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Stanford—is the Full Court in reverse or just changing gears?

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The Full Court of the Family Court has considered the impact of the High Court's decision in *Stanford v Stanford*[1] in several cases. In particular, the Full Court in *Bevan & Bevan*[2] and *Chapman & Chapman*[3] rejected the notion that *Stanford* required that the court be satisfied that it was just and equitable to make an order as a threshold issue to the exercise of the power under s 79 *Family Law Act* 1975 ("the Act"). More recently, in Hearne & Hearne[4] the Full Court seemed to go further than this. It confirmed previous indications by the Full Court that it was not necessary for the court to state expressly that it was satisfied that it was just and equitable to make an order under s 79 before proceeding to make an order.

This article looks at whether the Full Court's views are consistent with those of the High Court in *Stanford*. The analysis indicates significant uncertainty arising from post-*Stanford* Full Court decisions surrounding when s 79(2) is to be considered and whether there has been compliance with s 79(2).

What did the High Court say in *Stanford*?

The majority of the High Court in *Stanford* concentrated on the wording of s 79 and, in particular, that s 79(2) requires that:

> "[t]he court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order".

The s 79(2) requirement was explained by the High Court majority as follows:

> "In every case in which a property settlement order under s 79 is sought, it is necessary to satisfy the court that, in all the circumstances, it is just and equitable to make the order."[5]

The High Court majority identified the three fundamental propositions which "must not be obscured when a court is exercising power under s 79." The first principle starts with the words "First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order ...".[6] The second principle confirms that s 79 "confers a broad power."[7]

The majority went on to say that the court cannot simply assume that it is just and equitable to make an order:

> "Because the power to make a property settlement order is not to be exercised in an unprincipled fashion, whether it is "just and equitable" to make the order is not to be

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[1] (2012) FLC 93-518
[2] (2013) FLC 93-545
[3] (2014) FLC 93-592
[4] [2015] FamCAFC 178
[5] at para 35
[6] at para 37
[7] at para 38

> answered by assuming that the parties' rights to or interests in marital property are or should be different from those that then exist...."[8]

In stipulating the third principle, the High Court majority emphasised the same point:

> "Third, whether making a property settlement order is "just and equitable" is not to be answered by beginning from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in s 79(4). The power to make a property settlement order must be exercised "in accordance with legal principles, including the principles which the Act itself lays down". To conclude that making an order is "just and equitable" *only* because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act." *[footnote removed]*[9]

The majority referred to adherence to the three fundamental propositions in exercising the power in s 79 and that they "require that a court have a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage".[10]

Compliance with s 79(2) is mandatory and the High Court majority said that s 79(2) is a direction that the court shall *not* make an order unless it is "satisfied that, in all the circumstances, it is just and equitable" to do so.[11] The High Court conceded, however, that in many cases the just and equitable requirement would be:

> "readily satisfied by observing that ... the husband and wife are no longer living in a marital relationship [so] there is not and will not thereafter be the common *use* of property by the husband and wife."[12]

However, in saying that the requirement may be readily satisfied in many cases, the High Court did not elaborate on how the court should indicate that it was satisfied and whether satisfaction could be implied.

Perhaps the most difficult word to interpret in s 79(2) is "satisfied". It is not clear from either *Stanford*, or from s 79(2) itself, how the court has to show that it is satisfied. Is a finding or determination that an order is just and equitable required? Can "satisfaction" be implied from the reasons or does the court need to say expressly that it is satisfied?

Importantly, and particularly so in view of the interpretation of *Stanford* by the Full Court of the Family Court in the cases referred to in this article, the High Court majority said that the requirements of s 79(4) and 79(2) "are not to be conflated."[13] There is an obvious danger that if the Court does not expressly state the reasons why it is satisfied that it is just and equitable to make an order in accordance with s 79(2), that it will have reached the conclusion that the s 79(2) requirement has been met by conflating the consideration of s 79(4) and s 79(2).

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[8] at para 39
[9] at para 40
[10] at para 41
[11] at para 24
[12] at para 43
[13] at para 35

Bevan - Is s 79(2) a threshold issue and how do we know whether or not it has been complied with?

A majority of the Full Court of the Family Court in *Bevan & Bevan* rejected the notion that s 79(2) is a threshold issue or that the separate requirements of s 79 must be dealt with in a particular order. However, the majority said that:

> "The High Court's decision serves to focus attention on the obligation not to make an order unless it is just and equitable to do so".[14]

To support its use of the word "obligation" the majority referred to the High Court decision of *Mallet v Mallet*[15] and quoted from Dawson J who referred to s 79(2) as the "overriding requirement".[16]

The idea of s 79(2) as a separate step or a threshold issue was first raised by the writer in "*Stanford*: An examination of s 79 by the High Court".[17] This article can be read **here**. Other writers have expressed similar views, including Patrick Parkinson in "Family property law and the three fundamental propositions in *Stanford v Stanford*",[18] who said that a finding that it is just and equitable under s 79(2) was a "statutory precondition" to the making of an order under s 79.[19]

Section 79(2) as a threshold issue is suggested by the wording of s 79(2) and the High Court's interpretation of this as discussed above (particularly the first fundamental principle). Further, the Full Court of the Family Court in *Bevan* accepted that there needed to be:

> "separate consideration of the preliminary question of whether it is just and equitable to make any order altering property interests before the need arises to consider the extent to which existing interests are to be altered and the manner in which that is to be done."[20]

Although the majority of the Full Court used the phrase "separate consideration of the preliminary question" as to whether it was just and equitable to alter the parties' interests, it also said that the s 79(2) question could be answered "expressly, or by clear implication".[21] If the question raised by s 79(2) can be impliedly addressed, this is very different from a requirement that it be addressed expressly, perhaps with the court making a finding or a determination.

The majority also said that *Stanford* also served as a reminder to trial judges that a "finding" under s 79(2) was a "pre-condition" to making an order,[22] the latter being the same word used by Parkinson. A "finding" is defined in *Osborn's Concise Law Dictionary* (6th ed) as a "conclusion upon an enquiry of fact". A less legalistic meaning given in the *Australian Concise Oxford Dictionary* (5th ed) is "a conclusion reached by an enquiry". Both definitions suggest an express statement of a conclusion.

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[14] at para 65
[15] (1984) FLC 91-507
[16] at para 7
[17] 13 December 2012, *CCH Australian Family Law Tracker* and *CCH Law Central Blog* (now Wolters Kluwer, CCH)
[18] (2013) 3 FamLRev 80
[19] (2013) FamLRev 80,81
[20] at para 81
[21] at para 82
[22] at para 70

The majority of the Full Court, despite suggesting that the s 79(2) question could be answered "by clear implication", also recognised that before exercising power under s 79, a court must "have first determined" that it was just and equitable to make *an* order.[23] These words suggest that an express determination is required. The Full Court may, however, have been using "determine" in its plain English sense rather than its legal sense. According to the *Australian Concise Oxford Dictionary*, "determine" means "firmness of purpose, resoluteness" or "the process of deciding, determine or calculating", neither of which may require an express statement. According to *Osborn's Concise Law Dictionary* "determine" means "to decide an issue or appeal", which suggests an explicit conclusion reached. If the Full Court majority intended that the word "determine" only be given its plain English meaning, rather than its legal meaning, it could have been clearer. The confusion in relation to the interpretation of *Stanford* is not assisted by the use of, and uncertainty as to, the meanings of "finding" and "determine" in *Bevan*.

The trial judge in *Bevan* was found by the Full Court majority to have "impermissibly conflated" s 79(4) and s 79(2). Although the trial judge purported to address the *Stanford* requirement of s 79(2), because he conflated s 79(4) and s 79(2), the appeal was upheld. He conflated s 79(2) and s 79(4) when he purported to undertake a separate consideration of s 79(2) but had already made findings which prevented him from taking into account all relevant factors. He also conflated s 79(2) and s 79(4) by considering the parties "entitlement at law" only by reference to s 79(4). By raising the possibility that a trial judge could address the issue of s 79(2) implicitly, the Full Court left open the question of how this could occur whilst still using language which indicated that the court must make a finding or determination that s 79(2) was satisfied.

The primary judgment in *Stanford* makes it very clear that s 79(2) necessitates a separate inquiry to that required by s 79(4):

> "Section 79(4)(a)-(c) required that the contributions which the wife made to the marriage should be taken into account in "considering what order (if any) should be made" under s 79. But, as already noted, the inquiries required by s 79(4) are separate from the "just and equitable" question presented by s 79(2). The two inquiries are not to be merged. And neither the inquiry whether it would have been just and equitable to make a property settlement order if the wife had not died, nor the separate inquiry whether it was *still* just and equitable to do so, was to be merged with or supplanted by an inquiry into what division of property should be made by applying the matters listed in s 79(4)."[24]

Whether or not a finding or determination must be made that the court is satisfied that it is just and equitable to make an order under s 79(2), the High Court in *Stanford* was clear that there must be a "separate inquiry". The Full Court in *Bevan* said that there needed to be a finding or determination as to s 79(2) and that was a pre-condition, but also suggested satisfaction with s 79(2) could be implied. *Bevan* left a great deal of uncertainty about the interpretation of *Stanford*.

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[23] at para 89

[24] at para 51

Chapman - What if the parties do not raise s 79(2)?

The Full Court of the Family Court in *Chapman* confirmed that if the parties both agreed that it was just and equitable for an order to be made, the court did not need to address the issue at length. The Full Court said that in many cases:

> "the parameters, breadth and depth of the s 79(2) inquiry will be curtailed ... As a result, satisfaction of the s 79(2) requirement can be inferred, at least in part, from the issues joined and, importantly, not joined, between the parties."[25]

Whilst the Full Court said that the court may be able to infer that the s 79(2) requirement was satisfied, the Full Court did not suggest that the question could be ignored completely by the court in circumstances where the parties did not raise it as an issue. In fact, to ignore it would be inconsistent with *Stanford*. At trial, as neither party raised any issue in respect of s 79(2), the Full Court said the parties must therefore be implicitly conceding that the making of a s 79 order was just and equitable. The Full Court confirmed though, that the court still needed to address the issue even though the parties did not, saying:

> "Of course, while those factors might truncate a trial judge's consideration of the subsection, they do not relieve it; a trial judge must decide for him or herself that justice and equity requires an order to be made."[26]

The Full Court noted that the trial judge expressly considered the justice and equity of making an order in a short statement. The Full Court decided that the circumstances of the case, and the manner in which the parties conducted their respective cases, made further exposition by the trial judge of s 79(2) unnecessary. So, despite the Full Court indicating in *Bevan* and in *Chapman* that the question raised by s 79(2) could be addressed implicitly, this did not occur in *Chapman*.

Hearne - Can s 79(2) be implicitly addressed?

In *Hearne*, Strickland J (which whom Ryan J agreed, and Austin J agreed on this point) rejected the proposition put on behalf of the husband that "unless a finding is made as to whether it is just and equitable to alter property interests, the court has no power to make such an order." Strickland J quoted extensively from *Stanford* but then relied on para 22 of *Chapman* (cited above) for the proposition that "there need not be an express finding that the hurdle of s 79(2) has been overcome; it can be by necessary implication from the totality of the trial judge's reasons for judgment."[27] There was no discussion as to how a "finding" can be made, and when satisfaction can be implied rather than there be an express finding by the court.

Strickland J referred to *Bevan*, where the majority said that the separate s 79(2) issue will, "... in many cases ... [be] ... effectively answered in the affirmative by the way the parties present their cases."[28] However, following *Bevan* and *Chapman*, Strickland J said that although that will truncate a trial judge's consideration of s 79(2), it did not render the trial judge's obligation to decide for themselves that it was just and equitable to make the orders proposed. He noted that each party contended for an order to be made pursuant to s 79

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[25] at para 22
[26] at para 29
[27] at para 71
[28] at para 82

and neither party raised any issue before the trial Judge in respect of s 79(2). Thus, implicitly, each party must have conceded that the making of an order pursuant to s 79 was just and equitable.

The trial judge, under the heading "justice and equity", said that he was not satisfied that following the High Court's decision in *Stanford*, there remained (or ever was) a clear and separate fourth step which required the court to step back from the findings made as to the pool, contribution and s 75(2) adjustments and determine whether the orders proposed were just and equitable. Despite this, from an abundance of caution, the trial judge said he would look at the justice and equity of the proposed orders. At this stage, the trial judge expressly referred to the absence of any superannuation splitting order and looked at the structure of the settlement. This was the "fourth step" in the "four step process" followed in such cases as *Hickey & Hickey and the Attorney General for the Commonwealth of Australia (Intervenor)*[29] prior to *Stanford*.

Strickland J quoted extensively from these passages[30] and concluded that the trial judge had impliedly addressed the s 79(2) issue. He said:

> "I consider that, albeit nowhere expressly making the necessary finding, when his Honour's reasons are taken as a whole, it can still be seen that his Honour was satisfied that the proposed orders were just and equitable in the sense emphasised by the plurality in *Stanford*."[31]

This was a somewhat surprising conclusion. The trial judge considered the justice and equity issue in the context of a possible "fourth step" or final step, rather than in the context of being satisfied in accordance with s 79(2) that it was just and equitable to make an order at all.

Strickland J appeared to realise that he may not have established a sound basis for concluding that there had been compliance with *Stanford.* He said that even if there might be some doubt about that approach, there were other considerations which rendered this ground of appeal without merit. In particular, it was not the husband's case before the trial judge that it was not just and equitable to alter property interests. A party is generally bound on appeal by the case argued below,[32] unless it was a pure question of law.[33]

Although it could be argued that the issue was a question of law, Strickland J said:

> "If it is a matter that is one peculiarly for the trial judge, and the trial judge should have been given the opportunity to address it as part of the husband's case, then it will still be too late to raise on appeal … For example, in *Metwally*, the appellant's counsel was prevented from arguing on appeal that the *Racial Discrimination Act 1975* was unconstitutional, where his argument at first instance had proceeded upon the premise that the Act was valid. That of course has striking similarities to the argument in this case."[34]

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[29] (2003) FLC 93-143
[30] at para 77
[31] at para 78
[32] *Metwally v University of Wollongong (No. 2)* [1985] HCA 28
[33] *Waterboard v Moustakas* [1988] HCA 12
[34] at para 81

Strickland J also considered the husband's appeal point to be an abuse of process. If the appeal was successful and the matter remitted for rehearing, the husband did not intend to argue before the new trial judge that it was not just and equitable for orders to be made altering the property interests of the parties.

Austin J agreed with Strickland J in relation to both arguments. In relation to the trial judge implicitly concluding that the s 79(2) inquiry had been satisfied, Austin J said:

> "The totality of the trial judge's reasons, in the context of how the litigation was contested, inferentially reveals his Honour resolved the inquiry posited by s 79(2) of the Act."[35]

Regarding the abuse of process argument, Austin J also agreed with Strickland J and added that:

> "It would certainly bring the administration of justice into disrepute if the husband was permitted to argue one thing at trial, take a conveniently contradictory position merely to sustain an appeal, and then revert to his initial position upon re-trial. He should not be permitted to do so. Litigation is serious; not a game."[36]

The result in *Hearne* may have been driven by practicalities rather than strict compliance with *Stanford*. As the husband did not assert that it was not just and equitable for an order to be made (and did not intend to assert it if the matter was remitted for re-trial), the Full Court said that it could not criticise the trial judge for not stating that he was satisfied that the s 79(2) requirement had been met. However, the High Court in *Stanford* imposed a positive obligation on a trial judge to be satisfied that it is just and equitable to make an order before exercising the power to make a s 79 order. A majority of the Full Court of the Family Court in *Bevan* said that this satisfaction could be implied from the trial judge's reasons, although it also used the words "finding" and "first determined". The High Court in *Stanford* said that the requirement that it is just and equitable to make a s 79 order is one of the propositions that "must not be obscured", which is more consistent with an express statement such as a finding or determination. In *Hearne,* the trial judge expressly considered justice and equity in an entirely different context from the s 79(2) requirement set out in *Stanford* but the Full Court concluded that the s 79(2) requirement had been met by implication.

There have been other cases where s 79(2) has been impliedly rather than expressly addressed. For instance, in the Full Court of the Family Court in *Daines & Daines,*[37] an appeal against a judgment where the trial judge did not address s 79(2) was unsuccessful. Each party contended for orders adjusting their existing property interests and it was held to be significant that neither party suggested that the trial judge should make an adjustment to those interests because of s 79(2).

What is the effect on a s 79 order if the court does not follow *Stanford*?

The process by which a court must be satisfied in accordance with s 79(2) that it is just and equitable to make an order before exercising its power to make any order under s 79 and the effect of non-compliance, seems similar to the High Court's consideration of the proper

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[35] at para 114

[36] at para 117

[37] [2014] FamCAFC 61

approach to making consent orders under s 79 set out in *Harris* v *Caladine*.[38] This may be a better comparison than the argument based on *Metwally* used by Strickland in *Hearne*.

In *Harris* v *Caladine* Mason CJ, Brennan, Deane, Dawson and Toohey JJ held that the considerations set out in s 79(4) must still be taken into account when making consent orders, as well as when making orders not by consent. The court must also be satisfied that the orders are just and equitable under s 79(2). The court cannot rely on the parties' consent to the orders being made to absolve the court from its obligations to be satisfied that the orders are just and equitable. However, in the case of consent orders, the court will more readily find that the requirements are met because the parties have consented to the orders. Specifically, Dawson J said in *Harris* v *Caladine* in relation to s 79:

> "The fact that an order is sought by consent does not relieve a court, or a Registrar, from compliance with the requirements of the section, but it may render compliance much less demanding. Provided that a court, or a Registrar, is adequately informed, where the parties are at arm's length and are properly represented little more than consent may be needed to establish that the requirements of the section have been met …And in the case of an application under s 79, even if there is consent amounting to a contract, that is not enough of itself to entitle the parties to an order. The requirements of the section must be satisfied."[39]

Similarly, Toohey J said that "the parties to litigation cannot by consent confer power upon a court to make an order which the court lacks power to make".[40]

A similar issue arose in relation to the power to make parenting orders after the High Court delivered judgment in *MRR v GR*.[41] Richard Chisholm and Patrick Parkinson explored the status of existing parenting orders which did not follow the High Court's interpretation of the mandatory requirements of s 65DAA(1), including consent orders, in "Reasonable practicability as a requirement: the High Court's decision in *MRR v GR"*.[42]

The learned authors concluded that such orders, if made by the Family Court of Australia, were valid and enforceable until set aside as that court is a superior court. However, they noted that orders of the Family Court of Western Australia and the Federal Circuit Court (known as the Federal Magistrates Court at that time) were probably nullities. The appeal in *Hearne* was from a Judge of the Federal Circuit Court, so if *Stanford* wasn't followed - despite the Full Court saying that it was - the order appealed from was a nullity.

Chisholm and Parkinson referred to the Full Court's decision in *Horne & Horne*[43] as well as the legislation which retrospectively validated *Family Law Act* orders made without power in Western Australia in the 1990's and after aspects of the cross-vesting scheme were declared invalid in *Re Wakim; Ex parte McNally*.[44] After publication of Chisholm and Parkinson's article, the Federal Government rushed amendments to the *Family Law Act* 1975 through Parliament. The *Family Law Amendment (Validation of Certain Parenting Orders)* and *Other Measures Act* (2010) retrospectively validated affected orders if they were

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[38] (1991) FLC 92-217
[39] at pp 78,485–6
[40] at p 78,491
[41] (2010) FLC 93-424
[42] (2010) 24 AJFL 255
[43] (1997) FLC 92-734
[44] [1999] HCA 27

invalid. These amendments, and the reasons for them, were discussed by the writer in "Effects of 2010 post *MRR &GR* Legislative Amendments". This article can be read **here**.

Of course, it may be possible to make a distinction between the validity of parenting orders and the validity of s 79 orders. Consistent with this, following *Stanford*, there seemed to be little or no concern that existing s 79 orders, made by the Family Court of Western Australia or the Federal Circuit Court were invalid. The Federal Government did not retrospectively validate existing orders and there was no avalanche of applications asking the courts to re-exercise their powers to make fresh orders under s 79 because the existing s 79 orders were a nullity. Furthermore, the High Court in *MRR v GR* found that the court, in exercising the power to make parenting orders under s 65DAA, was required to find the existence of a jurisdictional fact. The wording of s 65DAA is, of course, more directive than s 79(2). Sections 65 DAA(1)(2) and (5) use the word "must" with respect to the matters to be considered. Section 65DAA(3) refers to "if and only if" but s 65DAA(6) states that the court "may, but is not required to consider" certain matters.

Chisholm and Parkinson distinguished the making of parenting orders from the making of property orders. Although they said "in each case the legislation set out the matters that must be considered, and the requirements that must be satisfied, before the court makes an order"[45] they also said that there was "no suggestion in the jurisprudence on s 79 that any particular finding of fact is necessary for the court to have power to make an order" under s 79.[46] These statements were based on the jurisprudence at that time, including *Harris v Caladine*, but *Stanford* appears to have changed the situation. The High Court majority said in *Stanford* that the Court must be satisfied that it is just and equitable to make an order before exercising the power under s 79. A distinction can be drawn between orders made prior to the handing down of *Stanford* and orders made subsequently. If the court knowingly exercises its power under s 79 without the court being satisfied that it is just and equitable to make an order, that order is probably more at risk of being set aside or appealed against than an order made prior to the High Court making it clear in *Stanford* what s 79(2) requires.

Professor Parkinson's views in the *Stanford* article referred to above, and the position he argued for the husband in *Hearne*, that a "finding" was required under s 79(2) before the court had the power to make a s 79 order, differed from those he expressed in the earlier *MRR* article.[47] In his *Stanford* article he likened s 65DAA(1) to s 79(2) and said that they were both "expressed in imperative terms" and both were statutory conditions. This is consistent with the wording of the majority in *Bevan* that s 79(2) was a "pre-condition".

Problems in practice

The problems which arise from the uncertainty about whether or not s 79(2) is a threshold issue or a pre-condition which a court must specifically find or determine is satisfied, or can simply be found to have been satisfied by implication from the reasons for judgment, include:

- How to prepare a client's case
- Whether to make submissions on the issue
- Whether to insist that a judge make an express finding or a determination

[45] at p 260
[46] at p 261
[47] at para 65

- When to advise a client that it might be an appeal point

- Different judges may have different views as to how to comply with *Stanford*. The Full Court of the Family Court judgments referred to in this article are not wholly consistent, particularly with their use of language.

If the Full Court is correct and the court is not required to make a "separate inquiry" and an express finding or determination as to whether the s 79(2) requirement has been satisfied before making an order under s 79, then it might be better for legal practitioners not to address the issue at all due to the risk of conflating s 79(4) and s 79(2). A successful appeal due to conflation might be a bigger risk than if no attempt to expressly satisfy s 79(2) is made. Obviously, though, this is a very unsatisfactory strategy in light of the strong views expressed by the High Court in *Stanford* about s 79(2).

It would be helpful for legal practitioners if the Full Court attempted again to reconcile the precise words of s 79(2) and *Stanford* without feeling constrained by its earlier judgments.

Where to now?

The Full Court of the Family Court considered in *Bevan* that looking at s 79(2) was not a threshold issue, although the High Court majority in *Stanford* was clear that s 79(2) required "separate consideration" from the rest of s 79 and was a "separate inquiry" from s 79(4).

If the Full Court of the Family Court is correct, the s 79(2) requirement can be satisfied by implication from a trial judge's reasons and does not need to be expressly addressed by a trial judge. This approach is difficult to reconcile with the views of the majority of the High Court in *Stanford* that an examination of s 79(2) is a mandatory issue, and perhaps a preliminary issue. Can consideration of the s 79(2) issue be both mandatory, as required by the High Court, and occur implicitly as the Full Court says is possible? The Full Court has rejected the proposition that s 79(2) is a threshold issue. However it is difficult for a court to determine the s 79(2) question without conflating s 79(4) and s 79(2) (or, at least, for a court to show that it has not "impermissibly conflated" them) if the s 79(2) question is not determined separately and expressly.

The writer thanks Belinda Fehlberg for her helpful comments. Of course, the opinions expressed in this article, and any errors, are those of the writer.