Federal Jurisdiction — Past, Present and Future

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THE AUSTRALIAN FEDERAL JUDICIAL SYSTEM

Edited by Brian Opeskin & Fiona Wheeler
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AUSTRALIAN lawyers have an unfortunate history of regarding jurisdiction as a 'peculiarly arid study'.[1] Consequently, they have not settled upon a coherent conceptual framework within which to analyse jurisdictional issues. While jurisdictional difficulties undoubtedly involve 'technical, complicated, difficult and not infrequently absurd'[2] constitutional law questions, they are no more 'arid' than disputes concerning the scope of executive and legislative power and ought not to be reduced to the simple conundrum of whether the parties have litigated in the appropriate forum. Broadly speaking, the distribution of judicial power within a federation necessarily effects an allocation of political power in a manner analogous to the distribution of legislative and executive power. In North America, there is no more striking illustration than the recent clash between the Supreme Court of Florida (a State jurisdiction) and the Supreme Court of the United States (a federal jurisdiction), which decided the winner of the Presidential election in 2000. Stated simply, the structure of the Australian judicial system and the allocation of jurisdiction within that system matter and have crucial implications for the rule of law and the federal system.

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1. O Dixon 'The Law and the Constitution' in SHZ Woinarski (ed) *Jesting Pilate* (Melbourne: Law Book Co, 1965) 54.
2. Z Cowan & L Zines *Federal Jurisdiction in Australia* 2nd edn (Melbourne: OUP, 1978) 'Introduction' to first edition, xiv.

Why, then, is Australian federal jurisdiction the poor cousin of United States federal jurisdiction, neither exciting the same passion[3] nor attracting similarly sophisticated debate?[4] Indeed, why is it that there is 'a great deal of ignorance in the legal profession concerning federal jurisdiction, both in its constitutional outlines and its detailed application?' As Justice Gummow notes in the foreword to this book, '[E]ven among those whose legal practices oblige them to know better ... one gets the impression from time to time that federal jurisdiction is exercised without those doing so appreciating it'.[5] Apart from some difficult, almost metaphysical[6] jurisprudence, there are a number of important structural and historical factors which distinguish the development of federal jurisdiction and federal courts in the United States and Australia, such as the 'autochthonous expedient' (section 77(iii) of the Constitution); the relatively recent emergence of significant Australian federal courts; and the various cross-vesting schemes which, when fully operational, blurred jurisdictional distinctions and ensured that it was effectively impossible for an Australian superior court to find it lacked jurisdiction in a particular case.[7]

Nevertheless, federal jurisdiction is now extremely topical and Australian lawyers have some catching up to do. Federal jurisdiction's rise to prominence coincided with the High Court's decision in *Re Wakim,*[8] which decided that federal courts could not exercise State jurisdiction and consequently that provisions of the cross-vesting legislation purporting to vest State jurisdiction in federal courts were unconstitutional. *Re Wakim*[9] prompted the recent referral of State corporation power culminating in the Corporations Act 2001 (Cth) and the return of unfettered corporations law jurisdiction to federal courts. Other recent developments include

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3. For a rather extreme example, see A Dershowitz *Supreme Injustice: How the High Court Hijacked Election 2000* (New York: OUP, 2001).
4. The seminal US examples include: P Bator, PJ Mishkin, DL Shapiro & H Wechsler (eds) *Hart and Wechsler's The Federal Courts and the Federal System* 3rd edn (New York: Foundation Press, 1988); H Hart 'The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic' (1953) 66 Harv L Rev 1362. A recent example is E Purcell Jr *Brandeis and the Progressive Constitution: Erie, the Judicial Power and the Politics of the Federal Courts in Twentieth Century America* (New Haven: Yale UP, 2000). Cowan & Zines supra n 2 is an excellent Australian text: it is to be hoped that a third edition will be forthcoming.
5. Opeskin & Wheeler, vi-vii.
6. For a discussion of the elusive concept of 'matter' which underpins Chapter III of the Constitution, see L Aitken 'The Meaning of "Matter": A Matter of Meaning – Some Problems of Accrued Jurisdiction' (1988) 14 Mon LR 158.
7. G Griffith, D Rose & S Gaegeler 'Choice of Law in Cross-Vested Jurisdiction' (1988) 62 ALJ 698.
8. (1999) 198 CLR 511.
9. The other (and arguably more important factor) was the High Court's decision in *R v Hughes* (2000) 202 CLR 535 which casts doubt on the ability of Commonwealth officers to carry out functions required by State law.

the establishment of the Federal Magistrates Court and the Australian Law Reform Commission's excellent review of the Judiciary Act 1903 (Cth).[10]

Clearly, this chapter of Australia's legal history is still being written.[11] The question is: how well does this book advance the task? A secondary question might be: does the book achieve the editors' goal of being a 'fresh examination of the subject from a broad perspective'?[12]

The book's title encapsulates its strengths and weaknesses. Within its ambit is the entire Australian federal judicial system. This is an enormous subject, covering federal jurisdiction, federal judicial power, the doctrine of the separation of powers, and the history of the federal courts and their relationship with State and territory courts. The editors have divided the book into four parts covering the following areas: (i) Recurrent Themes; (ii) Federal Courts; (iii) Federal Jurisdiction; and (iv) Federal Judges. Each part has three or four papers of approximately 30 pages in length. An initial impression is that although all of the papers in themselves are quite good, they form an eclectic whole where sustained analysis has been sacrificed for breadth. At least in part this may be symptomatic of the editors succumbing to a common affliction in books of this type – namely, to seek contributions from prominent judges, academics and practitioners, and then to fashion the book around the resulting papers. It is always a delicate balancing act to reconcile contributions from what the dust cover describes as a 'prestigious group of experts', whose views are undoubtedly influential, with the aspiration of genuinely contributing to legal scholarship.

The book's strength is that it captures much difficult and disparate law and presents it in an accessible format. It will be particularly useful for those entering the realm of the federal judicial system for the first time and also for those who, though acquainted with Chapter III of the Constitution, wish to update their knowledge in this dynamic field of discourse. For example, Professor Blackshield's paper, 'The Appointment and Removal of Federal Judges' succinctly compares Australian and United States law and discusses Justice Callinan's case and Justice Vince Bruce's departure from the New South Wales Supreme Court. Constitutional law students will benefit from Professor Saunders' contribution, 'The Separation of Powers' and Dr Wheeler's 'Federal Judges as Holders of Non-Judicial Office', both of which comprehensively and critically examine the doctrine of separation of powers in Australia – always a favourite topic with university examiners.

The editors are also to be commended for including the Honourable Peter Nygh's paper, 'Choice of Law in Federal and Cross-Vested Jurisdiction', which

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10. ALRC *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation* Report No 92 (Oct 2001).
11. M Gleeson 'The State of the Judicature' (2000) 74 ALJ 147, 150.
12. Opeskin & Wheeler, xiii.

fundamentally re-examines sections 79 and 80 of the Judiciary Act 1903 (Cth). These sections (together with section 68 of the Judiciary Act) are certain to further command the High Court's attention in the near future. Unfortunately, Nygh's paper was written before the High Court's decision in *Pfeiffer v Rogerson*[13] and while it contains a number of insights (many of which have been taken up by the High Court), practitioners would now probably be better served in the first instance by turning to the Australian Law Reform Commission's recent summary.

Unfortunately, one consequence of the book's breadth is that many topics – especially those with a political or philosophical aspect – receive sparse coverage. Problematically, where such pieces have been included a wolf may lurk in sheep's clothing. An example is the joint paper by Dr Gavan Griffith QC[14] and Mr Geoffrey Kennett entitled 'Judicial Federalism', which is an interesting and valuable contribution but which is undoubtedly, though perhaps not obviously to the uninitiated, polemical. The paper examines the impact of federalism upon the Australian judicial system and outlines our system's structural context. However, Griffith and Kennett predominantly argue that a rigid application of the separation of powers doctrine will ultimately favour the investing of federal jurisdiction in State courts to the detriment of litigants and, of course, the federal courts themselves. More controversially, they suggest that the principles established in *Kable's* case[15] ought to be extended because 'a federal system embodying the rule of law and representative government' is a fertile source of constitutional implications supporting 'a more general protection of judicial power at the State level'.[16]

The real problem, and this is not the fault of Griffith and Kennett, is that the gap between descriptive papers such as Sir Anthony Mason's 'The Evolving Role and Function of the High Court' and Justice Beaumont's 'Managing Litigation in the Federal Court', and the more conceptually difficult (but ultimately more rewarding) papers such as Griffith and Kennett's 'Judicial Federalism' and Professor Allars' 'Federal Courts and Federal Tribunals: Pluralism and Democratic Values', is too wide. The book is let down by 'Recurrent Themes' – the first, and scene-setting section. As Griffith and Kennett realise, 'The working out of the consequences of a federal system of government in the judicial sphere [is] a large field of operations and one that in a work of limited compass must be discussed thematically rather than comprehensively'.[17] However, considering 'judicial federalism' (as defined by Griffith and Kennett) is responsible for current jurisdictional difficulties, it is to be regretted that the theoretical basis is left substantially in the hands of one paper.

13. (2000) 203 CLR 503.
14. The former Commonwealth Solicitor-General.
15. (1996) 189 CLR 51.
16. Opeskin & Wheeler, 59.
17. Ibid, 38.

This is exacerbated by the fact that Griffith and Kennett are more interested in establishing some extremely controversial propositions which colour the entire paper.

While the book is dedicated to the federal judicial system and not merely federal jurisdiction, the doctrine of accrued jurisdiction receives scant attention. Professor Zines interrogates the topic with his usual alacrity and skill, but even he cannot do justice to it in the six pages allocated. This is simply not good enough. Accrued jurisdiction is practically and theoretically crucial. Practically, lawyers and judges in the Federal and Family Courts grapple every day with technical questions about the reach of accrued jurisdiction. More significantly, accrued jurisdiction has unrivalled power to determine the Australian judicial system's future because it permits State law to be determined in federal jurisdiction. Consequently, it potentially transforms federal courts from specialised courts of limited jurisdiction into courts of general jurisdiction. As such, accrued jurisdiction presents a number of challenges, including questions of judicial legitimacy and, as noted by Professor Zines, it may indirectly enable the Commonwealth Parliament to deprive State courts of State jurisdiction by vesting accrued jurisdiction exclusively in federal courts.[18] Accrued jurisdiction therefore has the potential to raise institutional tensions between federal and State courts. Taken to extremes, it may permit the reallocation of judicial power within the federation in much the same way as recent jurisprudence concerning the Commonwealth Parliament's external affairs power has reallocated legislative power in favour of the Commonwealth.

There are signs that what may be termed the 'self-limiting' aspects of accrued jurisdiction are being discarded by the High Court. These include the following tenets: accrued jurisdiction only arises where an initial federal claim is not 'colourable'; accrued jurisdiction only arises where the federal component is a significant part of the controversy; and, most importantly, accrued jurisdiction is discretionary. While these self-limiting features themselves have a number of conceptual difficulties (especially the allegedly 'oxymoronic' nature of discretionary federal jurisdiction),[19] they may have a legitimate role insofar as they safeguard State law's integrity and minimise friction between State and federal courts. It is not so much alarming that the self-limiting aspects of accrued jurisdiction are disappearing, rather it is disappointing that they are being undone in a conceptual vacuum without sufficient debate. It is a missed opportunity that these issues are not delineated properly in the book. Other commentators have noted that they are 'fundamental and under-explored precepts of federal jurisdiction'.[20] While Australian

18. L Zines 'Federal, Associated and Accrued Jurisdiction' in Opeskin & Wheeler, 265-298, 267.
19. L Aitken 'The Toils of Laocoon: Aspects of Federal Jurisdiction After *Wakim*' (2000) 19 Aust Bar Rev 223, 226.
20. Ibid.

lawyers have been chided for their hypnotic fascination with Article III of the US Constitution in the past, it may prove that American abstention doctrines[21] will be a fertile source for comparative studies in the future.

It has to be said that one of the most intriguing aspects of the book is Justice Gummow's foreword. In it he asks:

> But what, after all, is so strange in those branches of government, which enact and execute laws of the Commonwealth, preferring, at least in some instances, to entrust the adjudication of matters arising under those laws to courts created and funded by the Parliament of the Commonwealth, whose judges are appointed under section 72 of the Constitution and whose forum is Australia as a whole?
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> If there is cause for dissatisfaction with fragmentation of the judicial structure it is with the unending fascination of State governments in the creation of new 'specialist' courts and tribunals.[22]

Of course, his Honour's remarks are not fully reasoned and it would be wrong to read too much into them. However, it is remarkable that Justice Gummow refuses to acknowledge the immense practical difficulties created by *Re Wakim,* a case which has been described as 'the most widely-hated constitutional decision of all time'.[23] Furthermore, federal jurisdiction has moved far beyond simply determining matters arising under federal statutes and it strains credibility to suggest otherwise. While one may not always agree with Justice Gummow's conclusions, his Honour certainly identifies the broad issues to be debated and, unlike Griffith and Kennett, he is unashamedly a wolf. This is what Australia needs – a passionate debate about the broader issues that transcends (but is informed by) the many difficult and technical cases, statutes and law review articles.

It might be said – although this is a matter of judgment upon which reasonable minds may differ – that the editors have placed too much importance on the traditional issues facing the federal judicial system. The doctrine of separation of powers and judicial independence are dealt with in great detail. However, these are well-trodden areas and although the authors have looked at them as freshly as possible, it is fair to say that they are, in constitutional law terms, yesterday's news. These areas must be covered in any work seeking to comprehensively, though not exhaustively, examine the federal judicial system, but it is suggested that in this case they have received disproportionate attention. Perhaps the balance would have been better

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21. See generally L Tribe *American Constitutional Law* 3rd edn (New York: Foundation Press, 2000) vol 1.
22. Opeskin & Wheeler, v.
23. A comment attributed to Professor Zines by B Opeskin 'A Valediction Forbidding Mourning' in A Stone & G Williams (eds) *The High Court at the Crossroads* (Sydney: Federation Press, 2000) 216-223.

struck if the editors had included a section focused on themes for the future addressing issues such as, for example, what recent High Court cases 'constitutionalising' aspects of the common law may mean for federal judicial power,[24] and the question of whether the dual system of State and federal courts reflected in Chapter III operates as a structural protection of civil and legal rights by preventing jurisdictional lacunae.[25] The latter question especially has some resonance with themes raised by Justice Gummow and Professor Allars. In all fairness, however, judging by the date of Justice Gummow's foreword, it seems that many of the papers were written in the first half of 1999 and the book was not published until the end of 2000. It should not be surprising, therefore, given the dynamism of this area, that the intellectual landscape has changed.

Clearly, this book will be a valuable resource for constitutional law students and practitioners. Its strength lies in its consolidating an extensive amount of legal history and case law. If the level of a book's success is determined by the extent to which it achieves its author's (or editor's) aims, then this book succeeds insofar as it is a sprightly examination of foundational concepts from a broad perspective. If one is disappointed in what it does not cover, then perhaps the problem lies not with the editors or contributors but with the level of debate in this country. One hopes, in the words of one of the editors, that this volume 'will come to be regarded not as the epilogue of a gothic novel but as the prologue of its engaging sequel'[26] for that is where its true value lies.

PAUL DEVLIN
Mallesons Stephen Jaques (Sydney).

24. *Lange v ABC* (1997) 189 CLR 520; *Pfeiffer v Rogerson* supra n 13. For a US study, see Purcell supra n 4.
25. As to structural constitutional analysis, see eg L Tribe 'Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation' (1995) 108 Harv L Rev 1221; T McAfee 'The Federal System as a Bill of Rights: Original Understandings, Modern Misreadings' (1998) 43 Vill L Rev 17.
26. B Opeskin 'Cross-Vesting of Jurisdiction and the Federal Judicial System' in Opeskin & Wheeler, 299-334, 334 discussing *Wakim* supra n 8.