

JURISDICTION AND POWER: HABEAS CORPUS AND THE FEDERAL COURT

DAVID CLARK*

*This paper criticises the distinction made in *Ruddock v Vadarlis* that the Federal Court may not issue a writ of habeas corpus, though it may issue an order in the nature of a writ of habeas corpus. The paper argues that the Federal Court may issue a writ of habeas corpus and identifies three statutory bases for this conclusion. The paper also argues that the court in *Ruddock v Vadarlis* misunderstood the writ in assuming that it was less flexible than it actually is; and that the conclusion reached in that case was unnecessary given the findings actually made by the court.*

I INTRODUCTION

2001 was a watershed year in the history of the Federal Court of Australia. Despite the importance of the Federal Court in Commonwealth public law matters one of the unresolved¹ questions concerning the court's jurisdiction and power has been the relatively recent answer to the question of whether or not the court might issue relief in the nature of habeas corpus. The paucity of case law before 2001 requires some explanation as does the upsurge in applications for habeas relief after 2001. The lack of habeas corpus cases was in many ways surprising because since 1992² the law has required the mandatory detention of all illegal non-citizens and while efforts were made by lawyers to secure their release, no applicant seems to have resorted to habeas corpus as a remedy. Before 2001 there were cases in which orders in the nature of habeas corpus were sought, but they were refused on the merits and the court did not rule on whether that remedy or one like it was available.³ The main explanation for the absence of the remedy seems to lie in a belief by some members of the court that habeas corpus was not available because the remedy was not explicitly mentioned in the *Federal Court of Australia Act 1976* (Cth) ('Federal Court Act') itself. While there was

* Professor, School of Law, Flinders University.

¹ David Clark and Gerrard McCoy, *Habeas Corpus: Australia, New Zealand and The South Pacific* (Sydney: Federation Press, 2000) 27 concluded in their May 2000 book that 'To date, the matter remains unresolved'.

² See *Migration Reform Act 1992* (Cth) ss 54W and 54ZD. These sections were renumbered in later reprints of the *Migration Act 1958* (Cth) as ss 189 and 196 respectively. See the *Migration Act 1958* (Cth) reprint 8 of 2001, Renumbering Table 2. For a brief history see: Human Rights and Equal Opportunity Commission, *A Last Resort?: National Inquiry into Children in Immigration Detention*, Commonwealth Parliamentary Paper No 134 (2004) 141.

³ See *Puharka v Webb* (1983) 77 FLR 306, 319; *Guo Wei Rong v Minister for Immigration and Ethnic Affairs* (1995) 38 ALD 38, 78-9; *Wai Yee Yeoh v Minister for Immigration and Multicultural Affairs* [1997] FCA 1316 (Unreported, Emmett J, 31 October 1997). See also David Clark and Gerard McCoy, above n 1, 26-8. There is a dictum by Toohey J in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 51 to the effect that the Federal Court might entertain a habeas corpus application to release a person held under immigration legislation. But this dictum does not distinguish between the writ and an order in the nature of a writ of habeas corpus.

no case that held that the remedy was not available counsel in one case indicated that he had been told that habeas corpus was not within the powers of the Federal Court. In *Pylka* Mr P N Rose informed Hayne J in an application for the writ of habeas corpus before the High Court that

[m]y understanding [is] that the Federal Court has previously indicated that it did not believe it had the power. It was specifically given the powers for the other prerogative writs, but not for habeas corpus. That was left out of its Act.⁴

In a later passage in the same transcript the same counsel responded to the suggestion by Hayne J that the Federal Court could award the writ if the matter were remitted to the Federal Court by adding that

I know that on the one other occasion when I tried to seek habeas corpus in the Federal Court, and I went directly there, I was told I could not have it and was told I should read the Act. It is some years ago, your Honour, that it happened to me.

But all of this changed with the decision of the Full Federal Court in *Ruddock v Vadarlis*.⁵ The case was politically sensational coming as it did in the midst of a federal election campaign in which the question of allowing asylum seekers into the country became a major issue.⁶ The MV Tampa was a Norwegian ship that, on 26 August 2001, had rescued 433 asylum seekers from a sinking boat and had proceeded to the Australian territory of Christmas Island.⁷ The captain of the ship was ordered not to enter Australian waters and to enforce this order the government authorised a detachment of special-air-service soldiers to board the ship to prevent entry into Australian waters. Lawyers for the asylum seekers sought the writ of habeas corpus in the Federal Court in Melbourne before North J who decided that the detention by the Commonwealth was illegal.⁸ The Commonwealth launched an immediate appeal against this decision and the majority in the Full Court of the Federal Court held that the detention of the MV Tampa and its passengers was within the executive power of the Commonwealth conferred by s 61 of the *Constitution*. In order to avoid a repeat of the matter and to forestall further proceedings the Commonwealth parliament passed a validating act on the matter almost immediately.⁹

⁴ Transcript of Proceedings, *Re the Honourable P Ruddock; Ex parte Pylka* (High Court of Australia, Hayne J, 5 December 1997).

⁵ (2001) 110 FCR 491 (Full Federal Court) ('*Ruddock v Vadarlis*', also 'the Tampa case').

⁶ The controversial nature of the case was noted in *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229, 242 [29] (Black CJ and French J). For one view of the political context see David Marr and Marian Wilkinson, *Dark Victory* (2003) for another see Frank Brennan, *Tampering with Asylum* (2003).

⁷ *Ruddock v Vadarlis* (2001) 110 FCR 491, 522 [131] (French J). Cf Commonwealth, *Parliamentary Debates*, House of Representatives, 28 August 2001, 30359; Commonwealth, *Parliamentary Debates*, House of Representatives, 30 August 2001, 30663 where the Prime Minister states that there were 434 persons on board.

⁸ *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.

⁹ See *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth). The long title of this act reads: 'An Act to validate the actions of the Commonwealth and others in relation to the MV Tampa and other vessels, and to provide increased powers to protect Australia's borders, and for

While the case stimulated a considerable body of legal writing on many aspects of the case,¹⁰ the point of interest for the purposes of this paper was the holding by Beaumont J in his Full Court judgment that the Federal Court did have the power to issue orders in the nature of a writ of habeas corpus.

Following *Ruddock v Vadarlis* and the important case of *Al Masri* in August 2002¹¹ there was a major upsurge in applications for habeas corpus to the Federal Court¹². The stimulus for these applications was concern with the plight of persons refused refugee status in Australia and who were being detained in immigration detention centres, often in remote areas until their removal from the country. The recent run of cases has now probably runs its course for two reasons. First, the effect of the Tampa Affair, along with efforts to disrupt illegal people smuggling from Indonesia, has been to almost stop the flow of arrivals,¹³ while the numbers of persons in immigration detention centres has dramatically declined partly as a result of the grant of bridging visas by the Minister for Immigration to persons indefinitely detained.¹⁴ Second, the run of cases based on the *Al Masri*¹⁵ argument came to an end in 2004 when the High Court held by a

(footnote 9 cont'd) related purposes'. The Bill passed through all three stages in two days immediately following the Full Court decision: Commonwealth, *Parliamentary Debates*, House of Representatives, 18 September 2001, 30872; Commonwealth, *Parliamentary Debates*, House of Representatives, 19 September 2001, 31020.

- 10 See, eg, Justice A M North and Peace Declé, 'Courts and immigration detention: 'Once a jolly swagman camped by a billabong' (2002) 10 *Australian Journal of Administrative Law* 5; Francine Feld, 'Tampa Case: Seeking refuge in domestic law' (2002) 8 *Australian Journal of Human Rights* 157; Mary Crock, 'You have to be stronger than razor wire: Legal issues relating to the detention of Refugees and asylum seekers' (2002) 10 *Australian Journal of Administrative Law* 33; Michael White, 'Tampa Incident: Some subsequent legal issues' (2004) 78 *Australian Law Journal* 249; Eloise Dias, 'Punishment by another name? Detention of non-citizens and the separation of powers' (2004) 15 *Public Law Review* 17.
- 11 *MIMIA v Al Masri* (2002) 192 ALR 609 (Merkel J) ('*Al Masri*'). Actually, the *Al Masri* line of argument was first initiated in May 2002 when an Iranian applicant named Mohammed Reza Haliji sought a writ of habeas corpus in the Federal Court before Von Doussa J in Adelaide. As the applicant was released before judgment the question of the court's power in relation to habeas corpus was not ruled upon. See Penelope Debelle, 'Judge Condemns Refugee's Detention', *The Age* (Melbourne), 15 May 2002, 9. The author was present in the Court throughout these proceedings.
- 12 The *Al Masri* case rated a special mention in The Federal Court of Australia, *Annual Report 2002-2003*, Commonwealth Parliamentary Paper No 370 (2003) 29 and was summarized in the same report at 152-4.
- 13 Thus over 4,000 arrived illegally by boat in 1999-2000 and 2000-2001, but this number declined to none in 2002-2003 and 53 in 2003-2004: Department of Immigration and Multicultural and Indigenous Affairs, *2003-04 Annual Report*, Commonwealth Parliamentary Paper No 372 (2004) 4.
- 14 See *The Australian* (nationwide), 1 September 2004, 5. One indicator of the decline on the scale of the numbers in the camps was that immigration facilities at Curtin and Woomera were closed in 2002 and 2003 while the Port Hedland Immigration Detention Centre was closed in June 2004: Commonwealth Ombudsman, *Annual Report 2003-2004*, Commonwealth Parliamentary Paper No 349 (2004) 51.
- 15 *Minister for Immigration, Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54 (Full Federal Court) upholding *MIMIA v Al Masri* (2002) 192 ALR 609 (Merkel J). The substantive point in the *Al Masri* case was whether or not the power to detain unlawful non-citizens under the *Migration Act 1958* (Cth) was to be limited or was a power to detain whether or not the detainee could be removed from the country. The judges in the *Al Masri* litigation held that there was an implied limit to the detention power and that on the facts these limits had been exceeded. They held that Mr Al Masri was to be released, subject to bail like conditions, and that if conditions permitted he could be re-detained and removed from Australia. In fact Mr Al Masri decided to return to the Gaza Strip and the High Court refused an application for special leave by the Commonwealth against the Full Federal Court decision because Al Masri was no longer in the jurisdiction. See Transcript of Proceedings, *MIMIA v Al Masri* (High Court of Australia, 14 August 2003).

majority of four to three in the *Al Kateb*¹⁶ case that the detention of persons until they are removed from Australia was lawful and even if the detention should last indefinitely. Despite the drying up of the immigration detention cases as a result of both policy and legal developments applications for habeas corpus still continue to be heard in the Federal Court in other detention situations.¹⁷ The decline of these cases did not remove detention issues from the public arena. In 2005 it was discovered that an Australian Citizen had been illegally detained in an Immigration Detention centre and that another citizen had been unlawfully deported to the Philippines. Both events attracted enormous publicity and adverse comment.¹⁸

Thus the lasting legal effect of these cases has been the point first established in *Ruddock v Vadarlis* that the Federal Court had the power to issue an order in the nature of a writ of habeas corpus. In that case Beaumont J for the majority drew a distinction between a writ of habeas corpus and an order in the nature of a writ of habeas corpus.¹⁹ A writ of habeas corpus was said to be unavailable for various reasons. First, His Honour thought that 'this Court is not invested with a power to issue such a writ'.²⁰ This is true in the sense that the writ is not specifically mentioned, but other writs are not specifically mentioned either and this claim ignores the phraseology of s 23 which does refer to writs in general.

Second, was said that a writ of habeas corpus was only available to a State Supreme Court that had inherited by statute all of the jurisdiction of the superior courts of record at Westminster.²¹ These courts are accepted as having power to award a writ of habeas corpus²² and certainly the Supreme Courts of the States and Territories have such a power to issue the writ both at common law and by

¹⁶ *Al Kateb v Godwin* (2004) 219 CLR 562 ('*Al Kateb*') applied in *Ruhani v Director of Police* (No 2) (2005) 219 ALR 270.

¹⁷ See for example *Sargeson v Chief of the Army* (2006) 225 ALR 249, 254-5 [37] (Jacobson J).

¹⁸ See Mick Palmer, *Report of the Inquiry Into the Circumstances of the Immigration Detention of Cornelia Rau*, Commonwealth Parliamentary Paper No 174 (2005) 24-6 (section entitled 'The Lawfulness of Detention'). The Commonwealth Ombudsman has also conducted several recent inquiries into the illegal detention of Australian Citizens by the Immigration Department. See Commonwealth Ombudsman, *Report on Referred Immigration cases: Mr T, 23 March 2006* (2006) available Commonwealth Ombudsman's website <[http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2006_04.pdf/\\$FILE/MrT_immigration_mar2006.pdf](http://www.comb.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2006_04.pdf/$FILE/MrT_immigration_mar2006.pdf)> at 23 March 2006.

¹⁹ *Ruddock v Vadarlis* (2001) 110 FCR 491, 517 [101]. Note in that case Black CJ, dissenting, accepted that a writ was available though he does not discuss the point, see 514 [91]; while French J in the majority does not discuss the point at all. In the court below the applicants had applied for an order nisi for the issue of a writ of habeas corpus and the respondents did not contest that the court had jurisdiction to make an order of such a nature: (2001) 110 FCR 452, 469 [55]. For other cases where the applicant applied for relief in the nature of habeas corpus see *MIMIA v Al Masri* (2003) 197 ALR 241, 244 [10]; *Asalih v Manager, Baxter Immigration Facility* (2004) 136 FCR 291, 294 [1]; *MIMIA v Cisinski* (2004) 140 FCR 239, 240 [2]; *Ahga v MIMIA* (2004) 205 ALR 377, 378 [1]; *Al Kateb v Godwin* (2004) 219 CLR 562, 578 [24]; *VWYC v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 456 (Unreported, Finkelstein J, 1 April 2005) [1]. In *Sargeson v Chief of Army* (2006) 225 ALR 249, 254-5 [37]-[38] Jacobson J discussed the recent habeas discussion in the Federal Court in a case where the applicant sought a mandatory interlocutory injunction.

²⁰ *Ruddock v Vadarlis* (2001) 110 FCR 491, 517 [101].

²¹ *Asalih v Manager, Baxter Immigration Detention Facility* (2004) 136 FCR 291, 302 [37] ('*Asalih*').

²² Sir Edward Coke, 2 *Institutes* 55.

virtue of powers conferred by inherited imperial legislation on habeas corpus.²³ It seems to have been assumed that since the State Supreme Courts have an inherited jurisdiction to award the writ, and since the Federal Court did not have the jurisdiction of the superior courts of justice at Westminster, therefore the Federal Court did not have the jurisdiction to award a writ of habeas corpus.²⁴

Later cases in the Federal Court have accepted the distinction between a writ and an order for a writ of habeas corpus. In the most recent discussion of the point Selway J in *Asalih*²⁵ accepted the distinction and the reasoning of the Full Federal Court in *Ruddock v Vadarlis*. In *Asalih* the applicant applied for an order in the nature of habeas corpus, but the court chose to treat the matter as a mandatory injunction for release of the applicant.²⁶ His Honour went on to say that in any case the Federal Court did have power to award injunctive relief if warranted and that the practical effect of an injunction would be the same as if the detention were found to be unlawful upon a writ of habeas corpus.²⁷ In contrast other recent cases in the Federal Court have apparently accepted the right to apply for a writ of habeas corpus though in those cases the point does not seem to have been taken and therefore the court assumed the point.²⁸ An order in the nature of a writ of habeas corpus is known to other legal systems and is not therefore totally unheard of whatever one may think of the inelegant language.²⁹

The question to be considered in this paper then is whether the Federal Court of Australia has the power to issue a writ of habeas corpus.³⁰ The recent decisions of *Ruddock v Vadarlis* and *Asalih* have held that it may not; though several cases have also held that the court may issue an order in the nature of a writ of habeas corpus. In this paper it will be argued that there are several statutory bases enabling the Federal Court to issue a writ of habeas corpus in an appropriate case of illegal detention. In order to consider this question it will be necessary to recur to some fundamental concepts, always a useful strategy when undertaking legal research. The paper takes issue with the basis upon which the court rejected the argument that it had no power to issue a writ of habeas corpus, but accepts that

²³ Clark and McCoy, above n 1, 22, 39-45.

²⁴ *Asalih* (2004) 136 FCR 291, 304 [41].

²⁵ *Ibid* 304 [41], [42].

²⁶ *Ibid* 294 [1].

²⁷ *Ibid* 304-5 [43].

²⁸ See *Phong v Attorney-General (Cth)* (2001) 114 FCR 75, 83 [25] (Beaumont J) (a decision handed down on 7 September 2001 four days before the decision in *Ruddock v Vadarlis* by North J on 11 September 2001 and eleven days before the Full Court decision in that case on 18 September 2001); *Te v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 497, 503 [27].

²⁹ See *Charter of 1833* (Ceylon) s 49 in 1 *Revised Edition of Legislative Enactments of Ceylon* (Colombo: Government Printer, 1900) 94; *Criminal Procedure Act 1898* (India) s 491 in 5 *The Unrepealed General Acts of the Governor General in Council* (Calcutta: Government Printer, 1909) 191; *In Re AL McKenzie* (1881) 2 NSR 481; *Ex parte Doherty* (1899) 35 NBR 43. For other examples see David Clark and Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (2000) 21-3.

³⁰ For useful summaries of the effect of the writ see *R v Waters* [1912] VLR 372, 375 (Madden CJ); *Dien v Manager of the Immigration Detention Centre at Port Headland* (1993) 115 FLR 416, 418-9 (Malcolm CJ); *Hassan v Australasian Correctional Service Pty Ltd* (2002) 219 LSJS 253, 257 [24] (Lander J). See also Law Reform Commission of Western Australia, *Report on Judicial Review of Administrative Decisions*, Project No 95 (2002) 7.

the weight of authority now supports the distinction between a writ of habeas corpus and an order in the nature of a writ of habeas corpus.

II THE FEDERAL COURT'S POWER UNDER THE FEDERAL COURT OF AUSTRALIA ACT 1976 (CTH) S 5(2)

The critical question here is whether the court in *Ruddock v Vadarlis* was right to draw a distinction between an order in the nature of a writ of habeas corpus and the writ of habeas corpus. The starting point for the argument is s 5(2) of the *Federal Court Act* which states that '[t]he court is a superior court of record and is a court of law and equity'.³¹ Law normally means in this context Australian common law,³² and since there is a presumption against the language of a statute being meaningless, some sense must be given to this provision.³³ I suggest that it means that by this statute the Federal Court is also a common law court or at least has the powers of a common law court, subject, of course, to the Federal Court Act itself and any other relevant Commonwealth legislation. These propositions are supported by the cases that have looked at the 'court of equity' part of s 5(2) where the court has drawn upon principles of equity to conclude that by virtue of s 5(2) the Federal Court is 'by statute, a court of equity as regards matters otherwise within its jurisdiction'.³⁴ In other cases to consider s 5(2) the court has held, for example, that it may resort to the common law power to forfeit recognisances³⁵ and to equity to award a Mareva order against a third party.³⁶ In neither case was this specific power or order mentioned in s 23, but in both cases the court did not doubt that common law and equitable powers were available to

³¹ See also *Federal Magistrates Court Act 1999* (Cth) s 8(3) (emphasis added).

³² The High Court has frequently referred to Australian common law of which it is said that there is only one common law for Australia. For cases see *R v Kidman* (1915) 20 CLR 425, 436 (Griffith CJ); *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15 (Mason CJ and McHugh J); *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 556 (McHugh J); *Kable v DPP (NSW)* (1996) 189 CLR 51, 112; *Lipohar v R* (1999) 200 CLR 485, 507-8; for cases in the Federal Court see: *Caboolture Park Shopping Centre Pty Ltd v White Industries(Qld) Pty Ltd* (1993) 45 FCR 224, 228; *ACCC v C G Berbatis Holdings Pty Ltd* (2000) 69 ALR 324, 329 [11]. See also the *Law and Justice Amendment Act 1988* (Cth) s 41(1) amending s 80 of the *Judiciary Act 1903* (Cth) to omit 'common law of England' and substitute the words 'common law in Australia'.

³³ A principle accepted in all jurisdictions. For a case that applied this principle in the Federal Court see *Eshetu v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 300, 306. For other citations of Australian cases that have applied this principle see D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (6th ed, 2006) 44-5.

³⁴ *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services* (1990) 22 FCR 73, 83 (Gummow J). See also *McIntyre v Perkes* (1990) 22 FCR 260, 271 (Gummow and Von Doussa JJ): 'This Court as a court of bankruptcy is also a court of equity as to matters with which it is otherwise invested with jurisdiction.'; *Kirella Pty Ltd v Hooper* (1999) 92 FCR 90, 98 [36] (Tamberlin J).

³⁵ *Schoenmakers v DPP (No 2)* (1991) 31 FCR 429, 434, 437-8 (Foster J). See also *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, 228, where Sheppard J relied upon ss 5(2) and 23 of the *Federal Court of Australia Act 1976* (Cth) to justify the award of indemnity costs. In support of his argument he relied heavily on judgments of common law courts in England in the nineteenth century.

³⁶ See *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 395 [30], Gaudron, McHugh, Gummow and Callinan JJ wrote: 'With respect to the power of a court of equity...' as a basis for the remedy in that case.

the court under s 23 drawing on s 5(2). But this provokes the question as to what sort of court of common law and equity the Federal Court is.

Since the original jurisdiction of the court is conferred by s 19(1) in the following terms: ‘The Court has such original jurisdiction as is vested in it by laws made by Parliament’, it seems that the phrase a court of law and equity must mean that the Federal Court does not have the *jurisdiction* of an English court of common law and equity, for its jurisdiction derives from Australian statutes, nor does the court have the jurisdiction inherited from the English superior courts.³⁷ Rather the court may resort to common law and equity, provided that this is consistent with statute, to draw upon the *powers* of courts of common law and equity, subject to the necessary qualification that such powers are not excluded by Commonwealth statute.

The elements of the argument are these:

a. Habeas corpus exists at common law. Though the focus of most accounts of the writ is on the justly famous *Habeas Corpus Act 1679*, 31 Car 2, c 2, the writ pre-dates this and other statutes on the subject and was issued at common law³⁸ by the various superior courts of justice at Westminster.³⁹ As several courts have pointed out the writ throws a deep root⁴⁰ into the early common law and there is

³⁷ See Wilson and Dawson JJ in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 618 who write of the Federal Courts that they are different from the ‘state superior courts because those courts are invested with general *jurisdiction* by reference to the jurisdiction of the courts at Westminster.’ (emphasis added).

³⁸ For the leading text writers see: Sir Edward Coke, 2 *Institutes* 55; Sir William Blackstone, 3 *Commentaries* 131; Giles Jacob, *The Laws of Liberty and Property* (2nd ed, 1734) 44 ‘The writ of habeas corpus, was originally ordain’d by the Common Law of the land’; Thomas M Curley (ed), *A Course of Lectures on The English Law 1767-1773* by Sir Robert Chambers (1986) vol 2, 7-8; Matthew Bacon, *A New Abridgment of The Law* (5th ed, 1798) vol 3, 423; J L De Lolme, *The Rise and Progress of The English Constitution* (1838) vol 1, 454. For cases see: *In re John Anderson* (1861) 7 The Jurist Reports 122, 123; *Ex parte Walsh and Johnson*; *In re Yates* (1925) 37 CLR 36, 76 (Isaacs J); *Re Bolton, ex parte Beane* (1987) 162 CLR 514, 520-1 (Brennan J).

³⁹ See Sir Edward Coke, 2 *Institutes* 55; P R Glazebrook (ed), *Sir Mathew Hale’s Historia Placitorum Coronae 1736* (1971) 143ff; John Impey, *The New Instructor Clericalus Stating the Authority, Jurisdiction and Modern Practice of the Court of Common Pleas* (1817) vol 2, 660-73; William Tidd, *The Practice of the Courts of King’s Bench and Common Pleas* (1824) vol 1, 349; Henry Maddock, *A Treatise on the Principles & Practice of the High Court of Chancery* (3rd ed, 1837) vol 1, 27; C E Malden and A H Poyser, *Digest of the Practice of the Queen’s Bench Division* (1884) 296; F H Short and F M Mellor, *The Practice On The Crown Side of the King’s Bench Division* (2nd, 1908) 305. For cases see *Bushell’s Case* (1670) Vaughan 135, 157; 124 ER 1006, 1017; *Brass Crosby’s Case* (1771) 3 Wils 188, 198; 95 ER 1005, 1010; *Crowley’s Case* (1818) 2 Swanst 1, 48; 36 ER 514, 526; *Dodd’s Case* (1858) 2 De G & J 510, 523; 44 ER 1087, 1092; *Re Rex v McAdam* [1925] 4 DLR 33, 45; *Eshugbavi Eleko v Government of Nigeria* [1928] AC 459, 466; *Kempf v Kempf* [1945] 4 DLR 723, 725; *Re Hastings (No 2)* [1958] 3 All ER 625, 628E-F.

⁴⁰ *Secretary of State for Home Affairs v O’Brien* [1923] AC 603, 609 (Earl of Birkenhead). For other cases where the courts have recognised the ancient common law roots of the writ see *Ex parte Watkins* 3 Pet 193, 202; 7 L Ed 650, 653 (1830); *Ex parte Sandilands* (1852) 21 LJQB 342, 343; *Ex parte Yerger* 8 Wall 85, 97; 19 L Ed 332, 336 (1869); *McNally v Hill* 293 US 131, 136 (1934); *Williams v Kaiser* 323 US 471, 484 (1945) (citing O’Brien); *Fay v Noia* 372 US 391, 400 (1963) (citing O’Brien) as did the court in *Townsend v Sain* 372 US 293, 311 (1963); *McClesky v Zant* 499 US 467, 478 (1991); *INS v St Cyr* 533 US 289, 301 (2001); *Rasul v Bush* 159 L Ed 2d 548, 556 (2004); *In re Lo Tsun Man* (1910) 5 HKLR 166, 172; *Li Hong Mi v Attorney-General* (1917) 12 HKLR 6, 14; *In re Storgoff* [1945] 3 DLR 673, 693.

at least one habeas corpus case that pre-dates Magna Carta 1215.⁴¹ Indeed the common law form of the writ pre-dates⁴² the English and Imperial statutes⁴³ on habeas corpus.

The common law roots of habeas corpus were well understood by lawyers and statesmen in nineteenth century Australia. When the founding fathers came to draft the *Commonwealth Constitution* they turned their minds to the writ at the Melbourne session of the second convention in 1898. Concern was expressed by John Quick that the proposed list of remedies in what later became s 75(v) of the *Constitution* did not include habeas corpus. Quick argued that by the doctrine of limitation, by which matters not mentioned would be excluded, habeas corpus and certiorari would not be available to the future supreme federal court.⁴⁴ Edmund Barton sought to assuage these concerns by saying that

[a] writ of *habeas corpus* is a common law writ, in regard to which you have no trouble as to its exercise. It is one of the rights which the subject carries with him so long as he is within British territory.⁴⁵

In other words because British settlers brought to writ with them as part of the English common law it was not necessary to say that the writ was available. Mr Barton also pointed out that the writ was not included in the United States Constitution either, though art 1 s 9(2) of that constitution does control its suspension. As is well known s 75(v) of the *Constitution* confers upon the High Court an original jurisdiction '[i]n which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. Although habeas corpus was not included in this section (nor was certiorari) it was clear at the Constitutional Convention in Melbourne in 1898 that the included remedies were not intended to be words of limitation; that is, the non inclusion of habeas corpus was not intended to mean that the High Court could not issue the writ in an

⁴¹ See *Baldwin Tyrell's Case* (1214) in *Select Pleas of The Crown* (1887) vol 1, 67. See also the cases for 1220 in F W Maitland (ed), *Bracton's Notebook* (1887) vol 2, 361 (Nos 1407 and 1408), 374 (Nos 1420 and 1421). See also Maxwell Cohen, 'Some Considerations on The Origins of Habeas Corpus' (1938) 16 *Canadian Bar Review* 92-117; William F Duker, *A Constitutional History of Habeas Corpus* (1980) 12-23; R J Sharpe, *The Law of Habeas Corpus*, (2nd ed, 1989) 1-4; J Conway Davies, 'Common Law Writs and Returns Pt II' (1954) 27 *Bulletin of the Institute of Historical Studies* 1, 2; J H Baker, 'Personal Liberty Under the Common Law' in J H Baker, *The Common Law Tradition* (2000) 341-6.

⁴² For early cases see *Corbet's Case* (1489) in J H Baker (ed), *Reports of Cases by John Caryll* (1999) vol 1, 43; *Anon* (1496) in J H Baker (ed), *The Notebook of Sir John Port* (1986) 36; *R v Sheriffs of London, ex parte Buckley* (1529) in J H Baker (ed), *Reports of Cases from the time of King Henry VIII* (2003) 74; *Ruswell's Case* (1615) in W H Bryson (ed), *Cases Concerning Equity and The Courts of Equity 1550-1660* (2001) vol 2, 464.

⁴³ These are the *Habeas Corpus Act 1679*, 31 Car 2, c 2; *Habeas Corpus Act 1816*, 56 Geo 3, c 100; *Habeas Corpus Act 1862*, 25 & 26 Vict, c 20. There were of course habeas corpus provisions in earlier statutes. See: *Certiorari Act 1414*, 2 Hen 5, c 2; *The Staple Act 1433*, 11 Hen 6, c 10; *Jurors Act 1543*, 35 Hen 8, c VI, s 2; *Perjury Act 1601* (Eng) 43 Eliz c 5 s 2; *Petition of Right 1627* (Eng) 3 Chas I c 1 s 5; *Star Chamber Abolition Act 1640* (Eng) 16 Chas II c 10 s 6.

⁴⁴ *Official Record of The Debates of the Australasian Federal Convention*, 3rd Session, Melbourne, 20th January - 17th March 1898, vol 2, 1880-1 (4 March 1898).

⁴⁵ *Official Record of The Debates of the Australasian Federal Convention*, 3rd Session, Melbourne, 20th January - 17th March 1898, vol 2, 1884 (4 March 1898). See also Barton's remark at vol 2, 1876 that 'the right of *habeas corpus* existed under the common law of England'; Sir John Young CJ noted the same point in his farewell remarks see [1992] 2 VR xlvi as did Peter Reith: Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1987, 1281 (Peter Reith).

appropriate case. The understanding at the time was that the means of enforcing the decrees of the Federal Court (ie the High Court) ‘will be necessarily included within its powers’.⁴⁶ This was a view also held during the first decade of Federation by learned commentators on the new *Constitution*. Walter Harrison Moore and Sir John Quick were of the view that the High Court had a power to issue the writ as a consequence of the jurisdiction of the court and that future federal courts would also have the same power.⁴⁷

b. There is abundant Australian authority showing that the common law form of the writ is available⁴⁸ and in civil matters prior to 1816 that was the only way the *ad subjiciendum* form of the writ was obtainable.⁴⁹ This matters in the context of the argument here because habeas corpus is available in both civil and criminal matters. The detention of persons in immigration detention centres is a civil matter and this is why the applications in these cases have not dealt with the *Habeas Corpus Act 1679*, 31 Car 2, c 2 since that act was passed to expand the law in relation to criminal habeas corpus matters.⁵⁰

c. When the various supreme courts were created in the Australian colonies they were each constituted by legislation and typically were given the ‘several jurisdictions, powers and authorities’ of the superior courts of justice at Westminster.⁵¹ Subsequent modern legislation constituting the Supreme Courts has slightly altered this inheritance. The *Supreme Court Act 1935* (SA), for instance, refers merely to the ‘jurisdiction’ of the superior courts of justice at Westminster⁵² as does the legislation for Tasmania.⁵³ These propositions are

⁴⁶ Mr Isaacs in *Official Record of the Debates of the Australasian Federal Convention*, 3rd Session, Melbourne, 20 January - 17th March 1898, vol 1, 321 (31 January 1898).

⁴⁷ W Harrison Moore, *The Constitution of The Commonwealth of Australia* (1902) 272, n 3; Sir John Quick and Littleton E Groom, *The Judicial Power of The Commonwealth* (1904) 138.

⁴⁸ See *In re Jane New (No 1)* (1829) in T D Castle and Bruce Kercher (eds), *Dowling’s Select Cases 1828 to 1844* (2005) 549, 550 (NSW SC) (Dowling J); *Ex parte Nichols* (1839) 1 Legge 123, 134; *Ex parte Nichols* (1845) Reserved and Equity Judgments of NSW 11, 12; *In re Fischer (An Insolvent)* (1874) 8 SALR 57, 59; *Ex parte Lo Pak* (1888) 9 NSWLR 221, 234; *In re an application for a Writ of Habeas Corpus ex parte Keighran* (1923) [1918-1950] NTJ 20, 24; *R v Pilmapijimi ex parte Ganaggu* (1965) NTJ 776, 781; *Puharka v Webb* (1983) 2 NSWLR 31, 35; *Re Bolton and Another*; *ex parte Beane* (1987) 162 CLR 514, 521.

⁴⁹ Examples are legion. See *Corbet’s Case* (1489) in J H Baker (ed), *Reports of Cases by John Caryll* (1999) vol 1, 43; *Anon* (1496) in J H Baker (ed), *The Notebook of Sir John Port* (1986) 36; *Opinion on The Writ of Habeas Corpus* (1758) Wilmot 77, 88; 97 ER 29, 36; *Hobhouse’s Case* (1820) 3 B & Ald 420; 106 ER 716; *Ex parte Beeching* (1825) 4 B & C 137; 107 ER 1010; *Ex parte Besset* (1844) 6 QB 481, 486; 115 ER 180, 182; *In re Belson* (1850) 7 Moo 114, 130-1; 13 ER 823, 829. See also Sir John Baker, 6 *Oxford History of The Laws of England* (2003) 91-4.

⁵⁰ R J Sharpe, *The Law of Habeas Corpus*, (2nd ed, 1989) 20.

⁵¹ See *Administration of Justice In New South Wales and Van Dieman’s Land Act 1823*, 4 Geo 4, c 96, s 2; *Australian Courts of Justice Act 1828*, 9 Geo 4, c 83, s 3 (covers Van Dieman’s Land and New South Wales and because of their connection with New South Wales provides the foundation of the court legislation for Victoria and Queensland); *Supreme Court Act 1837* (SA) 7 Wm 4, No 5, s 7; *Administration of Justice (Civil) Act 1861* (WA) s 4 (continued as *Supreme Court Act 1935*(WA) s 16(1)(a)); *Supreme Court Act 1867* (Qld) s 21 (continued as *Supreme Court Act 1995*(Qld) s 200).

⁵² Section 17(2)(a)(i)-(iv). Note that this section refers to courts that no longer exist in England and that the provision refers to the ‘like jurisdiction ... as was formerly vested in, or capable of being exercised by, all or any of the courts in England following’. The cases also referred to the term jurisdiction alone see *R v Hughes* (1865) 3 Moo NS 439, 441; 16 ER 166, 167; *Gilbertson v South Australia* [1978] AC 772, 782G. Curiously the recently adopted rules of the Supreme Court (in force 4 September 2006) no longer refer to habeas corpus but to ‘[a]ctions in defence of liberty’:

⁵³ See Rules of the Supreme Court 2006 (SA) ch 8, pt 2, rr 196-198.

Supreme Court Civil Procedure Act 1932 (Tas) s 6(7).

impressive but nevertheless create an intellectual problem for they were taken over in the twentieth century versions of state supreme court acts from their beginnings in the nineteenth century. The problem is that while the original colonies were not part of a federation nor were they subject to an Australian constitution, contemporary courts are constrained by both considerations. Thus it is unlikely that the unlimited jurisdiction of the State supreme courts inherited from England can now be taken literally if such unlimited jurisdiction were to conflict with the limitations upon state courts that arise from the Federal system.⁵⁴

In the case of the Australian Capital Territory Supreme Court the power to grant any relief or remedy by way of a writ of habeas corpus is granted explicitly by the legislation as is the case in the current New South Wales and Victorian legislation.⁵⁵ In contrast the Supreme Court of the Northern Territory possesses a very wide remedial power and is in terms nearly identical to the language used in s 23 of the *Federal Court Act*.⁵⁶

d. In the case of the Federal Courts the matter turns upon the statute that constitutes the Court. It is accepted that the High Court is not a common law court with the powers of the Court of Queens Bench, for example.⁵⁷ Thus the powers and jurisdiction of federal courts are limited by legislation, but then so are state courts. It should be noted that all courts in Australia have been constituted by legislation, including the State Supreme Courts.⁵⁸ Some state supreme courts are by that legislation given the unlimited jurisdiction of the superior courts of justice at Westminster, though, of course, even that proposition needs to be modified by the fact that the state courts operate within a Federal System.⁵⁹ Nevertheless the state supreme courts may draw, as one High Court judge put it, upon a well of

⁵⁴ See the remarks in *Jackson v Sterling Industries Ltd* (1986) 12 FCR 267, 272 (Bowen CJ): Although the Supreme Court of New South Wales is spoken of as a court of 'general jurisdiction' and the statutory establishment of the Court is referential, the fact is that the jurisdiction conferred on that Court by statute is necessarily subject to subtraction due to constitutional limits and to additions, for example, by the *Judiciary Act 1903*(Cth), in a way not usually associated with courts of general jurisdiction in a unitary State.

⁵⁵ *Supreme Court Act 1933* (ACT) s 34B(1) where it is provided: 'The Court has power to grant any relief or remedy by way of a writ of habeas corpus' (emphasis added); *Supreme Court Act 1970* (NSW) s 71(1); *Constitution Act 1975* (Vic) s 86 where the heading of the section is entitled '[p]ower to Judges to award habeas corpus'.

⁵⁶ See *Supreme Court Act* (NT) s 20. 'The Court has power, in relation to matters in which it has jurisdiction, to make orders, including interlocutory orders, in such terms as it thinks fit and to issue, or direct the issue of, writs in such terms as it thinks fit'.

⁵⁷ *R v Commonwealth Court of Conciliation and Arbitration; ex parte Brisbane Tramways Co Ltd (The Tramways Case No 1)* (1914) 18 CLR 54, 75; *R v Bevan; ex parte Elias and Gordon* (1942) 66 CLR 452, 464-6; *Re Macks; ex parte Saint* (2000) 204 CLR 158, 211 [140].

⁵⁸ *Bastistatos v Roads and Traffic Authority (NSW)* (2006) 227 ALR 425, 454 [125].

⁵⁹ See the discussion in *Kable v DPP(NSW)* (1996) 189 CLR 51, 114 (McHugh J) of the limitations on state courts in Australia and his discussion of the integrated system of state and Federal courts envisaged by covering cl 5 and chp III of the *Constitution*. See also the comments on this point (footnote 59 cont'd) by Kirby J in *Bastistatos v Roads and Traffic Authority (NSW)* (2006) 227 ALR 425, 455 [131] where the judge wrote 'in the Australian constitutional context, no court really enjoys unlimited jurisdiction or powers. The jurisdiction and powers of every Australian court are limited by that court's constitutional and statutory competence.'

undefined powers by virtue of the link to the English superior courts.⁶⁰ This reserve of power is denied to the Federal Courts where the matter by statute stands differently.⁶¹ In each case the terms of the statute that constitutes the court and any other relevant legislation must be read carefully. Thus unlike the High Court, and most other Federal Courts,⁶² the Federal Court of Australia is by statute explicitly constituted as a ‘court of law and equity’. Now as the Federal Court is also a superior court of record and is a court of law and equity, and as such courts both in England and in Australia have the power to issue the writ of habeas corpus, the Federal Court may issue a common law writ of habeas corpus in an appropriate case.

III THE FEDERAL COURT’S POWER UNDER THE *FEDERAL COURT OF AUSTRALIA ACT 1976 (CTH) S 23*

This argument is reinforced by s 23 of the *Federal Court Act* which is often cited but not always fully understood. The full text of the section reads:

‘The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, *writs of such kinds*, as the Court thinks appropriate.’⁶³

The distinction that matters here is between the *jurisdiction* over the subject matter conferred by other statutes⁶⁴ and the *power* in s 23 of the *Federal Court Act of Australia 1976* (Cth) in a matter over which the court has jurisdiction.⁶⁵ Not all of the recent cases have paid attention to this distinction. In some cases the judges thought that the question was whether the Federal Court had a jurisdiction

⁶⁰ *Grassby v The Queen* (1989) 168 CLR 1, 17 (Dawson J). See also *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435, 451; *DJL v Central Authority* (2000) 201 CLR 226, 240-1 [25]; *A Solicitor v Law Society of New South Wales* (2004) 216 CLR 253, 261 [3] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ).

⁶¹ Noting the contrast between state supreme courts and the industrial tribunals constituted by Commonwealth legislation, Spigelman CJ recently wrote of that latter ‘that jurisdiction is not co-extensive with the common law supervisory jurisdiction of a superior court’: see *Solution 6 Holdings Ltd v Industrial Relations Commission (NSW)* (2004) 60 NSWLR 558, 589 [127]. The same reasoning would apply to the Federal Court.

⁶² See the *Bankruptcy Act 1930* (Cth) s 4 inserting s 18A in the principal act and thereby creating the Federal Court of Bankruptcy ‘which, shall be a Court of Record’; *Conciliation and Arbitration Act 1956* (Cth) s 10 inserting pt IV into the principal act and thereby creating the Commonwealth Industrial Court as a ‘superior court of record’; *Family Law Act 1975* (Cth) s 21(2) creating the Family Court of Australia as a ‘superior court of record’. In none of these instances were these courts also stated to be a court of law and equity as is the Federal Court of Australia. Merely being a superior court of record does not confer upon a Federal Court a general jurisdiction; the court is still limited by legislation. See *DMW v CGW* (1982) 151 CLR 491, 509 (Dawson J).

⁶³ See also the wide power under the *Federal Magistrates Court Act 1999* (Cth) s 15(b) (emphasis added).

⁶⁴ Section 19(1) of the *Federal Court of Australia Act 1976* (Cth) provides: ‘The Court has such original jurisdiction as is vested in it by laws made by Parliament’. The appellate jurisdiction of the Court is provided for in s 24 of the Act.

⁶⁵ See *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 628 (Toohey J); *Minister for Immigration v Madafferi* (2001) 106 FCR 76, 79 [14]. See also *St Justins Properties Pty Ltd v Rule Holdings Pty Ltd* (1980) 40 FLR 282, 285 (Federal Court) where Toohey J points out that s 19 deals with jurisdiction while s 23 deals with powers; *Denpro P/L v Centrepont Freeholds* (1983) 72 FLR 156, 161 where Northrop J refers to the powers conferred on the Court by s 23 of the *Federal Court of Australia Act 1976* (Cth).

to award a writ of habeas corpus⁶⁶ whereas the true question under s 23, as the text plainly shows, is whether the court has a power to award the writ in a matter over which the court has jurisdiction. In *Ruddock v Vadarlis* Beaumont J seems to have confused the two concepts. In that case he said

[i]t is equally clear, in my opinion, that a number of major jurisdictional issues arose on the claim for a writ of habeas corpus. In short, in my opinion, this Court is not invested with the power to issue such a writ. No such power is expressly invested and, in my view, no such implication should be made.⁶⁷

Jurisdiction is a typically protean concept in the law and is unfortunately a word with a variety of meanings⁶⁸ and several judges thought that it had too many meanings.⁶⁹ In a fuller account of the concept three High Court judges distinguished three senses of the term: (1) to describe the amenability of a defendant to the court's writ and the geographical reach of that writ; (2) to identify the subject matter of those actions entertained by a particular court; (3) to locate a particular territorial or law area.⁷⁰ But as a generic legal concept jurisdiction has simply been defined as the 'authority to decide',⁷¹ though this expression obscures rather more than it reveals. Sometimes the courts use the term in a comprehensive sense to refer to both the subject matter of the proceedings and the powers of the court to deal with those proceedings.⁷² This was also the essence of the distinction made by Pickford LJ in *Guaranty Trust Company of New York v Hannay & Co*⁷³ between jurisdiction in a narrow sense,

⁶⁶ Cf *Ruddock v Vadarlis* (2001) 110 FCR 491, 517[100] where the heading '[t]his court's jurisdiction to issue a writ of habeas corpus' appears in Beaumont J's judgment (emphasis added) and *Alsali v Manager Baxter Immigration Detention Facility* (2004) 136 FCR 291, 304 [41] where Selway J says 'in my view this court does not have the jurisdiction to grant a writ of habeas corpus' (emphasis added). See also the use of the word jurisdiction at 300 [27], 304 [42] and 305 [43] and contrast this with the passage at 299 [26] where the judge says '[i]n *Al Masri* [(2003) 126 FCR 54] the Full Court confirmed the jurisdiction and power of this Court to make orders "in the nature of habeas corpus"'.
⁶⁷ (2001) 110 FCR 491, 517 [101].

⁶⁸ *Minister For Immigration and Multicultural and Indigenous Affairs v B* (2003) 219 CLR 365, 377 [6] (Gleeson CJ and McHugh J).

⁶⁹ *United States v Vanness* 85 F 3d 661, 663n (1996) cited by Gaudron, Gummow and Hayne JJ in *Lipohar v The Queen* (1999) 200 CLR 485, 516 [78], n 142.

⁷⁰ *Ibid* 517 [79] (Gaudron, Gummow and Hayne JJ).

⁷¹ *Baxter v Commissioner of Taxation of New South Wales* (1907) 4 CLR 1087, 1142 (Isaacs J): 'Jurisdiction is a generic term and signifies in this connection authority to adjudicate'; *The Commonwealth v New South Wales* (1923) 32 CLR 200, 206 (Knox CJ); *Solomons v District Court(NSW)* (2002) 211 CLR 119, 139 [41] (McHugh J) *Minister For Immigration and Multicultural and Indigenous Affairs v B* (2003) 219 CLR 365, 377 [6] (Gleeson CJ and McHugh J).

⁷² See for example *Johnstone v The Commonwealth* (1979) 143 CLR 398, 404 (Jacobs J): "It means the legal power and right to determine the subject matter". That case concerned the power to remit (footnote 72 cont'd) a matter to a state supreme court. See also the extract from *Terms de la Ley* (1620) translated as 'jurisdiction is a dignity which a man hath by a power to do Justice in causes of complaint made before him' in 10 *Halsbury's Laws of England*, 4th edn reissue(2002) para 314 fn 1. [1915] 2 KB 536, 563 (CA). This passage as cited by Diplock LJ in *Garthwaite v Garthwaite* [1964] P 356, 387(CA) has been cited in Australia. See *Moll v Butler* [1985] 4 NSWLR 231, 244G-245A; *Walker v Hussman Australia Pty Ltd* (1991) 24 NSWLR 451, 464G-465D; *Braun v R* (1997) 112 NTR 31, 38(CCA). The passages in the English cases were cited with approval in the two New Zealand habeas corpus cases of *Re Kestle* [1980] 2 NZLR 337, 346 and *Taylor v The Superintendent of The Waikato Bay of Plenty Regional Prison* [2002] NZCA 45(7 February 2002) [12]. See also *Nakhla v McCarthy* [1978] 1 NZLR 291, 300-301(CA) and *Crispin v Registrar of the District Court* [1986] 2 NZLR 246, 250-251 where the passages from Garthwaite are discussed.

⁷³ [1915] 2 KB 536, 563 (CA). This passage as cited by Diplock LJ in *Garthwaite v Garthwaite* [1964] P 356, 387(CA) has been cited in Australia. See *Moll v Butler* [1985] 4 NSWLR 231, 244G-245A; *Walker v Hussman Australia Pty Ltd* (1991) 24 NSWLR 451, 464G-465D; *Braun v R* (1997) 112 NTR 31, 38(CCA). The passages in the English cases were cited with approval in the two New Zealand habeas corpus cases of *Re Kestle* [1980] 2 NZLR 337, 346 and *Taylor v The Superintendent of The Waikato Bay of Plenty Regional Prison* [2002] NZCA 45(7 February 2002) [12]. See also *Nakhla v McCarthy* [1978] 1 NZLR 291, 300-301(CA) and *Crispin v Registrar of the District Court* [1986] 2 NZLR 246, 250-251 where the passages from Garthwaite are discussed.

meaning authority to decide a matter, and jurisdiction in a wide sense as including the way in which a court will exercise its jurisdiction. Thus there are examples of the courts using the term jurisdiction in a wide not a narrow sense. That is, they have been prepared to accept that the term includes power and authority.⁷⁴

But sometimes the courts and statutes distinguish between jurisdiction and power. Fortunately some of the complexities of the concept are resolved in the case of the *Federal Court Act* because the terms of ss 19 and 23 make it clear that in that Act jurisdiction and power are separate concepts. In short the Act uses jurisdiction in the narrow sense as Northrop J explained in 1994:

Jurisdiction here means the authority which a court has to decide matters that are litigated before it. The word power is used to describe the method by which a court exercises a jurisdiction conferred upon it. A statute may, by express provision, confer a power on a court. In addition, a power may arise by implication or may be incidental or necessary to exercise the jurisdiction or power so conferred.⁷⁵

It is clear from this language that s 23 deals with a power to make orders and 'it is not a section conferring jurisdiction on the Court in the narrow sense'.⁷⁶ The words 'writs of such kinds' in s 23 seem to be so wide that it cannot be seriously argued that a writ of habeas corpus could not be within the contemplation of the section.⁷⁷ There is no provision in any statute, including the *Federal Court Act* itself, that expressly excludes a writ of habeas corpus from the power of the Federal Court.⁷⁸

⁷⁴ See *Granowski v Shaw* (1896) 7 QJL 18, 19; *Marine Board of Launceston v Launceston Corporation* (1935) 93 CLR 472, 477. As the High Court pointed out in *ASIC v Edensor Nominees P/L* (2001) 204 CLR 559, 590[64] 'Jurisdiction and power are not discrete concepts'.

⁷⁵ *ASC v MELB Asset Management Nominees* (1994) 49 FCR 334, 346G. See also *Piroglu v Minister For Immigration and Ethnic Affairs* (1981) 55 FLR 99, 101 where Northrop J refers to the jurisdiction power distinction in relation to ss 19 and 23 of the *Federal Court of Australia Act*. See also the comment on the distinction made by Toohey J in *Harris v Caladine* (1991) 172 CLR 84, 136 also cited in *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 487 and in *Braun v R* (1997) 112 NTR 31, 38 (Court of Criminal Appeal). Justice Toohey made the same remark in *Hookham v The Queen* (1994) 181 CLR 450, 461-2 as he did in *Wardley Australia Pty Ltd v Western Australia* (1992) 175 CLR 514, 561. Justice Toohey's language in *Harris v Caladine* has been repeated and endorsed in subsequent High Court cases such as *Solomons v District Court (NSW)* (2002) 211 CLR 119, 140 [43] (McHugh J); *Minister For Immigration and Multicultural and Indigenous Affairs v B* (2003) 219 CLR 365, 377 [6] (Gleeson CJ and McHugh J), 396 [69] (Gummow, Hayne and Heydon JJ); *Bastistatos v Roads and Traffic Authority (NSW)* (2006) 227 ALR 425, 427 [5]. In relation to habeas corpus this distinction was acknowledged early in the seventeenth century. See *Richard Bourn's Case* (1619) Cro Jac 543; 79 ER 465, 466 (Montague CJ): 'and to dispute it is not to dispute the jurisdiction, but the power of the King and his Court.'

⁷⁶ *Jackson v Sterling Industries Ltd* (1986) 12 FCR 267, 270 (Bowen CJ).

⁷⁷ *Cisinski v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 507 (Unreported, 17 May 2004) [68] citing Clark & McCoy 201, n 1. Note that the Full Court allowed the appeal of the Minister in this case: (2004) 140 FCR 239.

⁷⁸ A clear intention to regulate a power elsewhere in the *Federal Court Act* (or even in another statute) might curtail the ambit of s 23 as the court explained in *Re Basile; Ex parte Ancich* (1985) 8 FCR 287 where Pincus J held that a writ of execution was not available under s 23 because s 53 and O 37 r 7 of the *Federal Court Rules* made provision for the matter.

The test here is not whether the power to award a writ of habeas corpus is given in express terms but whether the writ is clearly excluded by the terms of either the *Federal Court Act* or any other Commonwealth enactment. As there is no provision in any Commonwealth statute that excludes habeas corpus from the Federal Court and given the wide remedial intent of s 23, there is no warrant in saying that s 23 excludes a writ of habeas corpus.

The decisions on the meaning of s 23 show that it is to be given a wide interpretation and that it is not to be read down.⁷⁹ Despite these expressions supporting the generous breadth of s 23, the powers of the Federal Court may not be as wide as that of a State Supreme Court of general jurisdiction. There are limits to s 23. These are: (1) that the court must have jurisdiction over the subject matter before s 23 comes into play; (2) there must be a case on the merits for the relief sought; (3) that there is no statute that provides an exhaustive code of the available remedies⁸⁰ and thereby excludes resort to s 23.

Despite these restrictions the power conferred by s 23 is no less in relation to the jurisdiction vested in the Federal Court than the power of a court of unlimited or general jurisdiction.⁸¹ What else can the phrase writs of such kinds mean if not the prerogative writs including the prerogative writ of habeas corpus? Indeed the law is that the writ cannot be excluded except in the most clear and express terms.⁸²

The argument that unless the writ of habeas corpus is expressly mentioned it

⁷⁹ *Jackson v Sterling Industries Ltd* (1986) 12 FCR 267, 270 (Bowen CJ): '[i]t is difficult to see any justification for reading down the words so as to restrict the powers to those which might be held to be the limits of exercise of powers of, say, an English court differently constituted'; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 641 (Gaudron J). See also *Hiero Pty Ltd v Somers* (1983) 47 ALR 605, 612-3 (Ellicott J); *Bercove v Hermes and Others (No 2)* (1983) 51 ALR 105, 108 (Toohey J); *Minister for Immigration v Msilanga* (1992) 34 FCR 169, 185 where Burchett J writes of s 23: 'This is as wide a conferral of power to grant the full range of interlocutory relief as any court could require'; *Athlete's Foot Australia Pty Ltd v Divergent Technologies Pty Ltd* (1997) 78 FCR 283, 286D-E where Tamberlin J writes: 'This is a power of the widest nature and is not to be narrowly construed by reference to vague implied constraints'; *Minister for Immigration v VFAD* (2002) 125 FCR 249, 267 where the Full Federal Court described the cases on s 23 as having 'a wide interpretation'. See also *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 422 [108] where Kirby J states that s 23 is a provision of 'great breadth'.

⁸⁰ *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150, 161; *Re Basile, ex parte Ancich* (1985) 8 FCR 287, 289; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 622; *Patrick Stevedores v MUA* (1998) 195 CLR 1, 29 [27]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 396 [33]; *Minister for Immigration v VFAD* (2002) 125 FCR 249, 266 [96]; *Elmi v Minister for Immigration* (1988) 17 ALD 471, 472 (Gummow J); *Chan v Minister for Justice and Customs* (2000) 108 FCR 65, 67 [8]; *MIMIA v Madafferi* (2001) 106 FCR 76, 79 [12]; *Ayan v MIMIA* (2003) 126 FCR 152, 155 [8].

⁸¹ *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 619 (Wilson and Dawson JJ).

⁸² *Re Bolton; ex parte Beane* (1987) 162 CLR 514, 523 (Brennan J): '[u]nless the Parliament makes footnote 82 cont'd unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation'. See also at 532 the remarks of Deane J to the same effect, that were cited with approval by Kirby J (dissenting) in *Ruhani v Director of Police (No 2)* (2005) 219 ALR 270, 284 [63]. See also *Azam v Secretary of State For The Home Department* [1974] AC 18, 31 where Lord Denning MR says: '[i]f Parliament is to suspend habeas corpus, it must do so expressly or by clear implication'. For other authorities on the point see *Re Harry K. Thaw (No 3)* (1913) 12 DLR 710, 719; *Perlman v Piche* (1918) 41 DLR 147, 159; *Maragos v Deguise* [1942] 1 DLR 763, 766 (Boulanger J): 'this writ is too important for the safeguarding of liberty to be ousted by mere inference or construction of a text'. For a statutory example of a denial of the writ to a state supreme court see *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 9(2).

cannot be within the power of the Federal Court to award it is fallacious. In the first place if taken seriously it would also mean that other remedies also not expressly mentioned in the Federal Court Act are also not available to the court in an appropriate case. For example, certiorari, prohibition, injunctions and mandamus are not mentioned in s 23 or elsewhere in the Federal Court Act either but no one doubts that, despite the lack of an express reference to these remedies, they are available to the court. In other cases the courts have held that s 23 authorises the Federal Court to issue the equitable remedies of a Mareva injunction⁸³ and an Anton Piller Order⁸⁴ neither of which are explicitly mentioned in s 23 of the Federal Court Act. Similarly the court relied upon the wide powers in s 23 to forfeit recognisances and to make a Mareva order neither of which are specifically mentioned in s 23.⁸⁵ In short the test for the remedial powers under s 23 is not whether a particular remedy is explicitly mentioned therein but whether there are indications elsewhere that the specific remedy in issue is excluded.

The idea that the writ is not available, unless expressly referred to in the Federal Court Act, seems to have been linked to the notion that because the Federal Court is a statutory court, and because the court is not a court of unlimited jurisdiction, the rule that all matters are presumed to be within jurisdiction, does not apply to the Federal Court.⁸⁶ But apart from the argument that the question is one of power not jurisdiction, the wide terms of ss 5 and 23 of the Federal Court Act do sufficiently expressly deal with the remedial power of the court in respect of matters within its jurisdiction and thus the presumption of inclusion is not needed in this case.

In *Ruddock v Vadarlis*⁸⁷ Beaumont J does refer to the text of s 23⁸⁸ but he does not refer to the word writs in that section nor does he explain why a writ of habeas corpus is outside the term as used in that section. He also thought that in the absence of an express power to issue a writ of habeas corpus that no implication that the writ was nevertheless available should be made.⁸⁹ He does not directly explain why no such implication should be made but a hint is given later when he discusses the difference between a writ of habeas corpus and an order in the nature of a writ of habeas corpus⁹⁰. The implication is that an order is more flexible than a writ and that the court might seek to escape the historical limitations of the writ by resorting to an order.⁹¹

⁸³ *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 618. Now to be described as a Mareva Order: *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 401 [22].

⁸⁴ *Polygram Records Pty Ltd v Monash Records (Australia) Pty Ltd* (1985) 10 FCR 332, 335; *Television Broadcasts Ltd v Thi Phuong Nguyen* (1988) 21 FCR 34, 38.

⁸⁵ *Schoenmakers v DPP (No 2)* (1991) 31 FCR 429, 434, 437-8 (Foster J); *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380. See also *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225, 228 where Sheppard J relied upon ss 5(2) and 23 of the *Federal Court of Australia Act 1976* (Cth) to justify the award of indemnity costs. In support of his argument he relied heavily on judgments of common law courts in England in the nineteenth century.

⁸⁶ *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 618 (Wilson and Dawson JJ).

⁸⁷ (2001) 110 FCR 491.

⁸⁸ *Ibid* 518 [106].

⁸⁹ *Ibid* 517 [101].

⁹⁰ *Ibid* 518 [107].

⁹¹ See also Selway J in *Alsali* (2004) 136 FCR 291, 304 [40] where in contrast to habeas corpus an injunction is praised as 'a more flexible remedy'.

Strangely Beaumont J did invoke the text of s 23 to establish that the court might issue an order in the nature of habeas corpus⁹² even though that section does not mention habeas corpus at all. In other words s 23 is wide enough to justify an order in the nature of habeas corpus because of the word *orders* appears in that section, but not a writ of habeas corpus even though the term *writs* appears in the same section. This is unconvincing reasoning and may perhaps be explained by the extraordinary speed with which the case was decided.⁹³ Judges do not always do their best work when hurried.

IV THE FEDERAL COURT'S POWERS UNDER THE JUDICIARY ACT 1903 (CTH) S 44

Section 44 allows the High Court to remit a matter before it to the Federal Court. It is accepted that the High Court may issue a writ of habeas corpus even though the writ is not mentioned in s 75(v) of the *Constitution*. The High Court may issue a writ of habeas corpus under its powers conferred by s 33(1)(f) of the *Judiciary Act 1903* (Cth) ('Judiciary Act'), where the writ of habeas corpus is specifically mentioned, but only as an incident of the exercise of the original or appellate jurisdiction of the High Court.⁹⁴ Where the High Court has jurisdiction over the subject matter it may issue the writ as numerous cases have shown.⁹⁵ In the event that the matter is remitted to the Federal Court under s 44 of the Judiciary Act the Federal Court will be clothed with the same powers as the High Court itself.⁹⁶ As the High Court has explained when the court chooses which court to remit the matter to 'the remitter should be made to the Court in which the law to be applied is the same as that applicable in this court'.⁹⁷ Thus in that situation if the High Court is competent to issue the writ in an appropriate case so too the Federal Court may issue the writ.⁹⁸ This is the case even if the matter remitted is a matter

⁹² (2001) 110 FCR 491, 518 [106].

⁹³ *Ruddock v Vadarlis* (2001) 110 FCR 491, 518 [108] where Beaumont J describes the appeal as urgent. The decision at first instance was made on 11th September 2001 and the appeal was heard two days later on the 13th of September with judgment on the 18th of September 2001.

⁹⁴ *Jerger v Pearce* (1920) 28 CLR 588, 590; *Ex parte Williams* (1934) 51 CLR 545, 548, 551-2; *R v Bevan ex parte Elias and Gordon* (1942) 66 CLR 452, 462, 465, 480; *Koon Wing Lau v Calwell* (1949) 80 CLR 533, 556, 581; *Re Superintendent of Goulburn Training Centre; ex parte Pelle* (1983) 48 ALR 225; *Re Stanbridge's Application* (1996) 70 ALJR 640, 641 (Kirby J); *Re Wooley, Ex parte Applicants M276/2003* (2004) 210 ALR 369, 370 [3], 277 [33]; 403 [118], 426 [219].

⁹⁵ As in *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 as explained by Isaacs J in *Ex parte Williams* (1934) 51 CLR 545, 552; *McCauley v Hamilton Island Enterprises Pty Ltd* (1986) 69 ALR 270, 275-6 (Mason J); *Re Jarman; ex parte Cook* (1997) 188 CLR 595, 613 (Toohey and Gaudron JJ).

⁹⁶ See *Johnstone v Commonwealth* (1979) 143 CLR 398, 408 (Aickin J); *Commonwealth v Mewett* (1994) 126 ALR 391, 401-2 (Foster J); *Commonwealth v Mewett* (1995) 59 FCR 391, 395 where Cooper J wrote: '[t]he jurisdiction of this Court on remitter is federal jurisdiction co-extensive with that of the High Court'; *Dinnison v Commonwealth* (1997) 74 FCR 184, 188 (Foster J).

⁹⁷ *State Bank (NSW) v Commonwealth Savings Bank* (1984) 154 CLR 579, 586 (Gibbs CJ).

⁹⁸ See the remedies specified but not issued in Transcript of Proceedings, *Re the Honourable P Ruddock; Ex parte Pylka M105/1997* (High Court of Australia, Hayne J, 5 December 1997). The case was remitted back to the Federal Court where the application for a writ of habeas corpus, amongst other relief, was dismissed: *Pylka v Minister For Immigration and Multicultural Affairs* (1997) 50 ALD 483, 487 (North J). For another case in which the applicant sought habeas corpus which was remitted to the Federal Court from the High Court see: Transcript of Proceedings, *RE MIMIA ex parte Smirnov M66/1997* (High Court of Australia, McHugh J, 20 August 1997).

over which the Federal Court does not have jurisdiction apart from the remitter.⁹⁹

One possible objection to this line of argument lies in those cases in the Federal Court that have held that where a matter is remitted to the court by the High Court pursuant to s 44 the remitted matter becomes a Federal Court matter and is to be determined by the ‘court’s procedure and in accordance with any relevant statute law impinging upon those procedures’.¹⁰⁰ Thus the Federal Court may deal with the remitted matter in accordance with its own procedures and any relevant Federal Court Rules.¹⁰¹ This view is consistent with the language of s 44(1) of the Judiciary Act which provides in part that ‘further proceedings in the matter or in that part of the matter, as the case may be, shall be directed by the court to which it is remitted’.

While the High Court does have rules of court governing habeas corpus¹⁰² the Federal Court does not. It might be thought from this that therefore the Federal Court cannot proceed to deal with the matter. But that would be a mistaken view. All that these authorities establish is that where the Federal Court has its own rules on the matter it may proceed in accordance with those rules. But it does not follow that where there are no such rules the court may not proceed to deal with the matter at all. In this case as there are no Federal Court Rules on habeas corpus the court would not be bound to follow the habeas corpus procedure in the High Court Rules, unless the remitter included a direction to do so.

A nice question of policy arises as to whether the designation of the writs of prohibition and mandamus in s 75(v) of the *Constitution* as constitutional writs makes any difference to the argument. It is now clear that the High Court prefers the term constitutional writs as several of the judgments in *Aala* in 2000 made clear.¹⁰³ One implication of this terminology is that these writs are no longer to be governed by the same principles of a superior court as if they were prerogative writs.¹⁰⁴ But this in itself does not affect the argument here because in the first place habeas corpus is not a constitutional writ, and even if it were, the Federal Court would, on remitter be placed in the shoes of the High Court in any case. Of more interest may be a subtle effect of the new designation, namely that the courts will be more prepared to shape the writs to accommodate it to Australian conditions and be less inclined to subject the writ to restrictions that reflect its English origins. Of course this is possible because on this argument the writ remains in its common law form and of course Australian courts create and shape Australian common law. Thus the historic flexibility of the writ combined with

⁹⁹ *In re O'Reilly; ex parte Bayford Wholesale Pty Ltd* (1983) 151 CLR 557, 559 (Dawson J).

¹⁰⁰ *Dinnison v Commonwealth* (1997) 74 FCR 184, 189A (Foster J).

¹⁰¹ *Cam v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 14, 38C (Mansfield J). See also *Sz v Minister for Immigration and Multicultural Affairs* (2000) 172 ALR 172, 175 [8] (Lehane J); *Applicant S61 v Refugee Review Tribunal* (2004) 136 FCR 122, 125 [3] (Moore J); *S422/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 138 FCR 151, 160 [17] (Dowsett and Lander JJ).

¹⁰² High Court of Australia Rules 2004 rr 25.09-13.

¹⁰³ *Re Refugee Tribunal, ex parte Aala* (2000) 204 CLR 82, 92-3 [19]-[21] (Gaurdaon and Gummow JJ), 132-6 [135]-[144] (Kirby J). See also *Solution 6 Holdings Ltd v Industrial Relations Commission (NSW)* (2004) 60 NSWLR 558, 590-1 [133].

¹⁰⁴ *Aala*, *ibid* 93 [22].

its court made character, means that Australian courts may depart from the approach to the writ adopted in England.¹⁰⁵

V THE FEDERAL COURT'S POWERS UNDER THE JUDICIARY ACT 1903 (CTH) S 39B

The court may be seized of an application for the writ of habeas corpus by virtue of its original jurisdiction under the *Judiciary Act 1903* (Cth).¹⁰⁶ Section 39B(1) of the Judiciary Act provides that '[t]he original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth.' Added to the Judiciary Act in 1983,¹⁰⁷ s 39B was intended relieve the High Court of its heavy workload under s 75(v) of the *Constitution*.¹⁰⁸ It is accepted that, subject to any other statutory limitations in s 39B itself or any other Commonwealth enactment, s 39B was intended to 'confer on the Federal Court the amplitude of the original jurisdiction of the High Courts under s 75(v)'.¹⁰⁹ It follows from this reasoning that because the High Court may issue a writ of habeas corpus under s 75(v) so may the Federal Court issue a writ of habeas corpus under s 39B.

VI DOES THE DISTINCTION MATTER?

Here we come to the heart of why the Federal Court has decided to allow orders in the nature of a writ of habeas corpus. In *Ruddock v Vadarlis* Beaumont J identified two practical reasons for the distinction. First, the standing rules for habeas corpus are less stringent than for injunctions, for example.¹¹⁰ The judge did not say it, but he seems to have disapproved of using habeas corpus to seek what he described as in effect a mandatory injunction in this case¹¹¹. It is true that the standing rules for the writ are generous, but not unlimited.¹¹² Perhaps the judge thought that the applicants were using the generous standing rules of habeas

¹⁰⁵ Note the language of Kirby J in *Aala* *ibid*, 134-5 [141] that prohibition and mandamus are not to be 'shackled to the supposed limitations on their availability in England or in the Australian colonies, in or before 1900'. The same approach is arguably applicable to habeas corpus also.

¹⁰⁶ As in *Ruddock v Vadarlis* (2001) 110 FCR 491, 517 [99]. But the argument in this section of the paper was not put in that case.

¹⁰⁷ By *Statute Law (Miscellaneous Provisions) (No 2) Act 1983* (Cth) Schedule 1.

¹⁰⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 September 1983, 1049 (Lionel Bowen). Also cited in *David Jones Finance & Investments Pty Ltd v Commissioner of Taxation* (1991) 28 FCR 484, 496. See also *Shergold v Tanner* (2002) 209 CLR 126, 138-9.

¹⁰⁹ *David Jones Finance & Investments Pty Ltd v Commissioner of Taxation* (1991) 28 FCR 484, 497 (Morling and French JJ). See also *Duff v McCulloch* (1985) 11 FCR 237, 239; *Applicant S70 of 2003 v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 204 ALR 115, 116 [3].

¹¹⁰ *Ruddock v Vadarlis* (2001) 110 FCR 491, 518 [107].

¹¹¹ Actually the formal relief sought was much more elaborate than this. See *Ruddock v Vadarlis*, *ibid* 516 [98] where two injunctions, two declarations and two orders in the nature of mandamus were sought.

¹¹² See Clark and McCoy, above n 1, 138-46 where the Australian cases are discussed.

corpus to obtain a remedy similar to a mandatory injunction that normally, if directly applied for, would require a more stringent test for standing. But the mere fact that a writ of habeas corpus would have the same effect as an injunction is not a reason for refusing the writ as other courts elsewhere that have discussed the appropriate remedy in detention situations have argued.¹¹³ Indeed in a recent decision the Full Court of the Federal Court said of the relationship between habeas corpus and an interlocutory injunction that although the two remedies might overlap to some extent, that does not force the court to decide between the two remedies.¹¹⁴

Second, the judge thought that it is easier for an applicant to satisfy the Court's discretion to issue habeas corpus than to obtain final relief in the case of other writs and injunctions, especially if relief is in the form of a mandatory order.¹¹⁵ The only thing wrong with this is that it is a completely misconceived understanding of habeas corpus. As Black CJ rightly noted in *Ruddock v Vadarlis* once it is established that a person is unlawfully detained there is no discretion to refuse the writ.¹¹⁶ This is in fact the correct position.¹¹⁷ Now since the orders made in several detention cases before the Federal Court were conditional in nature, and since hitherto a conditional writ of habeas corpus has not been available,¹¹⁸ perhaps the court, and this is only conjecture, thought that the only way to escape the technical limits of the writ as traditionally understood was to make an order in the nature of habeas corpus. This was certainly the approach of the court in the *Al Masri* case where the person released was subject to what were in effect bail conditions.¹¹⁹ It should be noted, however, that the writ of habeas corpus is not rigid or unchanging, but is in fact a highly flexible remedy that has

¹¹³ *R v Secretary of State For The Home Department, ex parte Muboyayi* [1992] QB 244, 254G (Court of Appeal) where Lord Donaldson MR says, after referring to Magna Carta, [t]he duty of the courts is to uphold this classic statement of the rule of law and if, in particular circumstances, a writ of habeas corpus is the appropriate procedure for doing so, it is wholly immaterial that the practical effect may be the same as enjoining the Crown.

¹¹⁴ *Minister for Immigration v VFAD* (2002) 125 FCR 249, 267 [102].

¹¹⁵ *Ruddock v Vadarlis* (2001) 110 FCR 491, 518 [107].

¹¹⁶ *Ibid* 514 [91].

¹¹⁷ Clark and McCoy, above n 1, 241-243. This has been the position since at least the seventeenth century. See *Jenke's Case* (1676) 6 St Tr 1189, 1207-8. See also the *Habeas Corpus Act 2001* (NZ) s 14(1) which reads '[i]f the defendant fails to establish that the detention of the detained person is lawful, the High Court must grant as a matter of right a writ of habeas corpus ordering the release of the detained person from detention'.

¹¹⁸ Cf the *Habeas Corpus Act 2001* (NZ) s 11(1) where the act allows interim orders for release and the High Court may attach any conditions to the order that the Court thinks appropriate to the circumstances.

¹¹⁹ See *Al Masri v Minister For Immigration and Multicultural and Indigenous Affairs* (2002) 192 ALR 609, 622 [56], 625 (Merkel J) affirmed on appeal by the Full Court of the Federal Court in (2003) 126 FCR 54. See also *VFAD of 2002 v MIMIA* (2002) 194 ALR 304, 308 [14]. The High Court allowed the Commonwealth's appeal against the decision below in *MIMIA v Al Khafaji* (2004) 219 CLR 664 and in *Al Khateb v Godwin* (2004) 219 CLR 562 rejecting the reasoning in *Al Masri* on the substantive issue of detention powers. The court did not rule on the question under consideration in this paper however. For other federal cases where a person was released on conditions see: *Somaghi v Minister For Immigration, Local Government and Ethnic Affairs* (1990) 21 ALD 104, 106 (reversed on other grounds in (1991) 31 FCR 100); *Goldie v The Commonwealth* (2000) 180 ALR 609, 623 [46] (reversed on other grounds in (2002) 117 FCR 566).

evolved throughout the centuries and can be expected to evolve further.¹²⁰ What is more the language of s 23 is not confined to powers that existed in another legal system or another time as the High Court pointed in *Jackson*.¹²¹ Thus it would be perfectly legitimate for the Federal Court to craft a writ of habeas corpus that departed in some respects from the established common law principles that have hitherto governed the writ.

On the other hand the writ of habeas corpus retains advantages as Selway J recently noted.¹²² The first advantage of the writ is expedition. As Isaacs J pointed out in 1925,¹²³ citing English authorities, the remedy is summary, swift and peremptory. Second, the standing rules are generous and even a stranger may apply for it in an appropriate case including in a case where the detainee is incommunicado.¹²⁴ There are of course other procedural advantages to the writ such as that once the initial burden of showing a prima facie case is established by the applicant the burden of proof to establish the legality of the detention is passed to the respondent detainor.¹²⁵

One consideration that weighed heavily with the court in *Asilah* against a writ of habeas corpus was that the habeas corpus procedure normally followed in state courts and the High Court was governed by rules of court. There are no Federal Court rules on habeas corpus of whatever species it is designated and Selway J thought, after reviewing the traditional procedure, that the two stage process of a rule nisi followed by a rule absolute was not appropriate in the application before him.¹²⁶ But this approach overlooks the wide scope of s 23 and the ability, conferred by the absence of rules of court on habeas corpus, of the court to craft 'writs of such kinds as the court thinks appropriate'.

¹²⁰ See the remark by Justice Robert Sharpe of the Ontario Court of Appeal in R J Sharpe, *The Law of Habeas Corpus* (2nd ed, 1989) in his 'Note to the Second Edition' where he writes that habeas corpus is a 'versatile and flexible remedy'. See also the remarks of the Lord Donaldson MR in *R v Secretary of State for The Home Department ex parte Muboyayi* [1992] QB 244, 258f-g (Court of Appeal): '[i]f it be objected, and shown, that the use of a writ of habeas corpus quia timet is a novelty, so be it. This, the greatest and oldest of all the prerogative writs, is quite capable of adapting itself to the circumstances of the times'; a passage cited by Gleeson CJ in *Al Kateb v Godwin* (2004) 208 ALR 124, 132 [25]; *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616, 632-3 [60] where the Court of Appeal stated: '[b]ut habeas corpus is not to be shackled by precedent. It will adapt and enlarge as new circumstances require.' An ironic remark because on the facts in that case the court refused to expand the reach of the writ in that case; *Harris v Nelson* 394 US 286, 291 (1969) (Fortas J): '[t]he very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected'.

¹²¹ *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 641. See also this case in the court below where Bowen CJ says [(1986) 12 FCR 267, 270]: 'the words used in s 23 are not to be limited by reference to the doctrines of some other system.'

¹²² *Asalih v Manager Baxter Immigration Detention Facility* (2004) 136 FCR 291, 303 [38].

¹²³ *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, 76-7 (Isaacs J); *Woon Koon Lau v Calwell* (1949) 80 CLR 533, 556 (Latham CJ) who writes: 'a writ of habeas corpus would provide an immediate remedy.'

¹²⁴ See (2003) 179 FLR 474.

¹²⁵ *Dien v Immigration Detention Centre* (1993) 115 FLR 416, 418-9. See also Clark and McCoy, above n 1, 227-9.

¹²⁶ (2004) 136 FCR 291, 301-3 [31]-[37], 305 [45].

VII CONCLUSION

This paper has shown that there are several existing statutory bases that authorise the Federal Court to issue a writ of habeas corpus in an appropriate case. The arguments for an order in the nature of a writ of habeas corpus were either misconceived, as they were based on the mistaken notion that the writ could only be issued if the court was explicitly authorized to do so, or failed to notice the essential distinction between jurisdiction and power at the heart of the Federal Court Act itself. The prudential reasons for favouring an order over a writ both ignores the wide power given to the court in s 23 of the Federal Court Act, and underestimates the inherent flexibility of the writ as it has changed over the centuries. In neither of the cases to discuss the point was it necessary to draw a distinction between a writ and an order in the nature of a writ of habeas corpus. In *Ruddock v Vadarlis* the majority held that the actions of the Commonwealth in that case were legally justified by s 61 of the *Constitution* and thus the necessity for considering the appropriate remedy for illegal detention did not actually arise in that case. Similarly in *Asalih Selway* J dismissed the application for release from detention on the substantive merits of the case rather than on the ground that the applicant had sought the wrong remedy.

Had the court been better advised in both cases it might have simply said either, that a mandatory injunction was more appropriate in the circumstances, and thus not have launched into an ill considered and unnecessary excursion into the law of habeas corpus or, had it gone into the matter in more detail, considered more fully whether the Federal Court actually had the power to issue the great writ.¹²⁷

¹²⁷ *Ruhani v Director of Police (No 2)* (2005) 219 ALR 270, 294 [114] (Kirby J).