

*AUTHORITY TO DECIDE: THE LAW OF JURISDICTION IN AUSTRALIA*

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BY MARK LEEMING

As Gleeson CJ and McHugh J said in *Minister for Immigration and Multicultural and Indigenous Affairs v B*:

In a legal context the primary meaning of jurisdiction is ‘authority to decide’. It is to be distinguished from the powers that a court may use in the exercise of its jurisdiction. [With respect to] a federal court created by the Parliament of the Commonwealth, its jurisdiction — its authority to decide — must be defined in accordance with ss 75, 76 and 77 of the *Constitution*.<sup>1</sup>

To realise that there is no court in Australia with unlimited jurisdiction is at one stroke to recognise the continuing importance of Justice Leeming’s standard work, and the relevance of this second edition. The ‘autochthonous expedient’, as Sir Owen Dixon named it, has much to answer for: it leads inexorably to a bifurcated system of state and federal courts, which has many toils and snares for the unwary. To compound the problem, the state courts enjoy a large amount of ‘invested’ federal jurisdiction, which means that on many occasions they exercise it without appreciating the fact that they have done so.

Justice Leeming is uniquely qualified to examine such problems, since he has the double advantage of a profound understanding of the theoretical issues involved, and the daily task of deciding cases that raise those very issues in a practical context.<sup>2</sup> He is almost in the position of Chief Justice Bryan five hundred and fifty years ago, who responded to counsel: ‘You do not have to tell me the law. I wrote the law. I know what it is about.’<sup>3</sup>

In Professor Geoffrey Lindell’s book, *Cowen and Zines’ Federal Jurisdiction in Australia*,<sup>4</sup> which is the ideal bookshelf companion to the work under review, Sir Anthony Mason describes how ‘[t]he very mention of “federal jurisdiction” is enough to strike terror in the hearts and minds of Australian lawyers who do not fully understand arcane mysteries’.<sup>5</sup>

<sup>1</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 377 [6] (‘MIMIA v B’), citing *Ah Yick v Lehmert* (1905) 2 CLR 593, 603; *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142; *Harris v Caladine* (1991) 172 CLR 84, 136.

<sup>2</sup> See, for a recent example, his discussion of the jurisdiction of the District Court of NSW in *Great Northern Developments Pty Ltd v Lane* [2021] NSWCA 150, [84], and following where he discusses ‘that slippery term jurisdiction’, quoting *MIMIA v B* (n 1) 405–8 [106]–[113] (Gummow, Hayne and Hayden JJ).

<sup>3</sup> As cited in Canada, *Parliamentary Debates*, House of Commons, October 26, 1999, 1634 (Ted McWhinney).

<sup>4</sup> Geoffrey Lindell, *Cowen and Zines’ Federal Jurisdiction in Australia* (Federation Press, 4<sup>th</sup> ed, 2016).

<sup>5</sup> *Ibid v*.

This new edition of *Authority to Decide* goes a long way to lightening such fears and should be on the shelf of every barrister, and in the library of all law firms. (It would be too much to hope that it might also find its way onto a law school reading list. In the author's teaching experience, the very existence of federal jurisdiction is seldom taught in the law school curriculum, or even adverted to).

As Justice Leeming notes in the Preface to the Second Edition, 'much has occurred' since the first edition of this work in 2012. This new edition includes additional discussion of the NSW Court of Criminal Appeal (pp 297–309) and the scope of appeals under cross-vesting legislation from the State and Territory courts (pp 165–74).

Several issues continue to bedevil the operation of federal jurisdiction. What is a relevant 'matter'? If there is no federal 'matter' to attract jurisdiction, the federal courts are powerless. What is the extent of the 'federal jurisdiction' that is exercised by the courts of the self-governing territories?<sup>6</sup> In what contexts may the Federal Court grant declaratory relief? What aspect of federal jurisdiction is attracted if a State administrative tribunal determines a matter arising between residents of different states?

Federal jurisdiction may be found in the most unlikely places. This means that those advising a client must always be alert to the possibility that such federal jurisdiction might have been attracted because of the nature of the parties, the remedy, or the source of the law that the trial court is relying on. Thus, if the Commonwealth is a party, or the parties reside in different states, then federal jurisdiction is attracted.

Who, for example, would have thought that the Federal Court could hear a defamation case?<sup>7</sup> Yet, in jurisdictional battles reminiscent of the ancient fight between the Court of Admiralty and the King's Bench, the Federal Court (*semble*) has become the preferred venue for hearing defamation. The ample reach of the ACT's defamation jurisdiction has now led to the anomalous position that most defamation actions (often driven by considerations of the damages available) are heard by a judge alone in the Federal Court.<sup>8</sup> In *Crosby v Kelly*,<sup>9</sup> the Full Federal

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<sup>6</sup> Discussed in detail in *Authority to Decide: the Law of Jurisdiction in Australia* (Federation Press, 2<sup>nd</sup> ed, 2020) 23–7.

<sup>7</sup> For a very detailed discussion see Richard Leder and Conor O'Beirne, 'Defamation Trials: Why the Plaintiffs are Rush(ing) to File in the Federal Court', *corrs.com.au* (Online Article, 2 November 2018) <<https://corrs.com.au/insights/defamation-trials-why-plaintiffs-are-rushing-to-file-in-the-federal-court>>.

<sup>8</sup> At the time of writing this review, a defendant in a Federal Court defamation case was seeking to have it heard by jury. This parallels developments in which a jury trial is likely to be required in a large cartel case in the Federal Court because any trial on indictment against a law of the Commonwealth must be by jury: *Federal Constitution* s 80.

<sup>9</sup> [2012] FCAFC 96, confirmed by *Wing v Fairfax* [2017] FCAFC 191.

Court concluded that the Federal Court might exercise as a cross-vested matter original jurisdiction of the ACT Supreme Court over defamation claims. This development gives the go-by to the possibility of a trial by jury before a representative group drawn from the citizenry as a whole, a consideration which seems otherwise to be in the forefront of the uniform Defamation Acts.<sup>10</sup>

The dangers of overlooking the distinction between state and federal jurisdiction are easily demonstrated. Take, for example, the recent decision in *Page v Sydney Sea Planes*.<sup>11</sup> Tragically, a sea plane on a pleasure flight crashed shortly after taking off, and all on board were killed. A claim in commenced very late on the last day for filing within the two-year limitation period in the Federal Court of Australia. But as Griffiths J explained, that Court lacked jurisdiction because there was no element of intra-state travel involved,<sup>12</sup> and thus no federal 'matter' to adjudicate. As his Honour observed,

The terms 'matter' or 'matters' appear in ss 75 and 76 of the Constitution, which deal with the original jurisdiction of the High Court, as well as s 77 regarding the power to define jurisdiction. The term 'matters' also appears in various relevant provisions of the Judiciary Act 1903 (Cth), including in ss 38 and 39. Section 39(2) invests State Courts with federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, subject to various exceptions and restrictions.<sup>13</sup>

The work has eleven chapters. The first three address the meaning of 'jurisdiction' generally, the way in which it may be invoked curially, and the scope of jurisdictional error. As to the last, what is 'jurisdictional error' has proven to be a devilishly difficult question; as Leeming J observes: 'At a high level jurisdictional error identifies that the limitations upon the exercise of power have not been observed'.<sup>14</sup> Of particular interest in this context is the ability to restrict the availability of review for jurisdictional error.<sup>15</sup> Chapter 4 looks at a fundamental question: the scope and meaning of 'matter' as the term to demarcate the jurisdiction conferred by ch III of the *Constitution*. 'Matter' has a protean quality that seems, in essence, to require a genuine and substantial dispute between opposing parties. Lurking here are problems of 'associated jurisdiction' and that

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<sup>10</sup> See *Defamation Act 2005* (NSW) s 21; *Defamation Act 2005* (Qld) s 21; *Defamation Act 2005* (Tas) s 21; *Defamation Act 2005* (Vic) s 21; *Defamation Act 2005* (WA) s 21; *Civil Law (Wrongs) Amendment Act 2006* (ACT) (amending the *Civil Law (Wrongs) Act 2002* (ACT)) s 21; *Defamation Act 2006* (NT) s 21. The *Defamation Act 2005* (SA) is an exception.

<sup>11</sup> [2020] FCA 537. Griffiths J's judgment contains, with respect, a detailed and useful analysis of the whole topic. Subsequently, leave was sought successfully to cross-vest the claim to the Supreme Court of NSW, which could exercise State jurisdiction and extend the time for making it: see [2020] NSW1502 (Adamson J). It is understood that her Honour's decision is under appeal.

<sup>12</sup> [2020] FCA 537, [32].

<sup>13</sup> *Ibid* [25].

<sup>14</sup> *Authority to Decide* (n 4) 60.

<sup>15</sup> *Ibid* 86–7.

disfavoured concept, 'accrued' jurisdiction, which arises when a similar substratum of facts gives rise as a discretionary question to inextricably entwined issues.

Chapter 5 elucidates the vexed question of conferring and excluding federal jurisdiction. This is perhaps the most interesting chapter in the book since it explores the limits of federal jurisdiction, and the way in which its exercise can become entangled with the omnipresent jurisdiction of the States. As Leeming J notes,<sup>16</sup> it is possible for the Parliament to legislate to restrict the scope of a relevant federal 'matter' to part only of the dispute. Such a limitation may extend to the remedies a Court could give. One assumes that this must, of course, be subject to the entrenchment of constitutional writs provided in s 75(v) of the *Constitution*.

Of particular importance is the operation of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) and the related concept of a 'special federal matter'. As Justice Leeming concludes, the 'present baroquely complex'<sup>17</sup> system has worked well enough in practice, despite the intricate theoretical problems that his Honour explores in great detail.

Chapter 6 examines service on a defendant as a means of establishing jurisdiction. It is the chapter that most commends itself to the practitioner on a day-to-day basis, although as the author notes, the relevant analysis is 'very straightforward in most cases'.<sup>18</sup>

Chapters 7 and 8 discuss the law relating to the scope of 'matters' in the context of private, and governmental litigation respectively while Chapter 9 considers the law relating to appeals.

A close reading revealed that the editing and referencing maintains the exemplary standard that is a hallmark of the publisher.

This book is the inevitable starting point for any advocate confronted by a thorny question of federal jurisdiction. Long may it not be a work of authority (in the classical sense) so that the author may, in successive further editions, discuss and explicate the continuing complexities of federal jurisdiction as statute and cases upon them bring them to light.

Lee Aitken  
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<sup>16</sup> Ibid 132, referring to *Abebe v The Commonwealth* (1999) 197 CLR 510.

<sup>17</sup> Ibid 174.

<sup>18</sup> Ibid 176.