the case for reform.

Jurisdictional overlap

5.34 The Federal Court has noted that the jurisdictional overlap provides a choice between federal and state judicial systems, but that there is a degree of inconsistency. For example, to ensure the consistency of jurisprudence in intellectual property matters there is an appeal from the Supreme Courts of the states to the full Federal Court. However, this system is not applied in all areas of the law. The Federal Court suggests that:

> It might be thought appropriate, on the basis of developing a consistent rational and principled approach to the question of conferring Commonwealth jurisdiction on Commonwealth and/or State and Territory courts that, the similar approach be taken in other federal areas, such as admiralty.[36]

5.35 The Family Court also highlights the need for national uniformity and consistency in de facto property matters. As the court explains:

> Changes to the *Family Law Act 1975* (Cth) in this area are a result of referrals from the majority of the States to the Commonwealth of power to legislate in this area of the law. The Family Law Courts only have jurisdiction over de facto property matters in participating jurisdictions, being all States and Territories except for South Australia and Western Australia – the only two States not to refer their power in this area.

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34 Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 9.

35 *Additional Information,* Attorney-General's Department, *Answers to Questions on Notice*, 28 September 2009, p. 6.

36 Registrar and Chief Executive, Federal Court of Australia, *Submission 3*, p. 1.

> As a consequence of non-referral, persons in a de facto relationship who are ordinarily resident in South Australia will not be able to apply to the Family Law Courts for relief. Western Australia, having its own Family Court with federal jurisdiction, has jurisdiction over de facto property matters. However, the Family Court of Western Australia cannot make a superannuation splitting order in these matters, and that is a significant problem. These examples demonstrate how de facto couples in both jurisdictions may be at a disadvantage by virtue of the failure to refer power.[37]

5.36 A similar concern also relates to another area of the jurisdictional interface between the federal and state judicial systems in family law cases. The constitutional division of responsibilities between the Commonwealth and the States are said to:

> …have served to inhibit the ability of the Family Law Courts to deal effectively with some matters such as child welfare and child protection in an appropriately holistic way. Jurisdictional issues in these areas are not new or groundbreaking but create inefficiencies for litigants, the Courts, relevant government agencies, taxpayers and the public at large. Further, the inability re resolve such jurisdictional issues serves only to generate hostility towards organisations like the Family Law Courts, which, in turn has far reaching consequences for an accessible justice system. These issues require serious consideration by appropriate bodies such as the Council of Australian Governments and the Standing Committee of Attorneys-General.[38]

5.37 The Family Court has made a number of suggestions about how this can be improved, and recognises that 'as child protection is a traditional legislative area of the States, it is acknowledged that there would be constitutional impediments to be overcome in order for any additional powers regarding child protection to be conferred on the Family Law Courts.'[39]

Extent of the Federal Court jurisdiction

5.38 The Federal Court has also brought to the committee's attention an issue in relation to the breadth of its jurisdiction. The court explains that section 39B of the *Judiciary Act 1903* confers much, but not all, of the jurisdiction in sections 75 and 76 of the Constitution.[40] The court is seeking 'a clear and comprehensive conferral' such as in section 39(2) of the *Judiciary Act* which gives State courts jurisdiction over matters listed in sections 75 and 76. In the court's view this approach:

> …would make the jurisdictional foundation of the Court clear and coherent. It would make the civil jurisdiction of the Court fully coordinate with the

37 Family Court and Federal Magistrates Court, *Submission 8*, p. 12.

38 Family Court and Federal Magistrates Court, *Submission 8*, p. 9.

39 Family Court and Federal Magistrates Court, *Submission 8*, p. 9.

40 Registrar and Chief Executive officer, Federal Court of Australia, *Submission 3*, p. 2.

> federal civil jurisdiction exercisable by the State and Territory courts under ss 75 and 76 of the Constitution. It would remove the anomalous situation that currently exists whereby the Federal Court has less federal civil jurisdiction than that of the State and Territory courts.[41]

5.39 The committee is concerned about the issues raised and encourages the government to review them as soon as possible.

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41 Family Court and Federal Magistrates Court, *Submission 3*, p. 2. Section 75 of The Constitution gives the High Court original jurisdiction in all matters:

> (i) Arising under any treaty;
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> (ii) Affecting consuls or other representatives of other countries;
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> (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
>
> (iv) Between States, or between residents of different States, or between a State and a resident of another State;
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> (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.
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> Section 76 of the Constitution provides that, 'The Parliament may make laws conferring original jurisdiction on the High Court in any matter-
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> (i) Arising under this Constitution, or involving its interpretation;
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> (ii) Arising under any laws made by the Parliament;
>
> (iii) Of Admiralty and maritime jurisdiction;
>
> (iv) Relating to the same subject-matter claimed under the laws of different States.

Section 39B of the *Judiciary Act 1903* (Cth) is reproduced at Appendix 7 to this report.