

FEDERAL COURT OF AUSTRALIA

Crosby v Kelly [2012] FCAFC 96

- Citation: Crosby v Kelly [2012] FCAFC 96
- Parties: **LYNTON CROSBY and MARK TEXTOR v MICHAEL KELLY**
- File number: ACD 70 of 2011
- Judges: **BENNETT, PERRAM AND ROBERTSON JJ**
- Date of judgment: 2 July 2012
- Catchwords: **HIGH COURT AND FEDERAL COURT** – jurisdiction of the Federal Court – proceedings brought in the Australian Capital Territory for defamation – whether *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) validly confers jurisdiction on the Federal Court
- CONSTITUTIONAL LAW** – courts – cross vesting of jurisdiction – conferring jurisdiction on the Federal Court with respect to laws made under s 122 of the Constitution – whether section both conferred jurisdiction and created rights – whether law defined jurisdiction of the Federal Court pursuant to s 77(i) of the Constitution – whether necessary to decide other constitutional questions
- Legislation: *Australian Capital Territory (Self-Government) Act 1988* (Cth) ss 48A, 48AA
Civil Law (Wrongs) Act 2002 (ACT) Ch 9
Constitution ss 75, 76, 77, 122
Federal Court of Australia Act 1976 (Cth) ss 19, 25(6)
Federal Court Rules 2011 r 40.13
Judiciary Act 1903 (Cth) s 39(2)
Jurisdiction of Courts (Cross-vesting) Act 1993 (ACT) s 4
Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) preamble, ss 3(1), 4(2), 9(3)
Supreme Court Act 1933 (ACT) s 20
- Cases cited: *Hooper v Hooper* (1955) 91 CLR 529 followed
ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140 applied
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 referred to
Northern Territory v GPAO (1999) 196 CLR 553 followed
O'Neill v Mann (2000) 101 FCR 160 approved
R v Commonwealth Court of Conciliation and Arbitration;

Ex parte Barrett (1945) 70 CLR 141 followed
Re Wakim; Ex parte McNally (1999) 198 CLR 511
followed
Ruhani v Director of Police (2005) 222 CLR 489 followed
Spinks v Prentice (1999) 198 CLR 511 followed

Date of hearing: 2 July 2012

Place: Sydney

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 47

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**IN THE FEDERAL COURT OF AUSTRALIA
AUSTRALIAN CAPITAL TERRITORY DISTRICT
REGISTRY**

GENERAL DIVISION

ACD 70 of 2011

**BETWEEN: LYNTON CROSBY
 First Applicant**

**MARK TEXTOR
Second Applicant**

**AND: MICHAEL KELLY
 Respondent**

JUDGES: BENNETT, PERRAM AND ROBERTSON JJ

DATE OF ORDER: 2 JULY 2012

WHERE MADE: SYDNEY

THE COURT ORDERS THAT:

1. The respondent's interlocutory application dated 22 December 2011 be dismissed.
2. The respondent pay the applicants' costs of the interlocutory application, which may be taxed immediately.
3. The proceedings be listed before the docket judge on a date to be notified.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

**IN THE FEDERAL COURT OF AUSTRALIA
AUSTRALIAN CAPITAL TERRITORY DISTRICT
REGISTRY**

GENERAL DIVISION

ACD 70 of 2011

BETWEEN:

AND: LYNTON CROSBY

MICHAEL KELLY

JUDGES: BENNETT, PERRAM AND ROBERTSON JJ

DATE: 2 JULY 2012

PLACE: SYDNEY

REASONS FOR JUDGMENT

BENNETT J

1 I agree with the conclusions and orders proposed by Robertson J for the reasons that His Honour gives.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Bennett.

Associate:

Dated: 4 July 2012

consent to a conferral of jurisdiction. That interpretation was rejected by Gummow and Hayne JJ at [116]-[127] in *Re Wakim; ex parte McNally* (1999) 198 CLR 511 and Gleeson CJ and Gaudron J agreed with that analysis. For that reason, the submission cannot be accepted. I agree with the reasons given by Robertson J.

I certify that the preceding two (2) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Perram.

Associate:

Dated: 4 July 2012

of Representatives for the seat of Eden-Monaro, and was Parliamentary Secretary for Agriculture, Fisheries and Forestry.

6 By their Statement of Claim the applicants alleged that on or about 1 October 2011 the respondent published certain words of and concerning the applicants and that the matter complained of was defamatory of each of the applicants. It is alleged that the words were published, using the Twitter software, to all those persons who were the followers of the respondent in each State and Territory of the Commonwealth of Australia, including the Australian Capital Territory. The applicants claim damages, including aggravated damages, costs and interest up to judgment on the grounds stated in the statement of claim.

7 No other cause of action is pleaded.

The jurisdictional issue

8 By an interlocutory application filed on 23 December 2011 the respondent objected to the competency of the originating application in the proceedings and sought the following orders:

1. The Originating Application and Statement of Claim in these proceedings be set aside.
2. Alternatively to Order 1 above, the Originating Application and Statement of Claim in these proceedings be dismissed.
3. Costs.
4. Such further or other orders as to this honourable Court may seem fit.

Grounds

1. The Federal Court of Australia does not have jurisdiction to hear or determine the Applicants' claim.

9 It is that interlocutory application which is before the Full Court for determination having been reserved under s 25(6) of the *Federal Court of Australia Act 1976* (Cth).

10 No defence to the statement of claim had been filed when the matter first came on for argument before a Full Court on 19 April 2012. At the commencement of that hearing the Court asked counsel for the respondent whether the defence to be filed would include reliance on an implied freedom of political communication as stated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560 and explained in the cases which have followed *Lange*, and whether the defence would rely on the respondent's position as a member of the House of Representatives and the privileges and immunities of a member of

the House of Representatives. Counsel replied that it seemed inevitable that the defence would include such reliance, subject to his client's instructions.

11 The Court therefore directed the respondent to file his defence and adjourned the matter. This was because where a matter pleaded by way of defence relies on a right, privilege or immunity founded in the Constitution, here *Lange* (above) or on a party's position as a member of the House of Representatives and the privileges and immunities of a member of the House of Representatives, the matter would be likely to be in federal jurisdiction and within the jurisdiction of this Court. This would be by virtue of the Constitution, s 76(i): "a matter arising under this Constitution, or involving its interpretation" and s 39B(1A)(b) of the *Judiciary Act 1903* (Cth). On that view it would not be necessary to consider the validity or operation in the Australian Capital Territory of the cross-vesting legislation, that is, primarily, the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).

12 However the defence filed on 4 May 2012 did not raise such a defence. Instead, the defence denied that the matter complained of bore the pleaded imputations; denied that the matter complained of was defamatory of either applicant and further said that the matter complained of was substantially true.

13 It therefore became necessary again to set down for hearing the interlocutory application raising the question of the Court's jurisdiction.

14 The pleadings have now closed as the applicants do not intend to file a reply to the defence.

15 The respondent served an amended notice under s 78B of the *Judiciary Act 1903* (Cth) dated 18 May 2012 since the applicants had not originally relied on, and the respondent had not originally challenged the validity of, s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth). The nature of the Constitutional matter there set out was as follows:

Does s4(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT) validly confer jurisdiction on the Federal Court of Australia?

Does s9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) validly confer jurisdiction on the Federal Court of Australia?

Is the common law of Australia as it applies in the Australian Capital Territory a law "made by the Parliament" within the meaning of s76(ii) of the Constitution?

Is Chapter 9 of the *Civil Law (Wrongs) Act 2002* (ACT) a law "made by the Parliament" within the meaning of s76(ii) of the Constitution?

16 As will appear, in my opinion it is necessary and appropriate only to consider the second of these matters.

17 Section 9 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) provides:

- 9(1) Nothing in this or any other Act is intended to override or limit the operation of a provision of a law of a State relating to cross-vesting of jurisdiction.
- (2) The Supreme Court of a Territory may:
- (a) exercise jurisdiction (whether original or appellate) conferred on that court by a provision of this Act or of a law of a State relating to cross-vesting of jurisdiction; and
 - (b) hear and determine a proceeding transferred to that court under such a provision.
- (3) The Federal Court or the Family Court may:
- (a) exercise jurisdiction (whether original or appellate) conferred on that court by a provision of this Act or of a law of the Australian Capital Territory or the Northern Territory relating to cross-vesting of jurisdiction; and
 - (b) hear and determine a proceeding transferred to that court under such a provision.

(emphasis added)

Submissions

18 In relation to the question whether s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) validly conferred jurisdiction on the Federal Court of Australia, by his revised submissions the respondent contended that it had been repeatedly said that ss 76 and 77 of the Constitution are exhaustive. With reference to the language in s 77(i) of the Constitution, a law "defining" the jurisdiction of the Federal Court must be a law that sets out that jurisdiction with some specificity. The relevant provision is:

- 77 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;
 - (ii) . . . ;
 - (iii)

19 The respondent submitted that s 9(3) could not be regarded as defining the jurisdiction of the Federal Court with respect to any of the matters in ss 75 and 76 of the Constitution. It

appeared only to open the way for the Legislative Assembly of the Australian Capital Territory to define it if, and as, it chose to do so. That was what *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (*Re Wakim*) made clear could not be done. Accordingly, s 9(3) did not confer jurisdiction pursuant to s 77(i). The respondent submitted that *Spinks v Prentice* (1999) 198 CLR 511 and *Northern Territory v GPAO* (1999) 196 CLR 553 (*GPAO*) were distinguishable as in those cases there was another law made under s 122. In any event, the respondent submitted, the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) was intended to facilitate hearing by the Federal Court of a matter transferred to it and it was not intended to create a whole new source of original jurisdiction. The respondent placed reliance on paragraph (b) of the preamble to that Act. It was submitted that the cross-vesting scheme was not directed to enabling a plaintiff simply to commence proceedings in any court he chose.

20 The applicants, by their revised submissions, contended relevantly that the Federal Court had jurisdiction by the combined operation of s 4(2) of the *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT) and s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth). The applicants submitted that *Re Wakim* (above) had no application to the Australian Capital Territory and referred to *GPAO* (above). The applicants submitted that, contrary to the respondent's submission, the jurisdiction of the Federal Court could be "defined" by reference to the laws of the Australian Capital Territory. The applicants also submitted that the effect of the cross-vesting legislation was to confer additional jurisdiction on courts otherwise lacking that jurisdiction.

21 The Attorneys-General of the Australian Capital Territory and of the Northern Territory, intervening under s 78A of the *Judiciary Act 1903* (Cth), filed a joint written outline of submissions. They submitted that the Federal Court may exercise jurisdiction in this matter by operation of s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) which conferred the jurisdiction described in s 4(1) of the *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT). They relied on *GPAO* (above) at [87]-[91], [128]-[132], [171] and [254]-[255]; *Re Wakim* (above) at [25] and [29]; and *Spinks v Prentice* (above) at [82] and [175] for the proposition that ss 76(ii) and 77(i) permitted the conferral of original and appellate jurisdiction on the Federal Court in respect of matters arising under a Commonwealth Act made pursuant to s 122 of the Constitution. They also submitted, in reliance on *Re Wakim* (above) at [105], that there was no objection to the conferral of such jurisdiction that is

defined by reference to the content, from time to time, of a law of the Australian Capital Territory. They adopted the submissions of the Attorney-General of the Commonwealth in relation to s 9(3).

22 The submissions on behalf of the Attorney-General of the Commonwealth, also intervening under s 78A of the *Judiciary Act 1903* (Cth), contended that the Federal Court had jurisdiction in the present matter on the basis that jurisdiction has been validly conferred directly by s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth). She submitted that the Commonwealth Parliament may confer on the Federal Court jurisdiction with respect to a matter arising under a Commonwealth law supported by s 122 of the Constitution: *GPAO* (above) at [91] and [257]-[258] and *Spinks v Prentice* (above) at [175].

23 The *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT) provides:

- 4(1) The Federal Court has and may exercise original and appellate jurisdiction in respect of ACT matters.

The Dictionary to that Act defines *ACT matter* to mean a matter—

- (a) in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State; or
(b) removed to the Supreme Court under section 8.

24 The *Supreme Court Act 1933* (ACT) relevantly provides:

- 20(1) The court has the following jurisdiction:
(a) all original and appellate jurisdiction that is necessary to administer justice in the Territory;
(b) jurisdiction conferred by a Commonwealth Act or a law of the Territory.

25 For completeness, it should also be noted that the *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides:

- 48A(1) The Supreme Court is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory.
(2) In addition, the Supreme Court may have such further jurisdiction as is conferred on it by any Act, enactment or Ordinance, or any law made under any Act, enactment or Ordinance.
(3) The Supreme Court is not bound to exercise any powers where it has concurrent jurisdiction with another court or tribunal.
- 48AA Nothing in section 48A is to be taken to imply that a law of the Australian Capital Territory may not confer on the Federal Court of

Australia original or appellate jurisdiction in any matter in respect of which, by virtue of section 48A, jurisdiction is conferred on the Supreme Court.

- 26 The Attorney-General of the Commonwealth submitted that the jurisdiction conferred on the Supreme Court by s 20(1) of the *Supreme Court Act 1933* (ACT) clearly extended to hearing and determining claims arising in the Australian Capital Territory under the common law of defamation and Chapter 9 of the *Civil Law (Wrongs) Act 2002* (ACT). She submitted that the Supreme Court had jurisdiction with respect to the present matter “otherwise than by reason of a law of the Commonwealth or of another State” as that language was clearly intended to capture matters in which the Supreme Court exercised jurisdiction conferred by or under ACT enactments.
- 27 Although s 9(3) referred in terms to a law of the Australian Capital Territory conferring jurisdiction on the Federal Court the correct construction, it was submitted, was that the Commonwealth Parliament itself conferred jurisdiction on the Federal Court.
- 28 Consistently with the approach of the High Court in *Ruhani v Director of Police* (2005) 222 CLR 527 (*Ruhani*), it was submitted that s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) should be read as picking up, as Commonwealth law, the Supreme Court's jurisdiction to hear and determine the present dispute. No second law under s 122 was necessary, she submitted, as the same provision could, and here did, both confer jurisdiction and create rights, those rights having the force of laws of the Commonwealth in respect of which a matter may arise within s 76 (ii) of the Constitution: reference was made to *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 (*Barrett*); *Hooper v Hooper* (1955) 91 CLR 529 and *Ruhani* (above).

Consideration

- 29 At first glance, s 4(2) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) appears to supply the gateway to the present issue. It provides that where the Supreme Court of a Territory has jurisdiction with respect to a civil matter then jurisdiction is conferred on the Federal Court, if it would not apart from the section have jurisdiction with respect to that matter. But s 3(1) of that Act provides that “Territory” does not include the Australian Capital Territory and “State” does include the Australian Capital Territory.

30 It is therefore necessary to go to s 9(3) of that Act which I have set out above.

31 It will be recalled that in *Re Wakim* (above), s 9(2) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) was held invalid as an attempt to confer jurisdiction on the Federal Court that was not found in s 75 or s 76 of the Constitution.

32 Earlier, in *GPAO* (above) a majority of the High Court had held that s 76(ii) of the Constitution, in conjunction with s 77(i) of the Constitution, permitted the conferral of jurisdiction on federal courts in matters arising under laws made under s 122 of the Constitution: see *GPAO* (above) at [91], [132] and [254]. The federal court in that case was the Family Court of Australia and the law made under s 122 of the Constitution was s 69ZG of the *Family Law Act 1975* (Cth), providing that Pt VII of that Act applied in and in relation to the Northern Territory so that a parenting order could be made by the Family Court in respect of a child that was not the child of a marriage.

33 Section 122 provides:

122 The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

34 In *Spinks v Prentice* (above), decided at the same time as *Re Wakim* (above), orders for examination were made by the Federal Court under the *Corporations Law* (ACT). The High Court held that s 51(1) of the *Corporations Act 1989* (Cth) validly conferred jurisdiction on the Federal Court under the *Corporations Law* (ACT). By s 51(1), jurisdiction was conferred on the Federal Court “with respect to civil matters arising under the *Corporations Law* of the Capital Territory”. The High Court gave the answers “yes” to the questions whether s 51(1) was a law defining the jurisdiction of a federal court other than the High Court within s 77(i) and with respect to a matter arising under a law made by the Parliament within s 76(ii): see especially (1999) 198 CLR 511 at [172] and [175] and also at [25] per Gleeson CJ, [27] and [30] per Gaudron J and [82] per McHugh J. The High Court followed the then recent decision in *GPAO* (above), on the assumption that s 122 of the Constitution was the sole source of power to make the *Corporations Law* (ACT).

- 35 On this analysis s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) itself, together, if necessary, with s 19 of the *Federal Court of Australia Act 1976* (Cth) which provides that the Court has such original jurisdiction as is vested in it by laws made by the Parliament, conferred jurisdiction on the Federal Court: *Re Wakim* (above) at [105], [107], [108] and [114]. That provision is a law made by the Parliament within s 76(ii) of the Constitution. It picks up, as Commonwealth law, the jurisdiction of the Australian Capital Territory Supreme Court to hear and determine the present dispute: *Ruhani* (above) at 527.
- 36 In *Ruhani* (above) the High Court considered s 5(3) of the *Nauru (High Court Appeals) Act 1976* (Cth). The section provided that where the Agreement (between the Government of Australia and the Government of the Republic of Nauru, signed on 6 September 1976) provided that an appeal was to lie to the High Court of Australia from the Supreme Court of Nauru with the leave of the High Court, the High Court had jurisdiction to hear and determine an application for such leave. It was held that this provision was a law made by the Parliament in exercise of its authority under s 76(ii) of the Constitution to make laws conferring original jurisdiction on the High Court in any matter “arising under any laws made by the Parliament”. The relevant matters arose under federal law because they owed their existence to the adoption and translation into Australian law of Articles 1 and 2 of the Agreement. The Nauru Act performed the double function of creating and enforcing rights.
- 37 Here, the content of the law is derived from the law of the Australian Capital Territory: see *Ruhani* (above) at 499. Although there is some infelicity in that law being defined to mean a matter “in which the Supreme Court has jurisdiction otherwise than by reason of a law of the Commonwealth or of another State”, it is sufficiently clear that the reference is to matters in which the Supreme Court has jurisdiction otherwise than by reason directly of a law of the Commonwealth or of another State, that is, where the Supreme Court exercises jurisdiction by virtue of Australian Capital Territory enactments. In the case of a State, such a direct law of the Commonwealth would be s 39(2) of the *Judiciary Act 1903* (Cth).
- 38 I reject the respondent’s submission that s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) is not a law “defining” the jurisdiction of the Federal Court because it does not set out that jurisdiction with sufficient specificity. In my opinion that submission is inconsistent with *Spinks v Prentice* (above). The earlier general dicta in *Abebe v*

Commonwealth (1999) 197 CLR 510 at [226] per Kirby J and *Gould v Brown* (1998) 193 CLR 346 at [187] per Gummow J do not qualify or contradict what was said by the Court in *Spinks v Prentice* (above) and in *Ruhani* (above).

39 As I have set out, the respondent submitted that *Spinks v Prentice* (above) and *GPAO* (above) were to be distinguished on the basis that in each of those cases there was another law made by the Parliament under s 122. In my opinion this search for a second law made under s 122 was misplaced and was not a viable basis of distinction. This is because there is no reason why a law made under s 122, here the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth), may not confer jurisdiction on this Court by reference to the law of the Australian Capital Territory rather than laws made by the Commonwealth Parliament, assuming the *Supreme Court Act 1933* (ACT) and Chapter 9 of the *Civil Law (Wrongs) Act 2002* (ACT) or the common law to be such territory laws. This is because s 9(3), in my opinion, both confers jurisdiction and creates rights arising under that provision. Those rights have the force of laws of the Commonwealth in respect of which a matter may arise.

40 I refer first to *Barrett* (above) at 155 and 169, with reference to s 58E of the *Commonwealth Conciliation and Arbitration Act 1904-1934* (Cth), which was relevantly in the following terms:

58E(1) The Court may, upon complaint by any member of an organization and after giving any person against whom an order is sought an opportunity of being heard, make an order giving directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules.

(2) Any person who fails to comply with such directions shall be guilty of an offence.

41 In *Hooper v Hooper* (above) at 535-538 the High Court applied *Barrett* (above) with reference to ss 10, 11 and 12 of Part III of the *Matrimonial Causes Act 1945* (Cth). The High Court said at 537 that the State laws to which the force of federal law was given were those which might exist from time to time.

42 I refer also the reasoning to the same effect in *O'Neill v Mann* (2000) 101 FCR 160 at [37] per Finn J, with which, with respect, I agree.

43 In *Ruhani* (above) the High Court applied *Barrett* (above) at [8], [61], [80]-[81] and [111].

44 I also reject the submission that the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) was intended only to facilitate hearing by the Federal Court of a matter transferred to it and it was not intended to create a new source of original jurisdiction. The respondent placed reliance on the preamble, paragraph (b). In my opinion the language of the Act shows that the Act was intended and, for the Australian Capital Territory, continues to be intended to confer jurisdiction on the Federal Court even where, as here, there has not been a transfer of proceedings. I refer to the balance of the preamble and to the terms of s 5 in contrast to the terms of s 9. I refer also to the structure of s 9(3) dealing separately, in paragraphs (a) and (b), with the jurisdiction conferred on the Court by reference to the content of a territory law relating to cross-vesting and the hearing and determination of proceedings transferred under such a provision. See also the Explanatory Memorandum to the Jurisdiction of Courts (Cross-Vesting) Bill 1986 at paragraph 5; and *Bankinvest AG v Seabrook* (1988) 14 NSWLR 711 at 713, 724 and 725-6.

45 In my view this analysis establishes the jurisdiction of the Federal Court to hear and determine the substantive defamation proceedings. It follows that the interlocutory application should be dismissed.

46 Because it is not necessary to decide other jurisdictional questions involving the Constitution the Court should not do so: see *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 at [141] and the authorities there cited. In particular, I do not consider whether disputes under Chapter 9 of the *Civil Law (Wrongs) Act 2002* (ACT) or the common law as it applies in the Australian Capital Territory otherwise arise under laws made by the Parliament within s 76(ii) of the Constitution: compare *O'Neill v Mann* (2000) 101 FCR 160.

Conclusion and orders

47 For these reasons I would dismiss the respondent's interlocutory application dated 23 December 2011, with costs. The proceedings should be listed before the docket judge on a date to be fixed. An issue arose under r 40.13 of the *Federal Court Rules 2011* as to whether the Court should order that the costs of this interlocutory application be taxed immediately. In my view, such an order should be made given the discrete nature of the jurisdictional question raised by the respondent's interlocutory application.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson.

Associate:

Dated: 4 July 2012