



Judiciary Legislation Amendment Bill 2006

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Law and Bills Digest Section

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Judiciary Legislation Amendment Bill 2006

Date introduced: 13 September 2006

House: Senate

Portfolio: Attorney-General

Commencement: Date of Royal Assent

Purpose

This is a technical Bill dealing with the exercise of summary jurisdiction by State courts. The Bill has two main purposes. The first is to give effect to purported orders made by non-judicial officers of State courts of summary jurisdiction contrary to paragraph 39(2)(d) of the *Judiciary Act 1903*, by providing that the rights and liabilities of all persons are the same as if each such order had been an order made by the court in the exercise of its federal jurisdiction.¹

As Senator Nick Minchin stated when introducing the Bill to the Senate:

This will place State summary courts in the same position as State district, county and supreme courts, enabling States to determine, subject to constitutional requirements, which class of officer may exercise federal jurisdiction and in what circumstances. These amendments ensure that State summary courts may be constituted in the same way for the purpose of exercising federal jurisdiction as they are for the purpose of exercising State jurisdiction.²

The second purpose of the Bill is to rectify a problem which arose in the family law jurisdiction when the Government added a new Part XIVB to the *Family Law Act 1975* by the commencement of the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. This was in response to evidence that a large number of family law consent orders were made contrary to paragraph 39(2)(d). Part XIVB provides that the rights and liabilities of all persons are the same as if each such order had been an order made by the court in the exercise of its federal jurisdiction. The Government has now explained:

Since the commencement of Part XIVB, it has become apparent that orders other than those covered by Part XIVB have been made contrary to paragraph 39(2)(d). This Bill will repeal Part XIVB and provide for new similar provisions to cover all ineffective orders, not just family law orders.³

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Background

Orders of non-judicial officers of State courts of summary jurisdiction

Cross-vesting of federal jurisdiction in State courts is a complex area of constitutional law. Under s 77(iii) of the Constitution, the Commonwealth Parliament may invest any court of a State with federal jurisdiction with respect to any of the matters mentioned in ss 75 and 76. Since 1903, great reliance has been placed on state courts exercising federal jurisdiction and they continue to play a significant role in federal civil matters.

The Constitution stipulates that federal jurisdiction conferred on a State court may be exercised by a registrar or other officer who is an integral part of the organisation of the court, as it is constituted under State law (see *The Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49). See further Australian Law Reform Commission [Report 92](#), 'The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation', July 2001.

Paragraph 39(2)(d) of the Judiciary Act 1903 states:

Exercise of federal jurisdiction by State Courts of summary jurisdiction

(d) The federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction, or an arbitrator on whom the jurisdiction, or part of the jurisdiction, of that Court is conferred by a prescribed law of the State, within the limits of the jurisdiction so conferred.

The effect of paragraph 39(2)(d) is that registrars and other non-judicial officers of State courts of summary jurisdiction do not have jurisdiction to make certain orders in federal matters, such as default orders. A corresponding provision, subsection 68(3) of the Judiciary Act, provides for similar restrictions in relation to the exercise of federal jurisdiction in criminal cases.

This bill would remove the limitation in paragraph 39(2)(d) of the Judiciary Act, but State courts exercising Federal jurisdiction are still subject to constitutional requirements. The question therefore is whether in removing the certainty of the Judiciary Act restriction, even if it was honoured more in the breach than observance, is the Commonwealth opening up possible challenges to past and future orders?

These requirements in relation to review of decisions of non-judicial officers are discussed in *Harris v Caladine* (1990) 172 CLR 84. Basically, the High Court decided such delegation was permissible as long as judges continue to bear the major responsibility for the exercise of judicial power, and that a non-judicial officer's decision is subject to review or appeal by a judge.

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In *Harris v Caladine* the High Court upheld, by a majority of five to two, the delegation of power to a registrar to make a consent order, that is, an order putting into effect an agreement between the parties. The consent order concerned the division of property between husband and wife in a family law matter. In making its decision, the High Court also arguably upheld the validity of s.37A of the Family Law Act which said that judges of the Family Court could generally delegate their powers to registrars, except the power to make orders in contested proceedings regarding the dissolution of a marriage, the validity of a marriage, or custody, welfare, guardianship or access in relation to a child of a marriage. A key factor in the Court upholding the delegation was the availability of rehearing de novo from the registrar's order to a judge of the Court. The availability of such a review was seen as necessary to ensure that the court acted judicially.

An analysis of this case shows that there is some uncertainty regarding the extent to which matters can be delegated to judicial registrars, as Chapter III of the Constitution requires judges to have a high degree of control over the exercise of that power. This was considered at some length by the Senate Legal and Constitutional Affairs Committee when considering the provisions of the Human Rights Legislation Amendment Bill 1996 in June 1997.

The Committee noted in [Chapter Three](#) of their report that two of the majority judges in *Harris v Caladine*, Mason CJ and Deane J, observed that a delegation must not be to the extent that "it can no longer properly be said that, as a practical as well as a theoretical matter, the judges constitute the court".⁴ The Committee reported:

3.20 It has been suggested in the *Australian Journal of Family Law* that this requirement that "the judges constitute the court" does not restrict the subject matter which may be delegated to registrars, although it would be wise to confine delegations to subsidiary matters. However, the Committee has received evidence from Mr Peter Bailey of the ANU Law Faculty to the contrary. It is strongly arguable that Mason CJ and Deane J did in fact intend to restrict the subject matters that may be delegated. After setting out the requirement that the "judges constitute the court", they stated:

This means that the judges must continue to bear the major responsibility for the exercise of judicial power, at least in relation to the more important aspects of contested matters.

... We must emphasise that the role of the officers of the Court such as Judicial Registrars and Registrars is secondary to that of the judges. The role of the officers is to assist the judges in the exercise of the jurisdiction, powers and functions of the Court. Although it is a commonplace characteristic of modern courts that officers such as masters and registrars exercise jurisdiction, powers and functions in a wide variety of matters, those matters are, generally speaking, subsidiary in importance to matters which are heard and determined by judges.⁵

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The Committee also noted advice from the Attorney-General's Department at paragraph 3.23 and 3.25 showing that the matters a registrar can properly determine may not be clear cut:

3.23 In a letter to the Committee the Attorney-General's Department advised that "generally, judicial registrars hear less complex matters or those concerning only a small amount of money", and noted that complex matters can be sent back to judges. The Department has also advised that the sum involved "does not always indicate the importance or difficulty of the issues". The criteria for importance may really be whether a proceeding involves interpreting law or assessing the credibility of witnesses. Further, an order requiring something to be done, such as an order that a respondent re-employ an applicant, could be of greater importance to the applicant, and possibly of greater financial significance, than the damages claimed.

...

3.25 The Attorney-General's Department has advised that it is unlikely *Harris v Caladine* will be overruled, that is, it is unlikely the High Court will find that *no* judicial power can be delegated to registrars. However, the Department has noted that, given the recent trend of High Court decisions touching on the separation of powers, future High Court decisions in this area may take a narrower view of the extent to which judicial power can be delegated to registrars.⁶

These issues were also analysed by the Family Law Council in its 'Proposal for a new process for dealing with post-contact disputes' [submission](#) to the inquiry into shared parenting dated 13 November 2003.

Given that the Bill specifically relates only to summary orders, it is unlikely to breach constitutional requirements, but it is a question of substance that State courts may have to manage carefully.

Past Orders

The question therefore arises, why remove the Judiciary Act limitations at this point? Partly it was noted in the second reading speech that State courts have been acting in contravention of the provisions in family law and taxation matters and causing uncertainty to affected parties. The Government has decided in response as a matter of practicality to therefore remove the limitation.

The other reason is stated in terms of policy. According to the Government, the previous legal position is based on a historical position which has changed. Traditionally, stipendiary magistrates and lay magistrates both exercised summary jurisdiction in States courts. Stipendiary magistrates were legally qualified full-time adjudicators, while lay magistrates were not. This was based on concerns that persons exercising the judicial power of the Commonwealth should be suitably qualified. Paragraph 39(2)(d) and

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subsection 68(3) were intended to address this concern. When introducing the Bill, Senator Minchin stated:

However, today State statutes generally require magistrates to be legally qualified and State courts of summary jurisdiction have evolved considerably in the past 100 years. I am confident the States will ensure that both federal and State jurisdiction are exercised only by suitably qualified people.⁷

Senator Nick Minchin described the factual circumstance that gave rise to the need for the second part of the Bill during the second reading speech as follows:

In December 2005, the Government was informed that registrars in the Victorian Magistrates Court had been purporting to exercise federal family law jurisdiction, contrary to the restrictions in paragraph 39(2)(d), by making consent orders in relation to family law matters. Consequently, all State and Territory Attorneys-General were contacted to remind them of the restrictions in the Judiciary Act. The Government also asked all State Attorneys-General to advise how widespread the practice was of non-judicial officers in State summary courts exercising federal jurisdiction in contravention of paragraph 39(2)(d).

While waiting for a response from State and Territory Attorneys-General, amendments were introduced in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* to effectively validate the ineffective family law orders as a matter of urgency. This provided certainty for parties involved in proceedings in which ineffective family law orders had been made.

It subsequently became apparent that in some States orders have been made contrary to paragraph 39(2)(d) in relation to taxation and other federal law matters. Parties to proceedings involving ineffective orders have acted on the assumption that the orders were valid and could be relied upon. Consequently, this bill creates new statutory rights and liabilities for parties that may be exercised and enforced in the same manner as valid orders of the relevant court. These provisions will provide certainty for these parties and avoid unnecessary legal challenges.⁸

The Government asserts that:

...subject to the requirements of the Constitution, it is generally not desirable for the States to have to put in place different arrangements for the handling by State courts of matters in federal jurisdiction. This obviously reduces their flexibility to deal with what are no doubt busy workloads.

State registrars already make the same kinds of orders in State jurisdiction which the Judiciary Act currently prevents them from making in federal jurisdiction. These amendments will allow the States to determine which officers, including non-judicial officers such as registrars, can exercise federal jurisdiction. By doing so this bill contributes to achieving a more accessible, efficient and flexible civil justice system.⁹

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Financial implications

The Financial Impact Statement in the Explanatory Memorandum to the Bill states that the amendments are not expected to have any significant financial impact.¹⁰

Main provisions

Schedule 1 – Orders of non-judicial officers of State courts of summary jurisdiction

Part 1 contains amendments to the *Judiciary Act 1903*.

Item 1 repeals existing paragraph 39(2)(d) to remove the requirement that in a State court of summary jurisdiction, federal jurisdiction may only be exercised by a magistrate or an arbitrator. Note the limits set out by the Commonwealth Constitution on the exercise of Federal jurisdiction by State Courts remains as explained in the ‘Background’ section of this Digest.

Item 3 repeals subsection 68(3) to remove the requirement that the federal jurisdiction of State and Territory courts under subsection 68(2) of the Judiciary Act must be exercised only by a Judge or magistrate. Again, constitutional limits apply as explained in the ‘Background’ section of this Digest.

Items 4 and 5 make consequential amendments, repealing subsection 8(5) of the *Commonwealth Places (Application of Laws) Act 1970* and amending subsection 15A(1ACA) of the *Crimes Act 1914*.

Item 6 repeals Part XIVB of the *Family Law Act 1975*. The Explanatory Memorandum states that:

Part XIVB is no longer necessary as Part 2 of Schedule 1 to this Bill effectively validates all orders made contrary to paragraph 39(2)(d) by non-judicial officers of State courts of summary jurisdiction, including family law orders previously dealt with by Part XIVB.¹¹

Past Orders

Part 2 inserts new provisions dealing with past orders.

Item 7 inserts definitions of the terms used in Part 2 such as *non-judicial officer*. The Explanatory Memorandum states that this amendment:

makes it clear that the Part only applies to orders purported to be made by officers of State courts of summary jurisdiction who are not officers of the kind referred to in

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repealed paragraph 39(2)(d) of the Judiciary Act. This definition includes (as well as other officers) registrars of State courts of summary jurisdiction.¹²

Item 8 defines an *ineffective order* for the purposes of Part 2, as meaning an order made by a non-judicial officer of a State court of summary jurisdiction in the purported exercise of the court's federal jurisdiction contrary to section 39(2)(d) and made before the commencement of the Part.

Subitem 8(3) provides that if there has been a purported variation etc to an ineffective order, a reference to that ineffective order in Part 2 is to be interpreted as a reference to the content of the order in the form it took from time to time. The Explanatory Memorandum states that:

This ensures that any variations etc to an ineffective order are taken into account when determining the extent of a person's rights and liabilities under item 9.¹³

Item 9 provides that the rights and liabilities are the same as if the ineffective order had been a valid order of the court of summary jurisdiction in question. The declaration of the rights and liabilities is limited to orders that would have been within the federal jurisdiction of the court in question.

Subitem 10(1) provides that the statutory rights and liabilities created by item 9 may be exercised and enforced in the same way as similar rights and liabilities arising under a valid order of the court of summary jurisdiction in question. **Subitem 10(2)** makes it clear that these rights include the right to appeal.

Subitem 11(1) ensures that acts done, or omitted to be done, in relation to the rights and liabilities specified in item 9 have effect for the purposes of any laws in the same way as orders of the relevant court of summary jurisdiction. The Explanatory Memorandum notes that this may be relevant when ascertaining a person's liabilities under other Commonwealth laws, such as taxation or bankruptcy.

Subject to subitem 11(3), **subitem 11(2)** provides that, for the purposes of any laws relating to the enforcement of orders, acts done or omitted to be done in relation to the rights and liabilities defined in item 9 give rise to the same consequences as if each ineffective order were a valid order of the relevant court. The Explanatory Memorandum states:

Subitem 11(2) is not intended to apply to the consequences of criminal convictions. It is intended to follow from the fact that a conviction is not validated or confirmed (subsection 11(3)) that any order purporting to impose a punishment in respect of the purported conviction also fails.¹⁴

Subitem 11(3) prevents item 11 from operating to validate or confirm a conviction.

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Subitem 11(4) defines the term *enforcement law*. An ‘enforcement law’ is a provision, other than a law relating to contempt of court, that sets out a consequence for a person if the person contravenes or acts in a specified way while there is in force an order made by a court exercising federal jurisdiction.

Item 12 gives courts the ability to deal with the statutory rights and liabilities created by item 9 in the same way that they could deal with similar rights and liabilities created by a valid order of the relevant court of summary jurisdiction

Item 13 provides that, where a person has interfered with a right conferred or affected by item 9 or failed to satisfy or comply with a liability conferred or affected by item 9, the interference or failure can be dealt with in the same manner as if it had occurred in relation to a right or liability arising under a valid order of the relevant court of summary jurisdiction. The example given in the Explanatory Memorandum is to give the relevant court the ability to deal with such failures or interferences as contempt of court.

Item 14 allows the court record of an invalid order to be used as evidence to show the existence and details of a person’s rights and liabilities created under item 9.

Item 15 ensures that Part 2 does not apply to any order of a court of summary jurisdiction that was declared invalid by that court or another court before the Part commences.

Item 16 provides that jurisdiction is conferred on the Family Court of Australia and the Federal Magistrates Court to hear matters arising under this Part. The State courts, including the Family Court of Western Australia, and the Federal Court already have jurisdiction by virtue of sections 39 and 39B of the Judiciary Act. A court only has jurisdiction in relation to matters arising under this Part if it had jurisdiction in relation to the matter in which the ineffective order was made.

Endnotes

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1. Explanatory Memorandum, p. 1.
 2. Senator Nick Minchin, *Debates*, Senate, 13 September 2006, p. 1.
 3. Senator Nick Minchin, *op. cit.*
 4. *Harris v Caladine* (1990) 172 CLR 84 at 94–95.
 5. Senate Legal and Constitutional Affairs Committee, ‘Report on inquiry into provisions of the Human Rights Legislation Amendment Bill 1996’, June 1997.
 6. Senate Legal and Constitutional Affairs Committee, *op. cit.*
 7. Senator Nick Minchin, *op. cit.*

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8. Senator Nick Minchin, *ibid.*
9. Senator Nick Minchin, *ibid.*
10. Explanatory Memorandum, p. 1.
11. Explanatory Memorandum, p. 3.
12. Explanatory Memorandum, p. 4.
13. Explanatory Memorandum, p.4
14. Explanatory Memorandum, p. 5.

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