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Jurisdiction of Courts (Miscellaneous Amendments) Bill 2000

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Law and Bills Digest Group
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Contents

Jurisdiction of Courts (Miscellaneous Amendments) Bill 2000

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Purpose

The main purpose of the Bill is to remedy possible defects in legislation passed last year which established the Federal Magistrates Court (FMC), and specifically which provided for transfer of proceedings between the FMC and both the Federal Court and the Family Court. Secondly, where cases have already been transferred under the impugned provisions and decided, the Bill seeks to give statutory effect to the outcomes of that litigation, outcomes which might otherwise be legally ineffective. Thirdly, the Bill clarifies the monetary limit in trade practices litigation transferred to the FMC from the Federal Court.

Background

The Federal Magistrates Court

Last year the Parliament passed the *Federal Magistrates Act 1999* (Federal Magistrates Act) and the *Federal Magistrates (Consequential Provisions) Act 1999* (Consequentials Act). That legislation established the FMC and, amongst other things, detailed its jurisdiction in areas such as family law, trade practices, human rights, judicial review of administrative decisions and bankruptcy.

The FMC was established as a lower level court to handle less complex matters currently dealt with in the Federal and Family Courts. It was intended to offer greater informality, simplicity and efficiency. Detailed information on the background to the establishment of the FMC can be found in the Bills Digest for the Federal Magistrates Act.[1]

In accordance with the doctrine of separation of powers, federal judicial power can only be exercised by courts established under or recognised in Chapter III of the Commonwealth Constitution. The Federal Magistrates Court is a Chapter III court.

The Separation of Powers

As just noted, the Commonwealth Constitution has been interpreted by the High Court as giving effect to a separation of powers, relevantly for our purposes, a separation of the judiciary from both the Parliament and the Executive. The constitutional separation of powers, an implication derived from the structure of the Constitution which contains a separate Chapter III dealing exclusively with federal judicial power, puts limits on the powers of the Parliament and the Executive. Over the last decade or so, the High Court has asserted and defined those limits in increasingly robust fashion. In other words, a number of laws have been found invalid because the High Court has regarded Parliament as transgressing the separation between legislative and judicial power which arises by implication from the existence of Chapter III in the Constitution.

The most significant High Court decision in terms of the current Bill is *Kable v Director of Public Prosecutions (NSW)*.[2] There the High Court recognised a free-standing doctrine of 'incompatibility', which it will deploy to invalidate laws that inflict on courts exercising federal jurisdiction functions which are incompatible with the independence, impartiality and integrity of Chapter III courts. Specifically in that case, the legislation was seen as cloaking the decisions of the Executive and the Parliament to prolong the detention of a prisoner with the legitimacy of a court order, but without allowing the NSW Supreme Court (which exercises federal jurisdiction) the full, free and independent exercise of judicial power necessary to preserve public confidence in the judiciary. The decision in *Kable* was a warning from the High Court that legislation runs the risk of constitutional invalidity if it arguably creates the impression that courts exercising federal jurisdiction are mere extensions of the Executive.

Kable also embodied another long-standing principle in the separation of legislative and executive powers: that only Chapter III courts can exercise federal judicial power. So the separation of powers in the Commonwealth Constitution gives rise to at least two doctrines: Parliament cannot foist functions on courts which are incompatible with their status as repositories of federal judicial power; nor can Parliament usurp the role of the courts and purport, as a legislature, to exercise judicial power. Both doctrines are relevant to the constitutionality of this Bill, as will be seen in the Concluding Comments.

An Ambiguity about Jurisdiction in Transferred Proceedings

The creation of *concurrent jurisdiction* between the Federal Court and the FMC, and the Family Court and the FMC, together with the capacity for *transfer of proceedings* between the relevant superior court[3] and the lower level magistrates court are important features of

the new federal magistracy. The ability to transfer proceedings was promoted by the Attorney-General when the legislation was introduced last year, as facilitating the division of judicial labour between more complex and less complex matters, and as contributing to the objective of easing the workload in both the Federal and Family Courts.[4] Defects in the transfer provisions would thus undermine a significant part of the legislative package so recently introduced.

The power to transfer proceedings from the FMC to either of the superior federal courts is set out in the Federal Magistrates Act. In some cases, a federal magistrate can exercise a discretion over whether to transfer a matter or not (section 39). In other cases the transferral of proceedings will be mandatory (section 41)—proceedings in this category will be specified in regulations, although none have been made to date. There is no appeal in relation to the decision about transfer of proceedings.

Provisions for the transfer of matters in the opposite direction, from either the Family or the Federal Court to the FMC, were set out in the Consequentials Act. The *Family Law Act 1975* (Family Law Act) was amended to provide for both discretionary (section 33B) and mandatory (section 33C) transfer of proceedings to the FMC. The *Federal Court of Australia 1976* was amended to provide for discretionary transfers (section 32AB). Again there is no appeal available regarding the transfer decision in any of these instances.

The existence of these provisions explicitly authorising transfer of proceedings might, on one interpretation, be the end of the matter. It is reasonable to interpret them as implicitly conferring jurisdiction on the receiving court to hear and determine the matters.[5] The precise problem which has prompted the Bill is not explained in the Explanatory Memorandum nor the Second Reading Speech. It appears to be that these transfer provisions run into a potential conflict with provisions in the *Administrative Decisions (Judicial Review) Act 1977* and the Family Law Act that deal with the jurisdiction of courts under those Acts. Arguably those provisions dealing with jurisdiction do not accommodate matters *transferred* to the court in question rather than originally instituted there. Whether this fear is well grounded in the family law area is discussed further below.

Main Provisions

Schedule 1—Jurisdiction of Courts

Confirming jurisdiction in proceedings transferred to and from the FMC

Items 1 and **3** deal with the two-way transfer of ADJR matters[6] between the FMC and the Federal Court, and the transfer of family law matters from the Family Court to the FMC. Both items remove from the relevant Act a legal ambiguity which currently casts doubt on whether such transfers of proceedings are legally effective.

Item 1 addresses that provision of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) which indicates how the Act should be interpreted. Thus it adds three new subsections to existing section 3 of the ADJR Act. **Proposed subsection 3(10)** confirms that references to 'an application made to the Federal Court' include (and are deemed always to have included) applications transferred to the Federal Court from the FMC. The bracketed words in proposed subsection 3(10), which exclude some provisions in section 11 of the ADJR Act, are there to prevent this amendment from itself sowing confusion. Their effect is to preserve the possibility that the Federal Court and the FMC may impose different procedural rules for making applications to the court in question.

A similar amendment is made in the next subsection, **proposed subsection 3(11)**, for matters travelling in the opposite direction (ie from the Federal Court to the FMC). The wording is slightly different to take account of the fact that not every ADJR matter which can be commenced in the Federal Court may also be commenced in the FMC (the Explanatory Memorandum refers to a number of examples including certain migration and citizenship matters).

The nett effect of both subsections is that when section 8 of the ADJR Act refers to jurisdiction over applications 'made to the…Court', there will be no doubt that it includes matters transferred to that court from the other tier (the FMC or the Federal Court depending on where the applicant initiated proceedings).

Section 19 of the Federal Magistrates Act prevents splitting of related matters between the FMC and either the Family Court or the Federal Court. It prohibits someone from commencing proceedings in the FMC if an 'associated matter' is already before one of those other federal courts.[7] Its policy intent is unrelated to the issue addressed in the Bill. Therefore, to prevent this technical rule creating further ambiguity as far as jurisdiction in transferred proceedings is concerned, **proposed subsection 3(12)** says that section 19 will be disregarded when interpreting **proposed paragraph 3(11)(b)**.

Item 2 is a consequential amendment, a reminder that in assessing the original jurisdiction of a federal court in an ADJR matter, the clarifying statements in **proposed subsections 3(10)-(12)** should be taken into account.

The Family Law Act confers jurisdiction on various courts to hear family law matters. Jurisdiction over 'matrimonial causes'—basically divorce, maintenance and property proceedings—is dealt with in Part V of that Act. Some courts have jurisdiction over defined family law matters including all matrimonial causes *expressly* conferred on them.[8] By contrast, jurisdiction is *expressly* conferred on the FMC only in relation to a small subset of family law matters in subsection 39(5A), as well as in other parts of the Act.[9] Subsection 39(1A), in rather different language, states that most matrimonial causes can be 'instituted…in the Federal Magistrates Court'.

It seems clear that the language in subsection 39(1A) is sufficient to impliedly confer *jurisdiction* on the FMC to hear and determine those matrimonial causes which can be 'instituted' there.[10] Arguably, though, the (implied) conferral of jurisdiction in subsection

39(1A) is confined to matters which *commence* in the FMC, rather than those matrimonial causes *transferred* to the FMC from the Family Court. But there is one more piece in the mosaic of FMC jurisdiction over these matrimonial causes: subsection 39(9) of the Family Law Act says that where section 39 confers or invests a court with jurisdiction, that court also has jurisdiction over matters arising under Commonwealth law where proceedings are transferred to that court.

Putting subsections 39(5A), (1A) and (9) together, arguably the FMC has jurisdiction over the subset of family proceedings mentioned in subsection 39(5A)—whether commenced in or transferred to the FMC—and over most matrimonial causes either instituted in (subsection 39(1A)) or transferred to (subsection 39(9)) the FMC.

If this interpretation is correct, and it is difficult to see why it is not, there is no apparent problem or ambiguity to be resolved by the Bill. In any case, **item 3** will remove any doubt. It states that the FMC has and always had jurisdiction where these matrimonial causes are instituted under the Family Law Act, thus catching proceedings commenced in either the superior or lower level court.

Clarifying the monetary limits in trade practices litigation transferred to the FMC

The new FMC was, in the Consequential Act, given limited jurisdiction in civil actions for damages pursued under section 82 of the *Trade Practices Act 1974* (TPA). A monetary limit of $200 000 was imposed when such damages claims are 'instituted in the Federal Magistrates Court'.[11]

The wording of this monetary limitation creates an unintended ambiguity. Arguably it implies that the monetary limit does not apply where proceedings under section 82 are first commenced in the Federal Court and then transferred to the FMC rather than 'instituted' in the latter court. **Item 4** removes this ambiguity by applying the limit to both situations. **Item 5** is a minor consequential amendment which provides a cross-reference to the provision authorising transfer of TPA proceedings from the Federal Court to the FMC.

Repairing the Possible Damage Caused by Defective Transfer Provisions

Part 2 of the Bill is an attempt, based on a formula used in the past by Commonwealth drafters and approved in the High Court, to repair the legal damage which may have been caused by the defects in 'transfer of proceedings' provisions identified above.

The scheme addresses those cases where the transfer provisions have been used in ADJR and family law matters to relocate proceedings from the Federal Court and Family Court respectively where they were instituted, to the FMC. The possible absence of FMC jurisdiction in such transferred proceedings puts a question mark over the legal validity of the decisions in those cases (the Explanatory Memorandum and Second Reading Speech do not provide an estimate of how many cases may be affected). The Bill labels these decisions 'designated judgments'. It then attempts to put the parties involved in or affected by those decisions in exactly the same legal situation as they would be if those decisions

had been validly decided. Strictly speaking it does not legislate to 'validate' the decisions, because of constitutional concerns discussed below. Instead, through the Bill, Parliament will *declare* the rights and liabilities of the parties to be the same 'as if' each designated judgment had been validly made. It goes further and attempts to mirror and provide for in legislation the legal consequences which would follow if the judgments had been validly made.

In adopting this mechanism of 'statutory judgments' the Bill embraces a model which has been used before in Commonwealth legislation to deal in one swoop with the problem of invalid or potentially invalid decisions. It was pioneered in the *Matrimonial Causes Act 1971*, which was enacted to deal with the consequence of the High Court decision in *Knight v Knight*.[12] That case found that certain orders for maintenance made by the Master of the South Australian Supreme Court were invalid because they involved the exercise of judicial power. The Master was not a member of the Court and therefore lacked jurisdiction to make the orders.

The *Matrimonial Causes Act 1971* declared the rights of parties in the affected maintenance proceedings to be the same as if the cases had been decided by a Supreme Court judge. The legislation was challenged in *R v Humby* on the basis that it breached the separation of powers provided for in Chapter III of the Constitution. The argument was that Parliament had transgressed the divide between legislative and judicial power, the latter sphere being reserved to Chapter III courts. The High Court unanimously rejected the challenge and upheld the legislation. Justice Mason put it this way:

> Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action…
>
> Here by legislative action the rights of parties in issue in proceedings which resulted in invalid determinations were declared. The rights so declared in form and in substance were the same as those declared by the invalid determinations. But the legislation does not involve an interference with the judicial process of the kind which took place in *Liyanage v The Queen*.[13]

The same sort of model has been used subsequently, for example to deal with the potentially massive consequences of *Re Wakim*,[14] a constitutional decision which found the cross-vesting scheme for corporations law cases to be invalid and thus threw into doubt the validity of thousands of decided cases. Another recent example is found in the *Family Court of Western Australia (Orders of Registrars) Act 1997* which dealt with certain orders made by registrars of the Family Court of Western Australia.[15]

Item 7 defines which judgments of the FMC will be singled out for this form of legislative imitation. Although Part 1 of the Bill acknowledges that the transfer provisions for ADJR matters moving from the FMC to the Federal Court share the same defect, the Second Reading Speech states that no cases have yet taken this path, therefore item 7 only deals with ADJR matters transferred from the Federal Court to the FMC and family law matters moved from the Family Court to the FMC.

Sub-item 7(1) pre-empts challenges based on possible defects in the provisions allowing ADJR matters to be transferred from the Federal Court to the FMC. It says that:

- if such a transfer occurred
- it transpires that the FMC *did* lack jurisdiction to decide the case
- the FMC delivered its judgment in the case, and
- the doubt over jurisdiction is removed by the clarifying amendments in item 1

then the FMC's purported decision is a 'designated judgment' for the purposes of the Bill.

Similarly, if a family law matter was transferred from the Family Court to the FMC where it was decided, and it transpires that the FMC lacked jurisdiction over the transferred proceedings but that defect is cured by item 3, then the FMC's purported decision is again a 'designated judgment' for the purposes of the Bill (**sub-item 7(2)**).

It is possible that in either situation the original decision of the FMC has been modified in some way. A court may have affirmed, revoked, set aside, reversed, varied, revived or suspended the original decision. **Sub-item 7(3)** has been inserted to ensure Part 2 has the desired curative effect on that judgment, both before and after any such modification.

Item 8 is the key provision in Part 2, in which Parliament attempts by legislation to mirror what the FMC has purported to decide but, due to alleged drafting defects, may have lacked jurisdiction to do. Rather than 'validate' these decisions, item 8 creates a legislative proxy for the court order, a declaration by Parliament that the rights and liabilities of any person are the same as if the designated judgments had been valid decisions of the FMC.

Item 9 elaborates on the effect of item 8. It confirms the ability of relevant people to exercise and enforce the rights and liabilities declared by legislation in item 8, as if they had instead been validly declared in a judgment and order by the FMC. **Sub-item 9(2)** confirms that this includes the right of appeal where that right is available against a decision of the FMC. Note that this creates the rather odd situation of appealing to a higher court against, not a trial and decision conducted by a judge, but a legislative declaration of rights and liabilities.

A court decision may have effect beyond its immediate context of settling a dispute between parties. To take a simple example, an award of damages may attract a liability to pay tax to the Australian Taxation Office. **Item 10** attempts to ensure that in mimicking the effect of a FMC order, the Bill replicates these flow-on effects of a court decision and confirms the right of all entities to act as if the designated judgment is, and always was, valid. Those who have contravened FMC court orders or do so in the future, will not be able to escape the legal consequences of their contravention by capitalising on the possible invalidity of such orders due to a defective transfer. That is the legal effect of **sub-item 10(2)**.

Item 11 confirms that courts can modify the rights and liabilities declared by **item 8** just as if they had been validly declared in a judgment of the FMC. **Sub-item 11(4)** also affirms the power to effect any other action a court could have effected in the same situation, when considering applications to:

- modify a judgment
- grant an extension of time
- grant a stay of proceedings.

Where past or future behaviour by a person would attract the powers of a court to deal with contempts in the case of a valid FMC order, the same behaviour attracts the same powers even though a designated judgment is instead the touchstone for assessing contempt: **item 12**.

The oddity of a legislative declaration of rights and liabilities, as if it was a judgment of the FMC, could lead to problems if those rights and liabilities must subsequently be established in another proceeding. There has been in these cases strictly speaking no trial, no judge and no judgment, simply a legislative declaration of rights. In practical reality, there has been a full trial with all its normal accoutrements, but drafting defects may have robbed the FMC of the jurisdiction validly to conduct that trial. **Item 13** provides that a copy of the court record of a designated judgment can be used in evidence in another proceeding to spell out the existence, nature and extent of the rights and liabilities declared in item 8.

Of course, it may be that the Federal Court or Family Court has in some way already nullified a decision of the FMC, for reasons quite unrelated to the jurisdictional question raised by the transfer provisions. **Item 14** confirms that Part 2 does not apply in such situations.

Transitional Provisions

As noted throughout this Digest, this Bill is based on a premise which is speculative. The doubt over jurisdiction in transferred proceedings has not been confirmed by a court, it is simply that the relevant Acts[16] contain ambiguities which may threaten that jurisdiction. The Bill, therefore, is drafted to cater for a future possibility: that a court decides there has indeed been an absence of jurisdiction. In such a case, Part 2 would be activated, with the intention of creating a set of legal consequences identical to those which would have flowed if the judgment had been valid. If it transpires there was never an absence of jurisdiction, Part 2 would have no work to do and the judgment would have its ordinary legal consequences.

Because of the speculative premise underpinning the Bill, the Government has inserted **items 16** and **17** to prevent any undesirable inferences being drawn. It says that the remedial action taken by the Bill should not be interpreted as indicating a lack of intention

when the FMC was originally established that it (and the Federal Court) should have jurisdiction in such transferred proceedings.

Concluding Comments

The Constitutionality of Parliament Simulating a Court Order

What can Parliament do when certain decisions, made in the past, are subsequently found or suspected to be invalid? When the decisions were purportedly made in court proceedings, the prospect of accepting their invalidity, undoing their myriad effects and re-running litigation presents a nightmare scenario. In 1973, in *Humby*, the High Court gave its unanimous approval to a particular legislative device aimed at avoiding the nightmare and restoring the legal effect of what were thought to be properly decided cases. The Court asserted that whatever the implied limitations on Parliament's power which arise from Chapter III of the Constitution, they do not invalidate legislative declarations of the rights of parties involved in litigation.

Relying on the High Court's finding in *Humby*, the Commonwealth Parliament has enacted similar schemes for certain orders made in the Family Court of Western Australia and now, in this Bill, for certain decisions taken by the FMC. State Parliaments around Australia have also relied on the same model in enacting a preliminary 'rescue package' to deal with the potentially massive consequences of the High Court's invalidation of the cross-vesting scheme in the area of corporations law.

As we have seen, however, in the intervening years since *Humby* was decided the High Court has adopted an increasingly robust view of the constitutional separation of powers. The doctrine in *Kable* spells danger for any law which might create an impression that Parliament is co-opting a court exercising federal jurisdiction to legislative or executive ends. The risk is a finding that Parliament is impermissibly exercising judicial power, or alternatively foisting on the judiciary a role incompatible with the independence and integrity of a Chapter III court.

Taking a cue from *Kable* it might plausibly be argued that Part 2 of the Bill represents an attempt by Parliament to clothe its legislative act with the imprimatur of an FMC judgment. Put this way, one can see how the foundations of an earlier decision such as *Humby* may have been loosened by the subsequent High Court decisions on judicial power epitomised by *Kable*.

It will come as no surprise, then, that the *Humby* model has indeed been subjected to fresh constitutional challenge in recent years. The NSW version of the post-*Wakim* rescue package, the *Federal Courts (State Jurisdiction) Act 1999* (NSW), was challenged in *Incentive Dynamics Pty Ltd v Robins*.[17] That challenge was rejected by a single Supreme Court judge. He conceded that establishing rights and liabilities as if there had been a valid

and effective trial on the merits where in fact there had been no such thing, and requiring a court without question to give effect to those rights and liabilities, might in some circumstances offend the constitutional separation of powers. The critical factor in his view was the nature of the body which had made the original (invalid) decision:

> the Act applies only where there has been a trial on the merits, by a tribunal of the highest integrity, competence and reputation, in which, subject to any points that could be raised in an ordinary appeal on the merits, both parties have had a fair opportunity to put their cases.[18]

If this reasoning was adopted in the High Court, it suggests that the applicability of the *Humby* model would depend on how much the original decision-maker resembled a court conducting itself in a judicial way. It would also suggest that the current Bill would survive constitutional challenge based on Chapter III.

The decision in *Incentive Dynamics* is under appeal to the NSW Court of Appeal.[19]

Meanwhile, the stage has been set for a High Court decision which may decide the relationship between *Humby* and *Kable*. The provisions of the post-*Wakim* rescue package in Queensland and South Australia have been challenged in an appeal heard by the High Court on 13-14 June 2000.[20] The range of arguments put in that case—*Re Macks; ex parte Saint*—by those seeking to invalidate the State 'validation' legislation include:

- *Humby* should be over-ruled
- the legislation in *Humby* can be distinguished from the corporations rescue package
- by requiring courts to give their 'rubber stamp' to the declaration of rights and liabilities by Parliament, the legislation offends the incompatibility principle spelt out in *Kable* or amounts to a legislative usurpation of judicial function.

There is one other aspect to *Re Macks* which raises a fresh issue not yet discussed in this Digest. Parties in the June 2000 High Court hearing homed in on the appeal provisions in the State 'validation' legislation. These resemble the 'right to appeal' provisions found in the Bill at sub-item 9(2). By drawing attention to the oddity of appealing to a higher court from an earlier decision which is in fact a legislative declaration of rights, some parties in *Re Macks* have questioned (in various ways) whether such a fiction is compatible with the proper functioning of an independent judiciary. Put another way, does the appellate hierarchy, which has the High Court at its apex, pre-suppose there was a genuine trial at first instance? If it does, can the appeal provisions stand? And if they can't, are they so inextricably bound up in the declaration of rights and liabilities that they bring the whole legislative scheme tumbling down?

The outcome of *Re Macks* is likely to clarify the constitutionality of Part 2 of the current Bill.

Endnotes

1 Jennifer Norberry, *Federal Magistrates Bill 1999*, Bills Digest No. 59 1999-2000, Department of Parliamentary Library, 9 September 1999, also available at http://www.aph.gov.au/library/pubs/bd/1999-2000/2000BD059.htm (29 November 2000). See also Andrew Grimm, *Federal Magistrates (Consequential Amendments) Bill 1999*, Bills Digest No. 55 1999-2000, Department of Parliamentary Library, 25 August 1999, also available at http://www.aph.gov.au/library/pubs/bd/1999-2000/2000BD055.htm (29 November 2000).

2 (1996) 189 CLR 51.

3 Both the Federal Court and the Family Court are superior courts of record.

4 The Hon. Daryl Williams, House of Representatives, *Debates*, 24 June 1999, p. 7367.

5 Section 15C of the *Acts Interpretation Act 1901*.

6 That is, applications to review the legality (rather than the merits) of administrative decisions, pursued under the *Administrative Decisions (Judicial Review) Act 1977*.

7 Certain exceptions to the rule are found in subsection 19(2).

8 See in particular subsection 39(5) of the *Family Law Act 1975*.

9 See for example the jurisdiction conferred in relation to parenting of children in subsection 69H(4) of the *Family Law Act 1975*.

10 See section 15C of the *Acts Interpretation Act 1901*.

11 Section 86AA of the *Trade Practices Act 1974*. The monetary limit may be varied by regulation.

12 (1971) 122 CLR 114.

13 *R v Humby; ex parte Rooney* (1973) 129 CLR 231 at 250.

14 *Re Wakim; ex parte McNally* (1999) 198 CLR 511. For an example of the remedial State legislation, see the *Federal Courts (State Jurisdiction) Act 1999* (S.A.).

15 See Bills Digest No. 12 1997-98, which can be found at http://www.aph.gov.au/library/pubs/bd/1997-98/98bd012.htm (29 November 2000).

16 The *Federal Magistrates Act 1999*, the *Federal Court of Australia Act 1977* and the *Family Law Act 1975*.

17 [2000] NSWSC 34 (11 February 2000).

18 ibid at para 69.

19 Transcript of the High Court hearing in *Re Macks; ex parte Saint*, 14 June 2000 (decision reserved).

20 *Re Macks; ex parte Saint*.