

CONSTITUTIONAL LAW: FEDERAL JURISDICTION
AND RESHAPING INSTITUTIONS

**FEDERAL COURTS AND
AUSTRALIAN NATIONAL IDENTITY**

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The history of Australian federal courts, from the creation of the Commonwealth Court of Conciliation and Arbitration in 1904 until now, is part of the broader history of how Australians have come to see themselves and their relationship to courts as institutions of an evolving Australian government. Although unremarked in current historical studies about Australian national identity, significant changes in the conception of the Australian court system occurred in parallel with fundamental shifts in the creation, formulation and discernment of national identity. This article considers the history of the Australian federal courts alongside the processes of the formation of Australian national identity, as explored by Curran and Ward. This approach reveals much about the strengths and weaknesses of the federal court system today.

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I INTRODUCTION

In an article published in the *Law Quarterly Review* in 1935, the Hon Owen Dixon, then a Justice of the High Court of Australia, wrote:

But neither from the point of view of juristic principle nor from that of the practical and efficient administration of justice can the division of the Courts into state and federal be regarded as sound.¹

In 1963, less than 30 years later, Mr E G Whitlam QC, then Deputy Leader of the Opposition, declared:

Judges who are called on to interpret and apply statutes should be appointed by governments responsible to the parliaments which passed those statutes. On this basic principle alone one should agree ... that federal laws should be applied and interpreted by judges appointed by the federal government.²

It would be a mistake to conceive of the creation of the Federal Court of Australia as merely a pragmatic solution to rationalise the jurisdiction of the existing federal courts, although proponents commonly cited functional considerations in favour of its establishment. Instead, the history of this and the other federal Australian courts is part of a broader history of how Australians have come to see themselves and their relationship to courts as institutions of an evolving *Australian* government. In other words, the history of Australian federal courts is part of the history of Australian national identity. Their twin development throughout the later 20th and 21st centuries reveals points of shared interaction and influence which deserve attention.

In the post-Imperial age, societies, once expressly defined by their membership of the British Empire, have undeniably created new and sometimes distinct identities. At the same time, fading imperialism has required reform, sometimes significant, of the structures and institutions of government inherited from and previously overseen by the Empire. Australian historians have debated when, where, why and how Australian national identity was created, formulated or discerned; and the debate continues.³ The fundamental

¹ Justice Owen Dixon, 'The Law and the *Constitution*' (1935) 51 *Law Quarterly Review* 590, 606.

² M H Byers and P B Toose, 'The Necessity for a New Federal Court (A Survey of the Federal Court System in Australia)' (1963) 36 *Australian Law Journal* 308, 327. The comments of Mr Whitlam are also recorded here.

³ See, for example, the contributions of Christopher Waters, James Curran, Marilyn Lake, Sharon Crozier-De Rosa, David Lowe and Frank Bongiorno in Symposium, 'Nationalism and Transnationalism in Australian Historical Writing' (2013) 10(3) *History Australia* 7.

and parallel changes that have occurred in the conception of the Australian court system have, however, gone unremarked in current historical studies of Australian national identity. This omission should be redressed. This article examines the history of the creation of Australian federal courts in relation to Curran and Ward's analysis of Australian national identity as an as yet unresolved response to the receding ties to the British Empire.⁴ It is not the purpose of the article to defend their analysis as an accurate description of Australian social, cultural and political life. Rather, the article seeks to explore the history of the federal courts alongside the broader, and sometimes hesitant, processes of national identity formation, which Curran and Ward detail. Ultimately this approach reveals the nature, strengths and weaknesses of the federal court system as it exists today.

The article maintains that the Curran and Ward analysis is helpful insofar as it elucidates the nature and foundations of the relationship between the federal courts and the other branches of federal government. The article argues that, over the past 20 years, the federal courts have gained acceptance as an integral part of Australian federal government and that they now perform significantly different roles in the federal polity from those generally contemplated before the 1960s. Notwithstanding Mortensen's view that arguments about nationhood and the federal polity to justify the creation of the Federal Court were and remain merely 'cosmetic' and fail to reflect reality,⁵ the article maintains that this acceptance of 'federal courts' as an important part of 'federal government' is an aspect of the Australian search for identity. Further, attention to the new roles of federal courts in the post-Imperial age discloses their more complex, nuanced relationships *with* the federal government and the Australian community. Navigating these relationships successfully requires a steady awareness of, and respect for, the different responsibilities of the three branches of government.

II THE CURRAN AND WARD ANALYSIS

In *The Unknown Nation: Australia after Empire*, Curran and Ward argue that the intensified interest in national identity evident amongst Australians from the early 1960s to the 1980s was 'a response to the relatively sudden collapse

⁴ James Curran and Stuart Ward, *The Unknown Nation: Australia after Empire* (Melbourne University Press, 2010).

⁵ Reid Mortensen, 'Autochthonous Essential: State Courts and a Cooperative National Scheme of Civil Jurisdiction' (2003) 22 *University of Tasmania Law Review* 109, 143.

of Britishness' as an accepted standard for civil allegiance.⁶ They comment that

[f]rom the mid-1960s, with a dwindling material basis for imperial sentiment, Australians were confronted with the task of remaking their nation in the wake of empire. It was a problem that touched every aspect of Australian life where identifiably 'British' ideas, symbols, motifs, precepts and practices demanded remodelling.⁷

As they observe, in 1968, journalist Donald Horne introduced the expression 'new nationalism' to describe Prime Minister Gorton's political style;⁸ and the term was rapidly adapted to signify what Serle referred to as a 'surge of national consciousness and idealism'.⁹ At around the same time, Manning Clark announced that 'the years of unleavened bread were over'.¹⁰

Curran and Ward contend, however, that 'the underlying rationale of the new nationalism was neither as self-assured, coherent nor universally welcomed as is generally assumed' and 'this era of national renewal ultimately failed to produce a viable solution to the problem of post-imperial nationhood'.¹¹ In consequence, Australians continue to be uncertain about their national identity and to doubt national institutions.¹²

Having regard to these contentions, it is instructive, first, to consider the British Imperial nature of Australian courts prior to Federation and these courts' reception of federal jurisdiction pursuant to the *Constitution* and the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'). It is useful to consider the circumstances that led to the establishment of a small number of federal courts, generally with subject-specific jurisdictions, before examining the arguments in the 1960s for the creation of a family court and, more particularly, a federal court of more expansive jurisdiction. What happened thereafter is significant in light of the Curran and Ward thesis that the search for Australian identity is not yet resolved.

⁶ Curran and Ward, above n 4, 7.

⁷ *Ibid* 5.

⁸ *Ibid* 5-6.

⁹ Geoffrey Serle, *From Deserts the Prophets Come: The Creative Spirit in Australia 1788-1972* (Heinemann, 1973) 176; see also at 178.

¹⁰ Manning Clark, *Occasional Writings and Speeches* (Fontana, 1980) 202. Clark made the original statement in Manning Clark, 'The Years of Unleavened Bread: December 1949 to December 1972' (1973) 32 *Meanjin Quarterly* 245, 250.

¹¹ Curran and Ward, above n 4, 7.

¹² *Ibid*.

III THE COURTS AT FEDERATION

The colonial courts were the creations of the British Imperial government. Immediately prior to Federation, the colonies had established court systems based on British prototypes. Each colony had a Supreme Court, which was modelled on the Supreme Court of Judicature in England.¹³ In consequence, the colonial Supreme Courts had general and, unless removed by statute, unlimited jurisdiction in civil matters. Full Courts of the colonial Supreme Courts exercised appellate jurisdiction. With a grant of special leave or sometimes as of right, an appeal lay to the Judicial Committee of the Privy Council, in some cases from a judgment at first instance and, in other cases, from a judgment on appeal.¹⁴ As well, each colony had its own court hierarchy. All the colonies had courts of summary jurisdiction and four had intermediate courts.¹⁵ The colonial courts applied English common law, enactments of the Imperial Parliament extending to the colony, enactments passed by the Federal Council of Australasia¹⁶ and enactments of their own colonial legislatures.¹⁷

Immediately before Federation, the colonial court systems were generally thought to be working well. In the inaugural address on the state of the Australian judicature given by the Chief Justice of the High Court in July 1977, Sir Garfield Barwick correctly said that, at Federation, '[t]here had not been substantial resort to the Privy Council from the colonists' and '[b]y the time federation was in discussion amongst the colonists, the Supreme

¹³ See *Supreme Court of Judicature Act 1873* (Imp) 36 & 37 Vict, c 66, although New South Wales and Tasmania had not yet adopted the fusion of the administration of law and equity brought about in England by this statute.

¹⁴ See Alex C Castles, *An Australian Legal History* (Law Book, 1982) 327–8.

¹⁵ Namely, New South Wales, Queensland, Victoria and South Australia: see generally Justice S Kenny, 'Colonies to Dominion, Dominion to Nation' in J T Gleeson, J A Watson and R C A Higgins (eds), *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol 1, 245; Castles, above n 14; Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987); Australian Judicial System Advisory Committee, *Australian Judicial System: Report of the Advisory Committee to the Constitutional Commission* (1987) 15–16 [3.3]–[3.8]; Sir Garfield Barwick, 'The State of the Australian Judicature' (1977) 51 *Australian Law Journal* 480, 481–2.

¹⁶ See the list of enactments in John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 377.

¹⁷ See *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63, s 2; Justice Kenny, above n 15, 252–3; Castles, above n 14, 449; Finn, above n 15.

Courts ... had attained in general a reputation for sound administration of the law'.¹⁸

The contemporary view that the colonial courts modelled on a British court system operated well in the self-governing colonies prior to Federation proved significant, both in terms of drafting the *Constitution* for Federation and for the absence of any federal court system.

IV CONSTITUTIONAL AND POST-CONSTITUTIONAL FEDERAL ARRANGEMENTS FOR COURTS

Whilst parts of ch III of the *Constitution*, particularly ss 75 and 76, may have been the product of an 'uncritical copying' of the *United States Constitution*, as Cowen maintained in his introduction to *Federal Jurisdiction in Australia*,¹⁹ at Federation the federal constitutional arrangements with respect to courts, including the disposition of federal jurisdiction, were not. Instead, they substantially reflected local experience of the colonial courts and the essentially British Imperial identity of the federating colonies and their respective communities.

The preservation, in the main, of the colonial judicial structure and its deployment for federal work was an anticipated outcome of the new *Constitution* by virtue of which these arrangements were possible. The possibility was present in the terms of ss 71 and 77 of the *Constitution*. These provisions required only the establishment of the High Court and permitted, but did not mandate, the creation of other federal courts. Thus, s 71 vested the judicial power of the Commonwealth 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'; and s 77(i) provided that the federal Parliament might define the jurisdiction of the lower federal courts by reference to the same matters that defined or might define the jurisdiction of the High Court. As Quick and Garran noted in 1901, in referring to 'such other federal courts as the Parliament creates', s 71 impliedly gave 'the Federal Parliament a power to create other federal courts besides the High Court', although '[t]he words ... leave it to the Parliament to decide whether any other federal courts are necessary'.²⁰ Significantly, s 77(iii) authorised the Parliament to invest 'any court of a State

¹⁸ Barwick, 'The State of the Australian Judicature', above n 15, 482.

¹⁹ Zelman Cowen, *Federal Jurisdiction in Australia* (Oxford University Press, 1959) ix.

²⁰ Quick and Garran, above n 16, 725.

with federal jurisdiction' and, in so doing, provided the basis for the arrangement subsequently made by the *Judiciary Act*, which was to prevail for the next 73 years or more.

The *Constitution* did not preference either the existing state courts or, save for the High Court, the federal courts (as yet uncreated). Rather, the *Constitution* left it to the federal Parliament to make arrangements for either or both of these institutions to be the repositories of the new federal jurisdiction. The Parliament chose its preferred option with the passage of the *Judiciary Act*. Section 39 of the *Judiciary Act*, the drafting of which is generally credited to Sir Samuel Griffith, a leader in the Federation movement and a participant in earlier *Constitution*-drafting,²¹ operated to invest the state courts with very nearly complete federal jurisdiction.²² The result was that the courts and court systems established in and for the former British colonies assumed responsibility for the application and interpretation of federal laws, subject to the supervision of the High Court. The court systems in the states were, as we have seen, essentially British Imperial constructs. Thus, the everyday experience of federal Australian justice remained tied to the Imperial model and its historical force.

Contemporary commentators and other scholars have proffered various explanations for the decision to draft the *Constitution* so as to permit the state courts to assume responsibility for the application and interpretation of federal law. Perhaps because of Griffith's involvement, Parliament's decision in 1903 to do so is usually seen as a foregone conclusion. The contemporary (and probably the most reliable) opinion of Quick and Garran was that there was such confidence in the state courts that it was 'possible to contemplate without misgiving the exercise of federal jurisdiction by [them]'²³ — an observation, which, as we have seen, Barwick was subsequently to repeat. It has also been said that there was not, among the Australian Federation architects, the same distrust of state courts as in the United States, where a federal court system

²¹ See Mortensen, above n 5, 115–16.

²² *Minister for the Army v Parbury Henty and Co Pty Ltd* (1945) 70 CLR 459, 505 (Dixon J). Section 39(1) of the *Judiciary Act* excluded any jurisdiction that the state courts would have had in matters that were within the High Court's original jurisdiction under s 75 of the *Constitution* or conferred by s 30 of the *Judiciary Act*, whilst s 39(2) conferred jurisdiction on the state courts in respect of the whole range of ss 75 and 76 matters, save for those excluded by s 38.

²³ Quick and Garran, above n 16, 804. See also Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 3rd ed, 2002) 2; Australian Law Reform Commission, *The Judicial Power of the Commonwealth — A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) 155 [6.3].

was established;²⁴ but this is to augment, rather than to detract from, the point made by Quick and Garran. Given contemporary opinion about the state courts, it is probably unsurprising that, as La Nauze indicated, concerns about 'the possibility of "extravagant" expenditure upon federal institutions' also favoured them as the repositories of federal jurisdiction.²⁵ The point worth emphasising in the present context is that early in the history of Federation, the federal Parliament was content to rely on institutions created in and for the British colonies and, in the case of the state Supreme Courts, modelled on the English Supreme Court of Judicature, to apply and interpret federal law in the exercise of the new federal jurisdiction. It is no stretch to see in this apparent confidence, the cultural processes identified by Curran and Ward, which found meaning and assurance in 'identifiably "British"' institutions and constructs.²⁶

Nevertheless, as at 1901, the potential pragmatic need for federal courts below the High Court was anticipated, at least to a degree, and the terms of s 71 of the *Constitution* provided some limited evidence of this anticipation.²⁷ It was the character of such federal courts and the precise circumstances that might bring them into being that remained uncertain. For instance, Quick and Garran ventured only that the need for federal courts was unlikely to arise in the immediate future,²⁸ perhaps because like many contemporaries they contemplated that the High Court's workload would remain light for some time.²⁹

As it happened, the Commonwealth Court of Conciliation and Arbitration was created in 1904 — just three years after Federation and one year after the establishment of the High Court. The impetus for the creation of the Court was, as we shall see, indicative of contemporary attitudes concerning the

²⁴ Cowen, above n 19, 2–3; Zines, above n 23, 2, 107–8; Australian Law Reform Commission, above n 23, 155 [6.2].

²⁵ J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 130. See also Justice Robert French, 'Federal Courts Created by Parliament' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 123, 125, quoting *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 19 April 1897, 938 (J H Carruthers).

²⁶ Curran and Ward, above n 4, 5.

²⁷ Justice Susan Kiefel, 'The Federal Court of Australia and Its Contribution to the Federal Civil Justice System' (2006) 9 *Flinders Journal of Law Reform* 1, 2; Sir Nigel Bowen, 'Federal and State Court Relationships' (1979) 53 *Australian Law Journal* 806, 806. See also R J Ellicott, 'The Autochthonous Expedient and the Federal Court' (2008) 82 *Australian Law Journal* 700, 701–3.

²⁸ Quick and Garran, above n 16, 726.

²⁹ Justice French, above n 25, 125.

character of the need that might justify the creation of a federal court. The Conciliation and Arbitration Court was set up by the federal Parliament³⁰ to address a matter to which contemporaries attributed exceptional federal significance. The history of labour disputes in Australia in the 1890s had marked out interstate industrial disputes as having special federal significance, such that the federal Parliament was given specific power to legislate with respect to their conciliation and arbitration in the new *Constitution*.³¹ Exercising this power, the Parliament created the Conciliation and Arbitration Court which, in 1908, was held to be a 'federal court' within s 73 of the *Constitution*.³² The Court's powers with respect to interstate labour disputes were very large indeed,³³ and the significance of its role was reflected in the appointment of a High Court Justice as President for a renewable term of seven years.³⁴ As Crock and McCallum remarked, the Parliament considered that 'only a court staffed by a senior judge would have the necessary status and authority to carry out' the Court's significant responsibilities.³⁵

The creation of the Conciliation and Arbitration Court was the first realisation of the federalists' understanding that there were in fact some few matters having quintessential federal significance or, because of the events of the time, such heightened federal significance that only a court established or created by the federal Parliament ought adjudicate disputes involving federal laws with respect to them. Thus, s 75 of the *Constitution* ensured that the High Court's jurisdiction over the matters to which it referred could not be diminished, and s 38 of the *Judiciary Act* excluded most of these matters from state court adjudication. In so doing, s 38 gave effect to the perception that there were matters that, on account of their subject matter or the identity of the parties, were of essentially federal significance. This included matters arising

³⁰ *Commonwealth Conciliation and Arbitration Act 1904* (Cth).

³¹ *Constitution* s 51(xxxv).

³² *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 324 (Griffith CJ).

³³ Mary Crock and Ronald McCallum, 'The Chapter III Courts: The Evolution of Australia's Federal Judiciary' (1995) 6 *Public Law Review* 187, 193; Chief Justice Michael E J Black, 'The Federal Court of Australia: The First 30 Years — A Survey on the Occasion of Two Anniversaries' (2007) 31 *Melbourne University Law Review* 1017, 1022.

³⁴ *Conciliation and Arbitration Act 1904* (Cth) s 12(1) (as originally enacted). See also Justice French, above n 25, 132. Lack of tenure was not to prove a problem until 1918: see below nn 37–8 and accompanying text.

³⁵ Crock and McCallum, above n 33, 193. The Court made just six awards in its first five years, although one of these was *Ex parte H V McKay* (1907) 2 CAR 1, better known as the *Harvester Case*, commonly thought of as a watershed decision notwithstanding its reversal in *R v Barger* (1908) 6 CLR 41.

directly under a treaty, suits between states or between the Commonwealth and states or persons suing or being sued on behalf of the State or the Commonwealth, or the jurisdiction to issue the prerogative writs in respect of decisions of officers of the Commonwealth. Likewise, the federal Parliament's creation of the Conciliation and Arbitration Court gave effect to the perception that, by reason of the pre-Federation history of labour disputes, their conciliation and arbitration, at least where they took an interstate form, had such heightened federal significance as to make their adjudication suitable for a court of the federal Parliament's creation.

The creation of the first federal court below the High Court was significant since it signalled the possibility that, over time, Parliament might discern that another such court was appropriate or necessary to apply federal legislation because, by virtue of its subject matter or the nature of the parties, it dealt with inherently federal concerns or matters of particularly strong federal interest. These matters and concerns were not, however, capable of prior identification: they came into being by virtue of history and circumstance. As will be seen, questions of national identity and nationhood have continued to inform the identification of 'federal significance'.

V DEVELOPING A FRAMEWORK FOR FEDERAL JURISDICTION AFTER 1918

At the end of the First World War the British Dominions, including Australia, reassessed their relationship with the United Kingdom. Prime Minister W M Hughes saw Australia's membership of the League of Nations as recognition that Australia was a 'separate nation[]',³⁶ although, in fact, there remained significant limits on Australia's international competence.

This new sense of independence from Britain did not, however, translate into a demand to diminish federal reliance on the British-model state courts. At most, it can perhaps be said that, around the end of the Great War, the law with respect to federal courts edged towards assuming a shape and form distinctively different from that governing state courts. Further, the potential difficulties that federal courts might occasion the Parliament and the Executive began to emerge. Just two months before Armistice Day, the High Court delivered judgment in *Waterside Workers' Federation of Australia v J W Alexander Ltd*, famously ruling that the Conciliation and Arbitration

³⁶ Justice Kenny, above n 15, 257, quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 10 September 1919, 12 171.

Court could not exercise the judicial power of the Commonwealth because the President had only limited tenure.³⁷ The *Commonwealth Conciliation and Arbitration Act 1904* (Cth) was amended in 1926 to provide for appointments to be made by the Governor-General in Council and for life.³⁸ Around this time too, the Court's workload had not only grown but its decisions had attracted political controversy, the upshot of which was that, in 1929, Prime Minister S M Bruce sought to undo the Court. Whilst Bruce and the proposed dismantling legislation were defeated, defeat was secured only when W M Hughes and some disgruntled backbenchers crossed the floor, thereby bringing down the Bruce government.³⁹

The second specialist federal court below the High Court was brought into existence in 1930 but only because the exigencies of the Great Depression were thought to require its creation. The establishment of the Federal Court of Bankruptcy was a response to a kaleidoscope of events, beginning with the 1929 decision in *Le Mesurier v Connor*.⁴⁰ In this case the High Court held that federal jurisdiction in bankruptcy could not be invested in state courts by a proclamation of the Governor-General because the proclamation was not a law within s 77 of the *Constitution*.⁴¹ Almost immediately, in response to this decision and the ever-growing pressure of the bankruptcies of the Great Depression, the federal Parliament amended the *Bankruptcy Act 1924* (Cth) ('*Bankruptcy Act*') specifically to invest federal bankruptcy jurisdiction in the state courts.⁴² Once properly invested with jurisdiction, the courts in New South Wales and Victoria were unable, however, to cope with the enormous bankruptcy caseload brought about by the Great Depression. The result was that a year later, in 1930, the *Bankruptcy Act* was further amended to create the Federal Court of Bankruptcy,⁴³ which sat only in New South Wales and Victoria, in order to relieve the courts in those states. In effect, the federal

³⁷ (1918) 25 CLR 434.

³⁸ *Commonwealth Conciliation and Arbitration Act 1904* (Cth) s 12, as amended by *Commonwealth Conciliation and Arbitration Act 1926* (Cth) s 6. See also Justice French, above n 25, 132.

³⁹ Heather Radi, 'Bruce, Stanley Melbourne (1883–1967)' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1979) vol 7, 453, 458.

⁴⁰ (1929) 42 CLR 481.

⁴¹ *Ibid* 500 (Knox CJ, Rich and Dixon JJ).

⁴² Save for two states, these were the Supreme Courts. In the case of Victoria and South Australia, jurisdiction was invested in the state Courts of Insolvency: see *Bankruptcy Act 1929* (Cth) s 4, amending *Bankruptcy Act* s 18(1)(b).

⁴³ *Bankruptcy Act 1930* (Cth) s 4, inserting *Bankruptcy Act* s 18A.

Parliament had identified the need to administer the bankruptcies brought about by the prevailing economic and social circumstances in the two most populous states as of such heightened federal concern as to necessitate a new federal court.

There were then only two federal courts below the High Court when Justice Dixon's much-cited⁴⁴ paper on 'The Law and the *Constitution*' (referred to at the outset of this article) was published.⁴⁵ Both courts were exceptional, in the sense that they were created to deal with exceptional circumstances of much greater than usual *federal* concern. The Dixon paper argued that there should have been no bifurcation of jurisdiction into federal and state; and, therefore, apart from the High Court, there was no occasion for federal courts. Dixon lamented the creation of federal jurisdiction as 'the greatest departure from English principle'.⁴⁶ His point was deceptively simple: whilst Federation called for a distribution of legislative powers, the only concern of courts was to apply the law,⁴⁷ and the supremacy of the law was the basis of the Australian legal system.⁴⁸ This latter proposition intertwined with his understanding that the authority of the *Constitution* derived from the law, not from the 'direct expression of a people's inherent authority to constitute a government'.⁴⁹ The paper was premised on a particular understanding of legal authority and relationships consistent with the existing circumstances. At the time the paper was published, the federal Parliament had not yet moved to adopt the *Statute of Westminster 1931 (Imp)* 22 & 23 Geo 5, c 4, which was designed 'to confer independence and Sovereignty' on the Dominions⁵⁰ and, in Australia's case, upon the federal Parliament's adoption of it.⁵¹ There had been no transfer of sovereignty from the United Kingdom and, of course, the *Australia Act 1986 (UK)* and the *Australia Act 1986 (Cth)* were not in contemplation. In his lamentations about the departure from British principle,

⁴⁴ See, eg, Bowen, above n 27, 814; R J Ellicott, 'The Need for a Single All-Australia Court System' (1978) 52 *Australian Law Journal* 431, 431.

⁴⁵ Justice Dixon, above n 1.

⁴⁶ *Ibid* 606.

⁴⁷ *Ibid* 607.

⁴⁸ *Ibid*.

⁴⁹ *Ibid* 597.

⁵⁰ *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 722 (Lord Reid for Lords Reid, Morris, Wilberforce and Pearson), save that with regard to Australia, New Zealand and Newfoundland it was not to apply until their Parliaments adopted it. In Australia's case, this did not occur until 1942: see generally Justice Kenny, above n 15, 259–61.

⁵¹ This did not occur until the Parliament passed the *Statute of Westminster Adoption Act 1942 (Cth)*.

what Dixon was pointing out in his 1935 paper is very important. What concerned him about the future shape of Australian court arrangements, and why it concerned him, reflected a world view and Australian identity that was fundamentally British in terms of ultimate authority, processes and outlook. This was to be undermined by Australia's entry into nationhood and the collapse of the British Empire following the Second World War.

VI THE POSTWAR HARBINGERS OF CHANGE

In *Constitutional Conventions: The Rules and Forms of Political Accountability*, Marshall noted that once the term 'Dominion' ceased to be used after the Second World War, '[t]he equal and independent nation states then became "member countries" or "full members of the Commonwealth"'.⁵² At the same time, the immediate postwar period brought with it harbingers of deep change for the federal court system.

This period saw an increase in federal court influence and the High Court's adoption of a doctrine that would have a long-term effect on future federal court arrangements.⁵³ By the early 1950s, decisions of the Conciliation and Arbitration Court had had a significant impact on the working lives of many Australians.⁵⁴ Far from being an ad hoc solution to a federal, but rare, need, this federal court had accumulated a national presence. The decision in *R v Kirby; Ex parte Boilermakers' Society of Australia* ('Boilermakers'),⁵⁵ which challenged the constitutional validity of the Court's authority and introduced a doctrine of strict separation of judicial power so far as concerned federal courts, spelled the end of the Conciliation and Arbitration Court in its then current form. The decision led Parliament to split judicial and arbitral functions between the Commonwealth Industrial Court and the Conciliation

⁵² Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, 1984) 170.

⁵³ Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 3, 16, 34. Cf *Western Australia v Commonwealth* (1995) 183 CLR 373, 485–6 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ) ('*Native Title Act Case*').

⁵⁴ Crock and McCallum, above n 33, 193.

⁵⁵ (1956) 94 CLR 254. This decision established that a federal court could not exercise non-judicial power of a kind that was neither ancillary nor incidental to the exercise of judicial power: at 271–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

and Arbitration Commission.⁵⁶ Federal jurisdiction was, hand-in-hand with its new-found judicial institutions, developing into a more complex, present and refined concept.

The idea of a general and expansive federal superior court below the High Court, together with the abolition of appeals to the Privy Council, was first agitated some years later. In an estimates debate in the federal Parliament on 27 August 1958, Whitlam proposed the creation of

some federal court of the status of the State Supreme Courts, with three objects — to free the High Court from lesser matters, to give a lead in law reform throughout the continent, and to co-ordinate Commonwealth administrative law.⁵⁷

His proposal for a new federal court was, he said, ‘somewhat on the lines of the United States Circuit Courts of Appeal’.⁵⁸ Whitlam envisaged ‘a commercial court for the whole of Australia’⁵⁹ and, in speaking of law reform, contemplated that, through the conferral of diversity jurisdiction, the federal Parliament might reduce the cost of litigation between governments and citizens.⁶⁰ At the same time, Whitlam proposed the abolition of ‘appeals to the Privy Council in constitutional matters’.⁶¹ As we shall see, these ideas informed the debate on the establishment of a new federal superior court in the 1960s.

VII EMERGING NATIONALISM AND THE FEDERAL COURTS

Australian historians generally agree that interest in Australian national identity grew in the 1960s, as indicated by Horne’s epithet of ‘new nationalism’. Whilst the current historical debate about the origins of new nationalism is not the subject of this article, the fact is that this ‘surge of national consciousness’, as Serle described the movement,⁶² also fuelled the arguments for

⁵⁶ *Conciliation and Arbitration Act 1956* (Cth). The labour relations jurisdiction of the Industrial Court was transferred to the Federal Court in 1976: *Federal Court of Australia (Consequential Provisions) Act 1976* (Cth).

⁵⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 August 1958, 835 (Gough Whitlam).

⁵⁸ *Ibid.*

⁵⁹ *Ibid* 836.

⁶⁰ *Ibid* 836–7.

⁶¹ *Ibid* 835.

⁶² Serle, above n 9, 176.

the creation of two major modern federal courts — the Federal Court of Australia and the Family Court of Australia. These arguments were not, however, straightforward or unified.

Momentum for the new federal courts gathered in the summer of 1963 at the annual Legal Convention of the Law Council of Australia, when Sir Kenneth Bailey, then Commonwealth Solicitor-General, announced that the Cabinet had authorised the Attorney-General, Sir Garfield Barwick, to 'design a new federal court with a view to consideration by Cabinet for approval for legislative action'.⁶³ This announcement was part of his response to the idea of a federal superior court, which M H Byers QC and P B Toose QC (as they then were) had developed in their paper delivered to the Convention earlier that day.⁶⁴ Ideas that had been mooted earlier seemed catalytic at this conference, reflecting perhaps the zeitgeist Horne and others had perceived in the broader community.

Byers and Toose contended that it was no longer appropriate for the state courts to do all the federal jurisdiction work, essentially for five reasons. First, there was 'no longer a strong State sentiment amongst members of the public'.⁶⁵ In doing so, they described an Australia 'after Empire' as being an important facet informing the operation of the Australian judiciary. Thus, they said:

Two World Wars, the financial crisis of the depression, uniform tax and Australia becoming a fully independent nation with its own ambassadors *etc* and a member of the United Nations have all helped to make citizens regard themselves as Australians rather than as belonging to any particular State.⁶⁶

Secondly, according to Byers and Toose, state governments were 'reluctant ... to handle large quantities of federal work for which they receive no special reimbursement, whether in relation to judges' salaries, provision of courts or general administration expenses'.⁶⁷ Thirdly, the Commonwealth had, they observed, 'through uniform tax assumed ultimate financial control' of the federation.⁶⁸ Fourthly, they said:

⁶³ Byers and Toose, above n 2, 325.

⁶⁴ *Ibid* 308–20.

⁶⁵ *Ibid* 313.

⁶⁶ *Ibid*.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

This device of investing the State courts with federal jurisdiction virtually means that the Federal Government hands over administration of the Statutes involved to State Governments without considering whether such State Governments might be or become hostile, friendly or merely disinterested.⁶⁹

In this connection, Byers and Toose noted that the state courts were to be 'accepted as they are' with, as they remarked, 'all the variations between them and their *limitations and traditions*'.⁷⁰

Fifthly, Byers and Toose had a particular picture of the constitutional arrangement regarding courts. They contended that

the original understanding was that the High Court and the State courts should carry the initial and comparatively light burden arising from federal legislation and that when the time came a complete structure of federal courts should be created.⁷¹

They proposed that the original jurisdiction of the new court consist of all matters in respect of which original jurisdiction was given to the High Court under s 75 or had been conferred on the High Court under s 76, as well as all matters in respect of which state courts had been invested with federal jurisdiction (other than Courts of Petty Sessions) and the jurisdictions of the two other federal courts.⁷² Federal jurisdiction was, it seemed, in tandem with its concrete manifestations, coming to mean something for the nation — at least to those like Byers and Toose.

The ensuing debate at the 1963 Law Council Convention disclosed that not everyone welcomed the proposal or shared the new nationalism of Byers and Toose. Francis Burt QC (as he then was) deplored the proposed 'two channel system' and echoed Dixon's view that there was 'no reason why the division of legislative power should be reflected in a division of judicial tribunals'.⁷³ Such a division would, he feared, 'breed[] ... complexity — and black motor cars'.⁷⁴

⁶⁹ Ibid.

⁷⁰ Ibid (emphasis added). Cf *Constitution* ss 106–8. See also the authors' subsequent references to the differences in state courts' processes and procedures and in their interpretation and application of federal laws; the prevalence of delay; and territorial limitations: Byers and Toose, above n 2, 314. They also gave details of the increase in the workload of the High Court and noted that the Parliament had made ad hoc additions to that Court's original jurisdiction without 'intelligible principle': at 312.

⁷¹ Byers and Toose, above n 2, 309.

⁷² Ibid 319.

⁷³ Ibid 323.

⁷⁴ Ibid.

Burt maintained too that a new federal superior court ‘would inevitably and seriously reduce the status of the State Supreme Courts’⁷⁵ — an apprehension that was to feed into a good deal of the opposition to its creation.

At the 1963 Convention Byers and Toose set the parameters of the ensuing debate, between the protagonists of the British model of the state Supreme Courts on the one hand and the protagonists of the new ‘Australian-made’ federal courts on the other. There were, however, differences between the protagonists of the new federal superior court about the precise rationale for its creation. The ‘new nationalism’ of Byers and Toose was tempered by the more pragmatic orthodoxy of Barwick and subsequently Attorney-General Robert Ellicott.

When Barwick responded to Byers and Toose in an article published in 1964, he too referred to an Australian judicial system, although he also saw the investiture of the state courts with federal jurisdiction as ‘a potentially permanent, and, as such, desirable feature’ of it.⁷⁶ Further, he emphasised, somewhat pragmatically, that a new federal superior court would ‘free the High Court ... for the discharge of its fundamental duties as interpreter of the *Constitution* and as the national court of appeal’.⁷⁷ He downplayed the differences between cases under federal and state law, maintaining that ‘as a rule’ there would need to be ‘something “special” about a class of matters’ to justify investing federal jurisdiction in a federal rather than a state court.⁷⁸ This time for the role of federal courts within an Australian court arrangement was, as Curran and Ward wrote of civic culture and institutions more generally, punctuated by ‘acute dilemmas about babies and bathwater’ as the difficulty of articulating the Australian ideal coexisted with anxieties raised by ‘the imprint of the imperial ideal’ and its ongoing currency.⁷⁹ In this context, pragmatism featured as a neutral middle ground and politically safe discourse with which to embrace a federal system of courts.

The idea that a matter should be ‘special’ to justify federal court adjudication was relied on to justify the past and future creation of federal courts below the High Court, although Barwick evidently struggled to give the idea any limiting content. He put forward the notion that the ‘special’ element might lie in the parties or, citing bankruptcy and industrial law, ‘in the

⁷⁵ Ibid.

⁷⁶ Sir Garfield Barwick, ‘The Australian Judicial System: The Proposed New Federal Superior Court’ (1964) 1 *Federal Law Review* 1, 2.

⁷⁷ Ibid; see also at 8–9.

⁷⁸ Ibid 3.

⁷⁹ Curran and Ward, above n 4, 7.

distinctive and separate character of the body of law concerned' or 'merely in the fact that uniformity in the interpretation and application of a Commonwealth law is desired'.⁸⁰ These were criteria that might embrace any matter within federal jurisdiction if Parliament so desired. Nonetheless, the idea that only a 'special federal interest or concern' would justify conferral of federal jurisdiction on a new federal court served to meet the case advanced by its opponents that state Supreme Courts would be diminished by its creation. Reliance on this idea as such justification also disclosed the less than universal agreement about the need for a federal superior court as an expression of Australian nationhood.

Allied to the proposal for a federal superior court were proposals to re-create family law under the administration of federally appointed judges. A Family Law Bill 1973 (Cth) was presented in the Senate in late 1973 and contemplated that jurisdiction would be exercised by a Family Law Division of the proposed Superior Court.⁸¹ The Senate Standing Committee favoured the creation of a specialist court, however; and a revised Bill was passed and received Royal Assent on 12 June 1975.⁸² In the same year, the *Privy Council (Appeals from the High Court) Act 1975* (Cth) removed the right of appeal from judgments of the High Court on non-constitutional matters.⁸³ After the failure of various parliamentary proposals for a federal superior court, the *Federal Court of Australia Act 1976* (Cth) was passed late the following year.⁸⁴

Attorney-General Ellicott was substantially to adopt Barwick's 'special interest' criterion in his second reading speech for the Bill for the Federal

⁸⁰ Barwick, 'The Australian Judicial System', above n 76, 3.

⁸¹ See Commonwealth, *Parliamentary Debates*, Senate, 13 December 1973, 2832 (Lionel Murphy).

⁸² *Family Law Act 1975* (Cth).

⁸³ The *Privy Council (Limitations of Appeals) Act 1968* (Cth) had previously ended appeals to the Privy Council from the High Court in matters involving the *Constitution* or federal laws.

⁸⁴ Legislative proposals were introduced into Parliament in 1968: Commonwealth, *Parliamentary Debates*, House of Representatives, 21 November 1968, 3142–6 (Nigel Bowen). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 18 May 1967, 2337 (Nigel Bowen). They were allowed to lapse and the proposal was abandoned in 1972: Commonwealth, *Parliamentary Debates*, Senate, 27 October 1972, 2086–8 (Ivor Greenwood). Proposals were also introduced in 1973 and 1974: see Commonwealth, *Parliamentary Debates*, Senate, 12 December 1973, 2724–9 (Lionel Murphy); Commonwealth, *Parliamentary Debates*, Senate, 2 April 1974, 525–8 (Reginald Wright). The proposals failed for various reasons: see Justice French, above n 25, 150; Chief Justice Black, 'The Federal Court of Australia: The First 30 Years', above n 33, 1020–1; James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4th ed, 2004) 147; Ellicott, 'The Autochthonous Expedient and the Federal Court', above n 27, 705–13.

Court in October 1976, when he said that jurisdiction was only to be vested in the new court 'where there [were] special policy or perhaps historical reasons for doing so'.⁸⁵ This was, by the time of the parliamentary vote, the justification for the conferral on the new court of jurisdiction in relation to industrial matters, bankruptcy, trade practices and review of Commonwealth administrative action. Ellicott explained that he did not propose a court of general federal jurisdiction because that would have 'greatly weakened the status' of the state courts and the 'quality of the work dealt with by them'.⁸⁶ The reasons he advanced for the new court were pragmatic: rationalisation of the jurisdiction of the Australian Industrial Court (as it was renamed in 1973) which by then embraced a miscellany of non-industrial matters; rationalisation of the Bankruptcy Court; and reallocation of some of the High Court's original jurisdiction to relieve its workload.⁸⁷

Although the stated rationale for the Federal Court of Australia Bill 1976 (Cth) was pragmatic, the original proposals for the creation of a superior federal court were infused by the notion, advocated by Whitlam, and Byers and Toose that the new court befitted a national 'coming of age'. Much of the debate about its creation was in keeping with the new nationalism that flourished in Australia at that time. Despite the perhaps unsurprising lack of identity rhetoric in the second reading, the Court, once created, came to embody the very 'coming of age' which other proponents had forecast and advocated. Subsequent history has shown that to conceive of the Federal Court's creation as merely a pragmatic solution to relieve an overworked High Court is to misconceive the peculiarly Australian history of the relationship between the courts and the other branches of federal government, as well as Australian society at large and Australia's sense of identity. At the same time, the nature of the opposition to the emergence of a federal court system in the 1960s and thereafter indicates that, as Curran and Ward would have it, this vision of Australia was not universally shared. Furthermore, the differences amongst the new court's proponents may also indicate a lack of self-assurance and coherence of the kind detected by Curran and Ward when speaking of Australian identity.

⁸⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1976, 2111.

⁸⁶ *Ibid* 2110.

⁸⁷ *Ibid* 2111.

VIII FEDERAL COURTS AS INTEGRAL TO THE FEDERAL POLITY

The place of federal courts continued to be actively contested at least until 1997. Whilst the 1987 report of the Advisory Committee to the Constitutional Commission recommended that there should be no structural change in the Australian judicial system,⁸⁸ the six members of the Advisory Committee were divided in their approach. A minority of two advocated an amalgamation of the Federal Court (and possibly the Family Court) and the State and Territory Supreme Courts.⁸⁹ A majority of four agreed that there should be no structural change in the Australian court arrangements⁹⁰ — a view accepted in 1988 *Final Report of the Constitutional Commission*.⁹¹ Two in the majority favoured integration of the federal and state court systems through cross-vesting and other mechanisms.⁹² Their preference indicated a loyalty and commitment to the state courts, which at that time had not departed far from their original British prototype. Two others in the majority affirmed the ‘basic principle’ that ‘courts [were] an aspect of government and that there must be a single government and Parliament able to accept political responsibility for the courts and their administration’.⁹³ In the *Final Report of the Constitutional Commission*, it was acknowledged that there was ‘a view held by many that the existence of the federal courts and the increase in their jurisdiction have had a serious impact on the status and prestige of the Supreme Courts of the States’.⁹⁴ The view narrated by the Commission was, evidently, not inspired by pragmatic concerns, but instead harked directly back to the ideological conflicts first emerging clearly at the Convention in the summer of 1963. The Commission was sympathetic⁹⁵ and it endorsed the cross-vesting proposal.⁹⁶

⁸⁸ Australian Judicial System Advisory Committee, above n 15, 36–7 [3.89]–[3.90].

⁸⁹ Ibid 40 [3.104] (Justice D F Jackson and Justice G A Kennedy).

⁹⁰ Ibid (Professor J R Crawford, Justice W M C Gummow, R C Jennings and Justice R E McGarvie).

⁹¹ Constitutional Commission, *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988) vol 1, 369 [6.17].

⁹² Ibid vol 1, 40–1 [3.107] (R C Jennings and Justice R E McGarvie).

⁹³ Ibid vol 1, 40 [3.106] (Professor J R Crawford and Justice W M C Gummow).

⁹⁴ Constitutional Commission, above n 91, vol 1, 366 [6.9].

⁹⁵ Ibid vol 1, 370 [6.20].

⁹⁶ Ibid vol 1, 371 [6.29].

The eventual outcome of the negotiation of these legal and ideological tensions was the national cross-vesting scheme.⁹⁷

The cross-vesting scheme had full operation from July 1988 until, in June 1999, the High Court in *Re Wakim; Ex parte McNally* ('*Re Wakim*') held aspects of it were invalid.⁹⁸ The effect of *Re Wakim* on the federal court system was, however, not nearly as devastating as some commentators envisaged.⁹⁹ In the immediate post-*Re Wakim* period, core federal law work in the Federal Court did not lessen,¹⁰⁰ although corporations work did decline significantly — until the states' referral of powers¹⁰¹ and subsequent federal legislation.

The explanation for the relatively slight effect of the *Re Wakim* decision lay in the fact that by the late 1990s the federal courts were assuming an essential place in the federal polity — and they were in fact widely seen as an aspect of the federal government. Federal court business had an identity and function distinct from that of the states' courts. The change had been facilitated by the High Court's refinement of the doctrine of accrued jurisdiction in the 1980s, which did much to diminish the spectre of proceedings split between federal and state courts along federal/non-federal lines;¹⁰² and was completed by the federal Parliament's conferral of further jurisdiction on the Federal Court in the late 1980s and 1990s. At this point, the Court was truly transformed from a specialised court into one of general federal civil law.¹⁰³ In 1983, subject to presently immaterial limitations, the Court was given jurisdiction with respect to any matter in which a writ of mandamus or prohibition, or an injunction, was sought against an officer of the Commonwealth, following the

⁹⁷ *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth). See also Brian Opeskin, 'Cross-Vesting of Jurisdiction and the Federal Judicial System' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 299, 307.

⁹⁸ (1999) 198 CLR 511.

⁹⁹ See, eg, Mortensen, above n 5, 143; Justice Margaret White, 'Federalism and the Australian Judicial System — Back to the Future: The Autochthonous Expedient and Other Devices' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 432, 443.

¹⁰⁰ See generally Federal Court of Australia, *Annual Report 2000–2001* (2001) app 7; Federal Court of Australia, *Annual Report 2001–2002* (2002) app 7.

¹⁰¹ See *Constitution* s 51(xxxvii). See, eg, *Corporations (Commonwealth Powers) Act 2001* (Vic).

¹⁰² See, eg, *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570. See also Justice Allsop, 'Federal Jurisdiction and the Jurisdiction of the Federal Court of Australia in 2002' (2002) 23 *Australian Bar Review* 29, 34–40; Zines, above n 23, 137–47.

¹⁰³ Justice French, above n 25, 152; Zines, above n 23, 114.

terms of s 75(v) of the *Constitution*.¹⁰⁴ In 1997, this jurisdiction was expanded when the Parliament conferred original jurisdiction substantially in the terms of ss 75(iii), 76(i) and 76(ii) of the *Constitution*, including in respect of any matter arising under any laws made by the federal Parliament, other than a criminal matter.¹⁰⁵

The relationship between the state and federal courts (and the state courts themselves) also altered after 1987. The perceived threat to the status of state courts was resolved as the state courts, especially the Supreme Courts, were integrated into a distinctly Australian arrangement. This was achieved in part through the High Court's development of relational principles, as in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, for example, which recognised and entrenched comity between intermediate appellate courts throughout the federation.¹⁰⁶

By 1997, some 10 years after the Constitutional Commission acknowledged a need to preserve the status of state courts (having an Imperial colonial heritage) against a danger said to have been created by the new Australian federal courts,¹⁰⁷ the federal Parliament and the executive had accepted that it was desirable that federal courts assume responsibility for the adjudication of civil disputes arising under federal law. This was reflected in Parliament's conferral of general federal law jurisdiction on the Federal Court in 1997,¹⁰⁸ which ensured that the Court was 'able to deal with all matters ... of an essentially federal nature'¹⁰⁹ — a measure described at the time by the then Attorney-General, Daryl Williams, as 'non-controversial'.¹¹⁰ Anxieties were, evidently, dissipating. Parliament, moreover, continued to confer specific jurisdiction under a steadily increasing number of federal statutes. By June 2001 the Federal Court's annual report listed over 150 statutes investing it

¹⁰⁴ *Statute Law (Miscellaneous Provisions) Act (No 2) 1983* (Cth) sch 1 s 3, inserting *Judiciary Act* s 39B(1).

¹⁰⁵ See *Law and Justice Legislation Amendment Act 1997* (Cth) sch 11 and *Law and Justice Legislation Amendment Act 1999* (Cth) sch 10 item 1, amending *Judiciary Act* s 39B(1A).

¹⁰⁶ (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). Cf *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

¹⁰⁷ See above nn 88–97 and accompanying text.

¹⁰⁸ See above n 105.

¹⁰⁹ Explanatory Memorandum, *Law and Justice Legislation Amendment Bill 1996* (Cth) 20 [107].

¹¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 February 1997, 1464.

with original jurisdiction.¹¹¹ As at 31 January 2014, in addition to s 39B of the *Judiciary Act*, the Court listed 199 such statutes which mostly conferred jurisdiction in emerging areas of Commonwealth legislative activity.¹¹²

The annual reports of the Federal Court in the years from 1997–98 to 2013–14 document its expanding jurisdiction, its ever-increasing workload and the significance of its decisions for Australian commercial, social and governmental activity. For example, over these years, the Federal Court assumed a responsibility for providing international and Australian businesses with suitable processes and procedures for resolving commercial disputes not only fairly but efficiently.¹¹³ As the repository of jurisdiction under legislation concerned with major national social issues, including anti-discrimination, native title, workplace relations and migration, the Court not only came to play a key role in resolving legal disputes in these fields, but also, in doing so, became the forum where competing views about their significance were ventilated and reported.¹¹⁴ Furthermore, the Court's supervision of executive action within its administrative law jurisdiction has been, and continues to be, critical to its role as a federal court and a part of the third branch of government.¹¹⁵

IX THREE TIERS OF FEDERAL JUSTICE

The creation of the Federal Magistrates Court in 1999¹¹⁶ marked the arrival of a three-tiered federal court system constituted by the High Court, the Family and Federal Courts, and the Federal Magistrates Court. Chief Justice Michael Black of the Federal Court declared the following year that 'we have now reached a point at which it is both *appropriate and necessary* to create a lower

¹¹¹ Federal Court of Australia, *Annual Report 2000–2001*, above n 100, app 5; Federal Court of Australia, *Annual Report 2001–2002*, above n 100, app 5.

¹¹² Federal Court of Australia, *Acts Which Confer Jurisdiction* (31 January 2014) <<http://www.fedcourt.gov.au/about/jurisdiction/acts>>.

¹¹³ Chief Justice Black, 'The Federal Court of Australia: The First 30 Years', above n 33, 1039; Ellicott, 'The Autochthonous Expedient and the Federal Court', above n 27, 716.

¹¹⁴ Chief Justice Black, 'The Federal Court of Australia: The First 30 Years', above n 33, 1033–6; Ellicott, 'The Autochthonous Expedient and the Federal Court', above n 27, 716.

¹¹⁵ Chief Justice Black, 'The Federal Court of Australia: The First 30 Years', above n 33, 1031; Justice French, above n 25, 152. See generally Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law* (Centre for International and Public Law, Australian National University, 1998).

¹¹⁶ The *Federal Magistrates Act 1999* (Cth) and the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth) received Royal Assent on 23 December 1999, although the Court did not sit until 3 July 2000.

level of federal court to deal with less complex cases'.¹¹⁷ Certainly, the volume and complexity of federal judicial work had grown and diversified as federal courts became indispensable to the operation of the federal polity. The constitutional architects had not envisaged a multi-tiered hierarchy of federal courts¹¹⁸ and the focus of later proposals for the reform of the Australian court arrangements was elsewhere.¹¹⁹ At 1999, however, there was no question that the institution to undertake this consequent work was to be a new *federal* one. The object of the Federal Magistrates Service, as it was first known, was to deal with less complex federal cases previously heard by the Family or Federal Courts. The new court was to provide 'a quicker, cheaper option for litigants and to ease the workload' of the other two courts.¹²⁰ Its constitutive statute emphasised that it would provide court services in regional areas, including mediation as well as formal court adjudication.¹²¹ The new federal court was to operate in a local space previously seen as the preserve of state courts with their antecedents in local colonial (and Imperial) experience.

Much like the Federal and Family Courts, the emergence of the Federal Magistrates Court as part of the Australian court system was initially contested. The Federal Magistrates Court endured various proposals, first intimated in 2008, to merge it with the Family and Federal Courts.¹²² Its renaming as the Federal Circuit Court on 12 April 2013, however, and its continued separate existence signified its acceptance as a permanent part of the federal system. Indeed, the Federal Circuit Court is now Australia's largest court. Currently constituted by 63 judges, it carries a substantial workload. In the year to June 2014, the Court had finalised some 88 999 matters.¹²³ Broadly speaking, its jurisdiction includes industrial law, family law and child support, administra-

¹¹⁷ Chief Justice M E J Black, 'Bring on the Change' [2000] (April) *Queensland Bar News* 11, 11 (emphasis added).

¹¹⁸ Quick and Garran, above n 16, 725–6; Zines, above n 23, 3.

¹¹⁹ Cf Australian Judicial System Advisory Committee, above n 15, 35–7 [3.86]–[3.90].

¹²⁰ Chief Federal Magistrate Diana Bryant, 'The Federal Magistrates Service' (2000) 14(3) *Australian Family Lawyer* 16, 16.

¹²¹ *Federal Magistrates Act 1999* (Cth) ss 3–4, 8–10, 13(4), 13(6), 21–5, 52. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 1999, 7365–7 (Daryl Williams).

¹²² Des Semples and Attorney-General's Department (Cth), *Future Governance Options for Federal Family Courts in Australia: Striking the Right Balance* (2008); Robert McClelland, 'Rudd Government to Reform Federal Courts' (Media Release, 5 May 2009). See also Kate Williams and Andrew Bell, 'Federal Magistrates Court: Ten Years Old' [2010] (Winter) *Bar News* 93, 95.

¹²³ Federal Circuit Court of Australia, *Annual Report 2013–2014* (2014) 4.

tive law (including the review of migration decisions), bankruptcy, human rights law (including anti-discrimination law), trade practices (with damages up to \$750 000¹²⁴) and the law of copyright, trade mark and design.¹²⁵ Although about 90 per cent of its work is in family law, it also deals with about 95 per cent of migration and bankruptcy applications filed in the federal courts. Its judges, based in and outside of the capital cities throughout Australia, continue to travel on circuit around the country. The creation of the three tiers of federal justice in this way discloses a growing confidence, despite some uncertainty, in the federal courts as the proper locus of significant national civil law jurisdiction with Australia-wide coverage, reflective of a more secure national identity.

X CONCLUSION: FEDERAL COURTS AND FEDERAL IDENTITY

As we have seen, Australia has reached a point where the federal courts are seen as essential to federal government. At the same time, the Parliament has come to accept political responsibility for their administration, as illustrated by legislation designed to limit delay and costs in Federal Court litigation.¹²⁶ These fundamental changes were initiated in the 1960s, in the search for national identity, and consolidated in the 1990s, by a spirit of innovation that sought to make federal institutions truly national institutions.

The expansion of the federal court system to embrace the Federal Circuit Court is testament to the very different perspective the Parliament now brings to federal courts. The federal courts are no longer small specialist courts. Rather, the federal courts are part of an organised federal court system that includes 'big' courts of wide federal jurisdiction, with a distinctively national orientation, including in the case of the Federal Circuit Court an appreciably local outreach.

The place of federal courts in the Australian court system in 2015 is clearly very different from that envisaged by Sir Garfield Barwick in 1964. Those who participated in the building of the federal courts have explained the emergence of this different role in various ways. Ellicott has emphasised the national status of the Federal Court and that it is 'an important part of the

¹²⁴ *Competition and Consumer Act 2010* (Cth) s 86AA(a).

¹²⁵ See generally Federal Circuit Court of Australia, *Jurisdiction of the Federal Circuit Court of Australia* (23 September 2014) <<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/jurisdictions/>>.

¹²⁶ See *Federal Court of Australia Act 1976* (Cth) ss 37M–37N, as inserted by *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth) sch 1 item 6.

international face of the Australian judiciary'.¹²⁷ He referred to the Federal Court as the natural 'repository of federal jurisdiction under important national policy statutes particularly in the economic and social areas'.¹²⁸ Michael Black, Chief Justice of the Federal Court from 1991 to 2010, detected 'an air of inevitability about the establishment of the new federal court'¹²⁹ and its place in 2007 as reflecting 'the continued expansion of Commonwealth legislative activity'.¹³⁰

Ellicott and Chief Justice Black (and others involved in the building of federal courts) have emphasised their national character alongside the social, economic and global changes that called for a national response. In these statements, as well as in the history of these courts, one can see not a limited pragmatic fix for a constitutional federation, but the intrinsically national and nationalising court forecast in the summer of 1963 by Byers and Toose. Whilst the federal courts created in the 1970s and since then have the same essential task as any other in the Australian court system — to administer justice impartially and according to law — the federal courts have themselves assumed a modern Australian identity, that is, as providing access to public resources for the benefit of all Australians. On this basis, they have sought to develop and apply practices and procedures best suited to the Australian community. This is reflected in the courts' use of information technology, whether in national videoconferencing or in electronic filing and case management systems, more informal court dress, court architecture¹³¹ and organisation, and in their essentially innovative approach to court work.¹³²

There is much in the history of Australian federal courts that resonates with Curran and Ward's account of Australians' search for national identity. The history of the creation of Australian federal courts is clearly part of the broader history of how Australians have come to see themselves and their relationship to Australian courts as institutions of government. The historians'

¹²⁷ Ellicott, 'The Autochthonous Expedient and the Federal Court', above n 27, 716.

¹²⁸ Ibid.

¹²⁹ Chief Justice Black, 'The Federal Court of Australia: The First 30 Years', above n 33, 1025.

¹³⁰ Ibid 1051.

¹³¹ As David Tait has written, '[c]ourt buildings, it can be argued, embody the relationship between citizen and state, court processes give concrete form to abstract rights, and the interactions between people in the court environment displays justice in practice': David Tait, 'Remote and Intimate Justice: Challenges and Paradoxes for Courts of the Future' (Paper presented at the 2004 Australasian Law Reform Agencies Conference, Wellington, 16 April 2004).

¹³² See, eg, Chief Justice Black, 'The Federal Court of Australia: The First 30 Years', above n 33, 1048–50.

observation that the new nationalism of the 1960s was neither universally accepted nor entirely coherent assists in understanding the nature of the opposition to the federal courts over time.¹³³

Further, when the contemporary history of federal courts as national repositories of power and identity is accepted, it is easier to comprehend the sometimes troubled relationship of the federal courts with the executive branch of federal government. Perhaps the expansion of federal court jurisdiction into areas of heightened national political sensitivity¹³⁴ and the greater costs associated with the larger and more expansive federal court system made tensions inevitable.¹³⁵ Disagreements over court funding nearly brought about the end of the Federal Magistrates Court¹³⁶ and continue to provide fertile ground for disputes between the courts and the executive. These disagreements are not unhelpful if they elucidate legitimate differing institutional perspectives and values. They are injurious, however, where the disputants fail to engage with and respect the unique role each must play in Australian national government. The place that federal Australian courts occupy today in the national government is more readily understood when their history is seen as part of the history of how Australians see themselves and their national institutions.

¹³³ See, eg, Sir Laurence Street, 'The Consequences of a Dual System of State and Federal Courts' (1978) 52 *Australian Law Journal* 434; Sir Walter Campbell, 'The Relationship between the Federal Court and the Supreme Courts of the States' (1979) 11 *University of Queensland Law Journal* 3, 12–13; Justice Andrew Rogers, 'Federal/State Courts — The Need to Restructure to Avoid Jurisdictional Conflicts' (1980) 54 *Australian Law Journal* 285; Sir Harry Gibbs, 'Developments in the Jurisdiction of Federal Courts' (1981) 12 *University of Queensland Law Journal* 3; Sir Harry Gibbs, 'The State of the Australian Judicature' (1981) 55 *Australian Law Journal* 677; Justice J D Heydon, 'Some Developments in Commercial Law in the Lifetime of the *Australian Law Journal*' (2007) 81 *Australian Law Journal* 577, 582–3.

¹³⁴ Justice Ronald Sackville, 'Judicial Review of Migration Decisions: An Institution in Peril' (2000) 23(3) *University of New South Wales Law Journal* 190, 202–4; Justice M H McHugh, 'Tensions between the Executive and the Judiciary' (2002) 76 *Australian Law Journal* 567.

¹³⁵ See Family Court of Australia, *Future Directions Report* (2000); Semple and Attorney-General's Department (Cth), above n 122; Department of Finance and Deregulation, *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio* (2012). The Federal Court's 2012–13 annual report records that in the five-year period since 2008–09, the Court's caseload had increased by 50 per cent, with increasingly complex cases, while in the same period its staff had decreased by 15 per cent: Federal Court of Australia, *Annual Report 2012–2013* (2013) 12.

¹³⁶ Federal Circuit Court of Australia, *Annual Report 2012–2013* (2013) 2; Ellicott, 'The Autochthonous Expedient and the Federal Court', above n 27, 718.