MZXOT.. ..... PLAINTIFF;

AND

MINISTER FOR IMMIGRATION AND CITIZENSHIP.. ..... DEFENDANT.

THE REMITTER CASE

[2008] HCA 28

HC of A
2008
Feb 27, 28;
June 18
2008
Gleeson CJ,
Gummow,
Kirby,
Hayne,
Heydon,
Crennan and
Kiefel JJ

Constitutional Law (Cth) — Judicial power of Commonwealth — High Court — Original jurisdiction — Power to remit matters to other courts — Statutory restrictions of power to remit — Migration decisions — Legislative scheme making High Court sole court that can grant relief in relation to certain matters — Whether inherent or implied power to remit matters to other courts — Ability of other courts to receive remitted matter — Commonwealth Constitution, ss 75(v), 77(ii) — Judiciary Act 1903 (Cth), ss 38, 39(1), 44(1) — Migration Act 1958 (Cth), ss 474(7), 476(1), (2)(a), (d), (4), 476A(1), 476B, 484.

Section 476(1) of the *Migration Act 1958* (Cth) conferred on the Federal Magistrates Court, subject to that section, the same original jurisdiction in relation to "migration decisions" as the High Court had under s 75(v) of the *Commonwealth Constitution*. Sub-section (2) provided that the Federal Magistrates Court had no jurisdiction in relation to certain types of decisions. Section 476A(1) provided that the Federal Court had original jurisdiction in relation to a migration decision only in certain stipulated cases. Section 476B(1), subject to sub-s (3), prohibited the High Court from remitting a matter, or any part of a matter, that relates to a migration decision to any court other than the Federal Magistrates Court. Sub-section (2) prohibited the High Court from remitting a matter, or any part of a matter, that relates to a migration decision to the Federal Magistrates Court unless that court had jurisdiction in relation to the matter, or part of the matter, under s 476. Sub-section (3) enabled the High Court to remit a matter that related to a migration decision in respect of which the Federal Court had jurisdiction under certain provisions of s 476A(1). Sub-section (4) provided that sub-s (1) had effect despite s 44 of the *Judiciary Act 1903* (Cth). Section 44(1) of the *Judiciary Act*, subject to exceptions, enabled the High Court to remit any matter, or part of such matter, pending in the High Court, on the application of a party or on its own motion, to any federal court or court of a State or a Territory that had jurisdiction with respect to the subject matter and the parties.

Held, (1) that s 476(2) of the *Migration Act* was a valid law of the Commonwealth.

(2) That the High Court had no inherent power or power implied by Ch III of the *Commonwealth Constitution* to remit to other courts matters in respect of which it had original jurisdiction under s 75(v) of the *Constitution*.

Semble, that the courts of the States have no jurisdiction in respect of matters within the scope of federal jurisdiction under Ch III of the *Constitution* other than that invested in them under federal legislation.

CASE STATED pursuant to the *Judiciary Act 1903* (Cth), s 18.

The plaintiff commenced proceedings in the High Court on 11 April 2007 against the Minister for Immigration and Citizenship under s 75(1) of the *Commonwealth Constitution*. His application for orders to show cause was amended pursuant to an order of Hayne J on 7 December 2007 to claim (2), an order pursuant to r 4.02 of the *High Court Rules 2004* enlarging the time in respect of his application for an order to show cause why writs of mandamus and certiorari should not issue; (3), a writ of mandamus directing the defendant Minister to determine an application of the plaintiff for a protection visa, made on 14 March 2006, according to law; (4), a writ of certiorari quashing a decision of a delegate of the defendant Minister, made on 18 April 2006, refusing to grant to the plaintiff a protection visa; (5), alternatively to (4), a declaration that that decision was invalid; (6), alternatively to (3)-(5), an order remitting the matter to another court for determination whether that decision was vitiated by jurisdictional order; (10), an injunction to prevent the defendant Minister, by his officers, servants or otherwise, from taking any action to implement that decision and from taking any action in reliance of its making; and (11) a declaration that ss 476, 476A, 476B and 484 of the *Migration Act 1958* (Cth) and/or ss 38(e) and 39(1) of the *Judiciary Act 1903* (Cth), in so far as they applied to "migration decisions" (as defined in s 5 of the *Migration Act*), were invalid and of no effect.

By consent of the parties on 8 November 2007 Hayne J stated a case for the consideration of a Full Court under s 18 of the *Judiciary Act*. The facts stated are summarised in the judgment of Gleeson CJ, Gummow and Hayne JJ at [6]-[13]. The questions stated are set out in the judgment of Heydon, Crennan and Kiefel JJ at [151].

D S Mortimer SC (with her *L G De Ferrari* and *C P Young*), for the plaintiff. The High Court has an implied power to remit any matter commenced in its original jurisdiction to another court and if a law of the Parliament purports either to prohibit the exercise of that power, or to deny jurisdiction to all receiving courts to hear and determine remitted matters, that law directs the manner and outcome of the exercise of the Court's jurisdiction and is an impermissible interference with the exercise of judicial power. Parliament may confer a power of remitter by statute and has done so by the *Judiciary Act*, s 44. Such a conferral is supported by s 51(xxxix) of the *Constitution*. The issue is whether a remitter power is incidental or necessary to the exercise of

judicial power by the Court. The combined effect of ss 476, 476A, 476B and 484 of the *Migration Act* is to control the remitter of matters relating to a migration decision which have been commenced in the High Court in its s 75(v) jurisdiction. Control is achieved by directly affecting the power to remit (s 476B) and by affecting the jurisdiction of the various receiving courts (ss 476(1), (2), 476A, 484). The scheme imposes a complete prohibition on remitter in primary decisions and decisions included in s 474(7). The plaintiff contests this complete prohibition. There is no challenge to the provisions of the *Migration Act* that control remitter by limiting the receiving courts and by corresponding limits on the remitter power. For example, s 476(1) confers the same original jurisdiction on the Federal Magistrates' Court as the High Court has under s 75(v), although s 476A(1) denies general s 75(v) jurisdiction to the Federal Court and instead gives that Court limited jurisdiction over specified kinds of decisions (and referrals from the Federal Magistrates Court). But for s 476(2)(a), the Federal Magistrates Court would be the only receiving Court for the plaintiff's application. That kind of regulation by Parliament is valid. The presence of s 476(2)(a) (together with s 476B(2)) transforms regulation of remitter into prohibition. [She referred to *Bodruddaza v Minister for Immigration and Multicultural Affairs* (1).]

The invalidity of ss 38(e) and 39(1) of the *Judiciary Act*, so far as they operate to deny jurisdiction in respect of "migration decisions", arises only if there is otherwise within the scheme in Div 2 of Pt 8 of the *Migration Act* no receiving court for the exercise of a remittance power. If the plaintiff is correct about the existence of an implied power and the invalidity of s 476(2)(a), read with s 476B(2), only the validity of s 476(2)(a) is affected. It is essential to the exercise of judicial power under Ch III that the High Court is able to determine for itself whether to hear a matter commenced in its original jurisdiction. A power to remit such a matter to another court, federal or State, is necessarily implied because the nature and role of the Court in Ch III and the nature of the judicial power of the Commonwealth require the implication; and the *Constitution* does not confer any exclusive original jurisdiction on the High Court and therefore contemplates the existence of such a power. Section 44 of the *Judiciary Act* is a statutory conferral of a power the Court already possessed in respect of subject matter and parties. [She referred to *O'Neill v O'Connell* (2); *Lambert v Weichelt* (3); *Felton v Mulligan* (4); *Johnstone v The Commonwealth* (5); and *McIntosh v National Australia Bank Ltd* (6).]

(1) (2007) 228 CLR 651 at 668-672.
(2) (1946) 72 CLR 101 at 124-125.
(3) (1954) 28 ALJ 282 at 283.
(4) (1971) 124 CLR 367 at 420.
(5) (1979) 143 CLR 398.
(6) (1988) 17 FCR 482 at 483.

The High Court is a statutory court, not of unlimited jurisdiction but of a special character because the law that provides for its existence and jurisdiction is the *Constitution* and because of the role assigned to it under the *Constitution*. Its principal functions are as the ultimate court of appeal (s 73) and the ultimate interpreter of the *Constitution* (7). Its role as an ultimate appellate court is "to develop and clarify the law and to maintain procedural regularity in the courts below" (8) as well as to determine the common law of Australia (9). In this respect the Court has a larger role than the Supreme Court of the United States. That role is assured by the constitutional protection afforded to the Supreme Courts of the States together with the entrenchment of appeals from those courts. It is a corollary of the importance of those courts and of the Court's appellate function with respect to them that the Court must be able to protect the effective exercise of its appellate jurisdiction. Ability to remit matters in its original jurisdiction is part of that protection. The constitutional protection of the Supreme Courts ensures that there is an enduring and entrenched repository for the exercise of the implied remitter power. Whether or not federal courts were created, the Supreme Court of a State had authority to adjudicate on the matters in ss 75 and 76 by reason of covering cl 5 (10). With the creation of a number of federal courts from which appeals can be brought, the appellate role of the High Court has expanded. The Court must be able to ensure the effective exercise of that jurisdiction. [She referred to *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe [No 2]* (11); and *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (12).] Power to remit matters falling outside the Court's principal functions is no different from other powers enabling it to protect and control its jurisdiction and processes.

The vesting of judicial power in the specific matters permitted, or vested, by the *Constitution* carries such implied power as is necessarily inherent in the nature of the judicial power (13). The power contended for is supported by an analogue in English courts that existed at the time of the adoption of the *Constitution* (14). That analogue is the removal of causes before judgment from inferior courts of records into

(7) *Judiciary Act*, ss 30, 76(1).
(8) *Morris v The Queen* (1987) 163 CLR 454 at 475; *Carson v John Fairfax & Sons Pty Ltd* (1991) 173 CLR 194 at 218.
(9) *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 112-113; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566; *Lipohar v The Queen* (1999) 200 CLR 485 at 505-506 [43]-[45].
(10) *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1136, 1137-1138, 1141; see also *Lorenzo v Carey* (1921) 29 CLR 243 at 251-252. cf *The Commonwealth v Limerick Steamship Co Ltd v Kidman* (1924) 35 CLR 69 at 87.
(11) (1998) 72 ALJR 630 at 633 [11]; 152 ALR 177 at 180.
(12) (2000) 74 ALJR 405 at 407 [9]; 168 ALR 407 at 410.
(13) *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 619.
(14) *R v Davison* (1954) 90 CLR 353 at 382; *White v Director of Military Prosecutions*

the Courts of King's Bench and Common Pleas by the writs of certiorari and habeas corpus cum causa. Where the cause was removed into the superior court when it ought not to have been, the writ of Procedendo would lie to remit the matter to the inferior court with an order that it proceed to judgment (15). [She referred to the *High Court Procedure Act 1903* (Cth), Sch O XLI, r 29 and to *Re T (A Child)* (16).] The Court's implied power to remit matters commenced in its original jurisdiction is analogous to other implied powers to protect and control its processes, including power to order a stay pending the hearing of a special leave application (17); power to grant an injunction preserving the status quo pending a hearing (18); power to allow bail (19); power to punish for contempt (20); power to grant relief by way of Mareva injunction; and the power to prevent an abuse of process (21). These implied powers are possessed by statutory superior courts (22). It is an essential aspect of judicial power that the choice about the manner of, and occasion for, its exercise remains with the repository of the power and is not interfered with by Parliament, so that regulation becomes prohibition. That is why a law of the Commonwealth regulating appeals to the Court through the grant of special leave does not contravene s 73 of the *Constitution* (23). Accepting the distinction between inherent and implied powers (24), unlike any other court recognised or contemplated by the *Constitution* the High Court has a general responsibility for the administration of justice and the rule of law in Australia. In the discharge of that responsibility it exercises the full plenitude of judicial power. The full plenitude of power under Ch III includes the Court's being able to decide for itself, by the exercise of a remitter power, whether it is the appropriate court to hear a case brought within its original jurisdiction.

The *Constitution* departed from the United States model by providing by s 77(iii) that the jurisdiction that is or may be conferred on the High Court can be conferred on State courts, including their Supreme Courts. The *Constitution* thus envisages the continued

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(2007) 231 CLR 570 at 594-595 [45]-[49]; *Thomas v Mowbray* (2007) 233 CLR 307 at 343 [66], 356-357 [116]-[121].

(15) Tidd, *The Practice of the Courts of King's Bench and Common Pleas in Personal Actions*, 7th ed (1821), Ch 15; Chitty, *Archbold's Practice of the Court of Queen's Bench in Personal Actions and Ejectment*, 8th ed (1847), vol 2, Pt 5, Ch 4.

(16) (1994) 74 A Crim R 526 at 527-528.

(17) *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 1]* (1986) 161 CLR 681; *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 61 ALJR 612; 75 ALR 461; *Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services* (1991) 65 ALJR 360; 99 ALR 417.

(18) *Tait v The Queen* (1962) 108 CLR 620 at 624-625.

(19) *United Mexican States v Cabal* (2001) 209 CLR 165 at 180.

(20) *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 397.

(21) *Walton v Gardiner* (1993) 177 CLR 378 at 392.

(22) *DJL v Central Authority* (2000) 201 CLR 226 at 241 [25]-[27].

(23) *Carson v John Fairfax & Sons Pty Ltd* (1991) 173 CLR 194 at 217.

(24) *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7.

existence of a level of courts with authority to adjudicate matters within federal judicial power. Section 71 also contemplates the creation of lower federal courts which can be invested with any of the original jurisdiction of the High Court (s 77(i)). The existence of the Supreme Courts entrenched by covering cl 5 and the contemplated existence of lower federal courts support the conclusion that none of the original jurisdiction under s 75 can be made, by statute, exclusive to the High Court. [GUMMOW J. That view of covering cl 5 did not survive *Felton v Mulligan* (25) and *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (26).] The importance of s 75(v) as an essential part of the rule of law is against construing s 75(v) jurisdiction as being able to be restricted by a law so that it is exclusive. The number and variety of occasions for the exercise of executive power throughout the Commonwealth suggests that the rule of law requires broad access to public law remedies. Just as the protection and access to judicial supervision which s 75(v) delivers might be impaired by a privative clause, or a non extendable time limit, they can be impaired by making access to judicial supervision more expensive, complex and time consuming, or by burdening the supervising Court.

The jurisprudence of the United States Supreme Court supports the existence of such powers as are necessary to ensure that an ultimate federal court is able properly to discharge its constitutional functions and responsibilities. The Rules provide that a plaintiff seeking to invoke the original jurisdiction must move for leave to file the initial pleading (27). In deciding whether to grant leave, the Court recognises that its original jurisdiction should only be invoked "sparingly" and in "appropriate cases" and it will look to the seriousness of the claim and the availability of another forum to resolve the dispute (28). The Court has said that spending its time on original jurisdiction cases detracts from its primary responsibility as an appellate tribunal (29). That is so even in relation to matters that by statute are within its exclusive original jurisdiction (30). The Court has also accepted that its grant of original jurisdiction does not preclude the concurrent grant of original jurisdiction to lower federal courts (31). It has recognised that federal courts have an inherent power to remit cases removed by them from State courts back to State courts (32). A power of remittal is directly analogous to an inherent power to stay a proceeding and a remittal power exists to "accommodate the values of economy, convenience,

(25) (1971) 124 CLR 367 at 411-413.
(26) (1980) 145 CLR 457 at 479.
(27) *Supreme Court Rules*, r 17.
(28) *Maryland v Louisiana* (1981) 451 US 725.
(29) *Massachusetts v Missouri* (1938) 308 US 119; *Washington v General Motors Corporation* (1972) 406 US 109; *Maryland v Louisiana* (1981) 451 US 725.
(30) *Arizona v New Mexico* (1976) 425 US 794.
(31) *Bors v Preston* (1884) 111 US 252.
(32) *Carnegie-Mellon University v Cohill* (1988) 484 US 343.

fairness and comity". In the Supreme Court of India, where the original jurisdiction of both that Court and the lower High Courts to grant remedies for the protection of fundamental rights is constitutionally protected, the Court has rejected petitions filed in favour of those proceedings being commenced in the High Court in order to reduce the burden on the Supreme Court and to preserve the "dignity, majesty and efficiency" of the High Court (33).

The Court's implied power to remit can be impaired or frustrated by a law that prohibits it from exercising a power to remit or that denies jurisdiction to all possible receiving courts in respect of remitted matters. The same effect may be achieved by a combination of those two ways. That is so with ss 476(2)(a) and 476B(2) of the *Migration Act*. Without s 476(2)(a), s 476(1) confers jurisdiction on the Federal Magistrates Court to enable it to be the receiving court in respect of a s 75(v) remitter and s 476B(1) preserves the High Court's power to remit to that court. Hence there is no need to consider the proper construction and validity of s 476A in respect of the Federal Court or the validity of ss 38(e) and 39(1) of the *Judiciary Act* in respect of the Supreme Courts. If s 476(2)(a) is invalid, is there no occasion to invalidate s 476B(2) because the Federal Magistrates Court will be the receiving court. Section 476(2)(a), read with s 476B(2), directs the manner and outcome of the exercise of the Court's jurisdiction and so is an impermissible interference with the exercise of judicial power (34). Those provisions remove the power to remit a particular class of matters. They do not regulate the exercise of the power to remit but abolish the power. The power is no mere matter of practice and procedure but part of the Court's curial function so that a prohibition on its exercise tends to render the Court's exercise of judicial power inefficacious and tends to bring the administration of justice into disrepute. The High Court is forced to deal with straightforward first instance cases involving factual controversies; litigants are forced to bring their controversies to a more complex and resource intensive jurisdiction.

D M J Bennett QC, Solicitor-General for the Commonwealth, (with him *S P Donaghue*), for the defendant and for the Attorney-General for the Commonwealth, intervening. It is only if an applicant for a protection visa elects not to seek merits review of a delegate's decision or inadvertently fails to seek such review within the permitted time that the restrictions on the courts that have jurisdiction in relation to "primary decisions" become relevant. The prospect of the High Court being swamped with applications to review primary decisions is remote.

(33) *Kumar (PN) v Municipal Corporation of Delhi* 1988 SCR (1) 732.

(34) *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27, 53; *Nicholas v The Queen* (1998) 193 CLR 173 at 232-233 [146].

The plaintiff's case that the *Constitution* implicitly requires Parliament to ensure that at least one court has concurrent jurisdiction in relation to every matter in which the High Court has original jurisdiction is directly contrary to ss 71, 77(i) and 77(ii). Section 71 empowers, but does not require, Parliament to create other federal courts. Section 77(i) then empowers Parliament to "define" the jurisdiction of any federal courts it does create. It is s 77(i) that authorises Parliament to define the extent to which the original jurisdiction of the High Court should be exclusive of that of other federal courts. When Parliament creates a federal court it is not obliged to invest any particular jurisdiction (35). The High Court can be given jurisdiction that is exclusive of any other court, notwithstanding the effect that may have on its capacity to discharge its constitutional and appellate functions (36).

The entrenched original jurisdiction under s 75 and the importance of some parts of that jurisdiction (notably s 75(v)) do not provide a basis for reading a conferral of jurisdiction on the High Court as if it impliedly requires a conferral on some other court. It is for Parliament to decide, in accordance with ss 71, 77(i) and 77(iii), which if any courts should be given jurisdiction in relation to such matters. There is no legal reason why Parliament may validly deny jurisdiction to the Federal Court (s 476A) but not to the Federal Magistrates Court (s 476). Parliament can give any federal or State court concurrent jurisdiction with the whole or part of the High Court's original jurisdiction. The selection of the court is a policy choice for the Parliament, not a constitutional choice for the Court.

The appellant's submission based on covering cl 5 reflects a misunderstanding. It is not the creation of federal courts that affects the jurisdiction of State Supreme Courts. It is the creation by Ch III of the concept of federal jurisdiction and the enactment of s 39 of the *Judiciary Act* that has implications for their jurisdiction. The only original jurisdiction that can be exercised by the High Court is federal jurisdiction the source of which is the *Constitution* or federal law. While the Supreme Courts once possessed jurisdiction in relation to some of the matters mentioned in s 75 independently of a grant under s 77(iii), the source of that jurisdiction was State law. State jurisdiction is not equivalent to federal jurisdiction even if it relates to the same subject matter (37). While the *Constitution* affords a measure of protection to the existence of State Supreme Courts, it does not "entrench" their jurisdiction. The submission that none of the original jurisdiction under s 75 can be made, by statute, exclusive to the High Court cannot be reconciled with s 77(ii). The power conferred by

(35) *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 281; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 534 [50], 582-583 [207], 606 [273].
(36) *Abebe v The Commonwealth* (1999) 197 CLR 510.
(37) *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1143.

s 77(ii) arises only if a federal court has jurisdiction in relation to the subject matter that is made exclusive (38). The reference in s 77(ii) to "any federal court" includes the High Court (39). Accordingly, as s 75(v) gives the Court jurisdiction in relation to judicial review proceedings concerning "migration decisions", s 77(ii) enables Parliament to render that jurisdiction exclusive of the jurisdiction of State courts. It has exercised that power twice, by enacting s 39(1) of the *Judiciary Act* and s 484 of the Act.

Pirrie v McFarlane (40) held that the provisions of the *Judiciary Act* that rendered the jurisdiction of the High Court exclusive and that provide for the automatic transfer of certain matters from State Supreme Courts to the Court validly provide for the submission of such matters to the only superior Court which had jurisdiction to entertain them. No other court had concurrent jurisdiction. [He referred to the evidence of Dixon KC before the Royal Commission on the *Constitution*, 13 December 1927, 776, at p 778.]

Section 77(i) and (ii) leave no room for implication. The express power to make the jurisdiction of federal courts exclusive of that of State courts, together with the power to define the jurisdiction of any federal courts created pursuant to s 71, denies the existence of an implied requirement that Parliament ensure that some other court has concurrent jurisdiction in all of the matters within the High Court's original jurisdiction.

The foundation for the plaintiff's submission that it is implicit in Ch III that the High Court can remit a matter to another court even if that court does not have jurisdiction in relation to that matter, provided the receiving court is capable of exercising that jurisdiction that it is essential to the exercise of judicial power under Ch III is that the High Court is able to determine for itself whether to hear a matter commenced in its original jurisdiction. The true position is that, subject only to limited exceptions, a grant of jurisdiction carries with it a duty to exercise that jurisdiction (41). [He referred to *Cohen v Virginia* (42); *Ashby v White* (43); *Pirrie v McFarlane* (44); *Voth v Manildra Flour*

(38) *Williams v Hursey* (1959) 103 CLR 30 at 89, 113.
(39) *Pirrie v McFarlane* (1925) 36 CLR 170 at 176.
(40) (1925) 36 CLR 170.
(41) Zines, *Federal Jurisdiction in Australia*, 3rd ed (2002), p 77; Lindell, "Duty to Exercise Judicial Review", Zines (ed), *Commentaries on the Australian Constitution* (1977), pp 150-157; Lindell, "The justiciability of political questions: recent developments", Lee and Winterton (eds), *Australian Constitutional Perspectives* (1992), pp 219-222.
(42) (1821) 6 Wheat 264 at 404.
(43) (1703) 2 Ld Raym 938 at 956 [92 ER 126 at 137-138].
(44) (1925) 36 CLR 170 at 223.

Mills Pty Ltd (45); *Oceanic Sun Line Special Shipping Co Inc v Fay* (46); and *BHP Billiton Ltd v Schultz* (47).]

The original jurisdiction of the High Court under s 75 is entrenched. If the Court had a general discretion to decline to exercise that jurisdiction, it would subvert the constitutional scheme (48). There are limited circumstances in which a court may decline to exercise its jurisdiction, eg, where it is established that the forum is clearly inappropriate (49); remission to another court pursuant to a statutory power such as s 44 of the *Judiciary Act* (50); where the proceedings would constitute an abuse of process (51); and where a court may grant a stay to permit arbitration pursuant to an arbitration clause under the *International Arbitration Act 1974* (Cth) (52). The limited nature of these exceptions demonstrates that the plaintiff's assertion that this Court has an unqualified right to determine for itself whether to hear a matter commenced in its original jurisdiction is incorrect.

The Court's role in interpreting the *Constitution* derives from the conferral of jurisdiction by the Parliament under s 76, not from the *Constitution* itself under s 75. The plaintiff's argument assumes that in the absence of an implied power to remit the Court is unable to discharge its constitutional and appellate functions adequately. There is no reason to believe that this is so. There is no analogy between the inherent powers a superior court may deploy to protect its capacity to discharge jurisdiction that has been properly conferred upon it, and the asserted power to confer, via remittal, jurisdiction upon another court. The latter is a legislative power in no way analogous to the ordinary powers of a court to control its own processes. If the implied power to remit a matter within jurisdiction is part of the judicial power of the Commonwealth, that power would necessarily be available to the Federal Court. If that Court could send matters within its original jurisdiction to other courts, that would fundamentally undermine the power conferred by s 77(i) to "define" the jurisdiction of federal courts. If the implied power to remit is not available to courts other than the High Court, it cannot be part of the judicial power of the Commonwealth.

The asserted analogy with the writ of Procedendo is misplaced. That writ provided a procedure to return a matter to the court in which it was commenced, in circumstances where the matter had been removed

(45) (1990) 171 CLR 538 at 559-560.
(46) (1988) 165 CLR 197 at 241.
(47) (2004) 221 CLR 400 at 420.
(48) Cowen, *Federal Jurisdiction in Australia* (1959), p 69; Sawer, *Australian Federalism in the Courts* (1967), p 39.
(49) *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 559-560.
(50) *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 634.
(51) *Jago v District Court (NSW)* (1989) 168 CLR 23 at 76.
(52) *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc [No 5]* (1998) 90 FCR 1.

from the original court pursuant to certiorari or habeas corpus. It provided a means to restore the status quo where the original court had been wrongly prevented from exercising its jurisdiction. It did not provide a means by which a superior court could decline to exercise jurisdiction in a matter commenced in its original jurisdiction by sending that matter to another court. The passage in the judgment of Gibbs J in *Felton v Mulligan* (53) concerns remitter to a court in which a matter originated. The argument in support of the implied power, that the *Constitution* does not envisage that the Court's original jurisdiction can be made exclusive, ignores s 77(i) and (ii) which envisage that.

The absence of implied power to remit is clear in relation to matters within the Court's exclusive jurisdiction. Section 77(i) and (iii) enable Parliament to invest federal and State courts with federal jurisdiction. They do not empower the Court, by making an order remitting a matter to another court, to vary Parliament's judgment by conferring jurisdiction on a court to determine that matter where Parliament has chosen not to invest jurisdiction in the receiving court in relation to the matter. *Johnstone v The Commonwealth* (54) is not to the contrary. It concerned s 44 of the *Judiciary Act*, which then contained only what is now s 44(1). The observation of Gibbs J that s 44 empowered the Court "by a remitter order, to invest the court to which a matter is remitted with a jurisdiction which it did not previously possess" (55) must be read in context. The majority held that s 44 conferred jurisdiction on the court to which a matter was remitted (56). Its role in conferring jurisdiction in remitted matters was clarified by the amendments to s 44 in 1983 that extended the Court's powers of remittal (57). The fact that no other court has jurisdiction in relation to an application for constitutional writs in respect of a "primary decision" means that, even if the implied power existed, it could have no operation in relation to a "primary decision". Section 476B(2) of the *Migration Act* simply makes express a limitation that would apply to any implied power of remittal.

Legislation passed under s 77(iii) can be repealed though it is unlikely that it would be to the extent that Ch III original jurisdiction could be exercised only by the High Court.

The jurisprudence of the Supreme Court of the United States does not support the submission that this Court has implied power to remit matters to another court. There do not appear to be any cases in which the Supreme Court has exercised a power of the kind for which the plaintiff contends. The decisions of that Court do, however, suggest

(53) (1971) 124 CLR 367 at 420.
(54) (1979) 143 CLR 398.
(55) (1979) 143 CLR 398 at 401.
(56) (1979) 143 CLR 398 at 408-409 per Aickin J.
(57) *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 634; *CFMEU v Australian Industrial Relations Commission* (2007) 157 FCR 260 at 279-280 [61]-[62].

that, if the volume of matters commenced in the original jurisdiction of this Court were to rise to such a level as to threaten its capacity to discharge its constitutional and appellate functions, the Court might be able to remedy that problem by deciding that it had a discretion to stay matters commenced in its original jurisdiction. Such a discretion has been recognised, and regularly invoked, by the Supreme Court. [*Massachusetts v Missouri* (58); *Ohio v Wyandotte Chemical Corporation* (59); and McKusick, "Discretionary Gatekeeping: The Supreme Court's Management of its Original Jurisdiction Docket since 1961" (60).] In exercising that discretion the Court has made it clear that it considers, first, the "seriousness and dignity of the claim" (61) and, secondly, the availability of an alternative forum in which the issue can be resolved (even if not as part of the same dispute or in proceedings between the same parties). In concurrent jurisdiction cases, the result of the exercise of the discretion to decline to exercise jurisdiction is that the case must be recommenced in a different court. The practical effect of the exercise of the discretion is much the same as remittal. [He also referred to *California v West Virginia* (62); *California v Texas* (63); *Texas v New Mexico* (64); *Wyoming v Oklahoma* (65); and *Mississippi v Louisiana* (66).] The Court's assertion of a power to decline to exercise jurisdiction in exclusive jurisdiction cases has been criticised both by members of the Court (67) and by academic commentators (68).

The Court need not decide in this case whether it has the power to stay a matter that is commenced in its original jurisdiction on the basis identified above as neither party urges the Court to exercise any such power.

The attack on the validity of the impugned provisions founders on the language of s 77(i) and (ii). Even if it were held that the Court had a discretion to decline to exercise jurisdiction in this matter, that would be irrelevant to the validity of the impugned provisions.

(58) (1939) 308 US 1 at 18-19.
(59) (1971) 401 US 493.
(60) *Maine Law Review*, vol 45 (1998) 185.
(61) *Illinois v City of Milwaukee* (1972) 406 US 91 at 93; *Arizona v New Mexico* (1976) 425 US 794 at 797; *Mississippi v Louisiana* (1992) 506 US 73 at 77.
(62) (1981) 454 US 1027.
(63) (1982) 457 US 164 at 168.
(64) (1983) 462 US 554 at 570.
(65) (1992) 502 US 437 at 450-452, cf 474.
(66) (1992) 506 US 73 at 77.
(67) *Arizona v New Mexico* (1976) 425 US 794 at 799 per Stevens J; *California v West Virginia* (1981) 454 US 1027 at 1027-1028 per Stevens J; *Wyoming v Oklahoma* (1992) 502 US 437 at 474-476 per Thomas J.
(68) Shapiro, "Jurisdiction and Discretion", *New York University Law Review*, vol 60 (1985) 543, at pp 561, 576; Bator, Meltzer, Mishkin and Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 3rd ed (1988), p 344; and Wright, *Law of Federal Courts*, 5th ed (1994), p 811.

D S Mortimer SC, in reply.

Cur adv vult

18 June 2008

The following written judgments were delivered: —

1 GLEESON CJ, GUMMOW AND HAYNE JJ. The litigation is a sequel to changes made to the *Migration Act 1958* (Cth) (the Act) by the *Migration Litigation Reform Act 2005* (Cth) (the 2005 Act). The 2005 Act introduced provisions by which the Parliament sought to impose time limits upon applications to the Federal Magistrates Court (the FMC), the Federal Court and this Court. The limits were uniform but of such short duration as to deny access to federal jurisdiction to applicants whose delay might not be the result of gross delay or culpable error.

2 In the Second Reading Speech on the Bill for the 2005 Act, the Attorney-General said (69):

> "The bill provides uniform extendable time limits in the High Court, the Federal Court and the [FMC]. The time limit measures provide a balance between giving applicants an opportunity to seek judicial review of migration decisions and ensuring timely handling of these applications."

The Attorney-General also said (70):

> "Migration cases filed in the High Court's original jurisdiction and remitted will be directed to the [FMC]. Further, the bill expressly provides that the High Court may remit on the papers without hearing. This is an appropriate efficiency for the handling of all matters filed in the High Court. The High Court is the apex of our judicial system. It should not be burdened with cases that are more appropriately handled by a lower court."

3 The legislative scheme has failed to achieve these objectives. In *Bodruddaza v Minister for Immigration and Multicultural Affairs* (71) this Court held that the provisions of the 2005 Act imposing time limits upon applications in the original jurisdiction directly conferred upon the High Court by s 75 of the *Constitution* were invalid. There was no challenge to the validity of the time limits with respect to the FMC and the Federal Court.

4 Both the plaintiff and the defendant (the Minister) are agreed that the effect of relevant provisions in the Act respecting time limitations (72)

(69) Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 March 2005, p 3.
(70) Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 March 2005, p 3.
(71) (2007) 228 CLR 651.
(72) Sections 476, 476A, 476B and 484, read with the definition of "migration decision" in ss 5, 5E and 474. The text of these provisions is set out in the reasons of Heydon, Crennan and Kiefel JJ.

and of the decision in *Bodruddaza* (73) is that the only court with jurisdiction to grant the relief the plaintiff seeks by way of certiorari and mandamus is this Court. The purpose of s 75(v) is to make it constitutionally certain that there is a jurisdiction to restrain officers of the Commonwealth from exceeding federal power (74) and it was affirmed in *Bodruddaza* that the jurisdiction of this Court in a matter falling within s 75(v) of the *Constitution* is entrenched (75).

5 The plaintiff wishes to achieve the result that, despite the absence of legislative authority, his application to this Court is remitted to the FMC. Before turning to consider his submissions something should be said respecting the facts.

The facts

6 The plaintiff was born in Nigeria in 1960 and is a Nigerian citizen. On 14 March 2006, whilst lawfully present in Australia as the holder of a Business (Short Stay) visa, he made an application for a protection visa. That application was refused by a delegate of the Minister on 18 April 2006. A copy of the decision of the delegate was sent under cover of a registered letter dated 18 April 2006. The letter was addressed to the plaintiff at the last address the plaintiff had given. There followed after an interval of some nine months a series of litigious forays which have culminated in an action in the original jurisdiction of this Court.

7 On 6 February 2007 and after he had been contacted by telephone by an officer of the Minister's Department, the plaintiff instituted in the FMC an application for judicial review of the decision of the delegate. It was only on 16 March 2007 that the plaintiff first received a copy of the letter dated 18 April 2006 and of the decision of the delegate. On 28 March 2007 the Minister filed an objection to the competency of the application made on 6 February 2007 and relied upon various grounds of objection. One was that by reason of para (a) of s 476(2) of the Act the FMC had no jurisdiction in the matter. The substance of this objection was that the decision of the delegate would have been reviewable elsewhere, namely by the Refugee Review Tribunal (the RRT) under Pt 7 of the Act, if application had been made to the RRT within time. The FMC proceeding was discontinued on 3 May 2007.

8 In the meantime, on 29 March 2007 the plaintiff made an application to the RRT. On 25 May 2007 the RRT determined it had no jurisdiction. Paragraph (b) of s 412(1) of the Act required that an application for review be made to the RRT within the prescribed period. In the present case this required the lodgment of the application for review at a registry of the RRT within a period not later than

(73) (2007) 228 CLR 651.

(74) *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14], 138-139 [155].

(75) *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.

twenty-eight days after the day on which the applicant received notice of the decision. The plaintiff was taken to have received on 28 April 2006 the notice of the decision sent by registered post on 18 April 2006. The time limit operated in this way although in fact the plaintiff had received the notification and a copy of the decision only on 16 March 2007. The result was that the twenty-eight day period within which the application had to be lodged with the RRT had ended on 26 May 2006. The application made by the plaintiff had not been received by the RRT until many months later, on 29 March 2007.

9 In anticipation of this outcome in the RRT, the plaintiff on 11 April 2007 invoked the original jurisdiction of this Court conferred by s 75(v) of the *Constitution*. As later amended, the relief sought in the plaintiff's application for an order to show cause includes certiorari to quash the decision of the delegate of the Minister made 18 April 2006 and mandamus directing the Minister to determine according to law the plaintiff's application for a protection visa. Certiorari is not listed in s 75(v), but may issue as ancillary to the constitutional writ of mandamus (76). The *High Court Rules 2004* (77) specify time limits within which applications for certiorari and mandamus must be made, but these, unlike those imposed by statute on the FMC and the RRT, are not absolute. The plaintiff seeks an enlargement of time under the *High Court Rules* (r 4.02).

The case stated

10 The case stated for the Full Court pursuant to s 18 of the *Judiciary Act 1903* (Cth) asks questions which put in issue the validity of provisions of the Act and the *Judiciary Act* in so far as they impair or frustrate the exercise of what the plaintiff submits is "an implied power" in the High Court to remit his application to another court.

11 By a favourable answer to Question 4 of the case stated the plaintiff wishes to have his application remitted by order of this Court to the FMC. But as the legislation stands that outcome is not possible. Section 476(1) of the Act provides that, subject to that section, the FMC has the same original jurisdiction in relation to migration decisions as does this Court under s 75(v) of the *Constitution*. However, para (a) of s 476(2) states that the FMC has no jurisdiction in relation to "a primary decision"; that term is defined in s 476(4) so as to include "a privative clause decision or purported privative clause decision" that would have been reviewable under Pt 7 (dealing with reviews by the RRT of protection visa decisions) if an application for that review had been made within the specified period. It is accepted by the parties that the decision of the delegate in the present case answered the definition of "primary decision" in s 476(4). The result is

(76) *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 507 [80]; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 672-673 [61]-[64].

(77) r 25.06.1 (Certiorari) and r 25.07.2 (Mandamus).

that s 476 does not confer any jurisdiction on the FMC to deal with the plaintiff's application for relief identified in s 75(v) of the *Constitution*.

12 On its face, s 476, in its application to the decision of the delegate of which the plaintiff seeks judicial review, is a law defining the jurisdiction of a federal court, other than this Court, with respect to a matter mentioned in s 75(v) of the *Constitution*. A law of that description is supported by the power conferred upon the Parliament by s 77(i) of the *Constitution*. This states:

> "Power to define jurisdiction
>
> With respect to any of the matters mentioned in the last two sections the Parliament may make laws:
>
> (i) defining the jurisdiction of any federal court other than the High Court."

13 As to the position of the High Court itself, the starting point is s 44 of the *Judiciary Act*. This would empower the High Court to remit the plaintiff's application for relief under s 75(v) of the *Constitution* to the FMC if the FMC had jurisdiction "with respect to the subject matter and the parties". However, s 44(1) must now be read with s 476B of the Act. Section 476B(2) states:

> "The High Court must not remit a matter, or any part of a matter, that relates to a migration decision to the [FMC] unless that court has jurisdiction in relation to the matter, or that part of the matter, under section 476."

As just explained, the effect of s 476 is that the FMC does not have jurisdiction in relation to the matter in question here.

The issues

14 Against that background three interrelated issues are presented by the plaintiff. The first asserts invalidity of the provisions of ss 476 and 476B of the Act and, in particular, of the barrier to remitter imposed upon the High Court by s 476B(2). As to the second issue, the plaintiff asserts the existence of authority in this Court, even in the absence of a supporting law made by the Parliament, to remit the plaintiff's application for consideration and determination by the FMC. Third, the plaintiff contends that there exists authority in the FMC, in the absence of any support by a law of the Parliament, to receive that remitter and consider and determine the plaintiff's application for certiorari and mandamus.

15 With respect to all three issues the plaintiff founds his case upon the existence of a necessary implication in the text and structure of Ch III of the *Constitution*. He submits that ss 476 and 476B are invalid because they oblige the High Court to exercise exclusively and without remitter the jurisdiction conferred by s 75(v) of the *Constitution* with respect to certain decisions by the Minister under the Act. The case presented by the plaintiff in its broader form, and as it appears in the written submissions, is that the High Court:

> "has an implied power to remit any matter commenced in its original jurisdiction to another court and that if a law of the

> Parliament purports either to prohibit the exercise of that power, or to deny jurisdiction to all receiving courts to hear and determine remitted matters, then that law directs the manner and outcome of the exercise of this Court's jurisdiction and is an impermissible interference with the exercise of judicial power by this Court."

State courts

16 It is convenient first to consider a related but distinct submission by the plaintiff which concerns the jurisdiction of the courts of the States.

17 In the course of oral submissions counsel for the plaintiff emphasised that the general expression "another court" used in the written submissions to identify the "receiving courts" was not limited to the FMC or another federal court; rather, the expression included State courts with jurisdiction generally in relation to the same kinds of parties and subject matter as were present in the High Court litigation. In particular, the plaintiff submits that the source of this jurisdiction in the State courts need not be a law of the Parliament conferring federal jurisdiction under s 77(iii) of the *Constitution*. There was no such federal law which applied to the plaintiff's litigation. But, the submission proceeded, that was not determinative because the necessary jurisdiction "belonged to" the courts of the States without the need for a law investing them with federal jurisdiction.

18 It should be said immediately that the following remarks of Gleeson CJ, Gaudron and Gummow JJ in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* are pertinent here (78):

> "The relationship between federal jurisdiction and State jurisdiction is not to be approached from a vantage point where the Supreme Courts are seen as superior to the operation of the *Constitution* by reason of their earlier establishment by or pursuant to (79) Imperial legislation. It is, after all, s 73 of the *Constitution* which now ensures the continued existence of those Supreme Courts (80)."

19 The submissions for the plaintiff sought to recognise this by emphasising the operation of the "supremacy clause" in covering cl 5 of the *Constitution*. This renders the *Constitution* (as set out by s 9 of the *Commonwealth of Australia Constitution Act 1900* (Imp) (81))

(78) (2001) 204 CLR 559 at 592 [69].

(79) For example, the Supreme Court of New South Wales was established by an instrument issued by the Crown pursuant to power conferred by Imperial statute, not by an exercise of the Royal Prerogative. The matter is explained by Windeyer J in *Kotsis v Kotsis* (1970) 122 CLR 69 at 90-91, and by Professor Enid Campbell in "The Royal Prerogative to Create Colonial Courts", *Sydney Law Review*, vol 4 (1964) 343, at p 345.

(80) *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 102-103, 110-111, 141-142.

(81) 63 & 64 Vict, c 12.

"binding on the courts, judges, and people of every State … notwithstanding anything in the laws of any State …".

20 However, that which is rendered "binding" is the federal scheme manifested in the text and structure of the *Constitution*. This includes Ch III and various inferences which have been held to follow necessarily from that federal scheme. The various powers conferred upon the Parliament by provisions in Ch III (82) are necessarily exclusive of those of the State legislatures; and this is true of the conferring, defining and investing of federal jurisdiction (83). It follows that a State legislature may not expand or contract the scope of the appellate jurisdiction of the Court conferred by s 73; or that of the original jurisdiction conferred by s 75 (84).

21 With these considerations in mind it is convenient to return to the plaintiff's submission respecting the jurisdiction to issue mandamus against the Minister which is said to "belong to" the State courts. That submission should be rejected, and on several grounds.

22 The first ground requires attention to s 77(ii) of the *Constitution*. This provides:

> "Power to define jurisdiction
>
> With respect to any of the matters mentioned in the last two sections the Parliament may make laws:
>
> …
>
> (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which *belongs to* or is invested in the courts of the States."

(Emphasis added.)

The phrase "of any federal court" includes the High Court (85). Sections 38 and 39(1) of the *Judiciary Act* render "the jurisdiction of the High Court … exclusive of the jurisdiction of the several Courts of the States", subject to exceptions none of which apply to the plaintiff's proceeding in this Court. The phrase "the jurisdiction of the High Court" when used in ss 38 and 39(1) is apt to include original jurisdiction whether conferred directly by s 75 of the *Constitution* or by laws made by the Parliament from time to time under s 76 of the *Constitution*. These sections of the *Judiciary Act* answer the description of a standing provision constantly speaking to the present state of the jurisdiction of the High Court (86).

(82) All sections of Ch III except s 75 contain provisions for the Parliament to legislate.

(83) *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 405-406 [228]-[230].

(84) *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 405 [227].

(85) *Pirrie v McFarlane* (1925) 36 CLR 170 at 176.

(86) *Le Mesurier v Connor* (1929) 42 CLR 481 at 503; see also, as to s 39(2) of the *Judiciary Act*, *Forsyth v Deputy Commissioner of Taxation* (2007) 231 CLR 531 at 537-538 [2]-[3].

23 That which "belongs to" the State courts within the meaning of s 77(ii) is the authority they possess to adjudicate under the constitutions and laws of the States (87). So long as ss 38 and 39(1) of the *Judiciary Act* stand unrepealed then, with respect to matters falling within the jurisdiction of the High Court, and in the words of Isaacs J, "no State jurisdiction can exist" (88). However, as Taylor J and Menzies J indicated in *Williams v Hursey* (89), this does not deny the existence of State jurisdiction in a suit which could not be tried in the exercise of federal jurisdiction (90).

24 The accepted view is that the denial of jurisdiction which otherwise "belongs to" the courts of the States manifests the operation of s 109 of the *Constitution* (with respect to the *Judiciary Act* provisions) upon the State laws which otherwise provide for the jurisdiction of the courts of the States (91). Those State laws are rendered "inoperative" (92). If this reasoning be applied to the present situation, it is by operation of s 109 of the *Constitution* that there is denied the competency of any State court, in the absence of a federal law investing it with federal jurisdiction, to adjudicate upon the action the plaintiff brings against the Minister for judicial review.

25 But there is a further ground for that outcome. It proceeds from an appreciation of the federal structure established by the *Constitution* and may be explained as follows. Perusal of the nine paragraphs of ss 75 and 76 of the *Constitution* discloses that while some identify controversies well known in the anterior body of general jurisprudence in the colonies (for example, actions in tort or contract between residents of the former colonies (93)), that was not so with respect to other heads of federal jurisdiction (94). How then could the adjudication of these controversies be said to "belong to" State jurisdiction? If they could not be so described, there was no occasion for any later federal law to rely upon s 77(ii) and for s 109 of the *Constitution* then to render inoperative that which did not otherwise exist.

26 The distinction was apparent to Inglis Clark, who wrote in 1901 and in advance of the enactment of the *Judiciary Act*. He observed (95):

> "But in the absence of any legislation by the Parliament of the Commonwealth which excludes the jurisdiction of the State courts,

(87) *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.
(88) *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142.
(89) (1959) 103 CLR 30 at 88-89, 113.
(90) See Cowen and Zines, *Federal Jurisdiction in Australia*, 3rd ed (2002), pp 237-238.
(91) *Felton v Mulligan* (1971) 124 CLR 367 at 412-413; *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457 at 471, 476.
(92) *Felton v Mulligan* (1971) 124 CLR 367 at 412.
(93) See *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 33-34 [45]-[48], 36-37 [55]-[58].
(94) *Kruger v The Commonwealth* (1997) 190 CLR 1 at 171.
(95) *Studies in Australian Constitutional Law* (1901), pp 177-178.

they will have jurisdiction to declare and apply the laws of the Commonwealth in all cases in which the judicial power of the Commonwealth is not necessarily exclusive of the judicial power of the States; because the laws of the Commonwealth are operative in every State and are declared by the fifth introductory section to the Constitution to be binding on the courts, judges and people of every State and of every part of the Commonwealth."

Inglis Clark continued:

"The matters in respect of which the judicial power of the Commonwealth seems to be necessarily exclusive of the judicial power of the States, in the absence of any legislation by the Parliament of the Commonwealth conferring jurisdiction upon the courts of the States in respect of them, are the following: —

1. Matters in which the Commonwealth is a defendant:

2. Matters in which a State may be compelled under the Constitution to become a defendant:

3. Matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

With regard to matters in which a State may be compelled under the Constitution to become a defendant, the State may of course authorize its own courts to exercise jurisdiction, and it may voluntarily submit itself to the jurisdiction of the courts of another State. The question of the power of a State court in the United States of America to issue a writ of mandamus to an officer of the United States to compel him to perform duties imposed upon him by a law of the United States came before the Supreme Court in the case of *McClung v Silliman* (96); and the Supreme Court decided that the courts of the States had not any jurisdiction in such cases."

27 Shortly thereafter, but also before the commencement of the *Judiciary Act* (97), the New South Wales Full Court decided in *Ex parte Goldring* (98) that a State court had no power to grant a mandamus to compel an officer of the Commonwealth (the Collector of Customs at Sydney) to perform duties imposed upon the officer by federal law, even if the duties were to be performed in the State in question (99). Counsel for the Collector in *Goldring* (Sir Julian Salomons KC) had cited *McClung v Silliman*. A recently affirmed corollary of the reasoning in *Goldring* is that a State law cannot unilaterally vest functions under that law in officers of the

(96) (1821) 19 US (6 Wheat) 598.
(97) On 25 August 1903.
(98) (1903) 3 SR (NSW) 260.
(99) Cowen and Zines, *Federal Jurisdiction in Australia*, 3rd ed (2002), pp 46-47, 197; Bailey, "The Federal Jurisdiction of State Courts", *Res Judicatae*, vol 2 (1940) 109, at p 111.

Commonwealth, whose offices are created by federal law and who have the powers vested in them by that law (100).

28 In the United States, the circumstance that a State court had inherited the jurisdiction of the Court of King's Bench with respect to mandamus, and the operation of the Supremacy Clause in Art VI and the reservation of powers to the States by the Tenth Amendment, did not have the consequence that mandamus might issue from that State court to a federal officer. In Australia the same may be said of covering cl 5 of the *Constitution*.

29 Writing after *Goldring*, in the second edition of *The Constitution of The Commonwealth of Australia* (101) Harrison Moore gave several instances where, in the absence of a conferral of federal jurisdiction, State courts could not have power to adjudicate under State law. These included the issue of mandamus to a federal officer to perform a federal duty and the issue of habeas corpus to a federal officer.

30 It is unnecessary to determine whether there holds true all of the instances given by Inglis Clark and Harrison Moore of the absence of jurisdiction which "belongs to … the courts of the States", so that in those cases there is no occasion or need for exclusion by federal law based upon s 77(ii) of the *Constitution*. It is sufficient for the present case to point to the clear authority since *Goldring* (102) that the mandamus the plaintiff seeks against the Minister here is one such instance.

31 The plaintiff fails to make good the submission that his application may be dealt with by this Court on the footing that, federal jurisdiction apart, the State courts have jurisdiction with respect to the subject matter which "belongs to" them by reason of covering cl 5 of the *Constitution*. There remains for consideration the plaintiff's submissions respecting an implied power of remitter from the High Court.

Implied power in the High Court

32 The statement that "the High Court shall have original jurisdiction", which is made in s 75 of the *Constitution* with respect to the matters listed in that section, brings with it such powers as are incidental and necessary to the exercise of the jurisdiction (103). The same result follows from the vesting by s 71 of the *Constitution* of "[t]he judicial power of the Commonwealth" in the High Court (104).

33 What is incidental and necessary in this context has not been, and perhaps cannot be, exhaustively detailed. A power to deal with contempt is included (105). So also is the power to stay orders, which is necessary to effectuate the grant of appellate jurisdiction by

(100) *Bond v The Queen* (2000) 201 CLR 213 at 219-220 [15]; *R v Hughes* (2000) 202 CLR 535 at 553 [31].
(101) (1910), pp 212-213.
(102) (1903) 3 SR (NSW) 260.
(103) cf *DJL v Central Authority* (2000) 201 CLR 226 at 240-241 [25].
(104) See *United Mexican States v Cabal* (2001) 209 CLR 165 at 180-181 [37].
(105) *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 394-397 [15]-[25], 429 [113].

s 73 (106). A broad power to protect the procedures of the Court against abuse may well also be included (107).

34 This Court has said that the exercise by the Parliament of its powers under s 76 of the *Constitution* to confer further additional original jurisdiction upon the Court is a matter of "great significance", because the result may be to "impair its ability to discharge its major functions with despatch" (108). Those major functions are, as to the original jurisdiction, the disposition of certain matters arising under or involving the interpretation of the *Constitution*, and as to the appellate jurisdiction the role, subject to the grant of special leave, as the final court of general appeal for the whole country (109). Further, with respect to jurisdiction directly conferred by s 75 the Court has indicated that relief may be refused where there is another court with jurisdiction in the matter (110).

35 The Parliament recognised from the time of the enactment of the *Judiciary Act* over a century ago that it would overburden the High Court to leave it as the only court with the whole of the jurisdiction conferred by s 75 and the whole of the jurisdiction which might be conferred by the Parliament pursuant to s 76. The immediate answer was the use of the power conferred by s 77(iii) to enact the broadly expressed conferral by s 39 of the *Judiciary Act* of jurisdiction upon the several courts of the States. Section 39 is expressed in terms that do not distinguish between civil and criminal matters. Section 68 deals specifically with criminal jurisdiction and was adapted from s 2 of the temporary legislation the *Punishment of Offences Act 1901* (Cth) (111). In more recent times legislation consequent upon the establishment of other federal courts has diverted from the High Court what had become a burdensome jurisdiction conferred particularly by a range of laws supported by s 76(ii).

36 The Commonwealth Solicitor-General, who appeared for both the Minister and, as intervener, the Attorney-General, in oral argument contended that there was no restraint upon the power of the Parliament to enact a repeal of all these measures and thereby burden exclusively the High Court with the full weight of original jurisdiction in federal matters. Such a state of affairs would, among other things, stultify the exercise of the appellate jurisdiction which is entrenched by s 73 of the

(106) *United Mexican States v Cabal* (2001) 209 CLR 165 at 180-181 [37]-[38].

(107) See *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 265-266 [9]-[13].

(108) *Willocks v Anderson* (1971) 124 CLR 293 at 299-300.

(109) *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe [No 2]* (1998) 72 ALJR 630 at 633 [11]; 152 ALR 177 at 180; *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 407-408 [9]-[11]; 168 ALR 407 at 410.

(110) *R v Langdon; Ex parte Langdon* (1953) 88 CLR 158 at 161; *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 633-634.

(111) See *Ah Yick v Lehmert* (1905) 2 CLR 59 at 606-607.

Constitution. It would undermine the operation of Ch III which places this Court (subject to the obsolete provisions in s 74) at the apex of the judicial structure (112).

37 It is well recognised in the decisions of the Court that the powers of the Parliament conferred by the various heads of power conferred by the *Constitution* are not to be interpreted on the footing that the ends sought to be achieved by their exercise must appear desirable rather than absurd or inconvenient (113). But a law, apparently based upon s 77(iii), which repealed ss 39 and 68 of the *Judiciary Act* would appear to strike at the effective exercise of the judicial power of the Commonwealth which is vested directly in the High Court by s 71 of the *Constitution*. Nor would it necessarily be decisive in this situation to invoke the principle that the legislative powers conferred by s 51 extend to the repeal of the whole or part of that which has been enacted (114); the legislative powers conferred within Ch III may require special consideration. It is sufficient to conclude now that the submission put for the Commonwealth can hardly be said to be self-evidently correct.

38 But the foregoing considerations do not render it incidental and necessary to the exercise of jurisdiction directly conferred upon this Court by s 75 of the *Constitution* that, in the absence of a law made by the Parliament under s 77 which confers on another court concurrent federal jurisdiction with respect to a particular class of case such as that involved here, the High Court has the power to decline itself to exercise its jurisdiction by remittal to another court selected by the High Court for the exercise of its jurisdiction. It is for the existence of such a power that the plaintiff contends.

39 The plaintiff accepted the statement as to the making of implications which appears in *Lange v Australian Broadcasting Corporation* (115). However, this would mean that an implication supporting that power of remitter could extend only so far as necessary to give effect to the provisions of Ch III and would have to be inherent in the constitutional text and structure. The text and structure of Ch III point away from the direction to which the plaintiff urges the Court.

40 In *Gould v Brown* (116) McHugh J, in a passage indicative of what was to be the reasoning in *Re Wakim; Ex parte McNally* (117), said (118):

> "The affirmative but limited grants of constitutional power to the Parliament of the Commonwealth negate its competency to invest

(112) *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 538-544.
(113) *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 117-118 [188].
(114) *Kartinyeri v The Commonwealth* (1998) 195 CLR 337.
(115) (1997) 189 CLR 520 at 567.
(116) (1998) 193 CLR 346.
(117) (1999) 198 CLR 511.
(118) *Gould v Brown* (1998) 193 CLR 346 at 423 [122].

the federal courts and the High Court with original and appellate jurisdiction except in accordance with ss 73, 75 and 76. In my view, logically these affirmative grants must also negative the power of other legislatures in the federation to invest the High Court and the federal courts with jurisdiction."

41 That reasoning is applicable here. With respect to any of the matters mentioned in s 75 (and s 76) it is the Parliament which may make laws defining the jurisdiction of any other federal court and investing a State court with federal jurisdiction. It would be at variance with the scheme of Ch III for the High Court in effect to delegate the exercise of its jurisdiction to resolve the controversy represented by a s 75(v) matter to another federal court or to a State court, in either instance selected by the High Court itself.

42 It is true that the usual consequence of the exercise by the High Court of its statutory power of remitter is that the Court, after making the order for remitter, is taken thereby to choose not to exercise further its original jurisdiction, at least where the whole of the matter has been remitted. In due course thereafter it may be that the appellate jurisdiction under s 73 of the *Constitution* is invoked but that will be the last step in a sequence following the investment or conferral of original jurisdiction in the federal or State court concerned. That investment or conferral of jurisdiction occurs by operation of the statute, not by a decision of this Court.

43 Since its commencement, the *Judiciary Act* has contained provisions both for the removal of causes into the High Court and for the remittal both of causes which should not have been removed and of actions commenced in the original jurisdiction.

44 The provisions originally enacted as ss 40-44 of the *Judiciary Act* for removal of causes and for remittal of causes removed were derived immediately from United States precedent. This was found in the Act of March 3, 1875 Ch 137 (119). That statute provided for the removal of certain causes from State courts into the circuit courts of the United States and for the remanding to the original court of causes which should not have been removed.

45 Some analogy in the procedures of the common law superior courts of record had been provided by the writ of procedendo. Where a cause had been removed into one of the Court of King's Bench, Common Pleas or Exchequer by certiorari from an inferior court and it transpired that the cause ought not to have been removed, then on the application of the aggrieved party the writ of procedendo might issue, addressed to the inferior court and requiring it to proceed with the cause from the stage it had reached when the writ of certiorari had been issued (120). The occasion for this remedy in modern systems of procedure was

(119) 18 Stat Pt 3 470.

(120) Chitty, *Archbold's Practice of The Court of Queen's Bench, in Personal Actions and Ejectment*, 8th ed (1847), vol 2, p 1156; Halsbury, *The Laws of England* (1909), vol 10, p 202.

considered by Lord Atkin in *Great Western Railway Co v West Midland Traffic Area Licensing Authority* (121) and by McPherson JA in *R v T* (122).

46 Section 45 of the *Judiciary Act*, as enacted, went further than the United States precedent. It provided:

> "(1) Any matter which is at any time pending in the High Court, whether originally commenced in the High Court or not, may be remitted for trial to any Court of a State which has federal jurisdiction with regard to the subject-matter and the parties.
>
> (2) The order remitting the matter may be made by the High Court, or a Justice sitting in Chambers, on the application of any party to the matter."

47 What is important for the present case is that the High Court has never asserted authority, without a legislative basis, to remit for hearing by another court selected by the High Court a matter in respect of which under the *Constitution* and the laws made by the Parliament the High Court has exclusive jurisdiction.

The plaintiff's authorities and precedents

48 The plaintiff referred to *Johnstone v The Commonwealth* (123). The issue in that case was whether an action in tort against the Commonwealth might, in exercise of the power conferred by s 44 of the *Judiciary Act* as it then stood, be remitted to the Supreme Court of any State or whether by reason of s 56 of the *Judiciary Act* the action might be remitted only to the Supreme Court of the State in which the cause of action had arisen. The decision of the majority was that s 44 empowered the Court to remit the action to the Supreme Court of any State and that s 56 did not require any other outcome. But, critically for the reliance the plaintiff seeks to place upon the outcome in *Johnstone*, Aickin J, one of the majority, said that (124):

> "the effect of s 44 is to confer federal jurisdiction on State courts in cases where this Court remits a case to them, and that federal jurisdiction is in those same matters in which this Court has federal jurisdiction by virtue of s 75 of the *Constitution* …
>
> This jurisdiction is conferred on the State courts by the Parliament, not by this Court. What s 44 does is not to authorise this Court to confer federal jurisdiction on the State courts. What it does is to confer federal jurisdiction on State courts in cases where this Court is authorised to remit the proceedings to State courts and does in fact so remit."

It is true that the other members of the majority in *Johnstone*, Gibbs J (125) and Murphy J (126), did not express themselves with the

(121) [1936] AC 128 at 140.
(122) [1995] 2 Qd R 192 at 194.
(123) (1979) 143 CLR 398.
(124) (1979) 143 CLR 398 at 408-409.
(125) (1979) 143 CLR 398 at 401-402.

same precision of language as Aickin J. But, however that may be, it is in the reasons of Aickin J that the statement of the doctrine of the Court is to be found.

49 The plaintiff also referred to decisions of this Court in *O'Neill v O'Connell* (127) and *Lambert v Weichelt* (128). In the first of these cases, Dixon J said (129):

> "But once the 'cause' is lawfully removed here, then the determination of the cause lies within the jurisdiction of this Court, which, unless it exercises the power conferred by s 42 or exercises its discretion to remit the whole or any part of it, may dispose of the matters in controversy and give what judgment and make what order appears right upon the facts and the law."

50 Section 42 of the *Judiciary Act* as it then stood (… the High Court shall proceed no further therein but shall dismiss the cause or remit it …) imposed an obligation on the High Court where it appeared to the Court that a cause which had been removed did "not really and substantially arise under the *Constitution* or involve its interpretation" (130). On the other hand s 45, the text of which is set out earlier in these reasons, conferred upon the High Court a power of remitter of any matter at any time pending in the High Court, whether originally commenced in the High Court or otherwise; that such an order might be made upon the application of any party and on the power of the Court was indicative of the exercise of a discretion. It is to s 45 that the reference by Dixon J in *O'Neill* to the exercise of the discretion of the High Court to remit should be understood. The same is true of the reference to *O'Neill* in *Lambert* (131). It is so unlikely as to be virtually inconceivable that by the somewhat imprecise language used in these cases the Court is to be taken as having accepted a radical proposition as to the exercise of its jurisdiction which anticipates the submission now made by the plaintiff.

51 The plaintiff referred to a provision in the Rules of Court contained in the Schedule to the *High Court Procedure Act 1903* (Cth). Order XLI, r 29 provided for a writ, "called a writ of Procedendo", to be issued commanding a judicial tribunal to which prohibition had issued, nevertheless, to proceed as if the prohibition had not issued; procedendo might issue on any ground on which relief might be given against a judgment in an action. But both prohibition and procedendo were remedies administered by the High Court, and the second was ancillary to the anterior exercise by the High Court of its jurisdiction

(126) (1979) 143 CLR 398 at 407.
(127) (1946) 72 CLR 101.
(128) (1954) 28 ALJ 282.
(129) (1946) 72 CLR 101 at 125.
(130) The phrase "not really and substantially" had its provenance in s 5 of the Act of March 3, 1875 Ch 137, 18 Stat Pt 3 470.
(131) (1954) 28 ALJ 282 at 283.

under s 75(v) of the *Constitution*. There is no precedent here in the practice of the Court which assists the plaintiff.

Conclusions

52 As explained at the commencement of these reasons, this litigation is the outcome of two circumstances. The first is the enactment of time limits upon the making of applications for judicial review of certain decisions under the Act which does not allow for failures by applicants, without any shortcomings on their part, to act within the stipulated period. The second is that the invalidity of that limitation system in its application to s 75(v) of the *Constitution* has the result that only this Court may entertain the plaintiff's case.

53 The 2005 Act qualifies what otherwise is the broad power of remitter conferred upon the High Court by s 44 of the *Judiciary Act*. The practical effect of the 2005 Act is to preserve for determination exclusively in this Court those applications made outside the time limits that Act imposes with respect to the FMC and the Federal Court. However, the present magnitude of the burden thus placed on this Court is not such as to impair to a sufficiently significant degree the discharge of the other jurisdiction of the Court as to call into question the validity of the changes made in the 2005 Act. The plaintiff did not submit that there was such a degree of impairment.

54 The plaintiff's case was put on a broader basis which requires a necessary implication as to the existence of a non-legislatively based remitter power of this Court. That case has not been made out.

Orders

55 The questions in the case stated should be answered as follows:

Question 1:	Yes.
Question 2:	Unnecessary to answer.
Question 3:	Sections 476(2)(a) and 476(2)(d) are not invalid. It is unnecessary to answer the balance of the question.
Question 4:	Does not arise.
Question 5:	The plaintiff should pay the costs of the case stated.

56 KIRBY J. These proceedings, on a stated case (132), raise questions about the *Constitution* that have not previously been decided. The first question is whether this Court, in the exercise of its original jurisdiction, has an implied power to remit proceedings to another court where to do so is necessary to attain justice and to protect the constitutional character and functions of the Court.

(132) Stated by Hayne J, pursuant to the *Judiciary Act 1903* (Cth), s 18. See reasons of Heydon, Crennan and Kiefel JJ at [151].

57 If the answer to that question is affirmative, the second question concerns the validity of recent federal legislation. In its terms, such legislation restricts the broad statutory power of remittal, long enjoyed by this Court (133), and purports to prohibit remittal to a federal court of proceedings commenced in this Court's original jurisdiction (134).

58 Depending on the answer to these questions, a third question arises as to whether, either by federal law, State law or the *Constitution* itself, another court has jurisdiction to receive any such remittal from this Court. Without a court that is legally authorised to *receive* the matter, a constitutionally implied power of *remittal* could not exist. In that sense, the existence of a *receiving* court is the other side of the coin of the power in this Court to *remit* proceedings begun in its original jurisdiction.

59 Ultimately, I have reached the same dispositive orders as the other members of this Court. Specifically, I agree in the conclusion expressed by Gleeson CJ, Gummow and Hayne JJ that "the present magnitude of the burden … placed on this Court is not such as to impair to a sufficiently significant degree the discharge of the other jurisdiction of the Court as to call into question the validity of the changes made" (135) in the legislation which the plaintiff attacks to found his argument of an implied constitutional power of remittal. I therefore agree that the case for the existence of a "non-legislatively based remitter power of this Court" has "not been made out" (136). This conclusion means that it is inessential to decide whether, had my conclusion been otherwise, the plaintiff had established the existence of a relevant receiving court.

60 Although the plaintiff fails, his arguments are not meritless. Eventualities can be conceived where a power of remittal, beyond that conferred by legislation, might need to be implied in order to protect the essential constitutional character and functions of this Court. This would then require a valid receiving court. The recognition, ambit and consequences of any such power must be left to a future occasion. These reasons will explain my conclusions, expressed in that qualified way.

The facts, proceedings and legislation

61 *The facts*: The relevant facts and history of the proceedings are set out in other reasons (137). The plaintiff invoked these facts to lay the foundations for his argument of injustice.

62 The plaintiff applied unsuccessfully for a refugee protection visa. He contended that he did not receive actual notice of an adverse

(133) *Judiciary Act*, s 44. A broad remittal power existed from 1903.
(134) *Migration Act 1958* (Cth) (the Act), ss 476, 476A, 476B and 484 read with the definition of "migration decision" in ss 5, 5E and 474 of the Act.
(135) Reasons of Gleeson CJ, Gummow and Hayne JJ at [53].
(136) Reasons of Gleeson CJ, Gummow and Hayne JJ at [54].
(137) Reasons of Gleeson CJ, Gummow and Hayne JJ at [6]-[9]; reasons of Heydon, Crennan and Kiefel JJ at [146]-[153].

administrative decision made against him by a delegate of the respondent Minister. Due to innocent time default, he was denied any possible review on the merits, by the Refugee Review Tribunal, of his claim to be a "refugee" (138) or consideration under the constitutional writs (139) (or their statutory equivalents and supplements (140)) in the Federal Magistrates Court (the FMC) or the Federal Court of Australia (the FCA). He submitted that this was the result of the scheme of legislation introduced by the *Migration Litigation Reform Act 2005* (Cth) (the 2005 Act) which aimed to limit the jurisdiction of the FCA and the FMC.

63 The plaintiff argued that the constitutional offence presented by this legislative exclusion of the jurisdiction of those federal courts was rendered clear by the decision of this Court in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (141). This Court there held that s 486A of the *Migration Act 1958* (Cth) (the Act) was invalid so far as it purported to curtail or limit the entitlement of an applicant to seek relief in this Court under s 75(v) of the *Constitution*. The section was inconsistent with the irreducible jurisdiction there conferred on this Court (142). Section 486A was also held to be invalid so far as it purported to prevent this Court from affording relief by way of statutory certiorari in determining a "matter" for which jurisdiction was conferred by s 75(v) of the *Constitution* (143).

64 This was the factual starting point for the plaintiff's argument. In the exercise of this Court's constitutional powers to issue the writs named in s 75(v) of the *Constitution* (and, possibly, ancillary public law remedies to make such writs effective), the Parliament was not entitled to impose inconsistent restrictions on this Court. If that is so, was it then possible for the Parliament to block all avenues available to this Court to remit to other courts (and by which those courts could receive) such matters as were appropriate for remittal? Was such a legislative scheme constitutionally valid? Was preventing access to any other court constitutionally permissible for every instance where there had been a statutory time default, no matter how trivial, self-evidently meritorious or otherwise legally insignificant? To protect this Court's essential constitutional character and functions, was it necessary to imply a constitutional power to *remit* to another court and to find a statutory or constitutional power for such a court to *receive* the remitted "matter"?

65 Explained in this way, the plaintiff's arguments assume a constitutional attractiveness and it is appropriate to explore them.

(138) Within the Refugees Convention 1951 and Protocol. See the Act, s 36(2).
(139) *Constitution*, s 75(v).
(140) *Judiciary Act*, s 39B.
(141) (2007) 228 CLR 651.
(142) (2007) 228 CLR 651 at 672 [58]-[60].
(143) (2007) 228 CLR 651 at 673 [64].

66 *The proceedings and case stated*: The other reasons in this matter describe the comparatively prompt response of the plaintiff, once he was made aware of the decision of the delegate, to assert his propounded status as a "refugee" and to challenge the delegate's determination adverse to his application. Although without legal representation, the plaintiff first endeavoured to challenge the decision by initiating proceedings in the FMC. When difficulties arose, inherent in the scheme of the Act as amended by the 2005 Act (144), the plaintiff (by now with legal representation) applied to the Refugee Review Tribunal. It held that it lacked jurisdiction because of the failure to comply with the specified time provisions. In this Court, the plaintiff challenges the validity of that legislative scheme, which purports to curtail the power of this Court to remit to another court an application for relief by way of the constitutional writs and supporting public law remedies (certiorari or a declaration), commenced in this Court's original jurisdiction.

67 The plaintiff's challenge led to the case stated in the terms described by my colleagues (145). As noted, the questions were further confined during oral argument (146). Additional constitutional questions arose during oral argument that were inherent to those formulated in the stated case. Such questions emerged as potential difficulties, even barriers, for the hypotheses of the argument advanced by the plaintiff concerning the ambit of the implied non-statutory power of remittal said to be enjoyed by this Court.

68 Specifically, the necessity of a "receiving" court loomed larger during argument. It became clear that a constitutional power of remittal would only be effective and useful if a repository court existed (either federal, Territory or State). Such a court needed, by statute, or by the *Constitution* itself, to have the jurisdiction and power to determine the "matter" remitted to it.

69 *The legislation*: The relevant provisions of the Act, as amended by the 2005 Act, appear in the reasons of Heydon, Crennan and Kiefel JJ (147). By the end of oral argument it was common ground that, according to the Act as so amended, of the federal courts named in s 484(1) of the Act, only this Court was afforded jurisdiction under the Act in respect of a "primary decision" (148). This conclusion requires an affirmative answer to question 1 of the stated case. However, the plaintiff submitted that this conclusion was necessarily incompatible with the requirements of the *Constitution*.

(144) Especially the Act, s 476(2)(a). See reasons of Heydon, Crennan and Kiefel JJ at [149].

(145) Reasons of Heydon, Crennan and Kiefel JJ at [151]. See also reasons of Gleeson CJ, Gummow and Hayne JJ at [10]-[13].

(146) Reasons of Heydon, Crennan and Kiefel JJ at [152].

(147) Reasons of Heydon, Crennan and Kiefel JJ at [154]-[159].

(148) As defined by ss 476(2)(a), 476(4) and 476A, read with ss 5E and 474(2). See reasons of Gleeson CJ, Gummow and Hayne JJ at [4], [11]-[13] and reasons of Heydon, Crennan and Kiefel JJ at [155]-[157].

The issues

70 The legal duty of this Court is to answer the questions in the stated case so far as they remain live issues between the parties. Those questions essentially concern the implied constitutional power of remittal. So explained, they proffer two issues:

(1) *The implied power of remittal*: In the exercise of its original jurisdiction under the *Constitution*, does this Court have a power, implied from the Court's constitutional character and functions, to remit to another court a matter commenced in its original jurisdiction, as supplementary or alternative to any statutory powers of remittal conferred upon the Court by federal law?

(2) *The prohibition on remittal*: If this Court does have such an implied constitutional power of remittal, is a law that purports to forbid this Court from exercising its implied constitutional power of remittal invalid? Specifically, is s 476B of the Act invalid on that ground?

71 The issues concerning the existence in this Court of an implied constitutional power of remittal are inextricably linked to the consequential issues involving the existence of a court with jurisdiction and power, proper to receive (and to decide) the remitted matter. In one sense, a conclusion that no Australian court (whether federal, Territory or State) exists with jurisdiction and power to receive and dispose of the remittal would necessarily cast in doubt the existence of an implied power of remittal in the first place. That approach subsumes the issues concerning "reception" of the "remittal" within the existence of the power of "remittal". In effect, it would make the answer to the questions in the stated case respond to both sides of the constitutional equation.

72 For conceptual reasons, it is convenient to divide the issues presented by the problem of identifying a "receiving" court or courts. This was partly argued as distinct from, and additional to, the problems of the suggested remittal power as such. Thus, the additional issues concerning the existence of a valid "receiving" court are:

(3) *The receiving court*: If this Court has a power, implied from the *Constitution*, to remit to another court a matter commenced in this Court's original jurisdiction, is there in the present case a receiving court with the relevant jurisdiction and powers?

(a) Obviously, the plaintiff propounded that a federal court (the FCA or the FMC) would have the relevant jurisdiction and power if certain provisions of the Act were held invalid as inconsistent with this Court's suggested implied constitutional power of remittal. Thus, would the powers of the FMC, as a relevant federal court, to receive a constitutional remittal from this Court arise under s 476(1) of the

Act (149) if s 476(2) of the Act were held to be constitutionally invalid?

(b) If, because of the terms of the Act, no federal court has the jurisdiction and power to receive remittal under this Court's implied constitutional power, do the State Supreme Courts, as the residual repositories of the general judicial power of the Australian nation, envisaged by the *Constitution*, qualify as implied repositories of remittal of a matter from this Court, with their own implied jurisdiction and powers to determine any such remitted matter?

(c) Otherwise, does an order of this Court pursuant to its implied constitutional power to remit to another court a matter commenced in this Court's original jurisdiction, necessarily confer upon that other court, without the need for a specific federal law, the jurisdiction and power to discharge the remittal? In effect, does that court exercise the jurisdiction of this Court by delegation, under authority derived directly from this Court's remittal order and thus from the *Constitution* itself?

(4) *The legislative definition of jurisdiction*: Whatever might otherwise be the determination regarding the implied constitutional power of this Court to remit to another court a matter commenced in this Court's original jurisdiction, could any such implied power exist contrary to an express law of the Parliament defining the jurisdiction of a federal court other than this Court; confining such jurisdiction to federal courts (such as the FCA and the FMC), and without any law investing a State court with the relevant federal jurisdiction? Specifically, in light of this Court's approach in *Abebe v The Commonwealth* (150) regarding the power of the Parliament to "define" the jurisdiction of federal courts, could any implied power of remittal survive the Act's express legislative prohibition on remittal to federal courts, affording jurisdiction to federal courts exclusive of State courts in the subject matter of the plaintiff's proceedings?

73 It is appropriate to separate the *remittal* and *reception* issues. The initial focus is upon the plaintiff's arguments for an implied constitutional power of remittal. Analysed in this way, unencumbered by the consequential problem of identifying a court with jurisdiction to receive such a remitted matter, the force of the plaintiff's primary

(149) The terms of s 476(1) of the Act are set out below at [139]. The sub-section confers on the FMC the same jurisdiction in relation to migration decisions as the High Court has under s 75(v) of the *Constitution*.

(150) (1999) 197 CLR 510 at 522 [20], 534 [50] per Gleeson CJ and McHugh J; at 589-590 [229] of my own reasons; at 605 [281] per Callinan J.

constitutional contention may be better understood. But, of course, the inter-connection of the power to *remit* and the authority to *receive* jurisdiction cannot be forgotten.

The arguments for an implied power of remittal

74 *Starting point: constitutional text*: There is nothing in the *Constitution* that expressly provides for "remittal" (or "remand") of a matter from one court in the integrated Judicature of the Commonwealth to another.

75 The *Constitution* is not expressed at such a level of detail. Instead, the provisions of the *Constitution* contemplate that such particularity will be provided by a law made by the Parliament (151) or by law declared to exist by the courts as necessarily implied in their creation and character as such and in the performance of their functions which have been provided for expressly. In *Jackson v Sterling Industries Ltd* (152), with respect to the FCA, Wilson and Dawson JJ remarked:

> "[T]he vesting of judicial power in the specific matters permitted by the *Constitution* [or directly vested by the *Constitution*] … carries with it such implied power as is necessarily inherent in the nature of the judicial power itself."

76 So far as the *express* provisions of Ch III of the *Constitution* are concerned, the plaintiff emphasised one constitutional feature as providing a clue about the existence, or absence, of a power in this Court to remit matters in its original jurisdiction to other courts. Whilst in many other ways Ch III of the *Australian Constitution* copied features of Art III of the *United States Constitution*, in at least two respects it adopted a different course. The plaintiff invoked these divergences to support his contention that a power of remittal was to be implied out of necessity.

77 The first distinctive feature, not copied in the *Australian Constitution*, is found in Art III s 2 para 2 of the *United States Constitution*, which says:

> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

78 There is no equivalent obligatory assignment of exclusive original jurisdiction to this Court. Section 75(ii) of the *Constitution* includes "matters … affecting consuls or other representatives of other countries" in the original jurisdiction of this Court. However, in any

(151) Hence the provisions in ss 76, 77 and 78 of the *Constitution* expressly providing that "the Parliament may make laws" and s 51(xxxix), being "matters incidental to the execution of any power vested by this Constitution in … the Federal Judicature".

(152) (1987) 162 CLR 612 at 619.

such matter the Parliament may make laws to define the jurisdiction of other federal courts (153) and to define the extent to which such jurisdiction shall be exclusive (154). These provisions have helped Australia to avoid the problem that has arisen in the United States from the apparent purpose of the constitutional text to assign even trivial trials of offences by consuls to the Supreme Court itself (155).

79 The second distinctive feature of the *Australian Constitution* is s 77(iii) which empowers the Parliament to make laws investing any court of a State with federal jurisdiction. This so-called "autochthonous expedient" (156) has no equivalent in the *United States Constitution*. The provisions of s 77(iii), together with those envisaging the creation of federal courts below this Court (157), make it clear that an exclusive discharge by this Court of matters included by s 75 as within its original jurisdiction was not, as such, part of the necessary constitutional design. On the contrary, the envisaged facility for divesting such jurisdiction to other federal (including Territory) courts and to State courts, together with the large emphasis in Ch III upon the appellate jurisdiction of this Court (158), make it plain that it was always contemplated that this Court would be preoccupied by its appellate jurisdiction. This anticipation has been confirmed by the actual business of the Court since it commenced the exercise of its jurisdiction in 1903.

80 From this conception of the "Federal Supreme Court" for which the *Constitution* provides (159), the plaintiff argued that means must exist to protect this Court from becoming overwhelmed by cases that have no special national, federal or legal significance. To a large extent, it might be expected that such protection would be enacted by the Parliament. This could be achieved by providing this Court with a large general power to remit matters, which could then be received and disposed of by other federal (including Territory) or State courts. That has been done by enactment (160).

81 Other means have been used to divert to other courts matters lying within the original jurisdiction of this Court (161). Whilst these

(153) *Constitution*, s 77(i).
(154) *Constitution*, s 77(ii).
(155) cf *Maryland v Louisiana* (1981) 451 US 725 at 739-740; *California v West Virginia* (1981) 454 US 1027 per Stevens J (diss) relying on 28 USC §1251(a) whereby Congress enacted that "[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States". Notwithstanding this provision, in *California v West Virginia*, a case to which the statute applied, the majority denied a motion for leave to file a bill of complaint in the Supreme Court.
(156) *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268.
(157) *Constitution*, ss 71, 77(i), (ii).
(158) *Constitution*, s 73. See also s 74.
(159) *Constitution*, s 71.
(160) See *Judiciary Act*, s 44.
(161) For example, by the creation of the Federal Court of Bankruptcy, followed later by other federal courts such as the FCA and the FMC.

initiatives of the Parliament were within the contemplation of the *Constitution* and aimed to protect this Court's jurisdiction, the plaintiff argued that this Court could not be left without a means of self-protection where that proved necessary. This was so at least where the protection by or under laws made by the Parliament proved inadequate or (as was suggested in this case) where the jurisdiction was distorted in a way that was bound to increase the number of cases in the original jurisdiction of this Court, without reserving any effective control to the Court itself. The plaintiff complained that this was the offence to the *Constitution* caused by the terms of the amendments to the Act, particularly the contested provisions of the 2005 Act. To overcome this problem, the plaintiff submitted that there was an implied power of remittal to divest this Court of excessive, inappropriate or unnecessary jurisdiction.

82 *Test for implied powers*: So far as the derivation of implications is concerned, the text of the *Constitution* pulls in opposite directions. The sparse language, the ever-changing political, economic and social conditions to which the text must respond and the extreme difficulty of achieving formal amendments lend support to a recognition of the existence of implications that expand upon the text, in ways not inconsistent with its language, structure, history and purposes.

83 On the other hand, once declared, such implications are themselves part of the *Constitution* and are extremely difficult to change. Because they lack, as such, the democratic endorsement that the text itself enjoys (having been endorsed by the electors (162)), this Court has exercised great restraint in deriving implications. Effectively, implications have been confined to those matters deemed truly necessary to give effect to the express constitutional provisions (163).

84 The plaintiff accepted this strict criterion for the derivation of an implied power of remittal in this Court. He contended that the necessity of a power of remittal could be seen as "logical or practical" or "implicit in the … structure" of Ch III and in the character and functions of this Court (164). In the past, significant constitutional implications have been upheld by decisions of this Court (165). Such

(162) cf *Constitution*, s 128; and see *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 441-442 per Deane J; *McGinty v Western Australia* (1996) 186 CLR 140 at 230 per McHugh J.

(163) *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 152 per Gummow J; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 453-454 [389] per Hayne J; *Bennett v The Commonwealth* (2007) 231 CLR 91 at 137 [135] of my own reasons; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174 [7] per Gleeson CJ; at 186 [44] per Gummow, Kirby and Crennan JJ.

(164) cf *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 410 [14].

(165) See, eg, *Australian Communist Party v The Commonwealth (Communist Party Case)* (1951) 83 CLR 1 at 193.

implications have sometimes proved controversial (166) and some have been disputed within the Court (167).

85 For the plaintiff, it was self-evident, and certainly necessary to the text of the *Constitution* governing the original jurisdiction of this Court, that the Court would possess an ultimate power, implied from the *Constitution*, to protect itself from being diverted from its essential constitutional and appellate functions into determining matters that fall within s 75(v) of the *Constitution*, but which otherwise have no national, federal or legal import.

86 Particularly was this so where, virtually without precedent, the Federal Parliament had departed from a long line of statutory provisions designed to afford general discretionary powers to this Court to remit such matters. By the 2005 Act, the Parliament had chosen to enact measures clearly intended effectively to force people like the plaintiff into proceedings in the original jurisdiction of this Court. In such matters, other federal (including Territory) courts or State courts could much more easily perform the functions envisaged by s 75(v) of the *Constitution*. They had long done so. They could not therefore be lawfully deprived of that function where the imputed or apparent purpose of the statutory provision was to overburden this Court and to discourage or frustrate such proceedings, effectively preventing their proper determination.

87 If the necessity of protecting the essential constitutional and appellate functions of this Court was the touchstone for the derivation of an implied constitutional power of remittal, the plaintiff argued that it had been satisfied in his case. Whatever might have been the position at Federation, with a smaller population and economy, comparatively confined statute books and decisional authority and fewer cases to be heard, changes since then demonstrated the necessity of remedies for protecting the Court from the deliberate diversion of matters into its original jurisdiction that would not otherwise justify the exercise of such jurisdiction.

88 In short, the plaintiff submitted that this Court was not required simply to accept such a burden on its original jurisdiction without response. It was entitled, and obliged, to defend itself in order to continue to hear and determine those matters that had properly to be decided by the High Court in its original and appellate jurisdiction. To deny a power of ultimate control over the discharge of the Court's

(166) See, eg, *Boilermakers* (1956) 94 CLR 254 at 270.

(167) *Boilermakers* (1956) 94 CLR 254 at 305-306 per Williams J; at 329 per Webb J; at 342-343 per Taylor J. See *Austin v The Commonwealth* (2003) 215 CLR 185 at 249 [124] per Gaudron, Gummow and Hayne JJ; cf at 313 [316]-[317] of my own reasons; *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 182 [24] per Gleeson CJ; at 202 [95] per Gummow, Kirby and Crennan JJ; cf at 206 [110]-[113] per Hayne J.

functions as envisaged by the *Constitution* would effectively surrender to the Parliament functions that constitutionally belonged to the Court itself.

89 *Clarification of entrenched role*: In his submissions, the plaintiff pointed to the unusual features introduced by the 2005 Act that diminish the statutory powers of remittal (168). He also emphasised that the 2005 Act was enacted without knowledge of the later decision of this Court in *Bodruddaza* (169) that made clear what had perhaps earlier been left to inference (170). *Bodruddaza* clarified the fact that s 75(v) of the *Constitution* could not be subjected to an inflexible time limit, as attempted in s 486A(1) of the Act, introduced by the 2005 Act. Thus the dynamics of the statutory scheme then provided were markedly changed (171).

90 As Gleeson CJ, Gummow and Hayne JJ point out, the legislative scheme of the 2005 Act failed to achieve the objective mentioned by the Attorney-General to support the further provisions now contested by the plaintiff (172). It therefore remains for this Court to consider the further protective measure. This Court having invalidated the attempt to impose a rigid time limit upon its exercise of original jurisdiction, the plaintiff submitted that it was only a small step to invalidate the inter-connected attempts by the Parliament to prevent this Court from remitting its s 75(v) jurisdiction to the FCA or the FMC. It was a further small step to invalidate the laws that set out to deprive those federal courts of the jurisdiction and power to receive the remitted matters. For the plaintiff, all such provisions were infected with the vice revealed by *Bodruddaza* and should provoke a similarly firm judicial response.

91 *Conformability with other implied powers*: To rebut any suggestion that finding such an implied constitutional power to remit would involve taking a radical or unusual step, the plaintiff cited a broad range of other powers, not expressly stated in Ch III of the *Constitution*, or in legislation, which this Court has previously acknowledged, or assumed, to exist.

92 Such powers are collected in the reasons of Heydon, Crennan and Kiefel JJ (173). I will not repeat them. It is fair to remark that, because a body is created by or under the *Constitution* as a "court", it will necessarily enjoy a range of powers so as to be able to discharge its functions accordingly. A court established under Ch III of the *Constitution*, as part of the integrated Judicature of the

(168) The general statutory trend has been to relieve this Court of jurisdiction rather than to burden it with effectively compulsory jurisdiction.
(169) (2007) 228 CLR 651. The decision was dated 18 April 2007.
(170) *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.
(171) The terms of s 486A of the Act appear in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 661 [17].
(172) Reasons of Gleeson CJ, Gummow and Hayne JJ at [2]-[3]. See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 10 March 2005, p 3.
(173) Reasons of Heydon, Crennan and Kiefel JJ at [196].

Commonwealth, will necessarily partake of certain features, enjoy certain powers and be subject to certain requirements implied from the essential character and functions of such courts (174). The grant of any part of the judicial power of the Commonwealth necessarily carries with it the authority to do what is essential to effectuate the purposes of the court (175).

93 The plaintiff argued that the long list of implied powers accepted to date should make this Court less hesitant to add an implied constitutional power of remittal. If that power were necessary to protect the essential constitutional character and functions of this Court, it should be accepted and declared to exist along with the other implied powers previously discovered – and for similar reasons.

94 *Conformability with historical orders*: The plaintiff also submitted that, in creating the courts and legal procedures as expressed in Ch III of the *Constitution*, the purpose of the document was to establish (or continue) courts and legal procedures of a type generally found in the United Kingdom, from where Australia derived its judicial and legal traditions before and at the time of Federation (176).

95 English legal history reveals the existence of a writ, called Procedendo, which bears some similarity to the implied constitutional power of remittal for which the plaintiff argued. That writ was available under the hand of the respective Chief Justices of the several Royal Courts (or the Chief Baron of the Court of Exchequer) to command inferior courts, notwithstanding the earlier issue of a writ of prohibition, habeas corpus or otherwise, to (177):

> "proceed with what speed you can, in such manner, according to the law and custom of England, as you shall see proper; our said writ to you thereupon before directed to the contrary thereof in anywise notwithstanding."

96 The writ of Procedendo is not expressly included in s 75(v) of the *Constitution*, nor is it mentioned within the public law remedies in the *Judiciary Act 1903* (Cth) (s 33), in other legislation (178), or in the present *High Court Rules*. In traditional courts of general jurisdiction, the survival of the writ continues to be a matter of debate (179).

(174) See, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 96 per Toohey J; at 107 per Gaudron J; at 115 per McHugh J; at 141-142 per Gummow J.

(175) *United Mexican States v Cabal* (2001) 209 CLR 165 at 180 [37].

(176) cf *R v Davison* (1954) 90 CLR 353 at 382 per Kitto J; *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 594 [46] per Gummow, Hayne and Crennan JJ; *Thomas v Mowbray* (2007) 233 CLR 307 at 343 [66], 356-357 [116]-[121] per Gummow and Crennan JJ.

(177) The form of the writ of Procedendo is contained in Chitty, *Forms of Practical Proceedings, in the Courts of Queen's Bench, Common Pleas, and Exchequer of Pleas*, 5th ed (1840), p 564. Provision for the writ was included in the original Rules of Court contained in the Schedule to the *High Court Procedure Act 1903* (Cth). See Order XLI, Pt 4 (Prohibition), r 29.

(178) Such as the *High Court of Australia Act 1979* (Cth).

(179) eg, *R v T* [1995] 2 Qd R 192 at 194 per McPherson JA; cf *Great Western Railway*

97 There are important differences between the writ of Procedendo and the type of implied remittal for which the plaintiff argued. Specifically, Procedendo existed in a court to which proceedings had earlier been removed by another writ. It directed the court a quo to resume an interrupted hearing, notwithstanding the earlier order for removal. That is not the situation here. The suggested remittal is not to a court (the FMC) which, until interrupted by the superior court's writ, was hearing the plaintiff's proceedings. Instead, it is directed to that court where earlier proceedings had been started and discontinued by the plaintiff, acting in accordance with his then understanding of the validity and meaning of the legislation that is now challenged.

98 Nonetheless, the plaintiff relied on the writ of Procedendo to demonstrate that a prerogative or common law order in the nature of remittal was not, as such, alien to superior courts of the Anglo-Australian legal tradition, including in cases where writs of the kind provided by s 75(v) of the *Constitution* had earlier been made. To this limited extent, the point made by the plaintiff is a valid one. It is reinforced by the existence and exercise of the statutory power of remittal afforded by the *Judiciary Act* throughout most of the history of this Court.

99 Even at the time when questions as to the limit inter se of the constitutional powers of the Commonwealth and of the States were automatically removed into this Court by statute (180), power was retained by this Court to terminate the removal where it appeared that the cause "does not really and substantially arise under the *Constitution* or involve its interpretation". This Court would then dismiss the matter or "remit it to the Court from which it was removed as justice requires" (181). The statutory power of remittal belonging to this Court has therefore always been very broad. To that broad statutory power the plaintiff argued that an implied constitutional power should be added, having at least some features in common with Procedendo.

100 *Conformability with appeals*: The plaintiff also relied on the care that had been taken by the Parliament when regulating appeals to this Court by special leave. This involved avoiding any actuality or appearance of statutory interference with this Court's discharge of its appellate functions and confining the legislative prescription to the "regulation" and "prescription" provided for by s 73 of the *Constitution*.

101 The plaintiff noted that this was the critical question before this Court in *Carson v John Fairfax & Sons Ltd* (182). In upholding the

(cont)
Co v West Midland Traffic Area Licensing Authority [1936] AC 128 at 140 per Lord Atkin.

(180) *Judiciary Act*, s 40A, inserted by *Judiciary Act 1907* (Cth), s 5 (repealed by *Judiciary Amendment Act 1976* (Cth), s 9).

(181) *Judiciary Act*, s 42(1) (repealed and substituted by *Judiciary Amendment Act 1976* (Cth), s 9); cf *Lee Fay v Vincent* (1908) 7 CLR 389.

(182) (1991) 173 CLR 194.

validity of the new statutory provisions controlling the grant of special leave to appeal to this Court (183), one of the salient points made by the Court was that the last word in the determination of the Court's appellate jurisdiction was still reserved to the Court itself. If otherwise within the constitutional provision governing appeals, matters would thus only be excluded if this Court so decided. As the Court stated (184):

> "The Court is at liberty to hear and determine such appeals as *it* considers appropriate in accordance with the criteria or considerations relevant to the grant or refusal of special leave."

102 By analogy, the plaintiff submitted that this Court had the final word as to whether it would hear or not hear matters, or would hear matters only after remittal to, and determination by, another court. Ultimately, this would only be possible if the power of remittal was perceived as inhering in the Court under the *Constitution* and was not necessarily reliant on federal legislative provisions. As demonstrated by the 2005 Act, such statutory provisions could occasionally reduce the ultimate power of the Court over the performance of its entire jurisdiction. Where this was the outcome, the plaintiff argued that this Court was empowered, out of necessity, to protect its own character and essential functions.

103 *Conformability with final courts*: The plaintiff also invoked decisions of two other final national courts, the Supreme Courts of the United States of America and India. He suggested that a decision from each court bore some analogy to the present problem and supported his argument for the existence of the implied constitutional power.

104 The United States decision was *Carnegie-Mellon University v Cohill* (185). A federal District Court had held that there was an "inherent" (non-statutory) power in the federal judiciary to remit (remand) cases that had earlier been removed from a State court to the federal District Court under its pendent jurisdiction. The power of remand was upheld for reasons of "economy, convenience, fairness, and comity" (186).

105 The relevant federal removal statute (187) explicitly authorised remand in only two situations. The parties to that case agreed that neither situation was applicable. The question in *Carnegie-Mellon* was therefore whether, in the absence of an express statutory provision to cover the type of case before the courts, the silence of the statute negated the existence of a curial power to remand. The majority held that it did not. They concluded that to remand the case would generally be preferable to dismissal, upon which order a statute of limitations

(183) Relevantly the *Judiciary Act*, s 35A.
(184) (1991) 173 CLR 194 at 217 (emphasis in original).
(185) (1988) 484 US 343.
(186) (1988) 484 US 343 at 351.
(187) 28 USC §1441(a).

would descend (188). The majority thus held that remand was within the exercise by federal courts of their pendent jurisdiction. Whilst the source was not expressly spelt out, by inference, the power derived from the constitutional character of such courts.

106 The opinion of the Supreme Court was delivered by Marshall J (189). A strong dissent was written by White J (with whom Rehnquist CJ and Scalia J agreed) (190). The minority judges contested the power of the Court itself to grant federal District Courts "virtual carte blanche to remand pendent claims" and particularly "for the amorphous reasons" expressed (191). They held that this action could not be reconciled with the earlier holding of the Supreme Court in *Thermtron Products Inc v Hermansdorfer* (192) "that cases cannot be remanded for nonstatutory reasons" (193).

107 Despite this earlier authority and the strong dissent in *Carnegie-Mellon*, the current doctrine of the *United States Constitution* is that a remand (remittal) power belongs to federal courts beyond the powers provided to such courts by Congress. Because the power was reposed in a federal court, there was thought to be no relevant risk of its misuse for improper reasons or "manipulative tactics" (194).

108 The Ch III provisions in the *Australian Constitution* are different from those of Art III in the *United States Constitution*. However, *Carnegie-Mellon* is arguably an important acknowledgment of the potential for the *Constitution* itself to sustain, in certain circumstances, an implied or "inherent" power to remand matters to other courts for reasons of broad requirements of justice and out of powers inhering in a court of the given character and functions.

109 The decision of the Supreme Court of India in *Kumar v Municipal Corporation of Delhi* (195) is different from the present case. That case did not involve remittal, as such, but rather a direction by the Supreme Court to the petitioners to approach the relevant State High Court for relief under Art 226 of the *Indian Constitution*. The petitioners had filed a writ petition before the Supreme Court of India under Art 32 of the *Constitution*. That article affords constitutional remedies for the enforcement of fundamental rights as provided in Pt III of the *Indian Constitution*. Notwithstanding Art 32, by Art 226, every High Court has power, within its jurisdiction, to issue writs of the same kind (including writs in the nature of mandamus, prohibition and certiorari).

110 The deflection of the petition to the relevant High Court in *Kumar* appears to have occurred by way of adjournment or postponement of

(188) (1988) 484 US 343 at 351-352.
(189) (1988) 484 US 343 at 345.
(190) (1988) 484 US 343 at 358.
(191) (1988) 484 US 343 at 361.
(192) (1976) 423 US 336.
(193) (1988) 484 US 343 at 361.
(194) (1988) 484 US 343 at 357.
(195) [1988] 1 SCR 732.

the proceedings in the Supreme Court. Nevertheless, some remarks of the participating judges (E S Venkataramiah and K N Singh JJ) describe circumstances that, if replicated in Australia, would arguably present the necessity for an implied constitutional power of remittal to prevent the final court from being so overburdened in its original jurisdiction as to be incapable of fulfilling its character and discharging its functions (196):

> "This Court has no time today even to dispose of cases which have to be decided by it alone and by no other authority. Large numbers of cases are pending from ten to fifteen years. Even if no new case is filed in this Court hereafter, with the present strength of Judges it may take more than fifteen years to dispose of all the pending cases.
>
> If the cases which can be filed in the High Courts are filed in the High Court and not in this Court this Court's task of acting as [an] original court which is a time consuming process can be avoided and this Court will also have the benefit of the decision of the High Court when it deals with an appeal filed against such decision.
>
> … We should preserve the dignity, majesty and efficiency of the High Courts …
>
> [T]he time saved by this Court by not entertaining the cases which may be filed before the High Courts can be utilised to dispose of old matters in which parties are crying for relief."

111 A discretionary refusal to enter upon undoubted jurisdiction is to be distinguished from an order of remittal or its functional equivalent. Nonetheless, the predicament of the Supreme Court of India, described in *Kumar*, indicates that, where necessary, such courts may feel obliged to find remedies for the gross over-crowding of their lists. This is especially so in final national courts, like this Court, where the discharge of their essential constitutional functions can be endangered by such over-crowding.

112 For example, if the Federal Parliament were to repeal the universal special leave arrangements governing the appellate jurisdiction of this Court (197), it would be likely that the supervening increase in appeals would oblige this Court to adopt non-statutory means to protect the discharge of its core constitutional functions. Likewise, within the original jurisdiction. If the Parliament were to prevent all possibility of judicial review in mass jurisdiction subjects (such as migration decisions), leaving only the remedies entrenched in this Court under s 75(v) of the *Constitution*, it is likely that other non-statutory procedures would have to be adopted by the Court to protect the fulfilment of its constitutional character and functions.

113 In effect, this was what the plaintiff argued. He submitted that the enactment by the Parliament of a statute that diverted his proceedings,

(196) [1988] 1 SCR 732 at 735.
(197) See *Judiciary Act*, s 35A.

and others like them, to this Court alone enlivened the necessity of a constitutional remedy by way of remittal. Once that power was derived from the *Constitution* itself, the question of whether circumstances had been demonstrated for the exercise of the power in the present case could be separately argued and decided.

114 *Immaterial considerations*: Against the foregoing presentation of his arguments, the plaintiff labelled a number of the contentions raised against him as immaterial to the implied power of remittal for which he contended.

115 Thus, the fact that no precedent existed which assisted him on the exact point (198) could be explained because, never before 2005, had the Parliament of the Commonwealth endeavoured in such a way to narrow this Court's statutory remittal power. Never, having granted a general jurisdiction to subordinate federal courts to provide judicial review, had that jurisdiction been cut back effectively to oblige such applications to be brought in this Court. Likewise, the plaintiff submitted that the absence of a present "flood" of cases was not determinative of the existence, or otherwise, of an implied power of remittal (199). This was to be found, or not found, in the language, structure, history and purpose of the *Constitution*. A decision on the *existence* of the power was to be distinguished from a decision on the occasion of its suggested *exercise*.

116 *Conclusion: an arguable concept*: I have taken care to explain the plaintiff's arguments in order to demonstrate that his submission is far from unpersuasive. In circumstances that can be postulated, an implied constitutional power of remittal might be upheld, beyond the statutory power afforded by s 44 of the *Judiciary Act*. In his reasons for the Court in *Lambert v Weichelt* (200), Dixon CJ (201) appears to have contemplated the existence of wider powers of remittal beyond the *Judiciary Act*. He said, referring to a proceeding removed into this Court by order made under s 40 of the *Judiciary Act* (202):

> "We must decide the whole cause in fact and in law, unless under the power conferred by s 42 of the *Judiciary Act or otherwise* we remit it for reconsideration to the court from which it has been removed."

117 This reference to "or otherwise" scarcely amounts to a decision on the point argued in these proceedings. However, for a judge who was always careful in his use of language in such matters, it indicates that the possibility now argued for the plaintiff may not have been entirely alien to Dixon CJ's thinking.

118 Subject to what follows, therefore, I would not be prepared to hold that the language, structure, history and purpose of the *Constitution*

(198) Reasons of Gleeson CJ, Gummow and Hayne JJ at [51].
(199) Reasons of Gleeson CJ, Gummow and Hayne JJ at [53].
(200) (1954) 28 ALJ 282.
(201) For himself, McTiernan, Webb, Fullagar, Kitto and Taylor JJ.
(202) (1954) 28 ALJ 282 at 283 (emphasis added).

exclude the possibility of an implied power in this Court to remit a proceeding properly commenced before it to another court which, for some reason, does not fall within the ambit of a statutory power of remittal enacted by the Parliament. In a case of necessity, this Court would not be without an implied constitutional power to protect its essential character and functions. As I said in *Nicholas v The Queen* (203):

> "Upholding the integrity of the judicial system is the unavoidable obligation of courts. It cannot be surrendered to the other branches of government. They cannot be permitted to direct the courts to act in ways which would undermine the integrity of the judicial process and thereby run the risk of imperilling public confidence in the courts."

119 These conclusions notwithstanding, I am unconvinced that a constitutional power of remittal must be found to meet the circumstances revealed in these proceedings or otherwise known to the Court.

The necessity for non-statutory remittal is unproved

120 *General scheme: statutory definition*: Whatever may be the design of other national constitutions, the *Australian Constitution* was drafted to give effect to the notions of parliamentary "sovereignty" that prevailed at the time of its adoption. Thus, the "original jurisdiction" of this Court was to arise in a constitutional list of specified subject matters (204) or under federal laws conferring jurisdiction on other subjects (205). The power to define jurisdiction by federal law is spelt out with particularity (206).

121 The importance of the power to "define" the jurisdiction of federal courts by parliamentary law was explained by this Court in *Abebe* (207). Section 77(i) of the *Constitution*, empowering the Parliament to make laws "defining the jurisdiction of any federal court", does not extend to the jurisdiction of this Court as there expressed. Thus, relevantly, to matters "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth" (208) in this Court, no law, made by the Parliament, can deprive this Court of such original jurisdiction under the guise of "defining" the jurisdiction. Neither the Act nor the 2005 Act purports to do this.

122 Unless the grant of "original jurisdiction" in s 75(v) of the *Constitution* without more necessarily imports a power in this Court to remit the exercise of that jurisdiction to some other court, provisions in the Act that attempt to "define" the jurisdiction and power of the FCA

(203) (1998) 193 CLR 173 at 265 [213] (footnote omitted).
(204) *Constitution*, s 75.
(205) *Constitution*, s 76.
(206) *Constitution*, s 77.
(207) (1999) 197 CLR 510.
(208) *Constitution*, s 75(v).

and the FMC, similar to that stated in s 75(v) of the *Constitution*, do not appear to cut across any entrenched original jurisdiction of this Court. To the contrary, by "defining the jurisdiction" of those other courts, the Parliament would appear to have done no more than s 77(i) contemplates. What I said in *Abebe* (209) applies:

> "[W]ithin the jurisdiction so granted to the [federal courts], the Parliament has made no attempt whatever to dictate … 'the manner and outcome' of the exercise of that court's jurisdiction. It remains wholly independent. It performs functions proper to a federal court. The objection that the Parliament ought not to have granted and withheld jurisdiction in the precise manner that it has is an objection of a political or practical character. The practical implications for the work of this Court are potentially significant. But such political and practical arguments must be addressed to the Parliament not the Court. So long as the law which it enacts offends no requirement or limitation of the *Constitution* and 'defines' the jurisdiction of a federal court 'with respect' to a 'matter' within the Parliament's authority, such a law is constitutionally valid."

123 *Distinguishing overseas cases*: Because of the differences between the *Constitution* of Australia and those of other countries, it is impossible to treat judicial observations elsewhere as entirely analogous to the Australian case. Thus, the distinction between the disposition of *Kumar* in the Supreme Court of India (210) and the implied constitutional remittal sought in these proceedings is obvious. There was no remittal in *Kumar*, still less one sourced in the implied constitutional powers of the Supreme Court.

124 Likewise, in the United States case of *Carnegie-Mellon* (211), the majority were at pains to emphasise that the power of non-statutory "remand", which they upheld, was justified by the silence of the statute by which Congress had otherwise expressly authorised certain "remands". Thus, Marshall J, for the Court, said (212):

> "We do not dispute that Congress could set a limitation … on the federal courts' administration of the doctrine of pendent jurisdiction. But Congress has not done so, expressly or otherwise, in the removal statute … Given that Congress' silence in the removal statute does not negate the power to dismiss such cases, that silence cannot sensibly be read to negate the power to remand them."

125 By inference, if in the circumstances of *Carnegie-Mellon* the relevant federal law had expressly provided for remand on specified conditions or had forbidden such remand, the reasoning suggests that the Supreme Court would have given effect to the statute according to its terms.

(209) (1999) 197 CLR 510 at 593 [237] (footnote omitted).
(210) [1988] 1 SCR 732.
(211) (1988) 484 US 343.
(212) (1988) 484 US 343 at 354.

126 So why not do so here, where the Parliament has enacted a law expressly forbidding remand by the High Court to the FCA and the FMC? The answer provided by the plaintiff was that such a law purported to "define" the High Court's "original jurisdiction" in a matter that fell within the constitutional list (s 75) and thus fell outside the parliamentary power to make laws "defining the jurisdiction". Yet, such a conclusion would stretch the ambit of the constitutional grant of jurisdiction in s 75(v) to cover not only the exercise of that jurisdiction in *this* Court, but also its exercise in *some other* court to which the High Court, of suggested necessity, had remitted the matter pursuant to the implied constitutional power of remittal. Only in this way could the implied power of remittal invalidate the enacted exclusion of remittal. The case for adopting such a construction of s 75(v) has not been made out.

127 *Legislative protection of jurisdiction*: The scheme of the *Constitution* obviously envisages initiatives by the Parliament to protect and uphold the capacity of this Court to fulfil its essential constitutional character and functions. It does so both in the appellate and original jurisdiction of the Court. Over the years, laws have been enacted to provide "exceptions" and "regulations" in the determination of appeals (213), to "confer" original jurisdiction on this Court and to "define" the jurisdiction of other federal courts. This has been done to protect this Court from burdens that would frustrate the fulfilment of its essential constitutional character and functions (214).

128 This appears to be the way the *Constitution* was intended to operate, in an ongoing conversation between the Court and the Parliament, each respectful of the other's envisaged role. This Court has said many times that, in resolving particular constitutional questions, it does not need to postulate a chamber of legislative horrors, unlikely to be enacted by the elected Parliament of the Commonwealth (215). On the other hand, a conviction that a constitutional offence will be rare is not a reason for ignoring it when it is shown to exist. That would be to betray the central function of this Court as the guardian of the *Constitution* and upholder of its requirements. We should not adopt a laissez-faire attitude to the validity of impugned legislation. Sometimes

(213) See *Constitution*, s 73. See, eg, *Judiciary Act*, s 35A, added by *Judiciary Amendment Act (No 2) 1984* (Cth), s 4.

(214) See *Constitution*, ss 76, 77.

(215) *Western Australia v The Commonwealth (Territorial Senators' Case)* (1975) 134 CLR 201 at 275 per Jacobs J; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 380-381 [87]-[88] per Gummow and Hayne JJ; *Egan v Willis* (1998) 195 CLR 424 at 505 [160] of my own reasons; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32] per Gleeson CJ, Gummow and Hayne JJ; *XYZ v The Commonwealth* (2006) 227 CLR 532 at 549 [39] per Gummow, Hayne and Crennan JJ; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 69 [46] per Gleeson CJ; *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 117-118 [187]-[188] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

exceptional and apparently offensive legislation can signal a constitutional defect which it is the function of this Court to expose (216).

129 The plaintiff emphasised the uniquely restrictive character of the law which, he complained, was part of a scheme that was partially invalidated in *Bodruddaza* (217). However, substantially coinciding with the 2005 Act, this Court took its own initiatives, pursuant to statutory power, to make new Rules of Court to cope with defined proceedings in the Court without oral hearings (218). The consequent amendments to the Rules were not disallowed in the Parliament.

130 Therefore, the record does not sustain an inference (if such were suggested) that, by confining to this Court's original jurisdiction proceedings such as those of the plaintiff, the Parliament has deliberately or otherwise "swamped" this Court with unsuitable matters or set out to impair its capacity to discharge its jurisdiction in conjunction with the necessary performance of the appellate jurisdiction of the Court.

131 *Rationale for the proceedings*: During argument, I asked counsel for the plaintiff to resolve a puzzle (219). Why, having commenced proceedings in this Court (where the statutory time limit would not debar him from relief), was the plaintiff anxious to have his matter remitted to the FMC? Why would he not expend the same resources and energy to pursue the available constitutional remedies in this Court under s 75(v)?

132 The answer provided was that, by decision of legal aid authorities in the State of Victoria, support for proceedings in the original jurisdiction of this Court would not be available to the plaintiff in a case such as the present. It was, however, available to contest the constitutional validity of the law under challenge.

133 Obviously, the necessity of an implied constitutional power of remittal cannot be determined, or even influenced, by such extraneous considerations. Nevertheless, for practical reasons, I am prepared to accept that the plaintiff and those advising him may have judged that, on the available statistics, his chances of securing a favourable disposition in this Court were small. As a matter of practicalities, his legal prospects, and those of people like him, would be improved if their applications for judicial review were heard in the first instance by

(216) As happened, eg, in the *Communist Party Case* (1951) 83 CLR 1 and in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; cf *Singh v The Commonwealth* (2004) 222 CLR 322 at 418 [268] of my own reasons.

(217) (2007) 228 CLR 651.

(218) *High Court Rules 2004*, rr 41.10.5 and 41.11.1. The power to make Rules of Court is provided by the *Judiciary Act*, s 86. See also *High Court of Australia Act 1979* (Cth), s 48. The *Legislative Instruments Act 2003* (Cth) applies in relation to such Rules of Court which are subject to disallowance in the Parliament.

(219) [2008] HCATrans 097 at 1530.

the FMC. Certainly that Court would ordinarily have more time available to it for such a case than this Court would.

134 Nevertheless, an invocation of the original jurisdiction, which is what the plaintiff attempts, initiates a trial ultimately dependent on evidence. The plaintiff wishes to have that trial. The stated case is a means of deciding whether such a trial is viable or, constitutionally speaking, would be futile. Nothing in the record, which this Court may consider in understanding the stated case, supports a conclusion that the burden imposed on this Court by the impugned provisions of the Act, as introduced by the 2005 Act, would impair the capacity of this Court to perform its essential constitutional functions.

135 Moreover, those matters of which the Court may take judicial notice contradict any such conclusion. The experience of the Court, under the new Rules, evidences its capacity to cope with the present jurisdiction. The dispositions remain entirely subject to the power and decision of the Justices. The burdens on this Court, although large, are much less than those on the Supreme Court of India, as described in *Kumar* (220).

136 It follows that no foundation is afforded that could sustain a conclusion that an implied constitutional power of remittal from this Court to another court of the plaintiff's matter is necessary, in the sense of constitutionally essential, to protect the capacity of the Court to fulfil its constitutional character and to discharge its core constitutional functions.

137 *Conclusion: remittal not established*: Accordingly, upon his arguments on the stated case, the plaintiff has failed to make good his claim of a non-statutory power of remittal in this Court. Subject to what follows, I would not be prepared to exclude the possibility that such an implied constitutional power of remittal might exist, to be called forth in conceivable circumstances. The evidence presented in the case stated and knowledge available by judicial notice contradict the present existence of such extreme circumstances. It is enough, therefore, to say that the plaintiff has not made good his assertion of an implied constitutional power of remittal. The questions in the case stated should be answered accordingly, but upon that footing.

The existence of a receiving court

138 *The remaining issues*: The foregoing conclusion leaves undecided the remaining issues concerning the existence of a court with the jurisdiction and power to *receive* any remittal from this Court, pursuant to the propounded implied constitutional power of remittal (221). As previously stated, those issues have been separated for convenience. Logically, however, they cannot be divorced from the resolution of the question of whether an implied power of remittal is consistent with the language, structure, history and purpose of the *Constitution*.

(220) [1988] 1 SCR 732 at 735. See above, these reasons at [110].
(221) See above, these reasons at [71]-[72].

139 In the present case, it is comparatively straightforward to deal separately with the "receiving court" issues. If I had concluded that an implied power of remittal otherwise existed, it would have been relatively simple (as a matter of statutory excision) to identify the federal statutory provisions necessary to eliminate any impediment to the reception by the FMC of such a remittal from this Court. Section 476(1) of the Act provides:

> "Subject to this section, the Federal Magistrates Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution."

140 If the introductory words "[s]ubject to this section" were found invalid as an impermissible burden on an implied constitutional power of remittal belonging to this Court (and, possibly, if s 476(2) and (4) were invalidated for the same reason), the FMC would undoubtedly then enjoy jurisdiction and power under the Act to receive any such remittal from this Court.

141 Thus, to remit to a recipient federal court, with its jurisdiction "defined" by a law made by the Parliament, as s 77(i) of the *Constitution* contemplates, only comparatively minor surgery on the Act would be needed. This might have to be supplemented by a declaration that the provisions of s 476B of the Act, as would impede the exercise of the implied remittal power, were invalid under the *Constitution*. In the present case, with such limited surgery, a receiving court would validly exist. There would then be no need to explore the remaining issues of whether, under the *Constitution*, State Supreme Courts might (without federal legislation) receive any such remittal, supported only by the *Constitution* itself or by the orders of this Court carrying with them the requisite federal jurisdiction to make good the remittal (222).

142 *Conclusion: unnecessary to answer*: As the plaintiff did not succeed in his argument that an implied constitutional power of remittal exists in this Court, it is neither necessary, nor appropriate, to pursue further the possible existence of a receiving court with the jurisdiction and power to decide the plaintiff's matter.

143 It is sufficient to conclude that, had an implied constitutional remittal power been otherwise established, such power to receive the remittal would not have to be rejected in this case because of a lack of a court that could receive and determine the remitted matter. Like the ultimate question of the existence of an implied power of remittal, the resolution of that question can be postponed. Such issues may never arise to be answered. The experience of the *Constitution* to this time suggests that this will be the situation. Nothing in the plaintiff's stated case, or in otherwise available knowledge, establishes the contrary.

(222) cf *Johnstone v The Commonwealth* (1979) 143 CLR 398 at 402 per Gibbs J; at 407 per Murphy J.

Orders

144 It follows that, on the basis ultimately expressed by Gleeson CJ, Gummow and Hayne JJ (223), the questions in the case stated should be answered as proposed in their reasons (224).

145 HEYDON, CRENNAN AND KIEFEL JJ. The central issue, which comes before the Full Court on a case stated, is whether s 476(2)(a) and (d) of the *Migration Act 1958* (Cth) (the Act) are invalid because it is said they prohibit this Court from exercising an implied power to remit to another court, matters commenced in its original jurisdiction under s 75(v) of the *Constitution*. The power to remit was sought to be implied from the nature and role of this Court as determined by Ch III of the *Constitution* (225), the nature of the judicial power of the Commonwealth and the fact that the *Constitution* does not expressly confer any exclusive original jurisdiction on this Court.

The facts

146 The plaintiff is a national of Nigeria. On 13 February 2006, the plaintiff lawfully entered Australia using a Business (Short Stay) visa. On 15 March 2006 he applied for a Protection (Class XA) visa on the basis of a well-founded fear of persecution on the ground of his religion. On 18 April 2006 a delegate of the defendant decided to refuse the application for a protection visa. A copy of the decision was sent to the plaintiff's last notified address.

147 The plaintiff was informed of the decision when he attended the offices of the Department in January 2007, after being contacted by phone and informed that he was an unlawful non-citizen. At this time he did not request, and was not given, a copy of the decision.

The proceedings

148 On 6 February 2007, whilst unrepresented, the plaintiff applied for judicial review of the delegate's decision in the Federal Magistrates Court. On 16 March 2007 the defendant's solicitors served on the plaintiff a copy of a court book, which included a copy of the delegate's decision. The plaintiff had not previously received a copy of that decision.

149 The defendant objected to the competency of the Federal Magistrates Court on the basis that notification of a decision of the delegate did not constitute a "migration decision" as defined by ss 5 and 474 of the Act, and review was being sought of a "primary decision" in respect of which the Federal Magistrates Court had no jurisdiction, given the terms of s 476(2)(a) of the Act (which is set out below). The matter was discontinued by consent on 3 May 2007 because of this objection to competency.

(223) Reasons of Gleeson CJ, Gummow and Hayne JJ at [52]-[54].
(224) Reasons of Gleeson CJ, Gummow and Hayne JJ at [55].
(225) Read with covering cl 5 of the *Constitution*.

150 On 29 March 2007, assisted by Victoria Legal Aid, the plaintiff applied to the Refugee Review Tribunal for review of the delegate's decision. On 25 May 2007 the Tribunal found that it had no jurisdiction to review the decision because the application was lodged outside the mandatory time limit prescribed in the Act.

151 On 11 April 2007 the plaintiff filed an application in this Court for an order to show cause and subsequently filed an amended application for an order to show cause. On 8 November 2007 Hayne J stated a case for the consideration of the Full Court pursuant to s 18 of the *Judiciary Act 1903* (Cth). The questions in the stated case are:

> "Q1. Is the effect of sections 476, 476A, 476B and 484 of the Act, read with the definition of "migration decision" in sections 5, 5E and 474, that the only Court that can hear and determine an application for any or all of:
>
> (a) the constitutional writs of prohibition and mandamus;
>
> (b) the constitutional remedy of injunction against an officer of the Commonwealth;
>
> (c) the public law remedy of certiorari;
>
> (d) the public law remedy of declaration in a suit against the Commonwealth or a person being sued on behalf of the Commonwealth,
>
> in respect of a 'primary decision' (as defined in s 476(4)), is the High Court of Australia?
>
> Q2. If the answer to Question 1 is 'Yes', are any or all of sections 476, 476A, 476B and 484 of the Act invalid:
>
> A. because they curtail, limit or impair, either directly or as a matter of practical effect, the constitutional role of this Court?
>
> B. because they curtail, limit or impair, either directly or as a matter of practical effect, the right or ability of applicants to seek the relief identified in paragraphs (a)-(d) of Question 1?
>
> Q3. If the answer to Question 1 is 'Yes', are any or all of sections 476, 476A, 476B and 484 of the Act, and/or sections 38(e) and 39(1) of the *Judiciary Act 1903* (Cth) invalid in so far as they apply to 'migration decisions' (as defined):
>
> A. because they are contrary to an implied power of this Court to remit to another court an application commenced in this Court for the relief identified in paragraphs (a)-(d) of Question 1?
>
> B. because they impair or frustrate the exercise of an implied power of this Court to decline to hear an application commenced in this Court for the relief identified in paragraphs (a)-(d) of Question 1, on the basis that another court is a more appropriate court?
>
> Q4. If the answer to Question 1 is 'No', or the answer to Question 2 or to Question 3 is 'Yes', should this matter be remitted to another court and, if so, to which court?
>
> Q5. Who should bear the costs of the case stated in this Court?"

152 It can be noted that Question 3A is directed to the impugned provisions of the Act because it is said they impose a "prohibition" on the remitter power of this Court in respect of matters within its original jurisdiction under s 75(v) of the *Constitution*. Question 3B is directed to those provisions in so far as they prevent the exercise of any jurisdiction by a receiving court, that is a court with concurrent jurisdiction. In oral argument the plaintiff accepted that it is unnecessary for the Court to answer Question 2 and narrowed the ambit of Question 3 so that the argument on invalidity was restricted to s 476(2)(a) and (d) of the Act.

153 The Attorney-General of the Commonwealth has intervened pursuant to s 78A of the *Judiciary Act* and has made joint submissions on behalf of the defendant and the Attorney-General.

The scheme of the Act

154 Section 5(1) of the Act relevantly provides:

"*migration decision* means:

(a) a privative clause decision; or

(b) a purported privative clause decision; or

(c) …"

155 It can be noted that the terms "privative clause decision" and "purported privative clause decision" are defined by the Act (226).

156 The jurisdiction of the Federal Magistrates Court is defined by s 476 of the Act which relevantly provides:

"*Jurisdiction of the Federal Magistrates Court*

(1) Subject to this section, the Federal Magistrates Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the *Constitution*.

(2) The Federal Magistrates Court has no jurisdiction in relation to the following decisions:

(a) a primary decision;

…

(d) a private clause decision or purported private clause decision mentioned in subsection 474(7).

…

(4) In this section:

(226) Section 474(2) provides: "*privative clause decision* means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5)." Section 5E defines "purported privative clause decision" as follows: "(1) In this Act, *purported privative clause decision* means a decision purportedly made, proposed to be made, or required to be made, under this Act or under a regulation or other instrument made under this Act (whether in purported exercise of a discretion or not), that would be a privative clause decision if there were not: (a) a failure to exercise jurisdiction; or (b) an excess of jurisdiction; in the making of the decision. (2) In this section, *decision* includes anything listed in subsection 474(3)."

primary decision means a privative clause decision or purported privative clause decision:

(a) that is reviewable under Part 5 or 7 or section 500 (whether or not it has been reviewed); or

(b) that would have been so reviewable if an application for such review had been made within a specified period."

157 Section 476A defines the jurisdiction of the Federal Court:

"*Limited jurisdiction of the Federal Court*

(1) Despite any other law, including section 39B of the *Judiciary Act 1903* …, the Federal Court has original jurisdiction in relation to a migration decision if, and only if:

(a) the Federal Magistrates Court transfers a proceeding pending in that court in relation to the decision to the Federal Court under section 39 of the *Federal Magistrates Act 1999*; or

(b) the decision is a privative clause decision, or a purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500; or

(c) the decision is a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B or 501C; or

(d) the Federal Court has jurisdiction in relation to the decision under subsection 44(3) or 45(2) of the *Administrative Appeals Tribunal Act 1975*.

(2) Where the Federal Court has jurisdiction in relation to a migration decision under paragraph (1)(a), (b) or (c), that jurisdiction is the same as the jurisdiction of the High Court under paragraph 75(v) of the *Constitution*."

158 Section 476B of the Act specifies the circumstances in which the High Court may or may not remit a matter:

"*Remittal by the High Court*

(1) Subject to subsection (3), the High Court must not remit a matter, or any part of a matter, that relates to a migration decision to any court other than the Federal Magistrates Court.

(2) The High Court must not remit a matter, or any part of a matter, that relates to a migration decision to the Federal Magistrates Court unless that court has jurisdiction in relation to the matter, or that part of the matter, under section 476.

(3) The High Court may remit a matter, or part of a matter, that relates to a migration decision in relation to which the Federal Court has jurisdiction under paragraph 476A(1)(b) or (c) to that court.

(4) Subsection (1) has effect despite section 44 of the *Judiciary Act 1903*."

159 Section 484 of the Act relevantly provides:

"*Exclusive jurisdiction of High Court, Federal Court and Federal Magistrates Court*

(1) Only the High Court, the Federal Court and the Federal Magistrates Court have jurisdiction in relation to migration decisions.

(2) To avoid doubt, subsection (1) is not intended to confer jurisdiction on the High Court, the Federal Court or the Federal Magistrates Court, but to exclude other courts from jurisdiction in relation to migration decisions.

… "

160 It is convenient at this juncture to mention a number of matters about this scheme. A decision to refuse to grant a visa is a "privative clause decision" (s 474(2) and (3)(b)) unless it involves a jurisdictional error, in which case it is a "purported privative clause decision" (s 5E) (227).

161 Part 7 of the Act permits full merits review of a decision of the Minister's delegate before the Refugee Review Tribunal if an application for review is made within the time limits specified in s 412(1)(b) of the Act. The limitations on courts which have jurisdiction in respect of judicial review fall to be assessed within that context. It is only if an applicant for a protection visa does not seek merits review of a delegate's decision or fails to seek such review within the permitted time under s 412(1)(b) (as occurred here) that the legislative limitations on courts which have jurisdiction in relation to "primary decisions" are relevant.

162 Section 476A provides that the Federal Court has original jurisdiction in relation to a "migration decision", if and only if the decision falls within the four paragraphs, set out above, which do not include a "primary decision" as defined in s 476(4).

163 Whilst s 476(1) provides generally that the Federal Magistrates Court has the same original jurisdiction in migration decisions as this Court has under s 75(v) of the *Constitution*, s 476(2)(a) expressly excludes from that conferral of general jurisdiction, jurisdiction in relation to a "primary decision" and s 476(2)(d) decisions mentioned in s 474(7) (228). The plaintiff characterised s 476(2)(a) and (d) as withdrawing jurisdiction from a receiving court (said to be the Federal Magistrates Court), and the plaintiff characterised s 476B as "prohibiting" this Court from remitting a matter to the receiving court.

164 There is agreement that of the three courts set out in s 484(1) only this Court has jurisdiction conferred on it by the Act in respect of a "primary decision". Accordingly, the plaintiff, the defendant and the

(227) This section and ss 476, 476A, 476B and 484 were introduced by the *Migration Litigation Reform Act 2005* (Cth) enacted after the decision in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

(228) An example of a decision under s 474(7) would be a personal decision of a Minister to grant or withhold a visa under s 417 of the Act.

intervener are all agreed that Question 1 of the stated case should be answered "Yes". This answer is plainly correct.

The plaintiff's case

165 As mentioned at the outset, the plaintiff challenged the validity of s 476(2)(a) and (d) of the Act primarily by reference to Ch III of the *Constitution*.

166 The essential argument put forward, on the plaintiff's behalf, was that this Court has an implied power to remit any matter commenced in its original jurisdiction to another receiving court. The contention which followed from that implication was that a law of the Commonwealth Parliament which denied jurisdiction to any receiving court to hear and determine remitted matters, or which prohibited the exercise of an implied power to remit, was a law which directed the manner and outcome of this Court's jurisdiction and was therefore an impermissible interference with this Court's exercise of the judicial power of the Commonwealth.

167 In essence, the response of the defendant and the intervener was that the Commonwealth Parliament is not required by the *Constitution* to ensure that another court has concurrent jurisdiction in relation to every matter in which this Court has original jurisdiction. Accordingly, it was contended that a power to remit to another court, a matter commenced in the original jurisdiction of this Court, cannot be implied.

168 The plaintiff's central proposition that s 476(2)(a) and (d) are invalid because, absent a statutory or implied power to remit, the Commonwealth Parliament cannot pass laws which make the original jurisdiction of this Court under s 75(v) of the *Constitution* exclusive to this Court, must be rejected for the reasons which follow.

Chapter III of the Constitution

169 The plaintiff's reliance on Ch III, for the implication of a power to remit, first involved recognising this Court as a statutory court having a particular nature and role under the *Constitution*. Secondly, it involved characterising the judicial power of the Commonwealth as having certain incidents including, it was said, a power of remitter. Thirdly, it involved construing ss 71 and 77(i) and (iii), which deal with the vesting of the judicial power of the Commonwealth, in a manner said to support an implied power of remitter.

170 The plaintiff never asserted that there was an express power to remit this matter to the Federal Magistrates Court but it was contended that the scheme of the Act defined the Federal Magistrates Court's jurisdiction in such a way as to *prohibit* remitter by this Court of two categories of migration decisions: a "primary decision" and certain privative clause decisions under s 474(7). It was this prohibition which was contested as unconstitutional, notwithstanding the plaintiff's acknowledgment that regulation of a power of remitter is unexceptional.

171 The plaintiff, the defendant and the intervener all accepted that the circumstances in which an implication could be drawn from the *Constitution* were identified in the unanimous decision of this Court in *Lange v Australian Broadcasting Corporation* (229). Any implication can "validly extend only so far as is necessary to give effect to [the sections from which the implication is drawn]" and an implication drawn from specific sections of the *Constitution* can "give effect only to what is inherent in the text and structure of the *Constitution*" (230).

The nature and role of the High Court

172 Stripped to its essentials, the plaintiff's argument, as based on the nature and role of this Court, raised a question about the separation of powers under the *Constitution*: was it a matter for Parliament or for this Court to determine whether to hear a matter commenced in its original jurisdiction under s 75(v)?

173 Whilst it cannot be doubted that the "power of remitter is of considerable importance in facilitating the exercise by this Court of its primary and unique functions" (231), the functions of this Court are not confined to determining matters in its original jurisdiction involving the interpretation of the *Constitution* (s 76(i) of the *Constitution* and s 30(a) of the *Judiciary Act*) and its function, subject to the grant of special leave to appeal, as Australia's final appellate court (s 73 of the *Constitution*).

174 In exercising its discretion to grant or refuse special leave to appeal from a decision of an intermediate appellate court, this Court normally considers whether the question before it is of such public importance as to warrant a grant of special leave because of the importance of its "public role" (232). As stated by Gaudron, Gummow and Hayne JJ in *Lipohar v The Queen* (233):

> "This Court is placed by s 73 of the *Constitution* at the apex of a judicial hierarchy to give decisions upon the common law which are binding on all courts, federal, State and territorial."

175 The undoubted importance of this Court's role as ultimate appellate court and the concomitant necessity to do all that is necessary to effectuate the main purpose of that grant of judicial power were factors which the plaintiff said underpinned a proposition advanced on his behalf, namely that a power to remit matters within its original jurisdiction was part of, or essential to, the effective exercise of this

(229) (1997) 189 CLR 520.

(230) *Lange* (1997) 189 CLR 520 at 567.

(231) *Re Minister for Immigration and Multicultural Affairs; Ex parte Abebe [No 2]* (1998) 72 ALJR 630 at 633 [11]; 152 ALR 177 at 180 per Gummow J; see also *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 407 [9]; 168 ALR 407 at 410 per McHugh J.

(232) *Smith Kline & French Laboratories (Aust) Ltd v The Commonwealth* (1991) 173 CLR 194 at 218 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

(233) (1999) 200 CLR 485 at 505 [45].

Court's appellate jurisdiction. That was said to be supported, first by the plaintiff's characterisation of State Supreme Courts as "an enduring and entrenched repository for the exercise of the implied remitter power", and secondly, by relying upon the expansion of this Court's appellate jurisdiction following the creation of a number of federal courts, as contemplated by s 71 of the *Constitution*, from which appeals could be brought to this Court (s 73(ii)). The plaintiff's proposition is unsustainable.

State Supreme Courts

176 It is incorrect to say that the jurisdiction of a State Supreme Court is "entrenched" or left as it previously stood before a conferral of federal jurisdiction in respect of the same subject matter is made under s 77(iii). Supreme Courts of the States did once possess jurisdiction in relation to some matters covered by s 75 of the *Constitution* but possession of that jurisdiction was authorised by State law operating independently of s 77(iii) of the *Constitution*.

177 As explained by Isaacs J in *Baxter v Commissioners of Taxation (NSW)* (234) the fact that State Supreme Courts may exercise jurisdiction in respect of subject matter once authorised by State law, is a circumstance which does not detract from or qualify in any way a later investing of a State court with federal jurisdiction under s 77(iii), which then is the source of federal jurisdiction in respect of that subject matter.

178 Further, in *Pirrie v McFarlane* (235) Knox CJ recognised that s 77(ii) authorised legislation that made the jurisdiction of this Court in certain matters exclusive of the State Supreme Courts.

179 Section 71 of the *Constitution* vests the judicial power of the Commonwealth in "three repositories" (236): the High Court, such other federal courts as Parliament creates and such other courts as Parliament invests with federal jurisdiction. By s 77(i) and (ii) Parliament is empowered to make the High Court the exclusive repository of the matters enumerated in ss 75 and 76 as it sees fit. Nothing in s 77 suggests Parliament can take away the jurisdiction set out in s 75(v).

180 Once a State Supreme Court is validly invested with federal jurisdiction, pursuant to s 77(iii), then under s 109 of the *Constitution* a State law conferring jurisdiction to do the same thing is no longer valid (237) or is inoperative (238). Section 39(1) of the *Judiciary Act*

(234) (1907) 4 CLR 1087 at 1143; cf *Webb v Outtrim* (1906) 4 CLR 356; see also *Pirrie v McFarlane* (1925) 36 CLR 170.

(235) (1925) 36 CLR 170 at 176 per Knox CJ. The case concerned s 38A of the *Judiciary Act* (introduced in 1907 and later repealed in 1976) and a dispute concerning direct appeals to the Privy Council from State Supreme Courts.

(236) Bailey, "The Federal Jurisdiction of State Courts", *Res Judicatae*, vol 2 (1940) 109, at p 109.

(237) *Ffrost v Stevenson* (1937) 58 CLR 528 at 573 per Dixon J.

(238) *Felton v Mulligan* (1971) 124 CLR 367 at 412 per Walsh J.

operates to remove the jurisdiction of State Supreme Courts in all nine matters enumerated in ss 75 and 76 in which this Court has original jurisdiction, and additional jurisdiction conferred by Parliament, and then invests jurisdiction in those State courts in some, but not all, of those enumerated matters. Thereafter the jurisdiction of this Court (except as otherwise provided by s 39) is exclusive of that of State courts (239). As explained in the joint judgment of Gleeson CJ, Gaudron and Gummow JJ in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (240):

> "A State court receives State jurisdiction under the constitution and laws of that State. It may also be invested with federal jurisdiction by a law made by the Parliament under s 77(iii) of the *Constitution*; s 39(2) of the *Judiciary Act 1903* (Cth) is an example of such a law. The federal courts established by the Parliament, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court, exercise their jurisdiction, necessarily federal, by reason of its conferral by laws enacted under s 77(i) of the *Constitution*. A 'matter' in respect of which that jurisdiction is conferred may, in a given case, include claims arising under common law or under the statute law of a State. But the jurisdiction invoked remains, in respect of all of the claims made in the matter, 'wholly' federal; even in a State court 'there is no room for the exercise of a State jurisdiction which apart from any operation of the *Judiciary Act* the State court would have had' and 'there is no State jurisdiction capable of concurrent exercise with the federal jurisdiction invested in the State court'. These terms were used by Barwick CJ in *Felton v Mulligan*."

(Footnotes omitted.)

Creation of federal courts

181 As mentioned, the plaintiff also relied on the expansion of this Court's appellate role upon the creation of a number of federal courts (pursuant to s 71), from which appeals could be brought to this Court (s 73(ii)), as further demonstration of the need for this Court to remit matters falling outside what were described by the plaintiff as its "principal functions". That argument involved some tacit acknowledgment that for many decades matters within the original jurisdiction of this Court under s 75(v) were exclusively dealt with by this Court.

182 However narrowly the principal functions of the Court may be described for certain purposes, including the purpose of characterising the Court's current work, the importance of the Court's original jurisdiction under s 75(v) of the *Constitution* has never been doubted

(239) *Felton v Mulligan* (1971) 124 CLR 367 at 413 per Walsh J.
(240) (2001) 204 CLR 559 at 571 [7].

and that importance has been re-emphasised recently in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (241).

183 As a practical aside, it is worth mentioning that this Court's additional original jurisdiction under s 76 of the *Constitution* concerning patent matters (242) subsisted for many decades without any implied power to remit such matters, before such jurisdiction was conferred on other courts by Parliament. There is no doubt that the Federal Court set up by and under the *Federal Court of Australia Act 1976* (Cth) owed its origins in part to a perceived need to relieve this Court of an excessive work load (243). With the commencement of the Federal Court a great deal of the original jurisdiction conferred on the High Court by s 76 was invested in the Federal Court in matters like patents and taxation. Equally, there is no doubt that the Federal Magistrates Court was set up, in part, to relieve the excessive work load on the Federal Court in certain matters.

184 Relevantly, jurisdiction of the Federal Court to hear claims for prerogative relief, subject to some exceptions, is now conferred by and defined in s 39B(1) of the *Judiciary Act* which provides:

> "Subject to subsections (1B), (1C) and (1EA), the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth."

185 Section 39B(1EA) covering civil proceedings relevantly provides that the Federal Court does not have jurisdiction in relation to s 75(v) matters to the extent that jurisdiction has been invested in the Federal Magistrates Court.

186 A power of this Court to remit matters necessarily involves the investiture of other courts with jurisdiction in respect of the subject matter of a proceeding.

187 This Court's statutory powers of remitter in the *Judiciary Act* have been considered by this Court from time to time. In *Johnstone v The Commonwealth* (244) Aickin J considered the words "federal court, court of a State or court of a Territory that has jurisdiction with respect to the subject matter and the parties" appearing in s 44 of the *Judiciary Act*. He said (245):

(241) (2007) 228 CLR 651; see also *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

(242) For example, under the *Patents Act 1952* (Cth), as originally enacted, rectification of the Register (s 32), extension of patents (s 90), revocation of patents (s 99), compulsory licences (s 108) and revocation for non-working of patents (s 109). Cf the *Patents Act 1990* (Cth), Ch 16 especially ss 154 and 155.

(243) Sir Garfield Barwick (then Minister for External Affairs), "The Australian Judicial System: The Proposed New Federal Superior Court", *Federal Law Review*, vol 1 (1964) 1, at p 9.

(244) (1979) 143 CLR 398.

(245) *Johnstone* (1979) 143 CLR 398 at 408-409; cf at 402 per Gibbs J; at 407 per Murphy J.

> "[t]he effect of s 44 is to confer federal jurisdiction on State courts in cases where this Court remits a case to them, and that federal jurisdiction is in those same matters in which this Court has federal jurisdiction by virtue of s 75 of the *Constitution* …
>
> This jurisdiction is conferred on the State courts by the Parliament, not by this Court. What s 44 does is not to authorise this Court to confer federal jurisdiction on the State courts. What it does is to confer federal jurisdiction on State courts in cases where this Court is authorised to remit the proceedings to State courts and does in fact so remit."

188 Further, it was noted by Gummow J in *Re Jarman; Ex parte Cook* (246) that exercising a power of remitter is a "step in [a] sequence" involving the investment or conferral of original jurisdiction on a federal or a State court by operation of s 44(3) of the *Judiciary Act* (247). His Honour said (248):

> "Section 44(3) … operates … as a law under s 77(i) of the *Constitution* defining the jurisdiction of a federal court other than the High Court, or as a law under s 77(iii) of the *Constitution* investing any court of a State with federal jurisdiction."

189 What is critical to this proceeding in terms of subject matter, parties, and s 44 of the *Judiciary Act* is that s 476B(1) of the Act provides that, subject to quite limited exceptions in s 476B(3), "the High Court must not remit a matter, or any part of a matter, that relates to a migration decision to any court other than the Federal Magistrates Court" and s 476B(2) provides that the High Court must not remit a matter to the Federal Magistrates Court unless that Court has jurisdiction in relation to a matter under s 476. Section 476B(4) provides that: "Subsection (1) has effect despite section 44 of the *Judiciary Act 1903*."

190 It was accepted by a majority of this Court in *Abebe v The Commonwealth* (249) that ss 476(1)-(3), 481(1)(a), 485 and 486 (250) of the Act were validly enacted and that s 485 (251) could prevent the Federal Court from exercising any jurisdiction that it would not otherwise have possessed when a matter was remitted to it pursuant to s 44 of the *Judiciary Act*.

191 Having regard to the express terms of ss 476B(1), (3) and (4), until Parliament decides to invest the Federal Magistrates Court with jurisdiction in respect of the subject matter of a "primary decision" as defined in the Act and decisions under s 474(7), this Court is not

(246) (1997) 188 CLR 595 at 634.

(247) Section 44(3) provides: "Where the High Court remits a matter, or any part of a matter, under subsection (2) or (2A) to a court: (a) that court has jurisdiction in the matter, or in that part of the matter, as the case may be; and (b) subject to any directions of the High Court, further proceedings in the matter, or in that part of the matter, as the case may be, shall be as directed by that court."

(248) *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 633.

(249) (1999) 197 CLR 510.

(250) As they stood between 1994 and 2001.

(251) *Abebe* (1999) 197 CLR 510 at 522 [20], 534 [50] per Gleeson CJ and McHugh J.

authorised under s 44 of the *Judiciary Act*, or the Act, or by implication, to remit this proceeding to the Federal Magistrates Court.

192 In so far as the plaintiff's contention that Parliament cannot make the original jurisdiction under s 75(v) of the *Constitution* exclusive to the High Court depends on an argument that this Court's general constitutional and appellate jurisdiction (including the importance of the appellate function in respect of State Supreme Courts) cannot be exercised effectively without an implied power to remit matters falling within its original jurisdiction, the contention is wrong and must fail.

Judicial power of the Commonwealth

193 It is well understood that judicial power includes taking actions of a kind recognised as "within the concept of judicial power as the framers of the *Constitution* must be taken to have understood it" (252). This is not necessarily to be described as inherent jurisdiction which has been called "an elusive concept" (253). As recognised in *United Mexican States v Cabal* (254): "The grant of judicial power carries with it authority to do all that is necessary to effectuate its main purpose."

194 Undoubtedly there are exceptional circumstances in which this Court might decline to exercise jurisdiction in respect of a matter within its original jurisdiction, an obvious example being where the proceedings constitute an abuse of process. Further, the Court may decline to exercise its jurisdiction where a matter may be remitted pursuant to the statutory power in s 44 of the *Judiciary Act* (255). A power to remit must be conditioned upon the basis that a receiving court has jurisdiction in respect of at least the subject matter (256).

195 The plaintiff also relied, by way of analogy, on the writ of procedendo permitting a remitter back to an inferior court by a superior court in circumstances where there had been an incorrect removal of a cause to the superior court on an application for certiorari or other prerogative relief including habeas corpus. The analogy is imperfect and unhelpful in the context of urging an implied power to remit, because the writ of procedendo operated to return a matter to an inferior court to enable it to resume the jurisdiction it undoubtedly possessed (257). If anything, the writ more closely resembles, but then only somewhat, the powers of this Court under s 42(2) of the *Judiciary Act*.

(252) *R v Davison* (1954) 90 CLR 353 at 382 per Kitto J; see also *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 594-595 [45]-[49] per Gummow, Hayne and Crennan JJ and *Thomas v Mowbray* (2007) 233 CLR 307 at 343 [66], 356-357 [116]-[121] per Gummow and Crennan JJ.

(253) *Grassby v The Queen* (1989) 168 CLR 1 at 16 per Dawson J.

(254) (2001) 209 CLR 165 at 180 [37] per Gleeson CJ, McHugh and Gummow JJ. See also *Grassby v The Queen* (1989) 168 CLR 1 at 16 per Dawson J: "In the discharge of that responsibility [for the administration of justice] it [a superior court of unlimited jurisdiction] exercises the full plenitude of judicial power."

(255) *Re Jarman; Ex parte Cook* (1997) 188 CLR 595 at 634 per Gummow J.

(256) *Johnstone* (1979) 143 CLR 398.

(257) *R v T* [1995] 2 Qd R 192 at 194 per McPherson JA.

196 Finally, it was asserted that an implied power to remit a matter within the original jurisdiction of this Court did not differ from various powers associated with the Court's power to protect and control proceedings before it. Examples given included powers to order a stay, pending a hearing of a special leave application (258), to grant an injunction pending a hearing (259) including a Mareva injunction, to grant bail (260), to punish for contempt (261) and to prevent an abuse of process (262). An implied power to prevent an abuse of process does not extend a court's jurisdiction beyond that which is vested in it (263).

197 None of those considerations obliges the conclusion that the judicial power of the Commonwealth supports an implication of a power to remit, to another court, a matter within the original jurisdiction of this Court. First the implication of such a power is contrary to the express terms of s 77. Just as fundamentally, this Court's power to control proceedings before it and make orders to do all that is necessary to effectuate a grant of jurisdiction to it does not include preventing a person from invoking the jurisdiction of the Court (264). Further, incidental powers in respect of issues such as contempt of court or concerning the preservation of the subject matter of proceedings are distinct from the power of remitter.

198 The power to invest original jurisdiction of this Court in another court, whether concurrently, partially, or wholly, is entirely a matter for Parliament as provided by s 71 and there is no fetter in s 77 as to how Parliament can define the federal jurisdiction of any federal court other than the High Court. This Court cannot remit a matter to the Federal Magistrates Court when Parliament has chosen not to invest that Court with relevant jurisdiction. The Federal Magistrates Court lacks the authority to deal with the subject matter and accordingly this Court lacks the authority to remit the matter to that Court.

(258) *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 1]* (1986) 161 CLR 681; *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 61 ALJR 612; 75 ALR 461.

(259) *Tait v The Queen* (1962) 108 CLR 620 at 624-625.

(260) *United Mexican States v Cabal* (2001) 209 CLR 165 at 180 [37] per Gleeson CJ, McHugh and Gummow JJ.

(261) *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 397 [25] per Gleeson CJ and Gummow J; at 429 [113] per Hayne J.

(262) *Walton v Gardiner* (1993) 177 CLR 378 at 392-393 per Mason CJ, Deane and Dawson JJ.

(263) *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 619 per Wilson and Dawson JJ; see also at 620-621 per Brennan J.

(264) *Commonwealth Trading Bank v Inglis* (1974) 131 CLR 311 at 314-315 per Barwick CJ and McTiernan J; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564 per Mason CJ, Deane, Dawson and Gaudron JJ. *Henry v Henry* (1996) 185 CLR 571 at 587 per Dawson, Gaudron, McHugh and Gummow JJ confirmed the adoption in *Voth* of the test of Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247-248. See generally Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), p 784.

199 To the extent that the plaintiff contended that a consideration of the judicial power of the Commonwealth obliges an implication that Parliament must ensure that there be a court other than this Court with concurrent jurisdiction in relation to every matter in which this Court has original jurisdiction under s 75(v), that contention is misconceived and must also fail.

Exclusivity of the High Court's original jurisdiction

200 The plaintiff's third contention, that the *Constitution* does not envisage that the Court's original jurisdiction may be made exclusive by Parliament, is contrary to the express terms of ss 71 and 77(i) and (iii) of the *Constitution*, which were principally relied on, and to which reference has already been made.

201 Whilst s 71 of the *Constitution* empowers Parliament to vest the judicial power of the Commonwealth in federal courts, which include this Court (265), it is s 77 which confers a power to define the jurisdiction of such a court by an Act of Parliament. Section 77 gives power to Parliament not only to define the jurisdiction of any federal court other than the High Court (s 77(i)) but also to define the extent to which the jurisdiction of any federal court is exclusive of the jurisdiction which is invested in any courts of the States (s 77(ii)) and to determine which, if any, courts of a State should be invested with federal jurisdiction (s 77(iii)).

202 In *Abebe*, Gleeson CJ and McHugh J (266) approved the statement of Gibbs CJ concerning the power to define jurisdiction under s 77 in *Stack v Coast Securities (No 9) Pty Ltd* (267):

> "Under the *Constitution*, the jurisdiction of a federal court can be defined only by an Act of the Parliament, and the jurisdiction so defined can be as wide as, or narrower than, (but not of course wider than) the matters mentioned in ss 75 and 76."

203 Furthermore, in *Abebe*, as already noted, a majority of this Court upheld the validity of provisions (268) which restricted severely the jurisdiction of the Federal Court to review certain decisions of the Refugee Review Tribunal, which resulted in a significant number of proceedings being commenced in the original jurisdiction of this Court pursuant to s 75(v) of the *Constitution*. Nevertheless the majority saw nothing in ss 75, 76 and 77 of the *Constitution* which prevented the Parliament from enacting ss 476, 485 and 486 of the Act (269) and nothing in s 77(i) or Ch III which required Parliament to give a federal court authority to decide every aspect of a controversy merely because it had jurisdiction over some aspect of that controversy.

(265) *Pirrie v McFarlane* (1925) 36 CLR 170 at 176 per Knox CJ.
(266) (1999) 197 CLR 510 at 534 [48]; see also at 603 [274] per Callinan J.
(267) (1983) 154 CLR 261 at 281.
(268) See [190].
(269) *Abebe* (1999) 197 CLR 510 at 534 [50] per Gleeson CJ and McHugh J; see also to similar effect Kirby J at 590 [231] and Callinan J at 603 [273].

204 In relation to the challenge to validity in this proceeding, there is nothing in ss 71, 75, 76 or 77 of the *Constitution* which prevents the Parliament from enacting ss 476(2)(a) and (d) of the Act. Equally, it would be open to Parliament at some time in the future to vest to such extent as it could, and as it saw fit, jurisdiction in one of the federal courts created by it in respect of "primary decisions" as defined in the Act and in respect of decisions under s 474(7). The fetters on Parliament relevant to the arguments advanced are that it could not (in the absence of constitutional amendment) wholly divest this Court of its original jurisdiction set out in s 75(v) of the *Constitution* or, as already mentioned, vest jurisdiction in a federal court wider than the matters mentioned in ss 75 and 76 (270).

205 The position in relation to the claims of invalidity of s 476(2)(a) and (d) of the Act is clear, and no particular, or further, illumination is likely to be gained by considering the position in other jurisdictions, such as the United States of America, with different constitutional arrangements in relation to the original jurisdiction of the final court in the judicial hierarchy. It was recognised in *Re Jarman; Ex parte Cook* (271) that the *Judiciary Act* proceeds on the footing that this Court may refrain from exercising its original jurisdiction where another court is invested with relevant federal jurisdiction, and that the Supreme Court of the United States of America has developed a comparable doctrine but for the reasons already given, such doctrines are not relevant to the facts here.

Conclusion

206 The considerations dealt with above show that there is nothing "inherent in the text and structure of the *Constitution*" (272) to support implication of a power in this Court to remit to the Federal Magistrates Court a "primary decision" as defined in the Act or a decision of the kind mentioned in s 474(7).

Orders

207

Question 1 should be answered:	Yes.
Question 2 should be answered:	Unnecessary to answer.
Question 3A should be answered:	Section 476(2)(a) and 476(2)(d) are not invalid. It is unnecessary to answer the balance of the question.
Question 3B should be answered:	No.
Question 4 should be answered:	Does not arise.

(270) *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 281 per Gibbs CJ.
(271) (1997) 188 CLR 595 at 634 per Gummow J.
(272) *Lange* (1997) 189 CLR 520 at 567.

Question 5 should be answered: The plaintiff should pay the costs of the case stated.

The questions reserved in the case stated dated 8 November 2007 be answered as follows:

Q1. Is the effect of ss 476, 476A, 476B and 484 of the Migration Act 1958, read with the definition of "migration decision" in ss 5, 5E and 474, that the only Court that can hear and determine an application for any or all of:

(a) the constitutional writs of prohibition and mandamus;

(b) the constitutional remedy of injunction against an officer of the Commonwealth;

(c) the public law remedy of certiorari;

(d) the public law remedy of declaration in a suit against the Commonwealth or a person being sued on behalf of the Commonwealth,

in respect of a "primary decision" (as defined in s 476(4)), is the High Court of Australia?

A. Yes.

Q2. If the answer to Question 1 is "Yes", are any or all of ss 476, 476A, 476B and 484 of the Act invalid:

A. because they curtail, limit or impair, either directly or as a matter of practical effect, the constitutional role of this Court?

B. because they curtail, limit or impair, either directly or as a matter of practical effect, the right or ability of applicants to seek the relief identified in paras (a)-(d) of Question 1?

A. Unnecessary to answer.

Q3. If the answer to Question 1 is "Yes", are any or all of ss 476, 476A, 476B and 484 of the Act, and/or ss 38(e) and 39(1) of the Judiciary Act 1903 (Cth) invalid in so far as they apply to "migration decisions" (as defined):

A. because they are contrary to an implied power of this Court to remit

to another court an application commenced in this Court for the relief identified in paras (a)-(d) of Question 1?

B. because they impair or frustrate the exercise of an implied power of this Court to decline to hear an application commenced in this Court for the relief identified in paras (a)-(d) of Question 1, on the basis that another court is a more appropriate court?

A. Sections 476(2)(a) and 476(2)(d) are not invalid. It is unnecessary to answer the balance of the question.

Q4. If the answer to Question 1 is "No", or the answer to Question 2 or to Question 3 is "Yes", should this matter be remitted to another court and, if so, to which court?

A. Does not arise.

Q5. Who should bear the costs of the case stated in this Court?

A. The plaintiff should pay the costs of the case stated.

Solicitor for the plaintiff, *Victorian Legal Aid (Civil Law Section)*.

Solicitor for the defendant and the intervener, *Australian Government Solicitor*.

JDM