

The Associate Judge Of The Supreme Court Of The Australian Capital Territory

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The purpose of this article is to outline the history of the position of Master, now referred to as Associate Judge, of the Supreme Court of the Australian Capital Territory (ACT). The article will demonstrate how the nature of the position has evolved as a result of changes in the Court rules and, only latterly, with legislative intervention. The Associate Judge now performs a role very close to that of a resident judge of the Court. A principled consideration of the structure of the Court may indicate that the maintenance of a separate position, Associate Judge, as distinct from resident judge, is no longer appropriate.

Historical basis for the position of Master

The position of Master has a long history in England going back to before the Norman conquest of England in 1066.¹ However, the early history of the official staff of English courts is obscure. The functions of Masters varied over time, as did their status. The Masters in the Court of Chancery were subject to much criticism as their positions carried with them the capacity to obtain substantial fees from litigants and the offices were sold for substantial sums.²

In 1815 the duties of Masters included:³

To examine into any alleged impertinence or scandal in any bill or answer.

The sufficiency of any bill or answer.

The regularity of all proceedings.

To settle all interrogatories for the examination of the parties.

To take accounts of executors, trustees and guardians.

To examine the claims of all creditors and legatees.

To fix the salaries of receivers and examine their accounts.

To sell estates.

To inquire for heirs and next of kin.

By the time of the publication of the first edition of *Halsbury's Laws of England* in 1909, there were in the United Kingdom seven Masters of the Supreme Court in the King's Bench Division.⁴ Their functions included: the control of the Central Office of the Supreme Court, judicial work in chambers and issuing directions on points of practice. Three Masters sat daily in chambers, where they adjudicated on summonses, subject to an appeal to a judge. They exercised the jurisdiction of the Court under the rules. In the Chancery Division, there were 12 Masters of the Supreme Court. They had no independent jurisdiction and all their authority was derived from the judge to whom

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¹ The history of the office of the Master is traced in pt 1 of CP Jacobs' book, *Proceedings in the Master's Office* (Law Book, 1969) which, in turn, relies upon articles by: Master Diamond, 'The Queen's Bench Master' (1960) 76 *Law Quarterly Review* 504; and Master Ball, 'The Chancery Master' (1961) 77 *Law Quarterly Review* 331.

² RW Bentham and JM Bennett 'The development of the office of Master in Equity in New South Wales' (1961) 3 *Sydney Law Review* 504, 506-7.

³ See Jacobs (n 1) 3.

⁴ Butterworth, *Halsbury's Laws of England*, vol 9 (1st ed, vol 9, 1909) 66.

they were assigned. The duties of these Masters were to make investigations and take accounts under the direction of the judge. There were also 11 Masters of the Supreme Court dealing with matters of taxation.⁵

In New South Wales, the office of Master dated from the Third Charter of Justice in 1823. That established the Supreme Court of New South Wales and provided:

AND WE DO hereby ordain appoint and declare that there shall be and belong to the said Court the following Officers that is to say a Registrar a Prothonotary a Master and a Keeper of Records ...

Although the position was intended to have all of the functions of Masters in England performed by the Masters in Chancery and the Masters of the Court of Kings Bench, as well as the function of the taxation of costs, the breadth of the office appeared to have been overlooked and the office was carried out as if it was limited to the role of Master in Chancery.⁶ The office was briefly abolished between 1832 and 1840 and then re-established as the office of the Master in Equity. This office continued to exist until 1970.⁷

In 1970 when the *Supreme Court Act 1970* (NSW) was passed, the position of Master was maintained with the capacity of the Governor to assign a Master to one or more of the divisions of court. The powers of the Masters were those given by the rules under a miscellany of Imperial and local Acts as well as under specified provisions of the rules. There were also powers for the Court to direct that assessments of damages be tried before a Master and that trials of proceedings involving interpleader and matters other than trials be referred to a Master by order of a judge or of the Court of Appeal.⁸ The position and role of Masters in New South Wales formed the context in which the position was established in the ACT.

Establishment of the position

The position of Master was established in the Territory as a result of amendments to the *Australian Capital Territory Supreme Court Act 1933* (Cth) (*Supreme Court Act*)⁹ by the *Statute Law (Miscellaneous Provisions) Act 1988* (Cth). This Act inserted Pt III of the *Supreme Court Act* (ss 30-33F).

The appointment of a Master “was not a bold step, but it managed to relieve the pressure on the government for the appointment of a fourth resident judge.”¹⁰ In the Second Reading Speech for the Statute Law (Miscellaneous Provisions) Bill 1988 (Cth), the Minister said:

There is a pressing need for an additional judicial officer on the Court, which has had three resident judges since 1972. During this period, the ACT’s population has increased from about 158,000 to over 260,000. The judges of the Court are also required to serve from time to time on the Federal Court of Australia and other tribunals. This situation has resulted in a backlog of civil matters.

The appointment of a Master will alleviate this problem. The position will be equivalent to similar positions, which exist with the same title, in State Supreme Courts in the United Kingdom and, from last year in the High Court of New

⁵ Ibid 67-68.

⁶ Bentham and Bennett (n 2) 509-510.

⁷ Ibid 511-516.

⁸ *Supreme Court Act 1970* (NSW) s 118; *Supreme Court Rules 1970* (NSW) pt 60, schs D, E.

⁹ The *Australian Capital Territory Supreme Court Act 1933* (Cth) became an Australian Capital Territory enactment as a result of the *A.C.T. Supreme Court Transfer Act 1992* (Cth) and is now referred to as the *Supreme Court Act 1933* (ACT). In this article, the Act, both before and after transfer, is referred to as the *Supreme Court Act*.

¹⁰ J Miles, *A History of the Supreme Court of the Australian Capital Territory: The First 75 Years* (Thomson Reuters, 2009) 37-38.

Zealand. The Master will do a substantial part of the Court's interlocutory work and some other civil matters.

The appointment of a Master—which would cost much less than the appointment of another judge—will result in a reduction of the waiting time in the Court and also enable the judges to devote more time to the Court's criminal lists. In the longer term, the judicial work of the Court will be made more attractive, since the judges would be enabled to concentrate on more important matters.

Four points can be noted about this extract from the Second Reading Speech:

- a. First, the need for the appointment of an additional judicial officer was driven by the increase in population and, hence, the increase in the overall workload of the Court.
- b. Second, what was intended was a Master performing a similar role to that in other state jurisdictions and New Zealand.
- c. Third, a point significant enough to be emphasised by the Minister was the reduced cost of appointing a Master rather than appointing a fourth judge.
- d. Fourth, the Minister refers to a desire to make “the judicial work of the Court ... more attractive” which, interestingly, appears to reflect a concern on the part of the Minister about the capacity to obtain suitable candidates for appointment as resident judges¹¹ of the Court.

The purpose of the appointment of the Master was also reflected in the other speeches made during the second reading debate. The Member for Flinders, Mr Peter Reith, said:¹²

The Australian Capital Territory Supreme Court Act is also interesting because it provides for the appointment of a master with powers similar to those vested in masters of State supreme courts. The appointment of a master will lighten the workload of judges, and that is a good idea.

The Member for Fisher, Mr Michael Lavarch, said:¹³

The decision to install the office of master of the Supreme Court in this Territory is a recognition of the delays being experienced currently not only in the Australian Capital Territory Supreme Court but also in courts throughout Australia. The master will relieve judges from hearing a number of applications and normally uncontentious matters which presently are heard by judges. As a result, the time of the three Supreme Court judges more properly will be able to be used in hearing actual cases. The sorts of matters which the master will hear include those of an interlocutory nature, such as applications for discovery, further and better particulars and simple applications concerning summary or default judgments. By doing this, the judges will be freed from hearing such matters.

The Master could be appointed for a term not exceeding seven years, specified in the instrument of appointment, or until the age of 65 years.¹⁴ The Master ceased to hold office upon attaining the age of 65 years.¹⁵ The conditions of appointment were otherwise determined by the Governor-General¹⁶ and, after transfer of responsibility for the Supreme Court after self-government, the Australian Capital Territory Executive.¹⁷ Unlike the resident judges of the Court who have the same entitlement to

¹¹ A “resident judge” is a judge appointed under s 4 of the *Supreme Court Act*. The expression “resident judge” is intended to distinguish such judges, whose only commission is as a judge of the Supreme Court, from those “additional judges” appointed under s 4A whose principal commission is another State or federal superior court (in practice, the Federal Court).

¹² Commonwealth, *Parliamentary Debates*, House of Representatives, 25 May 1988, 2945.

¹³ *Ibid* 2952.

¹⁴ *Supreme Court Act*, s 33(1).

¹⁵ *Supreme Court Act* s 33(2).

¹⁶ *Supreme Court Act* s 33E, as at 1989.

¹⁷ *Supreme Court Act* s 41B.

a pension as a judge of the Federal Court,¹⁸ the Master and later the Associate Judge has received a superannuation payment.

In 1993 the compulsory retirement age was increased to 70 years.¹⁹ The amendment was explained on the basis that: “This rationalises the retiring ages of Judges and Master.”²⁰ Each of the Masters and Associate Judges have in fact been appointed until the statutory retirement age.

Reviewing the position in 1993, Miles CJ noted the relatively broad jurisdiction of the Master compared with other jurisdictions and said:²¹

Because a substantial proportion of the Supreme Court workload can be borne in this way, there is considerably less cost to the public purse. There is, however, the danger that in continuing to decline to appoint a fourth judge and to rely on the outstanding performance of the master, the Government is virtually getting a judge on the cheap. Whatever attraction that has for the time being, it cannot last indefinitely.

Constitutional protection in the Territory

In 1992 when responsibility for the Supreme Court was transferred from the Commonwealth to the Territory, the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (‘Self-Government Act’) was amended by the *A.C.T. Supreme Court (Transfer) Act 1992* (Cth) so as to insert constitutional protections for certain judicial officers. These amendments, unlike some later amendments to the self-government legislation, were made at the request and with the consent of the Legislative Assembly. The amendments protected certain judicial officers from changes in their retirement ages and from removal from office other than following the report of a judicial commission.²² The Master was treated in the same way as resident judges of the Court.

The change of name

The *Court Legislation Amendment Act 2015* (ACT) had the effect of changing the name of the Master to that of Associate Judge. The manner in which that was achieved was by the insertion of s 45 into the *Supreme Court Act* which provided simply, “The Master is to be known as the Associate Judge.” Thus, the substantive position of Master and all of the legislative infrastructure associated with that position remained, but as a practical matter the title of the office was changed.

This change had two clear benefits. First, it gave to the office a title which ordinary people could understand was a judicial office. As one former Master of the Supreme Court of Victoria put it in 1969:²³

One of the disadvantages suffered by a present day holder of the office of Master of the Supreme Court of Victoria is that people are apt to inquire of him: “What is a Master? What is his job? What’s he got to do with the Law?” This curiosity, whilst it comes mainly from laymen, is not confined to them.

¹⁸ *Supreme Court Act* s 37U, which picks up the entitlements under the *Judges’ Pensions Act 1968* (Cth).

¹⁹ *Supreme Court (Amendment) Act (No 2) 1993* (ACT) cl 17.

²⁰ Explanatory Memorandum, *Supreme Court (Amendment) Bill (No 2) 1993* (ACT) 6.

²¹ J Miles, ‘The state of the judicature in the Australian Capital Territory’ (1994) 68 *Australian Law Journal* 14, 21.

²² *Australian Capital Territory (Self-Government) Act 1988* (Cth) ss 48A-48D.

²³ Jacobs (n 1) 1.

Second, it made the title of the office more obviously gender neutral. The change was consistent with what had previously occurred in NSW in 2005²⁴ and Victoria and Tasmania in 2008.²⁵ The Northern Territory followed suit in 2017.²⁶

The reason that the change was achieved by leaving in place the existing office of Master was to ensure that the only consequence was a change of name and that there was continuity in the office and the constitutional protections of that office under the *Self-Government Act*.²⁷ Had, as initially contemplated, the Act simply repealed and replaced the office of Master with that of Associate Judge, not only would that have denied the new office existing protections under the *Self-Government Act*, it would have required reappointment of the Master as Associate Judge. The approach adopted avoided these issues.

Occupants of the office

There have been five occupants of the office created by s 0 of the *Supreme Court Act*:

- (a) Alan Hogan: 1989-1996;
- (b) Terry Connolly: 1996-2003;
- (c) David Harper: 2003-2013;
- (d) David Mossop: 2013-2017; and
- (e) Verity McWilliam: 2017 to date.

History of the jurisdiction

The amendments to the Supreme Court Act establishing the office of Master came into effect on 9 November 1988.²⁸ In anticipation of that commencement, the judges of the Court made rules which inserted in the *Supreme Court Rules 1937* (ACT), ord 61A entitled “Master”.²⁹ The scope of the jurisdiction of the Master was defined by ord 61A, r 1.01. Because it defines the scope of the role of Master at the point where the office was introduced, it is worth setting the rule out in full:

1.01 The jurisdiction of the Court that is exercisable in accordance with sub-section 8 (1) of the Act may be exercised by the Master—

- (a) in trials (except with a jury) of suits in which damages are claimed in respect of the death of, or bodily injury to, any person or damage to property caused by, involving, or arising out of, the use of a motor vehicle;
- (b) in trials (except with a jury) of suits where the only matters in question are the amount of damages and costs;
- (c) in trials (except with a jury) of suits where the only matters in question are the value of goods and costs or the amount of damages, the value of goods and costs;
- (d) in trials of suits where the only matters in question are interest under section 53A of the Act and costs;
- (e) any matter (other than a trial of the whole proceedings, or a matter in proceedings tried or to be tried with a jury) referred to the Master by order of the Court or a Judge;
- (f) in trials and hearings of matters which if commenced in the Magistrates Court would have been within the jurisdiction of that Court pursuant to the Magistrates Court (Civil Jurisdiction) Ordinance 1982;

²⁴ *Courts Legislation Amendment Act 2005* (NSW).

²⁵ *Courts Legislation Amendment (Associate Judges) Act 2008* (Vic); *Supreme Court Amendment Act 2007* (Tas).

²⁶ *Supreme Court Amendment (Associate Judges) Act 2017* (NT).

²⁷ See Explanatory Statement, Courts Legislation Amendment Bill 2015 (ACT) 12.

²⁸ See Commonwealth, *Gazette: Special*, No S 348, 9 November 1988.

²⁹ See *Rules of the Supreme Court of the Australian Capital Territory (Amendment) 1988* (Cth).

- (g) in trials or hearings of suits (except with a jury) where the only matters in question are the possession of land and costs or the possession of land, the amount of damages or other money and costs and the trial or hearing may be dealt with under Order 38, rules 10 and 11;
- (h) in any suit in which an order, judgment or direction is sought with the consent of all parties to the suit;
- (i) subject to the other paragraphs of this sub-rule, in the hearing and determination of applications under any of the provisions of these Rules except:
 - Order 6
 - Order 19, rules 11 and 27
 - Order 29, rule 5
 - Orders 36 and 37
 - Order 39, rules 4, 5, 38, 40 and 42
 - Orders 45, 47 and 52
 - Order 53, except in the circumstances described in paragraph (g)
 - Orders 55, 57, 58, 59, 60 and 61
 - Order 65, rules 66, 82 and 83
 - Order 72
- (j) in the hearing and determination of applications for an order under section 11 or leave under section 16 of the Service and Execution of Process Act 1901;
- (k) in the hearing and determination of applications pursuant to sub-section 11 (1) of the Criminal Injuries Compensation Ordinance 1983;
- (l) in the hearing and determination of applications arising under the Foreign Judgments (Reciprocal Enforcement) Ordinance 1954; and
- (m) in any matter in which the Registrar may exercise the powers of Court under Order 75A, rule 69.

Order 61A, r 4.01 also provided that:

In any matter in which the jurisdiction of the Court may be exercised by the Master pursuant to a provision of this Order, the Master may exercise the Court's inherent jurisdiction relating to the matter.

Even with this rule, the power to exercise inherent jurisdiction of the Court remained practically limited because it was confined to matters strictly ancillary to the power granted to the Master.³⁰

In 1991 the jurisdiction was expanded by the *Rules of the Supreme Court of the Australian Capital Territory (Amendment) 1991* (ACT) ('Supreme Court Rules') to permit the Master to hear, with the leave of the Court or a judge, any matter where all the parties to the matter consent to the jurisdiction being exercised by the Master.³¹ The jurisdiction was also expanded so as to permit the Master to exercise the jurisdiction under the *Corporations Act 1989* (Cth) that was exercisable by the Registrar.³²

In the same year, additional powers were given to the Master in relation to proceedings under the *Commercial Arbitration Act 1986* (ACT), although these were located in ord 83 (later relocated to ord 88) rather than ord 61A.³³

Immediately prior to the repeal of the *Supreme Court Rules* and their replacement with the *Court Procedures Rules 2006* (ACT) ('Court Procedure Rules'), the items in ord 61A r 1 had expanded from (a)-(m) to (a)-(zd). Significant among the components of the Master's jurisdiction which had been added since the office was first created were the making of orders in relation to caveats, applications for orders under the *Family*

³⁰ *Exell v Exell* [1984] VR 1, 7-8.

³¹ *Rules of the Supreme Court of the Australian Capital Territory (Amendment) 1991* (Cth) cl 6.

³² *Ibid* cls 8-13.

³³ *Rules of the Supreme Court of the Australian Capital Territory (Amendment) 1991* (Cth) div 3.

Provision Act 1969 (ACT) and various applications under the *Limitation Act 1985* (ACT) and the *Trustee Act 1925* (ACT).³⁴

Prior to the intervention by the legislature in 2018, the most dramatic change to the jurisdiction of the Master was that made by the introduction of the *Court Procedures Rules* in 2006, following the enactment of the *Court Procedures Act 2004* (ACT), that provided in r 6200(1) that:

The civil jurisdiction (including the inherent jurisdiction) of the Supreme Court that is exercisable by a single judge may be exercised by the master.

Rule 6200(2) also permitted the Master to hear and decide applications for an extension of time in which to file an appeal from a decision of the Magistrates Court in criminal proceedings and also orders for substituted service in those proceedings.³⁵

Excluded from the jurisdiction given by r 6200(1) was (obviously) the power to hear and decide an appeal from an interlocutory judgment of the Master as well as the capacity to exercise the jurisdiction of the Supreme Court under the *Legal Profession Act 2006* (ACT) ('Legal Profession Act').³⁶ A judge was empowered to make an order requiring a matter in which jurisdiction was being exercised by the Master to be determined by a judge.³⁷ The Master also had power to refer proceedings or an issue in the proceedings to a judge.³⁸

Although these changes were very significant, and altered the structure of the grant of jurisdiction from one defined by its inclusions to one which was defined only by limited exclusions, the change received little mention in the Explanatory Statement of the *Court Procedures Rules*, which provided simply:

The jurisdiction of the Master has been enlarged in order to facilitate the work of the Court.

The effect of these changes was to permit the vast bulk of the civil work of the Court to be dealt with by the Master. The nature of the work being done was such that in a practical sense, so far as the legal profession was concerned, the Master had, except in relation to appeals from his or her decisions, the same function and status as a judge in civil matters. It is because of that functional equivalence that it made sense to amend the appeal provisions (dealt with below) so as to put the Master in the same position as a judge.

The limitation upon the Master exercising the powers of the Court in relation to matters under the *Legal Profession Act* was removed in 2008.³⁹ This permitted the Master to deal with matters by consent or interlocutory applications. Section 11 of the Supreme Court Act preserved to a Full Court matters relating to admission or disciplinary proceedings under the *Legal Profession Act*.

In February 2009, the Master commenced hearing applications under the *Bail Act 1992* (ACT) ('Bail Act'). Apart from the limited provisions relating to extensions of time and service in criminal proceedings, this was the first occasion when the Master was given jurisdiction in criminal matters. This was done under s 39 of the *Supreme Court Act*. That section provided (as at November 2010):⁴⁰

³⁴ *Supreme Court Rules 1937* (ACT) ord 61A, r 1(q), (y), (z) and (za).

³⁵ *Magistrates Court Act 1930* (ACT) ss 209-210.

³⁶ *Court Procedures Rules 2006* (ACT) r 6200(3).

³⁷ *Ibid* r 6201.

³⁸ *Ibid* r 6202.

³⁹ *Court Procedures Amendment Rules 2008 (No 3)* (ACT).

⁴⁰ *Supreme Court Act* s 39.

The master has power to administer oaths and may exercise the other functions given to the master under this Act, another Territory law or a special order of the court.

(Emphasis added.)

On 16 February 2009, the then Chief Justice, Higgins CJ, made an order permitting the Master to exercise jurisdiction in applications under the *Bail Act*. The power in s 39 would appear to be designed so as to permit a judge to make an order in a specific case permitting some part of the jurisdiction of the Court to be exercised by the Master. For example, it was a traditional function of the Master in Equity to undertake accounting work or other business so as to give effect to orders made by a judge. However, s 39 was used as a means by which a judge of the Court could expand, in a general manner, the jurisdiction of the Master. Notwithstanding the uncertain jurisdictional footing for the exercise of power under the *Bail Act*, that aspect of the jurisdiction of the Master was never challenged and it enabled the work of the Court in relation to bail applications to be shared equally amongst the judges and the Master.

In 2017 the jurisdiction of the Master, by then referred to as the Associate Judge, was further expanded. This was done by adding to r 6200 of the Court Procedures Rules, which defines the jurisdiction of the Associate Judge, the capacity to hear and decide applications under the *Bail Act* and presiding at pre-trial hearings under div 4.2.2B of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).⁴¹ The first of these amendments was significant in that it avoided the necessity for ongoing reliance upon s 39 of the *Supreme Court Act* to support the jurisdiction of the Associate Judge to determine bail applications. The second permitted the Associate Judge to preside at the pre-trial hearing of evidence given by complainants in a range of proceedings involving sexual offences. In the case of such evidence, the Associate Judge could be required to give rulings on the admissibility of evidence during the course of examination-in-chief, cross-examination and re-examination. The evidence given at the pre-trial hearing then became evidence in the trial which would be conducted by a judge.⁴² The change to the jurisdiction was significant because it was the first substantive involvement of the Associate Judge in criminal trials.

In April 2018 the legislature took ownership of the expanded jurisdiction of the Associate Judge by amending s 9 of the *Supreme Court Act* to define the scope of the Associate Judge's jurisdiction rather than simply permitting the jurisdiction of the Associate Judge to be determined by the *Court Procedures Rules*. The amendments made by the *Courts and Other Justice Legislation Amendment Act 2018* (ACT) involved a further expansion of the jurisdiction of the Associate Judge so that it was the same as the jurisdiction of a resident judge, subject only to excluding trials on indictment and participation in the Court of Appeal. The exclusion of jurisdiction to conduct trials on indictment was qualified in that s 9(2) continued to permit the Associate Judge to conduct pre-trial hearings in sexual assault cases. This expanded jurisdiction permitted, for example, the Associate Judge to sentence offenders for indictable offences. Because it involved the grant of the full jurisdiction of a single judge of the Court subject only to limited exclusions it represented a shift from reliance upon the rules or legislation to define the power in fact exercised to control by the Chief Justice through listing decisions made pursuant to s 7 of the *Supreme Court Act*.

In 2018 the *Crimes Legislation Amendment Act 2018 (No 2)* (ACT) provided powers to the Associate Judge, equivalent to those of judges, acting as a *persona designata*, to issue warrants under the *Confiscation of Criminal Assets 2003* (ACT), the *Crimes Act 1900* (ACT), the *Crimes (Surveillance Devices) Act 2010* (ACT), and the *Drugs of Dependence Act 1989* (ACT). These changes further enhanced the role of the Associate

⁴¹ *Court Procedures Amendment Rules 2017 (No 3)* (ACT).

⁴² *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 40S (now s 62).

Judge in relation to criminal matters and assimilated the status of the office to that of a resident judge.

However, although as a result of the amendments made in 2018 the Associate Judge was given the jurisdiction sufficient to permit the sentencing of offenders who had pleaded guilty to indictable offences, when drug and alcohol treatments orders were introduced, s 9 of the *Supreme Court Act* was amended so as to exclude from the jurisdiction of the Associate Judge the jurisdiction to make such orders.⁴³ No particular reason was identified for this exclusion.

Reflecting these changes, s 9 of the Supreme Court Act in its current form is as follows:

- 9 Exercise of jurisdiction by associate judge
- (1) The jurisdiction (including the inherent jurisdiction) of the court that is exercisable by a single judge may be exercised by the associate judge, other than for—
 - (a) a trial on indictment; or
 - (b) a matter before the Court of Appeal; or
 - (c) the jurisdiction of the court under part 2AA (Drug and alcohol treatment order jurisdiction).
 - (2) However, the associate judge may exercise the jurisdiction of the court in presiding at a pre-trial hearing under the *Evidence (Miscellaneous Provisions) Act 1991*, division 4.3.4 (Giving evidence at pre-trial hearing).
 - (3) For the exercise of jurisdiction given to the associate judge under this section, the Act has effect as if the court consisted of the judges and the associate judge.
 - (4) A person who is dissatisfied with an order of the associate judge made in the exercise of jurisdiction given under this section may appeal as prescribed under the rules to the Court of Appeal.

Appeals from the Master

When the position of Master was first established, s 9 of the Supreme Court Act provided that appeals from an “interlocutory judgment” of the Master were to a single judge but appeals from any other judgment were to a Full Court constituted by not less than three judges.⁴⁴ This contrasted with the position in relation to judgments of single judges where appeals on both interlocutory and other judgments were to a Full Court of the Federal Court.⁴⁵ However, appeals from interlocutory judgments of a judge could only be brought with the leave.⁴⁶

Following self-government, judges appointed to the ACT Supreme Court were no longer also given a commission as a judge of the Federal Court. This, in turn, led to the alteration of the appeal arrangements in relation to the ACT Supreme Court. In 2001 the Court of Appeal was established. Initially, the Court of Appeal only heard appeals from the Master as its operation in relation to appeals from single judges was dependent upon Commonwealth legislation altering the appellate jurisdiction of the Federal Court. Appeals from the ACT Supreme Court to the Court of Appeal were made possible by the *Jurisdiction of Courts Legislation Amendment Act 2002* (Cth) which removed the jurisdiction of the Federal Court to hear appeals from the ACT Supreme Court. However, even when the Commonwealth legislation was amended so as to preclude appeals from the ACT Supreme Court, a similar regime to that previously in place was continued in relation to the Master, namely, appeals from interlocutory judgments remained to a single judge as of right and appeals on other judgments were to the Court of Appeal.

⁴³ *Supreme Court Act* s 9(1)(c) inserted by the *Sentencing (Drug and Alcohol Treatment Orders) Legislation Amendment Act 2019* (ACT).

⁴⁴ *Supreme Court Act 1933* (ACT) s 9(2), as at 1989.

⁴⁵ *Federal Court of Australia Act 1976* (Cth) s 24(1), as at 1989.

⁴⁶ *Federal Court of Australia Act 1976* (Cth) s 24(1A), as at 1989.

In 2010 Penfold J questioned the necessity of the two levels of appeal in *Vatarescu v Commonwealth and the Australian Capital Territory* [2010] ACTCA 7 at [54]:

In the current circumstances of the Supreme Court, there must be a real question whether two levels of appeal are really necessary for an interlocutory order merely because it is made by the Master, especially given that non-interlocutory decisions of the Master are appellable as of right straight to the Court of Appeal. It may be that the distinction drawn in the Supreme Court Act between the Judges and the Master as to appeals in respect of interlocutory decisions is now outdated, and no longer justified in terms of policy or court efficiency. It might make sense to eliminate the appeal as of right from the Master to a single Judge in favour of a common rule for Judges and Masters to the effect that all appeals from interlocutory orders go straight to the Court of Appeal, but only by leave.

In 2013, during the Ceremonial Sitting for his retirement, Master Harper commented as follows:⁴⁷

During my time as Master ... the jurisdiction of the Master has greatly expanded. The Master now has the same civil jurisdiction as a judge at first instance. When the office was created in 1989 with the appointment of Master Alan Hogan, who we still refer to affectionately as “the old Master”, the jurisdiction was then very limited. The Master could not hear personal injury actions other than motor vehicle claims in which liability was in issue and could not deal with interlocutory applications arising under legislation other than the Supreme Court Rules.

That has changed greatly over the years, and I am going to take advantage of my captive audience to make one plea for legislative amendment. It is time to do away with the right of appeal to a single judge from an interlocutory decision of the Master. Such an appeal should, as is the case with interlocutory decisions of judges, lie only to the Court of Appeal and only by leave. The present system exposes litigants to an unnecessary extra level of appeal and whether they are exposed to that or not depends purely on whether the interlocutory application happens to have been listed to be heard by a Master or by a judge.

The Supreme Court Act should, in my opinion, be amended to make this change in the interests of reducing the workload of the court and in the interests of saving legal expense to litigants.

The appeal regime was changed by the *Courts Legislation Amendment Act 2015* (ACT). As well as changing the name of Master to Associate Judge, the Act substituted s 9 of the Supreme Court Act so that it provided that a person who was dissatisfied with an order of the Associate Judge could appeal “as prescribed under the rules” to the Court of Appeal. It also amended s 37E(4) which provided that an appeal from an interlocutory order of the Court constituted by a single judge could only be brought with leave of the Court of Appeal, so that it applied also to an interlocutory order of the Associate Judge.

The effect of these changes was that there was no longer an appeal from the Associate Judge to a single judge of the Court and that appeals from the Associate Judge and from a single judge were treated in the same way. This change reflected the assimilation of the position of Associate Judge with that of a resident judge by removing those appeal provisions which were indicative of the Associate Judge’s subordinate status.

The Attorney-General said in his presentation speech:⁴⁸

Part 6.4 of the Court Procedures Rules 2006 confers on the master the same civil jurisdiction exercisable by a single judge of the Supreme Court. This supports the proposed amendment and also promotes the efficient use of court resources. It is

⁴⁷ Transcript of Ceremonial Sitting for the Retirement of Master Harper, 22 May 2013, 13-14.

⁴⁸ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 19 February 2015, 562.

not a necessary or efficient use of court resources to require a single judge to hear an appeal of an interlocutory order made by the master and has the effect of diminishing the master's authority.

What is notable about this approach is that the expansion of the jurisdiction of the Master under the Rules had led to the position where the status of the office was such that the differential regime for appeals on interlocutory matters appeared to be inappropriate and inefficient. The practical reality created by the expansion of jurisdiction by subordinate legislation was the driver for the reconsideration of legislative regime governing appeals.

Comparison with other jurisdictions

Masters or Associate Judges exist in New South Wales, Victoria, Northern Territory, South Australia, Tasmania, and Western Australia. In each jurisdiction, the jurisdiction that can be exercised by a Master or Associate Judge is significantly more limited than the jurisdiction which may be exercised by the Associate Judge in the ACT.

In New South Wales, the *Supreme Court Act 1970* (NSW) provides for the Associate Judges in the Court of Appeal and for Divisional Associate Judges.⁴⁹ The powers of an Associate Judge are defined by the Rules which permit them to exercise powers under the rules as well as particular New South Wales and Commonwealth Acts.⁵⁰ Associate Judges are entitled to pension.⁵¹ There is, in fact, only one remaining Associate Judge, and it is unlikely that any more will be appointed.

In Victoria, there are currently nine Associate Judges. The jurisdiction of an Associate Judge is similar to New South Wales in that it defined by the rules and extends to duties, powers and authorities imposed or conferred by specific statutes or court rules.⁵² The matters in which Associate Judges have jurisdiction include a variety of civil interlocutory matters and a limited range of final hearings. Associate Judges are entitled to a pension.⁵³

In the Northern Territory the Associate Judge has powers given under the rules or by order of the Court.⁵⁴ The Associate Judge has no entitlement to a pension under the *Supreme Court (Judges Pensions) Act 1980* (NT).

In Tasmania⁵⁵, the default jurisdiction of the Associate Judge in civil matters is that it is the same as a single judge without a jury, although a variety of exceptions apply to that jurisdiction.⁵⁶ Like judges of the Court,⁵⁷ the Associate Judge has an entitlement to superannuation rather than a pension.⁵⁸

In South Australia, the Master of the Supreme Court is, while holding that office, also a District Court Judge and entitled to salary and allowances applicable to a District Court Judge.⁵⁹ The jurisdiction of a Master is significantly limited, having no power to deal with matters involving "the liberty of the subject" and a confined power to conduct

⁴⁹ *Supreme Court Act 1970* (NSW) ss 117A, 118.

⁵⁰ *Supreme Court Rules 1970* (NSW) ord 77, sch D.

⁵¹ *Judges' Pensions Act 1953* (NSW) s 17.

⁵² *Supreme Court Act 1986* (Vic) ss 110, 111; *Supreme Court (General Civil Procedures) Rules 2005* (Vic), ord 77.

⁵³ *Supreme Court Act 1986* (Vic) s 104A.

⁵⁴ *Supreme Court Act 1979* (NT) s 41K.

⁵⁵ The history of the position of Master in Tasmania is set out in CG Brettingham-Moore, 'The Office of Master' (1963) 1 *University of Tasmania Law Review* 842.

⁵⁶ *Supreme Court Rules 2000* (Tas) r 962.

⁵⁷ *Supreme Court Act 1887* (Tas) s 8.

⁵⁸ *Supreme Court Act 1959* (Tas) s 4AA.

⁵⁹ *Supreme Court Act 1935* (SA) ss 7(4), 12(2).

final hearings.⁶⁰ Masters are entitled to a pension under the *Judges Pensions Act 1971* (SA).

In Western Australia, the jurisdiction of the Master is defined by the rules. It includes the jurisdiction of a single judge sitting in chambers and matters which the Chief Justice directs the Master to hear.⁶¹ That jurisdiction is subject to a significant number of limitations.⁶² A Master is able to qualify for a pension under the *Judges Salaries and Pensions Act 1950* (WA).⁶³

As is apparent from the above discussion, the role of Associate Judge or Master in each other jurisdiction where the position exists is more limited than the role of the Associate Judge in the ACT. The ACT is the only jurisdiction where the jurisdiction of the Associate Judge or Master is so closely assimilated to that of a judge of the Supreme Court. Notwithstanding that the scope of their work is more limited than that of the Associate Judge in the Australian Capital Territory, in most jurisdictions an Associate Judge or Master has a post retirement entitlement to pension or superannuation of the same type as that afforded Supreme Court judges.

Observations about the change in jurisdiction

At the same time as the jurisdiction of the Associate Judge has been expanded, there have been other changes which have affected the scope of the work that the Associate Judge actually performs. Of principal significance are those changes which have altered the workload of the Supreme Court in relation to minor personal injury claims. In 2011, the *Courts Legislation Amendment Act 2011* (ACT) increased the civil jurisdiction of the Magistrates Court from \$50,000 to \$250,000⁶⁴. That significantly increased the scope of personal injury proceedings that are appropriately commenced and conducted in the Magistrates Court. It removed from the Associate Judge's workload a significant number of motor vehicle and personal injury proceedings. That occurred in parallel with the changes brought about by the *Civil Law (Wrongs) Act 2002* (ACT) and the *Road Transport (Third Party Insurance) Act 2008* (ACT) which were designed to increase the rate of settlement of cases prior to the commencement of proceedings. The reduction in the work of the Supreme Court in these kinds of personal injury proceedings will only be reinforced as the *Motor Accidents Injuries Act 2019* (ACT) captures accidents which previously would have resulted in common law claims in the Supreme Court and the number of common law cases arising prior to the Act's commencement tapers off.

The combined effect of these changes has been to remove from the Associate Judge's workload a number of relatively straightforward motor vehicle and personal injury matters resulting in the Associate Judge doing a variety of more complex work. This has obviously had benefits for the judges in that these matters are removed from their workload. However, it has meant that the majority of the civil work of the Court is dealt with by the Associate Judge. This has in some respects been an effective way to ensure a degree of consistency of approach and, hence, predictability of outcome in such cases. On the other hand, it has meant that the judges of the Court hear relatively few civil cases.

⁶⁰ *Supreme Court Act 1935* (SA) s 48(2)(c); *Supreme Court Civil Rules 2006* (SA) r 15, *Supreme Court Criminal Rules 2014* (SA) r 16.

⁶¹ *Rules of the Supreme Court 1971* (WA) ord 60, r 1(1)-(2).

⁶² *Rules of the Supreme Court 1971* (WA) ord 60, r 1(3).

⁶³ See *Supreme Court Act 1935* (WA) s 11B(3).

⁶⁴ *Magistrates Court Act 1930* (ACT) s 257.

The future

The purpose of this article has been to illustrate how the jurisdiction and functions of the Associate Judge have changed incrementally over time, largely as a result of the exercise of the rule-making power. The expansion of the jurisdiction pursuant to the exercise of that power has been driven by the pressure of the business of the Court and the desire of those exercising the rule-making power to have as broad as possible a pool of judicial officers to which work can be allocated. Recent amendments have given a proper statutory basis for the expanded role of the Associate Judge. The Legislative Assembly does not, however, appear to have considered in a principled way the appropriate, longer term structure of the Court. In 1988 the motivating force behind the establishment of the position of the Master was to provide additional judicial resources at a lower cost than would be involved in the appointment of an additional judge. That is because unlike resident judges whose remuneration and pension entitlements are those of a Federal Court judge,⁶⁵ the conditions of appointment of the Associate Judge are determined by the Executive⁶⁶ and have not included the potential for a judicial pension. The financial motivation for the maintenance of the position of Associate Judge will undoubtedly remain. However, in the light of the fact that the Associate Judge is no longer performing a subordinate and ancillary role to the role performed by the judges, and has been largely assimilated to the position of a judge in relation to all civil matters and a substantial number of criminal matters, it is worth considering whether it remains appropriate to retain the two-tier structure within the Court.

⁶⁵ *Supreme Court Act* s 37U(2).

⁶⁶ *Supreme Court Act* s 41B.