

'...SUCH OTHER FEDERAL COURTS AS THE PARLIAMENT CREATES': 100 YEARS OF EVOLUTION

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I INTRODUCTION

In the hundred and three years since Federation, the Parliament of the Commonwealth has exercised the power conferred by Chapter III of the *Constitution* to create seven courts, the first as early as 1904.¹ It is of course well beyond the scope of a single lecture to consider in any detail the rich history of these federal courts. Rather, my aim is to give an outline of the evolution of courts created by the Parliament under Chapter III over the course of the past century. The evolution of these courts falls naturally into three periods:

- 1904 to 1956
- 1957 to 1976
- 1977 to the present

As this survey will show, some of the important elements that have marked the evolution of Australia's federal courts have been present from the very beginning.

In fact, in many ways federal courts are not as novel as many may have supposed when the two large modern federal courts – the Federal Court of Australia and the Family Court of Australia – were created in the 1970s, or even when the most recent federal court – the Federal Magistrates Court of Australia – was created in 1999.

Since this is the *Lucinda Lecture*, and following the precedent set by Sir Zelman Cowen when he delivered it last year, I will begin by making a brief reference to the famous Easter cruise of the QGSY *Lucinda* – the Queensland Government Steam Yacht *Lucinda* – after which this annual lecture is named. It concerns s 71 of the *Constitution*, the section that is central to the federal judiciary and which suggests the title of this year's lecture. I take Chapter III of the *Constitution* as read, but the critical portion of s 71 needs to be quoted. It provides:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.

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¹ A further eight courts have been created under other heads of power, beginning with the Supreme Court of Papua and concluding with the Supreme Court of Norfolk Island.

The section then provides that the High Court shall consist of a Chief Justice and so many other Justices, not less than two, as the Parliament prescribes.

In the language of the early federal statutes, the High Court of Australia was *established* by the Parliament. It was not seen as a court *created* by the Parliament since its creation is mandated by the *Constitution* itself.² The Court was established 100 years ago, when the *Judiciary Act 1903* (Cth) ('*Judiciary Act*') came into force on 25 August 1903.

We can see at once that s 71 has a central role in the whole constitutional framework since it ensured the eventual paramouncy of the High Court of Australia in Australia's judicial system. The structure of the federal judiciary might, however, have been very different had some changes that were made to the 1891 draft of the *Constitution* during the *Lucinda's* Easter cruise found their way into the final instrument.

When the *Lucinda* set off on its Hawkesbury River cruise with the drafting committee, the draft of what became s 71 was in very similar terms to the present.³ Its principal author, Andrew Inglis Clark, was not however on board. He was confined to bed in his Sydney hotel with influenza. Edmund Barton took his place on the drafting committee and in Clark's absence on the first two days of the voyage (he joined the vessel on the third) the draft was revised to provide, merely, that:

The Parliament of the Commonwealth shall have *power* to establish a Court, which shall be called the Supreme Court of Australia ... The Parliament may also from time to time, subject to the provisions of this Constitution, establish other Federal Courts.⁴

Andrew Inglis Clark was not happy. He was later reported as saying that the other members of the drafting committee

went for a picnic on the pleasure yacht *Lucinda*, and while enjoying themselves they took it into their heads to tinker with the Bill and they altered all the clauses relating to the judicature ... and [he] took leave to say, messed it.⁵

The point of course is that had the draft not been changed back to its pre-*Lucinda* formulation, as it was in the Adelaide Convention of 1897, the High Court of Australia might not have come into being until much more recently, or even, in

² This view is confirmed by the second reading speech of the Judiciary Bill 1903 (Cth), where the Attorney-General explained the constitutional necessity of the High Court: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 588-9 (Alfred Deakin, Attorney-General).

³ See Michael White, 'QGSY *Lucinda* and its Significance to the Australian Constitution' in Michael White and Aladin Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution* (2002) 136, 159.

⁴ See Michael White and Aladin Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution* (2002) 299 (emphasis added).

⁵ *Mercury* (17 August 1897) cited in Michael White, 'QGSY *Lucinda* and its Significance to the Australian Constitution', above n 3, 160.

the view of Professor La Nauze, at all.⁶ The judicial system of the new Commonwealth could have operated since State courts could still have been invested with federal jurisdiction and the Privy Council could have been the ultimate court of appeal in all instances; but it would have been a very different *Constitution*.

I should mention s 77 of the *Constitution*. This section, with respect to the matters mentioned in ss 75 and 76, empowers the Parliament to make laws defining the jurisdiction of any federal court other than the High Court, laws defining the extent to which the jurisdiction of a federal court is to be exclusive of that which belongs to, or is vested in, the courts of the States and, equally importantly, laws investing any court of a State with federal jurisdiction.

Within such a structure federal courts are not, of course, strictly necessary, and in fact the Commonwealth functioned without any federal courts at all for over two and a half years until the High Court was established.

I note, however, that while for a short time during the evolution of the constitutional proposals the central place of the 'Federal Supreme Court' may have been in doubt, the drafters always remained aware of the new Commonwealth's potential need for federal courts. At all stages of the drafting process, the power remained to establish these courts as well as the 'Supreme Court of Australia'.

II THE FIRST PERIOD: 1904-1956

Before beginning this outline of 100 years of the evolution of federal courts, it is useful to recall how the future was seen in 1901 by John Quick and Robert Garran in their famous commentary on the *Constitution*. Dr Quick had been one of the representatives at the National Australasian Convention of 1897-8 and had a particular interest in Chapter III. Of the sections of the *Constitution* providing for the investiture of any court of a State with federal jurisdiction, Quick and Garran observed:

It will be practicable under this section [s 77], should the Parliament so desire, to dispense altogether, *at the outset*, with the creation of any federal courts other than the High Court, and to assign to the courts of the States such federal jurisdiction as may be necessary in order to secure the proper administration of the judicial business of the Commonwealth. In this way it will be possible to dispense with unduly cumbersome judicial machinery in the early years of the Commonwealth, and only develop and extend the national judicial system to meet the gradually increasing requirements of the people.⁷ [emphasis added]

⁶ J A La Nauze, *The Making of the Australian Constitution* (1972) 66-7, 130-2.

⁷ John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 803-4. This view is confirmed by the second reading speech for the Judiciary Bill 1903: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 589, 591 (Alfred Deakin, Attorney-General).

They continued:

But whilst federal functions may thus be exercised under federal authority, by State tribunals, the Federal Parliament can at any time revoke the authority, and transfer the whole of this subsidiary jurisdiction to courts of its own creation.⁸

Quick and Garran went on to make the point that the judicial department of the Commonwealth, as established under Chapter III, was more national and less distinctively federal in character than either the legislative or the executive departments.⁹ What Sir Owen Dixon later called the 'autochthonous expedient'¹⁰ was not seen as permanent and, as we shall see, Quick and Garran were prescient in their visions of the future. Of course Australia at the time was a very different country with a population of less than 4 million people, separated by great distances.

Even in this very early period in the history of the Commonwealth we see the emergence of some of the features that recur during the evolution of federal courts. The first of these is concurrent jurisdiction. One of the very first Acts of the Parliament, the *Customs Act 1901* (Cth), provided that a customs prosecution might be brought in the High Court of Australia (a federal court, but yet to be established), or in a State Supreme Court.¹¹ Concurrent jurisdiction was thus provided for even before there were any federal courts in which it could be exercised. There were of course other provisions that enabled State courts to exercise the emerging federal jurisdiction as the Parliament enacted the early Commonwealth legislation.

Exclusive jurisdiction is another element that emerged at the very beginning. When the *Judiciary Act* was passed, the Parliament exercised the power given to it by Chapter III to make the High Court's original jurisdiction in respect of what we would now call the constitutional writs exclusive of the jurisdiction of the State courts, and so it remains to this day.¹² (Since 1983 the Federal Court has also had this jurisdiction.)¹³ We see, therefore, that although the States were to be entrusted with federal jurisdiction on the broadest scale, there were some matters that even from the beginning the Commonwealth wished to keep for hearing and determination in a federal court.

Moreover, from the very beginning there was one matter that was seen as so essentially one of federal responsibility that the Parliament created a federal court to deal with it. That matter was the prevention and settlement of industrial disputes extending beyond the limits of any one State, a matter with a history of great divisiveness, and which had played an important role in the foundation of the new Commonwealth.

⁸ Quick and Garran, above n 7, 804.

⁹ *Ibid.*

¹⁰ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268.

¹¹ *Customs Act 1901* (Cth) s 245.

¹² *Judiciary Act 1903* (Cth) s 39(1).

A The Commonwealth Court of Conciliation and Arbitration

To prevent and settle disputes of this nature the Commonwealth Court of Conciliation and Arbitration was created in 1904.¹⁴ It was a body which, to modern eyes, had some curious features, including the innovative combination of judicial and arbitral functions that was ultimately to lead to its demise in 1956 in the *Boilermakers Case*.¹⁵

The *Conciliation and Arbitration Act 1904* (Cth) provided that the President of the Court was to be appointed by the Governor-General from among the Justices of the High Court.¹⁶ The first President was Mr Justice O'Connor and the second Mr Justice Higgins. The President originally had power to appoint any Justice of the High Court or any judge of a Supreme Court to be a deputy president.¹⁷ These and other provisions seem very strange today and indeed were subsequently held to be unconstitutional.¹⁸ But here another feature of federal courts can be seen to have emerged at an early stage – provisions by which a judge may hold a commission as a judge of more than one court. As federal courts have evolved, even to the present, dual commissions continue to exist and remain of significance.

The Commonwealth Court of Conciliation and Arbitration was of great importance in the social and industrial history of Australia. In his famous collection of papers, the second President, Mr Justice Higgins, described the work of the Court as creating 'a new province for law and order'.¹⁹ His judgment in the *Sunshine Harvester Case*²⁰ provided the foundation for the 'living wage' and later the 'basic wage'. In point of form it was the decision of the Court in an application under s 2(d) of the *Excise Tariff Act 1906* (Cth). The Act imposed excise duties on agricultural implements but provided that they should not apply to goods manufactured in Australia under remuneration conditions that were declared by the President of the Court to be fair and reasonable. His task – the appropriateness of which he complained about in his judgment – was to ascertain whether the conditions of remuneration were in truth fair and reasonable.²¹

As the President of the Australian Industrial Relations Commission has recently pointed out:

The central concept of the system [established by the 1904 Act] was, although novel, and almost unique, simple enough. The social evils of the strike and lockout were to be replaced with a system of conciliation and arbitration. The system was to be under the jurisdiction of a Court ... The economic significance

¹³ *Judiciary Amendment Act 1981* (Cth), inserting new s 39B into the *Judiciary Act 1903* (Cth).

¹⁴ *Conciliation and Arbitration Act 1904* (Cth) s 11.

¹⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, aff'd *Attorney-General (Cth) v R; Kirby v R* (1957) 95 CLR 529 (Privy Council).

¹⁶ *Conciliation and Arbitration Act 1904* (Cth) s 12(1).

¹⁷ *Conciliation and Arbitration Act 1904* (Cth) s 14.

¹⁸ *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

¹⁹ Justice H B Higgins, *A New Province for Law and Order* (1922). See also Justice H B Higgins, 'A New Province for Law and Order' (1915) 29 *Harvard Law Review* 13.

²⁰ *Ex parte H V McKay* (1907) 2 CAR 1, 5-6.

²¹ *Ibid* 2-3.

of the creation of the Court was of course quite profound, not only because of the part the Court and its successors would play in establishing wages and conditions of employment for the nation's employees but also because of the economic effects of its decisions and its relationship with industry protection policies which would endure until the closing decades of the century.²²

The Commonwealth Court of Conciliation and Arbitration grew in importance and size during the first fifty years of federation,²³ although in 1918 there was a successful challenge to the provisions for the appointment of its members²⁴ and its very existence became a matter of high political controversy. Nevertheless, it continued until 1956 when, by a majority, the High Court found that if the Court were to exercise judicial power it must be properly constituted as a Chapter III court and that, if constituted as a Chapter III court, it could not exercise non-judicial, arbitral, functions.

B The Federal Court of Bankruptcy

The other federal court to be created by the Parliament in this early period was the Federal Court of Bankruptcy.²⁵ Created in 1930, it was on any view a true ancestor of the Federal Court of Australia. It too was a court of specialist jurisdiction.

The court was apparently established in response to protests by New South Wales that its Supreme Court was unable to handle the increasing volume of bankruptcy business.²⁶ For most of its existence the Federal Court of Bankruptcy had only one judge and it rarely sat outside New South Wales and Victoria. Federal jurisdiction in bankruptcy was invested concurrently in the Supreme Courts of the States.²⁷

The place of the Federal Court of Bankruptcy in the evolution of federal courts and the federal judiciary is too often overlooked. It had a very distinguished membership and the jurisprudence it created continues to be important.

²² Justice Geoffrey Giudice, 'Our Industrial Relations System - What Makes It Unique?' (Speech delivered at the Sydney Institute, Sydney, 12 February 2002) <http://www.airc.gov.au/giudice_120202.htm> at 23 March 2004.

²³ For a discussion and analysis of the pre-*Boilermakers Case* era, see Mark Perlman, *Judges in Industry, A Study of Labour Arbitration in Australia* (1954). Professor Perlman emphasises the importance of Australia's socio-economic culture in understanding the arbitration system at that time.

²⁴ Originally the tenure of the Court's members was limited. However, in 1926, subsequent to a High Court decision in *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 holding that such limited tenure was inconsistent with the exercise of federal judicial powers, provision was made for appointment of judges in accordance with the provisions of Chapter III - by the Governor-General and for life tenure: see *Commonwealth Conciliation and Arbitration Amendment Act 1926* (Cth) s 6.

²⁵ *Bankruptcy Act 1930* (Cth) s 4, inserting s 18 into *Bankruptcy Act 1924* (Cth).

²⁶ Peter Durack, 'The Special Role of the Federal Court of Australia' (1981) 55 *Australian Law Journal* 778, 778. The then Attorney-General noted that there was some evidence that Victoria was experiencing similar problems.

²⁷ The *Bankruptcy Act 1924* (Cth) anticipated a Federal Court of Bankruptcy, and s 18(1) provided that the Courts having jurisdiction in bankruptcy were '(a) such Federal Courts (if any) as the Parliament creates to be Courts of Bankruptcy; and (b) such State Courts or Courts of a Territory as are specially authorized by the Governor General by proclamation to exercise that jurisdiction.'

Moreover it had connections with other Commonwealth courts. The foundation judge, Mr Justice Lukin, who was already a judge of the Commonwealth Court of Conciliation and Arbitration, became the first judge of the newly established Supreme Court of the Australian Capital Territory, thus beginning a connection between Chapter III courts and the Supreme Court of the Australian Capital Territory, a connection that continues to this day. Mr Justice Lukin was succeeded by Mr Justice Clyne, Mr Justice Gibbs, Mr Justice C A Sweeney and Mr Justice Riley. Appearances before Sir Thomas Clyne and, later, Sir Harry Gibbs were, for some of us at the Melbourne Bar, our privileged introduction to federal courts, and are remembered very positively. The court in Melbourne sat in the premises then occupied by the High Court at 450 Little Bourke Street, and there was a very strong sense of appearing before a superior federal court. Sir Harry Gibbs became, as we know, a Justice of the High Court and subsequently the Chief Justice of Australia, and Mr Justice Sweeney and Mr Justice Riley became foundation members of the Federal Court of Australia, which took over the jurisdiction of the Federal Court of Bankruptcy.

No account of the courts created by the Parliament in this early period, and no account of the evolution of federal courts, would be complete without reference to the important original jurisdiction of the High Court of Australia. As we shall see, the increasing burden upon the High Court of its original jurisdiction was a powerful reason for the establishment of the Federal Court of Australia.

The *Judiciary Act* conferred upon the High Court original jurisdiction in matters arising under the *Constitution* or involving its interpretation and in a range of other areas.²⁸ In anticipation of establishment of the High Court, the *Commonwealth Electoral Act 1902* (Cth) had conferred jurisdiction upon the High Court as the Court of Disputed Returns.²⁹ Original jurisdiction was subsequently conferred on the High Court under other laws made by the Parliament such as the *Patents Act 1903* (Cth), the *Estate Duty Assessment Act 1914* (Cth), the *Income Tax Assessment Act 1936* (Cth) and the *Gift Duty Assessment Act 1941* (Cth). Much of this jurisdiction was concurrent so that the parties had a choice between the Supreme Court of a State and the High Court of Australia. In some fields, however, the new jurisdiction was exclusive.

The jurisdiction conferred upon the High Court by the *Australian Industries Preservation Act 1906* (Cth)³⁰ is of particular interest as an example of the Commonwealth Parliament conferring exclusive jurisdiction upon a federal court in an area it regarded as being of special federal concern.³¹ The long title of that Act sufficiently describes its purpose. It was an Act for 'the preservation of Australian industries, and for the repression of destructive monopolies'. It was,

²⁸ *Judiciary Act 1903* (Cth) s 38.

²⁹ *Commonwealth Electoral Act 1902* (Cth) s 193(1).

³⁰ See especially s 11(1).

³¹ Although the Act expressly named the High Court as the repository of the jurisdiction, and made detailed provision for its exercise by the High Court, query whether s 39(2) of the *Judiciary Act 1903* (Cth) still operated to confer concurrent jurisdiction upon the Supreme Courts of the States. See also *Commonwealth Electoral Act 1902* (Cth) s 354.

in effect, an Australian anti-trust act, aimed at unfair competition by monopolisation, dumping and by other means. The original jurisdiction conferred upon the High Court by this Act included a criminal jurisdiction³² and a jurisdiction in claims for triple damages for loss suffered by reason of acts done in contravention of the Act.³³

The High Court has, on occasion, exercised original criminal jurisdiction. That jurisdiction was highlighted by the famous case of *R v Porter*.³⁴ Porter stood his trial in the High Court for the murder of his infant son whose death had occurred in the Australian Capital Territory after the establishment of the seat of government but before the establishment of the Supreme Court of the Australian Capital Territory. The High Court was invested with criminal jurisdiction in relation to the Territory in this interim period and so it was that Porter was tried by a jury before Mr Justice Owen Dixon sitting as a Justice of the High Court of Australia – a judge of a federal court. Mr Justice Owen Dixon's charge to the jury on the defence of insanity in that case is one of the classic expositions in Australian criminal law.³⁵ This is not the only time a person has stood trial before a Justice of the High Court³⁶ and indeed, in theory, it could happen again.³⁷

III THE INTERMEDIATE PERIOD: 1957-1976

A *The Australian Industrial Court*

The period 1957-76 saw the creation of new federal courts. In response to the *Boilermakers' Case*, the functions of the former Commonwealth Court of Conciliation and Arbitration were divided between two bodies. The judicial body was the Commonwealth Industrial Court,³⁸ renamed the Australian Industrial Court in 1973.³⁹ It survived an early challenge to its constitutional validity, it being claimed that the Court was impermissibly empowered to exercise both judicial and non-judicial powers. The challenge failed, the High Court holding that the relevant Act provided 'abundant evidence of the intention to establish a Commonwealth Industrial Court for the purpose of exercising judicial power even if some of the functions conferred upon it may in truth go outside Chap. III of the Constitution'.⁴⁰ The original functions of the Commonwealth Industrial Court were the interpretation and enforcement of industrial awards, the interpretation of union rules and the resolution of various questions of law arising under Commonwealth industrial legislation.

³² *Australian Industries Preservation Act 1906* (Cth) s 13.

³³ Section 11(1). See, for example, *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65; *Reafem v Dunlop Rubber Australian Ltd* (1964) 110 CLR 194.

³⁴ (1936) 55 CLR 182.

³⁵ Porter was found not guilty on the ground of insanity: *Ibid* 185-90.

³⁶ See also *R v Kidman* (1915) 20 CLR 425.

³⁷ The *Judiciary Act 1903* (Cth) s 30(c) confers original jurisdiction on the High Court in trials of indictable offences against the laws of the Commonwealth.

³⁸ *Conciliation and Arbitration Amendment Acts (No 1) and (No 2) 1956* (Cth).

³⁹ *Conciliation and Arbitration Act 1973* (Cth).

⁴⁰ *Seamen's Union of Australia v Matthews* (1957) 96 CLR 529, 534.

In the 1960s, jurisdiction of an entirely different nature was conferred upon the Court, first under broadcasting legislation⁴¹ and then, and more significantly, under the *Trade Practices Act 1965* (Cth).⁴² This was exclusive jurisdiction. Later, jurisdiction under the substantially expanded *Trade Practices Act 1974* (Cth) (*Trade Practices Act*) was also conferred upon the Australian Industrial Court and it was seen by many as anomalous that an 'industrial court' should be exercising jurisdiction in cases about anti-competitive practices and consumer protection. If, however, these cases were to be heard in federal courts the other options were to create an entirely new court to receive the new jurisdiction or to confer the jurisdiction upon one or other of the extant federal courts – the Federal Court of Bankruptcy or the High Court itself.

B The Federal Court of Australia

During this period the areas of Commonwealth legislative concern rapidly expanded. The burdens on the High Court also increased. Remarkable as it now seems, it is the fact that in the 1960s and even in the 1970s Justices of the High Court of Australia were sitting at first instance hearing such matters as taxation appeals, applications for the extension of the terms of patents, applications for judicial review (although not many because the complexities seemed so formidable) and even actions for personal injuries in the diversity jurisdiction of the Court. There was a substantial admiralty jurisdiction as well, original jurisdiction having been conferred upon the High Court by the *Colonial Courts of Admiralty Act 1890* (Imp) (53 & 54 Vict) Chapter 27.

The increasing burden of these cases upon the High Court led to discussion of the idea of an additional federal court. In a paper presented to the Australian Legal Convention in 1963, Mr M H Byers QC (later the Solicitor-General of Australia) and Mr P B Toose QC proposed that a new federal court be created to relieve the High Court of its increasing original jurisdiction workload, and recommended that the 'autochthonous expedient' of investing State courts with federal jurisdiction should be terminated to ensure that the Federal Government took full and direct responsibility for the administration of Commonwealth statutes.⁴³

We contend that the original understanding was that the High Court and the State courts should carry the initial and comparatively light burden arising from [F]ederal legislation and that when the time came a complete structure of federal courts should be created.⁴⁴

In May 1967, the Attorney-General, The Hon Nigel Bowen QC, announced that the government had decided that 'a relatively small new Federal court of quality

⁴¹ *Broadcasting and Television Act 1942* (Cth) s 134(3), amended by *Broadcasting and Television Act 1965* (Cth) s 11(1).

⁴² *Trade Practices Act 1965* (Cth) ss 5, 66(2), 68(1), 88(2).

⁴³ M H Byers and P B Toose, 'The Necessity of a New Federal Court: A Survey of The Federal Court System in Australia' (1963) 36 *Australian Law Journal* 308, 317. This was recently discussed by Justice Robert French in 'Legal retail therapy: Is forum shopping a necessary evil?' (Summer 2001-02) *Bar News* 44, 47-9.

⁴⁴ Byers and Toose, above n 43, 309.

and standing be established.⁴⁵ The Commonwealth Superior Court Bill 1968 (Cth) was presented to the Parliament in November 1968, and proposed a court with comparable status and jurisdiction to the Supreme Courts of the States. It would exercise original jurisdiction in all federal matters except matrimonial causes and trials on indictment, and would have appellate jurisdiction from the Territory Supreme Courts and inferior State courts exercising federal jurisdiction.⁴⁶ It would incorporate both the Commonwealth Industrial Court and the Federal Court of Bankruptcy. The Attorney-General noted that this development in the federal judicial system was to keep pace with the growth in complexity of the governance of the Commonwealth:

The need for another Federal superior court in which original proceedings could be taken in place of the High Court is emphasised by the legislation, passed by Parliament this year, limiting appeals to the Privy Council and strengthening the High Court's position as the ultimate court of appeal in Australia.⁴⁷

Although it had considerable support, the Bill lapsed and no further Bill was introduced⁴⁸ until, following a change of Government, the new Attorney-General, Senator Lionel Murphy QC, introduced the Superior Court of Australia Bill 1973 (Cth).⁴⁹

This proposal was much more ambitious and foresaw the substantial development of Commonwealth administrative law,⁵⁰ trade practices law and human rights law. Judicial review was to be a very significant part of the work of the new court. However, the Bill lapsed. A bill was again introduced for the establishment of the Superior Court of Australia in 1974. The 1974 Bill was defeated in the Senate, but the proposal for a family division of the Superior Court led, in 1975, to the creation of the Family Court of Australia – an entirely new federal court with jurisdiction under the *Family Law Act 1975* (Cth) ('*Family Law Act*').

Following the change of government in 1975, the Federal Court of Australia Bill 1976 (Cth) was introduced in October 1976.⁵¹ That Bill was passed and so the Federal Court of Australia was established. It first sat on 7 February 1977, in Sydney. It comprised a Chief Judge, Sir Nigel Bowen, and 18 other members, most of whom had served as judges of other courts created by the Parliament, either under Chapter III or under the Territories power.

⁴⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1967, 2337 (Nigel Bowen, Attorney-General).

⁴⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 November 1968, 3142-6 (Nigel Bowen, Attorney-General).

⁴⁷ *Ibid* 3145.

⁴⁸ In 1972, it was announced that the project was being abandoned: Commonwealth, *Parliamentary Debates*, Senate, 27 October 1972, 2086-8 (Ivor Greenwood, Attorney-General).

⁴⁹ Commonwealth, *Parliamentary Debates*, Senate, 12 December 1973, 2724-9 (Lionel Murphy, Attorney-General).

⁵⁰ See Byers and Toose, above n 43, 319.

⁵¹ The new Government criticised the previous proposal on the basis that it would have removed the bulk of the federal jurisdiction from State courts and greatly weakened the status of those courts and the quality of the work they dealt with. See: Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1976, 2110 (Robert Ellicott, Attorney-General).

At the Court's first sitting, the Chief Judge observed that it was a court 'with no history and, as yet, no tradition.'⁵² This of course cannot be disputed, and yet one may comment 26 years later that the Court was the inheritor of a rich history and tradition upon which it would base its own. The foundation members of the Federal Court (as have many of its judges since) held, or had held, commissions as judges of other courts – federal, State and territory. For the most part, they had also spent many years in practice before the courts. They shared a common heritage, having its foundations deep in the legal history of Australia, and beyond that in the colonies from which Australia was formed, and beyond that still in the original sources of the common law.

The new court was envisaged as remaining quite small, although even at its inception it was considerably larger than many of the Supreme Courts. It was envisaged as having an important appellate function and an original jurisdiction based largely upon what were seen as the 'traditional' areas of federal concern.

It may not have been fully appreciated, however, that some of the so-called 'traditional' areas of federal concern were areas in which a substantial expansion in the volume and importance of the cases was almost inevitable. It was inevitable that there would be a large expansion in the volume and importance of litigation under the competition law provisions of Part IV of the *Trade Practices Act*, and the consumer protection provisions of Part V. The latter had a large potential for growth, particularly through the possibilities of redress offered by the remedies provided for, and by the simple language of, s 52(1):

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive.

Similarly, Commonwealth administrative law had been the subject of the reforms of the 1970s, one of the aims of which was to make judicial review much more accessible. It was not the relatively small number of Acts under which jurisdiction was initially conferred that pointed to the size of the Court, but the importance of those Acts and the potential for their areas of concern to expand.

C The Family Court of Australia

As already mentioned, the end of the 1956-76 period saw a large transfer of jurisdiction from the States to the new Family Court of Australia and before moving to the third era, I should say something about the establishment of the Family Court. In the first 50 years or so of the Commonwealth, the Parliament did not exercise its legislative powers under s 51(xxi) and (xxii) of the *Constitution*,⁵³ but in 1959 the Commonwealth introduced uniform divorce laws in the form of the *Matrimonial Causes Act 1959* (Cth). Then, in 1961, the *Marriage Act 1961* (Cth) was enacted to establish uniform laws relating to

⁵² See Federal Court of Australia, Transcript of Proceedings, Sydney, 7 February 1977, 7. See also Sir Nigel Bowen, 'The Anatomy of a Federal Court' (1985) 1 *Australian Bar Review* 190, 190.

⁵³ These gave the Commonwealth the power to make laws with respect to '(xxi) Marriage; (xxii) Divorce and matrimonial causes and in relation thereto, parental rights, and the custody and guardianship of infants.'

marriage.⁵⁴ Jurisdiction to institute matrimonial causes and to hear disputes under this legislation was conferred on the Supreme Courts of the States and Territories.⁵⁵

The *Family Law Act* was enacted in response to widespread public dissatisfaction with the existing law, and so the origins of the Family Court are different to those of the Federal Court of Australia, notwithstanding that the two courts were created at about the same time and notwithstanding the earlier proposal for a family law division within the new Federal Court.⁵⁶ The aim of the *Family Law Act* was to reform the law governing the dissolution of marriage by replacing the existing fault-based grounds for divorce with one 'no fault' ground, a non-judgmental perspective on the breakdown of marriage.⁵⁷ It was also intended to supersede State and Territory laws about 'guardianship, custody, access and maintenance' of the children of a marriage.⁵⁸

When the *Family Law Act* created the Family Court of Australia, it retained the option for each State to set up its own court to administer the Commonwealth Act. Only Western Australia has done so⁵⁹ but it is interesting that, in contrast to the essentially dualist model adopted today in federal jurisdictions, there was originally an option for a cooperative model for this part of the federal judicial system.⁶⁰

The Family Court of Australia was as innovative as the legislation that established it. It was intended to be a helping Court and one that improved access to justice.⁶¹ Its processes were to include the provision of counselling and conciliation services, recognising their importance in resolving disputes between married people. The principle that the welfare of the children of the marriage

⁵⁴ For example, provisions relating to marriageable age (s 11), marriage of minors (s 12), solemnization of marriage (Part IV) and foreign marriages (Part VA).

⁵⁵ *Matrimonial Causes Act 1959-66* (Cth) s 23.

⁵⁶ The new Act generated much public debate. The 'no-fault' provision was the main focus of this debate. Supporters of the new Act said that the new approach would be more dignified, less costly and reduce the length of time of proceedings before the courts because parties would no longer need to argue the existence of fault-based grounds before the Court. Opponents saw it as a direct attack on the institution of marriage and thought that it would lead to the breakdown of the family by making divorce too easy, and would make it easy for husbands to avoid their responsibilities to support their wives and children': Family Court of Australia, *Australian law on divorce - Brief historical background* <http://www.familycourt.gov.au/education/html/divorce_law.html> at 23 March 2004.

⁵⁷ Family Court of Australia, *Australian Family Law - The Constitutional Framework* <<http://www.familycourt.gov.au/education/html/Constitution.html>> at 23 March 2004.

⁵⁸ *Ibid.*

⁵⁹ Although Western Australia did not refer its powers, the Western Australian State Family Court exercises federal jurisdiction under the *Family Law Act 1975* (Cth), thus this Act now applies to all children in WA as far as parental responsibility, residence, contact and maintenance are concerned.

⁶⁰ See Cheryl Saunders 'Collaborative Federalism' (2002) 61 *Australian Journal of Public Administration* 69.

⁶¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1974, 4321 (Gough Whitlam, Prime Minister); Commonwealth, *Parliamentary Debates*, Senate, 29 October 1974, 2039 (Senator James McLelland), Commonwealth, *Parliamentary Debates*, Senate, 29 October 1974, 2031 (Senator Allan Missen); cited in Family Court of Australia, *A Separate Family Court of Australia* <<http://www.familycourt.gov.au/education/html/separate.html>> at 23 March 2004.

should be the most important consideration in Family Court decisions was also emphasised. One of the reasons for transferring family law jurisdiction to a federal court, rather than leaving it with the State courts, was said to be that family disputes and criminal law should not be dealt with in the same forum or manner.⁶² The new court was also to have simpler procedures and was to reduce the formality of the court process.⁶³

Considering the changes that have occurred in Australian society and the growth of the population since the Family Court was established, it is not surprising that it has become one of the largest courts in the country. It has 53 Judges, seven Judicial Registrars, a staff of 688 and an annual budget of approximately \$117 million. In 2001-02 18 772 applications for divorce were lodged with the Court, and it made 17 492 interim orders, and 1 112 final orders.⁶⁴ The Court has registries throughout Australia, including regional centres, and like all federal courts in Australia, it is self-administered – a topic to which I will return.

IV THE MODERN PERIOD: 1977 TO THE PRESENT

During the intermediate period the federal judiciary grew from 13 judges in 1957 to 20 judges in 1974 (shortly prior to the establishment of the two new federal courts) to about 60 judges by the end of 1976. At that time the State and Territory senior judiciary comprised some 107 members, although many of the Territory judges were also Federal Court judges. By the end of the period 1956-76, very substantial changes in the make-up of the federal judiciary had taken place. Two substantial courts had been created, each with important areas of federal jurisdiction, and each having the capacity to expand substantially. Two more federal courts were to be created in the modern period: the Industrial Relations Court of Australia in 1995, and the Federal Magistrates Court of Australia in 1999.

A *The Family Court of Australia*

The history of federal courts reveals the problems of divided jurisdiction but, as these courts have evolved, ways have been found to overcome some of the problems and to reduce others. In the Family Court difficulties arose because of the limits to the Court's jurisdiction to make orders about children. It was originally confined to children of a marriage, as a necessary consequence of the limitation upon the Commonwealth's legislative powers under s 51(xxii) and (xxiii) of the *Constitution*. A partial solution to the serious problems that this caused in a society in which family structures were rapidly changing was found in another section of the *Constitution*, s 51(xxxvii), which confers legislative power upon the Parliament with respect to matters referred to it by one or more of the Parliaments of the States. So it was that in the 1980s all the States, except

⁶² Commonwealth, *Parliamentary Debates*, Senate, 29 October 1974, 2043 (Senator James McLelland).

⁶³ See Family Court of Australia, *Australian Family Law - The Constitutional Framework* <<http://www.familycourt.gov.au/education/html/Constitution.html>> at 23 March 2004.

⁶⁴ See 'Report on Court Performance' in Family Court of Australia, *Annual Report 2001-02*, 27-32.

Western Australia, referred legislative power over ex-nuptial children to the Commonwealth, thus enabling jurisdiction (federal jurisdiction) in such matters to be conferred upon the Family Court of Australia.⁶⁵ The subject-matter of referral included the power to legislate in relation to custody, guardianship and access to children, the maintenance and expenses of children and child-bearing and, in respect of New South Wales, Victoria and Tasmania, the determination of a child's parentage for the purposes of Commonwealth law. The referral did not, however, extend to child welfare and protection, adoption or juvenile justice, which remain the responsibility of the States.⁶⁶ The use of s 51(xxxvii) to allow federal jurisdiction to be exercised in matters now seen as requiring a uniform national approach represents another important step in the evolution of federal courts. As we shall see later, references under s 51(xxxvii) also provide a secure foundation for an important element of the Federal Court's jurisdiction in commercial cases.

Unsurprisingly, given the nature of families and the division of legislative powers in our federation, family law seems to have a particular capacity to give rise to jurisdictional questions. Most recently they have arisen concerning the Family Court's decision that it has jurisdiction concerning the welfare of children held in detention under the provisions of the *Migration Act 1958* (Cth).⁶⁷

The special problems with which the Family Court has had to deal include the very high proportion of people who appear before the Court unrepresented, often in cases involving their children.⁶⁸ Particularly difficult problems also arise when child abuse allegations have to be dealt with. In these, and in many other areas,

⁶⁵ See *Commonwealth Powers (Family Law - Children) Act 1986* enacted in each NSW, Victoria, Queensland, South Australian and Tasmania.

⁶⁶ Note that the Chief Justice of the Family Court, the Honourable Alistair Nicholson, recently suggested that referral of child protection powers to the Commonwealth would facilitate the protection of children's human rights, as the Family Court is often faced with situations where child protection issues arise, but it does not have the power to make orders in that regard. All that it can do is refer the problem to the relevant child welfare agency. See Chief Justice Alistair Nicholson, 'Children and Young People: The Law and Human Rights' (*The Sixteenth Sir Richard Blackburn Lecture*, Centre for International and Public Law, 14 May 2002) 5. Because of the limits of the subject-matters of ss 51(xxi) and (xxii) of the *Constitution*, the Family Court also lacks jurisdiction to deal with property distribution on the breakdown of a de facto relationship. This issue is currently dealt with under a range of different State and Territory legislation, leading to differential treatment for de facto couples depending upon place of residence. States and Territories have agreed that a uniform scheme for de facto couples should be implemented and propose to refer power to the Commonwealth to do so. However, to date, the Commonwealth has not accepted this referral in its entirety. It has agreed to accept the referral in relation to heterosexual de facto couples but not in relation to homosexual de facto couples. See L Willmott, B Matthews and G Shoebridge, 'De facto Relationships Property Adjustment Law - A National Direction' (2003) 17 *Australian Journal of Family Law* 37.

⁶⁷ See *B v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 30 Fam LR 181 where the Full Court of the Family Court held that the welfare jurisdiction of the Family Court is similar to the *parens patriae* jurisdiction formerly exercised by the Court of Chancery in England, and exercised by the Supreme Courts of the States and Territories. But see the High Court's decision in *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 31 Fam LR 339.

⁶⁸ See Family Court of Australia, 'Chief Justice Launches New Self Represented Litigants Project' (Press Release, 5 December 2000). At the time, 37% of all appearances were by persons representing themselves: <<http://www.familycourt.gov.au/media/html/represented.html>> at 23 March 2004.

the Family Court has developed innovative responses,⁶⁹ and I note them as examples of one aspect of the evolution of a federal court with an especially difficult and specialised role.

B The Industrial Relations Court of Australia

The creation of the Industrial Relations Court of Australia on 30 March 1994⁷⁰ followed the precedent established in 1904 in the Commonwealth, and found elsewhere as well, of specialist industrial courts and tribunals. The pattern was reflected in the early Federal Court, which was established with two divisions, an industrial division and a general division. Some judges were appointed only to the industrial division and the consent of the Chief Justice was required before they could hear a case in the general division.

The Industrial Relations Court was created to exercise the jurisdiction in industrial relations matters previously conferred upon the Federal Court, as well as an extensive new jurisdiction in cases of unlawful dismissal.⁷¹ Most of the 13 judges appointed to the new Court, including its Chief Justice, were already members of the Federal Court at the time of their appointment as judges of the Industrial Relations Court and those who were not received additional commissions as judges of the Federal Court.⁷² Although the Court still exists, its practical operation was short-lived as much of its jurisdiction was transferred back to the Federal Court by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). At the same time the separate divisions of the Federal Court were abolished. This ended the practice, which began in 1904 and which still exists in other systems, of the Commonwealth making special provision for the hearing of industrial matters in federal courts.

C The Federal Court of Australia

Since I am of course most familiar with the history of the Federal Court I shall use its development to discuss some important elements common to the recent evolution of all the courts created by the Parliament. Those elements are: self administration, procedural reform, the development of the doctrine of accrued federal jurisdiction over entire 'matters', cross-vesting, the reference of some legislative powers by the States to the Commonwealth and, finally, the continuing expansion of areas of Commonwealth legislative concern. As I shall show, the Federal Court has evolved over the past quarter of a century into a court of

⁶⁹ For example, the Self Represented Litigants Project. See the sources cited above n 68, and T Brown, R Sheehan, M Federico and L Hewitt, 'Resolving Family Violence to Children - The Evaluation of Project Magellan, A Pilot Project for Managing Family Court Residence and Contact Disputes When Allegations of Child Abuse Have Been Made' (2001) Family Court of Australia, <<http://www.familycourt.gov.au/papers/html/magellan.html>> at 23 March 2004.

⁷⁰ The Industrial Relations Court of Australia was created by the *Industrial Relations Reform Act 1993* (Cth).

⁷¹ See *Industrial Relations Reform Act 1993* (Cth) pt 7, div II.

⁷² Federal Court judges appointed to the Industrial Relations Court of Australia were Wilcox J (as Chief Justice), Northrop, Keely, Spender, Gray, Ryan, Lee, von Doussa, and Beazley JJ. New judges appointed directly to the Court and also receiving commissions as Federal Court judges were Marshall, North, Moore and Madgwick JJ. See Industrial Relations Court of Australia, *Annual Report 1996-1997*, 16.

general jurisdiction in civil matters arising under laws made by the Parliament. It has also evolved into one of Australia's largest intermediate appellate courts.

A lecture on the governance of courts is not likely to be over-subscribed, but the audience for such a lecture is nevertheless likely to be larger than for a lecture on case management and procedural reform. These, however, are important matters and there is a relationship between all of them. They centrally concern the evolution of federal courts and deserve to be mentioned here, even if briefly.

In 1904, the first federal court created by the Parliament had innovative procedures and functions. Seventy years later, when the establishment of a new federal court was being considered, one of the arguments advanced in favour of such a court was that it would enable the Commonwealth to become involved in reforms to court practice and procedure (reforms which, as those of us who were in practice at the time can recall, were badly needed).⁷³ As it happened, the Federal Court did quickly establish a reputation as an innovative court. It was a new court, keen to show what could be done, and the 'Commonwealth' did indeed become involved in reforms to court practice and procedure, but not primarily through the executive or legislative branches. The reforms originated from within the judicial branch. The new court became the first in Australia to introduce the principles of case management for virtually all cases, a revolutionary step in Australia at the time. The Court also quickly established itself as a leader in other areas of procedural reform and was an early pioneer in other fields, including information technology⁷⁴ and court-annexed assisted dispute resolution or ADR. (This can perhaps be seen as an evolution since it was not an entirely new concept in federal courts – conciliation for the prevention and settlement of disputes within the court's jurisdiction was one of the main objects of the first federal court the Parliament created.) Some of the Federal Court's early ventures into technology seem antiquated now, but they were important innovations at the time, and necessary to enable a new court to hear urgent applications in cities where there was no resident Federal Court judge. The reforms have continued. They have been fostered and, to some extent, enabled by the changes that later occurred in the governance of the Court as it assumed responsibility for its own administration.

1 Self-Governance

A little over a decade after the establishment of the two new federal courts a revolutionary change occurred in their governance. In 1990, following the earlier example of the High Court in 1979,⁷⁵ the Federal Court of Australia and the Family Court of Australia were each given the responsibility for their own administration. They have had that responsibility, and have managed and

⁷³ See Second Reading Speech, Superior Court of Australia Bill 1973 (Cth): Commonwealth, *Parliamentary Debates*, Senate, 12 December 1973, 2725 (Lionel Murphy, Attorney-General). See also Bowen, above n 52, 197.

⁷⁴ It was the first Australian court to establish, in 1994, a national court-based video-conferencing facility.

⁷⁵ See *High Court of Australia Act 1979* (Cth) s 17.

publicly accounted for it, ever since.⁷⁶ In point of form, responsibility for the administration of the Federal Court rests with its Chief Justice who is assisted by the Registrar.⁷⁷ In fact, governance of the Federal Court of Australia is collegiate in nature. It occurs through the work of committees of judges and registry staff, and through twice-yearly meetings of the whole Court at which important questions of policy are discussed and determined. The collegiate structure of the Court is still evolving.

Judicial self-governance enlarges the role of a court and the areas in which judges must become involved. A self-administered court assumes responsibility for a substantial budget and a large staff. The whole complex of tasks associated with the administration of a substantial public institution has to be undertaken. In the Federal Court there is no administrative task that is not undertaken within the Court's own administration. The tasks range from the purchase of small items of stationery to the assessment and acquisition of computer systems costing millions of dollars, and from the care and maintenance of libraries to the conditions of service of the Court's staff. The list extends even to property management. The figures are large. The Federal Court's budget for 2002-03 was some \$78 million and as at 30 June 2003 it employed some 368 staff.⁷⁸ One of the challenges facing self-administered courts is that they must endeavour to perform all their functions within the limits of the resources provided to them by the Parliament, notwithstanding that they have little control over their caseload, no control over their judicial size and no control over the amount of money allocated to them. (I must dispel one myth immediately: the Federal Court does not get to keep filing fees.)

As Justice Sackville has observed in an important recent paper,⁷⁹ self-governance changes the relationship between the courts and the other agencies of government. But, as he also points out, self-governance has provided a powerful impetus for the courts to become agents of change in the administration of justice since if courts are responsible for their own governance they cannot avoid responsibility for the proper administration of their part of the system of justice.⁸⁰ Importantly, self-administered courts remain accountable for their administration through requirements that include an annual report to the Parliament and other published material, and regular appearances by the Chief Executive and senior staff before a Senate Estimates Committee. I should, however, mention that the devolution of responsibility from the executive to the judicial branch of government carries with it an obligation upon the executive to provide the Court with adequate resources for the task. This in itself is a large topic and although

⁷⁶ The Commonwealth Administrative Appeals Tribunal followed the same model as from 1990: see *Administrative Appeals Tribunal Act 1975* (Cth) s 24A, amended by *Courts and Tribunals Administration Amendment Act 1989* (Cth), which took effect on 1 January 1990.

⁷⁷ See *Federal Court of Australia Act 1976* (Cth) s 18A, B.

⁷⁸ See Federal Court of Australia, *Annual Report 2002-03*. At least \$16 million, however, relates to property expenses for the Court's several courthouses. The amount of truly discretionary expenditure is quite small.

⁷⁹ Justice Ronald Sackville, 'Courts in Transition: An Australian View' (2003) *New Zealand Law Review* 185.

⁸⁰ *Ibid* 197.

the Federal Court has, for most of its history, been adequately resourced, some important longer-term issues of structure remain to be resolved.

2 The Docket System

The recent history of the Federal Court provides some good examples of self-administration leading to important reforms within the judicial system. The allocation of cases to dockets is one of them. Faced with a rapidly enlarging caseload on the one hand and the legitimate expectation that the Court would manage its resources efficiently, the Court itself embarked upon an investigation of how the most efficient courts in the common law world managed their case load. The Court being self-administered, there was no difficulty in engaging the most appropriate consultant of the Court's choice. The Court then proceeded to examine possible reforms in a measured, consultative and collegiate way. The consequence was a collegiate decision in the late 1990s to move from the old system of master calendars to what has become known as the individual docket system.⁸¹ Under the new system, each case is randomly allocated to a judge at the time of filing and the judge then manages the case, together with all others in the judge's docket, until trial and judgment or earlier resolution of the case. In my view, this system has worked very well, an opinion that appears to be shared by the members of the profession, who are generally strongly supportive of it.⁸² It has also complemented the Court's continuing work in improving its case management procedures and rules.

Two important points emerge: first, the change to the new system – revolutionary in Australia – was a collegiate response to the Court's need to become more efficient and, secondly, the whole process was underpinned by, and represented the workings of, judicial self-governance. Thus it was that one evolution led to another. The process did not stop there, however, and one more innovation should be mentioned before I consider the evolving jurisdiction of the Court.

Under the master calendar system, the Court was accustomed to having specialist lists in Melbourne and Sydney. This was not readily compatible with the new system and in any event there was a need to broaden the opportunities for judges with specialist knowledge and interest in areas such as admiralty, intellectual property, corporations law and taxation to manage and hear cases of that nature. We therefore evolved a system in Melbourne and Sydney under which judges join a panel of judges to whom cases in areas of their speciality are randomly allocated.⁸³ Judges joining such a panel do so on the understanding that they will take an active part in programs of judicial studies that the Court conducts in specialist areas. To take admiralty as an example, the judicial studies program for 2003 (in which the Court's admiralty marshals also take part) included a day of

⁸¹ An overview of the Individual Docket System can be found on the Federal Court's website: <http://www.fedcourt.gov.au/pracproc/aboutct_IDS> at 23 March 2004.

⁸² See, eg, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) ch 7.

⁸³ An overview of the panel system can be found on the Federal Court's website: <http://www.fedcourt.gov.au/pracproc/aboutct_IDS.html> at 23 March 2004.

lectures by a master mariner, a day of academic papers and seminars and a further day of explanation and inspection of port facilities.

3 An Evolving Jurisdiction

I turn now to the Court's evolving jurisdiction. One of the points made against the establishment of the Federal Court was that there would be disputes and uncertainty about the limits of State and federal jurisdiction – the so-called 'arid jurisdictional disputes'. An attempt to avoid this problem cooperatively by complementary State, Federal and Territory legislation cross-vesting State and Territory jurisdiction in federal courts, and (uncontroversially) vice versa, was made in 1988 in what became known as the cross-vesting scheme. The scheme worked very well in practice and jurisdictional disputes all but disappeared, but in 1999 the High Court held in *Re Wakim; Ex parte McNally*⁸⁴ that the State to federal cross-vesting elements of the scheme were invalid. The other important elements of the scheme still exist, however, and it continues to perform a useful function. Cases are still transferred between Australian courts under the scheme, including to the Federal Court in matters of existing federal jurisdiction. The partial invalidity of the cross-vesting scheme had the immediate effect of removing (but only temporarily) the underpinning from the Federal Court's growing workload in cases under the Corporations Law, a jurisdiction that it had been exercising since 1991, but the broader impact proved to be very much less than was feared at the time. This is because of the confirmation, early in the Court's history, and again recently, of its accrued or pendant jurisdiction in 'matters' of a federal character.⁸⁵

In its early years, the Federal Court attracted many cases under s 52 of the *Trade Practices Act*. Many, if not most, of these cases also involved conduct that might have given rise to a cause of action under State law, including at common law and in equity. It was in such a context that it was confirmed by the High Court in the early 1980s that the Court had an accrued or pendant jurisdiction to hear and determine the whole controversy between the parties once a federal issue had been raised.⁸⁶ This is so whether the federal aspect is part of the claim or is raised by way of a cross-claim or defence, and whether or not the federal issue is decided against the party raising it, unless the assertion of the federal issue is merely 'colourable'.⁸⁷

All federal courts have this jurisdiction, including the High Court, but its role at this time was particularly important for the Federal Court since its effect was to give the Federal Court a broad commercial jurisdiction through the lens of the *Trade Practices Act*. The question assumed a special importance in the early days

⁸⁴ (1999) 198 CLR 511.

⁸⁵ For a discussion of the role of the cross-vesting scheme and accrued jurisdiction in creating a single national judicial system through a plurality of courts see French, above n 43.

⁸⁶ See especially *Phillip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 513; *Fencott v Muller* (1983) 152 CLR 570. See also *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212. See also the discussion in French, above n 43.

⁸⁷ Justice James Allsop, 'Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002' (2003) 23 *Australian Bar Review* 29, 42.

of the Court since its jurisdiction in cases under the very popular s 52 was, until 1987, exclusive.⁸⁸ In the absence of State to federal cross-vesting, the broad accrued jurisdiction of federal courts – including the Family Court – retains its importance.⁸⁹

Section 32 of the *Federal Court of Australia Act 1976* (Cth) provides for another form of jurisdiction, associated jurisdiction:

- (1) To the extent that the Constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked.
- (2) The jurisdiction conferred by subsection (1) extends to jurisdiction to hear and determine an appeal from a judgment of a court so far as it relates to a matter that is associated with a matter in respect of which an appeal from that judgment, or another judgment of that court, is brought.

In this way the Federal Court has jurisdiction under all heads that could be conferred under sections 75 and 76 of the *Constitution*, if a matter brought before the court is associated with a matter that falls within the express jurisdiction of the Federal Court.⁹⁰

The firmly established accrued jurisdiction of the Federal Court, and its 'associated jurisdiction' under s 32 of the *Federal Court of Australia Act 1976* (Cth), greatly reduce, and for practical purposes virtually eliminate, the risk of a case falling into a jurisdictional hole. This is particularly important in commercial litigation, where the presence of accrued or associated jurisdiction is necessarily determined in the context of the numerous specific conferrals of jurisdiction under Commonwealth legislation regulating bankruptcy and insolvency, competition in trade and commerce, consumer protection (including conduct and product standards), corporations, financial transactions, general insurance, insurance agents and brokers, life insurance, marine insurance, and superannuation. Moreover, if any additional jurisdictional basis is needed in an unusual case it may well be found in s 39B(1A) of the *Judiciary Act*.

It should also be noted that the partial invalidation of the Corporations Law scheme in *Re Wakim*⁹¹ led to the States referring power to the Commonwealth under s 51(xxxvii) to enact a uniform corporations law in Australia.⁹² As previously mentioned in relation to the Family Court, the referral of powers has played an important part in the evolution of federal jurisdiction.

⁸⁸ See Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002) 140. See also Bowen, above n 52, 191.

⁸⁹ Leslie Zines, 'Federal, Associated and Accrued Jurisdiction' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 298.

⁹⁰ For a comprehensive treatment of the important topic of accrued and associated jurisdiction, see Allsop, above n 87; Zines, above n 88, 137-49; Justice Bradley Selway, 'Interaction between Federal and State Jurisdictions: Chapter III - Some Implications and Conundrums' (Paper presented to the Federal Court Judges' Conference, Melbourne, 30 August 2001) 8-13.

⁹¹ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

⁹² See *Corporations Act 2001* (Cth).

The original model of jurisdictional conferral upon the Federal Court involved separate conferrals by individual Acts. Initially there were about 10 such Acts, although their breadth and importance gave a far greater jurisdiction than their small number might have suggested. The number of Acts conferring jurisdiction in this way has increased steadily and now exceeds 150.⁹³

As well as the Court's important public law jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and its original jurisdiction to hear 'appeals' from the Administrative Appeals Tribunal, since s 39B of the *Judiciary Act* was introduced in 1983 the Court has had much the same 'constitutional writ' jurisdiction as the High Court.⁹⁴

The Court has also become an important trial and intermediate appellate court in intellectual property matters. Since 1987 it has had original civil jurisdiction in matters concerning patents, designs, trademarks and copyright. This jurisdiction is concurrent but the Court has exclusive appellate jurisdiction in these areas.⁹⁵

Other important areas of jurisdiction include admiralty (concurrent original jurisdiction), Commonwealth electoral matters (concurrent original jurisdiction and exclusive appellate jurisdiction), human rights, taxation (exclusive jurisdiction) and workplace relations (concurrent original jurisdiction and exclusive appellate jurisdiction).⁹⁶

Although the practice of conferring jurisdiction by specific provision continues,⁹⁷ in 1997 the *Judiciary Act* was amended to confer upon the Court original jurisdiction in any matter in which the Commonwealth is seeking an injunction or a declaration, in any matter arising under the *Constitution* or involving its interpretation and, most importantly, in any matter 'arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter'.⁹⁸ With the enactment of these provisions, the Federal Court became, for practical purposes, a court of general jurisdiction in civil matters arising under federal law, and a milestone in the evolution of federal courts was passed.

⁹³ Federal Court of Australia, *Annual Report 2001-02*, Appendix 5, 116-19.

⁹⁴ The Federal Court also deals with matters remitted from the High Court (pursuant to *Judiciary Act 1903* (Cth) s 44).

⁹⁵ See, eg, *Copyright Act 1968* (Cth) s 135AP.

⁹⁶ Also of note is the complementary jurisdiction in matters concerning the trans-Tasman market which the Federal Court of Australia and the High Court of New Zealand share under the *Trade Practices Act 1974* (Cth) s 46A and the *Commerce Act 1986* (NZ) s 36A respectively. This jurisdiction is supported by legislation in both New Zealand and Australia providing that the judges of New Zealand may sit as judges in Australia, and Federal Court judges may sit as judges in New Zealand: see *Trans-Tasman Mutual Recognition Act 1997* (Cth). See also Justice B A Beaumont and Justice I Barker, 'Trans-Tasman Legal Relations - Some Recent and Future Developments' (1992) 66 *Australian Law Review* 566.

⁹⁷ For example, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) confers jurisdiction on the Federal Court. A recent application for an injunction under that Act was heard by the Federal Court in *Minister for the Environment & Heritage v Greentree* [2003] FCA 857.

⁹⁸ See *Judiciary Act 1903* (Cth) s 39B(1A).

4 The Native Title Jurisdiction

One other area of original jurisdiction should be mentioned – native title. In 1993 jurisdiction was conferred upon the Court to make determinations of native title. The caseload is very large – 886 cases have been lodged with or referred to the Court since 1993. As well as presenting all the challenges of a new area of law, the cases present novel challenges of management, including *on country* hearings in some of the most remote locations in the world. In some instances, GPS coordinates need to be read into the transcript because the available maps are inadequate to identify the locations in question. Notwithstanding the remoteness of the places where it sits, the Court functions in these hearings with technology as advanced as any to be found in the courtrooms of the capital cities, and in some cases more advanced. As a self-administered court, the purchase, development and deployment of this remote area technology have been decided upon and funded by the Court. The Court has also had to adapt its Rules in novel ways; the Rules now provide, for example, that the Court may take evidence by way of dance, or song or in groups.⁹⁹

In these cases the Court functions in conditions of remoteness and, on occasions, physical difficulty rarely if ever encountered by other courts.

D The Federal Magistrates Court

In 2000, yet another important step in the evolution of federal courts was taken. On 23 June of that year, the Federal Magistrates Court sat for the first time.¹⁰⁰ It was the first lower tier federal court to be created under Chapter III. The Court was established to provide a speedier, simpler and less expensive means for determining some of the less complex cases within the jurisdiction of the Federal Court and the Family Court. It was intended that the new court should have less formal procedures and that it should have a strong focus upon alternative dispute resolution.

The Federal Magistrates Court has rapidly established itself as a successful and innovative court. It has developed a substantial *Family Law Act* caseload, which presently accounts for some 80 per cent of its total work. It hears applications for divorce, maintenance, property disputes where the property is worth less than \$700 000 (or, with the consent of the parties, without limit), parenting orders, enforcement of orders made by either the Family Court or itself, location and recovery orders concerning children, determination of parentage, and recovery of

⁹⁹ Order 78 Rule 32 of the *Federal Court Rules* (Cth) provides:

If evidence of a cultural or customary subject is to be given by way of singing, dancing, storytelling or in any other way other than in the normal course of giving evidence, the party intending to adduce the evidence must tell the Court, within a reasonable time before the evidence is proposed to be given: (a) where, when and in what form it is proposed to give the evidence; and (b) of any issues of secrecy or confidentiality relating to the evidence or part of the evidence.

See Chief Justice Black, 'Native Title Practice and Procedure' (Speech delivered at the Njarra Legal Forum, Garma Festival, Arnhem Land, 23 August 2001). See also the papers of the *AJJA Technology for Justice 2002 Conference* (available at <www.aija.org.au> at 23 March 2004) and particularly Chief Justice Black, *Remote Courts: Taking the Courtroom Bush*, presentation.

¹⁰⁰ See *Federal Magistrates Act 1999* (Cth).

child-bearing expenses and child support. Some 40 per cent of all family law cases are now commenced in the Federal Magistrates Court and in 2002-03, it dealt with almost 60 000 applications.¹⁰¹

Although proportionately smaller, the general federal law workload of the Federal Magistrates Court is also assuming substantial importance. The Court shares eight principal areas of jurisdiction with the Federal Court, including bankruptcy, the judicial review of migration decisions, as well as judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), applications under the consumer protection provisions of the *Trade Practices Act*, unlawful discrimination matters, some matters under the *Privacy Act 1988* (Cth) and appeals from the Administrative Appeals Tribunal transferred to it from the Federal Court. Jurisdiction under the *Copyright Act 1968* (Cth) was recently conferred upon it.

The Federal Magistrates Court now hears most of the bankruptcy and unlawful discrimination cases formerly heard by the Federal Court. It is also taking an increasing share of the workload in migration cases. In 2002-03, almost 900 written judgments of the Federal Magistrates Court were delivered.¹⁰²

In his State of the Judicature address to the 13th Commonwealth Law Conference in April this year, Chief Justice Gleeson expressed a common understanding when he said he expected that, in time, the Federal Magistrates Court would become one of Australia's largest courts.¹⁰³

E Appellate Jurisdiction

It remains to consider the evolution of the appellate functions of the federal courts created by the Parliament.

As we have seen, one of the reasons for the establishment of the Federal Court was the need to relieve the High Court of Australia of the burden of appeals from the Supreme Courts of the Territories. (The High Court's jurisdiction in Territory appeals is almost as old as the Court itself, having begun in 1905 when the *Papua Act 1905* (Cth) conferred a right of appeal to the High Court of Australia from judgments of the Central Court of Papua.¹⁰⁴) Moreover, until the Federal Court was established, the High Court heard appeals in bankruptcy matters from the Federal Court of Bankruptcy and, of course, appeals from single Justices of the High Court sitting at first instance in the Court's original jurisdiction.

The early role of the Federal Court as the intermediate appellate Court for the Supreme Court of the Australian Capital Territory and the Supreme Court of the Northern Territory was important, but with the evolution of those courts and the establishment of separate appellate courts in those territories that jurisdiction has now come to an end.

¹⁰¹ Federal Magistrates Court, *Annual Report 2002-03*.

¹⁰² Federal Magistrates Court, *Annual Report 2001-02*, 11.

¹⁰³ Chief Justice Gleeson, 'State of the Judicature' (Speech delivered at the 13th Annual Commonwealth Law Conference, Melbourne, 17 April 2003). Available at <http://www.hcourt.gov.au/speeches/cj/cj_stateof.htm> at 23 March 2004.

¹⁰⁴ See *Papua Act 1905* (Cth) s 43(1).

The final appeal from the Supreme Court of the Australian Capital Territory to the Federal Court was heard in 2002. This was the last of some 900 such appeals which, over 16 years, made a substantial contribution to the jurisprudence of the Territory, and in some instances to the broader jurisprudence of Australia. The Federal Court remains the appellate court for one territory – it occasionally hears appeals from the Supreme Court of Norfolk Island. There are also occasional appeals from the Supreme Courts of the States and Territories in some federal cases, generally in the fields of workplace relations or intellectual property.

The process of evolution has, in a sense, turned a full circle. The Supreme Court of the Australian Capital Territory was originally established to relieve the High Court of the burden of appeals from the ACT Court of Petty Sessions. The Federal Court, set up partly to relieve the High Court of the burden of appeals from the ACT Supreme Court, has now been replaced in that respect by the Court of Appeal of the Australian Capital Territory.¹⁰⁵

Most appeals to the Full Court of the Federal Court are, however, and always have been, civil appeals from the decisions of the Court's own judges. The Federal Court now hears very few criminal appeals but it has one of the largest lists of civil appeals in the country. In 2001-02, for example, it completed 520 civil appeals¹⁰⁶ compared with 463 appeals completed by the New South Wales Court of Appeal in 2001 (494 in 2002),¹⁰⁷ some 225 by the Queensland Court of Appeal¹⁰⁸ and 158 by the Court of Appeal in Victoria.¹⁰⁹ Recently, the appellate jurisdiction of the Federal Court was significantly enlarged by the conferral of jurisdiction to hear appeals from the Federal Magistrates Court. There were 227 such appeals in 2002-03, most of them heard by single judges.¹¹⁰ The Court also has an important original jurisdiction to hear appeals on points of law from Commonwealth tribunals. As these tribunals have grown in size and importance so has the role of the Federal Court in appeals from them, particularly the Administrative Appeals Tribunal. Appeals to the Federal Court from the Defence Force Discipline Appeals Tribunal, although few in number, contribute to the development of Australian military law.

The work of the Federal Court as a large intermediate appellate court has been especially important in some of the areas of its specialist jurisdiction and the overall contribution for the Federal Court to the development of federal jurisprudence is reflected in the fact that in the first 26 years of its existence it delivered judgment in well over 25 000 cases.¹¹¹

¹⁰⁵ The relationship between the Federal Court and the ACT Supreme Court continues and many Federal Court judges now hold additional commissions as ACT Supreme Court judges and sit from time to time as members of the ACT Court of Appeal.

¹⁰⁶ Federal Court of Australia, *Annual Report 2001-02*, 28.

¹⁰⁷ See NSW Supreme Court, *Annual Report 2002*, 44.

¹⁰⁸ Supreme Court of Queensland, *Annual Report 2001-02*, 16.

¹⁰⁹ Supreme Court of Victoria, *Judges' Annual Report 2001*, 10.

¹¹⁰ Federal Magistrates Court, *Annual Report 2002-03*, 50.

¹¹¹ See Chief Justice Black, '25th Anniversary Speech for the Federal Court of Australia' (Speech delivered at the 25th Anniversary sitting of the Federal Court of Australia, Sydney, 7 February 2002); Federal Court of Australia, *Annual Report 2001-02*.

The Family Court too has an important appellate function. It hears appeals from its own judges and from federal magistrates in family law matters. In 2002-03, the appellate division of the Family Court disposed of 278 appeals.¹¹² It would be hard to underestimate the importance of some of these appeals in the controversial and still-developing areas of family law.

Unlike the Family Court, the Federal Court has no appellate division. In this respect the evolution of the Federal Court has not followed the same path as some other large courts. Whilst the general trend elsewhere has been towards the establishment of separate appellate divisions, or separate courts of appeal, Federal Court judges generally are strongly committed to the dual role of trial and appellate judge and I have argued against the establishment of a separate appellate division in submissions to the Australian Law Reform Commission.¹¹³ It is my view that a combination of trial and appellate experience at the Federal Court level offers many benefits for the Court in both its appellate and trial work.

The enlargement, over the years, of federal subject matter jurisdiction, as well as the existence until recently of Territory appellate jurisdiction, has also meant that the appellate work of the Federal Court has extended into areas well beyond those of exclusively federal concern.

F An International Role

It is tempting to mention some other aspects of the evolving role of federal courts but I shall confine comments to only one – the international role of these courts. Some pointers to this can be found in the Commonwealth statutes of many years ago where special authorisation was given to federal judges to sit as judges in courts of the South Pacific. One such judge was Sir John Nimmo, to whom, in the language of the Bar, I am directly related since he was my Master's Master. He served for some time as Chief Justice of Fiji. In more recent times Federal Court judges have sat as judges of the Supreme Court of Fiji, the Court of Appeal of Tonga, the Privy Council of Tonga and the Court of Appeal of Vanuatu. We have developing links with the judiciaries of Indonesia, the Philippines and Vietnam, and provide funding of more than \$500 000 annually for a judicial training program in Indonesia. We have established law libraries in Tonga and Vanuatu and most recently have begun to give substantial assistance to the library of the High Court of Kiribati. These ventures, in addition to our continuing contacts with judiciaries in New Zealand, Canada, the United Kingdom and the United States are particularly satisfying.

V CONCLUSION: THE FUTURE?

The evolution I have been describing has been substantial, but no more than might have been expected considering that disputes about matters of special

¹¹² Family Court of Australia, *Annual Report 2002-03*, 32.

¹¹³ Submission to Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* Report No 89 (2000).

federal interest, including families and commerce, increasingly cross State and indeed national boundaries. I do not think that this expanded jurisdiction has caused undue uncertainty or increased cost since most of the jurisdictional problems that have emerged in the past have been shown to be capable of resolution. Nor do I feel that the evolution of federal courts has created the fragmentation that some feared.

On the contrary, we can now speak confidently of an Australian judiciary. Although the judicial system is comprised of quite distinct elements in a formal sense, the Australian judiciary is a reality just as much as the Australian legal profession is now a reality. I believe that federal courts, at all levels, have played an important part in that development. This view is based on more than my experience as a member of the Federal Court; it goes back to my experience as a barrister during the 1970s and 1980s when these developments began.

As to the future of the Federal Court? I would not like to see the Court become substantially larger. Whilst it is essential that the Court have the judicial resources necessary for it to perform its functions efficiently and speedily, the present size of the Court enables it to maintain a strongly collegiate character alongside its national character. Its present size has other advantages too, which I would not like to see put at risk by any substantial increase.

In the early history of the Federal Court and the Family Court there were suggestions at times that the two should be in some way linked, and even that the Family Court might become a division of the Federal Court. This idea seems to me, however, to have been based more upon the flawed assumption that big organisations are more efficient than smaller ones, than upon any informed understanding of the administration of modern courts. Nothing has been heard of such a suggestion of recent times. Moreover, apart from the very real problems of undue size, there has been no diminution in the highly specialised requirements for the exercise of family law jurisdiction. Indeed, as changes in Australian society produce still more challenging problems, even greater skills are required of those who have to resolve, according to law, the problems of families and the children of relationships. The three new federal courts can exist together in harmony but there is no good reason to join them together.

What of a criminal jurisdiction for federal courts? That, as they say, is a question for another day, although at least in relation to some commercial matters, that day may now be approaching, and in any event a strong case can be made for appellate jurisdiction in some federal criminal matters. Although, as we have seen, federal courts have exercised a criminal jurisdiction in trials on indictment, this has been a rarity and the criminal jurisdiction of federal courts has been essentially of a summary nature. Whether this should change, and to what extent, may be the next debate in the rich history of the evolution of Australia's federal courts.