

IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

BETWEEN:

No. S106 of 2009

**GRAEME JOSEPH KIRK &  
ANOR**

Appellants

And

**INDUSTRIAL RELATIONS  
COMMISSION OF NEW SOUTH  
WALES & ANOR**

Respondents

BETWEEN:

No.S347 of 2008

**KIRK GROUP HOLDINGS PTY  
LTD & ANOR**

Applicants

And

**WORKCOVER AUTHORITY OF  
NEW SOUTH WALES**

Respondent

BETWEEN:

No.S348 of 2008

**KIRK GROUP HOLDINGS PTY  
LTD & ANOR**

Applicants

And

**WORKCOVER AUTHORITY OF  
NEW SOUTH WALES**

Respondent

**SUBMISSIONS ON BEHALF OF THE**  
**ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)**

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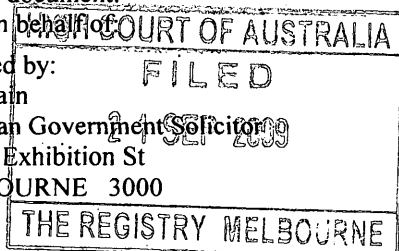
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## A. INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Attorney-General for the State of Victoria intervenes to contend that:
  - (1) An appeal does not lie from the Industrial Court of New South Wales (the **Industrial Court**)<sup>1</sup> to the High Court; and
  - (2) A State may create a court with criminal jurisdiction from which an appeal does not lie to the Supreme Court (and hence the High Court pursuant to s 73) when that court exercises State jurisdiction alone.

### 10 An appeal does not lie from the Industrial Court to the High Court

2. Section 73 of the Constitution provides an exhaustive statement of the High Court's appellate jurisdiction; the scope of s 73 cannot be extended by either the Commonwealth Parliament or the State Parliaments.<sup>2</sup> The Commonwealth Parliament may, however, create exceptions to the appellate jurisdiction of the High Court and regulate that jurisdiction.
3. The Industrial Court was here exercising State jurisdiction under the *Occupational Health and Safety Act 1983* (NSW). It was not exercising federal jurisdiction – adverting to the rule of law is not sufficient to attract federal jurisdiction.<sup>3</sup>
4. An appeal can only lie from a State court exercising State jurisdiction to the High Court pursuant to s 73(ii) if that court is “the Supreme Court of any State” or “any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council”.
5. The Industrial Court is not the “Supreme Court of any State”. The drafting history of s 73, the text of that section, and the interpretation given to it by this Court, compel the conclusion that the term “Supreme Court” means that single institution known as the Supreme Court existing in each State at federation. It is an institutional term that refers to a particular *court*; it is not a jurisdictional term. It does not refer to the jurisdiction that the Supreme Court exercised at federation and that may now be exercisable variously by a range of bodies.
6. The Industrial Court did not exist at the establishment of federation, being created in 1996.<sup>4</sup> Thus, the Industrial Court is not a court of any State from which, at the establishment of the Commonwealth, an appeal lay to the Queen in Council.
7. It follows that the Industrial Court is not a court recognised under s 73 (ii).
8. The High Court cannot hear appeals from State courts exercising State jurisdiction absent a judgment, decree, order or sentence of a court referred to in s 73(ii). It

<sup>1</sup> In 2005 the name of the Commission in Court Session was changed to the Industrial Court: s 151A of the *Industrial Relations Act 1996* (NSW) was added by cl 4 of sch 1 to the *Industrial Relations Amendment Act 2005* (NSW). In these submissions the term Industrial Court will be used.

<sup>2</sup> *Ruhani v Director of Police* (2005) 222 CLR 489, 530-531 [119] (Gummow and Hayne JJ), 545-552 [173]-[200] (Kirby J); cf 497-498 [3] (Gleeson CJ), 511-512 [51]-[52] (McHugh J), 574 [288] (Callinan and Heydon JJ). However, the position regarding Territories is different and arguably anomalous; see *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 337 [26] (Gaudron J); *Ruhani v Director of Police* (2005) 222 CLR 489, 530-531 [119] (Gummow and Hayne JJ), 549-550 [189]-[191] (Kirby J), 512 [52] (McHugh J).

<sup>3</sup> See Applicants' Summary of Argument (S347/2008), paragraphs 34, 57.

<sup>4</sup> *Industrial Relations Act 1996* (NSW), s 152.

follows that an appeal cannot lie directly from the Industrial Court to the High Court by reference to the type of matters being decided by the Industrial Court (including criminal offences). While s 73(i) turns on the type of jurisdiction being exercised in the individual case (viz. the original jurisdiction of the High Court), by contrast s 73(ii), in the absence of the exercise of federal jurisdiction, hinges upon the *court* being appealed from, not the type of matters being decided.

9. Section 73(ii) does not confer appellate jurisdiction on the High Court from orders made by the Industrial Court.<sup>5</sup>

10 **The exercise of State criminal jurisdiction may be unappealable**

10. The applicants contend that there is a right of appeal to the High Court from any criminal conviction in State jurisdiction.<sup>6</sup> It would follow that it is not constitutionally competent for New South Wales to create a court exercising criminal jurisdiction which is not subject to the appellate jurisdiction of the High Court.

11. In response, Victoria contends that a State may create a court with criminal jurisdiction from which an appeal does not lie to the Supreme Court (and hence nor to the High Court pursuant to s 73) when that Court exercises State jurisdiction alone.

- 20 12. On the basis that an appeal cannot lie directly to the High Court from a State court exercising State jurisdiction other than from those State courts in s 73(ii), the applicants' contention requires that an appeal lie from all State courts exercising State criminal jurisdiction to the Supreme Court. For only then could the High Court exercise its appellate jurisdiction over all courts exercising State criminal jurisdiction.

13. An essential step in the applicants' contention is that the Constitution must confer appellate jurisdiction on the Supreme Court of each State to hear appeals from all State courts exercising criminal jurisdiction. That is so because the Supreme Courts, as superior courts of record, do not have an inherent appellate jurisdiction; appeals are creatures of statute.<sup>7</sup>
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14. Section 73 does not expressly confer any appellate jurisdiction on State Supreme Courts. Nor does it do so by implication:

- (1) at federation not all the States had conferred upon their respective Supreme Courts appellate jurisdiction over all State criminal matters;
- (2) it is significant that at the time of federation, appeals from criminal trials in England were available solely on questions of law; the States did not create broadly based rights of appeal for the most serious criminal offences until after the passing in England of the *Criminal Appeal Act 1907* (U.K.);

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<sup>5</sup> The only other alternative by which the Industrial Court could be subject to the appellate jurisdiction of the High Court under s 73(ii) is if it was a federal court, and it is clearly not.

<sup>6</sup> See, for example, Applicants' Summary of Argument (S347/2008), paragraph 47; (S348/2008), paragraph 49.

<sup>7</sup> *Grierson v The King* (1938) 60 CLR 431, 436 (Dixon J); *Davern v Messel* (1984) 155 CLR 21, 47 (Mason and Brennan JJ).

(3) the Convention Debates reveal that the framers of the Constitution did not intend to confer any jurisdiction upon State Supreme Courts (by comparison with the explicit grant of jurisdiction to the High Court), and Mr Isaacs, Mr O'Connor and Dr Quick specifically discussed s 73<sup>8</sup> on the basis that it would not result in an appeal lying to the High Court from all State criminal proceedings unless an appeal were provided by the State to the Supreme Court;

(4) the availability of an appeal lying to the Supreme Court from all State criminal proceedings is not "necessary or obvious" for the operation of a single Australian common law so as to be constitutionally implied.<sup>9</sup> The implication required by the applicants is structural rather than textual; yet it fails to satisfy the test for such an implication as it is not "logically or practically necessary for the preservation of the integrity of that structure."<sup>10</sup> The basis for the existence of a single Australian common law is not solely constitutional. It includes in addition to Chapter III (principally s 73), the common law doctrine of precedent in its modern form whereby the High Court is not bound by English authority, and the historical process that led to the removal of appeals to the Privy Council. By omission, s 73 already includes significant exceptions with the effect that there are large categories of cases where no appeal now lies to the High Court. It expressly allows for additional exceptions to be created by the Commonwealth Parliament. The present category, namely State courts exercising State criminal jurisdiction from which an appeal does not lie to the Supreme Court, no more negates the operation of a single Australian common law than do the existing exceptions.

15. In the State context, the constraints derived from Chapter III on the State legislatures' powers with respect to State Supreme Courts are:

(1) the institution known as the Supreme Court of a State may not be abolished; and

(2) the principle identified in *Kable v Director of Public Prosecutions (NSW) (Kable)*.<sup>11</sup>

## B. DRAFTING HISTORY OF SECTION 73 OF THE CONSTITUTION

16. It is well recognized that "the drafting history of the *Constitution*, including the record of the Convention Debates, may be capable of throwing light on the meaning of a provision".<sup>12</sup> In this context, the Convention Debates support the view that the framers intended both the Commonwealth Parliament and the State Parliaments to

<sup>8</sup> As it now is.

<sup>9</sup> *McGinty v Western Australia* (1996) 186 CLR 140, 184 (Dawson J), in relation to implications.

<sup>10</sup> *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).

<sup>11</sup> (1996) 189 CLR 51; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ).

<sup>12</sup> See *Singh v Commonwealth* (2004) 222 CLR 322, 333-340 [14]-[28] (Gleeson CJ), 349-350 [54]-[55] (McHugh J), 385 [159], 386 [162] (Gummow, Hayne and Heydon JJ), 412-413 [247]-[249] (Kirby J), 423-425 [293]-[296] (Callinan J). See also *Cole v Whitfield* (1988) 165 CLR 360, 385 (the Court); *Cheng v The Queen* (2000) 203 CLR 248, 268-269 [52]-[55] (Gleeson CJ, Gummow and Hayne JJ).

be able to determine those matters from which an appeal would lie to the High Court from a State court exercising State criminal jurisdiction.

17. Section 73 was intended to confer appellate jurisdiction upon the High Court with respect to all decisions (both criminal and civil) from those State courts identified in s 73(ii). The Commonwealth Parliament was to be given exclusive legislative power over the creation of exceptions from the High Court's appellate jurisdiction, but could not exercise that power to prevent appeals from the State Supreme Courts.<sup>13</sup> Moreover, the State Parliaments could regulate those matters from which an appeal would lie to the High Court by determining the jurisdiction of their Supreme Courts.
- 10 18. The Convention Debates provide no support, either for the view that the framers intended to confer an appellate jurisdiction upon State Supreme Courts from lower courts exercising State criminal jurisdiction, or for the view that they intended to place any limit upon the power of the State Parliaments with respect to what original or appellate criminal jurisdiction the Supreme Courts *must* exercise.
19. Section 73 did not change significantly during the Convention Debates.<sup>14</sup> One notable change occurred in Adelaide with the replacement in the first paragraph of the words "the highest Court of final resort now established, or which may hereafter be established, in any State," with "the Supreme Court of any State". At that time the Supreme Courts were the only courts that existed in every colony.<sup>15</sup>
- 20 20. This amendment was significant. The highest Court of final appeal in every colony was not the Supreme Court. In South Australia an appeal lay from the Supreme Court to the Local Court of Appeal, which consisted of the Governor and all members of the Executive Council except for the Attorney-General.<sup>16</sup> Thus, following this amendment, an appeal would lie not from the highest court in each colony, but from the institution then existing in each colony known as the Supreme Court.
21. In 1898 in Melbourne Mr Symon proposed, and the Convention agreed, that after the word "State" there should be inserted the words "or of any other court of any State from which an appeal now lies to the Queen in Council". His purpose was to give the High Court jurisdiction to hear appeals from the Local Court of Appeal in South Australia, from which an appeal then lay by "leave" to the Queen in Council.<sup>17</sup> This was the only court in Australia (other than the State Supreme Courts) from which an appeal lay by "leave" to the Queen in Council.<sup>18</sup>
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<sup>13</sup> See the second paragraph to s 73 (the proviso).

<sup>14</sup> A convenient summary of drafting changes to s 73 is in Craven (ed), *The Convention Debates 1891-1898: commentaries, indices and guide* (1986), 498-501. See the Schedule attached for a detailed record of the course of the Convention Debates on the drafting of s 73.

<sup>15</sup> For example, South Australia, (*Local and District Criminal Courts Act 1969* (SA); *District Court Act 1991* (SA), s4), and Western Australia, (*District Court of Western Australia Act 1969* (WA), s 7(1)) first established their District Courts after federation. Queensland abolished its District Court in 1921 (*Supreme Court Act 1921* (Qld), s 3(1)) and revived it in 1958 (*District Courts Act 1958* (Qld), s 6(1)). Tasmania has never established a District or County Court. See *K-Generation Pty Ltd v Liquor Licensing Court* (2008) 252 ALR 471, 514 [205].

<sup>16</sup> Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 742-743; *Miller v Teale* (1954) 92 CLR 406, 412-413.

<sup>17</sup> *Convention Debates*, Melbourne 1898, 332; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 742-743; *Parkin & Cowper v James* (1905) 2 CLR 315, 330.

<sup>18</sup> Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 742-743.

22. In 1900, an appeal lay to the Queen in Council in two forms: by "leave" or by "special leave". By "leave", also described as "appeals by grant of right" or "appeals as of right", it was meant that so long as the conditions prescribed in the general Orders in Council were met the court appealed from was bound to grant leave. By "special leave" was meant a special order for leave granted by the Queen in Council, which in the case of Australia was available in every case from any court, irrespective of whether the conditions prescribed in the general Orders in Council were met.<sup>19</sup>
- 10 23. The delegates appear to have proceeded upon the assumption that Mr Symon's amendment was intended to, and would, cover only those courts, other than the Supreme Courts, from which an appeal lay by "leave", which would only add appeals from the Local Court of Appeal to the High Court's appellate jurisdiction.
24. In Melbourne there was controversy about the operation of the clause with respect to State criminal jurisdiction.<sup>20</sup> Not all of the colonies had broadly based rights of appeal from lower courts exercising criminal jurisdiction to the Supreme Court, or from a single justice of the Supreme Court sitting in criminal matters to the Full Court of the Supreme Court.<sup>21</sup>
- 20 25. That appeals were not available in all criminal proceedings reflected the state of the law in England. At the end of the nineteenth century, appeals from criminal trials in England were available solely on questions of law.<sup>22</sup> It was only after the passage of the English *Criminal Appeal Act* in 1907, which established for England and Wales a court capable of reviewing convictions by juries for errors of fact and law as well as of revising sentences, that all the States instituted broadly based rights of appeal for the most serious criminal offences.<sup>23</sup>
26. Further, an appeal did not lie by "leave" from Australian courts<sup>24</sup> exercising criminal jurisdiction to the Queen in Council.<sup>25</sup> An appeal lay only by "special leave" (as described above) and the Judicial Committee very rarely advised the grant of "special leave".<sup>26</sup>

<sup>19</sup> *Parkin & Cowper v James* (1905) 3 CLR 315, 331-334. See, generally, Bentwich, *The Practice of the Privy Council in Judicial Matters* (1926, 2<sup>nd</sup> ed) 137-180; Safford and Wheeler, *The Practice of the Privy Council in Judicial Matters* (1901), 708-768.

<sup>20</sup> See Schedule attached, [10]. Specifically, the conversation between Mr Isaacs, Mr O'Connor and Dr Quick there extracted.

<sup>21</sup> Castles, *An Australian Legal History* (1982), 337-340; Bennett, *A History of the Supreme Court of New South Wales* (1974), 182-183; McPherson, *The Supreme Court of Queensland* (1989), 120-121, 271; Woinarski, *An Introduction to the History of Legal Institutions in Victoria* (LLD thesis, The University of Melbourne, 1942).

<sup>22</sup> In 1848 by 11 & 12 Vic c 78 the Court of Crown Cases Reserved was established to hear appeals on questions of law in criminal proceedings: see, Pattenden, *English Criminal Appeals 1844-1994* (1996), 8-10. Prior to this date, errors on the face of the record could be reviewed by means of the writ of error: see Stephen, *A History of the Criminal Law of England vol I* (1883), 214.

<sup>23</sup> *Criminal Code Amendment Act 1911* (WA); *Criminal Appeal Act 1912* (NSW); *Criminal Code Amendment Act 1913* (Qld); *Criminal Appeal Act 1914* (Vic); *Criminal Appeal Act 1924* (SA); *Criminal Code 1924* (Tas) ch 44.

<sup>24</sup> It did, however, lie from some of the colonies in the West Indies: see, Howell, *The Judicial Committee of the Privy Council, 1833-1876* (1979), 93.

<sup>25</sup> No Order in Council established an appeal by grant of right in criminal proceedings from any of the Australian colonies: see, Safford and Wheeler, *The Practice of the Privy Council in Judicial Matters* (1901), 755-762.

<sup>26</sup> Safford and Wheeler, *The Practice of the Privy Council in Judicial Matters* (1901), 755-762; Bentwich, *The Practice of the Privy Council in Judicial Matters* (1926, 2<sup>nd</sup> ed), 174-177..

27. In *Re Dillett*,<sup>27</sup> the Judicial Committee stated:

Such appeals are of rare occurrence; because the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

28. In considering applications for “special leave” in criminal matters, the Judicial Committee repeatedly stated that it is “not a court of criminal appeal” (by way of direct contrast to the Court of Criminal Appeal created by the English *Criminal Appeal Act* of 1907).<sup>28</sup>

29. By comparison, the rights of appeal in civil jurisdictions from lower courts to the Supreme Courts<sup>29</sup> and from the Supreme Courts to the Queen in Council<sup>30</sup> were broad. Again, this mirrored the position in England.<sup>31</sup> Moreover, the state of the law with respect to criminal appeals in the 1890s means that the term “appeal” used in the criminal context at that time should not be understood as having any fixed meaning as to the nature of the appeal being described.<sup>32</sup>

30. Another source of controversy was the legislative power conferred by the clause upon the Commonwealth Parliament to make “exceptions” to the High Court’s appellate jurisdiction. The framers were particularly concerned that the Commonwealth Parliament would use this power to prevent appeals from the State Supreme Courts as had occurred in the United States of America.<sup>33</sup>

31. This was the subject of extensive discussion and ultimately led to the inclusion of the proviso to guarantee appeals from State Supreme Courts to the High Court.<sup>34</sup>

### C. SECTION 73 AND ITS INTERPRETATION

32. Chapter III contains the complete scheme for the judicial power of the Commonwealth. Within that scheme, s 73 is an exhaustive statement of the appellate jurisdiction of the High Court.<sup>35</sup> As such, neither the Commonwealth

<sup>27</sup> (1887) 12 App Cas 459, 467.

<sup>28</sup> See, e.g., *Arnold v The King-Emperor* [1914] AC 644, 648; *Balmukand v The King-Emperor* [1915] AC 629, 630; Bentwich, *The Practice of the Privy Council in Judicial Matters* (1926, 2<sup>nd</sup> ed), 177.

<sup>29</sup> Castles, *An Australian Legal History* (1982), 335-337; Bennett, *A History of the Supreme Court of New South Wales* (1974), 168-182; McPherson, *The Supreme Court of Queensland* (1989), 206-208; Woinarski, *An Introduction to the History of Legal Institutions in Victoria* (LLD thesis, The University of Melbourne, 1942).

<sup>30</sup> An appeal by way of grant lay for matters involving £500 in New South Wales, South Australia, Victoria and Western Australia and £1,000 in Tasmania: see Safford and Wheeler, *The Practice of the Privy Council in Judicial Matters* (1901) 559-570, 581-609.

<sup>31</sup> The appellate jurisdiction of each court in England as at 1909 is set out in Halsbury, *Laws of England* vol ix (1909), 1-223.

<sup>32</sup> *Eastman v The Queen* (2000) 203 CLR 1, 40-41 [128]-[133] (McHugh J).

<sup>33</sup> See Schedule attached, [12].

<sup>34</sup> See the Schedule attached.

<sup>35</sup> *Ruhani v Director of Police* (2005) 222 CLR 489, 500 [11] (Gleeson CJ), 512 [52] (McHugh J), 530 [119] (Gummow and Hayne JJ), 574 [288] (Callinan and Heydon JJ). Again, the position regarding Territories stands in a special position: see footnote 2 above.

Parliament nor any State Parliament may create new appellate jurisdiction in the High Court in addition to that in s 73.<sup>36</sup>

33. Section 73 does not confer appellate jurisdiction on the High Court to hear and determine appeals from every final decision made by an Australian court.
34. Section 73 contains two parts: first, a grant of appellate jurisdiction to the High Court; second, a conferral of legislative power upon the Commonwealth Parliament to make exceptions to and regulations for the exercise of that jurisdiction.

#### **Appellate jurisdiction over courts exercising State jurisdiction is limited**

- 10 35. The grant of appellate jurisdiction to the High Court with respect to State jurisdiction is limited to hearing and determining appeals from "all judgments, decrees, orders, and sentences" that are "of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council".

#### *Not all "judgments, decrees, orders, and sentences" are appellable*

36. This Court has interpreted the words "judgments, decrees, orders, and sentences" as confined to decisions made in the exercise of judicial power.<sup>37</sup>
37. Further, there are three broad categories of decisions that fall outside of the scope of "judgments, decrees, orders, and sentences":
- 20 (1) no appeal will lie where the Supreme Court gives an advisory opinion, such as a "guideline judgment" providing a table setting out a range of sentences;<sup>38</sup>
- (2) no appeal will lie when the Supreme Court acts as a court of disputed returns;<sup>39</sup>
- (3) no appeal will lie in respect of those decisions which, by reason of some common law rule, are unappealable; for example, no appeal lies from the verdict of a jury or from a judgment of the Supreme Court founded upon a general verdict of a jury.<sup>40</sup> Nor can the Crown appeal from an acquittal in a Supreme Court jury trial, even when the acquittal is by direction of a judge exercising federal jurisdiction.<sup>41</sup>
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<sup>36</sup> *Hannah v Dalgarno* (1903) 1 CLR 1, 10.

<sup>37</sup> *Holmes v Angwin* (1906) 4 CLR 297; *Consolidated Press Ltd v Australian Journalists' Association*; (1947) 73 CLR 549; *Saffron v The Queen* (1953) 88 CLR 523; *Mellifont v Attorney-General (Q.)* (1991) 173 CLR 289, 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ), 314 (Brennan J); *DPP (SA) v B* (1998) 194 CLR 566; *Wong v The Queen* (2001) 207 CLR 584.

<sup>38</sup> *Wong v The Queen* (2001) 207 CLR 584, 600 [39].

<sup>39</sup> *Holmes v Angwin* (1906) 4 CLR 297; *Webb v Hanlon* (1939) 61 CLR 313.

<sup>40</sup> *Musgrove v McDonald* (1905) 3 CLR 132; *Brisbane Shipwrights' Provident Union v Heggie* (1906) 3 CLR 686; *The Commonwealth v Brisbane Milling Co Ltd* (1916) 21 CLR 559; *Menges v The King* (1919) 26 CLR 369.

<sup>41</sup> *The King v Snow* (1915) 20 CLR 315; *Menges v The King* (1919) 26 CLR 369. It may nevertheless be possible for the Director of Public Prosecutions to refer a point of law to the Court of Appeal: see, for example, *Crimes Act 1958* (Vic), s 450A.



38. In consequence, not every form of "judgment" or "order" for which the governing statute or rules of a State Supreme Court may make provision can be the subject of an appeal to the High Court.<sup>42</sup>

*The term "Supreme Court" in s 73 means that institution in each State designated by the name "Supreme Court" at federation*

- 10 39. At the Adelaide Convention in 1897 the framers amended what was to become s 73 so that the words "the highest Court of final resort now established, or which may hereafter be established, in any State", were replaced by "the Supreme Court of any State". As noted above, the "highest Court of final resort" in South Australia was not the Supreme Court, but the Local Court of Appeal. At the same time the framers changed the words "Supreme Court of Australia" to "High Court". Both these amendments support the view that the framers intended to use the words "Supreme Court" as words of specific designation.
40. In *Parkin & Cowper v James*,<sup>43</sup> this Court considered whether by reason of s 73 an appeal lay from a decision of a single judge of the Supreme Court of Victoria or only from a decision of the Full Court of the Supreme Court of Victoria.
- 20 41. Mr Irvine, counsel for the respondents, submitted that the term "*Supreme Court*" in s 73 could have only two meanings: (i) the Supreme Court as constituted by the legislature; (ii) the court of final resort in the State.<sup>44</sup>
42. This Court unanimously held that the term "Supreme Court" is "used in the Constitution to designate the Courts which at the time of the establishment of the Commonwealth were known by that name".<sup>45</sup> To have held in favour of the second meaning above would have produced the illogical result that the term "Supreme Court" as used in s 73 did not include the Supreme Court of South Australia, only the Local Court of Appeal of South Australia.
- 30 43. In 1935 the Local Court of Appeal in South Australia was abolished.<sup>46</sup> The Supreme Courts then became the court of final resort in all States. But it does not follow that the term "Supreme Court" now means the highest court for the time being in the judicial hierarchy of each State.
44. In *Carson v John Fairfax & Sons Ltd*, the Full Court unanimously affirmed the above passage in *Parkin*.<sup>47</sup>
45. Further, the term "Supreme Court" in s 73 can only refer to *one* institution in each State as a matter of construction because:<sup>48</sup>
- (1) the definite article is used in s 73(ii) and also in each later paragraph in s 73, noting that the use in the third paragraph of the plural ("the Supreme Courts") relates to the words "the several States";

<sup>42</sup> *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 38 [63] (Gaudron, Gummow, Hayne JJ).

<sup>43</sup> (1905) 2 CLR 315.

<sup>44</sup> *Parkin & Cowper v James* (1905) 3 CLR 315, 319.

<sup>45</sup> *Parkin & Cowper v James* (1905) 3 CLR 315, 330.

<sup>46</sup> *Supreme Court Act 1935* (SA). See also, *Miller v Teale* (1954) 92 CLR 406, 413.

<sup>47</sup> (1991) 173 CLR 194, 211.

<sup>48</sup> See *Mitchforce v Industrial Relations Commission* (2003) 57 NSWLR 212, 239 (Spigelman CJ).

- (2) the use of the word “any” in s 73(ii) with reference to “any other federal court” and “any other court of any State” indicates that where the framers wished to refer to more than one State court they did so expressly;
- (3) the identification of the High Court as “a Federal Supreme Court” in s 71 indicates that the idea of a “Supreme Court” refers, within the relevant polity, to a single institution.

10 46. In *Parkin & Cowper v James*, the Court, after affirming that the term “Supreme Court” meant the court of each State so designated at federation, added as an obiter comment: “It may be that the term would also include courts established under another name in substitution for them, but with similar functions.”<sup>49</sup> This statement should not be read as casting doubt upon the correctness of the general approach established by the Court in that case nor as inconsistent with the designatory approach. The designatory approach has been followed by this Court for over a century. It may be that the term “Supreme Court” in s 73(ii) would include other courts with similar functions if, for example, a State were to remove all the jurisdiction of its Supreme Court and vest it in other courts. This may be the unlawful outer limit contemplated by Gummow J in *Kable*.<sup>50</sup> But that is not the present case.

20 “[A]ny other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council” means every State court that existed at federation

47. An appeal lies from the “judgments, decrees, orders, and sentences” of every State court, other than the Supreme Court, “from which at the establishment of the Commonwealth an appeal lies to the Queen in Council”.
48. As mentioned above, Mr Symon proposed this amendment so that an appeal would lie to the High Court from the Local Court of Appeal in South Australia, from which an appeal lay by “leave” to the Privy Council.<sup>51</sup>
- 30 49. In *Parkin & Cowper v James*, this Court, having acknowledged that the purpose of Mr Symon’s amendment was to include the Local Court of Appeal,<sup>52</sup> held that on their natural meaning the words “an appeal lies” could not be restricted to an appeal by “leave” and hence meant an appeal either by “leave” or “special leave”.<sup>53</sup>
50. Their Honours’ holding has the result that the High Court has jurisdiction to hear an appeal from “all judgments, decrees, orders, and sentences” of any State court that existed at federation when that court exercises State jurisdiction. This is so because an appeal lay by “special leave” from all courts in Australia.<sup>54</sup>
51. In *Collins v Charles Marshall Pty Ltd*,<sup>55</sup> the Full Court, without being referred to *Parkin & Cowper v James*, stated:<sup>56</sup>

<sup>49</sup> *Parkin & Cowper v James* (1905) 3 CLR 315, 330.

<sup>50</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 139.

<sup>51</sup> *Parkin & Cowper v James* (1905) 3 CLR 315, 330; *Convention Debates*, Melbourne 1898, 332.

<sup>52</sup> *Parkin & Cowper v James* (1905) 3 CLR 315, 330.

<sup>53</sup> *Parkin & Cowper v James* (1905) 3 CLR 315, 332-333.

<sup>54</sup> *Parkin & Cowper v James* (1905) 3 CLR 315, 333.

<sup>55</sup> (1955) 92 CLR 529.

<sup>56</sup> (1955) 92 CLR 529, 543.

It may be assumed that when the provision [s 73(ii)] speaks of a court from which an appeal lies to the Privy Council that means as of right [i.e. by “leave”].

52. In *Carson v John Fairfax & Sons Ltd*,<sup>57</sup> the plaintiffs submitted that *Parkin & Cowper v James* should not be followed to the extent that it stood for the proposition that the expression “an appeal lies” in the first and second paragraphs of s 73 does not mean as of right or “as of course” (that is, by “leave”).<sup>58</sup> In other words, it was submitted that the Court in *Parkin & Copper v James* was wrong to consider that “an appeal lies” extended to those appeals for which special leave was required. After considering the reasoning in *Parkin & Cowper v James*, as well as *Collins v Charles Marshall Pty Ltd*, the Full Court in *Carson* unanimously affirmed the holding in *Parkin & Cowper v James* that “an appeal lies” in those paragraphs includes an appeal by “special leave”.<sup>59</sup> The consequence was that all State courts that existed at the time of federation were subject to the appellate jurisdiction of the High Court, even when exercising State jurisdiction alone, and whether or not an appeal lay to the Supreme Court.

*The High Court has appellate jurisdiction over State courts exercising federal jurisdiction to determine an appeal on grounds arising solely from State law*

53. Section 73(ii) gives the High Court appellate jurisdiction over judicial decisions from “any ... court exercising federal jurisdiction”.
54. Thus an appeal lies from any State court which is exercising federal jurisdiction to the High Court, and that appeal may be determined by the High Court upon a ground which is derived solely from that court’s exercise of State jurisdiction.<sup>60</sup>

*The applicants misquote s 73(ii) as though it refers to jurisdiction not courts*

55. The High Court’s appellate jurisdiction from State courts exercising State jurisdiction is *not* cast by reference to the class of matter being adjudicated upon by those courts, but by the identity of the courts themselves. In consequence the High Court’s appellate jurisdiction over State matters is not, and cannot be, engaged by any particular class of matter unless it is the subject of a judgment, decree, order or sentence of a court identified in s 73(ii).
56. The applicants misquote the words of s 73(ii) as though it cast the appellate jurisdiction of the High Court by reference to the type of matters from which an appeal could be brought, rather than from particular institutions. They do so by confusing the conferral of jurisdiction in the first paragraph of s 73 with the proviso in the second paragraph. The misquote appears in the applicants’ submissions as follows:<sup>61</sup>

The *Constitution* confers jurisdiction on the High Court on appeal from any judgment of the Supreme Court “or of any other Court ... *in any matter* in which at the

<sup>57</sup> (1991) 173 CLR 194.

<sup>58</sup> (1991) 173 CLR 194, 214-215.

<sup>59</sup> (1991) 173 CLR 194, 215-216. Since *Carson v John Fairfax & Sons Ltd*, a range of observations have been made: see *Gould v Brown* (1998) 193 CLR 346, 425 [126] (McHugh J), 445 [193] (Gummow J); *Crampton v The Queen* (2000) 206 CLR 161, 184 [53] (Gaudron, Gummow and Callinan JJ). Their Honours were referring to an appeal from the District Court of NSW, which existed at federation, having been created by the *District Court Act 1858* (NSW).

<sup>60</sup> *The Queen v Wilkinson; Ex parte Brazell, Garlick and Coy* (1952) 85 CLR 467, 478; *Kerr v Pelly* (1957) 97 CLR 310, 319.

<sup>61</sup> Applicants’ Summary of Argument, (S347/2008), paragraph 35 (emphasis added).

establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council”.

57. The applicants then assume that all they need demonstrate is that the *matter* before the Industrial Court is one in relation to which at the establishment of the Commonwealth an appeal lay from the Supreme Court to the Privy Council. This assumption contradicts the manner in which s 73(ii) is expressed and has been understood. Relevantly, the conferral of jurisdiction is cast in terms of appeals from particular institutions:

10 The High shall have jurisdiction ... to hear and determine appeals from all judgments, orders, decrees and sentences: ...

(ii) ... of the *Supreme Court* of any State, or of any other *court* of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council.<sup>62</sup>

58. The reference to *matters* occurs only in the context of the proviso as a qualifying description of the guaranteed continuing availability of appeals to the High Court from a particular institution, the Supreme Court of a State:

20 But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal *from the Supreme Court of a State* in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.<sup>63</sup>

59. The proviso is a restriction on the legislative power of the Commonwealth Parliament to make exceptions and regulations in relation to the appellate jurisdiction of the High Court. The reference to “matters” within that context is not intended as part of a conferral of jurisdiction on the High Court; it is not intended as a general catch-all category of a range of jurisdiction, exercised by any court, from which an appeal will lie to the High Court. The applicant’s reading of the proviso improperly depends upon reading it as though the words “from the Supreme Court of a State” were not there.

### 30 **The exclusive power of the Commonwealth to make exceptions and regulations**

60. The first paragraph of s73 confers power upon the Commonwealth Parliament to make exceptions<sup>64</sup> and regulations<sup>65</sup> to the appellate jurisdiction granted to the High Court by that same paragraph. This conferral of legislative power is exclusive: the State Parliaments have no power to define the conditions and restrictions applicable to appeals from their Supreme Court or other courts to the High Court under s 73.<sup>66</sup>

61. The power of the Commonwealth Parliament to create “exceptions” to the appellate jurisdiction of the High Court was considered in *Cockle v Isaksen*.<sup>67</sup> In that case Dixon CJ, McTiernan and Kitto JJ held that the Commonwealth Parliament may make exceptions so long as they do not “destroy the general rule laid down by the Constitution that appeals shall lie to this Court”.<sup>68</sup>

62 Emphasis added.

63 Emphasis added.

64 *Cockle v Isaksen* (1957) 99 CLR 155; *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 194, 216.

65 *Carson v John Fairfax & Sons Ltd* (1991) 173 CLR 194, 216.

66 *Peterswald v Bartley* (1904) 1 CLR 497, 498-9.

67 (1957) 99 CLR 155.

68 (1957) 99 CLR 155, 165-166; *Carson v Fairfax & Sons Ltd* (1991) 173 CLR 194, 216.

62. The second paragraph of s 73 limits the power of the Commonwealth Parliament so that it may not prescribe an exception or regulation preventing the High Court from hearing an appeal from a Supreme Court of a State.<sup>69</sup>
63. In this way, s 73 creates a distinction between the power of the Commonwealth Parliament to legislate with respect to the appellate jurisdiction of the High Court from State Supreme Courts, on the one hand, and the appellate jurisdiction of the High Court from all other State courts, on the other hand. In doing so, s 73 confers a substantial power upon the Commonwealth to limit appeals to the High Court from those courts other than the Supreme Court of any State, identified in s 73(ii).

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#### D. CONSTITUTIONAL IMPLICATIONS FROM SECTION 73

**The Supreme Court of each State cannot be abolished nor can the *Kable* principle be infringed**

64. Section 73 prohibits by implication the abolition of the Supreme Court of each State<sup>70</sup> because:
- (1) it names those institutions known as the Supreme Court at federation and by implication assumes their continued existence; and
  - (2) the second paragraph of s 73 entrenches appeals from the Supreme Court of any State while it does not do so for other State courts exercising State jurisdiction.
65. If, contrary to these submissions, the term “Supreme Court” is capable of referring to a State court other than the so-named Supreme Court in each State at the time of federation, s 73 cannot be the basis for the continued existence of specific State Supreme Courts.
66. This follows because while s 73 confers appellate jurisdiction on the High Court from “all judgments, decrees, orders, and sentences” from all State courts existing at federation, the fact that an appeal lay from a State court exercising State jurisdiction to the High Court at the time of federation does not of itself guarantee the continued existence of that State court. That is so because the States may freely organize their court systems, and in doing so the States have abolished courts which existed at federation.<sup>71</sup> It is only because the Supreme Courts, as single identified institutions, are named in s 73, with entrenched appeals from their judgments, etc, to the High Court, that special protection is afforded to them.

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<sup>69</sup> *Carson v Fairfax & Sons Ltd* (1991) 173 CLR 194, 209-210.

<sup>70</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 111 (McHugh J), 139 (Gummow J); *Gould v Brown* (1998) 193 CLR 346, 425 [127] (McHugh J), 446 [194] (Gummow J); *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 592 [69] (Gleeson CJ, Gaudron and Gummow JJ); *Mansfield v Director of Public Prosecutions for Western Australia* (2006) 226 CLR 486, 491 [6] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 73-74 [57] (Gummow, Hayne and Crennan JJ).

<sup>71</sup> For example, in 1921 the District Court of Queensland was abolished: *Supreme Court Act 1921* (Qld), s 3(1); and the Local Court of Appeal in South Australia was abolished by the *Supreme Court Act 1935* (SA), s 3.

67. The States also may not infringe the principle in *Kable*, which follows from the place of ss 73(ii) and 77(iii) in Chapter III.<sup>72</sup>

**Otherwise, the States may organize their courts without restriction**

68. In *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*, Deane J stated:<sup>73</sup>

[I]n the absence of any express or implied constitutional prohibition or of any relevant limitations upon State powers persisting from colonial times, it is to be presumed that any legislative power which naturally appertains to self-government and which is not conferred upon the Commonwealth Parliament remains in the States.

- 10 69. When the *Colonial Laws Validity Act* was in force, s 5 of that Act conferred on each colonial legislature

full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof.

70. In *McCawley v The King*,<sup>74</sup> the Privy Council said of s 5 of the *Colonial Laws Validity Act*:

It would indeed be difficult to conceive how the Legislature could more plainly have indicated an intention to assert on behalf of colonial Legislatures the right for the future to establish Courts of Judicature, and to abolish and reconstitute them, than in the language under consideration.

- 20 71. This Court has repeatedly recognized that the States may determine the organization and structure of the State court systems, as well as the jurisdictions to be exercised by those courts.<sup>75</sup>

72. Once it is accepted that the States can create new courts, it necessarily follows that the range of matters over which the Supreme Court has jurisdiction may change over time by reason of certain types of matters being transferred to newly established courts.

73. The Constitution places no limit upon the exercise of this power by the States (save for the restrictions already noted).

30 **Section 73 does not confer appellate jurisdiction on State Supreme Courts**

74. Reference should be made to obiter comments of McHugh J in *Kable* which appear to suggest that State Supreme Courts enjoy an appellate jurisdiction under the Constitution. In that case his Honour stated:<sup>76</sup>

Without the continued existence of a right of appeal from the Supreme Court of each State to the High Court, it would be difficult, indeed probably impossible, to have the unified system of common law that the Constitution intended should govern the

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<sup>72</sup> *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ).

<sup>73</sup> (1983) 158 CLR 535, 589.

<sup>74</sup> (1920) 28 CLR 106, 121; [1920] AC 691, 710-711.

<sup>75</sup> *Le Mesurier v Connor* (1929) 42 CLR 481, 495-496, 498; *Adams v Chas. S. Watson Pty Ltd* (1938) 60 CLR 545, 554; *Peacock v Newtown Marrickville & General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25, 37; *Russell v Russell* (1976) 134 CLR 495, 516, 530, 535, 554; *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 61 (Mason J), 74 (Brennan J).

<sup>76</sup> (1996) 189 CLR 51, 114.

people of Australia. Moreover, although it is not necessary to decide the point in the present case, a State law that prevented a right of appeal to the Supreme Court from, or a review of, a decision of an inferior State court, however described, would seem inconsistent with the principle expressed in s 73 and the integrated system of State and federal courts that covering cl 5 and Ch III envisages.

75. The implication of McHugh J's reasoning is that the Constitution is the source of the general appellate jurisdiction of State Supreme Courts because, as a matter of general principle, when a new court is created, whatever range of matters over which it has the authority to decide, there is no appeal from any decision of that court unless a right of appeal is expressly created by statute.<sup>77</sup> As Dixon J stated in *Grierson v The King*,<sup>78</sup> referring to the limits on the powers of the New South Wales Court of Criminal Appeal under the *Criminal Appeal Act 1912* (NSW), "[a]ppeal is not a common-law remedy, and proceedings at law are only subject to that remedy by statute".<sup>79</sup>

76. Section 73 does not expressly confer any jurisdiction on the Supreme Courts. Nor does it do so by implication.

77. The drafting history of s 73 strongly supports the view that the framers did not intend to confer any jurisdiction on the Supreme Courts:

(1) as mentioned above, at federation not all the States had enacted statutes creating rights of appeal to their respective Supreme Courts from all State criminal proceedings;

(2) it may be assumed that the framers would have expressly conferred jurisdiction on the Supreme Courts if they had intended to change the settled common law position, much in the same way as the words in the first paragraph of s 73 conferring appellate jurisdiction upon the High Court are unequivocal. As Griffith CJ stated in *The King v Snow*,<sup>80</sup> in response to a submission that s 73 of the Constitution had changed the settled common law doctrine as to the effect of a verdict of acquittal,<sup>81</sup>

If it had been intended by the framers of the Constitution to abrogate that doctrine in Australia, and to confer upon the High Court a new authority, such as had never been exercised under the British system of jurisprudence by any Court of either original or appellate jurisdiction, it might have been anticipated that so revolutionary a change would have been expressed in the clearest language.

(3) The framers did not intend to confer any jurisdiction upon the Supreme Courts. Mr Isaacs, Mr O'Connor and Dr Quick specifically discussed s 73 on the basis that it would not result in an appeal lying to the High Court from all State criminal proceedings unless an appeal were provided by the State to the Supreme Court. Although Mr O'Connor lamented that this meant an appeal would not necessarily lie in all criminal proceedings, no amendment to the clause was proposed.<sup>82</sup>

<sup>77</sup> *Holmes v Angwin* (1906) 4 CLR 297, 304 (Griffith CJ).

<sup>78</sup> (1938) 60 CLR 431.

<sup>79</sup> (1938) 60 CLR 431, 436. See also *Davern v Messel* (1984) 155 CLR 21, 47 (Mason and Brennan JJ).

<sup>80</sup> (1915) 20 CLR 315.

<sup>81</sup> (1915) 20 CLR 315, 322.

<sup>82</sup> *Convention Debates*, Melbourne 1898, 1891. See the Schedule attached, [10].

78. The operation of a single Australian common law under the Constitution does not require an appeal to lie from all State criminal proceedings to the Supreme Courts.

79. This Court has repeatedly endorsed the proposition that there is a single Australian common law,<sup>83</sup> despite a tradition of dissent.<sup>84</sup> That there was a unified common law in 1901 appears from the provision for appeals to the Privy Council from Australian courts generally, including the High Court. The emergence of a single Australian common law is usually dated to no later than 1988, and was the result of the historical process, including decisions by the High Court that it was no longer bound by decisions of the House of Lords<sup>85</sup> or the Privy Council<sup>86</sup>, which led to the abolition of appeals to the Privy Council.

80. The main, but not the only, feature of the Australian legal system that supports the recognition of a single Australian common law is the breadth of s 73.<sup>87</sup> But it also follows as a practical matter from the integrated nature of the system for the exercise of federal jurisdiction, because State courts exercise federal jurisdiction in conjunction with the application of State laws.

81. However, a single Australian common law is not based upon, and does not require, an assumption that appeals from all courts in Australia lie to the High Court. Section 73 provides for numerous exceptions to the High Court's appellate jurisdiction with the effect that there are large categories of cases where no appeal lies to the High Court. If appeals do not lie to the High Court (through the Supreme Courts) from State courts exercising State criminal jurisdiction, this will no more negate the operation of a single Australian common law than do the existing exceptions.

82. Moreover, since the notion of a single Australian common law is not derived from the Constitution alone, but from historical processes external to the Constitution, the term functions as a description of the modern operation of the common law in Australia<sup>88</sup> rather than as a constitutional implication. To reason from this description to an implication that s 73 must confer appellate jurisdiction on the Supreme Courts is flawed. There is a circularity in arguing from inferences drawn from s 73 (viz., the existence of a single Australian common law) to a conclusion about the very content of s 73 (viz., a single Australian common law must require for its operation that State Supreme Courts have appellate jurisdiction over all State courts below them, the source of which jurisdiction must lie implicitly in s 73). Further, to reason from the existence of one implication to the existence of a further constitutional implication (s 73 conferring general appellate jurisdiction on the Supreme Courts) is a process of constitutional interpretation disapproved by this Court in *McGinty v Western Australia*.<sup>89</sup>

<sup>83</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563, 565; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 112-113; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 517-518 [15]; *Lipohar v The Queen* (1999) 200 CLR 485, 509-510 [57].

<sup>84</sup> Clark, *Studies in Australian Constitutional Law* (1901), 203-205; Priestley, "A Federal Common Law in Australia?" *Public Law Review*, vol 6 (1995) 221; *Lipohar v The Queen* (1999) 200 CLR 485, 575-585 [235]-[262] (Callinan J).

<sup>85</sup> *Parker v The Queen* (1963) 111 CLR 610.

<sup>86</sup> *Viro v The Queen* (1978) 141 CLR 88.

<sup>87</sup> Leeming, "Common Law within Three Federations" *Public Law Review*, vol 18 (2007) 186.

<sup>88</sup> The expression "common law in Australia", as used in s 80 of the *Judiciary Act 1903* (Cth), is in this sense more accurate than the expression "common law of Australia".

<sup>89</sup> (1996) 186 CLR 140.



83. Equally, the fact that this Court is now the apex of the judicial hierarchy does not lead to the conclusion that an appeal must lie to it from every court in Australia. The Constitution contemplated a dual system of appeals from State courts.<sup>90</sup> The Queen in Council had jurisdiction to hear appeals from all State courts, and the High Court had appellate jurisdiction over the judgments, decrees, orders and sentences of all State courts existing at federation. It could not have been contended at the time of federation that this arrangement necessarily implied a right of appeal to the High Court from all State courts, created at any time in the future. Although appeals from all State courts to the Queen in Council were abolished by s 11 of the *Australia Acts 1986* (Cth) & (UK), it does not follow that an appellate jurisdiction for the Supreme Courts over all State courts beneath them in the judicial hierarchy was thenceforth to be implied into the Constitution.

84. Finally, the existence of a constitutional implication conferring a right of appeal to the Supreme Courts would be contrary to long-standing authority in this Court affirming the validity of State privative clauses.<sup>91</sup> In particular, in *Fish v Solution 6 Holdings*,<sup>92</sup> the Court commented that a State privative clause may, if sufficiently clear, limit the appellate jurisdiction of a State Supreme Court, so long as it satisfied the *Hickman* principle. In this context, Professor Enid Campbell has written:

A State statute which vests an appeals jurisdiction in an inferior court and declares that decisions made in the exercise of that jurisdiction be 'final and conclusive' or 'final and without appeal' will preclude further appeal to the Supreme Court and thence an appeal to the High Court.<sup>93</sup>

## E. APPLICATION OF THE PRINCIPLES TO THE INDUSTRIAL COURT

### No appeal available from the Industrial Court to the High Court

85. The High Court does not have jurisdiction to hear an appeal from the Industrial Court because the Industrial Court is neither a Supreme Court of a State nor a State court that existed at federation.

86. The Supreme Court of New South Wales was established by the Charter of Justice granted pursuant to statute in 1823.<sup>94</sup> Section 22 of the *Supreme Court Act 1970* (NSW) "continued" the Supreme Court "as formerly established as the superior court of record in New South Wales".

87. By s 152 of the *Industrial Relations Act 1996* (NSW) the Industrial Court was established as a superior court of record with an equivalent status to the Supreme

<sup>90</sup> Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 760.

<sup>91</sup> *Clancy v Butchers' Shop Employees' Union* (1904) 1 CLR 181, 204 (O'Connor J); *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 140 (Barton J), 145-146 (O'Connor J); *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 633-634 (Gaudron and Gummow JJ).

<sup>92</sup> *Fish v Solution 6 Holdings Limited* (2006) 225 CLR 180, 195 [33]-[34] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ), 224 [147] (Kirby J), 235-236 [180] (Heydon J).

<sup>93</sup> Campbell, "Constitution Protection of State Courts and Judges" *Monash University Law Review*, vol 23 (1997) 397, 407, fn 61, citing *Twist v Randwick Municipal Council* (1976) 136 CLR 106; *Srizom v Surveyors Board of Victoria* (1995) 9 VAR 91.

<sup>94</sup> 4 Geo IV c 96. Subsequent statutory authority was provided by *The Australian Courts Act 1828* (Imp) (9 Geo IV c 83) and by the *New South Wales Constitution Act 1855* (18 & 19 Vict c 54 s 42).

Court and the Land and Environment Court. It did not exist at federation and it is not the Supreme Court.

88. Although the Full Bench of the Industrial Court is substituted for references to the Court of Criminal Appeal (which is part of the Supreme Court<sup>95</sup>) for the purposes of the *Criminal Appeal Act 1912* by s 196 of the *Industrial Relations Act 1996* (NSW), the Full Bench of the Industrial Court is not the Court of Criminal Appeal.

#### **No appeal lies from the Full Bench of the Industrial Court to the Supreme Court**

- 10 89. Section 179 of the *Industrial Relations Act 1979* (NSW) is valid because the Constitution does not require the Supreme Courts to exercise an appellate jurisdiction over all State criminal proceedings.<sup>96</sup> In consequence, no appeal lies to the Supreme Court from the Full Bench of the Industrial Court.

#### **The Industrial Court is part of the integrated court system under the Constitution**

- 20 90. Section 179 of the *Industrial Relations Act 1996* (NSW) prevents appeals from the Industrial Court to the Supreme Court. But it does not follow that the Industrial Court is not part of the integrated court system under the Constitution. It remains part of the integrated court system under the Constitution because it may exercise federal jurisdiction and because, in any case, the Supreme Court exercises supervisory jurisdiction over it.
91. The Court of Appeal may review decisions of the Full Bench of the Industrial Court for jurisdictional error pursuant to s 48 of the *Supreme Court Act 1970* (NSW).<sup>97</sup>
92. From the Court of Appeal, being the Supreme Court for the purposes of s 73 of the Constitution,<sup>98</sup> an appeal lies to the High Court.
- 30 93. Further, the Industrial Court is a “court of a State” for the purposes of s 77(iii) and as such an appeal lies to the High Court pursuant to s 73(ii) when it is a “court exercising federal jurisdiction”. The High Court’s appellate jurisdiction over the Industrial Court when it is exercising federal jurisdiction extends to a ground which is solely derived from State law (so long as it falls within the description “all judgments, decrees, orders, and sentences”).
94. As mentioned above, the Industrial Court is also subject to the *Kable* doctrine.
95. In all these ways, the Industrial Court of New South Wales has a place within the integrated system of courts recognised under Chapter III, despite there being here neither an appeal to the Supreme Court of New South Wales nor a further appeal to the High Court.

<sup>95</sup> *Stewart v The King* (1921) 29 CLR 234.

<sup>96</sup> Section 179 was considered in *Batterham v QSR Ltd* (2006) 225 CLR 237, but its validity was not in issue: see 244 [12], 257 [56].

<sup>97</sup> *Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2006) 66 NSWLR 151, 158-161 [28]-[36] (Spigelman CJ), 169-170 [83] (Basten JA).

<sup>98</sup> *Stewart v The King* (1921) 29 CLR 234.

**Dated:** 21 September 2009



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## SCHEDULE

### CONVENTION DEBATES ON THE DRAFTING OF SECTION 73

1. At Sydney in 1891 the clause (then Ch III, cl 4) was introduced and passed without discussion as follows:<sup>1</sup>

The Supreme Court of Australia shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament from time to time prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences, of any other Federal Court, or of the highest Court of final resort now established, or which may hereafter be established, in any State, whether such Court is a Court of Appeal or of original jurisdiction, and the judgment of the Supreme Court of Australia in all such cases shall be final and conclusive.

Until the Parliament makes other provisions, the conditions of and restrictions on appeals to the Queen in Council from the highest Courts of final resort of the several States shall be applicable to appeals from such Courts to the Supreme Court of Australia.

2. The clause closely mirrored cl 64 of Andrew Inglis Clark's draft constitution of 1891.<sup>2</sup>
3. At Adelaide in 1897, the clause (then cl 74) was passed as follows:<sup>3</sup>

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as The Parliament may from time to time prescribe, to hear and determine appeals from all judgments, decrees, orders, and sentences of any other federal Court, or court exercising federal jurisdiction, or of the Supreme Court of any State, whether any such court is a court of appeal or of original jurisdiction; and the judgment of the High Court in all such cases shall be final and conclusive.

Until The Parliament otherwise provides, the conditions and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

4. The drafting committee replaced in paragraph 1 the words "the highest Court of final resort now established, or which may hereafter be established, in any State," with "the Supreme Court of any State".
5. At Sydney in 1897 the clause was not discussed.
6. At Melbourne in 1898 the delegates engaged in considered debate about the clause's meaning and put forward several amendments. Mr Symon proposed that after the word "State" the following words be inserted, "or of any other court of

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<sup>1</sup> *Convention Debates*, Sydney 1891, 956.

<sup>2</sup> Williams, *The Australian Constitution: A Documentary History* (2005), 89.

<sup>3</sup> *Convention Debates*, Adelaide 1897, 1235.

any State from which an appeal now lies to the Queen in Council.”<sup>4</sup> The Convention agreed to the amendment.<sup>5</sup>

7. The Convention also considered how the clause would operate with respect to state criminal jurisdiction. In response to a question whether the clause granted the High Court jurisdiction to hear and determine appeals from decisions of state courts exercising state criminal jurisdiction, Mr O'Connor explained that the High Court would have such jurisdiction because:<sup>6</sup>

The jury find the verdict, but the judgment is the judgment of the Court. So that every possible case is covered.

8. Mr Isaacs later returned to the issue, stating:<sup>7</sup>

... The clause, as it stands, provides that the High Court shall have jurisdiction, subject only to any exceptions Parliament may impose, to hear appeals from any Federal Court or from the Supreme Court of any state on judgments, orders, and sentences. Sentences would include criminal matters. I would point out, also, that if the state legislature chooses to say that a decision of the Supreme Court of the state shall be final and conclusive, and without appeal, in any particular matter, yet under the terms of this clause the provisions of that state legislation would be nugatory in that respect, and they would have a right of appeal under the Constitution. Surely we do not intend to do that. But let us carry the matter a little further. Let us take the case of a man who has been fined in a police court for an assault. He appeals to the Supreme Court under the law of the state. Under this clause he could carry the case to the Federal High Court, notwithstanding any negative provision in the state legislation. ...

9. The following exchange then took place:<sup>8</sup>

Mr Wise	... I am not the least apprehensive of the dangers apprehended by Mr Isaacs, because the first sub-section [of the clause] provides that the only cases in which appeals are allowed under this Constitution are from decisions either from the Supreme Court of the state, or in such cases as the state considers of sufficient importance to allow appeals to the Privy Council. Each state has, therefore, power to prevent trivial appeals by providing that the decision of a court of first instance shall be final. If the case is of sufficient importance to go to the Supreme Court of the state, it should go to the High Court of Australasia just as it can go to the Privy Council.
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Mr Isaacs	But there are County Court cases in which there is no appeal to the Supreme Court. <sup>9</sup>
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<sup>4</sup> *Convention Debates*, Melbourne 1898, 332.

<sup>5</sup> *Convention Debates*, Melbourne 1898, 333.

<sup>6</sup> *Convention Debates*, Melbourne 1898, 333.

<sup>7</sup> *Convention Debates*, Melbourne 1898, 1886-1887.

<sup>8</sup> *Convention Debates*, Melbourne 1898, 1889.

Mr Wise                      If a case is of sufficient importance to go to the Supreme Court it ought to be of sufficient importance to be appealable to the High Court. ...

10. The exchange continued:<sup>10</sup>

Mr O'Connor              ... Mr Isaacs referred to appeals in criminal cases. There might be strong reason as a matter of general policy why there should not be appeals in criminal cases, involving, as they necessarily would great delay between the time of passing sentence and the carrying of it out. For that reason, I think appeals to the Privy Council in criminal cases are only allowed under very exceptional circumstances, but the case will be altogether different when you have a Court of Appeal sitting in Australia, the sittings of which can probably be made available for a criminal matter in a very few weeks.

Mr Isaacs                      If a man is tried in a Supreme Court he has an inalienable right of appeal to the Federal Court. At the General Sessions he may be given a much heavier sentence, but he has no right of appeal to the Federal Court.<sup>11</sup>

...

Mr O'Connor              No; a man subject to a sentence of any kind is entitled now to appeal to the Supreme Court of the State.

An hon. member              No, not under this section.

Mr O'Connor              I am taking it step by step, and I am taking the law as it is now. A man is entitled to an appeal to the Supreme Court in all the States.

Dr Quick                      Unfortunately that is not the case in this country, although, I admit, it is by a mistake in our legislation.

Mr O'Connor              That may be; but I am speaking with regard to most of the colonies. It is true that there is a right of appeal generally in criminal cases.

Dr Quick                      No.

Mr O'Connor              Whether there is or not, there ought to be. ... I think that the right of appeal in all criminal cases ought to be reserved to the High Court, which we have put here in place of the Privy Council. ...

<sup>9</sup> The County Court of Victoria then exercised civil jurisdiction and the matters on which appeals were not available to the Supreme Court are set out in s 133 of the *County Court Act 1890* (Vic).

<sup>10</sup> *Convention Debates*, Melbourne 1898, 1891.

<sup>11</sup> In Victoria, the Court of Petty Sessions had jurisdiction over felonies and misdemeanours with stated exceptions: *Justices Act 1890* (Vic) s 59. From specified decisions of the Court of Petty Sessions either an appeal lay to the Court of General Sessions (*Justices Act 1890* (Vic), ss 127-136, 178) or a case stated could be brought to the Supreme Court (*Justices Act 1890* (Vic), ss 137-154; *Supreme Court Act 1890* (Vic), s 36(5)). The Court of General Sessions also exercised criminal jurisdiction over indictable offences, with 20 stated exceptions: *Justices Act 1890* (Vic), ss 174, 179. An appeal lay on questions of law from a court exercising jurisdiction over indictable offences to the Supreme Court (Crown Cases reserved): *Crimes Act 1890* (Vic), s 481; *Supreme Court Act 1890* (Vic), s 36(5).

11. No amendment was made (or proposed) to effect such a change.
12. There was also extensive discussion and several unsuccessful proposals for amendment about whether the Commonwealth Parliament would use the power to make “exceptions” to the High Court’s appellate jurisdiction to prevent appeals from the State Supreme Courts as had occurred in the United States of America.<sup>12</sup>
13. The debate ended with agreement to a proposal put by Mr Glynn.<sup>13</sup> Its purpose, as interpolated by Mr Barton, was “to put it out of the power of the Commonwealth Parliament to regulate appeals so as to prevent any existing right [that is, as existing at the date of the establishment of the Commonwealth] of appeal from a local court to the High Court”.<sup>14</sup>
14. The drafting committee subsequently made minor drafting amendments to the clause and prepared the proviso as follows:<sup>15</sup>

But no exception or regulation prescribed by The Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.
15. To the Convention Mr Barton explained that the meaning of the proviso was that “[i]t leaves the state Parliament with jurisdiction, but prevents the Commonwealth Parliament from taking away the right”.<sup>16</sup>
16. The Convention agreed without amendment to the form of the clause proposed by the drafting committee.<sup>17</sup> The clause was passed by the Imperial Parliament without amendment.<sup>18</sup>

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<sup>12</sup> *Convention Debates*, Adelaide 1897, 967; *Convention Debates*, Melbourne 1898, 331-332, 1885-1893, 2323-2325, 2454.

<sup>13</sup> *Convention Debates*, Melbourne 1898, 2323.

<sup>14</sup> *Convention Debates*, Melbourne 1898, 2324.

<sup>15</sup> *Convention Debates*, Melbourne 1898, 2454.

<sup>16</sup> *Convention Debates*, Melbourne 1898, 2454.

<sup>17</sup> *Convention Debates*, Melbourne 1898, 2454.

<sup>18</sup> Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 737.