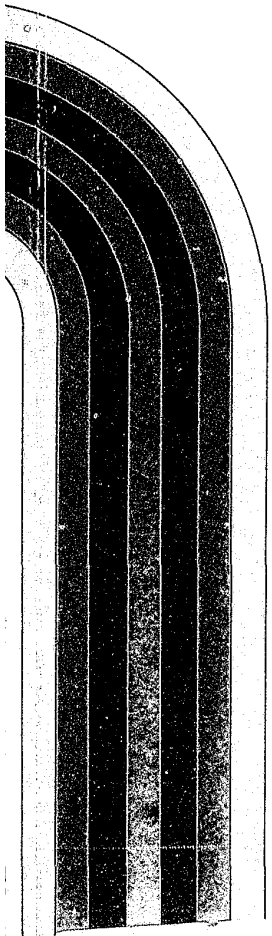

The Law Reform Commission

Report No.40

SERVICE AND EXECUTION OF PROCESS

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SERVICE AND EXECUTION OF PROCESS

I, NEIL ANTHONY BROWN, Acting Attorney-General of the Commonwealth of Australia, HAVING REGARD TO the functions of the Law Reform Commission

HEREBY REFER the following matter to the Law Reform Commission

TO INQUIRE INTO AND REPORT UPON the adequacy of the law relating to the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States and Territories having regard to the constitutional powers of the Commonwealth with particular reference to, but not confined to, the following matters —

(a) increases in the movement of persons and goods between States and Territories;

(b) improvement in the facilities available to parties and witnesses for travel between different parts of Australia;

(c) the development of an Australia-wide commercial community;

(d) the desirability of facilitating service and execution on an Australia-wide basis of legal process and judgments in litigation dealing with matters requiring service and execution in more than one State and Territory;

(e) the implications for the service and execution of process and judgments of the conferral of jurisdiction on State and Territory courts in matters requiring service and execution in more than one State or Territory;

(f) developments in the types and structures of courts and tribunals;

(g) developments in the procedures of courts and tribunals including the creation of informal procedures for minor civil disputes and minor criminal offences; and

(h) developments in legal co-operation in matters relating to the service and execution of process and judgments,

but excluding matters relating to the enforcement of fines.

DATED this 29th day of November 1982

NA Brown
Minister of State for Communications
acting for and on behalf of the
Attorney-General

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* The recommendations, statements of opinion and conclusions in this report are those of the members of the Law Reform Commission. They do not necessarily represent the views of consultants or contact officers or of the organisations with which they are associated.

Summary

Purpose of laws on interstate service and execution

1. Although Australia is in many ways a single national and economic unit with nationwide markets and dealings, it is in law a federation of separate States. The States have separate legal systems and generally their courts can exercise power only over people within their respective boundaries. This is because

- process, the term which includes the documents by which legal proceedings are commenced or by which witnesses are brought before the courts, can be effectively served only within the State in which it has been issued and
- service is an essential prerequisite to the exercise of power over a person.

This principle applies likewise to the Territories of Australia. Thus when legal disputes arise involving people in different States or Territories, the courts of the States and Territories face potential problems in securing the attendance of all the relevant parties and perhaps also witnesses. Similarly, problems can arise where it is sought to enforce a judgment of a State or Territory court beyond the boundaries of the State or Territory. While the legislatures of the States and Territories have some power to remedy these problems and have exercised those powers to some degree, not all the potential problems can be solved by the States and Territories themselves.

2. These problems existed before federation and the framers of the Constitution conferred on Parliament power in s 51(xxiv) of the Constitution to make laws to enable State and Territory process to be served and executed throughout Australia and judgments of State and Territory courts to be enforced throughout Australia. In addition, in s 118 of the Constitution there was included a general pronouncement of the mutual recognition of State laws and judgments. Thus the advantages of federation could be pursued without State and Territory boundaries acting as obstacles to the enforcement of legal rights and obligations. The importance of these matters to the successful integration of the States and Territories into a federation was recognised also by the first federal Parliament for, soon after federation, the Service and Execution of Process Act 1901 (Cth) was enacted to implement the powers given to Parliament in this area.

Operation of Service and Execution of Process Act

3. The Service and Execution of Process Act enables process commencing civil and criminal proceedings in State and Territory courts to be served outside

the State or Territory concerned throughout Australia. It also provides that other process in proceedings, including process to secure witnesses, may be served throughout Australia. It establishes procedures for the execution of warrants for the apprehension of persons throughout Australia, a procedure commonly known as extradition. And it provides a simple procedure by which a judgment given by a court of one State or Territory may be enforced in another State or Territory.

Review appropriate

4. While the Service and Execution of Process Act has operated reasonably well to facilitate the conduct of legal proceedings and the enforcement of judgments where people from different States and Territories are involved, it is a law largely unreviewed since its enactment in 1901. The only major change has been the introduction in 1963 of procedures for the enforcement of fines imposed on persons by courts of summary jurisdiction. Review of those procedures was excluded from the Commission's task. Most of the amendments to the Act have only involved changes of detail — the basic procedures extablished remain the same as they were in 1901.

Relevant considerations affecting reforms

5. *Legal changes.* Since that time the legal systems of the States and Territories, including the structures and procedures of their courts, the traditional arbiters of legal disputes, have undergone considerable change. This has meant in some cases that, because of the terms of the Service and Execution of Process Act, the facilities it provides for interstate service and execution of process and enforcement of judgments are denied to certain process and judgments of the courts of the States and Territories. An even greater change in State and Territory legal systems since 1901 has been the establishment of a wide range of bodies, commonly called tribunals, which have been given powers to deal with disputes of a legal nature. Other tribunals have been established with powers to regulate people who carry on particular occupations, professions or trades. The facilities provided by the Act do not extend to the service of process of tribunals or the enforcement of the decisions of tribunals outside the State or Territory in which they are established. The State and Territory boundaries therefore operate to obstruct proceedings carried on in tribunals which involve people in different States and Territories. To that extent, the purpose of the relevant constitutional grant of power to Parliament as an aid to integration of the federation is frustrated.

6. *Social, technological and commercial changes.* Australia has also undergone considerable changes in other fields since 1901. The business outlook is increasingly national rather than State-oriented. Revolutionary technological changes have facilitated rapid travel and transport of goods and the communica-

tion of information, enabling much greater interstate trade and travel. Indeed, for many purposes, State and Territory boundaries have become artificial and even meaningless. In this context, it is clear that an Act enacted in 1901 must come under close scrutiny to determine whether the procedures it established have been rendered out of date in the sense that they are no longer appropriate in a federation in which, notwithstanding differences in the legal systems of its components and their retention of certain powers to regulate conduct within their boundaries, there is a large degree of social, economic and commercial integration.

7. *Need for some safeguards.* Notwithstanding such developments, any reforms to the law regarding interstate service and execution of process and judgments must continue to address the question of the appropriate balance to be struck between the competing rights and interests of those involved in litigation across State and Territory boundaries — the parties and their witnesses. It is also necessary to ensure that changes to the law are cost effective.

Broad updating recommended

8. In the light of legal developments and the far-reaching social, technological, economic and commercial changes that have taken place in Australia since federation, the Commission recommends major changes to the schemes established by the Service and Execution of Process Act. These include changes in the procedures for interstate service and execution of the process presently within the scope of the Act and in the procedures for interstate enforcement of judgments. The Commission also recommends broadening of the scope of the present Act to enable interstate service and execution of the process of tribunals and interstate enforcement of the decisions of tribunals. For convenience a new Act, titled the Interstate Procedure Act, has been drafted, as amendment of the present Act to implement the Commission's recommendations would prove unwieldy.

Structure of Act

9. While a new Act has been drafted, it retains the basic structure of the Service and Execution of Process Act. There are good reasons for doing so in view of differences in the types of process that may be issued and in the types of proceedings in which process is issued (paragraphs 27–30). Also separate provisions should deal with the execution of judgments. And because of doubts that may be held regarding the constitutional validity of the proposed extension of the legislation to the service and execution of process and decisions of tribunals, the proposed new Act deals with these matters in such a way that the relevant provisions may be severed from provisions dealing with other matters.

Types of proceedings

10. *Proceedings in courts.* At present the Act contains a definition of the term 'suit' which might generally be described as a civil proceeding in a court. The Act then provides for the service of initiating and other process (not being a subpoena or summons) in a 'suit' and for service of process in a proceeding in a court that is not a 'suit'. The proceedings not specifically defined include criminal and quasi-criminal proceedings and maintenance and affiliation proceedings. The Commission recommends use of this device, but in the reverse. That is, 'criminal proceeding' should be defined and 'civil proceeding' should be any proceeding that is not a 'criminal proceeding' (paragraphs 155–6). The definition of 'criminal proceeding' should encompass

- any proceeding for the prosecution of an offence, whether the procedures applying to the hearing of the proceeding are civil or criminal in nature (paragraph 227)
- any proceeding related to a prosecution for an offence, for example, a preliminary hearing or committal hearing (paragraph 222)
- any proceeding concerning orders made in any of the above types of proceeding, for example, to enforce a bond or recognisance or a community service order (paragraph 230)
- various recently developed procedures whereby liability for an offence or the imposition of a fine for an offence may be determined without a hearing before a court (paragraph 226) and
- any proceeding arising by virtue of the prosecution or intended prosecution of a person for an offence, for example, a proceeding for the forfeiture of the profits derived from the commission of an offence (paragraphs 228–9).

The range of proceedings within the term 'civil proceeding' will thus include maintenance and affiliation proceedings under State or Territory law (paragraph 155).

11. *Proceedings in tribunals.* There should also be definitions of the various types of proceedings conducted in tribunals. While the roles of tribunals vary widely, their function in proceedings can be either adjudicative, in the sense of determining certain rights and obligations, or investigative, in which case there is no power of determination. The Commission recommends definition of an 'adjudicative function' as the function of determining the rights or liabilities of persons. These should include rights and liabilities in respect of the carrying on of a profession, trade or occupation (paragraph 623). 'Investigative function' should be defined as the conduct of an inquiry other than an inquiry conducted in connection with the exercise of an adjudicative function (paragraph 640).

Types of process

12. The various types of process that may be sought to be served or executed interstate should be defined also. This facilitates the application of different procedures in respect of each type of process.

- 'Initiating process' — which replaces the term 'writ of summons' — should be defined as any process by which a proceeding is commenced or by reference to which a person becomes a party to a proceeding (paragraph 157). For the purpose of a criminal proceeding this definition should be extended to cater for proceedings not dealt with in a court. It should include process first notifying a person that, in certain circumstances, no further steps will be taken in relation to an offence or that liability for an offence may be determined without an appearance before a court (paragraph 231).
- 'Subpoena' should be defined as any process which requires a person to do either or both of the following:
  - give oral evidence before
  - produce a document or thing to

  a court, officer of a court or person (paragraph 283), or before a tribunal (paragraph 621).
- 'Warrant' should be defined as any process authorising the apprehension of a person which has been issued in accordance with a law of a State or Territory, including such a law as applied by section 68(1) of the Judiciary Act 1903 (Cth) (paragraph 386).

Service of initiating process in civil proceedings

13. *Facility of service.* As at present, initiating process in a civil proceeding issued in one State or Territory should be permitted to be served in another State or Territory without any need to obtain leave to do so (paragraph 165).

14. *Endorsements.* Rather than the various endorsements presently required on a writ of summons served under the Act, the Commission recommends that the information that should be provided to a defendant (as to that information see below) should be contained in a document attached to the process when served (paragraph 199). This will facilitate the use of the same process whether service is to be effected within the State or Territory of issue or outside that State or Territory; thus there is no need to provide for the issue of concurrent process. If the document is not attached, service should be ineffective (paragraph 205).

15. *Appearance.* Where the law of the State or Territory of issue requires or permits the defendant to enter an appearance in the proceeding, the defendant should have a period of 21 days after service in which to do so (paragraph 209). The period should be the same regardless of longer periods permitted by State or Territory law (paragraph 208) and regardless of where the process is issued and where it is served (paragraph 207). The period of 21 days should be capable of being shortened to deal with circumstances where that is appropriate, for example, where the plaintiff seeks urgent relief (paragraph 209). To cater for the variety of procedures established under State and Territory laws, the term 'appearance' should be defined in general terms to include a procedure by which the defendant acknowledges service of process or informs the court in which the proceeding has been instituted that the defendant intends to make submissions on an issue arising in the proceeding or to challenge the jurisdiction of the court to hear the proceeding (paragraph 161). An appearance should give an address for service but, rather than having to be within 10 kilometres of the court that will hear the proceeding, in view of modern communications facilities the address for service may be anywhere within Australia (paragraph 201). This will facilitate the conduct of the defendant's case directly, including by the defendant's legal advisers, without the need for the appointment of an intermediary in the State or Territory of issue of process. The Court should be able to set aside an appearance if it fails to give an address for service, but provision of this power should not limit the power of the court to set aside an appearance on another ground (paragraph 210).

16. *Security for costs.* As at present, a person served with initiating process under the Act should be entitled to apply to the court in which the proceeding has been instituted for an order that the plaintiff give security for costs (paragraph 212). The court should be empowered to adjourn the proceedings until security as ordered is given.

17. *Leave to proceed.* At present, where a defendant does not appear at proceedings the plaintiff must obtain leave to proceed in the action from the court. The plaintiff must satisfy the court that the action has some defined nexus with the forum chosen by the plaintiff. The Commission recommends that this requirement be abolished (paragraph 168). The plaintiff will thus be able to proceed as if the process had been served within the State or Territory of issue.

18. *Venue objection procedure.* The Commission does not recommend, however, that the plaintiff should have an unrestricted right to choose the venue for the trial (paragraph 177). In place of the leave procedure and the associated nexus grounds, the Commission recommends that the defendant should be able to challenge the appropriateness of the plaintiff's chosen venue (paragraph 178). Some guidelines should be provided to courts to aid their determination of whether it is inappropriate for the proceeding to be heard in the court (paragraphs 179–80). The matters that the court should consider include

- the places of residence of the parties and the witness likely to be called in the proceeding
- the place where the subject-matter of the proceeding is situated
- the financial circumstances of the parties, so far as they are available
- any agreement between the parties as to the court or courts in which the proceeding should be instituted
- the appropriate law to apply in the proceeding and
- whether related or similar proceedings are pending (paragraphs 181–2).

Contrary to the present law regarding *forum non conveniens*, the court should be directed to disregard the fact that the plaintiff has instituted proceedings in the forum (paragraph 181). This will provide 'tailor-made' nexus conditions for each case.

19. *Procedure for objecting to venue.* An application under the venue objection procedure should be permitted only where the defendant has entered an appearance in the proceeding. The application generally should be made within the period limited for entry of an appearance, but the court should be permitted to allow an application to be made at a later time (paragraph 185). The application should be made by returning a form served with the process to the court setting out the reasons why the venue chosen by the plaintiff is inappropriate for the trial. A copy should be served on the plaintiff, who should be permitted to submit a written response to the arguments presented by the defendant. The court should then proceed to determine the application. It should be permitted to do so without a hearing or, if it considers that a hearing is necessary, whether of its own motion or on application by a party, it should order that there be a hearing to determine the application (paragraph 183). This should be the only procedure for challenging the appropriateness of the venue. In particular, no court of a State or Territory other than the State or Territory of issue of process should be able to restrain a party to a proceeding from taking a step in a proceeding on the ground that the venue is inappropriate (paragraph 184).

20. *Relief where court satisfied venue inappropriate.* Where the court is satisfied that it is an inappropriate venue for the proceeding, it should be able to order that the proceeding be stayed (paragraph 186). Such an order may be unconditional or subject to conditions, for example, that the defendant submit to the jurisdiction of another forum. A majority of the Commission recommend that the court also be able to order that the proceeding be transferred to another court that would have had jurisdiction in the proceeding if it had been commenced in that court (paragraphs 187–8, 193). Where the proceeding is in the Supreme Court of a State or Territory, the proceeding may be transferred to a specified court of another State or Territory or to the Federal Court of Australia. Where the proceeding is in a court other than a Supreme Court, the proceeding may be tranferred to a specified court of another State or Territory not being the Supreme Court. Courts of summary jurisdiction should be able

to transfer proceedings only to other courts of summary jurisdiction. Apart from where a proceeding is in a Supreme Court, if there is more than one court that would have jurisdiction in the transferred proceedings, transfer should be made to the court of more limited jurisdiction (paragraphs 194–5).

21. *Transfer conditional.* A majority of the Commission recommend that an order transferring a proceeding should be subject to the power of the transferee court, on application by a party to the proceeding, to decline to exercise jurisdiction in the proceeding. Such application should be made within 21 days of the transferee court being notified of the transfer order (paragraph 191).

22. *Ancillary matters regarding venue objection.* While generally a determination of inappropriateness of venue will be made on application, a court should be able to stay or transfer a proceeding if it comes to its own view that the venue chosen is inappropriate. Where a court orders a transfer of proceedings, it should be permitted to give directions as to further steps to be taken in the proceedings, as also should the transferee court. In exceptional cases a court (other than the Federal Court) to which a proceeding has been transferred should be permitted to order a further transfer of the proceeding, either of its own motion or on application (paragraph 196). The power of a court to stay a proceeding on grounds other than those related to the appropriateness of the venue, for example, that the proceeding is vexatious or oppressive, should be explicitly preserved so as to avoid confusion regarding the scope of the venue objection procedure (paragraph 182).

23. *Information to be provided.* The document required to be attached to initiating process when served under the Act should inform the defendant of

- the authority of the Act to provide for service anywhere in Australia (paragraph 200)
- the obligation, if an appearance is entered, to give an address for service of notices (paragraph 201)
- the period within which an appearance should be entered (paragraph 206)
- the right to make application for a stay or transfer of the proceeding on the basis that the venue chosen by the plaintiff is inappropriate and
- the procedure for making such an application (paragraph 203).

The form by which an application under the venue objection procedure may be made should also be attached to the process when served (paragraph 183). As to endorsements required to be made on process under State or Territory law, only those endorsements required on process generally, not those required where process is served out of the State or Territory under those laws, should be made on process served under the Act (paragraph 204).

Service of initiating process in criminal proceedings

24. *Facility of service.* As at present, initiating process in a criminal proceeding issued in one State or Territory should be permitted to be served in another State or Territory without any need to obtain leave to do so (paragraph 332).

25. *Time limitations on further proceedings.* Service of initiating process in a criminal proceeding should be ineffective unless it is served not less that 21 days before the day on which the person is required to attend before a court or to do some other act or thing specified in the process. The period of 21 days should be capable of being shortened to deal with circumstances where that is appropriate (paragraph 233).

Service of other process in civil and criminal proceedings

26. Process, other than initiating process or a subpoena, issued in civil or criminal proceedings should be permitted to be served outside the State or Territory of issue throughout Australia without conditions (paragraph 241–5).

Service of subpoenas on parties

27. A subpoena addressed to a party to the proceeding in which it is issued should be permitted to be served outside the State or Territory of issue subject to the same conditions as if it was to be served within that State or Territory (paragraph 285).

Service of subpoenas on non-parties

28. *Range of proceedings.* All subpoenas issued by or out of courts or by judicial or court officers should be capable of service outside the State or Territory of issue (paragraph 284).

29. *Special procedures.* Special procedures should apply to the service of a subpoena on a person who is not a party to the proceeding in which it is issued. These should be in addition to requirements of State or Territory law which concern the need to obtain leave to serve a subpoena or the need to serve a subpoena a longer period before the day for compliance than is required under the Commission's recommendations (paragraph 269). The procedures summarised below should apply where the person to whom a subpoena is addressed is not subject to any lawful restraints on the person's freedom of movement. Other procedures, summarised subsequently, should apply in respect of subpoenas addressed to persons whose freedom of movement is constrained by law.

30. *Leave not generally required.* Where service may be effected not less than 14 days before the day on which compliance with a subpoena is required, no leave should be required to serve the subpoena outside the State or Territory of issue (paragraph 269).

31. *Where leave required.* Where service of a subpoena outside the State or Territory of issue cannot be effected not less than 14 days before the day for compliance, the leave of the court that issued the subpoena should be sought. Service of a subpoena within the specified period without the leave of the court of issue should be ineffective (paragraph 270). To facilitate speedy consideration of an application for leave to serve a subpoena, such applications should be able to be dealt with by an officer of the court (paragraph 272).

32. *Grounds for leave.* The court should not exercise its discretion to give leave to serve a subpoena unless it is satisfied that

- the evidence likely to be given by the person to whom it is addressed, or the production of a document or thing specified in the subpoena, is necessary in the interests of justice (paragraph 270) and
- the subpoena will be served a sufficient time before the day for compliance to enable the person to comply with it without undue inconvenience (paragraph 271) and to enable the person, where a right to do so exists under State or Territory law, to apply to set aside, vary or obtain other relief in respect of the subpoena (paragraph 281).

The court should have power to impose conditions on a grant of leave and the order granting leave should specify the latest day on which service of the subpoena is permitted (paragraph 273).

33. *Information to be provided.* Service of a subpoena should be ineffective unless there is attached to the subpoena when served certain documents. These should inform the subject of the subpoena of

- the authority of the Act to provide for effective service
- the person's responsibilities in relation to compliance with the subpoena
- the right to have been given money for expenses (see below)
- the right, where it exists under State or Territory law, to apply to set aside, vary or obtain other relief in respect of the subpoena and
- the procedure for making such an application (see below).

There should be attached also sufficient blank forms by which such an application may be made. Where service has been effected pursuant to leave, a copy of the order granting leave should be attached (paragraph 280).

34. *Witness expenses.* Service of a subpoena should be ineffective unless enough money is given or tendered to the person served, at the time of service, to meet the expenses of the person in complying with the subpoena (paragraph 274). The items to be covered by witness expenses, for the purpose of compliance with the subpoena, should include the reasonable costs of

- necessary travel to and from, and accommodation while at, the place where compliance with the subpoena is required and
- finding, collating and producing a document or thing (paragraph 277).

The amount of money otherwise required to be given or tendered may be reduced if the person is given or tendered an authorisation to cover any part of these expenses, for example, a ticket or other travel authorisation or an accommodation voucher (paragraph 277).

35. *Application for relief in respect of a subpoena.* The Commission recommends a simple procedure whereby a person served with a subpoena may apply to the court of issue to set aside, vary or obtain other relief in respect of the subpoena. It is not proposed that the new Act confer such a right, but the procedure should apply where the right exists under the law of the State or Territory of issue. Similarly, the grounds on which such relief might be given should be those provided under the law of the State or Territory of issue. Such an application should be permitted to be dealt with merely on the written submissions of the person served and of the party who obtained the issue of the subpoena, or the court of issue should be able to require that there be a hearing of the application (paragraph 281).

36. *Recovery and adjustment of witness expenses.* Where a person has complied with a subpoena, the court or other person before whom compliance was required should be permitted to make orders to ensure that the person is paid a proper amount for expenses reasonably incurred in compliance, or requiring the person to repay any excess of witness expenses (paragraph 278).

Service of subpoenas on non-parties under lawful restraint

37. *Persons under lawful restraint.* A person to whom a subpoena is addressed may be subject to restraints imposed by or under law which affect the person's freedom of movement. These restraints may conflict with the requirements of a subpoena. In these circumstances, special procedures should apply for securing the attendance of the person at the proceedings in which the subpoena was issued (paragraph 296). These procedures have been framed in terms which should ensure their validity, the procedures established by the present Act being open to question on this point (paragraphs 291–2). For the purpose of the application of these procedures, a person should be regarded as being under lawful restraint if the person

- is in lawful custody
- by law, is not allowed to leave a State or Territory without permission or
- must comply with a condition imposed under a law relating to the conduct of persons charged with, convicted of or sentenced for an offence (paragraph 298).

38. *Order for production.* Where a subpoena is addressed to a person who is under lawful restraint in a State or Territory other than the State or Territory of issue, to secure the attendance of the person the court of issue should be given a discretion to make an order that the person be produced at the time and place at which compliance with the subpoena is required (paragraph 296).

39. *Grounds for making order for production.* A court should not make an order for production in respect of the person to whom a subpoena is addressed unless it is satisfied that

- the evidence likely to be given by the person, or the production of a document or thing specified in the subpoena, is necessary in the interests of justice and
- there will be sufficient time for compliance with the order without undue inconvenience and to permit the person, and the custodian of the person, to apply to set aside, vary or obtain other relief in respect of the subpoena or in respect of the order (paragraph 301).

The court should be empowered to require that the applicant provide security for the costs involved in producing the person as a condition to the making of an order (paragraph 302). The court should have power also to impose conditions on an order and the order should specify the time and place at which the person is to be produced (paragraph 303). The order should be directed to the custodian from time to time of the person (paragraph 303).

40. *Custodians.* The custodian of a person under lawful restraint should be a person

- who has the lawful custody of the person under lawful restraint
- who may lawfully give permission for the person to leave the State or Territory or
- who by law is responsible for supervising compliance with the conditions to which the person under lawful restraint is subject (paragraph 304).

41. *Service.* An order for production should be permitted to be served outside the State or Territory in which it was made on the custodian of the person named in the order (paragraph 304). If so served, the subpoena on which the order is based should be served on the person (paragraph 304). Where, after service, there is a change in custodian, the former custodian should give the order to the new custodian, and such giving should be deemed to amount to service of the order for production (paragraph 314).

42. *Expenses.* Service of an order for production should be ineffective unless there is given or tendered to the custodian at the time of service the sum of money that would have been required to have been given to the person named in the order on service of the subpoena if that person had not been under lawful restraint at the time of service (paragraphs 316–7). This requirement is

imposed to provide the custodian with, as it were, a deposit for the expenses of producing the person in compliance with the order and to provide the basis for the disbursement of witness expenses to a person who ceases to be under lawful restraint before the time for compliance with the order.

43. *Information to be provided.* Service of an order for production should be ineffective unless certain notices are attached to it when served (paragraph 305). These notices are the forms by which an application may be made to set aside or vary the order. Similarly, service of a subpoena on a person under lawful restraint should be ineffective unless certain notices are attached to the subpoena when served (paragraph 305). These should inform the subject of the subpoena of

- the authority of the Act to provide for effective service
- the person's responsibilities in relation to compliance with the subpoena if the person ceases to be under lawful restraint before the time for compliance
- the right to claim money for expenses if the person ceases to be under lawful restraint before the time for compliance with the subpoena
- the right, where it exists under State or Territory law, to apply to set aside, vary or obtain other relief in respect of the subpoena
- the right to apply to set aside the order for production based on the subpoena and
- the procedure for making such applications.

There should be attached also sufficient blank forms by which such applications may be made (paragraph 305).

44. *Application for relief in respect of a subpoena.* A person under lawful restraint who has been served with a subpoena should have the same rights as a person not under lawful restraint to apply to the court of issue to set aside, vary or obtain other relief in respect of the subpoena. The application should be made and dealt with as if the person was not under lawful restraint (paragraph 313). Where the application is granted, the court of issue should make any necessary consequential order in respect of the order for production based on the subpoena (paragraph 313).

45. *Application for relief in respect of an order for production.* There should be conferred on a person the subject of an order for production, and on the custodian of the person, a right to apply to the court that made the order for relief in respect of the order (paragraphs 310, 313). The procedure should be the same as that applying to applications for relief in respect of a subpoena (paragraph 311). In considering whether relief should be granted, the matters which the court should take into account include

- public safety
- the safety and well-being of the person named in the order and

- any conflict between the requirements of the order and a right conferred or an obligation imposed under law on the person named in the order (paragraphs 310, 312).

Where the application is granted, the court should make any necessary consequential order in respect of the subpoena on which the order is based (paragraph 312).

46. *Powers of custodian.* For the purposes of compliance with an order for production, the custodian of the person named in the order should be permitted to take whatever steps the custodian considers necessary to ensure that the person is produced at the time and place required and is thereafter returned to the control of the custodian (paragraphs 306–7). In particular, the custodian or the escort should be empowered to require the prison authorities in States or Territories through which they may pass and in the State or Territory in which the person is to be produced to assume custody of the person and to release the person into their custody (paragraph 308). Such authorities should be required to comply with all such requirements as are reasonable (paragraph 308).

47. *Continuance of sentence.* Where a person the subject of an order for production is undergoing a sentence of imprisonment, the person should be deemed to be undergoing that sentence while outside the State or Territory in which the sentence is being served for the purpose of compliance with the order so long as the person remains in the custody of the custodian or escort or in such other custody as they may arrange (paragraph 318).

48. *Escape or non-compliance with conditions.* While a person is outside the State or Territory in which the person is under lawful restraint, the laws of that State or Territory regarding liability for an escape from custody or for non-compliance with conditions as to conduct imposed on the person should continue to apply to the person, subject to any written conditions the custodian imposes on the person as conditions to be complied with while the person is outside the State or Territory for the purposes of compliance with the order for production (paragraph 319).

49. *Expenses of person released from restraints before time for compliance.* To ensure that a person who ceases to be under lawful restraint before the time for compliance with an order for production has sufficient money to comply with the subpoena on which the order is based, the custodian should pay any money given or tendered at the time of service of the order to the person as soon as practicable after the person ceases to be under lawful restraint (paragraph 316). As an alternative, the person on whose behalf the subpoena was issued should be able to give or tender witness expenses within a reasonable time of the person ceasing to be under lawful restraint (paragraph 317). The person should not be required to comply with the subpoena unless given or tendered witness expenses (whether by the custodian or some other person) no later than a reasonable time after the person ceases to be under lawful restraint (paragraph 317).

50. *Costs of compliance.* The court or other person before whom a person is required to appear pursuant to an order for production should be able to make orders regarding the costs of compliance with the order (paragraph 302). This power should extend to orders requiring repayment of money by a custodian or person where that money has not been utilised for the purposes of compliance with an order for production or a subpoena on which an order was based (paragraph 317).

51. *Subpoena not requiring attendance.* As the procedures summarised above are designed to ensure appropriate control over the means to secure the attendance at proceedings of a person not having the necessary freedom of movement to voluntarily comply with a subpoena, it follows that there is no need to follow those procedures where the subpoena does not require the person's attendance. Accordingly, the procedures for service of subpoenas addressed to persons not under lawful restraint should apply where a subpoena is addressed to a person who is under lawful restraint in a State or Territory other than the State or Territory of issue but does not require that the person attend the proceeding for the purpose of compliance (paragraph 300).

Service of initiating process in connection with the exercise of adjudicative functions by tribunals

52. *Conditions on service.* Initiating process concerning the exercise of an adjudicative function by a tribunal should be permitted to be served outside the State or Territory where the process is issued only where there is some nexus between the proceedings and the forum (paragraph 630). The nexus should be established if the matter in issue before the tribunal concerns

- real property within the State or Territory
- a contract, wherever made, for the supply of goods or the provision of services of any kind (including financial services) within the State or Territory
- an act or omission within the State or Territory
- the carrying on of a profession, trade or occupation within the State or Territory
- a pension or benefit under a law of the State or Territory or
- the validity of an act or transaction under a law of the State or Territory (paragraph 631).

53. *Facility of service.* Where one of the above nexus conditions is met, initiating process issued in a proceeding in a tribunal should be permitted to be served outside the State or Territory of issue of the process throughout Australia. There should be no need to obtain leave to do so (paragraph 630).

54. *Information to be provided.* An initiating process of a tribunal should have endorsed on it or attached to it when served a notice informing the person served of certain matters. Failure to endorse or attach the notice should render service ineffective (paragraph 634). The information included in the document should advise the person of

- the authority of the Act to provide for service anywhere in Australia when one of the nexus conditions is satisfied
- the particular nexus ground relied upon
- the obligations regarding entry of an appearance and
- the period within which an appearance should be entered (paragraph 634).

55. *Appearance.* Where the law of the State or Territory of issue requires or permits the person served to enter an appearance in the proceeding before the tribunal, the person should have a period of 21 days after service in which to do so. The period should be the same regardless of longer periods permitted by State or Territory law and regardless of where the process is issued and where it is served. The period of 21 days should be capable of being shortened to deal with circumstances where that is appropriate, for example, where urgent relief is sought. The term 'appearance', as in the case of proceedings in courts, should be defined in broad terms. An appearance should give an address for service, which may be anywhere within Australia. Failure to give an address for service should enable the tribunal to set aside the appearance. Where there is no procedure for entering an appearance, no further steps should be taken in the proceedings until the expiration of a period of 21 days from service of the process. This period also should be capable of being shortened in appropriate circumstances (paragraph 632).

56. *Security for costs.* A person served with initiating process in tribunal proceedings should be entitled, where the tribunal possesses power to make an order as to costs, to apply to the tribunal for an order that the applicant in the proceedings give security for costs. The tribunal should be empowered to adjourn the proceedings until security as ordered is given. Where the tribunal's power to award costs is limited by a monetary ceiling, an order requiring security in excess of that amount should be ineffective to the extent of that excess (paragraph 632).

57. *Leave to proceed.* No leave to proceed in the absence of an appearance by the respondent should be required (paragraph 633).

Service of other process in proceedings in tribunals

58. Process, other than initiating process or a subpoena, issued in proceedings in tribunals should be permitted to be served outside the State or Territory of issue throughout Australia without conditions (paragraph 636).

Service on parties of subpoenas related to adjudicative functions

59. A subpoena issued by or out of a tribunal addressed to a party to the exercise of an adjudicative function should be permitted to be served outside the State or Territory of issue subject to the same conditions as if it was to be served within that State or Territory (paragraph 639).

Service on non-parties of subpoenas related to adjudicative functions

60. *Court procedure qualified.* The procedures recommended above in relation to subpoenas issued by or out of courts or by judicial or court officers should apply also, with one qualification, to the service of subpoenas issued by or out of tribunals in connection with the exercise of adjudicative functions (paragraph 639).

61. *Leave required.* That qualification is that leave should be obtained in all cases for service of such subpoenas, not merely where the period between service and the date for compliance is less than 14 days (paragraph 638). Similarly, where the person to whom the subpoena is addressed is under lawful restraint and the subpoena requires the attendance of the person, application for an order for production of the person should be made (paragraph 639). There should be a discretion to give leave and the grounds for the granting of leave or the making of an order for production should be the same as those applying on an application for leave or for an order in respect of a subpoena issued by or out of a court or by a judicial or court officer (paragraph 639).

62. *Application for leave.* Where the tribunal of issue is constituted by, or has a member who is, a judge or magistrate, an application for leave, or for an order for production, should be made to the judge or magistrate. In any other case, the application should be made to the court that would have had jurisdiction in the tribunal proceedings if they had been, or had been able to be, instituted in a court. Where there is more than one such court, the application should be made to the court of more limited jurisdiction (paragraph 638).

Service of subpoenas related to investigative functions

63. *Leave required.* As with subpoenas issued in connection with the exercise of adjudicative functions, service of subpoenas issued by or out of tribunals in connection with the exercise of investigative functions should be subject to a leave requirement. Similarly, the making of an order for production in respect

of a person under lawful restraint should be subject to independent supervision (paragraph 641). In other respects, the same procedures should apply to service of such subpoenas or orders as apply to subpoenas and orders issued or made by courts (paragraph 647).

64. *Appropriate court.* In all cases, an application for leave to serve such a subpoena, or for an order for production of the person to whom such a subpoena is addressed, should be made to a judge of the Supreme Court of the State or Territory in which the tribunal of issue is established, who should have a discretion to give leave or make the order (paragraph 642).

65. *Grounds for leave or order for production.* In view of the different function being exercised, the grounds for the granting of leave or the making of an order for production where the subpoena is issued in connection with the exercise of an investigative function differ from those applying to a subpoena issued by a tribunal in connection with the exercise of an adjudicative function. The judge should not grant leave or make an order for production unless satisfied

- that the evidence likely to be given by the person to whom the subpoena is addressed, or a document or thing specified in the subpoena, is relevant to the exercise of the investigative function
- that the evidence, document or thing cannot reasonably be obtained from a person in the State or Territory of issue and
- where the evidence, document or thing may constitute or contain evidence that relates to matters of state, that having regard to the purpose and subject-matter of the investigative function, the public interest in having the evidence, document or thing made available to the tribunal outweighs the public interest in preserving secrecy or confidentiality in relation to the evidence, document or thing (paragraphs 643–5).

66. *Matters of state.* For the purpose of the preceding recommendation, evidence that relates to matters of state should be taken to include evidence

- that relates to
  - the security or defence of Australia
  - international relations, relations between the Commonwealth and a State or Territory, relations between two or more States or Territories or relations between a State and a Territory or
  - the prevention or detection of offences or contraventions of the law of the Commonwealth, a State or a Territory, or
- that, if adduced,
  - would disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of a law of the Commonwealth, a State or a Territory or

– would tend to prejudice the proper functioning of the government of the Commonwealth, a State or a Territory (paragraph 644).

Execution of warrants

67. *Power to apprehend.* Where a warrant has been issued in a State or Territory, the person named in the warrant should be able to be apprehended in any other State or Territory. There should be no requirement that the warrant be endorsed prior to apprehension of the person (paragraph 389). Also, it should not be necessary to produce the warrant when the person is apprehended (paragraph 427).

68. *Extradition hearing.* As soon as practicable after apprehension, the person should be taken before a magistrate in the State or Territory of apprehension for the purpose of an extradition hearing (paragraph 390). If available, the warrant or a copy thereof should be produced to the magistrate. If the warrant or copy is not produced, the magistrate should adjourn the proceeding for a specified reasonable time, not exceeding seven days, and admit the person to bail or remand the person in custody (paragraph 429). If the warrant or copy is not produced when the proceeding resumes, the magistrate should order the release of the person (paragraph 429).

69. *Proceeding where warrant or copy produced.* Where the warrant or copy is produced to the magistrate, the magistrate should, subject to the right of the person to challenge the validity of the warrant and to apply for release, order the extradition of the person and for that purpose should order that

- the person be remanded on bail to appear at a specified time and place in the State or Territory of issue of the warrant (non-custodial extradition) or
- the person be taken in custody to a specified place in the State or Territory of issue of the warrant (custodial extradition) (paragraphs 391, 412).

70. *Challenge to validity.* An apprehended person should be entitled to challenge the validity of the warrant in the extradition hearing and without the need to take separate proceedings, for example, by way of an application for a writ of habeas corpus (paragraphs 393–6). Where the magistrate is satisfied that the warrant is invalid, the person should be released (paragraph 396).

71. *Application for release.* An apprehended person should be entitled to apply for release (paragraph 400). The sole ground should be that it would be manifestly unjust or oppressive to make an extradition order (paragraph 406). Where the ground is not made out, the magistrate should make a custodial or non-custodial extradition order.

72. *Permanent manifest injustice or oppression shown.* Where the apprehended person establishes to the satisfaction of the magistrate that it would

be manifestly unjust or oppressive to make an extradition order at all, the magistrate should order that the person be released (paragraph 415).

73. *Temporary manifest injustice or oppression shown.* Where the apprehended person establishes to the satisfaction of the magistrate that it would be manifestly unjust or oppressive for an extradition order to be effective immediately, the magistrate should either make an extradition order and suspend its operation until a specified time, or adjourn the proceeding for a specified time, and in either case should remand the person on bail or in custody until the specified time (paragraphs 416–7).

74. *Variation of order.* Where the magistrate has adopted either course outlined in the previous paragraph, the apprehended person or the authorities seeking the person's extradition should be entitled to apply for a variation of the order (paragraph 416).

75. *Course on resumption of proceeding.* Where the magistrate has adjourned a proceeding for a specified time after temporary manifest injustice or oppression has been shown, when the proceeding resumes the magistrate should either make an extradition order, make an extradition order and suspend its operation until a specified time or adjourn the proceeding further for a specified time. Where either of the latter two courses are taken, the magistrate should also remand the person on bail or in custody until the specified time (paragraph 416).

76. *General power of adjournment.* For the purposes of an extradition hearing, a magistrate should have power to adjourn the hearing and remand the person on bail or in custody for the period of the adjournment (paragraph 409).

77. *Review of magistrate's order.* An apprehended person and the authorities seeking the extradition of the person should have a right to apply to a judge of the Supreme Court of the State or Territory in which the person was apprehended for review of the magistrate's order. The application should be made within seven days of the making of the magistrate's order (paragraph 420). This right should be in addition to a right to apply for review to the Federal Court pursuant to the Administrative Decisions (Judicial Review) Act 1977 (Cth) (paragraph 422).

78. *Powers where application for review made.* Pending review of a magistrate's order, the judge should be able to stay the execution of the order made by the magistrate and to order that the apprehended person be remanded on bail or in custody (paragraph 421).

79. *Nature of review.* Review of the magistrate's order by the judge should be by way of rehearing (paragraph 421). The judge should be able to confirm or vary the magistrate's order or revoke the order and make a new order.

80. *Procedure where non-custodial extradition order made.* Where a non-custodial extradition order has been made by a magistrate, the magistrate

should prepare a document setting out the conditions to which the grant of bail is subject. Where the order as confirmed or varied, or the new order made, by the judge on review is a similar order, the judge should cause such a document to be prepared. The document should be signed by the person who prepared it and by the apprehended person. A copy should then be given to the apprehended person and a further copy should be furnished to the court, tribunal or person before whom the apprehended person has been remanded to appear in the State or Territory of issue of the warrant. If the apprehended person refuses to sign the document, or does not comply with a condition precedent to release on bail, the magistrate, or the judge on a review, should revoke the non-custodial extradition order and make a custodial extradition order (paragraph 434). Any money or thing deposited as security for compliance with a non-custodial extradition order should be paid to the Attorney-General of the State or Territory of issue of the warrant or, if there is no Attorney-General, to the Administrator of the Territory of issue (paragraph 436).

81. *Law applicable to grant of bail.* The power of a magistrate or judge to admit a person to bail, whether for the purpose of the person's extradition or on the adjournment of an extradition hearing or review, should be exercised in accordance with the law of the State or Territory of apprehension (paragraph 432). However, in exercising that power, no regard should be had to provisions of that law that discriminate against persons resident in other States or Territories as regards the opportunity to obtain bail or the conditions on which bail may be granted (paragraph 433).

82. *Law applicable to enforcement of bail.* Proceedings in relation to the enforcement of bail should be conducted in and in accordance with the law of the State or Territory in which the apprehended person has been bailed to appear (paragraph 435). Thus where a non-custodial extradition order has been made, proceedings concerning the enforcement of bail granted to the apprehended person under that order should be taken in, and in accordance with the law of, the State or Territory of issue of the warrant as if bail had been granted under the law of that State or Territory.

83. *Custody of persons under custodial extradition order.* To facilitate the extradition of an apprehended person in respect of whom a custodial extradition order has been made, a magistrate, or judge on review, should have power when making such an order to direct the manner in which the apprehended person should be taken in custody to the State or Territory of issue of the warrant (paragraph 413). In addition, but subject to such directions, the person to whose custody the apprehended person has been committed should be able to take whatever steps are necessary to ensure compliance with the order, including requesting prison authorities in States or Territories through which they may pass on the way to the State or Territory of issue to assume custody of the apprehended person, and such authorities should comply with all such requests as are reasonable (paragraph 437). The laws of the State or Territory of issue regarding liability for an escape from custody should apply to an apprehended

person being taken to the State or Territory of issue pursuant to a custodial extradition order (paragraph 438).

84. *Warrants issued by tribunals.* The preceding recommendations regarding the extradition of persons named in warrants should apply regardless of the body by or out of which, or the person by whom, a warrant has been issued. However, these procedures should apply to a warrant issued by or out of tribunal only if

- the warrant was issued to compel compliance with a subpoena in relation to which leave for service was given or
- a judge of the Supreme Court of the State or Territory of issue of the warrant makes an order authorising the apprehension of the person named in the warrant (paragraphs 649–52).

The judge should have a discretion whether to make such an order, but where the warrant is issued for the purpose of bringing a person before a tribunal to give evidence or to produce a document or thing, an order should not be made unless the judge is satisfied of certain matters set out below.

85. *Grounds for order — adjudicative functions.* Where the warrant was issued by a tribunal in connection with the exercise of an adjudicative function, the judge should not make an order unless satisfied that the evidence likely to be given by the person, or the production of a document or thing specified or referred to in the warrant, is necessary in the interests of justice (paragraph 649).

86. *Grounds for order — investigative functions.* Where the warrant was issued by a tribunal in connection with the exercise of an investigative function, the judge should not make an order unless satisfied

- that the evidence likely to be given by the person, or a document or thing specified or referred to in the warrant, is relevant to the exercise of the investigative function
- that the evidence, document or thing cannot reasonable be obtained in the State or Territory of issue of the warrant and
- where the evidence, document or thing may constitute or contain evidence that relates to matters of state, that having regard to the purpose and subject matter of the investigative function, the public interest in having the evidence, document or thing made available to the tribunal outweighs the public interest in preserving secrecy or confidentiality in relation to the evidence, document or thing (paragraph 651).

The type of evidence that constitutes evidence relating to matters of state has been outlined previously.

87. *Production of order.* Where a person named in a warrant has been apprehended in a State or Territory other than the State or Territory of issue

pursuant to an order made by a judge, in addition to the requirement to produce the warrant or a copy thereof to the magistrate conducting the extradition hearing, a copy of the order authorising the apprehension of the person should also be produced to the magistrate. Also, where the warrant was issued to compel compliance with a subpoena served after leave has been given, a copy of that order should be produced to the magistrate (paragraph 653).

88. *Release of persons unnecessarily detained.* A person who has been taken pursuant to a custodial extradition order to the State or Territory of issue of a warrant for the purpose of giving evidence or producing a document or thing before a court, tribunal or other person, should have a right to apply to a court for release. Where the warrant was issued by or out of a court, application should be made to that court. Where the warrant was not issued by or out of a court, application should be made to a judge of the Supreme Court of the State or Territory of issue of the warrant (paragraph 439).

89. *Grounds for release.* The court or judge to which application is made should order that the person be released if satisfied that the apprehended person

- has been in custody for a period that, in the circumstances, is unnecessarily long or
- need not continue to be held in custody for the purpose of securing the attendance of the person to give evidence or to produce a document or thing (paragraph 439).

Suppression orders in extradition hearings

90. *Power to make suppression orders.* There should be power for a magistrate conducting an extradition hearing and a judge of a Supreme Court conducting a review of a magistrate's order to make an order, called a suppression order, prohibiting the publication of any report of a part of the proceedings of the extradition hearing or review conducted in public or of a finding publicly made by the magistrate or judge (paragraph 441).

91. *Grounds for making suppression order.* A suppression order should be permitted to be made if it appears to the magistrate or judge that the publication of a report of a part of the proceeding or finding would give rise to a substantial risk that, by virtue of the influence that the publication might exert on the members of the jury, the fair trial of a person charged with a criminal offence (the protected person) that may be tried by a jury might be prejudiced (paragraph 442). There should be power to make an interim suppression order pending full consideration of the arguments for and against the making of a suppression order (paragraph 447).

92. *Restriction on exercise of other powers.* Where the magistrate or judge makes a suppression order under this power, no similar power derived from another source should be exercised (paragraph 442).

93. *Duration of suppression orders.* A suppression order should remain in force until

- it is revoked
- the verdict of the jury is given at the trial of the protected person
- the protected person is discharged in respect of the offence
- a plea of guilty made by the protected person at committal proceedings or at the trial has been accepted
- the prosecution of the protected person is discontinued
- if the protected person is the apprehended person in the extradition hearing and the magistrate orders the release of the person, at the expiration of a period of seven days from the making of the order or
- if the protected person is the apprehended person in the review and the judge orders the release of the person, on the making of the order (paragraph 644).

94. *Area of operation of suppression order.* When a suppression order is made the magistrate or judge should specify whether it is to be enforceable in the State or Territory in which it is made, other specified States or Territories or throughout Australia (paragraph 445).

95. *Variation and revocation.* A suppression order made by a magistrate should be able to be varied or revoked by a magistrate in the State or Territory in which the extradition hearing was conducted. A suppression order made by a judge of the Supreme Court should be able to be varied or revoked by a judge of the Supreme Court. Further, a suppression order made in connection with extradition proceedings should be able to be varied or revoked by a magistrate or court before which the protected person appears in connection with the offence with which that person is charged (paragraph 448).

96. *Applicants for a suppression order.* An application for a suppression order, or for the variation or revocation of a suppression order, should be permitted to be made by

- the apprehended person
- a person to whom the warrant was directed
- a witness in the proceeding or review in which the suppression order is sought
- a publishing organisation
- a person who satisfies the magistrate or judge that he or she has a special interest in the question whether a suppression order should be made, varied or revoked and

- in the case of an application for the variation or revocation of a suppression order, the applicant for the suppression order (paragraph 446).

Without being joined as a party to the proceeding or review, such persons should be permitted to make submissions to the magistrate or judge concerning the question whether a suppression order should be made, varied or revoked and to call or give evidence in support (paragraph 447).

97. *Appeals against making or refusal to make a suppression order.* There should be a right of appeal, subject to the High Court's power to grant special leave to appeal, against the decision of a magistrate or judge

- to make a suppression order
- not to make a suppression order
- to vary or revoke a suppression order or
- not to vary or revoke a suppression order (paragraph 449).

Where the decision was made by a magistrate, the appeal should be made to a judge of the Supreme Court of the State or Territory in which the decision was made. Where the decision was made by a judge of a Supreme Court, the appeal should be made to the court to which appeals against final judgments or orders of the court in civil proceedings generally lie. This should be the only avenue of appeal. The appellate court should have power to confirm or vary the decision, or revoke the decision, whether or not it substitutes another decision, and to make orders for costs and deal with any other incidental or ancillary matters (paragraph 449).

98. *Appellants.* An appeal should be able to be made by

- where the decision the subject of appeal was made on application, the applicant
- the apprehended person
- a person to whom the warrant was directed
- a publishing organisation that
  - made submissions in the proceeding or review in which the decision was made or
  - did not make submissions but establishes that the failure to do so was not attributable to a lack of diligence on its part
- a person who made submissions in the proceeding or review in which the decision was made or
- a person who did not make such a submission but who establishes a special interest in the question whether the suppression order should be made, varied or revoked and that the failure to make submissions was not attributable to a lack of diligence (paragraph 449).

99. *Offence for disobedience of suppression order.* It should be an offence to fail or refuse to comply with a suppression order. But it should be a defence to a prosecution for such an offence if the accused person proves that, at the time of publication, the person did not know of a fact, for example, the existence of a suppression order, that made the publication an offence and that, before the publication, either the person took reasonable steps to ascertain that fact or that, even if those steps had been taken, the person would not have discovered that fact (paragraph 450).

Enforcement of judgments

100. *Meaning of 'judgment'.* For the purposes of the application of procedures for enforcement of judgments, that term should be defined to mean

- a judgment or order in a civil proceeding under which a sum of money is made payable or a person is required to do or not to do an act or thing other than the payment of money
- an order in a criminal proceeding under which a sum of money is made payable as a debt due to the Crown or a person is required to do or not to do an act or thing other than the payment of money (paragraph 515).

Facilities should be provided for the interstate enforcement of interlocutory as well as final judgments (paragraph 516). Orders of tribunals should also be enforceable under the new Act (paragraph 654). For this purpose the term 'judgment' should also mean an order of a tribunal that is enforceable without an order of a court (paragraph 655). However, the term should not include

- a judgment or order of a court or tribunal of a foreign country that has been registered in a court in Australia (paragraph 514) or
- an order imposing a fine (paragraph 515).

101. *Filing of judgment.* For the purpose of enforcing a judgment outside the State or Territory of rendition, a judgment creditor should produce a certified copy of the judgment to the prothonotary, registrar or other proper officer of a court in the State or Territory in which enforcement is sought (paragraphs 523–4). The prothonotary, registrar or other proper officer should be under an obligation to file the copy judgment in the court (paragraph 525).

102. *Appropriate court.* The court in which a judgment should be filed should be a court in or by which relief as given by the judgment could have been given. If there is more than one such court in the State or Territory in which the judgment is sought to be enforced, the judgment should be filed in the court of more limited jurisdiction (paragraph 535).

103. *Notification.* There should be no general notification requirements in relation to the filing of a judgment or the subsequent satisfaction of a judgment, whether to the judgment debtor (one exception is summarised below) or

to the court of rendition or other courts in which a judgment is filed (paragraphs 536–8).

104. *Effect of filing.* Once filed, the judgment should become a record of the court in which it is filed and should have the same effect and, subject to an exception noted below, be capable of giving rise to the same proceedings by way of enforcement or execution as if it were a judgment made by the court in which it is filed (paragraph 526).

105. *Present enforceability.* The exception to enforcement is that a judgment should capable of enforcement in a State or Territory other than the State or Territory of rendition only to the extent that the judgment is capable of being enforced in the State or Territory of rendition (paragraph 518). Thus where the judgment is subject to, for example, a stay in the State or Territory of rendition, no proceedings may be taken to enforce the judgment in any other State or Territory in a court of which the judgment is filed. Apart from satisfying the court as to the enforceability of the judgment, there should be no specific requirement to file an affidavit as to the amount due under a judgment or as to default in performance of other obligations imposed under a judgment (paragraph 529).

106. *Defences.* A court in which enforcement proceedings are taken after the filing of a judgment should not be able to refuse appropriate relief by applying the rules of private international law regarding recognition and enforcement of judgments (paragraph 519). Thus enforcement should not be refused on the basis, for example, that to do so would be to enforce a penal or revenue law of another jurisdiction.

107. *Stay of proceedings.* A court of a State or Territory in which proceedings are, or are to be, taken on a judgment filed in a court of that State or Territory should have power, on application by the judgment debtor, to order a stay of those proceedings or that the proceedings not be commenced until a specified time. The power should be exercised only for the purpose of permitting the judgment debtor to take steps to obtain relief in respect of the judgment, for example, its setting aside or variation. Such relief should be capable of being sought only from a court that, under a law in force in the State or Territory of rendition, has jurisdiction to grant relief. A court of a State or Territory in which a judgment has been filed should have no power to set aside, vary or give other relief in respect of the judgment (paragraph 546). Where a stay of proceedings or a postponement of the commencement of proceedings has been ordered, the court should also have power to impose conditions on the order, for example, as to the giving of security for costs (paragraph 546).

108. *Costs.* A judgment creditor should be entitled to recover the reasonable costs of obtaining and filing a certified copy of a judgment (paragraph 541). Costs concerning enforcement of a judgment filed in a court in a State or

Territory other than the State or Territory of rendition should be assessed on the same basis as if it were a judgment of the court in which the judgment is filed (paragraph 542).

109. *Interest.* Interest on a judgment filed in a court in a State or Territory other than the State or Territory of rendition should be assessed according to the law of the State or Territory of rendition (paragraph 543). However, interest should only be recoverable to the extent that the judgment creditor satisfies the court in which enforcement proceedings are taken as to the amount of the interest (paragraph 545).

Procedures for service

110. *Uniform procedures.* The Commission recommends that, in general, the new Act should prescribe how the various types of process within its scope should be served; that there should be uniform procedures for service of process outside the State or Territory of issue (paragraph 681).

111. *Initiating process in civil proceedings.* Initiating process in civil proceedings should be required to be served personally. The only exception to this is that initiating process in civil proceedings in courts of summary jurisdiction should be permitted to be served by post (paragraph 682).

112. *Initiating process in criminal proceedings.* Initiating process in criminal proceedings should be required to be served personally. The only exception to this is that where the initiating process concerns an offence for which the only penalty is a fine not exceeding $200, service should be permitted to be by post. The threshold level at which the requirement of personal service arises should be capable of alteration by regulation (paragraph 683).

113. *Other process in civil and criminal proceedings.* Process, other than initiating process or a subpoena, in civil and criminal proceedings should be permitted to be served in the same way as it may be served within the State or Territory of issue (paragraph 686).

114. *Subpoenas to parties.* A subpoena addressed to a party to the proceeding in which it is issued should be permitted to be served in the same way as it may may be served within the State or Territory of issue (paragraph 685).

115. *Subpoenas to non-parties.* A subpoena addressed to a person who is not a party to the proceedings in which it is issued should be required to be served personally (paragraph 684).

116. *Orders for production.* An order for production of a person should be required to be served personally (paragraph 684).

117. *Initiating process in tribunal proceedings.* Initiating process in proceedings in tribunals should be required to be served personally. There should be

an exception where the value of the matter in issue in the proceedings, or the amount claimed in the proceedings, does not exceed $3000, in which case service by post should be permitted. Notwithstanding this exception, where proceedings in a tribunal may result in the imposition of a fine exceeding $200, or an order affecting the rights and liabilities of a person in respect of the carrying on of a profession, trade or occupation, service should be personal. The threshold level at which the requirement of personal service arises should be capable of alteration by regulation (paragraphs 687–91).

118. *Other process in tribunal proceedings.* Process, other than initiating process or a subpoena, in proceedings in tribunals should be permitted to be served in the same way as it may be served within the State or Territory of issue (paragraph 693).

119. *Subpoenas to parties.* A subpoena addressed to a party to the proceeding in a tribunal in which it is issued should be permitted to be served in the same way as it may may be served within the State or Territory of issue (paragraph 692).

120. *Subpoenas to non-parties.* A subpoena addressed to a person who is not a party to the proceedings in a tribunal should be required to be served personally (paragraph 692).

Manner of effecting service

121. *Uniformity.* In view of the recommendations regarding the procedures for service, the precise manner in which personal and postal service should be effected should be specified (paragraph 694).

122. *Personal service on natural persons.* Personal service of process on a natural person should be effected

- by giving the process or a copy of the process to the person to whom it is addressed or
- where the person refuses to accept the process or copy, by putting it down in the presence of the person and telling the person, in general terms, the nature of the process (paragraph 696).

In addition, where process or a copy of the process is sent in a postal article to the person and the person acknowledges in writing receipt of the postal article, personal service should be taken to have been effected on the person (paragraph 696).

123. *Personal service on bodies corporate.* Personal service of process on a body corporate should be effected

- by leaving the process or a copy of the process at the office that is the registered office or a principal office of the body corporate under a law in force in the State or Territory where service is to be effected

- by sending the process or a copy of the process by registered post to the body corporate at such an office or
- by transmitting to the body corporate at such an office the information contained in the process by a means that reproduces, in the hands of the recipient, that information as it appears in the process (paragraphs 697–9).

If the body corporate does not have a registered office or a principal office, service may be effected by serving the body corporate at the principal place of business of the body corporate in the State or Territory where service is to be effected. If the body corporate has neither such an office nor a principal place of business, service should be effected at the address that, under the law in force in the State or Territory in which service is to be effected, is the address for service of notices on the body corporate.

124. *Personal service by agreement.* In addition, personal service of process should be taken to be effected if the process is served in a manner agreed upon by the person by or on whose behalf the process is to be served and the person to be served with the process (paragraph 700).

125. *Service by post.* Service of process by post on a natural person who, or body corporate that, has given an address for service should be effected by sending the process or a copy of the process by pre-paid post to the person or body corporate at that address. Service of process by post on a natural person who has not given an address for service should be effected by sending the process or a copy of the process by pre-paid post to the person at the address of the place of residence or business of the person last known to the person by or on whose behalf the process is to be served. Service of process by post on a body corporate who has not given an address for service should be effected by sending the process or a copy of the process by pre-paid post to the body at the relevant office, as defined above, of the body corporate (paragraph 701). In addition, where parties to proceedings are permitted by State or Territory law to authorise service of documents at a document exchange box, service of process by post should be permitted to be effected by leaving the process or a copy of the process, addressed to the person, in that exchange box or at a document exchange to be placed in that exchange box (paragraph 701).

126. *Service in accordance with law of State or Territory of issue.* Where the Act requires that service of process outside the State or Territory of issue be effected in the same way as service may be effected within that State or Territory, then, notwithstanding a law of the State or Territory of issue to the contrary, service of the process should be capable of being effected by serving a copy of the process and it should not be necessary to produce the original process at the time of service (paragraph 708).

127. *Non-application of certain restrictions on service.* Restrictions arising under the law of the State or Territory of issue of process regarding the days and times for service and the persons by whom service may be effected should not apply to process served pursuant to the Act (paragraphs 705, 707). However, such matters should be able to be regulated by general laws applying in the State or Territory in which service is to be effected (paragraphs 705, 707).

Proof of service

128. *Matters to be proved.* In order to prove service of process under the Act it should be necessary to prove

- the identity of the person who served the process
- the time at which and the day on which it was served
- the place at which it was served
- the way in which it was served and
- where relevant, the way in which the person served was identified (paragraph 711).

129. *Manner of proof.* The above matters should be permitted to be proved

- by affidavit or, where appropriate, by statutory declaration or
- if the process was required by the Act to be served in the same way as the process may be served in the State or Territory of issue, in a way permitted by the law of the State or Territory of issue (paragraph 710).

In any case where service is sought to be proved by affidavit or statutory declaration, it should not be necessary to call the deponent unless required by a court or tribunal, or by a person appearing before a court or tribunal (paragraph 713).

130. *Means of identification.* For the purpose of identifying a person to be served with process, a person serving process should be permitted to rely upon a statement by the person served that he or she is a particular person or holds a particular office. Evidence of such a statement should be admissible as evidence as to the identity of, or the office held by, the person served with process (paragraph 712).

131. *Receipt of postal articles presumed.* As a facilitative provision, a postal article sent by ordinary pre-paid post should be presumed, unless the contrary is proved, to have been received on the fourth day after being sent (paragraph 714).

132. *Written acknowledgments of receipt.* For the purposes of proof of service, a document that purports to have been signed by a person acknowledging receipt of a specified postal article should be admissible as evidence that the

person, or a court, tribunal or body corporate for which the person is acting, has received that postal article (paragraph 715).

Effect of service

133. Where service of process is effected in accordance with the procedures laid down in the Act, subject to any special federal procedures, for example, the venue objection procedure, a court or tribunal should have the same powers in the proceeding in which the process was issued as if the process had been served within the State or Territory of issue (paragraphs 213, 235, 287). For example, where a subpoena has been served under the Act, failure to comply with the subpoena should give rise to the same liabilities as if the subpoena was served within the State or Territory of issue.

Jurisdiction of courts and tribunals

134. *Effect of service.* However, while the facility provided by the Act for service of process will overcome any limitations on the jurisdiction of courts and tribunals regarding the place where service of process of the court or tribunal may be effected, service under the Act should have no effect on other limitations regarding the jurisdiction of courts and tribunals to hear proceedings in which the process has been issued (paragraph 213). In addition, it should be made clear that service of Territory process under the Act does not confer jurisdiction on a court or tribunal of the Territory beyond that that may be conferred under the Constitution (paragraph 197). The facilities provided by the Act will overcome problems caused by the interposition of State and Territorial boundaries in respect of service, but other limits on jurisdiction, for example, as to subject-matter, arising under the law of the State or Territory of issue will continue to be relevant.

135. *Enforcement of judgments.* While only one precondition has been imposed in relation to enforcement of judgments, namely, that a judgment be capable of enforcement in the State or Territory of rendition, a court or tribunal should have no jurisdiction to enforce a judgment given in a proceeding in which initiating process was served under the Act unless it is satisfied that the initiating process was served personally or that the judgment debtor has actual notice of the judgment (paragraph 682). This constitutes the one exception, noted above, regarding notification of a judgment to the judgment debtor.

Copies

136. For the purpose of a variety of procedures for interstate service and execution a copy of process, rather than the original, should suffice (paragraph 717). A document should be regarded as a copy of process if the doc-

ument was produced by a device that reproduces the contents of documents (paragraph 718). Thus, a copy could be produced by a photocopy machine or a facsimile machine, but not by transcription on a telex machine. However, immaterial differences between the original and the copy, for example, a difference in colour, should be disregarded (paragraph 718).

Rules and regulations

137. *Court rules.* The present Act empowers rule making authorities in the States and Territories to make rules regarding various aspects of the proctice and procedure that should apply on the interstate service and execution of process and judgments under the Act. This power should remain (paragraph 723).

138. *Regulations.* The regulation making power of the Governor-General should extend also to the power to make regulations regarding such matters (paragraph 723).

Exclusiveness of Act

139. *General principle.* The present Act has been held to non-exclusive. State and Territory rules providing for service and execution of process outside the State or Territory of issue can therefore also be employed to serve or execute process outside the State or Territory of issue in other parts of Australia. This has given rise to some confusion and in some cases leaves a defendant served with process outside the State or Territory of issue in a quandry as to which procedures for service have been employed, as neither set of procedures requires that the procedure used be identified. Also, the procedures subsequent to service established by State and Territory rules differ from those established by the federal Act. The Commission is concerned that the safeguards recommended for inclusion in the new Act, the Interstate Procedure Act, could be circumvented by the use of State and Territory rules to effect service outside the State or Territory of issue. To eliminate this possibility, the Commission recommends that the Interstate Procedure Act should be expressed to cover the field on the subject of interstate service and execution of State and Territory process and judgments (paragraphs 720–1).

140. *Substituted service.* However, there should be some exceptions to the exclusivity of the new Act. One exception should be in relation to the power of courts and tribunals to permit substituted service of process. The power of a court or tribunal under the law of the State ot Territory in which it is established to permit substituted service should extend to situations where it is impracticable to effect service in accordance with the procedures prescribed by the Act (paragraph 702).

141. *Transfer of prisoners legislation.* Another specific exception to the exclusivity of the new Act should be in regard to the scheme established by uni-

form State and Territory legislation, and complementary federal legislation, for the transfer of prisoners from one State or Territory to another for the purpose of the trial of a prisoner for an offence. This scheme, in addition to providing machinery for the transfer of prisoners, enables sentences of imprisonment imposed in one State or Territory to be served in another State or Territory to which a prisoner has been transferred if the prisoner is convicted and sentenced to a term of imprisonment in the latter State or Territory as a result of the transfer. These benefits for prisoners, and the scheme for the orderly transfer of prisoners, should not be disturbed (paragraph 456). However, the Commission has recommended that the grounds on which a person the subject of a warrant may seek to resist extradition should be confined to 'manifest injustice or oppression'. It is recommended that the same ground should apply in cases where a prisoner seeks to resist a transfer from one State or Territory to another for the purpose of a trial. Therefore the Transfer of Prisoners Act 1983 (Cth) should be amended (paragraph 458). The Commonwealth should also approach the States and Territories with a view to obtaining their agreement to similar amendments to the relevant legislation. In view of the different procedures established, on the one hand, in the Transfer of Prisoners Act 1983 (Cth) and, on the other, in the relevant State and Territory legislation, such an approach to the States and Territories should also encompass a request for the amendment of their legislation to require that the warrant initiating the request for transfer be produced to the court which will determine whether a transfer order shoud be made (paragraph 457).

142. *Subpoenas.* A further exception to the principle of exclusivity should be in regard to certain procedures established under the law of the State or Territory of issue with regard to the service of subpoenas which impose more stringent or onerous requirements for service than will apply under the Commission's recommendations. The two aspects of State and Territory procedure which should be specifically retained are

- requirements to obtain leave to serve a subpoena and
- requirements to serve a subpoena a longer period before the time for compliance than is required under the Commission's recommendation, that is, more than 14 days before the time for compliance (paragraph 271).

Such requirements commonly apply to service of subpoenas on persons described as experts, for example, medical practitioners, and these should be retained.

143. *General powers of control.* The purpose of the new Act is only to provide an exclusive code for the service and execution of process and judgments outside the State or Territory of issue in other parts of Australia. Once the process has been served or executed and subject to the special safeguards imposed, for example, the venue objection procedure and the ability to obtain security for costs, the procedures of the law of the State or Territory of issue will apply to the conduct of proceedings. Thus, for example, after service of initiating

process in a civil proceeding, the proceeding will be conducted as if the process had been served within the State or Territory of issue. The court hearing the proceeding should have all its usual powers to control the proceeding.

1. Introduction

The Reference

1. On 29 November 1982 the then Acting Attorney-General referred to the Law Reform Commission the question of 'the adequacy of the law relating to the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States and Territories'. The Commission was directed to have particular regard to a number of factors which reflect the development of Australia into a nation-wide commercial and social unit and developments in the structures and procedures of courts and tribunals. The Commission was also directed to have regard to developments in Australia and other countries in matters relating to service and execution.

Background to the Reference

Need for laws on service and execution

2. The need for laws on the topic of service and execution of process and judgments *ex juris* stems from the separate legal systems of the States and Territories, for the process and judgments of the courts of each State and Territory can have effect only within their territorial boundaries. Without legislation in aid, this limitation would impede commerce between the States and Territories and hinder effective enforcement of the criminal law, as it would not be possible for the courts of the States and Territories to exercise jurisdiction over persons outside their territory.

Legislation regarding service and execution

Colonial and State laws

3. Before federation colonial boundaries were a great impediment to the service and execution of process and the enforcement of judicial decisions. The concern that the territorial limitations on the reach of process and judgments should not stifle intercolonial trade and commerce was countered to some extent by laws or rules of court in the various Colonies establishing the jurisdiction of the Supreme Courts of the Colonies over persons not within the Colony. Generally, service of process was permitted outside a Colony where the Supreme Court gave leave, based upon a nexus between the forum and the subject matter of the litigation or the parties. However, a judgment founded on such jurisdiction was not enforceable in a neighbouring Colony. After federation, these rules continued to enable the process of the Supreme Courts to be served outside the territory of the State, whether in another part of Australia or elsewhere. They have occasionally been updated and refined to broaden the jurisdiction of the Supreme Courts to meet the demands of modern society and, in a few States, legislation or rules to similar effect have enabled process of some inferior courts to be served beyond

those territorial boundaries. However, these laws have not provided, or been able to provide, all the measures necessary to integrate the separate legal systems of the States effectively. For example, in the absence of legislation, a foreign judgment (that is, a judgment rendered outside the jurisdiction) cannot be the subject of immediate execution but can be enforced only by bringing an action upon it.[1] Moreover at common law a number of qualifications are imposed before a judgment may be given effect.[2] Further, in the absence of co-operative legislation between the States, a State cannot secure the enforcement of judgments of its courts outside the State.[3] It is not possible for criminal process to be served or executed outside the State in which it is issued[4] and it is not possible to compel a person to attend in answer to a subpoena.[5] State laws, therefore, do not overcome limitations arising out of the existence of their separate legal systems.

Pre-federation precedents

4. Even before federation, the problems experienced because of the deficiencies of colonial laws on the subject prompted attempts to provide 'federal' solutions. In 1885 the Federal Council of Australasia was formed. It was empowered to make laws with respect to

> (d) The service of civil process of the courts of any colony within Her Majesty's possessions in Australasia out of the jurisdiction of the colony in which it is issued:
>
> (e) The enforcement of judgments of courts of law of any colony beyond the limits of the colony:
>
> (f) The enforcement of criminal process beyond the limits of the colony in which it is issued, and the extradition of offenders (including deserters of wives and children, and deserters from the imperial or colonial naval or military forces).[6]

The Federal Council enacted two laws relying upon para (d) and (e), the Australasian Civil Process Act 1886 and the Australasian Judgments Act 1886. The former facilitated the service of process issued out of the Supreme Courts of the Colonies into the other Colonies and the latter provided for the enforcement in other Colonies of judgments given by a Supreme Court of a Colony. The effectiveness of these attempts at 'federal' solutions to the problems noted above was diminished, however, because New South Wales did not join the Council and South Australia joined only for two years.

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[1] *Perry v Zissis* [1977] 1 Lloyd's Rep 607, 613.

[2] See Sykes & Pryles 1987, 105–16. The extent to which these rules have been modified in relation to sister-State judgments in Australia by s 118 of the Constitution is unclear: id, ch 7.

[3] See id, ch 3.

[4] *Aston v Irvine* (1955) 92 CLR 353, 364. Before federation the colonies relied upon Imperial legislation, the Fugitive Offenders Act 1881 (Imp), extended to the Australian colonies by an Order in Council on 23 August 1883, to compel the attendance of alleged offenders.

[5] *Ward v Interag* [1985] 2 Qd R 552.

[6] Federal Council of Australasia Act 1885 (Imp), 48 & 49 Vic, c 60, s 15.

Continuing federal concern

5. Because of the concern that the process and judgments of the constituent States of the Commonwealth should be capable of service and execution throughout the country, the federal Parliament was empowered by the Constitution to make laws with respect to

> The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States.[7]

Relying mainly upon this provision, the Service and Execution of Process Act was enacted in 1901. Parts II and IV of the Act are very similar to the earlier Federal Council legislation. That the Act was passed so early in the life of the Commonwealth is an indication of the concern of Parliament that a measure of integration amongst the legal systems of the States should be provided at the earliest opportunity. It was clearly important to the purpose of the federal scheme.

> [The Bill] carries out one of the main objects of our union, and that is to make our business relations as convenient as possible and strike out all those limitations of jurisdiction which interfere with the proper, fair, and reasonable carrying out of business.[8]
>
> [T]he Senate will see that what [the Bill] seeks to do is to give to the whole people of the Commonwealth the real benefit of unity in so far as that can be carried out with justice to the inhabitants of each of the States.[9]

The Act facilitates the service and execution of civil process and criminal process, including warrants authorising the apprehension of persons, and provides a simple method by which the judgments of all courts of the States and Territories can be enforced throughout the Commonwealth.[10] The effect of State and Territorial boundaries as obstacles to the enforcement of legal rights and obligations, whether arising under State and Territorial laws or under federal laws which are enforced through State and Territory courts, is minimised and the disparate legal systems of the States and Territories are accorded a degree of national effectiveness. The legislation was enacted over 80 years ago and was in fact based on earlier Federal Council of Australasia legislation. It was far sighted when originally devised and has worked reasonably well, but it is now dated and must be reconsidered in the light of more recent developments.

Commercial and social developments

6. While the Service and Execution of Process Act has been amended a number of times those amendments have, with one exception which is not relevant to the Commission's inquiry,[11] wrought little substantive change to the law. Yet the changes that

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[7] Constitution s 51(xxiv). A complementary provision authorises Parliament to make laws with respect to: 'The recognition throughout the Commonwealth of the laws, the Public Acts and records, and the judicial proceedings of the States': Constitution s 51(xxv).

[8] Senator O'Connor, Cth Hansard (Sen), 25 June 1901, 1491 (on debate on the Bill for the Service and Execution of Process Act).

[9] id, 1494.

[10] The operation of the Act is explained in detail in later chapters of this report.

[11] In 1963 Part IVA, which facilitates the enforcement of fines imposed by courts of summary jurisdiction, was inserted in the Act. The matter of enforcement of fines is specifically excluded from the Commission's Terms of Reference.

have occurred in Australian society since 1901 have been dramatic. There have been revolutionary advances in the transport of people and goods and in communications, enabling much greater interstate trade and travel. The Australian business outlook is increasingly national and even world-wide. State and Territorial boundaries have become, for some purposes, artificial and even meaningless. Australians ignore State and Territory boundaries in many of their commercial and social dealings and relations. The Commission has been specifically required to have regard to these developments.[12]

Developments in structures and procedures of courts and tribunals

7. There have also been dramatic changes in the the structures and procedures of State and Territory courts and tribunals. In particular, procedures for the prosecution of offences have undergone considerable change, for example, by permitting criminal liablity to be determined without court proceedings, and many tribunals which are not courts have been given power to determine civil disputes, whether as alternatives to courts or exclusively. Concerns about the inadequacy of the Service and Execution of Process Act in the light of these developments were brought to the attention of the Commonwealth Attorney-General by certain State Attorneys-General[13] and the Commission is also directed to have regard to these matters in its inquiry.

Overseas developments

8. The Commission was directed to have regard also to developments in legal co-operation in matters related to service and execution of process and judgments. The Commission has examined developments in these matters occurring at the international level — treaties and conventions regarding service and execution — and within other countries. The most important of these developments have been with regard to execution of judgments.[14]

Course of the inquiry

Consultative documents

9. In 1984 the Commission released an Issues Paper.[15] This was followed by several research papers examining the Act's operation, suggesting tentative reforms to the law and calling for submissions.

- Research Paper No 1 — *Constitutional Considerations*
- Research Paper No 2 — *Commencing Process*

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[12] It might also be noted that these developments have at times led to suggestions for a system of national courts and to proposals for integrating the existing courts by cross-vesting of jurisdiction. These matters, clearly, go much beyond merely providing for interstate service and execution of process and judgments.

[13] Copies of the correspondence of the State Attorneys-General were given to the Commission along with the Terms of Reference.

[14] See ch 7.

[15] ALRC IP 5.

- Research Paper No 3 — *Tribunals*
- Research Paper No 4 — *Enforcement of Judgments*
- Research Paper No 5 — *Service of Other Process*
- Research Paper No 6 — *Interstate Execution of Warrants and Writs of Attachment*
- Research Paper No 7 — *Discussion of Reference. Draft Interstate Procedure Bill and Regulations*

All these papers were widely distributed to legal professional bodies, State and Territory courts and tribunals, Government Departments, process servers, civil liberties organisations and the police.

Consultation

10. In accordance with its usual practice, the Commission publicised the inquiry and its research into the issues raised in the Reference. Notices were published in various legal professional journals inviting submissions on various issues. Each State and the Northern Territory was asked to nominate a contact person within the relevant Attorney-General's Department or Department of Law who could keep the Commission apprised of the views of the State or Territory concerned.[16] The Commissioner-in-charge also discussed the Commission's research and tentative proposals with experts on the conflict of laws in the United States of America.[17] A list of those who made submissions, either individually or on behalf of organisations, may be found in Appendix C. The Commission was greatly assisted by the judges, magistrates and officers of State and Territory courts who provided statistical material regarding the use of the Act. The Commission thanks all those concerned. Particular thanks are due to the honorary consultants who provided many useful suggestions and comments during the course of the inquiry.

Approach to reform

General policy considerations

Introduction

11. On matters of procedure, such as service and execution of process and judgments, a number of options are generally available when reforms are considered. In reaching its recommendations as to appropriate reforms, the Commission has seen great importance in the great increase in the movement of persons and goods between the States and Territories and the vast improvement in the facilities available to persons to travel between different parts of Australia. As a result, in the eight decades of federation there has developed an Australia-wide commercial and economic community. In that context, few would disagree with the sentiments expressed by Judge Spence of the County Court of Victoria in a submission made some time ago to the Commission

[16] The nominees are listed with the participants to the Reference.

[17] These persons are included in the list of written submissions, Appendix C.

that: 'in general terms, in 1983, it is difficult to distinguish between suing a defendant for a debt intrastate or interstate.'[18]

The nature of the federation

12. The retention of separate State and Territorial legal systems has important implications in relation to both dispute resolution and choice of law. In Australia private parties who wish to resolve a legal dispute or to enforce a legal right will generally resort to a State or Territorial court. The courts of the States and Territories have limited jurisdiction over defendants and the ability to enforce a resulting judgment under the law of the State or Territory concerned is confined to the territory of that State or Territory. So too in relation to choice of law, there is no single national system of private law in Australia. Each State and Territory has its own body of private law with the consequence that the law applicable to a transaction or occurrence may vary from State to State. There are some important exceptions to the lack of unity portrayed above. The Family Court of Australia and the Federal Court of Australia are national courts which have a large volume of work and which largely possess a national jurisdiction. Moreover they administer federal laws and therefore there is functional unity in relation to the matters over which they have jurisdiction. In addition, the States and Territories have in some cases agreed upon uniform legislation, most importantly in the area of company law. But even where a State court applies uniform legislation or federal law, the usual limitations on its jurisdiction over defendants and the out-of-State enforcement of its judgments remain.[19] Thus it is still largely true to say that the development of an Australia-wide economic and commercial system has not been matched by the establishment of a national legal system.

13. In considering reforms to the law regarding interstate service and execution, the fact that the States are in many respects sovereign entities cannot be ignored. Yet within a federation such as Australia, with a Constitution guaranteeing freedom of interstate trade and commerce and directing that full faith and credit should be given to sister-State laws and judgments, State and Territorial boundaries cannot be permitted to thwart the assertion of legal rights or the imposition of liability. As has been said in one case dealing with the Act

> There is, . . . within a Commonwealth, no talismanic virtue in a State boundary line. The States of the Commonwealth do not carry into the twentieth century mediaeval notions of sanctuary.[20]

That differences are evident between the laws in force in different States is irrelevant in this regard, for the law regarding service and execution does not seek to assert the superiority of one State's law over another. Rather it is concerned with the effective application of already (or otherwise) determined law. Where persons relate without regard to State and Territorial boundaries the law should not seek to make their legal rights, when disputes between them arise, difficult to assert or enforce merely because those relations are carried on across those boundaries. Similarly, notwithstanding the

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[18] Spence *Submission* 1.

[19] For a fuller discussion see Pryles 1979.

[20] *Carmady v Hinton* (1980) 41 FLR 242, 244 (Wells J).

existence of separate systems of criminal law, such laws should be capable of enforcement against offenders wherever they may be within Australia.

Commonwealth powers in aid of integration

14. Section 51(xxiv) of the Constitution enables federal laws to be made with respect to the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States. Section 51(xxv) of the Constitution enables laws to be made with respect to the recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States. Conceivably the federal legislature could create a federal code of conflict of laws and allot each State law an appropriate sphere of application. In the absence of significant federal laws made under this paragraph, s 118 of the Constitution directs that full faith and credit shall be given throughout the Commonwealth to the laws, the public acts and records, and the judicial proceedings of every State.

Some matters for consideration

15. *Interests of the litigants.* In considering changes to the law, a number of considerations are relevant. One is the interests of the parties to litigation. The interests of the plaintiff in civil litigation will usually correspond to the general desirability of facilitating and simplifying the interstate service and execution of process — the easier it is to serve process interstate and assume jurisdiction over an absent defendant, the easier it will be for the plaintiff to litigate in a chosen forum. However the interests of the defendant are often quite different. The defendant may contest the plaintiff's choice of forum. The motive of the defendant may simply be to impede the plaintiff in obtaining relief but sometimes the defendant will have substantial and genuine reasons for objecting to the forum chosen by the plaintiff. For example, a defendant resident in Perth who is sued in the Supreme Court of Victoria will have a long way to journey to contest the action. The difficulties and inconvenience will be exacerbated if the underlying transaction which is the subject of the litigation occurred in Western Australia. In these circumstances it is likely that the defendant's witnesses will live in Western Australia and the inconvenience of litigating in Victoria will be considerable. Reforms must accommodate and appropriately recognise the competing interests of the parties to litigation.

16. *Law enforcement.* Also important is the interest in securing effective enforcement of the criminal law. In addition to prosecutions for State and Territory offences, State and Territory courts and procedures are employed for the prosecution of offences against federal laws. The concern with effective law enforcement therefore is a federal, as well as a State and Territory, matter. The interests of the prosecution will, as for plaintiffs in civil proceedings, usually correspond to the general desirability of facilitating and simplifying interstate service and execution of process. Apart from certain circumstances in which it may be possible to proceed with a prosecution in more than

one State or Territory[21] there can generally[22] be no argument concerning the venue chosen and the objective of the prosecution will be to obtain the appearance of the defendant with as little difficulty as possible. Persons charged with offences, however, will be concerned that there are adequate safeguards to protect them from being arbitrarily taken to the State or Territory in which the charge is laid, to provide them with sufficient time within which to prepare a defence and to enable them to apply for and be granted bail in appropriate circumstances. There should also be procedures for the institution of criminal proceedings by measures short of arrest.

17. *Interests of witnesses.* Legal proceedings do not, however, only involve the immediate parties. Proof of a party's case may require the oral evidence of witnesses or the production of documents by persons not parties to the proceedings. It is in the interests of litigants to be able to subpoena these persons wherever they may be in Australia. But their interests must also be considered. Demands for the attendance of witnesses or the production of documents should not be made unreasonably, should be timely so as to reduce undue inconvenience and adequate recompense should be provided for the costs of complying with them.

18. *Economic considerations.* Proposals for reform of the regime for interstate service and execution of process must take account of the costs involved. As far as possible changes should be cost effective. Administratively complex options should be rejected on grounds of increased costs unless an alternative system is not workable. The use of scarce judicial time for administrative tasks should be minimised. Procedures should also be designed so as to minimise costs as far as possible while providing adequate recognition of the interests mentioned above. One submission[23] suggested the creation and appointment of federal officials such as sheriffs and marshals to ensure the service and execution of State process and judgments outside the State of origin. It was suggested that there was federal legislative power to do so under s 51(vi) of the Constitution. It is likely that s 51(xxiv) of the Constitution would also authorise the creation of federal machinery for this purpose.[24] This suggestion would be very costly to implement. Economic considerations would suggest that existing State and federal institutions and officials should be used wherever possible.

Questions of principle

Introduction

19. Reform of the law regarding interstate service and execution also raises a number of fundamental questions of principle. One particularly important question which must be considered concerns the respective roles of State and federal law in setting procedural standards. Under the Act some matters are governed by federally prescribed standards while others are left to the relevant State law. For example, the procedure to be

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[21] This may be so in relation to federal offences: Judiciary Act 1903 (Cth) s 68.

[22] Doubts may occasionally arise because of difficulties in determining the jurisdiction in which an offence occurred.

[23] Nelson *Submission* 2.

[24] See *Ammann v Wegener* (1972) 129 CLR 415.

followed where a defendant in civil proceedings does not enter an appearance to a writ served pursuant to the Act is governed by specific federal law,[25] but the manner of enforcement of a civil judgment registered under the Act is left to be regulated by the law of the State of registration.[26] Sometimes both State and federal standards apply. For example, service of any process pursuant to the Act may be proved in accordance either with federally prescribed procedures or the procedures of the State in which the process was issued.[27]

20. Submissions to the Commission have differed on the appropriate roles of State and federal law respectively. There is a spectrum of options and opinions. On the one hand it has been suggested that, in view of the large degree of economic, social and legal integration of the States, for present purposes Australia should be regarded as functionally one unit and thus that federal law should regulate all aspects of interstate service and execution.[28] Conversely it has been asserted that, as the States retain independent legal systems with different procedural and substantive laws, Australia is not greatly integrated and thus that the system by which process and judgments are served and executed across State boundaries should, with minimal federal facilitation, recognise and maintain that independence in giving effect to the laws of the States.[29]

21. Implementation of even the latter approach would require some setting of federal standards. The legislation would have to select which law, the law of the place of issue or that of the place of service or execution, was to apply in any given situation. The law could then provide that State and Territory process and judgments could be served and executed in any other State or Territory in accordance with the chosen rules. Legislation imposing specifically federal standards, on the other hand, and use of the constitutional power in s 51(xxiv), possibly in conjunction with other relevant heads of power, to the full would allow the federal Parliament to enact a code for the interstate service and execution of process and judgments throughout Australia, specifying procedures to be followed. The procedures might control matters such as

- the execution of judgments to prevent, for example, use of imprisonment for mere non-payment of a debt or seizure of, say, household furniture to satisfy a judgment debt,
- the service of initiating and other process to require, for example, that a statement of claim commencing an action be served personally on the defendant and
- the execution of warrants authorising apprehension of persons to control, for example, the power to enter property to make an arrest and possibly even matters relating to interrogation of suspects.

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[25] s 11.

[26] s 21(2).

[27] s 17.

[28] Nelson *Submission* 2.

[29] Law Society of New South Wales *Submission* (28 February 1985) 2–3. This submission commented on the tentative proposals outlined in one research paper, but the point would appear to apply generally.

The federal legislature's power in respect of these matters is not unlimited,[30] but issues of legislative competence should not cloud consideration of the questions of principle even if constitutional constraints will dictate the extent to which the preferred principle may be implemented.

The case for maximum State and Territory regulation

22. There are several arguments for allowing maximum effect to State and Territory laws.

- *Simplicity.* In practice, it is simpler to avoid federal prescription of standards. The present approach of the Act is to apply the law of the jurisdiction of issue to the service of process and that of the jurisdiction of execution to the enforcement of judgments. Process issued out of, say, New South Wales will be served according to the New South Wales rules regardless of where in Australia it is served. Likewise, New South Wales rules govern a judgment executed in New South Wales regardless of where it originated.
- *Lack of need.* While there are differences amongst the laws of the States and Territories on procedural and substantive matters, those differences are relatively minor and not of major concern. Therefore, it is argued that there is no need to interfere by imposing overriding federal standards in cases requiring interstate service or execution.
- *Sovereignty.* The Constitution contemplates the continued existence of the States and their continued power to regulate matters of concern to them, subject to federal legislation on matters in respect of which power has been conferred upon the federal Parliament under the Constitution. The operation of State courts, including procedures governing service and execution of process and judgments, is a matter properly within State legislative power. The exercise of the federal power on service and execution of process and judgments should not be used to change such procedures any more than is absolutely necessary to facilitate interstate service and execution, nor should it seek to limit or restrict the operation of State laws merely because proceedings under or involving those laws have consequences for persons in other States. Section 118 of the Constitution — the full faith and credit provision — also may be regarded as requiring that Parliament should, as a matter of principle, ensure the unaltered application of procedural and substantive laws of the States.
- *De minimis.* Federal standards imposed in interstate cases would only apply in a minority of cases. The vast majority of cases, which are entirely intrastate, would continue to be regulated solely by State standards. The costs associated with introduction of exclusively federal standards would not be warranted by any supposed benefits.

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[30] See ch 2 for discussion of the constitutional power.

The case for maximum federal regulation

23. The following are arguments in favour of imposing specifically federal standards.

- *Uniformity.* Under the present Act, the law applicable to the enforcement of a judgment in one jurisdiction is the same whether that judgment was rendered within or outside that jurisdiction, while the execution of a judgment rendered in one jurisdiction that is sought to be enforced elsewhere is potentially subject to the relevant laws of every other Australian jurisdiction. Likewise, service of process in one jurisdiction is potentially governed by the regimes of every other jurisdiction, the particular regime applying depending upon the jurisdiction out of which the process was issued. If a federal standard were applied to interstate service of process and enforcement of judgments, persons liable to be served with process issued in another jurisdiction would be subject to only one scheme for service and the number of systems of law potentially applicable to any judgment would be a maximum of two.
- *Clarity.* It might be argued that the present Act, in not specifying, for example, standards of criminal investigation in relation to the interstate execution of warrants for the apprehension of persons, leaves those who may be required to consider whether some aspect of an investigation was properly conducted in a quandry whether to apply the law of the jurisdiction where a warrant was issued or that of the jurisdiction where the warrant was executed. The setting of federal standards would overcome any confusion because reference would need to be had to only one set of standards.
- *Federalism.* Notwithstanding the sovereignty of the States, the exercise of power by an equally sovereign federal Parliament should not be limited by the policy choices made in State laws. Commonwealth policies, which may not coincide with those expressed in State laws, may be adopted because Australia is party to an international convention on human rights or other subject, or because of the necessity to formulate procedures for the conduct of its comparatively small but nevertheless necessary court and policing operations. The federal legislation extends the reach of State process and judgments to localities in which they may otherwise have no operation. In so doing it is, or may be, appropriate that federal policies be accorded preference through the imposition of federal standards.
- *Need.* It is not true that the substantive and procedural differences between the States are minor. While the differences may be minor compared to, say, the differences between Victoria and Canada, there are important differences between the States on questions dealing with the modes of service of civil process, the remedies available for judgment enforcement, the power to enter property to make an arrest and the power to detain for questioning. These differences in the law that may be applied to interstate service and execution should be resolved by federal legislation in a principled and uniform manner.

Resolution of the issue

24. It is neither necessary nor desirable for a stark choice to be made between maximum federal regulation and maximum State regulation in relation to all aspects of interstate service and execution. Rather, a more measured approach is necessary. It would be a mistake to see the problem in terms of a choice between as much federal prescription as possible or as much reliance on State procedures as possible. On the contrary, whether a particular issue should be governed by State or federal rules must depend on the nature of the particular issue. In considering each issue the objectives of reform are critical. On a consideration of the economic, social and legal developments in Australia since federation and of other relevant matters noted above[31] the objectives of reform are

- the need to simplify, ease restrictions on and streamline interstate service and execution of process and judgments
- the need to protect adequately the interests of the parties to and other persons involved in litigation where their vulnerability to process has been extended by the operation of the Act
- the desirability of removing anomalies and clarifying areas of obscurity in the existing scheme and
- the need to remedy the deficiencies in the Act to accommodate new developments in the State legal systems, in particular the proliferation of dispute resolution and licensing tribunals.

Scheme of recommendations

Structure of Service and Execution of Process Act

25. Before proceeding to examine the operation of the Service and Execution of Process Act in detail and to discuss proposals for reform of the Act, note should be made of the structure of the Commission's recommendations. For that purpose it is necessary to understand the structure of the present Act.

- Part I is a preliminary Part which includes aids to interpretation of the Act.
- Part II Division 1 (s 4–13) deals with the service of 'writs of summons', the definition of which encompasses process by which civil proceedings are initiated.
- Part II Division 2 (s 14–16A) deals with a range of other process
  - s 14 concerning service of process other than initiating process in civil proceedings
  - s 15 providing for the service of summonses and other process, largely initiating process, in criminal and quasi-criminal proceedings
  - s 16 providing for service of subpoenas and summonses to witnesses in both civil and criminal proceedings and

[31] See para 12–3, 15–8.

- s 16A providing for the issue and service of orders for the production of prisoners to give evidence in civil and criminal proceedings.

- Part II Division 3 (s 17) deals with proof of service.
- Part III provides for the execution of warrants and writs of attachment for the apprehension of persons, generally known as extradition.
- Part IV makes provision for the enforcement of judgments of courts in civil proceedings outside the jurisdiction of rendition.
- Part IVA provides for the enforcement of fines imposed by courts of summary jurisdiction.[32]
- Part V deals with rules and regulations.

Structure of Part II

26. The difference in subject-matter explains the establishment of separate Parts that deal with the execution of process that authorises the apprehension of persons (Part III) and the execution of judgments (Part IV). However a question arises as to the reasons for the separation of provisions dealing with service of writs of summons (Part II, Division 1) from those dealing with service of other process. The reasons do not lie in the procedures for service, for the legislation generally permits service of all process outside the jurisdiction of issue in the same manner as if service was effected within the jurisdiction.[33] However Part II establishes different safeguards in respect of the service of, and in some cases in respect of later proceedings after service of, each type of process. These safeguards are designed to prevent abuse of the facilities for service *ex juris* provided in the Act. The most detailed safeguards are imposed in relation to initiating process in civil proceedings (writs of summons).

- The plaintiff is required by s 5 to endorse on or attach to the process certain information concerning the locality in which service is to occur, requirements as to an address for service given on the entry of an appearance and the nature of the claim made or relief sought in the proceedings.
- By s 8 a defendant is given a minimum time, which overrides any shorter period of time stipulated by the law of the State of issue, within which to enter an appearance in the proceeding.
- A defendant is entitled under s 10 to seek from the court out of which the process issued an order that the plaintiff give security for costs.
- Where the defendant does not appear within the stipulated time the plaintiff must seek leave to proceed. To obtain leave the plaintiff must show that the

[32] Review of this Part of the Act is excluded from the Commission's Terms of Reference.

[33] The exceptions to this are subpoenas and summonses to witnesses (s 16), which are to be served in accordance with the terms of the order granting leave for their service, and orders for the production of prisoners to give evidence (s 16A), in relation to which no mode of service is specified in the Act.

> action falls within one of the conditions specified in s 11(1)(a)–(f). These require that there be a nexus between the litigation and the jurisdiciton in which the proceedings are instituted. Even if satisfied that there is a nexus, the court has a discretion to decline to give leave to proceed if it takes the view that the forum is not a convenient one.

In contrast, no safeguards are fixed by s 14 for the service of other civil process. In relation to the service of initiating process in criminal and quasi-criminal proceedings, only minimal safeguards are imposed: before the proceedings may continue, the court before which the defendant's attendance was required must be satisfied that service was effected a sufficient time before the date set down for the hearing. There are no nexus requirements, but their absence is explicable on the basis that prosecution authorities of a State will only claim jurisdiction with respect to offences committed within that State and a court of a State will only have jurisdiction with respect to offences committed within that State.[34] Service interstate of subpoenas or summonses to witnesses requires the leave of the court by or out of which, or the judicial officer by whom, the process was issued. The court or judicial officer must be satisfied that the evidence that the witness might give is necessary in the interests of justice. Conditions may be imposed on a grant of leave. Similarly s 16A, which deals with the making and service of orders for the production of prisoners at proceedings for the purpose of giving evidence, requires that a court or judge be satisfied that the prisoner's attendance is necessary for the purpose of obtaining evidence in the proceeding.

Purpose of structure — relation between safeguards and interests of persons served

27. *Distinction between initiating process in civil and criminal proceedings.* Each of the safeguards imposed in relation to the service of the different types of process is specifically related to the interests of the persons concerned with the process. Persons receiving the first notice of the institution of proceedings against them or that relief is sought against them in proceedings would be entitled to expect that the facilities provided by the Act for service *ex juris* would not be used in a manner that would cause them hardship in defending the proceedings. One measure designed to prevent such hardship is the limitation imposed in relation to the service of initiating process in both civil and criminal proceedings which ensures that defendants have adequate time in which to seek legal advice. However, the Act distinguishes between civil proceedings and criminal proceedings. For civil proceedings, the defendant has avenues to prevent the conduct of proceedings in a jurisdiction that does not have a sufficient nexus with the proceedings or that is an inconvenient forum. For the reasons noted above[35] such provisions are inappropriate in relation to criminal proceedings. The distinction between civil and criminal proceedings for this purpose is also reflected in the Commission's recommendations.

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[34] Similar limitations, with some exceptions, apply to the prosecution of offences against federal laws undertaken in State courts: see Constitution s 80 and Judiciary Act 1903 (Cth) s 68.

[35] See para 26.

28. *Process to secure evidence.* Similarly, the safeguards imposed for service of subpoenas and other process to secure evidence are designed to protect the interests of the potential subjects of such process against the competing interests of the parties to proceedings. No distinction is drawn between civil proceedings and criminal proceedings in this regard because the interests of the subjects of such process are the same regardless of the nature of proceedings in relation to which the process is issued. This structure is also reflected in the Commission's recommendations.

29. *Distinction between initiating and other process in civil proceedings.* In contrast to the elaborate safeguards imposed in relation to service of initiating process in civil proceedings, there are no safeguards attached to service of process that is not a subpoena or summons or that falls outside the definition of 'writ of summons'. While there is little authority as to the type of process concerned,[36] the Commission has concluded that provision should be made for the service of such process. Moreover, it would be inappropriate for the safeguards that apply to service of initiating process to apply to this process. In so far as other process may be served on a party to proceedings, that party has already had the benefit of the safeguards concerning service of initiating process. In relation to service of other process on a non-party only minimal safeguards are required, the question of the appropriateness or convenience of the chosen venue being a matter only for the parties to the proceedings, not a person not involved as a party. Therefore, the Commission's recommendations retain the distinction between initiating process and other process in civil proceedings. Further, a like provision is included in relation to criminal proceedings.

Segregation of process of tribunals

30. The Commission was specifically required by the Terms of Reference to have regard to developments in the types and structures of tribunals and in the procedures of tribunals. This report makes recommendations for the establishment of procedures by which process issued in relation to proceedings in tribunals may be served outside the jurisdiction of issue.[37] While the Commission is confident that Parliament possesses sufficient legislative power to implement these recommendations,[38] there is little authority in point and it is desirable to draw the relevant provisions so that, if necessary, they can be severed from the rest of the Act. For similar reasons, as well as reasons relating to the varying purposes and nature of tribunal proceedings, the recommendations concerning tribunals are further subdivided on the basis of the nature of tribunal proceedings.

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[36] There are only two cases in point, both of which the Commission recommends should be legislatively overturned. See para 241 and 243, 282–3 respectively.

[37] See ch 8.

[38] Discussion of the legislative competence of Parliament is undertaken in ch 2.

Outline of the report

31. Following a chapter which looks at Parliament's power to legislate with regard to interstate service and execution, the report basically follows the structure outlined above. There are separate chapters dealing with

- service of initiating process in civil proceedings
- service of initiating process in criminal proceedings
- service of subpoenas and other process in civil and criminal proceedings
- execution of process authorising the apprehension of persons
- execution of judgments of courts and
- service and execution of process and orders of tribunals.

There is then a further chapter which discusses questions concerning mode of service, proof of service and other procedural and incidental matters.

Possible future work

32. In the course of its work on the Reference the Commission has become aware of a number of matters related to the law on service and execution of process and judgments which could be the subject of inquiry with a view to reform. Some of these matters are noted below.

33. This report makes no specific recommendations regarding judicial lunacy orders, a matter in respect of which there appears to be a need for uniform rules covering the jurisdiction to make such orders and their interstate recognition. In *Re Magavalis*[39] Justice McPherson observed that the Australasian Orders in Lunacy Act 1891, an enactment of the Federal Council of Australasia, still appeared to be in force in Queensland.[40] Another matter not considered in this report concerns the interstate recognition of grants of probate and of letters of administration. This is an area ripe for reform. The Western Australian Law Reform Commission completed a report on the subject in 1984.[41]

34. The terms of reference did not require the Commission to examine service and execution of Australian process and judgments outside Australia and of foreign process and judgments within Australia. However, there appears to be much work to be done in these areas. For example, the States and Territories each have legislation on the recognition and enforcement of foreign judgments within their respective boundaries. This legislation is not uniform and, in particular, South Australia possesses far more liberal legislation than exists in the other States and Territories. This lack of uniformity may be considered undesirable.[42] The area of international judicial assistance is another one in need of reform. This area encompasses co-operation in regard to service of process between countries and the obtaining of evidence abroad. Some of

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[39] [1983] Qd R 59.
[40] See also Sykes & Pryles 1987, 343–6.
[41] WALRC 34 Pt IV.
[42] See generally Sykes & Pryles 1987, ch 3.

the problems involved in obtaining evidence for the purposes of criminal proceedings will be rectified by the Mutual Assistance in Criminal Matters Act 1987 (Cth). However, problems will remain in relation to obtaining evidence for the purposes of civil proceedings. This latter area and that of service of process between countries are the subjects of conventions conclude by the Hague Conference on Private International Law, of which Australia is a member. Consideration should be given to ratifying the relevant Hague Conventions or making other arrangements with countries to facilitate service of process and obtaining evidence internationally.[43]

[43] The relevant international agreements and commentaries may be found in various reports by the Commonwealth Secretariat on *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth* and in the explanatory documentation prepared for Commonwealth jurisdictions on *The Hague Conventions on the Service of Process, the taking of evidence and legalisation.*

2. Constitutional considerations

Introduction

35. Parliament's main power to legislate in the field of the Commission's inquiry is found in s 51(xxiv) of the Constitution. There are also other powers, including s 51(xxv) and s 122 of the Constitution, which may be relevant. This chapter examines the scope of and limitations on the Commonwealth's legislative authority conferred by these provisions. The effect of certain other provisions of the Constitution so far as is relevant to the powers that the Service and Execution of Process Act enables State courts to exercise, particularly in the complex and sometimes vexed field of federal jurisdiction, is also considered. This discussion provides a framework within which the Commission's recommendations for reform of the Act may be considered.

Section 51(xxiv) — service and execution power

Nature of power

36. Despite some assertions to the contrary,[1] s 51(xxiv) has long been regarded as providing Parliament with a power that is to some extent concurrent with the powers of the States.[2] In one case involving a question about the operation of a State law which authorised the service of process outside the State, Justice Barton stated that s 51(xxiv)

> cannot be relied on for a general displacement of State legislation by Federal legislation on the matters there mentioned . . . I see nothing in the Federal *Service and Execution of Process Act* to show that anything that might be done under the Act in question here [the Inter-State Destitute Persons' Relief Act 1910 (SA)] would be in conflict with the former Act.[3]

Based upon these comments, it was until recently regarded as settled that State rules for the service of process *ex juris*, to the extent that they permitt process to be served in other parts of Australia, were not inconsistent with the Service and Execution of Process Act.[4] Where a plaintiff wished to serve process outside one State and in

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[1] eg Quick & Garran 1901, 934.

[2] The States have power to enact laws for service of process *ex juris* provided there is a proper nexus between the litigation and the State: *Ashbury v Ellis* [1893] AC 339. See also *HC Sleigh Ltd v Barry Clarke & Co* [1954] SASR 49. There are, however, limits on their power to require other States to recognise and enforce their judgments.

[3] *Renton v Renton* (1918) 25 CLR 291, 298 (Barton J).

[4] See eg *KW Thomas (Melbourne) Pty Ltd v Groves* [1958] VR 189, 192.

another, the plaintiff could rely on either the federal Act or the State rules.[5] The High Court has recently confirmed that there is no inconsistency between the federal Act and State rules for service *ex juris*.[6]

37. The question for present purposes is whether the Commonwealth could validly make federal law exclusive of State law under s 51(xxiv). The matter is of great importance, for the policies of federal legislation in this area which sought to impose particular requirements or establish particular safeguards would be ineffective if State legislation or rules in the same area which lacked these features continued to operate. In the absence of an assertion of exclusiveness, the existence of a provision in the Constitution conferring power on the federal legislature does not in itself withdraw State legislative authority over the subjects there mentioned. Nor does the mere existence of federal legislation on a matter necessarily result in the nullification of State legislation on the same matter. Only if the State legislation is inconsistent with Commonwealth legislation does s 109 of the Constitution operate to render the State legislation invalid (inoperative). There is no reason why s 109 should not apply to legislation under s 51(xxiv) to the same extent as it does to federal legislation enacted in reliance on any other power. While the comments of Justice Barton concerning the nature of the power in s 51(xxiv) would seem to suggest otherwise, no reason is given for the assertion, which is contrary to established principles of constitutional interpretation. If His Honour's later reference to the terms of the Service and Execution of Process Act were intended to supply that reason, it is clear that the reasoning is fallacious — one cannot draw conclusions regarding the constitutional power from legislation enacted in reliance upon that power. The federal legislature has been given power to legislate on the topic of service and execution throughout the Commonwealth. The States' power to legislate for the peace, order and good government of their respective States includes the power to make laws for the service of process of their courts beyond their territory provided the proceedings or the parties have a relevant connection with the State. It would also include power to provide for enforcement within the State of a judgment given in another State, but would not extend to the enforcement of a domestic judgment outside the State. Assuming the existence of valid legislation on the same matter emanating from both federal and State legislatures, s 109 of the Constitution may be called into operation. Notwithstanding Justice Barton's remarks, it is plain that State legislation which was inconsistent, within the meaning of s 109, with federal law in the same area would be rendered inoperative by s 109.[7]

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[5] Compliance with one absolved the plaintiff from the need to comply with the other: see *Dowd v Dowd* [1946] St R Qd 16, 17–9; *Jones and Co Ltd v Gardner Bros* (1921) 23 WAR 23, 26; *Shepherd v Laudehr* [1972] Tas SR 275 (NC 18); cf *Henry v Dennis* [1931] QWN 50. Difficulties can arise, however, where process is served in purported reliance upon both the federal Act and State rules and there are conflicting requirements: see *Maurice v Maurice* (1945) 63 WN (NSW) 36.

[6] *Flaherty v Girgis* (1987) 71 ALR 1.

[7] The judgments in *Flaherty v Girgis*, while finding no inconsistency between the federal Act and State rules at present, confirm that federal legislation which exhibited an intention to cover the field in the area of service and execution within Australia would, to the extent that State rules also provided for service *ex juris* within Australia, render those rules inoperative by force of s 109.

Scope of the power

Broad interpretation

38. Section 51(xxiv) confers legislative power with respect to 'the civil and criminal process and the judgments of the courts of the States'. It is possible to construe the power in two ways.

- *Narrow view.* This view would read the power as 'the civil and criminal process, and the judgments, of the courts of the States'. On this interpretation the power would be confined to court process alone.
- *Broad view.* This view would read the power as 'the civil and criminal process, and the judgments of the courts, of the States'. On this view Parliament could legislate with respect to process that was not court related.

The first indication of the proper construction of the power is found in *Aston v Irvine*,[8] where the High Court commented on the purpose of the constitutional power against the background of the difficulties that had been experienced before federation in securing effect for the process of one Colony in other Colonies.

> The nature of this power, as well as the prior history of the subject to which it relates, provides strong ground for interpreting it as enabling the federal legislature to regulate the manner in which officers of the law in one State should act with reference to the execution of the process of another State. It is a legislative power given to the central legislature for the very purpose of securing the enforcement of the civil and criminal process of each State in every other State.[9]

This broad interpretation was affirmed in *Ammann v Wegener.*

> [I]n s. 51(xxiv), which empowers the Parliament to make laws with respect to 'the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States', the word 'process' is not governed by the words 'of the courts'; those words refer only to 'judgments'. In other words, s. 51(xxiv) enables laws to be made with respect to the service and execution of (1) the civil and criminal process of the States, and (2) the judgments of the courts of the States.[10]

The acceptance of a broad interpretation of s 51(xxiv) is important for the Commission's inquiry as it is specifically asked in its Terms of Reference to consider whether the interstate service of process related to proceedings in tribunals[11] should be facilitated by federal legislation.

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[8] (1955) 92 CLR 353. The case concerned the validity of the procedures laid down in s 18 and 19 of the Act for the interstate execution of warrants authorising the apprehension of persons.

[9] id, 364.

[10] *Ammann v Wegener* (1972) 129 CLR 415, 436 (Gibbs J). See also 422 (Barwick CJ); 429 (Menzies J); 441 (Mason J).

[11] That term is intended to encompasses bodies with adjudicative functions and powers similar to those of courts and also bodies, such as Royal Commissions, that have investigative functions only.

Extension to provide efficacy to State process

39. The power conferred by s 51(xxiv) authorises laws to ensure the efficacy of process, not merely its physical service or execution or its operation when served.[12] Federal law may validly provide for the issue of 'federal' process[13] to give effect to State process.

> The Constitution does not narrowly limit the modes of execution allowed, but permits the Parliament to select the means by which process of one State is to be given efficacy in another, and to provide if necessary that further process be issued for this purpose.[14]

Incidental power

40. In common with other legislative powers, the service and execution power extends to the making of incidental laws, either because the power itself must be construed fully or because of s 51(xxxix) of the Constitution, which expressly authorises Parliament to make laws with respect to matters incidental to the execution of any of its other sources of law-making power. The potential for abuse of the facilities for service *ex juris* provided by the Act has been held to justify, as incidental to the power with respect to service and execution, provisions safeguarding against such abuse, for example, s 10 of the Act.[15] A number of other provisions of the Act that are supported by the incidental powers include provisions requiring writs of summons to bear endorsements advising parties of their rights,[16] the prescription of minimum times, irrespective of shorter periods provided by State law, for entering an appearance in a suit[17] and the requirement that a plaintiff satisfy the court that a civil proceeding is connected with the forum in which it has been instituted in order to obtain leave to proceed in the absence of an appearance by the defendant.[18]

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[12] *Ammann v Wegener* (1972) 129 CLR 415.

[13] One question involved in *Ammann v Wegener* concerned the validity of s 16(2) of the Act, which provides for the issue of a warrant for the apprehension of a person who has failed to answer a subpoena or summons served under the authority of leave granted under s 16(1).

[14] *Ammann v Wegener* (1972) 129 CLR 415, 438 (Gibbs J).

[15] s 10 enables a defendant who has been served with a writ of summons to apply to the issuing court or to a judge thereof for an order compelling the plaintiff to give security for costs. It has been upheld on the basis of s 51(xxxix), 'even if [the power to enact it] were not sufficiently implied by the nature of the power [in s 51(xxiv)]': *McGlew v New South Wales Malting Co Ltd* (1918) 25 CLR 416, 420 (Griffith CJ, Barton, Powers and Rich J). That case also decided that Parliament could require that the propriety of giving security should be determined judicially, that is, that federal jurisdiction could be conferred on State courts for that purpose.

[16] s 5.

[17] s 8.

[18] s 11(1).

Power with respect to process

Scope of the term 'process'

41. While in some contexts the term 'process' may be construed narrowly to encompass only the summons or other document by which proceedings are commenced,[19] in the context of s 51(xxiv) the term has been interpreted broadly. It includes not only process that commences a proceeding, for example, a writ of summons or statement of claim, but also other documents issued in the course of proceedings, such as a subpoena or summons to a witness.[20]

Extension to tribunals' process

42. *Issues.* The broad construction of s 51(xxiv) with respect to process, namely, that it confers power in respect of the process of the States, not the process of the courts of the States, indicates that there is at least some power to provide for the service and execution of the process of tribunals. The extent of that power must be considered. First, the power is limited to 'process of the States'. Secondly, it is conferred in relation to 'civil and criminal process'. Both these phrases should be examined. It is also necessary to consider the nature of process.

43. *Process 'of the States'.* While there is no authority on this phrase, it seems plain that it confines the power to process the authority for whose issue is derived from the law of a State. The power would not extend to process issued by, or in relation to proceedings in, a body which operated or derived its authority independently of the law of a State, for example, a body whose authority was derived from a contract between members of an association.

44. *'Civil and criminal' process.* The power is also confined to 'civil and criminal process'. In *Ammann v Wegener*[21] Justice Mason queried whether the power extended to 'the process of Royal Commissions and tribunals which are not courts in the strict sense . . .'[22] This query may relate to the question whether the process of Royal Commissions and tribunals can be described as 'civil' or 'criminal' process. While it is possible to construe the phrase strictly as confining the power to process concerned

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[19] See eg *Boilermakers' Society of Australia, Queensland Branch, Union of Employees v Brisbane Welding Works Pty Ltd* [1965] Qd R 598, a decision concerning the Rules of the Supreme Court of Queensland, O V, r 2.

[20] *Ammann v Wegener* (1972) 129 CLR 415, 437–8 (Gibbs J); 441 (Mason J).

[21] (1972) 129 CLR 415, 441.

[22] Insofar as Justice Mason was suggesting that the process of Royal Commissions and tribunals may not fall within the federal power because such process is not the process of courts in the strict sense, his comments contradict the clear holding of the Court that s 51(xxiv) extends to the process of the States and is not confined to the process of the courts of the States: see above para 38.

with 'the establishment of legal rights or the enforcement of the criminal law',[23] such an approach would be inconsistent with the liberal approach to interpretation of the provision so far adopted by the High Court. That approach indicates that a broad construction of the power is appropriate. Accordingly, the better view is that the phrase, rather than operating as a restriction on federal power excluding certain process of the States,[24] should be construed as including within the scope of the power all process of the States, whether it be civil or criminal. There is no need to read the power as confined to process issued in the course of or in relation to proceedings in the nature of judicial proceedings. 'Civil and criminal' was intended as an expansive, not a restrictive, term.[25] Such an interpretation is supported by the purpose of s 51(xxiv) of the Constitution, to allow federal laws to make, as far as possible, State process effective throughout the federation. The power was conferred on the federal legislature in recognition of the fact that the States lacked the necessary power in relation to all types of process. At the time of federation the process requiring the facilities of federal legislation in this regard may have been limited to process issued in relation to proceedings in the established judicial bodies, but there is no reason for considering the power as necessarily limited to judicial process. The intention must have been to provide power to enact legislation facilitating service and execution of all State process

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[23] *See Ammann v Wegener* (1972) 129 CLR 415, 423 (Barwick CJ). See also id, 422 where Barwick CJ suggested that whether process was civil or criminal was to be determined by the nature of the proceedings in relation to which the processs was issued. It was held in that case that process issued in relation to committal proceedings was, in view of the proceedings' relation to the normal criminal process for the prosecution of persons on indictment, criminal process.

[24] It is not necessary to interpret Barwick CJ's comments concerning the meaning of 'civil and criminal' as defining the limits of the power. Those comments were made in the context of a case involving a question as to process issued in relation to a preliminary examination (committal proceedings), proceedings which were not at all conclusive of the guilt or innocence of the accused, but merely investigative, and as such were an indication that the power was to be broadly construed. As no consideration was given to the process of bodies not associated with the normal judicial process, the comments cannot be taken to conclude the question whether the process of such bodies is within the scope of the power.

[25] Although it can have no bearing on the view ultimately taken by the courts, an indication that Parliament has taken such a broad view of the power is to be found in s 16, which enables process issued in relation to proceedings before coroners to be served outside the jurisdiction of issue. A proceeding before a coroner is 'merely in the nature of a preliminary investigation. It is not of any binding force.' (*Bird v Keep* [1918] 2 KB 692, 698 (Swinfen Eady MR)). While at common law a coroner was empowered to commit a person for trial on the evidence adduced at an inquest or inquiry, this power has been eliminated in certain jurisdictions (see eg Coroners Act 1975 (SA) s 26(3); Coroners Act 1980 (NSW) s 22(3)) and the proceedings may not in any event have any relation to the normal civil or criminal processes by which legal rights or liabilities are determined, a matter which distinguishes them from a preliminary investigation (committal proceedings) concerning the commission of an indictable offence: see *Ammann v Wegener* (1972) 129 CLR 415; *R v Murphy* (1985) 61 ALR 139.

which might be issued in relation to proceedings for which provision is made by State law. This includes a wide variety of proceedings conducted in tribunals established by the States.

45. *Nature of process.* A final possible limitation on the power of relevance to tribunal proceedings may stem from the term 'process' itself. No definitive interpretation has been provided as to its meaning in s 51(xxiv), but the term normally describes documents and orders issued in the course of court proceedings.[26] However, in view of the facilitative purpose of the power, there is no reason for such a narrow construction of the term in the present context. It has been said that the term 'process' in s 51(xxiv) extends to non-court process and that bodies such as Royal Commissions and tribunals that are not courts issue process.[27] Therefore, it is probable that the term refers merely to 'a document which may be served or an order which may be executed'[28] in proceedings conducted under, or by authority of, a law of a State. The power conferred by s 51(xxiv) would therefore extend to laws providing for the service and execution *ex juris* of documents issued by, or in relation to proceedings in, tribunals and orders made by tribunals for whose service or execution provision is made by the law of a State. So construed, the power with respect to 'process' is ample to enable legislation to be enacted to provide facilities for the service and execution of documents of tribunals in relation to the conduct of proceedings before them and for the execution of orders made by tribunals in such proceedings. It is thus unnecessary to resort to the other component of the power conferred by s 51(xxiv), namely, the power with respect to judgments, in order to provide for the execution of orders of tribunals.[29]

Substantive operation of power

46. The jurisdiction of a court in an action *in personam*[30] being dependent on service of process on the defendant, 'the rules as to legal service of a writ define the limit of the court's jurisdiction'.[31] Rules as to service are found in the laws of each State (either explicitly or by implication) and generally confine the operation of process to the territory of the State concerned. Thus the jurisdiction of State courts, in the sense of their competence over defendants, is generally limited to defendants who may be

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[26] See the authorities cited in *Ammann v Wegener* (1972) 129 CLR 415, 437–8 (Gibbs J), 441 (Mason J). See also Burke (ed) *Osborn's Concise Law Dictionary* 1976, 266; James (ed) *Stroud's Judicial Dictionary* 1974, 2129–30; Burke (ed) *Jowitt's Dictionary of English Law* 1977, 1438–9; Walker 1980, 1003.

[27] *Ammann v Wegener* (1972) 129 CLR 415, 423 (Barwick CJ), 441 (Mason J) respectively. The validity of the Act, so far as it enables service of subpoenas issued in relation to arbitration proceedings, has also been upheld, on the basis that arbitration proceedings are civil proceedings within s 16 of the Act: *Alliance Petroleum Australia (NL) v Australian Gas Light Co* (1983) 48 ALR 69; *TNT Bulkships Ltd v Interstate Construction Pty Ltd* (1985) 35 NTR 15.

[28] See *Ammann v Wegener* (1972) 129 CLR 415, 423 (Barwick CJ).

[29] See below para 51–2, 56–63 for consideration of whether this later component of the power would extend to support legislation providing for execution of tribunal orders.

[30] As to the meaning of an action *in personam* see Sykes & Pryles 1987, 22.

[31] Morris (ed) *Dicey and Morris on the Conflict of Laws* 1980, 182.

served within the State.[32] Section 51(xxiv) no doubt enables Parliament to prescribe procedures for serving process outside the State of issue and in another State or Territory. A view which obtained some support for a time was that the power was confined to such a procedural operation.[33] On this view the power enabled Parliament to facilitate service outside the State of issue only where the power to assume jurisdiction over an absent defendant was found in State law, in effect, that it only extended to laws establishing alternate procedures for service *ex juris* to those already provided by State laws. Inferior State courts generally do not possess power to assume jurisdiction over absent defendants, although State legislatures are competent to provide the power.[34] If construed in this narrow way, s 51(xxiv) therefore would do little to facilitate the conduct of litigation throughout Australia. Not surprisingly, the view now universally accepted by the courts is that the constitutional power has a substantive operation, extending to the making of laws extending the jurisdiction of State courts so far as their jurisdiction is dependent on the service of process.[35] Thus, irrespective of limits under State law on the area in which legal service may be effected, s 51(xxiv) enables Parliament to extend the area in which legal service may be effected, thereby facilitating the assumption by State courts of jurisdiction over defendants throughout the Commonwealth. So far as their jurisdiction depends on service, therefore, the power extends to laws conferring jurisdiction on State courts.[36] Such an extension or conferral of jurisdiction recently has come to be scrutinised in the context of Parliament's powers to invest State courts with federal jurisdiction, a matter discussed in a later part of this chapter.[37]

Power with respect to judgments

Introduction

47. In addition to the power to legislate with respect to the service and execution of process, s 51(xxiv) confers power to provide for the execution of judgments. That power, however, is narrower than the power with respect to process for it is confined to the 'judgments of the courts of the States'.[38] The scope of that power warrants examination, firstly, because the facilities provided by the Act for the enforcement of judgments of courts outside the jurisdiction of rendition have been held, or have been

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[32] Only in a few cases do State laws specifically confer any extra-territorial operation on process, thus permitting a court to assume jurisdiction over a defendant outside the State.

[33] See eg Lytton Wright 1930; *City and Suburban Parcel Delivery (Bryce) Ltd v Gourlay Bros Ltd* (1932) St R Qd 213.

[34] *Ashbury v Ellis* [1893] AC 339.

[35] 'This power is obviously not limited to the mode of performance of the manual act of service, but extends to the extra-territorial operation of the writ when served.': *McGlew v New South Wales Malting Co Ltd* (1918) 25 CLR 416, 420 (Griffith CJ, Barton, Powers and Rich J).

[36] See *Ex parte Iskra, ex parte Mercantile Transport Co Pty Ltd* (1962) 5 FLR 219, 228 (Sugerman J); *R. v Dodds, ex parte Mitchell* (1959) 2 FLR 462, 467 (Kriewaldt J). An extension of subject-matter jurisdiction would be outside the scope of s 51(xxiv).

[37] See para 68–72.

[38] *Ammann v Wegener* (1972) 129 CLR 415.

suggested as being, inapplicable in relation to certain orders made by courts.[39] In other words, it is necessary to determine whether it is possible to amend the Act so that these orders now may be enforced *ex juris*. Secondly, while the power with respect to process is probably ample to enable Parliament to enact legislation facilitating the execution of orders of tribunals *ex juris*,[40] an examination of Parliament's powers in this regard would be incomplete without a consideration of all the possible sources of power to enact such legislation. For this purpose, it is necessary to consider whether some or all tribunals are within the meaning of the term 'courts' as used in s 51(xxiv) and, if so, whether their orders are 'judgments' within s 51(xxiv). As an alternative to this strict interpretation of the power, consideration should be given to whether the constitutional power is broad enough to encompass orders that are enforceable as judgments of courts even though not pronounced by a court. Under many State and Territory laws enforcement of tribunal orders is secured through the procedures by which judgments given by courts may be enforced.

The term 'courts'

48. *Indications of a broad construction.* The High Court has stated that, in the context of s 51(xxiv), the term 'courts' should be construed broadly and is not confined to bodies exercising judicial powers or courts of justice.[41] But it has not specified the features a body must have to be a 'court' for the purposes of this provision.

49. *Reference to other contexts — a caution.* In seeking to clarify the meaning of the term in the context of s 51(xxiv), assistance might be derived from the interpretation given to the term in other contexts. But the meaning of the term is not immutable and there is no reason why it should have the same meaning for all purposes. Experience suggests that the word is capable of bearing different meanings (or that whether a body is a court depends on different tests) in various contexts.[42] For example, while the meaning ascribed to that term in s 77(iii) of the Constitution, which empowers the federal Parliament to make laws investing 'any court of a State' with federal judicial power, cannot be ignored, caution must be exercised in drawing conclusions as to the meaning of the term in s 51(xxiv) from authorities on s 77(iii). The purposes and contexts of the provisions differ noticeably.[43] On the one hand, s 77(iii) deals with the investiture of federal jurisdiction in State courts and the High Court has jealously guarded the separation and exercise of federal judicial powers.[44] Section 51(xxiv), on

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[39] See eg *Jackman v Broadbent* [1931] SASR 82; *Winchcombe v Winchcombe* [1955] QWN 16.

[40] See para 45.

[41] See *Ammann v Wegener* (1972) 129 CLR 415, 436 (Gibbs J), 442 (Mason J).

[42] Campbell 1981, 50–1.

[43] See eg the comments of Barwick CJ on this matter in *Ammann v Wegener* (1972) 129 CLR 415, 423.

[44] See Campbell 1981, 26–8.

the other hand, deals with federal legislative competence to enact provisions to assist State courts exercising a jurisdiction which would otherwise be State jurisdiction, by providing for the interstate service of their process and execution of their judgments.[45]

50. *Indicia of a 'court'.* There is no reason to suggest why the broad approach so far adopted in interpreting s 51(xxiv) should not apply so far as concerns the term 'court'. There is no warrant for importing into the term in its present context a requirement concerning the exercise of judicial power as applied in other contexts. On the contrary, the facilitative purpose of the constitutional provision suggests otherwise. The intention must have been to facilitate the execution of decisions of all tribunals established in the States from time to time in which disputes and claims of a legal nature might be resolved. It is therefore suggested that the term 'court' in s 51(xxiv) implies no more than a body, whether or not called a court,[46] that possesses the following characteristics. First, it must be constituted pursuant to a State law — the power being expressed to be in relation to 'courts of the States'. Second, it must have the power to resolve controversies between two or more parties or to determine rights *in rem* or the liability of a party (such as a shareholder's obligation to pay calls on shares) according to law. Third, it must be capable of giving a decision which is binding so long as it stands.

Are tribunals 'courts'?

51. *Relevant features of tribunals.* All the tribunals examined by the Commission[47] satisfy the first requirement — they are established by or pursuant to State legislation. Apart from those tribunals with investigative powers only they all also possess dispute resolution powers. These powers may be exercised in relation to disputes or controversies of the same nature as may be dealt with by the recognised 'courts' or in tribunals' roles in regulating particular professions, trades or occupations. Only the first situation is relevant for present purposes.[48] The great majority of tribunals exercising dispute resolution powers of this nature must apply the law in reaching decisions on disputes or controversies that come before them, notwithstanding that some may be directed to

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[45] Another context where policy considerations have influenced the interpretation of the term concerns the power of superior courts to punish or restrain contempts of inferior courts: see eg *Attorney-General v British Broadcasting Corporation* [1981] AC 303, 352–4 (Lord Fraser) concerning the principle of freedom of speech.

[46] That a tribunal is not called a 'court' under State law cannot be relevant, for such a test would enable a State to bring any conceivable institution under the rubric of federal legislative competence, or to withdraw it, by the simple expedient of calling it, or ceasing to call it, a court: see *Trevor Boiler Engineering Co Pty Ltd v Morley* [1983] VR 716, where the Workers' Compensation Board of Victoria was held to be a 'court of law' for the purposes of the Administrative Law Act 1978 (Vic) s 2. cf *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 442, 451. See also in the context of s 71 of the Constitution and the conferral of judicial power under s 11(1) of the Service and Execution of Process Act *Tana v Baxter* (1986) 68 ALR 245, 251–2 (Brennan J).

[47] A detailed analysis of tribunals' characteristics is undertaken in ch 8.

[48] The latter situation in which their dispute resolution powers may be exercised is not relevant because whatever orders may be made will necessarily be confined in their operation to the State or Territory in which they are made.

act without regard to technicalities and legal forms.[49] Some few tribunals are permitted to depart from the law, for example, they are enjoined to reach decisions that are 'fair and equitable' to all the parties.[50] As to the third feature, all the tribunals are capable of giving decisions that are binding so long as they stand, even though they may not have mechanisms to enforce their orders.[51]

52. *Conclusions.* The majority of tribunals would clearly satisfy the suggested criteria of a 'court' for the purposes of s 51(xxiv), although it is arguable that the same conclusion is not open in relation to those tribunals that are not required to apply the law in reaching decisions on the disputes or controversies that come before them. Noting this reservation, it is necessary to consider whether the orders made by those tribunals that may be regarded as 'courts' are 'judgments' within s 51(xxiv).

The term 'judgments'

53. *Nature of relief.* Like other terms, the term 'judgments' is susceptible to different interpretations, some narrow and some broad.[52] In the present context it should not be read in a narrow or pedantic sense. Its natural meaning in this context simply suggests an order or decision awarding some form of relief. It would extend to an order or decision requiring the payment of money and to orders in the nature of the equitable remedies of specific performance and injunctions.[53]

54. *Finality.* It might be suggested that the order or decision must be final in the sense of creating a *res judicata* between the parties. Both the nature of the decision[54]

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[49] In some cases the tribunals are not required to adhere to the rules of evidence, but this does not affect the requirement to apply the law in reaching a decision.

[50] See eg Small Claims Tribunals Act 1973 (Qld) s 10(2); Consumer Claims Tribunals Act 1974 (NSW) s 23(2).

[51] See para 59 for discussion of enforcement procedures. This deficiency does not necessarily require a conclusion that a particular tribunal is not a court: *Trevor Boiler Engineering Co Pty Ltd v Morley* [1983] VR 716, 720. Even in relation to a body capable of exercising the judicial power of the Commonwealth a power to enforce its own decisions is not necessarily required: *R v Davison* (1954) 90 CLR 353, 368; *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617, 631 (Barwick CJ).

[52] cf *Onslow v Commissioners of Inland Revenue* (1890) 25 QBD 465, 466; *Halsbury*, vol 26, para 501.

[53] The definition of the term in the Act extends to such forms of relief: s 3. It is therefore difficult to understand why, in *Jackman v Broadbent* [1931] SASR 82, 83–4 (Piper J), the question whether a judgment under the Act included a judgment ordering specific performance of a contract was left open.

[54] The decision must constitute a determination or adjudication of some question of law or fact, whether in the form of an express declaration or because the determination of the question is necessarily involved in the command or prohibition which constitutes the judgment or order in its coercive or operative aspect: see Bower & Turner 1969, para 30–4.

and the nature of the body from which it emanates[55] are relevant in this regard. While the term 'judgment' in other contexts has been restricted to final judgments,[56] there is no reason why the term as used in s 51(xxiv) should be similarly confined. The purpose of the power could be partially frustrated if the execution of decisions of an interlocutory or interim nature could not be obtained outside the State of rendition. The term would also include decisions that, while able to be varied by the court of rendition,[57] are binding on the parties so long as they stand.[58]

55. *Enforceability.* Notwithstanding the width of the term, it may be that the Commonwealth cannot provide for the execution in another State or Territory of a judgment which could not yet be executed in the State of rendition but which, for example, required further proceedings before execution process would issue.[59] A possible limitation on the scope of 'judgments' is that an order or decision must be capable of enforcement in the sense of being subject to execution in the State of rendition.

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[55] In order to create a *res judicata*, the decision must be that of a tribunal which has jurisdiction to finally decide a question between the parties, even if it is not called a court, and its jurisdiction must be derived from statute or from the submission of the parties: see *Administration of the Territory of Papua and New Guinea v Guba* (1973) 130 CLR 353, 453 (Gibbs J). Sometimes it is said that the decision must be that of a judicial tribunal, but 'judicial' in this context clearly has a much broader connotation than that employed for the purposes of Chapter III of the Constitution: see Bower & Turner 1969, para 21–9. See also *Pastras v Commonwealth* (1966) 9 FLR 152; *Basser v Medical Board of Victoria* [1981] VR 953, 971–6; *Isaacs v Cachia* [1981] 2 NSWLR 92; *Australian Transport Officers Federation v State Public Services Federation* (1981) 34 ALR 40.

[56] eg in the context of s 73 of the Constitution regarding the High Court's appellate jurisdiction in relation to 'judgments, decrees, orders and sentences': see *Smith v Mann* (1932) 47 CLR 426; *Medical Board of Victoria v Meyer* (1937) 58 CLR 62. See also the cases cited in Campbell 1981, 56.

[57] eg an order for periodic payment of maintenance which, if able to be varied, is not considered final: *Harrop v Harrop* [1920] 3 KB 386. But an order that is only variable in respect of future payments, not in respect of arrears due, is considered final in relation to payments already due: Sykes & Pryles 1987, 110.

[58] cf *Winchcombe v Winchcombe* [1955] QWN 16, 25 as to the requirements of a judgment under the Service and Execution of Process Act.

[59] An analogy may be drawn with the full faith and credit provision, s 118 of the Constitution, and s 18 of the State and Territorial Laws and Records Recognition Act 1901 (Cth). Pursuant to these provisions a judgment is to be given the same faith and credit in other States and Territories as it has in the State or Territory of rendition. This directive is usually invoked for the purpose of limiting the defences available to a judgment debtor to those available under the law of the State or Territory of rendition. However, the directive would also be relevant to a judgment that is not capable of enforcement in the State or Territory of rendition: it would be given no greater faith and credit in any other State or Territory. To construe s 51(xxiv) as empowering Parliament to provide for the interstate enforcement of a judgment which was not capable of enforcement in the State or Territory of rendition would therefore involve a considerable enlargement of even the broadest view of the full faith and credit provisions.

Are tribunal orders 'judgments'?

56. *Introduction.* While the term 'judgments' should be given a broad interpretation, the question is whether it is broad enough to encompass the orders of the tribunals which satisfy the criteria of a court. In order to assess this question, it is necessary to understand some of the features of their orders.[60]

57. *Nature of relief.* Many tribunals have jurisdiction (either exclusive of or co-extensive with courts) to adjudicate on disputes of the same type as may come before courts, for example, disputes arising out of contracts for the supply of goods and tenancy contracts. The orders tribunals may make in resolution of such disputes are of the same nature as orders of courts, including awards of damages or compensation and orders having the same effect as injunctions and orders for specific performance. Other tribunals have adjudicative powers in relation to persons involved in particular professions, trades and occupations. So far as these tribunals' orders relate to the possession by a person of a licence or registration to practice they are irrelevant for present purposes.[61] However, some such tribunals also possess power to adjudicate on disputes between members of the regulated profession, trade or occupation and persons with whom they do business, and in that regard the nature of the relief they may order resembles that of orders of courts and dispute resolution tribunals.

58. *Finality.* As with courts, tribunals are empowered to make orders determining the dispute between the parties to the proceeding and, in some cases, to make interlocutory orders. There may be procedures for reopening tribunal proceedings for the purpose of seeking a variation of an order,[62] although existing orders remain binding on the parties to the proceedings so long as they stand. While there may be some doubt whether tribunal orders give rise to a *res judicata,*[63] such a requirement is unnecessary in relation to the term 'judgments' in s 51(xxiv).[64]

59. *Enforceability.* At present, no tribunals possess the powers or procedures to execute their orders. In some instances where a person has failed to comply with an order made by a tribunal, 'enforcement' of that order can be achieved only through the reopening of the proceeding for the purpose of seeking an order that can be enforced through one of the mechanisms described below. Another method of enforcement is to impose criminal sanctions on a person who has failed to comply with an order. In

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[60] Extensive discussion of the features of tribunals, including of their orders, is undertaken in ch 8.

[61] This is because there can be no question of the interstate enforcement of such orders, as the tribunals have power to regulate practice only within the State where they are established.

[62] Such a procedure often is also available in respect of certain court orders, for example, orders for periodic maintenance: see above para 54, n 57.

[63] See eg *Maganja v Arthur* [1984] 3 NSWLR 561, 565 where it was said that a *res judicata* does not arise in relation to an order of a Consumer Claims Tribunal which has not been registered in a court for the purposes of its enforcement (on the enforcement procedures see below), but that the situation may be otherwise in relation to an order that was registered. See also *Cachia v Isaacs* [1985] 3 NSWLR 366, 368 (Kirby P) on the question of issue estoppel; cf 388–9 (McHugh JA) as regards issue estoppel and *res judicata.*

[64] See para 54.

relation to tribunal orders requiring the payment of money by a party, the common procedure is for enforcement of the orders to be assigned to a State court. The court procedures are brought into play by one of three mechanisms.

- State legislation may provide that the order of a tribunal is deemed to be, or is enforceable as if it were, a judgment or order of a court.
- It may be provided that the order is deemed to be, or is enforceable as if it were, a judgment or order of a court upon the filing or registration of a copy or certificate of the order (and sometimes additional documents) in a specified court.
- It may be provided that an order for the payment of a sum of money constitutes a debt due to the person in whose favour the order was made which may be recovered by proceedings in a court of competent jurisdiction. Enforcement thus requires the taking of further substantive proceedings in a court based on the tribunal order.

60. *Conclusions.* On a consideration of the nature of the relief given and the finality of orders, it may be concluded that most orders of tribunals would fall within the meaning of the term 'judgments'. However, a tribunal order that merely gives rise to a debt that can only be recovered through substantive proceedings in a court may not be a judgment because it is not immediately enforceable in the State or Territory of rendition. The other enforcement mechanisms described above do not suffer from this deficiency. Tribunal orders that are immediately enforceable in the sense of being subject to execution in the State of rendition, namely, orders that are deemed to be, or are enforceable as, judgments of courts are clearly 'judgments' for this purpose. In relation to orders that are enforceable only after filing or registration of a copy of certificate of the order two possibilities arise. On one hand it may be that the requirement of registration or filing is little more than a formality, akin to the formal act of entry of judgment in a court, and that as no further substantive proceedings are required, such orders can be regarded as being immediately enforceable for the purposes of the meaning of the term 'judgments'. On the other hand it may be that, in just the same way as a judgment of a court must be entered before execution on it may issue — and perhaps before it becomes a judgment for the purposes of s 51(xxiv) — so the requirement of registration or filing of tribunal orders is an essential prerequisite to such orders being regarded as 'judgments' for the purposes of that provision. The general conclusion, therefore, is that only some orders of tribunals may be regarded as being within the scope of the power with respect to judgments. The power would extend to orders deemed to be, or enforceable as, judgments of courts without more, and orders in relation to which requirements imposed by State law regarding registration or filing in a court had been fulfilled. It may extend to orders enforceable as judgments of courts even though they are not registered or filed where State law requires this as a precondition to execution.

Alternate basis for extension of the Act to tribunal orders

61. *Introduction.* There is another basis for extending the Act to facilitate the execution of orders of tribunals. As explained already,[65] the various tribunals that have been established in the States are not able themselves to enforce their orders. Rather, the three mechanisms described above enable enforcement to be effected through the procedures by which judgments of courts may be executed. Consideration needs to be given to whether the constitutional power is broad enough to enable legislation to be enacted providing for the execution of orders that are enforceable as judgments of courts even though not pronounced by a court. This approach directs the focus away from the meaning of each of the relevant terms in isolation and towards the compendious phrase is which the power is expressed, that is, 'the judgments of the courts of the States'.

62. *Extended scope of power.* On a narrow reading of s 51(xxiv), that is, that 'judgments of the courts' should be interpreted as 'judgments given or made by the courts', orders enforceable under either of the first two mechanisms would not be within the scope of the power.[66] But in view of the facilitative purpose of the power the courts have consistently adopted a broad approach to its interpretation. The narrow interpretation described above is therefore inappropriate. The power should be read as extending to an order which under State law is given effect as a judgment of a court, that is, an order the execution of which is authorised by State law through the procedures for enforcement of judgments of a court. The terms by which State law provided that authority would be irrelevant. Thus, whether the order was 'deemed to be a judgment', 'enforceable as a judgment' or 'enforceable as if it were a judgment', one looks to the purpose and effect of the provision and if its purpose and effect is to enable the enforcement of an order made by a tribunal through the procedures for enforcement of judgments of courts of a State, the federal legislature could provide for its execution outside the State.[67] But the States could not manipulate the application of the federal legislation merely by calling an order a judgment and calling the body through whose

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[65] See para 59.

[66] A judgment obtained in a court in proceedings based upon a tribunal order — the third form of enforcement for tribunal orders described above — clearly falls within federal legislative competence.

[67] It might also be regarded as peculiar or anomalous that the power would extend to an order enforced through the third mechanism but not through the first two mechanisms. If the procedures prescribed by State law for the enforcement of orders of a tribunal may be regarded as an indication of the status of the tribunal, those tribunals whose orders may be enforced directly, or through a simple registration or filing procedure, in a court may be considered as higher in status than tribunals whose orders may be enforced only through substantive proceedings in a court. While the merits of the original dispute apparently could not be canvassed in those proceedings, it may be possible to raise certain defences, such as that the order was obtained by fraud, in order to resist ultimate enforcement of the order. But the occasions on which such defences could be successful would be limited and in general the court would make an appropriate order as of course. This order could then be executed under the Act, while the orders of the tribunals of higher status would remain incapable of execution.

procedures it may be enforced a court, for the constitutional terms have a meaning independent of State law. The order would still have to be a 'judgment' and the body in which it is to be enforced a 'court'. But on this broad view it would not be necessary for the order to have been given or made by a 'court'.

63. *Application to enforcement procedures.* It remains to consider whether orders of tribunals enforceable through either of the first two mechanisms described above would fall within the scope of the power so interpreted. It must be assumed for this purpose that the courts whose procedures may be used to enforce the orders are 'courts' for the purposes of s 51(xxiv).[68] The crucial matter here concerns the enforceability of tribunal orders. It has been suggested that a 'judgment' must be immediately enforceable in the sense of being subject to execution in the State of rendition.[69] An order that is enforceable without filing or registration is clearly subject to immediate enforcement in the State of rendition and would therefore be within the scope of the power. However, orders enforceable only on registration or filing in a court may be regarded as 'judgments' only once so registered or filed. Legislative power in respect of the latter orders therefore may arise only once the order is filed or registered in a court.

Extent of power

64. At common law it is not possible directly to enforce in one jurisdiction a judgment rendered in another jurisdiction. A new action must be taken in the jurisdiction in which enforcement is sought. The action is based upon the foreign judgment which is treated as creating a debt due to the judgment creditor. Only after a local judgment has been obtained may the liability of the defendant be enforced, resort being had to local execution procedures. This restriction applies to sister-State judgments within Australia despite the full faith and credit provision of the Constitution.[70] Section 51(xxiv) of the Constitution,[71] however, clearly enables Parliament to make laws providing for the direct execution of the judgments of one State throughout the Commonwealth[72] and would also clearly support federal legislation placing conditions on the interstate enforcement of judgments. In addition, Parliament is at liberty to choose the method of execution: it could create an entirely new and separate procedure for execution of

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[68] The courts are generally Magistrates Court or similar inferior courts. It has never been contested that they are courts within the meaning of the term used in s 51(xxiv).

[69] See para 55.

[70] See *Cole v Cunningham* 113 US 107 (1889), 112 (Fuller CJ): 'No execution can be issued upon such [sister-State] judgments without a new suit in the tribunals of other States . . .' The decision concerned the effect of Art IV, s 1 of the United States Constitution, which provides, in part, that 'Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings in every other State . . .'. This provision is substantially reproduced in s 118 of the Australian Constitution.

[71] There is no counterpart in the United States Constitution.

[72] See eg Quick & Garran 1901, 617: 'This sub-section does something more than provide for the inter-state recognition of judgments; it means the inter-state execution of judgments.'

judgments;[73] it could adopt the procedures of the State where execution of a judgment is sought;[74] or it could adopt the procedures of the State of rendition of a judgment. Further, s 51(xxiv), either alone or in conjunction with s 51(xxv),[75] would support legislation providing not merely for the execution of a judgment but enabling independent proceedings, for example, bankruptcy proceedings, to be taken with a view to compelling a judgment debtor to pay the amount owed under a judgment.[76] These powers probably would extend to support legislation making available to a judgment creditor under a judgment rendered in one State the whole range of proceedings that may be taken by way of execution of a judgment rendered in another State. However, the powers probably would not extend to legislation enabling a court in the State in which enforcement or other proceedings are taken to vary a judgment given in another State, for this would go beyond the enforcement or recognition of a judgment.

'Throughout the Commonwealth'

65. Section 51(xxiv) refers to the service and execution of State process and State court judgments 'throughout the Commonwealth'. In one case it was held that this power enabled Parliament to provide for the enforcement of a State order within the State of rendition through the enforcement procedures of a federal court. The judgment

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[73] See eg Quick & Garran 1901, 617. This course, to a limited extent, has been adopted in relation to enforcement of custody orders under the Family Law Act 1975 (Cth) s 67(2), (3) and Family Law Rules O 26, r 3: see *Re Vaughan and Vaughan* (1980) 6 Fam LR 390; *Carolan v Proud* [1983] FLC 91–325. In the absence of a federal legislative power to make laws with regard to, or establish a jurisdiction with regard to, access to ex-nuptial children under the marriage or matrimonial causes powers of the Constitution (s 51(xxi), (xxii)), all the federal legislature can provide for is the enforcement of State orders involving such children. The mode adopted, in reliance on s 51(xxiv), is to enable federal procedures for the enforcement of orders — the procedures established by the Family Law Act 1975 (Cth) for enforcement of custody orders made under that Act — to be placed at the disposal of a person in whose favour a custody order in respect of an ex-nuptual child has been made in a State court under State law.

[74] This is the method adopted in Part IV of the Service and Execution of Process Act.

[75] See further para 66.

[76] While this is now made clear in the Act, before its amendment in 1912 (Service and Execution of Process Act 1912 (Cth) s 9, substituting s 21(2)) it had been queried whether Part IV of the Act authorisd the taking of such independent proceedings: see *Bennett v Cohen* (1901) 7 ALR (CN) 96. But cf *Re Richards; Ex parte Maloney* (1902) 2 SR (NSW) B and P 3, where the court found no difficulty in accepting that bankruptcy proceedings could issue on a judgment registered pursuant to the Act before the clarifying amendment. See also *McNamara v Miller* (1902) 28 VLR 327, where Hodges J held that proceedings under the Imprisonment of Fraudulent Debtors Act 1890 (Vic) could not be based on a certificate of judgment registered pursuant to the Act. Hodges J also thought that the Constitution did not enable Parliament to provide for the taking of such proceedings on a judgment rendered in another State (id, 330–1), but the decision was primarily based on the terms of the Act. For the purposes of the case it was necessary to consider only the terms of the Act. The comments regarding the constitutional power were therefore obiter. In any event they were directed primarily to s 51(xxiv). No consideration was given to the powers that might be provided by s 51(xxv).

had previously been registered in the registry of the federal court in another State.[77] It might be argued that the power extends to enable Parliament to prescribe procedures for the enforcement of judgments of a State court within the State of rendition itself. The words 'throughout the Commonwealth' are on their face capable of supporting that broad interpretation, particularly as in other provisions the Constitution employs different language, for example, 'beyond the limits of the State',[78] when the intention is to confine Parliament's power to an interstate context. However it is also arguable that a narrower interpretation of the phrase is more appropriate, namely, that it was intended that the power could be employed only to facilitate the service and execution of process and judgments outside the State of issue or rendition and not to supplant State law regarding service and execution within the State. A number of arguments would support this interpretation. First, the purpose of the power was to overcome some of the difficulties that were occasioned by the maintenance of separate legal systems in the Colonies and, after federation, the States, by enabling federal legislation to provide facilities for service and execution of State process and judgments that the States could not themselves provide — service and execution outside the territories of the States. In addition, on the broader view of the phrase the federal legislature, under the guise of facilitative legislation, could remove from the States their control over intrastate procedures for service and execution. A power such as this, amounting to the power to control an essential component of one organ of State administrations, namely, the judicial system, could be regarded as so inconsistent with the nature of the federation as to be constitutionally suspect. The narrower view has been adopted in the Act and the Commission has made no recommendations which would effect change in this respect.

Sections 51 (xxv) and 118

66. Section 51(xxv) of the Constitution confers power on Parliament to make laws with respect to 'the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States'. This power complements the constitutional directive in s 118 that 'full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State'.[79] In the context of the Commission's inquiry the power may be of use to amplify the power conferred by s 51(xxiv). For example, while the view was taken in one case that s 51(xxiv) only extended to the making of laws for

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[77] *Carolan v Proud* [1983] FLC 91-325. The federal court in question was the Family Court. Further, enforcement of the order could be sought in any State, for once the order was registered in a registry of the Family Court, it was enforceable through proceedings instituted in any other registry of the Court. See Family Law Act 1975 (Cth) s 67(2), (3) and Family Law Rules O 26, r 3.

[78] eg s 51(xiii).

[79] Both provisions are fairly faithful reproductions of Art IV, s 1 of the United States Constitution. As to the full faith and credit obligation generally see Pryles & Hanks 1974, ch 3. See also Sykes & Pryles 1987, ch 7. See also Australian Judicial System Advisory Committee 1987, ch 8, concerning recommendations to clarify the relationship between s 118 and s 51(xxv).

the *enforcement* of judgments,[80] it is arguable that s 51(xxv) would support a federal law which provided that a sister-State judgment, and also perhaps a tribunal order, was deemed to be of the same effect as a local judgment, so that all proceedings that might be taken on a local judgment could be taken on the sister-State judgment. In other words, s 51(xxv) may enable Parliament to make laws beyond the enforcement (or execution) of sister-State judgments and orders by deeming them to have the same effect as a local judgment or by requiring a court to accord them the same effect which they have in the State of rendition.

Section 122 — Territories power

67. Section 51(xxiv) and (xxv) of the Constitution enable laws to be made for the service and execution of State process and judgments and for the recognition of State laws, records and judicial proceedings 'throughout the Commonwealth', including in the Territories.[81] However neither s 51(xxiv) nor (xxv) enable laws to be made for the service and execution of Territory process and judgments outside the Territory concerned, or for the recognition of laws, records or judicial proceedings of the Territories. The constitutional basis for the such legislation — for the Service and Execution of Process Act so far as it applies to Territorial process and judgments — lies in the Territories power, s 122 of the Constitution.[82] While Parliament's power to provide for the service and execution of Territory process and judgments is not constrained by s 51(xxiv) — and to some extent therefore may be regarded as wider than the power with respect to State process and judgments[83] — laws made under s 122 must be 'for the government of [a] Territory', that is, they must have some connection with the government of a Territory. Therefore, while federal legislation under s 51(xxiv) could, in facilitating service of process, operate to confer jurisdiction (in the sense of competence over the defendant) on a State court without the necessity for a connection between the State and the subject-matter of the proceeding or the parties, such jurisdiction could not be conferred on a Territory court unless there was a relevant connection with the Territory.[84] In this respect, therefore, the power to legislate with respect to the service and execution of State process and judgments is broader than the power to provide for the service and execution of Territory process and judgments.

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[80] *McNamara v Miller* (1902) 28 VLR 327: see para 64, n 76.

[81] *Aston v Irvine* (1955) 92 CLR 353, 364: 'no doubt the words "throughout the Commonwealth" include the Territories, at all events those within Australia . . .'. See also *Lamshed v Lake* (1958) 99 CLR 132, 142; *Spratt v Hermes* (1965) 114 CLR 226, 247.

[82] *Lamshed v Lake* (1958) 99 CLR 132, 145–6, (Dixon CJ), referring to both s 51(xxiv) and 51(xxv). See also *Ffrost v Stevenson* (1937) 58 CLR 528, 554–8 (Latham CJ).

[83] For the sake of consistency, however, the power with respect to the Territories should be exercised in the same way as the power under s 51(xxiv): see Law Reform Commission Act 1973 (Cth) s 6(1)(d).

[84] See *Cotter v Workman* (1972) 20 FLR 318. But if the Territory court had jurisdiction over a case, for example, by consent, s 122 would enable enforcement of its judgment throughout Australia without any further requirement of a nexus.

Federal jurisdiction

Introduction

68. The scope and form of legislation regarding service and execution of process and judgments is largely dictated by the powers examined above. However mention should be made of one further constitutional matter of relevance in this area, namely, the power of Parliament to confer judicial powers on State courts. It is plain that Parliament cannot confer judicial power — the judicial power of the Commonwealth — on bodies that are not State courts within the meaning of s 77(iii) of the Constitution, nor can it confer non-judicial power on such courts. In respect of legislation concerning service and execution there are two contexts in which these limitations should be considered: the first concerns the conferral of specific powers on State courts and functionaries with respect to process and judgments; the second concerns the exercise of powers by State courts and functionaries under the laws of the States following service or execution of process pursuant to the Act.

Powers conferred in relation to service and execution of process and judgments

Limitations and safeguards

69. In providing for the service and execution of process and judgments, limitations and safeguards may be imposed to ensure, amongst other things, that the facilities provided are not abused. The present Act contains many such provisions.[85] The nature of the power to be exercised in relation to some of these limitations and safeguards has been held to be judicial and their conferral on State courts to be valid under s 77(iii) of the Constitution.[86] Other powers conferred on State officials have been held to be ministerial or administrative.[87] Some powers which are susceptible of being treated as judicial powers have been held not to be when conferred on specified officers,

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[85] eg s 10: court may order plaintiff to give security for defendant's costs; s 11(1): court may order that plaintiff is at liberty to proceed in the absence of an appearance by the defendant; s 16(1): court, or judge, magistrate or coroner, may grant leave to serve a subpoena outside the State or Territory of issue; s 18(1): magistrate may endorse warrant for apprehension for execution in a State or Territory other than that of its issue; s 18(3): magistrate may order apprehended person to be returned to State or Territory of issue of warrant; s 18(6): magistrate may order release of apprehended person; s 19: avenue for review of decision made by a magistrate concerning return or release of apprehended person; s 25: court or judge may order stay of proceedings on a registered certificate of judgment.

[86] See eg in respect of s 10 *McGlew v New South Wales Malting Co Ltd* (1918) 25 CLR 416. See also *Tana v Baxter* (1986) 68 ALR 245, 251–2 (Brennan J), warning that the power conferred by s 11(1) of the Act may be exercised only by a State court within s 71 (and also 77(iii)) of the Constitution — the implication being that the power conferred by s 11(1) is a judicial power.

[87] eg *Aston v Irvine* (1955) 92 CLR 353, concerning the powers of a magistrate under s 18(1) to endorse a warrant for execution in a State or Territory other than that of its issue.

but when conferred on a court are regarded as judicial in nature.[88] Other provisions conferring similar powers both on courts and specified officers,[89] are yet to be judicially considered. But for such provisions to be valid it must be assumed that the power is judicial in nature when exercised by a court, but ministerial or administrative when exercised by an officer not constituting a court.[90] In the context of the Commission's inquiries concerning extension of the Act to the process and orders of tribunals, such flexibility in the nature of powers conferred by the Act is essential, as it may be found necessary to confer on tribunals some or all of the types of powers presently conferred on courts and officers in the context of limitations and safeguards imposed on the service and execution of process and judgments.

70. In so far as powers conferred in the context of such limitations or safeguards are regarded as judicial, an exercise of federal jurisdiction is clearly involved because the exercise of those powers would involve a matter 'arising under any laws made by the Parliament' within s 76(ii) of the Constitution. Therefore, in exercising those powers a State court of summary jurisdiction must be constituted in accordance with s 39(2)(d) of the Judiciary Act 1903 (Cth), that is, by a 'Stipendiary or Police or Special Magistrate or some Magistrate of the State who is specially authorised by the Governor-General'.

Execution of judgments

71. The avenues open to Parliament to provide for the execution of judgments under s 51(xxiv) have been explained above.[91] The present Act, through a procedure whereby a certificate of judgment may be registered in a court in a State other then the State of rendition, adopts the procedures with respect to execution of the court of registration. The effect of the scheme is to require State courts to enforce judgments rendered in other States as though they were judgments rendered in the court of registration. The Act creates a distinct entitlement to enforcement of a judgment in another State going beyond, and independent of, the entitlement to enforcement that the successful party would otherwise have.[92] The entitlement 'owes its existence to federal law or depends

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[88] ibid: powers of magistrate under s 18(3) and (6) are non-judicial; powers of judge of Supreme Court under s 19 are judicial and are validly conferred, the terms of the section being construed as conferring the power on a Supreme Court to be constituted by a single judge.

[89] eg s 16(1) confers power on a court and on a judge, magistrate or coroner to grant leave for the service of a subpoena outside the State or Territory of issue. The nature of the power thus conferred was considered to be judicial in *Alliance Petroleum Australia NL v The Australian Gas Light Company* (1982) 31 SASR 35, but that was in the context of State provisions concerning appeals from a decision of a Master of the Supreme Court, not in the context of limitations on Parliament's power to confer powers on State courts and officers.

[90] For confirmation that certain powers may be so regarded see *R v Quinn, ex parte Consolidated Foods Corporation* (1977) 16 ALR 569, 571 (Gibbs J).

[91] See para 64.

[92] The procedure for, and limitations and conditions on, enforcement of judgments at common law have been noted above: see para 64. It is also clear that no State could validly require the courts of another State to enforce the judgments of its courts.

upon federal law for its enforcement'[93] and therefore gives rise to a matter 'arising under' a law made by the Parliament within s 76(ii) of the Constitution. Hence it is clear that a State court when enforcing a judgment under the Act exercises federal jurisdiction. One consequence of this conclusion, if there was any doubt about the power to do so under s 51(xxiv), is that Parliament may place conditions on the exercise of the power to enforce judgments outside the State of rendition. A further consequence is that the limitations imposed by s 39 of the Judiciary Act 1903 (Cth), particularly as to the constitution of a State court of summary jurisdiction exercising the power to enforce judgments of another State's courts,[94] apply. However that limitation would not apply in relation to the administrative aspects of enforcement,[95] for example, the execution of enforcement process. A further consequence is that the power to regulate judicially enforcement of judgments rendered in other States could not be conferred on bodies that are not courts within Chapter III of the Constitution.

Proceedings assisted by the Act

72. In so far as the jurisdiction of State courts depends on the service of their process on defendants, the Service and Execution of Process Act, in providing authority for the service of process on a defendant outside the State of issue, operates to confer jurisdiction, in the sense of competence over defendants, on State courts. Does this amount to a conferral of federal jurisdiction? The opinion of text writers has consistently been that a court does not exercise federal jurisdiction in hearing and determining proceedings merely because service of process commencing the proceedings has been effected under the federal Act.[96] However a contrary view was expressed in certain earlier cases.[97] Certain remarks of the majority of the High Court in the case of *Gosper v Sawyer*[98] also could be taken as suggesting that the use of the Act to serve process outside the State of issue of process attracts federal jurisdiction in the hearing and determination of the proceedings. But in the recent case of *Flaherty v Girgis*[99] both the majority judgment and that of Justice Deane make clear that, although the Act

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[93] *R v Commonwealth Court of Conciliation and Arbitration, ex parte Barrett* (1945) 70 CLR 141, 154 (Latham CJ). See also *Felton v Mulligan* (1971) 124 CLR 367, 416 (Gibbs J).

[94] See para 70.

[95] The limitation imposed by s 39(2)(d) is confined to the judicial exercise of the federal jurisdiction of a court of summary jurisdiction.

[96] See eg Cowen & Zines 1978, 177; Nygh 1984, 51. See also Pryles & Hanks 1974, 10–1.

[97] eg *Atlas Company of Engineers v York* (1903) 29 VLR 92; *Jones and Co Ltd v Gardiner Bros* (1921) 23 WAR 23; *Dowd v Dowd* [1946] St R Qd 16; *A Patkin and Co Pty Ltd v Censor and Hyman* [1949] ALR 557. It has been noted that discussion of this matter often proceeded from a misconception of the nature of federal jurisdiction: see *Alba Petroleum Co of Australia Pty Ltd v Griffiths* [1951] VLR 185. The issue was sometimes further clouded where the court was held to be exercising federal diversity jurisdiction: see eg *Atlas Company of Engineers v York* (1903) 29 VLR 92.

[98] (1985) 58 ALR 13, 17 (Gibbs CJ, Wilson and Dawson J). The other members of the Court in the case made no comment on the question, but agreed with the majority on the question of the competence of the Court to deal with the matters before it: id, 27 (Mason and Deane J).

[99] (1987) 71 ALR 1.

operates to confer jurisdiction on a State court by extending the area of valid service for process issued out of the court, the jurisdiction of the court to hear and determine the proceedings after valid service is generally State jurisdiction.[100] Federal jurisdiction will be exercised by the court only in relation to the specific powers conferred by the Act on State courts[101] or 'if the authority of the court to decide the matter, questions of service apart, is derived from federal law'.[102]

Conclusions

73. Notwithstanding that some matters concerning Parliament's legislative power in this area remain to be resolved, it is apparent that s 51(xxiv) in conjunction with s 122 of the Constitution supports the present legislation. In addition, s 51(xxiv) and 51(xxv) would provide power to extend the present Act in relation to the range of proceedings which may be taken on sister-State judgments. Further, in view of the broad construction which the High Court has adopted on s 51(xxiv), there appears to be adequate power to extend the Act to provide for the service and execution of the process of tribunals performing dispute resolution functions similar to those of traditional courts and to provide for the execution of their orders. It is also likely that s 51(xxiv) would support legislation providing for the service and execution of process of tribunals performing investigative functions. The following chapters will draw on this discussion of constitutional matters in formulating proposals for reform of the Service and Execution of Process Act.

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[100] id, 16–7 (Mason ACJ, Wilson and Dawson J); 25 (Deane J). Two of the Justices constituting the majority in this case, Wilson and Dawson J, also were in the majority in *Gosper v Sawyer*: see above n 123.

[101] See above para 69, 71.

[102] *Flaherty v Girgis* (1987) 71 ALR 1, 17 (Mason ACJ, Wilson and Dawson J). See also 25 (Deane J).

3. Initiating process in civil proceedings

Introduction

74. The structure of, and facilities provided by, the Act were briefly explained in chapter 1.[1] Part II of the Act, which deals with service of process, is divided into Divisions which distinguish between various types of process and establish separate schemes for service depending upon the nature of the process or the nature of the proceedings in relation to which it is issued. This chapter examines the provisions of Division 1 of Part II, dealing with service of writs of summons, and makes recommendations for its reform.

Existing law

Definitions

Process to which Division 1 applies

75. Before discussing the substantive provisions of Division 1 of Part II, it is pertinent to note some definitions of the terms used there. The first definition of importance is that of a 'writ of summons'. It is defined in s 3 of the Act.

> "writ of summons" means any writ or process by which a suit is commenced or of which the object is to require the appearance of any person against whom relief is sought in a suit or who is interested in resisting relief sought in a suit.

The definition thus encompasses three types of process: commencing process; process the object of which is to require the appearance of a person against whom relief is sought; and process the object of which is to require the appearance of a person who is interested in resisting relief sought. The first component of the definition does not necessarily require the appearance of a person and would presumably include initiating process issued in an action *in rem* against a ship or its cargo.[2] This is reinforced by the definition of 'suit', as all three components of the definition of a 'writ of summons' relate to a 'suit'.

> "suit" means any suit, action or original proceeding between parties or *in rem*, but does not include —
>
> (a) a suit, action or proceeding in which a person is charged with an offence, whether the offence is punishable summarily or on indictment; or
>
> (b) except in Part IV, a suit, action or proceeding under a law of a State or part of the Commonwealth that makes provision with respect to the maintenance of wives, children or other persons or with respect to affiliation.

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[1] See para 25–9.

[2] But see ALRC 33, para 236, n 157.

In view of this definition, it is clear that a 'writ of summons' is a process concerned with what may loosely be described as civil proceedings. Criminal proceedings are excluded, as also are proceedings with respect to maintenance and affiliation.[3] Provision is made in another section of the Act for the service of process concerned with such proceedings.[4] The reason for the exclusion of maintenance and affiliation proceedings is unclear[5] but it may be that such proceedings were considered to be quasi-criminal in nature and therefore more appropriately dealt with in another part of the Act.[6]

76. The question whether a particular process falls within the definition of 'writ of summons' has arisen in a number of cases and the distinction drawn in the legislation between writs of summons, other process in a suit — dealt with in s 14 — and criminal or quasi-criminal process — dealt with in s 15 — has been the cause of some difficulty. On the distinction between writs of summons and other process within s 14, it is now established that a third-party notice[7] and an interpleader summons[8] are writs of summons rather than other process in a suit within s 14. A questionable decision on this distinction, however, is that of Justice Schutt in *In re The Australian United Insurance Co Ltd (In Liquidation)*.[9] A petition for the winding up of a company had been lodged in the Supreme Court of Victoria. Later, the liquidator issued a summons seeking an order directing payment of calls on shares by the shareholders. It was held that the petition for winding up initiated a 'suit' and thus was a writ of summons. The question which then arose was as to the proper categorisation of the summons for the order for payment of calls.[10] The question was described as a difficult one, but it was concluded that the summons was process within s 14 of the Act rather than a writ of summons. No reasons were given for this conclusion, but it may have been reached on the basis that the summons did not require the shareholder to appear. However, the fragility of such reasoning is highlighted by a comment of Justice Napier in a later case[11] concerning the applicability of the second component of the definition of the

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[3] Such latter proceedings are included, however, for the purposes of Part IV. That Part deals with interstate execution of judgments given in a suit and is discussed in ch 7.

[4] See s 15.

[5] Some of the consequences of the exclusion are discussed in *R v Dodds, ex parte Mitchell* (1959) 2 FLR 462, 467–8 (Kriewaldt J).

[6] See *Johnston v Johnston* (1921) 17 Tas LR 20, 23.

[7] *Gilchrist v Dean* [1960] VR 266. No reason is given in the judgment, but the conclusion is certainly justified on the basis that the third-party notice is a process whose object is to require the appearance of a person against whom some relief is sought in a suit.

[8] *Silsby v Muller* (1983) 48 ACTR 53. The proceeding in relation to which the interpleader summons was issued was held to be a separate proceeding from that in which a judgment had been given which potentially affected the rights of the person to whom the interpleader summons was directed. Therefore, the summons was not other process in a suit within s 14 of the Act.

[9] [1924] VLR 505.

[10] The significance of the question was whether the summons was required to bear the endorsements specified in s 5 of the Act, writs of summons requiring them and other process within s 14 not requiring them.

[11] *In re E & B Chemicals and Wool Treatment Proprietary Limited* [1940] SASR 267, 275.

term 'writ of summons'[12] to such process.[13] These cases, and their implications for the Commission's proposals for reform, are discussed more fully in chapter 5.[14]

77. The distinction between a writ of summons and process falling within s 15, in the context of process concerning maintenance proceedings, also gave rise to some difficulty for a time,[15] but the matter has now been settled by amendments to the definition of 'suit'[16] made by the Service and Execution of Process Act 1963 (Cth) s 3. Such proceedings are excluded from that definition, except in relation to Part IV of the Act. That amendment also excluded from the definition of 'suit' proceedings in which a person has been charged with an offence. Notwithstanding, it was argued in a later case[17] that a summons issued upon an information made on oath for an offence under the Marketing of Primary Products Act 1958 (Vic) was a writ of summons. Not surprisingly, that argument was rejected.

Courts in which proceedings are heard

78. Two other definitions should be briefly noted. Section s 4(1) of the Act permits the service of a 'writ of summons issued out of or requiring the defendant to appear at any Court of Record'. Section 3 of the Act defines 'Court' as including 'any judge or justice of the peace acting judicially' and 'Court of Record' as including 'any court that is required to keep a record of its proceedings'. While not courts of record at common law, it has been held that courts of petty sessions, which are required by their establishing statutes to keep a register in which their proceedings are to be recorded by a clerk of the court, are courts of record for the purposes of the Act.[18] This reasoning applies also to Local Courts and Magistrates Courts. However it is implicit in the decision of the Supreme Court of Queensland in *R v Small Claims Tribunal, ex parte Leggett Rubber Products Pty Ltd*[19] that Small Claims Tribunals established under the Small Claims Tribunals Act 1973 (Qld), although required to keep a limited record of their proceedings, are not Courts of Record within the Act.

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[12] See para 75.

[13] The process under consideration was the same as that with which *Australian United Insurance* had been concerned.

[14] See para 237–8, 241–2.

[15] See eg *Lindgran v Lindgran* [1956] VLR 215; contra *R v Dodds, ex parte Mitchell* (1959) 2 FLR 462, and the cases there cited.

[16] See para 75 for the terms of the present definition.

[17] *Colbert v Tocumwal Trading Co Ltd* (1965) 7 FLR 103.

[18] *Fallshaw Bros v Ryan* (1902) 28 VLR 279. See also *Alba Petroleum Co of Australia Pty Ltd v Griffiths* [1951] VLR 185.

[19] [1977] Qd R 196.

Procedure of service

Separate federal code

79. Section 4(1) of the Act provides that a 'writ of summons issued out of or requiring the defendant to appear at any Court of Record of a State or part of the Commonwealth may be served on the defendant in any other State or part of the Commonwealth'.[20] Except where the Act incorporates State procedures, for example, on the procedure by which a court or judge is to be satisfied as to one of the nexus grounds in s 11(1)[21] or authorises State rules to be made,[22] it has been held that the Act constitutes a separate code for serving writs of summons out of the jurisdiction and there is no need to comply with State provisions governing service of process *ex juris*.[23] Similarly, in view of the plain facilitation of service without the need for leave to issue or serve the writ of summons, it has been held that there is no need to comply with State laws which require leave to issue a writ intended to be served *ex juris* or leave to serve a writ *ex juris*.[24] Sometimes service *ex juris* is sought in reliance upon both the federal legislation and State law.[25] In principle there is no reason why this cannot be done as the federal legislation has been held not to be an exclusive code for service of process *ex juris* within Australia.[26] However reliance on both federal and State laws can cause confusion[27] and the indorsements to the writ required under State and federal law may be inconsistent.[28]

Indorsements[29]

80. While there is no need to obtain leave to issue a writ intended to be served, or to serve a writ, outside the place of issue,[30] a writ of summons served under the Act must bear certain indorsements. Those stipulated in s 5(1) and (2) are required to be

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[20] Section 4(1) was amended in 1912 to include the words 'or requiring the defendant to appear at' in order to overcome the problem arising from *Buckingham v Weatherup* (1903) 29 VLR 381, where it was held that a summons issued by a justice of the peace under s 42 of the Marriage Act 1890 (Vic) was a writ of summons but had not been issued out of any Court of Record because s 42 provided that 'such justice may issue *his* summons'.

[21] *Apex Hospitals and Management Pty Ltd v Dean*, unreported, Supreme Court of Victoria, 15 February 1977 (Murray J).

[22] See s 27 of the Act.

[23] See *Dowd v Dowd* [1946] St R Qd 16; *BP Australia Ltd v Wales* [1982] Qd R 386.

[24] See *Norddeutscher Lloyd Ltd v Ockerby & Co Ltd* (1918) 20 WALR 390; *Jones and Co Ltd v Gardner Bros* (1921) 23 WALR 23; *Roberts Express Deliveries Pty Ltd v Vartex Petroleum Industries Pty Ltd* (1985) 40 SASR 155.

[25] See eg *Hinton Bros v Heath* [1903] QWN 16.

[26] *KW Thomas (Melbourne) Pty Ltd v Groves* [1958] VR 189; cf *Flaherty v Girgis* (1987) 71 ALR 1, 22 (Brennan J).

[27] See eg *Luke v Mayoh* (1921) 29 CLR 435.

[28] See *Maurice v Maurice* (1945) 63 WN (NSW) 36.

[29] The Commission here adopts the spelling employed in this Part of the Act. In contrast, Pt III of the Act uses the more common recent spelling, 'endorsements'.

[30] This shorthand phrase is used as a convenient contraction of phrases such as 'State or Territory in which a process has been issued'. It is preferable to a phrase such as 'jurisdiction of issue' because of the many senses in which the word 'jurisdiction' may be used.

'indorsed' on the writ, while that prescribed by s 5(3) must be contained in, 'indorsed' on, or 'annexed' to the writ. Strict compliance with these requirements, however, has been held not to be necessary.[31]

81. Section 5(1) stipulates that the required indorsement is to be 'in addition to any other indorsement or notice required by the law of' the place of issue. While some of the early cases hold or imply that this provision is to be construed as requiring a writ served under the Act to bear the indorsements prescribed by State law for service out of the jurisdiction under State rules,[32] the preponderance of authority holds that the provision only requires State prescribed indorsements for writs generally, that is, indorsements that would be required on a writ to be served within the jurisdiction of issue.[33] There is a good reason for not requiring State indorsements applicable to process to be served out of the jurisdiction, for as noted in one case[34] there could be inconsistencies between the indorsements required by s 5 and those prescribed by State law.[35]

82. Section 5(1) requires indorsement on a writ of summons of a notice to the following effect:

> This summons [*or as the case may be*] is to be served out of the State [*or as the case may be*] of . . . . . and in the State [*or as the case may be*] of . . . . . .

As the indorsement is required to be specific as to the place in which the writ is to be served, a question has arisen in a number of cases regarding the validity of service where service has been effected in a place different from that specified in the indorsement. In some cases that circumstance has been held to be an irregularity capable of waiver by the defendant,[36] while in others it has been held that the difference could be misleading to defendants and will invalidate service.[37]

83. The second indorsement, prescribed by s 5(2), is required on 'every . . . writ of summons to which, by the law of [the place of issue], an appearance is required to be entered'.

> Your appearance to this summons [*or as the case may be*] must give an address at some place within 10 kilometres of the office of the . . . . . Court of . . . . . at . . . . . at which address proceedings and notices for you may be left.

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[31] eg *Ninette Trading Pty Ltd v Kenworthy* [1980] VR 510, 512 (Jenkinson J).

[32] See *B v D* [1903] QWN 18; *Hinton Bros v Heath* [1903] QWN 16; *Henry v Dennis* [1931] QWN 50.

[33] See *Pringle v Musgrove* (1903) 20 WN (NSW) 280; *Jones and Co Ltd v Gardner Bros* (1921) 23 WALR 23; *Dowd v Dowd* [1946] St R Qd 16; *Edgar V Hudson Ltd v Consolidated Electric Heating Co Pty Ltd* [1952] QWN 44; *Shepherd v Laudehr* [1972] Tas SR 275.

[34] *Pringle v Musgrove* (1903) 20 WN (NSW) 280, 282 (Pring J).

[35] For an example of the difficulties this may cause, see *Maurice v Maurice* (1946) 63 WN (NSW) 36.

[36] See eg *Keevers v O'Neill* (1977) 30 FLR 300; *Collins v Collins* [1944] QWN 46; *Logan v Logan and Philpott* [1955] QWN 63.

[37] *Whyatt v Whyatt and Welch* [1946] QWN 48.

In one case[38] it was noted that a question arose as to the need to include this indorsement where the law of the jurisdiction of issue permitted a defendant to file a notice of intention to defend, the issue being whether such a procedure fell within the meaning of the term 'appearance'. The matter remained undecided, however, as argument had not touched on the issue. A related question posed, but not decided, in that case, was whether s 8 of the Act had any application where there was no requirement under the law of the place of issue that the defendant enter an appearance.[39] Section 8 specifies the period to be stated in the writ as the period within which a defendant may enter an appearance. In the case of process issued in a State or mainland Territory and served in another State or mainland Territory the period is to be not less than 20 days. In any other case, a period of not less than 45 days is prescribed. Both these periods, however, are extended if the rules of the court of issue provide for a longer period within which a defendant may enter or make an appearance. Where the local period is shorter then indorsement of the shorter period is irregular.[40] The indorsement required by s 5(2) is also supported by s 9, which, so far as relevant, states

> Every appearance entered by or on behalf of a defendant to a writ of summons served on him under this Act shall give an address at some place within 10 kilometres of the office of the Court out of which the writ was issued, at which address all proceedings and notices may be left for him.

The effect of this provision is that a defendant served under the Act, even if having a local solicitor, must appoint an agent in the place of issue to receive proceedings and notices.

84. The third indorsement is prescribed by s 5(3).

> Every writ of summons for service under this Act shall also contain or have indorsed thereon or annexed thereto a short statement of the nature of the claim made or the relief sought by the plaintiff in the suit, and if the plaintiff sues in a representative capacity shall also state such capacity.

Satisfaction of this requirement necessitates more than a bald statement of the nature of the cause of action. Thus a statement that 'the plaintiff's claim is for damages and/or breach of contract' was held to fall 'far short of the requirements of the Act'.[41] Some cases also suggest that the statement required by s 5(3) must indicate the ground within s 11(1) upon which the plaintiff will rely if the defendant does not enter an appearance in the proceedings.[42] However, these suggestions are difficult to reconcile with High

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[38] *Licul v Corney* (1976) 50 ALJR 439, 455–6 (Gibbs J).

[39] cf White v Hardwick (1922) 23 SR (NSW) 6, 10.

[40] See Licul v Corney (1976) 50 ALJR 439; *Scougall v Parke and Lacy Co Ltd* [1902] QWN 23. In one case application was made to the court prior to the service of the writ to determine the correct period which should be indorsed on the writ: *McColl v Peacock* [1924] VLR 102.

[41] *Express Airways v Port Augusta Air Services* [1980] Qd R 543, 545 (Douglas J).

[42] See *BP Australia Ltd v Wales* [1982] Qd R 386, 390. See also *McColl v Peacock* [1924] VLR 102, 110; contra *Dowd v Dowd* [1946] St R Qd 16, 18.

Court authority that the facility for service *ex juris* provided by s 4(1) is not limited to the circumstances specified in s 11(1) which will warrant a grant of leave to proceed in the absence of an appearance by a defendant.[43]

85. A writ of summons which does not bear all the required indorsements is not void, but is declared by s 6 to be 'ineffective for service under this Act'. Two consequences follow. First, a judgment obtained in proceedings where the writ served did not contain all the required indorsements is not a nullity and the judgment stands until set aside. Second, the irregularity of a writ can be waived by the defendant, for example, by entering an unconditional appearance after service.[44] Despite some difficulty in reconciling all the cases, waiver probably arises by

> words or conduct of such a nature that an inference can properly be drawn therefrom that the party alleged to have waived the objection does not intend to rely upon it.[45]

Concurrent writs

86. Provision is made in s 7 for the issue of concurrent writs, one for service within the place of issue and one for service *ex juris*. If that is done, the writ for service *ex juris* is required to be marked as concurrent.[46] There are several situations where at present it may be desirable to issue a concurrent writ for service *ex juris* in preference to indorsing the original writ in accordance with s 5. First, if the original writ is issued for service within the place of issue (and hence does not bear the s 5 indorsements or the time period required to be stated by s 8) but the defendant leaves that place prior to service or otherwise cannot be found there, then a concurrent writ marked for service outside the place would have to be issued so that service can be effected in accordance with the Act.[47] Secondly, if it is unclear where the defendant can be served, it would be prudent for a plaintiff to obtain the issue of two writs, one for service within the place of issue and a concurrent writ for service out. The reason for this is simply that if only one writ is issued, for service within or outside that place, and the defendant is subsequently found and served outside that place or within it, respectively, service may be held to be irregular.[48] Another instance where it may be prudent to issue a concurrent writ is where there are two defendants, one within the place of issue and one outside. The original writ (without the s 5 indorsements) may be served on one defendant within that place while the other defendant may be served outside that place with the concurrent writ indorsed in accordance with s 5.

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[43] *Luke v Mayoh* (1921) 29 CLR 435. While it was suggested *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93, 107 (Dixon CJ and Fullagar J), that the authority of *Luke v Mayoh* 'may well . . . some day have to be reconsidered', a majority in *Flaherty v Girgis* (1987) 71 ALR 1 endorsed the decision in *Luke v Mayoh*.

[44] See *Lindgran v Lindgran* [1956] VLR 215; *Atlas Company of Engineers v York* (1903) 29 VLR 92; *Keevers v O'Neill* (1977) 30 FLR 300; cf *Laurie v Carroll* (1958) 98 CLR 310.

[45] *Lindgran v Lindgran* [1956] VLR 215, 220 (Smith J). See also Sykes & Pryles 1987, 28–31; 106–8.

[46] Failure to so mark the writ would presumably constitute only an irregularity which could be waived by the defendant: cf *Licul v Corney* (1976) 50 ALJR 439, 442 (Gibbs J).

[47] See *In re Boyd, deceased* [1927] VLR 132; *Licul v Corney* (1976) 50 ALJR 439.

[48] See para 82, n 37.

Mode of service

87. The basic rule for the mode of service of a writ of summons is stated in s 4(2) of the Act.

> Subject to any rules of court that may be made under this Act,[49] the service under this section of a writ of summons may be effected —
>
> (a) in the same manner as if the writ were served on the defendant in the State or part of the Commonwealth in which the writ was issued; or
>
> (b) without limiting the generality of the foregoing, where the writ of summons is to be served in a State or Territory on a corporation that —
>
> (i) is incorporated under a law in force in that State or Territory relating to companies; or
>
> (ii) is a foreign company for the purposes of, and is registered as such a company under, such a law of that State or Territory,
>
> by leaving at, or by sending by post to, the place that is, for the purposes of that law, the registered office of the corporation the writ of summons or a copy of the writ of summons.

The first part of this provision permits process to be served *ex juris* in the same manner as it could be served within the place of issue. If the local rules of court permit a form of substituted service, this procedure can be used when serving the process on the defendant under the Act.[50] The second part of the provision was enacted in 1968 to clarify the mode of service to be used where service was sought to be effected upon a corporate defendant which had no existence (that is, did not carry on business and was not registered as a foreign corporation) in the place of issue.[51] The amendment does not clarify the situation, however, where service is sought to be effected on a statutory

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[49] See s 27(1)(a). In fact few rules been made by the courts of the States and Territories.

[50] eg *Re Andrews, deceased* [1956] QWN 50, where service of process on various individuals within the State and outside the State was ordered to be effected by pre-paid registered post. See also *Stubbs v J & J Lonsdale and Co Limited* [1915] VLR 448, where substituted service on a foreign company by serving its agents in another State was permitted by the Supreme Court of Victoria.

[51] Prior to 1968, s 4(2) provided merely that, in the absence of court rules to the contrary, a corporate defendant was to be served in the same manner as if the process was served on the defendant in the place of issue. In *Colbert v Tocumwal Trading Co Pty Ltd* (1965) 7 FLR 103 — the process was held to be within s 15, but the classification did not matter for the provisions regarding the mode of service were the same — it was argued that as the defendant had no existence in the place of issue and was not registered as a foreign corporation there, local provisions providing for the service of process on corporations in that place had no application and thus could not be employed to serve the defendant outside that place in conformity with the Act. This argument was rejected on the basis that the provision was to be construed as providing that in the case of an artificial person, service could be effected outside the place of issue in the same way as service could be effected on an artificial person of the same class or kind within the place of issue. It was noted, however, that the language of the s 4(2) and 15(3) was imprecise and that the provisions should be amended to clarify the matter. The suggestion was subsequently taken up when the Act was amended in 1968 to include what is now para (b) of s 4(2) in substantially its present form. However s 15(3) has not been amended in similar fashion.

corporation or on other types of bodies corporate, such as an incorporated association, which have no registered office.

88. In connection with the mode of service the requirements of s 11 of the Act must also be considered.[52] When no appearance is entered or made by a defendant served with a writ of summons under the Act, the plaintiff must seek leave to proceed in the defendant's absence. One aspect of the leave procedure[53] requires the plaintiff to demonstrate that the requirements of s 11(1)(g), (h) or (i) have been satisfied. The requirements are

> (g) that the writ was personally served on the defendant; or in the case of a corporation served on its principal officer or manager or secretary within the State or part in which service is effected;
>
> (h) that reasonable efforts were made to effect personal service thereof on the defendant, and that it came to his knowledge or in the case of a corporation that it came to the knowledge of such officer as aforesaid (in which case it shall be deemed to have been served on the defendant); or
>
> (i) that, in a case where the defendant is a corporation that —
>
> (i) is incorporated under a law in force in a State or Territory relating to companies; or
>
> (ii) is a foreign company for the purposes of, and is registered as such a company under, such a law,
>
> service of the writ was effected in the manner specified in paragraph (b) of sub-section (2) of section 4.

These provisions may have the effect of modifying the simple method of service permitted under s 4(2)(a). Assume that a natural person (as opposed to a corporation) has been served *ex juris* by a form of substituted service. If by the law of the place of issue substituted service is permitted in relation to the service of process within the jurisdiction, then service *ex juris* in the same manner is plainly authorised by s 4(2)(a). However, if the defendant does not appear and the plaintiff seeks to proceed in the defendant's absence, then the plaintiff must show either that the defendant was personally served with the process under s 11(1)(g) or, under s 11(1)(h), that reasonable efforts were made to effect personal service and that the process came to the defendant's knowledge. The question which arises is whether the form of substituted service adopted is personal service within the requirements of s 11(1)(g), there being no definition of the term in the Act. At least one case holds that if a form of substituted service is deemed to be or to have the same effect as personal service under the rules of the court concerned, then service *ex juris* in accordance with that form will satisfy the requirement of personal service in s 11(1)(g).[54] Presumably the same result might follow in Western Australia, where a rule made by the Supreme Court pursuant to s 27(1)(a) of the Act provides 'personal service under the Act of the process of a Court of the State may be effected in the same manner as if the process was served within the State'.[55] If process can be personally served within the State by a form of substituted

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[52] This provision is considered in more detail below, para 108–29.

[53] The other concerns the fulfillment of one of the six nexus grounds specified in s 11(1)(a)–(f).

[54] *Grice v Grice* [1930] St R Qd 261.

[55] Supreme Court Rules (WA) O 81B, r 6.

service, then this is deemed to be personal service for the purposes of the Act. If the meaning of personal service in s 11(1)(g) depends on State law, it would follow that substituted service would not be sufficient for the purposes of that provision in a State or Territory where substituted service was not deemed to be a form of personal service.

89. Similarly, where process is served on a corporation under s 4(2)(a), for example by a form of substituted service, rather than under s 4(2)(b), the requirements of s 11(1)(g) and (h) must be borne in mind. For the purposes of obtaining leave to proceed in the defendant's absence, service of a writ of summons on an officer of the corporation who is not its principal officer, manager or secretary within the State in which service was effected will not be effective under para (g) and will only be effective under para (h) if the plaintiff can show that it came to the knowledge of the relevant officer of the corporation within the State of service.

Nexus requirement

Introduction

90. Section 4(1) permits a writ of summons to be served on a defendant in any part of Australia. It is not necessary to obtain leave to do so and there is no express requirement that the action in which the writ was issued have any defined nexus with the forum before the writ may be served, that is, the legislation does not expressly restrict service upon a defendant out of the jurisdiction to cases where there is some connection between the litigation and the forum of the action. However, if a defendant does not appear, s 11(1) requires that the plaintiff obtain leave to proceed in the defendant's absence from the court having cognizance of the proceedings or a judge thereof. In order to obtain leave the plaintiff must first show[56] that the case falls within one of the nexus requirements set out in s 11(1)(a)–(f). These paragraphs set out defined connections between the litigation or the parties and the forum. An application made by a plaintiff under s 11(1) is made ex parte, the defendant not having appeared to the writ. The defendant will therefore not be able to contest the question whether the case falls within one of the nexus grounds. However, if the plaintiff obtains leave to proceed, s 11(2) authorises the defendant to apply to set aside that order. It provides that any order giving the plaintiff liberty to proceed in the action 'may be rescinded or set aside or amended on the application of the defendant'.

91. In relation to s 11 a number of questions have arisen and many of these are interrelated. One question is whether s 11(1) implicitly limits s 4(1) so that service of a writ of summons on a defendant out of the jurisdiction is only authorised in the circumstances set out in the nexus grounds specified in s 11(1). Another is whether a defendant can raise the nexus issue otherwise than under s 11(2), and if so how. A third concerns the onus of proof regarding satisfaction of the nexus conditions.

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[56] The plaintiff must also show that service has been effected in a specified way: see above para 88.

Initial application by the defendant

92. *Procedure.* Experience has shown that defendants have not been content to raise the nexus issue pursuant to the procedure authorised by s 11(2) for seeking to set aside an order granting the plaintiff liberty to proceed. Instead, defendants have sought to raise the nexus issue soon after service by utilising procedures permitted by the rules governing the court of issue, arguing that the action does not fall within any of the nexus grounds. This course of action is not expressly authorised by the Service and Execution of Process Act. Nevertheless defendants have constantly sought to employ it throughout the eight decades during which the legislation has been in force. Such action by defendants has brought into focus the questions noted above.

93. In one early case[57] it was accepted that the defendant could, after service, seek to set aside service on the basis that the case did not fall within any of the nexus grounds of s 11(1). This procedure was rejected, however, in a number of cases in the 1920's, the most significant decision being that of the High Court in *Luke v Mayoh.*[58] While the matter was somewhat clouded in that case because of the plaintiff's reliance on both State rules and the federal Act to effect service outside the place of issue, the High Court observed that the issue of whether the action fell within the s 11(1) nexus requirements arose only where the defendant did not appear. Thus the power to serve a writ *ex juris* under the Act was not qualified by the nexus conditions.[59]

94. In a series of later cases defendants were again permitted to raise the nexus issue prior to an application by the plaintiff for leave to proceed under s 11(1). The leading decision is that of the Full Court of the Supreme Court of New South Wales in *Ex parte Walker, re Caldwell's Wines Ltd.*[60] In the opinion of the Court, all that *Luke v Mayoh* had decided was that the issue and service of a writ under the Act were good whether or not the action fell within s 11(1) of the Act, and that the High Court had expressly refrained from deciding whether the jurisdiction of a court to entertain a case under the Act could be challenged and, if so, at what stage. The Court noted that the Supreme Court Rules provided for the entry of a conditional appearance and concluded that a defendant served with process under the Act who entered such an appearance, or perhaps without appearing at all,[61] could move to stay proceedings on the ground that the action did not fall within any of the nexus grounds. The Court thus concluded that an early challenge on the part of the defendant was possible under the Act provided that the relief sought was a stay of proceedings as distinct from an order setting aside the writ or service thereof.

> A decision in the contrary sense would involve an interpretation of the Service and Execution of Process Act extending the jurisdiction of all State Courts and rendering the position of a defendant who enters an appearance definitely worse than that of

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[57] *Blunt v Collingwood Proprietary Tinmining Co, No Liability* (1903) 20 WN (NSW) 158.

[58] (1921) 29 CLR 435; see also *Jones and Co Ltd v Gardner Bros* (1921) 23 WALR 23 (decided earlier than *Luke v Mayoh*); *Clark & Co Pty Ltd v Kerin* [1926] VLR 559, which relied on the authority of *Luke v Mayoh.*

[59] (1921) 29 CLR 435, 439.

[60] (1931) 31 SR (NSW) 494.

[61] id, 503; cf 505.

> one who does not appear. If the Legislature intended to make such an extension of jurisdiction it is difficult to understand the reasons underlying the provisions of s. 11. If any defendant served anywhere within the Commonwealth is to be in the same position as any person formerly served within the boundaries of the State out of which the writ issues, there would seem to be no reason for protecting the defendant who does not enter an appearance.[62]

The Court's reasoning is not entirely convincing. If the defendant is served out of the jurisdiction and voluntarily appears to the writ the defendant submits to the jurisdiction and there is no need to prescribe a nexus. On the other hand if a defendant after service *ex juris* does not submit to the jurisdiction then it is not illogical to insist on a nexus between the litigation and the forum before the plaintiff is at liberty to proceed.

95. The procedure accepted in *Ex parte Walker* was subsequently sought to be employed by the defendants in *Watson v Jacobson*[63] and *Friedman v Kemp's Nurseries Ltd.*[64] While the attempts were unsuccessful — for reasons associated with the sufficiency of evidence[65] — it was acknowledged in both cases that a defendant could raise the nexus issue, independently of the plaintiff's application for leave to proceed, by way of an application for a stay of proceedings after service of a writ under the Act.

96. The High Court had an opportunity to comment upon these developments in *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd.*[66] In particular, Chief Justice Dixon and Justice Fullagar discussed the procedure, accepted in *Ex parte Walker*, by which the defendant could raise the nexus issue, describing it as a procedure whereby a defendant enters a conditional appearance to a writ, objecting to the jurisdiction of the court, and then applies to have the writ set aside on the basis that the action does not satisfy any of the nexus requirements of s 11(1). They commented that that procedure appeared to be inconsistent with the authority of *Luke v Mayoh* and remarked: 'it may well be that *Luke v Mayoh* will some day have to be reconsidered'.[67] But in fact the procedure described was not that which had been accepted in *Ex parte Walker.*[68] This and the other cases permitting a defendant to raise the s 11 issue, which were decided after *Luke v Mayoh*, in fact authorised a defendant to seek a stay of proceedings but expressly disapproved of the procedure whereby the defendant sought to have the writ or service thereof set aside. In the recent case of *Flaherty v Girgis*[69] a majority of the High Court noted the error made in *Tallerman* and expressly approved of the procedure whereby the defendant can raise the s 11 issue by way of an application for a stay of proceedings. It was also noted that, so understood, the procedure was not inconsistent with *Luke v Mayoh*, and that that case 'should be accepted as having been correctly decided'.

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[62] id, 503.
[63] (1946) 63 WN (NSW) 145.
[64] [1954] VLR 336.
[65] See below para 99 re onus of proof.
[66] (1957) 98 CLR 93.
[67] id, 107–8.
[68] See also id, 142–3 (Taylor J).
[69] (1987) 71 ALR 1, 8 (Mason ACJ, Wilson and Dawson J).

97. Thus despite occasional doubts a practice has grown up and has been widely adopted whereby a defendant can raise the nexus issue without having to wait until the procedure prescribed in s 11(2) can be employed. The procedure is to enter a conditional appearance (or perhaps not to enter any appearance) and then to apply by notice of motion for appropriate relief. The ground of relief is that the case does not fall within the nexus grounds set out in s 11(1). Following *Flaherty v Girgis*, it would seem that the order sought should be a stay of proceedings.

98. If a defendant enters an unconditional appearance he or she would submit to the jurisdiction and would thereafter be precluded from raising the nexus issue. An unusual situation arose in *Trail v Robell.*[70] There the plaintiff commenced an action in Western Australia and the defendant was served under the Act in New South Wales. The defendant entered an unconditional appearance and filed a defence and also a request for further and better particulars of the Statement of Claim. The plaintiff then amended the Statement of Claim. The defendant contended that the amended Statement of Claim did not fall within s 11(1) of the Act and sought to alter the appearance to stand as a conditional appearance. Mr Registrar Talalla held that it was too late for the defendant to withdraw from the action and argue the nexus issue. The defendant's only possible recourse was to seek to have the plaintiff's amendment disallowed or to seek to stay the proceedings on general grounds of *forum non conveniens.*

99. *Onus of proof.* Two questions still remain: who bears the onus of proof; and should issues of fact be decided in the preliminary proceedings or adjourned to the trial. In *Ex parte Walker, re Caldwell's Wines Ltd*[71] it was suggested that initially the defendant must put forward evidence which indicates that the action does not fall within any of the nexus grounds of s 11(1). This view was put more forcibly in *Watson v Jacobson*[72] where it was held that the onus was on the defendant who challenged the jurisdiction to establish the claim. However in *WA Dewhurst & Co Pty Ltd v Cawrse*[73] it was held that the onus of proof was always on the plaintiff, regardless of whether the nexus issue was raised on an application by the plaintiff for leave to proceed, on an application by the defendant for a stay of proceedings or for an order rescinding an order granting leave to proceed.[74] This view was followed in *McFee Engineering Pty Ltd (In Liquidation) v CBS Constructions Pty Ltd*[75] and *Hall v Australian Capital Territory Electricity Authority.*[76]

100. *Determination of disputed facts.* In *Ex parte Walker, re Caldwell's Wines Ltd*[77] it was noted that it was 'unsatisfactory for the Court to have to deal with cases of this sort on affidavit evidence', and that where there appears to be 'a genuine contest as to jurisdiction . . . the facts should be determined at the trial in the ordinary

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[70] (1983) 2 SR (WA) 35 (District Court of Western Australia).
[71] (1931) 31 SR (NSW) 494.
[72] (1946) 63 WN (NSW) 145.
[73] (1959) 2 FLR 184.
[74] id, 187–8.
[75] (1980) 44 FLR 340.
[76] [1980] 2 NSWLR 26.
[77] (1931) 31 SR (NSW) 494.

way.'[78] This approach was followed in *Friedman v Kemp's Nurseries Ltd*,[79] where the defendant was permitted to enter an appearance under protest to enable the contest as to the court's jurisdiction to be dealt with at the trial. However in *WA Dewhurst & Co Pty Ltd v Cawrse*[80] it was commented that while it may not be appropriate to determine jurisdictional questions of fact upon affidavit evidence the issue should be resolved prior to the trial because

> This issue would not arise at the trial and it seemed undesirable to allow this question to await decision until the trial after great expense had been incurred, third parties in all probabilities added, witnesses brought to Victoria . . .[81]

Application by the plaintiff

101. If the defendant does not enter an appearance within the time prescribed then the plaintiff can proceed in the absence of the defendant only if given leave to do so.[82] In order to obtain leave the plaintiff must first establish that the case fulfills one of the nexus requirements set out in s 11(1)(a)–(f) and secondly must show that the requirements of service as prescribed by s 11(1)(g)–(i) are satisfied.

102. In relation to the first condition, the nexus requirement must be established as at the date of the commencement of the proceedings and not at some earlier time.[83] The plaintiff can establish the nexus requirements by affidavit,[84] but the affidavit must state sufficient facts to enable a court to see whether the action falls within one of the nexus grounds; a bold assertion that the case falls within one of the grounds is not sufficient.[85] However, if State rules governing proceedings in a court require that matters be proved by oral evidence, affidavit evidence supporting an application for leave to proceed may properly be rejected.[86] In granting leave to proceed a court may impose conditions. These may be such as to provide an additional opportunity for a defendant to enter an appearance in the action and contest the merits of the case where the court has notice of a substantive defence on the part of the defendant.[87]

103. In relation to the second condition regarding requirements of service s 17 of the Act authorises proof of service to be made by affidavit.

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[78] id, 504.
[79] [1954] VLR 336.
[80] (1959) 2 FLR 184.
[81] id, 186 (Dean J).
[82] See *Rossitter v Rossitter* (1915) 32 WN (NSW) 113.
[83] *Dowd v Dowd* [1946] St R Qd 16.
[84] See *Ross v Tapfield* (1906) 2 Tas LR 64.
[85] See *Johnson v Wilkins* (1905) 11 ALR (CN) 50.
[86] *Apex Hospitals and Management Pty Ltd v Dean*, unreported, Supreme Court of Victoria, 15 February 1977 (Murray J).
[87] See eg *Reid Murray Development Queensland (Pty) Ltd v Lynwood Holdings Pty Ltd* [1964] QWN 1, where the plaintiff was given liberty to proceed on condition that it not do so until 14 days had expired from the service on the defendant of a copy of the order. The purpose was to enable the defendant to enter an appearance and contest the merits of the case within the 14 day period.

> When any writ notice decree or other process has under the provisions of this Act been served out of the State or part of the Commonwealth in which it was issued such service may be proved —
>
> (a) by affidavit sworn before any Justice of the Peace having jurisdiction in the State or part of the State or part of the Commonwealth in which such service was effected, or before a Commissioner for Affidavits or Declarations, or Notary Public for that State or part; or
>
> (b) in any manner in which such service might have been proved if it had been effected within the State or part of the Commonwealth in which the writ notice decree or process was issued.

Under usual practice where service within the place of issue is sought to be proved, an affidavit may simply depose that the deponent did on a particular day in a particular place serve the defendant person with a true copy of the writ. Such an affidavit has been held to be unsatisfactory, however, in the context of a plaintiff's application for leave to proceed in the absence of a defendant. Rather, the affidavit must set out facts which will enable the court to determine whether the person served was the defendant and must also disclose what actually took place when service is said to have been effected.[88]

Subsequent application by the defendant

104. The third way in which the nexus issue may arise is through an application under s 11(2) by the defendant to rescind, set aside or amend an order granting a plaintiff leave to proceed in the defendant's absence. There are very few reported cases in which defendants have availed themselves of this procedure. They have much preferred to raise the nexus issue by seeking to set aside the writ or service or to stay proceedings before a plaintiff applies for leave to proceed under s 11(1). However in one case the court, on the basis of argument that had not been put to the judge who had made the order giving leave to proceed, was persuaded to set aside the order.[89] This underscores the point that the plaintiff's application under s 11(1) is made ex parte and the court does not have the benefit of the defendant's argument. It is also possible that a defendant may be able to apply under s 11(2) even though the plaintiff has obtained judgment in default of appearance by the defendant.[90]

Restraint of plaintiff by proceedings in another jurisdiction

105. A recent case, *Beecham (Australia) Pty Ltd v Roque Pty Ltd*,[91] indicates that there may be a fourth avenue by which a defendant can seek to challenge the plaintiff's choice of venue. In that case the defendant, having been served under the Act with process issued out of the Supreme Court of Victoria, applied for an injunction

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[88] *Jarrett v Brown* [1908] VLR 478; followed in *Warringah Shire Council v Magnusson* (1932) 49 WN (NSW) 187; *Caloundra Fish and Ice Supply v Moon Bros Pty Limited* [1966] QJPR 52; *Artificial Breeding Board of Tasmania v Gordon* [1973] Tas SR (NC) 2. See further para 709–15.

[89] *In re Fowles* [1936] VLR 96.

[90] *Chenoweth v Summers* [1941] ALR (CN) 364.

[91] Unreported, New South Wales Court of Appeal (31 July 1987).

from the Supreme Court of New South Wales restraining the plaintiff from taking any further steps in the proceeding in Victoria on the basis that Victoria was a *forum non conveniens*.[92] An interim injunction was made. The plaintiff subsequently took further steps in the proceedings in Victoria and was cited in New South Wales for contempt of the injunction. On appeal against the finding of contempt, the New South Wales Court of Appeal commented that, while the validity of the injunction had not been challenged, such injunctions should rarely, if ever, be issued to restrain proceedings commenced in another court in Australia on the basis of the private international law rule of *forum non conveniens*. Justice McHugh specifically left open the question whether such a procedure could be invoked by a defendant served with process under the Act.

The nexus requirements defined

106. *Independent and exclusive nature*. The nexus grounds specified in s 11(1)(a)–(f) resemble those established under the rules of the various State Supreme Courts for service out of the jurisdiction and in interpreting them reference is frequently made to cases examining the analogous requirements in the State rules. Also, the construction given to the nature of those rules may provide some guide to s 11(1). For example, it has been held that for the purposes of the State rules it is not sufficient for the plaintiff to prove that his case falls partly within one ground and partly within another, because the grounds are independent and disjunctive.[93] Moreover, under State rules for service *ex juris*, it seems that a cause of action falling within one of the nexus grounds cannot be combined with a cause of action falling outside it.[94] While one early case[95] suggested that there was no such limitation in relation to service under the Act, more recent authority has adhered to the traditional view regarding joinder of causes of action that do not fall within the nexus grounds.[96] It has been argued that the restrictive traditional view, based on considerations that the extension of jurisdiction over defendants outside the place of issue involves the invasion of the sovereignty of some other forum and the imposition of considerable inconvenience upon a person who owes no allegiance to the forum of the action, is not similarly supported in relation to service within Australia under the Act. There can be no question of invasion of sovereignty or of non-allegiance, nor is the inconvenience of defending litigation in a State other than the defendant's State of residence serious. 'And there is something to be said for allowing all those causes of action which arise out of substantially the same facts to be resolved at once.'[97] However, in view of the weight of authority on the matter, it is unlikely that the courts would now depart from the traditional view.

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[92] See as to this procedure Sykes & Pryles 1987, 91.

[93] See *Matthews v Kuwait Bechtel Corp* [1959] 2 QB 57. This is no longer the situation in New South Wales: see Supreme Court Rules 1970 (NSW) Pt 10, r 1(w).

[94] See *Eyre v Nationwide News Proprietary Ltd* [1967] NZLR 851; *Diamond v Sutton* (1866) LR 1 Ex 130, 132.

[95] *Pringle v Musgrove* (1903) 20 WN (NSW) 280, 282 (Pring J).

[96] *Earthworks & Quarries Ltd v FT Eastment & Sons Pty Ltd* (1965) 8 FLR 32.

[97] Pryles & Hanks 1974, 34–5.

107. *Standard of proof.* The standard of proof required of a plaintiff who seeks to establish that the action falls within one of the nexus grounds has been variously defined. In one case[98] it was said that the plaintiff had to show that there was 'a strong argument, more than a prima facie case', that the cause of action fell within one of the nexus grounds. In other cases it has been said that the plaintiff must show 'a good arguable case'.[99]

108. *Paragraph (a).* In order to obtain leave to proceed in the defendant's absence under the first nexus ground the plaintiff must establish

> that the subject-matter of the suit, so far as it concerns such defendant is —
> (1) land or other property situate or being within the State or part of the Commonwealth in which the writ was issued; or
> (2) shares or stock of a corporation or company having its principal place of business within that State or part; or
> (3) any deed, will, document, or thing affecting any such land, shares, stock, or property.

The opening words of para (a) require that the property and documents described in subpara (1) to (3) be 'the subject-matter of the suit'. It is not sufficient that they are incidentally involved in the suit. The opening words also refer to the subject-matter of the suit 'so far as it concerns such defendant'. In *Hall v Australian Capital Territory Electricity Authority*[100] it was held that these introductory words required that the land or other property the subject-matter of the action must be that of the defendant, it being said that the 'section is aimed at enabling the court to give effect to a judgment whether the action be in rem or in personam'.[101] A different conclusion however was reached in *Lyndsay Edmonds & Associates Pty Ltd v Quest Sales Pty Ltd*,[102] a case concerning an alleged breach of copyright. It was held that by virtue of the Copyright Act 1968 (Cth) the copyright existed throughout Australia and that it did not cease to exist in one State merely because a defendant infringed the copyright outside that State. Unlike the decision in the *Hall* case, the court obviously thought that para (a) was satisfied if the plaintiff possessed property within the forum. The decision suggests that in copyright cases every court in Australia has jurisdiction by virtue of the paragraph.

109. Subparagraph (a)(1) refers to 'land or other property situate or being within the State or part of the Commonwealth in which the writ was issued'. The provision clearly includes movable property and other forms of property. But actions concerning claims for duties levied on property within the place of issue do not fall within the provision for the property is not itself the subject-matter of the action.[103]

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[98] *WA Dewhurst & Co Pty Ltd v Cawrse* (1959) 2 FLR 184, 189 (Dean J).

[99] See *Deer Park Engineering Pty Ltd v Townsville Harbour Board* (1974) 5 ALR 131; *McFee Engineering Pty Ltd (In Liquidation) v CBS Constructions Pty Ltd* (1980) 44 FLR 340.

[100] [1980] 2 NSWLR 26.

[101] id, 29 (Master Sharpe).

[102] (1979) 60 FLR 349.

[103] *In re Fowles* [1936] VLR 96. See also *State of Victoria v Hansen* (1959) 2 FLR 335.

110. In accordance with the long standing rule that jurisdiction must be established as at the commencement of the proceedings, the provision requires a determination as to whether the property is situated within the place of issue on the date on which proceedings are instituted. The situation or location of tangible property is obvious. However the location of intangible property, such as debts and other choses in action, is more difficult to establish. *State of Victoria v Hansen*[104] suggests that generally shares are situated where they are registered.[105]

111. Subparagraph (a)(2) refers to the subject-matter of the suit being 'shares or stock of a corporation or company having its principal place of business within' the place of issue. In *State of Victoria v Hansen*[106] it was held that an action to recover stamp duty on an instrument of transfer of stock units in a Victorian company did not fall within this provision as the stock units were not the subject-matter of the action. Justice Adam indicated that to be the subject-matter of an action the title to the stock units would have to be in question.

112. Subparagraph (a)(3) refers to the subject-matter of the suit being 'any deed, will, document, or thing affecting any such land, shares, stock, or property'. In *State of Victoria v Hansen*[107] Justice Adam also rejected a contention that the action fell within this subparagraph. The stamp duty was not a charge on the stock and thus could not be said to be a 'thing' affecting the stock.

113. *Paragraph (b).* Section 11(1)(b) provides that leave may be granted if it is shown

> that any contract in respect of which relief is sought in the suit against such defendant by way of enforcing, rescinding, dissolving, annulling, or otherwise affecting such contract, or by way of recovering damages or other remedy against such defendant for a breach thereof, was made or entered into within [the place of issue].

Three elements are involved. First, the action must involve a contract. Second, the relief sought must be 'by way of enforcing, rescinding, dissolving, annulling, or otherwise affecting such contract, or by way of recovering damages or other remedy against such defendant for a breach thereof'. Third, the contract must have been 'made or entered into within' the place of issue.

114. The term 'contract' in s 11 and its counterparts in virtually identical State rules authorising service *ex juris* has been interpreted broadly. The approach is well summarised in a passage from the judgment of Justice Adam in *Wilson Electric Transformer Co Pty Ltd v Electricity Commission of New South Wales.*[108]

> [I]n the present context 'contract' is not to be narrowly construed, but is wide enough to include what may be described as implied, constructive or fictitious contracts, without

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[104] (1959) 2 FLR 335.

[105] As to the location of various types of property for the purposes of jurisdiction in probate and administration matters and questions of choice of law, see Sykes & Pryles 1987, ch 18.

[106] (1959) 2 FLR 335.

[107] id, 340.

[108] [1968] VR 330, 332.

> consensual element, but for the purposes of the old forms of action, at any rate, deemed to amount to contract — cases where assumpsit or an indebitatus count would have been available at common law. Thus, for present purposes, an action on a foreign judgment, an action on an account stated, an action for money had and received may be treated as an action upon a contract.

In *Adcock v Aarons*[109] it was held that an action on a foreign judgment was an action upon a contract for the purposes of s 11. This was followed, although with some reservations, by the Supreme Court of New South Wales in *Nominal Defendant v Motor Vehicle Insurance Trust of Western Australia.*[110] In *Halliday v Ryan*[111] it was held that an obligation to pay money due upon accounts stated was a contract within the meaning of this provision. In *Chenoweth v Summers*[112] it was held that an obligation to pay State income tax constituted a contract. Obligations to pay other taxes have been held to constitute contracts also.[113] But not all statutory liabilities to pay money have been held to constitute contracts. In *Gilchrist v Dean*[114] it was held that a statutory right to contribution between tortfeasors did not constitute a contract, on the ground that a claim based on the statute resembled not the other statutory rights which had been held to constitute contracts, but rather the equitable right to contribution between trustees guilty of a breach of trust. Likewise in *Wilson Electric Transformer Co Pty Ltd v Electricity Commission of New South Wales*[115] it was held that a statutory right given to an employer who had paid workers' compensation to obtain indemnity from a third party was not a contract. It was held that the substantial character of the action was an action in tort.

115. The second element of para (b) requires that the relief sought in the action be by way of 'enforcing, rescinding, dissolving, annulling, or otherwise affecting such contract, or by way of recovering damages or other remedy . . . for a breach thereof'. The wording is particularly wide and suggests that it was intended to encompass all actions relating to contracts. The courts have supported this apparent intention and refused to read down these words.[116] The provision is broad enough to encompass a claim by a third party in respect of a contract provided that the relief is by way of 'affecting such contract'.[117]

116. The third element of para (b) requires that the contract be made or entered into within the place of issue. A contract is made within the forum when the last act necessary to create a binding contractual obligation takes place within the forum,

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[109] (1903) 5 WALR 140.

[110] (1983) 50 ALR 511, 515; approved in *Tana v Baxter* (1986) 68 ALR 245.

[111] [1938] ALR 200.

[112] [1941] ALR (CN) 364.

[113] See *State of Victoria v Hansen* (1959) 2 FLR 335; *Belyando Shire Council v Rivers* [1908] QWN 17.

[114] [1960] VR 266.

[115] [1968] VR 330.

[116] See eg *BP Exploration Co (Libya) Ltd v Hunt* [1976] 1 WLR 788; *Tana v Baxter* (1986) 68 ALR 245.

[117] *Nominal Defendant v Motor Vehicle Insurance Trust of Western Australia* (1983) 50 ALR 511.

determination of the last necessary act being made according to the standard rules as to the formation of contracts. In the case of a contract made by mail or telegram the last necessary act is the posting or cabling of the acceptance — thus the contract is made where posting or cabling occurs. Where a contract is concluded by instantaneous means of communication such as a telephone or telex it is made where the acceptance is received.[118] The rule is easy to state but its application in particular circumstances can be difficult. For example, in a case involving a series of complex negotiations and offers and counter offers, the task of determining which offer was accepted and where can be quite onerous.[119] In addition, the place where the contract is made may be determined by accident rather than design. Thus it may be questioned whether the place where a contract is made constitutes a sufficiently substantial connection with the forum to constitute a basis of jurisdiction.

117. In the case of notional contracts such as an implied obligation to pay taxes the contract will usually be made in the jurisdiction where the tax is payable. In *State of Victoria v Hansen*[120] stamp duty was assessed on an instrument of transfer of stock units in a Victorian company. It was held that the obligation to pay the duty constituted an implied contract and that it was made or entered into in Victoria, the obligation to pay the stamp duty arising only where a transfer of marketable securities had been executed in Victoria or received in Victoria.[121]

118. *Paragraph (c).* This provision permits a plaintiff to obtain leave to proceed in the defendant's absence if it is shown 'that the relief sought against the defendant is in respect of a breach, within [the place of issue], of a contract wherever made'. As with para (b) there are three elements involved. First, the action must involve a contract. The term 'contract', it has been noted, bears a broad interpretation.[122] The second element is that the action be one in respect of a breach of contract. This is much more restrictive than the broad language of para (b), discussed immediately above. The third element of the provision is that the breach relied upon be one which occurred within the forum. Thus the provision requires a determination of where the breach of contract, in respect of which relief is sought, occurred.

119. A common breach of contract is that of non-payment of monies due under a contract. Sometimes the contract expressly provides where the monies are to be paid

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[118] See generally *Deerpark Engineering Pty Ltd v Townsville Harbour Board* (1974) 5 ALR 131; *Remilton v City Mutual Life Assurance Society Ltd* (1908) 10 WALR 19; *Koranna Nominees Pty Ltd v Roberts* [1981] ACLD 801; *Hampstead Meats Pty Ltd v Emerson and Yates Pty Ltd* [1967] SASR 109; *State of Victoria v Hansen* (1959) 2 FLR 335; *Express Airways v Port Augusta Air Services* [1980] Qd R 543. Where a public telex facility is used, a variant of the postal rule has been adpoted, that is, the contract is deemed to be made where the acceptance is dictated: *Leach Nominees Pty Ltd v Walter Wright Pty Ltd* [1986] WAR 244.

[119] See *The King v The Stipendiary Magistrate at Biloela and Kallis, ex parte Savas* [1944] St R Qd 68; *WA Dewhurst & Co Pty Ltd v Cawrse* (1959) 2 FLR 184.

[120] (1959) 2 FLR 335.

[121] id, 341 (Adam J).

[122] See para 114.

and thus the breach will occur at this place.[123] However, often a contract is silent as to the place of payment. In determining the intended place of payment in such cases the courts have adopted a broad approach which considers all the surrounding circumstances.[124] While the intended place of payment must be ascertained as at the date of the making of the contract, some courts have considered the conduct of the parties after this date in determining the place of payment.[125]

120. Resort has also been made to one rule which has traditionally guided determination of the place of payment, namely, that it is for the debtor or obligor to seek out the creditor or obligee, the debt being payable where the creditor or obligee is found. Though this rule was not applied where the creditor was outside the realm, it has been held that this exception has no application where the parties to the contract are within Australia.[126] Thus the fact that the creditor lived in a different State to the debtor did not excuse the debtor from seeking out and paying the creditor at that place.[127] This rule has even been applied to a debtor's obligation to pay a judgment debt.[128] In relation to an implied contract to pay taxes, it has been held that this is breached in the State where the taxes are due.[129] This rule can have little relevance, however, where a creditor has several residences throughout Australia. In these cases it is essential to look at other factors as well, such as the place within which the contract is performed or largely performed[130] and the place where the account of the debtor is maintained.[131]

121. Where the breach concerned consists of a failure to supply goods or a failure to supply goods conforming to the contract specifications, the terms of the contract are vital in determining where the breach occurs. In the case of a CIF contract, the seller's obligation is performed when it ships the goods and forwards to the buyer an effective bill of lading and insurance policy. If the goods shipped are not in accordance with the contract the seller's breach takes place at the port of shipment and not at the port

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[123] See eg *Deerpark Engineering Pty Ltd v Townsville Harbour Board* (1974) 5 ALR 131.

[124] *Earthworks & Quarries Ltd v FT Eastment & Sons Pty Ltd* (1965) 8 FLR 32, 34–5 (Dean J); *BP Australia Ltd v Wales* [1982] Qd R 386, 392; *McFee Engineering Pty Ltd (In Liquidation) v CBS Constructions Pty Ltd* (1980) 44 FLR 340, 349.

[125] *McFee Engineering Pty Ltd (In Liquidation) v CBS Constructions Pty Ltd* (1980) 44 FLR 340, 351 (Yeldham J); *BP Australia Ltd v Wales* [1982] Qd R 386, 392 (Shepherdson J).

[126] eg in *Earthworks & Quarries Ltd v FT Eastment & Sons Pty Ltd* (1965) 8 FLR 32, 35 Justice Dean J commented: 'The States cannot really be regarded even in the most limited sense as being foreign to each other, at any rate since federation.'

[127] See eg *Shallay Holdings Pty Ltd v Griffith Co-operative Society Limited* [1983] VR 760; *Reid Murray Development Queensland (Pty) Ltd v Lynwood Holdings Pty Ltd* [1964] QWN 1.

[128] See *Nominal Defendant v Motor Vehicle Insurance Trust of Western Australia* (1982) 45 ALR 697; cf *Adcock v Aarons* (1903) 5 WALR 140 where a contrary result was reached.

[129] *State of Victoria v Hansen* (1959) 2 FLR 335.

[130] *McFee Engineering Pty Ltd (In Liquidation) v CBS Constructions Pty Ltd* (1980) 44 FLR 340.

[131] *BP Australia Ltd v Wales* [1982] Qd R 386.

of delivery.[132] Where, however, the obligation on the seller is to deliver the goods to the purchaser at the purchaser's residence, the breach will occur at the latter point and not at the point of shipment.[133]

122. A breach of contract by repudiation is committed where the overt act of repudiation takes place. Thus in one case it was held that repudiation effected by the posting of a letter, the sending of a telegram or by telephone occurred in the place where the letter was posted, the telegram sent or the words of repudiation were spoken.[134] There is a suggestion in some cases, however, that the place of breach is the place where the repudiation becomes known to the party complaining of the breach.[135]

123. *Paragraph (d).* Under this provision the plaintiff must show 'that any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was done or is to be done or is situate within' the place of issue. This provision may be broadly described as the tort provision, authorising leave to be granted in respect of actions involving torts committed within the forum. However the provision is not confined to torts and may extend to certain other types of actions as well. The analogous State provisions authorising service *ex juris* are not identical and are variously worded. For example r 7.01(1)(i) of the General Rules of Procedure in Civil Proceedings 1986 (Vic) authorises service *ex juris* whenever 'the proceeding is founded on a tort committed within Victoria'. Formerly s 18(4) of the Common Law Procedure Act 1899 (NSW) authorised service *ex juris* if 'there is a cause of action which arose within the jurisdiction'.

124. Clearly this provision applies in respect of torts where the act for which damages are sought was done within the State. Problems arise in relation to multi-jurisdiction torts, that is, torts where the various constituent elements are not confined to one State. However, the approach adopted in relation to State rules such as those extracted above has been to consider where the act on the part of the defendant which gave the plaintiff a cause of complaint occurred. If the act occurred within the jurisdiction then service could be effected *ex juris.*[136] This approach has also been adopted in relation to para (d) of the federal Act. In *Hall v Australian Capital Territory Electricity Authority*,[137] where the plaintiff alleged that the defendant had negligently started a

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[132] *Lewis Construction Co Pty Ltd v M Tichauer Societe Anonyme* [1966] VR 341, a case dealing with the former Order 11 of the Rules of the Supreme Court of Victoria. See also *The King v The Stipendiary Magistrate at Biloela and Kallis, ex parte Savas* [1944] St R Qd 68, a similar case concerning an action where the writ was served under the Service and Execution of Process Act.

[133] *Hampstead Meats Pty Ltd v Emerson and Yates Pty Ltd* [1967] SASR 109.

[134] *Safran v Chani* (1970) 15 FLR 292, 295–6.

[135] See eg *Weckstrom v Hyson* [1966] VR 277, 280; *Safran v Chani* (1969) 14 FLR 128, 138.

[136] *Distillers Co (Bio-Chemicals) Ltd v Thompson* [1971] AC 458 (PC), on appeal from the New South Wales Court of Appeal, concerning s 18(4) of the Common Law Procedure Act 1899 (NSW); *Buttigeig v Universal Terminal and Stevedoring Corporation* [1972] VR 626, concerning the predecessor to r 7.01(1)(i) of the General Rules of Procedure in Civil Proceedings 1986 (Vic), O 11, r 1(eb) of the Rules of the Supreme Court of Victoria.

[137] [1980] 2 NSWLR 26.

fire in the Australian Capital Territory which had spread into New South Wales where the plaintiff's property was situated, the plaintiff argued that as the damage to the property occurred in New South Wales the case fell within para (d). This contention was rejected on the basis that it was not sufficient that the last ingredient of the cause of action, the damage, had been sustained in the forum.

125. When a person has paid damages for a tort or made workers' compensation payments in respect of an accident and then seeks indemnity as against a third party the question which arises is whether the act for which damages are sought is the payment of damages for the tort or the payment of workers' compensation or, alternatively, the original tort or accident. In *Wilson Electric Transformer Co Pty Ltd v Electricity Commission of New South Wales*[138] it was held that the basis of the claim for damages in the shape of an indemnity was the original negligence of the defendant in causing the injuries which had resulted in the plaintiff having to pay workers' compensation to the injured worker. The alternative view, that the act for which damages were sought was the payment of workers' compensation, Justice Adam found to be 'quite unconvincing'.[139]

126. A somewhat analogous problem arises in relation to direct actions against insurers under legislation that enables an injured person to directly sue the insurance company in certain circumstances without first proceeding against the insured. In this case the question is whether the act for which damages are sought is the issuing of the insurance policy or the act causing injury. In *Hodge v Club Motor Insurance Agency Pty Ltd*[140] it was held that the plaintiff injured in the place of issue could maintain his action against the insurer of the driver whose negligence had caused the injury because the act for which damages were sought was the accident occasioned by the driver's negligence in the forum, and thus the action fell within para (d). In *Nominal Defendant v Motor Vehicle Insurance Trust of Western Australia*,[141] a case involving an action for indemnity against an insurer, *Hodge's* case was distinguished on the ground that the action was dissimilar and it was held that the case did not fall within para (d). The reasoning of the court on this point is brief and it would be unwise to attach too much importance to it, particularly as it had been concluded previously that the case fell within s 11(1)(c).[142] However the case is an authority of sorts for the proposition that for the purposes of para (d) the place of the negligent conduct resulting in an accident is not the determinative factor in an action for indemnity brought against an insurer.

127. *Paragraph (e).* This nexus requirement focuses on the fact that the defendant was within the forum at the time when the liability sought to be enforced arose. It probably derives from a suggested basis of international jurisdiction for the recognition of foreign judgments.[143] The Commission has been unable to find any reported cases on this provision.

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[138] [1968] VR 330.
[139] id, 333. See also *Baldry v Jackson* [1977] 1 NSWLR 496.
[140] (1974) 22 FLR 473.
[141] (1982) 45 ALR 697; upheld on appeal (1983) 50 ALR 511.
[142] On appeal, Justice Miles did not discuss this point at all.
[143] See Sykes & Pryles 1987, 55.

128. *Paragraph (f).* This paragraph enables leave to be granted in a matrimonial cause where the domicile of the person against whom any relief is sought is within the State or part of the Commonwealth in which the writ was issued or where the proceedings were instituted under the Matrimonial Causes Act 1959 (Cth). When matrimonial causes were a matter of a State law this paragraph was of some importance. Process to commence State proceedings for matrimonial relief could be served on a defendant out of the jurisdiction if the defendant was domiciled within the forum.[144] Since the enactment of federal law in point, State law has ceased to be of much relevance. Further, the reference in the paragraph to the Matrimonial Causes Act 1959 (Cth) is out of date as that Act was repealed by the Family Law Act 1975 (Cth).[145] However, process issued under the Family Law Act can be served throughout Australia and elsewhere in accordance with O 18, r 5 of the Family Law Rules made pursuant to the Family Law Act.

Discretion

129. The language of s 11(1) is couched in terms that provide a court with a discretion to refuse to grant a plaintiff leave to proceed in the defendant's absence notwithstanding that the plaintiff has satisfied the court that the action fulfils one of the nexus grounds. The courts have accepted that such a discretion does exist on the basis of the use of the word 'may' and the presence of the power to prescribe the manner of proceeding and to impose conditions.[146] In determining how the discretion should be exercised the courts have considered the convenience of the parties and their witnesses in having the action tried in the jurisdiction of their choice. But primacy has been accorded to the plaintiff's right to choose the place of trial, which will be interfered with only on some definite and clear ground of inconvenience or otherwise.[147]

Security for costs

Validity and purpose

130. Section 10 of the Act provides that any defendant who has been served under the Act with a writ of summons may apply to the court out of which the writ was issued, or a judge thereof, for an order compelling the plaintiff to give security for costs, and upon such application the court or judge may require the plaintiff to give such security. The validity of this provision was upheld by the High Court in *McGlew v New South Wales Malting Co Ltd.*[148] The Court noted that a law providing for interstate service of process, by which a defendant might be summoned to appear in the court of a distant State and defend at his own expense a claim possibly without any

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[144] See eg *Yule v Yule* (1934) 51 WN (NSW) 60.

[145] s 10(b) of the Acts Interpretation Act 1901 (Cth) does not assist here, as the Family Law Act is not a re-enactment of the Matrimonial Causes Act.

[146] See *Earthworks & Quarries Ltd v FT Eastment & Sons Pty Ltd* (1965) 8 FLR 32, 36–7 (Dean J); *WA Dewhurst & Co Pty Ltd v Cawrse* (1959) 2 FLR 184.

[147] See eg *Shallay Holdings Pty Ltd v Griffith Co-operative Society Ltd* [1963] VR 760; *Lyndsay Edmonds & Associates Pty Ltd v Quest Sales Pty Ltd* (1979) 60 FLR 349; *Beecham (Australia) Pty Ltd v Roque Ltd* (1986) 2 VJB 174.

[148] (1918) 25 CLR 416.

foundation, was obviously open to great abuse. It was therefore open to Parliament to enact provisions to take precautions against that danger. The Court considered that there was ample power for the federal legislature to enact such a provision under the incidental power, s 51(xxxix) of the Constitution, even if the primary power, that is, s 51(xxiv), did not imply that such provision could be made.

Discretionary nature

131. The terms of s 10 clearly indicate that the defendant does not have a right to obtain an order compelling the plaintiff to give security for costs; the court or judge to whom application is made 'may' make the order. The cases have stressed the discretionary nature of this provision.[149] In contrast some State provisions authorising an order requiring security for costs are mandatory and entitle the applicant to security as of right.[150] But a mandatory State rule conferring a right on a defendant to obtain an order for security for costs may be inconsistent with s 10 of the federal Act and therefore inoperative by virtue of s 109 of the Constitution in cases where the defendant has been served out of the jurisdiction under the Act.

Principles guiding exercise of the discretion

132. Section 10 provides no guidance as to the appropriate circumstances in which an order compelling the plaintiff to give security for costs should be granted. Before the enactment of the Act a plaintiff resident outside the place of issue was compelled to give security for costs because of the difficulty that would be encountered by a defendant in enforcing a costs order against the plaintiff. An exception was made where the plaintiff could show that there was substantial property of a fixed and permanent nature within the jurisdiction which would be available in the event of the defendant being entitled to the costs of the action. This practice was not necessarily aimed at the plaintiff who was without means but was directed to the plaintiff who did not possess leviable assets within the jurisdiction.[151]

133. This consideration, however, is of little relevance in relation to applications for security for costs under s 10. First, the common situation will involve a plaintiff who is resident within the place of issue and a defendant who is resident and has been served with process outside that place. Secondly, even if the plaintiff is not resident within the place of issue and is not possessed of assets there, judgments, including costs orders, are enforceable throughout the Commonwealth pursuant to the provisions of Part IV of the Act.[152] Consequently if a defendant is successful in an action and obtains an order for costs the judgment will be enforceable against the plaintiff in whichever State

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[149] See *Ramsay v Eager* (1902) 27 VLR 603, 604; *Badge v Oldmeadow* (1911) 13 WALR 85, 86; *Sims v Robertson* (1921) 38 WN (NSW) 36; *Watson v Jacobson* (1946) 63 WN (NSW) 145, 146.

[150] See eg the State rule discussed in *Lowe v Brewer* (1904) 21 WN (NSW) 147.

[151] See *Sims v Robertson* (1921) 38 WN (NSW) 36; *Ramsay v Eager* (1902) 27 VLR 603.

[152] Part IV is discussed in ch 7.

or Territory of the Commonwealth the plaintiff resides or has property.[153] It is clear therefore that other considerations must guide the exercise of the discretion under s 10.

134. The main consideration which has influenced the courts in determining whether to make an order under s 10 is the situation of the natural or appropriate forum of the action. If the plaintiff institutes proceedings in a State or Territory that is not the natural forum of the action, the courts have been inclined to exercise the discretion in favour of making an order compelling the plaintiff to give security for costs. Conversely where the plaintiff sues in a forum which is the natural forum for the action the courts have been very reluctant to make such an order.[154] While the courts have stressed that each case must be decided on its merits, guidance as to the natural or appropriate forum has been obtained by reference to the types of considerations which would guide the determination of an application for a change of the venue of an action between parties within a State.[155]

135. It was at one time suggested that the financial circumstances of the plaintiff are relevant to the exercise of the discretion under s 10; that impecuniosity on the part of the plaintiff, and hence inability to pay costs if defeated, would justify the making of an order compelling the plaintiff to give security for costs.[156] However, in more recent cases the view has been taken that the poverty of the plaintiff is not in itself a sufficient reason for compelling the plaintiff to give security for costs. Linked with other factors, however, such as that the plaintiff has taken the action from its natural or approporiate forum, the financial circumstances of the plaintiff may justify the making of an order under s 10.[157]

136. A third factor to which relevance was attached in one case was the temporary residence of the plaintiff in the place of issue. It was said that that if the plaintiff was only temporarily in the forum and was liable to depart at short notice, and could therefore be shown to be 'a mere sojourner' in the forum, that would be an appropriate instance in which the court could order the plaintiff to give security for costs.[158]

Amount of costs

137. There has been little discussion in the cases of the extent to which security provided by a plaintiff should cover the potential costs of the defendant. However in *Evans v Sneddon*[159] it was held that where a defendant established a case for an order

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[153] See the observations made in *Sims v Robertson* (1921) 38 WN (NSW) 36. See also *Ramsay v Eager* (1902) 27 VLR 603.

[154] On this approach see *Smith v Chisholm* [1908] VLR 579; *Evans v Sneddon* (1902) 28 VLR 396.

[155] *Paull v Pettitt* (1912) 29 WN (NSW) 44; *Watson v Jacobson* (1946) 63 WN (NSW) 145.

[156] *Ramsay v Eager* (1902) 27 VLR 603.

[157] *Evans v Sneddon* (1902) 28 VLR 396, 401; *Sims v Robertson* (1921) 38 WN (NSW) 36; *White v Hardwick* (1922) 23 SR (NSW) 6. See *Badge v Oldmeadow* (1911) 13 WALR 85 for a case where, coupled with other factors, the impecuniosity of the plaintiff was a sufficient reason for requiring security for costs.

[158] *Ramsay v Eager* (1902) 27 VLR 603.

[159] (1902) 28 VLR 396.

under s 10, the order should require the plaintiff to give security for the whole costs of the action, not merely for the difference between the costs incurred by the defendant in litigating in the place of issue and the costs which would be incurred if the plaintiff brought the action in the natural or appropriate forum.

Effect of service

Issue

138. A very important issue concerning the operation of the Act — and one which long gave rise to many disputes in the courts — is the question of the ramifications which service of initiating process on a defendant out of the place of issue under the Act has for the jurisdiction of the State or Territory court concerned with the proceeding. While the matter now appears to be settled, discussion of the question is warranted in view of the diversity of opinion that was once expressed and because of its importance to the efficacy of Parliament's efforts to facilitate the conduct of legal proceedings across State and Territorial boundaries.

Nature of curial jurisdiction

139. Before discussing the views held on the matter, some comment should be made on the nature of curial jurisdiction and the considerations which the courts have deemed relevant to the question. The term 'jurisdiction' is a very broad and imprecise one when applied to courts of law. It is apt to cover the nature of jurisdiction, such as whether a court is exercising federal or State jurisdiction, as well as to describe matters such as a court's competence over the subject-matter of the action — the amount in controversy or the nature of the claim — or the ability of a court to grant the relief sought by a plaintiff. However often the term is used to refer to the court's competence over the defendant. The term is used in that sense in the following discussion. In an action *in personam*[160] the court must possess jurisdiction over the defendant and jurisdiction in this sense is primarily determined by the rules governing service of process. In the classic English text on the conflict of laws the rule is expressed as follows:

> Every action in the High Court commences with the issue of a writ or originating summons, which is a written command from the Queen to the defendant to enter an appearance in the action; and the service of the writ, or something equivalent thereto, is essential as the foundation of the court's jurisdiction. When a writ cannot legally be served upon a defendant, the court can exercise no jurisdiction over him. In an action *in personam* the converse of this statement holds good, and whenever a defendant can be legally served with a writ, then the court, on service being effected, has jurisdiction to entertain an action against him. Hence in an action *in personam* the rules as to the legal service of a writ define the limit of the court's jurisdiction.[161]

Considerations involved

140. In approaching the general issue the courts have thus had to consider limits regarding legal service of process. First, they have examined State and Territory laws

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[160] As to the meaning of an action *in personam* see Sykes & Pryles 1987, 22.

[161] JHC Morris (ed) *Dicey and Morris on The Conflict of Laws* 1980, 181–2.

to ascertain whether the jurisdiction of their courts is limited by virtue of limitations on the area within which service of their process may be effected. Such local laws permit the process of the Supreme Courts of the States and Territories, and some inferior courts,[162] to be served outside the geographic boundaries of their State or Territory.[163] In respect of many inferior courts, however, no such provision is made. Their process, therefore, is not permitted under local law to be served outside the State or Territory concerned.

141. State and Territory laws may also be relevant in determining whether the jurisdiction of a State or Territory court depends on the area of service or is further limited. Leaving aside questions of the subject-matter of the proceedings (the amount in controversy or the nature of the claim), it has been suggested in some cases that jurisdiction in the sense of competence over the defendant depends not simply on the provisions for service of process but may be limited to, for example, persons resident within the State or Territory concerned. This latter view would mean that jurisdiction could not be exercised over a person resident in another State even though there was provision for service of process *ex juris* under the law of the State of issue.

142. Apart from the effects of State and Territory laws, the effect of the federal Act must be considered. The Act authorises process initiating a proceeding to be served on a defendant outside the place of issue of the process. However, the question of the effect of service pursuant to the Act so far as the jurisdiction of State and Territorial courts are concerned is not addressed in the Act.[164] In relation to process initiating civil proceedings there is merely s 12 which deals with the effect of a judgment obtained after service of a writ of summons under the Act. That provision in no way relates to the effect which service under the Act has on the jurisdiction of the court out of which the process issued. However, the terms of s 13 have been particularly relevant in influencing the view taken by the courts as to effect of the general provisions in the Act authorising service of process outside the place of issue.

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[162] eg District Courts in Queensland.

[163] Constitutional doubts about the ability of a State legislature, or its delegate, to so provide have now been laid to rest: see *Ashbury v Ellis* [1893] AC 339. But there may still be a question whether Rules of the Supreme Courts authorising service *ex juris* are validly made under authority of legislation empowering the judges to make rules respecting the 'practice and procedure' of the court. While that question was decided in the affirmative in *HC Sleigh Ltd v Barry Clarke & Co Ltd* [1954] SASR 49, 51–3, it may be inferred from a comment by Gibbs CJ, Wilson and Dawson J, in *Gosper v Sawyer* (1985) 58 ALR 13, 18 that the earlier decision may have to be reconsidered.

[164] The provision in relation to process within s 15, that service under the Act is to have the 'same force and effect' as if service had been effected within the place of issue, has not been seen to deal with the matter. In any event, there is no such provision in relation to process falling within the definition of 'writ of summons'.

> This Part does not confer on any Court jurisdiction to hear or determine any suit which it would not have jurisdiction to hear and determine if the writ of summons had been served within the State or part of the Commonwealth in which the writ was issued.[165]

Two views of the Act

143. In the result two views of the operation of the Act,[166] so far as concerns the jurisdiction of State and Territory courts, emerged. On one view the general provisions authorising service of process *ex juris* effectively extend the area of effective or valid service of process and thus extend the jurisdiction — in the sense of competence over defendants — of State and Territory courts. That is, to the extent that the jurisdiction of these courts depends upon the service of process on a defendant, the federal legislation extends their jurisdiction. However an alternative view suggests that the Act does not extend the substantive jurisdiction of State and Territory courts but is merely procedural in character and provides an alternate mode for service of process outside the State or Territory in which the initiating process was issued. At its simplest, this narrow view means that the federal Act cannot operate to give a State or Territory court jurisdiction over a defendant outside the State or Territory unless the local law authorises the court to assume jurisdiction over such a defendant. Only if the court could exercise jurisdiction over absent defendants under State or Territory law would the federal legislation be effective and provide an alternate mode of service of process to that established under the local law.

The authorities[167]

144. *Early cases — the broad view.* Two relatively early decisions[168] in which the issue arose adopted the broad view of the Act. It was said that, in authorising service of process *ex juris*, the Act operated to 'extend the area of lawful service'[169] and thus

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[165] In referring to 'this Part', the apparent intention of the provision is to deal with the jurisdiction of courts in all proceedings, both civil and criminal, in which process is served under the Act. Its position in Division 1 of Part II, which deals exclusively with process initiating civil proceedings, therefore seems inapt. However, the provision only concerns the jurisdiction of a court to hear and determine a 'suit', that is, a civil proceeding (see para 75). Thus, unless a 'contrary intention' (see introductory words to s 3) as to the meaning of the term 'suit' in s 13 is to be inferred from the reference to the 'Part' of the Act rather than the Division — and a factor leaning the other way is that the provision appears in Division 1 of the Part — s 13 is only relevant to the jurisdiction of a court to hear and determine a civil proceeding.

[166] The divergent views as to the extent of power in s 51(xxiv) so far as this matter is concerned have been discussed previously: see para 46.

[167] All the authorities were exhaustively examined in one of the Research Papers issued in the course of the Reference, Pryles 1984a, para 100–18. For present purposes it is necessary only to summarise the principles expounded in the cases and to update the material in the light of later cases.

[168] *John Sanderson & Co v Crawford* [1915] VLR 568; *Johnston v Johnston* (1921) 17 Tas LR 20.

[169] [1915] VLR 568, 574 (Madden CJ).

extended the jurisdiction of State courts notwithstanding the lack of State provisions providing for the assumption of jurisdiction over defendants outside a State.

145. *Establishment of the narrow view.* However, in an even earlier case[170] the narrow view, that the Act is merely procedural in character, had been espoused. It was said there

> . . . that s. 4 was intended, not to extend the jurisdiction of the State Court, but to authorise the service in another State of a writ of summons in cases where the particular State Court, out of which the writ issues, has jurisdiction apart from the provisions of the Service and Execution of Process Act.[171]

This view was adopted in an important decision of the Supreme Court of New South Wales, *Ex parte Gove.*[172] Relying on a decision of the High Court, *City Finance Co Ltd v Matthew Harvey & Co Ltd*[173] — which had held that prima facie a statute conferring jurisdiction on a court was limited to persons within the territorial limits of the local legislature — the Chief Justice held that there was nothing in the legislation dealing with the jurisdiction of the court in question to rebut this prima facie rule and therefore under State law the court could only exercise jurisdiction with regard to persons within the State. Turning to the operation of the federal Act, His Honour said: 'I cannot find one word in the Service and Execution of Process Act which purports to extend the jurisdiction.'[174] To emphasise this point he referred to s 13 of the Act, saying that it guarded 'against any misapprehension . . . that the Federal Legislature intended to confer some new jurisdiction' on State courts. The other members of the court agreed, Justice Ferguson saying that the jurisdiction of a court to deal with a defendant outside a State had to be found in State law and that the federal Act could not confer such jurisdiction where none existed under State law.[175] The decision was therefore authority for the narrow view of the operation of the Act.

146. The Gove case was followed in a number of subsequent cases involving the jurisdiction of courts other than Supreme Courts, including *Mutch v Dalley*[176] and *City and Suburban Parcel Delivery (Bryce) Ltd v Gourlay Bros Ltd.*[177] It was also applied in relation to an action in the Supreme Court of New South Wales in *Braemar Woollen Mills Co-op Ltd v Poinsettia Hosiery Mills Pty Ltd.*[178] But shortly after the *Braemar* case the same court, in *Commissioner of Road Transport and Tramways v Green Star Trading Co Pty Ltd,*[179] arrived at a contrary decision and effectively overruled *Braemar* without referring to it. However, the court did not disapprove its prior decision in the

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[170] *Blunt v Collingwood Proprietary Tinmining Co, No Liability* (1903) 20 WN (NSW) 158.
[171] ibid (Cohen J).
[172] (1921) 21 SR (NSW) 548.
[173] (1915) 21 CLR 55.
[174] (1921) 21 SR (NSW) 548, 554.
[175] id, 556. See also 556 (Wade J).
[176] [1923] St R Qd 138 (by majority).
[177] [1932] St R Qd 213; reversed on other grounds *Gourlay Bros Ltd v City and Suburban Parcel Delivery (Bryce) Ltd* [1932] St R Qd 250.
[178] (1933) 51 WN (NSW) 6.
[179] (1936) 36 SR (NSW) 320.

Gove case and was careful to distinguish it, on the basis that the Supreme Court, unlike inferior courts, had jurisdiction in respect of at least some defendants out of the jurisdiction.[180] But in *A Patkin & Co Pty Ltd v Censor and Hyman*[181] the Victorian Supreme Court distinguished its earlier decision which had adopted a broad view of the operation of the Act, *John Sanderson & Co v Crawford*[182] and effectively adopted the Gove line of reasoning, although the Court held that the federal Act could authorise service of process *ex juris* with respect to heads of federal jurisdiction even though State law made no provision for service *ex juris*. As the *Patkin* case involved Supreme Court process it differs in result from the New South Wales decision of *Commissioner of Road Transport and Tramways v Green Star Trading Co Pty Ltd.*[183] The decision in the *Patkin* case was also inconsistent with the Victorian court's prior decision in *Swan Hill Co-operative Society Ltd v Richardson*,[184] where *John Sanderson & Co v Crawford* had been followed, but no reference was made to the *Swan Hill* case in the *Patkin* decision.

147. *Maintenance cases.* All the decisions discussed above concerned process falling within the definition of 'writ of summons',[185] that is, initiating process in civil proceedings. The issue of the effect of service as concerns the jurisdiction of State and Territory courts also arose in a number of cases in which the process in point concerned maintenance proceedings, falling within the ambit of the predecessor to the present s 15 of the Act. There was a complicating factor in these cases, which was the existence of two sets of State and Territory laws, one purporting to deal with situations where the person from whom maintenance was sought was within the State or Territory (the 'intrastate' legislation), and another specifically directed to the situation where that person was outside the State or Territory (the 'interstate' legislation). The question which arose was whether maintenance process under the 'intrastate' legislation could be served ex juris relying on the federal Act.

148. In *Colquhoun v Bell*[186] it was held that, while Parliament might possess sufficient power to extend the jurisdiction of State courts, the federal Act did not do so. In other words, the narrow view of the Act was adopted. Therefore, the federal Act could not be relied upon to serve process issued under the 'intrastate' legislation outside the territory of a State. However, the authority of the *Colquhoun* case was substantially weakened by a subsequent decision of the same court in *Enman v Enman*,[187] where *Colquhoun* was confined to its particular facts. And in *R v Dodds, ex parte Mitchell*,[188] while it was acknowledged that under the arrangement of the State legislation it may be logical to proceed under the 'intrastate' legislation where the defendant was within the State and the 'interstate' legislation where the defendant was outside the State,

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[180] See id, 327.
[181] [1949] ALR 557.
[182] [1915] VLR 568: see para 144.
[183] (1936) 36 SR (NSW) 320.
[184] [1930] ALR 156.
[185] See para 75.
[186] [1935] SASR 346.
[187] [1942] SASR 131.
[188] (1959) 2 FLR 462.

the federal legislation applied to validly authorise the service of process issued under the 'intrastate' legislation outside the State. Thus it was held that the federal Act to this extent operated to extend the jurisdiction of the State court. But in *Hodgson v Ryan*[189] it was held that where under State law a court possessed no jurisdiction over a defendant who had never been domiciled or resident or present in the State, the federal Act did not confer such jurisdiction.

149. While important, the authority of these maintenance cases cannot be overstated in relation the general issue so far as concerns the service of process initiating civil proceedings. This is because of the suggestion in some of the cases that the maintenance legislation involved was quasi-criminal in nature, the power of a court to award maintenance against the defendant being dependent on the act of leaving the plaintiff without means of support having occurred within the State.[190] Conceivably this may require that the defendant must have been within the State at some stage. On this view *R v Dodds, Hodgson* and, perhaps, *Colquhoun*, are reconcilable on their facts.

150. *Return of the broad view.* The effect of the holding in *Ex parte Gove*[191] and related cases clearly caused some difficulties and was overcome by State legislation in many instances. The purpose of this legislation was to expand, as a matter of State law, the jurisdiction of State courts to encompass defendants outside the State,[192] with the result that the federal Act could be used to give effect to such expanded State jurisdiction.[193] But the actual principle in the *Gove* line of cases, requiring that the State law itself provide for service of process out of the jurisdiction or authorise the assumption of jurisdiction over an absent defendant, remained. Judicial dissatisfaction with that principle was evident in a number of decisions, including *Jurd v AC Saxton & Sons Ltd*[194] and *Alba Petroleum Co of Australia Pty Ltd v Griffiths.*[195] Ultimately the *Gove* case was overruled by a majority of the New South Wales Supreme Court in *Ex parte Iskra, ex parte Mercantile Transport Co Pty Limited*[196] and the broad view

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[189] (1962) 4 FLR 390.

[190] See eg *R v Dodds, ex parte Mitchell* (1959) 2 FLR 462, 467 (Kriewaldt J).

[191] (1921) 21 SR (NSW) 548: see above para 145.

[192] eg the District Courts Act 1912 (NSW), the Act with which the *Gove* decision was concerned, was amended by the insertion of s 8A, which in part provided that the District Court was to 'have jurisdiction . . . notwithstanding that the defendant is not within New South Wales', if the defendant was in another State or part of the Commonwealth and the action concerned certain causes of action. The provision also provided, in effect, that in relation to service of process a plaintiff could rely on the Service and Execution of Process Act.

[193] The expansion has not been entirely effective: see *Thomas v Penna* [1985] 2 NSWLR 171 (DC NSW), a decision concerning the successor to s 8A of the District Courts Act 1912 (NSW).

[194] [1935] St R Qd 72.

[195] [1951] VLR 185.

[196] (1962) 5 FLR 219. While the case concerned the interstate service of process within s 15 of the federal Act, not s 4, the majority clearly thought that *Gove* should be laid to rest. Brereton J thought it was unnecessary to overrule the *Gove* case for the purpose of reaching a decision, but would have confined it to its facts.

of the operation of the federal Act re-established. The position was expressed in the leading judgment of Justice Sugerman as follows:

> The jurisdiction of a State court, considered solely from the point of view of its jurisdiction over persons who are outside the territorial limits of the State, is dependent upon the existence of statutory authority for the service of its process outside those limits. Part II of the *Service and Execution of Process Act*, within the limits of its operation, provides such authority. Where it operates, jurisdiction in the relevant sense is found in the State court, being, indeed, conferred by such operation. The pre-existence in the State court of extra-territorial jurisdiction in the abstract is not necessary; indeed there is no such concept. That is not to say, of course, that there may not co-exist in particular instances an equivalent extra-territorial jurisdiction in the true sense, flowing from an existing extension by State law of the area of effective service of process. In so far as *Ex parte Gove* proceeds upon contrary principles, and it does appear to do so, it was wrongly decided. *Matthew Harvey's Case*[197] decides nothing contrary to these principles.[198]

Effect of section 13

151. In the light of this decision, insofar as a court's jurisdiction over a defendant depends upon service of process, the federal Act has a substantive operation which extends the jurisdiction of State courts. But s 13 of the Act preserves other jurisdictional limitations besides limitations dependent on the area of service of process.[199] Thus what may be termed subject-matter limitations, whereby the competence of a court is confined by reference to the amount in controversy or the nature of the action, remain and are not affected by the federal Act.[200] The terms of State and Territory legislation therefore continue to be relevant so far as subject-matter limitations are concerned, for such limitations do not involve questions regarding the validity or effect of service of process.

Reform proposals

General policy considerations

152. The policy considerations underlying reform to the law on interstate service and execution of process have already been discussed.[201] It suffices here to make a few brief comments. The development of an Australia-wide economic and commercial community and of the concept of nationhood have made legal integration desirable and necessary. While the Act was far cited at the date of its enactment and has worked

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[197] See above para 145 at n 173 for the decision in this case.

[198] (1962) 5 FLR 219, 228.

[199] See *Ex parte Iskra, ex parte Mercantile Transport Co Pty Limited* (1962) 5 FLR 219, 226 (Sugerman J).

[200] See *Electronic Industries Imports Pty Ltd v Public Curator of the State of Queensland* [1960] VR 10; *Thomas v Penna* [1985] 2 NSWLR 171 for situations where subject-matter limitations preserved by s 13 have resulted in courts being unable to hear and determine actions. See also *Re Aylmore, deceased* [1971] VR 375.

[201] See para 11–8.

reasonably well to secure a degree of integration, the Act can be updated to conform more closely with prevailing economic, commercial and social conditions and to take account of developments in the legal sphere in the States and Territories. Changes can be seen as desirable to

- further effectuate State process and therefore integrate the legal systems of the States and Territories
- simplify interstate litigation
- reduce the costs involved and
- reduce the time involved.

These objectives have been noted in the previous discussion of matters relevant to reform of the Act.[202] They have also been adverted to in several submissions made to the Commission.

> We favour amendments to the Act producing the most simplicity and flexibility in relation to institution of legal proceedings and enforcement of orders and judgments throughout the States and Territories of the Commowealth. Far from regarding the consequential enlargement of jurisdiction in an issuing court as derogating from the status of other States or their courts, we consider rather that this approach enhances the operation of the federal system in Australia.[203]

Another submission commented 'that simplicity in the service of interstate initiating process would give cost saving benefits both to the plaintiff and the defendant'.[204]

Removal of uncertainty

153. Along with the task of updating the Act, reforms should also seek to eliminate areas of uncertainty or obscurity in the operation of the Act. In respect of the provisions concerning service of writs of summons, the discussion of the existing law has highlighted a number of matters which warrant attention in this regard. For example, there is a need to clarify whether State-required endorsements for service *ex juris* need to be made on process served under the Act and whether the provisions dealing with the entry of an appearance in a suit apply where analogous, but not the same, procedures apply under State and Territory law. Recommendations are made in the discussion that follows to eliminate problems such as these. First, however, it is necessary to explain the scope of the scheme proposed by the Commission with respect to service of process currently dealt with in Division 1 of Part II of the Act.

Scope of scheme

Structure of Act

154. The structure of the Act and the reasons therefor were explained in chapter 1.[205] For the reasons given there that basic structure should be retained. In the present

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[202] eg the interests of litigants and witnesses, the interest in effective law enforcement and economic considerations: see para 15–8.

[203] Supreme Court of New South Wales, Rule Committee, *Submission* 1.

[204] Institute of Mercantile Agents Ltd *Submission* (20 June 1984) 6.

[205] See para 25–9.

context, this means that new legislation should, in a set of discrete provisions, provide for service of initiating process in civil proceedings. Certain terms require definition to facilitate the operation of those provisions.

Definitions

155. *Civil proceeding.* The first matter to be defined is the type of proceedings to be dealt with. At present, those proceedings are defined as a 'suit',[206] which basically encompasses proceedings in the nature of a civil proceeding. It is recommended that this term replace the term 'suit', as it more accurately describes the nature of the proceedings involved. The present definition of 'suit' excludes criminal proceedings and maintenance and affiliation proceedings. While the Commission recommends that the provisions dealing with service of process in criminal proceedings should be separate from those dealing with civil process, it is of the view that maintenance and affiliation proceedings are more appropriately classified as civil rather than criminal proceedings. Therefore the scheme set out in the remainder of this chapter should apply to proceedings which are clearly civil in nature and also to maintenance and affiliation proceedings.

156. To differentiate between the proceedings to which certain provisions of the Act apply the device used in the Act is to apply later sections to process other than process within the ambit of Division 1 of Part II. That is, only the term 'suit' is defined, and later provisions of the Act are applied to process issued in proceedings that do not fall within the definition of that term. This device is helpful in that all types of proceedings will be covered in the legislation, whether because they are within the definition of the term or because they are not. The Commission favours retention of this device, but in reverse. That is, the legislation should contain an exhaustive definition of 'criminal proceeding', to which one set of provisions should apply, and leave the application of the other provisions to proceedings not being criminal proceedings. The reason is that it has proved easier to define what should be included within a definition of 'criminal proceeding' than what should be within a definition of 'civil proceeding'. But there should nevertheless be a definition of 'civil proceeding', defined simply as a proceeding other than a 'criminal proceeding'. The definition of the latter term, that is, the types of proceedings that should be regarded as criminal proceedings for the purposes of the legislation, is explained in chapter 4.[207]

157. *Initiating process.* The term presently used to describe the process to which Division 1 of Part II applies is 'writ of summons'. While it is the content of the definition which is primarily important, the term is archaic and does not accurately reflect the nature of the process included. The term 'initiating process' is preferable. The definition of 'writ of summons' describes not only the characteristics of certain process, but relates that process to proceedings defined by the term 'suit'. Thus 'writ of summons' describes certain process issued in proceedings that will, under the definition explained above, fall within the term 'civil proceeding'. In the Commission's view, however, the term 'initiating process' should not be so limited. It should relate to

[206] See para 75.
[207] See para 221–30.

process issued in both civil and criminal proceedings. As to the characteristics of the process, the present definition appears generally to be suitable apart from the problem noted earlier arising from the decision in *In re the Australian United Insurance Co Ltd (In Liquidation)*.[208] The effect of this decision should be overturned and, for that purpose, it is recommended that 'initiating process' should be defined as process by which a proceeding is commenced or by reference to which a person becomes a party to a proceeding. Thus defined, the definition will be apt to describe certain process issued in both civil proceedings and criminal proceedings.[209]

158. *Proceeding.* The term 'proceeding' should be defined to mean a civil proceeding or a criminal proceeding. In order to avoid any confusion, and also to enable the enforcement of interlocutory orders,[210] the definition should also include a reference to civil proceedings and criminal proceedings of an interlocutory or similar nature or conducted in chambers. The definition should also be confined to such proceedings before a court or an authority, terms defined below, in order to exclude proceedings that are conducted before or dealt with in other ways, for example, civil disputes heard by arbitration.

159. *Court.* This term is presently defined to include 'a judge or justice of the peace acting judicially'. No reference is made to the characteristics of a court, nor is any contained in a companion definition, that of 'Court of Record'. While the definition may be criticised for this deficiency, in view of the lack of certainty as to the meaning of the term 'court' in s 51(xxiv) of the Constitution, no further elaboration is desirable, for otherwise the scope of the legislation would be either confined to a greater extent than is required by the Constitution, or may be rendered invalid to the extent that a definition of the term went beyond the scope of the constitutional provision. However, the Commission considers that the present definition is unclear because of the use of the phrase 'acting judicially', on which various interpretations are open.[211] Therefore, it is recommended that the term be defined merely in terms of the Constitutional provision, that is, as meaning a court of a State or Territory. The Commission sees no need to retain a definition of 'Court of Record'. But State and Territory courts may be variously constituted and, being unconstrained by Constitutional provisions regarding the exercise of federal judicial power, quite often the powers of a State or Territory court may be exercised by individual members of, or officers of, a court. The definition of the term 'court' should therefore include reference to such persons exercising the powers of a court.

160. *Authority.* As a shorthand way of referring to such persons, the Commission recommends that the legislation contain a definition of the term 'authority', being defined as a judge, magistrate, coroner or officer of a court appointed or holding office

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[208] [1924] VLR 505. See para 76. See also for elaboration para 237–8.

[209] The definition, for the purpose of criminal proceedings, is extended to include certain other process: see para 231.

[210] See chapter 7 for the Commission's recommendations in relation to enforcement of orders given in proceedings.

[211] See further para 221.

under a law of a State or Territory. Not only will this be convenient for the purposes of the definition of 'court', it will also be convenient when referring to the persons or bodies by which other process, for example, subpoenas, are issued under State and Territory laws.

161. *Appearance.* In view of the comments of Justice Gibbs in *Licul v Corney*,[212] it also appears desirable to include a definition of the term 'appearance' and the procedure of 'entry of an appearance'. This matter was also noted in a submission commenting on proposed changes to the law in South Australia.

> An extension to the definition of 'appearance' and notice of 'appearance' seems most desirable from the South Australian point of view. Our Supreme Court rules have recently been redrafted by the Law Reform Committee, and in the draft rules 'appearances' have been replaced by notices of 'intention to defend' and notices of 'intention to set aside'. The Committee has been concerned as to how these requirements would 'mesh in' with the Service and Execution of Process Act provisions relating to appearances.[213]

The Commission agrees that such proposed notices may not come within the term 'appearance' as it is used in the Act. The term should not be confined to 'appearances' stictly so called, but should be defined to include procedures such as those requiring or permitting a person to lodge a notice of intention to attend or defend. The definition must be framed in general terms so as to encompass any such existing procedures and any others that may be devised by State and Territory legislatures or courts. It should also include procedures by which a person served with process notifies a court that the person acknowledges service or that the person intends to challenge the jurisdiction of the court to hear the proceeding.

Limitations on the plaintiff's right to choose the venue

Factors

162. Section 4(1) of the Act enables a writ of summons issued out of or requiring the defendant to appear at a court of record of a State or part of the Commonwealth to be served on the defendant in any other State or part of the Commonwealth. This basic principle, which gives Australia-wide effect to initiating process, should be contained in any new legislation. But that is not to say that a plaintiff should in all cases have an unrestricted right to choose the venue for his or her action. The defendant's interests must also be considered. For example, there may be instances where a defendant will not agree with the selection of the venue chosen by the plaintiff and may find that trial in that venue would be difficult or inconvenient. All schemes for the service of initiating process out of the jurisdiction impose some restrictions on the plaintiff's right to choose the venue. One form of such restrictions is the requirement that a plaintiff obtain leave from the chosen court at a certain time, for example, on the issue of the process or prior to service of the process or at some later time, such as when seeking to proceed in the defendant's absence after service has been affected and no appearance has been entered by the defendant. The latter is the present procedure

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[212] (1976) 50 ALJR 439, 455–6. See para 83.

[213] Lyons *Submission* 1.

prescribed by s 11 of the Act. Secondly, the plaintiff's ability to choose the forum may be limited by nexus requirements, that is, the plaintiff may have to satisfy the court in which he or she wishes to proceed that the action possesses some connection with the forum. These two limitations are often combined, but they need not be. The present Act in fact combines the two. The plaintiff must obtain leave to proceed if the defendant does not appear and in order to obtain leave the plaintiff must show that the action fulfills one of the nexus requirements set out in s 11(1). Similarly, State provisions authorising service of initiating process *ex juris* frequently combine the leave and nexus requirements, although those requirements may apply at a different stage of the proceedings. For example, under the former O 11 of the Rules of the Supreme Court of Victoria the requirements were imposed at an earlier stage than is the case under the federal Act, namely, prior to the service of the process. In contrast, the new Victorian rules do not combine the leave and nexus requirements. A writ can be served out of Victoria if one of the defined nexus requirements is fulfilled but there is no need to obtain the court's leave in order to do so. However leave is required to proceed in the defendant's absence if the defendant fails to enter an appearance. Moreover the defendant is specifically empowered to make application to set aside service on the grounds that the case does not fulfil any of the nexus requirements or that trial in Victoria would be inconvenient.[214]

163. In the context of any reform of the law regarding interstate service within Australia the crucial question is what restrictions, if any, should be imposed upon the plaintiff's right to choose the venue for the trial of his or her action? The converse question is what safeguards should be established to protect the defendant's interests and to prevent the defendant being sued in an inconvenient forum? To resolve these questions attention will be directed to specific issues, namely, whether the plaintiff should be required to obtain the court's leave at any stage, whether nexus requirements should be retained and to what extent the defendant should be afforded an opportunity to make application to set aside service or stay proceedings or have them remitted to a court in another State.

Leave of the court or a judge

164. *Introduction.* Many State provisions authorising service of process ex juris and the present federal Act require that the plaintiff obtain the leave of the court or a judge at some stage. The requirement of leave is essentially a safeguard to protect the interests of the defendant and ensure that the court's process is not abused. To obtain leave the court will normally be required to be satisfied that the provisions of the relevant legislation or rules of court are complied with and that the case is a proper one to grant leave. But any obligation to obtain leave increases costs, delays the proceedings and is an impediment to the objective of convenience and ease in the nation-wide service of process. Consideration of the question whether and, if so, at what time, a leave requirement should be imposed, requires some balancing of these competing interests.

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[214] General Rules of Procedure in Civil Proceedings 1986 (Vic) r 7.01, 7.04 and 7.05 respectively.

165. *Prior to service.* The more traditional of the State rules authorising service of initiating process *ex juris* require that the plaintiff obtain the court's leave prior to service of process out of the jurisdiction. The more modern tendency, however, exhibited in the new Victorian rules and relatively recent rules of some Canadian provinces,[215] is to abolish the requirement for obtaining leave at this stage. The federal Act does not require the plaintiff to obtain the court's leave prior to service and it would be a retrograde step to introduce this requirement. It would certainly not facilitate interstate service of initiating process and it would make interstate service less simple and more costly. The view of the Commission in this regard is supported by submissions received on the point.[216]

166. *On the defendant's failure to appear.* If the defendant does not enter an appearance in a proceeding having been served with initiating process under the present Act, the plaintiff must obtain the leave of the court or a judge to proceed in the defendant's absence. A similar requirement has been introduced by the new Victorian Supreme Court rules.[217] The Commission received a large number of submissions commenting on this aspect of the Act, the overwhelming majority of which strongly recommend abolishing this leave requirement.[218]

> The Act, whilst no doubt a good piece of work for its time, now bears little relationship to the modern commercial position in Australia. As a result, a Chamber Judge of the District Court is required to waste literally hours a week considering applications by Plaintiffs for Leave to Proceed under Section 11 of the Act in cases where a Defendant to a Writ of Summons has not appeared. The Plaintiff's solicitor is compelled to waste time, money and paper in establishing the matters of which a Judge is required to be satisfied under the Section. The majority of cases concern three types of litigation in the following order:
>
> > Sale of goods by a New South Wales supplier on a wholesale basis to retail customers in another State or Territory;
> > Loans of various kinds to persons who have since departed the State for another State;
> > Motor car accidents by visiting motorists.
>
> The first two types are sued for by a summons appropriate to a claim for debt or liquidated demand. The great majority of such claims are never defended. It is obvious I believe, that somehow if it is possible, the position should be arrived at that every Court in Australia has jurisdiction over every Australian in whatever part of Australia he is, subject to an overriding power to change the venue if the balance of convenience requires this to be done.[219]

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[215] General Rules of Procedure in Civil Proceedings 1986 (Vic) r 7.01; Saskatchewan Rules of Practice and Procedure r 31(1); New Brunswick Rules of Court r 19.01; Rules of Civil Procedure (Ontario) r 19.01.

[216] See eg Lyons *Submission* 1.

[217] General Rules of Procedure in Civil Proceedings 1986 (Vic) r 7.04.

[218] eg Pike *Submission* 1; Nygh *Submission* (24 April 1984) 1; Deputy Registrar, Court of Requests, Hobart *Submission* 1; Russell, McLelland & Brown *Submission* 1.

[219] Martin *Submission* (21 January 1983) 1.

Similar comments were made in public hearings conducted by the Commission in connection with the Reference on debt recovery and insolvency.

> Secondly, where a writ or summons is served out of the State or Territory pursuant to the Act, and no appearance is entered within the time, before the creditor can proceed, he has to obtain liberty to proceed from the court. Now this is virtually a rubber stamp procedure in our experience, but the costs of an application to the Supreme Court on an undefended basis are expensive, to say the least, and can easily exceed perhaps $200 if you claim everything that you possibly can under the court rules. We think that perhaps this liberty to proceed requirement could be lifted, or alternatively, be granted as a right.[220]

167. The Commission received only three submissions that supported retention of the leave requirement. The Civil Procedure Committee of the Law Society of the Australian Capital Territory commented

> The Committee has considered whether leave to proceed is appropriate and it has come to the view that it ought to be retained. The reason the Committee feels it ought to be retained is the practice which has arisen of some credit organisations issuing writs out of a jurisdiction suitable to them without any real nexus with that jurisdiction. Such a practice of course often places the defendant at a severe disadvantage and allows the plaintiff to engage in 'forum shopping'. There are instances of which the Committee is aware where despite the current provisions for leave to proceed, leave to proceed is granted without any apparent nexus under Section 11. Such instances can of course be corrected (but with considerable expense to defendants) and it is considered that if the leave to proceed provisions were abolished then forum shopping would be encouraged.[221]

Two submissions from judges of State Supreme Courts also recommended retention of the leave requirement, although one commented that he could see little justification for requiring that application be made to a court or judge and that the matter could be dealt with effectively by the Registrar of the Court.

168. *Recommendation.* Apart from wasting judicial time, as the submissions note applications for leave to proceed also increase costs. There may well be situations where a defendant does not wish to enter an appearance and defend the proceedings. In such circumstances, there is much to be said for the view that the leave requirement unnecessarily increases costs, particularly as the defendant will ultimately have to bear them. These seem compelling reasons for abolishing the leave requirement. However, there remains the point forcefully made by the Civil Procedure Committee of the Law Society of the Australian Capital Territory, namely, that the leave requirement is an important safeguard to the defendant. While the safeguarding of defendants is an important matter for which some provision must be made, the Commission is of the view that safeguards can be implemented more effectively than by requiring that the plaintiff obtain leave to proceed in the defendant's absence. Further, in the circumstances

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[220] DM Young *Transcript of Public Hearings* Canberra (24 November 1978) 273.

[221] Civil Procedure Committee, Law Society of the Australian Capital Territory *Submission* 1–2.

noted above, the apparent safeguard to the defendant provided by the leave requirement only damns the defendant with increased costs. The present requirement that the plaintiff obtain leave to proceed in the defendant's absence should not be retained. The Commission recommends that another safeguard, discussed below, be imposed to protect defendants from abuse of the facilities provided by the Act for service of initiating process *ex juris*.[222]

Nexus requirements

169. *Introduction.* A further matter to consider is whether new legislation should retain nexus requirements along the lines of those presently set out in s 11(1)(a)–(f) of the Act. One view expressed in the submissions was that 'service and execution of process should run unhindered by any restriction throughout Australia and its Territories'.[223] The argument is that it is desirable to facilitate and simplify the Australia-wide service of process to the widest extent possible. Certainly this view is consistent with the development of an Australia-wide economic community and would do much to obliterate State lines, which are often seen as an impediment to the national economy, in relation to the curial resolution of disputes. On the other hand the contrary consideration is founded on the fact that Australia is geographically a large country. In some instances it may be unfair or unjust to summon a defendant from a distant part of the country and require that person to defend proceedings in the forum chosen by the plaintiff. The argument for retaining nexus requirements is essentially one of fairness to the defendant by requiring that there be a nexus or connection between the litigation and the forum to justify the plaintiff's choice of venue. The comments of the Civil Procedure Committee of the Law Society of the Australian Capital Territory, noted above, also draw attention to problems of forum shopping that might arise were the nexus requirements to be abolished.

170. *Arguments for retention of nexus requirements.* A number of submissions were received that favoured retaining nexus requirements. For example, in response to the tentative suggestion put forward in RP 7 that, in place of the nexus requirements, the defendant should have a right to apply to the court of issue of initiating process for a stay of proceedings or a change of venue to a court of another State on the ground that the venue chosen by the plaintiff was an inconvenient one, a submission from the Supreme Court of Queensland expressed concern at the grave injustices which were likely to result if the nexus requirements were omitted and if the defendant was confined to arguing that the venue chosen by the plaintiff was an inconvenient forum.[224] The submission also raised the question of the existence of Commonwealth legislative power to extend the jurisdiction of State courts.

> The Court is gravely concerned at the implications of removing any nexus requirement relating to service of process out of the jurisdiction of State Courts. It is considered that if proceedings are served beyond the jurisdiction, without there being any nexus requirement provided for in the legislation, there is a potential for subsequent argument

[222] See para 178–97.

[223] Nygh *Submission* (4 January 1983) 1.

[224] See further for the Commission's proposals in this regard para 178–97.

> as to the jurisdiction of the Court to deal with the matter. Even after judgment it could be contended that the Court had no jurisdiction to adjudicate upon the matter. It would seem clear that the Commonwealth Parliament would not have power to confer jurisdiction on State Courts.

171. A court's jurisdiction may be predicated on several factors. In so far as it is based on service of process on a defendant and in particular on the geographic area in which a defendant may be served (*in personam* jurisdiction) it is clear that there is federal legislative competence to extend the jurisdiction of a court by enlarging the area within which a defendant may be served with process. Thus it was observed in one New South Wales case

> The object of the Act was, *inter alia*, to bring about an extension of the jurisdictional areas of State courts by providing for an enlargement of the geographical area within which service of their originating processes might be effected, so that it might be Commonwealth wide, and placitum (xxiv) was inserted in the Constitution to empower the passage of legislation to achieve this result.[225]

Earlier dicta of the High Court are consistent with this view.[226] In so far as a court's jurisdiction is confined by reference to matters other than the service of process, such as the amount in controversy or the subject-matter of the claim, s 13 of the present Act and the draft legislation proposed by the Commission[227] would not affect such limitations arising under State law.

172. Objection was also made to the removal of the nexus requirements in a submission from the then Queensland Minister for Justice and Attorney-General, the Hon NJ Harper, on the ground that this would result in an accretion of actions to the courts in New South Wales and Victoria even in respect of causes of action which may have arisen in Queensland, Western Australia or Tasmania.

> [T]heoretically under the proposed legislation [referring to the provisions of the draft Bill contained in RP 7, which abolished the leave requirements and instead provided for the venue challenge procedure noted above] a proceeding could be instituted in the Queensland Supreme Court by one resident of New South Wales suing another with respect to a contract made in New South Wales. The defendant, it would appear, could not object to jurisdiction, but could merely ask for a change of venue.

However, precisely such an action could be brought in the Queensland Court under the present Act because the nexus provisions are not relevant in all cases. They only become relevant if the defendant does not enter an appearance and if the plaintiff seeks leave to proceed in the defendant's absence or if the defendant, through the practice described earlier in this chapter, seeks a stay of the proceedings. If a defendant enters an unconditional appearance after being served in another State under the provisions of

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[225] *Ex parte Iskra, ex parte Mercantile Transport Co Pty Ltd* (1962) 5 FLR 219, 226 (Sugerman J).

[226] *McGlew v NSW Malting Co Ltd* (1918) 25 CLR 416, 420 (Griffith CJ, Barton Powers and Rich J); *Luke v Mayoh* (1921) 29 CLR 435, 439.

[227] See Appendix A, Interstate Procedure Bill 1987 cl 15.

the Act, the nexus provisions are simply not relevant. Thus the theoretical possibility cited by the Queensland Minister of a proceeding being instituted in Queensland by one resident of New South Wales against another resident of New South Wales with respect to a contract made in that State could happen under the present legislation. Moreover, the recommendations contained in this report do not confer on a plaintiff an unrestricted or unqualified right to choose the venue for trial of the action.[228]

173. *Arguments for abolition of nexus requirements.* There are also powerful arguments that can be mounted against retention of nexus provisions. First, the traditional nexus provisions such as those contained in s 11(1) of the Act and in State provisions authorising service of process *ex juris* can be criticised as being artificial and liable to manipulation. For example, under s 11(1)(b)[229] an action can proceed against an absent defendant if it involves a contract which was made within the State. The determination of where a contract is made is often a difficult matter, particularly if the contract is concluded between parties in different States as a result of postal, telephonic and/or telex communications between them. In protracted negotiations which lead up to the conclusion of a contract the determination of where the contract was formally concluded in accordance with the traditional contract rules is liable to be fortuitous. Moreover, if the contract is formally concluded in one State but all the other relevant factors are situated in another State (such as the residence of the parties and the place of performance of the contract), is it really appropriate for the action to proceed in the State where the contract was made? The same question may be asked in respect of contracts that are structured in such a way as to be deemed to have been made in a particular State, notwithstanding that performance of the contract occurs in another State, or structured so that a breach of the contract will be found to have occurred in a particular State which really has no factual connection to performance of the contract. Illustrations of the artificial nature of the nexus provisions and the opportunities for their manipulation can be multiplied. In these circumstances it must be asked whether nexus provisions really constitute a significant protection to defendants or whether the protection is often illusory.

174. Another problem is that the nexus provisions contained in s 11(1) are limited and do not comprise a number of instances where it might be thought appropriate for an action to proceed in the forum. For example, one submission commented that the nexus provisions do not comfortably include statutory claims in the nature of workers' compensation claims.[230] This could be remedied by widening the nexus provisions in the legislation.[231] One Research Paper prepared in the course of the Reference contained a detailed examination of possible nexus provisions based on State and foreign precedents.[232] But the Commission does not now favour an expansion of the nexus provisions because the wider the list of nexus provisions, the broader the jurisdiction of a court, and thus the less protection that is afforded to a defendant.

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[228] See further para 178–97.

[229] See para 113–7.

[230] Registrar, Workers' Compensation Commission of New South Wales *Submission* 3.

[231] This was suggested in the submission from the Supreme Court of Queensland.

[232] Pryles 1984a, para 168–93.

175. A further criticism that may be levelled at many of the traditional nexus requirements is that they do not necessarily establish a significant connection between the transation or occurrence the subject of the action and the forum of the litigation. In respect of some nexus provisions the supposed connection with the forum can only be described as tenuous. An example is the nexus requirement established in Pt X, r 1(1)(e) of the Supreme Court Rules 1970 (NSW).[233] It enables initiating process to be served *ex juris* where the proceedings are founded upon damage suffered wholly or partly in the forum caused by a tortous act or omission wherever occuring. It has been held that this nexus condition is satisfied in the case of consequential damage suffered within the forum, for example, where a motor car accident occurs outside the State and the plaintiff returns to the State and suffers continuing pain there.[234] This amounts to a claim of virtual unlimited jurisdiction in tort matters provided that the defendant journeys to the forum after the accident and suffers continuing pain or other detriment there.

176. Perhaps the strongest argument against nexus provisions is that they base the question of jurisdiction on one technical factor, for example, the place where a contract is made or breached or where damage is sustained, to the exclusion of other factors that are relevant to the question of the proper venue for the trial of an action. In the Commission's view it is misleading to look at only one factor in determining that question. Rather, a broad approach should be adopted, one which takes account of a number of diverse matters in determining the most appropriate venue. Recent cases discussing the question of forum non conveniens illustrate many matters have to be considered, including the residences of the parties, the places where witnesses reside and other evidence is situated, the law governing the proceedings and so on. All these matters are relevant in determining the appropriate forum having regard to the convenience of the parties, the convenience of witnesses and the ability of the parties to prove facts, the ease of application of the governing law and the question of proof of foreign law. The imposition of nexus requirements distorts the search for the appropriate forum by placing overwhelming importance on one particular factor and thereby ignoring others. Why is the place where a contract is made the appropriate forum to determine an action relating to that contract? Presumably, because there is an assumption that it will be in that place that evidence relating to the contract is situated and also because the laws of that place may govern the contract. But this is not necessarily so. The contract may be governed by the law of another State, the evidence relating to the parties' claims may be situated elsewhere and if neither of the parties was resident in that State there seems little compelling reason for the action to proceed there. In this situation, the Commission is of the view that the plaintiff's choice of venue should not be considered proper merely because one of the traditional nexus conditions is satisfied; that it is simplistic and misleading to make the determination dependent on single factor nexus requirements. Rather, the search should be for the most appropriate venue and this should depend on consideration of a number of factors relating to the parties, the evidence, the law governing the proceedings and so on.

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[233] See also r 7.01(1)(j) of the General Rules of Procedure in Civil Proceedings 1986 (Vic).
[234] See *Flaherty v Girgis* 63 (1985) ALR 466 (NSWCA).

177. *Recommendation.* For these reasons, the Commission recommends the abolition of inflexible nexus requirements of the type contained in the present Act. Therefore, it will be permissible to serve process thorughout Australia without leave, there will be no requirement to obtain leave before proceeding in the absence of the defendant and there will be no nexus conditions to be satisfied. But in place of the nexus provisions, the Commission recommends that there be a procedure whereby the most appropriate venue for the trial of the action may be determined. That determination should depend on an examination of all relevant matters. This recommendation does not abolish nexus requirements. It does not comprise formal and rigid single factor nexus requirements, but it does enable the court to tailor-make a nexus provision for each particular case having regard to all the appropriate facts and circumstances. Litigation should not proceed in an inappropriate forum but the determination of the appropriate forum should be a matter dependent on numerous factors which have to be evaluated in each particular case. Hence a more balanced and comprehensive nexus requirement is in fact proposed than those existing under schemes such as that contained in s 11 of the present legislation.

Venue objection procedure

Introduction

178. In the absence of nexus provisions there must be some machinery for enabling the court to determine the appropriateness of the venue chosen by the plaintiff. To facilitate this determination, the Commission recommends that there be provisions in new legislation specifically empowering the defendant to challenge the plaintiff's choice of venue on the ground that it is inappropriate. A defendant will not have to do so. The defendant may simply accept the venue chosen by the plaintiff either by entering an unconditional appearance or by not entering an appearance and not making application under the venue objection provision. In these circumstances there is no reason for disturbing the plaintiff's choice of venue. However if the defendant wishes to contest the choice of venue it will be up to the court out of which the process issued to determine the appropriate venue for the action.

Form of provision

179. *General provision.* The question that next arises is as to the form of the venue objection provision. One possibility is to have a general provision authorising the court to stay proceedings or otherwise grant appropriate relief if it is 'in the interests of justice' that the matter not proceed in the forum but be dealt with by the court of another State of Territory. Such a provision is contained in s 45(2) of the Family Law Act 1975 (Cth), which enables a court having jurisdiction under the Family Law Act to transfer the proceedings to another court having jurisdiction under the Act if it is in the interests of justice to do so. Justice Nygh, who as a Family Court Judge is familiar with the operation of this provision, at one stage advocated that similar provision be made in new legislation in the field of service and execution of State and Territory process.[235] Such a provision has certain advantages. Its very generality

[235] Nygh *Submission* (13 October 1983) 1.

makes it flexible and enables a court in each particular case to determine whether the circumstances are such that proceedings should be continued in the forum or whether it is appropriate for the proceedings to be continued in another jurisdiction. But this very flexibility and generality itself makes for difficulties. The common situation under the Service and Execution of Process Act is that the plaintiff will reside in the forum where proceedings are instituted and the defendant will reside in another State or Territory of Australia. Some of the plaintiff's witnesses may be in the forum and some of the defendant's witnesses may be in the place where the defendant resides. The defendant may very well object to the forum chosen by the plaintiff because of inconvenience in litigating in a State which is not his or her home State. On the other hand the plaintiff will probably have chosen the forum in which the litigation is instituted because it suits his or her interests. In these circumstances what is the court to do? Both parties will advocate trial in their home State where they reside and where perhaps some of their witnesses are also resident. What is the way out of this impasse? Does one say that the plaintiff's choice of forum should not be disturbed unless there are very compelling reasons for doing so or, conversely, does one follow the common law principle that generally a defendant should be sued in the place of his or her residence? The former view has been adopted in the context of the exercise of the discretion existing under s 11 of the Act,[236] the courts saying that, absent strong considerations to the contrary, the plaintiff's choice of venue should not be disturbed if the action falls within one of the nexus grounds.

180. *Criticisms of general provision.* A general venue provision simply empowering the court to grant relief 'if it is in the interests of justice to do so' could well result in protracted litigation on the issue of the appropriate venue. This would not only be expensive but it would go a considerable way towards negating the objectives of simplifying and facilitating Australia-wide service of process. It might be contended that the perceived difficulties with a general venue objection provision are exaggerated, particularly when such a provision has apparently worked satisfactorily in the context of the Family Law Act. But the situation under the Family Law Act is different from that under the Service and Execution of Process Act. In proceedings under the Family Law Act the parties may often be resident in the same jurisdiction. However, when resort is had to the Service and Execution of Process Act, the parties will most likely be residents of different States or Territories of Australia. Thus the number of occasions when resort will be had to a provision such as s 45(2) of the Family Law Act will be much fewer than those in relation to a corresponding provision of new legislation on service and execution of process. Further, choice of venue under the Family Law Act is not likely to be as contentious as it is under the Service and Execution of Process Act. In the latter case the choice of venue may determine the choice of law applied to the controversy. Under the Family Law Act every court exercising jurisdiction applies the same law. For these reasons it is suggested that the choice of venue under the

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[236] A plaintiff who establishes that his or her case falls within one of the nexus requirements of s 11(1) of the Act is not *ipso facto* entitled to an order for leave to proceed in the defendant's absence. The court has a discretion to grant leave to proceed: see *Earthworks & Quarries Ltd v FT Eastment & Sons Pty Ltd* (1965) 8 FLR 32; *Shallay Holdings Pty Ltd v Griffith Co-operative Society Ltd* [1983] VR 760.

Family Law Act will not in general be as controversial as choice of venue in proceedings instituted under the Service and Execution of Process Act.

181. *Structured provision recommended.* To reduce the impact of these problems the Commission recommends that, rather than the general form of the provision existing in the Family Law Act, the venue objection procedure should be structured.[237] Criteria should be specified to assist the courts in determining whether the venue chosen by the plaintiff is appropriate. These should include the following:

- the places of residence of the parties and of the witnesses likely to be called in the proceeding
- the place where the subject-matter of the proceeding is situated
- the financial circumstances of the parties
- any provision of an agreement between the parties regarding the State or Territory in which the proceeding should be instituted
- the law appropriate to apply in the proceeding and
- whether related or similar proceedings are pending.

To overcome problems with forum shopping by plaintiffs, it is also recommended that the present primacy accorded to the plaintiff's choice of venue should not be maintained. The court, in determining the appropriate venue for the trial, should not take account of the fact that the plaintiff instituted the proceedings in the forum.

182. *Criteria.* The first two factors need little comment. They relate to the convenience of the parties and of the witnesses and the situation of evidence. The third factor is a new circumstance which has not yet been adverted to in the cases dealing with *forum non conveniens.* In the Commission's view it is a matter which should be taken into account, along with the other circumstances, in determining the appropriate venue. Take, for example, the case of a debtor resident in Perth who borrows money from a finance company that has its head office in Melbourne. Suppose that a dispute arises in relation to the loan and that the creditor company institutes proceedings in Victoria. If the debtor is a person of very meagre financial resources and lacks the ability to defend the action in Victoria, this circumstance should be taken into account in determining the appropriate venue. If the factors pertaining to the convenience of the parties and the witnesses and the situation of evidence were fairly evenly distributed between the two States, this matter may well induce a court to the view that Victoria is not the appropriate venue for the action. However if all the other factors pointed to trial in Victoria, this factor alone might not be thought sufficient to justify trial in Western Australia. The fourth factor directs the court to consider forum clauses in contracts. The existence of a forum clause is a recognised ground for staying an action under principles of private international law, but is not necessarily decisive.[238] In the context of standard form contracts between traders and consumers where there may be inequality of bargaining power, a court may be inclined to give less weight to a forum

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[237] Justice Nygh, who had earlier proposed an unstructured provision, later supported the proposal for a structured provision: Nygh *Submission* (24 April 1984) 3.

[238] See Sykes & Pryles 1987, 77–9.

clause. The fifth factor points to the governing law, absent or notwithstanding choice of law clauses, as a relevant factor. It is clearly convenient to have an action tried in the State whose laws govern the transaction or occurrence. Sometimes a change of venue may bring about a change of the governing law and this might, on occasion, be thought desirable. For example, in torts the primary governing law is the *lex fori*, that is, the law of the forum where the action is heard.[239] If a tort action were instituted in a State which had little connection with the occurrence it might be desirable to change the venue of the action to a State with a greater interest in the resolution of the dispute. Considerations of the governing law have played a significant part in determining the remission of High Court actions to subordinate courts and the selection of the particular subordinate court.[240] The fifth factor would encompass cases where initiating process is served on a third party joining the person to the proceedings. The fact that there are existing proceedings pending which involve the same or a related matter or occurrence should be a relevant factor in determining the venue for the third party action. All these factors are directed to the question of the most appropriate court for the conduct of a proceeding. They are not intended to foreclose consideration of whether a proceeding should be dealt with in other ways, for example, by arbitration. Nor does the venue objection procedure foreclose arguments that a proceeding should be stayed on grounds such as vexation or oppression. To avoid any confusion, courts' powers to deal with these matters should be expressly preserved.

Procedure for raising venue issue

183. The Commission is of the view that there should be an informal and inexpensive procedure for raising the question of the appropriate venue. In the case of an action instituted in a magistrate's court and involving a claim for a modest amount, litigation on the issue of the appropriate forum could substantially increase the costs of the action and be out of all reasonable proportion to the amount claimed by the plaintiff. Further, in the case of a defendant with limited financial resources, the potential costs involved in a formal venue objection procedure would militate against a challenge to the plaintiff's choice of venue even though there may be good grounds for doing so. For this reason new legislation should contain an informal and inexpensive procedure for raising the venue issue. When served with initiating process the defendant should also be served with an application form which the defendant may complete and send to the court out of which the initiating process was issued setting out the defendant's objection to the venue and the grounds for that objection. A copy of the application should be sent to the plaintiff and the plaintiff should be able to lodge a notice of objection to the granting of the defendant's application. The court should then have power to determine the application on the basis of the matters set out in the application and the notice of objection, if any, without the need for a hearing. The whole procedure would be simple and relatively inexpensive. However, there may be instances where the application should only be determined after a hearing before the court. For example, both parties may desire a hearing or the action may be in a Supreme Court and involve a substantial amount of money. To cater for these circumstances, the court should be

[239] See id, 512–3.

[240] See Pryles 1984c.

empowered to order a hearing of the application where that is requested by a party or the court reaches that view of its own motion.

No other challenge

184. In view of the simple procedure outlined above, the Commission considers that no other challenge to the plaintiff's choice of venue should be permitted. The proper court to consider the question of the appropriate venue is the court in which a proceeding has been instituted.[241] A defendant should not be able to take proceedings in a court of State or Territory other than the State or Territory of issue of process seeking to restrain the plaintiff from proceeding in the latter State or Territory.

Preconditions to making application

185. It is only in cases where the defendant intends to contest the plaintiff's claim that the right to contest the plaintiff's choice of venue should be accorded. A defendant should not be permitted to challenge the venue chosen by the plaintiff unless the defendant has entered an appearance in the proceeding. The Commission is also of the view that time limits should be imposed within which a defendant may raise the issue of the appropriate venue. There would seem to be little merit, for example, in permitting a defendant to raise the question of venue at the conclusion of the proceedings after the merits of the case have been litigated or during the proceedings themselves. Thus as a general rule the defendant should only be able to raise the issue of the appropriate venue within the time for entering an appearance.[242] However the court should be empowered to consider the matter on the basis of a later application if there are special circumstances which indicate that it would be proper to permit the making of an application later than the generally prescribed time.

Appropriate relief

186. *Introduction.* If the court finds that another forum is the more appropriate forum there arises the question of what order it should make. In the international context, when a court determines that it is a *forum non conveniens*, it generally stays proceedings. It may do so on condition that the defendant, who is the applicant for the stay, undertakes to submit to the jurisdiction of the foreign and more convenient forum. The Commission recommends that a court should be able to order a stay of a proceeding, whether subject to conditions or otherwise. However, in the context of federal legislation binding all the Australian States it must be asked whether only this course should be open or whether a court should be empowered to make alternative orders in appropriate cases.

187. *Majority view.* If only a stay may be ordered, the proceeding in the court of issue must be terminated and new proceedings initiated in a court in the appropriate venue. A majority of the Commission[243] is of the view that the necessity to recom-

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[241] See para 196 for one exception, namely, where a proceeding has been transferred to a court of another State.

[242] See further on this matter para 206–10.

[243] Professor Pryles, Professor Crawford and Mr Simos.

mence proceedings is wasteful in terms of both the time and costs involved, and that it is appropriate that another course of action be open to a court that finds that it is an inappropriate venue, namely, to transfer the proceeding to a another court. The transfer of a proceeding would mean that it does not have to be instituted afresh in a new venue, with consequent savings in time and money. It also would mean that there are unlikely to be problems with respect to jurisdiction over the defendant. Further, it would overcome difficulties that could arise if the statutory limitation period for instituting a proceeding has expired in the venue which is determined to be the appropriate venue for the trial. Provision of a power to transfer proceedings would also promote procedural integration of the courts of the States and Territories, thus furthering the purpose of the Constitutional power in s 51(xxiv) with respect to integration of the separate legal systems of the States.

188. Powers to transfer proceedings are possessed by several courts at present. Reference has already been made to the power of a court having jurisdiction under the Family Law Act 1975 (Cth) to transfer proceedings to another court having such jurisdiction. There is similar provision in s 43 of the Federal Court of Australia Act 1976 (Cth) for changing the venue of an action in the Federal Court. Also, an action pending in the High Court may, pursuant to s 44 of the Judiciary Act 1903 (Cth), be remitted to any Federal Court or court of a State or Territory that has jurisdiction with respect to the subject-matter of and the parties to the action. Further, under the recently enacted Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth), there will be power for the Federal Court, the Family Court, and State and Territory Supreme Courts to transfer proceedings to another of those courts, and in some cases to inferior courts. A majority of the Commission therefore recommends that, in addition to the power to stay a proceeding, a court should have power to order that the proceeding be transferred to another court.[244] Recommendations are made below that will streamline the procedure. However, some limitations on the power are also recommended and these are discussed below.[245]

189. *Minority view.* One member of the Commission,[246] however, is of the view that the only relief that should be available if a court finds that another venue is the appropriate venue for the trial is a stay of proceedings. That is, the court should be confined to giving the type of relief that is available when, in the international context, a court is found to be a *forum non conveniens.* Apart from the constitutional difficulty raised by the proposed power to transfer,[247] the President considers that the power to stay is the appropriate power in this context. It does not involve one court unilaterally deciding that its proceedings, at whatever stage they may be, are to be accepted by another court. Following an order for a stay, accompanied by an undertaking by the defendant to submit to the jurisdiction of another court, proceedings in the court are

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[244] This recommendation, tentatively suggested in one of the Research Papers distributed by the Commission (Pryles 1984a, para 194–7), was supported by a number of submissions, including submissions received in confidence from members of certain State Supreme Courts, as having advantages over the option of merely granting a stay of proceedings.

[245] See para 193–5.

[246] The President.

[247] See para 190.

generally commenced promptly by the plaintiff's solicitor having a writ issued, followed by an entry of appearance by the defendant. Neither of these steps involves a court appearance. In practice, the reception by one court of process from another court will be the occasion of a summons for directions to determine how the rules of the transferee court will apply to the transferred action. In most cases the stay procedure will be more economical than a transfer. It will have the additional advantage that proceedings will be commenced by the appropriate process of the court which is to hear the matter. If a transfer were to occur after substantial interlocutory steps had been taken, there might be financial savings but even these could be offset by additional directions hearings to determine the status in the transferee court of the matters already dealt with by the transferor court. Rules and practice as to such matters as joinder of parties, discovery and interrogatories are by no means uniform throughout Australia. The Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth), if ultimately proclaimed and held to be constitutional, will rest on a consensus between the Commonwealth and the States and the Territories. On the other hand, under the proposed transfer procedure all courts in Australia, without any prior consultation with them, would be obliged to receive process from other courts. If there is to be a transfer system, the President would prefer the form which gives a transferee court an opportunity to decline jurisdiction in the proceeding.[248] By comparison with the stay procedure, however, this will invite an opposed application in the proposed transferee court with consequent expense and delay and the prospect of the parties having to return to the transferor court.

Transfer of proceedings

190. *Constitutional considerations.* A provision in federal legislation for the transfer of proceedings as an alternative to a stay raises a number of questions. The first is whether there is constitutional competence to so provide. That question cannot be definitively resolved at this stage. Certainly it would seem that federal power to provide for the interstate service of State process carries with it a power to enact provisions dealing with circumstances where the forum chosen by the plaintiff is not a *forum conveniens.* It is established that a court, in determining whether to grant a plaintiff leave to proceed under s 11 of the Act, can consider whether the forum is a convenient forum.[249] Notwithstanding that the action falls within one of the nexus grounds, if the forum is an inconvenient one it is clear that the court can stay the proceedings. To permit the court to transfer proceedings to another court goes one step further. This may be viewed as incidental to the power to make provision for appropriate relief in circumstances where the forum chosen by the plaintiff is an inconvenient one. On the other hand it may be contended that the power to transfer proceedings involves an interference with the court to which the transfer is made and that this is too remote from the power to authorise service of the first court's process out of the jurisdiction. Thus while a majority of the Commission is of the view that a power to transfer proceedings is desirable and should be included in new legislation, it is important that the relevant provision be framed so as to clearly indicate that that power is an alternative to the power to stay proceedings. Consequently, if the power to

[248] See further para 191.

[249] *Earthworks & Quarries Ltd v FT Eastment & Sons Pty Ltd* (1965) 8 FLR 32.

transfer is held to be unconstitutional the court will still be empowered to order a stay of proceedings where the defendant establishes that the forum chosen by the plaintiff is not the appropriate venue for the action.

191. *Conditions on transfer — majority view.* Another question concerns whether a transfer should be permitted only where certain conditions, in addition to the finding that a court is an inappropriate venue for the trial, are met. In particular, the transfer of proceedings to another court may be perceived to constitute an interference or intrusion into the affairs of the transferee court. In one submission which supported the power of transfer, such considerations led to the suggestion that 'it may be necessary, in order to prevent obstructive criticism, to limit any power to remit to cases where the court to which the proceedings are remitted consents to the remission'.[250] Adoption of this course would clearly increase the costs and time involved in dealing with proceedings and is not recommended. However, a majority of the Commission[251] considers that some caution is appropriate in relation to the conferral of the power to order a transfer, which will be a novel one in the present context. To this end, they consider that a transferee court should have some opportunity to express its view as to whether the transfer of proceedings is proper in the circumstances. They therefore recommend that an order transferring a proceeding should have effect subject to the right of the transferee court, where a party to the proceeding makes application to it in this regard, to decline to exercise jurisdiction in the proceeding. This power should, however, be exercised within a reasonable time of the transfer order being made. An application to the transferee court to secure an order declining jurisdiction in the proceeding should be made within 21 days of the transferee court being notified of the transfer order.

192. *Conditions on transfer — minority view.* A minority of the Commission[252] disagree with this recommendation. In their view the necessity to obtain consent, even in the limited circumstances recommended by the majority, would tend to undermine the simplicity and convenience of a transfer of proceedings. They also note that there is no necessity for the consent of the transferee court in relation to any of the powers of remission or transfer of proceedings presently available to courts under the legislation noted above, particularly the Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth), which provides for transfers between courts of different States and Territories. The matter is, after all, one dealing with federal legislation binding on all the States and conferring equal facility or advantage on them all by providing for the interstate service and execution of their process and judgments. Requiring a transferee court to hear a case which has been transferred to it is a small price to pay for these advantages which are given to all State and Territory courts, including the transferee court. In addition, when contrasted with the power to order a stay of proceedings, in the view of the minority the ability of a transferee court to refuse to hear a proceeding which has been transferred to it is illogical, for when a proceeding is stayed, particularly where a defendant is required to undertake to submit to the jurisdiction of another State, the proceeding will be instituted in a court of that State without any opportunity for

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[250] New South Wales Bar Association Submission 1.

[251] The President and Mr Simos, the President exercising a casting vote.

[252] Professor Pryles and Professor Crawford.

the court to decline to exercise jurisdiction in the proceeding. The minority therefore recommend that there be no provision for the transferee court to decline to hear a proceeding transferred to it by another court.

193. *Transferee court.* Another issue concerns the courts to which a proceeding may be transferred. In view of the fact that the proceedings concerned are instituted in a court of a State or Territory it seems appropriate that transfer should be permitted to a court of another State or Territory. However, it is not intended that a transfer should operate to confer jurisdiction on a court which, if the proceedings had been commenced there, would not have jurisdiction to hear and determine the proceedings.[253] Therefore the transferee court must in all cases be a court that would have had jurisdiction in the proceedings if they had been commenced in that court.

194. A further limitation on the power of transfer is considered appropriate because of concerns about the novelty of this power in the present context and about interference and intrusion into the affairs of the transferee court. In particular, the Commission considers that transfers should generally not be permitted from one court to a court of more superior jurisdiction. Therefore, it is recommended that where a proceeding has been instituted in the Supreme Court of a State or Territory, that court should be able to transfer the proceeding to the Supreme Court of another State or Territory or to any other court of another State or Territory. However, in respect of proceedings in courts other than Supreme Courts, a transfer should be permitted only to a court of another State or Territory that is other than a Supreme Court. Further, where a proceeding has been instituted in a court of summary jurisdiction,[254] a transfer should be permitted only to another court of summary jurisdiction. In relation to intermediate courts, it is tempting to seek to categorise them so as to enable transfers between courts within a category. However, the jurisdictional limits of the courts vary considerably from place to place and in some jurisdictions there are two tiers of courts while in other jurisdictions there are three tiers. Further, the Commission considers it inappropriate that a party to a proceeding be placed in a potentially advantageous position as regards possible awards of costs by enabling transfer to a court of another State or Territory where there is another court of more limited jurisdiction in that State or Territory that would have jurisdiction to deal with the proceeding. Therefore, in addition to limits on the status of courts to which a proceeding instituted in a court other than a Supreme Court may be transferred, a proceeding in such a court should, where there is more than one court in another State or Territory to which it could be transferred, be transferred to the court of more limited jurisdiction. While these limitations on courts other than Supreme Courts to transfer proceedings may result in there being no power to order a transfer in some cases, there will always be the power to stay peoceedings, including on condition that the defendant undertake to submit to the jurisdiction of another State or Territory.

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[253] There would not seem to be power to so confer jurisdiction, for courts continue to exercise State jurisdiction where service of initiating process has been effected under legislation enacted under s 51(xxiv): see para 72.

[254] See Acts Interpretation Act 1901 (Cth) s 26(d) for definition of this term.

195. The Commission also considers it desirable to enable proceedings to be transferred to the Federal Court of Australia, particularly as this court has facilities that would enable it, in proper circumstances, to hear part of a case in one State or Territory and another part of the case in another State or Territory.[255] In view of the limitations recommended above, however, transfer of a proceeding to the Federal Court should be capable of being ordered only by the Supreme Court of a State or Territory. A question arises as to whether transfer to the Federal Court should be permitted generally or only if the Federal Court would have had jurisdiction to hear the proceedings had they been instituted in that Court. Two submissions received by the Commission argued strenuously that such a limitation should be imposed. One from the Chief Justice of South Australia on behalf of the judges of the Supreme Court of South Australia strongly opposed any extension of the jurisdiction of the Federal Court based soley upon the fact that the initiating process had been issued out of a State or Territory court and served interstate under federal legislation. Another from the Federal Attorney-General's Department also argued that the power to transfer proceedings to the Federal Court should be limited to cases in which the Federal Court would have had jurisdiction if the proceedings had been instituted there, but on the basis that the qualification was appropriate to ensure that the Federal Court's workload was not effectively expanded at the whim of State and Territory courts. On the other hand, the view of the former Acting President of the Commission and a judge of the Federal Court, Justice Wilcox, was that there should be no qualification applied to the transfer of proceedings to the Federal Court.

> Admitting a bias, I suggest that the capacity for transfer to the Federal Court should not be limited to cases in which the Federal Court would have had jurisdiction in any event. Already, in my brief time in this court, I have had three cases at first instance where there has been considerable controversy as to the city in which the proceedings have been heard, which controversy has been able to be resolved by a determination to take some of the evidence in one city and another part of the evidence in a different city. I think that there may be cases where it is perceived as being mutually advantageous for the Federal Court to be able to take over a matter in relation to which it is desirable to hear evidence in more than one State. It would be unfortunate if the ability of the Federal Court to carry out this function were limited by a requirement that it had original jurisdiction in any event.[256]

While this view may be considered to have certain advantages, it is recommended that transfer to the Federal Court should be permitted only where that Court would have had jurisdiction to hear the proceedings had they been instituted there. In the Commission's view, any extension of the jurisdiction of the Federal Court should be effected in the context of amendments to legislation affecting the jurisdiction of the Federal Court itself and not incidently in the context of legislation regarding service and execution of State and Territory process.

196. *Ancillary recommendations.* While the venue issue may be raised by the defendant by way of an application for a stay or transfer of proceedings, there may be cases where no such application is made but it is apparent to the court that it is manifestly

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[255] Federal Court of Australia Act 1976 (Cth) s 48.

[256] Wilcox *Submission* 2.

inconvenient to try the action in the forum and that it ought to proceed in the court of another State. In these circumstances it is recommended that the court should be empowered to act of its own motion even though the parties do not raise the issue. Where a transfer of proceedings is ordered, the transferring court should be able, also of its own motion, to give directions relating to the further steps to be taken in the proceeding. This power is essential to ensure that the proceedings may be transferred effectively to the transferee court. Subject to those directions, the transferee court should possess a similar power and, subject to all those directions, the proceeding should be continued in the transferee court as if it had been commenced there and as if the steps already taken in the proceeding had been taken in the transferee court. It is also recommended that there be provision for the further transfer of proceedings in the rare cases where it may be necessary. It is most unlikely that this situation will frequently arise but there seems no reason in principle why the facility should not exist and be utilised on occasion when it is appropriate. Thus the court to which proceedings have been transferred should, unless it has declined jurisdiction in the proceeding, be able to order a further transfer of a proceeding, either on application or of its own motion. The Federal Court, however, should have no power to transfer proceedings under these provisions. But this will not bar transfer under the Federal Court of Australia Act 1976 (Cth).

197. *Process of the Territories.* A final question is whether there is any need to differentiate between Territorial process and process of the States. The power to provide for the interstate service of the process of the States is conferred by s 51(xxiv) of the Constitution. However the power to provide for the service throughout Australia of the process of Territory courts must rest on s 122 of the Constitution.[257] In *Cotter v Workman*[258] Justice Fox of the Supreme Court of the Australian Capital Territory held that O 12, r 1 of the Rules of the Supreme Court of the Australian Capital Territory was invalid. That rule purported to authorise the service of a Territorial writ on a defendant anywhere in Australia without leave and without any nexus requirement. Justice Fox held that such a rule, even if purportedly made pursuant to legislative authority, did not fall within the ambit of s 122 of the Constitution. It might be thought that the scheme recommended by the Commission for Australia-wide service of process without any leave requirements and without nexus requirements also goes beyond s 122 of the Constitution as far as Territorial process is concerned. On the other hand it can be argued that the venue objection provision contains a sufficient nexus to satisfy the requirements of s 122. If a defendant is served with Territorial process outside a Territory and does not enter an appearance, or enters an unconditional appearance and does not object to the venue of the action, there seems no reason why the action should not proceed in the Territory. In these circumstances there is, in effect, jurisdiction by agreement of the parties. Where, however, a defendant objects to the venue chosen by the plaintiff, the court will consider whether trial in the Territory is appropriate having regard to the criteria set out above.[259] It would be most unlikely that a court would find that trial in the Territory would be appropriate within these criteria even though

[257] See para 67.
[258] (1972) 20 FLR 318.
[259] See para 181–2.

there was no connection between the parties or the subject-matter of the proceedings and the Territory. On this view the existence of a venue objection provision with specified criteria provides a sufficient nexus to ensure that the requirements of s 122 of the Constitution are satisfied. However, the failure of a defendant to enter an appearance cannot be assumed in all cases to constitute a submission to the jurisdiction. In addition, as a Territory court's jurisdiction over the defendant will arise on service of the initiating process, it may be suggested that to rely upon the venue objection procedure to ensure that the proceedings have a proper connection with the Territory may be to leave the question of that connection until too late a stage. There should be a provision to the effect that the jurisdiction conferred on a Territory court by virtue of service of process under the legislation is to be no greater than the jurisdiction that could be validly conferred under the Constitution.

Procedure of service

Endorsements

198. *Introduction.* At present a writ of summons that is to be served out of the jurisdiction under the Act must bear the endorsements prescribed by s 5. The question to be considered is whether these endorsements should be retained, modified or abolished. For this purpose it is necessary to look at the purpose of each existing endorsement and to evaluate it on its merits. It is also necessary to consider whether additional endorsements or documentation should be required.

199. *Form.* Before considering the individual endorsements it is desirable to say something about their form. Of the three endorsements required by s 5, two (those required by subsections (1) and (2)) must be endorsed on the writ while the third endorsement (that required by subsection (3)) can either be contained in, endorsed on or annexed to the writ. This distinction has caused some confusion.[260] In the paragraphs that follow the Commission makes certain recommendations regarding the information that should be provided to a defendant when served with initiating process. The simplest and easiest way of doing this is to prescribe a form of document containing the necessary information (with the necessary details to be filled in by the plaintiff) and to provide that it is to be served with the process itself. Hence the Commission does not recommend that there be endorsements made on the process itself but that there be served with initiating process a document in a prescribed form containing the required information. Not only will this simplify the procedure for providing the necessary information to a defendant, but it will mean that process issued out of a court under State or Territory law will be capable of being served either within the jurisdiction, in which case the federal legislation will have no application, or outside the jurisdiction merely be attaching the required notices to the process. This will make interstate service simpler and easier. It will also mean that there is no necessity for the issue of concurrent writs, one for service within the jurisdiction and one for service out, as is the case at present where, for example, the location of the defendant is not known at the time of issue.[261]

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[260] *Ninette Trading Pty Ltd v Kenworthy* [1980] VR 510.

[261] See para 86.

200. *Existing endorsements.* The first endorsement required is that there be a notice on the writ to the following effect:

> This summons [*or as the case may be*] is to be served out of the State [*or as the case may be*] of . . . . . and in the State [*or as the case may be*] of . . . . . .

In public hearings conducted by the Commission in connection with its reference on debt recovery and insolvency it was observed that this endorsement did not add to the writ 'in any great way'.[262] Moreover this endorsement has caused some confusion. For example if a writ indicates that it is issued in State A and is to be served on the defendant in State B, is service of the writ upon the defendant in State C irregular? Or, is service of the writ upon the defendant in the State of issue, State A, irregular?[263] The Commission does not recommend the retention of this endorsement in its present form. In addition to the problems that arise where service is effected in a State or Territory other than that specified in the endorsement, there seems to be no good reason for specifying the particular State or Territory in which service is to be effected because the federal legislation authorises service throughout Australia. All that is required is that the defendant be informed that service of the process outside the place of issue is authorised by the Act. The notice attached to the process when served outside the place of issue should cite the authority of the Act to provide for effective service.

201. The second endorsement required is a notice to the following effect:

> Your appearance to this summons [*or as the case may be*] must give an address at some place within 10 kilometres of the office of the . . . . . Court of . . . . . at . . . . . at which address proceedings and notices for you may be left.

The Commission has received a number of submissions commenting on this endorsement and the requirement to give an address for service within 10 kilometres of the court of issue of initiating process.[264] Some have favoured abolition of the present requirement. For example, it was observed in one submission

> that this restriction places some burden on interstate defendants and forces them to incur additional expenses by appointment of local solicitors as their agent. As modern communications make it possible to communicate with persons at a greater distance than was the case when the Act was originally drafted, [it is considered] appropriate in contempory circumstances that this section be redrafted so as to exclude this restriction.[265]

Other submissions have favoured retention of the requirement to give an address for service within 10 kilometres of the court of issue of the initiating process on the basis that this is necessary in order that the court may be able effectively to control the proceedings.[266] The Commission is impressed by the argument that the ease of communications within Australia does not warrant putting a defendant to the expense

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[262] DM Young *Transcript of Public Hearings* Canberra (24 November 1978) 273.

[263] See para 82.

[264] The statement in the endorsement is given force by s 9, which states that if such an address is not given an appearance may be set aside as irregular: see para 83.

[265] Sumner *Submission* 1.

[266] eg Harper *Submission* 2.

entailed in giving an address for service within 10 kilometres from the court of issue. Accordingly it is recommended that where an appearance is required or permitted to be entered in the proceeding, the defendant should simply nominate an address within Australia as an address for service of notices.[267] Rather than having to be processed through an intermediary, notices will be able to be sent directly to the address given by the defendant. If the notices comprise process and the address is in a State or Territory other than the place of issue, their service at that address will be facilitated by proposals discussed in a later chapter.[268] The requirement that an address for service be given when an appearance is entered should, however, be included in the document attached to the initiating process.

202. The third endorsement necessitates a short statement of the nature of the claim made or the relief sought by the plaintiff and, if the plaintiff sues in a representative capacity, it also requires that that capacity be stated. It is highly desirable that a defendant who is sued in a State other than that where he or she resides should know the nature of the claim. This may be decisive in determining whether the defendant will go to the trouble and expense of entering an appearance and contesting the action in the out-of-State court. In most cases the initiating process will contain such a statement, as the old common law system of pleading has been abolished in all State and Territory courts. Nonetheless, all initiating process served outside the place of issue contain such a statement.

203. *Additional information.* The next question is whether additional information should be required to be given to a defendant when served with initiating process *ex juris*. One submission suggested that additional documentation and information should be provided.

> It would also be beneficial to a defendant if the Act provided for a headed form of Appearance to be served with the Writ. The same could indicate the stamp duty required (postal note for same), and at least the name of 10 local solicitor firms, to be supplied on a rote by the Law Society, for the purpose of indicating an address for service in the jurisdiction out of which the process issued.[269]

The suggestion regarding the provision of names of local firms of solicitors would have merited consideration if the requirements of s 9 had been retained. However, in view of the Commission's recommendation that the defendant be permitted to give an address for service anywhere in Australia,[270] it is no longer necessary to pursue the suggestion. The Commission also does not favour the provision of a form of appearance. In the Commission's view the procedure to be followed after service of the process *ex juris* on the defendant should, subject to the venue objection procedure and the right to apply for security for costs,[271] be the same as applies where service is effected within the

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[267] This recommendation does not affect procedures of courts requiring that the solicitor of record be admitted to practice in a particular State or Territory. All that is being done is to facilitate the simple and speedy service of notices on a defendant.

[268] See para 242.

[269] Registrar, Supreme Court of Tasmania *Submission* 1.

[270] See para 201.

[271] See para 211–2.

place of issue of the process. That is, the defendant should be required or permitted to file the appropriate documents, for example, a notice of intention to appear, for which provision is made by the law of the place of issue. It would therefore be misleading for a 'federal' form to be included with the process when served. The Commission is also of the view that the forms for which provision is made by the law of the place of issue should not be attached to the process. The reason is that, to be entirely effective, all the forms catering for the various procedures and courses of action open to the defendant would have to be attached. This could be confusing to the defendant. However, the Commission recommends that the document attached to the process when served *ex juris* should provide information to the defendant on the possible courses of action that may be taken in response to the process. This should include both the procedures required or permitted under the law of the place of issue and the 'federal' responses permitted, that is, a challenge to the choice of venue of the plaintiff and the right to apply for security for costs. The importance of drawing the defendant's attention to his or her right to object to the venue was noted in a some submissions received by the Commission.[272] This latter information will be supplemented by the provision of the form that may be used to make application for a change of venue or a stay of proceedings, a recommendation made above.[273]

204. *Endorsements required by State and Territory laws.* Section 5 of the Act provides that the endorsements there set out are 'in addition to any other endorsement or notice required by the law of' the place of issue of the process. There has been some confusion as a result of this provision. Some cases hold that a writ of summons must bear all endorsements required by the law of the place of issue including those specifically described for process to be served out of the jurisdiction while other cases hold that s 5 requires only that those endorsements required on process generally, that is, when intended to be served within the place of issue, be made on the process and does not extend to endorsements prescribed by that law for process to be served out of the jurisdiction.[274] In the Commission's view it should be made clear that only those endorsements required on process generally should be included, not those required on process intended to be served *ex juris*.

Effect of lack of endorsements

205. Section 6 of the Act provides that a writ of summons that does not bear all the endorsements required shall be ineffective for service under the Act. The Commission recommends that a similar provision be included in new legislation, providing that service of initiating process is not effective unless the prescribed documents are attached to the process. Under the present Act it is clear that the lack of endorsements on a writ of summons does not render the process a nullity and that their omission can be waived by the defendant, for example, by entering an unconditional appearance to

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[272] eg Lyons *Submission* 3.

[273] See para 183.

[274] See para 81 for discussion.

the process. In an earlier paper distributed by the Commission[275] it was suggested that compliance with the requirement to attach the prescribed notices to initiating process served *ex juris* should not be capable of waiver. The reasoning which led to this tentative conclusion was that the notices contained important information, particularly as to the defendant's right to object to the venue, and that this information should be given to defendants in all cases. This suggestion was criticised in one submission as being too severe.[276] Another submission commented

> [I]t is common place for parties to waive personal service by solicitors accepting service on behalf of their clients. I find it difficult to see why any procedural requirement in civil litigation should be incapable of waiver. It will often be inconvenient to both parties if there has to be strict adherence to a requirement such as this notwithstanding a mutual desire to dispense with strict compliance.[277]

The Commission is persuaded by these arguments that the requirement to attach notices to initiating process should be capable of waiver and that new legislation should not provide otherwise. If a defendant is served with initiating process that does not contain the necessary notices it is ineffective for service under the Act. Consequently, if the defendant does not enter an appearance and judgment is given in the plaintiff's favour the judgment could be set aside on the ground that the process was defective. If the defendant does enter an unconditional appearance and does not object to the venue, because he or she is ignorant of this right, application can be made out of time to seek a change of venue.[278] The absence of the required notices, particularly as to the right to apply for a change of venue, would undoubtedly constitute a sufficiently special circumstance which would entitle the defendant to make an application out of time.

Appearance

206. Section 8 of the Act provides that the period specified in process issued for service under the Act as the period within which the defendant may enter or make an appearance is not less than 20 days after service in the case of process issued in a State or mainland Territory and to be served in a State or mainland Territory and in other cases not less than 45 days after service. However, if a longer period is prescribed by the rules of the court of issue of the process, the period must be not less than that longer period. The Commission recommends that the document to be served with initiating process should state the time within which the defendant may enter an appearance.[279] But a number of questions arise.

207. The first is whether there should continue to be a distinction between process issued and served in the States and mainland Territories, on the one hand, and process either issued or served in the external Territories of Australia, on the other. There is certainly an argument, based on the distances involved, for saying that a defendant

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[275] See RP 7, Draft Interstate Procedure Bill 1986 cl 12(2).
[276] Zelling *Submission* 1.
[277] Wilcox *Submission* 1.
[278] See para 185 for this recommendation.
[279] A broad definition of the term 'appearance' has been recommended: see para 161.

who is served or sued in an external Territory should be allowed a longer period within which to enter an appearance than in cases having no connection with an external Territory. However, in the present day there are sufficient and extensive telephonic, telex, facsimile and postal facilities throughout Australia, including the external Territories, to enable speedy communications between one place and another. It is therefore recommended that the distinction presently made in the Act should be abolished. The period permitted to a defendant within which to enter or make an appearance should be the same regardless of the place of issue or the place of service of initiating process.

208. Another question is whether the period specified in the federal legislation should be displaced by the period prescribed by the rules of the court of issue if that period is longer. The matter is one of fine judgment on which differing views may be held, as is exhibited in a submission from the Civil Procedure Committee of the Law Society of the Australian Capital Territory.

> There were differing views within the Committee as to whether a longer period should be allowed where prescribed by rules of court out of which the writ of summons is issued. Some of the Committee favoured uniformity in all States and Territories regardless of local rules. Those against allowing a longer period pointed out the anomolous situation where, for example, in New South Wales the 28 day period applies in relation to summonses within the jurisdiction which would effectively be shortened in the case of interstate service.[280]

While the Commission acknowledges that there is variation amongst the States and Territories on this matter, it has come to the view that it is desirable for a uniform period to be prescribed for the purposes of entry of appearance. Therefore it is recommended that the period prescribed as the period for entry of an appearance should not be capable of displacement by longer periods prescribed by State and Territory rules.

209. The other question on this matter concerns the period that should be allowed for entry of an appearance. Within the context of a modern country in which rapid means of communication are available, there is no warrant for providing an excessively long time. But the period should also be long enough to enable a defendant to obtain advice as to his or her legal options, including whether to enter an appearance at all or to challenge the venue chosen by the plaintiff. The Commission recommends that a reasonable period, taking these matters into account, is 21 days. The document attached to initiating process when served *ex juris* should specify that the defendant has a period of 21 days after service within which to enter an appearance and that this period overrides any other period, shorter or longer, provided under State or Territory law. In some circumstances, however, it may be expedient that the period be shorter than 21 days, for example, where a plaintiff seeks urgent relief or where it is sought to join a new party in existing litigation. Consequently, the Commission recommends that the court before which the proceeding will be heard should, on application by a party to the proceeding, have power to prescribe a shorter period of time. It further recommends that the discretion of the court should be guided by providing that it should direct its attention to, amongst other things, the urgency of the matter, the

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[280] Civil Procedure Committee, Law Society of the Australian Capital Territory *Submission* 1.

places of residence or business of the parties and whether related or similar proceedings have been commenced against some other person. No doubt the court would be astute to deny attempts by a party to impose a shorter period merely as a vehicle of oppression against the person to be served with the process. But there may be circumstances, such as those noted above, where it is proper for the period to be shortened. Where the court orders that a shorter period of time should be permitted for the purposes of entry of an appearance the document served with the initiating process should state that period in lieu of the 21 day period recommended above and a copy of the order should also be attached to the process.

210. Finally, in respect of appearances, the requirement to give an address for service, noted in the document served with the process, should be given legislative force. Failure to provide an address for service should entitle the court to set aside the appearance. But this power should not limit other powers a court may have to set aside an appearance.

Security for costs

211. Section 10 of the Act enables a defendant who has been served with a writ of summons under the Act to apply to the court of issue or a judge thereof for an order compelling the plaintiff to give security for costs. The defendant does not have a right to obtain such an order, the provision being discretionary in nature. No indication is given by the provision as to the appropriate circumstances in which an order should be made, but the courts have enumerated several factors which should be considered relevant to the exercise of the discretion. The main factor in this regard is the situation of the natural or appropriate forum of the action, with the result that a plaintiff who institutes proceedings in a State or Territory that is not the natural forum of the action may be required to give security for costs. Another relevant factor is the financial circumstances of the plaintiff, although mere impecuniosity is not itself decisive.[281]

212. In the context of the Commission's proposals for reform the first consideration, namely, the situation of the natural forum for the action, would not appear to be a compelling factor. In view of the recommended venue objection procedure, if the plaintiff sues in a non-natural forum then the defendant can take appropriate action to move the venue of the trial to the appropriate forum. However there may be cases where a defendant will not object to the plaintiff's choice of venue or will waive such an objection on obtaining an order for security of costs. Further, there may be circumstances where the court is not inclined to order a change of venue but deems it appropriate to order that the plaintiff give for security of costs. Moreover, in view of the inclusion of a 'financial circumstances' factor in the venue objection procedure, it may be that the financial standing of the plaintiff will be a relevant consideration in determining whether to order that security for costs be given. While the provision does not seem of overwhelming importance the Commission recommends that it be retained. The provision should allow the court to order that the proceedings be stayed until security

[281] See para 132–6.

is given. In addition, the provision should not be exclusive, that is, the court should be able to exercise powers arising under the laws of the place of issue authorising such orders to be made.

Effect of service

213. The divergent views once held on the question of the effect of service under the Act were examined earlier in this chapter.[282] It is now clear that in so far as the jurisdiction of State and Territory courts depends on the area of service, the Act, in enabling process to be served outside the State or Territory of issue, has extended their jurisdiction. However the Act does not extend the jurisdiction of State and Territory courts in respect of jurisdictional limitations not dependent on the area of service. Hence subject-matter limitations on jurisdiction, for example, by reference to the amount in controversy, are not affected by the Act. Section 13 of the Act appears to be directed to the preservation of such jurisdictional limitations. It may be, as was observed in one case,[283] that s 13 is unnecessary. The Act does not purport to extend the jurisdiction of State and Territory courts in so far as their jurisdiction is confined by reference to the subject-matter of an action, nor would the federal legislature be constitutionally competent to extend such jurisdiction of State courts.[284] Nevertheless, it is recommended that new federal legislation contain a provision corresponding to s 13 of the Act, making it clear that the jurisdiction of State and Territory courts, insofar as it depends on the area of service, is extended by the legislation, but that other limitations on jurisdiction remain.

214. An example of provisions establishing such other jurisdictional limitations is s 47 of the District Court Act 1973 (NSW).

> (1) The court shall have jurisdiction in accordance with this Act to hear and dispose of an action, and a registrar may exercise the powers conferred on him by any of the rules prescribed for the purposes of this subsection –
>
> (a) notwithstanding that part of the cause of action arose outside New South Wales, provided a material part of the cause of action arose within New South Wales;
>
> (b) notwithstanding that the whole cause of action arose outside New South Wales, provided the defendant was resident within New South Wales at the time of service of the document which commenced the action; or
>
> (c) notwithstanding that the defendant is not within New South Wales, provided the whole cause of action or a material part of the cause of action arose within New South Wales and provided the defendant was within a State or part of the Commonwealth (within the meaning of the Service and Execution of Process Act 1901 of the Commonwealth) at the time of service of the document which commenced the action.

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[282] See para 138–51.

[283] *Ex parte Iskra, ex parte Mercantile Transport Co Pty Ltd* (1963) 5 FLR 219, 226 (Sugerman J).

[284] The power with respect to Territory courts is broader, however, by virtue of s 122, but there would nevertheless have to be some relevant connection of subject-matter jurisdiction with the Territory in question: see para 67.

(2) Subsection (1)(c) applies whether the defendant has or has not ever been resident or carried on business in New South Wales.

(3) In this section 'defendant' includes, where there are two or more defendants, any one of those defendants.

Section 47(1)(a) and (c) limit the jurisdiction of the District Court by requiring that at least a material part of the cause of action must have arisen within New South Wales.[285] However by s 47(1)(b) the only limitation on the jurisdiction of the District Court is that 'the defendant was resident within New South Wales at the time of service of the document which commenced the action'. If 'resident' bears its ordinary meaning then it would constitute a subject-matter limitation on jurisdiction and the effect of s 47 as a whole would be to empower the District Court to hear a case if either a material part of the cause of action arose within New South Wales or if the defendant was resident within New South Wales at the time of service. However sometimes the word 'resident' has been construed as meaning no more than 'present'.[286] If this is the meaning that the term 'resident' bears in the New South Wales provision then the effect of the provision would be to abolish any subject matter jurisdictional limitations by reference to the cause of action in cases where the defendant was served with process while within New South Wales. But federal legislation authorising service of process on a defendant throughout Australia would confer Australia-wide jurisdiction on the court and it would follow that there would be no subject-matter limitations by reference to the cause of action despite the terms of s 47(1)(c), because s 13 of the present Act and a corresponding provision in new legislation would in effect deem the defendant to have been served within the State. However if 'resident' in s 47(1)(b) means more than mere presence then it would constitute a limitation on jurisdiction other than that arising from the area of service of process. The complication in the matter arises from the wording of the New South Wales provision itself and exhibits the difficulties that may be encountered notwithstanding the recommendation that new legislation contain a provision equivalent to s 13 of the present Act.

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[285] See *Thomas v Penna* (1985) 2 NSWLR 171.

[286] eg in relation to international jurisdiction when a foreign judgment is sought to recognised or enforced at common law: see Sykes & Pryles 1987, 106.

4. Initiating process in criminal proceedings

Introduction

215. While the provisions of the Act concerning service of initiating process in civil proceedings have a clear precedent in the Federal Council of Australasia's Australasian Civil Process Act 1886, there is no precedent for s 15 of the Act which deals with service of criminal and quasi-criminal process. Prior to its enactment, the only way a person could be brought from one jurisdiction to another for the purposes of criminal proceedings was by extradition proceedings under the Fugitive Offenders Act 1881 (UK).[1] Section 15, in contrast, provides a non-custodial procedure for securing the attendance of persons at criminal proceedings in another State, although there are procedures for extradition if persons do not appear.[2] This chapter considers reforms to s 15.

Existing law

Application

216. Section 15 applies to process that is

> a summons or other process, not being a summons or other process to which section 4 or 14 applies, which is issued on an information, complaint or application made on, or supported by, oath, being a summons or other process which —
>
> (a) requires a person to appear before a court and answer to the information, complaint or application; or
>
> (b) gives to a person notice of the hearing before a court of the information, complaint or application.[3]

The provision encompasses what, for shorthand purposes, may be described as initiating process in criminal proceedings and process in other proceedings initiated by a summons or other process (to which s 4 or s 14 do not apply) issued on an information, complaint or application. The Parliamentary debates on the Service and Execution of Process Bill 1953, which enacted s 15 in substantially its present form, indicate that it was intended that maintenance and similar proceedings were to be included.[4] This intention was frustrated in one case[5] where it was held that a complaint and summons issued by the plaintiff under the Maintenance Act 1928 (Vic) against her husband for support was a 'writ of summons'. It has since been held that a similar summons fell

[1] That Act was extended to the Australian Colonies in 1883.
[2] Pt III of the Act. See ch 6.
[3] s 15(1).
[4] Cth Hansard (Sen), 10 September 1953, 39–41.
[5] *Lindgran v Lindgran* [1956] VLR 215.

within the process described in s 15[6] and this interpretation was given legislative approval by amendments in 1963[7] clarifying that a 'writ of summons' is process issued in relation to a suit and that the term 'suit' (except in Part IV) excludes proceedings in which a person is charged with an offence and proceedings under State or Territory law with respect to maintenance or affiliation.[8] Thus it is now clear that s 15, to the exclusion of s 4, applies to process concerning criminal proceedings and maintenance and affiliation proceedings.[9]

Procedure

217. The scheme applying to service of process to which s 15 applies is very simple. The process may be served outside the place of issue without leave and such service has 'the same force and effect' as service within the place of issue.[10] The Act does not require that the process bear any special endorsements,[11] nor does it specify a minimum period of time between the date of service and that on which the proceedings concerning the person are to commence.[12] But some protection is given to defendants to ensure that they have adequate time to seek advice in relation to a proceeding by the requirement that, where the person served fails to appear at the time and place specified in the process, the court that will hear the proceedings be satisfied that the process was served a 'sufficient time' before the time so specified before further steps may be taken in the proceedings.[13] If so satisfied

> the like proceedings may be taken as if service had been effected in the State or part of the Commonwealth in which the summons or other process was issued.[14]

Jurisdiction

218. In contrast to the situation with civil proceedings, the taking of subsequent steps in the proceedings in the absence of the defendant is not dependent upon the establishment by the plaintiff of a defined nexus between the forum and the action or the parties. However s 13 specifies that no additional jurisdiction is conferred on a court by the service of process under Part II of the Act, and s 15 is within Part II.[15] Limitations on jurisdiction relating to, for example, subject matter, therefore continue to exist.[16] It is therefore clear that service of process under s 15 does not

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[6] *R v Dodds, ex parte Mitchell* (1959) 2 FLR 462, a decision in relation to a summons issued under the Deserted Wives and Children Act 1901 (NSW).

[7] Service and Execution of Process Act 1963 (Cth) s 3.

[8] See Cth Hansard (H of R), 28 March 1963, 163, where this intent is made clear in the second reading speech on the Bill.

[9] Nygh 1984, 52; Pryles & Hanks 1974, 33.

[10] s 15(2), (4).

[11] cf s 5: see para 80–5.

[12] cf s 8: see para 83.

[13] s 15(4). There are no reported decisions upon what constitutes a 'sufficient time'.

[14] s 15(4).

[15] But see para 142, n 165 for comment regarding the terms and juxtaposition of s 13.

[16] *Ex parte Iskra, ex parte Mercantile Transport Co Pty Ltd* (1962) 5 FLR 219, 228 (Sugerman J).

confer jurisdiction on a court to hear and determine, for example, a prosecution for an offence if that jurisdiction does not exist under State or Territory law.[17] But once that jurisdiction is established, s 15 gives authority for service of the process outside the place of issue. In extending the area in which service may be effected, s 15 thus extends the jurisdiction of State and Territory courts so far as their jurisdiction depends on service.[18]

Mode of service

219. Service of process to which s 15 applies

> may, subject to the rules of court in force under this Act, be effected in the same way as it could be effected in the State or part of the Commonwealth in which the summons or other process was issued.

This is the same language as is employed in s 4(2)(a) of the Act. Despite the shortcomings that a strict reading of its terms would impose where service was sought to be effected on a corporation or statutory authority which had no presence in the State or part of issue,[19] the provision has been interpreted broadly to enable service on such bodies.[20] Nevertheless, it has been suggested that the provision be clarified in this respect,[21] but that suggestion has been taken up only in respect of service of initiating process in civil proceedings.[22]

Reform proposals

Introduction

220. Section 15 applies to process (generally initiating process) issued in criminal proceedings, maintenance proceedings and proceedings concerning affiliation. In chapter 3 it was recommended that maintenance and affiliation proceedings should be classified as civil proceedings for the purpose of procedures for service of initiating process *ex juris*.[23] In consequence, replacement provisions for s 15 will be confined in their operation to initiating process in criminal proceedings. Comments were made in chapter 3 also of the device that will be employed in the legislation to distinguish between civil proceedings and criminal proceedings, namely, by providing an exhaustive definition of the phrase 'criminal proceeding' and by defining 'civil proceeding' to mean

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[17] See para 147–9 for discussion of such aspects of jurisdiction in relation to maintenance proceedings.

[18] *R v Dodds, ex parte Mitchell* (1959) 2 FLR 462, 467 (Kriewaldt J): 'it may be said that the federal Act extends the jurisdiction of the New South Wales courts, but such an extension is clearly authorized by the Constitution'. See also *R v Morgan, ex parte Home Benefits (Pty) Ltd* [1938] SASR 266, 279 (Napier J).

[19] See para 87 for discussion.

[20] *Colbert v Tocumwal Trading Co Pty Ltd* (1963) 7 FLR 103.

[21] id, 109 (Sholl J).

[22] Service and Execution of Process Act 1968 (Cth) s 2, substituting s 4(2) of the Act. See also para 87.

[23] See para 155.

a proceeding other than a criminal proceeding.[24] For the purpose of determining the scope of replacement provisions for s 15 it is therefore necessary to consider the wide range of proceedings arising under State and Territory laws that are criminal in nature and to arrive at an appropriate definition of the phrase 'criminal proceeding'. It is also necessary to consider the various procedures applying in such proceedings such that adequate provision can be made for the service of process that initiates those proceedings. The other procedural aspects of s 15 must also be considered.

Classification of criminal proceedings

Present restrictiveness

221. The process presently within s 15 is process that

- requires a person to appear before a court or
- gives a person notice of the hearing before a court of a proceeding.

So confined, the vast majority of the range of criminal proceedings are included; liability for an offence is usually determined before a court, whether constituted by a single magistrate or judge or with a jury as well. The Act defines 'court' to include 'any judge or justice of the peace acting judicially'. Whether this definition is broad enough to encompass a magistrate or other officer conducting a preliminary investigation (committal proceeding) is open to question. If 'acting judicially' in this context means no more than that the relevant officer is required to act fairly — in accordance with the rules of natural justice — then 'court' would include the officer conducting committal proceedings. However, if it means that the officer be exercising judicial power, then the officer conducting committal proceedings would not be a 'court', as those proceedings are administrative in nature.[25] Thus the process to which s 15 applies may not include process that requires the appearance of a person at a preliminary investigation or committal proceeding. In addition, the provision clearly does not cater for process concerning criminal matters which are not dealt with in a court. Recent developments in the States and Territories have provided for minor criminal matters to be dealt with without court proceedings. Representations made by one State Attorney-General to the Commonwealth Attorney-General concerning this deficiency in the Act were passed on to the Commission when it received the Reference.[26]

Committal proceedings

222. The ambiguity concerning the application of s 15 to process concerning committal proceedings clearly should be resolved. If such proceedings were to be excluded the only way to secure the appearance of persons at committal proceedings would be by way of apprehension and extradition. In view of the integral part played by committal proceedings in the criminal process and the undesirability of potentially unnecessary apprehension of all defendants, it is recommended that the definition of 'criminal proceeding' should be framed so as to include committal proceedings.

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[24] See para 156.

[25] *Amman v Wegener* (1972) 129 CLR 415.

[26] See further para 224.

Procedures not requiring court appearance

223. *Infringement notices.* A variety of State legislation provides for the determination of liability for an offence or the imposition of a penalty for an offence without the necessity for an appearance before a court. Examples are found in legislation concerning procedures for dealing with parking and traffic infringements of a minor kind and similar minor matters. For example, a parking infringement notice may merely state the offence alleged to have been committed and the fine to be paid if further proceedings are to be avoided. Upon payment of the fine the offence is expiated. Only where the matter is disputed or the fine left unpaid are further proceedings taken. Provisions concerning such notices usually allow a number of methods of service. In Victoria, for example, a parking infringement notice may be served

> (a) by serving the notice personally upon the person who appears to have committed the infringement or any person who is driving or appears to be in charge of the vehicle;
> (b) by affixing the notice to the vehicle in a prescribed manner; or
> (c) by serving the notice personally on the owner of the vehicle or by sending the notice by post addressed to the owner of the vehicle at his last known place of residence or business, and for that purpose, where the vehicle is a motor car, the address appearing as the latest address of the owner in a certificate of registration of the motor car shall be taken to be his last known place of residence or business (as the case may be).[27]

In general, such notices are affixed to a vehicle and there can be no question of interstate service. But where the parking infringement has been committed by the owner of a vehicle registered outside Victoria and it has proved impossible to serve the parking infringement notice in accordance with paragraph (a) or (b), difficulties arise. As the parking infringement notice does not require the attendance of the alleged offender before, or notify the person of proceedings in, a court and as it is not 'issued on an information, complaint or application', its service outside the place of issue is not possible under s 15.

224. *'Alternative procedure' informations.* Various State laws also provide procedures for prosecution of, or imposition of penalties for, offences which provide the alleged offender with the option of having the matter dealt with in a court. For example, Part VII of the Magistrates (Summary Proceedings) Act 1975 (Vic) provides for an 'alternative procedure' which may be used in the prosecution of certain offences.[28]

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[27] Road Traffic Act 1958 (Vic) s 11A(2).

[28] These offences are specified in Schedule Two of the Magistrates (Summary Proceedings) Act 1975 (Vic) and include various minor offences under the Road Traffic Act 1958, the Transport Regulation Act 1958, the Commercial Goods Vehicles Act 1958, the Country Roads Act 1958, the Motor Car Act 1958, the Motor Boating Act 1961, the Litter Act 1964, the Dog Act 1970, the Housing Act 1958, the Companies (Victoria) Code and the Weights and Measures Act 1958.

This procedure is not mandatory but no doubt may be preferred as simplifying the prosecution procedure, reducing the use of court time and decreasing costs. Where the 'alternative procedure' is used an information in the prescribed form, accompanied by a sworn statement or statements describing the facts of the alleged offence and a prescribed notice informing of the possible courses of action which may be taken in response to the information, is served on the defendant.[29] The prescribed forms are set out in the First Schedule of the Magistrates' Court Rules 1980 (Vic) and it is pertinent to note their terms.

Magistrates' Courts Rules 1980 — Form 62

S. 84(2)

ALTERNATIVE PROCEDURE
INFORMATION FOR AN OFFENCE OR OFFENCES

In the Magistrates' Court
At
To: [*Full name of defendant.*]
of [*Address of defendant.*]
It is alleged by [*Full name of informant.*]
of [*Address of informant.*]
[*Occupation.*]
that [*Each offence to be stated separately.*]
Dated at the day of 19

(Informant)

TO THE DEFENDANT — The facts of the offence(s) alleged above are described in the attached sworn statement(s). You are advised to read carefully the statement(s) and also the attached notice advising you of how this information may be dealt with by a Stipendiary Magistrate in Chambers or by a Magistrates' Court.

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[29] Magistrates (Summary Proceedings) Act 1975 (Vic) s 84(2).

Magistrates' Courts Rules 1980 — Form 63

S. 84(2)(a)

ALTERNATIVE PROCEDURE
NOTICE TO DEFENDANT

You may, by notice in writing, elect to appear in court to answer the allegation(s) contained in the information. Unless a notice of your election to appear is received, you will not be entitled to appear or to be heard, except by leave of the court.

IF YOU WISH TO APPEAR —

You should complete the attached notices of election to appear and deliver by post or otherwise one notice to the informant and the other notice to the Clerk of the Magistrates' Court at not later than the day of 19 . You will then received a summons to appear in Court on a certain date.

IF YOU DO NOT ELECT TO APPEAR —

You may forward to the Clerk of the Magistrates' Court before the abovementioned date a written statement, explanation or submission concerning the circumstances of the alleged offence(s). The information will be heard by a stipendiary magistrate in chambers who may consider your written statement before imposing any penalty. If you take no action in respect of this notice, the information may be considered by a stipendiary magistrate in chambers and a penalty may be imposed. The Clerk of the court will advise you of the amount of the fine imposed and any costs awarded against you. If the stipendiary magistrate considers that the alleged offence(s) should be decided by a court, he will adjourn the information to a magistrates' court and you will be notified in writing by the clerk of the court of the date, time and place of hearing.

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225. While the 'Information for an Offence or Offences', being supported by the sworn statement or statements accompanying it, would fall within the introductory part of the definition of the process to which s 15 applies, neither s 15(1)(a) nor (b) would apply as the notice does not require the alleged offender to appear before court or notify the person of a hearing in a court. The same conclusion applies with respect to the 'Notice to Defendant', including in relation to s 15(1)(b), for while the proceedings may ultimately come before a court,[30] if process is to satisfy para (b) it would seem that it must in actual fact specify the time and place of the hearing and the court before which the hearing will take place. The 'Notice to Defendant' fails to provide this information.

226. *Recommendation.* It may be argued the procedure concerning infringement notices is merely an administrative one and that the notice does not constitute 'process' within s 51(xxiv) of the Constitution.[31] On this view there would be no power to provide for the interstate service of infringement notices and, in any event, there would be

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[30] A magistrate in chambers exercising the power to convict and impose a penalty on a person (though this power is restricted: See Magistrates (Summary Proceedings) Act 1975 (Vic) s 84(9)) would clearly come within the Act's definition of 'court' (as to which see para 221).

[31] See para 45 as to the nature of process.

no need for legislation to so provide. However, the Commission is of the view that they are process and provision should be made for their interstate service notwithstanding that the procedure is used for minor offences only. With the greater integration of the Australian community, brought about by improved communications and travel facilities, the determination of whether process concerning an offence should be capable of service outside the place of issue should not depend upon the seriousness of the offence. Rather, the constitutional power should be employed to further and assist that integration. State boundaries should not enable persons who, while not in their State of residence, commit even minor offences against the laws of another State, to do so with impunity. Procedural obstacles should not stand in the way of the prosecution of persons for offences. Similarly with the 'alternative procedure' under which an election to appear at the hearing of a charge is possible. While such procedures may not be mandatory they clearly provide a simpler and potentially less costly mechanism for prosecution of criminal offences of a minor nature than do normal procedures. Federal law enacted in pursuance of a power intended to facilitate the conduct of proceedings should not discriminate in favour of the use of one type of procedure; it should not in effect compel only one type of procedure to be used where State law provides for other procedures. It is therefore recommended that such procedures should be included in the definition of 'criminal proceeding'. Recommendations are made below regarding the nature of the initiating process issued in relation to such procedures so that it may be served *ex juris*.[32]

Matters conducted in accordance with civil practice

227. There are also other alternative methods for dealing with offences. For example, certain offences against federal taxation laws, namely, 'prescribed taxation offences', may be prosecuted by taking proceedings that, if instituted in inferior courts, are dealt with as normal criminal prosecutions but, if instituted in a Supreme Court,

> may be conducted in accordance with —
>
> (a) the usual practice and procedure of the Supreme Court in civil cases; or
>
> (b) the directions of the Supreme Court or a Justice or Judge of the Supreme Court.[33]

One submission on the draft Bill circulated by the Commission,[34] which included such proceedings within a definition of 'criminal proceeding', argued that

> it would be inappropriate for proceedings of this type taken in a superior court to be treated as criminal proceedings for the purpose of the proposed legislation when in all other respects civil procedures apply.[35]

While such proceedings may be conducted in accordance with civil practice they are concerned with the prosecution of a person for an offence and are therefore essentially criminal in nature. So too are customs prosecutions which, if taken in a Supreme Court,

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[32] See para 231.

[33] Taxation Administration Act 1953 (Cth) s 8ZJ(6).

[34] RP 7, Draft Interstate Procedure Bill cl 3(1).

[35] Director of Public Prosecutions (Cth) *Submission* 2.

are conducted in accordance with the usual practice of the Court in civil proceedings.[36] While it may be rare for process commencing such proceedings to be served interstate,[37] it would be inappropriate to classify these proceedings as civil, which would result in the application of the venue objection procedures recommended in chapter 3.[38] The same would apply in relation to similar types of proceedings conducted under State law for there would be only one jurisdiction in which the proceedings could be taken. Prosecutions dealt with in this way should be classified as criminal proceedings for the purpose of procedures for interstate service of process. This classification will not, however, affect the practice and procedure in accordance with which the proceedings are conducted once before a court.[39] Nor will this classification affect the opportunities for recovery of sums of money ordered to be paid in these proceedings, as the Commission's recommended definition of 'judgment' caters for awards made in them.[40]

Proceedings related to proceedings concerning an offence

228. *Confiscation of criminal profits.* There has been growing concern throughout Australia that those who take part in criminal enterprises have been able to retain a large part of the proceeds of their crimes despite the fact that hefty penalties may be imposed upon them when convicted. This concern has spawned legislation designed to enable the confiscation of the tools of and the profits derived by convicted persons or persons associated with them from crimes. Some of the legislation also provides for the making of restraining orders, which are in the nature of injunctions, prohibiting dealings with certain property before criminal proceedings against a person are concluded. Such legislation exists at the federal level and, following an agreement reached by the Standing Committee of Attorneys-General, at the State level also. For example, the Customs Act 1901 (Cth) provides procedures for the confiscation of the profits derived from crimes associated with the importation and exportation of narcotics.[41]

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[36] Customs Act 1901 (Cth) s 247.

[37] In relation to taxation prosecutions, s 8ZC of the Taxation Administration Act 1953 (Cth) provides in effect that a taxation offence shall be taken to have been committed at:

- the place where the act constituting the offence was done or the place where the omission constituting the offence should have been done;
- if the person who has committed the offence is a natural person — the usual place of residence or business of the person or the place of residence or business last known to the Commissioner; or
- if the person who has committed the offence is a corporation — the head office, a registered office or a principal office of the corporation.

Further, both the Customs Service and the Taxation Office have advised that in their memory the Service and Execution of Process Act has never been relied upon to serve initiating process on a defendant.

[38] See para 178.

[39] This explains the difference in classification of such proceedings for the purpose of the Commission's recommendations in its inquiry into the laws of evidence: see ALRC 38, Appendix A, Draft Evidence Bill 1987 cl 3, definition of 'criminal proceeding', and cl 6.

[40] See para 515.

[41] Customs Act 1901 (Cth) Part XIII, Division 3.

Proceedings under these provisions are dealt with in the Federal Court and there is no need for further comment on them for present purposes. The various State legislation, however, is relevant. The first such legislation enacted was the Crimes (Confiscation of Profits) Act 1985 (NSW). Under that legislation an application for a confiscation order (a forfeiture order or pecuniary penalty order) may be made to an appropriate court[42] within a certain time of a person having been convicted of a serious offence.[43] An application for a restraining order may be made ex parte to the Supreme Court where a person has been, or is about to be, charged with a serious offence.[44] The court may require notice of the application to be given to a person whom the court has reason to believe has an interest in the property which may be subject to the restraining order.

229. Just as it may be necessary to serve process commencing a normal criminal prosecution *ex juris*, so it may be necessary for process concerning proceedings for a forfeiture order or restraining order to be served outside the jurisdiction in which the proceedings are instituted. In view of the relation between a criminal prosecution and these proceedings and the inappropriateness of the venue objection procedures to these proceedings it is recommended that the proceedings be classified as criminal proceedings. Again this classification, adopted for the purpose of the procedures for service, will not affect the practice and procedure of the courts in dealing with the proceedings after service and, under recommendations made in chapter 7, it will be possible to enforce interstate orders made in the proceedings.[45]

230. *Proceedings associated with orders made in criminal proceedings.* The same considerations apply with respect to proceedings concerning matters arising out of orders made in criminal proceedings. For example, upon the hearing of charge against a person the person may be admitted to bail subject to a surety. If at some later stage it becomes necessary to seek to enforce the surety and for that purpose to serve commencing process in those proceedings outside the State in which the original order was made, the same procedures should apply to service of that process as apply to service outside the State of issue of initiating process in the original criminal proceedings.[46] Where a breach of bail is not in itself an offence, proceedings related to a breach of bail conditions should also be classified as criminal proceedings.[47] Similarly, proceedings to enforce a bond, suspended sentence, community service order or other similar order made in proceedings for the prosecution of an offence should be classified as criminal proceedings.[48]

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[42] Defined as the court before which the person was convicted or the Supreme Court: Crimes (Confiscation of Profits) Act 1985 (NSW) s 3(1).

[43] A 'serious offence' is an offence that may be prosecuted on indictment, an offence of supplying a restricted substance under the Poisons Act 1966 (NSW) or an offence prescribed for the purposes of the definition: Crimes (Confiscation of Profits) Act 1985 (NSW) s 3(1).

[44] If the court is not satisfied that the person is likely to be charged within 48 hours of the application, the court shall not make a restraining order: s 12(3).

[45] See para 515.

[46] Special provisions are proposed in relation to proceedings concerning bail granted in extradition proceedings: see para 435–6.

[47] National Police Working Party *Submission* 1–2.

[48] Zelling *Submission* 2.

Definition of initiating process

231. Comment has been made regarding the restrictive operation of s 15 because its terms refer to the characteristics of particular process. The recommendations made above considerably enlarge the scope of the provision through the definition of the nature of the proceedings, rather than of the characteristics of process. It is nonetheless necessary to define the characteristics of the process to which the provision should apply. This should be process initiating proceedings within the recommended classification of criminal proceeding. In the context of civil proceedings it has been recommended that 'initiating process' should be defined as process that commences a proceeding or by reference to which a person becomes a party to a proceeding.[49] This definition will suffice also in relation to many of the proceedings within the recommended classification of criminal proceedings. However in respect of the informal or alternative procedures within the recommended classification it is necessary to make special provision. For the purpose of these procedures 'initiating process' should include process giving notice to a person that, in specified circumstances, further steps will not be taken in relation to the offence or that liability for the offence may be determined without an appearance before a court.

Procedural matters

Formalities of process

232. The question of the mode in which initiating process in criminal proceedings should be served is discussed in a later chapter.[50] However note should be made here of other procedural matters. The Commission sees no cause to alter some aspects of the simple procedure for the interstate service of the process. The lack of requirements for leave to serve, and for endorsement of, the process and other procedural matters have not caused problems, nor is it envisaged that they will cause problems under the recommended classification of criminal proceedings. Therefore no changes are recommended in this regard.

Constraints against further proceedings

233. The only aspect of the procedure which has given rise to some concern relates to the time after service at which further steps in the proceedings may be taken. The existing provision, being confined to process related to court proceedings, permits the court before which a proceeding is to be conducted to decide whether a 'sufficient time' has elapsed between service of the process and the time when it is sought to take further steps in the proceeding. However, within the recommended classification of criminal proceedings procedures for determining liability for an offence may be regulated by administrative officers rather than courts. This potential has influenced the Commission to propose a different provision regarding the time for the taking of further steps in criminal proceedings. It would be inappropriate, in the Commission's view, for an administrative officer to decide whether a 'sufficient time' has elapsed in the circumstances of a case. Therefore the legislation should set a time period which

[49] See para 157.
[50] See ch 9.

should elapse before further steps in a proceeding may be taken. This period should be sufficient to permit the person served (not necessarily a 'defendant' in the strict sense) to seek advice on the options open and to prepare his or her case. The period proposed for the entry of an appearance in civil proceedings is an appropriate time. Therefore it is recommended that further steps in a criminal proceeding should be delayed until at least 21 days after service of the initiating process on the person. However, as is proposed for civil proceedings, that time period should be capable of being shortened. For that purpose, the legislation should provide for an application to be made to a court for an order that the time period be shortened. Such an application should be made to the court which is to deal with the proceeding, if there is such a court, or, if the proceedings are not to be dealt with in a court, a court of summary jurisdiction. The matters to which the court should direct its attention when considering such an application should not be expressed exclusively, for there may be unforeseen circumstances in which it would be appropriate to shorten time, but for the purpose of aiding consideration some indication of the relevant matters should be included. These should include the place of residence of the person to be served with the process, whether related or similar proceedings have been commenced against another person and urgency. While there will be the facility for shortening the time period, as the application will be made ex parte the court to which application is made will no doubt be concerned to ensure that the capacity to shorten time is not used oppressively against the person to be served.

Jurisdiction

234. It has been established that s 15 does not extend the jurisdiction of a court otherwise than by enlarging the area into which the process concerning matters which are to be heard in a court may effectively run.[51] No change is suggested in this regard. Therefore it will be open to a defendant or other person involved in criminal proceedings to argue that the body dealing with a charge or related matter within the recommended classification of 'criminal proceeding' does not have jurisdiction to deal with the matter. Territorial and subject-matter considerations would obviously be relevant to such arguments. The legislation should make it clear that such limitations remain notwithstanding the extension of jurisdiction in relation to the area of service. Such a provision has been recommended in relation to the service of initiating process in civil proceedings[52] and will be expressed to apply generally to proceedings in which process has been served under the legislation.

Effect of service

235. Within these limits of jurisdiction, service of initiating process outside the State of issue should have the same effect as service of that process within the State of issue. This is provided under the present Act and a provision to the same effect should be

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[51] *R v Dodds, ex parte Mitchell* (1959) 2 FLR 462.

[52] See para 213.

included in new legislation. Lest such provision not be regarded as sufficient, it should also be provided that after service, but subject to the time limitation, proceedings in relation to the process may be taken as if the process had been served within the State of issue.

5. Other process

Introduction

236. In addition to facilitating the service of initiating process in civil proceedings and criminal proceedings, the Service and Execution of Process Act facilitates the service of other types of process. This process includes

- civil process other than initiating process,
- subpoenas and summonses to persons to give evidence or produce documents in civil or criminal proceedings (including proceedings before a coroner) and
- orders for the production of prisoners to give evidence in any proceeding.

The Act deals with service of such process in s 14, 16 and 16A respectively. This chapter considers the operation of and changes to each of these provisions in turn.

Civil process other than initiating process

Application

Process concerning relief sought in proceedings

237. *Present interpretation.* The process to which s 14 applies is 'any writ (other than a writ of summons) notice decree or other process' issued in 'any suit in a Court of Record of a State or part of the Commonwealth'.[1] It has been held that s 14 does not apply to a third party notice[2] or an interpleader summons,[3] such process being held to be a 'writ of summons' or initiating process. In principle, therefore, it might be thought that process notifying a person of civil proceedings or that some relief is sought against the person in civil proceedings is outside the scope of the section. However that is not presently the case, for it was held in *In re The Australian United Insurance Co Ltd (In Liquidation)*[4] that a summons issued in the course of the winding up of a company for an order directing the payment of calls by contributories (shareholders) is process to which s 14 applies, on the basis that the summons was a proceeding in a suit commenced by the petition for winding up.[5]

238. *Doubts concerning that interpretation.* In relation to the decision in *Australian United Insurance* it was suggested in a later case[6] that, while a petition for the winding

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[1] s 14(1).
[2] *Gilchrist v Dean* [1960] VR 226.
[3] *Silsby v Muller* (1983) 48 ACTR 53.
[4] [1924] VLR 505, 506–7 (Schutt J).
[5] As to the commencement of a suit by the filing of a petition for a winding up see *Cheney v Spooner* (1928) 41 CLR 532.
[6] *In re E & B Chemicals and Wool Treatment Proprietary Limited* [1940] SASR 267.

up of a company initiated a suit,[7] a summons for an order directing the payment of calls by contributories also initiated a suit.[8] It was further noted that it was difficult to avoid the conclusion that such a summons was a 'writ of summons' within the meaning of the Act in the alternative sense of 'process . . . of which the object is to require the appearance of a person against whom relief is sought in the suit'.[9] However, despite these doubts regarding the reasoning in *Australian United Insurance*, the interpretation of the scope of the provision established in that case was not overturned.

Process requiring information or evidence

239. Recently it has also been held that s 14 is applicable in relation to an order for the examination of a person issued pursuant to s 541 of the Companies (New South Wales) Code.[10] Under earlier companies legislation the procedure which is now provided for in s 541 had provided for the issue, in one case, of a 'summons' for the examination of a person[11] and, in another, the making of an 'order' for examination.[12] In relation to the 'summons' procedure it had been held that the summons was within s 16[13] of the Act,[14] while there was a divergence of views on the application of s 16 in relation to the latter procedure.[15] Notwithstanding that divergence, the expedient adopted in the proceedings was to obtain, pursuant to State rules and based upon the order, the issue of a subpoena which then could be served *ex juris* under s 16. However the latest authority would indicate that there is no need to adhere to the s 16 procedure in relation to an order made under s 541 of the Companies Code and that the order may be served *ex juris* under s 14.

Procedure

240. Service of process falling within s 14 does not require leave and service 'may be effected in the same way . . . as if the service were effected in the State or part of the Commonwealth in which the writ notice decree or process was issued'. Such service

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[7] See also *Cheney v Spooner* (1928) 41 CLR 532, 537 (Isaacs and Gavan Duffy JJ).

[8] *In re E & B Chemicals and Wool Treatment Proprietary Limited* [1940] SASR 267, 271 (Angas Parsons J).

[9] id, 275 (Napier J).

[10] *Re Austral Oil Estates Ltd (In Liquidation)*, unreported, Supreme Court of New South Wales, McLelland J (12 December 1986). s 541 provides that an order may be made for the examination of a person who has been involved in the affairs of a corporation and who appears to be guilty of misconduct in relation to the corporation or who may be capable of giving information in relation to the affairs of a corporation.

[11] eg Companies Act 1899 (NSW) s 123.

[12] eg Companies Act 1961 (Vic) s 367A.

[13] s 16 is discussed at para 246–60.

[14] *Cheney v Spooner* (1928) 41 CLR 532.

[15] *Re John Sanderson & Co (NSW) Pty Ltd (In Liq)* (1975) 24 FLR 342 holding that the 'order' was a 'subpoena or summons' within s 16; *Re John Sanderson & Co (NSW) Pty Ltd (In Liq) (No 2)* (1975) 7 ALR 390 holding that it was not.

also 'shall have the same force and effect' as service within the State of part of issue[16] and, after service, 'all such proceedings may be taken as if the writ, notice, decree, or process had been served in the State or part of the Commonwealth' of issue.[17]

Reform proposals

Scope of provision

241. *Process concerning relief.* The Commission is of the view that there is some force in the doubts summarised above[18] concerning the scope of s 14 so far as it applies to process concerning relief sought against the person to be served with the process, particularly the latter point concerning the alternative meaning of a 'writ of summons'. Perhaps, however, the present interpretation arose from the fact that the process with which the case was concerned did not require the appearance of the shareholder. Be that as it may, that interpretation should be overturned. It is not appropriate that process which is the first notice to a person that relief is sought against the person, whether it also commences the proceeding or has been issued in a proceeding already underway, should be capable of service under the simple procedures of s 14. Rather, the appropriate procedures for service of such process are those recommended in chapter 3, which require the attachment of notices explaining the nature of the proceedings and the rights of the person served, set minimum times after service of the process for the taking of further steps in the proceedings and establish procedures for testing the appropriateness of the chosen venue. The definition of 'initiating process' recommended in chapter 3 has been framed with this purpose in mind, so that there will be a clear distinction between process by reference to which a person becomes a party to a proceeding (such as a contributory in a winding up) — to which the procedures for service recommended in chapter 3 will apply — and process directed to a party who already has notice of a proceeding or to a person who is not a party.

242. The potential operation of s 14 is limited presently, in respect of parties, by the requirement of s 9 that a party appearing in a civil proceeding give an address for service within 10 kilometres of the court of issue of the process. In most cases the address for service will be within the State or Territory of issue — it may perhaps be implied that that is to be the case in any event — and thus there will be no need to rely upon s 14 to serve other process on a party, for service will be effected within the place of issue. However, the Commission has recommended that a party entering an appearance be entitled to give an address for service anywhere in Australia.[19] The new provision will thus apply to all process to be served on a party to proceedings other than initiating process as defined. The provision will also apply, subject to the qualification discussed in the next paragraph, to other process to be served on non-parties.

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[16] s 14(2).
[17] s 14(3).
[18] See para 238.
[19] See para 201.

243. *Process requiring information or evidence.* The Commission is also of the view that the recent authority that s 14 is applicable to certain process requiring a person to attend to give evidence should be overturned. Notwithstanding that there may be a conceptual difference between an 'order' and a 'summons',[20] it is the nature of the demands made in process which should determine the procedures for its service interstate. In this regard, an order for examination requires a person to attend proceedings for the purpose of giving evidence or producing documents — exactly the same type of requirements as are imposed under process described by the terms 'subpoena' or 'summons'. In view of these requirements it is appropriate that, rather than the unrestricted procedures for service,[21] some safeguards should apply to the interstate service of process making such demands. In order to apply such procedures, recommendations are made below regarding the nature of the process that should be regarded as a subpoena for the purpose of procedures for interstate service.[22] Such process therefore will not be within the scope of the replacement provision for s 14.

244. *Range of proceedings.* Section 14 is presently confined to process other than writs of summons issued in a civil proceeding. There is no provision corresponding to s 14 which enables process other than initiating process in criminal proceedings to be served outside the place of issue. While there do not appear to have been any problems caused thereby, it appears desirable to now include such a provision. At the very least this may be necessary in view of the recommendations made in chapter 4 regarding the range of proceedings that should be classifed as criminal proceedings.[23] These include proceedings for the recovery of penalties that, if taken in a superior court, are conducted in accordance with the practice of the court in civil proceedings. It may be envisaged that the need may arise to serve other process in such proceedings and the lack of a provision authorising service of such process could give rise to problems. It is therefore recommended that there be a provision facilitating interstate service of process not being initiating process or subpoenas issued in both civil and criminal proceedings.

Procedural matters

245. Apart from changes to the scope of the provision, there is no reason to depart from the simple procedure for interstate service presently provided by s 14. No leave should be required, nor should any endorsements or notices be required on the process. Service outside the place of issue should have the same effect as service within that

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[20] The basis on which the authority of *Cheney v Spooner* (1928) 41 CLR 532 and *Re John Sanderson & Co (NSW) Pty Ltd (In Liq)* (1975) 24 FLR 342 was distinguished in *Re Austral Oil Estates Ltd (In Liquidation)*, unreported, Supreme Court of New South Wales (12 December 1986): see Transcript of Judgment, 3–4 (McLelland J).

[21] The present situation under s 14 and which it is recommended should be retained: see para 245.

[22] See para 282–3.

[23] See para 222–30.

place and proceedings should be able to be taken as if service was effected within that place. The manner by which such process should be served is discussed in a later chapter.[24]

Subpoenas and summonses to witnesses

Existing law

Procedure

246. *Facility of service.* Section 16(1) provides for the service *ex juris* of subpoenas or summonses to witnesses in the following terms:

> When a subpoena or summons has been issued by or out of a Court, or by a Judge, a Police, Stipendiary or Special Magistrate or a Coroner, in any State or part of the Commonwealth, requiring any person to appear and give evidence or to produce books or documents, in any civil or criminal trial or proceeding (including any proceeding before a Coroner), such subpoena or summons may upon proof that the testimony of such person or the production of such books or documents is necessary in the interests of justice by leave of such Court Judge Magistrate or Coroner on such terms as the Court Judge Magistrate or Coroner may impose be served on such person in any State or part of the Commonwealth.

The facilities thus provided clearly obviate difficulties which had existed when the States were separate Colonies prior to federation and which would continue if no such provision were made. There was and indeed still is no inherent power for a court to permit service of a subpoena on a witness outside the place of issue.[25] Section 15 of the Fugitive Offenders Act 1881 (UK) provided facilities to secure the attendance of witnesses in one Colony at proceedings in another Colony, but that provision was confined to criminal proceedings.

247. *Other means of obtaining evidence from witnesses.* Thus evidence in civil proceedings could only be obtained from persons outside a Colony if they consented to appear in the forum or were examined under a commission or similar procedure in their Colony of residence. One limitation on the power of a court to issue a commission is that there is no process of the court which would secure the witness' attendance.[26] On one view the facility provided by s 16 would render this limitation incapable of satisfaction in any case.[27] However it has been accepted that a commission may be issued in preference to a subpoena where in the circumstances of the case the credit of the witness is not in issue, the personal attendance of the witness would cause undue inconvenience to, for example, the witness' employer, or the costs involved in securing

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[24] See para 686.

[25] *Ward v Interag* [1985] 2 Qd R 552.

[26] The other limitations are that the evidence of the witness is material, the person is out of the jurisdiction of the court and the party seeking the commission cannot procure the attendance of the witness: *Willis v Trequair* (1906) 3 CLR 912, 919.

[27] *The National Mutual Life Association of Australasia Limited v The Australian Widows' Fund Life Assurance Society Limited* [1910] VLR 411.

the witness' attendance are disproportionate to the advantage of the person's actual attendance.[28]

248. *Grounds for leave.* Service *ex juris* of a subpoena or summons requires leave, which may be granted upon proof that the witness' evidence (oral or documentary) 'is necessary in the interests of justice'. To satisfy this requirement it is necessary to provide evidence, generally in the form of an affidavit, showing what evidence the witness is likely to give.[29] Merely stating that it would not be safe for the party applying to go to trial without the witness or that the evidence is material and necessary is not sufficient.[30] Although not specifically required, the courts have also required information sufficient to enable the determination of a reasonable amount which should be provided for the expenses of the person in complying with the subpoena or summons[31] and information to guide the fixing of conditions on the grant of leave.[32]

249. *Time constraints.* Even if the applicant for leave can establish that the evidence of the witness 'is necessary in the interests of justice', the authority from which leave is sought retains a discretion to refuse to grant leave. The circumstances in which that discretion may be exercised have never been fully enumerated, but include the time available to the witness to comply with the subpoena or summons. Where leave is sought only a short time before the hearing of a matter, especially where it is plain that the party or party's legal representatives have been dilatory in moving to seek leave, the authority of issue will be justified in refusing to grant leave where it considers that compliance with the process would unduly disrupt the business and social arrangements of the prospective witness.[33]

250. *Who may grant leave.* In one case[34] it was held that leave for the service of a subpoena issued by the Full Court of the Supreme Court could be sought from a Judge in Chambers. Section 16(3)[35] now enables Supreme Courts to delegate the authority to grant leave. Certain Supreme Courts have taken the opportunity to relieve their members of the burden of considering leave applications and to facilitate speedy consideration of leave applications.[36]

251. *Mode of service.* In contrast to s 4, 14 and 15, s 16 does not specify how service of a subpoena or summons may be effected after leave for its service outside the State

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[28] *Rickard v Sutherland* (1907) 24 WN (NSW) 153; *Burnside v Melbourne Fire Office Limited (No 2)* [1918] VLR 639; *Bolton v Kienzle* (1926) 43 WN (NSW) 30; *In re Matthews* [1919] VLR 733. Research has failed to identify any cases in which a commission rather than a subpoena has been issued since 1926.

[29] *Trapp, Couche & Co v H McKenzie Ltd* (1909) 15 ALR 179; *Diamond Bros v William Collin & Sons Ltd* [1911] QWN 46.

[30] See eg Practice Note (1937) 54 WN (NSW) 71.

[31] *Kingston v Reid & Co Ltd* [1903] QWN 11; *Re AH Prentice Ltd* [1930] QWN 11.

[32] *Kingston v Reid & Co Ltd* [1903] QWN 11.

[33] See eg *Willesee v Nationwide News Pty Ltd* (1979) 45 FLR 386.

[34] *Borthwick v Birt & Co Ltd* (1908) 25 WN (NSW) 41.

[35] Inserted into the Act by the Service and Execution of Process Act 1963 (Cth) s 7.

[36] See eg Service and Execution of Process Rules 1963 (Tas) r 5, where the Master is authorised to grant leave for the service of a subpoena or summons.

or Territory has been given. Section 16(1) merely states that the subpoena or summons may be served in any other State or Territory on such terms as are imposed on the grant of leave.

Scope of provision

252. *Subpoena or summons.* The scope of s 16 is confined by a number of terms used in the provsion, the most important of which are the terms 'subpoena' and 'summons'. In one case[37] it was held that an 'order' that a person attend proceedings to be examined[38] was encompassed within those terms. However in later proceedings in the same matter a more restrictive view was taken, confining the phrase to process that was in fact a subpoena or summons.[39]

253. *Evidence.* A more liberal approach to interpretation has been adopted in relation to the term 'evidence'. That term is not confined to information necessary to the judicial or quasi-judicial determination of some issue of fact but extends to all information which may, by authority of some process, be required to be given on oath, for example, a summons for the examination of a person by a liquidator inquiring into the affairs of a company in the process of being wound up.[40]

254. *Civil proceeding.* Similarly the term 'civil proceeding' has been broadly construed. It has been held to mean 'merely some method permitted by law for moving a Court or judicial officer to some authorized act, or some act of the Court or judicial officer'[41] and 'includes any application by a suitor to a Court in its civil jurisdiction for its intervention or action'.[42] The term has also been held to encompass arbitration proceedings, at least where the arbitration involves a dispute of the same nature as might be dealt with by a court.[43]

255. *Criminal proceeding.* A similarly broad interpretation has been given to the phrase 'criminal proceeding'. That term encompasses a preliminary investigation (committal proceeding) on the basis that, despite being ministerial and investigative in

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[37] *Re John Sanderson & Co (NSW) Pty Ltd (In Liq)* (1975) 24 FLR 342.

[38] See Companies Act 1961 (Vic) s 367A.

[39] *Re John Sanderson & Co (NSW) Pty Ltd (In Liq) (No 2)* (1975) 7 ALR 390, 397 (Kaye J). See also *Re Austral Oil Estates Ltd (In Liq)*, unreported, Supreme Court of New South Wales, McLelland J (12 December 1986), noted above at para 239.

[40] *Cheney v Spooner* (1929) 41 CLR 532.

[41] id, 536–7 (Isaacs and Gavan Duffy J).

[42] id, 538–9 (Starke J). See also *Re John Sanderson & Co (NSW) Pty Ltd (In Liq)* (1975) 24 FLR 342, 344 (Harris J).

[43] *Alliance Petroleum Australia (NL) v Australian Gas Light Co* (1983) 48 ALR 69. Compare the views of King CJ: id, 73–4, who regarded all arbitration proceedings as 'civil proceedings', with those of Zelling J: id, 81–2, and Wells J: id, 89, who would limit the phrase to 'curial' arbitrations. See also *TNT Bulkships Ltd v Interstate Construction Pty Ltd* (1985) 35 NTR 15, where O'Leary J commented that in view of the facilitative purpose of the power conferred on Parliament by s 51(xxiv) of the Constitution, that provision and legislation enacted in reliance upon it should be given a wide interpretation.

nature, a preliminary examination is but one step in the normal criminal procedures for the prosecution of a person for an indictable offence.[44]

256. *Coronial proceedings.* While no reported case has considered the operation of s 16 in respect of coronial proceedings,[45] the reference to such proceedings may be valid only if the broader view of the phrase 'civil and criminal process' in s 51(xxiv) of the Constitution, that preferred by the Commision, is adopted.[46] The investigative nature of coronial proceedings[47] is not the problem,[48] but the fact that the proceedings will not necessarily possess the relation to the normal course of a prosecution for an offence possessed by a preliminary investigation (committal proceeding): there may be no question of an offence having been committed; a person may not have been charged or it may be impossible to identify an alleged offender; or the coroner may not be permitted to include in his or her findings any suggestion as to the commission of an offence.[49] If the narrow view of the phrase 'civil and criminal process' were adopted it may be possible, however, to read down the references to coronial proceedings so as to limit the scope of the provision to such proceedings that operated in the same way as a preliminary investigation (committal proceeding) into the commission of an indictable offence.[50]

Nature of power to grant leave

257. The power to grant leave being conferred by federal legislation, a question arises as to the nature of that power. This is important in view of limitations on Parliament's power to confer federal judicial power on State functionaries.[51] In one case it was said that 'Parliament clearly contemplated that the granting of leave should be a judicial decision'.[52] If that is so, it would seem that the provision confers federal judicial power upon the designated State authorities. It might be argued, therefore, that its conferral on the various specified functionaries is invalid, the power not being conferred on the

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[44] *Ammann v Wegener* (1972) 129 CLR 415. On the relation of committal proceedings to a criminal prosecution see also *R v Murphy* (1985) 61 ALR 139.

[45] The provision refers to subpoenas or summonses issued by a coroner and to subpoenas or summonses requiring a person's attendance at proceedings before a coroner.

[46] See para 44 for exposition of this view.

[47] A coroner's inquiry has been described as being 'merely in the nature of a preliminary investigation. It is not of any binding force.' *Bird v Keep* [1918] 2 KB 692, 698 (Swinfen Eady MR).

[48] The investigative nature of committal proceedings was not considered a barrier to their being 'criminal proceedings' for the purposes of s 16(1): see para 253.

[49] eg Coroners Act 1975 (SA) s 26(3); Coroners Act 1980 (NSW) s 22(3).

[50] It is notable that the validity of the references to coronial proceedings was queried in Parliament in the debates on the Bill which inserted those references: see Cth Hansard (H of R), 15 April 1958, 843, 847; Cth Hansard (Sen), 20 March 1958, 305.

[51] Judicial power may only be conferred on a court of a State and non-judicial power may not be conferred on a court.

[52] *Alliance Petroleum Australia NL v The Australian Gas Light Company* (1982) 31 SASR 35, 41 (Bollen J). The question as to the nature of the power arose in the context of whether the decision of a Master in granting leave could be appealed to a judge of the Supreme Court.

courts of which they may be members or by reference to their positions as members of courts.[53] However, the case of *Ammann v Wegener*[54] is persuasive authority[55] for the proposition the power is validly conferred on the designated functionaries, including where they are exercising functions that are administrative in nature, for one aspect of that case concerned a summons whose service had been authorised by leave granted by a magistrate in the course of a preliminary investigation into the commission of an offence. It has been recognised that the nature of a power need not be immutable.

> The fact that the grant of power is contained in one compendious section does not mean that the nature of the power must remain the same, although the character of the functionary called on to exercise it is different.[56]

It is therefore arguable that the power conferred by s 16(1) varies in nature depending upon the body or officer in whom it is reposed.[57] The purpose of the provision would seem to support such a view. Subpoenas and summonses may be issued by a variety of bodies and persons and may relate to proceedings of various natures. The economy of the language by which the facilities are provided does not require that the nature of the power to grant leave for service of a subpoena or summons be viewed as remaining the same regardless of the bodies by whom and the proceedings in relation to which the process may be issued. The better view is that that power should be considered as being flexible and capable of adaptation to the various circumstances in which process may be required to be served outside the jurisdiction of issue. This interpretation is consistent with the liberal approach to interpretation which has characterised the courts' approach to the Service and Execution of Process Act, an approach due in part, no doubt, to the facilitative purpose of the power conferred by s 51(xxiv) of the Constitution.[58]

Enforcing compliance with a subpoena or summons

258. *Procedure.* Section 16(2) establishes a procedure for dealing with persons who fail to comply with a subpoena or summons served under the authority of leave. Where the person served 'fails to attend at the time and place mentioned in [the] subpoena or summons', the section provides for the issue of

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[53] A possible exception is the conferral of the power to grant leave on judges, for there is authority in respect of a somewhat analogous provision in s 19(1) that the reference to a judge is a reference to the judge as a member of a court: see *Aston v Irvine* (1955) 92 CLR 353, 366.

[54] (1972) 129 CLR 415.

[55] The point in issue was not argued in that case, but the provision was subject to close scrutiny.

[56] *R v Quinn, ex parte Consolidated Foods Corporation* (1977) 16 ALR 569, 571 (Gibbs J).

[57] See *Aston v Irvine* (1955) 92 CLR 353, 365; *Farbenfabricken Bayer AG v Bayer Pharma Pty Ltd* (1959) 101 CLR 652, 659–60; *Clyne v Official Trustee: Re Weiss, ex parte Official Trustee* (1983) 52 ALR 167.

[58] See para 38.

> such warrant for the apprehension of such person as . . . might have issued if the subpoena or summons had been served in the State or part of the Commonwealth in which it was issued.[59]

259. *Validity.* The provision purports to authorise the issue of a warrant to secure the person's attendance rather than merely facilitating service or execution of process issued under State law for that purpose.[60] The validity of this procedure, which provides for the issue of what might be regarded as 'federal' process rather than the service or execution of State process, has been upheld on the basis that the purpose of the 'federal' process is to enable State process to be carried into effect.[61] The power in s 51(xxiv) of the Constitution has been said to permit Parliament to 'select the means by which process of one State is to be given efficacy in another, and to provide if necessary that further process be issued for that purpose'.[62]

260. *Need for provision.* In contrast to s 14 and 15, there is no provision that service *ex juris* of a subpoena or summons is of the 'same force and effect' as service within the place of issue[63] or that, after service, proceedings may be taken as if service had been effected within that place.[64] While therefore a provision such as s 16(2) would appear necessary in order to enforce compliance with a subpoena or summons, it has been suggested that service under the Act is effective to give rise to the liabilities provided by the law of the place of issue should the person served fail to comply with the subpoena or summons without recourse to s 16(2).[65]

Reform proposals

Leave requirement

261. *Introduction.* In view of the greater integration of the Commonwealth and the guiding principles noted earlier,[66] the major issue for consideration in respect of reforms to the procedures for interstate service of subpoenas and summonses is whether leave to serve the process *ex juris* should continue to be required. On an

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[59] The warrant may then be executed under the provisions of Part III: s 18(1) specifically refers to a warrant issued under s 16(2) of the Act. As to the procedure for execution see ch 6.

[60] See para 286 as to other deficiencies.

[61] *Ammann v Wegener* (1972) 129 CLR 415. Barwick CJ dissented on this point.

[62] id, 439 (Gibbs J).

[63] cf s 14(2), 15(4).

[64] cf s 14(3), 15(4).

[65] *Ammann v Wegener* (1972) CLR 415, 420–1 (Barwick CJ). The other members of the court found it unnecessary to reach a decision on this matter as they held that s 16(2) was valid. However Mason J commented that while s 16(2) may not be necessary, it had probably been included to remedy any possible deficiency in the power to issue a warrant where a person failed to comply with a subpoena or summons: id, 443–4. See also the recent case of *Damoulakis v Murchie, ex parte Damoulakis* [1987] Qld L Rep 372 where a warrant issued upon a person's failure to comply with a subpoena served under the Act was effective to secure the extradition of the person notwithstanding that it made no reference to s 16(2).

[66] See para 11–8, 24.

assessment of economic and litigant interests it can be forcefully argued that the leave requirement is an impediment to the efficient conduct of proceedings. However on this matter it is not merely the interests of litigants that are relevant: the interests of potential witnesses are also important, and regard must be had to the principle that the courts should have available all relevant evidence bearing upon the matters in issue. That principle, however, is generally subject to the rights of the parties to determine who should be called to give evidence or to produce documents. Although a subpoena is a 'peremptory demand made by the court'[67] for the attendance of a person or the production of documents, the demand is initiated by a party and the sealing of a subpoena is largely an automatic procedure. The major relevant concerns competing with those of the parties, therefore, are those of prospective witnesses. Some protection for their interests in the context of intrastate service is provided by requiring a subpoenaing party to pay or tender in advance of the time for attendance or production a reasonable sum for the expenses of complying with the subpoena,[68] by the need to serve a subpoena a reasonable time before the trial so as to enable the witness to be put to as little inconvenience as possible[69] and by enabling a subpoenaed person to apply to set aside a subpoena if it is oppressive.[70] The issue is whether the leave requirement provides any further protection in the situation of interstate service which should be retained.

262. *Arguments for retention.* The primary further protection apparently provided by the necessity to obtain leave for the interstate service of a subpoena or summons is the requirement that the issuing authority be satisfied that the evidence of the prospective witness or documents sought to be obtained are 'necessary in the interests of justice'. It has been argued that this prevents the needless or frivolous interstate service of subpoenas or summonses and thus should be retained.[71] On the same basis it may be suggested that the leave requirement prevents the service of oppressive or vexatious subpoenas or summonses. While not in terms a relevant consideration on an application for leave, the issuing authority's residual discretion in the matter could be invoked if it considered that the subpoena or summons was oppressive.[72] This discretion may also be used to prevent the service of a subpoena or summons where its service would subject a prospective witness or person from whom documents are sought to hardship or undue inconvenience in complying with a subpoena or summons in the time available.

263. Although not required by the terms of s 16(1), it is the practice that an applicant for leave to serve a subpoena or summons provide the issuing authority with information to enable it to determine an amount for the prospective witness' expenses. Thereafter, if the prospective witness fails to attend, a warrant for his or her arrest may be issued only where it is proved that there was given or tendered to the person a reasonable

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[67] *Bank of New South Wales v Withers* (1981) 35 ALR 21, 40 (Sheppard J).

[68] See *Chapman v Pointon* (1741) 2 Stra 1150; *Bowles v Johnson (1748)* 1 Wm Bl 36. See also Supreme Court Rules 1970 (NSW) O 37, r 3(1); *Re Barnes* [1968] 1 NSWR 697.

[69] *Hammond v Stewart* (1722) 1 Stra 510; *Maunsell v Ainsworth* (1840) 8 Dowl 869.

[70] See *Commissioner for Railways v Small* (1938) 38 SR (NSW) 534.

[71] Submission received in confidence; Harper *Submission* 4.

[72] *Alliance Petroleum Australia NL v The Australian Gas Light Company* (1982) 31 SASR 35.

sum for expenses.[73] One comment made to the Commission concerning this matter was that 'applicants are not always sufficiently generous in what they propose [by way of witness expenses]'.[74] It was argued that the leave requirement should therefore be retained.[75]

264. *Arguments for abolition.* The application for leave to serve a subpoena is made ex parte without an opportunity for the prospective witness to be heard on the question. In such a situation it may not be generally difficult for the applicant to satisfy the issuing authority of the necessity for the evidence or documents sought to be obtained. The present procedure, whereby the applicant need only provide an affidavit showing the gist of the evidence which the prospective witness might give or of the documents sought to be obtained, would not result in a refusal of leave unless it was patently clear that the evidence or documents were unconnected with the issues in dispute in the proceedings or that it was possible to obtain the evidence from a source within the State or Territory of issue. Similarly, any protection that the leave requirement may provide against oppressive or vexatious subpoenas may be regarded with some scepticism. On an ex parte application made on the basis of affidavit evidence the terms of a subpoena or summons are unlikely to receive sufficient scrutiny to ensure that it is not oppressive to the potential witness.[76] That assessment would generally occur only on an application by the person served to set aside the subpoena or summons.[77] In any event, whether a subpoena is oppressive or vexatious can only properly be determined when the situation of the person served is considered.

265. It has also been suggested that the requirements as to witness expenses imposed by the courts in relation to the leave requirement provide an illogical preference to potential witnesses who are outside the State or Territory of issue.

> In relation to subpoenaing witnesses the Applicant must make enquiries with airlines and hotels to state in an affidavit precisely what will be the cost of bringing a witness to Court and this money has to be tendered with the subpoena. This is open to abuse by the witness who may decide to travel by other arrangements and stay with friends overnight and it is difficult to recover the excess of expenses from witnesses who are unwilling to return the money.[78]

Such situations could arise with service of a subpoena within the jurisdiction of its issue, for it is as much a requirement of intrastate service that, legislative abrogation apart,[79] expenses be paid or tendered in advance of the date for compliance with a subpoena as it is with interstate service of such process. However, retention of the leave

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[73] s 16(2). But see *Damoulakis v Murchie, ex parte Damoulakis* [1987] Qld L Rep 372.

[74] Submission received in confidence.

[75] See also Registrar, District Court of New South Wales *Submission* 2.

[76] See *Bank of New South Wales v Withers* (1981) 35 ALR 21, 40 (Sheppard J): 'whether a subpoena is too wide [oppressive] or not can be a nice question. Its determination will usually require legal representation . . .'.

[77] In *Alliance Petroleum Australia NL v The Australian Gas Light Company* (1982) 31 SASR 35 the point arose on an appeal against the granting of leave to serve the subpoena.

[78] Law Society of New South Wales *Submission* (20 March 1984) 2.

[79] See eg Justices Act 1902 (WA) s 75.

requirement merely to ensure that a prospective witness receives a sufficient amount to cover expenses would seem to be unnecessary if there is an appropriate and simple way to ensure that prospective witnesses are made aware of their rights to refuse to comply with a subpoena if no or an insufficient amount to cover their reasonable expenses was provided.[80] It was argued in one submission that the courts' general jurisdiction with regard to conduct money would be sufficient to ensure that prospective witnesses are provided with a reasonable sum for their expenses.[81] In addition, in the absence of a leave requirement the necessity to provide a sum for witness expenses would itself provide some curb against the unnecessary service of subpoenas on persons outside the State or Territory of issue.

266. It has also been said that the need for leave imposes an unnecessary burden on the courts.

> Wasteful applications also have to be made and the time of Judges taken up because of the provisions of Section 16(1). A Counter Clerk can and does issue a subpoena in the Murwillumbah Court against a resident of Murwillumbah. However, if the witness resides in Coolangatta, a Judge's Leave is necessary with all the waste of time, paper and money that is involved.[82]

The Commission attempted to obtain information from the various courts of the States regarding the number of applications for leave and the time spent in dealing with such applications. While it was not possible in all cases to obtain precise statistics, some courts provided estimates.[83] In some cases the leave requirement appeared to place no real burden upon judicial time while in others such a burden was more apparent: for example, leave applications in the Brisbane Magistrates Courts would occupy a single Magistrate for approximately $62\frac{1}{2}$ hours each year. Overall, however, the available evidence regarding usage of judicial time was inconclusive. However, one submission disputed the estimates of time provided by the District Court of New South Wales.[84] It argued that if all that the judge did was to 'rubber stamp' the leave application after the relevant documents had been read and approved by the court registrar or clerk then the estimate provided was probably accurate. However it suggested that that was not a proper course. A rubber stamp, clearly, provides little protection for potential recipients of subpoenas.

267. Another aspect of the leave procedure noted in the submission cited quoted above concerns the time and money incurred by practitioners in making applications for leave. The leave requirement clearly increases the costs of an action. Documents have to be filed and legal advisers' time spent in preparation and appearance at the hearing of the application. Generally these costs will be borne ultimately by the unsuccessful party in the action. A procedure which did away with these costs would be of some

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[80] Martin *Submission* (30 August 1984) 2.

[81] Civil Procedure Committee, Law Society of the Australian Capital Territory *Submission* 2.

[82] Martin *Submission* (21 January 1983) 1.

[83] See Young 1984b, para 42.

[84] Martin *Submission* (30 August 1984) 1 (Mr Martin is a former judge of the District Court of New South Wales). The details provided by the court had estimated that leave applications took only 2–3 minutes: Young 1984b, para 42.

benefit to parties. Practitioners are also concerned with the time involved with leave applications. The Law Society of New South Wales commented

> The Committee noted all subpoenas intended to be served outside the State either for witnesses or for the production of documents require special orders of the Court . . . The subpoena can be lodged with an affidavit from the practitioner, a Court Order and an Application. The applicant can either approach the Judge in Chambers to get the Order or these documents are filed and when the Judge is free to sign the Orders and other materials the subpoena will then be endorsed for service. The Committee felt that the delay can be quite considerable which is inconvenient if witnesses are required to be served urgently . . .[85]

268. The Civil Procedure Committee of the Law Society of the Australian Capital Territory commented on the procedure in relation to situations where the person to be served with a subpoena lives only a short distance away but across a State or Territory boundary.

> [The leave requirement] seems unnecessary in view of the matters set out in paragraphs (a) to (d) inclusive of the terms of reference. It is a particularly cumbersome procedure in this territory where the person who is to be subpoenaed may reside but a short distance from court, eg. in Queanbeyan but in another jurisdiction. The Committee believes that the court's jurisdiction in relation to conduct money and reasonableness of subpoenas is sufficient protection for subpoenas issued out of a state or territory and into another state or territory.
>
> *Recommendation*
>
> The Committee therefore proposes that Section 16 of the Act be amended to allow subpoenas or summonses to be issued out of the state or territory and into another state or territory but that the issue of such subpoena should be upon 'the same terms and conditions as would apply if service had issued into the jurisdiction of the court actually issuing the subpoena'. Where therefore local rules require a specific time period within which the subpoena must be served then that time limit is to be complied with for the subpoena to be valid.[86]

The leave requirement does seem to create a somewhat unnecessary obstacle in cases where subpoenas are to be served in neighbouring localities: while the distance between the localities is small, the interposition of a State or Territorial boundary raises the need to seek leave. One of the problems that the leave requirement was probably originally designed to alleviate was the unnecessary subpoenaing of persons who might be put to great inconvenience by having to travel large distances by slow means of transport to comply with a subpoena. However, in the case of neighbouring jurisdictions this justification has little relevance. To deal with this situation, it was tentatively proposed in an early consultative document[87] that the leave requirement be dispensed with where the distance required to be travelled by a witness to attend proceedings was less than 20 kilometres. However, that suggestion was criticised on the basis of the arbitrary setting of the area in which a subpoena could be served without leave. It was also

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[85] *Submission* (20 March 1984) 2.

[86] *Submission* 2.

[87] See Young 1984b, para 55.

argued that in view of the fact that a person might, within the State or Territory of issue, be required to travel a great distance, the imposition of a leave requirement where the distance to be covered was in excess of 20 kilometres was illogical.[88] In view of the rapid means of transport available, the Commission now is of the view that such a restriction cannot be justified.

269. *Recommendations — service without leave.* The Commission has concluded that the views put by practitioners regarding the leave requirement possess substance. It is also of the view that the protection provided to potential witnesses by the leave requirement is largely illusory in all but one respect, namely, in preventing service of subpoenas only a short time before the date of proceedings. In other respects, for example, conduct money and oppressive or vexatious process, adequate protection can be provided by other means. It is perhaps true that the leave requirement may prevent the unnecessary service of subpoenas in some instances, for example, on expert witnesses such as medical practitioners, but its retention in general does not appear to be justified. In any event, State and Territory laws generally specify particular rules for service of subpoenas on expert witnesses and these will be retained under the Commission's recommendations. In the interests of simplifying litigation and reducing the costs involved some abridgement of the leave requirement is warranted but the interests of parties to proceedings should not automatically prevail over those of prospective witnesses. Parties and their legal representatives must ensure that prospective witnesses are given adequate time within which to comply with subpoenas or summonses. Despite the common law requirement that a subpoena should be served a reasonable time before the time for compliance,[89] 'last minute' service of subpoenas, especially to produce documents, is commonplace. As Justice Sheppard of the Federal Court has remarked in a case dealing with intrastate service of a subpoena

> [There is a] growing tendency on the part of the [legal] profession to issue, in increasing numbers of cases, what can only be regarded as a proliferation of subpoenas to produce documents. To say that they are scattered almost like ticket tape or confetti a few days — often a few hours — before the commencement of litigation is no under-statement. They are issued by the Registry of the court as of course, without the intervention of any judicial or court officer, judge, master or registrar. Yet they are a court order demanding peremptory obedience; disobedience may result in imprisonment or sequestration in the case of corporations.
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> It is true . . . that courts will not usually insist upon immediate compliance with subpoenas served at too late an hour . . . [However] I have known of cases where small business men have been served with subpoenas to produce documents the evening before a case has come on and have spent the night searching a storeroom or a garage for documents required the next morning. It has not occurred to these people that they might have . . . sought an adjournment because of its late service; they would not know the law and they would not wish to incur expense for legal costs in order to find

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[88] Martin *Submission* (30 August 1984) 1.

[89] *Hammond v Stewart* (1722) 1 Stra 510; *Maunsell v Ainsworth* (1840) 8 Dowl 869.

> out what the rights and wrongs of the situation were. All that they were concerned to do, as law abiding citizens, was to obey the peremptory demand made by the court in the subpoena.[90]

Justice Sheppard went on to propose that subpoenas to produce documents should not be served without the leave of a court or officer of a court less than 14 days before the date for compliance with the subpoena. While this proposal has not been acted upon in the context of intrastate service of subpoenas or summonses, the Commission considers that it should be implemented in relation to interstate service of such process. In the normal course of events, parties and their legal advisers will have much more than 14 days notice of the hearing of proceedings — the date of a trial or proceeding is normally set well in advance. There will therefore be ample time to secure the issue and service of subpoenas or summonses. At the same time, a 14 day period would provide ample time for a prospective witness to make the necessary arrangements for travel to and accommodation at the proceedings, to cater for his or her absence from work and home and also for gathering together documents sought under a subpoena or summons. There would also be sufficient time, if the need arises, for the witness to make objection to compliance the subpoena or summons, for example, on the basis that it is vexatious or oppressive. It is recommended therefore that there be no requirement that a party obtain the leave of the issuing authority to serve a subpoena outside the State or Territory of issue where service can be effected not less than 14 days before the day for compliance with the subpoena. As suggested by the Civil Procedure Committee of the Law Society of the Australian Capital Territory,[91] this proposal should not interfere with procedures of courts under which a subpoena must be served a longer time before the day for compliance. It should also not affect any other requirements of local law, for example, requirements for leave to serve on special classes of persons.

270. *Recommendations — service with leave.* However there will be cases, no doubt, where it will be sought to serve a subpoena less than 14 days before the date for compliance. In order to provide adequate protection to prospective witnesses the leave of the issuing authority should be required in such cases. In conformity with the comments made above,[92] the matters to be taken into account on an application for leave should include whether the time between service and compliance is sufficient for the prospective witness not to be unduly inconvenienced in complying with the subpoena and whether there is enough time to enable the witness to seek appropriate relief in respect of the requirements of the subpoena. But merely because the short period of time between service and the date for compliance may not give rise to problems in these regards it is not suggested that leave should automatically be given. There should be some assessment of the relevance of the evidence which the person may be able to provide and of whether it is possible to obtain that evidence from a source within the State or Territory of issue of the subpoena. Therefore the authority from which leave is sought should also consider, as at present, whether the evidence is 'necessary in the interests of justice'.

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[90] *Bank of New South Wales v Withers* (1981) 35 ALR 21, 40–2.

[91] See para 268.

[92] See para 269.

271. The authority from which leave is sought should also, as at present, retain a discretion to refuse to grant leave notwithstanding that the grounds for a grant of leave are prima facie satisfied. The provision should be sufficiently flexible to cater for the variety of cirmcumstances that may arise and the retention of a discretion is an appropriate way to ensure that flexibility. For example, notwithstanding that prima facie the case may be a proper one in which to grant leave, it may be apparent to the authority asked to grant leave that the party applying has been so dilatory in moving to obtain the testimony of the person sought to be subpoenaed that leave should not be given. Without attempting to limit the circumstances in which such a view might be taken, it may be envisaged that the authority could adopt that view where the person to be subpoenaed was a person, particularly an expert, with a busy schedule and the party applying could provide no sufficient reason for not serving the subpoena well before the date on which the proceedings were to be heard.

272. *Procedure of leave requirement.* While the Act presently enables Supreme Courts to make rules delegating the power to consider leave applications to officers of their courts,[93] this facility is not available to any other courts. Some of the comments made by practitioners about the leave requirement concerned delays occasioned in, for example, District Courts, by the necessity to obtain the leave of a judge of the Court.[94] This was also noted by the Registrar of the District Court of New South Wales,[95] who suggested that leave might be obtained from an officer of the court rather than a judge. While the abolition of the leave requirement in general will eliminate the delays hitherto experienced, its retention in relation to subpoenas sought to be served only a short time before compliance is required increases the need to provide a procedure whereby leave applications can be dealt with expeditiously. It is recommended that leave applications should be able to be considered by officers of courts. The definitions of 'court' and 'authority', noted in chapter 3,[96] are designed, amongst other things, to enable officers of courts to deal with leave applications where they may exercise the powers of their courts.

273. In view of one purpose of the leave requirement, namely, to ensure that prospective witnesses are not unduly inconvenienced by the late service of subpoenas, where leave is given to serve a subpoena outside the State or Territory of issue the last day on which service of the subpoena is to be permitted should be specified. There should also be power to impose other conditions that are warranted by the circumstances of the case.

Witness expenses

274. *Requirement to provide witness expenses.* The requirement that the reasonable expenses of a person served with a subpoena or summons under the Act be provided is presently fulfilled through the procedure whereby the leave granting authority imposes a condition regarding the appropriate sum for witness expenses in the order granting

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[93] s 16(3).
[94] New South Wales Law Society *Submission* (20 March 1984) 2.
[95] Registrar, District Court of New South Wales *Submission* 2.
[96] See para 159, 160.

leave. With the abolition of the leave requirement in most cases, this will no longer be possible. But it is necessary to ensure that witness expenses are still paid. Certain State rules provide that a person served with a subpoena need not comply with the subpoena unless a sum to cover expenses is given or tendered to the person at the time of service or a reasonable time before the day for compliance with the subpoena.[97] With one qualification, the Commission recommends that a similar type of provision be included in relation to interstate service of subpoenas, to apply regardless of whether State rules require the provision of witness expenses.[98] That qualification concerns the time when the witness expenses should be given or tendered. The Commission is of the view that such expenses should be provided at the time of service of the subpoena. This will complement recommendations made below concerning information that should be provided to a prospective witness about his or her rights and liabilities under the subpoena. The requirement that witness expenses be provided at the time of service also influences the form of the provision requiring that they be provided. That is, rather than the form adopted in State rules, the Commission favours a provision which states that service of a subpoena without the giving or tendering of a reasonable sum for witness expenses is not effective. The result will be the same, but parties will be put on notice more effectively regarding the requirements of proper service.

275. *Amount of expenses — suggestions for reform.* The common law has required that there be paid or tendered to a prospective witness a reasonable sum for his or her expenses in attending proceedings for the purpose of giving evidence. However where a subpoena requires merely the production of documents without attendance the common law requires only that the custodian of the documents receive an amount sufficient to convey the documents by post to the court to which they must be produced.[99] That sum will in no way reflect the costs that might be incurred in searching for and compiling the documents before producing them, but these costs are recoverable only where Rules of Court or statute so provide. Again it is pertinent to consider comments made by Justice Sheppard in a case concerning intrastate service of a subpoena for production.

> Rules of court ought to be amended to permit recovery of some part at least of the amount incurred by strangers to litigation in looking out and producing documents . . . But I would add . . . that if persons are to be charged care would need to be taken to see that impecunious parties to litigation were not deprived of access to documents because of cost. Perhaps in these circumstances the community should pay.[100]

A similar suggestion was made in a submission to the Commission.[101] There are now provisions in at least two States which effect a change along the lines of this

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[97] See eg Supreme Court Rules 1972 (NSW) Pt 36, r 3(1); General Rules of Procedure in Civil Proceedings 1986 (Vic) r 42.05.

[98] See eg Justices Act 1902 (WA) s 75.

[99] *Bank of New South Wales v Withers* (1981) 35 ALR 21, 38–9.

[100] id, 41.

[101] Institute of Mercantile Agents Ltd *Submission* (5 May 1986) 3.

suggestion.[102] A requirement to pay such expenses can be embodied, however, in the terms of an order giving leave to serve a subpoena interstate under s 16(1).[103]

276. In relation to witness expenses for those required to attend proceedings two suggestions were made in submissions to the Commission. The first was that the legislation should specify what matters were to be covered by the amount given or tendered on the service of a subpoena. It was suggested that there was some confusion in this regard, particularly where a witness might be required to stay overnight at the place where attendance is required, and that this should be rectified.[104] Although the cases suggest that witness expenses should cover the costs of going to, remaining at and returning from the place of the proceedings,[105] the submissions noted that in practice sometimes accommodation expenses were denied. It was also suggested that the legislation should set down guidelines, based upon the distance to be travelled to reach the place of proceedings, as to the appropriate sum to be given or tendered.[106]

277. *Amount of expenses — recommendations.* Notwithstanding the reservation expressed by Justice Sheppard concerning the situation of impecunious parties to litigation and the fact that a person served with a subpoena inside the State or Territory of issue may not be able to recover the costs involved in finding and collating documents, the Commission has concluded that a person served outside the place of issue should be recompensed for the full costs of complying with a subpoena, including the costs of searching out and compiling documents sought under a subpoena. The range of matters to be covered by witness expenses should also be clarified. It should be made clear that witness expenses should be sufficient to cover

- the costs of finding and collating documents
- the costs of travel to and from the place of the proceedings and
- the costs of accommodation while in attendance at the proceedings.

As an alternative to the provision of witness expenses, either in whole or in part, a subpoenaing party should be permitted to provide a ticket or other travel authority for the conveyance of the person or the desired documents. The accommodation requirements of the person served should also be capable of being covered by such means. The Commission makes no recommendations, however, for the setting of a scale of expenses

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[102] See eg Supreme Court Rules 1972 (NSW) Pt 36, r 3(1); General Rules of Procedure in Civil Proceedings 1986 (Vic) r 42.01 definition of 'conduct money', r 42.08.

[103] See *Alliance Petroleum Australia NL v The Australian Gas Light Company* (1982) 31 SASR 35, 50, where, on an appeal against a grant of leave, Justice Bollen added a term to the order granting leave requiring that the subpoenaing party 'make good the reasonable cost . . . of finding, collecting, collating, marshalling and producing the relevant documents. Such "making good" shall be done after production of documents in compliance with the subpoenas.' This course was approved in an appeal to the Full Court of the Supreme Court of South Australia: *Alliance Petroleum Australia (NL) v Australian Gas Light Co* (1983) 48 ALR 69, 76 (King CJ), 90 (Wells J).

[104] Burley *Submission* 4–5; Kildea *Submission* (16 March 1986) 2.

[105] *Fuller v Prentice* (1788) 1 Hy Bl 49; *Ashton v Haigh* (1814) 2 Chit 201.

[106] Institute of Mercantile Agents Ltd *Submission* (5 May 1986) 3.

concerning the costs of travel and accommodation. Not only would a scale rapidly become out of date, but it would be very difficult to make adequate provision for the various forms, or combination of forms, of transport to which persons, particularly in remote areas, may have to resort in order to attend proceedings.

278. *Recovery and adjustment of witness expenses.* While in general witness expenses should be provided at the time of service of the subpoena, it may be very difficult to determine accurately in advance the costs that will be incurred by a witness in finding and collating documents required under a subpoena. Parties no doubt will be concerned not to give or tender an unnecessarily large amount which it may subsequently prove difficult to recover from the witness. However, they will also be concerned to provide a sufficient sum lest a witness, relying on the provision recommended above concerning prepayment of witness expenses,[107] should argue that service has been ineffective. Prospective witnesses, however, will be concerned to secure full reimbursement for their costs and should not encounter difficulty in doing so. The recommended prepayment provision may encourage parties to communicate with prospective witnesses before the service of a subpoena regarding the likely costs to be incurred, particularly in finding and collating documents sought for the purposes of proceedings. However, to remedy any potential problems on this matter it is recommended that a provision be included which will enable the court or authority before which compliance with a subpoena has occurred to make appropriate orders to reimburse the person should the amount tendered fall short of the costs incurred in so complying. Conversely, where the amount given exceeds those costs the person might be ordered to reimburse the party who provided expenses. This provision will not excuse a party from the obligation to provide witness expenses at the time of service of a subpoena, for otherwise service will be ineffective. But that provision will require only that a reasonable sum be provided, even though it may not in the result be sufficient to cover all the witness' costs. The power to make such orders should apply equally to expenses involved in actual attendance, that is, in regard to travel and accommodation costs, and to costs of finding and collating documents. Such a provision will address the concerns noted in the submission of the New South Wales Law Society that witnesses should not be able to profit from the provision of money for their expenses.[108] The object of the provision should be to ensure that actual costs reasonably incurred by a witness in complying with a subpoena are paid for while entitling a party to a refund of money not spent. In this regard, the recommendation departs from the provision found in the new Victorian Supreme Court rules which entitles a witness to reimbursement of expenses incurred in complying with a subpoena only if his or her expenditure exceeds by not less than $500 the amount given for witness expenses.[109] In the Commission's view there is no justification for placing such a burden on a witness.

Provision of information

279. *Existing law.* While the common law is clear on the rights of prospective witnesses in relation to matters such as the tendering of expenses and the right to make

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[107] See para 274, 227.

[108] See para 265.

[109] General Rules of Procedure in Civil Proceedings 1986 (Vic) r 42.08.

objection to a subpoena on the basis, for example, of oppression, there is no requirement generally under present State or federal law that a prospective witness be apprised of these rights. The comments of Justice Sheppard[110] also indicate that in fact very few people are aware of their rights when served with a subpoena.

280. *Recommendations.* To the extent that prospective witnesses are not aware of their rights those rights are effectively denied. This situation should be remedied by requiring that, when a subpoena is served outside the State or Territory of issue, a document informing the person of his or her rights should also be served. The document should specifically note that the person should have been given or tendered, at the time of service of the subpoena, a sum reasonably sufficient to cover the reasonable expenses of the person in complying with the subpoena. The document should also contain information regarding the rights to apply to set aside or obtain other relief in respect of the subpoena on the basis, for example, that it is vexatious or oppressive, for while such rights are well known amongst lawyers and the judiciary they are not known by the general public.[111] However, that notification may still leave a person in a quandry as to how to assert those rights. In order to facilitate the assertion of these rights, in addition to the general notice there should also be served with a subpoena a form which the person may return to the issuing authority as an application to set aside or obtain other relief in respect of the subpoena. Recommendations are made below as to the manner in which an application should be made and determined. Where a subpoena has been served following a grant of leave to do so, a copy of the order should also be served at the time of service of the subpoena. This will ensure that a prospective witness is able to verify that service has been effected within the time and in the manner specified, if any, in the order.

Procedure for application for relief in respect of a subpoena

281. Under the recommendation made above a subpoena when served will be accompanied by a form by which application may be made to set aside or obtain other relief in respect of the subpoena. In respect of such an application the following procedures should apply. It should be specified that the application may be made by sending the prescribed form to the authority of issue of the subpoena by registered post so that the form will be received not more than seven days after service of the subpoena or, if service is effected less than 8 days before the day for compliance, at least one day before that day. The person applying should also serve a copy of the application, personally or by post, on the subpoenaing party. The issuing authority should, upon receipt of the application, forthwith determine the application and notify the person and the subpoenaing party of that determination by any appropriate means. There should be a discretion whether to hold a hearing of the matter or to consider the matter merely on the written submissions of the interested persons. For this purpose, the party at whose instance the subpoena was issued should have an opportunity to make a written submission responding to the arguments set out in the application by the subpoenaed person. Apart from these matters, the procedures and rules of the jurisdiction of issue

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[110] See para 269.

[111] This was also suggested by Justice Sheppard in *Bank of New South Wales v Withers* (1981) 35 ALR 21, 41.

should apply to such applications. In particular, the grounds upon which a subpoena might be set aside or otherwise varied should be those of the jurisdiction of issue. The laws of all States make some provision for the setting aside of, or the making of other orders in respect of, subpoenas[112] and there is no need to impose federal rules on this matter.

Scope of provision

282. *Nature of process.* Section 16(1) provides for the granting of leave to serve a 'subpoena or summons . . . requiring any person to appear and give evidence or to produce books or documents'. Recent authority indicates that only process that is described as a 'subpoena' or 'summons' according to the law of the State or Territory in which it is issued falls within the scope of s 16.[113] The effect is that process not called a 'subpoena' or 'summons', although making similar demands, may be served interstate without the need to comply with the safeguards imposed by s 16. The Commission's view is that the nature of the demands made in process, rather than the label by which process is known, should determine the procedures and safeguards applicable on the interstate service or execution of the process. The procedures and safeguards recommended above are designed to provide adequate protection for the rights and interests of persons not parties to proceedings who are subject to process requiring their attendance or the production of information. Therefore all process, by whatever name called, which is of that nature should be subject to the procedures and safeguards recommended. For the purpose of applying these procedures the draft Bill set out in Appendix A to this report defines such process as a 'subpoena'.[114] But it should be recognised that that is merely a shorthand term to describe a range of process described by a variety of terms under State and Territory laws.

283. *Requirements of process.* While the terms in which the requirements of a subpoena or summons to which s 16 applies, namely, 'requiring any person to appear and give evidence or to produce books or documents', have not given rise to any problems, it is at least arguable, on a strict reading, that they would not encompass, for example, a subpoena that required merely the production of documents. Indeed, such a strict interpretation may be supported by the terms of s 16(2), which provides a means for enforcing compliance with a subpoena or summons only where a person 'fails to attend at the time and place mentioned in [the] subpoena or summons'. For the sake of certainty and clarity, and also for the greater facilitation of State process, a 'subpoena', for the purposes of the application of the procedures and safeguards recommended above, should be defined as a process that requires a person to do one or both of the following:

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[112] The Commission does not agree with the assertion in one submission (Harper *Submission* 4) that there is no right under the laws of Queensland for a person to apply to set aside a subpoena. Even if not explicitly conferred by rules of court or statute, the power to prevent an abuse of process would be within the inherent jurisdiction of the courts.

[113] *Re Austral Oil Estates Ltd (In Liq)*, unreported, Supreme Court of New South Wales, McLelland J (12 December 1986), noted above at para 239. See also *Re John Sanderson & Co (NSW) Pty Ltd (In Liq) (No 2)* (1975) 7 ALR 390, 397 (Kaye J).

[114] See Appendix A, Interstate Procedure Bill 1987 cl 6, definition of 'subpoena'.

- to give oral evidence
- to produce a document or thing.

284. *Range of proceedings.* The scope of s 16(1) is presently limited by virtue of the fact that the process to which it applies must require attendance or production at 'any civil or criminal trial or proceeding (including any proceeding before a Coroner)'. It is clear that this phrase encompasses a much broader range of proceedings than merely court proceedings involving opposing parties, for example, arbitration proceedings,[115] the examination of an officer of a company in liquidation in relation to the affairs of the company[116] and committal proceedings before a magistrate.[117] The Commission considers, however, that in order to facilitate as much as possible the interstate service of subpoenas no reference to any type of proceedings should be made. The provision should encompass all subpoenas issued by or out of a 'court', or by an 'authority', as those terms have been defined.[118] This will permit the service of such process issued in all types of proceedings and any dispute about whether its interstate service is permitted under the provision will depend not upon interpretation of some class of proceedings described in the provision but upon the interpretation of the scope of s 51(xxiv) of the Constitution.[119] So phrased, the provision will also extend to a subpoena requiring attendance or production before a body or person other than the issuing authority, whether that body or person is within or outside the State or Territory of issue of the process. Thus where procedures are available for the examination of a person outside the State or Territory of issue, this provision will enable the interstate service of the necessary process.

Subpoenas to parties

285. The recommended procedures and safeguards that should apply to service of a 'subpoena' are intended to provide protection for the rights and interests of persons not parties to litigation. The Commission recognises, however, that for various purposes a party to proceedings may wish to serve a 'subpoena', which as defined would include, for example, an order for discovery, on another party to the proceedings. Parties must be taken to be aware of this potential. It is unnecessary to impose the strict requirements of the recommendations made above in a situation of service of a 'subpoena' on a party. The laws of the jurisdiction of issue provide some protection to parties so served and these are all that are required. Therefore it is recommended that interstate service of a subpoena on a party to proceedings should be permitted as if, and should be subject to the same conditions as if, service was effected in the jurisdiction of issue.

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[115] *Alliance Petroleum Australia (NL) v Australian Gas Light Co* (1983) 48 ALR 69; *TNT Bulkships Ltd v Interstate Construction Pty Ltd* (1985) 35 NTR 15.

[116] *Cheney v Spooner* (1929) 41 CLR 532.

[117] *Ammann v Wegener* (1972) 129 CLR 415.

[118] See para 159, 160.

[119] In particular, the scope of the provision may be limited by the interpretation given to the phrase 'civil and criminal process': see para 44 for discussion.

Enforcement and punishment for non-compliance

286. *Present restricted operation.* Where a person has failed to attend at the time and place specified in a subpoena s 16(2) provides for the issue of a warrant for the apprehension of the person, but only if the issuing authority has the power to do so under State or Territory law. There are a number of restrictive aspects to this provision. First, the power is exercisable only if the subpoenaed person 'fails to attend'. It does not cater for the situation where a subpoena merely requires the production of a document. Second, the power to issue a warrant arises only where the Court, Judge, Magistrate or Coroner has power to issue such a warrant to compel compliance with a subpoena served in the jurisdiction of issue. Unless this provision is in fact unnecessary[120] this may result in there being no means for enforcing compliance with a subpoena served interstate in certain circumstances. Third, the specification of the warrant procedure may mean that other avenues for enforcing compliance with, or punishing for non-compliance with, a subpoena are not available.

287. *Recommendations.* Any new provision should remedy the deficiencies explained above. The sanctions for non-compliance clearly should apply to whatever form that non-compliance takes. The recommendations made above concerning the requirements of subpoenas will ensure that all possible forms of non-compliance are included. Also the full range of options open to enforce compliance with a subpoena or to punish a person for non-compliance should be available where a subpoena has been served outside the jurisdiction of issue. For example, where non-compliance with a subpoena may expose a person to a fine, that course should be open. This point was made in debate on the Service and Execution of Process Bill 1963, which introduced Part IVA into the Act.

> I think that the opportunity should have been taken in this amending Bill to amend section 16 so that an interstate witness who did not respond to a subpoena could be fined instead of a warrant of apprehension having to issue.[121]

In order to open up the full range of enforcement options and to deal with non-compliance there should be a provision to the same effect as the present s 14(3) and 15(4) providing that the same proceedings in relation to a subpoena served interstate may be taken as if the subpoena was served in the State or Territory of issue.

Orders for the production of prisoners

Existing law

Procedure

288. Section 16A establishes a procedure whereby certain prisoners may be brought before a court for the purpose of giving evidence in proceedings. The provision recognises that a bare subpoena would be inadequate to secure the attendance of prisoners

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[120] See para 260.

[121] Hon BM Snedden (later Sir Billy Snedden), Cth Hansard (H of R), 19 April 1963, 793.

in view of their lack of freedom of movement by providing for the issue of an order for the production of a prisoner.

> (1) Where it appears to any Court of Record of a State or part of the Commonwealth or to any Judge thereof that the attendance before the Court of a person who is undergoing sentence in any State or part of the Commonwealth is necessary for the purpose of obtaining evidence in any proceeding before the Court, the Court or Judge may issue an order directed to the Superintendent or other officer in charge of the gaol or place where the person is undergoing sentence requiring him to produce the person at the time and place specified in the order.

The applicant for the order may be required to give security for the costs of producing the prisoner[122] and the court before which the prisoner is brought may make an order as to those costs.[123] Section 16A(2) permits the order for production to be served — the manner of service is not specified and therefore presumably s 28A of the Acts Interpretation Act 1901 (Cth)[124] applies — on the Superintendent or officer to whom it is directed, who 'shall therepon produce, in such custody as he thinks fit, the person referred to in the order at the time and place specified therein'. Section 16A(4) provides that a prisoner produced pursuant to an order shall

> while in [the State or part of the Commonwealth in which he or she has been produced], in compliance with the order, be deemed to be undergoing his sentence, and the officer in whose custody he is shall have the same powers, in relation to the detention and disposition of that person, as the Superintendent or officer to whom the order was directed has in the State or part of the Commonwealth in which sentence was imposed upon that person.

There are no reported decisions on the application or interpretation of s 16A, but the Commission has been informed that the provision is used, generally for the purpose of bringing prisoners before a court to give evidence in criminal proceedings.

Scope of provision

289. The terms of the provision restrict the situations in which the facilities it provides may be used. As an order may be granted only by a Court of Record or judge thereof in respect of proceedings before the court, it would not seem possible for the attendance of a prisoner to be secured at, for example, committal proceedings, for they are conducted generally before a magistrate who does not sit as a court for that purpose. A further restriction is that an order under s 16A(1) may only be made in respect of 'a person who is undergoing sentence'. Thus a person on remand in custody, for example, could not be the subject of an order.

Shortcomings

290. The provision also suffers from certain shortcomings. While s 16A(2) permits the Superintendent or other officer to whom the order is directed to produce the person

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[122] s 16A(1A).

[123] s 16A(3).

[124] This section provides that a document permitted to be served under legislation shall, unless the contrary appears, be served personally or by ordinary prepaid post.

'in such custody as he thinks fit' and s 16A(4) gives the person having custody of the person produced the same powers in relation to 'the detention and disposition' of the person as that Superintendent or other officer, the provision does not clearly give powers in relation to the custody of the person while in transit from one State or Territory to another and passing through a third. Nor does the section deal with the powers of officers of a State or Territory through which the person may pass or in which the person is to be produced in relation to requests from the escort to assume custody of the person during transit or while in attendance at the proceedings. In addition, the provision does not deal with an escape by the person while in transit or in attendance at the proceedings. Further, while the prisoner is deemed to be undergoing sentence while in the State or Territory in which he or she is produced, no provision is made for the period during which the prisoner is in transit to or from that State or Territory.

Validity

291. A greater problem with the provision, however, is its validity. This might be doubted for two reasons. The first is that the provision may be construed as authorising the issue of an order for production even in relation to a person who is undergoing sentence in the same jurisdiction as the issuing court or judge, for s 16A(1) refers to a prisoner undergoing sentence in 'any State', not 'any other State'. However the provision could, and probably would, be read down so as to apply only in respect of prisoners in other States.

292. Another argument for invalidity may be found in the procedure established by the provision. It provides for the issue of an order not merely the service of an order made under State law. While this device has been approved by a majority of the High Court in relation to s 16(2),[125] the reasoning applied there was that s 51(xxiv) enabled Parliament to authorise the issue of 'federal' process in order to give efficacy to State process. Section 16A does not, however, authorise the issue of further 'federal' process to give effect to existing State process. It purports, rather, to have an independent operation to authorise the issue of process. It is clearly arguable, therefore, that the reasoning applied in upholding the validity of s 16(2) could not be applied to s 16A, with the consequence that s 16A is invalid.

Reform proposals

Introduction

293. In view of the doubts as to the validity of s 16A, despite the fact that the section has apparently been unchallenged since its enactment in 1928,[126] and the restricted operation and other shortcomings in its provisions, the provision is clearly in need of reform. While a new provision should deal with all necessary practical matters, the major issue concerns the establishment of a procedure which will be ensured of validity.

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[125] *Ammann v Wegener* (1972) 129 CLR 415: see para 259.

[126] But see *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 289 (Dixon J): 'Time does not run in favour of the validity of legislation . . .'.

Basic scheme

294. *Options.* The Commission has considered a number of options on the question of the appropriate procedure to be established. In a research paper issued earlier in the Reference it was tentatively suggested that there should be no special procedure for the production of prisoners and that a subpoena directed to a person in custody should be capable of service on the custodian of the person and that such service should compel the custodian to produce the person at the time and place specified in the subpoena.[127] It was acknowledged, however, that there were problems with that approach, including the provision of adequate expenses to cover the costs of the custodian in producing the prisoner and providing for the security of the prisoner. Some submissions also expressed concern at the prospect that the liability of a prisoner to attend proceedings in another State for the purpose of giving evidence could arise without judicial supervision.[128]

295. Another option would be to permit orders made under State and Territory law for the production of prisoners to be executed interstate. While at first attractive as providing full effect to State and Territory process, there is strong possibility that orders for production made under local law could not in fact direct the production of a prisoner from another jurisdiction. There is no restriction upon the issue of a subpoena arising from the place in which the person to whom the subpoena is addressed resides or may be found — limitations arise only when service of the subpoena is sought to be effected, hence the need for s 16(1). However the power to make an order under State or Territory law for production of a person who is a prisoner may be circumscribed by the location of the prisoner and of the officer having custody of the prisoner. The relevant provisions,[129] where they do not specifically refer to officers of the particular jurisdiction, would on normal rules of construction be confined to directing officers within their own jurisdictions to produce prisoners. Thus there may be no jurisdiction to make an order under the law of one State requiring the production of a prisoner held in another State, for directions may not be able to be given to the custodian in the other State. It would be meaningless, therefore, to provide for the interstate execution of orders for production made under State or Territory law.

296. *Recommendations.* It is probably essential to the validity of the new provision that there be existent valid State process upon which the procedures prescribed by federal law may operate. The location of a person whom it is desired to serve with a subpoena places no limitation on the power to issue a subpoena. Nor, so far as the issue of a subpoena is concerned, does any limitation arise because the person happens to be in custody. Therefore there is nothing to constrain the issue of a subpoena in one State directed to a person who is in custody in another State. However, even if served on the person in the other State under the recommendations made earlier, the person's lack of freedom of movement would operate to render the subpoena ineffective to secure

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[127] See Young 1984b, para 67.

[128] eg Harper *Submission* 5–6.

[129] See eg Prisons Act 1981 (WA) s 22; Evidence Act 1910 (Tas) s 121; Evidence Act 1958 (Vic) s 12; Supreme Court Act 1935 (SA) s 117; Local and District Criminal Courts Act 1926 (SA) s 282; Prisons Act 1952 (NSW) s 44; Crimes Act 1900 (NSW) s 565; Supreme Court Act 1970 (NSW) s 72; Prisons Act 1958 (Qld) s 16(1), s 31.

his or her attendance. At the stage where a subpoena has been issued under State law, however, there is no reason why federal law may not provide for the issue of further 'federal' process to give effect to the State process. The federal process can operate to alleviate the problem arising because of the person's lack of freedom of movement and to require the person to appear in the State of issue of the subpoena. Therefore it is recommended that, a subpoena having been issued directed to a person in another State lacking the freedom of movement to comply with the subpoena, federal law should provide for the issue of an order directed to the custodian of the person requiring the custodian to produce the person at the time and place at which compliance with the subpoena would be required. It can be seen that this proposal is a variant of the present procedure established under s 16A of the Act. The details of the procedure are discussed below.

Persons amenable

297. *Present restrictions.* A preliminary matter concerns the persons to whom the procedure should apply. Presently, s 16A operates only in respect of persons 'undergoing sentence'. The effect is that there is no avenue to secure the attendance of persons who are subject to legal restraints regarding their freedom of movement but not undergoing a sentence, for a mere subpoena, even if served interstate under the present Act, will be insufficient to overcome those restraints.

298. *Recommendations.* In contrast to the restricted class of persons within the ambit of the s 16A procedure, the procedures established in certain corresponding State provisions,[130] as well as the model United States law concerning the production of prisoners for the purpose of giving evidence[131] and the Canadian Criminal Code,[132] extend to all persons confined in a penal institution, prison or similar place, whether or not they are under a sentence of imprisonment. The principle thus reflected is sound — prima facie all persons under detention should be amenable to process requiring them to give evidence. However, there are also other persons who may lack freedom of movement without being in custody. This may arise by operation of law or by virtue of an order made by a court or other authority, such as an order admitting a person to bail on condition that the person report daily to certain authorities, an order of a court concerning the custody of a minor where the person granted custody of the minor is restrained from removing the minor from the jurisdiction, or an order that a person be made a ward of the state with one consequence being that they may not leave the jurisdiction without the permission of certain authorities. There is no reason why such persons should not be available to give evidence in proceedings in another State. The procedure of the proposed provision, however, will be necessary to overcome the inadequacies of a mere subpoena to be effective to require their attendance. It is therefore recommended that the provision should encompass all persons who are unable

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[130] See eg Supreme Court Act 1970 (NSW) s 72; Evidence Act 1910 (Tas) s 121; Evidence Act 1958 (Vic) s 12.

[131] See Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act s 1(a).

[132] See s 460(1).

to comply with a subpoena because their freedom of movement is restrained by the operation of law or pursuant to some order or direction made pursuant to law. Such persons will be referred to as 'persons under lawful restraint' in the following discussion.

Range of proceedings

299. It was recommended above that there should be no specification of the range of proceedings at which a person's presence under a subpoena may be required.[133] This proposal should extend to orders for the production of persons under lawful restraint.

Subpoenas not requiring attendance

300. The purpose of the recommended procedure being to overcome the deficiencies of a subpoena in securing compliance with it by a person under lawful restraint, it follows that the procedure will be unnecessary where restraints upon freedom of movement are irrelevant to compliance. Thus a subpoena which requires merely the production of a document or thing without requiring attendance will be effective notwithstanding that the person to whom it is addressed is under lawful restraint. The recommendations made above regarding subpoenas generally should therefore apply to subpoenas of that type addressed to persons under lawful restraint.

Procedure for obtaining production of persons under lawful restraint

301. *Grounds for order.* The basis of the procedure is that, a subpoena addressed to a person under lawful restraint in another State or Territory having been issued, federal law should provide for the issue of an order directed to the custodian of the person requiring the custodian to produce the person. For that purpose, an application should be made to the court or authority by or out of which the subpoena issued. In order that the determination of the application is not unnecessarily delayed the application should be made ex parte. Recommendations are made below to cater for circumstances where an order has been obtained improperly or there are good reasons why the order should not be enforced.[134] At present an order for production may be made where it appears to a court or judge that the attendance of the person undergoing sentence is necessary for the purpose of obtaining evidence in proceedings. This ground differs slightly from that applying to an application for leave to serve a subpoena, although there is probably little difference in effect. However, as an order for production is really a subpoena in another guise, it is appropriate that the grounds for the issue of the former be the same as those for leave to serve the latter. It is therefore recommended that the discretion to make the order for production should be based upon the satisfaction of the court or authority that the evidence of the person under lawful restraint is necessary in the interests of justice. The court or authority should be satisfied also that there will be enough time to enable compliance without undue inconvenience and to permit the making of various applications noted below.[135]

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[133] See para 284.
[134] See para 309–13.
[135] See para 310, 313.

302. *Security for costs and costs orders.* In many cases it will be difficult to determine in advance the costs of producing a person under lawful restraint, particularly if the person is a prisoner. It is clear, however, that primary responsibility for those costs should be borne by the applicant for the order. Therefore, as at present,[136] the court or authority to whom application is made should have a discretion to require the applicant to give security for the costs of the person's production. Until such security is given, the court should be permitted to stay the hearing of the application for the order. The court before which the person is produced should also have power to make an order regarding the costs of compliance with an order.

303. *Terms of order.* An order for the production of a person should specify the time and place at which the person is to be produced. This should be the time and place at which compliance with the subpoena on which the order is based is required. To cater for one circumstance discussed below,[137] the order should be directed to the custodian from time to time. The court or authority should have a discretion to impose conditions on the order, for example, as to the date by which the order should be served.

304. *Service.* An order for production having been made, provision should be made for the service of the order on the person's custodian. The custodian should be the person who has control over the person under lawful restraint. Thus for a person in custody, the custodian should be the person having actual custody of the person. In relation to persons under restraints short of custody, a custodian should be the person responsible for supervising those restraints. Service of the order on the custodian of the person should be effective to require the custodian to produce the person as specified in the order. Where an order for production is served, the subpoena on which the order is based also should be served on the person under restraint. The purpose of this requirement is explained below.[138]

305. *Information to be provided.* Just as certain information and documents should be provided to a person not under lawful restraint when served with a subpoena, certain information and documents should be provided to a custodian served with an order for production and a person under lawful restraint served with the subpoena on which the order is based. While the terms of the order will make clear the custodian's obligations in respect of compliance, the custodian should be provided with certain forms which may be used for the purpose of making an application, the content of which is discussed below,[139] to the court or authority that made the order. Similarly, a person served with the subpoena on which an order for production is based should be provided with information similar to that required to be given to a person not under lawful restraint. Additional information should also be provided in relation to the person's obligations and rights where he or she ceases to be under lawful restraint before the time for compliance with the order.[140] Failure to provide this information should result in service of the order or subpoena, as the case may be, being ineffective.

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[136] See s 16A(1A), (3).
[137] See para 314.
[138] See para 315.
[139] See para 310–2.
[140] See further para 315.

306. *Custody and control of persons produced pursuant to order.* Section 16A permits the custodian to determine the manner in which a person shall be produced pursuant to an order. While it is recommended that a court or authority should be able to impose conditions on an order for production, it is recommended also that, subject to any relevant such conditions, the custodian should retain some latitude to determine how a person should be produce in compliance with the order. At the very least, such latitude seems desirable because the court or authority by which the order is made may not be aware of circumstances which will affect the decision as to the manner in which the person should be produced.[141] The custodian's powers in this regard should extend to the manner in which the person should be conveyed to and from the proceedings and the person's accommodation while in attendance at the proceedings.

307. In many circumstances a person under lawful restraint, particularly a person detained in an institution, will be committed by a custodian to the custody of an escort, for example, prison officers or police, for the purposes of the person's production in compliance with the order. The escort will be under the general directions of the custodian as to the custody and control of the person while travelling to and from and attending the proceedings. However, the vagaries of travel and accommodation may be such as not to permit precise prior instructions to be given by the custodian to deal with all eventualities. The day to day control of the person, therefore, must necessarily be the responsibility of the escort and it should have sufficient powers to deal with all the circumstances that may arise. While it is unnecessary to make provision for these matters while the escort is in the State or Territory in which the person is under lawful restraint, such provision should be made in relation to the period for which the escort is outside that State or Territory.

308. The production of a person under lawful restraint pursuant to an order may well involve the passage of a person through other jurisdictions and may require more than one day's absence from the jurisdiction under whose laws the restraint is imposed. It may be necessary to accommodate the person during the journey to the place where the proceedings are to be held. The powers presently given by s 16A to an escort of a prisoner are defective in some regards for they confer no authority on officers in jurisdictions through which the person may pass or those in the jurisdiction in which the proceedings are to be heard to assume custody of the prisoner for the purposes of accommodating the prisoner while in transit to or in attendance at the proceedings.[142] These defects should be remedied to remove any doubt as to the lawfulness of a person's custody or control while away from the 'home' jurisdiction. There should be specific provisions authorising the escort to request authorities in a transit State or the destination State to assume custody of the person and authorising those authorities to assume custody and later surrender custody to the escort when requested.

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[141] cf Criminal Code (Can) s 460(4).

[142] In spite of the lack of specific authority, the practice has been for officers in the other jurisdictions to assume control of the prisoner for the purposes of the prisoner's accommodation while in transit or in attendance at the proceedings.

Procedure for relief in respect of an order

309. *Introduction.* In view of the fact that an application for an order will be made ex parte circumstances may arise where, upon a fuller understanding of all the facts, an order for production may not have been made. Just as a procedure has been proposed by which objection may be made to compliance with a subpoena, it is reasonable that provision should be made whereby objection may be made to compliance with an order for production. In this situation, however, the concerns that may militate against compliance with the order may be those of the custodian, not merely those of the person required to attend.

310. *Application by custodian.* An order for production having been made ex parte, the court or authority may not be aware of all the circumstances that may effect the custodian's ability or willingness to produce the person in compliance with the order. While mere unwillingness would not be a sufficient reason to excuse compliance with the order a custodian may have good reasons for not wishing to comply. The custodian may consider that it would be unsafe to the general public or unsafe or injurious to the person to take steps to comply. For example, the person the subject of the order may be confined in an institution for mentally ill persons and the custodian may consider that it would not be in the best interests of the person's well being to transport the person to a new and perhaps threatening environment. The custodian may consider that it would not be in the interests of public safety to convey a dangerous and violent prisoner to another State or Territory. The custodian may fear that a minor of whom he or she has custody would be traumatised by having to leave a family situation which provides security for the minor. As the obligation on the custodian to produce the person is imposed by federal law, it is appropriate that a procedure be established by federal law to enable a custodian to be relieved from the obligation. The custodian should be given a right to apply to the court or authority that made the order to set aside or obtain other relief in respect of the order. It is also appropriate that at least some of the matters to be considered on such an application should be specified by federal law. In view of the wide variety of circumstances that may arise, particularly as the range of persons who may be the subject of an order will be wide and not limited to persons undergoing sentence, it is desirable that these guidelines be stated in inclusive, rather than exhaustive, terms. The relevant circumstances are discussed below.[143]

311. Certain of the recommendations made in respect of applications to set aside or obtain other relief in respect of a subpoena should apply also to applications by custodians. The application should be made within a certain time of the order being served. The custodian should serve notice of the application on the party on whose application the order was made. The court or authority to whom the application is made should, upon receipt of the application, forthwith determine the application and notify the custodian and the subpoenaing party of that determination by any appropriate means. There should be a discretion whether to hold a hearing of the matter or to consider the matter merely on the written submissions. For this purpose, the party at whose instance the order was made should have an opportunity to make

[143] See para 312.

a written submission responding to the arguments set out in the application by the custodian.[144] In determining the custodian's application consideration will no doubt be given to the potential prejudice that may occur to a party if the person is not produced to give evidence at the proceedings. Where it is considered that the custodian should be relieved from the obligation, the order should be set aside. It may be decided, however, that the custodian's concerns could be adequately accommodated if the person's evidence was taken in the place where the person is located. The power to set aside or give other relief in respect of the order should extend, therefore, to varying the order so that examination of the person may take place in that place.

312. Some of the circumstances in which a custodian may wish to be relieved from the obligation to produce a person the subject of an order have been noted above. The matters to be considered in determining the application should therefore include public safety and the safety or well-being of the person. There may be other reasons for the custodian's concerns. While no attempt should be made to state these matters exhaustively, it is advisable to include one further matter which differs noticeably from the above matters. In view of the expanded range of persons who will be amenable to the procedure, there may be cases where the date on which the person's attendance is required under an order will conflict with requirements made on the person under the law of the place in which the person is subject to lawful restraint. For example, a person on bail may be required to attend proceedings regarding his or her prosecution for an offence on or near the day when attendance is required under the order for production. Authorities in that place will be concerned to ensure that those proceedings are not unnecessarily delayed because of the requirements of the order.[145] Therefore, a further factor that warrants inclusion in the provision regarding the matters that should be considered on an application by a custodian is the potential for any inconsistency between the requirements of the order for production and requirements imposed on the person pursuant to the law of the place in which the person is under lawful restraint. Where relief is given in respect of an order for production, the court or authority should make any necessary consequential orders in respect of the subpoena on which the order is based.

313. *Application by person.* A person served with a subpoena generally has the right to apply to set aside or obtain other relief in respect of the subpoena. This right should not be lost merely because a person is under some form of lawful restraint. The recommendations made in respect of the procedure to make objection to subpoenas generally[146] should therefore apply also to persons under lawful restraint served with a subpoena. The grounds for an application made by the person will be those of the State or Territory of issue of the subpoena. Where relief is granted in respect of the subpoena, the court or authority should make necessary consequential orders in respect of the order based on the subpoena. This avenue may not be sufficient, however, to cater for all circumstances in which the person may seek to be relieved

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[144] See para 281.

[145] Recommendations are made below to address the concerns of the person named in the order on this and similar matters: see para 313.

[146] See para 281.

from the obligation to attend proceedings. For example, a person may be on remand in custody and may, on or near the day on which attendance at the proceedings in the other State is required, have a right to apply for release on bail. A person under lawful restraint may also have further concerns regarding his or her safety. For example, the person may have acted as an informer and be concerned that while in transit to and from and in attendance at the proceedings he or she will be exposed to danger from criminal elements. The person's custodian, however, may not share these concerns and thus will make no application in respect of the order for production. To cater for such circumstances, it is recommended that, in addition to the procedure for seeking relief in respect of a subpoena, a person under lawful restraint should have a right to apply to set aside or obtain other relief in respect of the order for production on the same basis as the custodian of the person.

Ancillary matters

314. *Change in custodian.* Circumstances may arise where a person the subject of an order for production is transferred from the control of one custodian to another between the time of service of the order and the time when the person's production is required. While this probably will be rare provision must be made to transfer the obligation to produce the person to the new custodian. For that purpose, on a transfer of custodian the former custodian should give the order to the new custodian and such giving of the order should be taken to be service of the order on the new custodian. The obligation to produce will thus be cast on the new custodian. As the order will be directed to the custodian of the person from time to time,[147] rather than on a named custodian, there will be no cause for confusion on the part of the new custodian as to the obligation to produce the person.

315. *Removal of restraints.* Again, although it may be rare, a person may cease to be under lawful restraint after service of the order on a custodian but before the day on which the person's attendance is required. It would clearly be unjust for a custodian to continue to be under the obligation to produce a person in such circumstances. Therefore, a custodian's obligation should cease where the person ceases to be subject to restraints before the day for compliance with a subpoena. This does not mean, however, that the person should be excused from attendance. It was for this purpose that the recommendation was made above that the subpoena on which the order was based should be served on the person when the order is served on the custodian.[148] The person having been served, it will be effective to require attendance once the person has the freedom of movement necessary to comply with it.

316. *Expenses.* Where a person is released from lawful restraint in the circumstances noted above, the person will be under an obligation to comply with the subpoena. However at the time of service the person will not have been given or tendered a sum to cover his or her expenses in complying with the subpoena. It is inappropriate to require the person to comply with the subpoena before being given any money for expenses. For example, without prepayment, a person recently released from prison may not have

[147] See para 303.
[148] See para 304.

sufficient funds to do so. Some provision must be made to provide the person with a sum of money to enable attendance in compliance with the subpoena. Where there is a possibility that a person may cease to be under lawful restraint before the date on which attendance is required the custodian may advise the person serving the order of that fact when served. This will alert the party requesting the person's attendance to the possibility that funds may have to be provided to the person upon that occurrence. However, the party serving the subpoena may not become aware that the person may cease to be under lawful restraint before the day when attendance is required. The party will then not be alert to the need to tender witness expenses to the person. To overcome these problems it is recommended that in all cases, notwithstanding the terms of any order for production[149] or a requirement as to the giving of security for costs, on service of the order on the custodian there should be given or tendered to the custodian the same amount of money as would have been required to have been given to the person if the person had not been under lawful restraint. If the person is not released from constraints, this money, if accepted, may be applied to the costs of producing the person under the order. However, if the person is released, the amount given or tendered should be provided to the person by the custodian. This should be done as soon as practicable after the person has ceased to be under lawful restraint.

317. While this procedure should enable witness expenses to be given to a person who has ceased to be under lawful restraint in all cases, the party who obtained the issue of a subpoena may prefer to give or tender those expenses to the person when the person ceases to be under restraint notwithstanding that money was provided to the custodian at the time of service of the order for production. The requirement of the person to comply with the subpoena should therefore arise whether witness expenses have been provided by the custodian or by another person. To cater for cases where a party has provided witness expenses both to the custodian and to the person, the court or authority before which compliance with the order for production or subpoena was required should have power to make appropriate orders binding the custodian or the person regarding repayment of money. Where the person has complied with a subpoena, the court should also have power to make orders regarding the adjustment or recovery of expenses.

318. *Continuance of sentence.* While the range of persons potentially subject to an order for production has been enlarged, the procedure will continue to encompass persons serving a sentence of imprisonment. Provision should be made for the continuance of that sentence while the person is away from the place of detention. It should be made clear, however, that the sentence continues not only while the person is in attendance at proceedings in compliance with an order for production, but also during the period of transit to and from the proceedings. However, the sentence should be deemed to continue only so long as the person remains in the custody of the custodian or an escort or other authorities to whose custody the person has been committed.

319. *Escape of persons while order in operation.* A further defect with s 16A which should be remedied is the lack of any provision concerning the action that may be

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[149] See para 303 as to the power to impose conditions.

6. Execution of apprehension process

Introduction

320. Prior to federation, there was some uncertainty regarding the powers of Colonial legislatures to provide for the extradition of persons from one Colony to another to face criminal charges.[1] This was overcome by the application of Part II of the Fugitive Offenders Act 1881 (Imp) to the Australian Colonies by an Order in Council of 23 August 1883. On federation, s 51(xxiv) of the Constitution provided the federal Parliament with power to legislate on this topic. This it did in Part III of the Service and Execution of Process Act, entitled 'Execution of Warrants and Writs of Attachment', which enables certain process authorising the apprehension of a person, issued in one State or part of the Commonwealth, to be executed in another and the person apprehended and sent to the State or part in which the process was issued.[2]

321. While Part III is not divided into Divisions, it establishes two schemes. The first, encompassing s 18, 19, 19A and 19B, relates to warrants 'for the apprehension of a person' issued by 'a Court, a Judge, a Police, Stipendiary or Special Magistrate, a Coroner, a Justice of the Peace or an officer of a court . . . in accordance with section 16 [of the Act] or the law of a State or part of the Commonwealth'.[3] The second scheme, established in s 19C, concerns writs of attachment issued by 'a Court of Record of a State or part of the Commonwealth or a Judge of such a Court . . . for the arrest of a person for a contempt of the Court or disobedience of an order of the Court'.[4] The latter scheme has received little judicial or other comment and the last reported instance of its attempted use which the Commission has been able to identify was in 1928. On the other hand, the scheme concerning warrants for apprehension has been and continues to be the subject of a number of reported decisions and it is regularly employed throughout Australia.[5] This chapter considers the operation of these two schemes with a view to eliminating their deficiencies and updating them to accord with the developments noted in the Terms of Reference.

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[1] See eg *Ray v MacMackin* (1875) 1 VLR (L) 274; see also Quick & Garran 1901, 617–9.

[2] While the process within the scope of these provisions is not limited to process concerning the apprehension of a person on a criminal charge, to the extent that such process is encompassed these provisions complement s 15 of the Act which provides for the service of non-custodial criminal process outside the State or part of the Commonwealth in which it was issued.

[3] s 18(1).

[4] s 19C(1).

[5] For example 119 persons were extradited to New South Wales from other States and the Territories under this scheme in 1983. Because of different authorities' methods of recording interstate extradition, it is not possible to arrive at an accurate figure for all the States and Territories of Australia.

taken if a person being produced pursuant to an order escapes from custody while in transit to or from, or in attendance at, the proceedings in another State or Territory. It is appropriate that proceedings, if any, in relation to an escape should be dealt with in the place in which the person is under lawful restraint. Therefore an escape while in transit or in attendance in compliance with an order should be dealt with as if the escape occurred in the State or Territory in which the person is under lawful restraint. In view of the range of persons who may be subject to an order for production, it may not be the case that a person is produced in custody. For example, a person who is on bail subject to conditions that the person report to authorities at regular intervals may be permitted to attend the proceedings without an escort. For the period during which the person is away from the place under the law of which the restraints are imposed the person may not be required to report, or may be required to report to authorities in the place in which his or her attendance is required. The provision regarding escape should therefore also encompass failure to comply with any conditions imposed on the person by a custodian pursuant to the powers of the custodian[150] to determine the manner in which the person should be produced at proceedings in compliance with an order.

[150] As to which see para 306.

Interstate execution of warrants

Introduction

322. The first scheme operates in the following way. A warrant for the apprehension of a person issued in a State or part of the Commonwealth may be taken to another State or part and, after proof of certain matters, endorsed for execution in that other State or part.[6] The person the subject of a warrant so endorsed may be apprehended and brought before a magistrate or justice of the peace in the State or part where apprehended.[7] The magistrate or justice may then order that the person be returned in custody to, or admitted to bail on condition that he or she appear in, the State or part of issue of the original warrant.[8] The person may apply for discharge on certain grounds.[9] Provision is made for review, by way of rehearing, of the magistrate's or justice's decision by a judge of the Supreme Court of the State or part in which the warrant was executed.[10] In *Aston v Irvine*[11] the High Court upheld the validity of the procedure established in the legislation, in particular the conferral of ministerial or administrative powers on State officers to endorse warrants and to make orders for the return of a person to the State or Territory of issue of a warrant, and the conferral of federal judicial power to review such orders.[12] The High Court summarised the procedure as follows:

> [T]he scheme of s. 18 and s. 19 seems to be to treat the magistrate or justice as exercising a preliminary discretion to grant, so to speak, process ministerially and then to submit for judicial review by a judge of the Supreme Court the whole question of the liability of the person apprehended to be returned to the State originating the proceeding.[13]

Ancillary matters for which provision is made include the issue of a provisional warrant in the intended State or part of execution where the original warrant has not yet been endorsed, the making of orders concerning remand and admission to bail of persons apprehended under provisional warrants and endorsed warrants and the forfeiture, recovery and disbursement of recognisances entered into under such orders the conditions of which are later breached.

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[6] s 18(1).
[7] s 18(2).
[8] s 18(3).
[9] s 18(6).
[10] s 19.
[11] (1955) 92 CLR 353. The Court, Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto and Taylor J, delivered a joint judgment.
[12] The conferral of the power of review on a judge of the Supreme Court was held to be a conferral on the Supreme Court constituted by a single judge, and thus a valid conferral of federal judicial power on a 'court of a State' within s 77(iii) of the Constitution.
[13] (1955) 92 CLR 353, 365.

Endorsement of warrants

Range of warrants

323. *Issuing authorities.* Section 18(1) provides

> Where a Court, a Judge, a Police, Stipendiary or Special Magistrate, a Coroner, a Justice of the Peace or an officer of a court has, in accordance with section 16 or the law of a State or part of the Commonwealth, issued a warrant for the apprehension of a person, a Magistrate, Justice of the Peace or officer of a court who has power to issue warrants for the apprehension of persons under the law of another State or part of the Commonwealth, being a State or part of the Commonwealth in or on his way to which the person against whom the warrant has been issued is or is supposed to be, may, on being satisfied that the warrant was issued by the Court, Judge, Magistrate, Coroner, Justice of the Peace or officer (after proof on oath, in the case of a warrant issued by a Magistrate, Coroner, Justice of the Peace or officer of a court, of the signature of the person by whom the warrant was issued), make an endorsement on the warrant in the form, or to the effect of the form, in the Second Schedule to this Act authorizing its execution in that other State or part of the Commonwealth.

It its probable that, despite the liberal interpretation given to other provisions of the Act, the reference to the various authorities by which a warrant may be issued should be construed as a reference to such officers in their stated capacities. The provision would not, therefore, apply to warrants issued by the various officers while acting in other capacities, for example, as a Royal Commissioner or member of a specialist body or tribunal.[14] It is open to question whether the reference to warrants issued by a 'court' — which is very broadly defined in s 3 of the Act[15] — would encompass such bodies or tribunals where their functions can be described as judicial.

324. *Purposes of warrants.* Most international extradition schemes are confined to the return of persons charged or convicted of offences. In contrast, the opportunities for extradition amongst the States and Territories are broader for s 18 applies to all warrants that have been issued 'in accordance with section 16 [of the Act] or the law of a State or part of the Commonwealth'. Commonly the warrants which come to be endorsed under s 18(1) (and for which the language of the whole section is more appropriate[16]) are those for the apprehension of persons who have been charged with offences. But the provision encompasses warrants issued to secure the attendance of persons who have failed to comply with subpoenas or summonses,[17] or who have breached the conditions on which bail, or a conditional release from prison, was granted, and warrants issued in relation to civil default where that course is permitted under State law.

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[14] eg in the Northern Territory magistrates are, by virtue of that office, members of the Tenancy Tribunal: Tenancy Act 1979 (NT) s 19.

[15] 'Court' is defined to include 'any judge or justice of the peace acting judicially'.

[16] See *Ammann v Wegener* (1972) 129 CLR 415, 432 (Gibbs J).

[17] The reference to s 16 is to warrants issued where a person has failed to attend in compliance with a subpoena or summons whose interstate service was authorised under s 16(1). Similar warrants issued under State law where a person served within a State with a subpoena issued in that State failed to comply might subsequently come to be executed in another State.

325. *Proceedings.* This wide variety in the purposes for which extradition may be sought is apparently reinforced by the lack of any specification of the proceedings in relation to which a warrant has been issued. However, if a narrow view is taken of s 51(xxiv) of the Constitution, particularly of the phrase 'civil and criminal process',[18] the range of warrants within the scheme may be limited to those that have been issued in what may be described as civil or criminal proceedings. However, the Commission considers that a broader view of that phrase is appropriate[19] and, on that view, there would be no such limitation on the range of warrants within the scheme. Acceptance of that broad view, moreover, may be essential to the validity of the scheme in so far as it applies to warrants issued by coroners.[20]

326. *Federal offences.* It is commonplace that the arrest and prosecution of persons charged with federal offences depends in large measure on the procedures established in the various States and Territories. Section 68(1) of the Judiciary Act 1903 (Cth)[21] 'picks up' the State and Territory procedures and gives them the force of federal law.[22] Despite the 'federalisation' of State and Territory laws thus achieved, it had until recently been assumed[23] that the scheme applied to warrants for the apprehension of persons charged with offences against federal laws. However in a recent case[24] it was argued that, as State and Territory laws regarding the issue of warrants for the arrest of persons applied in respect of the arrest of alleged federal offenders only because of the 'picking up' achieved by the Judiciary Act, a warrant issued by a State or Territory officer for the arrest of a federal offender was not issued 'in accordance with . . . the law of a State or part of the Commonwealth' as required by s 18(1) of the Service and Execution of Process Act. But this argument was rejected, it being held that the law applied in issuing such a warrant was properly characterised as 'the law of a State or part of the Commonwealth' as that phrase was intended in s 18(1), notwithstanding that it applied only because of the operation of the Judiciary Act.[25] The conclusion, therefore, is that the scheme established by the Act applies to enable a State or Territorial warrant for the apprehension of a person charged with an offence against federal law to be executed in another State or Territory.

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[18] See para 44 for discussion of this view.

[19] See para 44.

[20] The question of the references to coroners has been discussed in relation to s 16 of the Act, which provides for the service of subpoenas or summonses issued by them: see para 256. The same arguments apply in this context and it is unnecessary to repeat them.

[21] That section, so far as is relevant, provides for the application of the 'laws of a State or Territory respecting the arrest . . . of offenders or persons charged with offences'.

[22] See *R v Loewenthal, ex parte Blacklock* (1974) 131 CLR 338, 346 (Mason J); *Lamb v Moss* (1983) 49 ALR 533, 559–61.

[23] See eg *Ex parte Maher* [1983] 2 Qd R 695.

[24] *Woss v Jacobsen* (1984) 56 ALR 254.

[25] The decision was upheld on appeal by a majority of the Full Court of the Federal Court: *Woss v Jacobsen* (1985) 60 ALR 313.

327. *'Warrant for apprehension'.* Section 18(1) provides for the endorsement of 'a warrant for the apprehension of a person'. This phrase encompasses any warrant which commands the apprehension of a person, regardless of what other commands it contains.[26]

Grounds for endorsement[27]

328. While the language of s 18(1) is not particularly precise as to the conditions to be satisfied before a warrant may be endorsed, it has been interpreted to require two conditions to be met: first, the person the subject of the warrant 'should be, or should be supposed to be, in, or on his way to,' the State or Territory in which the endorsement of the warrant is sought; second, the officer from whom the endorsement is sought 'should be satisfied that the warrant was issued as required by the sub-section, proof of the signature to the warrant being given'.[28] There are no reported comments as to the evidence necessary to satisfy the first condition, but the words of the section clearly do not require a substantial degree of proof as to the person's location. As to the second condition, while s 18(1) applies only in respect of a warrant that has been issued 'in accordance with . . . the law of a State or part of the Commonwealth', it would seem that the officer from whom an endorsement is sought need be satisfied only 'that the warrant was issued by' a court or a specified officer.[29] However, it is suggested that the endorsing officer must have some discretion to refuse to endorse a warrant which has clearly not been issued 'in accordance with' the law of a State or Territory, for example, a warrant which was clearly irregular or bad on its face, for that condition is a prerequisite to the operation of the section as a whole. But even if this view is accepted, questions concerning the validity of a warrant, such as whether the pre-conditions to its issue have been satisfied, may not be considered when an application for its endorsement is made. Situations could arise, therefore, in which invalid warrants are endorsed and persons apprehended upon them. The issue then is as to the time at which the validity of the warrant, as opposed to the validity of the endorsement, can be raised, if at all, under the procedures established in the latter part of the section. This issue is discussed in a later part of this chapter.[30]

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[26] *R v Pyvis, ex parte Neville* [1955] VLR 61. See also *O'Sullivan v Dejneko* (1964) 110 CLR 498.

[27] The word 'indorsement' appeared in this section of the Act as enacted in 1901. In 1953 Part III was re-enacted and the word 'endorsement' substituted. No change to the Second Schedule was made in 1953. In other sections of the Act the older form is still used: see para 80, n 29.

[28] *Aston v Irvine* (1955) 92 CLR 353, 363.

[29] See *Ammann v Wegener* (1972) 47 ALJR 65, 68–9 (Mason J) (These were proceedings subsequent to the Full Court proceedings reported in (1972) 129 CLR 415): '. . . it is for the magistrate in the State in which the warrant is to be executed "on being satisfied that the warrant was issued by the Court" or any person specified in the subsection, to make an endorsement on the warrant. The validity of the endorsement is conditional upon the magistrate's satisfaction that the warrant was issued.'

[30] See para 333, 353.

Form of endorsement

329. The endorsement is required to be 'on the warrant in the form, or to the effect of the form, in the Second Schedule' to the Act.[31] This requirement has not been pedantically construed[32] and substantial compliance probably suffices.

Execution of warrants — effect of endorsement

330. Section 18(2) of the Act provides

> A warrant so endorsed [ie endorsed as provided by s 18(1)] is sufficient authority to the person bringing the warrant, to all constables and persons to whom the warrant is directed and to all constables and peace officers in that other State or part of the Commonwealth [ie the State or part in which it has been endorsed] to execute the warrant in that other State or part of the Commonwealth, to apprehend the person against whom the warrant was issued and to bring that person before a Police, Stipendiary or Special Magistrate or a Justice of the Peace who has power to issue warrants for the apprehension of persons under the law of that State or part of the Commonwealth.

It has been suggested that s 18(2) and the following provisions appear to 'presuppose . . . that the warrant is valid, once the endorsing magistrate has been satisfied as to its issue'.[33] However, endorsement is only a ministerial act performed upon proof of the issue of a warrant.[34] Subsection 18(1) also states the purpose of the endorsement: 'make an endorsement on the warrant . . . authorizing its execution . . .' Therefore, while the provision may 'presuppose' validity upon endorsement, it is suggested that the endorsement cannot confer validity on, rather it only authorises the execution of, the warrant. Clearly, however, execution of a warrant before being endorsed would be unauthorised. But the purported execution of an unendorsed warrant does not bar its subsequent endorsement and then lawful execution,[35] nor does arrest upon other process, even if unlawful, render subsequent execution of a properly endorsed warrant unlawful.[36]

Application for return

Introduction

331. The remaining provisions of s 18 set out the procedure to be followed after the person apprehended under the warrant has been brought before a magistrate or justice of the peace.

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[31] In accordance with long standing practice the endorsement is generally placed on the back of the warrant. Hence the use of the phrase 'the backing of warrants', which has come to be 'the generally accepted term describing this method of summoning and arresting fugitives from justice': Brown 1976, 304. See also the marginal note to s 18 of the Act.

[32] See *R v Meldon, ex parte McCrory* [1938] QWN 6.

[33] *Ammann v Wegener* (1972) 47 ALJR 65, 69 (Mason J).

[34] See *Aston v Irvine* (1955) 92 CLR 353; see also id, 68–9.

[35] *R v Meldon, ex parte McCrory* [1938] QWN 6.

[36] *R v Horwitz* (1904) 6 WAR 184.

(3) Subject to this section, the Magistrate or Justice of the Peace before whom the person is brought may —

(a) by warrant under his hand, order the person to be returned to the State or part of the Commonwealth in which the original warrant was issued and, for that purpose, to be delivered into the custody of the person bringing the warrant or of a constable or other person to whom the warrant was originally directed; or

(b) admit the person to bail, on such recognizances as he thinks fit, on condition that the person appears at such time, and at such place in the State or part of the Commonwealth in which the original warrant was issued, as the Magistrate or Justice specifies to answer the charge or complaint or to be dealt with according to law.

(4) A warrant issued under paragraph (a) of the last preceding sub-section may be executed according to its tenor.

(5) The Magistrate or Justice of the Peace before whom the person is brought has, for the purposes of this section, the same power to remand the person and admit him to bail for that purpose as he has in the case of persons apprehended under warrants issued by him.

(6) If, on the application of the person apprehended, it appears to the Magistrate or Justice of the Peace before whom a person is brought under this section that —

(a) the charge is of a trivial nature;

(b) the application for the return of the person has not been made in good faith in the interests of justice; or

(c) for any reason, it would be unjust or oppressive to return the person either at all or until the expiration of a certain period,

the Magistrate or Justice of the Peace may —

(d) order the discharge of the person;

(e) order that the person be returned after the expiration of a period specified in the order and order his release on bail until the expiration of that period; or

(f) make such other order as he thinks just.

While their juxtaposition strongly supports the proposition that a person apprehended on a warrant executed interstate generally will be ordered to be returned to the State or Territory of issue of the warrant,[37] the courts have refrained from suggesting that these provisions require the return of a person except in exceptional or rare circumstances.[38] However the cases establish that it is necessary to make a clear case if return is to be refused.[39]

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[37] *O'Donnell v Heslop* [1910] VLR 162, 169 (Madden CJ).

[38] *White v Cassidy* (1979) 40 FLR 249, 251.

[39] *In re Alstergren and Nosworthy* [1947] VLR 23, 30. See also *Carmady v Hinton* (1980) 41 FLR 242, 244 (Wells J). See para 341–52 for discussion of the grounds on which return may be refused.

Nature of magistrate's or justice's powers

332. *Preconditions to exercise of discretion.* By the use of the word 'may', s 18(3) apparently confers a discretion on the officer before whom the apprehended person has been brought as to the disposition of the person. But that discretion is of a limited nature. Leaving aside for the moment the provisions of s 18(5) and (6) which are considered below,[40] in the first place the magistrate or justice of the peace is given only two choices as to the order to be made, both of which result in the person's return.[41] In the second place, the exercise of the discretion is expressed to be 'subject to this section'. Again leaving aside s 18(5) and (6), these introductory words direct attention to s 18(1) and (2) of the section. Consistent with the view expressed by Justice Mason in *Ammann v Wegener*,[42] it is arguable that, before making an order under s 18(3), the magistrate or justice need only find that there is an endorsed warrant and that the person produced is the person named in the warrant.[43] The conclusion appears to be that it is no part of the magistrate's or justice's task to consider the validity of a warrant before proceeding to make an order under the s 18(3).[44]

333. However, it is arguable that a contrary conclusion may be taken, namely, that a magistrate or justice may have to consider the validity of a warrant before proceeding to make an order under s 18(3). This is because, even without the limitation that the power to make an order under that provision is 'subject to this section', s 18(1) is expressed to apply only with respect to warrants issued 'in accordance with . . . the law of a State or part of the Commonwealth'. These words set the parameters for the operation of the whole section and it must as a matter of principle be open to an apprehended person to argue that the warrant on which he or she was apprehended was not issued 'in accordance with' such a law and hence that the section has no application to the subject warrant.[45] Therefore it is suggested that the question of the validity of

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[40] See para 338, 341–52.

[41] See *O'Sullivan v Dejneko* (1964) 110 CLR 498, 501–2 (Kitto J).

[42] (1972) 47 ALJR 61, 68–9: see para 328, n 29.

[43] See *O'Donnell v Heslop* [1910] VLR 162, 175 (Cussen J). See also *R v Horwitz* (1904) 6 WAR 184, 190 (McMillan J).

[44] See *Woss v Jacobsen* (1985) 60 ALR 313, 320 (Toohey J).

[45] If not, these words would have no meaning and the provision may operate to confer validity on a warrant which is invalid under the law of the State or part in which it was issued. A provision having this effect, it is submitted, could not be valid under s 51(xxiv) of the Constitution, nor could it be supported under s 51(xxv). It may be that a warrant issued by a superior court is entitled to be treated as conclusively valid (See *Ex parte Williams* (1934) 51 CLR 545) and thus under s 18 of the State and Territorial Laws and Records Recognition Act 1901 (Cth) to be given elsewhere such faith and credit as it has in the place of issue: see *Damoulakis v Murchie, ex parte Damoulakis* [1987] Qld L Rep 372. But the same principle would not apply to a warrant not issued by a superior court and there is no reason why federal law could not qualify the principle as it applies to warrants issued by superior courts.

a warrant is a relevant condition to the exercise of the discretion to order the return of a person. But rather than being a condition that must be affirmatively established, it is a matter to be investigated only if a serious doubt arises. If an apprehended person did not raise the issue, the magistrate or justice would have no cause to doubt the validity of the warrant and hence his or her power to order the return of the person. However, if the issue was raised, it is submitted that the magistrate or justice would have to consider the question before exercising the discretion, for the issue is critical to the whole operation of the section. But even if the view is taken that such a challenge to the validity of a warrant is not open under the procedures established by s 18, particularly s 18(3),[46] there is clear authority that a warrant's validity and thus the validity of any endorsement may be challeged by way of an application for a writ of habeas corpus, that is, in separate proceedings.[47]

334. *Residual discretion.* The suggestion has been made in one case[48] that, apart from the introductory words of s 18(3), there is some residual discretion conferred upon the magistrate or justice to refuse to make an order for the return of a person if those seeking return do not provide information concerning the alleged crime or the evidence implicating the person. Such information and evidence has consistently been given in extradition hearings, but in view of the fact that there is no requirement that a prima facie case be established against a person before extradition may be ordered,[49] it is arguable that no such information need be given before the magistrate or justice may make an order under s 18(3).

Orders for return

335. *Appropriateness of order.* Section 18(3) provides the magistrate or justice before whom an apprehended person has been brought with two choices: the issue of a warrant ordering the person to be taken in custody to the State or Territory of issue of the original warrant (a custodial return order); or the bailing of the person on condition that the person appear at a specified time and place in the State or Territory of issue to answer the charge or complaint or to be dealt with according to law (a non-custodial return order). There is nothing in the provision directing the manner in which the choice is to be made. Nor have guidelines been provided by the courts, apart from one dissenting view that non-custodial return is inappropriate where a warrant, in addition to commanding the apprehension of a person, commands the person's imprisonment.[50]

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[46] See para 353 for discussion of the relevance of s 18(6) in this regard.

[47] *R v Falkiner* (1914) 10 Tas LR 63.

[48] *Rider v Champness* (1970) 16 FLR 195, 199 (Lush J).

[49] cf the situation under many extradition schemes operating in the international sphere.

[50] See *O'Sullivan v Dejneko* (1964) 110 CLR 498, 502 (Kitto J). The other members of the High Court (Taylor, Menzies, Windeyer and Owen J), without discussing the matter, made a non-custodial return order requiring the person to appear in a court in the State of issue to be dealt with according to law: id, 510–1.

Thus the power conferred by s 18(3) is not fettered by guidelines or rules as to the circumstances in which one order is more appropriate than the other.[51]

336. *'Return'.* While s 18(3)(a) refers to a person being 'returned' to the State or Territory of issue of a warrant, the courts have not construed the section as requiring that the person have come from or be a resident of that State before an order under that section can be made. Rather, it has been suggested that the term 'must refer . . . to [the person] being taken back with the original warrant to the State from which that warrant has been brought'.[52] Such an interpretation is clearly necessary to the proper operation of the warrants scheme for otherwise it might have no application (contrary to its expressed intention[53]) in respect of warrants to compel the attendance of a person who has failed to comply with a subpoena served interstate, a situation where it might be common for the person the subject of the warrant to have never been in the State or Territory of issue. While the courts have thus overcome the possible restrictions arising from the term, its use probably stems from legislative schemes establishing procedures for the extradition of persons between sovereign countries, which are generally restricted in scope to alleged or convicted offenders and thus generally to persons who have been in the country where the charge is laid.

337. *Form of warrant for return.* Section 18(3)(a) empowers the issue of a warrant ordering the return of the apprehended person 'and, for that purpose, [for the person] to be delivered into the custody of the person bringing the warrant or of a constable or other person to whom the warrant was originally directed'. As with the form of endorsement,[54] this requirement has not been construed pedantically[55] and

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[51] A possible exception arises in the case of certain warrants alleging offences against federal law, although the matter has never been considered in any reported case dealing with such a warrant. This is because s 68(1) of the Judiciary Act 1903 (Cth) picks up the procedures and laws of the State or Territory in which a person is charged with a federal offence (the choice of venue being prescribed by s 80 of the Constitution or, where that provision is not applicable, s 68 itself), including the procedures 'for holding accused persons to bail'. Section 68(1) makes no mention of who is to apply those laws and it is thus arguable that they should be applied by the courts and officers of other States where a question arises as to the return of the person to the State or Territory of issue of a warrant alleging a federal offence. Thus the choice of order under s 18(3) may have to be made by reference to the bail laws of the State or Territory where the charge is laid. It may be queried whether s 68(1) was intended to have this effect.

[52] *O'Sullivan v Dejneko* (1964) 110 CLR 498, 502 (Kitto J). See also *Woss v Jacobsen* (1984) 56 ALR 254, 264 (Sheppard J): 'I think one should give the word ["return"] a meaning more akin to the meaning it has when used in connection with writs of various kinds and elections . . .'

[53] Hence the reference in s 18(1) to warrants issued under s 16 of the Act.

[54] See para 329.

[55] *R v Horwitz* (1904) 6 WAR 184 Parker and McMillan J, Burnside J dissenting.

minor defects of form in the warrant embodying the order of the magistrate provide no opportunity for a person to escape the effect of the order.[56]

Remand for purposes of proceedings under s 18

338. While the language of s 18(5) is not particularly clear, the few reported comments on it confirm that its purpose is to provide the magistrate or justice before whom an apprehended person has been brought with power to adjourn the proceedings under s 18 and to remand the person in custody or on bail for that purpose.[57] As the power is expressed to be 'the same . . . as he [that is, the magistrate or justice] has in the case of persons apprehended under warrants issued by him', the intention seems to be that the magistrate or justice should apply the law of the State or Territory in which he or she is sitting to the decision as to the disposition of the person pending resumption of the proceedings.[58] But the power to adjourn the proceedings and remand the person pending their resumption is only of a temporary nature. It cannot found an adjournment for many months in order to test whether an argument put by an apprehended person under s 18(6) has substance.[59]

Challenge to application for return

Introduction

339. It is a common element of extradition schemes operating in the international sphere that a person who is liable to be extradited may escape extradition if he or she is able to satisfy authorities in the state in which he or she is found of certain matters. Section 18(6) supplies an analogous opportunity to a person liable to be extradited from one State or Territory to another under the procedures of the warrants scheme. The result of a successful application under this provision may be to deny or qualify the effect a warrant would have if executed within the State or Territory of issue. In discussing the grounds available under s 18(6), it is proposed only to elucidate the principles applicable to them and to describe the types of arguments that have been considered relevant. A detailed discussion of particular cases, particularly as to whether the evidence adduced has been sufficient to satisfy any particular ground, is unnecessary for present purposes.[60]

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[56] This view does not contradict that taken with respect to defects in a warrant sought to be executed under the s 18 procedure (para 328) because the return warrant is issued under federal authority. It is clearly open to the Parliament to enable the rectification of such a warrant. The original warrant, however, stands in a different position, having been issued under State or Territory law.

[57] *Rider v Champness* (1970) 16 FLR 195, 198-9, 201 (Lush J); *Aston v Invine* (1955) 92 CLR 353, 365. Thus the provision does not relate to the choices of order under s 18(3).

[58] No reported case has discussed this aspect of the power.

[59] *Re Zanetti* (1985) 16 A Crim R 126.

[60] The research paper on the topic should be consulted if further information is desired: see Young 1984c.

Onus and standard of proof

340. It is clear from the introductory words of s 18(6) that it is for the apprehended person to make an application under that provision, an application which, for convenience, shall be described as an application for release. If the person makes no application for release or, having done so, fails to satisfy the magistrate or justice of any of the grounds specified, then the magistrate or justice may make an order under s 18(3). On the question of the standard of proof required from the applicant for release, it has been suggested in one case that the civil burden of proof, that is, proof on the balance of probabilities, applies.[61] In another case it was suggested that the effect of s 118 of the Constitution was to place 'a heavier burden on a prisoner resisting interstate extradition than the burden borne by a prisoner who is resisting extradition to another country'.[62] Paradoxically, however, the requirements of s 18(6) are, at least in theory, less demanding than those of federal legislation concerning international extradition in at least one respect. This concerns the terms in which the grounds for release are expressed. The three grounds specified in s 18(6)(a), (b) and (c) are expressed disjunctively, that is, the applicant for release need satisfy the magistrate or justice only of one of the three grounds there specified. In contrast, in relation extradition from Australia to another Commonwealth Country, under s 16 of the Extradition (Commonwealth Countries) Act 1966 (Cth)[63] the applicant for release must satisfy the officer or court conducting the proceedings that it would be unjust or oppressive to order the person's return, injustice or oppression being capable of being proved on the basis of grounds similar to those expressed in s 18(6)(a) and (b). In other words, while the applicant for release under s 16 of the Extradition (Commonwealth Countries) Act must establish injustice or oppression in all cases, the applicant for release under s 18(6) of the Service and Execution of Process Act need not do so, proof of, for example, the trivial nature of the offence by itself being sufficient to justify the release of the person. Whether this difference in terms produces any difference in practice, however, is open to question.[64]

Grounds for challenge

341. *Trivial charge.* Section 18(6)(a) sets out the first of the grounds upon which an application for release may be based: 'the charge is of a trivial nature'. While

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[61] See *White v Cassidy* (1979) 40 FLR 249, 251 (Green CJ).

[62] *Carmady v Hinton* (1980) 41 FLR 242, 244 (Wells J).

[63] That section also refers to 'the passage of time since the offence is alleged to have been committed or was committed' and, in addition to injustice or oppression, enables release to be ordered where extradition would be 'too severe a punishment'.

[64] See *Narain v DPP (Cth)* (1986) 68 ALR 511; cf *Daemar v Parker* [1975] 2 NSWLR 744, 746 (Yeldham J), a case concerning extradition from Australia to New Zealand involving s 27 of the Extradition (Commonwealth Countries) Act 1966. Section 27 is in the same terms as s 16 of that Act. Section 27 has been amended since the latter case was decided, but not in the way suggested by Justice Yeldham: id, 750.

little comment has been made on this ground,[65] it has been said that the extent of the penalty applicable is not determinative of the question, 'but rather what is alleged, and what is charged'.[66] It should be noted that in referring to a 'charge', this ground is presumably only available to persons who are the subject of criminal proceedings. It would require some contortion of this term if it was to be available, for example, to persons apprehended on warrants to compel attendance after failing to comply with a subpoena or summons.

342. *Lack of good faith.* The second ground upon which release may be sought is that 'the application for the return of the person has not been made in good faith in the interests of justice'. As with s 18(3)(a),[67] the word 'return' in this provision does not require that the apprehended person have been in the State or Territory to which extradition is sought. But in contrast to s 18(3)(a), the word is not confined to the custodial extradition of a person: the ground can be raised, therefore, regardless of whether a custodial or non-custodial return order is sought.[68] In considering whether this ground is satisfied, the courts have examined the circumstances surrounding the laying of a criminal charge and also the position of the informant, particularly if the informant is not a person holding a public office with duties which include the laying of informations or charges.[69]

343. *Injustice or oppression.* The third ground upon which release may be sought, and the most frequently invoked, is that 'for any reason, it would be unjust or oppressive to return the person either at all or until the expiration of a certain period'. The word 'return' is used in this provision in the same way as it is used in the previous ground, s 18(6)(b).[70] Further, the introductory words, 'for any reason', are not to be construed such that any taint of injustice or oppression will suffice. They 'serve only to show that the concepts of injustice and oppression are sufficiently flexible to accommodate — or not to accommodate — the particular facts of each case'.[71]

344. Until recently, the courts had shied away from any definition of the terms 'unjust' and 'oppressive'[72] and before 1980 there was scant recognition[73] of any difference

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[65] Comments in early cases regarded it as speaking for itself: eg *O'Donnell v Heslop* [1910] VLR 162, 169 (Madden CJ); *In re Alstergren and Nosworthy* [1947] VLR 23, 29 (Lowe J).

[66] *Ex parte Maher* [1983] 2 Qd R 695, 697 (Douglas J).

[67] See para 336.

[68] *O'Donnell v Heslop* [1910] VLR 162, 169.

[69] See eg *Andrew's Case* [1902] SALR 106; *The King v Boyce and Roberts, ex parte Rustichelli* [1904] St R Qd 181. cf *Mulfahey v Fullarton* [1920] VLR 126.

[70] See para 342, 336.

[71] *Perry v Lean* (1985) 63 ALR 407, 413 (Toohey J).

[72] See eg *In re Alstergren and Nosworthy* [1947] VLR 23, 29; *O'Donnell v Heslop* [1910] VLR 162; *Ex parte Klumper* (1966) 10 FLR 167, 171 (Sugerman JA).

[73] One exception was *In re Triggs* [1927] VLR 187.

in meaning between the two terms, nor that the terms were used disjunctively.[74] However lately the courts have been inclined to define the terms and have done so by reference to authority on the corresponding provision of the Fugitive Offenders Act 1967 (UK).

> 'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair.[75]

This statement has now often been cited with approval in relation to the terms as used in s 18(6)(c).[76] The implications of this interpretation of the terms, particularly as concerns the evidence by which a person might seek to establish injustice or oppression, are discussed later in this chapter.[77] Firstly, however, it will be useful to consider the various ways in which apprehended persons have sought to establish that it would be unjust or oppressive to order their return without reference to that interpretation.

345. The arguments raised under this ground tend to fall into one of two broad classes: 'legal' arguments, which relate to the charge alleged in or the grounds for the issue of a warrant, or concern principles applicable to the scheme; and 'practical' arguments, which raise for consideration the personal circumstances of the apprehended person. The early reported decisions generally concern arguments of the first class. One argument often raised was that the person concerned was not guilty of the charge alleged in the warrant. The courts, however, were loath to endorse an approach for dealing with this argument that would require all the evidence to be presented and evaluated in the State where the person was apprehended. They stressed that the extradition proceedings were not a trial of the charge and that there was no requirement, as in most extradition schemes, for the prosecution to establish a prima facie case against a person. The view was thus taken that as a general rule questions concerning the guilt or innocence of the apprehended person should be tried in the State or Territory in which the prosecution was instituted; that disputed questions of fact should

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[74] Rulings on this ground had merely stated that to return the person was or was not 'unjust and oppressive': *The King v Boyce and Roberts, ex parte Rustichelli* [1904] St R Qd 181, 185; *In re Hatherly, ex parte Hatherly* [1940] St R Qd 20, 32; *Lourey v Lourey* (1941) 35 QJPR 31, 33; *O'Sullivan v Dejneko* (1964) 110 CLR 498, 510; *Ex parte Klumper* (1966) 10 FLR 167, 173; *Skewes v Veen Huizen* (1978) 22 ALR 101, 113; or 'unjust or oppressive': *Ball v Murphy* (1908) 10 WAR 89, 92; *In re Alstergren and Nosworthy* [1947] VLR 23, 43; *Aston v Irvine* (1955) 92 CLR 353, 366; *In re Jack Mandel* [1958] VR 494, 498; *Amman v Wegener* (1972) 47 ALJR 65; *Walker v Duncan* [1975] 1 NSWLR 106; *Pyne v Jones* (1976) 13 ALR 662, 668; *White v Cassidy* (1979) 40 FLR 249, 256; without attempting to differentiate between the two terms.

[75] *Kakis v Government of the Republic of Cyprus* [1978] 2 All ER 634, 638 (Lord Diplock).

[76] See eg *Carmady v Hinton* (1980) 41 FLR 242, 251; *Golobic v Radalj* (1980) 33 ALR 61; *Lucas v Lovatt* [1983] Tas R 227 (NC 11); *In re Carney*, unreported, Supreme Court of Tasmania, 21 October 1983 (Cox J); *Perry v Lean* (1985) 63 ALR 407.

[77] See para 355.

not be determined by the magistrate or justice (or a judge on review) before whom the apprehended person was brought; but that where it was clear that the charge could not possibly succeed, that the evidence would be insufficient to send the person for trial, the return of the apprehended person might be refused.[78]

346. Another argument the scope of which has been narrowly confined is that the warrant discloses no offence in law. In conformity with the approach taken to the previous argument, it has been held that debatable or doubtful questions of law should not be considered in the extradition proceedings. If the argument is to succeed it must be plain that the charge against the person is 'misconceived'.[79]

347. An argument successfully raised in several cases that arose in the 1940's in Queensland was that there was no corresponding offence in the State or Territory from which the return of the apprehended person was sought.[80] The principle of double criminality, that the offence for which extradition is sought should exist in both the requesting and requested state, is a common element of extradition schemes operating between countries.[81] That the principle was applied in the context of the interstate warrants scheme was no doubt in part influenced by the courts' understanding of the operation of such extradition schemes.[82] However, its application to the scheme is questionable in view of the fact that the scheme does not operate — as do international extradition schemes — on the basis of reciprocity between the States, but by force of federal law binding on all the States. In addition, there is the full faith and credit clause, s 118, in the Constitution. These considerations have lead more recently to the conclusion that the principle of double criminality is inapplicable to the interstate warrants scheme.[83]

348. A related matter also raised successfully in some cases was that alternative procedures were available to the person seeking the return of the person the subject

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[78] See *O'Donnell v Heslop* [1910] VLR 162, 170–1 (Madden CJ). See also *In re Alstergren and Nosworthy* [1947] VLR 23; *In re Jack Mandel* [1958] VR 494; *Re McNamara* (1964) 7 FLR 83; *Skewes v Veen Huizen* (1978) 22 ALR 101; *Ex parte Maher* [1983] 2 Qd R 695.

[79] *Aston v Irvine* (1955) 92 CLR 353, 366–7; *Ammann v Wegener* (1972) 47 ALJR 65, 67 (Mason J); see also *O'Sullivan v Dejneko* (1964) 110 CLR 498; *Ex parte Klumper* (1966) 10 FLR 167; *In re Triggs* [1927] VLR 187.

[80] See *Lewis v Lewis* [1902] St R Qd 115 (a case concerning a writ of attachment), which was applied to the warrants scheme in *In re Hatherley, ex parte Hatherley* [1940] St R Qd; *In re Conway, ex parte Conway* [1946] QWN 31. See also *The King v Boyce and Roberts, ex parte Rustichelli* [1904] St R Qd 181.

[81] See eg 1982 Review, 41–5; *European Convention on Extradition* 1957, art 14, 2.

[82] See eg *Lewis v Lewis* [1902] St R Qd 115, 119 (Griffith CJ).

[83] *Walker v Duncan* [1975] 1 NSWLR 106; special leave to appeal refused: *Walker v Duncan* (1975) 6 ALR 254 (Barwick CJ; McTiernan, Gibbs and Mason J concurring). Murphy J dissented, arguing that, amongst other things, the opportunity to consider the effect of s 118 of the Constitution should have been pursued.

of the warrant.[84] The courts were highly critical of the plaintiffs' choice of the warrant procedure to secure their remedies against the defendants rather than alternative non-custodial options. However, by analogy with the decisions in *Walker v Duncan*,[85] it perhaps may be argued that the full faith and credit directive in s 118 of the Constitution requires that a warrant issued in accordance with the law of a State should not be denied effect in another State merely because other process is available which may achieve the same result.[86] This view would suggest that it is not for the officer conducting the extradition hearing to consider the appropriateness of, or to disapprove of, the course adopted by the relevant authorities in the State or Territory of issue.[87]

349. The cases suggest that a permissible argument under the 'unjust or oppressive' ground is that the person sought to be returned has previously been tried in the State or Territory to which his or her return is sought, that is, a claim that the doctrines of *autrefois convict* or *autrefois acquit* apply. To be successful, such a plea must relate to the particular offence or offences for which a person was originally tried and those others of which he or she could have been found guilty upon that trial.[88]

350. Two recent cases concerning the execution of warrants alleging offences against Commonwealth laws have raised the question whether the possibility that a prosecution might have been instituted in the 'home' State of the apprehended person is relevant.[89] In one case it was held that the choice of venue was properly that of the prosecution and that that matter should not be entertained on extradition proceedings.[90] In another, the question whether such matters were relevant was left open.[91]

351. In relation to warrants concerning alleged offences it was not until 1976 that any 'practical' arguments — arguments concerning the personal circumstances of the apprehended person — were raised in a reported case.[92] The decisions since stress that a finding of injustice or oppression can be made only on a consideration of all the circumstances of the apprehended person. Such a finding depends very much upon the

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[84] *In re Hatherley, ex parte Hatherley* [1940] St R Qd 20; *Lourey v Lourey* (1941) 35 QJPR 31. Both cases concerned a warrant issued after the failure of a person to pay maintenance. The alternative avenue was to seek registration of the maintenance order in Queensland and its enforcement there under Part IV of the Service and Execution of Process Act.

[85] [1975] 1 NSWLR 106; (1975) 6 ALR 254. See above n 83.

[86] s 118 would not operate directly on the warrant — it applies to 'the laws, the public Acts and records and the judicial proceedings of the States' — but it could be argued that it applies to the law in pursuance of which the warrant was issued.

[87] See *Merwin Pastoral Company Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1932) 48 CLR 565, 577 (Rich and Dixon J), 587–8 (Evatt J); *Jones v Jones* (1928) 40 CLR 315, 329 (Higgins J dissenting).

[88] *Ball v Murphy* (1908) 10 WAR 89. See also *Pyne v Jones* (1976) 13 ALR 662.

[89] That there may be choice of venue for a trial arises from the operation of s 68, 70 and 70A of the Judiciary Act 1903 (Cth).

[90] *Ex parte Maher* [1983] 2 Qd R 695, 698 (Douglas J). This holding may have been influenced by the fact that the apprehended person's arguments on this matter were held to be lacking in substance.

[91] *Silbersher v Gerkens* (1984) 13 A Crim R 1, 8 (Lockhart J).

[92] *Pyne v Jones* (1976) 13 ALR 662.

facts of each case. It is unnecessary for present purposes to examine in detail the facts of the numerous cases in which such arguments have been raised. They demonstrate, however, that relevant circumstances include the following:

- the length of time between the occurrence giving rise to the issue of the warrant and the execution of that warrant on the person
- the cause of any delay in execution of the warrant, particularly where it is possible to assign that cause to the apprehended person or the prosecuting authorities
- the circumstances of any previous decision by the requesting authorities not to seek the return of the person, where such decision has been communicated to the person, that is, whether the apprehended person has previously been informed that his or her extradition is not sought
- evidence of the rehabilitation of the person, including the establishment of social, business and family ties
- deterioration of the person's health
- advanced age of the person
- the distance from his or her home required to be travelled by the person if returned
- evidence of possible disruption to the person's business and family life in so far as that disruption affects the person's rehabilitation
- the seriousness of the offence with which the person is charged[93]
- inability of the apprehended person to locate or compel attendance of a witness and
- loss of documentary and other evidence relevant to the apprehended person's defence to the charges.

On the other hand, the following arguments have been held not to be relevant:

- the possibility that a person might be found unfit to plead to the charge once in the State or Territory of issue of the warrant[94] and
- potential prejudice to the apprehended person arising from media publicity in the State or Territory of issue, such matters being regarded as properly subject to the control of courts in that place.[95]

352. All the matters discussed above have arisen in the context of warrants alleging offences. But the interstate scheme also applies to warrants issued for other purposes, including to compel attendance at proceedings to give evidence. The major decision on

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[93] This may be relevant in two respects. First, the application for return should be warranted by the seriousness of the offence — in other words, the more serious the offence the more justified the application for return. Secondly, where a consideration of all the other circumstances indicates that it may be unjust or oppressive to return the person, the seriousness of the offence may justify a refusal to return the person — in other words, the more serious the offence the more likely it will be that return will be refused. See *Kakis v Government of the Republic of Cyprus* [1978] 2 All ER 634, 640 (Lord Diplock) and *R v Governor of Pentonville Prison, ex parte Narang* [1978] AC 247, 254 (Slynn J in the Divisional Court) as interpreted in *Perry v Lean* (1985) 63 ALR 407, 431–2 (Olsson J).

[94] *Golobic v Radalj* (1980) 33 ALR 61.

[95] *Perry v Lean* (1985) 63 ALR 407. cf para 440–50.

this aspect of the operation of the warrants scheme, *Ammann v Wegener*,[96] concerned a warrant issued after a person had failed to attend in answer to a summons, which had been served interstate under the procedures provided by s 16 of the Act, to give evidence at committal proceedings against a doctor charged with unlawfully using an instrument with intent to procure the miscarriage of the person. The major point of interest in the decision concerns the views expressed regarding the avenues for challenging the validity of a warrant executed under the scheme. This point is discussed below. The decision also involved consideration of some of the arguments that a person apprehended on such a warrant (that is, a potential witness) might raise on an application for release. First, it was argued that there was no legal foundation for the charge against the doctor. While declining, in accordance with the principles noted above,[97] to consider the questions of law which arose on this argument, Justice Mason did not question the applicant's right to raise the matter. By analogy, a potential witness might argue in an application for release that the accused in the proceedings at which his or her attendance was sought was clearly not guilty of the offence alleged. A potential witness might be in a particularly useful position so far as such a proposition is concerned. However, in view of the courts' insistence that disputed questions of fact generally should be determined in the State where a charge is to be prosecuted, that is, the State of issue of the warrant, it could only be in an exceptional case that such an argument could succeed. Secondly, it was argued that, by giving evidence at the committal proceedings, the potential witness would expose herself to criminal prosecution. Although the potential witness had been granted a pardon in the State of issue of the warrant, it was argued that she could still be subject to a conspiracy charge in the State where she resided. This argument was rejected, it being stated that the potential witness would be able to have recourse to the usually available privilege against self-incrimination in the proceedings in the State of issue.[98] Further arguments that the potential witness would be embarrassed and her privacy invaded by having to give evidence were rejected on the basis that neither were relevant.

353. A further argument that was raised but not fully argued was that the warrant was invalid because the preconditions to its issue had not been satisfied.[99] While recognising that the matter was not crucial to the decision, Justice Mason did comment on this aspect. After suggesting that the provisions of s 18 seemed to assume that a warrant was valid once endorsed[100] he said: 'In this setting there is much to be said for the view that the discretion conferred by s 18(6) does not extend to re-

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[96] (1972) 47 ALJR 65. There is only one other reported decision dealing with such a warrant: *Damoulakis v Murchie, ex parte Damoulakis* [1987] Qld L Rep 372.

[97] See para 346.

[98] It is unclear, however, whether the privilege can be claimed where a witness seeks to avoid incriminating himself or herself in respect of possible offences in a jurisdiction other than that in which the evidence is being given: see ALRC 26, vol 2, para 215–25.

[99] The warrant purportedly had been issued under s 16(2) of the Act, a precondition of which is that the officer issuing the warrant should be satisfied that the person who has failed to attend in answer to a subpoena or summons was tendered a reasonable sum of money for his or her expenses. In this case the potential witness had been given a return airline ticket for travel to and from the location of the committal proceedings.

[100] See para 330 for comment on this view.

viewing the validity of the warrant.'[101] However, Justice Mason noted that under the Fugitive Offenders Act 1881 (UK) the validity of the warrant had been recognised as a proper consideration on an application for release; he therefore proceeded to discuss the application on the basis that he could inquire into the validity of the warrant.

> On the assumption, therefore, that it is open to me to review the validity of the warrant and on the further assumption (which is contrary to the view which I have expressed) that the warrant was invalid, I would not regard it as unjust or oppressive to return the applicant to South Australia by reason of the fact that no sum of money was tendered to her for expenses. The question, so it seems to me, is whether that fact or circumstance makes return unjust or oppressive. I do not consider that it does. If it be conceded that it was unjust to expect her to go to Adelaide pursuant to the witness summons by reason of the failure to tender a reasonable amount for expenses, it does not follow that it is unjust for her to return now if proper provision is made for her expenses.[102]

While the result may appear reasonable, it is suggested that the reasoning is open to question on at least two grounds. First, Justice Mason suggested that the 'defect' arising from the failure to tender a reasonable sum of money for expenses at the time of service of the summons can be corrected by an appropriate order when a person is brought before the court on the execution of a warrant to compel compliance with the summons. But what is the source of this power? If a magistrate or justice (or judge on review[103]) is not satisfied as to any of the grounds in s 18(6), the only source of power open is s 18(3), which is to make a custodial or non-custodial return order. There is no provision for the payment of the expenses of a person the subject of the second class of order. A more basic criticism, however, concerns the power to deal with the application for return at all. Justice Mason appeared to suggest that once the person is before the court the matter is at large — that it is possible for the court to consider the question whether the person should be required to go to the State or Territory of issue without reference to the original warrant. The Commission cannot agree with this reasoning. As has been explained,[104] the introductory words of s 18 themselves must admit of a challenge to the validity of a warrant; that is, because the section applies to warrants issued 'in accordance with . . . the law of the State or part of the Commonwealth' of issue, it must be open to a person to argue that the section has no application because the warrant of which he or she is the subject is invalid. If as a result of a challenge to validity a warrant is found to be invalid, there can be no basis upon which a court can embark on a consideration of whether it would be unjust or oppressive to order the return of the person named in the warrant. The section as a whole cannot apply with respect to a warrant that has not been issued 'in accordance with' a particular law. Therefore, while the Commission would agree with the suggestion that the validity of a warrant is not a matter to be considered on an application for release under s 18(6), it would not agree with the reasons given for the suggestion.[105] Rather, a question

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[101] (1972) 47 ALJR 65, 69. See also *Walker v Duncan* [1975] 1 NSWLR 106, 110 (Taylor J).

[102] (1972) 47 ALJR 65, 69.

[103] See para 358–9 for discussion of s 19, which establishes a procedure for review of the magistrate's or justice's order.

[104] See para 333.

[105] See further para 393–4.

as to the validity of a warrant is an issue logically anterior to questions arising on an application by an apprehended person for release. A court, therefore, cannot consider whether it would be unjust or oppressive to order the return of a person and ignore the fact, if it be the case, that the warrant authorising the apprehension of the person is invalid, for in principle the person the subject of the warrant is not properly before the court at all.

354. Before leaving this matter it should be noted that, although a challenge to validity of a warrant may give rise to complex or debatable questions of law, the officer before whom the question is raised cannot defer consideration of the question until the person is before the courts of the State or Territory of issue of the warrant. Once a serious doubt concerning the validity of a warrant is raised, the matter must be investigated before proceeding to consider what order to make under s 18(3) or to consider any arguments of the apprehended person under s 18(6). In this regard the High Court's insistence that in general it is no part of the magistrate's or justice's discretion to investigate complex legal questions[106] should not be taken out of context. That limitation applies to questions concerning the nature of the charge alleged in a warrant, matters properly to be determined on the trial of the person in the State or Territory where the prosecution is brought. But that questions of law may arise in considering the validity of a warrant is a necessary consequence, if they are in fact raised, of the need to determine whether there is jurisdiction to make an order returning the person to the State or Territory of issue of the warrant or to proceed to consider an application for release. That determination cannot be left to the trial of the action for it has no relevance to the trial. Rather, its relevance is in relation to the application of the procedures established by the s 18 for the return of the person to the State or Territory where the prosecution is brought.

355. *English authority on meaning of 'unjust' and 'oppressive' — implications.* Before leaving consideration of the grounds for an application for release, a brief comment should be made on the recent adoption of authority based on the Fugitive Offenders Act 1967 (UK) as to the meaning of the terms 'unjust' and 'oppressive' and its implications for the arguments that may be raised by an apprehended person on an application for release. To reiterate, courts in Australia recently have adopted a statement by Lord Diplock in relation to that Act that the term 'unjust' is 'directed primarily to the risk of prejudice to the accused in the conduct of the trial itself', while the term 'oppressive' is 'directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration'.[107] If these interpretations of the terms were strictly applied in the context of an application for release based on s 18(6)(c), it would seem that certain of the arguments that previous cases hold to be open, although strictly circumscribed, would not now be open. For example, neither the argument that the charge alleged in the warrant is misconceived

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[106] *Aston v Irvine* (1955) 92 CLR 353, 366–7: see para 346.

[107] *Kakis v Government of the Republic of Cyprus* [1978] 2 All ER 634, 638.

nor the argument that there is insufficient evidence to put the person on trial[108] relate to 'risk of prejudice . . . in the conduct of the trial' or to 'hardship to the accused resulting from changes in his circumstances'. Whether the intended result of the adoption of the English authority as to the interpretation of these terms was to foreclose such arguments is a matter for conjecture, but that seems unlikely in view of the lack of discussion of the point in any of the cases. In the one case since adoption of that authority in which an argument as to the sufficiency of the evidence was raised there was no discussion of this possible effect, nor was it suggested that the argument was not open.[109] In this situation and particularly in view of the fact that no occasion has yet arisen for the High Court to comment upon the adoption of the interpretation of these terms, that interpretation probably cannot be regarded as defining the outer limits of the two terms, but merely as describing two contexts for the application of the possible ground for release.[110] A recent indication that that is the correct approach is to be found in the decision of Justice Matheson in *Harvey v Zanetti*.[111]

Range of orders

356. *Wide discretion.* The magistrate or justice is given a wide discretion as to the appropriate order to be made where he or she is satisfied of any of the grounds in s 18(6)(a), (b) and (c). While para (d) and (e) specify two particular orders,[112] para (f) empowers the making of any order that is considered just. The appropriate order will clearly depend upon the circumstances, but the orders open under s 18(6) can be employed only where the magistrate or justice is satisfied of one or more of the matters in para (a)–(c). Section 18(6) will not support an order adjourning the proceedings for a long or indefinite period where the officer is undecided as to those matters.[113]

357. *Finality.* While an application for release, if successful, will effectively bring to an end for the time being the prosecution of a person on the matters alleged in a warrant, it appears that an order for release is not final in the sense of foreclosing further applications for return. In one case where it was held to be unjust or oppressive to order the return of a person because he had decided upon law-abiding ways, it was asserted that

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[108] See para 345, 346.

[109] *Ex parte Maher* [1983] 2 Qd R 695. Under the English legislation which was the subject of discussion in the *Kakis* case such an argument would not be relevant because, before any application for release on the basis of injustice or oppression may arise, the magistrate before whom the apprehended person has been brought must be satisfied that a prima facie case has been made out against the person: Fugitive Offenders Act 1967 (UK) s 7(5)(a).

[110] Lord Diplock's later remark that: 'between them [that is, between the two terms] they would cover all cases where to return him would not be fair' ([1978] 2 All ER 634, 638), may be taken to indicate that that is so.

[111] (1985) 40 SASR 237, 242–3.

[112] See para 407 for discussion of whether, in specifying these orders, and in conjunction with the terms of para (c), the operation of the section is limited.

[113] *Re Zanetti* (1985) 16 A Crim R 126.

> a refusal to order extradition is not a decision that is final and conclusive; it is given in, and in relation to, the circumstances that obtained when the application for extradition was made. Foremost among those circumstances is the apparent intention of the prisoner to build a life for himself, free of crime and criminal connexions . . . If the prisoner commits a crime or crimes in the future, I am of the opinion that the whole question of his extradition may properly be raised again, and the whole of the circumstances reviewed de novo.[114]

Review of magistrate's or justice's order

Review under Service and Execution of Process Act

358. *Nature of review.* If either the apprehended person or the person who brought the original warrant is dissatisfied with an order made by a magistrate or justice under s 18(3) or (6), they may apply for a review of the order. Application is to be made to a judge of the Supreme Court of the jurisdiction of apprehension, who, sitting in chambers, may review the order.[115] The judge has a discretion to release the person on bail or direct that he or she remain in custody pending the review.[116] Section 19(3) provides

> The review of the order shall be by way of rehearing, and evidence in addition to, or in substitution for, the evidence given on the making of the order may be given on or in connexion with the review.

The terms of the provision seem to indicate that an apprehended person need not in fact have raised any arguments under s 18(6) when before a magistrate or justice in order to do so on review of the order. However, events occurring since apprehension or the previous proceedings are apparently irrelevant to the review.[117] The judge may come to his or her own view of the evidence and may confirm or vary the order, or quash it and substitute a new order.[118] While there is no explicit right of appeal given from the judge's decision, one may be found under in State or Territory law.[119]

359. *Procedure on review.* Prior to the enactment of the present s 19 of the Act[120] there was considerable debate upon whether and, if so, how, appeals might be made

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[114] *Carmady v Hinton* (1980) 41 FLR 242, 243–4 (Wells J). See also *Lucas v Lovatt* [1983] Tas R 227 (NC 11), Transcript of Reasons for Judgment, 7 (Cox J); *Harvey v Zanetti* (1985) 40 SASR 237, 243 (Matheson J).

[115] s 19(1). The power of review is judicial and the conferral of jurisdiction on a judge to review the order has been held to constitute conferral on the Supreme Court constituted by a single judge: *Aston v Irvine* (1955) 92 CLR 353, 366.

[116] s 19(2).

[117] *Golobic v Radalj* (1980) 33 ALR 61, 69–70; see also *Carmady v Hinton* (1980) 41 FLR 242, 243 (Wells J). In other contexts the word 'rehearing' has been interpreted such that circumstances arising after the initial hearing are properly to be considered: see *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, 619-20 (Mason J); *Calvin v Carr* (1979) 22 ALR 417, 431–2 (Lord Wilberforce) (PC).

[118] s 19(5).

[119] See eg *Golobic v Radalj* (1980) 33 ALR 61; *Carmady v Hinton* (1980) 41 FLR 242.

[120] See Service and Execution of Process Act 1953 (Cth) s 7.

from orders of a magistrate or justice. Section 19 settles the matter of whether a review exists. It does not settle the matter of how such a review should proceed. Since the enactment of s 19, it has been common for review to proceed by way of a summons duly served upon the person seeking to upholding the magistrate's or justice's order.[121]

Alternate avenue of review

360. *Application of Administrative Decisions (Judicial Review) Act.* In addition to review of a magistrate's or justice's order under s 19 of the Act, it now seems settled that review of such an order may be sought under the Administrative Decisions (Judicial Review) Act 1977 (Cth),[122] as a magistrate's or justice's order under s 18(3) or (6) is a decision of an administrative character made under an enactment and thus a decision to which s 5 of the Judicial Review Act applies.[123] It is therefore open to a person aggrieved by the order of a magistrate or justice[124] to seek review of the order by way of an application for review made to the Federal Court based on one or more of the grounds set out in s 5 of the Judicial Review Act.

361. *Nature of review.* Under the Judicial Review Act a person aggrieved by a decision to which the Act applies may apply to the Federal Court for an 'order of review' in respect of the decision. Section 16 of the Judicial Review Act specifies the orders which the Federal Court may make.

> (1) On an application for an order of review in respect of a decision, the Court may, in its discretion, make all or any of the following orders:
>
> (a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the Court specifies;
>
> (b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit;
>
> (c) an order declaring the rights of the parties in respect of any matter to which the decision relates;
>
> (d) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the Court considers necessary to do justice between the parties.

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[121] See *In re Jack Mandel* [1958] VR 494, 496 (O'Bryan J). cf eg *Aston v Irvine* (1955) 92 CLR 353, employing the common practice which had been followed prior to enactment of s 19, namely, by way of an order nisi.

[122] Hereinafter referred to as the Judicial Review Act.

[123] The matter has never been closely argued, but a number of decisions have proceeded on the basis that the Judicial Review Act applies to orders of a magistrate or justice under s 18(3) or (6): see eg *Silbersher v Gerkens* (1984) 13 A Crim R 1; *Woss v Jacobsen* (1984) 56 ALR 254, (1985) 60 ALR 313. The assumption is plainly warranted.

[124] Review of the decision of a judge of the Supreme Court of a State made under s 19 of the Service and Execution of Process Act is not available under the Judicial Review Act for that decision supersedes the magistrate's or justice's decision and the judge's decision is not an administrative decision within the meaning of the Judicial Review Act: *Perry v DPP*, unreported, Federal Court, 31 May 1985 (Fisher J).

It can be seen from this provision that the powers of the Federal Court, while extensive, do not extend to the substitution of a new decision for one which has been quashed or set aside.[125] Nor is the review one on the merits, for an application for review under the Judicial Review Act must be based on one or more of the grounds specified in s 5(1) of the Judicial Review Act.[126] The nature of the review conducted under the Judicial Review Act therefore differs from that conducted under s 19 of the Service and Execution of Process Act.

362. *Exclusiveness of review.* In view of these differences in the nature of the two avenues of review, it has been held that s 9 of the Judicial Review Act[127] does not exclude the avenue for review of a magistrate's or justice's order under s 19 of the Service and Execution of Process Act.[128]

363. *Discretion to refuse review under Judicial Review Act.* Section 10(1) of the Judicial Review Act provides that the rights of review given under the Judicial Review Act are in addition to any other avenues of review that a person may have. Section s 10(2) then goes on to provide that the Federal Court may, in its discretion, refuse to proceed upon a review for the reason

> (i) that the applicant has sought a review by the Court, or by another court, of that decision . . . otherwise than under this Act; or
>
> (ii) that adequate provision is made by any law other than this Act under which the applicant is entitled to seek a review by the Court, by another court, or by another tribunal, authority or person, of that decision . . .

In one case the Federal Court, on the basis of this provision, declined to review a magistrate's order in respect of which review had been sought by the apprehended person

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[125] See *Hamblin v Duffy* (1981) 34 ALR 333, 335 (Lockhart J). But see *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 68 ALR 441, 448 (Sheppard J), commenting that s 16(1)(d) 'plainly confers power upon the Court, in an appropriate case, to order a decision-maker, whether a Minister of the Crown or other public official, to decide a matter in a particular way.'

[126] Review by the Federal Court consists of 'a consideration of whether it appears that the decision under review is affected by one or more of' those grounds: *Sean Investment Pty Ltd v MacKellar* (1981) 38 ALR 363, 370 (Deane J). See also as to the difference in the nature of the review *Woss v Jacobsen* (1984) 56 ALR 254, 261 (Sheppard J).

[127] That section deprives State courts of jurisdiction to review certain decisions. Critical to this is the meaning of the term 'review' in s 9(2).

> "review" means review by way of —
>
> (a) the grant of an injunction;
>
> (b) the grant of a prerogative or statutory writ (other than a writ of habeas corpus) or the making of any order of the same nature or having the same effect as, or of a similar nature or having a similar effect to, any such writ; or
>
> (c) the making of a declaratory order.

[128] *Woss v Jacobsen* (1984) 56 ALR 254; affirmed (1985) 60 ALR 313.

under both s 19 of the Service and Execution of Process Act and under the Judicial Review Act.[129] In another case review was similarly declined where the apprehended person sought review of part of a magistrate's order under the Judicial Review Act and the person bringing the warrant sought review of another part of that order under s 19 of the Act, it being considered that all the matters should be dealt with in the one proceeding and that it was appropriate that the avenue for review provided by the Service and Execution of Process Act be employed.[130]

364. *Adjournment of proceedings under Service and Execution of Process Act.* While the Act has no specific provision concerning a declination of jurisdiction to review a magistrate's or justice's order on the basis that review has been sought elsewhere, a question arose in one case whether a Supreme Court should adjourn proceedings under s 19 where proceedings for review under the Judicial Review Act are pending. The question was answered in the negative, it being held that the court should not facilitate multiple proceedings pursuing essentially the same relief.[131]

Powers of arrest

Arrest on provisional warrant

365. In addition to the power contained in s 18 for the apprehension of a person the subject of a warrant — that is, endorsement of the warrant authorising its execution and the apprehension of the person — the Act provides for the apprehension of a person prior to the endorsement of a warrant. This facility is provided through the power to issue a provisional warrant under s 19A.

> (1) A Magistrate, Justice of the Peace or officer of a court who, under sub-section (1) of section 18, is empowered, subject to his being satisfied as to the matter specified in that sub-section, to endorse a warrant for the apprehension of a person may, if the warrant is not produced to him or he requires further information or proof before endorsing the warrant, issue a provisional warrant for the apprehension of that person upon such information and under such circumstances as, in his opinion, justify the issue of a provisional warrant, and the provisional warrant may be executed according to its tenor.
>
> (2) Where a person is apprehended in pursuance of a provisional warrant, he shall be brought forthwith before a Police, Stipendiary or Special Magistrate or Justice of the Peace who has power to issue warrants for the apprehension of persons under the law of the State or part of the Commonwealth in which he is apprehended, and, if the original warrant has not yet been endorsed, the Magistrate or Justice may —

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[129] *Perry v DPP*, unreported, Federal Court, 31 May 1985 (Fisher J).

[130] *Woss v Jacobsen* (1984) 56 ALR 254.

[131] *Silbersher v Curry*, unreported, Supreme Court of Victoria, 2 August 1984, Transcript of Reasons for Judgment, 7 (Gobbo J). It was suggested, however, that an apprehended person may be able to withdraw the proceedings under s 19, pursue the application to the Federal Court and then, if relevant, exercise the right available under s 19 to seek review by way of rehearing.

(a) discharge the person;

(b) admit him to bail on such conditions and recognizances as the Magistrate or Justice thinks fit; or

(c) authorize his detention for a reasonable time pending the endorsement of the original warrant.

(3) Where a person has been apprehended under a provisional warrant (not being a person who has been discharged in pursuance of the last preceding sub-section) and the original warrant is not, within a reasonable time, endorsed by a Magistrate or Justice of the Peace for the State or part of the Commonwealth in which the person was apprehended a Magistrate or Justice of the Peace for that State or part of the Commonwealth may discharge the person or release him from bail, as the case requires.

There are no reported decisions dealing expressly with the provision, but the procedures it establishes have been used often as a means for detaining a person prior to the endorsement of an original warrant.[132]

366. The provisional warrant procedure can be used either where the original warrant is not available or where further proof is required before that warrant may be endorsed. Within these limits, the officers mentioned in s 19A(1) have a wide discretion concerning the issue of a provisional warrant. While a decision to issue a provisional warrant would apparently fall within the range of decisions review of which may be sought under the Judicial Review Act,[133] given the width of discretion there would apparently be only limited opportunity for such a review.

367. There is a similarly wide discretion with respect to the disposition of a person apprehended on a provisional warrant. The magistrate or justice before whom the person is brought may

- discharge the person
- admit the person to bail on such conditions as are thought fit or
- authorise the person's detention for a reasonable time pending endorsement of the original warrant.

Presumably one of the latter two orders would be made unless the apprehended person could prove that he or she was not the person named in the provisional warrant.

368. A question arises, however, as to the terms of an order that a person be admitted to bail pursuant to s 19A(2)(b). While the detention of a person under an order pursuant to s 19A(2)(c) must be for a 'reasonable time', s 19A(2)(b) does not in terms require that a 'reasonable time' be specified in which the original warrant should be endorsed where a person is admitted to bail. In view of this difference, it might be thought that a person could be admitted to bail of indefinite duration. However,

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[132] eg *Pyne v Jones* (1976) 13 ALR 662; *In re Jack Mandel* [1958] VR 494; *O'Donnell v Heslop* [1910] VLR 162; *R v Meldon, ex parte McCrory* [1938] QWN 6.

[133] The decision is of an administrative character made under an federal law and is not within any of the classes specified in Schedule 1 of the Judicial Review Act or in regulations made under that Act. Therefore it is a decision to which the Judicial Review Act applies.

s 19A(3) provides that the person 'may'[134] be released from bail if the original warrant is not endorsed within a 'reasonable time'. While s 19A(2)(b) and s 19A(2)(c) could be construed differently, with the result that a reasonable period of detention must be specified but not the period of bail, it is certainly arguable that s 19A(3) implies that the duration of bail to which a person is admitted should also be a reasonable time, particularly as the powers involved affect the liberty of the person and therefore should be construed strictly so as to minimise any chances of arbitrary constraints upon liberty.[135] Such an interpretation seems appropriate also because otherwise a person admitted to bail would have no indication as to when the question of his or her release from bail under s 19A(3) could arise. The same arguments would suggest that, although a magistrate or justice is in terms empowered to authorise a person's 'detention for a reasonable time pending the endorsement of the original warrant', the period for which the person is to be detained — and if the arguments are accepted in relation to the above issue, the period for which a person is to be admitted to bail — should be specified with precision. On this view an order authorising a person's detention or admitting the person to bail that did not specify the period of detention or the duration of bail would be bad. Certainly, such an order would be vague and would leave a question as to when a person could apply to be discharged or released from bail under s 19A(3). As there is no authority on the provision, a concluded view on its operation in these respects, however, is not possible. But clearly, whatever view of these provisions is taken, the period of time that is a 'reasonable time' would depend on all the circumstances, which might include the distance between the place of issue and place of apprehension, which would influence the time required to obtain the original warrant.

369. These uncertainties apart, it is probable that the provision is valid notwithstanding that it provides for the issue of process rather than the service or execution of State process. The power conferred by s 51(xxiv) of the Constitution has been construed to permit the making of laws providing for the issue of 'federal' process to give efficacy to State process.[136] This reasoning seems clearly applicable to s 19A, which authorises the issue of a 'federal' provisional warrant in aid of a State warrant.

Arrest without warrant

370. The powers of apprehension under the Act are constrained by the requirement that the original warrant be endorsed or that a provisional warrant be obtained. The Act provides no opportunities for the immediate apprehension of a person wanted on a warrant where neither of these requirements have been met. In those circumstances there would be a risk that a person 'on the run' or who was recognised by chance[137]

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[134] While the procedure for the discharge or release from bail of a person under s 19(3) is cast in terms of a discretion, there would seem little basis for refusing to discharge or release the person from bail once the 'reasonable time' had elapsed.

[135] cf International Covenant on Civil and Political Rights (ICCPR) art 9(1).

[136] *Ammann v Wegener* (1972) 129 CLR 415.

[137] An instance is the situation that occurred on the arrest of Colin Creed, wanted on several charges in South Australia, who was recognised by chance in Western Australia by a holidaying South Australian police officer.

would escape apprehension. However the States have come to the aid of the federal procedure in this regard through the enactment of powers to apprehend without warrant certain persons who are wanted in other jurisdictions. An example of this legislation is s 352A of the Crimes Act 1900 (NSW).

> (1) This section applies to an offence —
>
> (a) that is an offence against the law of a State (other than New South Wales) or a Territory of the Commonwealth; and
>
> (b) that consists of an act or omission which, if it occurred in New South Wales, would constitute —
>
> (i) an indictable offence; or
>
> (ii) an offence punishable by imprisonment for 2 years or more.
>
> (2) A member of the police force may, at any hour of the day or night and without any warrant other than this Act, apprehend any person whom he has reasonable cause to suspect of having committed an offence to which this section applies.

Provisions to the same effect, although the terms may differ, exist in the Crimes Act 1958 (Vic) s 459(b), Police Act 1892 (WA) s 43(2), Police Administration Act 1978 (NT) s 125(1), Police Offences Act 1953 (SA) s 78a and the Crimes Act 1900 (NSW) in its application to the Australian Capital Territory s 352A.[138] No such provision exists in Queensland or Tasmania. The power in each case is dependent upon two things: reasonable belief or just cause to suspect that a person has commited an offence outside the jurisdiction; and the acts or omissions constituting that offence must also constitute an offence (either indictable or subject to a certain term of imprisonment) within the jurisdiction. To this extent such powers do not extend to the apprehension of all persons who might be subject to extradition under the interstate warrants scheme, because the scheme applies not only to warrants alleging offences.[139] Despite this, these powers are no doubt a necessary adjunct to the provisions in the federal Act. They also have removed one blight, that of the 'holding charge', whereby a charge under the law of the State where a person is found is concocted in order to justify the arrest of the person.[140]

Recognisances

371. Section 19B of the Act establishes a procedure for the forfeiture, recovery and disbursement of recognisances imposed on a grant of bail under under s 18, 19 or

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[138] Some of the provisions are broad enough to authorise the arrest of a person suspected of committing an offence anywhere in the world. There are also provisions for the admission to bail, or detention in custody, of the person apprehended until such time as an endorsed warrant is executed and, if that does not occur within a reasonable time (in New South Wales, the Australian Capital Territory and South Australia limited to seven days), the person's release from bail or custody.

[139] See para 324. To this extent these powers reflect notions of extradition schemes in the international sphere where the principle of double criminality applies. That principle is irrelevant to the interstate warrants scheme: *Walker v Duncan* [1975] 1 NSWLR 106; special leave refused (1975) 6 ALR 254. See para 347.

[140] See comments on this matter in NSW Hansard (Leg Council), 30 March 1983, 5469.

19A where the person fails to comply with the conditions on which bail was granted. There have been no reported decisions concerning this section, but a few aspects of its operation may be noted. First, by s 19B(1) a declaration of forfeiture of a recognisance is to be made in the State or part of the Commonwealth in which the person was admitted to bail. Where the breach of the conditions to which the grant of bail was subject occurs through the failure of the person to appear at proceedings in another State or part, that fact must be communicated to the proper authorities in the State or part where bail was granted. Just how this is to be done is not made clear, but would presumably require some form of document issued by the court or officer before whom the person was bailed to appear, which could be proved before a court or officer in the State or part where bail was granted. Certainly, it may not be possible for the court or officer before whom the person's appearance was required to issue a warrant to evidence the failure to appear — and to renew the pursuit of the person — as the power of that court or officer to issue a warrant where a person has failed to appear may only arise in respect of bail granted under the law of that State or Territory.[141] As bail was granted pursuant to the federal Act a warrant could not be issued for the arrest of the bail defaulter. Secondly, provision is made by s 19B(2) for the recovery of any sum due under a recognisance only in the case of those persons residing in the State or part where the declaration of forfeiture was made, that is, where bail was granted. A recognisance entered into by the person admitted to bail could not be enforced, therefore, unless that person resides in the State or part. Thirdly, by s 19B(3) any amounts recovered are to be transmitted to the Attorney-General of the State where the original warrant was issued, or the federal Attorney-General in respect of a warrant issued in a part of the Commonwealth. Thus even where a person breaches a condition of a grant of bail requiring the person to appear again in the State or part where bail was granted, for example, bail granted under s 18(5) or 19(2)(b), any amount recovered must be transmitted to the State or part of issue of the original warrant. It might also appear anomalous that, in the present day, the federal Attorney-General should receive an amount recovered under this provision in respect of a warrant not issued in a State, particularly in the case of warrants issued in those Territories which have separate administrations and have been granted a measure of self government.

Interstate execution of writs of attachment

Introduction

372. The second scheme established by Part III of the Act provides for the execution of writs of attachment for the arrest of persons. Section 19C of the Act provides

> (1) Where a Court of Record of a State or part of the Commonwealth or a Judge of such a Court has, whether before or after the commencement of this section, issued a writ of attachment for the arrest of a person for a contempt of the Court or disobedience of an order of the Court, the writ may —

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[141] See eg Bail Act 1978 (NSW) s 51; Bail Act 1980 (Qld) s 28: Department of Justice (Qld) *Submission* (3 March 1983) 2–3.

(a) by leave of a Judge of the Federal Court of Australia, be executed in any other State or part of the Commonwealth specified by the Judge; or

(b) by leave of a Judge of the Supreme Court of another State or part of the Commonwealth, be executed in that other State or part of the Commonwealth.

(2) The leave —

(a) shall be endorsed on the writ of attachment; and

(b) shall be sufficient authority to —

(i) the Sheriff of the Federal Court of Australia;

(ii) the Sheriff of the State or part of the Commonwealth in which the writ was issued;

(iii) the Sheriff of a State or part of the Commonwealth in which leave to execute the warrant is given; and

(iv) all other officers named in the endorsement on the writ,

to apprehend the person against whom the writ was issued and to bring that person before the Court out of which the writ was issued.

While the power is in terms conferred on 'a Judge of the Federal Court' or 'a Judge of the Supreme Court' of a State or Territory, it is probable that the provision would be upheld as a valid conferral of federal jurisdiction, the section being construed as conferring judicial power on the respective courts, the jurisdiction to be exercised by a single judge of the court.[142]

373. There are clear differences between this scheme and the interstate warrants scheme. One obvious difference is that there is no specific provision such as s 18(6) enabling a person to apply for release or setting out grounds for resisting a grant of leave for a writ's execution. However, the major difference is that, whereas a warrant must be endorsed prior to execution and then the person the subject of the warrant brought before a magistrate or justice for the purpose of an extradition hearing, the leave requirement with respect to a writ of attachment effectively combines these procedures and, if leave is given, the result is that the person the subject of the writ may be apprehended and immediately taken to the State or part in which the writ was issued.

Procedure

374. Given that a person the subject of a writ of attachment is liable, once leave is given, to be apprehended and taken immediately to the State or part of issue of the writ, it would seem a reasonable inference, based on considerations of justice and fairness, that the person be given an opportunity to argue that leave should not be given for the execution of the writ of attachment. That would require that the person be given notice of the application for leave. In an early case that was held to be so, the court refusing to consider the application because the person the subject of the

[142] See *Aston v Irvine* (1955) 92 CLR 353, 366 regarding s 19, which confers in the same terms federal judicial power to review a magistrate's or justice's order in respect of a person subject to a warrant. See para 358, n 115.

writ had not been notified of the proceedings.[143] This requirement, however, may give rise to difficulties. For example, a person may be seeking to evade the consequences of any contempt or disobedience to a court order and thus may seek to evade service of the summons or other process initiating the application for leave. But in such a case, presumably an order for substituted service could be obtained. In any event, the rules of certain Supreme Courts made under s 27(1) of the Act have catered for this situation by permitting leave to be granted on an ex parte application if the judge thinks fit.[144] The rules of the Supreme Court of New South Wales go further and state that the process by which an application for leave is made need not be served on any person unless the Court otherwise orders.[145]

Scope of provision

375. Section 19C applies to a 'writ of attachment for the arrest of a person' for contempt of or disobedience of an order of a Court of Record. Although a writ of attachment for arrest may in principle[146] be issued to compel the payment of money due under an order of a court, it was held in one case that the proper avenue for enforcing the payment of money due under a court order was through the procedures of Part IV of the Act, not by way of a writ of attachment executed under s 19C.[147] However, it is arguable on the basis of s 118 of the Constitution that, a writ of attachment being a judicial proceeding,[148] it should not be denied effect merely because there may be another avenue by which a person may seek to secure payment of money due under an order of a court, in other words, that the scope of s 19C should not be limited merely because other avenues of redress exist. However, mere enforcement through the s 19C procedure probably is not open, because the section applies only to writs issued in relation to contempt or disobedience of an order of a court, which may account for the decision noted above. Mere failure to pay probably would not amount to disobedience, but continued disregard of other enforcement process might constitute disobedience. With that limitation, there seems no reason why the words of the section should not include all writs of attachment for contempt of or disobedience of an order of a court.[149]

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[143] *Lewis v Lewis* [1902] QWN 13. See also *Jones v Jones* [1928] VLR 24 where the proceedings for leave were commenced by summons served on the person the subject of the writ.

[144] See eg Rules of Court (Service and Execution of Process Act) 1917–1981 (SA) r 15; Rules of the Supreme Court 1971 (WA) O 81B, r 22.

[145] Supreme Court Rules 1970 (NSW) Pt 71, r 1.

[146] See now, eg, Supreme Court Act 1970 (NSW) s 98(1)(a); Rules of the Supreme Court of Queensland, O 47, r 5; cf O 47, r 6.

[147] *Lewis v Lewis* [1902] St R Qd 115, 119 (Griffith CJ). See also *Jones v Jones* [1928] VLR 24, 27 (Mann J).

[148] The basis of that argument would be that the issue of the writ is within the discretion of a court or judge, and that the term 'proceedings' as used in s 118 includes 'some act of [a] Court or judicial officer'. cf *Cheney v Spooner* (1929) 41 CLR 532, a case concerning the term 'proceedings' in another context.

[149] See *Jones v Jones* [1928] VLR 24, 26 (Irvine CJ); (1928) 40 CLR 315, 319 (Higgins J). The other members of the High Court did not comment upon this matter.

Leave requirement

Considerations governing exercise

376. The power conferred by s 19C has been held to be discretionary and of a judicial nature.[150] No guide as to the manner in which the discretion is to be exercised is provided by the section. While the reported cases provide some guidance, these should be treated with caution. They are many years old[151] and some of the principles endorsed by the majorities in those cases now have been discarded in the context of the warrants scheme. They may thus be inapplicable now also in the context of the scheme concerning writs of attachment. In particular the principle of double criminality, first applied to the writs of attachment scheme[152] and later to the warrants scheme,[153] has been held more recently to be irrelevant to the warrants scheme.[154] Therefore, while the age of the authorities must be borne in mind, in order to understand the nature of the discretion and the circumstances that might lead to a refusal of leave it seems pertinent to consider the views of the judges who dissented from the conclusion that the principle of double criminality, or similar considerations, were relevant matters to be considered.

377. Those dissenting views in fact coincide closely with the principles which have been develped in the context of the interstate warrants scheme. For example, it was suggested that it was not relevant to consider any question as to the merits of the issue of a writ of attachment, or any differences between the States in the procedures under which a writ of attachment might be issued.[155] On the other hand, it was suggested that it would be proper to examine whether the writ had been issued in accordance with

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[150] *Lewis v Lewis* [1902] St R Qd 115.

[151] The last reported case was in 1928.

[152] *Lewis v Lewis* [1902] St R Qd 115. See also *Jones v Jones* [1928] VLR 24 regarding the weight given to the difference in the procedure under which a writ of attachment was issued in the State of issue and the State of intended execution. See also *In re E & B Chemicals and Wool Treatment Pty Ltd* [1939] VLR 278, where the non-availability of the writ procedure in the intended State of execution was relied on as justifying a refusal to issue a writ, it being held that the issue of the writ would be futile.

[153] See *In re Hatherley, ex parte Hatherley* [1940] St R Qd; *In re Conway, ex parte Conway* [1946] QWN 31. See also *The King v Boyce and Roberts, ex parte Rustichelli* [1904] St R Qd 181.

[154] *Walker v Duncan* [1975] 1 NSWLR 106; special leave to appeal refused (1975) 6 ALR 254. See para 347.

[155] See *Jones v Jones* [1928] VLR 24, 26 (Irvine CJ); (1928) 40 CLR 315, 320 (Higgins J). The High Court's involvement arose because, at that time, s 19 (as it then was — it is now s 19C) provided that an application could be made to a Justice of the High Court for leave to execute the writ in any State or part of the Commonwealth other than that of its issue, or to a judge of the Supreme Court of a State for leave to execute the writ in that State. Application having been made unsuccesfully to the Supreme Court of Victoria for leave to execute the writ there, the applicant then applied to a Justice of the High Court for leave. In the High Court, the view taken by the majority did not require consideration of the grounds upon which the discretion to grant leave should be exercised. Higgins J was the only Justice who had cause to consider the matter.

the law of the State of issue and to refuse leave if the writ had been issued wrongly.[156] The view was expressed also that it was relevant to consider the personal circumstances of the person the subject of the writ,[157] an approach very similar to that adopted in relation to applications for release made under the warrants scheme. The similarity in the purpose sought to be achieved by the interstate execution of, on the one hand, a warrant and, on the other, a writ of attachment, was noted by one of the majority in one case as justifying the view that it was relevant to consider whether the return of the person the subject of the writ would be unjust or oppressive,[158] the very words used to describe one of the grounds on which a person the subject of a warrant may apply for release.[159]

Finality of decision

378. Section 19C(1) specifies that application may be made to

- a judge of the Federal Court for leave to execute a writ of attachment in any other State or part of the Commonwealth (that is, other than the State or part of issue) specified by the judge or
- a judge of the Supreme Court of another State or part of the Commonwealth for leave to execute a writ of attachment in that State or part.

The question arises whether, if an application is made under one paragraph and refused, an application can be made later under the other paragraph (or the same paragraph), or whether a refusal to grant leave by one judge forecloses any further application for leave. Under the section as it previously stood[160] it was held in one case that, after an application had been refused by a Supreme Court in the exercise of its discretion, a later application to the High Court, based on the same evidence and in reality seeking leave to execute the writ in the same State where leave had been refused, should not be entertained, as the application was in substance the same application that had been refused by the Supreme Court, a court of co-ordinate jurisdiction.[161] Justice Higgins dissented, taking the view that the jurisdiction of the High Court was separate and independent from that of State Supreme Courts under the provision and that the order sought in the proceedings before the High Court was different from the order which had been refused in the Supreme Court.[162]

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[156] id, 26 (Irvine CJ); 320 (Higgins J).

[157] *Jones v Jones* [1928] VLR 24, 26–7 (Irvine CJ). In the High Court Higgins J also remarked that, apart from situations where a writ had not been properly issued, 'there may be other reasons for withholding leave': (1928) 40 CLR 315, 320.

[158] *Jones v Jones* [1928] VLR 24, 28–9 (Mann J). The injustice or oppression which Mann J held to be relevant, the difference in procedures for the issue of a writ of attachment, probably would not be considered relevant now: see para 347–8.

[159] s 18(6)(c).

[160] See para 377, n 155 for explanation. Application to the Federal Court has been substituted for application to the High Court, and the provision has been further amended to require the Federal Court judge to specify the State or Territory in which the writ may be executed.

[161] *Jones v Jones* (1928) 40 CLR 315, 318 (Knox CJ, Isaacs, Powers and Starke J).

[162] id, 318, 320.

379. In view of the terms of the present provision, under which an application is to be made in respect of the execution of the writ of attachment in a particular State or part of the Commonwealth, it would seem that the reasoning of the majority clearly applies.[163] But would a later application necessarily be doomed to failure because of an earlier refusal of leave? As it is doubtful whether the discretionary bases on which leave was refused in the early cases[164] would apply today,[165] with the result that the discretion can be exercised on grounds related to the personal circumstances of the person the subject of the writ, there seems no reason why a refusal of leave based on a consideration of those circumstances should necessarily foreclose a later application, either to the same court or to another court, where those circumstances subsequently change. For example, an application may first be refused on the basis that it would be unjust or oppressive for the person to be returned to the State of issue of the writ because the person is suffering from illness.[166] If later the person recovers from the illness, there would seem no reason to refuse to entertain a later application for the execution of the writ, as the basis for its prior refusal would not then exist. Similarly where an earlier refusal of leave is based on a deficiency of evidence rather than on some discretionary ground. For example, the judge to whom an application is made may not be satisfied on the evidence adduced that the person the subject of the writ is in the State or part in respect of which the application is made.[167] If later clear evidence of the person's presence in that State or part was available, there seems no good reason why a further application should not be made and be granted, assuming that no discretionary ground existed for refusing leave. It is suggested, therefore, that just as a refusal of an application for the return of a person on a warrant for apprehension has been held not to finally determine the person's liability to be returned to the State of issue of the warrant,[168] a refusal to grant leave for the execution of a writ of attachment should not be regarded as finally determining the question whether leave for its execution will ever be granted and the person returned to the State of issue of the writ. On this view, the refusal of an application would not foreclose a later application either to the same court or to another court and under either the same or a different paragraph of the section.

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[163] Even on the view preferred by Justice Higgins, if an application under one of the paragraphs was refused, a later application under the other paragraph in respect of the same State or part might be met by a plea of *res judicata*, on the basis that the orders sought in each proceeding are the same.

[164] *Lewis v Lewis* [1902] St R Qd 115; *Jones v Jones* [1928] VLR 24.

[165] See para 376–7.

[166] See *Jones v Jones* [1928] VLR 24, 27 where Irvine CJ suggested that that might be a circumstance that would justify a refusal of leave.

[167] See id, 26 where Irvine CJ suggested that proof of presence in the jurisdiction was a pre-condition to a grant of leave.

[168] *Carmady v Hinton* (1980) 41 FLR 242, 243–4 (Wells J): see para 357.

Reform proposals

Introduction

380. The scheme established in Part III of the Service and Execution of Process Act for the interstate execution of warrants has operated reasonably well since its inception to overcome the problems, noted by the High Court in *Aston v Irvine*[169], arising from the existence of separate legal systems in the States and Territories. However, there are still areas of uncertainty in the interpretation and application of this scheme, as there are also with respect to the scheme for interstate execution of writs of attachment for arrest. Some of the problems that have arisen are fairly simple and could be remedied by minor alterations to the terms of some of the provisions. Some, however, are of more importance: the issue of whether a person should be able to challenge the validity of the process sought to executed and, if so, how and at what time that should be done; and the question of what considerations should guide exercise of the discretion to grant leave to execute a writ of attachment. Such matters as these must be addressed in any consideration of reforms to the relevant law. Consideration must also be given to remedying certain deficiencies in the legislation, for example, the lack of any federal provision concerning the apprehension of a person for whom a warrant has been issued where the person is identified in circumstances which render the execution of the warrant impossible. As with the other parts of the Act, there is also a more basic issue which must be addressed, namely, whether the schemes can be considered to be up to date and to reflect current notions of the state of the Australian federation. As part of this broader examination of the Act, consideration should also be given to whether the scope of the schemes should be broadened to include, for example, other types of warrants, or warrants and writs issued by bodies or persons not presently specified in the Act.

Approach to updating of schemes

381. In any closely integrated system of federated States some means must be available to enforce the criminal process, in particular process authorising the apprehension of a person for an alleged offence, of one State in another. In Canada, the conferral of legislative power on the central legislature with respect to criminal law and procedure[170] has bypassed problems in this regard. Process whose issue is authorised by legislation enacted upon these powers runs throughout Canada and thus there is no need for legislation authorising the execution of that process in a Province different from that of its issue. In the United States of America the need for such means is recognised in the Constitution, art IV, s 2, cl 2.

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled be delivered up to be removed to the State having Jurisdiction of the Crime.

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[169] (1955) 92 CLR 353, 364.

[170] Constitution Act 1867 (Can) s 91(27).

In 51 of the States and Territories of the United States there is legislation, based on the Uniform Criminal Extradition Act, approved by the National Conference of Commissioners on Uniform State Laws in 1936[171], and also a new uniform Act, the Uniform Extradition and Rendition Act approved in 1980 (which supersedes the former Act), which provides machinery for implementing this command and sets out the rights of persons liable to be returned to the State seeking their apprehension. In terms of procedure this legislation resembles in some respects international extradition schemes, requiring, in addition to judicial decision, action on the part of the executive branch of State governments to initiate and approve extradition.

382. In Australia the need for such means has also been long recognised and federal legislation enacted in reliance on the power conferred by s 51(xxiv) of the Constitution has provided a means for executing apprehension process interstate since 1901.[172] While Part III of the Act has been amended a number of times, the schemes operating today are substantially the schemes that were enacted in 1901. At that time intercourse between the States and Territories was substantially less than it is today and, despite federation, the States were in many ways, as early decisions on this and other aspects of the Act indicate, still regarded as separate and independent entities. It is not surprising, therefore, that the scheme for interstate execution of warrants reflected this perception by drawing heavily from the models of extradition schemes which existed at that time.[173] In contrast, there was an attempt in establishing the scheme for interstate execution of writs of attachment to provide a procedure different from the normal procedures for extradition. Nevertheless, the courts have approached that scheme in the same way as they have the warrants scheme.

383. In 1987, however, the States and Territories of Australia can no longer be regarded as possessing a similar degree of independence as possessed in 1901. There has been significant integration of the States and Territories in commercial, social and economic terms. Travel and communications have become immeasurably easier and speedier. State and Territorial boundaries have been rendered virtually meaningless in many fields. In this situation, the continued operation of a scheme which is derived from schemes for extradition operating in the international sphere seems difficult to justify. Conformably with the objective of simplification, the procedures of and the rights available to persons the subject of a modern scheme for interstate execution of apprehension process should closely resemble the procedures which apply and the rights that may be asserted where such process is executed within the State or Territory of issue. This is not to deny that there may be a need to provide special recognition for the rights of persons subject to apprehension and return on process issued in another State or Territory, but any decision on the extent of any special recognition for those rights must take account of the present closely integrated state of the federation and of the

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[171] 11 ULA, Crim Law and Proc.

[172] The power conferred by s 51(xxiv), relating to the service and execution of all civil and criminal processs, is much broader than the United States' provision.

[173] eg, the requirement for endorsement of a warrant before it can be executed in another State, the opportunity for a person to resist extradition to the State or Territory of issue of a warrant and the grounds on which extradition may be resisted.

fact that some matters of law enforcement have assumed national importance, for example, in relation to organised crime and drug offences. The remainder of this chapter considers the procedures of a modern scheme for interstate execution of apprehension process and the rights that persons subject to such process should have.

One scheme or two?

384. Before embarking on this examination, two preliminary issues should be considered. The first is whether there should remain separate schemes in relation to warrants and writs of attachment. In a research paper dealing with Part III of the Act[174] it was tentatively suggested that there should be separate schemes for the execution of the two types of process. This suggestion was based on an assessment of the difference in the nature and body of issue of the two types of process. It was argued that while a warrant is process issued in a ministerial capacity, a writ of attachment is a judicial proceeding of a court, the issue of which is a discretionary matter for the court. It was also noted that a warrant is normally issued as a preliminary to some proceeding being taken against a person while a writ of attachment is more akin to execution process. On further consideration, however, it has been decided that these differences do not warrant the maintenance of separate schemes. Three considerations have influenced this conclusion. The first concerns the clarity of the law concerning interstate execution of writs of attachment. The Act confers apparently broad discretionary powers upon the courts of a State or Territory to decide whether process of the courts of another State or Territory should be permitted to be executed within the first-mentioned State or Territory. No guidelines are provided as to the manner in which the discretion should be exercised. Nor could it be suggested that the few reported cases concerning s 19C of the Act, the last of which occurred in 1928, have settled the principles applicable to the exercise of that discretion.[175] In particular, there is a need to clarify the status of some earlier comments[176] on matters relevant to the discretion to grant leave to execute a writ of attachment. Secondly, while there are differences in the types of process concerned, those differences are not such as to require that different schemes should apply to the execution of the differing types of process. On the contrary, while there may be a difference in the purpose for which a person's return to the State or Territory of issue of process is sought, the ultimate object of the execution of both types of process is the same, namely, the return of a person to that State or Territory to be dealt with according to the law of that State or Territory. Given that objective, regardless of the type of process similar considerations should apply in determining whether a person should be returned to the State or Territory of issue. The third matter which has influenced the Commission to recommend a single scheme with respect to apprehension process concerns two aspects of the present procedure for execution of writs of attach-

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[174] Young 1984c, para 127.

[175] Attempts to ascertain more recent, perhaps unreported, instances in which s 19C has been invoked have been unsuccessful. The Commission expresses its appreciation to the Registrars of the Supreme Courts and of the Federal Court at Sydney for their assistance in these inquiries.

[176] See eg *Lewis v Lewis* [1902] St R Qd 115, 119 (Griffith CJ); *Jones v Jones* [1928] VLR 24, 28–9 (Mann J), discussed at para 376–7.

ment. As already noted,[177] the requirement for leave to execute a writ of attachment effectively combines the endorsement and extradition procedures applying in relation to interstate execution of warrants. The latter procedures ensure that a person the subject of a warrant has a full opportunity to raise matters which may indicate that he or she should not be returned to the State or Territory of issue. There is also an opportunity for a full review of any order made in extradition proceedings, whether that be an order requiring the person's return or for the person's release. In contrast, a person the subject of a writ of attachment may not have an opportunity to be present to resist the granting of leave for the writ's execution[178] and any review of an order concerning the granting of leave would, on normal principles regarding review of the exercise of a discretion, be confined to a consideration of whether the discretion had miscarried, rather than encompass a review on the merits. The Commission considers it unjust that a person liable to be taken from one jurisdiction to another may not have an opportunity to be present when that liability is determined. It is true that under the warrants scheme the person must be apprehended in order that he or she may be present to put a case for non-return, but that course is preferable to one which allows the person to remain at liberty yet permits the liability of the person to be returned to be determined in the person's absence, with no opportunity for a full review of the decision reached. It is therefore recommended that there should be a single scheme with respect to the interstate execution of apprehension process and that the present warrants scheme is an appropriate starting point as to the elements of the scheme, for it is only this scheme which ensures the presence of a person when his or her liability to be returned is determined and which gives an opportunity for full review of a return order.

Range of apprehension process

Principle

385. The second preliminary issue concerns the range of process to which the scheme should apply. While the two existing schemes appear to encompass all types of process under which a person is liable to be apprehended, a significant limitation confining the scope of the schemes occurs through the specification of the issuing authorities. Thus the warrants scheme is restricted to warrants for apprehension issued by 'a Court, a Judge, a Police, Stipendiary or Special Magistrate, a Coroner, a Justice of the Peace or an officer of a court', while the scheme dealing with writs of attachment applies to writs of attachment for arrest issued by 'a Court of Record of a State or part of the Commonwealth or a Judge of such a Court'. The issue is whether the limitation on the issuing authorities should be retained.

386. The reason for the present limitation of issuing authorities is not readily apparent. At the time the limitation was imposed in 1901, it might have been thought that it was necessary to specify the bodies and officers from which the process originated in order to ensure constitutional validity, as s 51(xxiv) may have been considered to confer power with respect to the process of the courts of the States, rather than the

[177] See para 373.
[178] See para 374.

process of the States. This possibility — and it is notable that the limitation was reiterated when Part III was substituted in 1953 — appears plausible when it is considered that it was not until 1972 that the broader interpretation was affirmed by the High Court.[179] A further possible explanation of the limitation is that at the time the legislation was drafted the types of process included within the schemes were in fact generally issued by the bodies and officers specified; in other words, what started out as merely descriptive phrases have, in time, come to operate to limit the scope of the schemes. The limitation, moreover, is now significant, for there are many State and Territory provisions which authorise bodies and persons other than those specified to issue process authorising the apprehension of persons. These include provisions which authorise the issue of such process by persons such as those described when fulfilling other roles, that is, when not acting in their specified capacity[180] and other provisions which authorise their issue by other bodies and persons.[181] In the closely integrated state of the Australian federation there is no valid reason for denying the interstate execution of warrants issued under these provisions. Contemporary achievement of the purpose of the grant of constitutional power in s 51(xxiv) requires recognition of the fact that numerous bodies and officers, not being courts and judicial officers, have powers to authorise the apprehension of persons for the purposes of the laws the administration of which has been committed to them.[182] A modern scheme should facilitate the interstate execution of all types of apprehension process regardless of the body or person by whom the process was issued. Therefore, the Commission recommends that the scheme for interstate execution of apprehension process should apply to all such process issued in a State or Territory. All persons subject to apprehension process issued in accordance with the law of a State or Territory will thus be liable to apprehension wherever they may be.

Proviso

387. Under this proposal there will be no qualification of the process to which the scheme applies by reference to the body or person who has issued the process. In a later chapter[183] recommendations are made concerning the extension of the Act to facilitate the interstate service of process issued by, or in relation to proceedings before, tribunals that are not within the system of traditional courts. For reasons explained

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[179] *Ammann v Wegener* (1972) 129 CLR 415.

[180] See eg the powers of a Judge of the Supreme Court when acting as a Royal Commissioner: Royal Commissions Act 1923 (NSW) s 16; Commissions of Inquiry Act 1950 (Qld) s 13; Evidence Act 1910 (Tas) s 18(1); and the powers of a judge when acting as a member of a statutory tribunal: eg Probation and Parole Act 1983 (NSW) s 39(1); Police Complaints Tribunal Act 1982 (Qld) s 14(2).

[181] See eg Royal Commissions Act 1917 (SA) s 11(1), (3); Commissions of Inquiry Act 1950 (Qld) s 8(1), (2), 10(7); Royal Commissions Act 1968 (WA) s 16(1); Parole Act 1975 (Tas) s 25(6), 26(1); Commercial Tribunal Act 1984 (NSW) s 26(1).

[182] Some problems caused by the present provision were noted in relation to powers to issue warrants for the arrest of defaulting parolees who have been located in other States or Territories: see eg Committee of review, 31, 40 (Recommendation 52); Parole Board, New South Wales *Submission* 1.

[183] See ch 8.

there,[184] it is recommended that the facilities for interstate service and execution of certain process, including process authorising the apprehension of persons, should be available only under judicial supervision. Subject to such supervision, the scheme recommended in this chapter will operate to enable the apprehension and extradition of persons subject to apprehension process issued by tribunals.

Constitutional considerations

388. In chapter 2 of this report comment was made on two possible interpretations of the phrase 'civil and criminal process' found in s 51(xxiv) of the Constitution.[185] While the matter is not entirely without doubt, it has been argued that a broad view of that phrase should be taken. Consistent with that view, it is neither necessary nor desirable to specify, in provisions dealing with interstate execution of apprehension process, the proceedings in relation to which such process is issued. Any such specification would only limit the scope of the scheme. However, even if the narrow view of the phrase is ultimately adopted by the courts, the provisions declaring the scope of the scheme for interstate execution of apprehension process would not be invalid merely because they failed to specify the proceedings to which the process related. Rather, the provisions would be read down so as not to exceed the legislative power of Parliament.[186] The scheme would then apply only where the apprehension process related to proceedings of the type encompassed in the narrow view of the phrase.

Preconditions to interstate execution

389. It is now necessary to examine the procedures and rights established under the existing schemes with a view to their reform in accordance with the approach outlined earlier. The first matter to be considered concerns preconditions to the execution of apprehension process. Both the existing schemes impose preconditions on the execution of the process with which they deal. The warrants scheme requires that a warrant be endorsed for its execution in a State or part of the Commonwealth different from that of its issue, while the scheme concerning writs of attachment requires that the leave of a Judge of a Supreme Court or the Federal Court be obtain before a writ may be executed outside the State or part of issue. Leaving to one side for the present issues arising out of the dual nature of the leave requirement in relation to writs of attachment,[187] these provisions require merely that there be some evidence that the person subject to the apprehension process is within or may come to the State or Territory where permission for execution is sought and that proof be given that the process has been issued by one of the specified bodies or officers. Proof of these matters is not unduly onerous and the procedure may be regarded as merely an administrative formality. Importantly, there is no examination of the validity of the process which it is sought to execute. The procedure therefore provides little in the way of a safeguard for persons the subject of apprehension process. It might, therefore, be abolished or, alternatively, be strengthened to provide a real safeguard to the subjects of apprehension

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[184] See para 637–8, 648.

[185] See para 44.

[186] Acts Interpretation Act 1901 (Cth) s 15A.

[187] See para 373.

process by requiring the endorsing officer to be satisfied as to the validity of the process prior to endorsement or the granting of permission for execution. The Commission is firmly of the view that there should be some opportunity to test the validity of process sought to be executed interstate, however it does not consider it appropriate for that matter to have to be considered when permission for execution is sought. That would require that all process be examined for that purpose, which would be unduly onerous and unnecessary in many instances. In addition, the officer from whom permission is sought would be assisted by evidence from one side only; the person subject to the process would not be present or represented when permission was sought. The latter course is therefore not recommended. Rather, it is considered that the requirement that permission be obtained to execute the process should be abolished. At present, it appears to be no more than an administrative formality. In addition, it is a requirement to be met in each State or Territory — a person may be 'on the run', thus perhaps necessitating multiple endorsement or leave applications. In that situation, it may thus hinder the apprehension of a person subject to apprehension process. It is recommended, therefore, that federal legislation should simply authorise the execution of apprehension process issued in one State or Territory in any other State or Territory.[188] The process might therefore be executed wherever the person named in the process is found.[189] The practical effect of an endorsement or leave requirement will be achieved without the unnecessary procedural step.

Need for extradition hearing

390. The second matter to consider are the steps to be taken after a person is apprehended on process. The Act presently requires that a person apprehended on a warrant be taken before a magistrate or justice of the peace in the State or Territory where apprehension occurred for the purpose of an extradition hearing.[190] This is clearly something of a misnomer, as even the existing scheme encompasses process not related to criminal proceedings against a person. However, for convenience, the term shall be employed in further discussion. If Australia were truly one jurisdiction, it could be suggested that this hearing be abolished, with the result that the person would be taken immediately to the State or Territory of issue of the process. However, the process here under consideration operates to deprive a person of his or her liberty. The highly intrusive nature of such process and the need to balance its effects with the rights of persons is recognised even in the field of intrastate execution, which requires that a person apprehended within the jurisdiction of issue of a warrant be taken expeditiously before a magistrate or other officer.[191] In addition, the International Covenant

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[188] However some limitations are recommended in relation to apprehension process issued by tribunals: see para 648–52.

[189] Powers of arrest are discussed in a later part of this chapter: see para 424–8.

[190] The proceedings on an application to execute the writ of attachment operate as the extradition hearing but, as noted above (see para 374), the person may not in fact be present and if leave to execute the writ is given the person may be apprehended and taken immediately to the place of issue.

[191] eg Justices Act 1902 (NSW) s 29, 64; Justices Act 1921 (SA) s 59; Crimes Act 1958 (Vic) s 460(1); Criminal Code (WA) s 570.

on Civil and Political Rights (ICCPR)[192] requires, in art 9(3), that an arrested person 'be brought promptly' before a judicial or other officer. Pragmatic considerations also dictate the retention of the extradition hearing. For example, the person apprehended may not be the person named in the process. If a person were denied an opportunity to establish that discrepancy when first apprehended great injustice could result. The Commission therefore recommends that a person apprehended on process issued in another jurisdiction be taken before a magistrate or justice of the peace in the jurisdiction of apprehension for the purposes of an extradition hearing. The provision should reflect the statement in the ICCPR that such action should be taken promptly.

Nature of extradition hearing

Basic procedure

391. In the great majority of cases there will be no argument that the apprehended person should be returned to the State or Territory of issue of the process. In this situation, the extradition hearing will operate in much the same way as proceedings which occur when a person apprehended within the State or Territory of issue is first taken before a magistrate. Their purpose is to ensure that there is process which authorises the person's apprehension and that the person apprehended is the person named in the process. Thereafter the person is usually remanded, in custody or on bail, to a later date on which the substantive proceedings against the person will be conducted. The extradition hearing should operate in the same way. Where a person has been taken before a magistrate or justice in the State or Territory of apprehension, the process purporting to authorise the person's apprehension should be produced. Once satisfied that the process is apparently valid and that the person brought before him or her is the person named in the process, and subject to an assessment of the arguments that the person may raise in order to obtain release,[193] the magistrate or justice should remand the person to appear in the State or Territory of issue of the process.[194]

Basic requirements examined

392. *Identification.* It is axiomatic that before an order is made remanding a person to the State or Territory of issue the officer asked to make the order should be satisfied as to the identity of the apprehended person. There is no specific requirement for this in the Act at present. In relation to warrants, however, the power to make an order under s 18(3) is expressed to be 'subject to' the section, that is, s 18. The identification requirement is inferred from s 18(2), which specifies that the endorsement on the warrant authorises its execution, the apprehension of 'the person against whom the warrant was issued' and the bringing of 'that person' before the magistrate or justice.[195] In a research paper on Part III of the Act, it was suggested that the

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[192] The Commission must ensure that its proposals are, as far as practicable, consistent with the Articles of the ICCPR: Law Reform Commission Act 1973 (Cth) s 7(b).

[193] See para 397–407.

[194] See para 410–3 for discussion of the range of remand orders.

[195] See *O'Donnell v Heslop* [1910] VLR 162, 175 (Cussen J).

requirement to establish identity be more clearly spelt out.[196] This would have required that in all cases the identity of the person be positively established by proof on the part of the authority seeking the person's return. It is now considered that such a requirement could impose an undue burden, in both time and money, on those authorities. Of course, if the apprehended person disputes that he or she is the person named in the warrant and can provide reasons for that dispute, it will be necessary for the authorities seeking return to adduce evidence in rebuttal. However, unless the identification issue is specifically raised by the apprehended person, the 'requesting' authorities should not be required to do more than is required at present.[197]

393. *Validity of process.* It would also seem axiomatic that a person should not be liable to be remanded to the State or Territory of issue of process unless the process on which he or she has been apprehended is valid. In relation to the scheme dealing with writs of attachment, comments made by Justice Higgins, dissenting, in *Jones v Jones*[198] indicate that it may be proper for the judge who is asked to give leave for the execution of a writ to consider whether the issue of the writ was authorised by the law of the State or Territory of issue. In relation to the warrants scheme, a number of comments in the cases suggest that it is no part of the duties of a magistrate or justice on an extradition hearing to consider the validity of a warrant and that its validity may not be challenged by way of application for release under s 18(6).[199] It has been argued previously in this chapter, however, that the terms of s 18 require that in an appropriate case a finding that process is valid is a necessary condition to be satisfied before the exercise of the discretion to order the return of a person.[200]

394. As a matter of principle a person liable to be returned on process should have an opportunity to test the validity of that process. It is one thing to arrest a person on the basis of certain process and bring the person before a magistrate or justice. It is a very different thing, after apprehension, to order that a person be deprived of his or her liberty and sent to, or be constrained to go to, another State or Territory to answer, for example, a charge. While it may be appropriate that process, which when examined turns out to be invalid, may be relied upon to apprehend a person,[201] it is clearly inappropriate that such process might be used as the basis for an order of the latter type. The contrary view would give credence to the process merely because it had been issued in another jurisdiction. Note should also be made of art 9(4) of the ICCPR which specifies that a person deprived of his or her liberty by arrest shall be entitled to take proceedings to determine the lawfulness of his or her detention. An apprehended person should, therefore, have an opportunity to test the validity of the process on which he or she has been apprehended and which forms the basis of the proceedings in which his or her liability to be returned to the State or Territory of issue will be determined.

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[196] Young 1984c, para 84.

[197] See also Uniform Extradition and Rendition Act (US) s 3–107: see para 398.

[198] (1928) 40 CLR 315, 320.

[199] See para 328, 353.

[200] See para 333, 353.

[201] And unless issued in bad faith would not render the issuing and executing officers liable to legal action.

395. The question that arises is as to the proceedings in which a challenge to validity should be made. Should a person be able to do so in the extradition hearing or, as is apparently the case at present, should that challenge be made only in separate proceedings, such as on an application for a writ of habeas corpus? While a challenge to validity may raise difficult and complex questions of law,[202] the Commission is of the view that a person should be able to make such a challenge in the extradition hearing. There is not a little injustice in suggesting that a person may be subject to the compulsion of apprehension process yet be unable to test the validity of that process in the very proceedings by which it is sought to give effect to the process. In addition, the Commission can see no purpose in a procedure that necessitates the taking of additional proceedings solely for the purposes of a challenge to validity. Multiplicity of proceedings should be avoided. It is therefore recommended that it be made clear that a person may challenge the validity of the process on which he or she has been arrested before the magistrate or justice considers whether to make an order for the remand of the person to the State or Territory of issue or considers any other matters which may indicate that the person should not be returned to that State or Territory.

396. This is not to suggest that a magistrate or justice before whom a person is brought should in all cases embark on a wide ranging examination of the validity of the process produced at the extradition hearing. In the great majority of cases there will be no doubt about validity and, if the officer is satisfied that the process is apparently valid, he or she should then proceed to determine the order to be made in relation to the person. Similarly, where it is merely baldly asserted that the process is invalid without substantiating evidence or arguments, a magistrate or justice should not be concerned to delve into the question. However, where the evidence is sufficient to raise a serious doubt in the mind of the officer conducting the extradition hearing about the validity of the process, that officer should not proceed further until those doubts have been resolved. The requirement of validity, therefore, is not a condition to be satisfied affirmatively, but rather is a matter which may have to be investigated if a serious doubt arises. Where those doubts remain after presentation of all the evidence and arguments by both sides, the officer should not proceed further and should order the release of the person.

Further considerations — application for release

397. *Appropriateness.* As discussed thus far, the extradition hearing closely resembles the procedure that applies where apprehension process is executed within the State or Territory of issue and the person brought before a magistrate or justice. However, under the present scheme dealing with warrants and also, apparently, under the scheme concerning writs of attachment, an apprehended person is given rights not found in intrastate schemes. This is the right to make an application for release under s 18(6).[203] This provision specifies three grounds upon which a person may seek release. If the officer presiding at the extradition hearing is satisfied of one or more of these grounds,

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[202] See para 354.

[203] In the scheme dealing with writs of attachment the right is implied and enables a person to argue that leave should not be given to execute the process. However leave may be given without hearing the person the subject of the process.

there is a discretion to make an order appropriate to the situation, effectively denying a warrant its full effect, that is, the effect it would have if executed intrastate. It is necessary to consider whether the right to apply for release should be retained.

398. It is appropriate to consider the situation applying in another closely integrated federation, the United States of America. Reference has already been made to the constitutional prescription applying in the United States and the uniform laws on which the extradition laws of most of its States and Territories are based.[204] As far as the procedures for and grounds upon which a person might seek to resist return to the jurisdiction requesting the person's return are concerned, the earlier uniform law, the Uniform Criminal Extradition Act, approved by the National Conference of Commissioners on Uniform State Laws in 1936,[205] relies upon the constitutional right of a person in custody to apply for a writ of habeas corpus to challenge his or her detention. Apart from the bases upon which such a writ may be granted, s 20 of that Act specifies that

> the guilt or innocence of the accused as to the crime of which he is charged may not be inquired into . . . except as it may be involved in identifying the person held as the person charged with the crime.

The more recent uniform law, the Uniform Extradition and Rendition Act approved in 1980 (which supersedes the former Act), requires that the requesting State hold a judicial hearing to establish 'probable cause' for the arrest of a person prior to the executive request for extradition,[206] specifically establishes a judicial extradition hearing and, in s 3–107, defines the issues to be resolved at the hearing. That section requires that a judge order the transfer of a person to the requesting State if satisfied that the necessary documentation for transfer has been lodged and that the Governor of the requested State has issued a warrant recognising the request for transfer, 'unless the arrested person establishes by clear and convincing evidence that he is not the demanded person'. This system therefore provides a very limited opportunity to a person who is otherwise liable to be returned to the State originating the request for return to seek release.[207]

399. There is no doubt that the right to apply for release notwithstanding the existence of valid process authorising apprehension is a most powerful potential safeguard for the rights of persons subject to process executed interstate. However, it is a right derived from extradition schemes operating in the international sphere. In the context of a federation throughout which the laws, the public Acts and records, and the judicial proceedings of every State are to be given full faith and credit[208] and in which there is now a considerable degree of social, commercial and economic integration, both the right to apply for release and the grounds for release may be considered to reflect notions that were present at the time of federation rather than those present today.

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[204] See para 381.

[205] 11 ULA, Crim Law and Proc.

[206] s 3–102(1).

[207] The right to apply for a writ of habeas corpus is not extinguished, being guaranteed by the United States Constitution.

[208] Constitution s 118.

Strict adherence to the basic approach to reform[209] would require that there be no opportunity for a person apprehended on process executed interstate to apply for or obtain release on such grounds as are presently specified in s 18(6) of the Act. In other words that, subject to the basic procedures outlined above, extradition should be automatic.

400. Clearly, there should not be extensive barriers to the return of persons apprehended outside the State or Territory of issue of process. However, the Commission considers this does not necessarily dictate that an apprehended person should have no opportunity to seek to obtain release. In the context of interstate execution of apprehension process the circumstances of persons subject to such process may vary widely. Those circumstances may indicate that it would be contrary to notions of justice or fairness for a person to be compelled or required to go the State or Territory of issue of the process. In addition, the ICCPR guarantees certain rights with which the Commission's recommendations are required to be consistent.[210] So far as relevant, these rights should be accorded recognition and procedures should be provided whereby those rights can be asserted. While it is true that such recognition and the relevant procedures might be deferred until the return of a person to the State or Territory of issue, the Commission considers that it is approriate that a person should have an opportunity to assert those rights in the State or Territory where he or she is apprehended. This may, after all, be the situation of the person's residence. In addition, to defer the recognition or enforcement of those rights until the person's return may be to effectively deny their recognition or enforcement. Therefore, the Commission recommends that there should continue to be an opportunity for a person apprehended on process executed interstate to raise, at the extradition hearing, matters which might indicate that the person should not be compelled or required to go to the State or Territory of issue of the process.

401. *Grounds for application.* Those matters, however, should be limited to those which are sufficient to provide appropriate protection for the civil rights of individuals in present day Australia while promoting a contemporarily relevant and efficient interstate warrants scheme. In the research paper on this topic[211] it was suggested that the grounds on which a person might seek to be released should be limited to the following:

- that the application for return has not been made in good faith in the interests of justice
- that it would be dangerous to require the person to go to the State or Territory of issue because of the age or ill-health of the person or
- that the authorities seeking return have previously declined to seek the return of the person on the same or similar charge arising from the same circumstances as that upon which return is presently sought.

This suggestion has been criticised. It has been argued that to so restrict the opportunities for a person's release amounts to a gross abrogation of the rights of persons

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[209] See para 381–3.

[210] Law Reform Commission Act 1973 (Cth) s 7(b).

[211] Young 1984c, para 101.

subject to apprehension process.[212] While the Commission sees some force in this argument, it is not persuaded that, merely because these rights have been available in the past, they should continue to be available in the future. The state of the Australian federation today requires a reassessment of the rights presently available to persons subject to apprehension and return on the interstate execution of process. However, the conclusion has been reached that the suggested grounds are too restrictive. The circumstances surrounding the interstate execution of apprehension process and the apprehension of persons vary widely. The cases themselves indicate that, apart from the enumeration of certain principles, the courts have been loath to establish any practices or approaches that could be construed as derogating from the need to consider each case on its merits. The Commission considers that it should follow this course. The specification of the grounds open to a person in order to obtain release should be such as to admit of all possible circumstances that might arise which justify the release of a person rather than his or her extradition.

402. It could be argued that the present grounds, which appear to have stood the test of time so far as flexibilty is concerned, should be retained. However, it has been noted[213] that the first of the grounds specified in s 18(6), namely, that 'the charge is of a trivial nature', is not apparently applicable where the apprehension process concerned does relate to the alleged commission of an offence.[214] It is, therefore, a ground available only in particular circumstances. Further, when one considers the formulation of the 'exculpatory' grounds in federal legislation dealing with the extradition of persons from Australia to other countries,[215] it can be seen that the mere triviality of the charge is not of itself sufficient to justify a refusal to extradite — the triviality of the charge is but one element which may amount to injustice or oppression. In the context of a scheme for interstate execution of apprehension process within a federation, there seems no basis for retaining an apparently less onerous standard which may permit the refusal of extradition. In any event, it is not appropriate in the present state of the Australian federation for the severity of a charge to be capable in itself of being determinative of a person's liability to be extradited. The decision to prosecute or to seek, by the issue of apprehension process, a person's return for some other cause, coupled with the interstate execution of the process, is a sufficient indication that the purpose for which the person's apprehension and return is sought is viewed with sufficient seriousness by the relevant authorities in the State or Territory of issue to justify the return of the apprehended person. An officer conducting an extradition hearing should not be enabled to in effect substitute his or her decision on whether a person should be prosecuted for the decision taken by the relevant authorities in the State or Territory of issue, whose undoubted responsibility it is to take whatever proceedings are necessary in order to enforce the law of that State or Territory. The Commission therefore recommends that this ground for release should be abolished.

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[212] Law Society of New South Wales *Submission* (28 February 1985) 3–4.

[213] See para 341.

[214] Such a ground might be applicable in the context of the scheme for interstate execution of writs of attachment, if the same grounds may be relied on.

[215] Extradition (Commonwealth Countries) Act 1966 (Cth) s 16, 27. See also on the same topic the Fugitive Offenders Act 1967 (UK) s 8(3).

403. However the decision to prosecute a person, or to seek a person's return for some other cause, evidenced by the issue and execution of apprehension process, should not be regarded as sacrosanct. It has always been open to the courts to consider whether the cause for the issue of process, apparently justified on its face, constitutes in fact an abuse of process. This seems to be the object of the second ground specified in s 18(6), namely, that 'the application for the return of the person has not been made in good faith in the interests of justice'. The question that arises is whether this power to control abuse of process should be exercised in the State or Territory of apprehension or the State or Territory of issue of the apprehension process. It perhaps would be more consistent with the principles enumerated by the courts in relation to the warrants scheme concerning consideration of disputed questions of law and fact[216] for consideration of an allegation of abuse of process to be deferred until a person is before the courts in the State or Territory of issue. However, if that was always to be the case, no matter how strong the argument might be the person would necessarily be put to not a little inconvenience and expense in having that matter determined in the State or Territory of issue. The inconvenience to the person arising from the disruption of his or her life in the State or Territory of apprehension (if it be the case that the person's residence is there) must also be considered. On the other hand it could be suggested that, given the resources generally available to the authorities seeking the person's presence in the State or Territory of issue, it would not be unduly onerous or inconvenient to require them to attempt to refute such an argument in the State or Territory of apprehension. It might also be suggested that it is more consonant with considerations of fairness that an apprehended person should have the opportunity to test the bona fides of the issue and execution of apprehension process before being compelled or required to leave the State or Teritory where he or she is present, perhaps resident, to go the the State or Territory of issue of the process. However, the Commission is not convinced that it would always be inappropriate for an issue such as this ground contemplates to be reserved for determination by a competent court in the State or Territory of issue. For example, proper consideration of the issue might require that extensive evidence, available only from sources in the State or Territory of issue, be available to the court called upon to determine the matter. In such circumstances, the persons capable of giving that evidence would be put to some inconvenience by the necessity to travel to the location of the extradition hearing.

404. There is, however, a way out of this dilemma. The third ground specified in s 18(6), namely, that 'for any reason, it would be unjust or oppressive to return the person either at all or until the expiration of a certain period', is broad enough to enable an apprehended person to raise a wide range of matters in seeking to obtain his or her release. It is true that the potential arguments have been restricted to some extent by decisions of the courts. However, the Commission can see no reason in principle why an argument raising for consideration the question whether a person's return has been sought in good faith in the interests of justice cannot be considered to be a matter going to the question whether it would be unjust or oppressive to order the return of the person. In the legislation which in all probability was the model for s 18(6) of the Act, the Fugitive Offenders Act 1881 (UK), the corresponding

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[216] See para 345–6.

provision linked these two matters and provided that injustice or oppression was to be established by showing, amongst other things, that the application for return was not made in good faith in the interests of justice.[217] The same formulation has, with one slight change, been adopted in the Fugitive Offenders Act 1967 (UK) s 8(3) and in federal legislation concerning extradition to Commonwealth countries, the Extradition (Commonwealth Countries) Act 1966 (Cth) s 16 and 27. The change referred to now requires consideration to be given to the accusation against the person, rather than the application for return of the person. The alteration in terms probably does not, however, effect any great change in the substance of the argument that an apprehended person might raise. If, therefore, the 'unjust or oppressive' argument is left open to an apprehended person, there is no need to specifically provide for an argument based on the accusation against the person not being in good faith in the interests of justice,[218] for if the evidence presented at the extradition hearing clearly indicates bad faith on the part of the authorities or persons who have secured the issue and execution of the apprehension process, then the magistrate or justice may find that it would be unjust or oppressive to order the remand of the person to the State or Territory of issue. If, however, the magistrate or justice is of the view that it would be inappropriate to enter on a consideration of the matter at the extradition hearing because of, for example, the extent of proof that would be required to determine the question, then the magistrate or justice would be justified in refusing to release the person. This would not, however, bar the apprehended person from raising this matter at proceedings in the State or Territory of issue of the process once he or she was remanded to appear there.

405. The 'unjust or oppressive' ground must therefore be considered. It has already been noted that there should be some opportunity to an apprehended person to seek release on the extradition hearing. In addition, the grounds on which release might be sought should be flexible enough to accommodate all possible circumstances that might arise on the interstate execution of apprehension process. The 'unjust or oppressive' ground provides such flexibility. It is apt to enable any and all relevant matters in favour of the apprehended person's release to be put in issue at the extradition hearing. The scope of permissible arguments is constrained by principles enunciated by the courts, especially as regards the types of matters that might be raised in relation to 'legal' questions concerning the process itself or the accusations made in the process.[219] They have also to some extent limited the scope of the ground in relation to matters concerning the personal circumstances of the apprehended person — 'practical' reasons for releasing the person.[220] The recent adoption of English authority on the meaning of the terms 'unjust' and 'oppressive' may also, if that approach is endorsed by the High Court and once its ramifications are fully discussed, lead to some limitation

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[217] Fugitive Offenders Act 1881 (UK) s 19.

[218] Similarly, the trivial nature of a charge may be considered as one possible ingredient in establishing injustice or oppression.

[219] See para 345–50.

[220] See para 351.

of the matters that an apprehended person may raise under this ground, for it has been noted that some of the arguments presently open under this ground do not sit well with the meanings recently ascribed to those terms.[221] It might also be thought that in the course of time, as the matters that are apt for recognition in a scheme for interstate execution of apprehension process in the context of a closely integrated federation are further refined, the matters potentially within the scope of this ground will be further confined, although the course of future developments in this field is a matter of conjecture. In particular, that course will probably depend to some extent on the interpretation ultimately given to s 118 of the Constitution. Notwithstanding this element of uncertainty, the very flexibility of the 'unjust or oppressive' ground is highly apt to provide the widest latitude to the courts in further developing the principles to be applied when the question of a person's liability to be returned to the State or Territory of issue of apprehension process arises.

406. However, as noted above, it would be anomalous if the grounds on which a person liable to interstate extradition may seek release were less onerous than those available to persons liable to extradition to other countries.[222] Nor would it be appropriate that a person in the former position should be able to obtain release — in effect, obtain the denial to a warrant of its proper effect — with the same ease as a person in the latter position. Retention of the ground of 'injustice or oppression' would mean that the burden on an apprehended person in each of those situations would be the same. To distinguish the situation of a person liable to interstate extradition and to narrowly confine the circumstances in which such a person may obtain release, it is recommended that the grounds for release in this situation should be such as to require the person to do more than is required of a person liable to be extradited to another country. It is therefore recommended that the 'unjust or oppressive' ground be qualified. The person liable to interstate extradition should be able to obtain release only if the person satisfies the magistrate conducting the extradition hearing that it would be 'manifestly unjust or oppressive' to order extradition.

407. At present, s 18(6)(c) provides that an apprehended person may seek to satisfy the officer conducting the extradition hearing that 'it would be unjust or oppressive to return the person either at all or until the expiration of a certain period'. While the latter option clearly enables some flexibility in the disposition of the apprehended person where the evidence suggests that the immediate return of the person would be unjust or oppressive, it may be limited in its application by the apparent intention of the paragraph, coupled with the terms of s 18(6)(e), that the period during which it would be unjust or oppressive to return the person is capable of precise determination. That is, s 18(6)(c) apparently provides only two options: that return at all would be unjust or oppressive, or that return prior to the elapse of a determinable period of time would be unjust or oppressive. The provision therefore does not cater clearly for circumstances where the presiding officer is satisfied that it would be unjust or oppressive to return the person immediately but is unable to determine with particularity the period for which the injustice or oppression will continue. For example, a magistrate or justice may be

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[221] See para 355.

[222] See para 402.

satisfied that it would be unjust or oppressive to return a person immediately to the State or Territory of issue because of the person's ill health. In such a case it would be rare for the period of the person's ill health to be capable of precise determination, but the present provision may be thought to deny the opportunity for the presiding officer to make an appropriate order. This defect should be remedied. It is recommended that the provision in the legislation regarding the ground for release should be clearly framed so as to apply both in circumstances where it is possible to determine the period for which manifest injustice or oppression may continue and in circumstances where it is not possible to so determine.[223]

408. Before leaving this discussion, comment should be made concerning one argument that was urged on the Commission. The Commonwealth Director of Public Prosecutions argued

> It is anomalous that a person charged with an offence against federal law should be able to take proceedings before a court in one State to prevent or delay proceedings being taken against him in the court of another State. It is surely in the interests of justice that any issues raised in the proceedings be resolved, without undue delay, by the court which has jurisdiction to hear the matter.
>
> In our view the function of the magistrate in the State of arrest should be to ensure that the warrant has been properly issued and executed and that the person arrested is the person named in it. If he is so satisfied, then he should be required to order that the defendant return, or be returned, to the State of issue. The defendant should have a right to seek review before the courts of that State. Those courts should have power, if they consider it appropriate, to order that the defendant be returned to the State of arrest at the prosecution's expense.[224]

In effect, the argument is one for the establishment of separate procedures for dealing with persons charged with federal offences and that persons subject to warrants charging federal offences would be subject to virtually automatic extradition. The Commission is of the view that it would be inappropriate for such a change to be implemented. First, if it is desired to provide for automatic extradition of alleged federal offenders, such provision should be made explicitly in legislation dealing with federal prosecutions, not in a law which deals incidentally with the apprehension of persons alleged to have committed federal offences. Further, it may not be appropriate to provide for the automatic extradition of alleged federal offenders for there may well be circumstances where the return of a person on 'federal' process would be manifestly unjust or oppressive, for example, by reason of ill health. In addition, in view of the width in the choice of the venue for a prosecution of a federal offence,[225] the Commission is not prepared to accept that the choice of venue may never be used as a vehicle of oppression which, if the occasion deserves, may justify a refusal to order extradition. Therefore it is not recommended that there be special provisions dealing specifically with federal offenders providing for automatic extradition.

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[223] The appropriate orders to be made where this ground is satisfied are discussed below at para 414–7.

[224] Director of Public Prosecutions (Cth) *Submission* 2.

[225] Judiciary Act 1903 (Cth) s 68.

Adjournment

409. It is a necessary concomitant of the procedure of any initial hearing following the execution of apprehension process that the officer conducting the proceedings have power to adjourn the proceedings and make necessary ancillary orders for the disposition of the apprehended person on the adjournment. This is provided for in relation to the warrants scheme by s 18(5) of the Act. The Commission recommends that there should continue to be provision to the same effect in the new scheme for interstate execution of apprehension process. The major issue in this regard is as to the law which should guide the choice of ancillary orders concerning the disposition of the apprehended person pending resumption of the proceedings. The Act presently confers the power to remand a person and to admit the person to bail for that purpose by reference to the powers that the magistrate or justice possesses in relation to warrants issued by the magistrate or justice. In other words, the magistrate or justice is to apply the law of the State or Territory of apprehension governing such situations. The issue of the appropriate law to govern the choice of ancillary orders within the new scheme is pursued later in this chapter.[226]

Orders

410. *Where no grounds for release established.* Under the present scheme concerning interstate execution of warrants, where a person has been brought before a magistrate or justice and after proof of formal matters, in the absence of an application under s 18(6) on the part of the person or where he or she has not satisfied the magistrate or justice of one or more of the grounds specified in s 18(6)(a)–(c), the magistrate or justice may make a custodial or non-custodial return order. While in terms conferred as a discretion, in practice either order would be made as a matter of course. If all the necessary matters have been proved, the person has failed to establish that he or she should be released and, if necessary, an adjudication made on the validity of the process,[227] the magistrate or justice should order the return of the person. The Commission therefore recommends that the apparent discretion in this matter should be eliminated, that is, the legislation should provide that in a proper case the magistrate or justice shall make an extradition order.

411. The magistrate's or justice's power to choose the extradition order is presently entirely discretionary.[228] This may be considered to be something of an anomaly when contrasted with the discretion to order the remand of a person for the purposes of an adjournment of the extradition hearing, a discretion in respect of which s 18(5) specifies a particular governing law, presently the law of the State or Territory of apprehension.[229] One issue is whether that discretion should remain undirected. An issue to be considered first, however, is whether the officer conducting an extradition hearing should retain a choice as to the order that should be made for the extradition of a person.

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[226] See para 430–3.
[227] See para 393.
[228] See para 335.
[229] See para 338.

412. One possibility is that there be no choice of orders, that is, that remand to the State or Territory of issue always be in custody or, alternatively, on bail. The latter option need only be stated to be rejected. It could not be considered appropriate that in all cases persons should be admitted to bail to appear in the State or Territory of issue, for that would provide open slather to those who are habitual bail absconders. There might, on the other hand, be considered to be some merit in the former option. This view would proceed on the basis that, where apprehension process has been issued in a State or Territory, a person the subject of such process should not be able to obtain release on bail until brought before the proper authorities in the State or Territory of issue. This is the effect of the scheme dealing with the interstate execution of writs of attachment. Once leave for the execution of the writ has been given, the person named in the writ may be apprehended and taken immediately to the State or Territory of issue.[230] To restrict generally the order open on an extradition hearing to custodial orders only, however, is not justified. The reasons for the issue of apprehension process vary widely and it cannot be assumed that, in order to secure the appearance in the State or Territory of issue of a person who is subject to such process or for other purposes,[231] it is necessary in all cases to order custodial remand. In the procedures applying to intrastate execution of certain apprehension process, there is no similar restriction on the scope of orders open to an officer before whom a person arrested under such process has been brought. Such officers are able, in accordance with the relevant law, to remand a person on bail if they consider that custodial remand is unnecessary, amongst other things, to secure the person's appearance at further proceedings. The retention, in the context of extradition hearings, of the discretion as to custodial or non-custodial remand is merely to recognise that that procedure operates as a substitute, where apprehension process is executed interstate, for the initial hearing that occurs where such process is executed intrastate. In addition, art 9(3) of the ICCPR states that it 'shall not be the general rule that persons awaiting trial shall be detained in custody'. Compliance with this principle requires that, even where apprehension process is issued in relation to the alleged commission of an offence, the option of non-custodial remand should be available to the officer conducting an extradition hearing. It could hardly be suggested that the result should be otherwise where the process concerned does not allege the commission of an offence. The Commission therefore recommends that the new scheme retain the options of custodial and non-custodial remand to the State or Territory of issue of apprehension process.

413. This recommendation will enable the question of a person's disposition on remand to the State or Territory of issue to be approached with the flexibility that is appropriate to cater for all the different circumstances that may arise. Given the appropriateness of a flexible approach to that question, an issue that arises is whether, as at present, the choice as to the proper order in the circumstances should be unguided

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[230] While never discussed in the reported cases, it might be argued that the discretion conferred in relation to the execution a writ of attachment could be be exercised in refusing leave where the judge considers that it would be inappropriate that the person named in such process be subject to custodial return to the State or Territory of issue.

[231] These may include the protection of the public, the preservation of evidence or the safety of witnesses.

in any way, or whether the relevant officers should be directed to have attention to the principles of a particular law concerning the circumstances where non-custodial remand is appropriate. While flexibility is important, it is anomalous that the Act should specify that a particular law is to be applied in reaching a decision as to the disposition of an apprehended person on an adjournment of an extradition hearing, yet fail to specify the application of any law in reaching a decision as to the disposition of a person on an order for the person's extradition. This anomaly should be eliminated. The issue of the appropriate law to govern that decision is discussed below.[232]

414. *Where manifest injustice or oppression shown.* While the Act presently describes with some particularity two of the orders that may be made where a person has satisfied a magistrate or justice of one or more of the grounds in s 18(6)(a)–(c), the range of available orders is essentially open-ended, for s 18(6)(f) provides that the magistrate or justice may 'make such other order as he thinks just'. Clearly, the range of potential orders should be such as to permit an order appropriate to the circumstances of each case to be made. However, there are certain shortcomings in the presently specified orders. First, the type of order specified in s 18(6)(e), in conjunction with s 18(6)(c), may limit the scope of the 'unjust or oppressive' ground through the necessity to specify the period during which a person should not be returned to the State or Territory of issue.[233] Recommendations have been made previously[234] to remedy this apparent shortcoming. A further shortcoming in relation to the terms of s 18(6)(e) concerns the phrase 'be returned'. While the word 'return' in s 18(6)(b) and (c) encompasses both custodial and non-custodial return,[235] the phrase 'be returned' in s 18(6)(e) could be construed to be confined to custodial return. Certainly, that is the meaning that the phrase has in s 18(3)(a). If the same construction applied to s 18(6)(e), an order under that provision must require the custodial return of a person after the elapse of the relevant period of time. However, considering that that provision requires also that the person be released on bail until the elapse of that time, it may be that the phrase is not to be construed in the same way as in s 18(3)(a). But if that is not so, then there seems to be some contradiction in an order which bails a person for the present but requires custodial return to the State or Territory of issue. However, regardless of the proper interpretation of the present provision, new legislation should clarify the position. The range of orders available should be specified with sufficient precision to eliminate any potential arguments as to their applicability or scope, but in such a way as to be sufficiently flexible to enable an appropriate order to be made whatever the nature of the manifest injustice or oppression that has has been established, that is, whether it is permanent or temporary and, if it is temporary, whether or not the period of its continuation is capable of precise determination.

415. The proper course to be taken in one situation is simply enough stated. If it has been shown that it would be manifestly unjust or oppressive for the person to be remanded at all to the State or Territory of issue, that is, if the manifest injustice or

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[232] See para 430–3.
[233] See para 407.
[234] ibid.
[235] See *O'Donnell v Heslop* [1910] VLR 162.

oppression is shown to be of a permanent nature, there is no reason for the person's continued detention. As a consequence, the magistrate or justice should order that the person be released.

416. In other situations the magistrate conducting the extradition hearing may be satisfied only that the arguments presented by the apprehended person would render it manifestly unjust or oppressive to order the immediate remand of the person. In some cases it may be possible to determine how long the injustice or oppression will continue, in other words, to affirmatively determine the time when it would be proper for the person to be remanded to the State or Territory of issue. In other cases it may not be possible to reach a determination on that question. To cater for these cases two types of order should be available. First, the magistrate should be able to make a custodial or non-custodial extradition order, but suspend the execution of the order until a later specified date. Second, the magistrate should be able to adjourn the proceedings until a later date at which time the magistrate may then consider whether the injustice or oppression previously shown is still operative.[236] In either case, it should be possible for the apprehended person, or the authorities seeking the person's extradition, to apply for a variation of the order made. The right to apply for variation will, for example, enable a remand order whose execution has been suspended to be activated prior to the date specified in the suspension order if the injustice or oppression ceases to be operative before that date. Alternatively, the apprehended person may be able to lengthen the period of suspension of the remand order if he or she can show that, at the date when the remand order is to be executed, the injustice or oppression previously shown will continue to be operative. Similarly, the right to apply to vary an order adjourning the proceedings will enable changed circumstances of the apprehended person to be considered immediately.

417. A further matter to be considered is the order that should be made concerning the disposition of a person pending the person's remand to the State or Territory of issue of a warrant on a suspended remand order or pending the resumption of the proceedings where they have been adjourned to a later date. In this context, it may be noted that the order envisaged by s 18(6)(e) requires that a person be admitted to bail pending his or her return to the State or Territory of issue. While it may no doubt be appropriate to adopt this course in certain cases, in other cases it may be proper that the person be remanded in custody pending the abatement of the temporary injustice or oppression. Take, for example, a situation where the magistrate is satisfied that, by reason of the ill-health of the apprehended person, it would be manifestly unjust or oppressive for the person to be immediately remanded to the State or Territory of issue. While acknowledging the danger to the person if he or she were to be immediately extradited, the magistrate or justice may nevertheless be of the view that the person

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[236] The power of adjournment recommended here is based on grounds different from those under the general power of adjournment: see para 409. The latter power is merely to assist in the efficient conduct of the extradition proceeding. The former power, in contrast, is to be exercised only where the magistrate is satisfied, after all evidence and argument has been presented, that it would be manifestly unjust or oppressive to make an extradition order that would be immediately operative.

is a dangerous criminal who should not be admitted to bail. In such a case it would be appropriate, whichever of the two orders specified above[237] is made by the magistrate, for the person to be remanded in custody in, for example, a prison hospital. Another situation that may occur is that, whatever the reason for the temporary injustice or oppression, the magistrate or justice may form the view that, pending remand to the State or Territory of issue, the person should be kept in custody for his or her own protection. It is therefore recommended that the magistrate should have a discretion to order that the apprehended person be remanded on bail or in custody pending the execution of the suspended extradition order or the resumption of the proceedings that the magistrate has adjourned under the second option specified above. The basis on which that discretion should be exercised is discussed below.[238]

Review of order made at extradition hearing

Issues

418. While there is no specified avenue for review of an order granting leave to execute a writ of attachment, there are two avenues for review of a magistrate's or justice's decision under s 18(3) or (6) of the Act in relation to a person's return to the State or Territory of issue of a warrant. Two issues arise. The first is whether there should continue to be an avenue for review of an order of a magistrate or justice made on an extradition hearing. The second is as to the nature of that review.

Appropriateness of review mechanism

419. In relation to the first issue, the lack of a specified avenue for review of an order granting leave to execute a writ of attachment should not be accorded undue importance. It can be explained by the difference in nature of the proceedings there involved compared to the administrative nature of proceedings before a magistrate or justice under the warrants scheme.[239] However, it could be suggested that the approach adopted by the Commission, namely, that the procedures on interstate execution of apprehension process should approximate those applicable on the intrastate execution of apprehension process, dictates that no greater review of an order made on an extradition hearing should be permitted than could occur of the order made on the initial hearing after apprehension process has been executed intrastate. In most instances, that would merely involve review of the order as to the disposition of a person pending the commencement of the substantive proceedings against the person, that is, of the decision to remand the person in custody or on bail pending those proceedings. In other instances not involving an allegation that a person had committed an offence, there may in fact be no such initial hearing, as the apprehension process involved may require a person to be apprehended and taken immediately to be dealt with for the matter prompting the issue of the process, for example, to give evidence at proceedings where the person had failed to attend in compliance with a subpoena.

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[237] See para 416.

[238] See para 430–3.

[239] See *Aston v Irvine* (1955) 92 CLR 353.

420. The analogy with intrastate execution of apprehension process cannot, however, be taken too far. In particular, because of the opportunity that an apprehended person is to have to seek release, the matters that may arise for consideration at an extradition hearing exceed the matters that arise on the initial hearing, if indeed any such hearing is held, after intrastate execution of apprehension process. These matters, moreover, concern a person's liability to be remanded to the State or Territory of issue of the process. They are not merely matters that concern the choice of a custodial or non-custodial order for a person's disposition pending the taking of the proceedings with respect to the matters alleged in the process. It is therefore appropriate that there should be specified an avenue for review of the order made by a magistrate or justice at an extradition hearing. The Commission is strengthened in this view by the requirements of s 7(a) of the Law Reform Commission Act 1973 (Cth), which direct the Commission to ensure that its proposals, amongst other things, 'do not unduly make the rights and liberties of citizens dependent upon administrative rather than judicial decisions'. It is true that this requirement could be met by requiring that the extradition hearing be before a court in the first instance. However, a requirement for such a course in all cases would involve an unnecessary use of judicial time. In many instances there will be no circumstances which could lead to the release of a person at the extradition hearing. In those cases a purely administrative order, made after the basic procedural requirements of the provisions have been met, is an appropriate course to secure the appearance of a person in the State or Territory of issue of apprehension process. Therefore, there should continue to be a specific right of review of the magistrate's order made at an extradition hearing, open both to the apprehended person and to the authorities seeking the person's remand to the State or Territory of issue, where either party is dissatisfied with that order. An application for review should, however, be made expeditiously and for that purpose should be made within seven days of the making of the extradition order by the magistrate or justice. The review should be by the Supreme Court, constituted by a single judge, of the State or Territory of apprehension.

Nature of review

421. In view of the fact that the order of a magistrate or justice at an extradition hearing concerns the liberty of a person, the Commission is of the view that, as is the case at present, the avenue for review of an order made at an extradition hearing should enable as complete a review as possible, that is, review by way of rehearing.[240] The type of review contemplated by s 19 of the Act should be retained. The judge conducting the review should have the power to vary or revoke the order made at the extradition hearing and to substitute a new order. There should also be power to stay the execution of the magistrate's order pending the review.

Dual avenues of review

422. It remains to consider whether any provision should be made concerning the right of review under the Administrative Decisions (Judicial Review) Act. As has been

[240] cf Bail Act 1978 (NSW) s 48, which provides for review by the Supreme Court of a bail decision of a magistrate by way of rehearing.

noted, the nature of the review contemplated by s 5 of the Judicial Review Act is more limited than the review permitted under the Service and Execution of Process Act.[241] In that context, there seems little reason for retention of the right of review under the Judicial Review Act. That view gains force from the reported decisions in which review under the Judicial Review Act has been sought. As those cases note,[242] the existence of the right of review under the Service and Execution of Process Act is a matter which the Federal Court is specifically required to consider when considering whether to exercise its discretion, under s 10 of the Judicial Review Act, to review the decision in respect of which review is sought. Moreover the indication given by these cases is that the existence of the right of review under the Service and Execution of Process Act will in most cases justify a refusal to review the decision under the Judicial Review Act. However, the Commission has concluded that review under the Judicial Review Act should necessarily be excluded absolutely. Therefore no change to the existing situation is recommended in this regard.[243]

Ancillary matters

Introduction

423. The recommendations made in the preceding part of this chapter set out the basic framework of the scheme for interstate execution of apprehension process. However, some ancillary procedures of the scheme must be considered, in addition to some of the practical matters which provide substance to its basic framework. These include the following:

- the powers available to apprehend persons named in apprehension process which is sought to be executed under the scheme
- the law applicable to a decision whether to admit a person to bail or to remand a person in custody, both for the purposes of an extradition hearing or review of an order made at an extradition hearing and for the purposes of remand to the State or Territory of issue of apprehension process
- the place of and applicable law in proceedings to enforce bail
- provisions for the keeping of custody of persons remanded in custody to the State or Territory of issue of apprehension process
- the law to be applied should a person escape from custody while being returned to the State or Territory of issue of apprehension process in consequence of a custodial remand order.

Powers to apprehend

424. *Range and usefulness of powers.* There are presently at least two, and in some cases three, avenues to enable the apprehension of a person named in a warrant where the person is found in a State or Territory other than the State or Territory of issue

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[241] See para 361.

[242] See para 363.

[243] See also ARC 26, para 34–6, which notes that, since these decisions, review has not been sought under the Judicial Review Act, but that there is no reason to close this avenue of review.

of the warrant. The first is that available after the warrant has been endorsed for its execution in a different State or Territory. The second is the ability to obtain a provisional warrant for the apprehension of a person in the State or Territory in which the person is found pending the endorsement of the original warrant. The third, available in some States and Territories, is the power provided under the law of those States and Territories for the apprehension of a person reasonably suspected of having committed an offence outside the jurisdiction that would amount to an offence of a certain seriousness if committed within the jurisdiction. In relation to writs of attachment only one avenue for apprehension, equivalent to the endorsement procedure in relation to warrants, is open. This 'formal' opportunity to apprehend a person, although it must ultimately occur in order presently to justify the extradition hearing (or in the case of writs of attachment, the return of the person) would probably be employed in the first instance only if the whereabouts of a person were clearly known and there was no likelihood that the person would move from that location. Rather, the provisional warrant avenue or that available under the law of the State or Territory where the person is located would be the most likely to be employed. Thereafter, the original warrant would be brought from the State or Territory of issue, an endorsement would be made for its execution in the State or Territory of apprehension and it would be executed on the person.

425. *Apprehension on process.* The Commission has recommended that there be no need for apprehension process to be endorsed for execution prior to its execution in a State or Territory different from that of its issue. While this will lessen the formalities to be observed prior to execution of the process, it may not facilitate to any greater degree than is presently the case the apprehension of persons named in apprehension process outside the State or Territory of issue, other than to speed up the process of apprehension where the whereabouts of such persons are known and unlikely to change. It would thus seem necessary to retain the opportunity to obtain provisional apprehension process and to permit the State and Territory laws that enable the apprehension of out-of-State offenders to continue to operate. In relation to provisional process, the only occasion now appropriate for its issue would be that the original process is not available. However, as a consequence of recommendations made elsewhere in this report,[244] it will not be necessary to have the original process when it is sought to execute the process on a person. All that will be required is a facsimile of the process, which for all purposes will be taken to be the original process. With present communications facilities it will be possible in many cases to obtain a facsimile of the process within a short time of a person being identified. It will then be possible to execute the facsimile and to apprehend the person. With this opportunity, it is therefore unnecessary to provide for the issue of provisional apprehension process. The facsimile of the process will be sufficient also for all the purposes for which formerly the original process was required, that is, when the apprehended person is brought before a magistrate or justice for the extradition hearing it will be sufficient if the facsimile of the process is produced to the magistrate or justice.

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[244] See para 717.

426. *Apprehension without process.* However, there will continue to be circumstances where this facility will be ineffective to secure the apprehension of a person. For example, a person the subject of apprehension process may be 'on the run' and, unless facsimiles of the apprehension process were to be sent throughout Australia, it might not prove possible to have the process at hand for the purpose of apprehending the person when he or she is located. Or such a person may be noticed purely by chance, in which case it is unlikely that the process or a facsimile thereof would be available. The federal legislation does not cater for the apprehension of persons in such circumstances, perhaps because of a perceived lack of legislative competence to do so. However, provisions in the laws of certain States and Territories enabling the apprehension of out-of-state offenders have remedied the shortcomings of the Act in this regard. There is clearly an element of cooperation between the States and Territories to be seen in the enactment of these provisions,[245] for they have authorised the apprehension in one State or Territory of persons suspected of having committed offences in other States or Territories. Such co-operation is common in extradition schemes operating in the international sphere, but its necessity in a federation where the federal legislature has been conferred with power to facilitate the interstate execution of process generally seems somewhat anomalous. It also appears undesirable that, to give effectiveness to a scheme established under a power possessed only by the federal Parliament, reliance should be placed upon State and Territory legislation. There is a question, therefore, whether some provision should now be made in federal legislation to cater for the apprehension of persons in circumstances such as those described above.

427. One reason for providing a federal power in this regard is the lack of relevant provisions in all States — Queensland and Tasmania lack such provisions. Another is the limited nature of the powers provided by the State and Territory provisions. That they extend only to the apprehension of persons suspected of having committed offences against the laws of another State or Territory and make no reference to alleged offenders against federal laws is not a shortcoming, for s 8A of the Crimes Act 1914 (Cth) provides the necessary power in that regard. However, the powers do resurrect the notion of double criminality[246] for they are dependent on the acts or omissions which constitute the offence which a person has allegedly committed in another jurisdiction also constituting an offence in the jurisdiction of apprehension. In addition, the powers do not enable all persons whose apprehension has been authorised by the issue of process in a State or Territory to be apprehended if they are found outside that State or Territory. While there are good reasons for limiting powers to apprehend persons where no process authorising their apprehension exists[247] and while in principle it might be said to be preferable that specific written authority be available to be executed on a person at the time of the person's apprehension, failure to provide a power to apprehend persons where process authorising their apprehension, although

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[245] It might also be suggested that, in view of perceived deficiencies in the ambit of federal legislative power, there is an element of cooperation between the States and Territories on the one hand and the Commonwealth on the other.

[246] See para 347.

[247] See eg ALRC 22, vol 2, para 1100–2, particularly the 'Principles Governing the Granting of Powers of Intrusion' and the 'Principles Governing the Exercise of Powers of Intrusion'.

not immediately available at the time of apprehension, does exist can only induce law enforcement officers to seek to bend the law, for example, by the concoction of holding charges. Such power exists in some jurisdictions with respect to persons whose apprehension is authorised by process issued within those jurisdictions.[248] The Commission recommends that there should be similar provision in the new scheme, enabling the apprehension of a person in a State or Territory where process issued in another State or Territory authorising the person's apprehension, or a facimile or copy thereof, is not then in the hands of the officer seeking to effect the person's apprehension. The person should be able to be apprehended by those able to effect apprehension in the State or Territory of issue, by persons in the State or Territory where the person is found who possess similar powers and by police officers in the latter State or Territory.

428. However, it is necessary to consider whether Parliament has sufficient power to so provide. Section 51(xxiv) of the Constitution empowers the making of legislation with respect to the 'execution . . . of the civil and criminal process . . . of the States'.[249] It might be suggested that Parliament has no power under this provision to provide for the apprehension of a person without the execution of the process. However, the power recommended above is one to be exercised only where apprehension process is in existence. Also, the constitutional power has been held to support the actual issue of process where its issue is in aid of the service or execution of State process.[250] Given the hitherto liberal approach by the High Court to the construction of s 51(xxiv), it is likely that the provision of the power of arrest proposed would be upheld on a similar basis, that is, that it is a power given in aid of the execution of process of a State or Territory.

Procedure after apprehension

429. Where a person has been apprehended under the power recommended in the previous paragraphs, the extradition hearing may not be able to commence immediately because the apprehension process may not be available to be produced. Provision must therefore be made for the disposition of the person pending arrival of the process or copy thereof. The existing provisions with respect to the disposition of a person following apprehension on a provisional warrant[251] are an appropriate model on which to base the necessary new provisions. A person apprehended without process should be taken as soon as practicable before a magistrate or justice in the State or Territory of apprehension. If at that time the apprehension process is available and is produced to the magistrate then the extradition hearing should proceed as usual. If the process is not available, but the magistrate is satisfied that apprehension process has been issued in another State or Territory in respect of the person[252] brought before the magistrate, the magistrate should be permitted to adjourn the proceedings and to remand the

[248] See eg Police Offences Act 1953 (SA) s 79(1); Police Act 1898 (WA) s 45; Police Administration Act 1978 (NT) s 124.

[249] As to the classification of process as civil or criminal see *Ammann v Wegener* (1972) 129 CLR 415, 422 (Barwick CJ); cf para 44.

[250] *Ammann v Wegener* (1972) 129 CLR 415.

[251] See para 367.

[252] See para 392 as to identification requirements.

person in custody or on bail pending the arrival of the process or a copy thereof.[253] In order to overcome the ambiguity of the present provision,[254] the magistrate or justice should in all cases be required to specify the period of remand. The period of remand should be a reasonable one. What is reasonable will depend on all the circumstances of the case. A long period of remand, especially if the person is held in custody, would amount to an arbitrary deprivation of the person's liberty[255] and should not be countenanced. In fairness to the apprehended person, in addition to providing some guidance to the magistrate before whom the person is brought, the maximum period for which the person may be remanded should be specified in the legislation. In the present day, the maximum period of remand should not exceed seven days.[256] Such a period is clearly sufficient to enable the apprehension process or a copy thereof to be brought or sent to the State or Territory of apprehension. If, after the period specified in the order of remand has elapsed, the process or copy is not produced when the apprehended person next appears before the magistrate or justice, the person should be released. The person should also be released if, when first brought before the magistrate or justice, he or she is satisfied that the person apprehended is not the person wanted under the process.

Law applicable to decision concerning remand

430. *Issue.* Throughout the previous discussion reference has been made to circumstances where a magistrate, or judge on review, is to make an order regarding the remand of a person. These include remand for the purposes of the extradition hearing or review of the order made at the extradition hearing, remand pending the execution of a suspended extradition order or the resumption of the proceedings after an adjournment for the period of continued operation of injustice or oppression and remand to the State or Territory of issue of the apprehension process concerned. In only one case, that under s 18(5) of the Act, is the law applicable to that decision presently specified.[257] While in those cases where no applicable law is specified it could be expected that the officer called upon to determine the type of remand order would do so by reference to the law of the State or Territory where the officer is sitting, clarity and certainty in the law require that the applicable law be specified in all cases. Three possibilities are open as to the law that should be applicable: the law of the State or Territory where the officer is sitting; the law of the State or Territory of issue of the apprehension process with which the proceedings are concerned; or criteria prescribed by federal legislation. In this regard it should be noted that the ICCPR, with which the recommendations of the Commission are required, as far as practicable, to be consistent, specifies that persons awaiting trial are to enjoy certain rights. Of greatest relevance in the present context is art 9(3), the second sentence of which states

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[253] The law applicable to the determination of custodial or non-custodial remand is discussed at para 430–3.

[254] See para 368.

[255] See ICCPR art 9(1).

[256] cf Crimes Act 1900 (NSW) s 352B; Crimes Act 1900 (NSW) in its application to the Australian Capital Territory s 352B; Police Offences Act 1953 (SA) s 78b.

[257] But note the possible effect of the Judiciary Act 1903 (Cth) s 68(1) in relation to certain federal offenders: see para 335, n 51.

> It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial [or] at any other stage of the judicial proceedings . . .

431. *Recommendation.* There is no general federal law on the subject of bail or the criteria which should guide a court's decision whether to remand a person in custody or on bail pending the continuance of proceedings against the person. If the 'federal' course were to be adopted, there would thus be a need to develop such criteria, as well as the conditions to which a grant of bail might be made subject. In the research paper dealing with Part III of the Service and Execution of Process Act,[258] it was tentatively suggested that such federal criteria and conditions should be developed based on the recommendations concerning 'police bail' made in an earlier report of this Commission, *Criminal Investigation.*[259] On further consideration, however, the Commission has come to the view that it is not necessary to establish federal procedures in this regard. Such provisions would be necessary if the laws of some or all of the States and Territories did not provide an opportunity for persons to obtain non-custodial remand on the adjournment of the proceedings against them. However, the laws of all the States and Territories provide this opportunity, that is, they establish no general rule that persons awaiting trial be detained in custody.[260] In some States and Territories where specific bail laws are in force, the criteria and conditions relevant to bail appear to be modelled on the recommendations made in the Commission's *Criminal Investigation* report. And while some laws require that persons charged with certain particularly serious offences positively establish good cause for their release on bail[261] — a reversal of the onus of proof to the applicant for bail rather than the authorities seeking to resist the granting of bail — the Commission does not consider that such a restriction on the opportunity to obtain bail necessitates the promulgation of federal bail rules to apply in all cases.

432. Therefore the choice of the applicable law is between that of the State or Territory of issue of the apprehension process concerned or the State or Territory of apprehension. While in theory at present the law of the State or Territory of issue may be the applicable law in the limited circumstances of alleged federal offenders noted above,[262] to require that law to be applied in all cases would be to impose an onerous task on those required to make a decision concerning the remand of a person. It would require them to obtain a working knowledge of the relevant laws of all the various jurisdictions of the federation. In view of the fact that all State and Territory laws provide appropriate opportunities for a person to obtain bail, the simplest course is to permit those required to make decisions concerning the remand of persons under the scheme to do so under the law with which they will be familiar. Therefore the Commission

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[258] See Young 1984c, para 102–5.

[259] See ALRC 2, para 178–85.

[260] In some cases there is a presumption in favour of the grant of bail (eg Bail Act 1978 (NSW)) while in others there is a right to make application for bail (eg Bail Act 1982 (WA)).

[261] eg Bail Act 1977 (Vic) s 4(4)(a).

[262] See para 335, n 51.

recommends that in all cases[263] a decision concerning the custodial or non-custodial remand of a person under the scheme be governed by the law of the State or Territory where the officer required to make the decision is sitting, that is, the State or Territory where the person has been apprehended.

433. *Proviso.* One proviso should be noted however. This regards discriminatory provisions in the bail laws of certain States. For example, s 4(4)(b) of the Bail Act 1977 (Vic) and s 16(3)(b) of the Bail Act 1980 (Qld) prescribe that a person shall not be granted bail if the person is charged with an indictable offence and the person is not ordinarily resident in Victoria or Queensland respectively, unless the person can show cause why bail should be granted. The Queensland provision has been held to be invalid by reason of s 117 of the Constitution.[264] The Commission considers that a similar conclusion is plain in relation to the Victorian provision. While the law of the State or Territory of apprehension is to be applied in respect of decisions concerning the disposition of persons on an adjournment of proceedings or the remand of persons, these provisions therefore will have no application.

434. *Procedure.* One procedural matter should also be noted. In many of the bail laws of the States and Territories there is a requirement that, on the granting of bail, a bail agreement or undertaking be prepared, signed by the person and a copy given to the person.[265] This sets out the terms on which bail is granted, the basic condition of which is to appear as directed at the subsequent proceedings, and any other conditions to which the grant of bail is subject. The application of the various State and Territory bail laws will result in such agreements or undertakings being prepared where a person apprehended under the scheme is granted bail on an adjournment or remand. Special provision should be made, however, for the preparation of such an instrument where the person is remanded on bail to appear in the State or Territory of issue of the apprehension process and for the transmission of the instrument to the relevant authorities in that State or Territory. This will facilitate the enforcement of bail or other relevant proceedings should the conditions of bail not be complied with.[266] If the person to whom bail has been granted refuses to sign the instrument or fails to comply with a condition precedent to release on bail, the order granting bail to the person should be revoked and another order, remanding the person in custody to the State or Territory of issue, should be made.

Proceedings for enforcement of bail

435. *Location of proceedings and applicable law.* Section 19B of the Act places the responsibility for enforcement of bail undertakings and forfeiture of recognisances with the courts and relevant authorities in the State or Territory in which the person was admitted to bail, that is, the State or Territory of apprehension, yet provides that all money recovered be transmitted to the Attorney-General of the State of issue of the original process, or to the Attorney-General of the Commonwealth if the process was

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[263] The possible present effect of s 68(1) of the Judiciary Act 1903 (Cth) will thus be reversed.
[264] *Re Loubie* (1985) 62 ALR 139 (Sup Ct Qld, Dowsett J).
[265] eg Bail Act 1982 (WA) s 28; Bail Act 1980 (Qld) s 11; Bail Act 1982 (NT) s 25.
[266] See para 435–6 for further recommendations in this regard.

issued in a Territory. This seems anomalous in two respects. First, a responsibility is imposed upon the authorities of the State or Territory of apprehension yet they are unable to reap any of the 'rewards' that may flow from enforcement of the bail conditions. Second, these authorities are made responsible for enforcement of bail that may have been breached only by the failure to appear in the State or Territory of issue of the apprehension process. Certain shortcomings in the provision have also been noted.[267] The Commission considers that responsibility for enforcement of bail, and any related matters, should be reposed in the relevant authorities of the State or Territory where the person was remanded to appear. After all, it is primarily to the judicial administrations of that State or Territory that 'abuse' has been shown if the conditions of the bail undertaking are breached. Therefore, the Commission recommends that the place where proceedings related to enforcement of the bail undertaking should be taken is the State or Territory where the person has been remanded to appear. Thus if a person breaches a condition to which a grant of bail was subject on the adjournment of any proceedings in the State or Territory of apprehension, the authorities in that State or Territory should have the carriage of any proceedings related to that breach. Such proceedings will be taken under the relevant law of that State or Territory. On the other hand, if a person breaches a condition of bail granted on the person's remand to the State or Territory of issue of the apprehension process, the relevant authorities of that State or Territory should be responsible for taking any proceedings related to that breach. The transmission of the instrument setting out the conditions to which the grant of bail was subject to the relevant authorities in that State or Territory[268] will facilitate the taking of those proceedings. The law to be applied in those proceedings should be the law of that State or Territory. However, without special provision, there would be no power to take enforcement proceedings under that law in relation to bail granted in another State or Territory. Therefore, there should be a provision to the effect that that law is to apply in relation to enforcement of bail notwithstanding that bail was granted under the law of another State or Territory. In addition, the present limitation on the taking of proceedings for the recovery of sums forfeited under bail conditions — s 19B(2) presently limits such proceedings to those against persons resident in the State or Territory in which the recovery proceedings are sought to be taken — should be abolished, for there is no reason why recovery should not be permitted against any person, wherever resident, who has given security for compliance by the apprehended person with bail conditions.

436. *Allocation of property recovered in enforcement proceedings.* It follows, on the basis that it is to the authorities of the State or Territory where a person has been bailed to appear that 'abuse' has been shown where the conditions of bail are breached, that any 'rewards' from proceedings taken in relation to bail should be retained by that State or Territory. Thus proceeds recovered in proceedings to enforce securities given for compliance with bail conditions should be retained by the State or Territory in which the proceedings are taken, that is, the State or Territory in which the person was bailed to appear. To cater for cases where money or other property has been deposited as security for compliance with a bail undertaking given on the remand of

[267] See para 371.
[268] See para 434.

a person to the State or Territory of issue of apprehension process, there should in addition be provision for the transfer of that sum of money or other property to the relevant authorities in that State or Territory.

Custodial matters

437. *Custody during transit.* The Act presently contains no provisions dealing with the steps that may be taken by persons having custody of a person for the purposes of the custodial remand of the person to the State or Territory of issue of apprehension process. In relation to the execution of writs of attachment, it is merely provided that, after leave for execution has been given, the person may be apprehended and brought before the court of issue of the writ, that is, the court in the State or Territory of issue. Under the warrants scheme a magistrate may by warrant order the custodial remand of a person to the State or Territory of issue of the original warrant and, for that purpose, the person's delivery into the custody of the officer who brought the original warrant or any other person to whom the original warrant was directed. While both provisions no doubt empower the person having immediate custody of a person to take whatever steps are necessary in order to return the person to the State or Territory of issue, they do not provide any authority for any other authorities to assume custody of the person for the purposes of the journey to that State or Territory. For example, it may be necessary for the return journey to be conducted over more than one day and in that case it would be necessary for the apprehended person to be accommodated in a gaol or police cell overnight. Those in charge of such places, however, have no specific authority to assume custody of the person for that purpose. These deficiencies should be remedied. The person having the custody of an apprehended person under a custodial extradition order should have power to request the relevant authorities in States or Territories through which passage is necessary to assume custody of the apprehended person and to relinquish custody when requested and those authorities should have authority to comply with those requests.

438. *Escape.* The Act is also presently deficient in that no provision is made for dealing with a person who, while under a custodial order remanding the person to the State or Territory of issue, escapes from the custody of the officers into whose custody the person has been placed for that purpose or officers who may assume custody of the person during the journey. This situation has been discussed in the context of the production of persons under lawful restraint for the purpose of giving evidence in proceedings in other States or Territories[269] and the recommendations there made should apply generally here also. However, rather than proceedings in relation to an escape being taken in the State or Territory from which the person has come, in this context such proceedings should be taken in the State or Territory to which the person was being taken, that is, the State or Territory of issue of the apprehension process.

Persons returned in custody for purpose of giving evidence

439. The scheme discussed in this chapter will cover all types of apprehension process and all purposes for which such process may be issued. One such purpose is the

[269] See para 319.

apprehension of a person who has failed to comply with a subpoena. Apprehension process may be issued and then executed under the scheme for the purpose of compelling the attendance of a person to give evidence at proceedings in the State or Territory of issue. In some cases a warrant may be issued without there first being a subpoena served on the person. Such apprehension process may be issued in relation to proceedings in courts and in tribunals that are not courts and, under recommendations noted previously,[270] all such apprehension process will be capable of execution under the scheme. Where a person has, after apprehension, been taken in custody to the State or Territory of issue, the person will be produced at the proceedings. However, it may be that the person is required to remain in custody for some time until giving evidence. This may particularly be so where the process has been issued in relation to proceedings in a tribunal which is undertaking a wide ranging investigation into a matter, for many such investigative exercises may continue for some months, if not longer. The Commission is concerned that a person subject to apprehension process issued for this purpose should not be detained in custody for any longer than is absolutely necessary in order to secure the attendance of the person to give evidence. Therefore, it is recommended that a person taken in custody on such process to the State or Territory of issue should have a right to apply for release from custody. Such application should be made to the court of issue of the apprehension process or, if the process was not issued by a court, the Supreme Court of the State or Territory of issue of the process. The court should be permitted to order the release of the person if it is satisfied that the person has been in custody for an unnecessarily long time or that it is not necessary that the person remain in custody for the purpose of securing the person's attendance at the proceedings in which the person is required to give evidence.

Suppression orders in extradition hearings

440. *Issue.* The Commission was requested[271] to provide a power for a magistrate conducting an extradition hearing to make an order, commonly known as a suppression order, forbidding the publication of some or all of the evidence adduced at the hearing or the names of the persons involved. Such a power or a variant — a power to exclude persons from proceedings — is available in many jurisdictions in certain proceedings.[272] However, because of the terms of some of the relevant State and Territory legislation, those powers are not available in extradition hearings. The grounds which may justify the making of such orders vary widely from jurisdiction to jurisdiction and include matters as diverse as concerns that publication of certain information may prejudice the trial of a person for an offence and or may cause hardship to parties or witnesses involved in proceedings. The Commission has reservations about whether such a broad range of matters should be applicable to a power to order suppression of material disclosed in extradition hearings. Moreover, an adequate assessment of whether such a wide range of matters should be included in any power to order suppression would require a wide ranging examination of matters outside the Commission's Terms of Reference.

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[270] See para 386–7.

[271] Submission in confidence.

[272] See ALRC DP 26, para 42.

441. *Limited power recommended.* However after thorough investigation the Commission, in a recent report, *Contempt*,[273] has recommended that there should be a limited power for courts and other bodies taking evidence in public to make suppression orders postponing the publication of material disclosed in the proceedings for the purposes of limiting potential influence on a jury in the trial of a person for an offence. To the extent that those considerations are relevant in the context of extradition hearings, it is recommended that there should be a power to make similar orders in extradition hearings and review proceedings.[274]

442. *Grounds for suppression order.* The purpose of a such suppression order should be to eliminate, where necessary, the possibility that a jury subsequently empanelled in the trial of a person for an indictable offence would be influenced by the publication of information disclosed in extradition proceedings. Primarily, the possibility of influence will arise in relation to the person whose extradition is sought, but it may be that juries in other trials could be influenced by the publication of certain information disclosed at an extradition hearing. For example, the person liable to extradition may be a potential witness in proceedings for the prosecution of another person. It may, therefore, be necessary for a suppression order to be made in respect of information disclosed at an extradition hearing concerning the witness, but the person to 'benefit' from the order will be the person awaiting trial. A mere possibility of influence, however, should not be sufficient to enable a suppression order to be made. The power to make a suppression order should arise only where a magistrate, or judge on review, is satisfied that the publication of the information would give rise to a substantial risk that the fair trial of a person on an offence triable by jury would be prejudiced by virtue of the influence that the publication might exert on the jurors.[275] Consonant with the recommendations made in the *Contempt* report, it is also recommended that, where a suppression order is made on that basis, the magistrate, or judge on review, should not be able to exercise any other, more general, power otherwise possessed to prohibit or postpone reporting of the extradition hearing or proceeding on review.[276]

443. *Material to which suppression order may relate.* The information capable of influencing jurors may include evidence presented at the extradition hearing, an address by an apprehended person or the person's representative or by the representative of the authorities seeking the person's extradition, or a finding made by a magistrate, or judge on review, in the proceedings. A suppression order should be capable of covering any part of the proceedings on the extradition hearing or review.

444. *Duration of suppression order.* In view of the purpose of a suppression order, that is, to eliminate a substantial risk of prejudice to the trial of a person for an offence triable by a jury, a suppression order should continue in operation only while that risk continues. Therefore, a suppression order made in an extradition hearing, or

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[273] See ALRC 35, para 300.

[274] See id, para 273–8 for discussion of the existing law and para 296–328 for discussion of the reasons for the reforms there recommended.

[275] id, para 300, 324.

[276] id, para 325.

proceedings on review, should continue in operation only until the person subjected to the risk of prejudice in his or her trial has been discharged, a guilty plea by the person has been accepted, the jury gives its verdict or the prosecution is discontinued by the entering of a 'no bill' or otherwise.[277] It follows that, where the suppression order has been made for the 'benefit' of the person liable to extradition, the order should cease to have effect if the person is released, that is, not extradited, for the release of the person effectively terminates the proceedings against the person in the State or Territory of issue of the apprehension process concerned. However, in the case of release ordered by a magistrate, the suppression order should continue in force until the time for making an application for review of the order has expired, that is, until seven days after the making of the order.

445. *Area of operation of suppression order.* The basis of a suppression order being the concern that the jury trial of a person for an offence may be substantially prejudiced by the publication of information disclosed at an extradition hearing, or proceeding on review, it may be necessary to prohibit publication of that information only in the area from which jurors in the trial will be drawn. On the other hand, in view of advanced means of communication and networking of the information media, publication in an area other than that area may well result in the information becoming known to persons in that area. To cater for all possible circumstances, the magistrate, or judge on review, should possess power to prescribe whether a suppression order is to operate only in certain States or Territories or throughout the Commonwealth.

446. *Obtaining a suppression order.* The circumstances in which it may be desirable that a suppression order be made will no doubt vary widely. It is therefore necessary that the procedure for obtaining suppression orders permit all persons involved in extradition proceedings to apply for such orders. This would include the parties, namely, the apprehended person and the authorities seeking extradition, and also witnesses in the extradition hearing or the proceedings on review. Also, any person who satisfies the magistrate, or judge on review, that the person has a special interest in the question whether a suppression order should be made should be permitted to apply for an order.[278] The magistrate, or judge on review, should also be permitted to make a suppression order of his or her own motion where satisfied that the grounds for the making of the order exist.

447. *Procedure on application.* Where an application has been made for a suppression order, or the magistrate or judge intimates an intention to make an order, any of the persons who may apply for an order should be permitted to be heard on the question whether the order should be made. In addition, accredited journalists and publishing organisations should have a right to be heard on the question whether a suppression order should be made.[279] Pending consideration of submissions on that question, the magistrate or judge should have power to make an interim suppression order.

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[277] id, para 297.
[278] See ALRC 27, para 252–8.
[279] ALRC 35, para 488.

448. *Variation and revocation of suppression orders.* All the persons who have a right to apply for a suppression order should also have a right to apply to the magistrate or judge for the variation or revocation of a suppression order made in an extradition hearing or proceedings on review. In addition, a magistrate or court conducting the committal proceedings or the trial of the person for whose benefit the order was made should be able to vary or revoke the suppression order.

449. *Appeals.* An avenue for appeal against a decision concerning a suppression order, that is, a decision to make or to refuse to make, or a decision to vary or revoke or not to vary or revoke, a suppression order should also be provided. An appeal should be permitted to be brought by any of the persons who may apply for an order. In the case of a decision made by a magistrate, the appeal should be made to the Supreme Court, constituted by a single judge, of the State or Territory in which the decision was made. If the suppression order was made by a Supreme Court judge on the review of the extradition order, the appeal should be made to the court to which appeals from decisions of the court in civil proceedings are ordinarily taken. On appeal, the appellate court should be permitted to confirm, vary or revoke the suppression order and to substitute its own decision for the decision previously made.[280]

450. *Breach of suppression orders.* A breach of a suppression order, that is, a publication of the information specified in the order, should constitute an offence.[281] The ordinary procedures for prosecution of federal offences should apply.[282] It should be a defence to a prosecution for an offence of breaching a suppression order that the publication was made 'innocently'. That is, while the onus should lie on the publisher to take reasonable steps to discover whether there is a suppression order and its terms, there should not be strict liability. If such reasonable steps are taken, there should be no liability in the absence of knowledge of the order.[283]

Related matters

Enforcement of fines

451. Finally, note should be made of certain matters that relate to the operation of the scheme for the interstate execution of apprehension process. The first concerns the operation of Part IVA of the Service and Execution of Process Act. This provides for the enforcement of fines imposed by courts of summary jurisdiction by the imprisonment of persons failing to pay them. This aspect of the Act was specifically excluded from the Terms of Reference. The facilities provided by Part IVA of the Act do not create an exclusive scheme for the enforcement of fines.[284] The Commission does not propose any change in this regard. Thus enforcement of fines through the imprisonment of a person

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[280] id, para 489.
[281] id, para 490.
[282] id, para 491.
[283] id, para 263.
[284] See s 26R of the Act.

for non-payment will continue to be open either under the procedures established in Part IVA or through the execution interstate of apprehension process under the scheme proposed in this chapter.

Parole orders transfer

452. The scheme for interstate execution of apprehension process will also continue to apply in respect of process issued in relation to breaches of probation or parole orders. However, it may be that the need for interstate execution of apprehension process issued in such cases will diminish in view of the recent implementation of a uniform parole order transfer scheme between the States and Territories.[285]

Prisoners interstate transfer

453. *Introduction.* In contrast to these two minor matters, a matter of some importance is the relation between the proposed new scheme for interstate execution of apprehension process and the scheme recently established by uniform State and Northern Territory legislation which facilitates, amongst other things, the transfer of persons imprisoned in a State or the Northern Territory for offences against the laws of that State or Territory (the place of imprisonment) to another State or the Northern Territory for the purpose of standing trial for offences against the laws of that other State or Territory (the place of prosecution).[286] There is also complementary federal legislation which provides for the transfer of persons imprisoned in a State or any Territory for offences against federal laws or laws of certain Territories[287] to another State or Territory for the purpose of standing trial for offences against federal laws or laws of that other State or Territory.

454. *Uniform State and Northern Territory legislation.* The uniform State and Northern Territory legislation[288] requires as a precondition to the transfer of a prisoner that he or she be the subject of an arrest warrant issued in accordance with the law of the State of prosecution.[289] An 'arrest warrant' is

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[285] For an example of the legislation see Parole Orders (Transfer) Act 1983 (NSW).

[286] Prisoners (Interstate Transfer) Act 1982 (NSW); 1982 (Qld); 1982 (SA); 1982 (Tas); 1983 (NT); 1983 (Vic); 1983 (WA). These Acts also provide for transfers of prisoners for compassionate reasons, but this aspect is irrelevant for present purposes.

[287] The Australian Capital Territory, Norfolk Island, Christmas Island and the Cocos (Keeling) Islands: see Transfer of Prisoners Act 1983 (Cth) s 3(1), definition of 'Territory'.

[288] For convenience reference shall be made to the New South Wales Act, the other legislation being in like terms.

[289] Prisoners (Interstate Transfer) Act 1982 (NSW) s 12(1).

a warrant to apprehend, a warrant to arrest or a warrant to commit a person to prison, but does not include —

(a) such a warrant, where the term which the person to be apprehended, arrested or committed under the warrant is liable to serve is default imprisonment[290]; or

(b) a warrant to secure the attendance of a witness.[291]

Once this precondition exists, a procedure combining the exercise of ministerial and judicial discretions (the precise terms of which are not at present relevant) is provided whereby a prisoner may be transferred from the State of imprisonment to the State of prosecution.

455. *Possible inconsistency.* An issue arises as to whether this legislation can co-exist with the existing interstate warrants scheme or the scheme proposed in this chapter. There was clearly some consideration of the the question of the operation of the transfer scheme in relation to the existing warrants scheme, for matters regarding default imprisonment and transfers of prisoners for the purpose of giving evidence are excluded from the uniform scheme[292] and are dealt with in Part IVA and s 16A[293] respectively of the Service and Execution of Process Act. However the uniform transfer scheme may nevertheless be thought to be inconsistent with the interstate warrants scheme. This possible inconsistency arises because the federal scheme does not limit the interstate execution of a warrant by reference to the status of the person the subject of a warrant, that is, the federal scheme would in terms apply to warrants seeking the apprehension of persons who are prisoners. It is true that a convention has existed which postpones any attempt to execute a warrant under the federal scheme where the subject of the warrant is a prisoner, but that convention cannot affect the terms of the federal scheme. And while there is no explicit expression of intention in the Service and Execution of Process Act that the federal scheme is to exclude the operation of State laws, it might be argued that the federal Act covers the field in relation to the removal of persons from one State or Territory to another under warrants for apprehension issued in accordance with State or Territory law. As the warrants with which the uniform State and Northern Territory scheme is concerned are also warrants requiring the apprehension of persons, albeit that they are at the relevant time prisoners in a State or Territory, it could be argued that the uniform State and Northern Territory laws are rendered invalid (inoperative), by virtue of s 109 of the Constitution, so far as they relate to transfer for the purposes of prosecution of prisoners.

456. *Response to possible inconsistency.* While there may be some benefit in there being a single law on the subject of interstate execution of apprehension process, it is recognised that the circumstances of interstate execution of such process on persons

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[290] 'Default imprisonment' means imprisonment in default of —

(a) payment of any fine, penalty, costs or other sum of money of any kind ordered to be paid by any court, judge or justice; or

(b) entering into a recognizance to keep the peace or to be of good behaviour.

[291] Prisoners (Interstate Transfer) Act 1982 (NSW) s 5(1).

[292] See the exclusions in para (a) and (b) of the definition of 'arrest warrant' reproduced above.

[293] See para 291–2 regarding the validity of s 16A.

who are prisoners requires special provisions to ensure that their interstate transfer is carried out in an orderly and appropriate fashion. In addition, the uniform legislation addresses questions concerning the priority of sentences imposed in the State of imprisonment and the State of prosecution and provides certain benefits to prisoners by permitting sentences imposed in different jurisdictions to be served in one place and, in some cases, concurrently.[294] These matters having been settled between the States and complementary federal legislation having been enacted also,[295] they should be permitted to continue to operate. Therefore it is recommended that the operation of the uniform scheme should be specifically preserved, lest there be some basis for the argument regarding inconsistency, by a provision to that effect in the legislation establishing the scheme proposed in this chapter.

457. *Co-operation of States and Northern Territory sought.* However, in the light of these proposals, the Commission believes that some consideration should be given by the States and the Northern Territory to the modification of their legislation where different standards are imposed by the uniform legislation and the proposed scheme in respect of the same matters. One such area is in the grounds upon which a prisoner may seek to resist transfer to the State of prosecution. These include

> that it would be harsh or oppressive or not in the interests of justice to transfer the prisoner . . . or that the trivial nature of the charge or complaint against the prisoner does not warrant the transfer . . .[296]

While these grounds resemble the present grounds available in s 18(6) of the Act, they are not in the same terms. Similarly, they do not correspond to the grounds for release proposed by the Commission.[297] Another area for possible modification concerns the prerequisites to the making of an order for the transfer of a prisoner. Both the present scheme for interstate execution of warrants and the proposed scheme operate without any necessity for executive decision making. In contrast, the uniform State and Northern Territory scheme depends upon executive decisions whether to request and to consent to a transfer.[298] The necessity for such decision making, however, is readily understandable by the need to provide for the orderly handling of interstate transfers of prisoners. However, those executive decisions overshadow opportunities for a challenge to the validity of the process on which a request for transfer is based. An arrest warrant must have been issued in the State of prosecution before the Attorney-General of that State may request the transfer of a prisoner detained in the State of imprisonment. The Attorney-General of that State must then consent to the transfer before further steps may be taken to effect that transfer. Those steps require an application to an inferior court for an order for the prisoner's transfer. While there is thus the necessity for a judicial order to effect a transfer of a prisoner, the court is required, subject to any arguments that the prisoner may raise in seeking to resist transfer, to order the transfer if satisfied that the required executive consents have been given.[299] The legis-

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[294] See Prisoners (Interstate Transfer) Act 1982 (NSW) s 27.
[295] Transfer of Prisoners Act 1983 (Cth).
[296] Prisoners (Interstate Transfer) Act 1982 (NSW) s 15(b).
[297] See para 406.
[298] Prisoners (Interstate Transfer) Act 1982 (NSW) s 12, 13.
[299] Prisoners (Interstate Transfer) Act 1982 (NSW) s 14(1), 15(a).

lation does not even require that the arrest warrant should be produced to the court to which the application for transfer is made and the court has no opportunity to peruse the arrest warrant. The Commission recommends that the Commonwealth approach the States and the Northern Territory with a view to securing amendments to their legislation to render the grounds on which a prisoner may seek to resist transfer the same as those on which a person apprehended under the proposed scheme may seek to obtain release and to provide that an arrest warrant that is the basis of a request and consent to the transfer of a prisoner at least be produced to the court which is asked to make a transfer order in order that it may be satisfied that the warrant is valid on its face.

458. *Federal transfer legislation.* The Transfer of Prisoners Act 1983 (Cth) provides a complementary scheme of prisoner transfer within the field of federal competence.[300] The operation of this legislation should also be preserved in legislation implementing the Commission's proposals for the new scheme for interstate execution of apprehension process.[301] However, the Commission recommends that the federal transfer legislation should be amended to bring it into line with these proposals. For that purpose, s 10(4) of the federal legislation should be amended to make the grounds on which a prisoner may resist transfer the same as those on which a person apprehended under the proposed scheme may seek to obtain release.

Other process

459. A comment should also be made regarding other warrants. The Commission has made no proposals that would enable other warrants, such as search warrants, to be executed interstate. The reason for this is simply that the Standing Committee of Attorneys-General has reached agreement on a scheme of uniform legislation in the States and Territories providing for the issue and execution of search warrants in one jurisdiction to assist criminal investigations in another jurisdiction.[302] There is thus no reason for federal law to provide for interstate execution of search warrants.

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[300] See Transfer of Prisoners Act 1983 (Cth) s 8(1), 9(1) for the ambit of the federal law.

[301] The federal transfer legislation already preserves the operation of the scheme established under the Service and Execution of Process Act: see Transfer of Prisoners Act 1983 (Cth) s 30(b).

[302] See (1984) 9 *Commonwealth Record* 329. For an example of the legislation see Crimes (Amendment) Ordinance 1984 (ACT), inserting a new Division 2 in Part X of the Crimes Act 1900 (NSW) in its application to the Australian Capital Territory.

7. Judgments

Introduction

460. In addition to the power to make laws for the Australia-wide service and execution of process, Parliament is authorised by s 51(xxiv) of the Constitution to provide for the execution throughout the Commonwealth of the judgments of the courts of the States. The relevant provisions are found in Parts IV and IVA of the Act. The former deals with the enforcement of civil judgments and the latter with the enforcement of fines imposed by courts of summary jurisdiction. Only Part IV will be considered in this report as the subject of enforcement of fines is excluded from the Commission's Terms of Reference.

Existing law

The procedure of enforcement

Ambit

461. Part IV applies to a judgment given in a suit by any Court of Record[1] of any State or part of the Commonwealth. A 'judgment' is defined in s 3 as follows:

> "judgment" includes any judgment, decree, rule or order given or made by a court in any suit whereby any sum of money is made payable or any person is required to do or not to do any act or thing other than the payment of money.

The judgment must be given in a 'suit', a term also defined in s 3.[2] For the purposes of Part IV the term, in addition to ordinary civil proceedings, includes maintenance and affiliation proceedings.

462. In *Winchcombe v Winchcombe*[3] it was held that an order for weekly maintenance was not within the definition of 'judgment', on the basis that the definition required that the judgment be final and that the exact sum owing be clearly ascertainable by the court in which execution was sought. The definition, however, does not stipulate that a judgment must satisfy such criteria and this decision may be criticised for reading words into the legislation which are not expressly included and which are not necessary for its operation.

463. The definition of 'judgment' expressly includes orders decreeing equitable relief. However in one case it was suggested that a judgment for specific performance could not

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[1] See para 78 as to the term 'Court of Record'.
[2] See para 75 for the text of the definition.
[3] [1955] QWN 16, 25 (Mansfield SPJ).

be enforced outside the place of rendition[4] under the Act.[5] While this may have been confined to the circumstances of the case where there was doubt as to whether the court possessed jurisdiction, to the extent that it was intended as a general pronouncement it is clearly inconsistent with the definition of 'judgment' and with other provisions of the Act, such as s 23(b) and (c), which show beyond doubt that the Act extends to judgments in the nature of an injunction or order for specific performance.

Registration

464. At common law a judgment could be enforced ouside the place of rendition only by instituting a new action in the forum in which enforcement was sought on the foreign judgment which was treated as creating a debt.[6] In contrast the Act provides for the enforcement of a judgment ouside the place of rendition by a simple process of registration. A judgment creditor can obtain a brief certificate of judgment[7] from the rendering court[8] and, upon production of the certificate to a court of like jurisdiction in another State or Territory, the certificate is registered there in a book called The Australian Register of Judgments.[9] Upon registration, the judgment can be enforced in the same way (including by the taking of proceedings in bankruptcy or insolvency) as a local judgment given by the court of registration.[10] In a number of States the judges of the Supreme Courts, under the authority of s 27 of the Act, have made rules in connection with the practice and procedure of the execution and enforcement of sister-State or territorial judgments under the Act.[11]

465. By s 21(1)(a) a certificate of judgment must be registered in a court of like jurisdiction. These are specified in s 22.

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[4] This term describes the State or Territory in which a judgment has been given or made.

[5] *Jackman v Broadbent* [1931] SASR 82.

[6] See Sykes & Pryles 1987, 101–2.

[7] The form of the certificate set out in the Third Schedule to the Act requires that it disclose the court which rendered the judgment, the title of suit and date of commencement, the form or nature of suit, the name of the judgment creditor, the name of the judgment debtor, the date of judgment, an abstract of the judgment stating the amount ordered to be paid, the rate of interest payable thereon and the date from which it is payable, or the particulars of any act ordered to be done or not to be done, the date of trial and the amount of verdict if any. The certificate must be signed and dated by the prothonotary, registrar or other proper officer of the rendering court.

[8] s 20.

[9] s 21(1).

[10] s 21(2).

[11] eg see O 81B, r 12–17 of the Rules of the Supreme Court of Western Australia; and the rules made by the Judges of the Supreme Court of South Australia under the Service and Execution of Process Act dated 19 April 1917, 4 November 1937 and 5 June 1981.

For the purposes of the last preceding section —

(a) the Supreme Courts of the several States and parts of the Commonwealth are Courts of like jurisdiction to one another;

(b) the District Courts, County Courts and other Courts of Record of the several States and parts of the Commonwealth having limited civil jurisdiction (other than Courts referred to in the next succeeding paragraph) are Courts of like jurisdiction to one another; and

(c) the Small Debts Courts, Courts of Petty Sessions and other Courts of Record of the several States and parts of the Commonwealth having civil jurisdiction to hear and determine suits in a summary way are Courts of like jurisdiction to one another.

If there is no court of like jurisdiction then s 21(1)(b) provides that a certificate of judgment is to be registered in 'a District or County Court or other inferior Court of Record having civil jurisdiction in such State or part'. Problems have arisen where the inferior court in the State of registration possesses a lower monetary limit of jurisdiction than the amount of the judgment debt. For example in *Good v Johnson*[12] a judgment was obtained in the Local Court of Adelaide for seven hundred and seventy-four pounds six shillings and 10 pence including costs. The judgment creditors sought to enforce the judgment in Queensland. The Registrar of the Magistrates Court in Queensland refused to register the judgment because the amount thereof exceeded the jurisdictional limit of the Court. Registration was then sought in the Supreme Court of Queensland. It would be doing some violence to the wording of s 21(1)(b) to hold that the Supreme Court of Queensland was an 'inferior Court of Record'. Acting Justice Stable avoided this problem by holding that the Local Court of Adelaide was 'a court of like jurisdiction' to the Supreme Court of Queensland within the meaning of s 21(1)(a) and 22 of the Act. However, a contrary result was reached in *Vischer v McMahon*,[13] where it was held that provisions of State or Territory law which impose monetary limits on the jurisdiction of courts to hear and determine actions and enter judgment are irrelevant to the question of the court in which a certificate of judgment should be registered under the Act, for it says nothing about monetery limits of courts in specifying the court in which registration should be made. The reasoning in this case seems preferable to *Good v Johnson* but the two decisions together indicate the apparent confusion that can result from the provisions as presently enacted.

466. The terms of s 21(1), namely, that upon production of the certificate of judgment the proper officer 'shall forthwith register the same', suggest that there is an obligation to register a certificate that is proper on its face. This interpretation was confirmed in *Ex parte Penglase*,[14] it being held that the officer to whom the certificate was produced had no discretion to refuse to register a proper certificate. It was noted, however, that there was a 'safety valve' by which a judgment debtor could counter enforcement proceedings on an invalid judgment, namely, s 25 of the Act.[15]

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[12] [1958] QWN 26.

[13] (1984) 29 NTR 26.

[14] (1903) SR (NSW) 680.

[15] id, 682–3. But there are limitations on the power to order a stay of proceedings: see para 483.

467. There is a discretion, however, where the certificate of judgment is sought to be registered more than 12 months after the date of the judgment. Section 21(3) requires that in such circumstances leave first be obtained from the court in which registration is proposed. An application for leave may be made ex parte and will only be refused if some special reason for doing so appears to the court.[16]

Costs

468. Under s 22A of the Act a defendant may be ordered to pay the plaintiff's costs of registering the certificate of judgment and of 'other proceedings under this Act'. Such a costs order is, by s 22A(2), deemed to be incorporated with the certificate of judgment. The amount of costs are to be assessed by the court or a judge of the court of registration. In applying for an order under the section the plaintiff must provide the court with some material on which it may make an assessment.[17] A court may order the payment of costs 'upon being satisfied that the registration of the judgment was reasonably justified under the circumstances'. There are no reported cases on this point, but it might be presumed that an order would be justified if, for example, the defendant had assets within the State or Territory in which the certificate of judgment was registered, if the defendant had taken up residence in that State or Territory or if the plaintiff reasonably believed that the defendant was journeying to that State or Territory.

469. While a court may assess the amount of costs to be paid by a defendant, those costs may not exceed 'the amount prescribed'. Neither the Act nor regulations made thereunder contain a prescription in point. But s 27(1)(d), (e) and (f) of the Act enable State Supreme Court Judges to make Rules of Court prescribing, respectively, the fees to be paid in connection with the execution and enforcement of the process and judgments of the courts of other States and other parts of the Commonwealth, the costs to be allowed to a person upon the execution or enforcement of a judgment of another State or part of the Commonwealth and the manner of recovery of any such fees or costs. Examples of rules which prescribe a maximum amount for the purposes of s 22A include O 81B, r 25 of the Rules of the Supreme Court of Western Australia[18] and r 20 of the Rules of Court (Service and Execution of Process Act) 1917 of South Australia.[19]

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[16] *Westpac Banking Corporation v Szentessy* (1985) 65 ACTR 39.

[17] *Reid v Reid* [1929] VLR 22, 23 (Lowe J).

[18] This rule provides that the costs allowed must not exceed $100.

[19] This rule provides

(a) The costs of registration of a certificate of judgment in the Supreme Court shall be as prescribed by the Fifth Schedule to the Supreme Court Rules;

(b) the costs of registration of a certificate of judgment in a Local Court in any jurisdiction shall be fixed at fifteen dollars ($15.00).

Objections to enforcement

Common law rules

470. At common law a series of rules were devised on the recognition and enforcement of foreign judgments, that is, judgments rendered in a jurisdiction other than the forum in which enforcement was sought. A foreign judgment had to meet a number of prerequisites to be given effect in the forum. First, the foreign court was required to have possessed international jurisdiction. This was assessed not under the rules of the foreign court, but under the rules of the forum in which enforcement was sought which determined the circumstances in which a foreign court would be regarded as jurisdictionally competent. These so called rules of international jurisdiction were often much narrower than the rules of domestic jurisdiction, resulting in the competence conceded to a foreign court usually being less than the jurisdiction claimed by the courts of the forum.[20] Another prerequisite was that a foreign judgment had to be final and conclusive in the sense of creating a *res judicata* between the parties.[21] Further, where a foreign judgment was sought to be enforced as distinct from recognised it was necessary that the judgment be for a sum of money that was fixed or mathematically ascertainable. Foreign judgments for an uncertain monetary sum or decreeing equitable relief were not enforced.[22]

471. In addition to these limitations on the recognition and enforcement of foreign judgments, the common law enabled a number of defences to be asserted, for example, fraud. This defence was very wide, for while a domestic judgment can only be impeached for fraud on the basis of evidence discovered since the trial, a foreign judgment could be attacked for fraud even though the issue had been explored in the foreign proceedings.[23] Further defences were that there had been a denial of natural justice in the foreign proceedings or that the enforcement of the foreign judgment would contravene local public policy.[24] Moreover, a foreign judgment of a penal or revenue nature, that is, imposing a penalty or based on a tax liability, could not be enforced in the forum.[25]

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[20] The outstanding example of this discrepancy is jurisdiction exercised over absent defendants under the rules of the various Supreme Courts for service *ex juris*. While the forum court would claim to exercise jurisdiction over an absent defendant in the circumstances set out in those rules, it would not recognise a foreign judgment where the foreign court had assumed jurisdiction over an absent defendant under its corresponding rules for service of process *ex juris*. See *Crick v Hennessy* [1973] WAR 74; *Society Co-operative Sidmetal v Titan International Ltd* [1966] 1 QB 828. See generally Sykes & Pryles 1987, 108–9. The common law rules as to the recognition and enforcement of foreign judgments are considered in Sykes & Pryles 1987, ch 3.

[21] See *Nouvion v Freeman* (1889) 15 App Cas 1; Sykes & Pryles 1987, 110–1.

[22] *Henderson v Henderson* (1844) 6 QB 288.

[23] See *Abouloff v Oppenheimer* (1882) 10 QBD 295; *Svirskis v Gibson* [1977] NZLR 4.

[24] See Sykes & Pryles 1987, 114–5.

[25] id, 116.

Grounds for different approach in relation to sister-State judgments

472. In the context of the enforcement of foreign judgments in Australia it is arguable that a distinction should be drawn between judgments of courts of other countries and judgments rendered in other States and Territories of the Commonwealth, and that the common law rules described above should not apply to the recognition and enforcement of judgments of the latter type. A prime reason for drawing this distinction is the command contained in s 118 of the Constitution, that 'full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State'.[26] Section 118 of the Constitution is complemented by a specific provision, s 18 of the State and Territorial Laws and Records Recognition Act 1901 (Cth).

> All public Acts, records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken.

If s 18 means that a judgment rendered in one State or Territory is to be given the same faith and credit in another State or Territory as it has in the State or Territory of rendition, it would seem that the only defences which could be asserted against the recognition or enforcement of the judgment are those which exist in the State or Territory of rendition with respect to the impeachment of domestic judgments. However, while the constitutional and statutory full faith and credit provisions have aroused considerable academic speculation, the courts have said very little about them and eight decades after federation the operation of these provisions is still a matter of some obscurity.

Issues

473. In the context of the operation of Part IV of the Act the issue which arises is what defences can be asserted to the enforcement of a judgment a certificate of which has been registered under the Act. Do all the common law rules applicable to the recognition and enforcement of foreign judgments apply or can a registered judgment only be impeached on grounds which are available in the place of rendition with respect to domestic judgments? Or, as a third alternative, is the true situation somewhere between these two views? A related issue is whether defences to the enforcement of a judgment should be tried in the court in which the certificate of judgment is registered or in a court in the place of rendition. If defences should be tried in the State of rendition then it would follow that the only defences which could be asserted are those which are available to impeach a domestic judgment. On the other hand if the court of registration is able or prepared to adjudicate defences then theoretically a broader range of objections could be taken and the common law rules employed.

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[26] See *Harris v Harris* [1947] VLR 44. See generally Sykes & Pryles 1987, 300–3; Pryles & Hanks 1974, ch 3.

Structure of Part IV

474. The structure of the provisions concerning enforcement of judgments is no doubt relevant to these issues. As noted above, a judgment creditor may obtain a certificate of judgment from the court of rendition and produce it to a court of like jurisdiction in another State or Territory, whereupon it shall be registered. Once registered, the judgment has the same force and effect as a judgment of the court of registration and proceedings may be taken upon it as if it was a judgment of the court of registration. No qualifications are prescribed for the registration or subsequent enforcement of a judgment rendered in another State or Territory, nor does the Act enumerate defences which can be asserted by a judgment debtor to the enforcement of the sister-State judgment, such as fraud, denial of natural justice or contravention of local public policy.[27] Further, Part IV does not appear to contain an appropriate procedure for the court of registration to determine any such objections to enforcement. Leave is not required to register a judgment (except in the case of a judgment more than 12 months old) and there is no discretion to refuse to register a certificate of judgment which purports to comply with the Act.[28] Section 25 of the Act enables the court of registration to grant a stay of proceedings on a registered certificate of judgment, but its terms suggest that its purpose is to permit a stay only so that a defendant may take proceedings in the place of rendition in relation to the judgment and does not enable a permanent stay of proceedings to be granted.[29] All this suggests that the common law rules applicable to the recognition and enforcement of foreign judgments are not incorporated in the Act and that objections to the enforcement of a judgment should generally be determined in the place of rendition of a judgment. It would follow that the only defences which could be asserted are those which exist in the place of rendition with respect to domestic judgments and that in rare cases where the court of registration may decide to pass upon the validity of a sister-State judgment it should do so only according to the rules applied in the place of rendition with respect to domestic judgments.[30]

Authorities

475. The first case in which the issue arose, however, decided that Part IV had a narrower operation than that suggested above.[31] The plaintiff had served the defendant under State rules for service *ex juris* — at the time of the action, 1899, the Act was not in existence — and had obtained judgment. A certificate of the judgment was later registered under the Act in another State. While there was no suggestion that

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[27] In contrast, State and Territory legislation providing for the enforcement of foreign judgments by a process of registration prescribes specific prerequisites for registration and contains grounds for setting aside registration which are broadly similar to the common law rules on the recognition and enforcement of foreign judgments. See Sykes & Pryles 1987, 117–26.

[28] *Ex parte Penglase* (1903) 3 SR (NSW) 680: see para 466.

[29] See further para 483.

[30] This is the view of academic commentators: see Pryles & Hanks 1974, ch 2; Nygh 1984, 115–9; Sykes 1972, 366. See also Morison 1947; Pryles 1972b. cf Read 1938, 304.

[31] *MacKenzie v Manwell* (1903) 20 WN (NSW) 18.

the judgment was not valid and effective in the State of rendition, registration was set aside on the basis that the judgment was a nullity outside that State as the court of rendition had purported to exercise jurisdiction over an absent defendant who had not submitted to the jurisdiction. This was clearly a reference to the position appertaining at common law with respect to foreign judgments.[32] The decision therefore suggests that Part IV incorporates at least some of the common law rules.

476. However in a number of succeeding cases where the process initiating the original proceedings had been served under the Act, a different result was reached. For example, in *Adcock v Aarons*[33] an application to set aside execution on a registered certificate of judgment, made on the basis that the action in which judgment had been obtained did not fall within the nexus grounds of s 11 of the Act[34] and therefore that service of process on the defendant under the Act had been improper, was rejected.[35] The case thus establishes that a judgment is enforceable under Part IV of the Act even though it is obtained against an absent defendant, at least where the absent defendant was served with the process under the Act rather than State rules for service *ex juris*. Similarly in *Ex parte Penglase*,[36] the court refused to grant a writ of prohibition to restrain the taking of execution proceedings on a registered certificate of judgment which had been sought on the basis that the judgment a certificate of which had been registered was invalid because the court of rendition had had no jurisdiction over the defendant served outside the State of rendition. The court refused to consider the validity of the judgment. However, there are suggestions in two of the judgments that, if the defendant had instead applied for a stay of proceedings under s 25 of the Act, the court would have considered the validity of the judgment,[37] and Justice Walker suggested that a permanent stay could be granted under that section.[38]

477. That suggestion was rejected, however, in *Remilton v City Mutual Life Assurance Society Ltd.*[39] The defendants sought, under s 25, a permanent stay of execution proceedings on a registered certificate of judgment on three grounds: that they had a good defence to the action; that they had never been present or resident in the place of rendition — a ground which would have been conclusive to deny enforcement of the judgment if the common law rules were applicable; and that the case did not fall within the nexus grounds of s 11 of the Act. It was held that a permanent stay of pro-

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[32] See above para 470–1 for a description of these rules.

[33] (1903) 5 WALR 140.

[34] For discussion of the nexus grounds, and their relevance in relation to the validity of service, see para 92–7.

[35] A second ground for the application, that the underlying cause of action upon which the judgment was based was statute-barred in the State of registration and therefore that the judgment should not be enforced there, was also rejected. The court pointed out that such an argument would not have been relevant even under the common law rules applicable to foreign judgments, for under those rules a foreign judgment pronounced by a jurisdictionally competent court is conclusive as to its merits, fraud or denial of natural justice apart.

[36] (1903) 3 SR (NSW) 680.

[37] id, 683 (Stephen ACJ), 685 (Walker J).

[38] id, 685.

[39] (1907) 24 WN (NSW) 177.

ceedings could not be granted under s 25, but that a temporary stay could be granted to enable the defendant to apply to set aside the judgment in the place of rendition. The conclusion that a permanent stay could not be granted under s 25 is significant. If a court cannot grant a permanent stay of proceedings on a registered certificate of judgment there would be little point in the court of registration adjudicating defences unless, of course, it could set aside registration. But Justice Pring asserted that the judgment must be assumed to be good until set aside in the place of rendition.[40] This suggests that only a court in the place of rendition could adjudicate defences to the enforcement of a judgment registered under the Act and it would follow that the only defences available are those which exist in the place of rendition with respect to domestic judgments.[41] This view was adopted in *In re E and B Chemicals and Wool Treatment Pty Ltd*,[42] where the defendant applied to restrain enforcement on a registered certificate of judgment on the basis that to do so would be contrary to the public policy of the State of registration. The defendant's application was rejected, Justice Napier deciding that the proper course for a defendant who sought to restrain enforcement on a registered certificate was to apply for a temporary stay under s 25 and then to apply to the court of rendition to set aside the judgment. In further proceedings arising out of the same matter, *In re E & B Chemicals and Wool Treatment Proprietary Limited*,[43] Justice Napier adhered to his earlier views. Justice Angas Parsons, on the other hand, was of the view that the common law rules applied to enforcement of a judgment under Part IV,[44] although he held that the defendant had failed to establish a case for the application of those rules on the evidence. Justice Richards' view is somewhat confusing for, while agreeing with the conclusion and the reasons therefor of Justice Napier in the earlier case, he also expressed agreement with the reasons of Justice Angas Parsons in the instant case. And in later comments he leaves open the question of whether the common law rules are applicable to enforcement of a judgment registered under Part IV.[45] While a later case, *Winchcombe v Winchcombe*,[46] appears to support the proposition that the common law rules regarding finality of foreign judgments are applicable to judgments sought to be enforced under Part IV, in fact the argument as to finality was accepted only on the basis that the definition of 'judgment' in the Act required that the judgment be final and that a judgment under which it was not possible for the court of registration to ascertain the exact sum of money payable under it was not a final judgment.[47]

478. The defences available to the enforcement of a judgment under Part IV came to be considered by the High Court in *The Queen v White, ex parte T A Field Pty*

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[40] id, 178.

[41] The later decision in *Davis v Davis* (1922) 22 SR (NSW) 185, which appears to decide to the contrary, is on closer examination revealed as a case in which the plaintiff employed the wrong procedure in seeking to obtain execution on a registered certificate of judgment: see Fleming 1952, 409–10.

[42] [1939] SASR 441.

[43] [1940] SASR 267.

[44] id, 273.

[45] id, 279–80.

[46] [1955] QWN 16.

[47] See above para 462 for criticism of the decision in this case.

Ltd,[48] a case concerning a judgment of the Supreme Court of Papua New Guinea, at a time when that country was still a Territory of Australia and embraced within the Act, which ordered payment to the Chief Collector of Taxes of Papua New Guinea of the sum of 86 930.89 kina, given in proceedings to recover unpaid tax. The currency in which the order was expressed, kina, was a currency authorised under the Central Banking (Currency) Act 1975 (PNG), but that Act ultimately derived its authority from an Act of the federal Parliament. The judgment debtor sought to restrain enforcement on a certificate of the judgment which had been registered in a State on three grounds: that the judgment was not a final judgment because there was an appeal, as yet unresolved, pending in Papua New Guinea; that a judgment for the recovery of revenue was not a judgment within the meaning or operation of s 20 of the Act; and that the judgment was expressed in a foreign currency and therefore did not constitute a judgment under s 20 of the Act. Chief Justice Barwick, with whom Justice Gibbs and Justice Mason agreed, rejected the first argument on the basis that the judgment was a final judgment in the action for the recovery of unpaid tax and that the pendency of an appeal did not operate to render the judgment in any sense interlocutory or not final.[49] The Chief Justice[50] also rejected the judgment debtor's second argument, which was based on the common law rule that a court would not assist the enforcement of a foreign revenue law, and in doing so provided the clearest statement to date that the common law rules with respect to the enforcement of foreign judgments are not applicable under the Act.

> Of course, general words in a statute may be construed in a qualified sense, if the evident policy or purpose of the statute requires such a qualification. The Act is an Act of the Parliament evidently intended to provide for the service and execution throughout the Commonwealth including its territories, of the process of the States forming part of the Commonwealth and of the Territories of the Commonwealth and of the Courts of the States and of the Territories. Neither the States nor the Territories are treated by the Act as foreign country vis-a-vis one another or vis-a-vis the Commonwealth. They are regarded as what they are, parts and possessions of the Commonwealth. Its language is akin to that of the *Judgments Extensions Act* 1868 (Imp.) and of the *Inferior Courts Judgments Extension Act* 1882 (Imp.) and can be contrasted with the language and structure of the *Administration of Justice Act 1920* (N.S.W.). *I can see no basis upon which the language of the Act should be qualified to accommodate it to the pre-existing common law obtaining in relation to the process and judgments of foreign countries.*[51]

The Chief Justice also rejected the third argument as in his view kina was not a form of foreign currency (at that time). It was a form of currency authorised by the federal Parliament, although not made legal tender throughout the Commonwealth and its Territories. Justice Gibbs and Justice Jacobs dismissed the third argument simply on the basis that the Act provided for the registration of judgments, including those of the Supreme Court of Papua New Guinea, and that no reason appeared for saying that a judgment of that court was not a judgment within s 20 simply because it was not expressed in currency that was legal tender throughout Australia.

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[48] (1975) 133 CLR 113.
[49] id, 116–7.
[50] Gibbs and Mason J again concurring.
[51] id, 117. Emphasis added.

479. The unequivocal terms in which Chief Justice Barwick rejected the second argument of the defendant — that the judgment should not be enforced because to do so would be to enforce the revenue laws of a foreign country — seems to be a clear statement that the common laws rules are inapplicable to the enforcement of judgments under Part IV of the Act. However, the strength of that authority is a little weakened when one considers the basis upon which the defendant's first ground, that the judgment was not final, was rejected. The finality argument had been put and accepted in *Winchcombe v Winchcombe,*[52] but that was on the basis that an uncertain order did not fall within the definition of 'judgment' in the Act. In contrast, in *The Queen v White, ex parte T A Field Pty Ltd* the lack of finality asserted was that an appeal was pending in the place of rendition. In support of the argument reference was made to the common law rule and cases relevant to the judgments of foreign countries.[53] In view of the attitude adopted in relation to the second ground, the court could have said simply that a defence such as that raised in the first ground was irrelevant to enforcement of a judgment under the Act, at least where the judgment was presently enforceable in the place of rendition. However, in adjudicating upon the first defence as it did, it may be argued that the High Court implicitly accepted that some of the common law rules are relevant.[54]

480. The view that the common law rules on the enforcement of foreign judgments are not relevant under the Act is also supported by comments of the High Court in *Flaherty v Girgis.*[55] While the major point in the case concerned Part II of the Act, certain observations were made regarding Part IV. In particular, it was noted that a judgment of a State court is enforceable under Part IV in circumstances where jurisdiction has been assumed over an absent defendant under State rules for service *ex juris* rather than under Part II of the Act. The availability of the Act in these circumstances contrasts with the situation obtaining at common law, where such a judgment would not be enforceable outside the State of rendition.

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[52] [1955] QWN 16. See para 462.

[53] Counsel's argument is reproduced at (1975) 133 CLR 113, 114 where RJ Bainton QC argued as follows:

> At common law, there could be no suit on a judgment that was not final. The judgment in this case is not final because if the appeal against the assessment succeeds, the judgment must be vacated because it will not a judgment in respect of an existing debt: *Nouvion* v. *Freeman.* (1889) 15 App Cas 1.

[54] In later proceedings the Supreme Court of New South Wales had no difficulty accepting that, in issuing execution process on the registered certificate of judgment, the judgment creditor could convert the amount ordered to be paid in the judgment to Australian dollars at the exchange rate applicable at the time of the issue of the process for the purpose of levying the amount of the judgment against the judgment debtor: *T A Field Pty Ltd v Chief Collector of Taxes of Papua New Guinea* [1975] 2 NSWLR 101.

[55] (1987) 71 ALR 1.

Conclusion

481. While there is some ambivalence in the authorities and in the leading case decided by the High Court, *The Queen v White, ex parte T A Field Pty Ltd*,[56] the weight of authority supports the proposition that the common law rules applicable to the recognition and enforcement of foreign judgments do not apply to judgments sought to be enforced under the Act and that a registered sister-State judgment can be impeached only on grounds which are available in the place of rendition with respect to domestic judgments. Generally such defences should be tried in the place of rendition and the proper course is for the court of registration to grant a temporary stay of proceedings under s 25 to enable the judgment debtor to make application in the place of rendition for relief. In those cases where procedural considerations make possible the adjudication of a defence in the court of registration, it is suggested that only the same range of defences are available to a judgment debtor.[57]

Proceedings on a registered judgment

Affidavit of liability

482. Section 23 of the Act provides that 'no execution shall be issued or other proceedings taken upon' a certificate of judgment unless an affidavit is first filed in the court out of which it is intended to issue such execution or take such proceedings. The affidavit must state that the amount for which execution is proposed to be issued is actually due and unpaid or, in the case of equitable relief, that any act ordered to be done remains undone or that any person ordered to forbear from doing any act has disobeyed the order. No execution shall be issued for a larger amount than that sworn to in the affidavit.[58] Under rules made by some Supreme Courts pursuant to the power conferred by s 27 of the Act, execution can only issue within a limited time after the making of an affidavit under s 23.[59]

Stay of proceedings

483. Section 25 of the Act enables the court of registration or a judge thereof to order a stay of proceedings on a registered certificate of judgment on the application of the judgment debtor. The order may be subject to conditions, including as to the giving

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[56] (1975) 133 CLR 113.

[57] See eg Sykes 1972, 366.

[58] The affidavit may be filed on the same day that application is made for the issue of execution process or other enforcement proceedings are commenced: *Winchcombe v Winchcombe* [1955] QWN 16.

[59] eg O 81B, r 17 of the Rules of the Supreme Court of Western Australia provides

> (1) Execution shall not be issued or other proceedings taken upon a certificate registered in a Court unless execution is issued or the proceedings are taken within 30 days next after the making of the affidavit required by section 23 of the Act, or within such further time as the Court may order.
>
> (2) An application for an order under paragraph (1) may be made ex parte.

of security or as to the making of an application to the court of rendition to set aside the judgment. The latter condition, expressly referred to in the provision, seems to reflect the prime purpose of the section, that is, to authorise a stay of proceedings to be granted to enable the judgment debtor to apply to the courts of the State of rendition to set aside or vary the judgment, whether because the judgment debtor asserts a defence to the action in which the judgment was given or because of the assertion of some irregularity in the judgment.[60] It was held in one case that a permanent stay could not be granted under s 25.[61] If this is correct then a judgment debtor cannot seek a stay of proceedings for the purpose of enabling the court of registration to adjudicate defences to the enforcement of the judgment.[62]

Nature of proceedings

484. *Introduction.* Section 21(2) provides that once a certificate of judgment is registered proceedings may be taken to enforce the judgment in the same way as if the judgment were a judgment of the court of registration.[63] This provision is complemented by s 24.

> The Court in which any such certificate of a judgment has been registered and the Judges thereof shall, in respect of execution upon the certificate and the enforcement of the judgment, have the same control and jurisdiction over the judgment as if the judgment were a judgment of such Court.

While it is clear that a registered judgment can be enforced in the same way as a local judgment, questions have arisen as to the types of proceedings that can be taken upon a registered certificate of judgment. It seems that there are limits to the rule that a registered judgment is to be equated with a domestic judgment.

485. *Preliminary proceedings.* Proceedings that are preliminary or ancillary to the actual execution of a judgment can be taken on a registered certificate of judgment. Thus in *Chief Collector Taxes v Bayliss*[64] it was held that procedures for the oral examination of a judgment debtor to make the debtor disclose what assets are available to satisfy the judgment may be taken by a judgment creditor under a registered certificate of judgment just as they may be taken by a judgment creditor who has obtained a local judgment.[65]

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[60] See eg *In re E and B Chemicals and Wool Treatment Pty Ltd* [1939] SASR 441, 444; *Remilton v City Mutual Life Assurance Society Ltd* (1907) 24 WN (NSW) 177.

[61] *Remilton v City Mutual Life Assurance Society Ltd* (1907) 24 WN (NSW) 177.

[62] But cf *TA Field Pty Ltd v Chief Collector of Taxes of Papua New Guinea* [1975] 2 NSWLR 101.

[63] Proceedings cannot be taken before the certificate is registered in the Australian Register of Judgments kept by the court of registration, even if the certificate has been produced to the proper officer of the court: *Re Bayliss* (1971) 19 FLR 14. The judgment also remains a judgment of the court of rendition — s 21(2) provides only that proceedings may be taken 'as if' the judgment had been a judgment of the court of registration: *Re Abrahamson, ex parte Crisp & Gunn Ltd* (1978) 34 FLR 217.

[64] (1976) 31 FLR 490, 494–5.

[65] The procedures in question were provided for in O 42, r 32 of the former Rules of the Supreme Court of Victoria.

486. *Fraudulent debtors and bankruptcy proceedings.* However in two cases decided in Victoria soon after the enactment of the Act it was held that the Act did not authorise proceedings to be taken under the Imprisonment of Fraudulent Debtors Act 1890 (Vic).[66] It was said that the only proceedings which could be taken on a registered certificate of judgment were those that were in the nature of execution of the judgment. They had to involve something to give effect to the judgment. Proceedings under the Imprisonment of Fraudulent Debtors Act went beyond the enforcement of a judgment, and in view of the fact that the availability of relief under the legislation was dependent on there being some fraud in the contracting of a debt or in the declination to pay it, to permit such proceedings on a registered certificate of judgment would be equivalent to permitting the court of registration to punish the judgment debtor for a criminal or quasi-criminal offence committed in another State.[67] It was also suggested in one of these cases — although it was unnecessary to the decision — that Parliament lacked the legislative competence under s 51(xxiv) of the Constitution to authorise proceedings to be taken under such legislation on a registered certificate of judgment.[68] It seems that an argument either way could be constructed. But more importantly, the suggestion ignores the power conferred on Parliament by the following provision of the Constitution, s 51(xxv), and it may well be that the two provisions in combination would support legislation providing for the taking of proceedings under such legislation on a registered certificate of judgment.[69]

487. The constitutional question apart, the views in these two cases stand in direct contrast to those expressed by the Supreme Court of New South Wales in *Re Richards, Ex parte Maloney*,[70] where it was held that the terms of the Act, particular s 23 and 24, indicated that proceedings other than those strictly relating to the execution of the judgment could be taken on a registered certificate of judgment. The court in that case refused the judgment debtor's application to set aside a bankruptcy notice issued on a registered certificate of judgment. The effect of this decision was confirmed by amendments to the Act in 1912 which inserted words in s 21(2) making it clear that proceedings in bankruptcy or insolvency could be taken on a registered certificate of judgment.[71] This amendment, however, says nothing about proceedings under Imprisonment of Fraudulent Debtors legislation. The latter can be distinguished from bankruptcy and insolvency proceedings because of their criminal or quasi-criminal nature. Nevertheless the reasoning of Justice Walker in *Re Richards, Ex parte Maloney*[72] is broad enough to suggest that such proceedings can be taken upon a registered certificate of judgment.

488. *Enforcement against third parties.* In one case it was held that a reference to a judgment in State legislation providing that the amount ordered to be paid in a

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[66] *Bennett v Cohen* (1901) 7 ALR (CN) 96 (County Ct); *McNamara v Miller* (1902) 28 VLR 327.

[67] See particularly *McNamara v Miller* (1902) 28 VLR 327, 331 (Hodges J).

[68] id, 330–1.

[69] See para 66.

[70] (1902) 2 SR (NSW) B & P 3.

[71] For an example of proceedings taken after this amendment see *Re Noel* (1949) 15 ABC 10.

[72] (1902) 2 SR (NSW) B & P 3.

judgment could be recovered from the insurer of the judgment debtor did not mean only a judgment obtained in that State, but included judgments of courts of other States.[73] If the narrower view had been taken it would have been necessary to consider whether a judgment obtained in another State could be enforced against the insurer under that legislation by registration of a certificate of judgment in a court in that State under the Act.[74]

489. *Interest.* Before 1912 no reference was made in the Act to the recovery of interest on a judgment, nor was there provision in the certificate of judgment for the statement of the rate of interest applicable to a judgment. However the registration court apparently could award interest on a registered certificate of judgment by virtue of the authority which it possessed under s 21(2). In one case in which proceedings were taken on a registered certificate of judgment it was sought to recover interest from the date of judgment to the date of registration at the rate of interest applicable in the place of rendition, and from the date of registration at the rate applicable in the place of registration. However, it was held that execution should issue only for the interest accruing after the date of registration, such interest to be determined according to the laws of the place of registration.[75]

490. In 1912 s 21(2) was amended to provide that on a registered certificate of judgment 'interest shall be payable thereunder at the rate and from the date set out therein'. The form of certificate of judgment in the Third Schedule to the Act was also amended so that the certificate was to contain an abstract of judgment stating the amount ordered to be paid and the rate of interest (if any) payable thereon and the date from which it was payable. Thus the question of the amount of interest payable on a judgment is now a matter for the rendering court. If it awards interest then the certificate of judgment will show both the rate and the date from which it is payable. Regardless of the place where the certificate is registered the same rate of interest will apply and the interest is recoverable in the place of registration. If the rendering court does not award interest it seems that the registration court can no longer do so.

491. *Variation.* A registered certificate of judgment is deemed to have the same force and effect as a domestic judgment of the court of registration. But s 21(2) provides only that a certificate, on registration, 'shall be a record' of the registering court, not that it shall be a judgment or order of the registering court. Also, since 1912, interest on a judgment a certificate of which has been registered under the Act is payable at the rate and from the date specified in the certificate — matters therefore under the control of the court of rendition. Further, s 24 gives the registering court control and jurisdiction only 'in respect of execution upon the certificate and the enforcement of the judgment'. In addition, s 25 empowers the registering court to order a stay of proceedings and incidentally to impose terms 'as to making application to the Court by which the judgment was given or made, to set aside the same'. In *Bell v Bell*[76] the

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[73] *Griffith v Queensland Insurance Co Ltd* [1974] VR 321. The legislation in question was s 47(1) of the Motor Car Act 1958 (Vic).

[74] id, 326–7 (Crockett J).

[75] *Australian Joint Stock Bank Ltd v Dowel* [1904] QWN 40.

[76] (1954) 73 WN (NSW) 7.

effect of these provisions was said to be that a registered certificate of judgment had the same effect as a domestic judgment of the registering court only for the purposes of the execution and enforcement of the judgment: a registered certificate of judgment did not become a judgment of the court of registration for all purposes. Thus it was held that the registering court had no power to vary a judgment a certificate of which had been registered under the Act.

492. *Limitations on remedies.* Sometimes the law of a State or Territory restricts the remedies available to a plaintiff by reference to the nature of the cause of action or the status of the defendant. A question arises as to the effect of such restrictions in relation to proceedings to execute or enforce a judgment a certificate of which has been registered in the forum under the Act. In *Davis v Davis*[77] it was held that such laws of the place of registration applied to govern the appropriate procedure by which the plaintiff could seek to execute or enforce a certificate of judgment registered there under the Act. A similar view was taken by the majority in *Smith v Cotton.*[78] Chief Justice Street, with whom Justice Gordon concurred, noted s 21(2), which provides that the same proceedings may be taken on a registered certificate of judgment as if the judgment was a judgment of the registering court. In determining what proceedings could be taken on the judgment, the registering court could look to the nature of the proceedings in which the judgment had been given, a course of action facilitated by the form of the certificate of judgment, which requires a statement of the form or nature of the suit as well as an abstract of the judgment. Any limitation on enforcement proceedings applying to judgments given in proceedings of that nature in the registering court would apply also to judgments given in such proceedings in another State or Territory and registered in the forum under the Act.[79] Justice Ferguson dissented. In his view, while a judgment operated in two distinct ways, one being the determination of certain issues and the other being the imposition of liability on the defendant, the registration under the Act of a certificate of judgment was operative only as to the second aspect, that is, the liability, not that part of the judgment or decree which determines the issues. Therefore in seeking to enforce the liability the plaintiff was not limited by State laws which imposed limitations on enforcement by virtue of the facts out of which the liability arose — the nature of the proceedings in which the judgment was given. In his view, under the conclusion reached by the majority

> the beneficial operation of the Act would be very much restricted, and to a large extent destroyed, as in every case before enforcing a judgment the Court in which it was registered would be bound to enquire into the facts, and decide whether upon those facts the same judgment might have been recovered in that Court. I am satisfied that that was not the intention of the Legislature. The intention was that when by the judgment of a Court of any state in the Commonwealth an obligation had been imposed upon a person to pay a sum of money or to do some act the payment of that

[77] (1922) 22 SR (NSW) 185.
[78] (1926) 27 SR (NSW) 41.
[79] id, 52–3.

> money or the performance of that act might be enforced by a Court of any other State in the same way as if the like payment or the like performance had been ordered by the judgment of that Court.[80]

493. The opinion of academic commentators is divided, Professor Sykes[81] agreeing with the majority view and Professor Nygh preferring the reasoning of Justice Ferguson.[82] It may be that the answer lies in drawing a distinction between limitations or restrictions on remedies available to enforce the original cause of action and limitations or restrictions on remedies applicable to the execution or enforcement of a judgment. On this view the fact that the law of one State provides no remedy to a person in particular circumstances would not be a defence to the enforcement in that State under the Act of a judgment obtained in another State which provided a remedy to a person in those circumstances. On the other hand, if the law of a State provided that a judgment obtained in particular types of proceedings, or proceedings involving persons of a particular status, could be enforced only in limited ways, then such limitations would apply to enforcement in the forum of a judgment, a certificate which has been registered in the forum under the Act, obtained in similar circumstances in another State.

Notification

494. Section 26 of the Act establishes a scheme of notification in respect of judgments which have been registered under the Act. It requires the registration court to notify the court of rendition of the fact of registration, the issue of execution process or other enforcement proceedings and the satisfaction of the judgment either in whole or in part. It also requires the court of rendition to notify all registration courts of the satisfaction of a judgment. The object of s 26 clearly is to keep the various courts concerned with a judgment informed of proceedings being taken on that judgment. Once a certificate of judgment is registered the judgment does not cease to be enforceable in the original State of rendition. Moreoever it is possible to register a certificate of judgment in more than one State. However the notification requirements operate to ensure that a judgment creditor does not recover more than the amount of the judgment through a process of multiple execution in several States, for satisfaction of a judgment in whole or in part will come to be noted on each certificate of judgment registered under the Act. The court of rendition of a judgment acts as the clearing house for the scheme of notification, having the obligation to notify other courts in which a certificate of judgment has been registered of satisfaction obtained upon a judgment either in the place of rendition or in another State or Territory.

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[80] id, 62–3.
[81] Sykes 1972, 367.
[82] Nygh 1984, 119.

Reform proposals

Introduction

495. There are relatively few reported cases concerning Part IV of the Act. This state of affairs is certainly not due to any reluctance on the part of judgment creditors to employ the facilities provided by Part IV to secure the enforcement of judgments, for the statistics regarding registrations of certificates of judgment indicate that frequent use is made of it.[83] They show that there has been an enormous increase in the number of registrations effected under the Act in the eight decades of its existence, particularly in recent years. Coupled with the very modest number of recent reported cases indicating difficulties with the operation of the Act, this suggests that Part IV has worked reasonably well.

496. But it cannot be said that the operation of Part IV has been entirely free from problems, nor that there is no room for improvement. For example, a question still remains regarding the applicability of the common law rules regarding recognition and enforcement of foreign judgments, notwithstanding that on the whole the authorities suggest that the common law rules are not relevant. Another question concerns the construction of the provisions concerning the court in which a certificate of judgment should be registered. These and other problems noted in the previous section of this chapter should be addressed in reforms to Part IV.

Objectives of reform

497. The object of Part IV was to create a simple registration scheme for the interstate enforcement of judgments utilising the execution processes of the court of registration. Consideration of the terms of the scheme indicates that the court of registration was not intended to have a wider role beyond execution and was not intended to adjudicate matters relating to the enforceability of the judgment in the sense of determining defences which the judgment debtor may wish to assert. This was a role assigned to the court of rendition whose assistance could be sought by granting of stay of proceedings under s 25 to enable the judgment debtor to seek relief in the State of rendition. This scheme is efficient and is highly effective to carry out the basic policy in this area, namely, the simple Australia-wide enforcement of judgments rendered by State and Territory courts. There is no cause to depart from this basic system, but reforms should be effected to strengthen and clarify it. The recommendations contained in this chapter are based on the following considerations:

- the retention of the present scheme whereby the role of the court of enforcement is limited to the utilisation of its execution machinery and does not extend to determining questions of the validity or variation of the judgment, matters which must be resolved in the State of rendition

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[83] The available statistics are collated in Appendix D. They are not comprehensive, being largely confined to recent years and not including registrations of certificate of judgments in Territory courts, but certain general conclusions may be drawn.

- the simplification of the present scheme wherever possible and
- the removal of obscurities which have arisen in relation to the provisions of Part IV.

Overseas, international and State schemes

Introduction

498. The Commission's Terms of Reference, amongst other things, require that regard be had to 'developments in legal co-operation in matters relating to the service and execution of process and judgments'. Enforcement of foreign judgments has proved to be an important practical aspect of private international law and has engendered considerable activity over the years. The common law has evolved a series of fairly sophisticated rules on the recognition and enforcement of foreign judgments and there has been considerable legislative activity on the subject dating from the early 19th century in the United Kingdom and from the mid-19th century in the Australian colonies. In addition, various international fora have interested themselves in the subject and have sought to devise international conventions in point.[84] For example, the Commonwealth of Nations, through Commonwealth Law Ministers' Meetings, has been most active in this area, one outcome being the preparation of a draft Bill entitled the Foreign Judgments (Reciprocal Enforcement) Act. The draft Bill is primarily seen as a device for drawing attention to the kinds of issues which are likely to arise in this area rather than as a model Act.[85] Other international fora which have been responsible for drafting rules and conventions on the enforcement of foreign judgments are the International Law Association and the Hague Conference on Private International Law which has concluded two conventions (1925 and 1971). Of great significance too is the activity of the European Economic Community which resulted in a Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed at Brussels on 27 September 1968 and which came into force on 1 February 1973.[86] This Convention affects not only the member States but also third countries.[87] The 1968 Convention has entered into law in the United Kingdom by virtue of the Civil

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[84] Many of these developments are referred to in a comprehensive report by Professors McClean and Patchett commissioned by the Commonwealth Secretary-General for presentation to the Commonwealth Law Ministers' Meeting at Winnipeg, Canada, in August 1977: McClean & Patchett 1977, para 2.06–2.14.

[85] See the Report of a working meeting held in Nairobi, Kenya, 9–14 January 1980 on the *Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth* (1980) x and 15–6.

[86] In 1971 a Protocol on the interpretation of the 1968 Convention by the European Court was signed at Luxembourg and a further Convention was signed on 9 October 1978 which dealt with the accession to the 1968 Convention and the 1971 Protocol by Denmark, Ireland and the United Kingdom who had all joined the European Economic Community after the conclusion of the 1968 Convention. By a Convention of 25 October 1982 Greece acceded to the Convention.

[87] See Pryles & Trindade 1974; Nadelmann 1967. See also Fletcher 1982, ch 4.

Jurisdiction and Judgments Act 1982 (UK) which makes profound changes to English law. The Commission has considered these developments in the course of considering changes to the Service and Execution of Process Act and brief mention should be made of their salient features.

Classification

499. The various schemes for the enforcement of foreign judgments can be classified in a number of ways. One approach, based on the nature of their provisions, results in a four-fold classification.[88]

- *Compulsory recognition and direct enforceability.* Under this category a judgment will be recognised and may be enforced without the need for more than administrative intervention by a court of the receiving law area. Judgments are not open to further review in that forum, the jurisdiction of the court of rendition may not be questioned and the validity of the proceedings in that court cannot be impeached. This category encompasses schemes providing for the direct enforcement of foreign judgments without qualification, an example of which is the present system under the Act which, as already noted, does not prescribe preconditions for registration nor defences to enforcement along the lines of the rules established at common law.
- *Discretionary recognition and direct enforcement.* In this scheme the enforcing court retains a discretion whether or not to enforce the foreign judgment. An example is the Administration of Justice Act 1920 (UK) under which a foreign judgment could not be registered and thus directly enforced unless the court is satisfied that in all the circumstances of the case it is just and convenient that enforcement be allowed.
- *Compulsory recognition, subject to challenge, and direct enforceability.* Under this category there is a duty to register a foreign judgment but registration can be set aside on a number of grounds which closely follow the common law rules on the recognition and enforcement of foreign judgments. An example is the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK) which has been widely copied in the Australian States.
- *Automatic recognition and direct enforceability.* An example of this is the 1968 EEC Convention where recognition and enforcement are subject to very few exceptions.[89]

500. Another way of classifying schemes for the enforcement of foreign judgments is on the basis of the source of the schemes. On this basis there are three categories.

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[88] This is the approach taken by Professors McClean and Patchett in the report to a Commonwealth Law Ministers' Meeting noted above at n 85: McClean & Patchett 1977.

[89] See further para 504–5.

- *International or regional conventions.* This category encompasses schemes concluded amongst sovereign States. Examples include the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters concluded on 1 February 1971 and the 1968 EEC Convention.

- *Uniform legislation.* This category concerns schemes founded on uniform legislation enacted in the participating law areas. Most of the schemes operating in Commonwealth countries take this form. In 1920 the United Kingdom Parliament enacted the Administration of Justice Act. It was a model Act devised for Commonwealth use and provided for the enforcement in the United Kingdom of judgments given by superior courts in any part of 'His Majesty's dominions'. Similar legislation was enacted in many other parts of the British dominions including all the Australian States. This scheme was largely superseded by later legislation modelled on the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK) which extended to judgments of countries other than those within the British Commonwealth. Legislation based on the 1933 Act is now operative in all Australian States except South Australia.[90] In South Australia a unique and much more advanced Act is in force — the Act 1971 (SA).[91] Another example in this category is the Model Act prepared by the Canadian Conference of Commissioners on Uniformity of Legislation in 1924.[92] The Model Act was initially devised as a scheme for the Canadian provinces but in some provinces the legislation extends to extra-Canadian judgments.[93] A further example is legislation enacted in the States of the United States of America based on the Uniform Enforcement of Judgments Act 1964 approved by the National Conference of Commissioners on Uniform State Laws. It has been enacted in 21 jurisdictions in the United States.[94] An earlier Act devised in 1948 was enacted in five jurisdictions.[95]

- *Federal schemes.* This category concerns schemes usually implemented by legislation of a paramount legislature that is binding in all the law areas involved. Examples are the Judgments Extension Act 1868 (UK) and the Inferior Courts Judgments Extension Act 1882 (UK) which provided for the enforcement in the various law areas of the United Kingdom of judgments obtained in other law areas of the United Kingdom. These Acts have been repealed by the Civil Jurisdiction and Judgments Act 1982 (UK) which not only implements the 1968 EEC Convention but which also provides in s 18 and 19 and Schedules 6 and 7 for

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[90] See Sykes & Pryles 1987, 117–25.

[91] See id, 125–6.

[92] The Model Act has been subject to several revisions and amendments. It heavily draws on the United Kingdom models.

[93] See Castel 1975, 535–54. The Model Act has been enacted in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan.

[94] Alaska, Arizona, Colorado, Connecticut, Idaho, Iowa, Kansas, Maine, Minnesota, Nevada, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Washington, Wisconsin and Wyoming.

[95] Arkansas, Illinois, Missouri, Nebraska and Oregon.

the establishment of a new scheme for the enforcement throughout the United Kingdom of judgments obtained in particular law areas of the United Kingdom. Another instance of legislation of a paramount legislature applying to various law areas is the Service and Execution of Process Act. Legislation of this type usually goes beyond uniform legislation and international schemes in that the tendency is to provide for automatic enforcement of judgments with few, if any, defences which can be asserted at the place of enforcement.

501. These categories are not watertight and tend to overlap. For example, there are federal schemes which are not based on legislation of a paramount legislature but which take the form of uniform legislation of the various law areas concerned. Examples include the Canadian provincial legislation and the legislation enacted in a number of American States. The Canadian legislation largely built on the common law rules and on the 1920 and 1933 UK Acts. In contrast, the American uniform legislation is more closely akin to the inter-United Kingdom and the inter-Australian schemes in that enforcement is largely automatic and there are few defences available to resist enforcement.

Evaluation of other schemes

502. *Relevance.* Evaluation of all these schemes in the context of a revision of the Act is not as onerous as it might first appear. As mentioned above the federal schemes, particularly those based on legislation of a paramount legislature, tend to go beyond the other schemes in that they largely provide for the automatic enforcement of judgments and prescribe few qualifications. In contrast, most of the uniform legislative schemes and the schemes based on international conventions contain a whole host of qualifications. While qualifications and safeguards might be necessary in international schemes where interests might conflict and legal traditions and approaches differ, it is obvious that a scheme confined to the constituent parts of a single country (such as the components of the United Kingdom or the States and Territories of Australia) can go much further. Automatic recognition without qualification can be provided and the question is simply how best to effect it. Thus in the present context primary attention may be directed to the most analogous foreign schemes, namely, the new intra-United Kingdom scheme established by s 18 and 19 and Schedules 6 and 7 of the Civil Jurisdictions and Judgments Act 1982 (UK) and the uniform American legislation. But reference should also be made to two other relatively new and outstanding schemes: the 1968 EEC Convention and the 1971 South Australian legislation.

503. *South Australian Act.* The Foreign Judgments Act 1971 (SA) is the most recent Australian legislation providing for the enforcement of foreign judgments. It goes considerably beyond the scheme modelled on the 1933 United Kingdom legislation (which is in force in the other States) in a number of respects. First, it is not confined to the judgments of proclaimed countries as is the 1933-type legislation.[96] Further, it pre-

[96] The Governor can make a proclamation under s 6 of the legislation but the existence of a proclamation is not a pre-condition to registration. The proclamation merely has the effect of deeming judgments of the courts of the proclaimed country to satisfy the pre-conditions imposed in the legislation for enforcement.

scribes much wider bases of international jurisdiction than the 1933-type legislation.[97] But, while broad, this legislation is not as liberal as the Service and Execution of Process Act, for it still imposes jurisdictional requisites to the enforcement of foreign judgments as well as generally requiring that the foreign judgment be final and conclusive. In addition, some of the traditional rules are retained in its other provisions.[98] Therefore while the South Australian legislation may be seen as far sighted and liberal as regards the enforcement of non-Australian judgments, it would not be an appropriate model to be followed in relation to the intra-Australian enforcement of State and Territorial judgments.

504. *EEC Convention.* Article 220 of the Treaty of Rome 1957 obliges the member states to enter into negotiations designed to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. Pursuant to this directive work on a convention on the enforcement of judgments commenced in 1960 and resulted in a Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed on 27 September 1968 which came into force on 1 February 1973.[99] The 1968 EEC Convention is supplemented by a 1971 Protocol dealing with its interpretation by the European Court and by two Accession Conventions concluded in 1978 and 1982. As previously mentioned these Conventions have been enacted as part of the law of the United Kingdom by the Civil Jurisdiction and Judgments Act 1982. The Convention is important in a number of respects, not least because of the simple procedures prescribed for recognition and enforcement of judgments throughout the EEC's member states. A matter of particular importance, however, is that the form of the Convention is unique. Instead of imposing jurisdictional prerequisites to the recognition and enforcement of a judgment rendered in another member state, the Convention purports to regulate the original jurisdiction of the courts of the member states in the first instance. That is, the Convention prescribes the circumstances in which a court of a member state may assume jurisdiction to hear and determine an action. As the original jurisdiction of the courts is closely regulated it follows that their judgments can be enforced throughout the EEC without any need for imposing further jurisdictional prerequisites.[100] But certain exclusionary rules are prescribed by art 27 of the

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[97] Foreign Judgments Act 1971 (SA) s 5(1)(b) and (c) go considerably further than the common law rules and those stated in the 1933-type legislation: see *Malaysia-Singapore Airlines Ltd v Parker* (1972) 3 SASR 300. See generally Sykes & Pryles 1987, 125–6.

[98] eg s 5(2) provides that a judgment is not registrable under the Act if it is a judgment for the enforcement of any penal law or for the recovery of a non-recoverable tax; s 8 provides that a registered judgment may be set aside if the judgment debtor did not receive notice of the proceedings in sufficient time to enable defence of the proceedings, if the judgment was obtained by fraud or if enforcement of the judgment would be contrary to public policy.

[99] See McClean & Patchett 1977, 42–53. A second Convention in the field of private international law has been concluded also by the EEC countries, namely, the Convention on the Law Applicable to Contractual Obligations: see North 1982.

[100] The Civil Jurisdiction and Judgments Act 1982 (UK), which implements the Convention in the United Kingdom, therefore not only alters the law on the enforcement of foreign judgments but also alters the law of England and Scotland on the assumption of jurisdiction in original actions.

Convention. It provides that a judgment shall not be recognised in various circumstances including where recognition would be contrary to the public policy of the State in which recognition is sought. Again, therefore, the scheme of the Convention is not as broad as that under the Service and Execution of Process Act.

505. The detailed jurisdictional rules contained in the Convention are primarily directed to the situation of litigation involving defendants who are domiciled within a member state of the EEC. As a general rule the Convention says nothing about the assumption of jurisdiction over defendants who are domiciled outside the EEC, for example, in Australia. Notwithstanding, a judgment rendered against a person domiciled outside the EEC becomes enforceable throughout the EEC under the Convention irrespective of the jurisdictional basis that was relied upon in the action. Further, the rendering court's jurisdiction is not subject to investigation in another enforcing court in the EEC as there are no jurisdictional prerequisites to recognition and enforcement. The Convention therefore discriminates quite markedly against defendants who are domiciled outside the EEC member states.

506. *United Kingdom scheme.* The Civil Jurisdiction and Judgments Act, while primarily a vehicle for implementation of the 1968 EEC Convention, also establishes, in s 18 and 19 together with Schedules 6 and 7, a new scheme for the enforcement in one law area of the United Kingdom of a judgment given in another law area of the United Kingdom. By s 18(2) the term 'judgment' is broadly defined to include not only a judgment or order given by a court of law in the United Kingdom, but also any award or order made by a tribunal in any part of the United Kingdom which is enforceable in that part without an order of a court of law and an arbitration award which has become enforceable in the part of the United Kingdom in which it was given in the same manner as a judgment of a court. But s 18(3) confines the term to judgments given in civil proceedings and also contains certain other exclusions. Section 18(8) provides that a judgment to which the section applies shall not be enforced in another part of the United Kingdom except by way of registration under Schedules 6 or 7. Certain of the rules of private international law applicable to foreign judgments are excluded by s 19(1).

507. Schedules 6 and 7 prescribe the procedure for enforcement by registration. A distinction is drawn between money judgments which are dealt with in Schedule 6 and non-money judgments which are dealt with in Schedule 7. Paragraph 2 of the Sixth Schedule provides that a party who wishes to secure the enforcement in another part of the United Kingdom of any money provisions contained in a judgment may apply to the proper officer of the court of rendition for a certificate under the Schedule. By para 3 a certificate cannot be issued where the time for bringing an appeal has not expired or the judgment is subject to a stay of execution. Paragraph 4 provides that the certificate shall state the amount payable and the rate of interest, if any, payable thereon and the date from which such interest began to accrue; it shall also state that none of the conditions specified in para 3 are applicable and it may also contain such other particulars as may be prescribed. The certificate can then be registered in a superior court of another part of the United Kingdom under para 5 and from the date of registration is, for the purposes of its enforcement, of the same force and effect as if

given originally in the registering court. A stay of proceedings can be ordered by the registering court under para 9 to enable the judgment debtor to seek relief in the part of the United Kingdom in which the judgment was given. This procedure thus closely resembles that prescribed by the Service and Execution of Process Act.

508. Schedule 7 prescribes a like procedure for the enforcement of non-money judgments. However instead of obtaining a certificate of judgment the party in whose favour judgment has been given obtains a certified copy of the judgment. But there are certain obstacles to registration of a non-money judgment. For example, para 5(5) provides that a judgment cannot be registered in another part of the United Kingdom if compliance with the non-money provisions contained in the judgment would involve a breach of the law of that part of the United Kingdom. The scheme is thus more restrictive than the Service and Execution of Process Act.

509. *United States legislation.* In 1948 the National Conference of Commissioners on Uniform State Laws drafted a Uniform Enforcement of Foreign Judgments Act which was intended to be used as a model for enactment of legislation by the States providing for the interstate enforcement of the judgments of State courts in the United States. Legislation based on this model is currently in force in Arkansas, Illinois, Missouri and Nebraska. A revision of the 1948 Uniform Act was effected in 1964 and has been adopted in 21 States. Section 1 of the Act defines a foreign judgment to mean a judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in the State of enactment. The full faith and credit obligation only extends, by virtue of art IV, s 1 of the Constitution of the United States and Title 28 United States Code s 1738, to the judicial proceedings of courts of a State, Territory or possession of the United States. But a judgment may be denied full faith and credit outside the State of rendition if the defendant did not participate in the proceedings in the rendering State. In such cases the court of enforcement is entitled to examine the jurisdiction of the rendering court and may deny the judgment effect if it finds that the rendering court lacked the appropriate jurisdiction.[101]

510. Section 2 of the 1964 Uniform Act provides that a copy of a foreign judgment may be filed in the office of the clerk of any court in the State. The clerk is then required to treat the foreign judgment in the same manner as a judgment of the State of filing. Section 2 goes on to provide that

> A judgment so filed has the same effect and is subject to the same procedures, defences and proceedings for re-opening, vacating, or staying as a judgment of a [district court of any city or county] of this State and may be enforced or satisfied in like manner.

Thus a registered or filed sister-State judgment is not only given the same effect as a local judgment as regards its enforcement but also in regard to defences and proceedings

[101] See *Williams v North Carolina (No 2)* 325 US 226 (1945). See generally Pryles & Hanks 1974, 71–4.

for re-opening the judgment. This is in contrast to the situation under the Service and Execution of Process Act where the validity of a judgment is to be tested under the laws of the State of rendition and not the laws of the State of registration.[102]

511. Section 3 of the 1964 Uniform Act requires that the judgment creditor file with the clerk of court an affidavit setting forth the name and last known post office address of the judgment debtor. Upon the filing of the foreign judgment the clerk is required to mail notice of the filing of the judgment to the judgment debtor at the address given. It is further provided that no execution or other process for enforcement of a foreign judgment shall be issued until a set number of days after the date on which the judgment is filed. By s 4 a stay of execution can be granted if the judgment debtor shows that an appeal from the foreign judgment is pending or will be taken or that a stay of execution has been granted. A stay can also be granted if the judgment debtor shows any ground upon which the enforcement of a domestic judgment of the State of registration would be stayed.

512. There is also federal legislation in the United States providing for the enforcement of federal District Court judgments in other districts by a simple process of registration.[103] This legislation can be distinguished from the Service and Execution of Process Act in that it is federal legislation providing for the enforcement of judgments given by federal courts and does not extend to the judgments of State courts.[104]

513. *Conclusion.* The schemes examined above all exhibit some similarities in their procedures for registration of foreign judgments and in their treatment of registered foreign judgments as if they were domestic judgments of the place of registration. Also, to a greater or lesser extent, they all prescribe certain preconditions to registration or to enforcement of a judgment after registration. This may be contrasted with the liberal situation pertaining under the Service and Execution of Process Act, which imposes no preconditions to registration or to enforcement of a judgment once registered. Nor are any defences to enforcement specified in the Act. Therefore the models provided by the schemes examined above are really only of marginal relevance to the Commission's task of considering reforms to the Act. However, certain features of those schemes may be worthy of adoption and these are examined in the context of specific reforms to aspects of the present scheme of Part IV.

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[102] Section 2 of the 1964 Uniform Act appears to run contrary to the full faith and credit obligation contained in Title 28 of the United States Code s 1738, which provides that an authenticated judgment of a sister-State must be given 'the same full faith and credit in every court within the United States and its Territories and Possessions as [it has] by law or usage in the courts in such State, Territory or Possession from which [it was] taken'. This provision suggests that the only defences that can be asserted in relation to a sister-State judgment are those available in the State of rendition.

[103] See Title 28 of the United States Code s 1963. See also 28 USC s 1963A which provides for registration of judgments of the Court of International Trade.

[104] The federal legislature in the United States does not possess a general power to provide for interstate service and execution of State process and judgments, such as is found in s 51(xxiv) of the Australian Constitution.

Reform of Act

Scope of scheme

514. The Commission is confined by its Terms of Reference to considering the execution of judgments of the courts of the States and Territories. Thus foreign (extra-Australia) judgments and judgments of federal courts are excluded from the field of inquiry. The latter are already dealt with in federal legislation which provides for their Australia-wide recognition and enforcement.[105] On the question of foreign judgments, it is instructive that the Civil Jurisdiction and Judgments Act 1982 (UK) expressly excludes from the scheme of intra-United Kingdom enforcement a foreign judgment that is registered in a United Kingdom court and is deemed to be a judgment of the court of registration for the purposes of enforcement. It is recommended that this exclusion be adopted. As was pointed out above[106] all the States and Territories have legislation providing for the enforcement of judgments given in foreign countries through a scheme of registration. The scheme in South Australia is much more liberal than that which exists elsewhere and enables the registration and enforcement of foreign judgments which would clearly not qualify for enforcement in the other Australian States. Federal legislation for the interstate execution of judgments should not extend to the Australia-wide enforcement of foreign judgments registered in State or Territory courts, for otherwise the liberal rules applying in South Australia — or any other State which came to adopt them — would effectively come to apply throughout Australia. Therefore the definition of the term 'judgment' should specifically exclude a judgment of a court or tribunal of a foreign country which is registered in a court of a State or Territory.

515. Apart from this exclusion, what judgments should be capable of enforcement under the legislation? The present definition of the term confines the operation of Part IV to judgments, whether for the payment of money or otherwise, given in civil proceedings or proceedings with respect to maintenance or affiliation. With one qualification, it is recommended that this structure be retained. That qualification arises from the Commission's recommended definition of criminal proceedings, which includes proceedings seeking pecuniary penalty orders and restraining orders in relation to the profits of criminal activity.[107] While connected or associated with proceedings concerning offences — hence their inclusion in the category of criminal proceedings — the orders made in such proceedings are of the same nature as orders made in ordinary civil proceedings: a sum of money ordered to be paid is enforceable as a debt due to the State on whose behalf the proceedings are taken; and restraining orders operate

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[105] High Court judgments are enforceable throughout Australia by virtue of s 25 and 77M of the Judiciary Act 1903 (Cth) and s 26 of the High Court Procedure Act 1903 (Cth). Federal court judgments can be executed throughout Australia under s 53 of the Federal Court of Australia Act 1976 (Cth). Decrees made under the Family Law Act have effect throughout Australia by virtue of s 103 of the Family Law Act 1975 (Cth).

[106] See para 500, 503.

[107] See para 227–9.

in the same way as injunctions. Such orders, apart from fines, should be capable of enforcement throughout Australia in the same way as orders made in ordinary civil proceedings.

516. Another aspect of the definition of the term, and hence the scope of the scheme, that requires consideration concerns the question of finality. The extent of legislative power in this regard was considered in chapter 2 of this report.[108] In contrast to the breadth of this power, the definition of 'judgment' in the Act has been construed as requiring that a judgment or order be final.[109] In the present day, however, the Commission can see no reason why interlocutory, as well as final, judgments should not be capable of enforcement throughout Australia. Therefore the definition of the term should make specific reference to interlocutory orders and judgments.

517. While the Terms of Reference refer to the execution of the judgments of the courts of the States and Territories, in inquiring into the adequacy of the law the Commission is directed to have regard to, amongst other things, 'developments in the types and structures of courts *and tribunals*'.[110] While perhaps at first glance contradictory, the Commission has understood these directives as requiring it to consider whether orders of tribunals should be enforceable outside the State or Territory where they are made through procedures of the type established in the Service and Execution of Process Act. The terms in which the general directive, to inquire into the adequacy of the present law, is expressed clearly paraphrase the terms of the relevant constitutional provision, s 51(xxiv), and rather than interpreting this as confining the Commission's considerations to the subjects dealt with in the present law, it has been interpreted as directing the Commission to consider all subjects that may fall within the ambit of the constitutional power. The question of interstate execution of tribunal orders is one such subject and is discussed in the next chapter of this report.[111] But by way of comparision it may be noted briefly that the recently established intra-United Kingdom scheme for enforcement of judgments extends to 'any award or order made by a tribunal in any part of the United Kingdom which is enforceable in that part without an order of a court of law'.[112]

Qualifications for enforcement

518. *Present enforceability.* As was noted above, the Commission can see no reason to depart from the basic scheme established in Part IV. Federal legislation providing for the interstate enforcement of judgments should simply permit the employment of execution machinery in a particular State to enforce a judgment given in another State. Questions relating to the validity, effect and variation of the judgment should be litigated in the place of rendition. It follows from this scheme that a judgment should

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[108] See para 54.

[109] *Winchcombe v Winchcombe* [1955] QWN 16: see para 462. See also on the question of finality the High Court's decision in *The Queen v White, ex parte T A Field Pty Ltd* (1975) 133 CLR 113: see para 478–9.

[110] Emphasis added.

[111] See particularly para 563–6, 600–6.

[112] Civil Jurisdiction and Judgments Act 1982 (UK) s 18(2)(d).

not be enforceable outside the place of rendition at a time when it is not enforceable within that place. The converse is also largely true, namely, that a judgment which is presently capable of being enforced in the place of rendition should, with few or no exceptions, be capable of being enforced in other States. Certainly it would be anomalous if the interstate execution of a judgment was permitted at a time when it was not enforceable in the State of rendition. Accordingly it is recommended that the basic qualification for a judgment sought to be enforced interstate should be that the judgment is presently capable of being enforced in the place of rendition. An express provision to this effect would render unnecessary a provision such as s 21(3) of the Act. It provides that no certificate of a judgment shall be registered after the lapse of 12 months from the date of the judgment unless leave has been obtained. There seems no compelling reason to distinguish between judgments less than 12 months old and those more than 12 months old. The essential consideration is simply whether the judgment is presently capable of being enforced in the place of rendition. If it is, it should be subject to execution throughout the Commonwealth, but if it is not then federal legislation should not give it greater effect.

519. *Application of common law rules.* In earlier discussion it was suggested that the scheme of Part IV indicated an intention not to incorporate the common law foreign judgment rules and, on the whole, the cases indicate that this view is correct. It is, however, recommended that new legislation make it clear and so put the issue beyond doubt. Under the scheme established in the Civil Jurisdiction and Judgments Act 1982 (UK) for the enforcement in one law area of the United Kingdom of judgments rendered in another such law area, a judgment given in one part of the United Kingdom

> . . . shall not be refused recognition in another part of the United Kingdom solely on the ground that, in relation to that judgment, the court which gave it was not a court of competent jurisdiction according to the rules of private international law in force in that other part.[113]

This provision expressly excludes the common law foreign judgment rules only insofar as they impose a jurisdictional qualification to recognition and enforcement. Other aspects of the common law rules apparently remain. In the Australian context, however, it appears undesirable to exclude the rule on jurisdiction but permit the other common law foreign judgment rules to remain. The general thrust of the decided cases being that all the common law rules are inapplicable in relation to enforcement of judgments under the Act, it would be a retrograde step to now retain some of those rules. It is therefore recommended that the common law rules on the enforcement of foreign judgments be abrogated in their entirety in relation to enforcement of judgments under the legislation.

520. *Other conditions.* While the United Kingdom legislation excludes the common law jurisdictional rules applicable to foreign judgments, certain specific preconditions to registration are enacted. Paragraphs 10(b) of Schedule 6 and 9(b) of Schedule 7 provide that the court of registration may set aside the registration of a judgment if it is satisfied that the matter in dispute in the proceedings in which the judgment in

[113] id, s 19(1).

question was given had previously been the subject of a judgment of another court or tribunal having jurisdiction in the matter. Thus if the registered judgment conflicts with a prior judgment given in the forum or perhaps with a prior foreign judgment which qualifies for recognition and enforcement in the forum then the registration of the certificate of judgment may be set aside. It may be suggested that an anologous provision should be contained in new legislation. It is worthy of note, however, that the reported cases do not reveal any instances of a registered certificate of judgment conflicting with a prior judgment given in the State of registration or recognised by the State of registration. In any event, as a judgment registered under the Act is of the same effect as a judgment rendered by the registering court, the general rule regarding prior inconsistent judgments would apply in the State of registration without specific provision to that effect. Also, it is likely that a prior judgment would be taken into account in the State of rendition and would prevent the plaintiff obtaining a second judgment there. There would thus be no occasion for the interstate execution of the judgment. Therefore the problem of conflicting or inconsistent judgments is unlikely to arise and no provision along the lines of that contained in the United Kingdom legislation is necessary.

521. A further qualification on registration is provided in para 5(5) of Schedule 7 of the United Kingdom Act.

> A judgment shall not be registered under this Schedule by the Superior Court in any part of the United Kingdom if compliance with the non-money provisions contained in the judgment would involve a breach of the law of that part of the United Kingdom.

This disqualification only relates to the enforcement of non-money judgments. Like the provision considered in the previous paragraph, such a provision could be included in new Australian legislation without destroying the scheme of the legislation but it seems largely unnecesssary because of the extreme rarity of cases where it might be relevant. Again, throughout the eight decades of the operation of the present Act there has been no reported case of a non-monetary judgment being registered under the Act whose enforcement would involve a conflict with the law of the State of registration. Therefore, no such provision is recommended.

Procedure of enforcement

522. *Introduction.* The procedure for registration and enforcement of judgments under the Act has been described previously in this chapter. While the basic scheme appears to have operated well, certain minor changes are recommended in line with the objectives of reform noted earlier. These are discussed in the following paragraphs.

523. *Certificate of judgment or copy of judgment.* The first area in which a change is recommended is in relation to the documentation to be produced to a court in the State or Territory in which enforcement is sought. Presently, a certificate of judgment is required to be registered in a book kept by the court called the Australian Register of Judgments. The form of the certificate is set out in the Third Schedule to the Act. The certificate sets out in tabular form pertinent information concerning the judgment. While the requirements of the certificate are clearly stated, it appears that often some of

the required information is inadvertently omitted.[114] This can cause difficulties for the registering court and for plaintiffs when enforcement proceedings are later sought to be taken on a registered certificate. It has also been suggested that the need for an officer of the court of rendition to prepare a certificate of judgment is an unnecessary waste of time and that a certified copy of the judgment would work just as well.[115] Certainly, in the case of a judgment ordering non-monetary relief such as an injunction or specific performance, a tabular certificate of judgment would appear to be far less convenient than a copy of judgment. A certified copy of a judgment is all that is required under the United Kingdom legislation in relation to non-money judgments, although a certificate of judgment is required in relation to money judgments.[116] While a similar distinction could be maintained in Australian legislation, in the Commission's view it would be simpler and more convenient overall to require merely a certified copy of the original judgment in all cases. It is recommended that a certified copy of judgment be required in all cases for production to a court in the State or Territory in which enforcement of a judgment is sought.

524. *Filing or registration.* If a certified copy of the original judgment is produced there seems no compelling reason why the judgment should be registered by a process of entering the relevant details in a book set aside for that purpose. Accordingly it is recommended that upon production of a copy of a judgment it should simply be filed in the court to which it is produced.

525. *Obligation to file.* A registrar or other proper officer of a court presently has a duty to register a certificate of judgment complying with the Act unless it is more than 12 months old.[117] It is recommended that this situation continue, that is, that there be an obligation on an officer of the court to which a copy of a judgment is produced to file the copy in the court.

526. *Effect of filing.* As is the case under the Act at present, once a copy of a judgment is filed in a court, the copy judgment should be a record of the court. Further, the judgment should be deemed to have the same effect, and to give rise to the same proceedings by way of enforcement or execution, as if it were a judgment of the court in which it is filed.

527. *Leave.* Section 21(3) of the Act provides that a certificate of judgment shall not be registered after the lapse of 12 months from the date of judgment unless leave is first obtained from the court in which the certificate is to be registered. Endeavours were made to obtain statistics regarding the number of applications made under s 21(3). Adequate statistics could not be obtained in the case of most States. In South Australia, the Director of the Courts Department estimated that 10 applications under the provision were made each year to the District Court, while generally there were no such applications made in the Supreme Court. In Tasmania, the records revealed that

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[114] Registrar, Supreme Court of South Australia *Submission* 1.

[115] Nygh *Submission* (June 1984) 1.

[116] Civil Jurisdiction and Judgments Act 1982 (UK) Schedule 7, para 2(1); Schedule 6, para 2(1).

[117] *Ex parte Penglase* (1903) SR (NSW) 680.

there were no such applications made in the State. Detailed statistics were obtained from Queensland. Applications made to Magistrates Courts for the years 1977 to 1982 were as follows:

1977 – 5	1980 – 35
1978 – 11	1981 – 36
1979 – 28	1982 – 32

In the District Court, 40 applications were made in 1979 and 46 applications were made in 1982. Applications to the Supreme Court were as follows:

1972 – 2	1981 – 5
1977 – 3	1982 – 3

Thus as far as can be ascertained the number of applications made to Supreme Courts is not great but the applications made to Magistrates Courts and District Courts in Queensland total approximately 100 per year. It is a fair assumption that at least equal if not greater numbers of applications are made in Victoria and New South Wales.

528. The need to make an application to register a certificate of judgment more than 12 months from the date of judgment was criticised in a number of submissions as being inconvenient and a waste of time and money. One submission also noted that the requirement appeared to prejudice those who unsuccessfully attempted to negotiate settlement of a judgment, for those attempts could well take more than a year.[118] Further, it is hard to see that it serves any significant purpose in that an application is usually made ex parte and has become largely administrative in nature. The waste of scarce judicial time therefore is unwarranted. One possibility would be to extend the short time period presently prescribed, for example, to a period of three or five years from the date of judgment. However, while this would probably result in the making of less applications, it would not remove the basic criticisms regarding wastage of time and money. The Commission therefore recommends that there be no leave requirement in this regard. However, the basic condition that a judgment not be enforced in another State unless it is presently capable of being enforced in the State of rendition[119] will result in the application of the time limitations arising under the law of the State of rendition. A judgment will thus not be capable of enforcement after the time that enforcement in the State of rendition is barred.

529. *Affidavit of liability.* Section 23 of the Act requires that, before execution on a certificate of judgment can be effected, the judgment creditor swear an affidavit. The affidavit must state: that the amount for which the execution is proposed to be issued is actually due and unpaid; that an act ordered to be done remains undone; or that the person ordered to forbear from doing an act has disobeyed the order. Precisely why this requirement is imposed by the Act is not readily explicable. In view of the fact

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[118] Martin *Submission* (21 January 1983) 2.

[119] See para 518.

that the judgment, once registered, can be executed in the same way as a judgment of the court in which it is registered, the usual preconditions to execution of domestic judgments would apply to execution on a registered judgment. The same will apply under the Commission's recommendations for the filing of a certified copy of judgment. Moreover, there appears to be no reason for distinguishing between a domestic judgment and a judgment given in another State filed in a court of a State, particularly in view of the principle that the execution procedures applicable should be those of the State or Territory in which execution is sought. Therefore it is recommended that the affidavit requirement imposed by the Act be abolished. However, the requirement that a judgment not be enforced under the Act if it is not capable of being enforced in the place of rendition will operate to safeguard against multiple enforcement. A judgment which was satisfied would not be capable of enforcement in the State of rendition and a judgment which was partially satisfied would only be capable of enforcement in that State to the extent that it was unsatisfied. These restrictions would apply to prevent further enforcement of the judgment in any State or Territory in which a copy of the judgment had been filed.

530. *Appropriate court.* The Act provides in s 21(1)(a) for the registration of a certificate of judgment in any 'Court of like jurisdiction' in any other State or part of the Commonwealth. The three paragraphs of the definition of 'Court of like jurisdiction' in s 22 refer to the three tiers of courts that exist in most, but not all, States and Territories, namely, Supreme Courts, District and County Courts and Small Debts Courts and Courts of Petty Sessions. There are some omissions in s 22. For example, for completeness the third tier set out in s 22(c) should refer to Magistrates Courts (which exist in Queensland and Victoria), Local Courts (which exist in South Australia, New South Wales and Western Australia) and Courts of Requests (Tasmania). If there is no 'Court of like jurisdiction', s 21(1)(b) provides that the certificate of judgment is to be registered in a District or County Court or other inferior court of record having civil jurisdiction in the State or Territory of registration.

531. Ascertainment of the proper court in which to register a certificate of judgment in accordance with these provisions has not been free of difficulty. In particular, problems have been perceived to arise where a judgment is obtained in an inferior court in one State or Territory for an amount which exceeds the civil jurisdiction of an inferior court of the State or Territory in which registration is sought. For example, a judgment may be obtained in an intermediate court in one State and may be sought to be enforced in another State that only has a two tier court structure consisting of Magistrates Courts and a Supreme Court. In these circumstances there appears to be no 'Court of like jurisdiction' within s 22 and s 21(1)(b) would require that the judgment be registered in an inferior court of record of the State of registration. But it may well be that the monetary jurisdiction of the Magistrates Court in the latter State is less than the amount of the judgment awarded by the intermediate court in the State of rendition. Even if the State of registration had an intermediate court so that the provisions of s 22 could operate, it may be the case that the intermediate court of the State of registration has a lower monetary limit of jurisdiction than the amount of the judgment given by the intermediate court of the State of rendition. In these circumstances the view taken by the Supreme Court of Queensland in *Good v*

Johnson[120] was that the judgment had to be registered in the Supreme Court of the State of registration, but this interpretation does some violence to the wording of s 21 and 22. However, that reasoning was not applied in *Vischer v McMahon*[121] where it was held that, in the absence of a court of like jurisdiction in the State of registration, s 21(1)(b) required registration in an inferior court of record notwithstanding that that court has a lower jurisdictional limit than the amount of the judgment given in the State of rendition. This was because the Act itself conferred jurisdiction on the court to enforce the judgment irrespective of limits on jurisdiction imposed by State or Territory law which would apply in an original action brought in the court of registration under State or Territory law.

532. While the latter view, if correct, would overcome the problems arising from differing jurisdictional limits of inferior courts other problems may arise. Take, for example, a case where a judgment is obtained in a third-tier court in a State which orders the defendant to do or to forebear from doing an act other than the payment of money. If the plaintiff wishes to enforce that judgment in another State, s 22(c) requires that the judgment be registered in an equivalent court in the State of registration. But the lowest tier of courts in the State of registration may not be able to award equitable relief; they may only be able to give monetary remedies. If this was so, then such courts would not have any execution process which would be available to enforce the judgment. The problem might be overcome if it was possible, after registration, to use the execution process of a superior court in the State of registration to enforce the judgment, but this would be a fairly indirect and cumbersome way of enforcing the interstate judgment.[122]

533. A number of possibilities could be suggested to overcome the problems noted above. One is to build on the existing system and provide that a copy judgment can be filed in a court of like jurisdiction. This would require some amendments to the present s 22 to include the references to the courts there omitted.[123] Moreover, if the view were taken that *Good v Johnson* was rightly decided then the problem which arose in that case could be overcome by amending s 21(1)(b) to provide for filing in the Supreme Court of a State rather than in an inferior court of record of a State in cases where there was no court of like jurisdiction. Alternatively, if the view in *Vischer v McMahon* is followed then this could be clarified by specifically investing inferior courts with federal jurisdiction to enforce a judgment for an amount which exceeds that which the court in which the judgment is filed could itself award.

534. A second possibility is to dispense with the concept of a court of like jurisdiction and to introduce a flexible system. For example, in one submission it was suggested that 'the judgment creditor should be free to register in any court which would have had jurisdiction with the proviso that he may be deprived of costs of registration and

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[120] [1958] QWN 26.

[121] (1984) 29 NTR 26.

[122] Some of these problems were averted to in the public hearings of the Commission conducted in the course of its Reference on debt recovery and insolvency: David Clement and Darryl Harper, *Transcript of Public Hearings*, Canberra (24 November 1978) 273–4.

[123] See para 530.

enforcement if he chose too superior a court'.[124] Under such a system, however, there may be some argument about an appropriate court in the context of an application to award costs on a lower scale. The suggestion was also rejected in another submission in which the view was expressed that 'it does not seem to be right in principle that a Supreme Court judgment may be enforced in a small debts court or vice versa'.[125]

535. A third possibility is to provide for the filing of a copy judgment in a court which would have had jurisdiction to award a like judgment or remedy, other than by consent of the parties. A variation on this option was contained in one submission where it was suggested that a judgment creditor who seeks to enforce only part of a judgment should be able to do so in a court which would be competent to award the residual value of the judgment sought to be enforced.[126] Under this option there could be no argument, such as arises under the present system, as to the proper court in which to file a copy judgment. Nor would the potential difficulties of or objections to the second option arise. This system would ensure that registration would always be effected in a court which could have awarded the very remedy decreed by the rendering court, both in nature and in amount, and the court would possess the necessary execution mechanisms to enable the plaintiff to enforce the out-of-state judgment. The Commission recommends that this option be adopted. Filing of a copy judgment should occur in a court which could have awarded the relief given in the judgment. If there is more than one such court in the State or Territory where the judgment is sought to be enforced, then the copy judgment should be filed in the court of more limited jurisdiction.

536. *Cross-notification between courts.* Section 26(1) of the Act establishes a scheme of cross-notification between the court of rendition of a judgment and courts in which a certificate of the judgment has been filed. It requires a court in which a certificate of judgment has been registered to notify the rendering court of that fact. The registering court is also required to notify the rendering court of the issue of any execution process or the taking of enforcement proceedings on a registered certificate and of the satisfaction, either in whole or in part, of the judgment in the registering court. Section 26(2) also requires that, when a judgment has been satisfied in whole or in part, either in the State of rendition or in another State where it is registered, the rendering court is obliged to notify other courts in which the judgment is registered of such satisfaction. In a Research Paper on the topic of judgments it was suggested that the notification requirements should be expanded to require a court of registration to notify the rendering court of a stay of execution granted in respect of a registered judgment. It was also suggested that the 'clearing house' functions of the rendering court be expanded by requiring that court to notify courts in which a judgment was registered if a judgment had been varied or set aside or if proceedings upon it had been stayed.[127] A number

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[124] Nygh *Submission* (June 1984) 1.
[125] Staples *Submission* (29 January 1986) 1.
[126] Treston *Submission* 1.
[127] Pryles 1984b, para 118.

of submissions supported the general tenor of these suggestions, one noting that 'there ought to be a complete record somewhere of what happens pursuant to the judgment and the obvious place would appear to be the court of rendition'.[128]

537. The Commission has considered a number of arguments both for and against the cross-notification requirements. Arguments 'for' include the following:

- Notification is desirable in the interests of the judgment debtor as it ensures that each court in which a judgment has been registered will be kept aware of the situation with respect to a judgment and thus will be able to prevent double satisfaction of a judgment.
- In view of the fact that the Commission has recommended abolition of the affidavit requirement,[129] the need for notification procedures between courts might be thought to be greater.
- Notification between courts may be rendered relatively simple and inexpensive with the introduction of computer technology into the courts.

On the other hand a number of arguments may be put in favour of abolition of the requirements.

- Notification as between courts is cumbersome and time-consuming and, until the advent of computer technology in all Australian courts, would require the commitment of substantial resources in order to be effective and efficient.
- The problem of double satisfaction of a judgment is unlikely to arise frequently and it should be left to the judgment debtor to take the necessary action to prevent fraudulent or unjust enrichment.
- Notification requirements as between courts are undesirable in view of the objective of streamlining and simplifying interstate execution of judgments.

A judgment on this question is necessarily a fine one involving an evaluation of the considerations noted above. On balance, the Commission has come to the view that there should be no system of cross-notification between courts in respect of judgments sought to be enforced under the Act. In its view, the objective of streamlining and simplicity would be unduly compromised by such requirements. Fears that defendants will be liable to double enforcement also appear to be exaggerated, at least to the extent that they assume that defendants are helpless in the face of attempted double enforcement of a judgment. Not only would a defendant be quick to point out to a court an attempt by a plaintiff to enforce a judgment that had already been enforced, but the basic condition of present enforceability[130] will be effective in such circumstances to

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[128] Registrar, Supreme Court of South Australia *Submission* 1. See also Institute of Mercantile Agents Ltd *Submission* (5 May 1986) 5.

[129] See para 529.

[130] See para 518.

render further enforcement procedures void. The Commission therefore recommends that the present cross-notification requirements be abolished.

538. *Notification to judgment debtors.* A related question concerns the desirability of notifying judgment debtors of certain actions taken in respect of a judgment. It was suggested in one Research Paper that a judgment debtor should be given notice, as is required under the United States Uniform Enforcement of Foreign Judgments Act, of the filing of a judgment in a court of another State both as a safeguard against double enforcement and to enable the debtor to seek a stay of proceedings if there was cause for doing so.[131] This proposal could be extended by requiring that a judgment debtor be notified of the issue of execution process on a judgment. Again, however, there are powerful arguments against the imposition of such requirements. In addition to the basic objection that they would complicate the scheme for interstate execution of judgments and the argument, as was put above, that defendants are not helpless in the face of attempted double enforcement, several other arguments should be considered.

- Judgment debtors are not necessarily notified within the State of rendition of the issue of any execution process and they should not be accorded greater rights in another State where the judgment is filed.
- Notifying a judgment debtor of the filing of a judgment may enable the debtor to defeat the judgment creditor by removing assets from that State before execution can be issued.
- A judgment creditor will only file a judgment in a State in which the judgment debtor possesses assets. The judgment debtor ought to know or would be presumed to know that assets in any State were liable to be relied upon for enforcement of a judgment.

In the Commission's view these arguments outweigh any that may be put in favour of a requirement to notify judgment debtors of the filing of a judgment or the issue of execution process. Therefore no general requirement of notification to judgment debtors is recommended.[132]

539. *Costs.* Section 22A provides that the court of registration may order the defendant to pay the plaintiff's costs of registration (including the cost of obtaining a certificate of judgment) and of enforcement proceedings under the Act to an amount to be assessed by the court or a judge thereof but not exceeding the amount prescribed. Neither the Act nor regulations made pursuant to s 28 prescribe a maximum amount. However, rules made by State judges pursuant to s 27 contain provisions in point, both as to the method of assessment and the maximum amount allowed. For example, O 81B, r 24 and 25 of the Rules of the Supreme Court of Western Australia provide

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[131] Pryles 1984b, para 101.

[132] But see para 682 for recommendations regarding notice where initiating process in a proceeding has not been served personally.

24. Where proceedings are taken to enforce a judgment, a certificate of which has been registered under the Act in a Court of the State, the costs shall be allowed as upon similar proceedings to enforce a like judgment of that Court.

25. The costs that may be allowed under s 22A of the Act shall not exceed the sum of one hundred dollars.[133]

Once a costs order has been made, s 22A(2) provides that the order is deemed to be incorporated with the certificate and the amount payable thereunder is payable under the certificate.

540. A judgment creditor is likely to incur costs in relation to the interstate enforcement of a judgment in respect of

- obtaining a copy judgment and filing it in a court of a State or Territory for the purposes of enforcement and
- the issue and execution of enforcement process.

The judgment creditor should be able to recover these costs. The question is whether the present procedures for doing so are appropriate. In this regard, the requirement that the costs be assessed by the enforcing court or a judge thereof has been criticised.

> A final anachronism which makes work for judges and the legal profession is the part dealing with enforcement of civil judgments. Section 22A requires a judge to approve of and assess the costs of registration of interstate judgments. Application has to be made to him with proof that [registration of] the judgment was justified. This is usually done by an Affidavit stating that the defendant has no assets in the court of judgment but has assets in the court in which it is proposed to register the judgment. The amounts of the assessment are fixed by a scale, but nevertheless it seems quite absurd that there could not be some simple system of registration between the various courts of Australia without the intervention to any extent of the legal profession.[134]

In a similar vein another submission offered the following comments in relation to the procedures under the Act in the Tasmanian Court of Requests.

> The provisions of this section [s 20] allow a certificate to be registered for enforcement however before the costs of such registration can be allowed against a defendant, the Court must be satisfied etc, in accordance with s 22A(1).
>
> As 'Court' means commissioner, a formal application and order must be drawn and filed and placed before the 'Court'. This procedure again increases costs and because of the nature of the order, could it not be done administratively by the Registrar.[135]

541. The Commission agrees with these comments and does not favour retention of the scheme contained in s 22A. There are a number of ways of giving a judgment creditor an entitlement to costs but removing the obligation of determining those costs

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[133] See also r 19 and 20 of the Rules of Court (Service and Execution of Process Act) 1917 (SA); r 4 of the Supreme Court (Service and Execution of Process) Rules 1968 (Vic).

[134] Martin *Submission* (21 January 1983) 2.

[135] Deputy Registrar, Court of Requests, Hobart *Submission* 1.

from a court or judge. One option would be to empower an administrative officer of the court to assess the costs. Another option would be to prescribe in regulations the amount of costs which a judgment creditor is entitled to in respect of obtaining a copy of the judgment and filing it. A third option is merely to provide that these costs are recoverable and to leave the procedure by which those costs are to be determined to each court. This is the course adopted in the United Kingdom legislation[136] and the Commission recommends that this course be followed.

542. So far as concerns the costs of enforcing the judgment in a State or Territory where it has been filed, it has already been noted that once a judgment is registered proceedings will be able to be taken on it as if it were a judgment of the court in which it is registered. It follows that the costs associated with enforcement of a judgment should be the same as those associated with enforcement of a like judgment of the registering court. Also, the procedures for their recovery should be those applicable in the court in which enforcement proceedings are taken.

543. *Interest.* Section 21(2) of the Act makes it clear that the question of interest is one for the court of rendition and not for the court of registration. This accords with the policy of making the court of rendition responsible for the amount, variation and enforceability of the judgment and for according to the court of registration the status of an execution tribunal. In conformity with this policy interest should continue to be determined in accordance with the law of the State or Territory of rendition of a judgment.

544. However, there are practical problems associated with determining an entitlement to interest in this way. The Act presently requires the rate of interest and the date from which it accrues to be endorsed on the certificate of judgment which the plaintiff obtains from the court of rendition. But this is not always done. In order to overcome this problem it has been suggested that the entitlement to interest should be determined in accordance with the law of the State or Territory of enforcement of the judgment.[137] This solution, while perhaps convenient, particularly in view of the fact that a certified copy of the judgment — the Commission's recommended documentation for filing rather than a certificate of judgment — may not show the rate of interest applicable to the judgment, would mean that a judgment which was filed in several States would be subject to different rates of interest depending on the jurisdiction in which it was first enforced. There would also be situations where differing rates of interest would apply to the same judgment which was part satisfied in a number of States.

545. The Commission therefore favours retention of the existing scheme whereby the rate of interest is determined in accordance with the law of the State or Territory of rendition. But it is recognised that there are practical problems to overcome if the system is to be effective: the copy of the judgment may not show the appropriate rate of interest; and even if it does, the information may be misleading. The latter problem arises because in some courts the rate of interest applicable to a judgment

[136] Civil Jurisdiction and Judgments Act 1982 (UK) Sch 6, para 7; Sch 7, para 7.
[137] Registrar, Supreme Court of South Australia *Submission* 1; Zelling *Submission* 2.

debt may fluctuate from quarter to quarter. Thus the rate endorsed on the copy of the judgment may not be accurate at the time enforcement of the judgment is sought. These problems can be overcome, however, short of changing the basis on which the entitlement to interest is determined. The Commission recommends a flexible provision whereby the judgment creditor has an obligation to satisfy the enforcing court as to the amount of interest payable on the judgment under the law of the rendering State, but to leave the procedure by which that is done to be determined by the enforcing court. If the judgment creditor cannot satisfy the enforcing court of the applicable rate of interest and the amount of interest so determined, there should be no entitlement to the recovery of interest on the judgment.

546. *Stay of proceedings.* The basic scheme of the Act at present, and which it is recommended should be maintained, is merely to enable the execution process of a court in one State to be used to enforce a judgment given in another State. The enforcing court, therefore, should not itself determine questions relating to the validity of the judgment and defences which a judgment debtor may assert in order to prevent enforcement. Rather, questions relating to the validity, enforceability and variation of a judgment should be determined in the State of rendition. Section 25 provides machinery to enable a stay of enforcement proceedings to be ordered pending the outcome of proceedings in the State of rendition to determine the validity of a judgment or to set it aside. It has been held that a permanent stay cannot be granted under this provision.[138] It is recommended that new federal legislation also contain a provision enabling a stay to be granted. However, to strengthen the basic scheme of the legislation, it should be specifically provided that a stay can be granted only for a specified period of time and only for the purpose of enabling a judgment debtor to make application to an appropriate court in the State of rendition to set aside, vary or give other relief in respect of the judgment. As at present, where the enforcing court grants a stay it should also have power to require that the judgment debtor give security for the costs associated with the stay.

[138] *Remilton v City Mutual Life Assurance Society Ltd* (1907) 24 WN (NSW) 177.

8. Tribunals

Introduction

Terms of Reference

547. The Service and Execution of Process Act applies, in terms, only to process concerning proceedings in courts and to judgments of courts. Further, it has been held that the facilities provided by the Act cannot be availed of in relation to the process and orders of certain tribunals.[1] Several State Attorneys-General have expressed concern about the lack of facilities for interstate service and execution of the process and orders of some tribunals — Small (Consumer) Claims Tribunals and Residential Tenancies Tribunals were mentioned — and have suggested to the Commonwealth Attorney-General that this should be remedied.[2] These concerns are reflected in two paragraphs of the Terms of Reference, which require the Commission to consider

- developments in the types and structures of courts and tribunals and
- developments in the procedures of courts and tribunals including the creation of informal procedures for minor civil disputes and minor criminal offences.

The first of these paragraphs points to the need to consider a wide range of tribunals, not only those with dispute resolution roles.

Approach to reform issue

Purpose of constitutional power

548. The major issue is whether federal law should facilitate the interstate service and execution of process and orders of some or all State and Territory tribunals.[3] This matter could be considered in a number of ways, for example, by considering the 'worthiness' of particular tribunals. However, one would quickly be overcome by the sheer weight of numbers of tribunals.[4] Consonant with the Commission's approach

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[1] See *R v Small Claims Tribunal, ex parte Leggett Rubber Products Pty Ltd* [1977] Qd R 196, 198, a decision concerning Small Claims Tribunals in Queensland.

[2] Copies of the representations made by State Attorneys-General to the Commonwealth Attorney-General were provided to the Commission at the time the Reference was given.

[3] All the different bodies under examination, although known by a variety of names and performing a variety of functions, will be referred to as 'tribunals' to distinguish them from judicial tribunals, that is, courts.

[4] It was estimated in one study of administrative tribunals (a term encompassing Small Claims Tribunals) in Victoria that there were over 200–300 such tribunals in existence: Robbins 1982, 1. If that figure were to be multiplied by the number of separate jurisdictions in Australia the enormity of such a task can be appreciated. In any event, such an approach would risk the omission of potentially 'worthy' tribunals, for that study notes that even State administrations may not be aware of the numbers of tribunals within their own jurisdictions: ibid.

to updating of the existing provisions of the Service and Execution of Process Act, it is appropriate to consider the matter by considering the purpose of the relevant constitutional powers. At federation, the role of the courts in the resolution of civil disputes and the prosecution of alleged offenders was seen as a potentially powerful tool to promote the integration of the Commonwealth, hence the conferral of power on the federal legislature in s 51(xxiv) of the Constitution to make laws by which a measure of integration between the separate legal systems of the States could be achieved. What must now be considered is whether the purpose sought to be achieved by the conferral of this power is being compromised because the Service and Execution of Process Act does not provide for the service and execution of the process and orders of tribunals and whether that purpose could be furthered by the provision of those facilities.

Categorisation of tribunals

549. Just as the facilities provided by the Act for the service of process are distinguished on the basis of the types of proceedings in which the process is issued, it is desirable to attempt some categorisation of tribunals or tribunal proceedings for the purpose of considering whether the coverage of the Act should be enlarged to include tribunals' process and orders. It would be possible to categorise tribunals by reference to a number of indicia, for example, according to their membership, procedure or jurisdiction. The wide variety of such characteristics,[5] however, militates against their choice as a basis for categorisation. Rather, a broader basis for categorisation should be used. Again, in the same way as the roles of the courts were seen at the time of federation to be crucial to the effective integration of the States, the Commission considers that a roles-based categorisation should be adopted, for such a categorisation is appropriate to and permits a proper examination of whether the purpose of the constitutional grant of power is currently being achieved. For that purpose, the Commission proposes a three-fold categorisation. Some tribunals have roles similar to those of courts — the adjudication of disputes between persons after the hearing of evidence and so on. Consequently, consideration whether their process and orders should be capable of interstate service and execution raises issues analogous to and not dissimilar from those concerned in relation to process and judgments of courts. Other tribunals have quite different tasks, such as the regulation of professions, trades and occupations. Still others perform tasks of an investigative and advisory nature generally for purposes related to government. The latter two categories by their very nature are different from courts and give rise to special considerations. The three broad categories adopted by the Commission therefore are dispute resolution tribunals, regulatory tribunals and investigative tribunals. It must be admitted that the categories are not perfect, in the sense of being mutually exclusive, for one tribunal may perform more than one role.[6] However, such overlapping of categories does not detract from their usefulness in considering the major issue, for each role can be isolated for the purposes

[5] See further para 570–609.

[6] eg the various functions of the Commercial Tribunal established in New South Wales to regulate credit providers and to adjudicate upon disputes between credit providers and their customers.

of discussion. If necessary, limitations can be placed on any facilities for interstate service and execution in respect of particular roles or those facilities may be granted in respect of one role but denied in respect of another.

Outline of chapter

55. As a precursor to discussion of whether federal law should facilitate the interstate service and execution of process and orders of tribunals on the basis set out above, a brief summary is provided of the development of and roles assigned to State and Territory tribunals. Some of the major characteristics of tribunals are also examined. There are several reasons for this. First, some characteristics of tribunals may be such as to require modification of the course indicated by the assessment undertaken of tribunals in relation to the purpose of the constitutional power. Further, an understanding of tribunals' characteristics is necessary in order to devise procedures for interstate service and execution of their process and orders. In addition, as the discussion in chapter 2 of constitutional considerations has indicated, the Commonwealth's power to legislate in this field is not unlimited and may depend on tribunals possessing certain characteristics.[7] The relevant constitutional considerations are identified in this chapter in order to provide some understanding of the form of the Commission's recommendations in this area, the exposition of which conclude the chapter.

Development and roles of tribunals

Dispute resolution tribunals

Development

551. At the time of federation the power to adjudicate upon civil and criminal matters was generally confined to the courts.[8] Since then, there has been considerable change in the legal systems of the States and more recently those of the Territories. In particular, tribunals, rather than the courts, now exercise a wide range of dispute resolution powers. The fields in which tribunals now exercise concurrent or exclusive dispute resolution powers include consumer, tenancy and credit law, anti-discrimination or equal opportunity law, labour law and compensation for workers' injuries. Further, they have become an integral part of the corpus of dispute resolution mechanisms available to the public, a large number of persons having used the facilities they provide.[9]

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[7] See particularly para 51–2.

[8] One exception in the civil area was the system of arbitration, regulated in certain Colonies even before federation: see eg Arbitration Act 1891 (SA); Arbitration Act 1892 (Tas).

[9] eg 5510 matters were heard and determined by Consumer Claims Tribunals in New South Wales in the 1985–86 financial year: DCA 1986, Appendix 6; during 1984–85 the New South Wales Anti-Discrimination Board received 808 complaints of discrimination under the Anti-Discrimination Act 1977 (NSW) and 30 complaints were referred to the Equal Opportunity Tribunal for determination: ADB 1986, 77, 51.

Reasons for development

552. *Informality of procedures.* A major reason for the establishment of dispute resolution tribunals is to enable parties to resolve their disputes informally, quickly and cheaply, discouraging the delays and technical arguments which could arise in court proceedings.[10] For example, on the second reading of the Bill to establish Consumer Claims Tribunals in New South Wales it was said: 'the procedure laid down will ensure that the tribunals operate with a minimum of expense, formality and delay'.[11]

553. *Specialisation.* In view of the generally limited jurisdiction given to dispute resolution tribunals, a second reason concerns the capacity of tribunals and their members to develop an expertise for handling disputes of the type within that jurisdiction. The members of certain tribunals are required to have some expertise on matters within the jurisdiction of those tribunals. The benefits of bringing to bear specialist knowledge or skill in the resolution of particular disputes has often been recognised.[12]

Extent of development

554. The range of tribunals and their jurisdictions are not uniform throughout Australia. For example, Small (Consumer) Claims Tribunals have been established only in Queensland, Victoria, New South Wales and Western Australia. In Tamania consideration was given to the establishment of similar tribunals but the fact that the Service and Execution of Process Act would not apply to the process and orders of such tribunal was a significant reason for not adopting that course.[13] Instead, there is now legislation enabling Courts of Requests to adopt procedures when dealing with small claims-type matters that are very similar to the procedures of the tribunals in the jurisdictions noted above.[14] The potential problems regarding interstate service and execution of process and judgments have been overcome while enabling the speedy, cheap and informal resolution of disputes. A broadly similar approach has been taken in South Australia, the Northern Territory and the Australian Capital Territory.

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[10] In some tribunals, for example, there are restrictions on the right of parties to be represented by legal practitioners.

[11] Hon FM Hewitt, Minister for Labour and Industry and Minister for Consumer Affairs, NSW Hansard, 21 March 1974, 1729. Similar expressions of purpose in relation to tribunals may be found in the following: TLRC 19, Recommendations of the Residential Tenancy Committee, para 8; TLRC 22, 6–8; Community Committee on Tenancy Law Reform, para 2.3.1, 2.3.7; the long title of the Residential Tenancies Act 1980 (Vic). See also Robbins 1982, 21–2.

[12] See eg the comments of the then Premier and Treasurer, the Hon NK Wran QC, on the composition of the New South Wales Equal Opportunity Tribunal: NSW Hansard, 25 November 1980, 3411–2. See also eg Equal Opportunity Act (SA) 1984 s 19, s 22; Planning Appeals Board Act 1908 (Vic) s 5, s 16(4), s 17(2)(b).

[13] Wright 1980, para 2.09. The paper notes that the decision of *R v Small Claims Tribunal, ex parte Leggett Rubber Products Pty Ltd* [1977] Qd R 196, referred to in para 78, has created practical difficulties for the Tribunals in New South Wales and Queensland. This has also been noted in some submissions, eg Department of Justice (Qld) *Submission* (29 September 1983) 1.

[14] Court of Requests (Small Claims Division) Act 1985 (Tas).

Regulatory tribunals

Development of regulatory role

555. The growth in tribunals regulating entry into and practice in various professions, trades and occupations has also been rapid. The first such bodies concerned the medical[15] and legal professions[16] and auctioneers.[17] They now also cover persons such as architects, builders, chiropodists, dental technicians, dentists, horse and greyhound trainers, jockeys, nurses, optometrists, optical dispensers, pharmacists, physiotherapists, plumbers, drainers and gasfitters, process servers, real estate agents, surveyors, travel agents, valuers and veterinary surgeons. There is almost uniform coverage of such occupations throughout Australia, although the characteristics of the tribunals involved vary from State to State.

Variety of functions

556. Regulatory tribunals perform a number of tasks. They often fix the standards of knowledge, skill and experience required for particular vocations. They control the issue of licences to, or the registration of, persons who desire to carry on particular vocations, investigating the qualifications of and assessing the suitability of applicants. This task is often a continuing one, involving annual re-issue of licences or re-registration and also disciplinary functions. For these purposes regulatory tribunals often possess investigative powers broader than the powers of dispute resolution tribunals and courts, but ultimately their function will be to reach a determination regarding the rights of a person to carry on a profession, trade or occupation. In doing so, they may be called upon to adjudicate upon disputed matters of fact, whether arising because of an objection to the issue or renewal of a licence or registration, or upon a complaint by a member of the public or a public 'watchdog' concerning the occupational performance of a person having a licence or being registered. They may exercise similar powers where they are authorised to determine disputes between licenced or registered persons and their customers or clients and to order the payment of compensation or the rectification of work. Regulatory tribunals also may have general investigative functions concerning the practice of the occupation concerned or, more widely, general matters of concern within the regulated field of activity.

Multi-body tribunals

557. In some cases it is misleading to speak of a 'tribunal' as regulating a profession, trade or calling, for there may be separate bodies which undertake the various regulatory tasks. One body may fix the required standards and control the issue of licences to or registration of persons. It may also undertake initial investigations where the professional conduct or propriety of a licenced or registered person is called into question. Another body may then have the task of conducting a complete investiga-

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[15] The Medical Practitioners Act 1855 (NSW).

[16] An Act to regulate the admission in certain cases of Barristers of the Supreme Court of New South Wales, 11 Vic No 57 (1848).

[17] An Act to regulate the Licensing of Auctioneers and the collection of Duties on Property sold by them, 11 Vic No 16 (1847).

tion into the matters which the initial investigation has revealed as warranting further inquiry. As a result, a licence or registration may be cancelled or suspended, a fine imposed or orders of a compensatory nature made.

Investigative tribunals

Development of role

558. The process whereby governments have relied upon special tribunals to investigate and make recommendations on matters of policy has long been established.[18] The increasing complexity of society and trend toward greater governmental regulation have led to greater reliance upon investigative tribunals to perform some of the information gathering functions essential to policy and decision-making by government.

Purposes

559. *Policy and public administration.* Bodies established by the executive, for example, Royal Commissions and Boards of Inquiry, undertake investigations to aid governments' tasks of policy formulation.[19] Parliamentary committees inform the legislative process and scrutinise public administration.[20] Permanent investigative tribunals established under legislation have important investigative and advisory roles in the formulation of government policy and decision-making.

560. *Specific investigative tasks.* Investigative tribunals also have specific investigative and advisory tasks of a more limited nature, inquiring into particular situations or occurrences. Parliamentary Commissioners or Ombudsmen are concerned with specific incidents of public administration. Other tribunals, for example, the New South Wales Privacy Committee, investigate private disputes. Investigative tribunals may be employed also to investigate matters such as public disasters, for example, the collapse of the Westgate Bridge in Melbourne, and criminal enterprises, such as drug trafficking.

Achievement of constitutional purpose

Issue

561. The various types of tribunals just described have important roles in society. Dispute resolution tribunals provide, as an alternative to the courts, an avenue for the resolution of disputes of a legal nature. Regulatory tribunals play a major role in the maintenance of the standard of services provided to the public. Investigative tribunals contribute to the quality of decision-making and impartially investigate matters of public concern. Their importance to both government and the public at large cannot be underestimated. In the present context, the question is whether their performance

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[18] The Doomesday Book, resulting from an inquiry appointed by William the Conqueror in 1086, is reported to be the first use of the Crown's prerogative to issue a commission to provide the information required for informed decision-making by government: Hallett 1982, 16–7.

[19] id, 12–3.

[20] Campbell in Nethercote (ed) 1982, 179. See also Odgers 1976, 467; Pettifer (ed) 1981, 557.

is less efficient than it could be because of the present lack of facilities to enable the service and execution of their process and orders beyond the geographic limits of their respective jurisdictions.

Case for reform

Introduction

562. The purpose of the grant of power in s 51(xxiv) of the Constitution has already been discussed.[21] That purpose is to diminish the effects of State and Territorial boundaries as obstacles to the proper and appropriate enforcement of legal rights and obligations, both civil and criminal, throughout the federation, thereby contributing to the greater integration of the Commonwealth both commercially and socially. In relation to courts' process and judgments that purpose generally has been achieved through the facilities provided by the Service and Execution of Process Act. However, the largely exclusive role of the courts at the time of federation in the regulation and enforcement of civil and criminal rights and obligations has been superseded. Tribunals have increasingly become involved with these matters, assuming various important roles in the just and orderly operation of society. Also, sweeping social and commercial developments have occurred since federation, rendering State and Territorial boundaries artificial or meaningless in many practical respects. Commercial and social intercourse takes place largely without reference to State and Territorial boundaries. Further, it has been said that the constitutional power is one 'to be exercised in aid of the functions of the States'.[22] Those functions include the roles of the tribunals described above. The Commission therefore considers it appropriate in principle that, to further the purpose of the constitutional power, the scope of the Service and Execution of Process Act should be enlarged to encompass the process and orders of tribunals. This would enable all official organs by which such intercourse is sought to be ordered or regulated to perform their tasks with minimal hindrance from State and Territorial boundaries.

Dispute resolution tribunals

563. The case for that conclusion is clearest in relation to dispute resolution tribunals. Such tribunals are integral components of the system by which persons may seek to assert and obtain redress for infringements of their rights or to enforce the obligations owed to them by others; their role is precisely the same as that of the courts. Persons may obtain the same form of redress in such tribunals as is available in the courts. In one State a small dispute may be referred to a Magistrate's Court or similar while in another State the same dispute may be taken to a Small (Consumer) Claims Tribunal. In yet another State the Magistrate's Court, sitting as a special Small Claims Division, may determine the matter. However, while the process and judgments of such courts are within the Service and Execution of Process Act, tribunals' process and orders are not and the public is denied access to them where the circumstances of a dispute require process to be served interstate or the capability to enforce a resulting order in another jurisdiction.

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[21] See para 5.

[22] *Aston v Irvine* (1955) 92 CLR 353, 364 (Full Court).

564. It could be suggested that in such circumstances persons should resort to the courts. However, the existence of concurrent jurisdiction in courts and tribunals should not require a person to bring a dispute before a court rather than a tribunal. To insist upon utilisation of court procedures might result in persons not being able to afford to bring an action at all. Further, some tribunals, for example, Residential Tenancies and Tenancy Tribunals in South Australia and the Northern Territory, have exclusive jurisdiction over disputes of certain kinds. Because the Act does not extend to tribunals, persons wishing to bring disputes before these tribunals where interstate service of process or enforcement of a resulting order is or may be necessary are presently thwarted in their efforts to enforce their legal rights. In addition, the procedures adopted when determining a dispute in those courts which have small claims divisions or similar are the same in many respects as the procedures of the tribunals, including the following:

- provision for settlement of disputes by conciliation[23]
- restriction of parties' rights to legal representation[24]
- relaxation of the rules of evidence[25]
- restrictions on the circumstances in which awards of costs may be made[26] and
- restrictions on rights of appeal.[27]

Persons referring disputes to such courts may be considered to have some advantage over persons whose disputes, because the Act does not apply to process and orders of tribunals, must be referred to and determined by a court in the traditional way, for persons in the former class would have the benefit of informal and cheap procedures while those in the latter would be subject to the traditional formalities and technicalities of the courts.

565. Nor can it be said that tribunals are inherently inferior to courts, justifying refusal to extend the facilities of the Act to their process and judgments. While on one level, for example, possession of the power to punish for contempt of their proceedings, tribunals might be considered to be inferior to courts,[28] on other bases, for example, the monetary limits on their jurisdiction, the opposite conclusion might be reached. Some tribunals have no ceiling on the amounts of compensation they may award[29] and other tribunals have monetary ceilings well above those imposed in relation to courts of summary jurisdiction.[30]

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[23] Local and District Criminal Courts Act 1926 (SA) s 152c.

[24] Local and District Criminal Courts Act 1926 (SA) s 152b.

[25] Small Claims Act 1974 (NT) s 12; Small Claims Ordinance 1974 (ACT) s 12; Local and District Criminal Courts Act 1926 (SA) s 152a(1).

[26] Local and District Criminal Courts Act 1926 (SA) s 152d; Small Claims Act 1974 (NT) s 29; Small Claims Ordinance 1974 (ACT) s 29.

[27] Local and District Criminal Courts Act 1926 (SA) s 152g; Small Claims Act 1974 (NT) s 19, 33; Small Claims Ordinance 1974 (ACT) s 19, 33.

[28] See eg Robbins 1982, 17–8.

[29] eg the Victorian and South Australian Equal Opportunity Tribunals and the Drainage Division of the Victorian Planning Appeals Board.

[30] eg the Anti-Discrimination Board of New South Wales has a ceiling of $40 000.

566. Therefore the Commission considers that facilities should be provided to enable the service of process and the enforcement of orders of dispute resolution tribunals outside their jurisdictions. This will enhance their ability to properly fulfil their roles and further the purpose of the grant of constitutional power in this area.[31] It may be that the complexity and time for determination of proceedings in tribunals would be marginally increased by the provision of facilities for interstate service and execution of process. But these are only slight disadvantages compared with the benefits obtained through enlargement of the scope of the Act.

Regulatory tribunals

567. Some regulatory tribunals have dispute resolution functions. To this extent, the case for reform in respect of dispute resolution tribunals applies with equal force in relation to regulatory tribunals. Facilities for service and enforcement *ex juris* should be provided to regulatory tribunals in this respect. However, in relation to their other tasks other considerations are relevant. These tribunals, through their licensing and registration functions, as well as their disciplinary functions, perform a role that continues to grow in importance. As society has become more diversified and complex, it has been recognised that an increasingly high degree of knowledge and skill is required to maintain professional, trade and occupational services to society and that there is a need for greater vigilance against the unscrupulous provision of such services. With some assistance from developments in technology, in contrast to the situation pertaining at the time of federation there is now a significant level of integration of the nation's business and commerce with conseqent increases in the movement throughout Australia of those in professional and other occupations. This has led to the need for persons to obtain multiple licences or be registered in several jurisdictions. Although regulatory tribunals' tasks in this area are confined to the geographical area of one jurisdiction, it could not be said that the exercise of those tasks should ignore the relevant conduct of a licenced or registered person outside that geographical area. Rather, in Australia today proper control in each jurisdiction of any particular occupation should encompass consideration of a person's conduct throughout Australia. However, the failure of the Service and Execution of Process Act to provide facilities for the service of the process of regulatory tribunals may impede the performance of their important role. This situation should be remedied through enlarging the scope of the Act to encompass the process of such tribunals. The level of integration of business and commerce

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[31] That such facilities should be provided was suggested in the representations made to the Commonwealth Attorney-General by various State Attorneys-General (see para 547) and in a number of submissions, eg Department of Law (NT) *Submission* (19 August 1983); Department of the Attorney-General and Justice (NSW) *Submission* (28 September 1983); Department of Justice (Qld) *Submission* (29 September 1983); Institute of Mercantile Agents Ltd *Submission* (20 June 1984); Builders' Registration Board of Queensland *Submission*; Appeal Tribunals Branch, Courts Department (SA) *Submission*; Equal Opportunity Board (Vic) *Submission*; Small Claims Tribunals (WA) *Submission* (16 November 1984); Hewitt *Submission*. No submissions have argued that such facilities should not be provided.

should be matched by providing a measure of national effectiveness to the regimes by which the regulation of professions, trades and occupations occurs in each jurisdiction in Australia.[32] Such a reform also will further the purpose of the constitutional power.

Investigative tribunals

568. The important role of investigative tribunals in providing information and advice to governments upon matters of policy might be considered by some to be a matter of purely local or internal concern to the State concerned. However, within a federation, important questions of policy in one State cannot be divorced entirely from the approach taken to those matters in other States. At times it might be essential that a co-ordinated approach is taken. In many cases the collection of information for the purposes of the task of an investigative tribunal can and has been assisted through co-operation between the relevant authorities in different jurisdictions. However in other investigations, attempts to secure such co-operation may be frustrated and the capacity to compel the production of information for the purposes of a tribunal's task may be necessary. In fact there is evidence to suggest that the tasks assigned to investigative tribunals involving important policy matters have at times been frustrated by jurisdictional limitations on effective service of process[33] and the Commission has been urged to find a suitable means by which process of investigative tribunals issued to secure the attendance of witnesses or the production of information from other jurisdictions could be effectively served outside the jurisdiction.[34] Within proper bounds,[35] the Commission considers that the important role performed by such tribunals should be assisted by extension of the facilities of the Service and Execution of Process Act to their process and that such extension will promote the purpose sought to be achieved by the constitutional power.

569. There is a clearer case for enlarging the scope of the Act to include the process of investigative tribunals whose briefs are not so clearly policy oriented but are rather of an information and advisory kind for government in respect of particular situations.

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[32] Several submissions argued that relevant facilities should be provided even though the need for them may be rare: Pharmaceutical Council of Western Australia *Submission*; Pharmacy Board of Victoria *Submission*; Nurses' Registration Board (Tas) *Submission* (31 July 1984); Real Estate and Business Agents Supervisory Board (WA) *Submission*.

[33] The report of the Victorian Board of Inquiry into Poker Machines, commenting upon the inability of the Board to secure the attendance of witnesses from outside Victoria, states:

> In the present case, which has involved lengthy and detailed examination of events alleged to have occurred in New South Wales, the limitation [of the ability to obtain information from New South Wales] has been significant. There are a number of areas in relation to which more precise findings would have been possible had it been possible to serve people outside Victoria with a summons to attend to give evidence or to produce documents. (Wilcox Report, para 1.12).

[34] ibid. Further submissions argued that, while the occasions requiring interstate service of process related to investigative roles might be rare, there should be facilities to enable interstate service where it is not possible to obtain information through informal channels: Watts *Submission*; Privacy Committee, New South Wales *Submission*; Geschke *Submission*.

[35] As to which see para 640–7, 651–2.

While again the co-operation of relevant authorities generally might be expected, it can also be envisaged that the proper exercise of a task assigned to an investigative tribunal could easily be frustrated if, for example, by the simple expedient of absenting himself or herself from the relevant jurisdiction during the currency of the inquiry, persons whose actions were in question could escape effective service of process issued by the tribunal. Again, the level of practical integration within Australia is not matched in the facilities provided for the purpose of overcoming the legal effects of State and Territorial boundaries. Reform is required to enlarge the scope of the Act to enable the interstate service and execution of process to coerce the attendance of a person or the production of documents for the purpose of investigative tribunal's tasks.

Analysis of characteristics of tribunals

Introduction

570. Notwithstanding the conclusions reached above it is important that certain characterisics of tribunals be understood. In the examination of tribunals' characteristics undertaken here there has been no attempt to consider the characteristics of all State and Territory tribunals.[36] Nor has it been attempted to catalogue the minutiae of particular tribunals. Rather, the discussion which follows is intended to expose the more relevant of a variety of characteristics possessed by tribunals. Relevance in this regard has been determined by reference to the reasons for such an exposition, namely, to indicate whether any features of tribunals are such as to require modification or qualification of the conclusions reached above; to point the way as to the form of recommendations for enlargement of the scope of the Act to encompass the process and orders of tribunals; and to identify characteristics of tribunals that are relevant to the scope of Parliament's power in this area.[37] This section of the chapter discusses the first and second of these matters. For the purposes of discussion attention is given to the following characteristics of tribunals:

- their membership
- their jurisdiction
- their basic functions
- their procedures, including methods by which proceedings in tribunals are commenced, methods of service, means for the taking of evidence, powers to deal with contempt and rules for determination of matters
- the range of orders which they may make
- the enforcement mechanisms available and
- the availability of and grounds for appeals from orders of tribunals.

571. It may be suggested that, for the purposes of the first matter, it is pertinent also to identify certain differences and similarities of tribunals vis-a-vis the present subjects of the Service and Execution of Process Act, that is, the courts, on the basis that their differences, in particular, should require denial of facilities for interstate service and

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[36] See para 548, n 4 for comment regarding the numbers of tribunals.

[37] See para 51–2.

execution of process and orders. However the assumption made, that only bodies of the same nature as courts are deserving of the facilities of the Act, is misconceived, for the Act does not require any State or Territory court whose process and judgments are presently within the scope of the Act to possess particular characteristics or features. The Act is primarily facilitative, taking State and Territory courts as it finds them, and only imposes safeguards or limitations on interstate service and execution where necessary for the recognition and protection of the rights of persons affected by process and judgments emanating from other jurisdictions. Thus, rather than focusing on the differences of tribunals from courts, the first matter requires that the characteristics of tribunals be assessed from the standpoint of basic considerations of fairness and justice. On that basis, only if procedures cannot be devised to address particular concerns should consideration be given to deny tribunals, or some of them, the facilities which they require in order that their roles may be properly and effectively performed. Therefore, any differences between courts and tribunals are relevant only to consideration of the second matter, that is, the procedures by which facilities for interstate service and execution of tribunals' process and orders should be provided.

Membership

Relevant considerations

572. *Qualifications.* A diverse range of qualifications applies to the membership of tribunals. In some cases persons holding judicial office are, by virtue of their office, members of a tribunal.[38] Other tribunals may be constituted by a judicial office-holder on an ad hoc basis.[39] In other cases, members of tribunals are generally appointed for a specific term. They may be required to be judicial office-holders,[40] or to hold or have held legal qualifications or be qualified to hold a judicial office.[41] Other tribunals' members,[42] or some of them, are not required to hold qualifications, although in some cases by tradition legally qualified persons are appointed.[43] While not requiring legal

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[38] eg all magistrates in the Northern Territory are members of the Tenancy Tribunal of the Northern Territory: Tenancy Act 1979 (NT) s 19.

[39] eg there are no appointments to the Motor Accidents (Compensation) Appeal Tribunal in the Northern Territory, but the Tribunal is constituted by a Supreme Court Judge: Motor Accidents (Compensation) Act 1979 (NT) s 28.

[40] eg the Presiding Officer of the Equal Opportunity Tribunal in South Australia is required to be a judge or magistrate: Equal Opportunity Act 1984 (SA) s 18(3).

[41] eg referees of Small Claims Tribunals in Western Australian are required to be on the role of legal practitioners: Small Claims Tribunals Act 1974 (WA) s 7; the Chairman and Deputy Chairmen of the Commercial Tribunal of Western Australia are required to be legal practitioners of at least seven years standing: Commercial Tribunal Act 1984 (WA) s 5; the Chairman and Deputy Chairmen (if any) of the Commercial Tribunal of New South Wales are required to be qualifed for appointment as Judges of the District Court of New South Wales: Commercial Tribunal Act 1984 (NSW) s 5(1)(a), (b).

[42] eg members of the Equal Opportunity Board in Victoria.

[43] eg referees of Consumer Claims Tribunals in New South Wales generally hold legal qualifications and in Queensland amendments in 1979 opened the way to the appointment of magistrates as referees of Small Claims Tribunals, and no other appointments are now made.

qualifications, members of some tribunals are required to hold other qualifications appropriate to the types of disputes or matters with which they will be required to deal.[44] In other cases, particularly regulatory tribunals, the principal member of a tribunal may be required to have legal qualifications or be, or be qualified for appointment as, a judicial office-holder while other members of the tribunal may be appointed as representatives of the interests of those over whom the tribunal may have jurisdiction.[45]

573. *Terms of employment.* The terms under which tribunal members are appointed are basically of three types. One category involves those members who are appointed at pleasure. For example, a person appointed as a Royal Commissioner is appointed by, and can only be removed by, the Governor. The terms on which a Royal Commissioner holds office are at the complete discretion of the Governor and, being for the purpose of undertaking a specific investigation, may or may not be limited in time. Another category concerns tribunals whose members' terms and conditions of appointment, or some of them, are specifically set out in the legislation establishing the tribunal. Typically, these provide for such matters as the term of appointment, the extent to which full-time engagement in the activities of the tribunal is required, the determination of members' remuneration and the situations in which they may be removed from office. Members' remuneration may be determined by the Governor or relevant Minister, or by a statutory remuneration tribunal. In some cases the terms provide for members' removal from office by the Governor for incapacity, incompetence or misbehaviour. There are generally also other provisions concerning vacation of office, including retirement upon reaching a certain age, and all members' appointments are limited to a maximum period of time.[46] The third category comprises those tribunals whose members are subject to public service legislation.[47]

574. *Constitution of tribunals.* The constitution of tribunals for the purpose of the conduct of proceedings varies with the number and type of members appointed. A tribunal composed of an individual clearly will be constituted by that member, for example, a Royal Commission given to a sole Commissioner. A tribunal may also be constituted by a single member for the purpose of proceedings where there are a

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[44] eg the members of a number of land use and valuation tribunals, other than the chairmen, are required to have experience in matters within the particular tribunal's jurisdiction: Town Planning and Development Act 1928 (WA) s 42(2)(b), (c); Planning Appeals Board Act 1980 (Vic) s 5, 16(4), 17(2)(b); Land Valuation Tribunals Act 1978 (WA) s 6(1). See also the Equal Opportunity Act 1984 (SA) s 19, which provides for the appointment of a panel of 12 persons who are qualified in the field of discrimination, from which, under s 22, the Presiding Officer of the Equal Opportunity Tribunal may choose persons to sit at the hearing of proceedings in the Tribunal.

[45] eg the Chairman of the Commercial Tribunal of New South Wales must be qualified for appointment as a Judge of the District Court while part-time members of the Tribunal may be appointed to represent the interests of persons required to be licensed or registered under various legislation (generally credit providers) or the interests of persons who deal with licensed or registered persons, consumers: Commercial Tribunal Act 1984 (NSW) s 7(1); see also Commercial Tribunal Act 1984 (WA) s 6(1).

[46] See eg Commercial Tribunal Act 1984 (NSW) Part II Division 1.

[47] eg Small Claims Tribunals Act 1973 (Qld) s 5.

number of members, for example, Small (Consumer) Claims Tribunals.[48] In other cases, a tribunal may be constituted by a Chairman or Presiding Officer and other members selected by that member.[49] The constitution of a tribunal may be dictated also by the type of proceeding. For example, the Victorian Planning Appeals Board is comprised of divisions for the purpose of hearing the variety of matters within its jurisdiction and the members constituting the division shall be selected bearing in mind the nature of the proceedings.[50] Another example includes a State Parliament, which may itself constitute an investigative tribunal or which may authorise certain members of Parliament to constitute a committee, in fact, an investigative tribunal.

Assessment

575. The only aspects of tribunal membership which require consideration in the present context concern their conditions of appointment and the fact that some tribunals have 'representative members'. The terms and duration of appointment to most judicial offices have long been designed to ensure an independent and impartial judiciary, secure against pressure from the executive and legislative arms of government. In contrast, virtually all appointments to tribunals are subject to limitations as to duration and, while some terms of appointment resemble those of judicial officers, others are those of the general public service of the State concerned. In addition, in some cases persons are appointed to tribunals as representatives of the interests of persons who may become involved in tribunal proceedings. It might be thought that these features threaten significantly the independence and impartiality of tribunals and therefore that there should be no facilities for the interstate service and execution of their process and orders or, perhaps, that such facilities should be provided subject to particular safeguards.

576. The Commission acknowledges that tribunal members, especially members of tribunals with dispute resolution roles, should not be subject to pressure from the executive and legislature or from particular sectors of the community. In respect of most tribunals, the terms of appointment guarantee that independence, being generally similar to those of judicial office-holders. In respect of those few tribunals whose members are subject to the terms and conditions of public service employment, the Commission considers that any argument concerning their independence lacks foundation in view of the fact that such legislation applies also to members of certain courts, courts whose process and judgments have been within the purview of the Service and Execution of Process Act since 1901.[51] Thus to suggest that tribunals whose members are subject

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[48] eg Consumer Claims Tribunals Act 1974 (NSW) s 5(1). See also eg Commercial Tribunal Act 1984 (WA) s 13(3).

[49] eg Commercial Tribunal Act 1984 (WA) s 13(1), (2).

[50] Planning Appeals Board Act 1980 (Vic) s 16(1), (4).

[51] Magistrates in Queensland are subject to public service legislation: Public Service Act 1922 (Qld); Public Service Regulations, reg 106. Further, it is only recently that public service legislation has ceased to apply in many other jurisdictions: WA — 1979; Vic and SA — 1983.

to the terms of public service employment should not be included in any extension of the Act would be to suggest that these courts should be excluded from the Act, a proposition difficult to sustain in the light of the Act's operation since 1901.

577. The limited term of appointment of tribunal members must also be acknowledged as a potential source of some concern in respect of tribunals' members' independence. However, the Commission considers that that concern is minor when contrasted with the probable reasons for fixed term appointments. The qualifications for appointment mean that members will be drawn from the judiciary, from the practising legal profession and from other professions. Some persons might view the prospect of permanent appointment to a tribunal as a disincentive to the acceptance of appointment. They may see permanent appointment as a closing off of further or other career opportunities. This may particularly be so in relation to persons whom it is sought to appoint to regulatory tribunals, as such persons are often drawn from the profession or occupation for whose regulation the tribunal exists. Therefore, the Commission considers that this aspect of tribunals' membership provides no basis for restricting the provision of facilities with respect to service and execution of their process and orders.

578. The other matter of concern in this regard relates to the fact that certain members of some tribunals are appointed as representatives of particular interests. Such representative members, it could be argued, may well jeopardise the independence and impartiality of a tribunal, as they may feel constrained by the opinions of those whom they are appointed to represent rather than bringing an impartial mind to bear on the issues which may arise in the tribunal's performance of its various roles. Again, however, the reasons for appointment of representative members counterbalance the view that their presence presents an obstacle to extension of the Act to such tribunals' process and orders. The presence of representative members on tribunals will go some way to securing, in their regulatory role, a system of regulation that is responsive both to the wishes of the profession or occupation being regulated and of the community in general.[52] In their investigative role, they will facilitate the representation of all relevant interests in the advice which it is the tribunal's task to provide. And in their dispute resolution role, such members will aid the process of adjudication through their practical knowledge of the activities of the particular occupation in relation to which the tribunal has been conferred with jurisdiction. In all cases, in addition, there is the opportunity for developing a body of specialised knowledge and experience within the tribunal notwithstanding that individual members come and go. There are further reasons for the Commission's conclusion in this regard. All tribunals with representative members also have members who are not representatives, generally legal practitioners or members of the judiciary. There is thus, if need be, a member to guard against any lack of partiality on the part of a representative member. In addition, all tribunals are subject to the supervisory jurisdiction of the superior courts. There are thus procedures by which any real or perceived partiality may be rendered ineffective. Therefore the Commission considers that concerns about the independence and impartiality of tribunals' members do not warrant denial of facilities for the interstate service and execution of the process and orders of tribunals.

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[52] *Consumer Sales and Credit Law Reporter*, para 23-010.

Jurisdiction

Range and limit

579. *Range.* In total the range of matters within the jurisdiction of tribunals is extremely wide. But in general individual tribunals have more limited jurisdiction than courts.[53] Regulatory and some investigative tribunals are clear examples of tribunals whose powers are exercised in relation to limited areas, for example, the practice of a particular profession. Other examples include certain dispute resolution tribunals, for example, Residential Tenancies (Tenancy) Tribunals and Commercial (Credit) Tribunals. Certain investigative tribunals have a more general jurisdiction, for example, committees of State legislatures. Similarly, some dispute resolution tribunals also have varied jurisdictions. For example, Small (Consumer) Claims Tribunals have jurisdiction in respect of a wide range of claims arising out of contracts for the supply of goods or services.

580. *Territorial constraints.* In only a few cases[54] does legislation actually spell out the territorial limits of tribunals' jurisdiction. However, even where legislation is silent on this matter, normal rules of construction would require some recognised connection with the State in which a tribunal is established for the tribunal to have jurisdiction.[55]

Assessment

581. The exercise of jurisdiction by a tribunal, in regard both to subject matter and locality, is subject to the control of superior courts, either by specific conferral in legislation or because of the courts' inherent power to control inferior tribunals. No unfairness or injustice is evident, therefore, merely because specific territorial limitations as to jurisdiction generally are not imposed on tribunals. However, in the same way as the extra-territorial jurisdiction of courts is often confined by nexus grounds,[56] consideration should be given to whether such a course is desirable in relation to the interstate service of process of tribunals. This matter is discussed later in the chapter.[57]

Functions

Two types

582. The wide range of tasks performed by tribunals has been discussed previously. And, while a three-fold roles-based categorisation has been employed in considering whether tribunals' process and orders should be within the scope of federal legislation, on a functional analysis of tribunals' tasks in relation to which process may be issued and orders made these tasks may be seen to be of two types. Tribunals with dispute

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[53] But some courts also have limited jurisdiction, for example, Workers' Compensation Courts.

[54] eg Residential Tenancies Act 1980 (Vic) s 17.

[55] See *Macleod v Attorney-General for New South Wales* [1891] AC 455; *Ashbury v Ellis* [1893] AC 339; see also Sykes & Pryles 1987, ch 2.

[56] eg General Rules of Procedure in Civil Proceedings 1986 (Vic) r 7.01 generally requires that a nexus exist before process may be served outside Victoria. The Service and Execution of Process Act presently imposes such nexus grounds at a later stage: see para 90.

[57] See para 624–31.

resolution roles have adjudicative functions similar to those of the courts. Regulatory tribunals also have adjudicative functions to the extent that they may be called upon to determine whether a person should be licensed or registered in the face of an objection,[58] or should continue to be licensed or registered after a complaint has been made.[59] Even where no objection or complaint is made, one of their tasks is to determine whether a person should be licensed or registered. While in legislative terms the tribunal may be required to 'investigate' whether a person should be licensed or registered, its ultimate task will be to make a determination regarding licensing or registration. Therefore this also is an adjudicative function. In other respects regulatory tribunals' functions may be of an investigative nature, involving inquiries into certain aspects of the practice of the occupation the subject of their powers and the provision of advice to relevant authorities or government. In such cases there is no determinative power such as is possessed when exercising an adjudicative function. A similar function, for a wide variety of purposes, is undertaken by tribunals in the third roles-based category discussed above. Many tribunals also have other functions. For example, in addition to its dispute resolution and investigative functions, the Victorian Equal Opportunity Board undertakes general educative functions concerning discrimination.[60] But the only functions of tribunals that are relevant to service and execution of their process and orders are the adjudicative and investigative functions.

Assessment

583. The variety of roles performed and functions exercised by tribunals gives no cause for concern in relation to the provision of facilities for interstate service and execution of their process and orders. However, one tribunal may perform two or more of the roles identified above. Further, those rules may become merged, for example, the resolution of a dispute between a licensed person and a consumer may also involve consideration of disciplinary action against the licensed person. Thus, if there is a need to categorise tribunals for the purposes of federal legislation in this area it would be unhelpful and confusing to adopt a roles-based categorisation. Rather, in the same way as some of the facilities of the Act are presently provided by reference to whether the proceedings in a court are civil or criminal, the two functions of adjudication and investigation would be an appropriate basis for differentiating between the procedures for and safeguards attached to the interstate service of process issued in relation to proceedings in tribunals. On that basis, it would be necessary only to identify the function being exercised by a tribunal, adjudicative or investigative, for the purpose of determining which procedures should be employed to effect interstate service. The issues which arise are whether there is constitutional power to provide for the service and execution of process and orders issued in relation to such functions and whether the difference in functions dictates that there should be differences in the facilities provided for interstate service and execution of process and orders of tribunals. These issues are discussed later.[61]

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[58] eg Estate Agents Act 1980 (Vic) s 25.
[59] id, s 28.
[60] Equal Opportunity Act 1984 (Vic) s 16.
[61] See para 611–2 and para 617–20.

Procedure

Factors considered

584. *Initiation of proceedings.* Initiation of proceedings in some dispute resolution tribunals[62] may occur through the filing or lodgement of a notice with the tribunal or an officer of the tribunal or with a court for transmission to the tribunal. Similarly, the dispute resolution function of regulatory tribunals may be initiated by lodging a complaint against a licensed or registered person with a tribunal.[63] In such cases, responsibility for service of notice of the proceedings devolves upon an officer of the tribunal, often called the Registrar, or may be the responsibility of the tribunal itself. The responsibility is to give notice of a claim or complaint and its particulars to the person against whom relief is sought and also other persons appearing to have an interest in the proceedings.[64] The initiation of proceedings in investigative tribunals depends upon whether the tribunal is a temporary or permanent one. Temporary tribunals' proceedings will be commenced by the document establishing the tribunal.[65] In such cases there are no parties in the normal sense and thus no notice of proceedings will be given. Often, however, notices will be placed in newspapers advising that interested persons may make their views known to the tribunal through certain channels. Persons whose conduct is in question or are otherwise likely to be able provide relevant information will generally be required to give evidence to the tribunal and thus may be served with a subpoena or summons. The method of initiation of proceedings in permanent investigative tribunals will depend upon the nature of the powers possessed by the tribunal. For example, if a tribunal has a continuing brief to investigate and advise upon matters, the investigation may be commenced by the tribunal itself. Public notices may be issued advising of the matter under investigation, but there are no parties to the proceedings. In those without a continuing brief, an investigation may be initiated by a specific reference from a responsible public officer.[66] Other investigative tribunals may commence investigations only after a complaint of wrongdoing from a member of the public.[67]

585. *Mode of service.* In general, service of notices upon persons concerned as parties to proceedings in tribunals may be by post, whether registered[68] or ordinary.[69] Some

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[62] eg Small (Consumer) Claims Tribunals and Residential Tenancies (Tenancy) Tribunals.

[63] eg Estate Agents Act 1980 (Vic) s 28.

[64] See eg Consumer Claims Tribunals Act 1974 (NSW) s 14(1)(a); Residential Tenancies Act 1980 (Vic) s 35(2)(a).

[65] eg a commission issued by the Governor to constitute a Royal Commission.

[66] eg a reference from the Minister for Consumer Affairs to the Commercial Tribunal of New South Wales: Credit (Administration) Act 1984 (NSW) s 32.

[67] eg a complaint relating to an invasion of privacy to the New South Wales Privacy Committee: Privacy Committee Act 1976 (NSW) s 15(1)(d).

[68] eg Medical Practitioners Act 1970 (Vic) s 17(2).

[69] eg Equal Opportunity Act 1984 (SA) s 93(3).

tribunals are empowered to allow substituted service of a document.[70] Only rarely is a document required to be served personally,[71] although presumably personal service may be used in any case where service by post is permitted.

586. *Publicity of proceedings.* In contrast to the situation generally obtaining in courts, some dispute resolution tribunals are required to conduct their proceedings in private,[72] or the proceedings are only open to certain categories of people.[73] Other dispute resolution tribunals' proceedings generally are required to be in public, but, as in courts, there may be power to order that the proceeding or part of the proceeding be in private.[74] The disciplinary task of regulatory tribunals may commence with certain preliminary investigations conducted in private,[75] but in general at the hearing of disciplinary charges the tribunal must 'sit as in open court'.[76] Proceedings in investigative tribunals are generally permitted, at the discretion of the tribunal, to be conducted either in private or in public.[77]

587. *Representation.* In proceedings before some dispute resolution and regulatory tribunals there is no restriction on the right of a party to be represented, although in some cases the leave of the tribunal is required.[78] In addition, persons having an interest in matters under consideration in proceedings in an investigative tribunal may be, and generally are, with the permission of the tribunal, represented.[79] However, in certain dispute resolution tribunals, for example, Residential Tenancies Tribunals and Small (Consumer) Claims Tribunals, there is no general right to representation but it may be permitted in certain circumstances, including where there is agreement between the parties as to representation or where one of the parties is a corporation.[80]

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[70] eg Residential Tenancies Act 1980 (Vic) s 32(5).

[71] eg a summons to a witness in proceedings before a Small Claims Tribunal under the Victorian credit legislation: Credit (Administration) Act 1984 (Vic) s 70(6).

[72] See eg Small Claims Tribunals Act 1973 (Qld) s 33(1); Consumer Claims Tribunals Act 1974 (NSW) s 31(1)(b).

[73] See eg Small Claims Tribunals Act 1974 (WA) s 33(1).

[74] eg Small Claims Tribunals Act 1973 (Vic) s 31(1), s 31A; Credit (Administration) Act 1984 (Vic) s 73.

[75] eg investigations by the Investigating Committee under the Medical Practitioners Act 1938 (NSW) s 27A(4); similarly see Veterinary Surgeons Act 1923 (NSW) s 19D(4).

[76] See eg Optometrists Act 1930 (NSW) s 15(5); Optical Dispensers Act 1963 (NSW) s 25(3); Medical Practitioners Act 1938 (NSW) s 28(6); Dentists Act 1934 (NSW) s 8(5); Surveyors Act 1929 (NSW) s 15(3); Valuers Registration Act 1975 (NSW) s 21; Builders Licensing Act 1971 (NSW) s 28; Australian Jockey Club Act 1873 (NSW) s 32(2)(a), (3)(b).

[77] eg Royal Commissions Act 1917 (SA) s 6.

[78] Equal Opportunity Act 1984 (Vic) s 52(3); Anti-Discrimination Act 1977 (NSW) s 101(1)(b).

[79] eg Royal Commissions Act 1923 (NSW) s 7(2); Royal Commissions Act 1917 (SA) s 13.

[80] Small Claims Tribunals Act 1973 (Qld) s 32(3); Small Claims Tribunals Act 1973 (Vic) s 30(3); Consumer Claims Tribunals Act 1974 (NSW) s 30(4); Small Claims Tribunals Act 1974 (WA) s 32(3); Residential Tenancies Act 1978 (SA) s 25; Residential Tenancies Act 1980 (Vic) s 44. There is no restriction upon representation in the Tenancy Tribunal in the Northern Territory: Tenancy Act 1979 (NT) s 23.

538. *Application of rules of evidence.* The rules of evidence are abridged in many tribunals' proceedings, particularly proceedings in dispute resolution tribunals, for example, Small (Consumer) Claims Tribunals, Residential Tenancies (Tenancy) Tribunals and Equal Opportunity Tribunals. A common formulation is that a tribunal 'is not bound by the rules of evidence but . . . may inform itself on any matter in such manner as it thinks fit'.[81] Some tribunals are empowered to receive hearsay evidence[82] and provision is sometimes made regarding the reception of a transcript of evidence in proceedings before a court, the drawing of conclusions of fact therefrom and the adoption of any findings, decision or judgment of a court that may be relevant to the proceedings before the tribunal.[83] Similarly, regulatory tribunals with powers to adjudicate upon disputes between consumers and members of the regulated profession, trade or occupation, may not be required to apply the rules of evidence. However, in relation to the disciplinary powers of such tribunals, which may involve an adjudication by the tribunal that the regulated person has contravened accepted standards of work or service and thus is liable to be penalised or lose a licence or registration, the rules of evidence normally apply.[84] Investigative tribunals' tasks are not subject to the rules of evidence,[85] but they may be required to permit persons having an interest in the matter under investigation, or whose conduct is in question, to examine or cross-examine witnesses.[86] Also, it would seem that they must observe the rules of natural justice in making any findings in a report.[87]

589. *Oath or affirmation.* In respect of each of the categories of tribunals, evidence is generally required to be given on oath or affirmation,[88] although in some cases there is a discretion as to whether evidence should be so given.[89] In many cases there is also a discretion as to whether the evidence must be given orally or in writing.[90]

590. *Coercive powers.* Many dispute resolution, regulatory and investigative tribunals have powers, through the issue of subpoenas or witness summonses, to require a person to give evidence or produce documents at their proceedings.[91] Generally, failure to comply with a summons or subpoena requiring attendance or production of

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[81] See eg Consumer Claims Tribunals Act 1974 (NSW) s 31(4).

[82] eg Tenancy Act 1979 (NT) s 24.

[83] eg Residential Tenancies Act 1978 (SA) s 24(4)(i), (j).

[84] eg Commercial Tribunal Act 1984 (WA) s 17(4), (5).

[85] eg Commissions of Inquiry Act 1950 (Qld) s 17.

[86] eg Royal Commissions Act 1968 (WA) s 22.

[87] See *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* [1983] NZLR 662, particularly 671 (Lord Diplock).

[88] eg Consumer Claims Tribunals Act 1974 (NSW) s 31(2)(b); Tenancy Act 1979 (NT) s 29(1); Medical Practitioners Act 1970 (Vic) s 16A(1) (incorporating Evidence Act 1958 (Vic) s 15); Royal Commissions Act 1917 (SA) s 10(5).

[89] eg Residential Tenancies Act 1978 (SA) s 24(1)(d).

[90] eg Credit (Administration) Act 1984 (NSW) s 35(4).

[91] A notable exception is one major group of tribunals, Small (Consumer) Claims Tribunals, which do not have a power to issue subpoenas or similar process. However, Victorian Small Claims Tribunals do have this power in relation to the jurisdiction conferred on them by the Credit Act 1984 (Vic): Credit (Administration) Act 1984 (Vic) s 70(5).

documents is an offence.[92] In some few cases, however, a tribunal may have power to issue a warrant for the apprehension of the defaulting person for the purpose of bringing the person before the tribunal. Generally only certain investigative tribunals, particularly Royal Commissions[93] and the committees of legislatures,[94] have this power, although the Commercial Tribunal of New South Wales, but not the other tribunals administering credit legislation, also has this power.[95]

591. *Contempt powers.* Many dispute resolution and regulatory tribunals have no power in themselves to punish conduct of the type that, if it occurred in or in relation to proceedings in a court, would constitute contempt of a court. Rather, such conduct may constitute an offence to be tried in a competent court.[96] However, some such tribunals have power to exclude a person from proceedings if the person acts in a way that would constitute contempt.[97] In some few cases dispute resolution tribunals are themselves permitted to deal with contempt, either by the conferral of specific powers[98] or by reference to powers in relation to contempt possessed by a judge of a particular court.[99] A number of investigative tribunals, particularly Royal Commissions, have powers to deal with contempt.[100]

592. *Procedures and rules for reaching determinations.* While dispute resolution tribunals have power to adjudicate upon and reach a determination on the matters in dispute before them, some are also empowered to attempt to resolve disputes through

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[92] eg Inquiries Act 1945 (NT) s 11(1).

[93] See eg Commissions of Inquiry Act 1950 (Qld) s 8(1); Royal Commissions Act 1917 (SA) s 11(3); Royal Commissions Act 1968 (WA) s 16. In Tasmania and New South Wales this power is available only if the Commission is constituted by a judge of the Supreme Court: Evidence Act 1910 (Tas) s 18(1); Royal Commissions Act 1923 (NSW) s 16. In Queensland a Royal Commission may also issue a warrant to secure attendance where it appears that the person whose attendance is sought will not attend in answer to a summons: Commissions of Inquiry Act 1950 (Qld) s 8(2).

[94] Constitution Act 1867 (Qld) s 45: this provision provides for a fine at first and imprisonment if it is not paid; Parliamentary Privilege Act 1858 (Tas) s 5; Parliamentary Evidence Act 1901 (NSW) s 7, 8.

[95] Commercial Tribunal Act 1984 (NSW) s 26(1). In the other tribunals having jurisdiction in credit matters failure to comply with a witness summons is an offence: Commercial Tribunal Act 1984 (WA) s 18; Credit Ordinance 1985 (ACT) s 201(1); Credit (Administration) Act 1984 (Vic) s 70(5), 80(d).

[96] See eg Consumer Claims Tribunals Act 1974 (NSW) s 35(1); Credit Ordinance 1985 (ACT) s 202.

[97] See eg Consumer Claims Tribunals Act 1974 (NSW) s 35(2).

[98] See eg Small Claims Tribunals Act 1973 (Qld) s 38(1); Small Claims Tribunals Act 1974 (WA) s 37(1).

[99] See eg Commercial Tribunal Act 1984 (NSW) s 29.

[100] See eg Commissions of Inquiry Act 1950 (Qld) s 10; Royal Commissions Act 1923 (NSW) s 18 (applies only if the Royal Commissioner is a judge of the Supreme Court — determination of contempt is made by the Court of Appeal); see also Evidence Act 1910 (Tas) s 18(1); Royal Commissions Act 1917 (SA) s 11(1).

conciliation.[101] In some cases tribunals are directed to attempt conciliation before proceeding to a formal adjudication,[102] presumably at the time set down for formal hearing. In the anti-discrimination field certain complaints-handling officers have powers to compel the attendance of persons for the purpose of concilation conferences,[103] but such conferences are conducted separately from the tribunal proceedings themselves. While failure to attend may be an offence,[104] there is no power to compel a person to provide evidence at such conferences. Where no conciliation power exists, or conciliation proves unsuccessful, both dispute resolution and regulatory tribunals would be required, on general principles, to comply with the rules of natural justice in reaching a determination. In some cases this injunction is specifically declared.[105] In either case, this would include that parties be notified of any evidence or allegations which may affect the decision of the tribunal and be permitted to examine and cross-examine witnesses and present argument. In reaching a decision, dispute resolution tribunals are often enjoined to act according to equity and good conscience and with regard to the substantial merits of the case without regard to technicalities and legal forms.[106] In some cases orders made by tribunals are required to be 'fair and equitable to all the parties'.[107] In a number of cases, tribunals may refer a question of law for determination by a court.[108]

Assessment

593. *Introduction.* Certain aspects of the procedures of tribunals may be thought to give rise to concern on considerations of fairness and justice. These are the restrictions on open proceedings in tribunals, restrictions on the right to representation of parties, abrogation of the rules of evidence and the procedures and rules for reaching decisions. It is necessary to consider these matters in order to determine whether there is a need to modify the conclusions reached above that tribunals' process and orders should be included within the scope of the Service and Execution of Process Act.

594. *Publicity of tribunal proceedings.* While investigative functions of tribunals are generally conducted in public, there may be power to limit the access of the public to, or the publication of proceedings of, the tribunal. This power may be essential to the proper exercise of the function for otherwise governmental policy options may be released before it is appropriate or persons whose conduct is in question may be

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[101] eg Small (Consumer) Claims Tribunals and the Residential Tenancies Tribunals in Victoria and South Australia.

[102] eg Consumer Claims Tribunals Act 1974 (NSW) s 22.

[103] eg Anti-Discrimination Act 1977 (NSW) s 92(2); Equal Opportunity Act 1984 (Vic) s 45(3).

[104] eg Anti-Discrimination Act 1977 (NSW) s 92(3).

[105] eg Residential Tenancies Act 1980 (Vic) s 30(1)(a).

[106] eg Tenancy Act 1979 (NT) s 22(b); Equal Opportunity Act 1984 (Vic) s 51; Commercial Tribunal Act 1984 (NSW) s 19(9)(b).

[107] Consumer Claims Tribunals Act 1974 (NSW) s 23(2); Small Claims Tribunals Act 1973 (Qld) s 10(2). But note that this does not enable the Tribunal to deal with a matter not formulated in the claim: *Davies v Constantine* (1983) ASC para 55–250.

[108] eg Residential Tenancies Act 1978 (SA) s 28; Residential Tenancies Act 1980 (Vic) s 36; Evidence Act 1910 (Tas) s 22.

forewarned of an investigation and take steps to avoid official action to secure their attendance at the proceedings. In this context, therefore, the power to close or prohibit publication of proceedings is similar to the power possessed by courts and does not warrant any qualification of the conclusion that such tribunals process should be capable of interstate service.

595. The same argument applies in relation to those dispute resolution and regulatory tribunals that in general conduct their proceedings in public but have power to close them or prohibit their publication. However, special consideration must be given to those tribunals, for example, some Small (Consumer) Claims Tribunals, that are required by legislation to conduct their proceedings in private. As a general rule it is no doubt desirable that proceedings having legal consequences for persons should be conducted in public. It might be argued therefore that the prescription of private proceedings in some tribunals offends principles of fairness and justice. However, this would pay no heed to the probable reasons for that prescription. These include

- the possibility that a person required to present his or her own case before a tribunal — the prescription of closed proceedings often being linked with restrictions on the right to legal representation — may suffer 'stage fright' if required to do so at an open and public hearing and
- that a closed hearing may have been thought to be necessary to encourage attempts to resolve the matters in dispute by conciliation, another facet of the procedure of Small (Consumer) Claims Tribunals.

In addition, if this facet of tribunal procedure were to be relied upon as a basis for excluding the process and orders of certain tribunals from the scope of a reformed Service and Execution of Process Act, certain courts' process and orders also would have to be excluded. For example, proceedings in the Small Claims Division of a Court of Requests generally are required to be in private.[109] In these circumstances, the Commission does not consider that legislative prescription of a private hearing requires the denial of facilities for interstate service and execution of the process and orders of tribunals to which such prescriptions apply.

596. *Representation of parties.* Those tribunals in which the right to legal representation is restricted have fairly restrictive financial constraints upon their jurisdictions. Linked with such a limitation, one reason for the restriction on representation is undoubtedly the desire to eliminate reliance upon excessive legal technicality in tribunal proceedings. Further, there is probably an intention to eradicate any advantage that may arise where one party can afford representation and another cannot.[110] In addition, as with the matter of publicity, restrictions on the right to representation are imposed not only in certain few tribunals but also in some courts.[111] On the same basis as was discussed above, therefore, the restriction in some tribunals on the right to representation of parties at proceedings does not justify the denial of facilities for interstate service and execution of the process of such tribunals.

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[109] Court of Requests (Small Claims Division) Act 1985 (Tas) s 24.

[110] See Bradbrook, MacCallum & Moore 1983, 685.

[111] See para 564.

597. *Abrogation of rules of evidence.* The relaxation of these rules is designed to eliminate the technicalities of normal legal proceedings — particularly tactical advantages that may arise through legal niceties — and to facilitate the presentation and handling of cases by the parties themselves. Also, notwithstanding the abrogation of these rules, there seems no reason to doubt that tribunal members would be able to determine the relevance of and the weight that should be accorded to any information presented. In any event, if account were taken of irrelevant or improper matters, an aggrieved party would have a right of review to a court on the basis of denial of natural justice, a right accorded even where normal rights of appeal are not open.[112] There is thus no cause for denying or qualifying facilities for interstate service and execution of the process and orders of those tribunals that are not required to adhere to the rules of evidence in their proceedings.

598. *Decision-making procedures.* The existence of procedures in some tribunals for the resolution of disputes by conciliation also does not justify any qualification on the provision of facilities for interstate service and execution of their process and orders. Such procedures are conferred on courts in some jurisdictions where small claims procedures have been grafted onto existing court procedures[113] and the performance of the conciliatory task is not seen as a disqualifying factor in relation to the officer who may later be called upon to determine the dispute in the normal way.[114] Court-annexed conciliation or arbitration procedures are also gaining popularity with the realisation that the adversarial processes of the courts tend to destroy commercial relations that, if disputes could be settled in a less antagonistic way, could be fruitfully continued for all parties' benefit.

599. Most tribunals are required to apply normal legal principles in the exercise of their adjudicative functions. A very few tribunals, however, are enjoined to reach a determination that is 'fair and equitable to all the parties',[115] the inference being that such tribunals are permitted to reach decisions that may not have been reached had strict compliance with legal principle been necessary. Far from causing concern that such tribunals are inherently unfair, such an injunction itself will ensure that they approach their decision-making tasks in a fair manner. Even were there any doubt in this regard, a consideration of the jurisdictional field of tribunals to which this injunction applies — the consumer law area, an area where the law has until recently lagged behind community perceptions of the realities of consumer transactions — provides a compelling argument that bodies called upon to hear disputes arising from such transactions should be permitted to resolve those matters without strict adherence to legal principle. That avenue having been provided in certain States, federal legislation should not restrict its usefulness by denying such tribunals the facility to have their process and orders served and executed interstate.

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[112] See further para 607.

[113] eg Local and District Criminal Courts Act 1921 (SA) s 152c(1).

[114] id, s 152c(2).

[115] eg Small Claims Tribunals Act 1973 (Qld) s 10(2); Consumer Claims Tribunals Act 1974 (NSW) s 23(2).

Orders

Exposition

600. *Range.* The orders that may be made by dispute resolution tribunals are sometimes set out with great particularity[116] or are dictated by the type of applications that may be made to a tribunal. In other cases, the potential orders are expressed with more generality and are equivalent to orders that may be made by courts, for example, awards of damages, injunctions and orders for specific performance.[117] In those dispute resolution tribunals whose jurisdictions are limited by a monetary figure, any order requiring the payment of a sum of money in excess of that limit may only be effective to require payment of money up to that limit[118] or may be totally void.[119] In other cases there is a monetary ceiling upon the amount of compensation that may be awarded in damages by a tribunal.[120] Some dispute resolution tribunals are also empowered to make interim orders to preserve the status quo between the parties to a dispute and the rights of the parties pending determination of the dispute.[121]

601. The orders that may be made by regulatory tribunals reflect their concern with the suitability of persons to engage in an occupation. Thus the primary orders they may make relate to the licensing or registration of a person or, in the disciplinary context, to the suspension, revocation or cancellation of a person's licence or registration or the disqualification of a person from the holding of a licence or registration. Some regulatory tribunals, however, where a complaint from a member of the public has led to disciplinary proceedings, have power to impose a fine, to direct that a regulated person rectify faulty workmanship and to award compensation to the complainant.[122] These orders are similar to those that may be made by courts.

602. *Costs.* Some tribunals are not empowered to make awards of costs.[123] In other cases, the power to award costs is circumscribed by requirements, for example, that the tribunal be 'of the opinion that because of exceptional circumstances an injustice would be done to a party to a proceeding if costs were not allowed to that party',[124] that all the parties to a proceeding have been represented by a solicitor or barrister or

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[116] eg Small Claims Tribunals Act 1973 (Qld) s 20(2).

[117] Residential Tenancies Act 1978 (SA) s 22; Residential Tenancies Act 1980 (Vic) s 24.

[118] Consumer Claims Tribunals Act 1974 (NSW) s 26.

[119] Small Claims Tribunals Act 1973 (Qld) s 21.

[120] Anti-Discrimination Act 1977 (NSW) s 113(b)(i).

[121] Anti-Discrimination Act 1977 (NSW) s 112; Equal Opportunity Act 1984 (SA) s 96(2); Equal Opportunity Act 1984 (Vic) s 46(3). In New South Wales the President of the Anti-Discrimination Board may apply to the Tribunal for an interim order prior to the resolution of a dispute by conciliation or referral of the dispute to the Tribunal: Anti-Discrimination Act 1977 (NSW) s 89A.

[122] Medical Practitioners Act 1938 (NSW) s 29(1); Surveyors Act 1929 (NSW) s 14; Builders Licensing Act 1971 (NSW) s 30.

[123] eg Small Claims Act 1973 (Qld) s 35; Small Claims Tribunals Act 1973 (Vic) s 33; Consumer Claims Tribunals Act 1974 (NSW) s 33.

[124] Small Claims Tribunals Act 1974 (WA) s 35(2).

that other special circumstances exist.[125] Other tribunals, in the same way as courts, possess a discretion as to whether to award costs,[126] but in some cases there may be a limit on the amount of costs which may be awarded.[127]

Assessment

603. *Range.* The range of orders that may be made by tribunals does not give rise to any concern of fairness or justice. It should be noted, however, that in so far as orders of regulatory tribunals relate to the practice of a profession, trade or occupation, they are confined in their operation to the State or Territory in which they are made. There is thus no reason to provide for their interstate execution.

604. *Costs.* Parties to proceedings in tribunals that are not empowered to make awards of costs or whose power to award costs is circumscribed are necessarily put to some expense, which may not be recoverable in part or at all, in preparing and presenting their case. In situations where a person must go to another State for the prupose of tribunal proceedings, the associated costs may be greater than those of parties from within the State where the tribunal is established. It could be suggested that at least such additional costs should be recoverable in appropriate circumstances. Again, however, it is necessary to consider the reasons for restrictions of this nature. These include concerns about the costs of court proceedings and that the threat of liability for costs may deter the taking of any proceedings at all. In this light, the conferral by federal law of a power to award costs would be counter-productive in terms of enabling tribunals to properly fulfill their roles. Nor does the Commission see anything inherently unfair or unjust in requiring parties to proceedings to bear their own costs. However, to ensure that facilities for the service and execution of tribunals' process and orders are not abused, it may be desirable to impose some limitations on the circumstances in which those facilities may be employed. This matter is discussed below.[128]

Enforcement of tribunal orders

Means of enforcement

605. Orders of regulatory tribunals relating to licences or registration are to all intents and purposes 'self-executing'. Questions of enforcement of tribunal orders generally arise only to the extent that they are of the same nature as court orders, for example, awards of compensation or orders directing the performance of certain obligations. Such orders made by dispute resolution and regulatory tribunals are capable of enforcement through three basic mechanisms. The first method of 'enforcement' involves the imposition of criminal liability upon a person who has failed to comply with

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[125] Residential Tenancies Act 1978 (SA) s 27.
[126] Tenancy Act 1979 (NT) s 30A.
[127] Residential Tenancies Act 1980 (Vic) s 45.
[128] See para 629, 635.

an order of a tribunal.[129] The second mechanism, particularly in relation to 'money' orders, is to enable a person in whose favour an order has been made to utilise the enforcement mechanisms of a court. In some cases, the order of the tribunal is deemed to be, or to have the same effect as, an order of a court for payment of the stated sum and to be enforceable accordingly.[130] In other cases, a copy or certificate of the order of the tribunal may be filed or registered in a court and thereupon the order is deemed to be, or to be enforceable as, an order of that court.[131] In yet other cases the sum of money ordered to be paid is deemed to be a debt due to the person in whose favour the order has been made which may be recovered by an action in a court of competent jurisdiction.[132] The third enforcement mechanism requires a person in whose favour a 'non-money' order has been made to renew a claim to the tribunal, presumably so that the tribunal can then make a 'money' order which can be enforced under the second mechanism.[133]

Assessment

606. That tribunals generally lack their own enforcement mechanisms provides no reason for denying facilities for the interstate service and execution of their orders, for this may be explained by reasons of utility.[134] The procedures by which tribunals' orders are enforced may be relevant, however, to the question whether there is constitutional power to provide for their interstate enforcement and to the form of the recommendations as to their interstate enforcement. The pertinent constitutional matters have been discussed in chapter 2[135] and are summarised later in this chapter.[136] Reform proposals are discussed later also.[137]

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[129] This is generally employed in relation to orders other than for the payment of a sum of money: Residential Tenancies Act 1978 (SA) s 22(3); Equal Opportunity Act 1984 (Vic) s 46(4); Anti-Discrimination Act 1977 (NSW) s 116. Occasionally, however, this sanction does exist for non-payment: Residential Tenancies Act 1980 (Vic) s 40; Equal Opportunity Act 1984 (SA) s 96(4).

[130] Tenancy Act 1979 (NT) s 39(9)(b).

[131] Small Claims Tribunals Act 1973 (Qld) 22(3); Small Claims Tribunals Act 1973 (Vic) s 20(3); Small Claims Tribunals Act 1974 (WA) s 22(3); Consumer Claims Tribunals Act 1974 (NSW) s 25(1); Residential Tenancies Act 1978 (SA) s 22(4); Residential Tenancies Act 1980 (Vic) s 42(1); Equal Opportunity Act 1984 (Vic) s 46(5); Anti-Discrimination Act 1977 (NSW) s 115.

[132] Equal Opportunity Act 1984 (SA) s 96(6).

[133] Small Claims Tribunals Act 1973 (Qld) s 23; Small Claims Tribunals Act 1973 (Vic) s 21; Small Claims Tribunals Act 1974 (WA) s 23; Consumer Claims Tribunals Act 1974 (NSW) s 24.

[134] See eg *Trevor Boiler Engineering Co Pty Ltd v Morley* [1983] VR 716, 720 (Starke J).

[135] See para 59–63.

[136] See para 613.

[137] See para 654–65.

Appeals from tribunal orders

Limitations

607. The orders of most regulatory tribunals concerning the licensing or registration of persons are subject to an appeal to a court, often the Supreme Court of the State in which the tribunal is established.[138] This right also exists in relation to the orders some dispute resolution tribunals.[139] In other cases, limitations on appeals exist. Examples of such limitations include

- no right of appeal against an order of the Motor Accidents (Compensation) Appeal Tribunal of the Northern Territory[140]
- a right of appeal against an order of the Residential Tenancies Tribunal of South Australia only where the dispute concerns a sum of money in excess of $1000[141]
- no right of review of orders of Small (Consumer) Claims Tribunals except on jurisdictional grounds or on the basis that there has been a denial of natural justice[142] and
- a right of appeal to the District Court against an order of the Commercial Tribunal of Western Australia only where a question of law is involved or the tribunal or District Court gives leave.[143]

Assessment

608. Restrictions on rights of appeal occur not only in relation to orders of tribunals. Such restrictions are imposed in respect of many orders of courts, particularly those courts which have special small claims procedures.[144] The Commission therefore does not consider that such restrictions warrant any limitation on facilities for interstate service and execution of process and orders of tribunals.

Conclusions

609. The preceding analysis demonstrates that there are no features of tribunals which require that their process and orders should be denied facilities for interstate service and execution. But it also has shown that there is a need to examine certain aspects of Parliament's legislative power in this area and to consider whether facilities for interstate service and execution of tribunals' process and orders should be subject to particular safeguards or limitations. The first of these tasks is undertaken in the

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[138] eg Medical Practitioners Act 1970 (Vic) s 11(2).

[139] Anti-Discrimination Act 1977 (NSW) s 118.

[140] Motor Accidents (Compensation) Act 1979 (NT) s 30.

[141] Residential Tenancies Act 1978 (SA) s 29. The appeal is to be to a Local Court of full jurisdiction, whose decision is not appealable.

[142] Small Claims Tribunals Act 1973 (Qld) s 18, 19; Small Claims Tribunals 1973 (Vic) s 16, 17; Consumer Claims Tribunals Act 1974 (NSW) s 20, 21; Small Claims Tribunals Act 1974 (WA) s 18, 19.

[143] Commercial Tribunal Act 1984 (WA) s 20(1).

[144] eg Small Claims Ordinance 1974 (ACT) s 19, s 33; Court of Requests (Small Claims Division) Act 1985 (Tas) s 33.

following section of this chapter, while the latter is dealt with in the discussion of recommendations for reform.

Constitutional considerations

Introduction

610. For present purposes, it is necessary here only to summarise certain pertinent aspects of constitutional power in this area.[145] These include matters relevant to Parliament's power

- to provide for the service of process issued in relation to the two basic functions of tribunals
- to provide for the execution of orders of tribunals made in the exercise of an adjudicative function and
- to confer powers on tribunals in respect of the service and execution of their process and orders.

The summary will also facilitate understanding of the form of the Commission's recommendations.

The power with respect to process

Meaning of 'process'

611. It is not possible to conclude with certainty the meaning of the term 'process' as it is used in s 51(xxiv).[146] While it is likely that the term encompasses a wide range of documents issued by tribunals in the course of their proceedings and also their orders,[147] no legislative definition of the term should be attempted. It is desirable to define certain features of the documents issued by tribunals only for the purpose, as has been done in relation to court documents, of differentiating the procedures that should apply in respect of particular types of documents. Thus whether the legislation to implement the Commission's recommendations will apply to such a document must await judicial confirmation of the status of the particular document as 'process' in the relevant sense. If so, then the legislation would apply to facilitate service or execution interstate. If not, the legislation will not apply and, because of the terms of the relevant constitutional provision, could not be made to apply. Further, the constitutional power being confined to 'process of the States', Parliament has power only with respect to process issued under, or by authority of, the law of a State. Thus the power would not extend to the process of tribunals that operate or derive their authority independently of such law, for example, a tribunal whose authority is derived from a contract between members of an association.

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[145] For a full discussion of constitutional considerations see ch 2.
[146] See para 45.
[147] ibid.

'Civil and criminal process'

612. A further relevant matter regarding Parliament's power arises from the conferral of power with respect to the 'civil and criminal process' of the States. Two possible interpretations of this phrase have been discussed: one that the process within the ambit of s 51(xxiv) is confined the process issued 'in relation to proceedings for the establishment of legal rights or the enforcement of the criminal law';[148] the other that the phrase may be broadly construed to encompass all process of the States. The Commission has argued that the broad view, which is supported by a consideration of the purpose and nature of s 51(xxiv) as an enabling provision intended to support federal laws effectuating State process throughout the federation and facilitating State functions, should be accepted.[149] On this view, there is power to provide for the interstate service and execution of process issued in relation to both of the functions of tribunals.[150] Nevertheless, the provisions concerning process related to adjudicative functions should be drawn separately from those dealing with process related to investigative functions. This would enable the latter provisions, if found to be invalid, to be severed without affecting the operation of the former provisions.

The power with respect to judgments

613. The previous discussion of constitutional considerations examined three possibilities as a basis for federal power to provide for the interstate enforcement of orders of tribunals: that orders of tribunals may be 'process . . . of the States'; that they could be regarded as within the ambit of the phrase 'judgments of the courts' because their orders are 'judgments' and the tribunals are 'courts'; or that the phrase 'judgments of the courts' is broad enough to encompass orders of tribunals that are enforceable through court mechanisms.[151] Regardless of the basis relied upon, however, a tribunal order may only be enforceable interstate under legislation enacted in reliance on s 51(xxiv) if it is binding on the parties and is capable of enforcement in

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[148] *Ammann v Wegener* (1972) 129 CLR 415, 423 (Barwick J).

[149] See para 44.

[150] Conversely, if the narrow view is accepted, their would be no power to provide for the service of process issued in relation to the exercise of investigative functions by tribunals, for such proceedings are not determinative of anything. Whether the power would extend to process issued in relation to adjudicative functions related to a regulatory role, that is, adjudications concerning whether a person should be or continue to be registered or licensed to practice a profession, trade of occupation, would depend on the view taken of the rights concerned in such a matter, particularly whether those rights are 'legal rights' within the view expressed by Barwick CJ. The answer to that question is not clear notwithstanding that they may be 'rights' for the purposes of the application of the rules of natural justice (*Banks v Transport Regulation Board (Victoria)* (1968) 119 CLR 222) and to establish standing in respect of the prerogative writs to compel the proper conduct of proceedings of a regulatory body (*R v O'Donnell, ex parte Builders' Registration Board of Queensland* [1983] 1 Qd R 417; *Builders' Registration Board of Queensland v Rauber* (1983) 47 ALR 55). Also a regulatory body having the power to revoke a licence is a body 'invested with authority to adjudicate upon matters involving civil consequences to individuals' (*Wood v Woad* (1874) LR 9 Ex 190, 196 (Kelly CB)).

[151] See para 45; 51–2, 56–60; 61–3 respectively.

the State of rendition.[152] An order that is deemed to create a debt due to the person in whose favour it has been made which is recoverable only through action in a court of competent jurisdiction cannot be regarded as being immediately enforceable. Further, in view of the two positions that may be taken in relation to tribunal orders that are able to be enforced only after filing or registration in a court,[153] interstate enforcement should only be possible after an order has been so filed or registered.

Incidental powers

614. The Service and Execution of Process Act confers several powers on courts and court officers intended to guard against abuse of the facilities provided for interstate service and execution of process and judgments. Examples include

- s 10, which empowers courts to order that a plaintiff give security for the defendant's costs
- s 11, which requires courts, in the absence of an appearance by the defendant, to consider whether the plaintiff should be given leave to proceed in an action on the basis that the action or the parties have a defined nexus with the forum
- s 16, which requires a court, judge, magistrate or coroner to consider whether leave should be given for the service of a subpoena outside the jurisdiction of issue and
- s 18(3) and (6), which require a magistrate to consider the question of the extradition of a person on a warrant issued in another State.

There is no doubt that Parliament could likewise impose such 'safeguard' provisions in relation to the service and execution of tribunals' process and orders. However, in doing so it would be necessary to avoid conferring federal judicial power on tribunals or their officers. For example, s 10 has been held to amount to a conferral of federal judicial power on State courts, supported by s 76(ii) and s 77(iii) of the Constitution,[154] and the same appears to be so in relation to s 11.[155] While the power conferred by s 16 has been held to be judicial for the purposes of State provisions regarding appeals, if it were held to be a conferral of federal judicial power the references to the particular office holders would be invalid, for it is trite that federal judicial power can be conferred only on 'courts' within Chapter III of the Constitution.[156] Yet s 16 has not suffered any challenge on this basis since its enactment and, while mere elapse of time is no guarantee of validity, there has been no adverse comment on the section in this regard despite other aspects of it being considered by the High Court on several occasions.[157] In contrast, while the power of a magistrate under s 18(3) and (6) is 'susceptible of

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[152] See para 54–5.

[153] See para 59–60.

[154] *McGlew v New South Wales Malting Co Ltd* (1918) 25 CLR 415, 420–1 (Griffith CJ, Barton, Powers and Rich J).

[155] See *Gosper v Sawyer* (1985) 58 ALR 13, 17 (Gibbs CJ, Wilson and Dawson J) as explained in *Flaherty v Girgis* (1987) 71 ALR 1, 16–7 (Mason ACJ, Wilson and Dawson J); *Tana v Baxter* (1986) 68 ALR 245, 251–2 (Brennan J).

[156] See further para 69–71.

[157] See particularly *Ammann v Wegener* (1972) 129 CLR 415.

being treated as a judicial function', it does 'not necessarily amount to a grant of the judicial power of the Commonwealth' and has been held not to be so.[158]

615. While it is difficult to discern the status of some of the powers conferred by Parliament on courts and court officers in this area, perhaps the answer is that certain powers may be regarded as being judicial when conferred on a court but not judicial when conferred on particular office-holders.[159] Such an approach would be consistent with the liberal approach adopted by the courts when considering s 51(xxiv) and the Service and Execution of Process Act. On that basis some latitude exists to enable the conferral of specific powers on tribunals and tribunal officers without those powers being regarded as judicial. Therefore, notwithstanding reservations concerning the extent of Parliament's power, if it is appropriate that certain powers be conferred on tribunals in order to safeguard against abuse of facilities for the interstate service and execution of their process and orders, those powers should be conferred in the interests of fairness to the persons involved. However, the provisions should be structured so that it will be possible, if the conferral of power is found to be invalid, to sever the necessary parts without affecting the operation of the provisions as a whole.

Reform proposals

Preliminary matters

Ambit

616. The Commission has concluded, after consideration of the roles performed by tribunals and an analysis of some of their characteristics, that federal legislation should provide facilities by which tribunals' process and orders may be served and executed interstate. It is now necessary to consider how those facilities should be provided and what safeguards should be attached thereto, bearing in mind relevant constitutional considerations. A basic issue to be resolved is the ambit of the scheme by which those facilities are provided. In other words, it is necessary to define the term 'tribunal' to distinguish between the procedures that will apply to service and execution of courts' process and orders and those that will apply to tribunals' process and orders. That task is somewhat complicated by the great diversity in tribunals' characteristics. There is one feature, however, which appears to be common to all the bodies, not being courts, that have dispute resolution, regulatory and investigative roles, namely, possession of the power to take evidence on oath or affirmation. This power is available even though it may not be employed in practice. Therefore definition of the term 'tribunal' should be made by reference to the authority of a person or body under the law of a State or Territory to require the giving of evidence on oath or affirmation. That authority is possessed also by courts, which should be excluded from the definition. This

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[158] *Aston v Irvine* (1955) 92 CLR 353, 365.

[159] See para 69.

definition will not encompass those complaints-handling officers[160] who have power to call compulsory conferences, as they do not have power to require evidence to be given on oath or affirmation.

Categorisation of proceedings for purposes of service of process

617. *Issue.* For the purpose of the procedures for interstate service of courts' process the Service and Execution of Process Act and the Commission's recommendations distinguish between process issued in civil proceedings and process issued in criminal proceedings. Within those broad categorisations, further divisions exist and have been recommended on the basis of the type of process concerned. In the present context, two issues arising are whether a broad categorisation should be made in respect of tribunals' process and whether further divisions should be established in respect of particular types of process.

618. *Basis of categorisation.* It has already been noted that the roles performed by tribunals are an inappropriate basis for distinguishing between them for the purpose of the application of procedures for interstate service and execution of their process. Rather, any distinction should be based on their two basic functions, namely, adjudicative functions and investigative functions. While some tribunals have power to attempt to resolve disputes by conciliation, the process of conciliation may nevertheless lead to the making of an order which may be enforced, if necessary, as if the order were made as a result of the more formal adjudicative processes of the tribunal. Therefore for present purposes the power to conciliate on disputes should be regarded as an ancillary aspect of the adjudicative function.

619. *Assessment.* There are at least two factors that may justify the application of different procedures to the service and execution of process issued in the exercise of adjudicative functions, on the one hand, and investigative functions on the other. The first is the difference in outcome of each of the functions and the implications those outcomes raise as to their exercise. The adjudicative function will result in a determination or order affecting the parties to the adjudication. In the performance of the dispute resolution role, the determination may affect the legal rights of the parties in much the same way as a judgment of a court. In the performance of the regulatory role, adjudication will result in a determination affecting the right of a person to carry on, or to continue to carry on, the particular profession, trade or occupation regulated by the tribunal. The exercise of an adjudicative function is thus directed by the need to ultimately reach a determination disposing of the matter at hand, whether that be a matter of the same type as is dealt with by the courts or one affecting the occupational rights of a person. The evidence required for the purposes of the tribunal proceedings will be only that relevant to the resolution of the various issues required to be considered in reaching its final determination. In contrast an exercise of the investigative function results in no final determination. While commonly conducted for the purpose of establishing relevant facts to aid government decision-making, such fact-finding is not of the same nature as is undertaken by courts or tribunals exercising an adjudicative function and the outcome is merely an opinion as to the pertinent

[160] See para 592.

facts and as to a course or courses of action which should be followed. There are no parties to the exercise of an investigative function in the sense in which that term is used in proceedings involved in the exercise of an adjudicative function, merely interested persons. The information sought by a tribunal exercising this function, while it will have in mind the topic on which fact-finding and an expression of opinion is sought, will not be directed in the same way as the evidence relevant to the exercise of an adjudicative function. The proper exercise of the investigative function probably requires a wide ranging information-gathering exercise. Some of this information may later be put to one side as irrelevant to the purpose of the investigation. However, there is the potential that a tribunal in the exercise of an investigative function may seek information, and issue subpoenas or similar process, backed up with the possibility of criminal sanctions for non-compliance, in order to obtain that information, which in reality is unnecessary or irrelevant to the purpose at hand. That potential may give rise to concern that a tribunal exercising an investigative function may overreach its proper bounds, and thus that there should be some limitation on the ability to serve or execute process issued by the tribunal to secure information.

620. Linked with this potential for overreaching of legitimate investigative exercises is the possibility that a tribunal may be given an investigative task that, while clothed with legality, is in fact an attempt by the government of one State to pursue an exercise with political motives against, or designed to embarrass, the government of another State. Alternatively, while a particular investigative task may not have this ostensible aim, it may have such an effect. Disagreement between the States is not unknown. If those disagreements were to be facilitated by enabling interstate service of process whose object is to compel the giving of information by persons, particularly public servants or government officers of a State, great harm would be done to the fabric of the federation. At its lowest level, embarrassment to or interference with the government of a State by a tribunal established in another State is something which federal legislation should not countenance or facilitate. These considerations do not arise, however, in relation to the exercise of adjudicative functions. It is therefore necessary to impose special limitations on facilities for interstate service of process issued in connection with the exercise of an investigative function to guard against the possibilities discussed above. For this purpose it is appropriate to categorise the process issued by tribunals according to whether it is issued in connection with the exercise of an adjudicative function or the exercise of an investigative function.

Categorisation of process

621. On the next issue, namely, whether, within that broad categorisation, there should be further divisions, an affirmative answer is clearly indicated. Such further divisions exist and have been recommended in relation to the service of court process, being based on the variety of process that they may issue.[161] A similar variety of

[161] For comment on the purpose of the structure of the Service and Execution of Process Act and the Commission's recommendations see para 25–9.

process may be issued by tribunals and it is appropriate that different procedures apply to the interstate service of each type of process. Tribunal process should therefore be categorised as follows:

- initiating process, defined as process initiating a proceeding or process by reference to which a person becomes a party to a proceeding
- subpoenas, defined as process that requires a person to give oral evidence to a tribunal or to produce a document or thing to a tribunal
- warrants, defined as process issued in accordance with the law of a State or Territory that authorises the apprehension of a person and
- other process, being process that is not initiating process, a subpoena or a warrant.

These categories correspond to those adopted in relation to court process. Because of the difference between adjudicative and investigative functions, however, it will be evident that while a tribunal exercising an adjudicative function may have cause to issue all such types of process, a tribunal exercising an investigative function will only have cause to issue subpoenas and warrants.

Basic approach

622. In view of the important roles performed by tribunals and the general objectives for reform of the law regarding interstate service and execution of process and judgments,[162] it seems desirable that in general procedures for service and execution of tribunals' process and orders should be similar to those recommended in relation to the process and judgments of courts. However, analysis of tribunals' characteristics and consideration of the differences in adjudicative and investigative functions has indicated certain areas of concern which may warrant a different approach in relation to tribunals' process and orders. Consideration of this question is pursued in relation to the two categories of tribunal functions recommended above.

Service of process issued in connection with adjudicative functions

Definition of function

623. For the purpose of the broad categorisation recommended above, it is necessary to define the two functions of tribunals. Basic to the adjudicative function is the making of a determination of some kind on the matters involved in the tribunal proceeding, whether that determination is of the same nature as may be made by a court or, in relation to a regulatory roles, is of a different nature. The definition of 'adjudicative function' should therefore refer to the function of determining the rights and liabilities of persons. For the purpose of the definition, it should be made clear that rights and liabilities include person's rights and liabilities in respect of the carrying on of a profession, trade or occupation. This will ensure that adjudicative functions undertaken in the performance of a regulatory role will be included. For this purpose also, the definition should in addition refer to determinations altering the rights and liabilities

[162] See para 24.

of persons because, particularly in relation to the regulatory role, the determination may qualify, without excluding, the rights of persons to carry on professions, trades or occupations.

Service of initiating process

624. *Preconditions on service.* Under the Commission's recommendations, initiating process in court proceedings will be able to be served *ex juris* without any necessity for leave or the satisfaction of nexus conditions. However, a plaintiff will not have an unrestricted right to choose the venue of trial, for the defendant will have an opportunity to argue that the venue chosen is inappropriate and to obtain a stay of proceedings or a transfer of proceedings to an appropriate court.[163] The issue is whether similar procedures should apply to service of tribunals' initiating process.

625. *Inappropriateness of venue objection procedure.* There are a number of factors which may indicate that the venue objection procedure and related proposals for a change of venue or a stay of court proceedings are not suitable to the situation of tribunals. First, in view of the lack of uniformity in the establishment of tribunals, provision of a power to transfer proceedings would be useless where the appropriate venue for proceedings was found to be a State or Territory in which no similar tribunal existed. In such situations, a tribunal would be limited to ordering a stay of proceedings. The claimant in the tribunal proceedings would then be compelled, if he or she wished to pursue the claim, to commence action in a court in another State.

626. Another factor is that certain matters can be dealt with by one tribunal only. This is particularly so with regard to the powers of regulatory tribunals. They have powers to regulate the carrying on of a profession, trade or occupation only within the State or Territory in which they are established and have no power over the licensing or registration of persons in other States. It would thus be nonsensical to provide procedures for a change of the venue of proceedings or a stay proceedings on the basis that there is a more convenient venue in which the matter might be determined.

627. Further, consistent with the reasons for the establishment of many tribunals that exercise adjudicative functions, particularly dispute resolution tribunals,[164] the Commission is concerned to provide a scheme that is reasonably simple, cheap, promotes speedy resolution of the matters before tribunals and does not unduly increase the complexity of tribunal proceedings. Application of the venue objection procedure to service of tribunal process may be thought to be undesirable on a consideration of several of these objectives.

628. *Possible alternatives.* A number of alternative procedures have been considered to address these factors. One initially attractive option was simply to permit the service *ex juris* of tribunals' initiating process without restriction and not to apply the venue objection procedure. That would certainly provide a simple procedure, capable of being readily understood both by parties and tribunal members — some of whom, as they are not required to be legally qualified, might have difficulty dealing with the

[163] See para 178–97.
[164] See para 551–4.

concepts, for example, the applicable law in proceedings, requiring consideration under the venue objection procedure — and would be cheap and promote speedy determination of disputed matters. However, very little of the legislation establishing tribunals explicity speicifes territorial limitations on tribunals' jurisdiction. If this option were implemented, proceedings could be commenced in a tribunal and process served outside its State or Territory notwithstanding that none of the parties nor the subject of the proceedings had any connection with that State or Territory and where, on a proper assessment of the question, the tribunal would be held to lack jurisdiction. Even if such jurisdictional objections could be raised by the respondent to the proceedings before the tribunal,[165] unrepresented parties may well have difficulty in presenting them. In addition, determination of such objections could involve difficult questions of interpretation and would increase the complexity of the proceedings. Further, it may be envisaged that such objections often could lead to proceedings in the Supreme Court of the State or Territory in which the tribunal is established, a potential further increasing the complexity of the proceedings and having adverse financial implications for all concerned. Thus this option is open to many of the same objections as were identified above in relation to application of the venue objection procedure.

629. A further alternative, and one which might go some way to eliminating problems associated with tribunals assuming jurisdiction over matters having no connection with their State or Territory, would be to require that leave be obtained from a court before interstate service could be effected. One submission argued that such a requirement should be imposed, at least in some cases, because of the limitations that exist in some tribunals on the right of parties to be represented at tribunal proceedings and on recovery of costs.[166] While that submission did not discuss the basis on which a leave application would be assessed, it referred to the apparent lack of provision in relevant State and Territory legislation for challenging the appropriateness of service of tribunals' process *ex juris*. Presumably, therefore, the proposition was that leave would be based on there being an appropriate nexus between the venue of the proceedings and the subject-matter of the claim or the parties thereto. Again, however, such a procedure, even if applied only in relation to the process of some tribunals, would further complicate tribunal proceedings, increase costs — including costs of representation at the hearing of leave applications — and delay the determination of matters in issue in tribunal proceedings. The Commission therefore does not favour either of the options discussed above.

630. *Recommendations.* The Commission is of the view that nexus provisions may be usefully employed to generally eliminate concerns of tribunals exceeding their jurisdiction or of proceedings being instituted in inappropriate venues. However they should not create unnecessary obstacles to or increase the costs associated with service of tribunals' process and tribunal proceedings. The rules of several courts permit service of process *ex juris* where the proceedings have a nexus with the jurisdiction in which they are instituted without requiring that the nexus be established prior to

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[165] Parties might have to resort to Supreme Court proceedings, an unattractive course not least because of the costs involved.

[166] Law Society of Western Australia *Submission* 1–2.

service.[167] The Commission recommends that a similar procedure should apply to service of initiating process of tribunals.[168] Assuming that the nexus grounds were framed with a minimum of technicality so as to be easily understood, it would be a relatively simple matter for a person wishing to institute a claim, or the tribunal officer whose obligation it is to serve notice of a claim on the respondent, to determine whether the claim has a nexus with the State or Territory in which the tribunal is established before attempting to effect service on the respondent. There would be no additional initial costs involved nor any significant delay in instituting the proceedings. But there would, because of the limitations imposed, be an opportunity for a respondent to challenge the appropriateness of service on the basis that none of the nexus grounds was satisfied. Where possible under its procedures, such an objection could be dealt with by a tribunal. In other cases, application might have to be made to a Supreme Court to exercise its supervisory jurisdiction. While the implications of such challenges for costs and delay cannot be ignored, those implications would only arise occasionally.

631. As noted above, the successful operation of this procedure depends on the nexus grounds being easily understood and applied by those who have cause to do so — parties to tribunal proceedings and the officers and members of tribunals. In addition to the need to eliminate technicality, it is necessary to include only those grounds which would, if the matter were to be assessed under the venue objection procedure relating to court process, generally lead to the conclusion that the chosen venue is appropriate in the circumstances. Otherwise, they would be open to the same criticisms as have been made of several of the nexus grounds established under State rules.[169] The range of matters presently within the jurisdiction of tribunals in the exercise of their adjudicative functions indicates that the nexus conditions need not be unduly extensive. While their jurisdiction may be enlarged in the future, it would be idle speculation to attempt to anticipate such developments. The major tribunals, for example, Small (Consumer) Claims Tribunals, Credit (Commercial) Tribunals, Tenancy (Residential Tenancies) Tribunals and Equal Opportunity Tribunals, deal respectively generally with contracts for the supply of goods or services, including financial services, with tenancy contracts concerning real property within the State or Territory concerned and with complaints of unlawful acts or practices resulting in discrimination. Three elements are involved, namely, contracts, real property and acts, which should form the basis of three nexus conditions. These would also apply to tribunals such as motor accident tribunals and

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[167] eg General Rules of Procedure in Civil Proceedings 1986 (Vic) r 7.01; Rules of the Supreme Court of Tasmania, O 11, r 1(1); Rules of the Supreme Court of Queensland, O 11, r 1. See also New Brunswick Rules of Court, r 19.01; Saskatchewan Rules of Practice and Procedure, r 31(1).

[168] There is no doubt that federal legislation could specify, through nexus conditions, the circumstances in which process can be served outside the State or Territory of issue. They are presently provided in s 11 of the Act, although at a later stage, and the power to impose them has never been questioned. Their imposition at an earlier stage would make them more immediately relevant to service of process, rather then invoking them at a subsequent stage, namely, on the defendant's non-appearance, and would tend to support the validity of the legislation so far as it applied to process of Territory tribunals, in view of the possible limitations arising under s 122 of the Constitution: see para 67, 197.

[169] See para 173–6.

land use tribunals. The adjudicative functions of tribunals performing regulatory roles requires a further nexus condition related to the carrying on of occupations. A fifth nexus condition is required to cater for tribunals that assess entitlements to pensions or benefits available under State and Territory laws. A further nexus condition should be provided to deal with tribunals that may adjudicate on the validity of acts and dealings conducted under State and Territory laws. Therefore legislation should enable initiating process concerning the exercise of an adjudicative function by a tribunal to be served where the proceedings concern

- real property within the State or Territory in which the tribunal is established
- a contract, wherever made, for the supply of goods or the provision of services of any kind (including financial services) within that State or Territory
- an act or omission within that State or Territory
- the carrying on of a profession, trade or occupation within that State or Territory
- a pension or benefit under a law of that State or Territory or
- the validity of an act or transaction under a law of that State or Territory.

632. *Appearance.* The procedures recommended in relation to service of initiating process in court proceedings apply a uniform period of 21 days after service, which should be capable of being shortened in certain circumstances, within which a defendant may enter an appearance in a proceeding.[170] The Commission recommends that the same procedure apply in relation to tribunals' process. The term 'appearance' should also be broadly defined to include procedures for acknowledging service or for notifying a tribunal of an intention to take part in proceedings or to challenge its jurisdiction[171] and an appearance should give an address for service, which may be anywhere in Australia.[172] Where all that the respondent must do if he or she wishes to take part is to attend on the day set down for a hearing, it is recommended that the hearing should not be permitted to proceed until a period of 21 days, capable of being shortened in appropriate circumstances, has elapsed since the date of service of the initiating process. Consideration of whether the period is to be shortened should be made by the tribunal that will deal with the matter on an assessment of matters such as urgency, the places of residence of the parties and the pendency of related or similar proceedings in the tribunal against other persons.[173]

633. *Procedure where no appearance.* A further measure intended to simplify and decrease costs associated with interstate service of courts' process is the recommendation that a plaintiff should not require leave to proceed in the absence of an appearance by the defendant.[174] For the same purpose, it is desirable that no such requirement be

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[170] See para 206–9.

[171] See para 161.

[172] See para 201.

[173] The provision should be of the same nature as that recommended in relation to courts' consideration of applications to shorten time: see para 209.

[174] See para 168.

imposed where the respondent to tribunal proceedings, having been served in another State or Territory, does not enter an appearance or attend on the day set down for the hearing. It is therefore recommended that, after the elapse of the specified period, or such shorter period as has been permitted by a tribunal, there should be no restriction imposed by federal law on the continuation of the tribunal proceedings where the respondent has not entered an appearance or does not attend the hearing.

634. *Endorsements.* In relation to service of courts' process, the Commission has recommended that certain documents, informing defendants of their rights and obligations, be attached to initiating process when served and that failure to attach those documents should render service ineffective.[175] Persons served with initiating process of tribunals also should be informed of their rights and obligations and failure to do so should result in ineffective service. Initiating process of a tribunal should be accompanied by certain information, either endorsed on the process or attached thereto, when served under the facilities provided by the legislation. The amount of information required is not as extensive as that required under the recommendations made for courts' process, there being no venue objection procedure. But at a minimum persons should be informed of the authority of the federal legislation to provide for service in certain circumstances, that is, where the nexus grounds apply, and also, to enable a challenge to the appropriateness of service, of the particular ground relied upon for service. They should be informed also of their rights and obligations regarding entry of an appearance or attendance on the day set down for hearing.

635. *Security for costs.* The Commission has recommended retention of the power presently available where initiating process in court proceedings has been served *ex juris* for a court to order that a plaintiff give security for the defendant's costs.[176] The extension of that power to the circumstances of service of tribunals' process would be inappropriate so far as concerns those tribunals that have no power to make awards of costs. However, it does seem appropriate that such a power be given to those tribunals that have some power to order payment of costs. In these tribunals the costs-deterrence argument[177] does not apply, at least to some extent. Therefore it is recommended that, where a tribunal has power under State or Territory law to order payment of costs, the tribunal should be given power to require a party at whose instance tribunal proceedings have been initiated to give security for the costs of a party served in another State or Territory with initiating process. Where the power to award costs is limited by a ceiling, the tribunal should be permitted to require security up to that amount only.

Service of other process

636. The process of tribunals that falls within the category of other process as defined above[178] should be permitted to be served outside the State or Territory of issue

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[175] See para 205.
[176] See para 211–2.
[177] See para 604.
[178] See para 621.

without any restriction by federal law. This conforms with the Commission's recommendations in respect of such other process issued in court proceedings.[179]

Service of subpoenas

637. *Leave requirement.* In relation to court subpoenas, the Commission has recommended that the present leave requirement of s 16 of the Act be abolished in all cases except where service is sought to be effected within 14 days of the day for compliance.[180] In view of tribunals' importance and the objectives for reform, it could be argued that a similar situation should obtain in relation to service of subpoenas issued in connection with the exercise of an adjudicative function. Some submissions have suggested that no leave should be required for service of adjudicative subpoenas.[181] Other submissions, in contrast, have argued that the leave of a court should be required for their service to ensure that tribunals do not overstep their bounds.[182]

638. While the Commission has recommended that leave should be abolished in respect of courts' subpoenas, it is of the view that the arguments which support that recommendation are not of the same force when adjudicative subpoenas are considered. In particular, because many tribunals restrict the right to representation, subpoenas may be sought to be issued without adequate consideration whether it is proper to do so in the circumstances. The potential for unneccessary inconvenience to and disruption of the affairs of persons liable to the demands of a subpoena is therefore increased. While the alternative views both appear to have equal justification, on balance it is appropriate to require some supervision of service of adjudicative subpoenas. Notwithstanding that such supervision will cause some increase in the costs associated with service, the Commission recommends that interstate service of adjudicative subpoenas should be possible only where prior permission to do so has been given. To minimise those costs as far as possible, it is recommended that, where the tribunal has a member who is a judge or magistrate, permission should be sought from that member. Only where a tribunal has no members who are judges or magistrates should a separate application for permission have to be made to a court. The court to which application should be made should be a court that would have had jurisdiction in the proceedings if the proceedings had been, or were capable of being, instituted in a court. If there is more than one such court, permission should be sought from the court of more limited jurisdiction.

639. *Other procedures.* In other respects, the procedure applying to service of adjudicative subpoenas should be the same as those recommended in relation to service of subpoenas issued in court proceedings. These include

- the matters which should be established in order to obtain permission to serve a subpoena[183]

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[179] See para 241–4.
[180] See para 269–71.
[181] eg Builders' Licensing Board of Queensland *Submission* 2.
[182] eg Harper *Submission* 4.
[183] See para 270.

- the attachments required to a subpoena when served, including a copy of the instrument by which permission for service is given[184]
- the requirement to provide witness expenses at the time of service[185]
- the summary procedure for seeking variation, setting aside or other relief in respect of a subpoena[186]
- the power to make orders as to the costs of compliance with a subpoena[187] and
- the application of these procedures where the person to whom the subpoena is addressed is under lawful restraint but the subpoena does not require the attendance of the person.[188]

Also, as has been recommended in relation to court subpoenas, the above procedures should not apply where the person to whom the subpoena is addressed is a party to the tribunal proceeding in which it is issued.[189] Further, where the person to whom the subpoena is addressed is under lawful restraint and attendance is required, rather than obtaining permission to serve the subpoena application should be made for an order for production of the person at the tribunal proceedings.[190] Where this latter procedure applies, again the recommendations made in respect of courts' subpoenas should apply in respect of adjudicative subpoenas, including

- the requirement to serve a copy of the subpoena on which an order for production is based on the person subject to the order[191]
- the provision of witness expenses to the custodian of the person[192] and
- the right of the custodian and the person to apply for relief in respect of the order for production.[193]

Service of process issued in connection with investigative functions

Definition of function

640. The Commission has already noted the need to provide a separate scheme for the interstate service and execution of tribunals' process issued in connection with the exercise of an investigative function.[194] This function does not result in the making of a determination which is capable itself of affecting the rights or liabilities of persons. The definition of the investigative function therefore requires reference to the making of an inquiry, other than in the exercise of an adjudicative function, into a matter.

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[184] See para 280.
[185] See para 274.
[186] See para 281.
[187] See para 278.
[188] See para 300.
[189] See para 285.
[190] See para 296.
[191] See para 304.
[192] See para 316–7.
[193] See para 309–13.
[194] See para 617–20.

Service of subpoenas

641. *Leave requirement.* It has also been noted that only a limited range of process may be issued in connection with the exercise of investigative functions, being confined to subpoenas and warrants.[195] This section deals with procedures for the service of subpoenas. The need for a separate scheme for service of investigative subpoenas stems from the desire to ensure that the information gathering tasks of a tribunal exercising investigative functions are properly confined to the matters within the brief of the tribunal and from the concern that facilities for interstate service and execution of process should not provide a vehicle by which embarrassment to or interference with the government of a State may be caused. Some mechanism is required to protect against potential abuse. One possibility would be to impose nexus requirements, but in view of the virtually unlimited range of legitimate matters that may be the subject of investigation by tribunals such a course would be undesirable. Similarly, it is not practicable to merely exclude certain tribunals from the scope of the scheme. Therefore the Commission recommends a leave requirement in respect of interstate service of subpoenas issued in connection with the exercise of an investigative function by a tribunal. That is, before such a subpoena may be served interstate, leave should first be obtained.

642. *Court to which application should be made.* The first aspect of the leave procedure to be considered concerns the body to which application should be made. To address the concerns noted above, it is necessary that an independent body assess whether leave should be given. While some might argue that the appearance of independence and impartiality would be greater if leave was to be sought from the Federal Court, the Commission is of the view that the Supreme Court of the State or Territory in which the tribunal is established would be an equally independent and impartial arbiter of whether leave should be granted. The Supreme Courts' roles include a supervisory component and there is no reason to doubt their ability or will to reach decisions that may be unfavourable to the aims of the executive or legislature should occasion warrant. Therefore the Commission recommends that leave should be sought from the Supreme Court of the State or Territory in which the tribunal is established.

643. *Grounds for leave.* The next aspect of the procedure requiring consideration is the grounds for leave. As the investigative function differs from the adjudicative function, the grounds for permission in respect of service of adjudicative subpoenas (the same as for courts' subpoenas) are not appropriate. Rather, the basic ground to be satisfied should be that the evidence sought to be obtained from the person to be served with a subpoena is relevant to the matter the subject of the investigative function. In order to minimise unnecessary subpoenaing of persons and inconvenience to the subjects of subpoenas, it is also appropriate that the Supreme Court be directed to consider whether the evidence sought from the person is reasonably obtainable from a source within the State or Territory in which the tribunal is established.

644. While these grounds will serve to control the unnecessary subpoenaing of persons, they will not be effective to overcome potential interference with or embarrass-

[195] See para 621.

ment to other governments. To address these concerns and also because of the virtually unlimited range of matters that may be the subject of an investigation, it is appropriate that a further matter that should be considered on a leave application is whether the evidence sought to be obtained from the person to whom the subpoena is addressed should be protected in the public interest. While many privileges may be sought to be invoked to justify the non-disclosure of information in court proceedings — some may also be available in tribunal proceedings — in the present context the only information that it may be necessary to seek to protect is that which may be protected from disclosure in court proceedings under state interest privilege.[196] The types of information that should be within the scope of that privelege have been the subject of recent recommendations by the Commission in its report on the laws of evidence and it is recommended that the same considerations apply in the present context. In the draft legislation attached to that report this information is described as evidence that relates to matters of state.

> [E]vidence that relates to matters of state includes evidence —
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> (a) that relates to —
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> (i) the security or defence of Australia;
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> (ii) international relations or to relations between the Commonwealth and a State or relations between two or more States; or
>
> (iii) the prevention or detection of offences or contraventions of the law; or
>
> (b) which, if adduced —
>
> (i) would disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of a law, including a law of a State; or
>
> (ii) would tend to prejudice the proper functioning of government, including the government of a State.[197]

On an application for leave to serve an investigative subpoena the Supreme Court should consider whether the evidence sought to be obtained from the person to whom the subpoena is addressed is evidence that relates to matters of state.

645. In its report on evidence the Commission recommended that, when a question of state interest privelege arose, the courts should consider the competing public interests in disclosure and non-disclosure. The balancing of those public interests was to be made by reference to matters such as the importance of the evidence to the proceedings, by whom the evidence is adduced (in the case of a criminal proceedings) and the nature of the offence charged or the cause of action in the proceedings.[198] A similar consideration of competing public interests should also occur in the present context, that is, notwithstanding that the evidence sought to be obtained relates to matters of state, the Supreme Court should consider whether the public interest in enabling the

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[196] This term describes what has been variously described as Crown privilege or public interest privilege: see ALRC 26, para 863–8.

[197] ALRC 38, Appendix A, Evidence Bill 1987 cl 112(2). For the purposes of this provision 'State' is defined to include a Territory: cl 112(5).

[198] See id, cl 112(1) and (3).

evidence to be obtained for the purpose of the exercise of the investigative function is outweighed by the public interest in preserving secrecy or confidentiality in relation to the evidence. However, because of the nature of the investigative function, the matters to which reference should be made when assessing those competing public interests should differ from those considered in court proceedings. In the present context the Commission recommends that the competing public interests should be assessed by reference to the purpose and subject-matter of the investigative function in connection with which a subpoena has been issued.

646. Notwithstanding that the grounds for leave are established, the Supreme Court may consider that it would not be proper to permit service of an investigative subpoena. For example, the circumstances of a leave application may indicate that there will be only a short period of time between the day of service and the day for compliance with the subpoena, and the Supreme Court may consider that it would be unduly inconvenient for the person to have to comply with the subpoena at short notice. To cater for such circumstances, it is recommended that the Supreme Court have a residual discretion to refuse to grant leave notwithstanding that in other respects the grounds for leave have been established.

647. *Associated procedures.* As with adjudicative subpoenas, after leave has been given for service of an investigative subpoena the same procedures should apply as have been recommended in relation to courts' subpoenas.[199] A copy of the order granting leave also should be attached to the subpoena when it is served.

Execution of warrants

Introduction

648. While only a few tribunals have power to issue process authorising the apprehension of a person — a warrant as defined above[200] — there should be facilities for interstate execution of such process. The extradition procedures recommended in chapter 6 have been designed to enable warrants issued by tribunals to be executed interstate. However, just as a distinction has been made between courts' and tribunals' subpoenas for the purposes of their interstate service and a leave requirement imposed in respect of the latter, it is appropriate that the interstate execution of a warrant issued by a tribunal generally should be subject to prior supervision. In applying this supervision, the difference between the exercise of adjudicative functions and the exercise of investigative functions should be maintained.

Adjudicative functions

649. *Warrants to compel compliance with a subpoena.* In most cases where tribunals exercising adjudicative functions have power to issue a warrant, the power is limited to situations where a person has failed to attend in compliance with a subpoena. In the Commission's view, where an adjudicative subpoena has been served interstate

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[199] See para 639.

[200] See para 621.

under the procedures recommended above,[201] there is no need for further supervision if the person served with the subpoena fails to attend and a warrant is issued to compel attendance. The requirement for prior permission to serve the subpoena is a sufficient safeguard and no further impediment should be placed in the way of execution of a warrant issued by reason of the default of the person in complying with the subpoena. However, where a warrant is issued without the prior issue and service of a subpoena under the recommended procedures, prior permission should be sought for the apprehension of the person subject to the warrant. As the warrant would have been issued under the supervision of the tribunal concerned, it is appropriate that another body consider the question whether it is proper to give such permission. For this purpose, the application should be made to the Supreme Court of the State or Territory in which the tribunal is established. The matters to be considered on an application for permission to apprehend the person, with one exception, should be the same as those considered when permission is sought to serve an adjudicative subpoena. That exception is merely to eliminate one non-applicable matter, namely, whether there is sufficient time available to the person within which to comply and to make objection to compliance.[202]

650. *Other warrants.* In a few cases tribunals exercising adjudicative functions are empowered to deal with an alleged contempt of their proceedings in the same way as a court may deal with contempt of its proceedings. This power may include the power to issue a warrant for the purpose of bringing the alleged contemnor before the tribunal. The Commission recommends that the interstate execution of warrants issued in such circumstances should be subject to prior supervision. The only difference in this procedure from that described immediately above regards the matters to be considered on an application for permission to apprehend the person the subject of the warrant. As the basis for the issue of such a warrant may vary considerably, it is not possible to specify with any particularity matters that may be relevant to the question whether permission for apprehension of the person should be given. In these circumstances, the Commission recommends merely that the Supreme Court should be given a discretion to give permission for the apprehension of the person.

Investigative functions

651. *Warrants to compel compliance with a subpoena.* The same considerations apply to warrants issued by tribunals exercising investigative functions as apply to warrants issued in the course of the exercise of adjudicative functions. Thus where a warrant has been issued after a person has failed to comply with an investigative subpoena served interstate under the procedures recommended above, there should be no need for further supervision where the person is sought to be apprehended interstate. Where the warrant has not been preceded by a subpoena served under supervision, an order of the Supreme Court of the State or Territory in which the tribunal is established

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[201] See para 638.

[202] See para 270.

should first be obtained authorising the apprehension of the person. The matters to be established on an application for an order should be the same as apply on an application for leave in respect of an investigative subpoena.[203]

652. *Other warrants.* Similarly, the apprehension interstate of a person named in a warrant issued in relation to an alleged contempt of a tribunal exercising an investigative function should be subject to the supervision of the Supreme Court of the State or Territory in which the tribunal is established. The Supreme Court should have a discretion to give permission for the apprehension of the person.

Production of order

653. Under the procedures recommended in chapter 6, when a person apprehended on a warrant issued in another State or Territory is taken before a magistrate for the purpose of the extradition hearing the warrant or a copy thereof must be produced.[204] Where the warrant has been issued by a tribunal, there should be produced also a copy of the order authorising the apprehension of the person or, where the warrant has been issued because of the failure of the person named to comply with a subpoena, a copy of the order authorising the service of the subpoena.

Execution of tribunals' orders

Introduction

654. The basic procedures by which tribunals' orders are enforced have already been noted.[205] These are to adopt the enforcement mechanisms of the courts in the State or Territory in which the tribunal is established. While it would be possible to provide federal procedures for enforcement separate from those of the courts, that would not be a cost effective proposition. Because of the reliance on court mechanisms within the State or Territory in which a tribunal is established, it seems both appropriate and cost efficient for procedures for their interstate enforcement also to be provided through the enforcement mechanisms of courts. However, while the possibility may be remote, in the future some tribunals may be provided with their own enforcement mechanisms. The Commission considers that its proposals should be framed so as to permit interstate enforcement of orders of such tribunals. Again, however, it seems appropriate to provide those facilities through the enforcement mechanisms of courts, primarily because there may not be analogous tribunals in a State or Territory where enforcement is sought. It is therefore recommended that procedures for interstate enforcement of tribunals' orders should be grafted onto the procedures recommended in chapter 7 regarding the interstate enforcement of orders and judgments of courts. For present purposes, it is necessary only to summarise these recommendations and to point out specific provisions that should be made in respect of tribunals' orders.

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[203] See para 643–5.
[204] See para 391.
[205] See para 605.

Definition

655. In view of the likely constitutional limitation in relation to judgments concerning their enforceability,[206] it is recommended that procedures for enforcement of tribunal orders should not extend to those orders that are capable of being enforced only through the taking of further substantive proceedings in a court. For the purposes of the application of the recommended enforcement procedures to orders of tribunals, the definition of a judgment should include only those tribunal orders that are enforceable without an order of a court.

Present enforceability

656. As with judgments and orders of courts, an order of a tribunal should only be enforceable interstate where it is capable of being enforced within the State or Territory of rendition.[207] If a tribunal order is subject to a stay in the State of rendition, it will not be capable of enforcement in another State under the legislation.

Copy of order

657. In order to facilitate interstate enforcement of a judgment of a court, the person in whose favour the judgment has been made (the judgment creditor) must obtain a copy of the judgment for the purposes of its filing in a court in the State or Territory where enforcement is sought.[208] The same procedure should apply in respect of tribunals' orders. Where the order is locally enforceable without further procedures, that copy should be obtained from the tribunal which made the order. This provision will enable interstate enforcement of orders of tribunals that may in the future be endowed with enforcement procedures. Where local enforcement requires registration or filing in a court, the copy should be obtained from that court after filing or registration. This provision will overcome any doubts concerning the power to legislate for the enforcement of such orders before they are registered or filed in a court under State or Territory law.[209]

No leave

658. There should be no requirement that leave be obtained for the filing of an order that is more than 12 months old. It should be possible to file the order while it remains enforceable within the State or Territory of rendition.[210]

Appropriate court

659. The court in which the copy of a tribunal order should be filed should be a court that itself could have awarded the relief ordered in the order. Where there is more than one such court, the order should be filed in the court of more limited jurisdiction.[211]

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[206] See para 55, 59–60.
[207] See para 518.
[208] See para 523.
[209] See para 55, 59–60, 613.
[210] See para 518, 527–8.
[211] See para 530–5.

This procedure will ensure that filing always occurs in a court that possesses the necessary enforcement mechanisms while not permitting judgment creditors to penalise judgment debtors through costs. Even in respect of tribunals which may come to possess their own enforcement mechanisms, the Commission is confident that there will always be at least one court in a State or Territory, namely, the Supreme Court, that will possess the appropriate enforcement mechanisms.

Effect of filing

660. Once filed, an order should be a record of the court in which it is filed. It should be of the same effect, and be capable of giving rise to the same proceedings by way of execution and enforcement, as if it were an order of the court in which it is filed. That court should not be permitted to adjudicate on the validity of the order, or to entertain proceedings to set aside, vary or obtain other relief in respect of the order.[212]

Affidavit of liability

661. There should be no requirement under federal law that the judgment creditor swear an affidavit before execution on a filed order can be effected.[213] The requirement that the order be capable of enforcement within the State or Territory of rendition before it may be enforced elsewhere, however, will require that the judgment creditor satisfy the court in which enforcement is sought of that fact.

Notification

662. There should be no requirement for cross-notification between courts and tribunals of the filing of an order, the issue of execution process or the satisfaction of an order.[214] Nor should there be any requirement to notify the judgment debtor of the filing of an order in a court.[215]

Costs

663. The judgment creditor should be able to recover costs for obtaining a copy of the order and its filing, and also costs associated with enforcement of the order.[216]

Interest

664. Where interest is payable on a sum awarded in a tribunal order, the rate of interest should be that specified by the law of the jurisdiction of rendition. The judgment creditor, in order to recover interest, should be obliged to satisfy the court in which enforcement is sought as to the amount of interest payable.[217]

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[212] See para 526.
[213] See para 529.
[214] See para 536–7.
[215] See para 538–9. But note one exception to this, discussed at para 682.
[216] See para 539–42.
[217] See para 543–5.

Stay of proceedings

665. The judgment debtor should be able to apply to the court in which enforcement proceedings are, or are to be, taken for a stay or postponement of proceedings on the order. The purpose of a stay should only be to permit the judgment debtor to make application to an appropriate court in the State or Territory of rendition to set aside, vary or give other relief in respect of the order. The enforcing court should specify the period for which the stay is granted, and should be permitted to impose other conditions, including conditions as to security for costs.[218]

[218] See para 546.

9. Mode and proof of service and other matters

Introduction

665. The procedures of the schemes for interstate service and execution of process and judgments have been dealt with in previous chapters. This chapter discusses the mechanics of service, that is, the mode in which the various types of process discussed in the previous chapters should be served and procedures for proof of service. A number of ancillary matters are also considered.

Mode of service

Existing law

666. The present methods for service of process may be summarised as follows:

- service of initiating process in civil proceedings may be effected
  - in the same manner as if it were served on the defendant in the jurisdiction of issue, or
  - where the defendant is a corporation incorporated or registered under the law of the jurisdiction of service, by leaving at, or by sending by post to, the registered office of the corporation, the writ or a copy thereof[1]
- service of other process in civil proceedings may be effected in the same way as if service were effected in the jurisdiction of issue
- service of initiating process in criminal proceedings may be effected in the same way as it could be effected in the jurisdiction of issue
- service of a subpoena or summons may be effected as specified by the court that, or the judge, magistrate or coroner who, grants leave for its service
- the manner of service of an order for the production of a prisoner is not specified and therefore is presumably that provided for in s 28A of the Acts Interpretation Act 1901 (Cth).[2]

In general these provisions, in combination with s 17(b) — which provides that service of process under the Act may be proved in any manner in which service may be proved if effected within the jurisdiction of issue — enable service of process to be effected, and proof of service of process to be established, as if service had been effected within the

[1] But where the defendant does not appear at the proceedings, the process must have been served personally (in the case of a natural person) or in accordance with the special rules regarding corporations: s 11(1)(g), (h) and (i).

[2] For the effect of this section see para 288, n 124.

jurisdiction of issue of process. This is no doubt of some assistance to those desiring to serve process interstate because they do not need to know the law regarding service in the jurisdicition where service is to be effected. The task of the courts regarding proof of service is also made simpler for the same reason. However, the application of the laws of the jurisdiction of issue has not been entirely without problems.

Problems arising from existing law

Application of law of jurisdiction of issue

667. One problem is that encountered by process servers, whose services are often sought by parties or their legal advisers in order that service may be properly effected on another party. Because State laws regarding service apply to service *ex juris* under the Act, process servers must be conversant with the laws regarding service of all the separate jurisdictions within Australia. The variety of such laws and the consequent difficulties for process servers in seeking to ensure that service is effected and proved in the proper manner were noted in a submission to the Commission by the Institute of Mercantile Agents Ltd, a body representing the interests of a large number of process servers in Australia.[3] The submission argued that this problem could be overcome if the States adopted uniform procedures for service.

668. Another problem concerns State laws that specify the persons by whom service may be effected. Where there are no such persons present or conveniently available in the jurisdiction in which service is to be effected, it may not be possible to effect service or, alternatively, service by some other person in theory would result in improper or ineffective service. But as one submission noted, where process is served by a person not authorised under the laws of the State or Territory of issue to effect service because of difficulties in obtaining the services of one of the authorised persons, there has been a tendency to 'turn a blind eye' to any irregularity in service.[4]

Leave requirement for initiating process in civil proceedings

669. It has already been noted that there is one problem arising from the 'picking up' of the procedures for service of the State of issue and the requirements of s 11(1)(g)–(i) in relation to process initiating civil proceedings which occurs where substituted service of the initiating process has been allowed by the court of issue of the process.[5] A further problem arises where service of initiating process is permitted to be effected by post under the law of the place of issue of the process. Assume that the plaintiff wished to serve a natural person. Relying on s 4(2)(a), the plaintiff may merely post the process to the defendant at the last known residential address of the defendant. However, if the defendant does not appear, s 11(1)(g) requires that, in order to obtain leave to proceed in the defendant's absence, the plaintiff must establish that the defendant has been personally served with the process or that reasonable ef-

[3] Institute of Mercantile Agents Ltd *Submission* (20 June 1984) 3. A summary of the variety of State laws governing one aspect of service, namely, days and times for service, may be found in NSWLRC 37, ch 4.

[4] Stidwill *Submission* 1.

[5] See para 88.

forts to effect personal service were made and that the process came to the defendant's knowledge. The plaintiff in this example would be unable to satisfy the court of those matters and would not obtain leave to proceed. Thus, although the Act exhibits an apparent acceptance of State procedures for service, including service by post where permitted, the present leave requirement[6] virtually compels plaintiffs to serve initiating process personally, or at least attempt to do so, lest the defendant fail to enter an appearance.[7]

Reform options

Considerations affecting selection of mode of service

670. The question of the method of service of process is of major importance. First, it is important to plaintiffs. The method must be such as to enable the ready institution of proceedings and effective service on defendants — defendants must not be able to evade service easily — in order to give the court in which the proceedings are to be heard jurisdiction over the defendant.[8] Second, the method of service is critical to the right of defendants to be adequately informed of the institution of proceedings against them. It must provide a real likelihood that the defendant will actually receive the process, or at least notice of it. Third, the question gives rise to economic considerations. Costly procedures will only increase the costs of proceedings, ultimately likely to be borne by the unsuccessful party. A consideration of these factors, clearly, does not lead to a single conclusion about the most appropriate means for service. Relatively informal methods for service may accord with the interests of plaintiffs and be inexpensive but would ignore the concerns of defendants. Rigorous service requirements would recognise the rights of defendants but may fail to give due weight to plaintiffs' interests and would probably be expensive. In determining methods for service it is necessary to attempt to balance these oft-competing considerations.

Retention of law of jurisdiction of issue

671. The Commission has explored a number of options regarding procedures for service. The first is retention of the existing law, that is, generally to permit service to be effected outside the State or Territory of issue of process in the same manner as service can be effected within that State or Territory. A number of submissions suggested that this should be the case. It has been argued that if a particular mode of service is thought sufficient under the law of a State or Territory for the purposes of informing defendants of the institution of proceedings (both civil and criminal) or for informing others of the demands made by courts and tribunals (such as subpoenas or summonses to witnesses), there is no reason why federal law should insist that the process be served in another manner.[9] Adoption of this course may further one objective of reform noted previously, namely, the need to simplify, ease restrictions on

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[6] The Commission has recommended abolition of the leave requirement: see para 168.

[7] This may be contrasted with the unqualified acceptance of State and Territory laws controlling the mode of service of other process in civil proceedings (s 14(2)) and initiating process in criminal proceedings (s 15(3), (4)).

[8] Service may not be essential in the case of some tribunals: see para 584.

[9] Burley *Submission* 3.

and streamline interstate service and execution of process,[10] at least where the law of the State or Territory of issue provides for a relatively simple and inexpensive mode of service. In conjunction with the schemes proposed in relation to the various types of process, adoption of the procedures for service of the State or Territory of issue would permit the service *ex juris* of process initiating proceedings[11] with the same ease with which that may be done within the State or Territory. The same would obtain in relation to other process concerning proceedings, including witness subpoenas, except in those instances where the Commission has recommended that prior leave to serve should be required to protect the interests of the potential recipient of the process[12] or in recognition of the situation of the potential recipient.[13] In addition, the costs associated with service would not be greatly different from those incurred where service is effected within the State or Territory of issue.

672. Retention of the procedures for service of the State or Territory of issue of process, however, would not eliminate some of the problems noted above.[14] Process servers would still need to know and apply a variety of laws regarding service and there would still be problems where State or Territory laws required particular persons to effect service. In addition, it may be queried whether this option is appropriate in light of a further objective of reform, namely, the need to adequately protect the interests of the parties to and other persons involved in litigation where their vulnerability to process has been extended by the operation of the Act. The laws of the States and Territories regarding procedures for service have no doubt been developed after consideration of cost factors and of the interests of parties to and other persons involved in litigation. In so doing, it has been necessary to consider the interests only of persons within each State or Territory for, without express legislative authority for service *ex juris*, only those persons are amenable to process issued within the State or Territory. The Service and Execution of Process Act, however, enlarges the area in which service may be effected, exposing persons throughout Australia to the demands or requirements of process wherever issued. In this situation it is relevant to consider the potential difficulties faced by persons who have been served with process issued out of a State or Territory that is on the other side of the continent. It must be acknowledged that this argument cannot be taken too far, for in many cases where process is served across State and Territory borders, particularly in 'twin city' situations such as Tweed Heads and Coolangatta or Albury and Wodonga, the person served may be closer to the court or tribunal in which the proceedings will be heard than other persons within the State or Territory of issue. However, as a rule it may be expected that service *ex juris* will

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[10] See para 24.

[11] But note that nexus conditions are specified in relation to the service of initiating process concerning the exercise of adjudicative functions by tribunals: see para 630–1.

[12] Thus the leave requirement where a subpoena issued out of a court is to be served a short time before the date on which compliance with the subpoena is required: para 270; and the requirement for leave where a subpoena has been issued by or out of a tribunal: para 638, 641.

[13] Thus the requirement for an order for production where a witness is under lawful restraint: see para 296.

[14] See para 667–8.

entail greater distances between the place of issue of process and the place of service than is the case with service within the State or Territory of issue.

Acceptance of law of jurisdiction of service

673. An alternative is to permit service of process issued in one State or Territory to be effected in another State or Territory in accordance with the law of the latter jurisdiction. If adopted, this option would overcome the problems noted above in relation to the variety of procedures for service[15] and requirements for service by particular persons.[16] It could be linked also with the former option, with the result that service could be effected either in accordance with the laws of the State or Territory of issue or those of the State or Territory of service. But whether so combined or not, one difficulty would be in determining which laws of the State or Territory of service were to apply. The obvious choice would apparently be the law of the State or Territory of service applying to process of a similar nature to that which it is wished to served. However, on what basis would process issued in one State or Territory be categorised as being of a similar nature to process of another State or Territory? A number of possible criteria were considered, including the court or tribunal out of which the process was issued or that was to deal with the action, the amount in issue and the nature of the relief sought or demands made, but it was concluded that, in view of the disuniformity of court and tribunal systems within the States and Territories, no single factor or simple combination of factors was available as a basis on which the similarity in nature of process could be determined. Therefore the Commission does not favour this option.

Specification of federal procedures

674. A further option is for federal law to prescribe the mode in which process should be served under the Act. This could be done in two ways. The first would be to simply rely upon the mode of service specified in s 28A of the Acts Interpretation Act 1901 (Cth). That provision in effect permits service of any document, the service of which is provided for by federal law, to be effected personally or by post unless provision to the contrary is made in the particular law providing for the service of the document. The second alternative is to specifically provide for the mode in which the various process within the scope of the new legislation proposed by the Commission may be served, that is, to provide to the contrary so that s 28A of the Acts Interpretation Act 1901 (Cth) does not apply. The first alternative would permit all process to be served by post and the likelihood of the person to be served actually receiving the process could not be guaranteed. The Commission therefore does not favour this course for it would not necessarily give adequate recognition to the rights of those exposed to the service of process issued out of another State or Territory.[17] On the other hand, the specification in new legislation of the mode of service would permit appropriate measures to be prescribed in relation to particular types of process. The prescribed methods of service could take account of the various competing considerations involved in each particular

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[15] See para 667.
[16] See para 668.
[17] See para 15, 17.

instance. In addition, the uniform methods for service *ex juris* thus imposed would eliminate some of the difficulties presently encountered by process servers.[18]

Recommended modes of service

Need to assess factors in relation to particular process

675. A conclusion as to the proper approach to be adopted cannot be made in a vacuum and must depend on an assessment of the competing considerations noted above[19] in relation to each type of process within the scope of the Commission's proposals. Account must be taken also of the procedures, other than those related to the mode of service, of the schemes recommended in relation to each type of process. The various categories of process, and the considerations relevant thereto in the present context, are discussed in the following paragraphs and recommendations are made as to the mode of service that should apply in each case.

Initiating process in civil proceedings

676. Under State and Territory laws process initiating civil proceedings in courts is generally required to be served personally. In some States and Territories, however, process initiating proceedings in courts of limited jurisdiction, for example, Magistrates Courts and Local Courts, is permitted to be served by post.[20] Under the Service and Execution of Process Act, therefore, which 'picks up' State and Territory procedures, service of process *ex juris* is generally required to be personal, but in some cases postal service is permitted. However, while postal service may be permitted, leave to proceed in the action in the absence of the defendant is dependant in part — a nexus between the chosen forum and the action is also needed — on the court being satisfied that the process was served personally or attempts to effect personal service were made and the process came to the notice of the defendant.[21] Thus, in order that a plaintiff may be sure to obtain leave to proceed it is necessary to personally serve the initiating process even though postal service is permitted.[22]

677. However, the Commission has recommended that the leave requirement be abolished,[23] primarily because of the present narrowness of the nexus grounds and the artificiality of nexus grounds in themselves. In its place, the Commission has recommended that there be a procedure whereby the appropriateness of the venue chosen by the plaintiff can be tested — in effect, a case by case nexus test to determine the most appropriate venue for the proceedings. That procedure does not depend upon the court being satisfied that the defendant was served in a particular way with the relevant process. State and Territory law will nevertheless require that, before a court embarks on a hearing of the merits of a case in the absence of a defendant, it be satisfied that it has personal jurisdiction over the defendant and for that purpose it must be

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[18] See para 667.
[19] See para 670.
[20] The position is summarised in ALRC 36, para 51.
[21] s 11(1)(g), (h).
[22] See para 88–9.
[23] See para 168.

satisfied that the process has been served on the defendant in accordance with the rules prescribed in relation to that court, or the type of proceeding involved, which define personal jurisdiction. In the absence of a requirement of personal service in all cases, it may be that proceedings in which the initiating process is permitted to be served by post will be permitted to proceed without the defendant having received notice of the proceedings. For example, the defendant may have moved from the address to which the process was posted or the postal article containing the process may have been lost in the course of the post or stolen from the defendant's letter box, but proof of posting may be sufficient for a court to be satisfied that it has jurisdiction over the defendant. In such cases the first notice that the defendant may receive of the proceedings is when execution of a judgment obtained by the plaintiff in default of the defendant's appearance is sought to be effected against the property of the defendant. In order to prevent execution, the defendant will then have to seek a stay of the execution proceedings and apply to set aside the judgment on the basis that he or she had no notice of the proceedings in which it was made. This necessarily involves not a little expense to the defendant and inconvenience to both parties, particularly where the parties are in different States or Territories.

678. In order to avoid this situation it could be suggested that personal service of initiating process be required in all cases. As personal service of initiating process in civil proceedings is presently required in many courts, this would effect a change only in those courts where postal service is permitted. Such a course may be thought appropriate to give due account to the concern that defendants should actually receive notice of proceedings against them prior to the attempted execution of a judgment made in the proceedings. Also, quite apart from the obvious desirability of ensuring such notice, it is also important that the defendant be made aware of the right to challenge the choice of venue made by the plaintiff. The requirement that notices be attached to initiating process advising of this and other matters[24] will only be effective to notify defendants of their rights if there is some certainty that they will receive the process. A requirement of personal service would provide the best guarantee for effective notification to defendants of their rights. However, a requirement of personal service would impose more onerous requirements on plaintiffs who are presently able to rely upon postal service in certain courts. In such cases, it would also increase the costs of service, ultimately to be borne by the unsuccessful party if the action proceeds to judgment.

679. Thus there emerges no single alternative on the question of the mode of service which is clearly preferable to the others in the sense of adequately addressing all the factors relevant to the issue. In that context it may be argued that, the States and Territories having already undertaken consideration of the appropriate balance between these factors in determining the mode in which their process may be served within the jurisdiction, federal legislation facilitating service *ex juris* should merely adopt the various State and Territory procedures, notwithstanding the practical problems sometimes encountered by process servers in having to serve process in accordance with

[24] See para 199.

a variety of laws.[25] However, one object of reform being to streamline and simplify procedures for service *ex juris*,[26] these practical problems cannot be ignored. Moreover, while the balance struck by State and Territory laws regarding service may be entirely proper with respect to intrastate service, a simple 'picking up' of those procedures in a context where process is to be served outside the State or Territory of issue pays no heed to the special problems faced by defendants when served with process emanating from a jurisdiction a great distance away.

680. The Commission in a previous paper in the Reference tentatively recommended that federal law should require that service *ex juris* of all initiating process in civil proceedings be effected personally.[27] In view of the fact that most State and Territory laws already require personal service of such process, no further undue burden would be placed on those wishing to effect service. However, the Commission proposed that the particular ways in which personal service could be effected should be defined by federal legislation. That is, rather than merely picking up State and Territory procedures for personal service, it was proposed that federal legislation exhaustively state the mode in which personal service might be brought about.[28] One purpose of such definition was to ensure that there would be a high probability that the process would actually come to the notice of the person to be served, as under various State and Territory laws some of the means in which personal service, or service equivalent to personal service, may be effected provide no guarantee of this. For example, a number of State and Territory provisions concerning personal service permit personal service to be effected without actually giving the process to the person to be served. A common provision is to the effect that service may be effected on the person to be served by leaving the process, at the last known address of the person, with a person apparently over a specified age and apparently residing there.[29] There can be no guarantee that service thus effected will be effective to give notice of the proceedings to the person concerned: the person may have left the address or the process may not be given to the person to be served by the person who actually received it. Another desirable aspect of the definition of the modes of personal service was seen to be the elimination, by the statement of procedures which would apply uniformly throughout the Commonwealth, of the practical problems presently encountered by process servers because of the variety of procedures for personal service permitted under State and Territory law picked up by the Act.

681. The costs of a requirement of personal service in all cases, however, has caused some concern. In particular, the Commission has been concerned not to increase unduly the costs associated with proceedings which themselves concern only relatively small sums of money. While the sums involved in Supreme Court and District (County) Court proceedings may be relatively small, it is primarily in the lowest level or tier of courts that proceedings concerning small sums will be brought. It would seem also

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[25] See para 667.
[26] See para 24.
[27] RP 7, Draft Interstate Procedure Bill 1986, cl 11(2).
[28] id, cl 4.
[29] eg County Court Rules (Vic) O 3, r 3; Magistrates Court Rules 1960 (Qld) r 55(1).

that the greatest volume of initiating process served under the Act is in relation to proceedings in the lowest tier of courts. While the statistics maintained by the courts do not enable determination of the number of times initiating process issued in respect of proceedings in the various levels of courts is served under the provisions of the Act, it is a fair inference from the number of registrations of judgment in the Australian Register of Judgments maintained in respect of each court[30] that the greatest use of the Act in order to effect service of process outside the State or Territory of issue is made in respect of proceedings in the lowest tier of courts. As much initiating process in proceedings in such courts is presently permitted by the Act to be served *ex juris* by post,[31] an all-embracing requirement of personal service, therefore, would increase the costs involved in instituting civil proceedings in such courts. While the plaintiff must initially bear the costs involved, ultimately they will be borne by the defendant if unsuccessful in the proceedings. In some situations where the proceedings involved do not proceed to judgment those costs also may be borne by the defendant, for example, where the defendant concedes the plaintiff's claim without further steps in the proceedings being taken.

682. These concerns suggest that some modification of the Commission's previous proposal, which would have required personal service of all initiating process, is warranted. That modification would be to permit service of initiating process in civil proceedings in courts of summary jurisdiction to be effected either personally or by post. However, to follow that course simpliciter would not be appropriate in the Commission's view, for there would remain doubts, where postal service had been employed, about whether the defendant had actually received notice of the proceedings and notice of the right to challenge the appropriateness of the chosen venue. Assuming that the process had not come to the attention of the defendant, the first notice he or she might get of the proceedings may be the arrival of the bailiff on the doorstep seeking to take steps to execute a judgment given in the proceedings. An appropriate balance between costs factors and the interests of defendants must, however, be struck. In the Commission's view a proper balance may be struck by 'deferring' the costs of personal service. Such a 'deferral' can be achieved by permitting initiating process in summary court proceedings to be served outside the State or Territory of issue either personally or by post — the forms of personal and postal service being exhaustively defined for the reasons noted above[32] — but, before proceedings are taken to enforce any resulting judgment, the plaintiff/judgment creditor should be required to satisfy the court in which those proceedings are to be taken that the initiating process in the proceeding was served personally or that the defendant has actual notice of the judgment. Such a course would enable the plaintiff to choose the form of service which was considered appropriate in the circumstances, including the cheaper option of postal service. Where the defendant acknowledged the plaintiff's claim after postal service and paid the amount claimed, the costs of personal service would not be added to the amount

[30] See Appendix D.

[31] Postal service is permitted because the Act allows service in accordance with State and Territory laws, many of which allow postal service of initiating process in proceedings in inferior courts.

[32] See para 674.

of the plaintiff's claim. But where the proceedings resulted in a judgment against the defendant, whether because of non-appearance by the defendant or otherwise, the interests of the defendant would be protected by requiring that the court in which enforcement proceedings are sought to be taken be satisfied that the defendant has notice of the judgment before allowing those proceedings to be taken. Where the defendant had appeared to contest the original proceedings the court would be entitled to draw the conclusion that the defendant was aware of a judgment given in those proceedings. In such a case, again, the cheap form of service adopted by the plaintiff would not result in additional costs being imposed on the defendant over and above the amount awarded in the judgment. Only where a defendant had not appeared in the original proceedings may he or she have to bear the costs of personal service or notice, for a plaintiff/judgment creditor may be entitled to add to the amount recoverable under the judgment the costs of actually giving notice of the judgment to a defendant/judgment debtor. Therefore, not only would this proposal enable the 'deferral' of costs associated with personal service, it would eliminate those costs in all cases except those in which it became necessary to give notice of the judgment before enforcement proceedings were taken. The requirement of actual notice would also enable a defendant/judgment debtor to take steps to seek a stay of enforcement proceedings on condition that he or she pursue appropriate remedies, for example, the setting aside of the judgment, in the State or Territory where judgment has been given.[33] The procedure would thus permit defendants having grounds on which to defend the proceedings to obtain appropriate relief from the earlier judgment. There will be some costs and inconvenience involved in this course, but this is preferable to imposing the costs of personal service in all cases.

Initiating process in criminal proceedings

683. Again, the recommendation to be made in this regard will reflect a balancing of the competing factors involved, but in this instance the paramount concern is that persons not be exposed to criminal sanction in their absence, or be liable to apprehension for failure to appear at proceedings, without having notice of the proceedings. In order to ensure a high probability of such notice, it is therefore considered appropriate that in general initiating process in criminal proceedings should be served personally. But again, also, the costs associated with such a requirement in all cases would impose quite a burden on authorities which undertake a large volume of prosecutions. However this factor can only be relevant where the costs associated with personal service are in a sense disproportionate to the potential penalties to which the defendant in the criminal proceedings may be exposed. In the Commission's view, those costs would not be disproportionate where the proceedings could result in the imprisonment of a person or the imposition of a heavy financial penalty. On the other hand, the costs of personal service might be considered disproportionate where the person the subject of the proceedings would be liable to suffer only a minor fine if convicted. It is therefore recommended that postal service of initiating process be permitted where the criminal proceedings involved may result only in the imposition of a fine not greater than a specified amount. While it is acknowledged that there is a degree of arbitrariness in

[33] See above para 546 for this procedure.

the setting of any particular figure, the Commission recommends that, for the present, the maximum amount of the potential fine should be $200. This level has been chosen as it will enable postal service in relation to very many minor criminal matters, including minor traffic and parking offences. There should, however, be power to prescribe by regulation the maximum amount of the potential fine.

Subpoenas

684. *Subpoenas to non-parties.* As failure to comply with a subpoena may constitute a contempt of the court of issue of the subpoena or an offence, or expose the defaulter to apprehension,[34] it is appropriate that persons to whom subpoenas are directed be ensured of notice of the demands made in subpoenas. Some State and Territory laws permit intrastate service of subpoenas by post.[35] In the Commission's view, however, such a course would be inappropriate in the context of interstate service of subpoenas. It is true that some additional costs will be involved in requiring personal service, but these costs would be minor compared to the sum that will have to be given or tendered to the person the subject of a subpoena by way of conduct money.[36] It is therefore recommended that subpoenas should generally be required to be served personally. Orders for production of persons under lawful restraint should also be served personally.

685. *Subpoenas to parties.* Such a requirement, however, is probably unnecessary where a subpoena is directed to a party to the proceedings in relation to which it is issued. Such subpoenas will generally be issued only once issue has been joined in the proceedings, that is, after the defendant has entered an appearance in the proceedings, and in doing so an address for service will have been given. There will be a high probability that a subpoena posted to that address will be received by the party. There is no need, therefore, to require that a subpoena addressed to a party be served personally. That requirement may, however, be imposed by State or Territory law. Alternatively, that law may permit postal service. In this instance, the imposition of a federal standard in relation to service is unwarranted. Subpoenas to parties should be permitted to be served *ex juris* in the same way as they may be served within the State or Territory of issue.

Other process in civil and criminal proceedings

686. Initiating process has been defined to include any process constituting the first notice to a person who may be capable of becoming a party to a proceeding.[37] Subpoena has been defined to include any process that makes demands for production of evidence.[38] In relation to process not within these definitions and directed to persons who are not parties, the lack of any consequences arising out of the process indicates

[34] In some cases also a person who fails to comply with a subpoena is liable for the costs associated with any adjournment of the proceedings consequent on the non-compliance: eg Supreme Court Rules (Qld) O 40, r 19.

[35] eg Court of Petty Sessions Ordinance 1930 (ACT) s 62.

[36] See para 274.

[37] See para 157.

[38] See para 282–3.

that there is no need to provide special protection to the subjects of such process when served *ex juris*. In addition, on the entry of an appearance in a proceeding by a defendant, an address for service will have been given. Here too there is no need for special procedures for service, as the defendant will already have notice of the proceedings and may be expected to know that ancillary process may follow. It is recommended that other process — meaning process other than initiating process or a subpoena — in civil and criminal proceedings be permitted to be served *ex juris* is the same manner as such process may be served in the State or Territory of issue.

Initiating process of tribunals

687. *Dispute resolution role.* As was noted previously, initiating process in relation to tribunals is issued only in respect of the exercise of an adjudicative function.[39] Such a function, however, may be exercised for two purposes: the resolution of a dispute of the same nature as a dispute that might be dealt with in civil proceedings before a court; or the performance of a regulatory role. In so far as tribunal proceedings are of the same nature as civil proceedings in courts, the procedures for service of tribunals' initiating process should be the same as those recommended in relation to initiating process in civil proceedings. That is, in general initiating process should be required to be served personally. However, it is also recommended that the procedures for 'deferral' of the costs of personal service[40] apply. The question which arises concerns the basis upon which a distinction should be made between tribunal proceedings for the purposes of the application of these 'deferral' procedures, there being no category of tribunals similar to the category of 'courts of summary jurisdiction'.

688. In view of the great diversity of tribunals, it is recognised that the basis chosen may be criticised as being arbitrary, but some basis must be chosen. The Commission is of the view that an appropriate basis for a distinction between tribunal proceedings for the purpose of the application of the 'deferred costs' scheme is the value of the matter in issue, or the amount of damages or compensation claimed, in the tribunal proceeding. Such a distinction bears some resemblance to that on which civil proceedings in courts have been categorised, for courts of summary jurisdiction have jurisdiction generally only where the matter in issue or the amount claimed in the proceedings is not above a certain amount. However, the amount prescribed in relation to courts of summary jurisdiction varies considerably from jurisdiction to jurisdiction. The determination of the appropriate amount in relation to tribunal proceedings, therefore, is not a straightforward task of applying the same monetary ceiling to tribunals as applies in courts of summary jurisdiction.

689. The commencing point is to consider the monetary ceilings sometimes imposed by State and Territory law which govern the jurisdiction of tribunals, particularly those in relation to whose proceedings it might be expected that the facilities provided by the Commission's recommendations in chapter 8 will be most often utilised. Small (Consumer) Claims Tribunals and Residential Tenancies (Tenancy) Tribunals would

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[39] See para 621.

[40] See para 628.

apparently fall within this category.[41] The monetary ceiling of Small (Consumer) Claims Tribunals varies from $1500 in Queensland[42] to $2000 in Western Australia[43] and $3000 in Victoria and New South Wales.[44] That of Residential Tenancies (Tenancy) Tribunals varies from $1500 in Victoria[45] to $2500 in South Australia[46] (although these monetary limits may be raised by consent of the parties) and $5000 in New South Wales.[47] The Commission considered setting the ceiling for the distinction of proceedings for the purposes of the application of the 'deferred' costs procedures[48] at the maximum amount applying to these tribunals, that is, $5000. However, at least initially, it is thought appropriate that a mid-range figure be adopted, and therefore it is recommended that the figure should be $3000. But there should be power to alter that limit by regulation to cater for changes in the monetary limits on tribunals' juridictions.

690. *Regulatory role.* Adjudicative functions of tribunals may also come to be exercised in the context of the regulation of various professions, trades or occupations. Such disciplinary proceedings are quasi-criminal in nature, some tribunals possessing the power to fine registered or licensed persons and all tribunals possessing power to suspend or cancel a license or registration. In view of their nature, it is appropriate that the procedures for service recommended in relation to initiating process in criminal proceedings also apply to initiating process of tribunals involving their disciplinary functions. Thus it is recommended that initiating process issued in relation to adjudicative functions of tribunals involving disciplinary matters be required to be served personally, except where the only potential sanction to which the person the subject of the proceedings is liable is a fine not exceeding $200.

691. *Combined proceedings.* In some cases proceedings in certain tribunals may be both of a dispute resolution nature and of a disciplinary nature. This situation will arise where a tribunal is empowered to deal with disputes between consumers of certain services and the registered or licensed providers of those services and, in the course of those proceedings, also has the power to impose disciplinary sanctions on a registered or licensed provider. While the disciplinary function may be considered ancillary to the dispute resolution function, in that the disciplinary function arises out of a consideration of the merits involved in the dispute resolution function, the Commission is of the view that, where proceedings in a tribunal may result in the

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[41] These tribunals were specifically mentioned by State Attorneys-General in their correspondence to the Commonwealth Attorney-General which in part prompted the giving of the Reference to the Commission: see para 547.

[42] Small Claims Tribunals Act 1973 (Qld) s 4, definition of 'small claim'.

[43] Small Claims Tribunals Act 1974 (WA) s 4, definition of 'small claim'; Small Claims Tribunals Act Regulations, reg 5.

[44] Small Claims Tribunals Act 1973 (Vic) s 2, definition of 'small claim'; Consumer Claims Tribunals Act 1974 (NSW) s 26; Consumer Claims Regulations, reg 9.

[45] Residential Tenancies Act 1980 (Vic) s 18(1).

[46] Residential Tenancies Act 1978 (SA) s 21(2). No ceiling is imposed in relation to the Tenancy Tribunal of the Northern Territory.

[47] Residential Tenancies Tribunal Act 1986 (NSW) s 19(3).

[48] See para 682 for full explanation of the procedure.

impostion of disciplinary sanctions, the procedures for service of initiating process in disciplinary proceedings simpliciter should apply.

Subpoenas of tribunals

692. The issues regarding service of subpoenas issued in civil and criminal proceedings are applicable equally to the question of the mode of service of subpoenas issued by or out of tribunals. It is therefore recommended that subpoenas issued by or out of tribunals should be required to be served personally, except where addressed to a party to the tribunal proceedings, in which case a subpoena should be permitted to be served *ex juris* in the same way as it may be served within the State or Territory of issue. This recommendation applies to subpoenas issued in relation to exercises of both adjudicative functions and investigative functions.

Other process of tribunals

693. Consistent with the recommendation made in relation to other process – process other than initiating process or subpoenas – issued in the course of civil and criminal proceedings, other process in tribunal proceedings should be permitted to be served *ex juris* in the same way as it may be served within the State or Territory of issue.

Procedures of service

Introduction

694. As a result of the recommendations made in the previous paragraphs, rather than State and Territory procedures applying to the service of certain process the legislation will specify the particular mode of service. It is necessary, therefore, to consider the actual procedures for effecting service under the general heads of personal service and postal service.

Personal service

695. *Principle.* In a number of instances discussed above it has been recommended that certain process be served personally. As to the actual mode of effecting personal service a number of courses could be adopted. One would be to adopt the procedures of personal service of the State or Territory of issue of the particular process concerned. Another would be to adopt the procedures of the State or Territory of service. However, the Commission has noted that certain of these laws permit personal service to be effected in a manner which provides little guarantee that the intended recipient will actually receive the process or notice thereof.[49] It has also been noted that the present procedures create problems for process servers because of the need to effect service in accordance with the law of the State or Territory of issue of process.[50] In order to ensure a high probability that personal service will be effective to give notice of the process to the intended recipient of the process, and to eliminate practical problems,

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[49] See para 680.
[50] See para 667.

it is recommended that the actual procedures for effecting personal service should be exhaustively stated in the new federal legislation. The following paragraphs discuss the particular methods which should be permitted.

696. *Personal service on natural persons.* The primary objective of personal service is to ensure a high probability that the intended recipient of process will actually receive the process or notice of it. This is best achieved by requiring that the process be given by hand to the person to whom it is addressed. There may be situations, however, where, although the person to be served can be located, that person refuses to take the process. The adoption of such an attitude by the person to be served should not be effective to thwart service. Faced with such a situation, a process server should put the process down in the presence of the person to be served and explain the nature of the process to the person in general terms, and such action should constitute personal service. The Commission also recommends that personal service should be capable of being effected by post provided that the person to whom the process is addressed acknowledges receipt of it. While reliance on such a method may not be appropriate in some instances because of the likelihood that the intended recipient will not acknowledge receipt of the process, in other circumstances such considerations may not be present. One procedure which enables the Australia Post to monitor delivery of postal articles is security post. Under this form of post the sender may require an acknowledgment of delivery by the addressee and the postal article will not be delivered unless the signature of the addressee has been obtained.[51] The acknowledgment of delivery signed by the addressee is then returned to the sender and, under recommendations made below,[52] this document will be able to be utilised by the sender as evidence that service has been effected. While impossible to be sure in all cases that the person who accepts delivery of the postal article and signs is in fact the addressee, there will be a high probability that the person is in fact the addressee.[53] But the procedures for personal service through the post should not be limited to security post. Quite apart from the possibility that Australia Post may alter its procedures, and thus render any references to 'security post' in legislation obselete, the addressee may be quite prepared to acknowledge the receipt of process sent by ordinary post. The draft legislation prepared by the Commission[54] therefore provides for personal service through the post in a general way, provided that there is acknowledgment by the addressee of receipt of the process.

697. *Personal service on bodies corporate.* The methods available for personal service of process on bodies corporate should encompass similar procedures to those recommended in relation to service on natural persons. Therefore one avenue of personal service on a body corporate should be by leaving the process at the offices of the body corporate — equivalent to giving the process to a natural person. The process should

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[51] This procedure differs from certain other forms of post under which only *some* signature, not necessarily that of the addressee, is required prior to delivery of a postal article.

[52] See para 715.

[53] Recommendations are made below regarding proof of service which will deal with possible difficulties in this regard: see para 712.

[54] See Appendix A, Interstate Procedure Bill 1987 cl 9(2).

be left at the registered office or a principal office of the body corporate under the law of the State or Territory in which service is to be effected. If there is no such office, the process should be left at the principal place of business of the body corporate in that State or Territory. Personal service on a body corporate should also be permitted by certain forms of post — equivalent to the security post and acknowledgment of delivery option in relation to service on natural persons. Thus personal service should be permitted by sending the process by a form of post, defined as registered post, which requires that a written acknowledgment of receipt be obtained for delivery of the postal article containing the process. The postal article containing the process should be sent to the registered office or a principal office, or if there is no such office, the principal place of business, of the body corporate in the State or Territory in which service is to be effected.

698. There are certain bodies corporate, however, that have no registered office or principal office and no principal place of business, for example, incorporated associations. In the case of these bodies, the laws of the State or Territory in which they are formed provide for service of documents on the body corporate by serving a representative (a natural person) of the body corporate at an address given for the service of notices.[55] To effect personal service on such a body it is recommended that process be left at, or sent by registered post to, an address that, for the purposes of the law of the State or Territory in which service is to be effected, is the address for service of notices on the body.

699. The Commission is also of the view that certain modern forms of communication should be permitted to be utilised in order to effect personal service on bodies corporate. Many bodies corporate employ devices such as facsimile machines in the course of their business. The information contained in documents can be sent from one place to another by way of such devices and, in the hands of the recipient, the form of the original document is reproduced. It is recommended that the transmission to a body corporate of the information contained in process by a device which, in the hands of the recipient, reproduces the form of the process, should amount to personal service of the process on the body corporate.

700. *Personal service by agreed method.* It is not uncommon that a prospective defendant or legal representatives of a defendant will agree to accept service of process in a particular way or at a particular place. It is recommended that federal legislation permit personal service to be effected in a manner agreed upon by the parties.

Postal service

701. Postal service of process should be permitted by ordinary pre-paid post. Where an address for service has been given, for example, on the entry of an appearance in a proceeding, the process should be sent to that address. Where no address for service has been given, process addressed to a natural person should be sent to the place of residence or business of the person last known to the person on whose behalf the process is to be served. In the case of a postal service on a body corporate, the process

[55] eg Associations Incorporation Act 1981 (Vic) s 48.

should be sent to the registered office or a principal office, or if there is no such office, the principal place of business, of the body corporate in the State or Territory in which service is to be effected, and in the case of bodies corporate that have no such offices, to the address for service of notices on the body corporate. The Commission also recommends that postal service be capable of being effected through the facilities of a document exchange where the person to be served has authorised that course under the law of a State or Territory applicable in the proceedings. The process should be either placed in the document exchange box of the person to be served, or left at a document exchange to be placed in that exchange box.

Substituted service

702. Where it proves impracticable for a party to effect service of process as required under a law of a State or Territory, many courts and tribunals are empowered to permit service to be effected in another manner. It is plain that the power to allow 'substituted service' of process in lieu of the prescribed mode of service should be available notwithstanding that service is to be outside the State or Territory of issue of process. Traditionally, the power to allow substituted service arose only where the person to be served was amenable to the jurisdiction of the court out of which the process was issued, that is, within the State or Territory of issue of the process.[56] However, as the Commission's recommendations will permit service of process anywhere in Australia, in effect rendering all persons in Australia amenable to the jurisdiction of the the court of issue, the power to allow substituted service under State or Territory law should be capable of exercise notwithstanding that the person to be served is outside the State or Territory of issue. The Commission does not propose to confer a power to allow substituted service on courts and tribunals, however it is recommended that the powers available under State and Territory law to allow substituted service should be available where service in accordance with the Commission's recommendations proves to be impracticable.

Applicability of certain limitations on service

703. *Days and times for service.* As the Act presently provides that service of process *ex juris* is to be effected in 'the same manner' or 'the same way' as service of the process may be effected within the State or Territory of issue, any restrictions of those laws regarding the 'manner' or 'way' in which service may be effected apply with respect to service of process under the Act. On one view of these terms, it may be argued that any requirements of those laws regarding times or days for service would not apply to service of process under the Act. This view is based on the proposition that such matters do not relate to the 'manner' or 'way' in which service is effected. Furthermore, on this view, s 109 of the Constitution operates to render service of process in the prescribed 'manner' or 'way' effective notwithstanding that service has been effected outside specified times or on days when service of process within that State or Territory may not be effected. An alternative view, however, is that restrictions as to the days

[56] *Laurie v Carroll* (1958) 98 CLR 310.

and times for service imposed by State and Territory laws are picked up by the Act; that the prescription of 'the same manner' or 'the same way' of service incorporates such restrictions.

704. The Commission has not been made aware of any problems in regard to the days and times of service of process interstate under the Act. But it is necessary to consider whether any restrictions should be imposed in this regard in view of the Commission's recommendation of federal modes and procedures for service in place of State and Territory modes and procedures. A starting point is assessment of the situation applying under federal, State and Territory laws. Under rules applying in federal courts process can generally be served or executed on any day of the week. There are some exceptions. Process of the Family Court may not be served on Christmas Day and Good Friday[57] and process of the High Court may not be served on a Sunday, Christmas Day and Good Friday.[58] In relation to process of the States and Territories, service of civil process on Sunday, and in some cases on Christmas Day and Good Friday, is generally void.[59] However in New South Wales, s 3 of the Sunday (Service of Process) Act 1984 provides that civil process may be served on a Sunday, except a Sunday on which Christmas Day falls.[60] Thus while most States and Territories maintain restrictions on days of service of civil process, the recent trend, exhibited in the New South Wales legislation, is to abolish these restrictions. There are also generally no restrictions as to the time of day when service of civil process may be effected.[61] Service and execution of State and Territory criminal process may generally be effected on any day and at any time.

705. In view of the recent trend in this area, the Commission is of the view that service of process, both civil and criminal, under the Act should be permitted at any time and on any day. This freedom should exist not only in relation to process which will be required to be served under the federally prescribed procedures, but also to process that will be permitted to be served in the same manner as in the State or Territory of issue. However, it is recognised that problems may arise in particular jurisdictions where the freedom with which service is permitted is abused by those who effect service. Therefore it is recommended that days and times for service of process under the Act should be capable of regulation in the State or Territory of service through laws which, for example, limit the hours in which process servers may carry out their tasks. Thus while the federal legislation should permit service of process at

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[57] Family Law Rules O 18, r 6.

[58] High Court Rules O 60, r 9(1).

[59] The relevant laws are summarised in NSWLRC 37, ch 4.

[60] The report that prompted the enactment of the Act, NSWLRC 37, had recommended that service of civil process be permitted on any day; that is, no qualification as to a Sunday on which Christmas Day falls was proposed.

[61] Limitations as to the times for execution of civil process apply basically to process issued for the purposes of execution of a judgment. They are thus irrelevant for present purposes, because execution process will, under the Commission's recommendations for enforcement of judgments, be effected through process issued and executed in accordance with the law of the State or Territory of enforcement.

any time and on any day, there should be power for State and Territory legislatures to impose restrictions as to the times and days when service may be effected within their State or Territory in order that local problems in this regard may be remedied.

706. *Persons by whom service may be effected.* In contrast to the present ambiguity regarding the application of restrictions on days and times for service of process arising under laws of the place of issue of process, the present prescription that service of process *ex juris* is to be effected in 'the same manner' or 'the same way' as service may be effected within the place of issue clearly seems to apply any restrictions in those laws as to the persons by whom service of process may be effected. As a result, service of process under the Act must be effected by one of the specified class of persons, if any, permitted to effect service of that process within the place of issue. One problem arising from the application of these restrictions has been noted above,[62] which gives rise to the question whether they should be maintained.

707. In the same vein as restrictions on days and times for service of process, limitations on the classes of person who may carry out service appear to be designed to ensure that potential recipients of process are not exposed to harassment in the course of service of process on them. Therefore, it is recommended that the same course should be followed in relation to these types of limitations as has been recommended in relation to restrictions on days and times for service. That is, the Act should impose no restriction as to the persons who may serve process, but the matter should be capable of regulation by State and Territory legislatures should the need to do so arise. Again, this recommendation should apply both to process required to be served under the federally prescribed procedures and to process permitted to be served in the same manner as in the State or Territory of issue.

708. *Production of original process.* As the Act presently provides that service of process *ex juris* may be effected in the same manner as if the process was served within the State or Territory of issue, the Act picks up the circumstances in which service under State or Territory law may be effected through service of a copy of the process.[63] However, even though service may be effected with a copy, it is not uncommon for there to be a requirement that the original process be produced to, or be available for inspection by, the person served with the copy. In a context where service is to be effected outside the State or Territory of issue, and particularly where there are multiple defendants in different States or Territories, this could clearly produce substantial delay in effecting service on all the defendants. The Commission therefore recommends that those State and Territory laws requiring production of the original process at the time of service not apply where service is effected under the Act.

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[62] See para 668.

[63] See also Service and Execution of Process Act 1901 s 4(2)(b).

Proof of service

Existing law

709. One aspect of the provision regarding proof of service, s 17(b), has already been mentioned. This permits proof of service in any manner in which service of process within the jurisdiction of issue may be proved.[64] Section 17(a) provides an alternate method of proof of service, namely,

> by affidavit sworn before any Justice of the Peace having jurisdiction in the State or part of the State or part of the Commonwealth in which such service was effected, or before a Commissioner for Affidavits or Declarations, or Notary Public for that State or part.[65]

While proof of service by affidavit is common under State and Territory laws, decisions regarding this provision require that the affidavit in relation to service under the Act should contain additional information to that generally required where intrastate service is sought to be proved. Thus it has been said that an affidavit of service 'must set out facts which will enable the Court to determine whether the person served was the defendant . . .'[66] In relation to this matter one submission commented

> Whether the case law requirement that the means by which identification is established should remain seems arguable. It is unnecessary in intra-state matters. It is often inadvertently omitted from affidavits of service, with consequent expense and delay.[67]

Recommendations

Manner of proof

710. Under recommendations made above, certain process will be permitted to be served *ex juris* in the same way that it may be served within the State or Territory of issue. In general, however, service will be subject to specific federal procedures. In relation to service of the former process it is appropriate that proof of service *ex juris* continue to be made in the same way as service within the State or Territory of issue may be proved. To cater for the latter process, however, and also to provide for an alternative manner in which service may be proved, there should be a specific provision

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[64] See para 666.

[65] Proof of the office of the person before whom the affidavit was sworn may not be required if the law of the State in which proof of service is sought to be established provides that the contents of the affidavit is evidence, or prima facie evidence, of the statements therein: *Fallshaw Bros v Ryan* (1902) 28 VLR 279. Where such proof is required, this may be achieved by production of the *Government Gazette* of the jurisdiction in which service took place showing the appointment of the person to the specified office: *Fallshaw Bros v Ryan* (1902) 28 VLR 279. See also State and Territorial Laws and Records Recognition Act 1901 (Cth) s 6(1)(a), 12.

[66] *Caloundra Fish and Ice Supply v Moon Bros Pty Limited* [1966] QJPR 52 (Moynahan DCJ). See also *Jarrett v Brown* [1908] VLR 478; *Warringah Shire Council v Magnusson* (1932) 49 WN (NSW) 187.

[67] Spence *Submission* 1.

regarding proof of service. In this regard the existing provision provides a useful model. It is therefore recommended that proof of service should be permitted to be made by affidavit. However, to cater for non-judicial proceedings in which proof of service may be required, for example, proceedings before tribunals, proof of service should also be permitted to be made by statutory declaration.

Matters to be proved

711. On the question of the matters to be proved in order to establish that service has been effected, the problem noted by Judge Spence could be eliminated by abolishing the case-law-added requirement for a statement of the means of identification of the person served. However, the Commission has noted a trend towards requiring such information to be proved when seeking to prove service.[68] Further, the requirement seems entirely appropriate in view of the procedures for personal service, particularly service on natural persons, recommended by the Commission.[69] It is also appropriate in view of the consequences that flow from service.[70] The Commission therefore recommends that the means of identification of the person served be one component of the matters to be proved in order to prove service of process. As to the other matters to be proved, it seems desirable that the legislation should contain a statement of all the relevant matters. In this way, any confusion presently arising regarding the contents of an affidavit of service or as to the matters required to be proved under any other manner of proof of service, will be eliminated. An example of this approach is provided by r 6.17 of the General Rules of Procedure in Civil Proceedings 1986 (Vic), which sets out the required contents of an affidavit of service.

> An affidavit of service of any document shall state by whom the document was served, the hour of the day, day of the week and date on which it was served, the place and mode of service and the manner of identification of the person served.

Such a provision can leave those who effect service in no doubt as to the matters which must be proved if service is to be proved to the satisfaction of the court in which the question arises. The Commission recommends that a similar approach be taken in relation to proof of service effected under the Act. Proof of service should require proof of the following matters:

- the identity of the person who served the process
- the time of day and day on which the process was served
- the place at which the process was served
- the way in which the process was served and
- where relevant, the way in which the person served was identified.[71]

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[68] See eg r 6.17 of the General Rules of Procedure in Civil Proceedings 1986 (Vic).

[69] See para 696.

[70] eg a proceeding may be continued in the absence of the defendant without leave; and service of a subpoena will render the person served liable to sanctions for non-compliance.

[71] This matter would not be relevant where service of process by post was sought to be proved.

Ancillary matters

712. *Means of establishing identity.* A number of ancillary matters of relevance to proof of service also should also be noted. The first concerns the means by which the identity of a person to be served may be established. In many cases a process server's only means of identifying the person to be served will be by asking a person if he or she is the person to whom process is addressed. Relying on an affirmative answer to that question, the process server may then serve the process on the person. However, in the absence of a special provision, a reference in an affidavit or statutory declaration to a statement that the person served had admitted that he or she was the addressee of the process would not be admissible as proof that the person was in fact the addressee.[72] To remedy this situation it is recommended that there be a specific provision to render admissible evidence of a statement by a person as to the person's identity and to establish that such evidence is evidence of the person's identity.[73]

713. *Oral evidence by deponent.* Another matter concerning proof of service, in particular where proof is sought to be established by affidavit or statutory declaration, relates to the need of the deponent to give evidence as to its making. Normally, such a document would not be admissible without such evidence. In a context where process has been served outside the State or Territory of issue, such a requirement would involve additional expense for the parties on whose behalf process was served and inconvenience for process servers. It is therefore recommended that it not be necessary to call the person who has sworn an affidavit or made a statutory declaration of service to give evidence unless required by the court or tribunal hearing the proceedings, or a party to those proceedings.

714. *Presumption of receipt.* In order to facilitate proof of service where postal service is permitted, it is recommended that there be a presumption, capable of being rebutted, in relation to receipt of postal articles. A common form of such a presumption in relation to service of documents by post is that service of a document sent by letter is deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.[74] The vagueness of the time of presumed receipt, as well as the need to call evidence as to 'the normal course of the post', diminishes the usefulness of this presumption. In the Commission's view, it is desirable for the presumption to be capable of simple application and that it not increase the time and costs involved in proving service. For this purpose, it is recommended that the presumption of receipt of a postal article should arise a specified time after the article has been posted. In conformity with recommendations made in the Commission's recent report, *Evidence*,[75] it is recommended that receipt should be presumed to have occurred on the fourth day after posting.

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[72] The statement would be excluded as hearsay.

[73] See eg General Rules of Procedure in Civil Proceedings 1986 (Vic) r 6.08:

> For the purposes of proof of service, evidence of a statement by a person of his identity or that he holds some office is evidence of his identity or that he holds that office.

[74] See eg Interpretation Act 1984 (Vic) s 49(1); Interpretation Act 1984 (WA) s 75(1).

[75] ALRC 38, Appendix A, Draft Evidence Bill 1987 cl 134(1).

715. *Written acknowledgment of receipt of process.* Finally, special provision should be made as to the admissibility of a document acknowledging receipt of process. Under recommendations made above, personal service on a natural person will be capable of being effected by sending the process by security post and personal service on a body corporate will be capable of being effected by sending the process by registered post. Both these systems of post require the signature of a person acknowledging receipt of a postal article: in the case of security post, the signature of the addressee; in the case of registered post, the signature of a person acting for the addressee suffices. The acknowledgment thus obtained is returned to the sender of the postal article. To facilitate proof of service effected by these means it is recommended that there be a provision making clear that a document purporting to have been signed by a person acknowledging receipt of a postal article be admissible as evidence that the person, or, where the person is acting for a body corporate, the body corporate, has received the article.

Reckoning of time

716. In relation to a number of recommendations made by the Commission time periods have been imposed. For example, it has been recommended that a defendant served with initiating process in civil proceedings have a period of 21 days within which to enter an appearance in the proceedings and that service of a subpoena be permitted without leave where service occurs not less than 14 days before the day for compliance with the subpoena. While not calling for further recommendations, two matters arising from the operation of the Acts Interpretation Act 1901 (Cth) should be noted in relation to such periods. First, the periods will be reckoned exclusive of the day on which service occurs.[76] Second, where the last day of a period within which certain action must be taken, for example, the entry of an appearance, falls on a Saturday, Sunday, public holiday or bank holiday in the place where the action is required to be taken, the period will be extended to the first following day that is not a Saturday, Sunday, public holiday or bank holiday in that place.[77]

Copies

Use for service and execution

717. Mention has already been made regarding situations where service of process under the Act may be effected by serving a copy of the process.[78] In the context of service outside the State or Territory of issue, and particularly where there are multiple defendants, perhaps in different States or Territories, the ability to effect service with a copy would clearly reduce the time involved in carrying out service on all parties. Further, some State and Territory laws require that the original process be retained by the court or tribunal out of which the process has issued. The Commission's

[76] See Acts Interpretation Act 1901 (Cth) s 36(1).
[77] id, s 36(2).
[78] See para 87, 708.

scheme for service *ex juris* should not disrupt such arrangements made by States and Territories for the effective administration of their courts and tribunals. It is therefore recommended that service should be capable of being effected by serving the original process or by serving a copy of the process. This recommendation applies both to service as required by the particular federal rules recommended by the Commission and service in accordance with State and Territory rules. Similarly, it is recommended that a copy of a warrant should be as effective as the original warrant for the purposes of its execution under the Act.

Form of copies

718. As to the form of a copy, the Commission is of the view that it should resemble the original as closely as possible. For that purpose, it is recommended that a copy should be in the nature of a photographic copy of the original process and not a transcription which in form or layout may differ from the original. Thus a copy should be a document reproduced by a device that reproduces the contents of documents. This will enable the use of photocopying machines, facsimile machines and similar devices for the production of copies. The ability to use the latter such devices will enable a copy of process to be 'transmitted' to a process server in the State or Territory where service is to be effected who could then effect service with that copy. Speedier service would therefore be promoted. Similarly, the ability to transmit a copy of a warrant will eliminate the need to obtain a provisional warrant in order to apprehend a person in a State or Territory other than that in which the warrant was issued,[79] thereby facilitating more efficient extradition and reducing the burden on officials who might otherwise be required to consider whether to issue provisional warrants.

Exclusive federal legislation

Nature of power

719. At present the Act has been held to be non-exclusive.[80] State and Territory laws on service and execution of process therefore continue to operate within their respective spheres.[81] The co-existence of federal law, on the one hand, and State and Territory law, on the other, on this subject is not, however, mandated by the Constitution. Section 51(xxiv) and s 122 of the Constitution, in conjunction with the operation of s 109, could be employed to render federal legislation on the subject the only law with respect to service and execution of State and Territory process outside the State or Territory of issue and in other parts of Australia.[82]

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[79] See para 425.

[80] See para 36.

[81] Many of these laws deal with service *ex juris* generally, not merely service in other parts of Australia.

[82] See para 37.

Recommendation

720. The recommendations made in this report have been designed to provide simple and effective means for initiating and conducting proceedings in courts and tribunals in which process may be required to be served or executed outside the State or Territory of issue, while providing appropriate recognition for the rights of all parties and persons involved. For example, implementation of the Commission's recommendations in relation to civil proceedings will mean that process initiating such proceedings could be served outside the State or Territory of issue unconditionally — no nexus requirements being imposed — but there will be opportunities for the defendant to obtain a change of venue for the proceedings. Those opportunities, however, can only be effectively utilised if persons know of them; hence it has been recommended that initiating process be accompanied by various forms notifying persons served of their rights in this regard. The effectiveness of this scheme would be impaired if persons were able to use State or Territory procedures for service *ex juris* rather than having to use federal legislation. A further problem arising out of the co-existence of federal laws and State and Territory laws dealing with the same subject is that persons served with process outside the State or Territory of issue may at present be unable to determine which scheme has been relied upon in the circumstances. This is a matter of some concern, particularly as the rules for proceedings after service may differ under the two schemes.[83]

721. In order to eliminate this problem and to ensure the effective operation of safeguards such as those noted above, it is recommended that the legislation implementing the recommendations of the Commission express an intention to cover the field, that is, to provide the only law on the subject of service and execution of State and Territory process and judgments outside the State or Territory of issue or rendition and within Australia. Section 109 of the Constitution will then come into operation to render State and Territory laws inoperative in so far as they provide for or apply to service and execution of their process and judgments in other parts of Australia.

Exceptions to exclusivity

722. Apart from some special procedures designed to safeguard the rights and interests of persons subject to interstate service and execution, it is not proposed to affect the powers of courts and tribunals to deal with proceedings in which process has been served interstate nor to affect the powers of courts and tribunals to enforce judgments. Thus it is recommended that, subject to the special safeguards provided in the various schemes concerning process of particular types, service of process under the Act should give rise to the same consequences as service within the State or Territory of issue. These consequences would include the exercise of powers possessed by courts and tribunals to control their proceedings including, for example, the power to set aside a writ if it is vexatious or an abuse of process and the power to stay proceedings because of an agreement between the parties that disputes should be resolved through other

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[83] See *Flaherty v Girgis* (1987) 71 ALR 1, 15 (Mason ACJ, Wilson and Dawson J), 27 (Deane J).

means such as arbitration.[84] In addition, under recommendations made elsewhere in this report there will be exceptions to the exclusiveness of the scheme for interstate service and execution of process. These are

- the powers of courts and tribunals to allow substituted service of process which is sought to be served interstate,[85]
- the continuance of schemes for the interstate transfer of prisoners for the purpose of their prosecution for offences[86] and
- the applicability of certain procedures established under State and Territory laws regarding service of subpoenas which impose more stringent or onerous requirements for service than will apply under the Commission's recommendations, particularly as to requirements
  - to obtain leave to serve a subpoena or
  - to serve a subpoena a longer period before the time for compliance than is required under the Commission's recommendations.[87]

Regulations and rules

723. The Act presently enables regulations to be made by the Governor-General prescribing all matters that are required or permitted to be prescribed or are necessary or convenient to be prescribed for the purpose of carrying out or giving effect to the Act.[88] The Act also enables the rule making authorities of the Supreme Courts in the States and Territories to make rules regarding various aspects of the practice and procedure of their courts in relation to process and judgments served or executed under the Act.[89] With the federal legislation operating as the only law on the subject of interstate service and execution, it is appropriate that the Governor-General be specifically empowered to make regulations on such matters in order to ensure, as far as is practicable, uniformity in matters of practice and procedure between the States and Territories. However, to cater for circumstances where it is proper that such matters vary from one State or Territory to another, or in respect of different courts or tribunals or levels of courts or tribunals, the regulation making power should be capable of being exercised in a different way in relation to particular courts and tribunals or particular process. Pending the making of such regulations, the rules made by rule making authorities in the States and Territories should continue to operate. Those authorities should also continue to have power to make such rules to the extent that regulations made by the Governor-General do not deal with matters for which provision is necessary or may conveniently be made.

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[84] See para 182.
[85] See para 702.
[86] See para 457–8.
[87] See para 271.
[88] s 28.
[89] s 27.

Appendix A
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INTERSTATE PROCEDURE BILL 1987

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A BILL

FOR

An Act to make exclusive provision for the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States and Territories, and for related purposes

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

PART I — PRELIMINARY

Short title

1. This Act may be cited as the *Interstate Procedure Act 1987*.

Commencement

2. This Act shall come into operation on a day fixed by Proclamation.

Act to bind Crown

3. This Act binds the Crown in all its capacities.

Application of Act

4. (**1**) This Act extends to each external Territory including Norfolk Island.

(**2**) For the purposes of this Act —

(a) the Jervis Bay Territory is part of the Australian Capital Territory; and

(b) the Coral Sea Islands Territory is part of Norfolk Island.

Application of State and Territory laws

5. (**1**) This Act does not affect a power of a court or tribunal to allow substituted service of a process.

(**2**) This Act does not affect the operation of the *Transfer of Prisoners Act 1983* or a law of a State or the Northern Territory that, in an instrument published pursuant to section 5 of that Act, is declared to be a State transfer law of the State.

(**3**) This Act does not affect the operation of a law of a State or Territory so far as the law provides for service of a subpoena on a person —

(a) only after permission or leave has been given; or

(b) only if it is served not less than a specified number of days, being greater than 14 days, before the date for compliance with the subpoena.

(**4**) In other respects this Act applies to the exclusion of the application of a law of a State or Territory with respect to the service or execution of process or the judgments of a court of the State or Territory in some other State or Territory.

Interpretation

6. In this Act —

"adjudicative function", in relation to a tribunal, means the function of determining the rights or liabilities of a person, including the function of making a determination altering those rights or liabilities;

"Australia", when used in a geographical sense, includes each external Territory;

"authority" means a judge, magistrate, coroner or officer of a court appointed or holding office under a law of a State or Territory;

"civil proceeding" means a proceeding other than a criminal proceeding;

"court" means a court of a State or Territory and includes an authority exercising the powers of a court;

"court of issue", in relation to a process, means the court by or out of which the process was issued and "authority of issue" has a corresponding meaning;

"criminal proceeding" means —

(a) a prosecution for an offence;

(b) a procedure, other than a prosecution, that, under a law of a State or Territory, may be used to determine liability for an offence or to impose a penalty for an offence;

(c) a proceeding that is related to or associated with a prosecution for an offence or a procedure referred to in paragraph (b); or

(d) a proceeding for relief the right to which arises from the conviction or charging of, or an intention to charge, a person in relation to an offence,

but does not include a claim for compensation;

"initiating process" means a process by which a proceeding is commenced or by reference to which a person becomes a party to a proceeding;

"investigative function", in relation to a tribunal, means the function of conducting an inquiry other than an inquiry conducted in connection with the exercise of an adjudicative function;

"judgment" means —

(a) a judgment, decree or order given, entered or made in a civil proceeding under which a sum of money is made payable or a person is required to do or not to do an act or thing other than the payment of money;

(b) an order made in a criminal proceeding under which a sum of money is made payable as a debt due to the Crown in right of the Commonwealth, a State or a Territory or a person is required to do or not to do an act or thing other than the payment of money; or

(c) an order of a tribunal that is enforceable without an order of a court,

whether or not the judgment or order is final, but does not include —

(d) a judgment or order of a court or tribunal of a foreign country that has been registered in a court in Australia; or

(e) an order, however described, imposing a fine;

"magistrate" includes a justice of the peace who has power, under a law of the State or Territory in which the justice holds the office, to issue warrants;

"order for production" means an order made under subsection 41(1) or paragraph 60(1)(c) or 62(1)(c);.

"person under lawful restraint" means a person who —

(a) is in lawful custody;

(b) by law is not allowed to leave a State or Territory without permission; or

(c) must comply with a condition imposed by, or by authority of, a law that makes provision for imposing conditions as to the conduct of persons charged with, convicted of or sentenced for an offence,

and "lawful restraint" has a corresponding meaning;

"place of issue", in relation to a process, means the State or Territory in which the process was issued;

"proceeding", except in Part IV, means a civil proceeding or a criminal proceeding in a court or before an authority and includes —

(a) an interlocutory or similar proceeding; and

(b) a proceeding heard in chambers;

"registered post" means a system of post under which a postal article may not be delivered unless the addressee or a person acting for the addressee acknowledges in writing receipt of the postal article.

"subpoena", except in Part IV, means a process that requires a person to do one or both of the following:

(a) to give oral evidence before a court, authority or person;

(b) to produce a document or thing to a court, authority or person;

"tribunal" means a person, or a body established by or under a law of a State or Territory, authorised by or under such a law to take evidence on oath or affirmation, but does not include —

(a) a court; or

(b) a person exercising a power conferred on the person as judge, magistrate, coroner or officer of a court;

"warrant" means a process issued in accordance with —

(a) a law of a State or Territory; or

(b) the provisions of such a law as applied by subsection 68(1) of the *Judiciary Act 1903*,

that authorises the apprehension of a person.

Custodians

7. (1) In relation to a person referred to in paragraph (a) of the definition of "person under lawful restraint" in section 6, "custodian" means a person who has the actual custody of the person.

(2) In relation to a person referred to in paragraph (b) of the definition of "person under lawful restraint" in section 6, "custodian" means a person who may lawfully give permission for the person to leave the State or Territory.

(3) In relation to a person referred to in paragraph (c) of the definition of "person under lawful restraint" in section 6, "custodian" means a person who by law is responsible for supervising compliance with the condition.

Copies

8. (1) A reference in this Act to a copy of a process, order or document is a reference to a copy of the process, order or document that was produced by a device that reproduces the contents of documents.

(2) For the purposes of this Act, a document produced as mentioned in subsection (1) that is identical to a process, order or document in all material respects may be taken to be a copy of the process, order or document.

Personal service on natural persons

9. (1) For the purposes of this Act, personal service of a process, order or document may be effected on a natural person —

(a) by giving the process, order or document, or a copy of the process, order or document, to the person; or

(b) if the person refuses to accept service — by putting the process, order or document, or a copy of the process, order or document, down in the person's presence and telling the person, in general terms, the nature of the process, order or document.

(2) In addition to subsection (1), where —

(a) a process, order or document, or a copy of the process, order or document, has been sent in a postal article by pre-paid post to a person; and

(b) the person has, by writing signed by the person, acknowledged receipt of the postal article,

then, for the purposes of this Act, personal service of the process, order or document shall be taken to have been effected on the person.

Personal service on bodies corporate

10. (1) For the purposes of this Act, personal service of a process, order or document may be effected on a body corporate —

(a) by leaving the process, order or document, or a copy of the process, order or document, at the local office of the body corporate;

(b) by sending the process, order or document, or a copy of the process, order or document, by registered post to the body corporate at the local office of the body corporate; or

(c) by transmitting to the body corporate at the local office of the body corporate the information contained in the process, order or document by a means that reproduces, in the hands of the recipient, that information as it appears in the process, order or document.

(2) In subsection (1), a reference to the local office, in relation to a body corporate, is a reference to —

(a) the office that is the registered office or a principal office of the body corporate under a law in force in the State or Territory in which service is to be effected;

(b) if the body corporate does not have such an office — the principal place of business of the body corporate in that State or Territory; or

(c) if the body corporate does not have such an office or a principal place of business — the address that, under a law in force in that State or Territory, is the address for service of notices on the body corporate.

Personal service by agreement

11. (1) In addition to sections 9 and 10, personal service of a process, order or document may, for the purposes of this Act, be effected in accordance with an agreement between a person by or on whose behalf a process, order or document is to be served and the person to be served with the process, order or document.

(2) "Person" includes a person acting with the authority of a person.

Service by post

12. (1) For the purposes of this Act, service of a process, order or document by post on a person or body corporate that has given an address for service may be effected by sending the process, order or document, or a copy of the process, order or document, by pre-paid post to the person or body corporate at that address.

(2) For the purposes of this Act, service of a process, order or document by post on a person who has not given an address for service

may be effected by sending the process, order or document, or a copy of the process, order or document, by pre-paid post to the person at the address of the place of residence or business of the person last known to the person by or on whose behalf the process or document is to be served.

(3) For the purposes of this Act, service of a process, order or document by post on a body corporate that has not given an address for service may be effected by sending the process, order or document, or a copy of the process, order or document, by pre-paid post to the body corporate at the address of the office that is the local office of the body corporate for the purposes of subsection 10(1).

(4) Where a person has, under a law that applies to a proceeding, authorised service of process, order or documents on the person at a document exchange box, then, for the purposes of this Act, service of a process, order or document by post on the person may be effected by leaving the process, order or document, or a copy of the process, order or document, addressed to the person —

(a) in that exchange box; or

(b) at a document exchange to be placed in that exchange box.

Certain restrictions on service not to apply

13. (1) Subject to a law of the State or Territory in which service of a process, order or document is to be effected, a process, order or document may be served under this Act —

(a) on any day and at any time; and

(b) by any person.

(2) Where service of a process under this Act must be effected in the same way as service of the process may be effected in the place of issue, then, notwithstanding a law of the place of issue to the contrary —

(a) service of the process may be effected by serving a copy of the process; and

(b) it is not necessary that the process be produced at the time of service.

(3) The power of a court or tribunal to allow substituted service of a process applies with respect to process that is to be served outside the place of issue.

Proof of service

14. (1) Service of a process, order or document under this Act shall not be taken to have been proved unless the following are proved:

(a) the identity of the person who served it;

(b) the time at which and the day on which it was served;

(c) the place at which it was served;

(d) the way in which it was served;

(e) where it is relevant — the way in which the person served was identified.

(2) Proof may be —

(a) by affidavit or, where appropriate, statutory declaration; or

(b) if the process or document was required by this Act to be served in the same way as the process or document may be served in the place of issue — in a way permitted by the law of the place of issue.

(3) It is not necessary to call the deponent to give evidence of service unless a court, authority or tribunal, or a person appearing before a court, authority or tribunal, so requires.

(4) For the purposes of paragraph (1)(e), evidence of a statement by a person served of the identity of the person or an office held by the person is admissible as evidence of the person's identity or office.

(5) For the purposes of this Act, a postal article sent by prepaid post (not being registered post) addressed to a person at an address in Australia shall be presumed, unless the contrary is proved, to have been received by the person on the fourth day after being posted.

(6) For the purposes of this Act, a document that purports to have been signed by a person acknowledging that the person, or a court, authority, tribunal or body corporate for which the person is acting,

has received a specified postal article is admissible as evidence that the person or the court, authority, tribunal or body corporate received the article.

Effect of service

15. Subject to this Act, service or execution of a process in accordance with this Act —

(a) has the same effect; and

(b) may give rise to the same proceedings,

as if the process had been served in the place of issue.

PART II — SERVICE OF PROCESS IN CIVIL AND CRIMINAL PROCEEDINGS

Division 1 — Initiating process in civil proceedings

Application of Division

16. This Division applies to civil proceedings.

Interpretation

17. In this Division, a reference to —

(a) a court is a reference to the court in which the proceeding in relation to which an initiating process has been issued will be heard;

(b) a person entering an appearance includes a reference to the person doing some act that gives notice to a court that a person served with initiating process —

(i) acknowledges service of the initiating process;

(ii) intends to make a submission regarding an issue arising in the proceeding in relation to which the initiating process was issued; or

(iii) intends to contest the jurisdiction of the court to hear the proceeding,

and "appearance" has a corresponding meaning.

Initiating process may be served in any part of Australia

18. (1) Subject to this Division, an initiating process issued in a State or Territory may be served in some other State or Territory.

(2) Subject to subsection (3), service must be personal.

(3) An initiating process issued in relation to a proceeding in a court of summary jurisdiction may be served by post.

Information to be provided

19. Service of an initiating process is not effective unless notices, as prescribed, are attached to the process or copy served.

Time for appearance

20. (1) Where —

(a) an initiating process has been served under section 18; and

(b) under a law of the place of issue, a person served with initiating process is required or permitted to enter an appearance,

the period after service of the process within which the person served may enter an appearance is 21 days, or such shorter period as the court, on application, allows.

(2) The matters that the court shall take into account in determining an application to allow a shorter period include —

(a) urgency;

(b) the places of residence or business of the parties; and

(c) whether related or similar proceedings have been commenced against some other person.

Appearance to state address for service

21. (1) An appearance entered after service of an initiating process under section 18 must give an address within Australia as an address for service.

(2) If no address is given, or if the address given is false or misleading, the appearance may be set aside.

(3) Subsection (2) does not limit the power of the court to set aside an appearance.

Security for costs

22. (1) Where an initiating process has been served under section 18, the court may, on application by the person served, order that —

(a) the party by or on whose behalf the process was served give such security as the court specifies for the costs of the person served of and incidental to the proceeding; and

(b) the proceeding be stayed until the security is given.

(2) Subsection (1) does not limit the power of the court to make an order requiring security for costs.

Change of venue

23. (1) Where an initiating process has been served under section 18, the person served may apply to the court for an order under this section.

(2) Where, under a law of the place of issue, a person served with initiating process is required or permitted to enter an appearance, an application may be made only if the applicant has entered an appearance.

(3) Where the application has been sent by registered post to the court, the application shall be taken to be made at the time when it is received by the court.

(4) The applicant must serve personally or by post a copy of the application on the party on whose behalf the initiating process was served and on each other party, if any, to the proceeding.

(5) A party to the proceeding may file a notice of objection to the granting of the application and must serve personally or by post a copy of the notice on the applicant.

(6) The court may determine the application without a hearing, but may, on application by a party or of its own motion, direct that there be a hearing.

(7) The court shall cause notice of the determination of an application to be given by any convenient means to each party to the proceeding.

(8) The court may make an order under this section if it is satisfied, on application or of its own motion, that it is inappropriate for the proceeding to be heard in the court.

(9) The matters that the court shall take into account in determining whether it is inappropriate for the proceeding to be heard in the court include —

(a) the places of residence of the parties and of the witnesses likely to be called in the proceeding;

(b) the place where the subject-matter of the proceeding is situated;

(c) the financial circumstances of the parties, so far as the court is aware of them;

(d) any agreement between the parties regarding the court or courts in which the proceeding should be instituted;

(e) the law that it would be most appropriate to apply in the proceeding; and

(f) whether a related or similar proceeding has been commenced against some other person,

but do not include the fact that the proceeding was commenced in the place of issue.

(10) If an application for an order under this section is made after the period for entering an appearance has ended, the court shall not make an order unless it is satisfied that there are special circumstances that justify the making of the order.

(11) Where the court is satisfied as required by subsection (8), and, where applicable, subsection (10), it may order that the proceeding be stayed (whether or not subject to conditions) or make one of the following orders:

(a) if the court is the Supreme Court of the place of issue —

(i) an order that the proceeding be transferred to a specified court of some other State or Territory, being a court that would have had jurisdiction if the proceeding had been commenced in that court; or

(ii) an order that the proceeding be transferred to the Federal Court of Australia, if that court would have had jurisdiction if the proceeding had been commenced in that court;

(b) in any other case — an order that the proceeding be transferred to a specified court, other than the Supreme Court, of some other State or Territory, being a court that would have had jurisdiction if the proceeding had been commenced in that court and, if there is more than one such court, being the court of more limited jurisdiction.

(12) A court of summary jurisdiction may only order the transfer of a proceeding under paragraph (11)(b) to another court of summary jurisdiction.

(13) Where the court makes an order referred to in paragraph (11)(a) or (11)(b), it may give directions in relation to the further steps to be taken in the proceeding.

(14) Subject to section 24, an order made under paragraph (11)(a) or (11)(b) has effect to transfer the proceeding to the court specified in the order.[1]

(15) Subject to the directions, if any, made under subsection (13), the court to which the proceeding is transferred may give directions of a similar kind and, subject to those directions, that court shall proceed as if —

(a) the proceeding had been commenced in that court; and

(b) the same or similar steps as were taken in the proceeding before it was transferred had been taken in that court.[2]

(16) This section does not affect the power of a court to stay a proceeding on a ground other than that it would be more appropriate for the proceeding to be heard in another court.

Court may decline jurisdiction

24. (1) Where an order has been made under paragraph 23(11)(a) or 23(11)(b), a party to the proceeding may, within 21 days after the court to which the proceeding has been transferred being notified of the order, apply for an order under this section.

(2) Subsections 23(3), (4), (5), (6) and (7) apply, with the necessary modifications, with respect to an application or order under this section.

(3) On an application under subsection (1), the court to which the proceeding has been transferred may by order decline to exercise jurisdiction in the proceeding.

(4) Where an order is made under subsection (3), the relevant order made under paragraph 23(11)(a) or 23(11)(b) ceases to have effect.[3]

Further change of venue

25. (1) Where a proceeding has been transferred under section 23 (including under that section as applied by this subsection) to a court other than the Federal Court of Australia, that section applies, with the necessary modifications, as if the proceeding had been commenced in that court.

(2) The court shall not make an order under section 23 as applied by subsection (1) unless there are special circumstances that justify the stay of the proceeding or the further transfer of the proceeding to some other court.[4]

No restraint of proceedings

26. Where initiating process has been served under this Act, a court of a State or Territory other than the place of issue of the process shall not restrain a party in the proceeding from taking a step in the proceeding on the ground that the place of issue is not the appropriate venue for the proceeding.

Division 2 — Initiating process in criminal proceedings

Application of Division

27. This Division applies to criminal proceedings.

Interpretation

28. In this Division, a reference to initiating process includes a reference to a process, issued in relation to an offence, that first notifies a person that, in specified circumstances —

(a) no further action will be taken in relation to the offence; or

(b) liability for the offence may be determined without an appearance by the person before a court.

Initiating process may be served in any part of Australia

29. (1) Subject to this Division, an initiating process issued in a State or Territory may be served in some other State or Territory.

(2) Subject to subsection (3), service must be personal.

(3) Where the only penalty for the offence in relation to which an initiating process has been issued is a fine not exceeding $200 or, if some other amount is prescribed, that other amount, service of the initiating process may be by post.

Time for service

30. (1) Where a person served with initiating process is required or permitted to do an act specified or referred to in the process not later than a particular day, service of the process is not effective unless the period between service and that day is not less than 21 days, or such shorter period as a court or authority, on application allows.

(2) The matters that the court or authority shall take into account in determining an application to allow a shorter period include —

(a) urgency;

(b) the place of residence or business of the person to be served; and

(c) whether related or similar proceedings have been commenced against some other person.

(3) In this section, "court or authority" means the court in which or the authority before whom the proceeding, in relation to which an initiating process has been issued, will be heard, and if there is no such court or authority, a court of summary jurisdiction in the place of issue of the process.

Division 3 — Other process

Application of Division

31. This Division applies to civil proceedings and criminal proceedings.

Other process may be served in any part of Australia

32. (1) A process issued in a State or Territory, other than a process that is —

(a) an initiating process; or

(b) a subpoena addressed to a person who is not a party to the proceeding in relation to which the subpoena has been issued,

may be served in some other State or Territory.

(2) Service must be effected in the same way as service may be effected in the place of issue.

PART III — SERVICE OF SUBPOENAS

Division 1 — Subpoenas to persons not under lawful restraint

Application of Division

33. This Division applies to a subpoena addressed to a person who is not a party to the proceeding in relation to which the subpoena is issued and who, at the relevant time, is not under lawful restraint.

Subpoenas may be served in any part of Australia

34. (1) Subject to this Division, a subpoena issued in a State or Territory by or out of a court or by an authority may be served in some other State or Territory.

(2) Service must be personal.

Time for service

35. (1) Service of a subpoena is not effective unless the period between service and the day on which the person is required to comply with the subpoena is not less than 14 days, or such shorter period as the court of issue or the authority of issue, on application, allows.

(2) The court or authority shall not allow a shorter period unless it is satisfied that —

(a) the evidence likely to be given by the person to whom the subpoena is addressed, or the production of a document or thing specified in the subpoena, is necessary in the interests of justice; and

(b) there will be enough time for the person —

(i) to comply with the subpoena without undue inconvenience; and

(ii) to make an application under section 38.

(3) In granting an application, the court —

(a) shall impose a condition that the subpoena not be served after a specified day; and

(b) may impose other conditions.

Information to be provided

36. Service of a subpoena is not effective unless there are attached to the subpoena or copy served —

(a) notices as prescribed; and

(b) if an application under subsection 35(1) has been granted — a copy of the instrument granting the application.

Expenses

37. (1) Service of a subpoena is not effective unless, at the time of service, enough money to meet the expenses of the person served is given or tendered to the person.

(2) If an authorisation for the supply of goods or services in respect of any part of the expenses of a person is given or tendered to the person, the amount of money otherwise required to be given given or tendered is reduced accordingly.

(3) In this section, "expenses" includes the reasonable costs of —

(a) necessary travel to and from, and accommodation while at, the place where compliance with the subpoena is required; and

(b) finding, collating and producing a document or thing,

for the purpose of complying with the subpoena.

Application for relief from subpoena

38. (1) Where a person served with a subpoena under section 34 has a right under a law of the place of issue to apply to set aside, vary or obtain other relief in respect of the subpoena, the application may be made by sending it by registered post to the court of issue or to the authority of issue.

(2) The application shall be taken to have been made at the time when it is received by the court or authority.

(3) Subject to subsection (4), the application must be made —

(a) within 7 days after service of the subpoena; or

(b) if the subpoena was served less than 8 days before the day specified in the subpoena as the day on which compliance with the subpoena is required — not later than one day before that day.

(4) The application may be made at any time if the court or authority is satisfied that it would be just to permit the making of it.

(5) The applicant must serve personally or by post a copy of the application on the party by or on whose behalf the subpoena was served.

(6) The party may file a notice of objection to the granting of the application and must serve personally or by post a copy of the notice on the applicant.

(7) The court or authority may determine the application without a hearing, but may, on application by the applicant or the party, or of its own motion, direct that there be a hearing.

(8) The court or authority shall cause notice of the determination to be given by any convenient means to the applicant and to the party.

(9) This section does not affect the grounds on which a court or authority may set aside, vary or grant other relief in respect of a subpoena.

Adjustment of expenses

39. A court, authority or person before which or whom compliance with a subpoena was required may make orders to ensure that the person who has complied with the subpoena receives the exact amount of the person's expenses within the meaning of section 36.

Division 2 — Subpoenas to persons under lawful restraint

Application of Division

40. This Division applies with respect to a subpoena addressed to a person who is not a party to the proceeding in relation to which the subpoena is issued and who, at the relevant time, is under lawful restraint in a State or Territory other than the place of issue.

Order for production of person under lawful restraint

41. (1) Where —

(a) a subpoena has been issued in a State or Territory by or out of a court or by an authority; and

(b) the person to whom it is addressed must attend before a court, authority or person for the purposes of complying with it,

the court of issue or the authority of issue may, on application, make an order that the person be produced at the time and place specified in the subpoena as the time and place at which compliance with the subpoena is required.

(2) The court or authority shall not make an order unless it is satisfied that —

(a) the evidence likely to be given by the person to whom the subpoena is addressed, or the production of a document or thing specified in the subpoena, is necessary in the interests of justice; and

(b) there will be enough time —

(i) for compliance with the order without undue inconvenience; and

(ii) to permit the making of applications under sections 45 and 46.

(3) Before making an order the court or authority may —

(a) require the applicant to give such security as the court or authority specifies for ensuring compliance with an order made under section 47; and

(b) stay the hearing of the application until the security is given.

(4) An order —

(a) may be made subject to specified conditions; and

(b) shall be addressed to the custodian from time to time of the person named in the order.

Service of order for production

42. (1) Subject to this Division and to the conditions, if any, imposed under paragraph 41(4)(a), an order for production may be served on the custodian for the time being of the person named in the order.

(2) The subpoena on which the order for production is based must also be served on the person to whom the subpoena is addressed.

(3) Service in each case must be personal.

(4) A person served with an order for production who ceases to be the custodian of the person named in the order shall give the order to the new custodian, if any.

(5) The giving of the order shall be taken to be personal service of the order on the new custodian.

(6) Where a custodian has been served with an order for production, the custodian shall comply with the order unless the person named in the order ceases to be under lawful restraint before the time for compliance.

Information to be provided

43. (1) Service of an order for production is not effective unless notices, as prescribed, are attached to the order or copy served.

(2) Service of a subpoena on which an order for production is based is not effective unless notices, as prescribed, are attached to the subpoena or copy served.

Expenses

44. (1) Service of an order for production is not effective unless, at the time of service, there is given or tendered to the custodian a sum of money equal to the amount that would, if the person named in the order had not been under lawful restraint, have been required under section 37 to have been given or tendered to the person on service of the subpoena on which the order is based.

(2) If, before the time for compliance wih the order for production, the person ceases to be under lawful restraint —

(a) the custodian must, as soon as practicable thereafter, give or tender to the person an amount equal to the amount given or tendered to the custodian under subsection (1); and

(b) the person is not required to comply with the subpoena on which the order for production is based unless that amount was given or tendered to the person (whether by the custodian or by some other person) no later than a reasonable time after the time when the person ceased to be under lawful restraint.

Application for relief from subpoena

45. (1) Section 38 applies, with the necessary modifications, with respect to a subpoena served on a person under lawful restraint.

(2) Where a court or authority sets aside, varies or grants other relief in respect of the subpoena, it shall make any necessary consequential order in respect of the order for production based on the subpoena.

Application for relief from order for production

45. (1) A court or authority that made an order for production may, on application by the custodian or the person named in the order, set aside or vary the order.

(2) The application may be made by sending it by registered post to the court or authority.

(3) Subsections 38(2), (3), (4), (5), (6), (7) and (8) apply, with the necessary modifications, with respect to an application under this section.

(4) The matters that the court or authority shall take into account in determining an application include —

(a) public safety;

(b) the safety and well-being of the person named in the order; and

(c) any inconsistency between —

(i) the requirements of the order for production; and

(ii) a right conferred or an obligation imposed by, or by authority of, law on the person named in the order for production.

(5) Where the court or authority sets aside or varies the order for production, it shall make any necessary consequential order in respect of the subpoena on which the order for production is based.

Costs of compliance

47. The court, authority or person before which or whom compliance with —

(a) an order for production; or

(b) a subpoena upon which an order for production was based,

was required may make such order as is just (including an order binding the custodian or the person named in the order for production) for the proper apportionment or payment of the costs of compliance with the order or the expenses of compliance with the subpoena.

Custody of persons, &c.

48. (1) A custodian of a person named in an order for production, and any escort of the person arranged by the custodian, have, by force of this section, while they are in a State or Territory other than the State or Territory in which the person is under lawful restraint —

(a) the custody of the person; and

(b) power to do such things as are necessary to ensure that the person is —

(i) produced in compliance with the order; and

(ii) returned thereafter to the State or Territory in which the person is under lawful restraint.

(2) Without limiting subsection (1), the custodian or the escort may —

(a) require that the keeper of a gaol in some State or Territory receive the person and keep the person in custody for such time as the custodian or the escort requires; and

(b) require that the keeper of a gaol who has custody of a person pursuant to a requirement under paragraph (a) surrender custody of the person to the custodian or the escort at the time and in such manner as the custodian or the escort requires,

and the keeper of the gaol shall comply with such requirements as are reasonable.

(3) A person who is serving a sentence of imprisonment in a State or Territory shall be deemed to be serving that sentence while the person is outside the State or Territory for the purposes of compliance with an order for production so long as the person remains in the custody of the custodian or escort or in custody arranged by the custodian or escort.

(4) The provisions of a law in force in a State or Territory that relate to the liability of a person —

(a) who escapes from lawful custody; or

(b) who fails to comply with a condition of a kind referred to in paragraph (c) of the definition of "person under lawful restraint" in section 6,

apply, subject to any conditions specified in writing by the custodian of a person named in an order for production as conditions to be complied with while the person is outside the State or Territory, to the person while the person is outside the State or Territory in which the person is under lawful restraint for the purposes of compliance with the order for production.

Subpoenas not requiring attendance

49. Where —

(a) a subpoena to which this Division applies has been issued in a State or Territory by or out of a court or by an authority; and

(b) the person to whom it is addressed need not attend before a court, authority or tribunal for the purpose of complying with it,

the provisions of Division 1 apply, with the necessary modifications, as if the subpoena were addressed to a person who is not under lawful restraint.

PART IV — SERVICE OF PROCESS OF TRIBUNALS

Division 1 — Preliminary

Interpretation

50. In this Part —

"proceeding" means a proceeding in a tribunal in connection with the exercise of an adjudicative function by the tribunal;

"subpoena" means a process that requires a person to do one or both of the following:

(a) to give oral evidence before a tribunal;

(b) to produce a document or thing to a tribunal;

"tribunal of issue", in relation to a process, means the tribunal by or out of which the process was issued.

Division 2 — Service of initiating and other process related to adjudicative functions

Application of Division

51. This Division applies with respect to a proceeding that concerns —

(a) real property within the State or Territory in which the tribunal is established;

(b) a contract, wherever made, for the supply of goods or the provision of services of any kind (including financial services) within that State or Territory;

(c) an act or omission within that State or Territory;

(d) the carrying on of a profession, trade or occupation within that State or Territory;

(e) a pension or benefit under a law of that State or Territory; or

(f) the validity of an act or transaction under a law of that State or Territory.

Interpretation

52. In this Division, a reference to —

(a) a tribunal is a reference to the tribunal in which the proceeding in relation to which an initiating process has been issued will be heard; and

(b) a person entering an appearance includes a reference to the person doing some act that gives notice to a tribunal that a person served with initiating process —

(i) acknowledges service of the initiating process;

(ii) intends to make a submission regarding an issue arising in the proceeding in relation to which the initiating process was issued; or

(iii) intends to contest the jurisdiction of the tribunal to hear the proceeding,

and "appearance" has a corresponding meaning.

Initiating process may be served in any part of Australia

53. (1) Subject to this Division, an initiating process issued in a State or Territory may be served in some other State or Territory.

(2) Subject to subsection (3), service must be personal.

(3) Where —

(a) the value of the subject-matter of a proceeding; or

(b) the amount claimed in a proceeding,

in relation to which an initiating process has been issued does not exceed $3,000 or, if some other amount is prescribed, that other amount, service may be by post.

(4) Notwithstanding subsection (3), where a proceeding in relation to which an initiating process has been issued may result in —

(a) the imposition of a fine exceeding $200 or, if some other amount is prescribed, that other amount; or

(b) an order affecting the rights or liabilities of a person in respect of the carrying on of a profession, trade or occupation,

service must be personal.

Information to be provided

54. Service of an initiating process is not effective unless a prescribed notice is endorsed on or attached to the process or copy served.

Time for appearance

55. (1) Where —

(a) an initiating process has been served under section 53; and

(b) under a law of the place of issue, a person served with initiating process is required or permitted to enter an appearance,

the period after service of the process within which the person served may enter an appearance is 21 days, or such shorter period as the tribunal, on application, allows.

(2) Where —

(a) an initiating process has been served under section 53; and

(b) under a law of the place of issue, there is no procedure by which a person served with initiating process may enter an appearance,

no steps shall be taken in the proceeding before the expiration of a period of 21 days, or such shorter period as the tribunal, on application, allows, after service of the process.

(3) The matters that the tribunal shall take into account in determining an application to allow a shorter period include —

(a) urgency;

(b) the places of residence or business of the parties; and

(c) whether related or similar proceedings have been commenced against some other person.

Appearance to state address for service

56. (1) An appearance entered after service of an initiating process under section 53 must give an address within Australia as an address for service.

(2) If no address is given, or if the address given is false or misleading, the appearance may be set aside.

(3) Subsection (2) does not limit the power of the tribunal to set aside the appearance.

Security for costs

57. (1) Where —

(a) an initiating process has been served under section 53; and

(b) the tribunal has power, under a law of the State or Territory in which the tribunal is established, to make an order for costs in a proceeding,

the tribunal may, on application by the person served, order that —

(c) the person by or on whose behalf the process was served give such security as the tribunal specifies for the costs of the person served of and incidental to the proceeding; and

(d) the proceeding be stayed until the security is given.

(2) Where the power of a tribunal to make an order for costs in a proceeding is limited as to amount, an order made under paragraph (1)(c) that requires security to be given in excess of that amount is ineffective to the extent of that excess.

(3) Subsection (1) does not limit the power of the tribunal to make an order requiring security for costs.

Other process may be served in any part of Australia

58. (1) A process issued in a State or Territory, other than a process that is —

(a) an initiating process; or

(b) a subpoena addressed to a person who is not a party to the proceeding in relation to which the subpoena has been issued,

may be served in some other State or Territory.

(2) Service must be effected in the same way as service may be effected in the place of issue.

Division 3 — Service of subpoenas related to adjudicative functions

Application of Division

59. This Division applies with respect to a subpoena addressed to a person who is not a party to the proceeding in relation to which the subpoena is issued.

Order for leave or for production

60. (1) Where a subpoena has been issued by or out of a tribunal in a State or Territory, a court of the State or Territory may, on application —

(a) if the subpoena is addressed to a person who is not under lawful restraint — give leave to serve the subpoena outside the State or Territory;

(b) if the subpoena is addressed to a person who is under lawful restraint in some other State or Territory and the person need not attend before a tribunal for the purpose of complying with it — give leave to serve the subpoena outside the State or Territory; or

(c) if the subpoena is addressed to a person who is under lawful restraint in some other State or Territory and the person must attend before a tribunal for the purpose of complying with it — order that the person be produced at the time and place specified in the subpoena as the time and place at which compliance with the subpoena is required.

(2) The court shall not exercise a power under —

(a) paragraph (1)(a) or (1)(b) unless it is satisfied of the matters specified in paragraphs 35(2)(a) and (b); or

(b) paragraph (1)(c) unless it is satisfied of the matters specified in paragraphs 41(2)(a) and (b).

(3) Subsection 35(3) applies, with the necessary modifications, in connection with the operation of paragraph (1)(a) or (1)(b).

(4) Subsection 41(3) applies, with the necessary modifications, to the consideration of an application for an order under paragraph (1)(c).

(5) Subsection 41(4) applies, with the necessary modifications, to an order made under paragraph (1)(c).

(6) In this section, "court" means —

(a) where a person who is a member of, or who constitutes, the tribunal of issue of the subpoena is a magistrate or a judge — the person;

(b) in any other case — the court that would have jurisdiction to the extent of the value of the subject-matter of the proceeding, or the amount claimed in the proceeding in relation to which the subpoena was issued, and if there is more than one such court, the court of more limited jurisdiction.

Further provisions concerning subpoena or order for production

61. (1) Where leave has been given under paragraph 60(1)(a) in relation to a subpoena, section 34 and sections 36 to 39 inclusive apply, with the necessary modifications, as if the subpoena had been issued by or out of a court or by an authority.

(2) Where leave has been given under paragraph 60(1)(b) in relation to a subpoena, section 34 and sections 36 to 39 inclusive apply, with the necessary modifications, as if the subpoena —

(a) had been issued by or out of a court or by an authority; and

(b) was addressed to a person who is not under lawful restraint.

(3) Where an order has been made under paragraph 60(1)(c), sections 42 to 48 inclusive apply, with the necessary modifications, as if the order was based on a subpoena issued by or out of a court or by an authority.

Division 4 — Service of subpoenas related to investigative functions

Order for leave or for production

62. (1) Where a subpoena has been issued by or out of a tribunal in a State or Territory in connection with the exercise by the tribunal of an investigative function, the Supreme Court of the State or Territory may, on application —

(a) if the subpoena is addressed to a person who is not under lawful restraint — give leave to serve the subpoena outside the State or Territory;

(b) if the subpoena is addressed to a person who is under lawful restraint in some other State or Territory and the person need not attend before a tribunal for the purpose of complying with it — give leave to serve the subpoena outside the State or Territory; or

(c) if the subpoena is addressed to a person who is under lawful restraint in some other State or Territory and the person must attend before a tribunal for the purpose of complying it — order that the person be produced at the time and place specified in the subpoena as the time and place at which compliance with the subpoena is required.

(2) The court shall not exercise a power under subsection (1) unless it is satisfied that —

(a) the evidence likely to be given by the person to whom the subpoena is addressed, or a document or thing specified in the subpoena, is relevant to the exercise by the tribunal of the investigative function;

(b) the evidence, document or thing cannot reasonably be obtained from a person in the place of issue of the subpoena; and

(c) where the evidence, document or thing may constitute or contain evidence that relates to matters of state — having regard to the purpose and subject-matter of the investigative function, the public interest in having the evidence, document or thing made available to the tribunal outweighs the public interest in preserving secrecy or confidentiality in relation to the evidence, document or thing.

(3) For the purposes of paragraph (2)(c), evidence that relates to matters of state includes evidence —

(a) that relates to —

(i) the security or defence of Australia;

(ii) international relations, relations between the Commonwealth and a State or Territory, relations between two or more States or Territories or relations between a State and a Territory; or

(iii) the prevention or detection of offences or contraventions of the law of the Commonwealth, a State or a Territory; or

(b) that, if adduced —

(i) would disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of a law of the Commonwealth, a State or a Territory; or

(ii) would tend to prejudice the proper functioning of the government of the Commonwealth, a State or a Territory.

(4) Subsection 35(3) applies, with the necessary modifications, in connection with the operation of paragraph (1)(a) or (1)(b).

(5) Subsection 41(3) applies, with the necessary modifications, to the consideration of an application for an order under paragraph (1)(c).

(6) Subsection 41(4) applies, with the necessary modifications, to an order made under paragraph (1)(c).

Further provisions concerning subpoena or order for production

63. **(1)** Where leave has been given under paragraph 62(1)(a) in relation to a subpoena, section 34 and sections 36 to 39 inclusive apply, with the necessary modifications, as if the subpoena had been issued by or out of a court or by an authority.

(2) Where leave has been given under paragraph 62(1)(b) in relation to a subpoena, section 34 and sections 36 to 39 inclusive apply, with the necessary modifications, as if the subpoena —

(a) had been issued by or out of a court or by an authority; and

(b) was addressed to a person who is not under lawful restraint.

(3) Where an order has been made under paragraph 62(1)(c), sections 42 to 48 inclusive apply, with the necessary modifications, as if the order was based on a subpoena issued by or out of a court or by an authority.

PART V — EXECUTION OF WARRANTS

Division 1 — General

Persons subject to warrants may be apprehended

64. (1) Subject to this Division, where a warrant has been issued in a State or Territory, the person named in the warrant may be apprehended in some other State or Territory.

(2) The person may be apprehended by —

(a) a person by whom the warrant may be executed in the place of issue;

(b) a person who, in the State or Territory in which the person named in the warrant is found, has similar powers to a person referred to in paragraph (a); or

(c) a member of the police force of the State or Territory in which the person named in the warrant is found.

(3) It is not necessary to produce the warrant when the person is apprehended.

Procedure after apprehension

65. (1) A person shall, as soon as practicable after being apprehended, be taken before a magistrate in the State or Territory in which the person was apprehended and, if the warrant or a copy of the warrant is available, it shall be produced to the magistrate.

(2) If the warrant or a copy of the warrant is not produced, the magistrate may —

(a) order that the person be released; or

(b) adjourn the proceeding for such reasonable time, not exceeding 7 days, as the magistrate specifies and remand the person on bail or in such custody as the magistrate specifies.

(3) If the warrant or a copy of the warrant is not produced when the proceeding resumes, the magistrate shall order that the person be released.

(4) If the warrant or a copy of the warrant is produced, the magistrate shall, subject to subsection (6), order —

(a) that the person be remanded on bail on condition that the person appear at such time and place in the place of issue of the warrant as the magistrate specifies; or

(b) that the person be taken, in such custody and otherwise as the magistrate specifies, to a specified place in the place of issue of the warrant.

(5) The order may be subject to other specified conditions.

(6) If, on application by the apprehended person, the magistrate is satisfied that —

(a) the warrant is invalid or it would be manifestly unjust or oppressive to make either of the orders referred to in subsection (4) — the magistrate shall order that the person be released; or

(b) it would be manifestly unjust or oppressive that either of the orders referred to in subsection (4) be effective immediately — the magistrate shall —

(i) make an order under subsection (4) and suspend its operation until a specified time; or

(ii) adjourn the proceeding for a specified time,

and order that the person be remanded on bail or in such custody as the magistrate specifies until that time.

(7) An application may be made at any time to vary an order made under paragraph (6)(b).

(8) When a proceeding resumes following an order made under subparagraph (6)(b)(ii), the magistrate shall —

(a) make an order under subsection (4) or paragraph (6)(a);

(b) make an order under subparagraph (6)(b)(i) and order that the person be remanded on bail or in such custody as the magistrates specifies until a specified time; or

(c) make a further order under subparagraph (6)(b)(ii) and order that the person be remanded on bail or in such custody as the magistrates specifies until a specified time.

(9) An order of a magistrate under this section may be executed according to its tenor.

(10) For the purposes of a proceeding under this section —

(a) the magistrate may adjourn the proceeding and remand the person on bail or in such custody as the magistrate specifies for the adjournment; and

(b) it is not necessary that a magistrate before whom the proceeding was previously conducted continue to conduct the proceeding.

Procedure on remand on bail

66. (1) Where a magistrate has made an order under paragraph 65(4)(a), the magistrate shall prepare an instrument setting out the conditions to which the grant of bail is subject.

(2) The magistrate and the person the subject of the order shall each sign the instrument.

(3) A copy of the instrument shall be —

(a) given to the person; and

(b) furnished to the court, authority, tribunal or person before which or whom the person has been remanded to appear.

(4) If the person —

(a) refuses to sign the instrument; or

(b) does not comply with a condition to which the grant of bail is subject, being a condition precedent to the person's release on bail,

the magistrate shall revoke the order and make an order under paragraph 65(4)(b).

(5) If an amount of money or any other thing is given as security for compliance with the conditions to which a grant of bail under paragraph 65(4)(a) is subject, a sum of money equal to that amount, or that thing,

shall be paid or given to the Attorney-General of the place of issue of the warrant or, if the warrant was issued in a Territory other than the Northern Territory, to the Administrator of that Territory.

Review

67. (1) Where an order has been made under section 65, the apprehended person or a person to whom the warrant was directed may, within 7 days after the making of the order, apply to the Supreme Court of the State or Territory in which the order was made for review of the order.

(2) Where the application is made by —

(a) the apprehended person — a person to whom the warrant was directed shall be the respondent; and

(b) a person to whom the warrant was directed — the apprehended person shall be the respondent.

(3) Notice of the application must be served personally or by post on the respondent.

(4) The Supreme Court may, pending its review —

(a) stay the execution of the order; and

(b) order the person to be remanded on bail or in such custody as the court specifies.

(5) The review shall be by way of rehearing.

(6) The Supreme Court may confirm, vary or revoke the order and, if it revokes the order, it may make a new order.

(7) The order as confirmed or varied, or the new order, may be executed according to its tenor.

(8) If the order as confirmed or varied, or the new order, is an order that is similar to an order referred to in paragraph 65(4)(a) —

(a) the Supreme Court shall cause an instrument of the type referred to in subsection 66(1) to be prepared; and

(b) subject to subsection (9), the succeeding provisions of section 66, with the necessary modifications, apply.

(9) For the purposes of paragraph (8)(b), a reference to a magistrate —

(a) in subsection 66(2) is a reference to the person whom the Supreme Court has caused to prepare the instrument; and

(b) in subsection 66(4) is a reference to the Supreme Court.

Law applicable to grant of bail

68. Notwithstanding subsection 68(1) of the *Judiciary Act 1903*, the provisions of a law of a State or Territory with respect to the granting of bail apply in relation to a power under this Division to grant bail to a person apprehended in that State or Territory as if the person had been apprehended under, or by authority of, a law of that State or Territory.

Enforcement, &c., of bail

69. The provisions of a law of the place of issue of a warrant with respect to bail and matters related to bail apply in relation to a person who has been remanded on bail under —

(a) an order made under paragraph 65(4)(a); or

(b) an order confirmed, varied or made under section 67 that is similar to an order referred to in paragraph 65(4)(a),

as if the person had been remanded on bail under, or by authority of, a law of the place of issue.

Custody, &c., of persons

70. (1) For the purpose of complying with an order made under paragraph 65(4)(b), or an order confirmed, varied or made under section 67 that is similar to an order referred to in paragraph 65(4)(b), the person to whom the custody of the apprehended person has been committed may —

(a) require that the keeper of a gaol in some State or Territory receive the apprehended person and keep the apprehended person in custody for such time as the person requires; and

(b) require that the keeper of a gaol who has custody of an apprehended person pursuant to a requirement under paragraph (a) surrender custody of the apprehended person to the person at the time and in such manner as the person requires,

and the keeper of the gaol shall comply with such requirements as are reasonable.

(2) The provisions of a law in force in the place of issue of a warrant that relate to the liability of a person who escapes from lawful custody apply to a person being taken to the place of issue in compliance with an order referred to in subsection (1).

Warrants issued by tribunals

71. (1) The preceding provisions of this Division do not apply in relation to a warrant issued by or out of a tribunal unless —

(a) the warrant was issued because of non-compliance with a subpoena in relation to which leave has been given under paragraph 60(1)(a), 60(1)(b), 62(1)(a) or 62(1)(b); or

(b) the Supreme Court of the place of issue of the warrant (not being a warrant referred to in paragraph (a)) makes an order under subsection (3).

(2) For the purposes of the application of the preceding provisions of this Division in relation to a warrant referred to in paragraph (1)(a), the requirement under section 65 to produce a warrant or a copy of the warrant shall be taken to be a requirement to produce the warrant or a copy of the warrant and a copy of the instrument by which leave was given under paragraph 60(1)(a), 60(1)(b), 62(1)(a) or 62(1)(b), as the case may be.

(3) The Supreme Court of the place of issue of a warrant (not being a warrant referred to in paragraph (1)(a)) issued by or out of a tribunal may, on application, make an order authorising the apprehension of the person named in the warrant.

(4) Where the warrant was issued for the purpose of bringing the person named in the warrant before the tribunal to give oral evidence or to produce a document or thing, the court shall not make an order —

(a) where the warrant was issued in connection with the exercise by the tribunal of an adjudicative function — unless it is satisfied that the evidence likely to be given by the person, or the production of a document or thing specified or referred to in the warrant, is necessary in the interests of justice; or

(b) where the warrant was issued in connection with the exercise by the tribunal of an investigative function — unless it is satisfied that —

(i) the evidence likely to be given by the person, or a document or thing specified or referred to in the warrant, is relevant to the exercise by the tribunal of the investigative function;

(ii) the evidence, document or thing cannot reasonably be obtained from a person in the place of issue of the warrant; and

(iii) where the evidence, document or thing may constitute or contain evidence that relates to matters of state — having regard to the purpose and subject-matter of the investigative function, the public interest in having the testimony, document or thing made available to the tribunal outweighs the public interest in preserving secrecy or confidentiality in relation to the evidence, document or thing.

(5) For the purposes of subparagraph (4)(b)(iii), evidence that relates to matters of state includes evidence of the kind referred to in subsection 62(3).

(6) An order may be subject to specified conditions.

(7) Where an order has been made under subsection (3) in relation to the person named in a warrant —

(a) the preceding provisions of this Division apply in relation to the warrant subject to the conditions, if any, to which the order is subject; and

(b) for the purposes of the application of those provisions, the requirement under section 65 to produce a warrant or a copy of the warrant shall be taken to be a requirement to produce the warrant or a copy of the warrant and a copy of the order.

Release of persons unnecessarily detained

72. (1) A person, who, pursuant to an order made, confirmed or varied under this Division, has been taken in custody to the place of issue of a warrant for the purpose of giving oral evidence or producing a document or thing, may apply to a court for an order that the person be released from custody.

(2) The person at whose request the warrant was issued shall be the respondent.

(3) Notice of the application must be served personally or by post on the respondent.

(4) If the court is satisfied that the person —

(a) has been in custody for a period that, in the circumstances, is unnecessarily long; or

(b) need not continue to be held in custody for the purpose of securing the giving of the evidence or the production of a document or thing,

the court may order that the person be released from custody and the person shall be released accordingly.

(5) In this section, "court" means —

(a) if the warrant was issued by or out of a court or by an authority — the court of issue or the authority of issue; or

(b) in any other case — the Supreme Court of the place of issue of the warrant.

Division 2 — Suppression orders

Interpretation

73. In this Division —

"jury" means a jury trying a criminal offence in a court;

"protected person" means the person referred to in subsection 74(1) as the person charged with a criminal offence;

"publishing organisation" means a person who, or a body that, is in the business of publishing newspapers, magazines, periodicals, books or pamphlets or making radio broadcasts or television transmissions, whether or not the business is carried on for profit;

"suppression order" means an order made under subsection 74(2) and includes an interim suppression order.

Suppression orders

74. (1) This section applies where it appears to —

(a) a magistrate conducting a proceeding under section 65; or

(b) a Supreme Court conducting a review under section 67,

that the publication of a report of —

(c) a part of the proceeding or review held in public; or

(d) a finding publicly made by the magistrate or court,

would give rise to a substantial risk that, by virtue of the influence that the publication might exert on the members of the jury, the fair trial of a person charged with a criminal offence that may be tried by a jury might be prejudiced.

(2) The magistrate or court may, on application or of the magistrate's or court's own motion, make an order forbidding the publication of any report of the part or finding.

(3) The magistrate or court shall not exercise any other power that the magistrate or court might have to make an order in the nature of a suppression order for the purpose of preventing or lessening the prejudice referred to in subsection (1).

Duration, &c., of suppression orders

75. (1) A suppression order remains in force until —

(a) it is revoked;

(b) the verdict of the jury is given at the trial of the protected person;

(c) the protected person is discharged in respect of the offence;

(d) a plea of guilty made by the protected person at committal proceedings in respect of the offence or at the trial of the person is accepted;

(e) the prosecution of the protected person for the offence is discontinued;

(f) if the protected person is the apprehended person concerned in the proceeding before a magistrate and the magistrate makes an order under paragraph 65(6)(a) — the end of the period of 7 days after the making of the order; or

(g) if the protected person is the apprehended person concerned in the review before the Supreme Court and the order confirmed, varied or made on review is similar to an order referred to in paragraph (f) — the confirmation, variation or making of such an order.

(2) A suppression order —

(a) shall specify whether it is to be enforceable in —

(i) the State or Territory in which it is made;

(ii) other specified States or Territories; or

(iii) throughout Australia; and

(b) may be made subject to specified exceptions or conditions.

Interim suppression orders

76. Where an application has been made for a suppression order, the magistrate or the Supreme Court may, without inquiring into the merits of the matter, make an interim suppression order to have effect, subject to revocation, until the application is determined.

Variation and revocation of suppression orders

77. (1) A suppression order may be varied or revoked —

(a) where the suppression order was made by a magistrate conducting a proceeding under section 65 — by a magistrate in the State or Territory in which the proceeding is or was conducted;

(b) where the suppression order was made by a Supreme Court conducting a review under section 67 — by the court;

(c) in either case — by a magistrate or court before which the protected person has appeared or been taken for the purposes of committal proceedings in relation to the offence or the trial of the person for the offence.

(2) The power to vary or revoke a suppression order may be exercised on application, or on a magistrate's or court's own motion.

Application, &c.

78. (1) An application for a suppression order, or for the variation or revocation of a suppression order, may be made by —

(a) the apprehended person;

(b) a person to whom the warrant was directed;

(c) a witness in the proceeding or review in which the suppression order is sought;

(d) a publishing organisation;

(e) a person who satisfies the magistrate or court that the person has a special interest in the question whether a suppression order should be made, varied or revoked; or

(f) where an application is made for the variation or revocation of a suppression order — the applicant for the suppression order.

(2) A person referred to in subsection (1) may, without being joined as a party to the proceeding or review, make a submission to the magistrate or court on the question whether a suppression order should be made, varied or revoked, and may call or give evidence in support of that submission.

(3) The magistrate or court may delay a proceeding or review to allow a submission to be made, or evidence to be called or given, as referred to in subsection (2).

Appeals against suppression orders

79. (1) Except as provided by the *Judiciary Act 1903*, an appeal lies as of right against the decision of a magistrate or court —

(a) to make a suppression order;

(b) not to make a suppression order;

(c) to vary or revoke a suppression order; or

(d) not to vary or revoke a suppression order.

(2) The appeal lies —

(a) if the decision was made by a magistrate — to the Supreme Court of the State or Territory in which the decision was made; or

(b) if the decision was made by a court — to the court to which appeals against final judgments or orders of the court in civil proceedings generally lie.

(3) Except as provided in this section, no appeal lies against a decision or order made under this Division.

(4) On the appeal, the appellate court —

(a) may confirm or vary the decision, or revoke the decision, whether or not it substitutes another decision; and

(b) may make orders for costs and deal with any other incidental or ancillary matters.

Institution of appeals

80. The appeal may be instituted by —

(a) if the decision the subject of the appeal was made on application — the applicant;

(b) the apprehended person;

(c) a person to whom the warrant was directed;

(d) a publishing organisation that —

(i) made a submission to the magistrate or court that made the decision the subject of the appeal; or

(ii) did not make a submission as referred to in subparagraph (i) but that satisfies the appellate court that the failure to make such a submission was not attributable to a lack of diligence on its part;

(e) a person who made a submission to the magistrate or court that made the decision the subject of the appeal; or

(f) a person who did not make a submission to the magistrate or court that made the decision the subject of the appeal but who satisfies the appellate court that —

(i) the person has a special interest in the question whether the suppression order should be made, varied or revoked; and

(ii) the failure to make a submission to the magistrate or court was not attributable to a lack of diligence on the part of the person.

Disobedience of suppression orders

81. (1) A person shall not fail or refuse to comply with a suppression order.

Penalty:

(2) It is a defence to a prosecution for an offence against subsection (1) if the defendant proves that —

(a) at the time when the publication was made, the defendant did not know a fact that made the publication a contravention of subsection (1); and

(b) either —

(i) before the publication was made, the defendant had taken all steps that were reasonable in the circumstances (having regard, among other things, to the likelihood of such a contravention) to ascertain that fact; or

(ii) if the defendant did not take the steps referred to in subparagraph (i) — the defendant would not have discovered that fact even if all those steps had been taken.

PART VI — JUDGMENTS

Interpretation

82. In this Part —

"court of rendition", in relation to a judgment, means —

(a) the court in which the judgment was given, entered or made; or

(b) if the judgment is an order of a tribunal —

(i) if a law of the State or Territory in which the tribunal is established provides that an order of the tribunal is enforceable without registration or filing of the order in a court — the tribunal; or

(ii) in any other case — the court in which the order is registered or filed otherwise than under this Part;

"enforcing court", in relation to a judgment, means a court in which the judgment is filed under subsection 83(1);

"place of rendition" means the State or Territory in which the court of rendition is established;

"proceeding" includes a proceeding as defined in section 50;

"relevant initiating process" means the initiating process issued in relation to a proceeding in which a judgment has been given, entered or made.

Enforcement of judgments

83. (1) Upon production of —

(a) a copy of a judgment certified by an officer of the court of rendition to be a true copy; or

(b) a copy of such a copy of a judgment,

the prothonotary, registrar or other proper officer of an appropriate court in a State or Territory other than the place of rendition shall file the copy in the court.

(2) The judgment thereupon becomes a record of that court and —

(a) has the same effect; and

(b) subject to subsection (3), may give rise to the same proceedings by way of enforcement or execution,

as if the judgment had been given, entered or made by that court.

(3) A judgment is capable of being enforced in or by a court of a State or Territory in which a copy of it is filed under subsection (1) only if, and to the extent that, at the time when the proceeding for enforcement is or is to be taken, the judgment is capable of being enforced in or by —

(a) the court of rendition; or

(b) a court in the place of rendition.

(4) In this section —

(a) "appropriate court" means a court in or by which relief as given by the judgment could have been given, and if there is more than one such court, the court of more limited jurisdiction; and

(b) a reference to enforcement, in relation to a judgment, includes a reference to execution in relation to the judgment.

Stay may be granted

84. (1) A court of a State or Territory in which a copy of a judgment has been filed under subsection 83(1) may, on application by a person against whom the judgment has been given, entered or made, order that proceedings in that court by way of enforcement or execution of the judgment not be commenced until a specified time, or be stayed for a specified period, on condition that the person make and prosecute an application to an appropriate court to set aside, vary or obtain other relief in respect of the judgment.

(2) The order may be made subject to other conditions, including conditions as to the giving of security.

(3) In subsection (1), "appropriate court" means a court that has jurisdiction under a law in force in the place of rendition to grant an application to set aside, vary or obtain other relief in respect of the judgment.

Costs

85. Where a copy of a judgment is filed under subsection 83(1) —

(a) the reasonable costs or expenses of and incidental to obtaining the copy and filing it are recoverable in proceedings by way of enforcement or execution of the judgment; and

(b) the entitlement of a person to, and the liability of a person for, the costs or expenses of and incidental to such proceedings are the same as they are in proceedings by way of enforcement or execution of a similar judgment given, entered or made by the enforcing court.

Interest

86. Where a copy of a judgment is filed under subsection 83(1), interest on the amount of the judgment —

(a) is payable at the same rate or rates and in respect of the same period or periods as would be applicable in the court of rendition; and

(b) is recoverable to the extent that the judgment creditor satisfies the court in which proceedings by way of enforcement or execution of the judgment are taken as to the amount of the interest.

Rules of private international law not to apply

87. Where a copy of a judgment is filed under subsection 83(1), a court of a State or Territory in which it is filed shall not refuse to permit proceedings by way of enforcement or execution of the judgment to be taken or continued by reason only of the operation of a rule of private international law.

PART VII — MISCELLANEOUS

Jurisdiction of courts with respect to matters arising under Act

88. (1) The several courts of the States are invested with federal jurisdiction and, so far as the Constitution allows, jurisdiction is conferred on the several courts of the Territories, with respect to matters arising under this Act.

(2) The jurisdiction so vested in, or conferred on, a court is vested or conferred without regard to the limits of jurisdiction of the court under the law of the State or Territory in which the court is established.

Jurisdiction of courts and tribunals in proceedings

89. (1) The jurisdiction that a court has by virtue of service of process under this Act is not affected by any limitation arising under a law of a State or Territory concerning the locality in which the process may be served.

(2) The jurisdiction that a court of a Territory has by virtue of service of process under this Act extends only so far as the Constitution permits.

(3) Where an initiating process has been served under this Act, proceedings against a person by way of enforcement or execution of a judgment given, entered or made in the proceeding in relation to which the initiating process was issued shall not be taken in any court unless the court is satisfied that —

(a) the initiating process was served personally on the person; or

(b) the person has received actual notice of the judgment.

(4) In this section —

"court" includes tribunal;

"proceeding" includes a proceeding as defined in section 50.

Constitution of courts

90. The jurisdiction of the Supreme Court of a State or Territory in a matter arising under section 60, 62, 67, 71, 72 or 74 or under paragraph 77(1)(a) or 79(2)(a) shall be exercised by the court constituted by a single judge.

Regulations

91. (1) The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters —

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) In particular, the regulations may make provision for or with respect to —

(a) the practice or procedure in connection with the service and execution of process and judgments;

(b) the fees to be paid in connection with the service and execution of process and judgments;

(c) the costs or expenses to be allowed to a person for obtaining a copy of a judgment and its filing; and

(d) the recovery of any such fees, costs or expenses.

(3) The regulations may make different provisions with respect to different States and Territories, with respect to different process and judgments and with respect to different courts and tribunals.

(4) So far as the regulations do not make provision for or with respect to a matter of practice or procedure, the practice or procedure shall be —

(a) in connection with the service of process — the practice or procedure that would be applicable in the place of issue; and

(b) in connection with the execution of process or judgments — the practice or procedure applicable in the State or Territory in which execution is effected.

(5) So far as the regulations do not make provision for or with respect to fees, costs or expenses, the fees, costs or expenses shall be —

(a) in connection with the service of process — the fees, costs or expenses that would be applicable to service in the place of issue;

(b) in connection with the execution of process or judgments — the fees, costs or expenses applicable in the State or Territory in which execution is effected; and

(c) in connection with obtaining a copy of a judgment and its filing — the fees, costs or expenses applicable in the State or Territory in which the copy is filed.

NOTES

1. Professors Pryles and Crawford recommend (see para 192) that subclause 23(14) be amended by omitting "Subject to section 24,".

2. The President recommends (see para 189) that subclauses 23(11), (12), (13), (14) and (15) be omitted and the following subclause substituted:

> (11) Where the court is satisfied as required by subsection (8), and, where applicable, subsection (10), it may order that the proceeding be stayed (whether or not subject to conditions).

3. Professors Pryles and Crawford (see para 192) recommend that clause 24 be omitted.

4. The President recommends (see para 189) that clause 25 be omitted.

Provisions for inclusion in Interstate Procedure Regulations

The Interstate Procedure Bill 1987 refers to various notices required to be attached to process served under the Bill. Their purpose is to provide information to persons served of their rights and obligations in relation to service of process and forms that may be used by persons served for the purpose of making various applications permitted to be made by the Bill. The following table specifies the appropriate notices in each case by reference to the provisions of the Bill. The table also identifies how many notices of each type should be used in each case. The notices are identified as forms. The forms should be included in Regulations made under the Bill.

TABLE

Column 1	Column 2	Column 3	Column 4
Item	Provision	Form	Number
1.	Section 19	Form 1 Form 2	1 1 for each plaintiff plus 1
2.	Paragraph 36(a) (including as applied by section 49)	Form 3 Form 4	1 2
3.	Subsection 43(1)	Form 5	2
4.	Subsection 43(2)	Form 4 Form 6 Form 7	2 1 2
5.	Section 54	Form 8	1
6.	Paragraph 36(a) (as applied by subsection 61(1), 61(2), 63(1) or 63(2))	Form 9 Form 10	1 2
7.	Subsection 43(1) (as applied by subsection 61(3) or 63(3))	Form 11	2
8.	Subsection 43(2) (as applied by subsection 61(3) or 63(3))	Form 10 Form 12 Form 13	2 1 2

Form 1

Interstate Procedure Act 1987

NOTICE TO [DEFENDANT][1]

YOU SHOULD READ THIS DOCUMENT VERY CAREFULLY

IF YOU HAVE ANY TROUBLE UNDERSTANDING IT
GO TO SEE A LAWYER FOR ADVICE
AS SOON AS POSSIBLE

Attached to this notice is a[2] . It claims:[3]

Service of the[4] on you outside[5] is allowed by the Interstate Procedure Act 1987.

YOUR OBLIGATIONS

[6]If you want to defend this matter, you must file a[7] in the[8] This must give an address in Australia where documents can be left for you or sent to you. You only have 21[9] days after receiving the[4] to do so.

YOUR RIGHTS

If you [6][have filed or intend to file a[7] and you] think it would be inappropriate to have the trial of this matter at the[8] , you can apply to have the trial transferred to a court in an appropriate place. Alternatively, you can apply to have the trial stayed, but if this happens you may have to agree to have the trial in some other court.

You can make either of these applications at any time, but if you do so more than 21[8] days after receiving the[4] , there must be special circumstances before the application will be granted. If your application is not successful, you may have to pay the costs of having the application determined.

To make either of these applications:

(a) complete each of the attached forms (headed "Application for Stay or Change of Venue") in accordance with the instructions;

(b) sign and date them; and

(c) send one by *registered post* to the court named at the bottom of one form and serve the other(s) personally or by post on the person(s) named at the bottom of the other form(s).

Instructions:

1. *or other proper description of person to be served.*
2. *insert the name of the process and of the court of issue, eg, "a statement of claim of the Supreme Court of New South Wales".*
3. *set out short particulars of the claim, enough to let the defendant know what the claim is about, eg, "damages of $11,050 for breach of contract made between you and AB on 1 January 1999 concerning . . .".*
4. *insert the name of the process.*
5. *insert the name of the State or Territory of issue.*
6. *delete if not applicable.*
7. *insert the name of the document or procedure by which an "appearance" as defined in the Act may be entered.*
8. *insert the name of the court of issue.*
9. *where another period has been approved by the court of issue, insert this period.*

Form 2

Interstate Procedure Act 1987

APPLICATION
FOR STAY OR CHANGE OF VENUE

[1]

[2]I,[3] , apply for a stay of the trial of this matter.

[2]I,[3] , apply for the trial of this matter to be transferred to the following court:[4]

In support of my application, I say:

(a) my place of business is:[5]

(b) my home is:[5]

(c) I intend to call the following people to be witnesses:[6]

(d) other evidence I need for the trial is:[7]

(e) the trial is about:[8]

(f) [9]

[10]I wish to attend personally or have a lawyer represent me when the application is considered.

11

Send this form to:[12]

Instructions for plaintiff:

1. *insert the name of the court of issue and the title and file number, etc, of the proceeding.*
12. *insert the name and address of court of issue and of each plaintiff, each one on a separate form.*

Now rule through the above Instructions.

Instructions for person completing this form:

2. *2form 4delete the paragraph which is inapplicable.*
3. *insert your full name and address.*
4. *insert the name and address of the court you are nominating to hear the trial.*
5. *complete with the appropriate address.*
6. *set out the names of the witnesses you intend to call and their addresses. If there is not enough space, attach another page.*
7. *specify what other evidence you will need to call on and its location. If there is not enough space, attach another page.*
8. *insert a description of the subject-matter of the trial, eg, "a washing machine" or "the following block of land: . . ." and its location.*
9. *set out any other reason for the application, eg, financial hardship.*
10. *delete if you do not wish to appear personally or be represented when the application is considered.*
11. *sign and date the document here. If you have attached other pages, sign each of them also.*

Form 3

Interstate Procedure Act 1987

NOTICE TO [WITNESS][1]

YOU SHOULD READ THIS DOCUMENT VERY CAREFULLY

IF YOU HAVE ANY TROUBLE UNDERSTANDING IT GO TO SEE A LAWYER FOR ADVICE AS SOON AS POSSIBLE

Attached to this notice is a[2]

Its service outside[3] is allowed by the Interstate Procedure Act 1987.

YOUR OBLIGATIONS

You must obey the[4] if:

(a) the person who served it on you gave or offered you enough money to meet your expenses in obeying it, including the cost of your travel (if required) to[5] . Alternatively, you should have been given or offered a combination of money, travel tickets and accommodation vouchers to meet your expenses; and

(b) [6] you also received the[4] more than 14 days before[7] .

(c) [6] if you received the[4] 14 days or less before[7] —

(i) you also received a document from[8] permitting the[4] to be served 14 days or less before[7]; and

(ii) you received the[4] before the day specified in that document.

YOUR RIGHTS

The law says that in some cases you do not have to obey a[4] , but you must apply if you want to be excused. If you need advice on this matter, contact a lawyer as soon as possible. If you want to apply, then you must do so within 7[9] days of receiving the[4] . If your application is not successful, you may have to pay the costs of having the application determined.

To apply to be excused:

(a) complete each of the attached forms (headed "Application for Relief from Compliance with[4] ") in accordance with the instructions;

(b) sign and date them; and

(c) send one by *registered post* to the court or authority named at the bottom of one form and serve the other personally or by post on the person named at the bottom of the other form.

Instructions:

1. *or other proper description of person to be served.*
2. *insert the name of the process and of the court or authority of issue, eg, "a subpoena of the Supreme Court of New South Wales".*
3. *insert the name of the State or Territory of issue.*
4. *insert the name of the process.*
5. *insert the name and location of the court, authority or person before which compliance with the process is required.*

5. *insert the name and location of the court, authority or person before which compliance with the process is required.*
6. *delete the paragraph which is inapplicable.*
7. *insert the day for compliance with the process.*
8. *insert the name of the court or authority that granted leave for service of the process.*
9. *where a shorter period has been approved by the court or authority of issue, insert the number of days within which the witness must make application in order to comply with the requirements of paragraph 38(3)(b) of the Act.*

Form 4

Interstate Procedure Act 1987

APPLICATION FOR RELIEF FROM COMPLIANCE WITH[1]

[2]

[3]I,[4] , apply for permission not to obey the[1] served on me in relation to the above proceeding.

[3]I,[4] , apply for permission not to obey the[1] served on me in relation to the following extent:[5]

In support of my application, I say:[6]

[7]I wish to attend personally or have a lawyer represent me when the application is considered.

[8]

Send this form to:[9]

Instructions for party serving:

1. *insert the name of the process, eg, "subpoena".*
2. *insert the name of the court or authority of issue and the title and file number, etc, of proceeding.*
9. *insert the name and address of the court or authority of issue and of the party serving, each one on a separate form.*

Now rule through the above Instructions.

Instructions for person applying:

3. *delete the paragraph which is inapplicable.*
4. *insert your full name and address.*
5. *set out the extent to which you do not wish to obey.*
6. *set out the reasons for your application. If there is not enough space, attach another page.*
7. *delete if you do not wish to appear personally or be represented when the application is considered.*
8. *sign and date the document here. If you have attached other pages, sign each of them also.*

Form 5

Interstate Procedure Act 1987

APPLICATION FOR RELIEF
FROM COMPLIANCE WITH ORDER FOR PRODUCTION

1

Re: Order for Production[2] , based on[3] .

I,[4] , apply for permission to be excused from compliance with the Order for Production referred to above, which requires that I produce[5] .

In support of my application, I say:[6]

[7]I wish to attend personally or have a lawyer represent me when the application is considered.

8

Send this form to:[9]

Instructions for party serving:

1. *insert the name of the court or authority of issue of the process on which the Order for Production is based and the title and file number, etc, of proceeding.*
2. *insert the date of the Order for Production*
3. *insert the name and date of the process on which the Order for Production is based.*
5. *insert the name of person named in the Order for Production.*

9. *insert the name and address of the court or authority by which the Order for Production was made and of the party serving, each one on a separate form.*
   Now rule through the above Instructions.

Instructions for person applying:

4. *insert your full name and address.*
6. *set out the reasons for your application. If there is not enough space, attach another page.*
7. *delete if you do not wish to appear personally or be represented when the application is considered.*
8. *sign and date the document here. If you have attached other pages, sign each of them also.*

Form 6

Interstate Procedure Act 1987

NOTICE

YOU SHOULD READ THIS DOCUMENT VERY CAREFULLY

IF YOU HAVE ANY TROUBLE UNDERSTANDING IT
GO TO SEE A LAWYER/ASK TO SEE A LAWYER[1] FOR ADVICE
AS SOON AS POSSIBLE

Attached to this notice is a[2]

Its service outside[3] is allowed by the Interstate Procedure Act 1987.

YOUR OBLIGATIONS

An order for your production at[4] , based on the[5] referred to above, has been served on your custodian (the person who has custody of you or the person who has control over your movements). Under this order you will be required to go or be taken to[4] , unless you [are released/have all contraints on your freedom of movement removed][1] on or before[6] .

If you [are released/have all contraints on your freedom of movement removed][1] on or before[6] , and you are given or offered enough money, or a combination of money, travel tickets and accommodation vouchers, to meet your expenses in obeying the[5] , including the cost of travel, you will have to go yourself to[4] .

YOUR RIGHTS

The law says that in some cases you can be excused from being produced under the order served on your custodian. In addition, in some cases you do not have to obey

a[5] . But in each case you must apply if you want to be excused. If you need advice on these matters, contact a lawyer as soon as possible. If you want to apply then in either case you must do so within 7[7] days of receiving the[5] .

To apply to be excused from being produced under the order served on your custodian:

(a) complete each of the attached forms (headed "Application for Relief from Order for Production") in accordance with the instructions;

(b) sign and date them; and

(c) send one by *registered post* to the court or authority named at the bottom of one form and serve the other personally or by post on the person named at the bottom of the other form.

To apply to be excused from having to obey the[5] served on you:

(a) complete each of the attached forms (headed "Application for Relief from Compliance with[5] ") in accordance with the instructions;

(b) sign and date them; and

(c) send one by *registered post* to the court or authority named at the bottom of one form and serve the other personally or by post on the person named at the bottom of the other form.

Instructions:

1. *delete as appropriate depending on whether person to be served is in custody.*
2. *insert the name of the process and of the court or authority of issue, eg, "a subpoena of the Supreme Court of New South Wales".*
3. *insert the name of the State or Territory of issue.*
4. *insert the name and location of the court, authority or person before which compliance with the process is required.*
5. *insert the name of the process.*
6. *insert the day for compliance with the process.*
7. *where service is to be less than 8 days before the day for compliance, insert the number of days within which the witness must make application in order to comply with the requirements of paragraph 38(3)(b) of the Act.*

Form 7

Interstate Procedure Act 1987

APPLICATION FOR RELIEF
FROM ORDER FOR PRODUCTION

1

Re: Order for Production[2] , based on[3]

I,[4] , apply for permission to be excused from being produced under the Order for Production referred to above.

In support of my application, I say:[5]

[6]I wish to have a lawyer represent me when the application is considered.

7

Send this form to:[8]

Instructions for party serving:

1. *insert the name of the court or authority of issue of the process on which the Order for Production is based and the title and file number, etc, of proceeding.*
2. *insert the date of the Order for Production.*
3. *insert the name and date of the process on which the Order for Production is based.*
8. *insert the name and address of the court or authority*
   by which the order for production was made and of the party serving, each one on a separate form.
   Now rule through the above Instructions.

Instructions for person applying:

4. *insert your full name and address.*
5. *set out the reasons for your application. If there is not enough space, attach another page.*
6. *delete if you do not wish to be represented when the application is considered.*
7. *sign and date the document here. If you have attached other pages, sign each of them also.*

Form 8

Interstate Procedure Act 1987

NOTICE

YOU SHOULD READ THIS NOTICE VERY CAREFULLY

IF YOU HAVE ANY TROUBLE UNDERSTANDING IT GO TO SEE A LAWYER FOR ADVICE AS SOON AS POSSIBLE

The Interstate Procedure Act 1987 permits the document of the[1] [attached to this notice/on which this notice appears][2] to be served outside[3] where the claim made against you concerns:

(a) real property within the State or Territory named above;

(b) a contract, wherever made, for the supply of goods or services or the provision of credit within that State or Territory;

(c) an act or omission within that State or Territory;

(d) the carrying on of a profession, trade or occupation within that State or Territory;

(e) a pension or benefit under a law of that State or Territory; or

(f) the validity of an act or transaction under a law of that State or Territory.

The document [attached to this notice/on which this notice is appears][2] is served in this case in reliance on item[4] .

YOUR RIGHTS

If you think that none of the above items applies in this case, you should go to see a lawyer as soon as possible for advice on what you can do to stop the[1] dealing with this matter.

YOUR OBLIGATIONS

[5]If you want to defend this matter, you must send a[6] to the[1] , which must give an address in Australia where documents can be left for you or sent to you. You only have 21[7] days after receiving this notice to do so.

[5]If you want to defend this matter, you must attend the hearing in the[1] at the time set down in [[5][the document attached to this notice/on which this notice appears][2]/the notice which will be sent to you soon]. But the hearing must be at least 21[7] days after the day on which you received [the document attached to this notice/on which this notice appears][2].

Instructions

1. *insert the name of the tribunal of issue.*
2. *delete depending on whether notice is endorsed on or attached to the process of the tribunal.*
3. *insert the name of the State or Territory of issue.*
4. *insert letter corresponding to ground relied on.*
5. *delete the paragraph which is inapplicable.*
6. *insert the name of the document or procedure by which an "appearance" as defined in the Act may be entered.*
7. *where another period has been approved by the tribunal, insert this period.*

Form 9

Interstate Procedure Act 1987

NOTICE

YOU SHOULD READ THIS DOCUMENT VERY CAREFULLY

IF YOU HAVE ANY TROUBLE UNDERSTANDING IT
GO TO SEE A LAWYER FOR ADVICE
AS SOON AS POSSIBLE

Attached to this notice is a[1] .

Its service outside[2] is allowed by the Interstate Procedure Act 1987 under permission given by[3] .

YOUR OBLIGATIONS

You must obey the[4] if:

(a) the person who served it on you gave or offered you enough money to meet your expenses in obeying it, including the cost of your travel (if required) to[5] . Alternatively, you should have been given or offered a combination of money, travel tickets and accommodation vouchers to meet your expenses; and

(b) you also received the[4] before the day specified in the document which gives permission for service. That document should also be attached.

YOUR RIGHTS

The law says that in some cases you do not have to obey a[4] , but you must apply if you want to be excused. If you need advice on this matter, contact a lawyer as soon as possible. If you want to apply then you must do so within 7[6] days of receiving the[4] . If your application is not successful, you may have to pay the costs of having the application determined.

To apply to be excused:

(a) complete each of the attached forms (headed "Application for Relief from Compliance with[4] ") in accordance with the instructions;

(b) sign and date them; and

(c) send one by *registered post* to the court or authority named at the bottom of one form and serve the other personally or by post on the person named at the bottom of the other form.

Instructions:

1. *insert the name of the process and of the tribunal of issue, eg, "a summons of the Small Claims Tribunal of Victoria".*
2. *insert the name of the State or Territory of issue.*
3. *insert the name of the court or officer by whom permission for service was given.*
4. *insert the name of the process.*
5. *insert the name and location of the tribunal before which compliance with the process is required.*
6. *where service will be less than 8 days before the day for compliance, insert the number of days within which the witness must make application in order to comply with the requirements of paragraph 38(3)(b) of the Act.*

Form 10

Interstate Procedure Act 1987

APPLICATION FOR RELIEF FROM COMPLIANCE WITH[1]

[2]

[3]I,[4] , apply for permission not to obey the[1] served on me in relation to the above proceeding.

[3]I,[4] , apply for permission not to obey the[1] served on me in relation to the above proceedings to the following extent:[5]

In support of my application, I say:[6]

[7]I wish to attend personally or have a lawyer represent me when the application is considered.

[8]

Send this form to:[9]

Instructions for party serving:

1. *insert the name of the process, eg, "subpoena".*
2. *insert the name of the tribunal of issue and the title and file number, etc, of proceeding.*
9. *insert the name and address of the court that gave permission for service of the process or that may adjudicate on the application and of the party serving, each one on a separate form.*

   Now rule through the above Instructions.

Instructions for person applying:

3. *delete the paragraph which is inapplicable.*
4. *insert your full name and address.*
5. *set out the extent to which you do not wish to obey.*
6. *set out the reasons for your application. If there is not enough space, attach another page.*
7. *delete if you do not wish to appear personally or be represented when the application is considered.*
8. *sign and date the document here. If you have attached other pages, sign each of them also.*

Form 11

Interstate Procedure Act 1987

APPLICATION FOR RELIEF
FROM COMPLIANCE WITH ORDER FOR PRODUCTION

1

Re: Order for Production[2] , based on[3]

I,[4] , apply for permission to be excused from compliance with the Order for Production referred to above, which requires that I produce[5]

In support of my application, I say:[6]

[7]I wish to attend personally or have a lawyer represent me when the application is considered.

8

Send this form to:[9]

Instructions for party serving:

1. *insert the name of the tribunal of issue of the process on which the Order for Production is based and the title and file number, etc, of the proceeding.*
2. *insert date of Order for Production*
3. *insert the name and date of the process on which the Order for Production is based.*
9. *insert the name and address of the court or authority by which the Order for Production was made and of the party serving, each one on a separate form.*

   Now rule through the above Instructions.

Instructions for person applying:

4. *insert your full name and address.*
5. *insert the name of the person named in the Order for Production.*
6. *set out the reasons for your application. If there is not enough space, attach another page.*
7. *delete if you do not wish to appear personally or be represented when the application is considered.*
8. *sign and date the document here. If you have attached other pages, sign each of them also.*

Form 12

Interstate Procedure Act 1987

NOTICE

YOU SHOULD READ THIS DOCUMENT VERY CAREFULLY

IF YOU HAVE ANY TROUBLE UNDERSTANDING IT
GO TO SEE A LAWYER/ASK TO SEE A LAWYER[1] FOR ADVICE
AS SOON AS POSSIBLE

Attached to this notice is a[2]

Its service outside[3] is allowed by the Interstate Procedure Act 1987.

YOUR OBLIGATIONS

An order for your production at[4] , based on the[5] referred to above, has been served on your custodian (the person who has custody of you or the person who has control over your movements). Under this order you will be required to go or be taken to[4] , unless you [are released/have all contraints on your freedom of movement removed][1] on or before[6]

If you [are released/have all contraints on your freedom of movement removed][1] on or before[6] , and you are given or offered enough money, or a combination of money, travel tickets and accommodation vouchers, to meet your expenses in obeying the[5] , including the cost of travel, you will have to go yourself to[4]

YOUR RIGHTS

The law says that in some cases you can be excused from being produced under the order served on your custodian. In addition, in some cases you do not have to obey a[5] . But in each case you must apply if you want to be excused. If you need advice on these matters, contact a lawyer as soon as possible. If you want to apply then in either case you must do so within 7[7] days of receiving the[5]

To apply to be excused from being produced under the order served on your custodian:

(a) complete each of the attached forms (headed "Application for Relief from Order for Production") in accordance with the instructions;

(b) sign and date them; and

(c) send one *by registered post* to the court or authority named at the bottom of one form and serve the other personally or by post on the person named at the bottom of the other form.

To apply to be excused from having to obey the[5] served on you:

(a) complete each of the attached forms (headed "Application for Relief from Compliance with[5] ") in accordance with the instructions;

(b) sign and date them; and

(c) send one *by registered post* to the court or authority named at the bottom of one form and serve the other personally or by post on the person named at the bottom of the other form.

Instructions:

1. *delete as appropriate depending on whether person to be served is in custody.*
2. *insert the name of the process and of the tribunal of issue, eg, "a summons of the Small Claims Tribunal of Victoria".*
3. *insert the name of the State or Territory of issue.*
4. *insert the name and location of the tribunal before which compliance with the process is required.*
5. *insert the name of the process.*
6. *insert the day for compliance with the process.*
7. *where the process is to be served less than 8 days before the day for compliance, insert the number of days within which the witness must make application in order to comply with the requirements of paragraph 98(3)(b) of the Act.*

Form 13

Interstate Procedure Act 1987

APPLICATION FOR RELIEF
FROM ORDER FOR PRODUCTION

1

Re: Order for Production[2] , based on[3]

I,[4] , apply for permission to be excused from being produced under the Order for Production referred to above.

In support of my application, I say:[5]

[6]I wish to have a lawyer represent me when the application is considered.

7

Send this form to:[8]

Instructions for party serving:

1. *insert the name of the tribunal of issue of the process on which the Order for Production is based and the title and file number, etc, of the proceeding.*
2. *insert date of the Order for Production*
3. *insert the name and date of the process on which the Order for Production is based.*
8. *insert the name and address of the court or authority by which the Order for Production was made and of the party serving, each one on a separate form.*

   Now rule through the above Instructions.

Instructions for person applying:

4. *insert your full name and address.*
5. *set out the reasons for your application. If there is not enough space, attach another page.*
6. *delete if you do not wish to be represented when the application is considered.*
7. *sign and date the document here. If you have attached other pages, sign each of them also.*

INTERSTATE PROCEDURE (MISCELLANEOUS PROVISIONS) BILL 1987

TABLE OF PROVISIONS

Clause

PART I — PRELIMINARY

1. Short title
2. Commencement

PART II — SERVICE AND EXECUTION OF PROCESS ACT

3. Repeal and savings

PART III — AMENDMENT OF TRANSFER OF PRISONERS ACT

4. Principal Act
5. Proceedings before court of summary jurisdiction

SCHEDULE

A BILL

FOR

An Act to amend the Service and Execution of Process Act 1901, and for related purposes

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

PART I — PRELIMINARY

Short title

1. This Act may be cited as the *Interstate Procedure (Miscellaneous Provisions) Act 1987*.

Commencement

2. This Act shall come into operation on the day on which the *Interstate Procedure Act 1987* comes into operation.

PART II — SERVICE AND EXECUTION OF PROCESS ACT

Repeal and saving

3. (1) The Acts specified in the Schedule are repealed except as to sections 1 and 2, Part IVA and section 27 of, and the Fourth Schedule to, the *Service and Execution of Process Act 1901* as amended and in force immediately before the commencement of this Act.

(2) The repeals effected by subsection (1) do not affect anything done before the commencement of this Act with respect to the service or execution of process or judgments and further steps may be taken with respect to a process or judgment so served or executed as if those repeals had not been effected.

PART III — AMENDMENT OF TRANSFER OF PRISONERS ACT

Principal Act

4. The *Transfer of Prisoners Act 1983* is in this Part referred to as the Principal Act.

Proceedings before court of summary jurisdiction

5. Section 10 of the Principal Act is amended by omitting subsection (4) and substituting the following:

> "(4) Where a court of summary jurisdiction to which an application for a trial transfer order has been made under section 8 or 9 is satisfied that the applicant for that transfer order is entitled to make that application, the court shall grant the application unless it is satisfied that —
>
> (a) it would be manifestly unjust or oppressive to grant the application; or

(b) the transfer of the prisoner in pursuance of such a trial transfer order would be likely to prejudice the conduct of any proceeding in which the prisoner is, or is likely to be, an appellant or an applicant for review or of any proceeding incidental to such a proceeding,

and if it is satisfied as to a matter referred to in a paragraph of this subsection, it shall refuse to grant the application.".

SCHEDULE

Section 3

ACTS REPEALED

Service and Execution of Process Act 1901
Service and Execution of Process Act 1912
Service and Execution of Process Act 1918
Service and Execution of Process Act 1922
Service and Execution of Process Act 1924
Service and Execution of Process Act 1928
Service and Execution of Process Act 1931
Service and Execution of Process Act 1953
Service and Execution of Process Act 1958
Service and Execution of Process Act 1963
Service and Execution of Process Act 1968
Service and Execution of Process Act 1974

Interstate Procedure legislation explanatory memorandum

INTERSTATE PROCEDURE BILL 1987

OUTLINE

1. The purpose of the Interstate Procedure Bill 1987 is to provide for the service and execution of process of the States and Territories and judgments and orders of the courts and tribunals of the States and Territories throughout Australia. The power to enact the Bill comes primarily from two provisions of the Constitution: section 51(xxiv), which allows Parliament to make laws with respect to 'the service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States'; and section 122, which allows Parliament to make laws 'for the government of any territory'. Some provisions also rely on section 51(xxxix), which empowers Parliament to regulate incidental or ancillary matters, section 51(xxv), which allows Parliament to make laws with respect to 'the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States', section 76(ii), which deals with jurisdiction arising under laws made by the Parliament and section 77(iii), which concerns the investiture of State courts with federal jurisdiction.

2. The Bill replaces section 3, Parts II to IV (inclusive) and section 28 of the *Service and Execution of Process Act 1901*. This Act is in need of reform owing to significant changes in the legal systems of the States and Territories since its enactment and social, technological, economic and commercial developments in Australia since federation. The Bill provides for the service and execution of process and judgments to the greatest extent possible commensurate with recognition of the rights and interests of people involved in proceedings which require the interstate service and execution of process and judgments.

3. The proposed legislation is based upon a report and recommendations of the Law Reform Commission (ALRC 40, *Service and Execution of Process* (1987)). In this memorandum, the abbreviation 'Report' is used to refer to the report of the Law Reform Commission.

4. The Bill deals only with the service and execution of process and judgments. Apart from some special procedures proposed to safeguard the rights and interests of persons subject to interstate service and execution, the Bill does not affect the powers of courts and tribunals to deal with the subject-matter of a proceeding in which process has been served under its provisions, nor does it affect the powers of courts and tribunals to enforce judgments. However, to the extent that the Bill does regulate procedural matters relating to service and execution, the provisions of the Bill, with limited exceptions, will be the only law on the subject of interstate service and execution of process and judgments.

NOTES ON CLAUSES

PART I — PRELIMINARY

Clauses 1 and 2: Short title and commencement

1. These clauses provide for the short title and commencement of the Bill. The Bill, when enacted, will come into operation on a date fixed by the Governor-General by Proclamation.

Clause 3: Act to bind Crown

1. The Bill, when enacted, will bind the Crown in all its capacities.

Clause 4: Application of Act

1. By subclause (1) the Bill is Australia-wide in scope and extends to each external Territory including Norfolk Island.
2. By subclause (2) the Jervis Bay Territory is deemed to be part of the Australian Capital Territory and the Coral Sea Islands Territory is deemed to be part of Norfolk Island for the purposes of the Bill.

Clause 5: Application of State and Territory laws

1. The purpose of this clause is to make it clear that the Bill, subject to limited exceptions, will be the only law on the subject of interstate service and execution of process and judgments.
2. Subclause (1) preserves the power of courts and tribunals to allow substituted service.
3. Subclause (2) preserves the operation of the scheme established by the *Transfer of Prisoners Act 1983* and by uniform State and Territory legislation that provides for the transfer of a prisoner from one State or Territory to another for the purpose of the prosecution of the prisoner for an offence. This scheme contains important measures which ensure the orderly transfer of prisoners and provides some benefits for prisoners with regard to the concurrent serving of sentences.
4. Subclause (3) preserves the operation of certain procedures of State and Territory laws relating to the service of subpoenas that provide protections additional to those established in the Bill.

   Reference: Report, paragraphs 702, 456, 458, 269.
5. Subclause (4) provides that, apart from the exceptions contained in the previous provisions of the clause, the Bill is to be exclusive of State and Territory laws providing for and applying to the service and execution of their process or the judgments of their courts in other States and Territories. The Bill thus forms an exclusive code for the interstate service and execution of process and judgments. State and Territory laws regarding service of process *ex juris* will continue to apply to service of their process outside Australia.

   Reference: Report, paragraphs 720–1.

Clause 6: Interpretation

1. This clause defines a number of expressions used generally throughout the Bill, in particular:

   - *'adjudicative function'*: One of the two basic functions of tribunals, this is the function of determining the rights or liabilities of a person, including the function of making a determination altering those rights or liabilities.

     Reference: Report, paragraph 623.

   - *'authority'*: This term is used as a convenient shorthand reference to judicial office holders, magistrates, coroners and officers of courts.

     Reference: Report, paragraph 160.

   - *'civil proceeding'*: A civil proceeding is exhaustively defined as any proceeding other than a 'criminal proceeding'.

     Reference: Report, paragraphs 155–6.

   - *'court'*: This includes an 'authority' exercising the power of a court.

   - *'criminal proceeding'*: This is exhaustively defined to mean —

     - 'normal' criminal prosecutions, including those which, when instituted in a superior court, are conducted in accordance with the civil practice of the court, for example, taxation prosecutions,
     - alternative procedures whereby liability for an offence may be determined or a penalty for an offence imposed without an appearance before a court, for example, under the 'alternative procedure' established in Part VII of the *Magistrates (Summary Proceedings) Act* 1975 (Vic),
     - proceedings related to criminal prosecutions, for example, proceedings concerning the granting of bail to a person charged with an offence, proceedings for the enforcement of the conditions of bail and committal proceedings and
     - proceedings for relief, other than compensation, the right to which arises from the conviction or charging of, or intention to charge, a person in relation to an offence, for example, proceedings concerning the forfeiture of criminal profits and tools of crime, or proceedings restraining dealings with property that may be tainted by criminal activities, under the Crimes (Confiscation of Profits) Act, 1985 (NSW).

     Reference: Report, paragraphs 222–30.

   - *'initiating process'*: This means all process (eg statements of claim, summonses and writs of summons) that commences a civil or criminal proceeding and also process that is the first notice to a person of a proceeding to which the person may be capable of becoming a party.

     Reference: Report, paragraph 157.

   - *'investigative function'*: This means the function of conducting an inquiry, but not in the exercise of an adjudicative function.

     Reference: Report, paragraph 640.

- *'judgment'*: This definition is required for the purposes of Part VI of the Bill. It means —
  - a judgment, decree or order given in a civil proceeding requiring the payment of money or awarding other relief, for example, an order for specific performance or an injunction,
  - orders made in criminal proceedings for the payment of money creating a debt due to the Crown or requiring the performance of other obligations and
  - an order of a tribunal that is enforceable without an order of a court.

  For the sake of clarity, specific reference is made to final and interlocutory judgments. Because of different procedures and grounds for registering foreign judgments in the States and Territories, the definition specifically excludes foreign judgments registered in a court in Australia. Also excluded are fines — enforcement of fines is dealt with in Part IVA of the *Service and Execution of Process Act 1901*, which is not affected by the Bill.

  Reference: Report, paragraphs 514–7, 655.

- *'person under lawful restraint'*: This definition includes, for example, persons who are in custody and persons whose freedom to leave a State or Territory is subject to conditions because they have been charged with, convicted of, or sentenced for, an offence.

  Reference: Report, paragraph 298.

- *'proceeding'*: This definition clarifies that the references in the Bill to a proceeding include interlocutory proceedings and proceedings in chambers.

- *'registered post'*: This is a system of post requiring, before delivery, the signature of the addressee or a person acting for the addressee.

- *'subpoena'*: This means any process that requires a person to give oral evidence before, and/or to produce a document or thing to, a court, authority or person. While the definition clearly encompasses process usually described by the term subpoena, it also includes process known by other names.

  Reference: Report, paragraphs 282–3.

- *'tribunal'*: A tribunal is defined as a person, or body established under State or Territory law, that, under State or Territory law, may take evidence on oath or affirmation. Courts and persons exercising power conferred on them in their capacity as a judge, magistrate, coroner or officer of a court are excluded. Examples of the latter are magistrates conducting committal proceedings and coroners conducting an inquest or inquiry.

  Reference: Report, paragraph 616.

- *'warrant'*: This means all process that authorises the apprehension of persons, regardless of the other commands in the process. The definition applies to apprehension process issued in accordance with the law of a State or Territory, including such a law as applied by subsection 68(1) of the *Judiciary Act 1903*. The latter provision will ensure that there is no

room for argument, as has occurred recently, that the extradition scheme does not apply to warrants for the apprehension of persons alleged to have committed federal offences whose prosecution will take place in a court of a State or Territory.

Reference: Report, paragraphs 384–6.

Clause 7: Custodians

1. This clause defines the custodian of a person under lawful restraint.

Clause 8: Copies

1. A number of provisions allow service or execution of process to be effected with a copy of the process. This clause defines what is meant by a copy.

   Reference: Report, paragraphs 717–8.

Clause 9: Personal service on natural persons

1. This clause explains the procedure to effect personal service of a process, order or document on a natural person. The purpose of the procedures is to ensure that the person to whom a process or document is addressed actually receives the process or document.

   Reference: Report, paragraph 695.

2. Subclause (1) explains that personal service may be effected by giving the process, order or document, or a copy of the process, order or document, to the person to whom it is addressed. If the person refuses to take it when proffered, it may be put down in the person's presence and the person told, in general terms, of its nature.

3. In addition, subclause (2) provides that personal service shall be taken to have been effected if a process, order or document, or a copy, has been sent by post to the person and the person has acknowledged receipt. Any form of post may be used, provided the addressee acknowledges receipt.

   Reference: Report, paragraph 696.

Clause 10: Personal service on bodies corporate

1. This clause explains the procedure to be undertaken to effect personal service of a process, order or document on a body corporate. Again, the purpose is to ensure that the body corporate receives the process or document. Service may be effected —

   - by leaving a process, order or document, or a copy, at the local office of the body corporate (paragraph (1)(a)),
   - by registered post sent to the local office of the body corporate (paragraph (1)(b)) or

- by electronic means. The information contained in a process, order or document must be transmitted to the body corporate by a means that reproduces, in the hands of the recipient, that information as it appears in the process or document. This provision will enable use, for example, of a facsimile machine (paragraph (1)(c)).

Reference: Report, paragraphs 697–9.

2. Subclause (2) defines the term 'local office' as the registered or principal office of the body corporate in the State or Territory where service is to be effected. If the body corporate does not have such an office, which may be the case with statutory corporations, the local office is the principal place of business of the body corporate in the State or Territory where service is to be effected (paragraph (b)). Paragraph (c) covers those bodies corporate that have neither a registered or principal office, nor a principal place of business, for example, an incorporated association. The laws of the States and Territories all provide for some means of serving documents on such bodies, usually by designating a person as a person on whom documents addressed to the body may be served.

Clause 11: Personal service by agreement

1. Subclause (1) provides that, in addition to the methods of effecting personal service set out in clauses 9 and 10, personal service can be effected in a manner agreed upon by the parties.
2. Subclause (2) enables such agreement to be made by the representatives of the parties.

Reference: Report, paragraph 700.

Clause 12: Service by post

1. This clause explains the procedure to be undertaken where service by post is permitted by the Bill. Subclauses (1), (2) and (3) all provide that postal service may be effected by normal pre-paid post.
2. Subclause (4) provides for postal service through the facilities of a document exchange.

Reference: Report, paragraph 701.

Clause 13: Certain restrictions on service not to apply

1. State and Territory laws commonly provide that service of certain process may be effected only on certain days and by certain persons. It is unclear whether, under the *Service and Execution of Process Act 1901*, these conditions apply to service outside the State or Territory of issue of process. Subclause (1) states that, as a general rule, process may be served on any day and at any time and by any person. However, it provides that the States and Territories may regulate such matters in respect of process served within their boundaries. Thus rather

than the limitations arising under the law of the State or Territory of issue of process being applicable, it will be the law of the State or Territory of service that will apply.

Reference: Report, paragraphs 703–7.

2. State and Territory laws also may require that the original process be served or, even if service may be effected with a copy, that the original process be produced for inspection at the time of service. The Bill requires that certain process be served *ex juris* in the same way as it may be served in the State or Territory of issue. However, to facilitate speedy and economic service, subclause (2) states that in all such cases service of a copy of process is sufficient and that it is not necessary to produce the original.

   Reference: Report, paragraphs 708, 717.

3. Subclause (3) provides that the power to allow substituted service extends to situations where service is to be effected outside the State or Territory of issue.

   Reference: Report, paragraph 702.

Clause 14: Proof of service

1. Subclause (1) specifies the matters that have to be proved in order to prove service of a process or document.

   Reference: Report, paragraph 711.

2. Subclause (2) specifies the ways in which these matters should be proved.

   Reference: Report, paragraph 710.

3. Subclause (3) relieves the maker of an affidavit or statutory declaration from the necessity to give evidence as to service unless required to do so.

   Reference: Report, paragraph 713.

4. Subclause (4) enables a server of process to rely upon a statement by the person served as to the person's identity or an office held by the person, for the purpose of establishing the identity of or office held by the person served. Evidence of such a statement would normally be inadmissible as hearsay. Subclause (4) also overcomes this difficulty.

   Reference: Report, paragraph 712.

5. Subclause (5) raises a presumption that a letter or other object posted by pre-paid post (other than registered post) was received by the person to whom it is addressed four days after having been posted.

   Reference: Report, paragraph 714.

6. Subclause (6) enables service to be proved where a process or document has been sent by post and the addressee, or a person acting for the addressee, has signed an acknowledgment of receipt of the postal article containing the process.

   Reference: Report, paragraph 715.

Clause 15: Effect of service

1. The clause enables courts and tribunals, where process has been served or executed outside the State or Territory of issue, to conduct proceedings, subject to the proposed safeguards applying to service, as if the Bill had not been relied upon to effect service. For example, service of initiating process under the Bill will enable a court to proceed to judgment in the same way as it would if the process had been served within the State or Territory of issue of the process. Similarly, service of a subpoena under the Bill will enable a court to take whatever procedures are permitted under the law of the State or Territory of issue of the process in order to enforce compliance with the subpoena. The clause also has the effect of maintaining limitations on the jurisdiction of courts and tribunals arising otherwise than by virtue of service of process. Subject-matter limitations, for example, will continue to be relevant where service of process is effected under the Bill just as they are are when process is served within the State or Territory of issue.

   Reference: Report, paragraphs 213, 235, 287.

PART II — SERVICE OF PROCESS IN CIVIL AND CRIMINAL PROCEEDINGS

Division 1 — Initiating process in civil proceedings

Clause 16: Application of Division

1. This clause provides that Division 1 of Part II is to apply to civil proceedings.

Clause 17: Interpretation

1. This clause defines two terms used in Division 1 of Part II. Paragraph (a) states that references to a 'court' are references to the court that will hear the proceeding in relation to which initiating process has been issued.

2. Paragraph (b) provides an extended meaning to the term 'appearance' in order to cater for the variety of procedures permitted under the laws of the States and Territories by which notice is given to a court that a defendant acknowledges service or intends to take part in a proceeding or to contest the jurisdiction of a court to hear a proceeding.

   Reference: Report, paragraph 161.

Clause 18: Initiating process may be served in any part of Australia

1. Subclause (1) states that initiating process issued in one State or Territory may be served in other States and Territories. Service must be in accordance with the other provisions of Division 1.

2. Subclause (2) provides that, subject to one exception, initiating process must be served personally.

3. That exception is provided for in subclause (3). It enables initiating process issued in relation to a proceeding in a court of summary jurisdiction to be served by post.

   Reference: Report, paragraphs 676–82.

Clause 19: Information to be provided

1. The *Service and Execution of Process Act 1901* requires that process initiating a civil proceeding bear certain endorsements in order for service of the process to be effective. In place of this requirement, this clause requires that there be attached to the process or copy that is served certain notices. Failure to attach the notices will result in service being ineffective. The notices will inform the defendant of his or her rights and obligations and are specified in provisions for inclusion in Interstate Procedure Regulations set out in Appendix A of the Report.

   Reference: Report, paragraphs 199–205. Interstate Procedure Regulations, Forms 1 and 2.

Clause 20: Time for appearance

1. Subclause (1) provides that a defendant served with initiating process under the Bill is to have a period of 21 days after service within which to enter an appearance. The court is given a discretion to prescribe a shorter period where an application for that purpose is made.

2. The need to shorten the period within which an appearance may be entered by the defendant could arise from a wide variety of circumstances. Subclause (2), however, provides some guidance as to the matters to be taken into account in determining an application to shorten the 21 day period, for example, that the plaintiff seeks urgent relief.

   Reference: Report, paragraphs 206–10.

Clause 21: Appearance to state address for service

1. Subclause (1) provides that an appearance must give an address for service. In view of modern facilities for rapid communications throughout Australia the address for service may be anywhere in Australia (cf *Service and Execution of Process Act 1901* section 9).

   Reference: Report, paragraph 201.

2. Subclause (2) enables a court to set aside an appearance if no address, or a false or misleading address, for service is given in an appearance.

3. Subclause (3) clarifies that the power to set aside an appearance conferred by subclause (2) does not affect any other power a court may have under the law of the State or Territory of issue to set aside an appearance.

   Reference: Report, paragraph 210.

Clause 22: Security for costs

1. Paragraph (1)(a) enables a defendant, when served with initiating process under the Bill, to obtain an order that the plaintiff give security for costs.

2. Paragraph (1)(b) enables a court to stay proceedings until the plaintiff gives security as ordered.

3. Subclause (2) preserves other powers a court may have under the law of the State or Territory of issue to make orders requiring that security for costs be given.

   Reference: Report, paragraphs 211–2.

Clause 23: Change of venue

1. Subsection 11(1) of the *Service and Execution of Process Act 1901* requires that a plaintiff obtain leave to proceed from the court where the defendant has not entered an appearance in the proceeding. One aspect of the matters on which a grant of leave is conditional is that the proceeding have a defined nexus with the State or Territory in which it has been instituted. The need to obtain leave is abolished, as are the nexus grounds. Where a defendant does not appear, a plaintiff will be able to proceed in the action as if the initiating process had been served within the State or Territory of issue (see clause 15). However, a plaintiff should not have an unrestricted right to choose the venue for the trial of an action. This clause establishes a procedure whereby a defendant may challenge the choice of venue made by the plaintiff.

   Reference: Report, paragraphs 177–8.

2. Subclause (1) gives a person served with initiating process under the Bill a right to apply to the court in which the proceeding has been instituted for an order under the clause.

   Reference: Report, paragraph 178.

3. By subclause (2), an application under subclause (1) may be made only if the applicant for the order has entered an appearance in the proceeding. This limitation is appropriate to deter frivolous applications and parties who would apply only for the purpose of delaying the proceeding.

   Reference: Report, paragraph 185.

4. Subclauses (3) to (7) inclusive establish the procedure for making and dealing with an application. The court will be able to determine the application either on the written submissions of the parties or on a hearing (subclause (6)).

   Reference: Report, paragraph 183.

5. Subclause (8) gives the court a discretion to make an order under the clause if it is satisfied that it would be inappropriate for the proceeding to be heard by it. The court may reach that view either on application or of its own motion.

   Reference: Report, paragraphs 178, 196.

6. Subclause (9) provides some guidance as to the matters which should be considered in determining whether the venue chosen by the plaintiff is inappropriate. Rather than applying rigid and often artificial nexus grounds, the intention is that the court should have the opportunity to 'tailor-make' an appropriate nexus on a case by case basis. For that purpose, the court should consider —

   - the location of the parties and their likely witnesses,
   - the location of the subject-matter of the proceeding,
   - the financial circumstances of the parties,
   - any agreement between the parties as to the courts in which the proceeding should be instituted,
   - the appropriate law to be applied in the proceeding and
   - whether related or similar proceedings are current.

   However, contrary to the usual principle applying in cases where the appropriate venue for the trial of a proceeding is in issue, the court should not give special weight to the plaintiff's choice of venue.

   Reference: Report, paragraphs 181–2.

7. It is preferable that a challenge to the appropriateness of the plaintiff's chosen venue be made before the hearing of a proceeding commences, otherwise the time of the court may be unnecessarily wasted by commencing to hear a proceeding which it is ultimately determined should not be heard in the court. Subclause (10) therefore requires that, where an application is made after the time limited for entry of an appearance, the court should be satisfied that there are special circumstances which justify the making of an order.

   Reference: Report, paragraph 185.

8. Subclause (11) sets out the orders that a court may make where it is satisfied that it is inappropriate for the proceeding to be heard by it and also, where applicable, that there are special circumstances that justify the making of an order.

9. The first part of subclause (11) enables the court to order that the proceeding be stayed, whether unconditionally or subject to conditions, for example, that the defendant must submit to the jurisdiction of another court. The power to order a stay will be available to all courts.

   Reference: Report, paragraph 186.

10. As an alternative to a stay, paragraphs (11)(a) and (b) enable a court to order a transfer of a proceeding. A Supreme Court may order that a proceeding before it be transferred to a court of another State or Territory (subparagraph (11)(a)(i)) or to the Federal Court of Australia (subparagraph (11)(a)(ii)), so long as the court to which the proceeding is transferred is one that would have had jurisdiction to hear the proceeding if it had been commenced in that court.

11. Paragraph (11)(b) sets out the available transfer orders that may be made by courts that are not Supreme Courts. These courts can transfer a proceeding to a court of another State or Territory other than its Supreme Court. Again, the court to which the proceeding is transferred must be one that would have had jurisdiction to hear the proceeding if it had been commenced in that court. Further, if there is more than one such court in the State or Territory to which the proceeding is to be transferred, the proceeding should be transferred to the court of more limited jurisdiction.

12. Subclause (12) provides that a court of summary jurisdiction can transfer a proceeding only to another court of summary jurisdiction.

    Reference: Report, paragraphs 187–8, 193–5.

13. Subclause (13) enables the transferring court to give directions in relation to further steps to be taken in the proceeding.

    Reference: Report, paragraph 196.

14. Subclause (14) provides that, subject to clause 24, a transfer order operates to transfer a proceeding to the court specified in the order.

    Reference: Report, paragraph 191.

15. By subclause (15), the court to which a proceeding is transferred may, subject to the directions of the transferring court made under subclause (13), make similar directions in relation to the steps to be taken in a proceeding. It provides also that the proceeding shall continue as if it had been instituted in the court to which it has been transferred.

    Reference: Report, paragraph 196.

16. The object of clause 23 is to provide a mechanism to enable a proceeding to be heard in the most appropriate court. For greater certainty, subclause (16) preserves the powers of courts to stay proceedings otherwise than on the basis that there is another court that is more appropriate to hear the proceeding. For example, a court may stay a proceeding on the basis that a contract between the parties specifies that disputes should be referred to arbitration or on the basis that the proceeding is vexatious or oppressive.

    Reference: Report, paragraph 182.

Clause 24: Court may decline jurisdiction

1. This clause enables a court to which a proceeding has been transferred to decline to exercise jurisdiction in the proceeding on the application of a party to the proceeding. The application must be made within 21 days of the court being notified of the transfer order (subclause (1)).

2. Where a court makes an order declining jurisdiction, the transfer order ceases to have effect (subclause (4)).

    Reference: Report, paragraph 188.

Clause 25: Further change of venue

1. This clause provides the court to which a proceeding has been transferred with the same powers to stay the proceeding or transfer the proceeding as if the proceeding had been instituted in that court. This will enable further transfers to be made where there are special circumstances (subclause (2)). However, where a proceeding has been transferred to the Federal Court, that court will have no power to stay or transfer the proceeding under this clause (subclause (1)).

   Reference: Report, paragraph 196.

Clause 26: No restraint of proceedings

1. This clause prohibits a court in a State or Territory other than the State or Territory in which a proceeding has been instituted from restraining a party to the proceeding from taking steps in the proceeding on the basis that the venue chosen is inappropriate. This reverses the private international law rule that allows a court to restrain a party in 'foreign' proceedings from proceeding in the foreign court on the ground that the foreign court is a *forum non conveniens*. Therefore a question as to the appropriateness of the venue of a proceeding will be capable of being raised only in the court in which the proceeding is instituted.

   Reference: Report, paragraph 184.

Division 2 — Initiating process in criminal proceedings

Clause 27: Application of Division

1. This clause provides that Division 2 of Part II is to apply to criminal proceedings.

Clause 28: Alternative criminal procedures

1. This clause extends the meaning of the term 'initiating process' in relation to criminal proceedings that are not dealt with in a court.

   Reference: Report, paragraph 231.

Clause 29: Initiating process may be served in any part of Australia

1. Subclause (1) states that initiating process issued in one State or Territory may be served in other States and Territories. Service must be in accordance with the other provisions of Division 2.
2. Subclause (2) provides that, subject to one exception, initiating process must be served personally.
3. That exception is provided for in subclause (3). Initiating process may be served by post where the only penalty for the offence in relation to which the process is issued is a fine not exceeding $200 or such other amount as is prescribed by regulation.

   Reference: Report, paragraphs 232, 683.

Clause 30: Time for service

1. Subclause (1) provides that where a defendant served with initiating process under the Bill is required or permitted to do an act specified or referred to in the process not later than a particular day, service of the process is not effective unless the period between service and that day is not less than 21 days. However, a court or authority is given a discretion to prescribe a shorter period on application.

2. The need to shorten the period could arise from a wide variety of circumstances. Subclause (2), however, provides some guidance as to the matters to be taken into account in determining an application to shorten the 21 day period.

3. Subclause (3) makes it clear that an application to shorten the period of 21 days should be made to the court or authority that will hear the proceeding or, if the proceeding will not be heard before a court or authority, a court of summary jurisdiction in the State or Territory of issue of the initiating process.

Reference: Report, paragraph 233.

Division 3 — Other process

Clause 31: Application of Division

1. This clause provides that Division 3 of Part II applies to both civil and criminal proceedings.

Clause 32: Other process may be served in any part of Australia

1. Subclause (1) states that process issued in one State or Territory, other than initiating process or a subpoena addressed to a person who is not a party to the proceeding in which the subpoena is issued, may be served in other States and Territories. This clause will apply to service of a subpoena on a party to a proceeding, as well as other process, whether or not addressed to a party.

2. Subclause (2) provides that service of such process shall be effected as if the process was served within the State or Territory of issue.

Reference: Report, paragraphs 201–5, 285, 685–6.

PART III — SERVICE OF SUBPOENAS

Division 1 — Subpoenas to persons not under lawful restraint

Clause 33: Application of Division

1. This clause provides that Division 1 of Part III applies to subpoenas addressed to non-parties who are not under lawful restraint. The reference to the 'relevant time' is to the time at which service is to be effected.

Clause 34: Subpoenas may be served in any part of Australia

1. Subclause (1) states that subpoenas issued in one State or Territory by or out of a court or by an authority may be served in other States and Territories. Service must be in accordance with the other provisions of Division 1.

2. Subclause (2) provides that a subpoena must be personally.

   Reference: Report, paragraph 684.

Clause 35: Time for service

1. The general principle expressed in clause 34 is qualified in particular by this clause. Subclause (1) provides that service of a subpoena is ineffective unless the period between service and the day for compliance with the subpoena is not less than 14 days. However, the provision also gives a discretion to the court or authority of issue to allow service to be effected a shorter period before the day for compliance.

   Reference: Report, paragraphs 269–71.

2. Subclause (2) specifies that the discretion to allow service less than 14 days before the day for compliance may be exercised only if the court or authority is satisfied that —

   - the evidence likely to be given by the person to whom the subpoena is addressed, or the production of a document or thing specified in the subpoena, is necessary in the interests of justice and
   - there will be enough time between service and the day for compliance to enable the person to comply with the subpoena without undue inconvenience and also to permit the person to make application, where the law of the State or Territory of issue so allows, for relief in respect of the subpoena (see clause 38).

     Reference: Report, paragraphs 270–1.

3. By subclause (3), if a court or authority allows service of a subpoena within 14 days of the time for compliance, it must impose a condition that it not be served after a specified day. It may also impose other conditions.

   Reference: Report, paragraph 273.

Clause 36: Information to be provided

1. Paragraph (a) provides that service of a subpoena is not effective unless certain notices are attached to the subpoena or copy served. The notices will inform recipients of their rights and obligations. The required notices are specified in provisions for inclusion in Interstate Procedure Regulations set out in Appendix A of the Report.

   Reference: Report, paragraph 280. Interstate Procedure Regulations, Forms 3 and 4.

2. Paragraph (b) requires that, where the court or authority of issue has allowed an application for the service of a subpoena as referred to in clause 35, a copy of the instrument by which the application was granted must also be attached to the subpoena. This will enable the person served to verify that service has been effected in accordance with the conditions imposed by the court or authority.

   Reference: Report, paragraph 280.

Clause 37: Expenses

1. Subclause (1) provides that service of a subpoena is not effective unless the person served is given or tendered, at the time of service, enough money to cover his or her expenses in complying with the subpoena.

   Reference: Report, paragraph 274.

2. Subclause (2) enables the amount of money to be provided for witness expenses to be reduced if, for example, a ticket or travel warrant, or similar authority in respect of accommodation, is given or tendered at the time of service.

3. Subclause (3) provides guidance on the matters for which witness expenses should provide.

   Reference: Report, paragraph 277.

Clause 38: Application for relief from subpoena

1. This clause provides a procedure by which a person served with a subpoena may apply to set aside, vary or obtain other relief in respect of the subpoena. No right to make such an application is given: the procedure will only arise if such a right is given by the law of the State or Territory of issue of the subpoena. The basis on which relief might be given is governed by the law of the State or Territory of issue (subclause (9)).

   Reference: Report, paragraph 281.

Clause 39: Adjustment of expenses

1. This clause enables the court, authority or person before whom a person has complied with a subpoena to make appropriate orders to ensure that the person receives the correct amount of money to cover the reasonable costs incurred in complying with the subpoena.

   Reference: Report, paragraph 278.

Division 2 — Subpoenas to persons under lawful restraint

Clause 40: Application of Division

1. This clause provides that Division 2 of Part III applies to subpoenas addressed to non-parties who are under lawful restraint in a State or Territory other than the State or Territory of issue at the time service is to be effected. The Division

provides a procedure for securing the attendance of persons who are not at liberty to voluntarily comply with a subpoena due to lawful constraints upon their freedom of movement.

Clause 41: Order for production of person under lawful restraint

1. This clause establishes the procedure for obtaining an order for production of a person under lawful restraint at a proceeding for the purpose of giving oral evidence or producing a document or thing.

2. By subclause (1), where a subpoena has been issued by or out of a court or by an authority in a State or Territory and the person to whom it is addressed must attend before a court, authority or person for the purpose of complying with it, the court or authority of issue is given a discretion, on application, to make an order that the person to whom the subpoena is addressed be produced at the time and place at which compliance with the subpoena is required. While this provision provides for the making of a 'federal' order, the power in section 51(xxiv) of the Constitution extends to laws providing for the issue of 'federal' process to give efficacy to State process.

   Reference: Report, paragraph 296.

3. Subclause (2) sets out the matters of which the court or authority must be satisfied before making an order for production. Included are the same considerations that apply on an application for leave to serve a subpoena within 14 days of the day for compliance (see subclause 35(2)) and an additional consideration, namely, that there will be enough time to make application for relief in respect of the order for production (see clause 46).

   Reference: Report, paragraph 301.

4. Subclause (3) enables the court or authority to require that the applicant for an order for production give security for the costs associated with compliance with the order. The hearing of the application may be stayed until such security is given.

5. Subclause (4) enables conditions to be imposed on the order and specifies that the order shall be addressed to the custodian from time to time of the person named in the order.

   Reference: Report, paragraphs 302–3.

Clause 42: Service of order for production

1. Subclause (1) provides that an order for production may be served on the custodian of the person named in the order. However, the other provisions of the Division must be considered, as also must conditions imposed on the order under paragraph 41(4)(a).

2. Subclause (2) requires that the subpoena on which the order is based also be served on the person to whom it is addressed.

   Reference: Report, paragraph 304.

3. By subclause (3), an order for production and a subpoena must be served personally.

   Reference: Report, paragraph 684.

4. Subclause (4) requires that, where there is a change in custodian, the former custodian give the order to the new custodian. This will amount to personal service of the order (subclause (5)).

   Reference: Report, paragraph 314.

5. By subclause (6), service of an order for production is effective to require the custodian to comply with it unless the person has ceased to be under lawful restraint before the time for compliance with it.

   Reference: Report, paragraphs 304, 315.

Clause 43: Information to be provided

1. Subclause (1) requires certain notices to be attached to an order for production when it is served. Their purpose is to provide the custodian with the relevant forms to be used if an application is to be made under clause 46. Failure to attach the notices will result in ineffective service.

2. Subclause (2) requires certain notices to be attached to a subpoena when it is served on a person under lawful restraint. Failure to attach the notices will result in ineffective service. The information to be included in these notices is similar to that required in the notices to be attached to a subpoena served on a person not under lawful restraint (see clause 36), with additional forms that may be used if an application is to be made under clause 46. The form of the various notices are specified in provisions for inclusion in Interstate Procedure Regulations set out in Appendix A of the Report.

   Reference: Report, paragraph 305. Interstate Procedure Regulations, Forms 4, 5, 6, 7.

Clause 44: Expenses

1. This clause establishes a mechanism for enabling a person the subject of an order for production to be given witness expenses to enable the person to comply with the subpoena on which the order is based if the person ceases to be under lawful restraint before the time for compliance.

2. Subclause (1) requires that, at the time of service of the order for production, the custodian be given or tendered the amount which otherwise would have been required to have been given or tendered to the person named in the order if that person had not been under lawful restraint. Failure to do so will result in service of the order being ineffective.

3. Paragraph (2)(a) requires the custodian to give or tender an amount equal to that amount to the person if the person ceases to be under lawful restraint before the time for compliance with the order. This should be done as soon as practicable after the person has ceased to be under lawful restraint.

   Reference: Report, paragraphs 316–7.

4. Paragraph (2)(b) then provides that the person need not comply with the subpoena on which the order was based unless the required amount was given or tendered (whether by the custodian or another person) no later than a reasonable time after the person ceased to be under lawful restraint.

   Reference: Report, paragraph 317.

Clause 45: Application for relief from subpoena

1. A person under lawful restraint should not be denied rights to apply to set aside, vary or obtain other relief in respect of a subpoena served on the person merely because he or she is under lawful restraint. Thus subclause (1) enables a person under lawful restraint who is served with a subpoena to take advantage of the procedure established in clause 38 for applying for relief in respect of the subpoena.

2. Subclause (2) enables the court or authority of issue, where it grants relief in respect of a subpoena on which an order for production is based, to make consequential orders in respect of the order.

   Reference: Report, paragraph 313.

Clause 46: Application for relief from order for production

1. Subclause (1) confers a right on a custodian served with an order for production, and on the person named in the order, to apply to the court or authority that made the order to set aside or vary the order.

   Reference: Report, paragraphs 310, 313.

2. The method and time limits for making an application under this clause, and the powers of the court or authority regarding the procedure for determining the application, are the same as those that apply upon an application for relief in respect of a subpoena. Subclauses (2) and (3) provide for this.

3. Subclause (4) provides guidance on the matters to be considered in determining whether an order for production should be set aside or varied.

   Reference: Report, paragraph 312.

4. Subclause (5) enables the court or authority, where it sets aside or varies an order for production, to make consequential orders in respect of the subpoena on which the order was based.

Clause 47: Costs of compliance

1. This clause empowers the court, authority or person before which or whom compliance was required with an order for production, or a subpoena on which an order for production was based (in a case where the person has ceased to be under lawful restraint before the time for compliance with the order), to make an order (including an order binding the custodian or the person named in the order for production) for the proper apportionment or payment of the costs or expenses of compliance with the order or subpoena.

   Reference: Report, paragraphs 302, 317.

Clause 48: Custody of persons, &c.

1. Subclause (1) provides the custodian of a person required to be produced under an order for production, or an escort arrenged by the custodian, with the necessary powers, while outside the State or Territory in which the person is under lawful restraint, to ensure compliance with the order.

2. Subclause (2) amplifies these powers. It enables the custodian or escort to request that the person be kept in custody by the prison authorities of States or Territories through which the person may be taken while on the way to and from the State or Territory where the person is to be produced and also by the prison authorities of the latter State or Territory. It also requires those authorities to comply with such requests as are reasonable.

   Reference: Report, paragraphs 306–8.

3. Subclause (3) provides that a person serving a sentence of imprisonment is deemed to be serving that sentence while outside a State or Territory for the purpose of compliance with an order for production, so long as the person remains in the custody of the custodian or escort or such other custody as they arrange.

   Reference: Report, paragraph 318.

4. Subclause (4) applies certain State and Territory laws to persons while they are outside the State or Territory for the purposes of compliance with an order for production. The effect of paragraph (4)(a) is that a person who escapes from custody while outside a State or Territory for the purposes of compliance with an order for production is deemed to have escaped from custody in the State or Territory. Similarly, the effect of paragraph (4)(b) is that any failure to comply with conditions imposed as to a person's behaviour is deemed to have occurred in the State or Territory in which the person is under lawful restraint. To cater for the exigencies of interstate transfer of persons under lawful restraint, subclause (4) also empowers a custodian to impose conditions that must be complied with while a person is outside a State or Territory for the purposes of compliance with an order for production.

   Reference: Report, paragraph 319.

Clause 49: Subpoenas not requiring attendance

1. The procedures prescribed in the preceding provisions of Division 2 of Part III are designed to secure the attendance of a person as a witness where otherwise a subpoena would be ineffective to achieve that purpose. Where a subpoena addressed to a person under lawful restraint does not require the attendance of the person, it is unnecessary to obtain an order for production of the person. In such cases, the procedures for service of subpoenas on persons not under lawful restraint should apply. This clause provides for this, applying the provisions of Division 1 of Part III.

   Reference: Report, paragraph 300.

PART IV — SERVICE OF PROCESS OF TRIBUNALS

Division 1 — Preliminary

Clause 50: Interpretation

1. This clause defines a number of expressions used in Part IV, in particular:

   - *'proceeding'*: This term bears a different meaning in Part IV from that which it bears in other Parts of the Bill. It means a proceeding in a tribunal in connection with the exercise of an adjudicative function.
   - *'subpoena'*: This means process that requires a person to give oral evidence before and/or produce a document or thing to a tribunal (cf clause 6).

   Reference: Report, paragraph 621.

Division 2 — Service of initiating and other process related to adjudicative functions

Clause 51: Application of Division

1. This clause confines the operation of Division 2 of Part IV to situations where a proceeding in a tribunal satisfies one of a limited number of nexus grounds, that is, conditions giving rise to a nexus between the subject-matter of the proceeding and the venue chosen. The nexus grounds are fairly broad and have been drafted so as to eliminate the technicality of many such provisions found in State and Territory laws dealing with service of process *ex juris*.

   Reference: Report, paragraphs 630–1.

Clause 52: Interpretation

1. This clause defines two terms used in Division 2 of Part IV. Paragraph (a) clarifies that references to a 'tribunal' are references to the tribunal that will hear the proceeding in relation to which initiating process has been issued.
2. Paragraph (b) provides an extended meaning to the term 'appearance'.

   Reference: Report, paragraph 632.

Clause 53: Initiating process may be served in any part of Australia

1. Subclause (1) states that initiating process of a tribunal issued in one State or Territory may be served in other States and Territories. Service must be in accordance with the other provisions of Division 2.

   Reference: Report, paragraph 630.

2. Subclause (2) provides that, subject to one exception, initiating process must be served personally.

3. That exception is established by subclause (3). It enables initiating process to be served by post where the value of the subject-matter or the amount claimed in the proceeding in relation to which the initiating process has been issued does not exceed $3000 or such other amount as is prescribed by regulation.

4. Subclause (4) establishes an exception to subclause (3). Where the tribunal proceeding may result in the imposition of a fine exceeding $200 or such other amount as is prescribed by regulation, or in an order affecting the rights and liabilities of a person in respect of the carrying on of a profession, trade or occupation, the initiating process issued in relation to the proceeding must be served personally.

   Reference: Report, paragraphs 687–91.

Clause 54: Information to be provided

1. This clause requires that a notice be endorsed on or attached to the initiating process when served. Its purpose is to inform the person served of his or her rights and obligations. Failure to endorse or attach the notice results in ineffective service. The required notice is specified in provisions for inclusion in Interstate Procedure Regulations set out in Appendix A to the Report.

   Reference: Report, paragraph 634. Interstate Procedure Regulations, Form 8.

Clause 55: Time for appearance

1. Subclause (1) provides that where a person served with initiating process under the Bill is required or permitted to enter an appearance in a proceeding, the period within which an appearance may be entered is a period of 21 days from the day of service, or such shorter period as the tribunal may, on application, allow.

2. Subclause (2) provides for cases where there is no procedure for entering an appearance. Further steps in the proceeding may not be taken until a period of 21 days, or a shorter period allowed by the tribunal, has elapsed after service.

   Reference: Report, paragraph 632.

3. The need to shorten the 21 day period could arise from a wide variety of circumstances. Subclause (2), however, provides some guidance as to the matters to be taken into account in determining an application to shorten the 21 day period, for example, that urgent relief is sought.

   Reference: Report, paragraph 632.

Clause 56: Appearance to state address for service

1. Subclause (1) provides that an appearance must give an address for service. The address for service may be anywhere in Australia.
2. Subclause (2) enables a tribunal to set aside an appearance if no address, or a false or misleading address, for service is given in an appearance.
3. Subclause (3) clarifies that the power to set aside an appearance conferred by subclause (2) does not affect any other power a tribunal may have to set aside an appearance.

   Reference: Report, paragraph 632.

Clause 57: Security for costs

1. Subclause (1) enables a person served with initiating process under the Bill to obtain an order that the applicant in the proceeding give security for costs. By paragraph (1)(b), however, the power to make an order requiring security is confined to those tribunals that have power under their respective State or Territory laws to make an order as to costs in a proceeding.
2. Paragraph (1)(d) enables a tribunal to stay a proceeding until security as ordered is given.
3. Subclause (2) restricts the operation of an order requiring that security be given where the power of a tribunal to award costs is limited.
4. Subclause (3) preserves other powers a tribunal may have under the law of the State or Territory of issue to make orders requiring that security for costs be given.

   Reference: Report, paragraph 635.

Clause 58: Other process may be served in any part of Australia

1. Subclause (1) states that process issued by or out of a tribunal in one State or Territory, other than initiating process or a subpoena addressed to a person who is not a party to the proceeding in which the subpoena is issued, may be served in other States and Territories. This clause will apply to service of a subpoena on a party to a proceeding, as well as other process, whether or not addressed to a party.

2. Subclause (2) provides that service of such process shall be effected as if the process was served within the State or Territory of issue.

   Reference: Report, paragraphs 636, 639, 693.

Division 3 — Service of subpoenas related to adjudicative functions

Clause 59: Application of Division

1. This clause provides that Division 3 of Part IV applies with respect to subpoenas addressed to non-parties in proceedings. Because of the definition of 'proceeding', this Division will apply to subpoenas issued in connection with the exercise of an adjudicative function.

Clause 60: Order for leave or for production

1. The purpose of this clause is to impose some supervision on the service of subpoenas issued by or out of tribunals in connection with the exercise of an adjudicative function.

2. Paragraphs (1)(a) and (b) provide that a court of the State or Territory of issue may, on application, give leave to serve a subpoena issued by or out of a tribunal outside the State or Territory.

3. Where a subpoena is addressed to a person under lawful restraint in some other State or Territory and the person must attend for the purpose of compliance, paragraph (1)(c) provides for the making of an order that the person be produced at the time and place at which compliance with the subpoena is required.

4. Subclause (2) specifies the grounds to be established before the appropriate order under subclause (1) may be made. In relation to an application for leave to serve a subpoena, paragraph (a) applies the grounds specified in paragraphs 35(2)(a) and (b). In relation to an application for an order for production, paragraph (b) applies the grounds specified in paragraphs 41(2)(a) and (b).

5. Subclause (3), (4) and (5) apply certain procedural matters concerning applications made in respect of a subpoena issued by or out of a court or by an authority to the making of the appropriate applications and orders under this clause.

6. Subclause (6) defines the court to which the appropriate application should be made. By paragraph (a), where the tribunal of issue has a judge or magistrate as a member, an application should be made to that person. In other cases, paragraph (b) prescribes that the application should be made to a court that would have jurisdiction in the proceeding if it had been, or were capable of being, heard in a court. Where there is more than one such court, the application should be made to the court of more limited jurisdiction.

   Reference: Report, paragraph 638.

Clause 61: Further provisions concerning subpoena or order for production

1. This clause provides that, once the appropriate order has been made in respect of a subpoena issued by a tribunal, the provisions that apply to service of a court subpoena apply equally to service of the tribunal subpoena.

   Reference: Report, paragraph 639.

Division 4 — Service of subpoenas related to investigative functions

Clause 62: Order for leave or for production

1. This clause imposes supervision on the service of subpoenas issued by or out of tribunals in connection with the exercise of investigative functions.

   Reference: Report, paragraph 641.

2. Paragraphs (1)(a) and (b) provide that the Supreme Court of the State or Territory of issue may, on application, give leave to serve such a subpoena outside the State or Territory of issue.

3. Where a subpoena is addressed to a person under lawful restraint in some other State or Territory and the person must attend for the purpose of compliance, paragraph (1)(c) provides for the making of an order that the person be produced at the time and place at which compliance with the subpoena is required.

   Reference: Report, paragraph 642.

4. Subclause (2) requires that the Supreme Court be satisfied of certain matters before making an order under subclause (1). It should be satisfied that —

   - the evidence likely to be given by the person to whom the subpoena is addressed, or a document or thing specified in the subpoena, is relevant to the exercise of the investigative function being undertaken by the tribunal of issue,
   - the evidence document or thing cannot reasonably be obtained from a person within the State or Territory of issue of the subpoena and
   - where the evidence, document or thing may constitute or contain evidence that relates to matters of state — the public interest in having the evidence made available to the tribunal outweighs the public interest in preserving secrecy or confidentiality in respect of the evidence. The assessment of the competing public interests is to be made having regard to the purpose and subject-matter of the investigative function being undertaken by the tribunal.

   Reference: Report, paragraphs 643–6.

5. Subclause (3) defines what is included within the phrase 'evidence that relates to matters of state'. Broadly, it includes matters that, in a court, could be the subject of claim of state interest privilege.

   Reference: Report, paragraph 644.

6. Subclauses (4), (5) and (6) apply certain procedural matters concerning applications made in respect of a subpoena issued by or out of a court or by an authority to the making of the appropriate applications and orders under this clause.

Clause 63: Further provisions concerning subpoena or order for production

1. This clause provides that, once the appropriate order has been made in respect of a subpoena issued by a tribunal, the provisions that apply to service of a court subpoena apply equally to service of a tribunal subpoena.

   Reference: Report, paragraph 647.

PART V — WARRANTS

Division 1 — General

1. This Division establishes procedures for the extradition of persons from one State or Territory to another.

Clause 64: Persons subject to warrants may be apprehended

1. Subclause (1) states that a person named in a warrant issued in a State or Territory may be apprehended in another State or Territory. There will be no need for the warrant to be endorsed prior to the apprehension of the person (cf *Service and Execution of Process Act 1901* subsection 18(1)).

   Reference: Report, paragraph 389.

2. Subclause (2) specifies the persons who may effect apprehension.

3. Subclause (3) states that a warrant need not be produced when a person is apprehended. There will be no need for a provisional warrant (cf *Service and Execution of Process Act 1901* section 19A) or for reliance on powers of arrest under State or Territory laws (eg Crimes Act, 1900 (NSW) section 352A).

   Reference: Report, paragraphs 426–7.

Clause 65: Procedure after apprehension

1. This clause sets out the procedure for the extradition hearing in the State or Territory where a person is apprehended.

2. Subclause (1) requires that an apprehended person be taken before a magistrate in the State or Territory in which the person was apprehended as soon as practicable after being apprehended. Where available, the warrant or a copy of the warrant must be produced to the magistrate.

3. Subclauses (2) and (3) establish the procedure to be adopted if the warrant or a copy thereof is not produced. On the first appearance of the apprehended person, the magistrate may order the release of the person or adjourn the proceeding

for a specified time, not exceeding 7 days, and remand the person on bail or in custody. If, when the proceeding resumes, the warrant or a copy is still not produced, the magistrate must order the release of the apprehended person.

Reference: Report, paragraph 429.

4. Subclause (4) and subsequent clauses prescribe the procedure where the warrant or a copy is produced to the magistrate.

5. By subclause (4) the magistrate should, subject to certain rights the apprehended person has to seek to resist extradition, order either the non-custodial or custodial extradition of the person to the State or Territory of issue of the warrant. Conditions may be imposed on either order (subclause (5)).

   Reference: Report, paragraph 391.

6. Subclause (6) sets out the rights of the apprehended person to seek to resist extradition and the course that should be taken if the magistrate is satisfied that extradition should be refused or delayed.

7. Paragraph (6)(a) enables the person to challenge the validity of the warrant and to be released if the challenge is made out.

   Reference: Report, paragraphs 393–6.

8. Paragraph (6)(a) also enables the person to be released if he or she can satisfy the magistrate that extradition would be manifestly unjust or oppressive (cf *Service and Execution of Process Act 1901* paragraphs 18(6)(a), (b) and (c)).

   Reference: Report, paragraphs 397–407.

9. If the magistrate is satisfied that it would be manifestly unjust or oppressive for an extradition order to be effective immediately — in effect, that the manifest injustice or oppression shown by the apprehended person is of a temporary nature only — paragraph (6)(b) provides the magistrate with two choices of order. By subparagraph (i), the magistrate may make an extradition order and suspend its operation until a specified time. This course might be adopted where the magistrate is able to determine with some accuracy the period during which the matters raised by the apprehended person will continue to justify a delay in extradition. Where it is not possible for the magistrate to so determine, the course provided in subparagraph (ii) might be adopted, that is, that the magistrate adjourn the proceeding for a specified time. In either case, the magistrate is also required to order the remand of the person on bail or in custody until the specified time.

   Reference: Report, paragraphs 414–7.

10. Subclause (7) enables an application to be made for the variation of an order made under paragraph (6)(b). For example, it may be necessary to vary the date of execution of an extradition order where unforeseen circumstances have arisen.

    Reference: Report, paragraph 416.

11. When a proceeding resumes after an adjournment ordered under subparagraph (6)(b)(ii), subclause (8) specifies the action to be taken. The magistrate should either order the extradition of the person or the person's release (paragraph (a)), make an extradition order and suspend its operation until a specified time (paragraph (b)) or make a further order adjourning the proceeding for a specified time (paragraph (c)). If either of the latter 2 courses are adopted, the magistrate should also order the remand of the person on bail or in custody until the specified time.

Clause 66: Procedure on remand on bail

1. This clause specifies the procedure to be followed where a magistrate has made a non-custodial extradition order. Its purpose is to facilitate the enforcement of bail granted to an apprehended person under such an order by the relevant authorities in the State or Territory of issue of the warrant.

2. By subclause (1) the magistrate must prepare an instrument setting out the conditions upon which bail has been granted. The magistrate and the person shall each sign the instrument (subclause (2)).

3. Subclause (3) requires that a copy of the instrument be given to the apprehended person and that a further copy be furnished to the court, authority, tribunal or person before which or whom the person has been remanded to appear in the State or Territory of issue of the warrant.

4. If the person refuses to sign the instrument, or does not comply with a condition precedent to release on bail, for example, the provision of security for compliance with the bail conditions, subclause (4) requires the magistrate to revoke the non-custodial extradition order and to make a custodial extradition order.

   Reference: Report, paragraph 434.

5. Subclause (5) requires that any sum of money or other thing deposited as security for compliance with bail conditions under a non-custodial extradition order be paid or given to the Attorney-General, or if there is no Attorney-General, the Administrator, of the State or Territory of issue of the warrant.

   Reference: Report, paragraph 436.

Clause 67: Review

1. This clause provides an avenue for review of an order made by a magistrate under clause 65.

2. By subclause (1), either the apprehended person or a person to whom the warrant was directed may apply for review of a magistrate's order to the Supreme Court of the State or Territory in which apprehension occurred. The application must be made within 7 days of the making of the order which it is sought to have reviewed.

3. Subclause (2) provides for the relevant parties to the review and subclause (3) requires that notice of the application for review be served personally or by post on the respondent.

4. Subclause (4) enables the Supreme Court to preserve the status quo pending the review.

5. By subclause (5), the review is to be by way of rehearing.

6. The Supreme Court is given wide powers by subclause (6) in relation to the orders which it may make on the review. It may confirm or vary the order, or revoke the order and make a new order.

   Reference: Report, paragraphs 419–21.

7. Subclauses (8) and (9) apply the provisions of clause 66 where the order confirmed, varied or made by the Supreme Court is a non-custodial extradition order.

Clause 68: Law applicable to grant of bail

1. This clause provides that the law of the State or Territory in which a person has been apprehended will apply in relation to the exercise of powers given by the preceding provisions of the Division to grant bail to the person. To secure this objective in all cases, it is necessary to exclude the operation of subsection 68(1) of the *Judiciary Act 1903*, which may have the effect of applying the law of the State or Territory of issue of a warrant where the person named in the warrant is alleged to have committed an offence against federal law.

   Reference: Report, paragraphs 431–2.

Clause 69: Enforcement, &c., of bail

1. This clause provides for the application of the relevant laws of the State or Territory of issue of a warrant to the enforcement of bail granted to a person under a non-custodial extradition order in another State or Territory.

   Reference: Report, paragraphs 435–6.

Clause 70: Custody, &c., of persons

1. Subclause (1) provides that, for the purpose of complying with a custodial extradition order, the person to whose custody the apprehended person has been committed may request the prison authorities of States or Territories through which the person may be taken while on the way to the State or Territory of issue of the warrant to keep the person in custody. These authorities must comply with such requests as are reasonable.

   Reference: Report, paragraph 437.

2. The effect of subclause (2) is that a person who escapes from custody while on the way to the State or Territory of issue of a warrant is deemed to have escaped from custody in the State or Territory.

   Reference: Report, paragraph 438.

Clause 71: Warrants issued by tribunals

1. This clause restricts the circumstances in which a person named in a warrant issued by a tribunal may be apprehended outside the State or Territory of issue.
2. Subclause (1) provides that the preceding provisions of Division 1 do not apply in relation to a warrant issued by or out of a tribunal unless certain conditions are met.
3. Paragraph (a) relates to a warrant that has been issued because of non-compliance with a subpoena in relation to which an appropriate order has been made under clause 60 or 62, that is, a grant of leave for the service of the subpoena outside the State or Territory of issue. As the service of such a subpoena has been subject to supervision, it is not necessary to impose further supervision if the person to whom the subpoena was addressed fails to comply with the subpoena.
4. Paragraph (b) relates to warrants to which paragraph (a) does not apply. In relation to these warrants, the preceding provisions of the Division do not apply unless the Supreme Court of the State or Territory of issue makes an order under subclause (3).
5. Subclause (2) expands the requirements of clause 65 in relation to a warrant issued as mentioned in paragraph (1)(a). In addition to producing the warrant or a copy of the warrant to the magistrate conducting the extradition hearing, a copy of the instrument giving leave for service of the subpoena must be produced.
6. Subclause (3) provides the Supreme Court of the State or Territory of issue of a warrant (not being a warrant referred to in paragraph (1)(a)) with a discretion to make, on application, an order authorising the apprehension of the person named in the warrant.
7. Subclause (4) specifies the matters of which the Supreme Court must be satisfied before making an order authorising the apprehension of a person named in a warrant issued by a tribunal. Paragraphs (a) and (b) specify different grounds depending on whether the warrant was issued in connection with the exercise of an adjudicative function or in connection with the exercise of an investigative function. The grounds specified in relation to adjudicative warrants are essentially the same as those that apply to adjudicative subpoenas (see clause 60), while the grounds applying in relation to investigative warrants are essentially the same as apply in relation to investigative subpoenas (see clause 62). In respect of the latter warrants, subclause (5) provides for the meaning of the phrase 'evidence that related to matters of state'.
8. By subclause (6), the Supreme Court may impose conditions on an order made under this clause.

9. Subclause (7) provides for the application of the preceding provisions of the Division to a warrant where an order has been made authorising the apprehension of the person named in the warrant. By paragraph (a), the application of those provisions is subject to the conditions, if any, imposed by the Supreme Court on the order. Paragraph (b) expands the requirements of clause 65 so that, in addition to producing the warrant or a copy of the warrant to the magistrate conducting the extradition hearing, a copy of the order made by the Supreme Court must be produced.

   Reference: Report, paragraphs 648–53.

Clause 72: Release of persons unnecessarily detained

1. The purpose of this clause is to ensure that a person extradited in custody to the State or Territory of issue of a warrant for the purpose of giving oral or documentary evidence is not detained in custody for a greater time than is necessary.

2. Subclause (1) provides that such a person may apply to a court for release from custody. Subclause (2) provides for the parties to such an application and subclause (3) requires that notice of the application be served personally or by post on the respondent.

3. Subclause (4) provides a court with a discretion to order the release of the person if it is satisfied that the person has been in custody for an unnecessarily long time or that it is not necessary that the person continue to be held in custody to secure the giving or production of the evidence.

4. Subclause (5) specifies the court to which an application for release should be made. Where the warrant was issued by or out of a court or authority, application should be made to that court or authority (paragraph (a)). In any other case application should be made to the Supreme Court of the State or Territory of issue (paragraph (b)).

   Reference: Report, paragraph 439.

Division 2 — Suppression orders

1. This Division confers on magistrates conducting extradition proceedings and on Supreme Courts conducting reviews of magistrates' orders the power to restrict reporting of proceedings or findings in order to avert prejudice to criminal jury trials.

Clause 73: Interpretation

1. This clause defines a number of expressions used only in the Division:

   - *'jury'*: This means a jury trying a criminal offence in a court.

- *'protected person'*: This is the person whose jury trial may be prejudiced by the reporting of proceedings or findings made in an extradition hearing or review: in effect, the person for whose benefit an order under this Division may be made.
- *'publishing organisation'*: This covers individuals and corporate bodies engaged (whether or not for profit) in the business of publishing written publications or making radio or television broadcasts.
- *'suppression order'*: This means an order prohibiting the report of any part of the proceeding or review, or any finding made in the proceeding or review, under the operative provision of this Division (subclause 74(2)), including an interim suppression order.

Clause 74: Suppression orders

1. Subclause (1) specifies that the power to make a suppression order arises where the magistrate or Supreme Court is satisfied that a report of a part of a proceeding or review held in public, or of a finding publicly made, would give rise to a substantial risk that, by virtue of influence exerted on jurors, the fair trial of any person charged with a criminal offence triable by jury might be prejudiced.

   Reference: Report, paragraph 442.

2. Subclause (2) formally confers the power to make a suppression order, either on application or of the magistrate's or court's own motion.

3. Subclause (3) renders the power exclusive: no other power that a magistrate or Supreme Court might have to make an order for the purpose of preventing or lessening prejudice of the type referred to in subclause (1) may be exercised where the power conferred by this clause is exercised.

   Reference: Report, paragraph 442.

Clause 75: Duration, &c., of suppression orders

1. Subclause (1) provides that a suppression order remains in force only until one of certain events occurs. These events result in there being no continuing risk of prejudice of the kind which prompted the making of the suppression order. In particular, where the protected person is the person concerned in extradition proceedings, whether before a magistrate or Supreme Court, a suppression order ceases to have effect (subject to the 7 day period for the making of applications for review of magistrates' orders) where the person is released under an order made in those proceedings.

   Reference: Report, paragraph 444.

2. By paragraph (2)(a), a suppression order must state the locality in which it is to be enforceable. It may not be necessary for a suppression order to be enforceable throughout Australia.

   Reference: Report, paragraph 445.

3. By paragraph (2)(b) a suppression order may be made subject to exceptions and conditions.

Clause 76: Interim suppression orders

1. This clause empowers a magistrate or Supreme Court, when an application has been made for a suppression order, to make an interim suppression order without inquiring into the merits of the matter. The order will have effect, unless revoked, until the application is determined.

   Reference: Report, paragraph 447.

Clause 77: Variation and revocation of suppression orders

1. This clause provides for the variation or revocation of a suppression order.
2. By paragraph (1)(a), a suppression order made by a magistrate in an extradition hearing may be varied or revoked by a magistrate in the State or Territory in which the proceeding is or was conducted.
3. By paragraph (1)(b), a suppression order made by a Supreme Court on review may be varied or revoked by the Supreme Court.
4. By paragraph (1)(c), any suppression order made under the Division may be varied or revoked by a magistrate or court before which the protected person has appeared in connection with the offence with which the person is charged.
5. Subclause (2) empowers variation or revocation of a suppression order either on application or on a magistrate's or court's own motion.

   Reference: Report, paragraph 448.

Clause 78: Application, &c.

1. Subclause (1) lists the persons who may apply for a suppression order or for the variation or revocation of a suppression order as follows:

   - a party or witness in the proceeding or review in which the order is sought or was made;
   - a publishing organisation;
   - a person with a 'special interest' in the question before the magistrate or court; and
   - in the case of an application to vary or revoke an order — the original applicant for the order.

   Reference: Report, paragraph 446.

2. Subclause (2) enables any of the persons specified in subclause (1) to present arguments and/or evidence to the magistrate or court on the question whether a suppression order should be made, varied or revoked. The person will not be joined as a party.

3. Subclause (3) empowers the magistrate or court to delay the proceeding or review to allow evidence or arguments to be presented in accordance with subclause (2).

   Reference: Report, paragraph 447.

Clause 79: Appeals against suppression orders

1. Subclause (1) provides for appeals as of right against decisions to make or not to make a suppression order or to vary or revoke or not to vary or revoke a suppression order. The provision is subject to the Judiciary Act 1903, whereby appeals to the High Court are by special leave only.
2. Subclause (2) provides for the appeal to go to —
   - where the decision was made by a magistrate — the Supreme Court of the State or Territory in which the decision was made or
   - where the decision was made by a court — the court to which appeals against final judgments and orders of the court in civil proceedings generally lie.
3. Subclause (3) states that the appeal rights conferred by this clause are exhaustive.
4. Subclause (4) empowers the appellate court to confirm, vary or revoke the decision concerned (including substituting its own order for an order already made) and to make orders dealing with costs and other ancillary matters.

   Reference: Report, paragraph 449.

Clause 80: Institution of appeals

1. This clause lists the persons who may institute an appeal under clause 79 as follows:
   - the applicant (where the decision was made on application);
   - a party to the proceeding or review in which the decision was made;
   - a publishing organisation, if it either made a submission to the magistrate or court which made the decision appealed against or satisfies the appellate court that its failure to make such a submission was not attributable to a lack of diligence;
   - a person who made a submission to the magistrate or court which made the decision appealed against;
   - a person who did not make such a submission, but who satisfies the appellate court that

- he or she has the requisite 'special interest' and
- the failure to make such a submission was not attributable to a lack of diligence.

Reference: Report, paragraph 449.

Clause 81: Disobedience of suppression orders

1. Subclause (1) creates an offence of failing or refusing to comply with a suppression order.
2. Subclause (2) establishes a defence to a prosecution under subclause (1) if it is proved that —
   - at the time of the publication, the defendant did not know of a fact whereby the publication constituted a contravention of subclause (1) (for example, that the suppression order had been made) and
   - either that the defendant had taken all reasonable steps to ascertain such a fact or, even if those steps had been taken, the defendant would not have discovered such a fact.

Reference: Report, paragraph 450.

PART VI — JUDGMENTS

1. This Part provides for the enforcement and execution of a judgment, decree or order of a State or Territory court or an order of a State or Territory tribunal in courts in other States or Territories.

Clause 82: Interpretation

1. This clause defines a number of expressions used in Part VI:
   - *'court of rendition'*: This is the court in which a judgment was given. If the judgment is an order of a tribunal and the law of the State or Territory in which the tribunal is established provides that the order may be enforced without registration or filing in a court, the court of rendition is the tribunal. In respect of other orders of tribunals, the court of rendition is the court in which the order is registered or filed otherwise than under this Part.
   - *'enforcing court'*: This is a court in which a judgment is filed under subclause 83(1).
   - *'place of rendition'*: This is a shorthand phrase for
     the State or Territory in which the court of rendition is established.
   - *'proceeding'*: The definition prescribed in clause 6 is expanded to include a proceeding as defined in clause 50, namely, a proceeding before a tribunal.

- *'relevant initiating process'*: This is the initiating process issued in relation to a proceeding in which a judgment has been given.

Clause 83 – Enforcement of judgments

1. This clause sets out the procedures by which a judgment given in one State or Territory can be enforced in another.

2. Subclause (1) provides that where a copy of a judgment certified by an officer of the court of rendition to be a true copy of the judgment or a copy of that copy is produced to the prothonotary, registrar or other proper officer of an appropriate court in a State or Territory other than the place of rendition, that officer must file the copy in the court. The officer has no discretion to refuse to file the copy.

   Reference: Report, paragraphs 523–5, 657.

3. Subclause (2) provides that upon filing the judgment becomes a record of that court. It is further provided by paragraph (a) that the judgment has the same effect and, by paragraph (b), that subject to subclause (3), may give rise to the same proceedings by way of enforcement or execution as if the judgment had been given by the court in which it is filed.

   Reference: Report, paragraphs 526, 660.

4. Subclause (3) provides that a judgment filed under this clause is capable of being enforced only if, and to the extent that, at the time when the proceeding for enforcement is or is to be taken, the judgment is capable of being enforced in or by the court of rendition (paragraph (a)) or a court in the place of rendition (paragraph (b)). This clause will prevent enforcement of, or the taking of other proceedings on, a judgment filed under this clause where, for example, the judgment has been satisfied in the court of rendition. Similarly, where the judgment has expired through lapse of time, it will not be possible to enforce the judgment. While the judgment creditor will have to satisfy the court in which enforcement proceedings are taken that the judgment is capable of enforcement in the place of rendition, the Bill leaves the manner in which that is to be done to the discretion of the court in which those proceedings are taken. There is no specific requirement to file an affidavit as to the enforceability of the judgment.

   Reference: Report, paragraphs 518, 656.

5. Paragraph (4)(a) defines the appropriate court for the purposes of the filing of a copy of a judgment. This is a court in or by which relief as given by the judgment could have been given. If there is more than one such court, the copy judgment should be filed in the court of more limited jurisdiction.

   Reference: Report, paragraphs 530–5, 659.

Clause 84 – Stay may be granted

1. Subclause (1) enables the judgment debtor to obtain an order staying proceedings or postponing the commencement of proceedings by way of enforcement or

execution of a judgment filed under clause 83. The court in which those proceedings are or are to be taken has a discretion to make the order. The purpose of a stay or postponement is to give the judgment debtor an opportunity to make and prosecute action to have the judgment set aside or varied or to obtain other relief in respect of the judgment. A condition to that effect must be imposed where a stay or postponement is ordered and the time to be permitted for doing so must also be specified.

2. Subclause (2) empowers the court to impose further conditions on an order staying or postponing proceedings, including conditions as to giving security for costs.

3. Subclause (3) clarifies that the action that a judgment debtor may take to set aside or vary or obtain other relief in respect of the judgment after a stay or postponement of proceedings must be taken in a court that, under a law in force in the place of rendition, has power to grant such relief. No such proceedings may be taken in a court in the State or Territory in which a judgment has been filed (see also clause 87).

   Reference: Report, paragraphs 546, 665.

Clause 85: Costs

1. Paragraph (a) entitles a judgment creditor to recover the reasonable costs of obtaining a certified copy of a judgment and filing it. The Governor-General has power to prescribe the fees that should apply (paragraph 91(2)(c)), but where no relevant regulation is made, those fees are to be determined by the law of the State or Territory where the copy judgment is filed (paragraph 91(5)(c)).

   Reference: Report, paragraphs 540–1.

2. Paragraph (b) provides for the entitlement to and liability for costs associated with proceedings by way of enforcement or execution of a judgment filed under clause 83. These are to be assessed as if those proceedings were taken on a similar judgment of the court in which it is filed.

   Reference: Report, paragraphs 542, 663.

Clause 86: Interest

1. Paragraph (a) provides that interest on a judgment filed under clause 83 is to be assessed on the basis of the law applying in the place of rendition.

   Reference: Report, paragraph 543.

2. By paragraph (b), interest will only be recoverable to the extent that the judgment creditor satisfies the court in which enforcement or execution proceedings are taken as to the amount of the interest.

   Reference: Report, paragraphs 545, 664.

Clause 87: Rules of private international law not to apply

1. This clause states that the rules of private international law regarding recognition and enforcement of foreign judgments have no relevance where enforcement or execution of a judgment is sought under this Part.

   Reference: Report, paragraphs 519–21.

PART VII — MISCELLANEOUS

Clause 88: Jurisdiction of courts with respect to matters arising under Act

1. Subclause (1) provides for the investing of federal jurisdiction in State courts and, so far as the Constitution allows, the conferral of jurisdiction of Territory courts, with respect to matters arising under the Bill. The matters referred to are the specific powers conferred on courts by the Bill, not proceedings in which process has been served under the Bill.

2. Subclause (2) clarifies that the jurisdiction so invested or conferred is not affected by limits on the jurisdiction of State and Territory courts arising under State or Territory law.

Clause 89: Jurisdiction of courts and tribunals in proceedings

1. Subclause (1) states, for greater certainty and clarity, that the jurisdiction of a State court arising by virtue of service of process under the Bill is not affected by any limitation arising under a law of a State or Territory concerning the locality in which process may be served. The purpose of the clause is to make it plain that the Bill is effective to enable service of process outside a State or Territory notwithstanding that the law of a State or Territory does not provide for service of process outside the State or Territory. Other limits on jurisdiction arising under State or Territory law continue to be relevant, for example, limits on the value of claims that may be litigated in a State or Territory court.

   Reference: Report, paragraphs 213, 234.

2. Subclause (2) clarifies that the jurisdiction of Territory courts by virtue of service under the Bill is subject to the limits of the Constitution.

   Reference: Report, paragraph 197.

3. Subclause (3) limits the jurisdiction of a court to hear proceedings for the enforcement or execution of a judgment given in a proceeding in which the initiating process was served under the Bill. Its purpose is to ensure that the judgment debtor is aware of the proceedings. The initiating process must have been served personally on the judgment debtor or the judgment debtor must have received actual notice of the judgment.

   Reference: Report, paragraph 682.

4. Subclause (4) provides that references in this clause to a court and to a proceeding are to be taken to include references to a tribunal and to a proceeding in a tribunal.

Clause 90: Constitution of courts

1. This clause provides that the jurisdiction of a Supreme Court in matters arising under certain provisions of the Bill is to be exercised by the Supreme Court constituted by a single judge.

Clause 91: Regulations

1. Subclause (1) confers a power on the Governor-General, drafted in the usual terms, to make regulations under the Bill.
2. Subclause (2) makes clear that the powers of the Governor-General extend to the making of regulations regarding certain aspects of practice and procedure in connection with the service and execution of process and judgments. The power also extends to the prescribing of certain fees and costs. The power of Supreme Court judges to make rules on these matters is also retained (see Interstate Procedure (Miscellaneous Provisions) Bill 1987 subclause 3(1)) so that these matters may be adequately regulated if the regulations do not cover all matters appropriate to be covered.
3. Subclause (3) enables the regulations to differentiate between the States and Territories, process and judgments, and courts and tribunals in relation to the matters prescribed in the regulations.
4. Subclauses (4) and (5) provide that, in so far as the regulations do not deal with certain matters of practice and procedure or fees and costs, those matters are to be regulated by the relevant laws of the States or Territories.

Reference: Report, paragraph 723.

INTERSTATE PROCEDURE (MISCELLANEOUS PROVISIONS) BILL 1987

OUTLINE

1. The purpose of the Interstate Procedure (Miscellaneous Provisions) Bill is to repeal most provisions of the *Service and Execution of Process Act 1901* in consequence of the enactment of the Interstate Procedure Bill 1987 and to amend the *Transfer of Prisoners Act 1983* to implement a recommendation of the Law Reform Commission in its report ALRC 40, *Service and Execution of Process* (1987).

NOTES ON CLAUSES

PART I — PRELIMINARY

Clauses 1 and 2: Short title and commencement

1. These clauses provide for the short title and commencement of the Bill. The Bill, when enacted, will come into operation on the day on which the *Interstate Procedure Act 1987* comes into operation.

PART II — SERVICE AND EXECUTION OF PROCESS ACT

Clause 3: Repeal and saving

1. Subclause (1) provides for the repeal of the *Service and Execution of Process Act 1901* except as to sections 1 and 2, Part IVA and section 27 and the Fourth Schedule to the Act. The provisions retained deal with enforcement of fines imposed by courts of summary jurisdiction (a subject excluded from the Commission's Terms of Reference) and with the power of courts to make rules in relation to service and execution of process and judgments.
2. Subclause (2) provides, in the usual terms, for the continuance of proceedings commenced before the enactment of this Bill.

PART III — TRANSFER OF PRISONERS ACT

Clause 4: Principal Act

1. This clause provides for references to the Principal Act, the *Transfer of Prisoners Act 1983*, in this Part.

Clause 5: Proceedings before court of summary jurisdiction

1. This clause amends section 10 of the Principal Act by omitting subsection (4) and substituting another subsection. This is to bring the grounds on which a prisoner may seek to resist the making of a transfer order into line with the grounds on which a person may seek to resist extradition under the Interstate Procedure Bill 1987, namely, manifest injustice or oppression, while retaining the ground of likely prejudice to proceedings involving the prisoner.

   Reference: Report, paragraph 458.

Appendix B
Service and Execution of Process Act 1901

SERVICE AND EXECUTION OF PROCESS ACT 1901

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SERVICE AND EXECUTION OF PROCESS ACT 1901

An Act to provide for the Service and Execution throughout the Commonwealth and the Territories of the Civil and Criminal Process and the Judgments of the Courts of the States and of the Territories, and for other purposes connected therewith

PART I — PRELIMINARY

Short title

1. This Act may be cited as the *Service and Execution of Process Act 1901*.

Extension to Territories

2. (1) This Act extends to Norfolk Island, the Territory of Papua and the Territory of New Guinea.

(2) For the purposes of this Act —

(a) the Territory of Papua and the Territory of New Guinea shall be deemed to be one Territory of the Commonwealth;

(b) the Jervis Bay Territory shall be deemed to be part of the Australian Capital Territory; and

(c) a reference to a part of the Commonwealth shall be read as including a reference to a Territory to which this Act extends or is for the time being applied by the regulations.

Interpretation

3. In this Act, unless the contrary intention appears —

"Court" includes any judge or justice of the peace acting judicially;

"Court of Record" includes any court that is required to keep a record of its proceedings;

"defendant" includes any party against whom relief is sought in a suit or who is required to attend the proceedings in an action as a party thereto;

"judgment" includes any judgment, decree, rule or order given or made by a court in any suit whereby any sum of money is made payable or any person is required to do or not to do any act or thing other than the payment of money;

"party" includes the Commonwealth or a State or any person suing or being sued on behalf of the Commonwealth or a State;

"plaintiff" includes —

(a) the Crown;

(b) any person suing on behalf of the Crown; and

(c) any party seeking relief in a suit against any other party;

"suit" means any suit, action or original proceeding between parties or *in rem*, but does not include —

(a) a suit, action or proceeding in which a person is charged with an offence, whether the offence is punishable summarily or on indictment; or

(b) except in Part IV, a suit, action or proceeding under a law of a State or part of the Commonwealth that makes provision with respect

to the maintenance of wives, children or other persons or with respect to affiliation;

"writ of summons" means any writ or process by which a suit is commenced or of which the object is to require the appearance of any person against whom relief is sought in a suit or who is interested in resisting relief sought in a suit.

PART II — SERVICE OF PROCESS

Division 1 — Service of Writs of Summons

Writ of summons may be served in any part of the Commonwealth

4. (1) A writ of summons issued out of or requiring the defendant to appear at any Court of Record of a State or part of the Commonwealth may be served on the defendant in any other State or part of the Commonwealth.

(2) Subject to any rules of court that may be made under this Act, the service under this section of a writ of summons may be effected —

(a) in the same manner as if the writ were served on the defendant in the State or part of the Commonwealth in which the writ was issued; or

(b) without limiting the generality of the foregoing, where the writ of summons is to be served in a State or Territory on a corporation that —

(i) is incorporated under a law in force in that State or Territory relating to companies; or

(ii) is a foreign company for the purposes of, and is registered as such a company under, such a law of that State or Territory,

by leaving at, or by sending by post to, the place that is, for the purposes of that law, the registered office of the corporation the writ of summons or a copy of the writ of summons.

Indorsement on writ for service outside State

5. (1) Every writ of summons for service under this Act out of the State or part of the Commonwealth in which it was issued shall, in addition to any other indorsement or notice required by the law of such State or part of the Commonwealth, have indorsed thereon a notice to the following effect (that is to say):

"This summons [*or as the case may be*] is to be served out of the State [*or as the case may be*] of and in the State [*or as the case may be*] of ."

(2) Every writ of summons to which, by the law of such State or part, an appearance is required to be entered, shall have indorsed thereon a notice to the following effect (that is to say):

"Your appearance to this summons [*or as the case may be*] must give an address at some place within 10 kilometres of the office of the Court of at which address proceedings and notices for you may be left."

(3) Every writ of summons for service under this Act shall also contain or have indorsed thereon or annexed thereto a short statement of the nature of the claim made or the relief sought by the plaintiff in the suit, and if the plaintiff sues in a representative capacity shall also state such capacity.

Effect where writ of summons not properly indorsed

6. If a writ of summons or copy thereof does not bear all the indorsements hereby required it shall be ineffective for service under this Act.

Concurrent writs may be issued

7. A writ of summons for service out of the State or part of the Commonwealth in which it was issued may be issued as a concurrent writ with one for service within such State or part of the Commonwealth and shall in that case be marked as concurrent.

Time limited for appearance

8. The period specified in a writ of summons for service under this Act as the period within which a defendant may enter an appearance to the writ of summons shall be —

(a) if the writ of summons is issued in a State, in the Australian Capital Territory or in the Northern Territory and is to be served in a State or in either of those Territories — not less than twenty days after service of the writ has been effected; or

(b) in any other case — not less than forty-five days after service of the writ has been effected,

or, if a longer period is prescribed by the rules of the court out of which the writ of summons is issued, not less than that longer period.

Appearance to state address for service

9. (1) Every appearance entered by or on behalf of a defendant to a writ of summons served on him under this Act shall give an address at some place within 10 kilometres of the office of the Court out of which the writ was issued, at which address all proceedings and notices may be left for him.

(2) If such address is not given or is fictitious or illusory the appearance may be set aside as irregular.

Order for plaintiff to give security for costs

10. Any defendant who has been served under this Act with a writ of summons may apply to the Court out of which the writ was issued, or a Judge thereof, for an order compelling the plaintiff to give security for costs, and upon such application the Court or Judge may make the order.

Proceedings where no appearance entered

11. (1) When no appearance is entered or made by a defendant to a writ of summons served on him under this Act, if it is made to appear to the Court from which the writ was issued or a Judge thereof —

(a) that the subject-matter of the suit, so far as it concerns such defendant is —

(1) land or other property situate or being within the State or part of the Commonwealth in which the writ was issued; or

(2) shares or stock of a corporation or company having its principal place of business within that State or part; or

(3) any deed, will, document, or thing affecting any such land, shares, stock, or property; or

(b) that any contract in respect of which relief is sought in the suit against such defendant by way of enforcing, rescinding, dissolving, annulling, or otherwise affecting such contract, or by way of recovering damages or other remedy against such defendant for a breach thereof, was made or entered into within that State or part; or

(c) that the relief sought against the defendant is in respect of a breach, within that State or part, of a contract wherever made; or

(d) that any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was done or is to be done or is situate within that State or part; or

(e) that at the time when the liability sought to be enforced against the defendant arose he was within that State or part; or

(f) in a matrimonial cause —

(i) that the domicile of the person against whom any relief is sought is within that State or part; or

(ii) that the proceedings were instituted under the *Matrimonial Causes Act 1959*,

and if one of the following is also made to appear to such Court or Judge —

(g) that the writ was personally served on the defendant; or in the case of a corporation served on its principal officer or manager or secretary within the State or part in which service is effected;

(h) that reasonable efforts were made to effect personal service thereof on the defendant, and that it came to his knowledge or in the case of a corporation that it came to the knowledge of such officer as aforesaid (in which case it shall be deemed to have been served on the defendant); or

(i) that, in a case where the defendant is a corporation that —

(i) is incorporated under a law in force in a State or Territory relating to companies; or

(ii) is a foreign company for the purposes of, and is registered as such a company under, such a law,

service of the writ was effected in the manner specified in paragraph (b) of sub-section (2) of section 4,

such Court or Judge may on the application of the plaintiff order from time to time that the plaintiff shall be at liberty to proceed in the suit in such manner and subject to such conditions as such Court or Judge may deem fit, and thereupon the plaintiff may proceed in the suit against such defendant accordingly.

(2) Any such order may be rescinded or set aside or amended on the application of the defendant.

Effect of judgment

12. When a judgment is given or made against a defendant who has been served with a writ of summons under this Act, such judgment shall have the same force and effect as if the writ had been served on the defendant in the State or part of the Commonwealth in which the writ was issued.

No increased jurisdiction conferred by this Part

13. This Part does not confer on any Court jurisdiction to hear or determine any suit which it would not have jurisdiction to hear and determine if the writ of summons had been served within the State or part of the Commonwealth in which the writ was issued.

Division 2 — Service of other Process

Process may be served in any part of the Commonwealth; mode of service

14. (1) When, in any suit in a Court of Record of a State or part of the Commonwealth, any writ (other than a writ of summons) notice decree or other process is required to be served on any party or person, such writ notice decree or process may be served on such party or person in any other State or part of the Commonwealth.

(2) Such service may, subject to any Rules of Court which may be made under this Act, be effected in the same way, and shall have the same force and effect, as if service were effected in the State or part of the Commonwealth in which the writ notice decree or process was issued.

(3) Thereupon all such proceedings may be taken as if the writ, notice, decree, or process had been served in the State or part of the Commonwealth in which it was issued.

Service of summons, &c., issued on information, &c.

15. (1) This section applies to a summons or other process, not being a summons or other process to which section 4 or 14 applies, which is issued on an information, complaint or application made on, or supported by, oath, being a summons or other process which —

(a) requires a person to appear before a court to answer to the information, complaint or application; or

(b) gives to a person notice of the hearing before a court of the information, complaint or application.

(2) A summons or other process to which this section applies which is issued in one State or part of the Commonwealth may be served on the person to whom it is addressed in another State or part of the Commonwealth.

(3) Service under this section may, subject to rules of court in force under this Act, be effected in the same way as it could be effected in the State or part of the Commonwealth in which the summons or other process was issued.

(4) Service so effected shall have the same force and effect as if it had been service in the State or part of the Commonwealth in which the summons or other process was issued, and if the person on whom service has been effected fails to appear before the court at the time and place specified in the summons or other process, and it appears to the court that service was effected a sufficient time before the time so specified, the like proceedings may be taken as if service had been effected in the State or part of the Commonwealth in which the summons or other process was issued.

Subpoena or summons to witness may be served in another State by leave of a Judge, &c.

16. **(1)** When a subpoena or summons has been issued by or out of a Court, or by a Judge, a Police, Stipendiary or Special Magistrate or a Coroner, in any State or part of the Commonwealth, requiring any person to appear and give evidence or to produce books or documents, in any civil or criminal trial or proceeding (including any proceeding before a Coroner), such subpoena or summons may upon proof that the testimony of such person or the production of such books or documents is necessary in the interests of justice by leave of such Court Judge Magistrate or Coroner on such terms as the Court Judge Magistrate or Coroner may impose be served on such person in any other State or part of the Commonwealth.

(2) If such person fails to attend at the time and place mentioned in such subpoena or summons, such Court Judge Magistrate or Coroner or any other Police, Stipendiary, or Special Magistrate having jurisdiction in the State or part of the State or part of the Commonwealth in which

the subpoena or summons was issued may on proof that the subpoena or summons was duly served on such person, and that a reasonable sum was tendered to him for his expenses issue such warrant for the apprehension of such person as such Court Judge Magistrate or Coroner might have issued if the subpoena or summons had been served in the State or part of the Commonwealth in which it was issued.

(3) The powers of a Supreme Court of a State or other part of the Commonwealth, or of a Judge of such a Court, to grant leave under sub-section (1) may be exercised by an officer of the Court authorized in that behalf by rules of court made by virute of sub-section (1) of section 27.

Orders for the production of prisoners

16A. (1) Where it appears to any Court of Record or a State or part of the Commonwealth or to any Judge thereof that the attendance before the Court of a person who is undergoing sentence in any State or part of the Commonwealth is necessary for the purpose of obtaining evidence in any proceeding before the Court, the Court or Judge may issue an order directed to the Superintendent or other officer in charge of the gaol or place where the person is undergoing sentence requiring him to produce the person at the time and place specified in the order.

(1A) A Court or Judge may, before issuing an order under the last preceding sub-section, require the applicant for the order to give such security as the Court or Judge thinks fit for ensuring compliance with any order that may be made under sub-section (3) for payment by the applicant or any other person of the whole or any part of the costs of compliance with that first-mentioned order.

(2) Any order made under this section may be served upon the Superintendent or officer to whom it is directed in whatever State or part of the Commonwealth he may be and he shall thereupon produce, in such custody as he thinks fit, the person referred to in the order at the time and place specified therein.

(3) The Court before which any person is produced in accordance with an order issued under this section may make such order as to the costs of compliance with the order as to the Court seems just.

(4) Where a person who is undergoing sentence in any State or part of the Commonwealth is, in pursuance of an order made under this section, produced in another State or part of the Commonwealth, he shall, while in that State or part of the Commonwealth, in compliance with the order, be deemed to be undergoing his sentence, and the officer in whose custody he is shall have the same powers, in relation to the detention and disposition of that person, as the Superintendent or officer to whom the order was directed has in the State or part of the Commonwealth in which the sentence was imposed upon that person.

Division 3 — Proof of Service

Mode of proof of service

17. When any writ notice decree or other process has under the provisions of this Act been served out of the State or part of the Commonwealth in which it was issued such service may be proved —

(a) by affidavit sworn before any Justice of the Peace having jurisdiction in the State or part of the State or part of the Commonwealth in which such service was effected, or before a Commissioner for Affidavits or Declarations, or Notary Public for that State or part; or

(b) in any manner in which such service might have been proved if it had been effected within the State or part of the Commonwealth in which the writ notice decree or process was issued.

PART III — EXECUTION OF WARRANTS AND WRITS OF ATTACHMENT

Backing of warrant for execution out of a State or part of the Commonwealth in which it was issued

18. (1) Where a Court, a Judge, a Police, Stipendiary or Special Magistrate, a Coroner, a Justice of the Peace or an officer of a court has, in accordance with section 16 or the law of a State or part of the Commonwealth, issued a warrant for the apprehension of a person, a Magistrate, Justice of the Peace or officer of a court who has power to issue warrants for the apprehension of persons under the law of another State or part of the Commonwealth, being a State or part of the Commonwealth in or on his way to which the person against whom the

warrant has been issued is or is supposed to be, may, on being satisfied that the warrant was issued by the Court, Judge, Magistrate, Coroner, Justice of the Peace or officer (after proof on oath, in the case of a warrant issued by a Magistrate, Coroner, Justice of the Peace or officer of a court, of the signature of the person by whom the warrant was issued), make an endorsement on the warrant in the form, or to the effect of the form, in the Second Schedule to this Act authorizing its execution in that other State or part of the Commonwealth.

(2) A warrant so endorsed is sufficient authority to the person bringing the warrant, to all constables and persons to whom the warrant is directed and to all constables and peace officers in that other State or part of the Commonwealth to execute the warrant in that other State or part of the Commonwealth, to apprehend the person against whom the warrant was issued and to bring that person before a Police, Stipendiary or Special Magistrate or a Justice of the Peace who has power to issue warrants for the apprehension of persons under the law of that State or part of the Commonwealth.

(3) Subject to this section, the Magistrate or Justice of the Peace before whom the person is brought may —

(a) by warrant under his hand, order the person to be returned to the State or part of the Commonwealth in which the original warrant was issued and, for that purpose, to be delivered into the custody of the person bringing the warrant or of a constable or other person to whom the warrant was originally directed; or

(b) admit the person to bail, on such recognizances as he thinks fit, on condition that the person appears at such time, and at such place in the State or part of the Commonwealth in which the original warrant was issued, as the Magistrate or Justice specifies to answer the charge or complaint or to be dealt with according to law.

(4) A warrant issued under paragraph (a) of the last preceding subsection may be executed according to its tenor.

(5) The Magistrate or Justice of the Peace before whom the person is brought has, for the purposes of this section, the same power to remand the person and admit him to bail for that purpose as he has in the case of persons apprehended under warrants issued by him.

(6) If, on the application of the person apprehended, it appears to the Magistrate or Justice of the Peace before whom a person is brought under this section that —

(a) the charge is of a trivial nature;

(b) the application for the return of the person has not been made in good faith in the interests of justice; or

(c) for any reason, it would be unjust or oppressive to return the person either at all or until the expiration of a certain period,

the Magistrate or Justice of the Peace may —

(d) order the discharge of the person;

(e) order that the person be returned after the expiration of a period specified in the order and order his release on bail until the expiration of that period; or

(f) make such other order as he thinks just.

Review of order of Magistrate or Justice

19. (1) Where —

(a) a person is dissatisfied with an order made under sub-section (3) or (6) of the last preceding section; or

(b) a Magistrate or Justice of the Peace has made, under sub-section (3) or (6) of the last preceding section, an order for the discharge of an apprehended person, or an order for the return or admittance to bail of such a person under the terms of which the person is not, or may not be, required to return or be returned within three months after the date of the order to the State or part of the Commonwealth in which the original warrant was issued,

the apprehended person or the person bringing the warrant, as the case requires, may apply to a Judge of the Supreme Court of the State or part of the Commonwealth in which the person was apprehended, sitting in chambers, for a review of the order, and the Judge may review the order.

(2) A Judge to whom an application is made for the review of an order may —

(a) order the release on bail of the apprehended person on such terms and conditions as the Judge thinks fit; or

(b) direct that the apprehended person be kept in such custody as the Judge directs in the State or part of the Commonwealth in which the person is apprehended until the order has been reviewed.

(3) The review of the order shall be by way of rehearing, and evidence in addition to, or in substitution for, the evidence given on the making of the order may be given on or in connexion with the review.

(4) For the purposes of a review under this section, a copy of a public document or of a document filed in a Department or office of the Commonwealth or of a State or part of the Commonwealth, certified to be a true copy of the document by the person purporting by the certificate to have charge of the document, shall be received as evidence of the facts stated in the copy.

(5) Upon the review of an order, the Judge may confirm or vary the order, or quash the order and substitute a new order in its stead.

(6) The order as confirmed or varied, or the substituted order, shall be executed according to its tenor as if it had been made by the Magistrate or Justice of the Peace.

Provisional warrants

19A. (1) A Magistrate, Justice of the Peace or officer of a court who, under sub-section (1) of section 18, is empowered, subject to his being satisfied as to the matter specified in that sub-section, to endorse a warrant for the apprehension of a person may, if the warrant is not produced to him or he requires further information or proof before endorsing the warrant, issue a provisional warrant for the apprehension of that person upon such information and under such circumstances as, in his opinion, justify the issue of a provisional warrant, and the provisional warrant may be executed according to its tenor.

(2) Where a person is apprehended in pursuance of a provisional warrant, he shall be brought forthwith before a Police, Stipendiary or Special Magistrate or Justice of the Peace who has power to issue warrants for the apprehension of persons under the law of the State or part of the Commonwealth in which he is apprehended, and, if the original warrant has not yet been endorsed, the Magistrate or Justice may —

(a) discharge the person;

(b) admit him to bail on such conditions and recognizances as the Magistrate or Justice thinks fit; or

(c) authorize his detention for a reasonable time pending the endorsement of the original warrant.

(3) Where a person has been apprehended under a provisional warrant (not being a person who has been discharged in pursuance of the last preceding sub-section) and the original warrant is not, within a reasonable time, endorsed by a Magistrate or Justice of the Peace for the State or part of the Commonwealth in which the person was apprehended a Magistrate or Justice of the Peace for that State or part of the Commonwealth may discharge the person or release him from bail, as the case requires.

Forfeiture of recognizances

19B. (1) Where a person has, in pursuance of any of the last three preceding sections, been admitted to bail in a State or part of the Commonwealth, and a Magistrate, Justice of the Peace for that State or part or, where the person was admitted to bail by a Judge of the Supreme Court of that State or part, a Judge of that Court, is satisfied that the person has failed to comply with the conditions of the recognizance upon which he was so admitted to bail, that Magistrate, Justice or Judge may, by order under his hand, declare the recognizance to be forfeited.

(2) Where a recognizance is so declared to be forfeited, payment of any sum due under the recognizance by a person residing in the State or part of the Commonwealth in which the recognizance was declared to be forfeited may be enforced as a fine imposed by a District or County Court or other inferior Court of Record having jurisdiction in that State or part.

(3) An amount recovered in pursuance of this section shall be transmitted to the Attorney-General of the State in which the original warrant was issued or, if that warrant was issued in a part of the Commonwealth other than a State, to the Attorney-General of the Commonwealth.

Writ of attachment may be executed in another State or part of the Commonwealth

19C. (1) Where a Court of Record of a State or part of the Commonwealth or a Judge of such a Court has, whether before or after the commencement of this section, issued a writ of attachment for the arrest

of a person for a contempt of the Court or disobedience of an order of the Court, the writ may —

(a) by leave of a Judge of the Federal Court of Australia, be executed in any other State or part of the Commonwealth specified by the Judge; or

(b) by leave of a Judge of the Supreme Court of another State or part of the Commonwealth, be executed in that other State or part of the Commonwealth.

(2) The leave —

(a) shall be endorsed on the writ of attachment; and

(b) shall be sufficient authority to —

(i) the Sheriff of the Federal Court of Australia;

(ii) the Sheriff of the State or part of the Commonwealth in which the writ was issued;

(iii) the Sheriff of a State or part of the Commonwealth in which leave to execute the warrant is given; and

(iv) all other officers named in the endorsement on the writ,

to apprehend the person against whom the writ was issued and to bring that person before the Court out of which the writ was issued.

PART IV — ENFORCEMENT OF CIVIL JUDGMENTS

Certificate of judgment

20. Any person in whose favour a judgment is given or made, whether before or after the commencement of this Act, in a suit by any Court of Record of any State or part of the Commonwealth, may obtain from the prothonotary or registrar or other proper officer of such Court a certificate of such judgment in the form and containing the particulars set forth in the Third Schedule hereto or as near thereto as the circumstances will permit, which certificate such officer is hereby required to grant under his hand and the seal of such Court.

Registration of judgments and proceedings thereunder

21. (1) Upon production of such certificate —

(a) to the prothonotary, registrar, or other proper officer of any Court of like jurisdiction in any other State or part of the Commonwealth; or

(b) if there is no Court of like jurisdiction in such other State or part, to the registrar or other proper officer of a District or County Court or other inferior Court of Record having civil jurisdiction in such State or part,

such officer shall forthwith register the same by entering the particulars thereof in a book to be kept by such officer and to be called "The Australian Register of Judgments".

(2) From the date of registration the certificate shall be a record of the Court in which it is registered, and shall have the same force and effect in all respects as a judgment of that Court, and the like proceedings (including proceedings in bankruptcy or insolvency) may be taken upon the certificate as if the judgment had been a judgment of that Court, and interest shall be payable thereunder at the rate and from the date set out therein.

(3) No certificate of a judgment shall be so registered after the lapse of twelve months from the date of the judgment, unless leave in that behalf has first been obtained from the Court in which the certificate is proposed to be registered or from a Judge thereof.

Definition of courts of like jurisdiction

22. For the purposes of the last preceding section —

(a) the Supreme Courts of the several States and parts of the Commonwealth are Courts of like jurisdiction to one another;

(b) the District Courts, County Courts and other Courts of Record of the several States and parts of the Commonwealth having limited civil jurisdiction (other than Courts referred to in the next succeeding paragraph) are Courts of like jurisdiction to one another; and

(c) the Small Debts Courts, Courts of Petty Sessions and other Courts of Record of the several States and parts of the Commonwealth having civil jurisdiction to hear and determine suits in a summary way are Courts of like jurisdiction to one another.

Costs of proceedings under this Act

22A. (1) The Court in which any such certificate of a judgment has been registered may, upon being satisfied that the registration of the judgment was reasonable justified under the circumstances, order that the plaintiff's costs of registration and other proceedings under this Act, to an amount to be assessed by the Court or Judge, but not exceeding the amount prescribed, be paid by the defendant to the plaintiff.

(2) Any such order shall be deemed to be incorporated with the certificate, and the amount payable thereunder to be payable under the certificate.

Execution not to issue unless affidavit of liability filed

23. No execution shall be issued or other proceedings taken upon such certificate unless an affidavit is first filed in the Court out of which it is intended to issue such execution or take such proceedings made by the person in whose favour the judgment was given or made or by some other person cognizant of the facts of the case, stating —

(a) that the amount for which execution is proposed to be issued is actually due and unpaid; or

(b) that an act ordered to be done remains undone; or

(c) that the person ordered to forbear from doing an act has disobeyed the order,

and no execution shall be issued for a larger amount than that sworn to.

Proceedings subject to the control of the Court

24. The Court in which any such certificate of a judgment has been registered and the Judges thereof shall, in respect of execution upon the certificate and the enforcement of the judgment, have the same control and jurisdiction over the judgment as if the judgment were a judgment of such Court.

Stay of proceedings

25. (1) The Court in which any such certificate of a judgment has been registered or a Judge thereof may, on the application of any person against whom the judgment has been given or made, order a stay of proceedings on such certificate.

(2) Such order may be made on such terms as to giving security, or as to making application to the Court by which the judgment was given

or made, to set aside the same, or otherwise, as to the Court or Judge may seem fit.

Notification of proceedings upon certificate and of satisfaction of judgment

26. (1) When —

(a) any certificate of a judgment is registered in any Court; or

(b) any execution is issued or other proceedings are taken in any Court upon any such certificate; or

(c) satisfaction of the judgment either in whole or in part is entered in any Court upon any such certificate,

the Registrar or other proper officer of that Court shall forthwith notify the same in writing under the seal of the Court to the Registrar or other proper officer of the Court in which the judgment was given or made.

(2) When any judgment whereof a certificate has been registered in any Court has been satisfied in whole or in part, the Registrar or other proper officer of the Court in which the judgment was given or made shall forthwith, upon satisfaction being made or notified as the case may be enter such satisfaction upon the judgment and notify such satisfaction in writing under the seal of the Court to the Registrar or other proper officer of every other Court in which a certificate of the judgment has been registered, and such satisfaction shall thereupon be entered upon every such certificate.

PART IVA — ENFORCEMENT OF FINES IMPOSED BY COURTS OF SUMMARY JURISDICTION

[Not reproduced]

PART V — RULES AND REGULATIONS

Rules of Court

27. (1) The powers of a Judge or Judges, or of another authority, under the law of a State or part of the Commonwealth, to make rules of court in relation to the Supreme Court of that State or part extend, by force of this Act, to the making of rules of court for prescribing —

(a) the practice and procedure in connexion with the service of the process of the Courts of that State or part of the Commonwealth under this Act;

(b) the practice and procedure in connexion with the execution and enforcement by the Courts of that State or part of the Commonwealth of the process and judgments of the Courts of other States and parts of the Commonwealth;

(c) the fees to be paid in connexion with the service of the process of the Courts of that State or part of the Commonwealth under this Act;

(d) the fees to be paid in connexion with the execution and enforcement under this Act by Courts of that State or part of the Commonwealth of the process and judgments of the Courts of other States and parts of the Commonwealth;

(e) the costs to be allowed to a person upon the execution of enforcement under this Act by the Courts of that State or part of the Commonwealth of a judgment or other process of another State or part of the Commonwealth; and

(f) the manner of recovery of any such fees or costs.

(**2**) So far as rules of court made under the last preceding sub-section do not prescribe matters referred to in that sub-section, the practice and procedure shall be —

(a) in connexion with the service of process — the process and procedure that would be applicable to service in the State or part of the Commonwealth in which the process was issued; or

(b) in connexion with the execution and enforcement of process and judgments — the practice and procedure applicable in the State or part of the Commonwealth in which the execution or enforcement is effected.

(**3**) Rules of court made by virtue of this section shall not be deemed to be statutory rules with the meaning of the *Rules Publication Act 1903*.

Regulations

28. The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters that are required or permitted by this Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular, for applying this Act, with or without modification, to, or in relation to, a Territory not specified in sub-section (1) of section 2.

SCHEDULES

SECOND SCHEDULE Section 18

INDORSEMENT ON WARRANT

*State of Queensland** to wit.

WHEREAS proof upon oath has this day been made before me that the name of J.S. subscribed to the within warrant is in the handwriting of the within-mentioned [Justice of the Peace of the *State of New South Wales**], I hereby authorize W.T., who brings me this warrant, and all other persons to whom this warrant was originally directed or by whom it may be lawfully executed, and also all constables and other peace officers of the [*State of Queensland**], to execute this warrant within the [*State of Queensland**], and to bring the said A.B., if apprehended within the [*State of Queensland**], before me or before some other [*Justice of the Peace of the State of Queensland**] to be dealt with according to law.

Given under my hand this day of , One thousand nine hundred and

J.L.,
A Justice of the Peace of the [*State of Queensland**]

*Or as the case may be.

THIRD SCHEDULE

Section 20

CERTIFICATE OF JUDGMENT

IN the Court of

Title of suit and date of commencement	Form or nature of suit	Name and addition of party to whom payment is to be made or in whose favour judgment is given or made	Name and addition of party ordered to pay money, or to do or not to do any act	Date of judgment	Abstract of judgment stating amount (if any) ordered to be paid, the rate of interest (if any) payable thereon, and the date from which it is payable, and particulars of any act ordered to be done or not to be done	Date of trial and amount of verdict, if any

I certify that this certificate correctly and fully sets forth the particulars of a judgment given in this Court, on the day of , in a suit wherein A.B. was plaintiff and C.D. was defendant [*or as the case may be*].

Dated this day of 19 .

L.M.
[Prothonotary, Registrar, *or other proper officer.*]

FOURTH SCHEDULE

[Not reproduced. It relates to the enforcement of fines imposed by courts of summary jurisdiction, a subject excluded by the Terms of Reference.]

Appendix C
List of written submissions

C Abbott, Commissioner, New South Wales Police
FN Albietz, Acting Parliamentary Commissioner for Administrative Investigations, Queensland
Appeal Tribunals Branch, Courts Department, South Australia
Attorney-General's Department, Commonwealth
Attorney-General's Department, South Australia
Australian Customs Service
Australian Taxation Office
JM Batt, Barrister
SW Begg
J Bennett, Acting Registrar, Industrial Appeals Tribunal, Tasmania
Board of Inquiry into Poker Machines, Victoria
B Brown, Secretary, Rule Committee, Supreme Court of New South Wales
Builders' Registration Board of Queensland
CM Burley, Association of Private Detectives, Victoria
The Honourable Sir Francis TP Burt, KCMG, Chief Justice of Western Australia
MH Byers, Solicitor-General, Commonwealth
Judge LL Byth, Chairman, District Courts of Queensland
Professor E Campbell, Monash University
The Honourable Sir Walter B Campbell, Chief Justice of Queensland
Civil Procedure Committee, Law Society of the Australian Capital Territory
DJ Cook, Chief Stipendiary Magistrate, Magistrates Court Brisbane
Council for Civil Liberties, New South Wales
Court of Petty Sessions, Australian Capital Territory
Courts Department, South Australia
Crown Law Department, Western Australia
Department of Attorney-General and of Justice, New South Wales
Department of Justice, Queensland
Department of Law, Northern Territory
Department of the Premier and Cabinet, South Australia
Deputy Registrar, Court of Requests, Hobart
Deputy Registrar, Supreme Court of Tasmania
Director of Public Prosecutions, Commonwealth
District Court, Adelaide
Equal Opportunity Board, Victoria
Estate Agents Board, Victoria
N Geschke, Ombudsman, Victoria
Sir Clifford Grant, Chief Magistrate, Court of Petty Sessions, Perth
The Honourable Sir Guy Green, Chief Justice of Tasmania
The Honourable NJ Harper, Attorney-General and Minister for Justice, Queensland

Judge D Heenan, Chairman of Judges, District Court of Western Australia
CB Hewitt, Solicitor
JT Howard, Registrar, Principal Registry, Federal Court of Australia
Chris Hudson & Company, Loss Assessors and Investigators
Institute of Mercantile Agents Ltd
KL Kildea
The Honourable Mr Justice LJ King, Chief Justice of South Australia
Law Department, Tasmania
Law Department, Victoria
Law Society of New South Wales
Law Society of South Australia
Law Society of Tasmania
Law Society of Western Australia
P Lefevre, Master, Supreme Court of the Northern Territory
M Lyons, Researcher, South Australian Law Reform Committee
CS MacPhail, Clerk of the Local Court, Perth
TJ Martin, former judge of District Court of New South Wales
The Honourable Mr Justice BH McPherson, Supreme Court of Queensland
Professor A von Mehren, Harvard Law School
Motor Accidents Insurance Board, Tasmania
National Police Working Party
D Nelson, Barrister
New South Wales Bar Association
Northern Territory Law Reform Committee
Nurses' Registration Board, Tasmania
The Honourable Mr Justice PE Nygh, Family Court of Australia
Parole Board, New South Wales
Pharmacy Board of Tasmania
Pharmacy Board of Victoria
Pharmeceutical Council of Western Australia
IH Pike, Director, Magistrates Courts Administration, New South Wales
Planning Appeals Board, Victoria
Privacy Committee, New South Wales
Prothonotary, Supreme Court of New South Wales
Real Estate and Business Agents Supervisory Board, Western Australia
Professor WLM Reese, Columbia University
Registrar, District Court of New South Wales
Registrar, Supreme Court of the Australian Capital Territory
Registrar, Supreme Court of South Australia
Registrar, Supreme Court of Tasmania
Registrar, Supreme Court of Western Australia
Registrar, Workers' Compensation Commission of New South Wales
V Robinson, Senior Assistant Parliamentary Counsel, Office of Parliamentary Counsel
The Honourable Mr Justice A Rogers, Supreme Court of New South Wales
Russell, McClelland and Brown, Solicitors
Small Claims Tribunals, Western Australia

South Australian Law Reform Committee
Judge GH Spence, County Court of Victoria
GT Staples, Master, Supreme Court of Western Australia
Judge JH Staunton, CBE, QC, Chief Judge, District Court of New South Wales
KR Stidwill, Chamber Magistrate
The Honourable Sir Lawrence W Street, KCMG, KStJ, Chief Justice of New South Wales
The Honourable CJ Sumner, Attorney-General for South Australia
Supreme Court of Queensland
Supreme Court of New South Wales, Rule Committee
Town Planning Appeal Tribunal and Land Valuation Tribunal, Western Australia
B Treston, Solicitor
Victorian Bar
Victorian Nursing Council
RH Watts, Ombudsman, Northern Territory
DL Wheeler, Clerk of the Legislative Assembly, New South Wales
The Honourable Mr Justice MR Wilcox, Federal Court of Australia
CR Woodhouse, Ombudsman, Tasmania
The Honourable Sir John McI Young, Chief Justice of Victoria
The Honourable Mr Justice HE Zelling, Supreme Court of South Australia

Note: Where more than one submission has been made, references to submissions in the report include the date of the submission.

Appendix D
Registrations of certificates of judgment in the Australian Register of Judgments

New South Wales

Courts of Petty Sessions

1977	1121	1980	1324
1978	1189	1981	1572
1979	1344	1982	1921

District Court (metropolitan District Court only)

1978	343	1981	255
1979	255	1982	154
1980	457	1983	168 (to 28/9/83)

Supreme Court

1977	78	1980	73
1978	59	1981	33
1979	55	1982	42

Victoria

Magistrates Court

1961	834	1972	933
1962	984	1973	703
1963	990	1974	663
1964	953	1975	301
1965	844	1976	341
1966	897	1977	348
1967	975	1978	368
1968	1064	1979	383
1969	848	1980	758
1970	1008	1981	815
1971	905	1982	1068

County Court

1902	3	1980	208
1978	205	1981	117
1979	191	1982	95

County Court

1902–1912	62	1943–1952	153
1913–1922	197	1953–1962	714
1923–1932	315	1963–1973	1499

Supreme Court

1981 (to 24/10/83)	75

Queensland

Magistrates Court

1962	209	1973	156
1963	240	1974	141
1964	237	1975	139
1965	165	1976	176
1966	140	1977	150
1967	170	1978	185
1968	186	1979	300
1969	118	1980	342
1970	154	1981	370
1971	204	1982	511
1972	224		

District Court

1979	161	1982	173

Supreme Court

1902	1	1981	42
1972	12	1982	44
1977	11		

Western Australia

Local Court

1969	171	1977	96
1970	160	1978	164
1971	67	1979	301
1972	160	1980	257
1973	140	1981	263
1974	93	1982	378
1975	112	1983	366 (to 14/11/83)
1976	109		

District Court

1971	71	1978	24
1972	86	1979	29
1973	54	1980	29
1974	35	1981	30
1975	37	1982	21
1976	31	1983	14 (to 14/11/83)

Supreme Court

1901	0	1923	6
1902	8	1924	3
1903	10	1925	1
1904	2	1926	6
1905	7	1927	1
1906	2	1928	6
1907	9	1929	4
1908	9	1930	3
1909	3	1931	3
1910	2	1932	2
1911	4	1933	4
1912	1	1934	0
1913	3	1935	2
1914	2	1936	1
1915	1	1937	1
1916	0	1938	2
1917	0	1939	4
1918	1	1940	6
1919	5	1941	0
1920	1	1942	1
1921	1	1943	0
1922	0	1944	1

1945	0	1965	2
1946	0	1966	1
1947	1	1967	2
1948	2	1968	3
1949	2	1969	4
1950	2	1970	0
1951	2	1971	1
1952	1	1972	7
1953	1	1973	6
1954	1	1974	9
1955	3	1975	8
1956	4	1976	5
1957	3	1977	6
1958	2	1978	2
1959	1	1979	5
1960	1	1980	4
1961	2	1981	7
1962	0	1982	10
1963	0	1983	4 (to 3/11/83)
1964	1		

South Australia

District Court

1980	540	1982	685
1981	499		

Supreme Court

1902	2	1982	3
1972	8		

Tasmania

Supreme Court

1980	11	1982	7
1981	11		

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