Murphy J. delivered the sole dissenting judgment, allowing the appeal on the grounds that the 'statutory procedure intended for the applicant's protection has not been followed'.[29] In his opinion, a jury should have been called upon to decide Ngatayi's capacity to stand trial, and the trial judge had erred in entering a plea of 'not guilty' for the accused. The danger he saw in the latter practice was that, although the outward appearance of justice was maintained, it might wrongly subject the defendant to a 'trial of a charge, the nature of which is beyond his understanding . . .'.[30] His Honour went on to consider the policy problems associated with the co-existence of our prevailing legal system and traditional aboriginal tribal law, suggesting that:

> when a person from another culture is charged with a breach of the laws of the dominant culture (particularly when a very serious crime is involved), it may be expedient but in some ways unsatisfactory to defer the trial until the accused is able to understand the charge and the proceedings, if ever. . . .[31]

This conclusion, with respect, does not appear to have satisfied even his Honour's own conscience, although it did accentuate the problematic nature of a cultural conflict that defies a truly equitable solution.

MARK DARIAN-SMITH*

PHILIP MORRIS INCORPORATED AND ANOTHER v. ADAM P. BROWN MALE FASHIONS PTY LTD[1]

Constitutional Law (Cth) — Federal Court of Australia — Jurisdiction — Implied Incidental power — Claim normally within jurisdiction of State Court — Trade Practices — Associated matters — Constitution (Cth) ss. 51(xxxix), 76 — Federal Court of Australia Act ss. 22, 32 — U.S. doctrine of pendent jurisdiction.

I INTRODUCTION

Arguments have recently been advanced that with the creation of the Family Court and the Federal Court,[2] there is emerging within Australia a dual competitive system of State and Federal courts.[3] The central questions arising out of such a development — whether we should have a single Australian court system, or, in its absence, how far the new Federal courts can and/or should adjudicate in matters traditionally dealt with by State courts — are part of the broader fundamental issue

[29] *Ibid.* 37.
[30] *Ibid.* 36.
[31] *Ibid.* 37.

* A Student of Law at the University of Melbourne.

[1] Unreported decision of the High Court, February 10, 1981. The High Court delivered a joint judgment in this case and in the case of *United States Surgical Corporation v. Hospital Products International Pty Ltd & Others.* Because this case note analyses the judgment solely from the constitutional perspective, it will be convenient to discuss only the *Philip Morris* case. The constitutional principles applicable were identical for both cases.

[2] See Family Law Act 1975 (Cth) s. 21 and Federal Court of Australia Act 1976 (Cth) s. 5. Both courts were established by the Commonwealth pursuant to ss. 71 and 77 of the Australian Constitution.

[3] *Cf.* the views of The Honourable Sir Laurence Street, 'The Consequences of a Dual System of State and Federal Courts' (1978) 52 *Australian Law Journal* 434, and The Right Honourable Sir Garfield Barwick, 'The State of the Australian Judicature' (1979) 53 *Australian Law Journal* 487, 488-9.

of Commonwealth-State powers.[4] With such questions yet to be resolved, the Full Bench of the High Court[5] has added to the debate with its recent joint judgment in the two cases of *Philip Morris Incorporated and Another v. Adam P. Brown Male Fashions Pty Ltd*, and *U.S. Surgical Corporation v. Hospital Products International Pty Ltd & Others*.[6] For the purposes of this note, a detailed recital of the facts is unnecessary. Suffice it to say that Adam P. Brown made unauthorized use of the plaintiff's (Philip Morris) 'Marlboro' trade mark and that Philip Morris sued Adam P. Brown in the Federal Court of Australia seeking damages and injunctions (i) restraining Adam P. Brown from engaging in misleading or deceptive conduct in contravention of ss. 52 and 53 of the Trade Practices Act 1974 (Cth) as amended, and (ii) restraining Adam P. Brown from passing off its own goods as the plaintiff's goods. Because the tort of passing off is a common law matter normally within the exclusive jurisdiction of State courts, Adam P. Brown alleged that the Federal Court did not have jurisdiction in respect of it. Notice of this defence having been given under s. 78B of the Judiciary Act 1903 (Cth) as amended, to the State and Commonwealth Attorneys-General, the Victorian Attorney-General applied for and was granted (under s. 40(i) of the said Act) an order removing the passing off part of the case to the High Court and referring to the High Court the question 'Does the Federal Court . . . have jurisdiction in respect of that part of the proceeding so removed?' The High Court therefore had to decide squarely for the first time[7] (i) the scope of the Federal Court's jurisdiction to deal with non-federal claims to relief which were joined with federal matters expressly within the jurisdiction of the Court; and (ii) whether such jurisdiction was enlarged by ss. 22 and 32 of the Federal Court of Australia Act 1976 (Cth) or s. 51(xxxix) of the Constitution (Cth). In the determination of the first question the High Court had to decide whether the U.S. doctrine of 'pendent jurisdiction' was applicable in Australia.[8]

II THE DECISION

A. The Federal Court's jurisdiction with respect to claims normally within the jurisdiction of State Courts

The first step in the resolution of this issue was ascertaining the meaning of s. 76 of the Constitution (Cth) which provides, for present purposes,

> The Parliament may make laws conferring original jurisdiction on [federal courts] in any matter —
> (i) Arising under [the] Constitution, or involving its interpretation;
> (ii) Arising under any laws made by the Parliament.

[4] Sir Laurence Street *ibid.* 437 recognizes this and warns against the administration of justice becoming a pawn in a Commonwealth — state power struggle. In the speech he made on the occasion of his taking the oath of office (yet to be published), the present Chief Justice of the High Court also referred to this matter, advocating the eventual integration of both Federal and State courts into one harmonious system.

[5] Barwick C.J., Gibbs, Mason, Stephen, Murphy, Aickin, Wilson JJ.

[6] Unreported February 10, 1981.

[7] The Court had already decided the scope of the High Court's own power to determine non-federal matters when it was exercising its original jurisdiction, interpreting the Australian Constitution under s. 76(i). See *Cater v. Egg and Egg Pulp Marketing Board (Vic.)* (1942) 66 C.L.R. 557, 580, 585-7, 602. Also, in relation to the Federal Court, Northrop J. in *Adamson v. West Perth Football Club Incorporated and Others* (1979) 27 A.L.R. 475, 493, 499 decided that the Courts had a judicially implied incidental power to exercise jurisdiction over a pendent state matter when exercising jurisdiction over a federal matter. His Honour was dealing with an action of restraint of trade which was joined to a restrictive trade practices action under the Trade Practices Act 1974 (Cth), and although he fully dealt with the issue with which the High Court was concerned in the *Philip Morris* case, only Mason J. of all the justices in the latter case, (at 46) referred to the judgment of Northrop J.

[8] All these issues will be discussed in turn, *infra.*

The claim of Philip Morris in respect of misleading or deceptive conduct was undoubtedly within the jurisdiction of the Federal Court, because it was expressly authorized by ss. 80, 82 and 86 of the Trade Practices Act 1974 (Cth) which is a law made by the Parliament, thus making the claim a 'matter arising under [a law] made by the Parliament' within s. 76(ii) of the Constitution. The real question for determination was whether that aspect of the plaintiff's claim seeking relief for passing off was so much a part of the claim under the 1974 Act as to enable it to qualify as a matter arising under a law of the Commonwealth in respect of which the Parliament could confer original jurisdiction on the Federal Court.[9] The meaning of the word 'matter' was thus central to the decision.

Barwick C.J. began his analysis with the proposition that the 'matter' raised in an action determines the range or extent of the jurisdiction of a Federal court.[10] He stated that for this purpose 'matter' is not confined to the 'cause of action' asserted by the moving party and neither do the remedies sought or the issues raised by the proceedings necessarily mark out the parameters of the 'matter' before the court. Rather, the facts alleged by the parties and their consequences are determinant of what is relevantly the 'matter'.[11] In his view, it followed that once the jurisdiction of a Federal court is attracted in relation to a matter — as in this case by the claim under the Trade Practices Act 1974 (Cth) — there vests in that court an 'accrued federal jurisdiction'[12] enabling it to resolve the whole 'matter' before the court, even though this may involve enforcement of rights which derive from a non-federal source, as long as the federal and non-federal rights sought to be enforced are so connected as to make them part of the one 'matter' before the court.[13] Barwick C.J. went further and asserted that once federal jurisdiction is attracted, it is not lost because the claim which attracted it (the federal claim) has not been substantiated or has been displaced.[14] This is consistent with the actual result in *Adamson v. West Perth Football Club Incorporated and Others*[15] where even though Northrop J. decided that Adamson's claim in so far as it was based on the Trade Practices Act 1974 (Cth) failed, he nevertheless held that his claim in so far as it was based on the common law doctrine of restraint of trade succeeded.

The Chief Justice qualified his remark that the federal jurisdiction should not be confined by any narrow view of what are the parameters of the 'matter' before the court, by stating that a Federal court's jurisdiction does not extend to enable it to resolve any other matter which although an allied or associated matter, is *in substance a disparate and independent matter* from the matter in relation to which the federal jurisdiction has been attracted.[16] According to his Honour therefore, the test of the relevant nexus that must exist between a federal and a non-federal claim before a federal court can adjudicate on the latter claim is whether the two are in substance not disparate and independent matters. His Honour did not cite any authorities for his propositions and his test is sufficiently vague and flexible to enable the Federal Court to significantly broaden its jurisdiction over non-federal matters. In the case before him, the Chief Justice entertained no doubt that the requisite nexus existed

[9] See *e.g.* Gibbs J.'s judgment, 27.
[10] *Ibid.* 5.
[11] *Ibid.* 5-6.
[12] His Honour states that the accrued federal jurisdiction is not limited to matters incidental to that aspect of the matter which has in the first place attracted federal jurisdiction, *ibid.* 7.
[13] *Ibid.*
[14] *Ibid.* 6.
[15] (1979) 27 A.L.R. 475, 506-7.
[16] Judgment 6-7 (emphasis added).

between the trade practices claim and the passing off claim, therefore enabling the Federal Court to deal with both of them.[17]

Like the Chief Justice, Gibbs J. accepted that the nature of the matter in each case will determine whether the Federal Court has jurisdiction.[18] In his opinion, 'matter' does not simply mean 'legal proceeding' but denotes 'controversies which might come before a Court of Justice'.[19] His Honour then stated:

> the jurisdiction of the Federal Court, once attracted in respect of a matter arising under a law of the Parliament, is wide enough to enable the court to decide questions which it would clearly have no jurisdiction to entertain if made in separate proceedings . . . only . . . if those questions form part of the matter which attracts jurisdiction. . . . Such a matter may involve a number of questions not all of which in themselves are of a kind described in s. 75 or s. 76 [of the Constitution] and the court having jurisdiction may deal with all these questions.[20]

His Honour elaborated:

> if one of the grounds on which a claim is based is that a right, duty or immunity arises under a Commonwealth Act, then (*provided that the claim is genuinely made*) the matter may properly be given the character of a matter arising under a law of the Parliament, although the same right, duty or immunity is claimed also to arise under State law on the same facts. . . .[21] [I]f a party claims relief on two different legal grounds, but *the facts on which the relief is sought on each ground are identical, and the relief sought on each ground is the same in substance but not in form*, there is only one matter for determination.[22]

Apart from the requirement that the claim be genuinely made, the test of the relevant nexus between a federal and a non-federal claim, according to Gibbs J., is whether the two claims arise from identical facts and whether the relief sought is the same in substance for each claim. If that test is satisfied then the two claims acquire the character of a 'matter arising under a law of the Parliament', in respect of which federal courts can be given jurisdiction under s. 76(ii) of the Constitution (Cth).

Gibbs J. was aware that his test was wide enough to enable the jurisdiction of Federal courts to be expanded, so he added a proviso. He stated that the principles he outlined do not mean that a Federal court has jurisdiction to make a complete adjudication of any legal proceeding which involves a matter of the requisite kind and other matters as well: 'If the jurisdiction extended so wide, it would mean that a party could, by joining a number of matters in one proceeding, enlarge at will the jurisdiction of the Federal Court beyond the . . . restrictions imposed by ss. 75-77 of the Constitution . . .'.[23] This suggests that the requisite nexus is a question of degree and that the facts of each case must be closely examined.[24] In the case before him, Gibbs J. held that the requisite nexus was satisfied so that both the trade practices and

[17] *Ibid.* 10-11.
[18] *Ibid.* 24.
[19] *Ibid.* 23. He relied on *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 265 and *South Australia v. Victoria* (1911) 12 C.L.R. 667, 675.
[20] *Ibid.* 27. The last remark is apparently inconsistent with his Honour's earlier statement (at 24) that 'jurisdiction may not be conferred on a Federal Court in matters which are associated with matters within jurisdiction, but which are not of themselves of a kind described in s. 75 or s. 76 . . .'.
[21] *Ibid.* 30 (emphasis added).
[22] *Ibid.* 29 (emphasis added). His Honour considered that this principle derived from the meaning of the word 'matter' similarly applied whether the question arises in relation to s. 76(i) or s. 76(ii) of the Constitution (Cth). He therefore relied on cases dealing with s. 76(i). See *e.g. R. v. Carter; Ex Parte Kisch* (1934) 52 C.L.R. 221; *R. v. Bevan; Ex Parte Elias and Gordon* (1942) 66 C.L.R. 452; *Hopper v. Egg & Egg Pulp Marketing Board (Vic.)* (1939) 61 C.L.R. 665; *Carter v. Egg and Egg Pulp Marketing Board (Vic.)* (1942) 66 C.L.R. 557.
[23] *Ibid.* 27.
[24] *Ibid.*

the passing-off claim together constituted 'a matter which the Federal Court has jurisdiction to determine'.[25]

Mason J. (with whom Stephen J. agreed) recognized that the outcome of the case depended on whether the Court was prepared to attribute a broad or a narrow content to the word 'matter'.[26] He chose to give the word a broad meaning; 'one which would catch up, as far as possible, the controversy which parties brought for determination by a court'.[27] The result was that

> the [Federal] Court having jurisdiction to determine a matter falling within ss. 75 and 76 giving rise to the exercise of federal jurisdiction has jurisdiction to decide *an attached non-severable claim*.[28]

His Honour elaborated on the meaning of 'non-severable', stating that to acquire this characterization, a non-federal claim does not have to be united to the federal claim by a single claim for relief. Rather, a claim may be non-severable if the resolution of the attached claim is essential to a determination of the federal question or if the attached claim and the federal claim so depend on common transactions and facts that *they arise out of a common substratum of facts*.[29] Mason J., relying on authority concerning s. 76(i) of the Constitution (Cth),[30] proceeded to reject three propositions advanced by Adam P. Brown, *viz.*:[31]

(i) that a Federal court has no jurisdiction to deal with any claim to relief not itself grounded in federal law;

(ii) that there cannot be jurisdiction to deal with a non-federal claim unless the resolution of that claim is necessary for the determination of the federal claim; and

(iii) that the jurisdiction of a court to hear and determine attached claims to relief is greater when the jurisdiction which is invoked is jurisdiction under s. 76(i) compared with s. 76(ii) of the Constitution.

As is evident from their judgments, *supra*, Barwick C.J. and Gibbs J. also rejected these propositions although regarding proposition (iii) Gibbs J. expressly rejected it[32] whilst Barwick C.J. implicitly did so.[33] In the case before him, Mason J. decided that the passing off claim was not *a distinct matter severable* from the trade practices claim because *both arise out of a common substratum of facts, and the relief sought was substantially similar*.[34] The test that his Honour ultimately applied appears to be a combination of the tests adopted by Barwick C.J. and Gibbs J.

Although Murphy J. stated that he was deciding the case on the broad proposition that 'if fragmentation cannot be avoided the evident purpose of our constitutional provision for Federal Courts would be defeated', and not on the meaning of the word 'matter', he did agree that that word should be read widely and liberally.[35] He therefore concluded that:

> when the jurisdiction of any federal court . . . is attracted in any matter, the Court . . . has the power to determine any matter, federal or non-federal in origin, which is *not completely separate and distinct* from the matter which attracted federal jurisdiction.[36]

[25] *Ibid.* 31.
[26] *Ibid.* 45.
[27] *Ibid.* 43. See his full discussion of the authorities on this question, 38-43.
[28] *Ibid.* (emphasis added).
[29] *Ibid.* (emphasis added).
[30] The cases in question are listed. *Supra* n. 22.
[31] Judgment 41-2.
[32] See n. 22.
[33] Judgment 7.
[34] *Ibid.* 47 (emphasis added).
[35] *Ibid.* 50.
[36] *Ibid.* 51 (emphasis added).

His test is therefore nearly identical to that of Barwick C.J. and is not dissimilar to that of Mason J. Murphy J. also stated that 'once federal jurisdiction is attracted, it remains'.[37] Presumably his Honour was concurring with the view of the Chief Justice that jurisdiction over the related non-federal claims does not depend on the success of the federal claim which initially attracted a Federal court's jurisdiction. In the case before him, Murphy J. was not persuaded that the passing off claim was separate and distinct from the trade practices claim.[38]

The minority judgments of Aickin and Wilson JJ. were similar in essential respects. In holding that the Federal Court had no jurisdiction in respect of the passing off claim, their Honours accepted Adam P. Brown's argument that the word 'matter' is narrower in scope when it is used in reference to s. 76(ii) compared to s. 76(i) of the Constitution.[39] Their reasoning was that jurisdiction under s. 76(i) is not conditioned by any description of subject matter: all claims may be resolved by the court as long as these give rise to a question requiring the interpretation of the Constitution, whereas jurisdiction under s. 76(ii) is restricted as to subject matter: unless the rights, duties or liabilities sought to be enforced 'arise under' a law made by the Parliament, then there is no jurisdiction in respect of them.[40] Aickin J. continued:

> It is this vital distinction which requires the conclusion that matters arising under the common law or Acts of State Parliaments cannot be the subject of a grant of jurisdiction to federal courts under s. 76(ii) whatever the degree of overlap there may be in the facts relevant to the two kinds of matter.[41]

Wilson J. however was prepared to concede that where a federal question cannot be resolved without the determination of non-federal questions, then the concept of 'matter' arising under an Act would widen to embrace the whole.[42]

The end result of *Philip Morris* is that five out of seven High Court justices held that where the requisite nexus exists between a non-federal and a federal claim before the Federal Court, it can adjudicate on both claims by treating them as a single 'matter'. The tests which those on the majority put forth as a means of determining whether the requisite nexus is satisfied in a given case differ somewhat in their form but not in their substance. It can be said that where two claims are 'not in substance disparate and independent' (*per* Barwick C.J.) or 'not completely separate and distinct' (*per* Murphy J.) or are not 'distinct and severable' (*per* Mason and Stephen JJ.) but 'the facts on which the relief is sought on each [claim] are identical and the relief sought on each [claim] is the same in substance' (*per* Gibbs J.) or both claims arise out of 'a common substratum of facts' (*per* Mason and Stephen JJ.) then the Federal Court has jurisdiction in respect of both claims albeit one is non-federal in nature.[43]

B. Jurisdiction under s. 32(1) of the Federal Court of Australia Act 1976

Philip Morris and the Commonwealth Solicitor-General argued that s. 32(1) extended the jurisdiction of the Federal Court to all matters 'associated' with the trade practices claim. Section 32(1) provides

[37] *Ibid.*
[38] *Ibid.* 52.
[39] *Ibid.* 63-5, 76-7.
[40] *Ibid.* In accordance with this reasoning their Honours held that the authorities *supra* n. 22 (stating that in respect of s. 76(i) the Court has power to resolve the whole matter before it) are not relevant in respect of jurisdiction conferred under s. 76(ii).
[41] *Ibid.* 65.
[42] *Ibid.* 77.
[43] In *Adamson's* case, *supra* 493, the test put forth by Northrop J. was: 'In order to come within the implied incidental power, the pendent State matter must not be severable or distinct from the matter properly before the Court' with the proviso (499) that the claim must be 'bona fide and substantial'.

> To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked.

The whole Court felt that the language of s. 32(1) was too wide because it purported to grant to the Court a jurisdiction of a non-federal nature which is more than is necessary to resolve the matter in relation to which the federal jurisdiction has been attracted.[44] In particular, Barwick C.J. described the words 'to the extent that the Constitution permits' as an unfortunate form of drafting because it imposed upon a court of construction a task which it ought not to be asked to undertake.[45]

However, the Court was prepared to uphold the validity of s. 32(1) by reading down its provisions in accordance with s. 15A of the Acts Interpretation Act 1901 (Cth), as amended. The judgment of Gibbs J. was broadly representative of the effect which the court was prepared to confer on s. 32(1).[46] His views were that:[47]

(i) Section 52(1) cannot validly confer on the Federal Court jurisdiction in respect of matters other than those enumerated in ss. 75 and 76. It therefore does not extend to confer on the Federal Court jurisdiction to entertain a claim based on State law because such a claim would not give rise to a matter of a kind specified in ss. 75 or 76 of the Constitution.

(ii) However once the jurisdiction of the Court is invoked, *e.g.* under the Trade Practices Act 1974 (Cth), its jurisdiction is extended by s. 32(1) to associated matters which arise under other laws made by the Parliament, even though the Parliament has not (except by s. 32(1)) conferred jurisdiction on the Court in respect of those matters. For example, although no original jurisdiction has been conferred upon the Federal Court in respect of an action for infringement of copyright, which is a matter arising under a law of the Commonwealth, the effect of s. 32(1) is that jurisdiction is conferred on the Federal Court in respect of all actions for infringement of copyright that are associated with matters otherwise within the jurisdiction of the court, *e.g.* actions under the Trade Practices Act 1974 (Cth).

(iii) Section 32(1) applies only if there is a matter which arises under an existing federal law; it does not confer on the Federal Court jurisdiction in associated matters in respect of which the Parliament is empowered to pass a law although no law, apart from s. 32(1) itself, has actually been passed.

C. Jurisdiction under s. 22 of the Federal Court of Australia Act 1976

The Court had to decide whether s. 22 added to the Federal Court's jurisdiction. Section 22 provides:

> The Court shall, in every matter before the court, grant . . . all remedies to which any of the parties appear to be entitled in respect of a legal or equitable claim properly brought forward by him in the matter, 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 Court[48] held that s. 22 was valid because it did not purport to enlarge the jurisdiction of the Federal Court but only intended to confer on it the power to grant appropriate relief in any legal or equitable claim already within the Court's jurisdiction.

[44] See judgment, 10 *per* Barwick C.J.; 25-6 *per* Gibbs J.; 38-46 *per* Mason and Stephen JJ.; p. 52 *per* Murphy J.; 67-9 *per* Aickin J.; 78 *per* Wilson J.

[45] *Ibid.* 9-10.

[46] *Supra* n. 44. *Cf.* Mr Justice Murphy's reading down, 52.

[47] Judgment 25-6.

[48] *Ibid.* 9 *per* Barwick C.J.; 20-21 *per* Gibbs J.; 37 *per* Mason and Stephen JJ.; 61 *per* Aickin J.; 78 *per* Wilson J.; Murphy J. did not consider this question.

D. Jurisdiction under s. 51(xxxix) of the Constitution (Cth)

So far as is relevant, s. 51(xxxix) provides:

> The Parliament shall . . . have power to make laws . . . with respect to . . . matters incidental to the execution of any power vested . . . in the Federal Judicature.

Those members of the Full Bench who considered this question[49] held on well established authority[50] that s. 51(xxxix) cannot be used to extend the jurisdiction of Federal Courts to matters other than those set out in ss. 75 and 76 of the Constitution.

E. Applicability of the U.S. doctrine of 'pendent jurisdiction'

The U.S. doctrine prior to 1966 was formulated in these terms:

> The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the Federal Court, even though the federal ground be not established may nevertheless retain and dispose of the case upon the non-federal ground; in the latter it may not do so upon the non-federal cause of action.[51]

The case of *United Mine Workers of America v. Gibbs*[52] however, expanded the doctrine so that an attached non-federal claim may be dealt with by a Federal court if (i) there is a substantial federal question; (ii) the state and federal claims derive from a common nucleus of operative fact, and (iii) the plaintiff would normally be expected to try the two claims in one proceeding.

No member of the High Court unequivocally endorsed the current U.S. doctrine.[53] Barwick C.J., whilst conceding that the U.S. and Australian approaches were developed for similar reasons, felt that the U.S. authorities are not helpful in the resolution of Australian cases because the U.S. doctrine, as expressed in the *United Mine Workers* case, goes beyond the Australian doctrine in so far as it warrants 'an accretion of non-federal jurisdiction which is not necessary or convenient for the resolution of the case or controversy which has been the source of the federal jurisdiction in the first place . . .'.[54] Gibbs J. was prepared to accept the *Hum v. Oursler*[55] doctrine, but was of the view that the *United Mine Workers doctrine*[56] cannot be warranted by Chapter III of our Constitution.[57] Mason J. expressed the view that the U.S. authorities have 'a direct relevance' to the Australian constitutional position and they lend support to the conclusions he expressed, but, ultimately, he preferred to rest the Federal Court's jurisdiction squarely on the provisions of ss. 75 to 77 of the Constitution, rather than ascribe any part of it to judicially implied incidental power.[58] Murphy J. did not expressly comment on the U.S. doctrine, although he referred to U.S. authorities, including *Hum v. Oursler* and *United Mine Workers* in support of his propositions. Aickin J., in contrast to Gibbs J., was not even satisfied that the *Hum v. Oursler* doctrine regarding the words 'cases' and

[49] *Ibid.* 9 *per* Barwick C.J.; 24 *per* Gibbs J.; 66 *per* Aickin J.; 79 *per* Wilson J.
[50] *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 265; *R. v. King; Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 269-70.
[51] *Hum v. Oursler* (1933) 289 U.S. 238, 246.
[52] (1966) 383 U.S. 715, 725-6.
[53] *Cf.* the view of Northrop J. in *Adamson's* case *supra* 499 that 'In determining whether, in any particular case, the Federal Court has the implied incidental power, assistance can be had by a consideration of decisions of the Supreme Court of the United States . . .'.
[54] Judgment 8.
[55] (1933) 289 U.S. 238, 246.
[56] (1966) 383 U.S. 715, 725-6.
[57] Judgment 30.
[58] *Ibid.* 46. He concludes this statement with '*Cf. Adamson* . . . at pp. 493-501 . . .'.

'controversies' is closely comparable to the High Court's approach to the word 'matters'. In any event in his view *United Mine Workers* went too far so that no assistance could be derived from the U.S. cases.[59] Finally, Wilson J. felt that the U.S. doctrine has never taken root in Australia and that there are major differences between Art. III of the U.S. Constitution and Ch. III of our Constitution which diminishes any persuasion which the U.S. decisions might otherwise exert.[60]

III COMMENT

By holding that in certain circumstances Federal courts may adjudicate on non-federal claims in respect of which they would clearly have no jurisdiction if made in separate proceedings, the majority in *Philip Morris* has enlarged the potential for Federal courts to encroach on matters traditionally dealt with by State courts. As a result, concern has been expressed that eventually the number of commercial cases coming before the State Supreme Courts will significantly diminish. Important questions of policy surround this case, and there is no doubt that the High Court was well aware of them. Mason J. stated:

> Lurking beneath the surface of the arguments presented in this case are competing policy considerations affecting the role and status of the Federal Court and the Supreme Court of the States. There is on the one hand the desirability of enabling the Federal Court to deal with attached claims so as to resolve the entirety of the parties' controversy. There is on the other an apprehension that if it be held that the Federal Court has jurisdiction to deal with attached claims, State Courts will lose to the Federal Court a proportion of the important work which they have hitherto discharged, work which the Federal Court has no jurisdiction to determine if it be not attached to a federal claim.[61]

There may be cause for the Supreme Courts to be concerned because it will be up to the Federal Court at first instance to decide whether the requisite nexus between federal and non-federal claims exists. Given the width and flexibility of the tests propounded by the majority, and given that historically courts have jealously guarded or enlarged their own jurisdiction, it is not unlikely that the Federal Court will broadly construe its own jurisdiction in a given case. There is the danger that the practice of joining non-federal claims to federal claims will be abused to the extent that in order to take advantage of the relatively speedier processes or remedies of the Federal Court, litigants may strain to draw *prima facie* state causes of action within a tenuous federal claim for relief. It is true that *Philip Morris* suggests some safeguards: Gibbs J. requires that the claim has to be made genuinely[62] and Barwick C.J. states that the Federal Court, in appropriate circumstances, has a discretion to deal only with the federal claim and ignore the attached non-federal claim.[63] However it is questionable whether such safeguards are adequate. There is also the danger that in a given case where the relevant nexus exists, one party may apply *ex parte* to the Federal Court and the other party may apply simultaneously to a Supreme Court thus possibly resulting in two inconsistent interim orders covering the same non-federal claim. In such circumstances it is uncertain which order would prevail.[64]

Whilst recognizing these dangers and the unsatisfactory position in which State Supreme Courts may find themselves, it is submitted that the actual decision of the

[59] *Ibid.* 67.
[60] *Ibid.* 79.
[61] *Ibid.* 44.
[62] *Ibid.* 30.
[63] *Ibid.* 7.
[64] Perhaps s. 109 of the Constitution will resolve the situation: see *Tansell v. Tansell* (1977) 19 S.A.S.R. 165 in regard to the analogous situation of inconsistent proceedings in the Family Court and Supreme Courts.

majority in *Philip Morris* is correct because, in the writer's opinion, Federal-State power conflicts are less important than the assurance that a citizen can have his whole case determined in one court and that he should not have to take a risk in choosing whether he goes to a State or a Federal court.[65] The majority decision recognizes that human and community — no less commercial — problems just do not fall into watertight jurisdictional components and that clear dividing lines cannot be drawn.[66]

Ultimately however the present situation, wherein the boundary line between the jurisdiction of Federal courts on the one hand and State Supreme Courts on the other still remains ill-defined, will have to be remedied because 'no legal proceedings are more futile and unproductive than disputes as to jurisdiction'.[67] It is in the public interest that Australia's court system should be integrated. Whether such an integration takes the form of a vesting of federal jurisdiction in State courts or a vesting of state jurisdiction in Federal courts is a political question. In the meantime there is little doubt that the *Philip Morris* case has enhanced the Federal Court's jurisdiction in commercial matters.

EMILIOS KYROU*

[65] This is currently a very serious problem in relation to custody proceedings. See Australian Parliament. *Report of the Joint Select Committee on the Family Law Act* (1980) Vol. 1 pp. 13-15.

[66] This language is adapted from the article of The Honourable Sir Laurence Street, *supra* n. 3 p. 437.

[67] Quoted from the speech made by the present Chief Justice of the High Court on the occasion of his taking the oath of office (yet to be published).

* A Student of Law at the University of Melbourne.