Australian Law Reform Commission to review *Judiciary Act*

In February 2000, the Commonwealth Attorney-General, the Hon Daryl Williams AM QC MP, announced that the Australian Law Reform Commission (ALRC) had been given three new references. One of these references asks the ALRC to review the *Judiciary Act 1903* (Cth).

The *Judiciary Act 1903* is the most significant piece of federal legislation regulating the structure of the Australian judicial system. As originally enacted, the Act established the High Court, defined its jurisdiction within the limits set by Chapter III of the Constitution, and established the basic jurisdictional relationships between federal and state courts.

Over the course of nearly a century, the Act has been amended by nearly 70 separate pieces of legislation, but it has never been the subject of systematic review. The Commission's current reference provides a unique opportunity to review jurisdictional relationships in the Australian federal judicial system, both from the perspective of underlying principle and practical operation.

The Commission's terms of reference raise a large number of issues. Some are highly specific; others invite the broadest inquiry about whether the current jurisdictional arrangements best serve the interest of "efficient administration of law and justice in the exercise of federal jurisdiction". The terms of reference also place some important limits on the scope of the inquiry. Two matters that are expressly *excluded* are (a) jurisdiction in criminal matters, and (b) the cross-vesting arrangements in the light of *Re Wakim; Ex parte McNally*.[1]

The ALRC has formed an expert Advisory Committee to assist in defining those issues which are at the core of the inquiry. The ALRC also has started to consult widely with courts, legal professional associations, private practitioners and government lawyers, community and business groups, government agencies and departments, and academics. The ALRC will consider overseas approaches to these issues, including the experience of other federations such as Canada and the United States.

At this stage the ALRC is focusing the inquiry on six core areas.

- allocating federal jurisdiction between federal and state courts;
- transfer of proceedings between and within courts;
- claims by or against the Commonwealth;
- choice of law in federal jurisdiction;
- the jurisdiction of territorial courts;
- location of legislative provisions.

Jurisdiction of Territorial Courts

An area which may be of particular interest to *Balance* readers is the jurisdiction of territorial courts. The Commission's terms of reference require it to consider: (a) the impact of self-government on the exercise of jurisdiction in territory courts under Commonwealth laws; and (b) whether it is appropriate or necessary for provisions of Part IXA of the Judiciary Act relating to the Northern Territory to be extended or replicated for the Australian Capital Territory.

The *Northern Territory (Self Government) Act 1978* (Cth) transferred legislative and executive responsibility for the Northern Territory from the Commonwealth to the Territory. Soon afterwards, the Commonwealth passed a group of related Acts to enable the Northern Territory government to assume responsibility for the judicial arm of government as well. One of these acts repealed the 1961 Commonwealth legislation that established the Northern Territory Supreme Court as a superior court of record. This was done in contemplation of Northern Territory legislation to establish a Supreme Court in its own right. Amendments also were made to the *Judiciary Act*, principally by inserting a new Part IXA.

Part IXA of the Judiciary Act refers to suits relating to the Northern Territory and the jurisdiction of the Supreme Court of the Northern Territory. The establishment of a Supreme Court for the Northern Territory under local legislative and executive control carried with it the assumption that Commonwealth legislation generally would not be applied directly to the Court.[2] However, an exception was made for the conferral of jurisdiction upon the Court in matters that may not have been within the competence of the Northern Territory legislature. In particular, Part IXA confers jurisdiction on the Northern Territory Supreme Court in relation to:

- suits between the Commonwealth and the Northern Territory (s 67B);
- prerogative writs sought by the Commonwealth against the Northern Territory or its officers (s 67C(a));
- prerogative writs sought against the Commonwealth or its officers in matters arising in the Northern Territory (s 67C(b)); and
- certain other matters that historically were part of its jurisdiction when the Court was established under Commonwealth law (s 67C(c)).

The ACT was granted self government in 1988 by the *Australian Capital Territory (Self Government) Act 1988* (Cth). As in the Northern Territory, the ACT Supreme Court had been established much earlier under Commonwealth law,[3] and the question arose whether this arrangement should be changed in the light of self-government. As initially drafted, the self-government Bill sought to delay indefinitely the transfer of the judicial arm from the Commonwealth to the Territory. However, last minute amendments brought about the result that responsibility for the ACT Supreme Court was transferred to the ACT on 1 July 1992, and responsibility for lower courts was transferred at an earlier date.

The relationship between territory courts and Chapter III of the Constitution has been a vexed one, as reflected in recent High Court decisions (see eg *Kruger v Commonwealth*[4] and *Newcrest Mining (WA) Ltd v Commonwealth*[5]). The "disparate power" or "separationist" theory emphasises that the power of the

Commonwealth Parliament to make laws for the government of any territory (s 122 of the Constitution) is plenary and lies outside the federal-state judicial relations governed by Chapter III. On the other hand, the "integrationist theory" emphasises the integration of the territories with the Commonwealth and the subjection of s 122 to at least some provisions of the Constitution. The resolution of these contending viewpoints lies with the High Court, but the difficulties ought to be borne in mind when considering the jurisdiction to be conferred on the courts of the ACT.

The High Court recently addressed some of these issues in the context of the relationship between s 72 and s 122 of the Constitution in *Re The Governor, Goulburn Correctional Centre; Ex parte Eastman.*[6] (Section 72 relates to the appointment, tenure and remuneration of judges of courts created by the federal Parliament, and section 122 relates to government of the territories.) The relevant issues in that case were whether the Supreme Court of the ACT is a court created by the Parliament for the purposes of s 72 and whether s 72 applies to courts created pursuant to s 122. In the course of its decision the High Court noted that "underlying the arguments ... is a problem of interpretation of the Constitution which has vexed judges and commentators since the earliest days of Federation." In the end, the majority followed previous lines of authority in *Spratt v Hermes*[7] and *Capital TV & Appliances Pty Ltd v Falconer*[8] and found that a court created by Parliament for the government of a territory is not a federal court created under s 71 and that s 72 does not apply to appointments to courts created under s 122.

These issues prompt the Commission to ask a number of questions. First, there is the question whether the sections in Pt IXA of the *Judiciary Act* remain appropriate in relation to the Northern Territory, or whether the provisions have placed the Northern Territory in a position more advantageous than the states. In particular, no state court may exercise federal jurisdiction in matters in which certain prerogative writs are sought against an officer of the Commonwealth (s 38(e)). However, where a prerogative writ is sought against the Commonwealth or its officers in matters arising in the Northern Territory, the Northern Territory Supreme Court has jurisdiction (s 67C(b)). In addition, suits between the Commonwealth and the states lie within the High Court's exclusive original jurisdiction, in the sense that no state court may adjudicate such a matter (s 38(c), (d)). However, suits between the Commonwealth and the Northern Territory may be adjudicated in the Supreme Court of the Northern Territory (s 67B).

Further questions relate to whether provisions similar to those in Pt IXA should be applied to the Australian Capital Territory. These matters go to the heart of decisions about how closely the self-governing territories should be comparable to the states.

The ALRC intends to release an issues paper on this reference in July 2000 and will submit its final report to the Attorney-General by 28 February 2001. The issues paper will be made available on the Commission's website at the time of publication.

If you would like to register your interest in this reference, or make a submission relating to jurisdiction of territory courts or any other matter relevant to the reference, please contact the ALRC.

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1 (1999) 163 ALR 270.
2 Commonwealth Parliamentary Debates, HR, 22 August 1979, 460 (Viner), 598 (Bowen).
3 *Seat of Government Supreme Court Act 1933* (Cth), s 6.
4 (1997) 190 CLR 1.
5 (1997) 190 CLR 513.
6 (1999) 165 ALR 171.
7 (1965) 114 CLR 226.
8 (1971) 125 CLR 591.

This article has been supplied by the Australian Law Reform Commission.

Amendments to Federal Court Rules: Federal Court of Australia

The Federal Court of Australia has made the following amendments published in the Commonwealth Government Gazette on 20 April 2000 as Statutory Rule No. 53 of 2000.

(a) changes to Order 4 rule 6 to require an applicant seeking to rely on an allegation of fraud, misrepresentation, breach of trust, wilful default of undue influence to file and serve a statement of claim which sets out particulars of the allegation;

(b) changes to Order 46 rule 5 to allow documents to be taken out of a Registry with the permission of a Registrar;

(c) changes to Order 46 rule 6 in relation to access to transcripts;

(d) changes to Order 52 in relation to the Court's powers where a party to an appeal is absent when the appeal is called on for hearing;

(e) changes to Order 73 rule 6 to ensure that the heading of the opt out notice states the names of the parties to the proceedings, the serial number of the proceedings and the District Registry where the notice which are within his or her knowledge;

(f) changes to Order 78 rule 12 to ensure that the relevant government is joined as a party to application under section 190D of the Native Title Act 1993 by the claimant for an order of review of a decision by the Native Title Registrar not to accept the claim for registration.

These amendments commenced on 20 April 2000:

An unofficial copy of the Federal Court Amendment Rules 2000 (No.2) was published in the Commonwealth Government Gazette on 20 April 2000 as Statutory Rule No.54 of 2000. These amendments insert a new order 52B which deals with the Court's role as a Court of Disputed Returns under the Commonwealth Electoral Act 1918. They commenced on 20 April 2000.